Construction Law Update:

Case Law & Legislation Affecting the Construction Industry (2012-2013)

Presented by

Division 10 – Legislation and Environment

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TABLE OF CONTENTS

INTRODUCTION

Division 10 is proud to present the Seventh Edition of the annual publication, ***Construction Law Update: Case Law & Legislation Affecting the Construction Industry (2012-2013).***

This is the fourth year that the **Construction Law Update** will be distributed exclusively in an electronic format along with the materials for the 2013 Annual Meeting in Dana Point, California. The **Construction Law Update** has become a hot item, requested by many construction practitioners throughout the country. Along with this year's update, you can get access to the archive of previous updates (2006-2012) on the Forum's *eLibrary* site at:

http://www.legalist.com/danapoint2013/elibrary.html

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

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

The submissions in this publication are made throughout the 2012-2013 year, which means that some legislation may have passed, been rejected, or even tabled since the publication of this update. The case law and legislation included in this update are not intended to be an exhaustive compilation of every construction-related decision or legislative enactment from within a particular jurisdiction. We rely heavily on our authors to submit timely and accurate information. It is written by you and for you! If you would like to join this great team of contributors and authors, please contact one of our editors. Have a great year!

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Construction Law Update

Alabama

Case Law:

1. In *Ridnour v. Brownlow Homebuilders, Inc.,* 2012 WL 887479 (Ala. Civ. App. March 16, 2012), the Court of Civil Appeals recognized that only county commissions and municipalities have the power to adopt general residential construction and building codes. The State Fire Marshal may adopt residential construction and building codes relating specifically to fire prevention and protection applicable statewide that supersede the municipal and county codes to the extent they are inconsistent with the code adopted by the State Fire Marshal. The State Fire Marshal does not have the authority to adopt portions of the building code that do not relate to fire prevention and protection. The issue arose out of the homeowner's attempt to introduce testimony by the Alabama State Fire Marshal on issues regarding adoption of the 1997 Standard Building Code.

2. In *White-Spunner Construction., Inc. v. Construction Completion Co.*, LLC 2012 WL 2362637 (Ala. June 22, 2012), the Alabama Supreme Court held that a subcontractor's contract with an unlicensed sub-subcontractor in Alabama was an illegal contract. Since the subcontractor's breach of contract claim against the general contractor could not be maintained without relying in whole or in part on the illegal contract, summary judgment awarding subcontractor over $1.12 million in damages and fees was reversed. The subcontractor argued that the sub-subcontractor was serving merely as a "labor-broker" supplying temporary workers and was therefore not required to comply with the licensing statute for general contractors, § 34-8-1, Ala. Code 1975. This argument was rejected by the Alabama Supreme Court.

3. In *Limestone Creek Developers v. Trapp*, 2012 WL 3538211 (Ala. August 17, 2012), a contract requiring a home builder to purchase lots from a developer in a new subdivision was found by the Alabama Supreme Court to have violated county subdivision regulations. The regulations required approval of the proposed subdivision plat prior to the sale of lots or offers for sale. The contract purported to sell lots in a new subdivision before the county issued the permit to develop the subdivision, and therefore was void.

Legislation:

1. 2012 SB 139 (HR 374) "Highways, Bridges, and Roads, Civil Liability of Person or Entity Constructing with State or Subdivision of State Abated as Provided by Common Law" was passed in the House on April 12, 2012, and adopted by the Senate on April 24, 2012, as Act 2012- 225. Found at Ala Code §§ 6-5-701-709. The statute generally provides that a contractor cannot be held liable for work performed on roads or highways for repairs, construction or maintenance when the work is done on behalf of the Alabama Department of Transportation unless there is physical injury, property damage or death resulting from 1) the failure of the contractor to follow the plans and specifications, causing a "dangerous condition," 2) the contractor followed the plans but a reasonably prudent contractor should have

realized the specifications created a "dangerous condition" or 3) a latent defect caused by the work of the contractor created a "dangerous condition." Ala. Code § 6-5-701. The contractor shall bear no liability for any civil claims by third parties resulting from the engineering or design of the project unless the contractor undertook to design or provide professional engineering services for the project. Ala. Code § 6-5-704.

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Alaska

Legislation:

1. Alaska Stat § 40.42.410, HB-258, 27th Leg., 2nd Reg. Sess. (Alaska 2012). With HB-258 the Alaska legislature limited the liability for contractors using gravel or other aggregate material that contains naturally occurring asbestos. The law requires the Alaska Department of Transportation and Public Facilities to develop procedures concerning such materials. The bill also requires contractors to submit a site-specific use plan to the Department when the contractor is intending to use materials that contain 0.25 percent of naturally occurring asbestos by mass.

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Arizona

Case Law:

1. In *Wang Electric, Inc. v. Smoke Tree Resort, LLC*, 2012 Ariz. App. LEXIS 120, 640 Ariz. Adv. Rep. 15 (Ariz. Ct. App. July 31, 2012), the Arizona Court of Appeals addressed the enforceability of five subcontractors' mechanics' liens and unjust enrichment claims against a landlord of commercial property. The lease agreement required the tenant to remodel the leased premises, but the landlord approved the plans and specifications and was obligated to reimburse the tenant a substantial amount in remodeling expenses.

As to the unjust enrichment claims, the Court held that the subcontractors must show that the landlord engaged in improper conduct—such as directly retaining the general contractor and refusing to pay—in order for liability to attach. Otherwise, the landlord's active role in construction and the landlord's contractual right to retain the improvements did not by themselves make retention of those improvements without payment to the subcontractors unjust. On the other hand, mechanics' liens may attach to the landlord's property if the tenant acted as the landlord's agent in requesting the remodeling work. A lease provision stating that no liens shall attach to the property is void against public policy.

Addressing whether the subcontractors properly perfected their mechanics' liens against the landlord's interest in the property, the Court held as follows: (1) serving the mechanics' lien on the landlord (along with the lien foreclosure complaint) three months after recording the lien constitutes service "within a reasonable time" after recording the lien under A.R.S. § 33-993(A);

(2) initial service of a preliminary 20-day notice on the landlord suffices to apprise the landlord of potential lien claimants, even if subsequent preliminary notices named only the tenant, and not the landlord, as the property owner; (3) a mechanics' lien contains a sufficient legal description pursuant to A.R.S. § 33-993(A)(1) if it contains the county assessor parcel number and incorporates by reference a property description contained in the public records; (4) a preliminary 20-day notice may be served on the tenant's managing member as the "reputed owner" pursuant to A.R.S. § 33-992.01(B) and is not invalid for failing to serve the landlord; and (5) a mechanics' lien exclusively against the tenant's leasehold interest that has been terminated is extinguished if the lien is imposed against improvements in which a landlord has a continuing or reversionary ownership interest, unless the tenant acted as the landlord's agent (which it did in this case for purposes of the lien statutes), or the landlord is estopped from denying the agency relationship, the lien may be enforced against the landlord's property interests.

2. In *Technology Construction, Inc. v. City of Kingman*, 636 Ariz. Adv. Rep. 20, 278 P.3d 906 (Ariz. Ct. App. June 12, 2012), the Arizona Court of Appeals affirmed the award of delay damages to a contractor on a public project. After the City of Kingman presented the contractor with a contract and notice to proceed four months late, the contractor submitted a notice of claim due to the increased cost of asphalt, changes in the work, delays beyond the contractor's control, and the cost impact on oil-based product caused by Hurricane Katrina. The Court held that despite the existence of a "no liability" clause stating "in no case…will the City…be liable for any portion of the expenses of the work," the contractor nonetheless could recover damages pursuant to uniform specifications that were incorporated into the contract that contained delay damages and changed conditions clauses. The Court also rejected the City's reliance on the classic rule in *Hadley v. Baxendale*, which holds that only reasonably foreseeable damages can result from a breach of contract and the City's argument, that delay damages for increased material costs were not foreseeable, the Court held that these delay damages were reasonably foreseeable because "[p]rices of commodities…change over time and in accordance with market forces under many influences, including weather."

3. In *KAZ Construction, Inc. v. Newport Equity Partners*, 629 Ariz. Adv. Rep. 8, 275 P.3d 602 (Ariz. Ct. App. March 2, 2012), the Arizona Court of Appeals held that even though a construction deed of trust was invalid for failure to have the trustee execute the deed the trust, a contractor could not enforce its mechanics' lien against the reputed lender due to the contractor's failure to serve a preliminary 20-day notice on that lender. A.R.S. § 33-992.01(B) requires that a mechanics' lien claimant "shall, as a necessary prerequisite to the validity of any claim of lien, serve the owner or reputed owner, the original contractor or reputed contractor, the construction lender, if any, or reputed construction lender, if any,…with a written preliminary twenty day notice as prescribed by this section." The Court reasoned that the policy underlying the statute was to provide notice to parties with an interest in the property so they might protect that interest. Since the contractor had constructive notice of the lender's reputed interest in the property, and was statutorily required to provide that lender with a 20-day notice, the mechanics' lien was invalid as to the lender.

4. In *Alliance Trutrus, LLC v. Carlson Real Estate Co.*, 629 Ariz. Adv. Rep. 4, 270 P.3d 911 (Ariz. Ct. App. February 28, 2012), the Arizona Court of Appeals held that a contractor did not timely file suit against a mechanics' lien discharge bond. The contractor originally recorded a mechanics' lien against the property, but the owner executed and served a lien discharge bond pursuant to A.R.S. § 33-1004. The contractor thereafter filed suit on the bond. However, the contractor filed that suit more than 6 months after the contractor had recorded its mechanics' lien, arguing that A.R.S. § 33-1004(D)(2) extended the statute of limitations since

the lien discharge bond was served less than 90 days before the 6-month lien foreclosure period expired. However, the Court held that the plain language of A.R.S. § 33-1004(D)(2) does not grant a claimant an additional 90 days to file its lawsuit, it merely allows an additional 90 days to amend any complaint to add the principal and sureties as parties. Since the contractor did not timely file its action within 6 months, the bond claim was already discharged as a matter of law before the action was filed.

5. In *Hall v. Read Development*, 623 Ariz. Adv. Rep. 11, 274 P.3d 1211 (App. 2012), the homeowner plaintiff purchased a previously-owned house and experienced various structural problems. The homeowner filed suit against the original contractor alleging breach of the implied warranty of habitability and requesting "rescission of the purchase," or damages for the cost of repair in the alternative. The jury found in favor of the homeowner on her breach of implied warranty claim and awarded $30,000 in damages. Both parties then requested their attorneys' fees pursuant to A.R.S. § 12.341.01(A). The homeowner cited the court's discretionary ability, in absence of a contractual provision addressing attorneys' fees, to award the "successful party" its reasonable attorneys' fees in any action arising out of contract. The original contractor, citing past settlement offers, based its request for fees on the statutory provision stating "if a written settlement offer is rejected and judgment finally obtained is…more favorable to the offeror…, the offeror is deemed to be the successful party from the date of the offer and the court may award [that party] reasonable attorney fees." The homeowner countered that the original contractor's prior $40,000 and $126,000 settlement offers did not exceed the "judgment finally obtained," because the judgment finally obtained consisted of the $30,000 verdict plus the homeowner's attorneys' fees and costs. The trial court agreed: since the homeowner would be awarded $225,000 in fees and $10,757.79 in costs as the "successful party," the aggregate amount, including the $30,000 in damages awarded by the jury, exceeded the contractor's prior settlement offers.

The Arizona Court of Appeals upheld the trial court's decision to include attorneys' fees and costs in the "judgment finally obtained," but on different grounds. As a preliminary matter, the court agreed there can be two competing "successful parties" in a contract-related case—(1) the overall successful party in the litigation, based on the jury's verdict, and (2) the party whose offer was rejected and never beaten by the "judgment finally obtained," but that party is deemed "successful" only from the date of the offer forward. The court clarified that the amount of fees and costs the trial court should consider in determining what the "judgment finally obtained" is are those fees and costs incurred up to the date of the offer, not through the date of the judgment. In this case, the original contractor made a $40,000 settlement offer in January 2007 but at the time of that offer, the homeowner had incurred $69,396.50 in fees. Later, about one month before trial, the original contractor made another settlement offer for $126,000—however, the homeowner had incurred $206,692.81 in fees as of that date. In both cases, the "judgment finally obtained"—the homeowner's pre-offer attorneys' fees and costs along with the $30,000 damages award—exceeded the original contractor's various settlement offers and therefore precluded the original contractor from being a "successful party" from the date of the offers. Therefore, since the homeowner was the only "successful party," the trial court's $225,000 fee award and $10,757.79 cost award in the homeowner's favor was upheld.

The Arizona Court of Appeals also agreed that the homeowner could not seek rescission of her home purchase. Although the Supreme Court long ago eliminated any privity requirement for subsequent homeowners to maintain a breach of implied warranty of habitability claim against the original builder, privity of contract is nonetheless required for any homeowner seeking rescission of the contract. Thus, a subsequent purchaser is limited to the remedy of recovering damages for any breach of the implied warranty of habitability.

Legislation:

1. H.B. 2123 – Transaction Privilege Tax Reform Committee. This bill establishes the Transaction Privilege Tax Reform Committee and requires it to study and make recommendations regarding the collection of revenues to the state General Fund - including individual and corporate income tax as well as the transaction privilege tax. The bill also requires the committee to make recommendations to minimize the fiscal impact to cities, towns and counties. The committee will submit its report to the Governor and Legislature by October 31, 2012.

2. H.B. 2830 – Energy Savings Accounts. This bill indefinitely extends the current expiring law allowing school districts to enter into long-term energy savings contracts at no initial outlay of money, and extends this contracting ability to the rest of state and local government.

3. S.B. 1441 – Residential Construction, Fall Protection. This bill creates a more flexible standard for residential fall protection of Arizona construction workers. In particular, the bill:

- Requires each residential construction employee who is engaged in construction activities that are 15 or more feet above areas or surfaces to which the employee can fall to be protected by guardrail systems, safety net systems or personal fall systems, except when an employer can demonstrate that it is impractical or creates a greater hazard.

- Allows for the suspension of residential construction fall protection requirements if the work in question is of a short duration or non-repetitive.

- Includes requirements for temporary or emergency conditions where there is a danger of employees or materials falling through floor, roof or wall openings or from stairways or runways.

- Permits the employer to develop and implement a fall protection plan that meets the requirements pursuant to current statute if the employer demonstrates that it is infeasible or creates a greater hazard to use these systems.

- Permits an employer to develop a single fall protection plan covering all construction operations.

- Employers whose work does not fall within the Arizona Department of Occupational Health and Safety's jurisdiction, such as federally owned or managed lands, and work on Native American lands, must still comply with federal OSHA's residential fall protection enforcement policy.

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Arkansas

Case Law:

1. In *Clow v. Vickers Construction, Inc.*, 2011 Ark. App. 662, the Arkansas Court of Appeals addressed whether the "no-sue" provision of Arkansas Code Annotated § 17-25-103(d) applied to residential contractors. This was an issue of first impression.

When problems arose in connection with an oral contract for a single family residence, the unlicensed contractor sued to recover the cost of labor and material on the basis of the oral contract, or alternatively, under the theory of quantum *meruit*. The Clows responded that Vickers Construction was an unlicensed contractor at the time it constructed their house and shop, and that Ark. Code Ann. § 17-25-103(d) barred it from seeking recovery at law or under the theory of quantum *meruit*. The trial court disagreed that the statute barred suit and awarded the contractor a judgment of $40,775.38.

On appeal, the Court examined whether the "no-sue" provision, which was not added to the residential building contractor subchapter of the statute until 2011, was applicable to residential contractors. Section 17-25-103(d) provides that "no action may be brought either at law or in equity for quantum *meruit* by any contractor in violation of this chapter." Although the definition of "contractor" in § 17-25-101(a)(1) still specifically exempts single-family residences, the residential contractor subchapter added in 1999 provided that this subchapter applied to all contractors not specifically excluded. The Court reversed the trial court, holding that § 17-25-103(d) does apply to residential contractors and the trial court erred in not dismissing Vickers' lawsuit on that basis.

2. In *May Construction Company v. Town Creek Construction & Development, LLC*, 2011 Ark. 281 (2011), a case of first impression, the Arkansas Supreme Court examined a materialmen's lien statute, Arkansas Code Annotated § 18-44-110. Town Creek entered into a written cost-plus contract with May to construct improvements on the property. The contract contained an arbitration clause. To finance the project, Town Creek obtained a loan from Chambers Bank, secured by a mortgage of Phases I and II of the residential portions of the property and a certificate of deposit valued at $150,000. The mortgages did not initially include the mortgage on the commercial property, but it was added shortly after work was to begin on the project in July 2005. In August 2006, disputes arose and Town Creek terminated the contract. May recorded a materialmen's lien one month later.

May Construction argued that its lien should have priority over the construction mortgage of the bank, and Chambers Bank naturally argued its mortgage had priority. The key factual question that would resolve this dispute is whether construction on the property commenced before Chambers Bank filed its mortgage. To put it mildly, there was quite a bit of conflict in the parties' testimony on when construction commenced. The trial court ruled that Chambers Bank filed its construction mortgage before May Construction began construction. On appeal of the circuit court's ruling that May's lien was inferior to Chambers' mortgage on the property, the Arkansas Supreme Court reversed. The supreme court turned to Arkansas lien statutes, and specifically A.C.A. § 18-44-110, which states:

> Construction or repair commences when there is a visible manifestation of activity on real estate that would lead a reasonable person to believe that construction or repair of an improvement to the real estate has begun or will soon begin, including, but not limited to, the following:

- Delivery of a significant amount of lumber, bricks, pipe, tile, or other building material to the site;

- Grading or excavating the site;

- Laying out lines or grade stakes; or

- Demolition in an existing structure.

In reviewing the trial court's decision, the Arkansas Supreme Court found that ruling "was clearly based upon the intent of the parties." In rejecting that approach, the supreme court reasoned, "Under the plain language of section 18-44-110, the subjective intent of the parties is not an element of the commencement of construction. In our review of the statute, the circuit court should have examined the 'visible manifestation of activity' on the property, including, but not limited to, any of the four enumerated circumstances, to determine whether construction had 'commenced' at the time that Chambers filed its construction mortgage." The Court held that the determination of when construction commences is objective, not subjective. The commencement of construction is that date upon which a "visible manifestation of activity" has occurred "that would lead a reasonable person to believe that construction…has begun or will soon begin[.]"

3. In *Bayer CropScience LP v. Schafer, 2011 Ark. 518,* S.W.3d (2011), which does not directly involve construction industry litigants or subject matter, the Arkansas Supreme Court ruled the statutory limitation on punitive damages unconstitutional.

Legislation:

1. Ark. Code Ann. § 16-45-104 – Affidavit as to Correctness of Account. Section 16-45-104 has been amended to require that an affidavit of account be attached to any complaint seeking to recover on an open account and to clarify the information that is required to be included in the affidavit.

2. Ark. Code Ann. § 16-108-201 *et seq*. – Uniform Arbitration Act. Section 16-108-201 has been enacted to adopt the provisions of the Uniform Arbitration Act.

3. Ark. Code Ann. § 17-25-304 – Financial Statement. Section 17-25-304 previously stated that persons and entities applying for a new license were required to submit audited financial statements. Those submitting renewal applications did not have to submit audited financial statements; only a financial statement "reviewed by a certified public accountant or registered public according to American Institute of Certified Public Accountants' Professional Standards" was required. Section 17-25-304 has been amended to put original applicants and renewal applicants on equal footing. Neither original nor renewal applicants are required to submit audited financial statements. The financial statement must only be "reviewed by" a proper accountant.

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California

Case Law:

1. In *California Paving & Grading Co. v. Lincoln General Ins. Co.*, 206 Cal.App.4th 36 (2012), the Court of Appeal, Second District, held that work performed pursuant to a subdivision improvement agreement "constituted a 'work of improvement contracted for by a public entity' and therefore amounted to a public work within the meaning of section 3100." (Id. at 38.) The Plaintiff, California Paving & Grading Co., Inc. ("Paving") was a subcontractor for Masada Development, Inc. ("Masada"), a licensed general contractor, for the construction of public improvements at a subdivision in the City of Los Angeles.

Masada was hired as a general contractor by a developer, 26 Moorpark LLC ("Moorpark"), that entered into a Subdivision Improvement Agreement and Contract (the "SIA") with the City of Los Angeles as a condition of approval of the final map for the subject subdivision. The SIA required Moorpark to construct all public improvements required by the final map and to obtain payment security in an amount no less than fifty (50) percent of the estimated costs of the improvements. "In accordance with the [SIA], Moorpark obtained a 'subdivision labor and material payment bond' in the amount of $97,500 from Lincoln General Insurance Company, the surety." (*Id*. at 38.)

"On January 20, 2009, Paving completed its work but was not paid." (*Id*. at 39.) Paving did not file suit against Moorpark and Masada to recover for work it performed until June of 2009. In March of 2010, and after both Moorpark and Masada filed for bankruptcy, Paving filed suit against Lincoln General Insurance Company (the "Surety") alleging that it was entitled to recover on the labor and material payment bond as an intended beneficiary. The surety demurred to the complaint, stating that the complaint failed to state a cause of action because Paving did not give timely written notice of its claim and its claim was untimely under the statute of limitations applicable to a public work. The trial court sustained the demurrer without leave to amend and Paving appealed.

The Court of Appeal found that Paving's action was governed by the statutory scheme pertaining to payment bonds for public works. "Public work," as defined by Civil Code section 3100, is "any work of improvement contracted for by a public entity." The SIA between Moorpark and the City of Los Angeles "expressly required Moorpark, at its 'own cost and expense, to *construct and install all public improvements* required in and adjoining and covered by the final map.'" (*Id.* at 43 (emphasis in original).) Paving's subcontract with Masada required Paving to "furnish labor, services, equipment and materials required pursuant to the prime contract for the construction of the PUBLIC IMPROVEMENTS." (*Id.* at 43.) The subcontract agreement between Masada and Paving was for the performance of public improvements required by the underlying SIA between Moorpark, the developer, and the City of Los Angeles.

Ultimately, the Court of Appeal found that an agreement in furtherance of the underlying SIA between the developer and City of Los Angeles was a contract for a "work of improvement contracted for by a public entity." (*Id.* (quoting Cal. Civil Code § 3100).) The facts of the SIA before the Court of Appeal were distinguished from the facts of the contract at issue in *Progress Glass Co. v. American Ins. Co.*, 100 Cal.App.3d 720 (1980) ("Progress Glass"), where the Court of Appeal found that a long term land lease with a private developer did not constitute a contract for a "public work" because the public entity in *Progress Glass* was not a party to the construction contract between the owners of the project and the contractor. The public entity's lease did not amount to a contract for a work of improvement because the public entity's role

was nothing more than that of a lessor. In contrast, the City of Los Angeles contracted for the work of improvement in the SIA and entered into the SIA requiring Moorpark "to construct and install all public improvements required in and adjoining and covered by the final map." (*Id.*) Paving's subcontract was in furtherance of the SIA between the City of Los Angeles and Moorpark and was, therefore, a 'work of improvement contracted for by a public entity.'" (*Id.* (quoting Cal. Civ. Code § 3100).) Furthermore, the Court of Appeal rejected the argument that "public work" should be defined by Public Work Contracts Code section 7103.5 or Labor Code section 1720, which define "public work" more narrowly and would preclude Paving's subcontract work from being considered a public work "merely because the instant subcontract was not subject to competitive bidding or prevailing wage requirements." (*Id.* at 45.)

Because the work for which Paving was seeking to recover payment from the Surety was a "public work," Paving was required to provide notice to the public owner in compliance with Civil Code section 3098 or Civil Code section 3258. Paving did not allege that it provided the public agency, the City of Los Angeles, a written notice, as required by California Civil Code section 3098 or section 3252, subdivision (b). Therefore, Paving's action was barred by its failure to give the required preliminary notice. The Court of Appeal found it was not necessary to address the issue of whether the lawsuit was time barred based on Civil Code section 3249 given its determination that Paving failed to satisfy the requirements of Civil Code section 3098 or Civil Code section 3258 and, as a result, is barred from asserting a cause of action as a third party beneficiary on the payment bond.

2. In *Tri-State, Inc. v. Long Beach Community College Dist.*, 204 Cal.App.4th 224 (2012), the Court of Appeal of the Second District of California held Civil Code section 3186 (renumbered at Civil Code section 9358 effective July 1, 2012),[1] does not authorize an attorneys' fee award in favor of a public entity against a stop notice claimant. Tri-State, Inc. ("Tri-State") performed work as a subcontractor on a construction project owned by Long Beach Community College District. Tri-State delivered a stop notice to the District stating that $1,134,998.06 was unpaid by the general contractor, Taisei Construction Corporation ("Taisei").

After the action commenced, Taisei obtained a release bond in an amount equal to one hundred twenty five percent of the claim. The District accepted the release bond in exchange for its dismissal from the action based on a stipulation and subsequent order entered by the trial court.

Thereafter, the District moved for an award of $10,974.50 in attorneys' fees in reliance on Civil Code section 3186. Tri-State opposed the motion and argued that Civil Code section 3186 did not support an award of attorneys' fees. The trial court entered a judgment of dismissal, including an award of $10,974.50 in attorneys' fees as costs. Tri-State successfully appealed.

Civil Code section 3186 states, in pertinent part, that upon a receipt of a stop notice by a public entity it is the duty of the public entity "to withhold from the original contractor . . . money or bonds . . . due or to become due to that contractor in an amount sufficient to answer the claim

[1] The renumbered Civil Code section 3186, Civil Code section 9358, states, in pertinent part, that "[t]he public entity shall, on receipt of a stop payment notice, withhold from the direct contractor sufficient funds due or to become due to the direct contractor to pay the claim stated in the stop payment notice and to provide for the public entity's reasonable cost of any litigation pursuant to the stop payment notice." The "reasonable cost of any litigation" language at issue in *Tri-State, Inc.*, does not differ between section 3186 and the renumbered statute, section 9358.

stated in the stop notice and to provide for the public entity's reasonable cost of any litigation thereunder."

The Court of Appeal reasoned that the subject provision relating to public work stop notices did not provide for an award for attorneys' fees because it does not expressly authorize an attorneys' fee award. The court first compared the statute to similar statutes in which attorneys' fees are expressly authorized. For example, Civil Code section 3176 expressly states that the prevailing party in an action to enforce payment of a claim stated in a private work bonded stop notice is entitled to attorneys' fees. Civil Code section 3176 expressly authorizes the prevailing party "attorneys' fees." Had the legislature intended to authorize an attorney fee award in favor of a public entity it would have so stated and it did not so state in Civil Code section 3186.

The Court of Appeal also found that "reasonable cost of any litigation" does not include attorneys' fees. Instead, the "reasonable cost of any litigation" refers to ordinary costs, such as "verifying and recording the lien," exclusive of attorneys' fees, given the legislative history of Civil Code section 3176. (*Tri-State, Inc., supra*, 204 Cal.App.4th at 231.) Revisions of the statute to exclude the reference to counsel fees occurred after the Supreme Court held in *Builders' Supply Depot v. O'Connor*, 150 Cal. 265, 268-69 (1907), that "an attorney fee award in favor of a prevailing mechanics' lien claimant, but not an opposing party prevailing on the claim, violated the 14th Amendment of the United States Constitution and provisions of the California Constitution." (*Tri-State, Inc., supra*, 204 Cal.App.4th at 230.)

In dicta, the Court of Appeal noted that the Long Beach Community College District did not commence an interpleader action. Had the Long Beach Community College District interpleaded the funds, it would have been entitled to recover its attorneys' fees under Code of Civil Procedure section 386.6, subdivision (a).

3. In *Eggers Industries v. Flintco, Inc.*, 201 Cal.App.4th 536 (2012), the Court of Appeal of the Third District of California found that a subcontractor supplying custom doors for a public works contract was a subcontractor covered by the public works payment bond even though it did not manufacture the custom doors. Defendant Flintco, Inc. ("Flintco") was the general contractor on the public work project. Flintco contracted with Architectural Security Products ("ASP") to provide custom doors for the project. ASP subcontracted with Plaintiff Eggers Industries ("Eggers") to manufacture the custom doors. Eggers was not paid in full for the doors it manufactured and provided to the project and sought recovery from Flintco and the two sureties for the public works project, Fidelity and Deposit Company of Maryland and Federal Insurance Company ("Sureties").

Whether Eggers was entitled to recovery under the payment bonds pursuant to Civil Code section 3248, subdivision (c), depended on whether ASP was a subcontractor or a materialman on the project. The section provides that a public work payment bond benefits the persons named in Civil Code section 3181. It is not true that a public work payment bond "inure[s] to the benefit of materialmen and subcontractors of any tier of a public works project and that any such materialmen or subcontractors may maintain a direct action against the sureties." (*Eggers Industries, supra*, 201 Cal.App.4th at 840-41 (emphasis in original).) The Court of Appeal upheld the trial court's ruling on Egger's motion for summary judgment that ASP was a subcontractor, not a materialman, because a subcontractor is not required to actually construct any part of the project, whether on- or off-site. It was sufficient that the person or company "*agrees* with the prime contractor to perform a substantial specified portion of the work of construction which is the subject of the general contract in accord with the plans and

specifications by which the prime contractor is bound." (*Id.* at 540 (quoting *Theisen v. County of Los Angeles*, 54 Cal.2d 170, 183 (1960) ("Theisen")).)

The Court of Appeal also noted that the *Theisen* court defined a subcontractor broadly and noted that "[w]e do not accept the view of some other jurisdictions that to be a subcontractor one must install work at the site of the improvement." (*Id.* at 544-45 (quoting *Theisen, supra*, 54 Cal.2d at 183-84) (internal citations omitted).)

The Court of Appeal further clarified the broad scope of the Theisen opinion by emphasizing that one who agrees to construct a definite, substantial part of the work is a subcontractor, without requiring any limitation that the work actually be performed by the first tier subcontractor. Ultimately, the subcontractor's status as a subcontractor is determined by what it agrees to do and is not altered by the work it actually performs or, as the case may be, subcontracts with a third-party to perform. The use of the phrase "charge of" in describing a subcontractor encompasses a subcontractor that agrees to provide that portion of the construction, not "whether the person performs the construction himself, has employees perform the construction, or subcontracts with someone else for that person to perform the construction." (*Id.* at 546-47.)

The broad interpretation of the term "subcontractor" provides sub-tier materialmen an avenue for collecting unpaid public works contract balances from a surety. To protect itself from payment bond claims, the general contractor can condition payment to subcontractors on proof of release by subcontractor's suppliers.

Legislation:

1. A.B. 1671, Progress Payments, Withholding Retention Proceeds Prohibited & Presentation of Bids Under Sealed Cover; Bidder's Security. Public Contract Code section 7202 currently prohibits the Department of Transportation from "withholding retention proceeds when making progress payments to a contractor for work performed on a transportation project" through January 1, 2014. The proposed legislation will make the provisions prohibiting the Department of Transportation from withholding retention proceeds effective through January 1, 2020. The purpose of the statute is to "[e]xtend the operation of 0-percent retentions on transportation contracts [that] provides confidence within California's construction industry to continue working with Caltrans on projects to help rebuild California's infrastructure."

The bill was amended on July 6, 2012. In the July 6, 2012 version of the proposed legislation, Public Contract Code section 10167 was also amended. The substantive change to the section is the addition of a clause allowing the submission of "an electronic bidder's bond by an admitted surety insurer submitted using an electronic registry service approved by the department advertising the contract."

2. A.B. 1783, 2012 Cal. Legis. Serv. Ch. 114, Department Responsibilities; Certification and Determination of Eligibility. The Assembly Bill was chaptered July 13, 2012 and amends Government Code section 14839.1 and Public Contract Code section 2002. The current version of the statutes provide the Department of General Services with the authority to determine the eligibility of a business for a small business preference and also grants other governmental entities the right to certify small businesses if the governmental entity uses "substantially the same or more stringent definitions" as those set forth in Government Code section 14837. The revised statutes do not allow other government entities to certify

small businesses and, instead, provide that the Department of General Services has the "sole responsibility for certifying and determining eligibility of small businesses." (2012 Cal. Legis. Serv. Ch. 114 (A.B. 1783).) "Local agencies shall have access to the department's list of certified small businesses on the department's Internet Web site, which is available to the public, for use as a reference guide to confirm a small business certification." (*Id.*) The revisions to Public Contract Code section 2002 do allow local agencies to set preferences for small businesses certified by the Department of General Services and to set "additional guidelines for local preference purposes." (*Id.*)

3. Cal. Pub. Cont. Code §§ 10262 & 10262.5 (S.B. 293), Payments to Subcontractors & Progress Payments to Subcontractors; Time for Payment; Remedies; Withheld Payments; Report. The statute setting forth the time for payment of progress payments to any subcontractor for public or private work is modified to provide more protection to subcontractors. Effective January 1, 2012, a prime contractor or subcontractor shall make progress payments to a subcontractor within seven days of receipt of funds to which a subcontractor has an interest, instead of ten days, as previously required.

4. Cal. Civ. Code § 7108.5 (S.B. 293), Prime Contractors and Subcontractors; Payment to Subcontractors; Good Faith Dispute; Violations; Penalty; Application to Private Works of Improvement and Public Works; Exception. Effective January 1, 2012, a prime contractor or subcontractor is required to make payment to any subcontractor within seven days of receipt of progress payment. This statute does not apply in instances in which Public Contract Code section 10262, discussed above, applies.

5. Cal. Pub. Cont. Code § 10261 (S.B. 293), Payments Upon Contracts; Progress Payments; Withholding of Percentage of Contract Price; Warrants; Electronic Transfer; Complex Projects Requiring Higher Retention Amount. The statute setting forth the retention in California limits the amount of retention to five percent, with the exception of complex work. After ninety-five percent of the work for a project is completed, the retention may be reduced to an amount no less than one hundred and twenty five percent of the estimated value of the work yet to be completed, if approved in writing by the surety on both the performance and payment bonds. However, if the project is deemed "substantially complex," higher retentions for such projects will be noted in the request for bids. The statute is to remain effective through January 1, 2016, at which time the statute returns to its prior version which requires progress payments not to exceed ninety-five percent and retention of progress payments to be, at a minimum, five percent. The distinction is important in that the five percent benchmark changes from a maximum to a minimum on January 1, 2016.

6. Cal. Pub. Cont. Code § 7201 (S.B. 293), Public Works of Improvement Contracts Between Public Entity and Original Contractor, Original Contractor and Subcontractor, and Between all Subcontractors Thereunder Entered Into on or after Jan. 1 2012; Limits on Retention Proceeds, Waiver. The revision to the statute limits public work retentions to five percent in all public work contracts, including subcontracts, and supply agreements thereunder. The prior version of the statute allowed retention as provided for in the specific public work contract. This statute is effective for contracts entered into on or after January 1, 2012. There are two exceptions to the five percent retention limit. The first exception is for projects deemed "substantially complex." Higher retentions for such projects will be noted in the request for bids. The second exception applies to a general contractor withholding more than five percent from a subcontractor when the general provides written notice at the time of the request for bids and the subcontractor is unable or refuses to obtain the appropriate bonds required by statute.

7. Cal. Pub. Cont. Code § 2501 (S.B. 922), Local Public Entity Governing Boards; Majority Vote Regarding Use and Funding of Project Labor Agreements. This statute protects project labor agreements and community workforce agreements. These arrangements allow pre-hire collective bargaining agreements with one or more labor organizations that create terms and conditions of employment for a specific project that apply to the general contractor and all subcontractors. The statute prohibits public agencies from adopting general bans of such agreements and applies to all ordinances and initiatives. Noncompliance with the statute by chartered cities with existing bans will result in the State of California withholding funding beginning January 2015.

8. Cal. Civ. Code §§ 2782 & 2782.05 (S.B. 474), Construction Contracts; Void and Unenforceable Indemnification Provisions; Agreements Between Subcontractors, Builders, or General Contractors & Construction Contracts; Void and Unenforceable Indemnification Provisions; Agreements Between General Contractors, Construction Managers, or Subcontractors. The revised statute benefits subcontractors seeking relief from broad indemnity clauses in subcontracts. The modifications prevent general contractors and owners for both public and private projects from enforcing indemnity clauses that attempt to require indemnity for claims arising from the indemnitee's "active negligence" by making such clauses void. The existing law only prohibited contract clauses requiring general contractors from providing indemnity for the "sole negligence or willful misconduct" of a public works owner or for design defects. The new law also prohibits contract clauses attempting to shift liability for active negligence onto subcontractors and suppliers. Furthermore, the new law also prohibits indemnification of a private works owner's active negligence. In sum, the revised statute prevents general contractors, subcontractors, and suppliers from assuming liability for the "active negligence" of general contractors, public owners, or private owners. There are thirteen categories of exceptions enumerated in the statute, including residential construction subject to Civil Code section 895, et seq. and wrap-up insurance policies. The law is effective for those contracts entered into on or after January 2013.

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Colorado

Case Law:

1. In *Melssen v. Auto-Owners Insurance Company*, 285 P.3d 328 (Colo. App. 2012), the Colorado Court of Appeals held that a notice of claim made under Colorado's Construction Defect Action Reform Act (CDARA) constitutes a "suit" such that an insurance company's duty to defend was triggered. The policy at issue defined "suit" as:

> a civil proceeding in which damages because of 'bodily injury,' 'property damage,' 'personal injury' or 'advertising injury' to which the insurance applies are alleged. 'Suit' includes:
>
> - An arbitration proceeding in which such damages are claim and to which you must submit or do submit with our consent; or

- Any other alternative dispute resolution proceeding in which such damages are claimed and to which you submit without consent.

Melssen, 285 P.3d at 332. The court found that the CDARA notice of claim process constitutes an alternative dispute resolution proceeding. Id. at 334-35.

It is unclear how significant this decision will be, however. In 2010, the Colorado legislature passed a law codified at C.R.S. § 13-20-808 that expressly states that a CDARA notice of claim triggers an insurer's duty to defect. See § 13-20-808(7)(a)(I). However, courts routinely have held that the statute does not apply retroactively, but instead on applies to policies in effect on or after the date the statute was passed. The statute did not apply to the policy in Melssen, but the court nevertheless concluded that the CDARA notice triggered the insurer's duty to defend. As time goes on, C.R.S. § 13-20-808 will apply to more policies, rendering the court's decision in *Melssen* unnecessary.

Shaw argued that the statute of repose did not begin to run until the entire project was completed. The subcontractors argued that the statute of repose began running upon completion of the building on which they performed work (i.e., when the certificate of occupancy for the building was issued). The court agreed with the subcontractors, holding "that an improvement may be a discrete component of an entire project, such as the last of multiple residential buildings." Shaw, 2012 COA 24 ¶ 38. The court declined to reach the subcontractors' other argument, namely that "'improvement' should be determined even more narrowly on a trade-by-trade basis." *Id*. Consequently, in multi-unit and multi-phase projects, each building will likely be deemed to have its own state of repose.

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2. In *Swinerton Builders v. Nassi*, 272 P.3d 1174, No. 10CA1847 (Colo. App. 2012), the Colorado Court of Appeals established new law in Colorado regarding the recovery of attorney's fees and costs by a prevailing party in an action to pierce the corporate veil. The case involved a construction contract between Swinerton and Beauvallon. The contract incorporated by reference the dispute resolution provisions of AIA Document A201, which provided for arbitration of claims arising out of or related to the contract. The contract also contained a fee shifting provision which provided, "in the event of any litigation between the parties, the prevailing party shall be entitled to reimbursement for all reasonable attorney's fees, expert fees, court costs, and all other third-party costs of the litigation incurred by the prevailing party."

After the project was complete a dispute arose and Swinerton filed a demand for arbitration asserting breach of contract claims against Beauvallon and Craig Nassi (Beauvallon's president) and an unjust enrichment claim against Beauvallon. Ultimately, the arbitrators ordered Beauvallon to pay Swinerton more than $1 million in damages, interest, attorney fees and costs, which was confirmed by the district court.

When Beauvallon failed to pay the judgment, Swinerton separately brought a district court action against Nassi seeking a declaratory judgment that Beauvallon is Nassi's alter ego and, therefore, Nassi is bound by the terms of the agreement between Beauvallon and Swinerton. Swinerton also sought to pierce Beauvallon's corporate veil to obtain a personal judgment against Nassi. The district court ruled in favor of Swinerton, concluding that Swinerton could pierce Beauvallon's corporate veil and hold Nassi personally liable for the arbitration award against Beauvallon. Afterwards, Swinerton sought to recover the attorney's fees and

costs that it incurred in the veil-piercing litigation, pursuant to the contract's fee-shifting provision.

The district court denied Swinerton's request and Swinerton appealed the denial of its attorney's fees and costs for the veil-piercing action. As a matter of first impression in Colorado, the court of appeals held that a party who prevails in an action to pierce the corporate veil may recover the attorney's fees and costs incurred in that action if 1) the action was brought to enforce a breach of contract judgment against the corporation; and 2) the contract underlying the judgment authorized an award of fees and costs for the enforcement of the judgment against the corporation.

In doing so, the appellate court explained that an action to pierce the corporate veil is not a separate and independent cause of action, but rather a procedure to enforce an underlying judgment. When the corporate veil is pierced, a shareholder who did not sign the corporation's contract may be held personally liable for the contractual obligations of the corporation. Thus, the court held that Beauvallon's veil was pierced and Nassi was responsible for Beauvallon's contractual obligations, including its obligations under the Swinerton contract's fee-shifting clause.

3. In *Martin v. Freeman*, 272 P.23d 1182, No. 11CA0145 (Colo. App. 2012), the Colorado Court of Appeals considered another matter of first impression regarding piercing the corporate veil. Tradewinds Group, LLC ("Tradewinds") hired Robert Martin ("Martin") to construct an airplane hangar. Dean Freeman ("Freeman") managed Tradewinds as a single member LLC. In 2006, Tradewinds sued Martin for breach of the construction agreement. In 2007, while the litigation against Martin was pending, Tradewinds sold its only meaningful asset; an airplane, for $300,000. The proceeds of that sale were diverted to Freeman, who paid Tradewinds' litigation expenses. In 2008, a judgment was entered in favor of Tradewinds and Martin appealed. In the appeal, the court found that Tradewinds' damages were speculative and remanded with directions to enter judgment in Martin's favor. On remand, the trial court declared Martin the prevailing party and awarded him $36,645.40 in costs. Because the proceeds of Tradewinds only asset went directly to Freeman, the LLC no longer had any assets. As a result, Martin initiated an action to pierce Tradewinds' corporate veil. After a bench trial, the trial court found sufficient grounds to pierce Tradewinds' corporate veil and held Freeman personally liable for the judgment entered against Tradewinds.

On appeal, the defendants argued that the court erred because the court failed to find wrongful intent or bad faith. The second prong of the veil-piercing test is whether justice requires recognizing the substance of the relationship between the corporation and the person or entity sought to be held liable over the form because the corporate fiction was used to perpetrate a fraud or defeat a rightful claim. The court of appeals concluded that a showing that the corporate form was used to defeat a creditors' rightful claim is sufficient and further proof of wrongful intent or bad faith is not required to pierce the corporate veil.

4. In *D.R. Horton, Inc. v. The Travelers Indemnity Company of America*, 2012 WL 527204, No. 10cv02826 (D. Colo. 2012), the United States District Court for the District of Colorado considered a motion to dismiss a Colorado Consumer Protection Act ("CCPA") claim against an insurer. The plaintiffs developed a residential community in Boulder County and engaged a number of subcontractors to perform certain work on the project. The subcontract agreements required the subcontractors to carry commercial general liability policies ("CGL policies") naming plaintiffs as additional insureds. Each of the subcontractors took out one or more CGL policies with one or more of the Travelers defendants, naming plaintiffs as additional

insureds. In 2003, plaintiffs were sued in state court for alleged construction defects at the project. In August 2003, plaintiffs tendered the defense of the construction defects litigation to the subcontractors and the Travelers defendants. Each of the Travelers defendants accepted plaintiffs' tender of their defense. Plaintiffs hired a law firm to represent them in the construction defects litigation and the firm billed the Travelers defendants for its fees and costs.

Over a period of 5 years, however, none of the Travelers defendants actually paid any portion of the plaintiff's defense fees and costs. On October 31, 2008, the Travelers defendants tendered checks to plaintiffs for payment of plaintiffs' defense fees and costs totaling approximately $31,000. Plaintiffs returned the checks claiming them to be inadequate under controlling law. In fact, Plaintiffs alleged that the $31,000 figure was less than 4 percent of the Travelers Defendants actual obligations. The district court followed the decision of the Colorado Supreme Court in *Showpiece Homes Corp. v. Assurance Company of America*, 38 P.3d 47 (Colo. 2001), which held that the CCPA applies to the acts or practices of insurance companies and that that an insured may maintain an action against its insurer for bad faith handling of the insured's claim under the CCPA.

5. In *TCD, Inc. v. American Family Mutual Insurance*, 2012 WL 1231694 (Colo. App. 2012), the Colorado Court of Appeals addressed an insurer's duty to defend in light of the 2010 amendment to C.R.S. 13-20-808, which was passed by the Legislature to express its disapproval of the decision in *General Security*.

Frisco Gateway Center, LLC ("Gateway") contracted with TCD to construct a building in Frisco, Colorado. TCD then subcontracted with Petra Roofing and Remodeling Company ("Petra") to install the roof on the building. The subcontract required Petra to defend and indemnify TCD and to name TCD as an additional insured under its CGL policy. American Family Mutual Insurance Company ("American") issued a CGL policy to Petra, with TCD named as an additional insured. The American policy period was August 22, 2006-August 22, 2007, but was cancelled on June 10, 2007 due to nonpayment.

TCD filed suit against Gateway seeking payment for its work at the project. Gateway counterclaimed against TCD for breach of contract, negligence, and violation of the CCPA. As an additional insured under the CGL policy, TCD demanded that American defend and indemnify it in the underlying action, but American denied coverage. As a result, TCD filed suit against Petra and its insurance company for declaratory judgment, breach of insurance contract, breach of contract, and negligence. The trial court granted summary judgment on all claims in favor of American because the counterclaims asserted by Gateway against TCD did not give rise to a duty to defend or indemnify under the CGL policy.

TCD appealed arguing, among other things, that C.R.S. 13-20-808 should be applied retroactively because the August 22, 2006-June 10, 2007 CGL policy was "currently in existence" at the time the lawsuit was filed. In pertinent part, section 13-20-808 provides that "in interpreting a liability insurance policy issued to a construction professional, a court shall presume that the work of a construction professional that results in property damage, including damage to the work itself or other work, is an accident unless the property damage is intended and expected by the insured." The Colorado Court of Appeals explained that while an occurrence policy allows for notice of claims after the policy period, it does not mean that the policy is "currently in existence" as contemplated by C.R.S. 13-20-808. Under section 13-20-808, the statute indicates that it "applies to all insurance policies currently in existence or issued on or after [May 21, 2010]."

Ultimately, the Colorado Court of Appeals found that the language in C.R.S. 13-20-808 was not ambiguous nor was it retroactive. Additionally, Colorado statutes are presumed to be prospectively applied and "[a] plain reading of 'currently in existence' supports the conclusion that section 13-20-808 applies only to policies for which the policy period had not yet expired on May 21, 2010."

6. In *Melssen v. Auto-Owners Insurance Company*, 2012 WL 2752172, No. 11CA0123, 11CA0864 (Colo. App. 2012), the Colorado Court of Appeals analyzed the notice of claim process under CDARA. The Holley's contracted with Gene and Diane Melssen d/b/a Melssen Construction (the "Melssens") to build a custom home. During construction, the Melssens retained CGL overage from Auto-Owners Insurance Company ("Auto-Owners"). The Auto-Owners policy obligated Auto-Owners to defend the Melssens with respect to any "suit" seeking damages for "property damage" occurring during the policy period. Shortly after the house was constructed, cracks developed in the drywall. Additionally, large cracks appeared in the outside stucco and basement slab. In April 2008, the Holleys sent the Melssens a notice of claim pursuant to CDARA. The notice asserted approximately $300,000 in damages to Holley's property caused by engineering and construction defects. The notice included a list of estimated damages and repairs and two reports by Holley's experts regarding the nature of the defects.

In June 2008, the Melssens sent Auto-Owners a copy of the notice of claim and demanded defense and indemnity. Auto-Owners did not immediately deny coverage, but it did not inspect the property or otherwise participate in adjusting the claim. In October 2008, Auto-Owners sent the Melssens a letter denying coverage of the claimed damages because they occurred outside the policy period. Afterwards, the Holleys agreed to an arbitration and mediation settlement with the Melssens and the foundation engineer. The Melssens paid $140,000 toward the cost of settlement. The Melssens then asserted an action against Auto-Owners for, among other things, breach of contract and bad faith breach of contract. After a three-day trial the jury issued a verdict in favor of the Melssens as well as costs and attorneys fees.

Auto-Owners appealed and contended that the CDARA notice of claim process was not a civil proceeding because the notice of claim was not a complaint nor was the claim process otherwise an alternative dispute resolution ("ADR") proceeding under the policy. Under the policy, however, a suit was not limited to a civil complaint. The policy referred broadly to a civil proceeding not a civil action and expressly included any other ADR proceeding in which damages are claimed and to which the insured submitted with Auto-Owner's consent. An ADR proceeding is a procedure for settling a dispute by means other than litigation, such as arbitration or mediation. The court ruled that the notice of claim process constituted both a civil proceeding and an ADR proceeding.

Auto-Owners further maintained that the CDARA notice of claim process still did not constitute a suit under the policy because Auto-Owners did not expressly consent to mediation and settlement of the claim. Consent, however, may be implied or waived. The Melssens argued that Auto-Owners impliedly consented because the claims adjuster knew and did not object to the Melssens' investigation of the property damages or its intention to have settlement discussions with the Holleys. Also, the Melssens argued that they were not required to obtain Auto-Owner's consent because Auto-Owners waived enforcement of the consent requirement by rejecting their claim on other grounds. The court noted that "an insurer waives its right to argue that its insured failed to give the required notice under a policy if it denied liability on the basis of lack of coverage and did not assert the noncompliance defense until after judgment

was entered against the insured." Thus, the court found that Auto-Owners impliedly consented to the notice of claim process and waived the consent requirement in the policy.

7. In *Glass House Residential Association v. Alta Riverfront LLC et al*., No. 2012CV1531, the Denver District Court recently considered a motion to compel arbitration in a construction defect lawsuit. The developer included mandatory arbitration provisions for construction defect claims in the initial condominium declarations. The mandatory arbitration provisions stated that it could not be repealed or modified without the consent of the developer and the general contractor. The homeowners association voted to amend the declarations to remove the mandatory arbitration provision before it filed the construction defect lawsuit. The developer and general contractor moved to compel arbitration, arguing that the homeowners association's amendment was ineffective because it was done without their consent.

The court ruled that the developer and general contractor had successfully and permissibly restricted the homeowners association from subsequently amending the condominium's declarations and bylaws to remove the arbitration requirement. In reaching its decision, the district court distinguished *Eagle Ridge Condominium Ass'n v. Metropolitan Builders, Inc.*, 98 P.3d 915 (Colo. App. 2004) because the ADR provision in the Glass House declaration contained a restriction requiring the developer's and general contractor's consent and this restriction did not violate any provision of the Colorado Common Interest Ownership Act (CCIOA). Because CCIOA contains no express prohibition on a developers' ability to forbid the repeal of a mandatory arbitration provision, the district court enforced the arbitration requirement over the homeowners association's objections.

8. In *Shaw Construction, LLC v. United Builders Services, Inc.*, 2012 WL 311665, No. 11CA2351 (Colo. App.), the Colorado Court of Appeals decided two questions of first impression under the Construction Defect Action Reform Act ("CDARA"). First, section 13-20-805 only tolls construction defect claims against those parties that receive actual notice of a claim. Second, in applying the statute of repose in section 13-80-104 to a multi-phase construction project, an improvement may be a discrete component of a larger project. And such an improvement can be substantially completed before the entire project is finished.

Shaw Construction, LLC ("Shaw") was the general contractor for a large condominium complex in Stapleton. Shaw hired United Builders Services to hang drywall and MB Roofing to install roofs, gutters, and downspouts (collectively "Subcontractors"). The City and County of Denver issued certificates of occupancy ("CO") for each residential building for phases I, II, and III. The CO for the last building in the project was issued on March 10, 2004 and the Subcontractors worked on this building. The architect, however, did not certify completion of all remaining architectural items in the project until June 8, 2004.

On May 15, 2007, Shaw received a notice of claim letter from the HOA under CDARA. On January 21, 2009, the HOA filed an action against developers of the property, but did not add Shaw as a defendant until January 28, 2010, when it amended the complaint. On March 29, 2010, Shaw filed its answer and third-party complaint naming Subcontractors, among others, as third-party defendants. The following day, Shaw sent its first and only notice of claim under CDARA to Subcontractors. Subcontractors moved for summary judgment contending that the six-year statue of repose had expired. In particular, the Subcontractors argued that substantial completion occurred on March 10, 2004 therefore the statute of repose barred Shaw's March 29, 2010 third-party complaint.

The trial court granted Subcontractors motions and concluded that substantial completion occurs "when an improvement to real property achieves a degree of completion at which the owner can conveniently utilize the improvement for the purpose it was intended." Because the project was to provide a residence for occupants, the March 29, 2010 CO was the date of substantial completion of the project. The court rejected Shaw's tolling argument that the HOA's notice of claim tolled all claims associated with the project including those against the Subcontractors. The court reasoned that the plain language of CDARA requires actual notice to a party to toll a claim as to that party.

Additionally, the court considered the meaning of an "improvement" as to which substantial completion should be determined. The term improvement is not defined in CDARA. Shaw argued that in a multi-phase project, improvement means the entire project. Subcontractors countered that the statute of repose is triggered when the subcontractor complete its own work and not when the entire project was completed. The court concluded that an improvement may be a discrete component of an entire project, such as the last building in a multiple building project. The court found that "the Subcontractors worked on a discrete component-the final building-of the project" and that the "drywall, roofs, gutters, and downspouts were integral and essential to the function of that building." Thus, the completion of the last building in the residential complex constituted an improvement and the substantial completion of that building would trigger the statute of repose.

Legislation:

1. HB12-1119. Concerning enforcement of violations by the department of public health and environment that pertain to construction-related discharges of storm water. The key elements of the bill are summarized as follows:

- A minor violation means a violation that does not harm or threaten public health or safety or the environment and that is either an inspection related violation of a paperwork violation.

- The division shall not commence any enforcement action against a violator for a minor violation unless the division notifies the violator of the violation and the violator fails to cure the violation within a reasonable time as determined by the division.

- If a violator fails to cure the violation within a reasonable time as determined by the division, then the division may assess a financial penalty up to two times the amount authorized in subsection (1) of this section.

- As soon as feasible after the effective date of this paragraph (c), the division shall collaborate with the construction industry and other interested persons to develop more responsive and streamlined processes for preventing violations of this article and of permits issued under this article and for enforcing such provisions when violations occur.

2. SB12-038. Concerning protection of consumers who engage a roofing contractor to perform roofing services on residential property. The bill requires roofing contractors offering to perform work on residential property to 1) sign a written contract with the property owners detailing the scope and costs of the roofing work and contact information for the roofing contractor; and 2) permit property owners to rescind a contract for the performance of roofing

work and obtain a refund of any deposit paid to the roofing contractor. Also, the bill prohibits roofing contractors from paying, waiving, rebating, or promising to pay, waive, or rebate all or part of any insurance deductible applicable to an insurance claim made to the property owners' property and casualty insurer for payment for roofing work on the residential property covered by a property and casualty insurance policy.

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Connecticut

Case Law:

1. In *Electrical Contractors, Inc. v. Department of Education*, 303 Conn. 402 (2012), the Connecticut Supreme Court ruled that a nonunion electrical contractor (ECI), but not six of its individual employees, had standing to challenge prebid specifications for a state financed school construction project in the City of Hartford (City), requiring that all project work be performed by union labor under the terms of the project's project labor agreement (PLA).

The plaintiffs brought suit against the City, the Connecticut Department of Education, its commissioner, and several contractors seeking declaratory, injunctive and other extraordinary relief on the grounds that it was illegal for the City to impose mandatory PLAs on successful bidders for the projects at issue, and other similar state-financed construction projects. After the case was removed to federal court, then later remanded back to state court, the defendants moved to dismiss the plaintiffs' claims for lack of subject-matter jurisdiction, arguing that 1) the plaintiffs lacked standing to bring a bid protest under the precedent established by *Connecticut Associated Builders & Contractors v. Hartford*, 251 Conn. 169 (1999) (Associated Builders); 2) the claims against the state were barred by the doctrine of sovereign immunity; and 3) the plaintiffs' challenge to the use of PLAs in state-funded municipal school construction projects was preempted by federal labor law. The trial court ruled that the action should be dismissed for lack of standing and subject matter jurisdiction because the plaintiffs failed to make a colorable claim that the PLA requirement "effectuated fraud, corruption, favoritism or otherwise undermined the objective or integrity of the competitive bidding process" under the principles articulated in *Associated Builders*. The trial court further concluded that the individual plaintiffs lacked standing, as they were not prequalified electrical contractors and had no ability to bid on the project.

The plaintiffs appealed the trial court's ruling to the Connecticut Appellate Court, and their appeal was then transferred to the Supreme Court. In its decision, the Supreme Court considered the circumstances under which an unsuccessful bidder on a state or municipal contract has standing to challenge the award of that contract. The Court reiterated established precedent that an unsuccessful bidder generally has no right to judicial intervention under common law because it has no right in the contract at issue and recognized that no state statute grants unsuccessful bidders standing to challenge the award of a public contract. However, the Court recognized a "limited exception" to the rules of standing, which provides "a means of protecting the public's interest in properly implemented competitive bidding processes…" Under the exception, unsuccessful bidders have standing to challenge a public contract award where fraud, corruption or acts undermining the objective and integrity of the bidding process exist.

In ruling that ECI had standing, the Court discussed how the trial court had misinterpreted and incorrectly relied on Associated Builders. In *Associated Builders*, the principal issue was whether the plaintiffs, a trade association representing contractors and two individual subcontractors, had standing to enjoin the award of a city contract based on a claim that *nonbidding* contractor members of the association *would have* bid if not for the PLA requirement. The Court in *Associated Builders* established a two-pronged test for standing, requiring that the claimant make a colorable claim that 1) it bid on the project or would have bid, but for the PLA requirement; and 2) the PLA requirement effectuated fraud, corruption, favoritism, or other acts that undermine the objective and integrity of the bidding process. The Court noted that in *Associated Builders*, it had ruled that the plaintiffs failed to meet the first prong of the test, yet still expounded on why the plaintiffs could not satisfy the second prong of the test, focusing on the plaintiffs' failure to substantiate their arguments that PLAs negatively impact access to the bidding process and increase the costs of the overall project. The Court clarified that the discussion in *Associated Builders* regarding the second prong of the test was nothing more than dicta because the first prong of the test had not been satisfied, and that the discussion evaluated whether a "colorable claim" had been made, but not the full merits of the plaintiffs' arguments regarding the impact of PLAs on the public bidding process.

The Court reasoned that the trial court improperly relied on the dicta of Associated Builders as a dispositive evaluation on the merits that PLA requirements do not contravene the public bidding statutes and have no negative cost impacts to nonunion contractors and workers. The Court noted that to the extent these issues were discussed in *Associated Builders*, such discussion was for the limited purpose of evaluating whether a colorable claim had been made and was not a full determination on the merits. The Court stated that *Associated Builders* recognized that an agency's discretion to require a PLA is not unfettered. The Court concluded that the trial court misapprehended *Associated Builders* as having determined that PLAs never affect the integrity of the competitive bidding process, resulting in the trial court improperly evaluating the plaintiffs' claims on the merits, rather than for the sufficiency of such claims to establish standing.

The Court held that the trial court failed to conduct an investigation of sufficient depth in determining the standing issues. Contrary to the determination of the trial court, the Court found that the allegations in the ECI's complaint regarding the negative impact of PLAs on the bidding process, and the evidence offered in support thereof, was sufficient to establish standing. In particular, the trial court failed to give adequate consideration to specific factual allegations in the ECI's complaint regarding the negative cost impact of PLAs, as well as supporting affidavits and other evidence showing the discriminatory effect of PLAs on nonunion contractors. The Court held that the ECI had provided the colorable factual showing needed for standing that was absent in *Associated Builders*.

The Court upheld the trial court's determination that the individual plaintiffs did not have standing against the non-state defendants, because the individual plaintiffs were not prequalified general contractors (as required by CGS § 4a-100) and could not become prequalified general contractors in their individual capacity, thereby lacking the ability to ever directly bid for government projects. The Court concluded that any injury that might be suffered by individual employees in relation to escalated costs to general contractors resulting from a PLA requirement, would be too speculative and remote to establish a direct and actual injury as needed for standing on the part of the individuals.

The Court also held that ECI had standing to bring its claim that the PLA requirement violated Connecticut's antitrust statutes. The Court stated that the Connecticut Antitrust Act

(CGS §§ 35-26; 35-28; 35-29) confers broad standing to unsuccessful bidders in the municipal bidding process and that because ECI had submitted a bid it had a statutory right to bring the antitrust claim against City. The Court rejected the argument of the non-state defendants that the PLA issue falls into a construction industry exception to antitrust legislation created under the National Labor Relation Act (NLRA), 29 U.S.C § 151 et seq., allowing pre-hire PLAs. The Court rejected that argument because the plaintiffs did not challenge the legality of the PLA or the process by which it was negotiated, but challenged the requirement that all prospective union and non-union bidders were required to comply with the PLA. Additionally, the Court rejected the argument of the non-state defendants that the PLA was beyond antitrust scrutiny pursuant to CGS § 35-31(b),because the City and state were acting in a proprietary capacity with regard to the projects at issue, rather than a regulatory capacity as would be necessary for the application of qualified immunity under that statute.

Similarly, the Court rejected the non-state defendants' arguments that the trial court correctly determined that the plaintiffs' claims were preempted by Section 301 of the NLRA (29 U.S.C. § 185), because the PLA was a pre-hire collective bargaining agreement within the primary jurisdiction of the National Labor Relations Board (NLRB). The Court noted that the judicial federal preemption doctrines advanced by the defendants did not require resolution of the PLA issue in a federal forum, but only that federal law apply be applied, making it possible for the issues to be resolved in state court. The Court further held that the preemption doctrines advanced by the defendants' served to preclude state *regulation* of an area preempted by the NLRA, but did not apply when the state or municipality was acting in a proprietor's role relative to the management of its property. The Court held that the PLA bid requirement at issue in this case was not an act of government regulation. Rather, it was an act undertaken in the City's role as proprietor in the purchasing of construction service. Therefore, adjudication of the state competitive bidding and antitrust law claims was not preempted by the NLRA.

Lastly, the Court agreed with the arguments of the state-defendants, ruling that the plaintiffs' claims against them were barred by sovereign immunity. The Court noted that the only sovereign immunity exception that could apply under the circumstances would require the plaintiffs to allege acts by the state that were in excess of their statutory authority. The Court found that the plaintiffs' allegations asserted that the state undermined the competitive bidding statutes because the state had funded the projects and had been aware of the City's actions in implementing a PLA requirement. The Court held that these allegations were insufficient to qualify for an exception to sovereign immunity, because the conduct which purportedly exceeded statutory authority was by the City, not the state.

2. In *Construction Ken-Nection, Inc. v. Cipriano*, 136 Conn. App. 546 (2012), the Connecticut Appellate Court upheld the finding of the trial court that the plaintiff's mechanic's lien was invalid because the work underlying the lien was "expanded work" beyond the scope of the parties' contract, which the defendants had not consented to.

The plaintiff, a contractor, entered into a contract with the defendants for the construction of a log home. The contract excluded site work, foundation excavation and septic system installation and required that all changes from the identified scope of work would only be executed through written change orders. After the contract was signed, the defendants had a septic system installed and orally modified the contract to include site work, including the installation of a driveway. However, no written change orders were ever executed. Subsequently, the plaintiff created a total cost-of-work estimate, including the sum of the contract price, the agreed-to prices of the septic and driveway work, and additional work beyond the scope of the initial written contract and oral agreements. The written estimate was not

provided to the defendants until four months after it was created and six months after the plaintiff commenced work. Eventually, the defendants informed the plaintiff they could not continue funding the plaintiff's monthly payment requisitions because their lender would not provide additional financing due to insufficient work having been performed since the previous loan draw request. The plaintiff sent the defendants a final invoice on August 29, 2006, returning later to perform siding work at the project on September 21, 2006 (the expanded work).

The plaintiff filed a mechanic's lien on December 14, 2006 and commenced an action to foreclose the lien in October, 2007. In its decision, the trial court found that the defendants did not knowingly consent to performance or cost of the expanded work done by the plaintiff, that the expanded work was not within the scope of the contract and that the filing of the lien was beyond the ninety day statutory period because the lien was filed more than ninety days after the last day the plaintiff provided agreed upon services or materials. The trial court found for the defendants and dismissed the plaintiff's lien foreclosure.

The plaintiff appealed, challenging the trial court's factual findings as clearly erroneous. The Appellate Court upheld the trial court's findings, applying the statutory limitation in CGS § 49-34, which limits a mechanic's lien to the price the owner has agreed to pay for the work. The Court focused on the fact that the plaintiff had applied prior payments made by the defendants to the cost of expanded work, that the defendants never consented to such work, and that the plaintiff's practice resulted in a funding shortfall for approved scope work as the project neared completion. The Court stated that the plaintiff should have applied payments to the original contract price before any other work. According to the Court, the plaintiff had, in effect, filed a mechanic's lien to secure payment of amounts for expanded work that the defendants had never agreed to. Additionally, the Court upheld the trial court's finding that the work performed on September 21, 2006 was not the last date of work for the purposes of the plaintiff's mechanic's lien, because that work was not within the contract. The Court held that it was not clearly erroneous for the trial court to find that the lien filing period commenced on August 3, 2006 because that was the last date that agreed upon work was performed. Accordingly, the Court concluded that the trial court was not clearly erroneous in finding that the December 14, 2006 lien filing was in excess of the statutory ninety day period, rendering the lien invalid.

3. In *Probuild East, LLC v. Poffenberger*, 136 Conn. App. 184 (2012), the defendant, a project owner, appealed the decision of the trial court granting a judgment of mechanic's lien foreclosure to the plaintiff, a supplier of the contractor with whom the defendant entered into a contract for renovation of the defendant's property. On appeal, the defendant argued that the trial court's judgment should be reversed because 1) the mechanic's lien was invalid; 2) no lienable fund existed because the contractor had been paid in full; 3) no lienable fund could exist because the defendants contract with the contractor did not comply with the Home Improvement Act (HIA), CGS § 20-418, et seq.

The Appellate Court rejected each of the defendant's arguments, upholding the judgment of the trial court. First, the Court held that the defendant's inclusion of the wrong "commencement date" on its mechanic's lien did not invalidate the lien under CGS § 49-34. In doing so, the court referenced the liberal policy to be applied in construing compliance with the mechanic's lien statutes in order to achieve the remedial purpose of such statutes and further noted the lack of prejudice to the defendants as a result of the plaintiff's error. The Court refused to invalidate the lien on such grounds, finding that the statute had been substantially complied with.

Second, the Court rejected the defendants argument that there was no lienable fund for the plaintiff, a subcontractor, as required by CGS §§ 49-33 and 49-36, because there was no contractual debt owed by the defendant to the general contractor. The Court upheld the finding of the trial court that a lienable fund did exist because notwithstanding that the defendant had paid to general contractor the full amount of their original contract price, additional work and "extras" had increased the amount of the original contract price resulting in an unpaid balance of $10,800. The Court concluded that a lienable fund in the amount of $10,800 was available, that being the "unpaid debt by the owner to the contractor."

Third, the Court rejected the defendant's argument that because the defendant's contract with the general contractor was in violation of the HIA, CGS § 20-429(a), that contract was unenforceable against the defendant, thereby precluding the existence of a lienable fund. The Court recognized that when a general contractor's failure to comply with the HIA renders a construction contract unenforceable by it against the owner, any lien by such contractor will be held invalid. However, the Court held that the HIA applies to general contractors, not subcontractors. Therefore, a HIA violation in the contract between owner and general contractor, which precludes claims by the general contractor, will not similarly bar a subcontractor from filing a valid mechanic's lien for lack of a lienable fund.

4. In *Town of Stratford v. A. Secondino and Son, Inc.*, 133 Conn. App. 737 (2012), the Connecticut Appellate Court considered whether the defendant was required to comply with a contractual provision in its contract with the plaintiff requiring the defendant to obtain approval of its payment applications from the project's architect, as a condition precedent to the defendant's right to receive payments. The defendant, a contractor, contracted with the plaintiff, a municipality, for the construction of a new fire headquarters in the plaintiff-town. The contract provided that the defendant was to make monthly payment applications, that the contractor would receive payment by the fifteenth day of the month, provided it had submitted a payment application to the architect by the first day of the preceding month, or, if the contractor submitted a payment application after the first of the month it would receive payment not later than thirty days after the architect approved such application and in such amount as approved by the architect. During the course of the project, the defendant would submit "pencil copies" of requisitions to the architect, which would be revised and finalized between the architect and defendant. The finalized requisitions would be sent to the architect, reviewed for approval, signed, then forwarded to the plaintiff for additional review. The defendant was unaware that the architect was reviewing and signing the final applications before forwarding them to the plaintiff, believing that the architect did not perform any review following approval of the "pencil copy" of each requisition.

Following substantial completion of the project, the architect provided the plaintiff with a list of punchlist work to be completed by the defendant having an estimated cost of $60,950 and suggested that pursuant to the contract, twice the cost of such work be withheld from payments due to the defendant. The defendant claimed that only $3675 worth of punchlist work remained and a dispute arose between plaintiff and defendant regarding the amount of payment due to the defendant from retainage withheld to date.

The plaintiff filed suit claiming breach of contract for failure to correct work that did not conform to contractual specifications. Thereafter, the parties and their attorneys met on several occasions, attempting to resolve the dispute. The architect did not attend these meetings and the defendant was informed that the dispute would be resolved directly by the parties without regard to the architect's participation. During these meetings, the plaintiff represented that the defendant would be paid outstanding sums if it returned to complete punchlist work, prompting

the defendant to return to the project and complete punchlist work to the plaintiff's satisfaction. Notwithstanding that the plaintiff certified that the defendant completed remaining work, it failed to pay and proceeded with suit for breach of contract and breach of warranty. The defendant counterclaimed for non-payment.

Following trial, the trial court awarded judgment to the defendant on the plaintiff's claims and a judgment for the defendant on its counterclaims for $136,510.20 in damages, plus $40,122.41 in interest, but refused to award "wrongful detention of money interest" pursuant to CGS § 37-3a.

On appeal, the plaintiff challenged the trial court's ruling that the defendant was not required to obtain approval of the payment applications from the architect as a condition preceding to payment, because the plaintiff had waived that condition by dealing directly with defendant after commencing litigation and after ceasing use of the architect as contract administrator. The Court upheld the trial court's finding that the plaintiff had waived the condition precedent to payment through its conduct, noting that a waiver of a known right does "not have to be express, but may consist of acts or conduct from which waiver may be implied…." The Court held that the record supported the trial court's finding of waiver because the parties had departed from the requisition process requiring the architect's approval by the time the defendant submitted its final requisition, the plaintiff's conduct never indicated it still expected the defendant to continue submitting requisitions to the architect and the plaintiff's actions indicated that the architect was no longer a participant in the contract close-out and final payment process. The Court held that there was adequate evidence to support the trial court's finding that the plaintiff waived the condition precedent to payment and uphold the judgment in favor of the defendant.

The Court also rejected the defendants claim for additional interest pursuant to CGS § 37-3a, noting that an award of pre-judgment interest pursuant to that statute is within the discretion of the trial court. The Court held that the trial court did not abuse its discretion in refusing to award such interest as duplicative of the contractual interest already awarded.

5. In *BHP Land Services, LLP v. Seymour*, 137 Conn. App. 165 (2012), the Connecticut Appellate Court considered whether a property owner could be held liable to a contractor under equitable theories of recovery, for services provided to the owner's daughter, while residing at the subject-property. The daughter had lived at the subject property and ran a business of horse boarding, horse training and related sales, but did not pay rent and had never executed a written agreement with the defendant related to her occupancy of the property. The defendant paid the mortgage and applicable taxes for the property, but never resided there and had no involvement in the daughter's business.

The plaintiff was hired by the defendant's daughter to grade the subject property and remove tree stumps at an agreed upon price per acre. The plaintiff performed work, but was not paid in full by the daughter. The plaintiff commenced suit, seeking to foreclose a mechanic's lien against the defendant in her capacity as trustee, and alleging three additional claims against the defendant in her individual capacity for breach of contract, *quantum meruit* and unjust enrichment. Following trial, the trial court found for the defendant on the mechanic's lien foreclosure and breach of contract claims. However, the trial court found that the plaintiff was entitled to restitution from the defendant under theories of quantum meruit and unjust enrichment.

The defendant appealed the trial court's award, asserting that the plaintiff had alleged the existence of a contract with the defendant, and was therefore precluded from seeking recovery on claims of quantum meruit and unjust enrichment. The Court upheld the trial court's award, holding that the plaintiff sought valid equitable claims as alternative relief to its contract claim. The Court also rejected the defendants claim that she received no benefit from the plaintiff's services and was not unjustly enriched. The Court refused to disturb the trial court's factual finding that the defendant, as owner of the subject property, would necessarily benefit from any improvements to the property, holding that the trial court's finding was not clearly erroneous based on the evidentiary record. The Court noted that the defendant had attended a public hearing before the inland wetlands and watercourses agency regarding the grading to be performed by the plaintiff and noted that the plaintiff provided testimony that an entity other than the plaintiff had previously removed many trees, leaving the stumps to be removed by the plaintiff.

6. In *Naek Construction Company, Inc. v. Progressive Medical Services, LLC*, 2012 WL 695614, Superior Court, Judicial District of Hartford (February 10, 2012)(Woods, J), the court granted the defendant's mechanic's lien discharge application pursuant CGS § 49-35b(a), ruling that the plaintiff-contractor's mechanic's lien was invalid because the work performed by the contractor within ninety days of the filing of the mechanic's lien was extra-contractual work to which the defendant had never agreed or consented and which failed to extend the commencement of the statutory lien filing period from the true last day work approved by the defendant.

The plaintiff contracted with the defendant for the construction of an office building containing medical facilities. The project was substantially complete by April 30, 2009, however, the plaintiff did not file a mechanic's lien against the property until February 23, 2010. The plaintiff claimed that it had returned to the project in December, 2009 to perform winterization work to prevent pipes from freezing, bursting, and causing flood damage to the property. The plaintiff installed a heating system and other work to prevent this from occurring, but did not charge the defendant for this work, or inform the majority members of the defendant LLC that winterization work was going to be done. The plaintiff's mechanic's lien reflected the open balance on the original contract price, but did not include additional amounts for the purported winterization work.

The Court, in evaluating the defendant's discharge application, determined whether the defendant had proven by clear and convincing evidence that the lien was untimely filed. The Court relied on prior case precedent setting forth the standard for determining whether the date for commencement of the lien filing period began on the date of substantial completion versus the actual date of work last performed by the contractor. The Court stated that for the date of substantial completion to be considered the date the contractor "ceased performing services" pursuant to CGS § 49-34, instead of the actual last date of work, the contractor must have unreasonably delayed final completion and any services or materials provided after substantial completion must have been furnished at the contractor's initiative and not the owner's request. Applying the foregoing test, the Court found that the building was substantially complete in April, 2009. However, before determining whether the winterization work was performed at the contractor's initiative, not the owner's request, the Court noted that pursuant to CGS § 49-33(a), the "work last done" under § 49-34 presumes such work to be done pursuant to a contract or agreement with or by consent of the owner. The Court emphasized that "consent" under § 49-33(a) indicates an agreement that the owner will be liable for the materials or labor furnished. The Court concluded that because there was no explicit agreement by the defendant for the plaintiff to winterize the building in December, 2009, that work was wholly "extracontractual" and

"outside the purview of § 49-33(a)." The Court held that the defendant could not return to the project and perform work that is not pursuant to any agreement, then claim extension of the commencement period for filing a mechanic's lien by virtue of that work. The Court granted the defendant's application and discharged the plaintiff's mechanic's lien.

7. In *York Hill Trap Rock Quarry Co v. Conn-Strux, Inc.*, 2012 WL 671963, Superior Court, Judicial District of New Haven (February 10, 2012)(Markle, J.), the court considered the extent to which CGS § 49-41 and 49-42, requiring payment bonds on public works projects, preclude unjust enrichment claims by subcontractors against municipalities. In this case, the plaintiff had furnished materials to a general contractor in connection with a project for the City of Meriden (City). The plaintiff brought suit directly against the general contractor, its payment bond surety and the City for collection of unpaid balances for materials furnished. Among the plaintiff's claims was a claim for unjust enrichment against the City, which the City moved to have stricken from the complaint on the grounds that CGS § 49-41 precludes equitable claims for payment against a municipality on a public works project.

In considering the merits of the City's argument, the court noted that the predecessor to CGS § 49-42, was enacted to divest municipal contracting officials and agents from responsibility for payment of subcontractors' claims, but also recognized that there is no express appellate authority dictating that CGS § 49-41 precludes unjust enrichment claims by subcontractors against municipalities. The Court reviewed the legislative history leading up to the most current version of CGS § 49-41, including the addition of a direct right of action by subcontractors against a municipalities under CGS § 49-41(d) for failure to obtain a payment bond as required by CGS § 49-41 et seq., and determined that the most recent amendments were enacted to ameliorate the prior situation in which the City could avoid liability to a subcontractor even though it had failed to require a payment bond from the general contractor. In light of the legislative history and prior case precedent interpreting CGS § 49-41 and 49-42, the court concluded that the plaintiff's claim was legally insufficient because a claim for unjust enrichment cannot be asserted against the state or municipality under a public works project, the subcontractor's claims being limited to payment bond claims against the surety pursuant to CGS § 49-42 or claims against municipality pursuant to CGS § 49-41(d).

8. In *Clem Martone Construction v. DePino*, 2012 WL 432595, Superior Court, Judicial District of New Haven (January 20, 2012) (Zemetis, J), the trial court ruled that determination of attorney's fees recoverable pursuant to CGS § 52-249(a) in a mechanic's lien foreclosure action, required segregation of the fees incurred to prosecute the lien foreclosure from fees incurred to defend the defendants' counterclaims. In this case, the plaintiff filed a one count action seeking to foreclose a mechanic's lien filed in connection with the construction of a home for the defendants. The defendants filed a counterclaim for breach of contract. Following a hearing, the court determined that there was an unpaid balance on the contract between plaintiff and defendants, that the plaintiff was entitled to foreclose on its mechanic's lien, that the defendants proved their breach of contract claim, and that the debt owed by the defendants to the plaintiff was the unpaid balance of their contract less the breach of contract damages proven by the defendants. The court deferred determination of an attorney's fee award, pursuant to CGS § 52-249(a), until the court's entry of the judgment of foreclosure.

Subsequently, plaintiff's counsel submitted an affidavit showing a total of $37,000 in attorney's fees in support of plaintiff's request for an award pursuant to CGS § 52-249(a). Defendants' counsel opposed plaintiff's request to the extent the request included any fees related to defense of the contractual aspects of the defendants' counterclaim. The court determined that the plaintiff should be awarded $10,368.75 in attorney's fees, that being the

sum necessitated by the prosecution of the foreclosure aspects of the subject mechanic's lien. The court found that the "foreclosure aspects" included determining the debt owed to the plaintiff based on the cost of work remaining after substantial completion and subtracting that value from the contract price, as well as determining whether the plaintiff had actually achieved substantial performance of the contract. The court recognized that the plaintiff's burden to prove substantial performance was intertwined with its defense of the defendants' counterclaims, but refused to award the plaintiff fees beyond those it found to be specifically related to the foreclosure aspects of the case.

Legislation:

1. Public Act No. 12-18. An Act Concerning Penalties for the Violation of Mechanical Contractor Registration Requirements. This act clarifies the definition of "mechanical contractor" under the Connecticut General Statutes pertaining to occupational licensing by the Connecticut Department of Consumer Protection. This act also establishes a penalty for a mechanical contractor who fails to obtain a certificate of registration and willfully (1) engages his or her employees in plumbing and piping or heating, piping, and cooling work or (2) supplies for work an employee who does not hold a valid license to perform such work.

Section 1. Amendment of the definition of "mechanical contractor" as used in CGS §§ 20-341s to 20-341bb. "Mechanical contractor" means any corporation, association, firm, partnership or other business organization regularly offering to the public the services of its employees licensed to perform plumbing and piping work or heating, piping and cooling work, excluding (i) businesses that perform work exclusively on single family or multifamily private residences or dwellings of four or less units; or (ii) businesses employing less than ten persons licensed to perform plumbing and piping work or heating, piping and cooling work .

Section 2. Addition of subsection (e) to CGS § 20-341y. A mechanical contractor who does not obtain a certificate of registration from the Department of Consumer Protection, as required by CGS § 20-341t, and who willfully engages its employees in plumbing and piping work or in heating, piping and cooling work, or who willfully supplies for employment an employee who does not hold a valid license to perform such work, shall be fined $1000 for the first offense and $2,500 for each subsequent offense.

2. Public Act No. 12-70. An Act Concerning Department of Transportation Project Delivery and Project Labor Agreements for Certain Public Works Projects. This act authorizes the commissioner of the Connecticut Department of Transportation (DOT) to designate that highway construction projects be built using either a (1) "construction-manager-at-risk" contract with a guaranteed maximum price, or (2) design-build contract, as alternatives to DOT's traditional "design-bid-build" process, and further provides mandatory contract provisions and procedures for these projects.

The act also authorizes the State, its agencies and political subdivisions, to require a "project labor agreement" (PLA) for public works projects when determined to be in the public's interest. A public entity must determine if a PLA is in the public's interest before entering into a design-build contract of at least $10 million to (1) build a new public school, or (2) renovate or reconstruct an existing public school.

§1(a). DOT no longer limited to design-bid-build contracts. DOT has traditionally put highway projects out to bid under the design-bid-build method. Prior law did not authorize DOT to use the construction-manager-at-risk (CMAR) or design-build project delivery methods. The

act allows the commissioner of DOT to designate specific highway construction projects to be put to bid under either a CMAR or design-build contract.

§1(b). Requirements for CMAR Projects. Under the act, the commissioner may enter into one contract with an architect or engineer for the project design, and a second contract with a CMAR contractor. The CMAR contractor is responsible for (1) providing input during the design process, and (2) building the project, using a low sealed bid process to select trade subcontractors. The CMAR contract must include a guaranteed maximum price.

The act allows the commissioner to select the architect, engineer, or contractor from among the contractors selected and recommended by a selection panel. It is not clear if the selection panel selects and recommends architects and engineers or just contractors. The act also does not discuss panel membership or how it is appointed, although the law establishes within DOT at least one panel to evaluate and select DOT architecture, engineering, and other consultants (CGS § 13b-20c).

The CMAR contract must be based on competitive proposals received by the commissioner after he has advertised the project at least once in a newspaper with a substantial circulation in the project area. The commissioner must establish the criteria, requirements, and conditions of the proposals and the award. He must award the contract based on the general conditions and staff costs, plus qualitative criteria. The act does not define what "general conditions" and "staff costs" include. The act makes the commissioner solely responsible for other aspects of the project, but does not specify what these might be.

The contract must clearly state (1) the contractor's responsibilities to deliver a completed and acceptable project on a particular date; (2) the project's maximum cost; and (3) if applicable, the cost of acquiring the property as a separate item.

§1(b). Requirements for Design-Build Projects. The act allows the commissioner to enter into a single contract with a design-builder, whom he may select from among those a selection panel recommends. The commissioner must advertise the project and its specifications at least once in a newspaper with a substantial circulation in the project area.

The contract must (1) include such project elements as site acquisition, permitting, engineering design and construction, and (2) be based on competitive proposals. The commissioner must award the contract based on a predetermined "metric" setting forth the selection criteria, provided to design-build contractors before they develop technical proposals. This metric may be unique to a project, but must consist of a score combining the (1) proposer's qualifications and past performance, (2) proposal's technical merit, and (3) cost. The commissioner must establish a selection panel for each project to score the first two elements according to the applicable metric. The proposal's sealed cost portion must be opened in a public ceremony only after this scoring has taken place. The commissioner must determine all criteria, requirements, and conditions for the proposals and award, and is solely responsible for other aspects of the contract. The contract must clearly state (1) the design-builder's responsibility to deliver a complete and acceptable project on a particular date; (2) the project's maximum cost; and (3) if applicable, the cost of acquiring the property as a separate item.

§§ 4-7. Project Labor Agreements (PLAs). The act authorizes public entities (including the state, its agencies, instrumentalities or political subdivisions) to utilize PLAs for public works projects. PLAs are defined as "a prehire agreement covering the terms and conditions for all persons who will perform work on a specific public works project." Notwithstanding any other

Connecticut laws or regulations pertaining to public procurement of goods and services, a PLA may be required for any public works project when the public entity determines, in its discretion, that it is in the public's interest to require a PLA for that particular project.

In making the “public interest determination” the public entity may consider the potential effects the PLA may have on 1) the efficiency, cost, and direct and indirect economic benefits to the public entity; 2) the availability of a skilled workforce to complete the project; 3) the prevention of construction delays; 4) the project's safety and quality; 5) the advancement of minority and women-owned businesses; and 6) community employment opportunities.

PLAs required by public entities pursuant to the act must 1) set forth mutually binding procedures for dispute resolution that can be implemented without delay; 2) include guarantees against a strike, lockout, or other concerted action meant to slow or stop work on the project; 3) ensure a reliable source of skilled and experienced labor; 4) include goals for the number of apprentices and for the percentage of work to be performed by minorities, women, and veterans; 5) invite all contractors to bid on a project regardless of whether the contractor's employees are union members; 6) permit the selection of the lowest responsible qualified bidder regardless of union affiliation; 7) not require compulsory union membership for people working on the project; and 8) bind all contractors and subcontractors to the terms of the agreement.

A bidder that does not agree to abide by the PLA's terms or a requirement to negotiate a PLA shall not be considered a responsible qualified bidder.

The act requires that public entities to determine if a PLA is in the public's interest (based on the criteria identified above) before entering into a design-build contract valued at $10 million or greater for (1) new construction of a public school or (2) renovation or reconstruction of an existing public school.

Under the act, a public entity's decision to require a PLA is not evidence of fraud, corruption, or favoritism. This provision of the act precludes the success of bid protests alleging fraud, corruption, or favoritism in the bid process which are based on nothing more than the public entity’s decision to require a PLA.

The act specifies that if any of the provisions of the act concerning the use of PLAs are found to contravene state or federal law, the act's remaining provisions concerning PLAs are severable and will remain in full force and effect.

3. Public Act No. 12-80. An Act Concerning the Recommendations of the Sentencing Commission Regarding the Classification of Unclassified Misdemeanors. The act repealed CGS § 31-89a, which criminalized late or non-payment by contractors to “employee welfare funds” (as defined in CGS § 31-53 pertaining to prevailing wage rate requirements on public works projects) and imposed criminal and personal civil liability on the proprietors, partners or officers, directors and employees of corporations that failed to make fund contributions.

Section 193 of the act repealed CGS § 31-89a, which treated past due payments to employee welfare funds as wages for purposes of allowing an employee, labor organization, or the labor department to sue pursuant to CGS § 31-72, and recover twice the amount due plus costs and reasonable attorneys' fees. CGS § 31-89a also provided that a proprietor, partner, or corporate officer, director, or employee made responsible by the corporation for making fund contributions, who failed to make a payment to an employee welfare fund when due, was

subject to a fine not exceeding $200 and/or up to 30 days in prison, for each week of nonpayment. Additionally, a proprietor, partner, or corporate officer or director was personally liable in a civil action for the amounts due plus costs and reasonable attorney's fees, regardless of whether or not the officer or director was made responsible by the corporation for payment of the fund contributions.

4. Public Act No. 12-184. An Act Concerning Smoke and Carbone Monoxide Detectors and Alarms in Residential Dwellings. This act requires battery-operated smoke detection and warning equipment (smoke detectors) to be temporarily installed in any one or two-family dwelling occupied while undergoing interior alterations or additions under a building permit. It also requires that carbon monoxide detection and warning equipment (CO detectors) be temporarily installed in the area of the work while it is in progress if any fuel-burning appliance, fireplace, or attached garage is present. The equipment may combine smoke and CO detection technology into a single device and must be of a type or technology tested and certified under standards issued by the American National Standards Institute and Underwriters Laboratories.

The proposal and passage of this act was in response to a highly publicized and deadly fire that occurred in Stamford, Connecticut on Christmas eve, 2011.

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District of Columbia

Case Law:

1. In *Giron v. Dodds*, 35 A.3d 433 (D.C. App. 2012), the District of Columbia Court of Appeals upheld the Superior Court's denial of a motion to compel an owner to arbitrate a claim to enforce an arbitration award through piercing the corporate veil. After John and Teresa Dodd (the "Dodds") learned that they paid their contractor, C & C General Builders ("C & C"), for completing 70% of the demolition and renovation work on a residential building in Northwest Washington D.C. when only 40% of the work was complete, they refused to make additional progress payments. In response, C & C abandoned the job. The dispute was subject to an arbitration provision in the contract. Ultimately, the tribunal awarded the Dodds $120,872.42 in damages. Subsequently, after learning that C & C was asset-less, the Dodds filed a motion in trial court to confirm the arbitration and pierce the corporate veil to hold the owners of C & C individually liable due to their wrongful and fraudulent conversion of C & C's funds. The owners of C & C filed a motion to compel and argued that the Dodds' claim was subject to the arbitration provision in the contract. The trial court denied the motion and the owners of C & C appealed. The Court of Appeals upheld the trial court's decision and ruled that the Dodds' claim was not a new dispute, but was in connection with their efforts to collect the arbitration award already rendered in their favor.

Legislation:

1. Mechanics Lien Amendment Act of 2012 Public-Private Transportation Partnerships – On June 4, 2012, the Mechanics' Lien Amendment Act of 2012 (the "Act") became law in the District of Columbia and made a number of small changes to the District of Columbia's mechanics' lien law. The most prominent change to the law is that contractors are

now allowed to file a mechanics' lien during construction or within 90 days after the completion of the project. Previously, the District of Columbia required contractors to wait until the project was complete. The Act also reduced the number of sureties required to bond off the a lien from two to one, and it increased the number of days that the contractor is allowed to object or comment on owner's intent to bond off the lien.

2. Private Contractor and Subcontractor Prompt Payment Act of 2012 - The proposed Private Contractor and Subcontractor Prompt Payment Act of 2012 ("the Bill") would establish new prompt payment laws that establish time requirements for owners to pay contractors and contractors to pay subcontractors. Specifically, the Bill would require private owners to pay contractors undisputed amounts within 15 days after the occupancy permit is obtained, or 15 days after the owners takes possession, or 15 days after the owner receives the contractor's invoice if the construction contract does not provide a specific date or time of payment. Failure to pay the contractor timely subjects the owner to an interest penalty and reasonable attorney's fees. Likewise, a contractor must pay its subcontractor within 7 days after receipt by the contractor of payment for work performed by the subcontractor.

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Florida

Case Law:

1. In *QBE Ins. Co. v. Chalfonte Condo. Apt. Ass'n, Inc.*, 94 So.3d 541 (Fla. May 31, 2012), the insured, Chalfonte, filed a claim with its property insurer, QBE, after suffering property damage caused by Hurricane Wilma. Dissatisfied with QBE's investigation and processing of its claim, Chalfonte filed suit seeking a declaratory judgment, breach of contract for failure to provide coverage, breach of contract for breach of the implied warranty of good faith and fair dealing, and violation of Fla. Stat. § 627.701(4)(a). Chalfonte asserted that its claim for violation of the implied contractual warranty of good faith and fair dealing is not the same as a statutory bad-faith claim by a first party insured, contending that there is a separate common law claim. The Court rejected this argument and held that such a claim must be brought under Fla. Stat. § 624.155.

Additionally, though QBE failed to strictly comply with requirements of Fla. Stat. § 627.701(4)(a), which provide certain language and font requirements to be included in insurance policies, the Court concluded that it wasn't the legislature's intent to penalize insurers for failure to strictly comply with those requirements, and as a result, a policyholder could not bring a suit against the insurer.

2. In *Insurance Co. of the West v. Island Dream Homes, Inc.*, 679 F.3d 1295 (11th Cir. May 8, 2012), a condominium insurer brought an action against a roofing contractor to recover amounts paid for damage caused when large stone veneer wall fell while the contractor was conducting repairs. The court held that, regardless of whether roofers are "professionals" under Florida law, the insurer must put forth evidence of the standard of care in the roofing industry to establish what a reasonably prudent roofer would do under similar circumstances, and the fact that veneer fell while roofers were working on it was not enough to establish negligence on its own. The court affirmed judgment as a matter of law because no reasonable jury could find negligence where plaintiff failed to present any evidence on the standard of care.

3. In *Amerisure Mut. Ins. Co. v. Auchter Co.*, 673 F.3d 1294 (11th Cir. 2012), an owner brought a construction defect claim against a general contractor based on an allegedly defective installation of a roof by a subcontractor. The parties stipulated that the installation of the roof tiles was defective and constituted an "occurrence," with no damage to property other than the roof itself. In a split decision, the court looked to Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871 (Fla. 2007), and Auto-Owners Ins. Co. v. Pozzi Window Co., 984 So. 2d 1241 (Fla. 2008), and concluded that there was no property damage to trigger the policy, because the only damage was the defective work itself. As a result, because there was no trigger, there was no coverage available under the policy.

4. In *Stock Building Supply of Florida, Inc. v. Soares Da Costa Construction Services, LLC*, 76 So.3d 313 (Fla. 3d DCA 2011), the court provided a very detailed overview of lien law in Florida, including issues related to notice, release, notice of termination, and payment bond requirements. The case involved a construction project that began, stopped, and restarted, after which there was a failure to send a new Notice to Contractor, resulting in an eventual payment to the wrong company, even though actual notice was given. The court affirmed final summary judgment, and strictly construed the Florida lien law requirements to find a failure to satisfy a condition precedent to a claim on a payment bond precluded the claim. A dissenting opinion construes the analysis as a "super technical approach to the statutory scheme and gives binding effect to the utterly immaterial variances from the ordinary which had no effect upon the substantial rights of the parties."

5. In *Strickland v. TIMCO Aviation Services, Inc.*, 66 So.3d 1002 (Fla. 1st DCA 2011), a building owner, TIMCO, entered into a contract with Joye Painting to pressure wash a roof. An employee of Joye Painting fell through a skylight during the job. The employee sued TIMCO and alleged that TIMCO was negligent because the skylights were indistinguishable from the roof due to their color, could not withstand 200 pounds of perpendicular pressure, and lacked protective guardrails in violation of OSHA and industry standards. TIMCO moved for summary judgment on the basis that no act or admission by TIMCO caused the accident, and that the injured person was an employee of an independent contractor, and knew about the skylights and the consequences of stepping on one. The trial court granted summary judgment in favor of TIMCO. On appeal, summary judgment was affirmed, because "mere inspection by a property owner of an independent contractor's work does not amount to control of the work or active participation by the property owner." The court applied the general rule that a property owner employing an independent contractor will not be liable for injuries sustained by employees of the contractor during performance of the work, as neither the exception of active participation by the owner nor the exception for negligent creation of a dangerous condition by the owner applied. As a result, the property owner only had to maintain the premises in a reasonably safe condition, and to warn an independent contractor of an actual or potential danger known to be on the property. The property owner has no duty to warn of open and apparent dangers, such as those presented by walking on a skylight. Further, property owners have no duty to warn of obvious hazards or dangers that are an integral part of the work a contractor is hired to perform.

The court also concluded that OSHA regulations requiring protective guardrails and the ability to withstand 200 pounds of perpendicular pressure were applicable only to walking-working surfaces, not to skylights on roofs. As a result, TIMCO was not liable for negligence for failure to comply, because the OSHA Regulation did not apply.

6. In *Safeco Ins. Co. of Am. v. Victoria Mgmt., LLC*, 2012 WL 1606101 (S.D. Fla. May 7, 2012), a surety issued performance and payment bonds for construction of nursing home, and required the contractor and others to execute an indemnity agreement in its favor as condition of issuing bonds. The owner of the nursing home eventually terminated the contractor and called on the surety to complete the project. The surety sued the architect for common law indemnity and professional negligence. The architect moved to dismiss the surety's common law indemnity claim arguing that there was no relationship between the architect and the surety or the contractor. The court disagreed and held, "the surety can maintain a claim against an architect where the allegations are that the architect's professional negligence caused or contributed to the loss." The court denied the architect's motion to dismiss.

7. In *West Construction, Inc. v. Florida Blacktop, Inc.*, 88 So.3d 301 (Fla. 4th DCA 2012), a lowest bidder paving subcontractor sued the general contractor after the paving subcontractor was not hired. The court held that the contractor's use of the bid in submitting contractor's own bid did not amount to manifestation of assent merely because subcontractor's proposal included a preprinted paragraph stating that subcontractor was submitting its bid with express understanding and agreement that use of its bid in any way would constitute acceptance of the bid and create a binding contract between the parties. The court reversed final judgment entered for the paving subcontractor against the contractor for lack of an enforceable contract between the parties.

8. In *Michael Mullne v. Sea-Tech Construction, Inc.*, 84 So.3d 1247 (Fla. 4th DCA 2012), a default judgment previously entered against a property owner was set aside as void for lack of jurisdiction. Here, the wife alone signed a contract creating a seawall on property jointly owned with her husband. The contractor's initial complaint against both spouses included a count for lien foreclosure and a count for breach of contract; however, the default judgment did not mention the lien foreclosure and was entered against both spouses even though the husband had failed to sign the contract. The court noted that Fla. Stat. § 713.12 allows a lien against property jointly owned by husband and wife, but concluded that no personal liability was imposed on the husband as a non-party to the contract. Instead, liability only extends to the non-contracting spouse's interest in property on which the improvement was made. The court reversed the trial court's order denying the motion to vacate the default judgment.

9. In *Lee County Electric Cooperative, Inc. v. City of Cape Coral*, No. 2D10-3781, 2012 WL 3705266 (Fla. 2d DCA Aug. 29, 2012), the City of Cape Coral brought an action against a utility company that had a franchise agreement with the city to operate an electric utility, seeking a declaratory judgment as to which party was responsible for relocation expenses of electric lines that had been placed in one public utility easement to another public utility easement as part of Cape Coral's road construction project. The Second District Court of Appeals affirmed the ruling in Cape Coral's favor because the utility did not have a compensable property interest in running its electric lines through a specific public utility easement, therefore the city's requirement that the utility company bear the cost of moving the lines was not a taking of property without just compensation. Further, the franchise agreement did not alter the common law principles that the utility must pay relocation costs.

10. In *AGBL Enterprises, LLC v. GIRLCOOK, Inc.*, No. 4D11-2082, 2012 WL 3822760 (Fla. 4th DCA Sept. 5, 2012), the lessor of a commercial building brought an action against the lessee, seeking eviction and past due rent. The lessee alleged, as an affirmative defense, that the lessor was in breach of the lease for failing to maintain the premises, and that as a result, the lessee was placing the rents in escrow. The lessee further counterclaimed for breach of contract. After a nonjury trial, the circuit court entered judgment in favor of the lessee.

The Fourth District Court of Appeals affirmed the trial court's finding that the lessor breached the lease by failing to maintain the premises, but reversed and remanded to reduce the damages for the amount attributed to the lessor's failure to timely complete work on the shopping plaza, because the lease provided no obligation on the lessor to complete the work on the plaza by a certain date.

11. In *Continental Cas. Co. v. A.W. Baylor Versapanel-Plastering, Inc.*, No. 5D11-3523, 2012 WL 3870415 (Fla. 5th DCA Sept. 7, 2012), following an arbitration panel's refusal to award attorney fees under Fla. Stat. § 713.29, which provides attorney's fees for prevailing parties in actions to enforce a claim on a construction bond, the subcontractor filed a motion to recover attorneys fee against the general contractor and general contractor's surety. The trial court found that neither was the "prevailing party," but awarded fees pursuant to statutes which generally permit, inter alia, an award of attorney's fees to a subcontractor who obtains a judgment against a surety insurer under a payment or performance bond for pecuniary loss resulting from a contractual breach. On appeal, the court reversed the award of fees, holding that where subcontractor's action against surety was a claim to enforce Fla. Stat. § 713.23 bond, provisions of Fla. Stat. § 713.29 controlled over conflicting provisions of Fla. Stat. §§ 627.756 and 627.428, which are applicable only to common law bonds.

12. In *Zirkelbach Construction, Inc. v. Rajan*, 93 So.3d 1124 (Fla. 2d DCA July 27, 2012), a construction company petitioned for a writ of certiorari quashing an order granting a homeowner's motion to compel production of certain insurance documents in underlying defective construction suit involving water intrusions into the residence. The Second District Court of Appeals held that the circuit court departed from essential requirements of law in compelling the insurer to disclose its claim file because the homeowner failed to make the required showing of need and inability to obtain protected claims handling materials by other means without undue hardship. The court explained, in order for work product privilege to attach, the focus is on whether there is some event which could foreseeability be the basis of future litigation that compels the creation of the documents. The court further noted that there is a conflict between the Second District Court of Appeals and the Fourth District Court of Appeals, in which the Second District applies a less stringent foreseeability standard, but to date, the Supreme Court of Florida has not yet resolved this conflict.

13. In *Vila & Son Landscaping Corp. v. Posen Construction, Inc.*, No. 2D10-5582, 2012 WL 4093545 (Fla. 2d DCA Sept. 19, 2012), a subcontractor sued the general contractor for breach of contract, asserting that the general contractor wrongfully terminated the subcontract and awarded work to a different subcontractor at a lower price. A jury found that the general contractor had indeed breached the contract, and awarded damages to the subcontractor. The general contractor filed a motion for judgment notwithstanding the verdict both as to liability and as to damages. The trial court ordered a new trial, and both parties appealed. The Florida Second District Court of Appeals held that the contractor was entitled to judgment notwithstanding verdict because the subcontract contained a termination for convenience provision. The subcontractor's contention that it was entitled to verdict in its favor because the general contractor acted in bad faith was based on misplaced reliance on federal procurement cases, which have limited value in disputes between parties to a private contract. The court concluded that, given the plain language of the subcontract, it is not apparent how contractor's decision to terminate for convenience to obtain a better price was contrary to the reasonable expectations of contracting party. As a result, the trial court's holding was reversed and remanded for entry of a judgment in favor of the general contractor.

Legislation:

1. H.B. 897/S.B. 1202, Construction Liens and Bonds. H.B. 897/Senate Bill 1202 may be the most significant piece of legislation for Florida contractors passed and enacted this year. It impacts a wide array of statutory sections controlling liens and bonds, including Section 95.11 relating to statutes of limitations, Section 255.05 relating to bonds on public projects, Section 255.0518 to require public bid openings, and Chapter 713 Part I relating to liens and bonds on private projects. It was approved by the Governor on May 4, 2012, and becomes law on October 1, 2012.

In general, the bill:

- Establishes a uniform time period of one year to initiate an action to enforce a claim against a payment bond.
- Requires a contractor to supply a copy of the payment bond to the public entity contracting for a public works project before commencing construction.
- Requires government entities to open sealed bids for public works projects at a public meeting.
- Simplifies procedures for a lessor to prohibit the attachment of liens to a parcel of property as the result of an improvement to a leased premises by a tenant.
- Revises the methods by which notices and other documents relating to construction liens must be served.
- Provides that where the contractor records and furnishes a public entity with a bond and written consent of surety, the public entity may not condition payment on the production of a release or waiver from a claimant.

The bill **amends Section 95.11** to clarify that payment bonds under Section 255.05 and Chapter 713 as well as payment bonds under Section 337.18 are subject to the one year statute of limitation established in those sections. Payment bonds which are not subject to those sections also have a one year statute of limitation under Section 95.11(5)(e). The effect of this amendment is that all payment bonds are now subject to a one year statute of limitations. It should be noted that the official House of Representatives Final Bill Analysis dated May 9, 2012 states that the bill establishes a 5 year statute of limitations to initiate an action on a payment bond, however, the actual statutory language signed into law instead excepts all payment bonds from the five year statute of limitations that generally applies to actions on written instruments, and instead applies a one year statute of limitations.

The bill **amends Section 255.0518** to require that sealed bids for construction work be opened in a public meeting and the name of the bidder and amount of the bid must be announced at that time. Additionally, it requires that a public entity make available, upon request, the name of a bidder and amount of the bid.

The bill **amends Section 255.05** to:

- Require that the bond number assigned by the surety be placed on the first page of the bond.

- Require that the contractor, before commencing work, record the required statutory bond in the official records of the county where the project is located and provide the public entity contracting for the work a certified copy of the recorded bond. The public entity may not make any payments on the project until it receives the certified copy.

- Require the governmental entity having charge of the work to provide a certified copy of the contract with the general contractor and the recorded bond upon the request of a claimant.

- Provide, for contracts entered into after October 1, 2012, that any limitation or expansion of the effective duration of the bond or any additional conditions precedent to the enforcement of a claim are unenforceable.

- Require that the contractor or its attorney serve a Notice of Contest of Claim Against Payment Bond rather than the Clerk of Court.

- Change the requirement that a Notice to Contractor be "delivered" to a requirement that it be "served."

- Provide, for contracts entered into after October 1, 2012, that where the contractor records and furnishes the public entity with a bond and written consent of surety, the public entity may not condition payment on the production of a release or waiver from a claimant. The surety may revoke its consent by serving written notice on the public entity.

Chapter 713 Part I was impacted most by this bill, as follows:

- **Section 713.10 – Liens on Leaseholds** – The bill makes the prohibition of liens on a particular property effective for a leasehold that has a lien prohibition even if some of the other leases on the property do not have language prohibiting liens.

- **Section 713.13 – Notice of Commencement** – The bill deletes language in the Notice of Commencement stating that the Notice of Commencement may not expire before the completion of construction and final payment to the contractor.

- **Section 713.132 – Notice of Termination** – The bill requires service of the Notice of Termination only upon those who have served a Notice to Owner or who have a direct contract with the owner.

- **Section 713.16 – Demand for Copy of Contract and Statements of Account** – The bill requires that any request for a sworn statement include a description of the property, the names of the owner, contractor, and the lienor's customer as set forth in the lienor's Notice to Owner or for a bonded job, the Notice to Contractor.

- **Section 713.18 – Manner of Serving Notices and Other Instruments** – The bill adds "common carrier delivery service" and "global express guaranteed" to the methods of service and deleting "overnight or second day delivery." It allows posting of a notice on a site only when other methods of service cannot be accomplished.

It also provides that service of a Notice to Owner or a Notice to Contractor is effective as of the date of mailing if it is sent by one of the specified methods and is mailed within forty days of commencing work and a log of the mailing is maintained.

It also allows an incomplete address in a Notice of Commencement, or, in the absence of a Notice of Commencement, an incomplete address from the building permit application, to be reformatted as necessary for purposes of mailing or delivery without affecting the validity of service.

- **Section 713.23 – Payment Bond** – Provides that where a copy of the bond is not attached to the recorded Notice of Commencement, the Notice to Contractor may be served up to 45 days after the lienor is served with a copy of the bond, and that a Notice to Owner served on a contractor meets the requirement for a 45 day Notice to Contractor, or that a combined Notice to Owner and Notice to Contractor may be used.

  Provides that where the bond is not recorded before commencement of construction, the time for serving a Notice of Nonpayment may be calculated, at the option of the lienor, as 90 days from final furnishing of labor or material or 90 days after the lienor is served with a copy of the bond.

  Allows a contractor to serve a Notice of Contest of Bond or Notice of Bond rather than the current requirement that the Clerk serve it.

  For contracts entered into after October 1, 2012, any limitation or expansion of the effective duration of the bond or any additional conditions precedent to the enforcement of a claim is unenforceable.

  Requires that the bond be attached to any Notice of Bond.

2. H.B. 1013/S.B. 1196, Construction Warranties. There is a common law implied warranty of fitness and merchantability related to the purchase of improved real estate purchased from the builder. This common law implied warranty applies to buildings and other improvements which are affixed to the real property, as opposed to fixtures that can be removed from the real property without damage to the premises.

This act **creates Section 553.835** in the Florida Building Code section of the statutes and contains legislative findings that this warranty should not extend to "off-site Improvements." This bill was a response to Lakeview Reserve Homeowners v. Maronda Homes, Inc., 48 So.3d 902 (Fla. 5th DCA 2010), which held that a homeowners' association could pursue a legal claim for breach of common law implied warranties of fitness and merchantability against a real estate developer for certain defects in community improvements, including defective roads, drainage, retention ponds and underground pipes.

In contrast, Section 553.835 now provides that a purchaser of a new home or a homeowners association does not have a cause of action for damages based on an implied warranty of fitness and merchantability or habitability, relating to an offsite improvement for a new home. Under the bill, an offsite improvement includes a street, driveway, road, sidewalk, drainage, utilities, or any other improvement or structure that does not immediately and directly support the fitness and merchantability or habitability of the home itself.

This act is retroactive which means that it will apply to any pending cases. It was signed by the Governor on April 27, 2012, and became law on July 1, 2012.

3. House Bill 521/Senate Bill 992, Regulation of Cranes. Construction cranes are currently regulated under federal rules adopted by OSHA. OSHA conducted a thorough and exhaustive review of these rules over the last few years in an effort to better protect against crane hazards, in consultation with many of the most knowledgeable engineering, construction, and safety experts in the nation and in the world. This review culminated in new rules setting forth comprehensive and detailed new regulations applicable to construction cranes and their operators.

Because construction cranes are routinely transported across city, county, and state lines, uniform federal regulation of such equipment and its operators is essential to commerce, to Florida's economic competitiveness, and to minimizing construction costs in our state. Several local governments, however, have enacted or considered additional regulations on the operation of construction cranes and the certification of crane operators. This bill prohibits local governments from enacting any ordinances pertaining to cranes or hoisting equipment, in deference to federal OSHA regulations.

This act **amends Section 489.113** of the Florida Statutes to preempt any regulation of hoisting equipment, mobile cranes, conveyors, and tower cranes used in construction. This makes the OSHA rules regulating crane operations the single standard to be followed. The bill was signed by the Governor on April 6, 2012 and took effect immediately.

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Georgia

Case Law:

1. In *Maxum Indemnity Company v. Jimenez et al.*, 734 S.E.2d (Ga. Ct. App. 2012), one of the latest in a string of state cases nationally interpreting the "occurrence" requirement in a commercial general liability (CGL) policy, the Georgia Court of Appeals affirmed summary judgment in favor of a plumbing subcontractor against its CGL insurer for damages arising from defective installation. Jimenez and Gill Plumbing Company ("Gill") were hired to install certain plumbing pipes on a project at Georgia Southern University. After completion of their work, a pipe burst and caused property damage to nearby dormitory units. Litigation commenced to recover the costs of repairs against Jimenez and Gill. A jury determined that Jimenez was at fault and liable for the repair costs. Gill successfully asserted indemnification claims against Jimenez for the repair costs. Maxum, Jimenez's CGL insurer, brought a declaratory judgment action seeking a declaration that it had no duty to indemnify Jimenez because the underlying claim did not constitute "property damage" caused by an "occurrence" under its policy. The trial court rejected Maxum's arguments and found that Jimenez's CGL policy provided coverage for the defective work and related property damage.

Relying on precedent, the Georgia Court of Appeals confirmed the trial court's ruling, holding that a subcontractor's defective work that causes unexpected or unintentional damage to other work constitutes an "occurrence" under the policy provisions. Maxum attempted to characterize the award as one for only contractual damages and, thus, outside the scope of

covered property damages arising solely out of tort liability. The court interpreted the contract and tort claims alleged in the complaint as both arising from the same defective work resulting in the property damage at issue and held that such claims can be brought under both contractual and tort theories. The court also declined to adopt Maxum's application of the "Contractual Liability" policy exclusion. In finding that the property damage arose from Jimenez's tortious negligence, and not solely from a contractual claim, the court held that the exclusion was not applicable. Finally, the court denied Maxum's argument that coverage was barred under the "Contractors Limitation Endorsement" exclusion. The court held that this exclusion only bars recovery for damages sustained by fellow contractors, not a third-party as alleged (the university).

2. In *Choate Construction Company v. Auto-Owners Insurance Company*, 2012 WL 58656526, ___ S.E.2d – (Ga. Ct. App. 2012), the Georgia Court of Appeals enforced a surety bond even though the electrical subcontractor's name was incorrectly listed in the bond. Choate, the general contractor, required its electrical subcontractor, Dedmon Electrical Services ("Dedmon"), to provide payment and performance bonds for a Board of Regents project at the University of Georgia. Dedmon, after commencing work on the project, provided bonds issued by Auto-Owners in the name of D.E.S. Electrical Contractors ("DES"). Upon Dedmon's default on the project, Atlanta Electrical Distributors, Inc. ("AED"), a materials supplier to Dedmon, ultimately filed suit against a host of defendants for, inter alia, payment for electrical materials provided to Dedmon on the project. AED subsequently assigned its claims against Dedmon, DES and Auto-Owners to Choate. Auto-Owners refused to pay based on the premises that its bonds to DES were not affiliated with the Choate/Dedmon subcontract. The trial court granted summary judgment in Auto-Owners' favor due to Choate's failure to provide evidence that Dedmon and DES were the same entity. Therefore, Auto-Owners had no liability under its bonds.

On appeal, Choate successfully argued that the information contained in the bond application, identifying the project and referencing the Choate/Dedmon subcontract, provided sufficient evidence to preclude summary judgment. Choate further argued that there was sufficient evidence for the jury to consider whether there was a concerted effort by Auto-Owners and agents of DES and Dedmon to defraud Choate. The Georgia Court of Appeals overturned the trial court.

3. In *Pinnacle Properties V, LLC v. Mainline Supply of Atlanta, LLC*, 735 S.E.2d 166 (Ga. Ct. App. 2012), the Georgia Court of Appeals upheld summary judgment for a supplier that had foreclosed on real property to satisfy a materialman's lien. Mainline provided construction materials to McGuire Properties, Inc. ("MPI") for the construction of a building on land leased by Pinnacle from the Kennesaw Development Authority ("KDA"). Upon MPI's failure to pay Mainline for its materials, Mainline filed a lien against the fee and leasehold estates of KDA and Pinnacle, respectively. The trial court granted summary judgment in favor of KDA on Mainline's lien lawsuit, finding that the KDA/Pinnacle lease agreement severed ownership in the real property and improvements. The trial court, however, granted Mainline summary judgment on its lien against Pinnacle's interests.

On appeal, the Georgia Court of Appeals found that Pinnacle had a sufficient property interest such that Mainline's lien could attach. Pinnacle argued that it merely had a usufruct, insufficient under O.C.G.A. § 44-14-161 et seq. for the attachment of a lien. However, due to Pinnacle's admissions in prior pleadings that it did, in fact, have property interests in the building, the court found sufficient grounds for attachment. Georgia law allows a lien to attach to whatever interests exist at the time the materials were provided. Under the agreements in

existence, the court determined that Pinnacle had an estate for years in the building. Because a lien can be foreclosed against any legal interest in real or personal property, the court affirmed the attachment and enforcement of Mainline's lien against Pinnacle's interests in the building.

4. In *Benchmark Builders, Inc. v. Schultz*, 315 Ga. App. 64, 726 S.E.2d 556 (Ga. Ct. App. 2012), the Georgia Court of Appeals found that a "prevailing party" attorney fee provision in a construction contract provides a separate and distinct claim for relief. The provision at issue provided that the prevailing party in any action to enforce the contract terms shall be entitled to recover its reasonable attorney's fees as part of such action or in a separate action. Benchmark, having lost on its breach of contract claims, argued that the Schultzes could not be a "prevailing party" because no actual damages were awarded to the Schultzes on the breach of contract claims alleged by both parties. The Court, however, found that a jury verdict in favor of the Schultzes' on the contract claims rendered them the prevailing party such that they could recover their attorney fee award as a separate claim.

5. In *Brantley Land & Timber, LLC v. W&D Investments, Inc.*, 316 Ga. App. 277, 729 S.E.2d 458 (Ga. Ct. App. 2012), the Georgia Court of Appeals affirmed summary judgment in favor of a utility contractor on its breach of contract claims against several developers that had failed to pay for work performed. The developers argued that W&D was required under Georgia licensing law to obtain a utility contractors license, and that because W&D had failed to do so, the construction contracts were unenforceable. As such, the developers were entitled to be reimbursed for all monies previously paid. The parties stipulated that none of the water system installation performed by W&D was deeper than five feet underground. Thus, the trial court interpreted the plain language of the licensing statute to not require W&D to have obtained a utility contractors license for its work, thereby permitting W&D to enforce its construction contract against the developers.

6. In *182 Tenth, LLC v. Manhattan Construction Company*, 316 Ga. App. 776, 730 S.E.2d 495 (Ga. Ct. App. 2012), the Georgia Court of Appeals found that a general contractor's general conditions are not lienable. The trial court entered a jury verdict foreclosing Manhattan's lien against real property owned by 182 Tenth, LLC ("182 Tenth"). In the lower court, Manhattan introduced evidence of its judgment against the contract debtor, Mid Atlanta Properties, Inc. ("Mid Atlanta"), and that it was still owed more than $2 million dollars for work performed on the project. 182 Tenth moved for a directed verdict on the grounds that Manhattan failed to provide sufficient evidence that all of its costs associated with the lien amount were, in fact, lienable services under Georgia law. The trial court denied this motion, holding that it was the jury's decision, with guidance from the court, as to the amount of any lien for which Manhattan would be entitled. The trial court effectively shifted the burden onto 182 Tenth to parse non-lienable work from Manhattan's lien claim.

On appeal, 182 Tenth argued that it had no burden to prove which portions of Manhattan's prior judgment against Mid Atlanta were lienable services. The Georgia Court of Appeals agreed, holding that Manhattan's judgment amount against Mid Atlanta was not prima facie evidence of Manhattan's right to a lien against 182 Tenth's real property in that full amount. However, Manhattan provided sufficient evidence for each line item of its judgment against Mid Atlanta, which provided a basis for identifying lienable services. The jury award was less than the full amount, which indicated their consideration of such a distinction. Accordingly, there was no reversible error in the jury instruction.

182 Tenth also claimed on appeal that there was insufficient evidence to support the jury's finding that Manhattan was entitled to foreclose a lien upon the real property. 182 Tenth

argued that Manhattan's "general conditions" were not lienable because they were not labor, material or services that were incorporated into the improvement. The appellate court similarly held that interest on Manhattan's unpaid payment applications was not lienable. Accordingly, the judgment entered in Manhattan's favor was reversed and the case remanded.

Legislation:

1. H.B. 932, Sales & Use Tax Withholding Requirements on Non-Resident Subcontractors. H.B. 932 modified the amount of withholding allowed by general contractors on its non-resident subcontractors. Prior Georgia law provided that general contractors are liable for up to 4% of the payments due non-resident subcontractors, but the Georgia Department of Revenue only allowed general contractors to withhold 2%. HB 932 eliminated the "up to" 4% language, replacing it instead with a fixed amount of 2% for increased consistency. The bill passed both chambers and was signed into law with an effective date of July 1, 2012.

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Hawaii

Case Law:

1. In *Davis v. Jayar Constr., Inc.*, 126 Hawaii 473, 272 P.3d 1240 (Haw. Ct. App. 2012), the injured employee was entitled to attorney fees and costs after prevailing in an administrative proceeding before the Labor and Industrial Relations Appeals Board. The award was approved as a lien against compensation payable by the employer, rather than as directly payable by the employer.

2. In *Oceanic Companies, Inc. v. Kukui`ula Development Co. (Hawaii), LLC*, 2011 Haw. App. LEXIS 255 (Haw. Ct. App. March 18, 2011), the subcontractor was terminated from the project and sought arbitration with the contractor pursuant to the Master Contract The appellate court determined that arbitration was not mandated. The Master Contract provided that disputes related to the work or arising out the Master Contract "may" be resolved by binding arbitration. Therefore, the contractor could not be compelled to arbitrate.

3. In *ORI Anuenue Hale, Inc. v. Kasan Constr. Corp.*, 126 Haw. 124, 267 P.3d 708 (Haw. Ct. App. 2012), an arbitrator determined an agent of the owner could obtain a mechanic's lien even though the agent worked for an unlicensed contractor. The owner argued that all licensed or unlicensed subcontractors of an unlicensed contractor were prohibited from recovering for work performed. Therefore, the trial court's confirmation of the arbitration award was against public policy and should have been vacated. The Intermediate Court of Appeals disagreed. The arbitrator found there was no subcontractor, but an authorized agent acting on behalf of the owner. The owner assumed the hazards of the arbitration process, including the arbitrator's refusal to bar the agent's claim for a mechanic's lien.

4. In *Leis Family Limited Partnership v. Silversword Engineering*, 126 Haw. 532, 273 P.3d 1218 (Haw. Ct. App. 2012), the owner had a thermal energy system designed, constructed and installed in its building. A subcontractor hired the designers for the system. After completion, the owner alleged the system was undersized and did not satisfy the building's

cooling load requirement. The owner sued the designers, but not the general contractor nor the subcontractor that hired the designers. The designers moved for summary judgment arguing that the economic loss doctrine barred the owner's claims. The trial court granted the designers' motion and the Intermediate Court of Appeals affirmed. On appeal, the owner argued the economic loss doctrine did not apply because its claim was based on allegations of breach of a legal duty, separate and apart from any contractual duty. But the owner failed to state a duty owed by the designers that was cognizable under tort law. The owner could have negotiated contractual rights against the general contractor or any of its subcontractors. Its failure to do so did not warrant creation of a duty in tort on the part of the designers.

5. Construction of a rail system in Honolulu is currently a controversial topic. Construction has begun, but in *Kaleikini v. Hoshioka*, 128 Haw. 53, 283 P.3d 60 (2012), the Hawaii Supreme Court put a stop to the construction based upon a failure to provide an adequate, statutorily required archaeological inventory survey (AIS) for the entire project prior to approval. Construction was planned to take place in four phases. The fourth phase had a high likelihood of affecting archeological resources. A phased approach to identification and evaluation of archaeological resources was planned, under which an AIS would be completed and its results approved for each phase before construction commenced on that phase. The statute required, however, completion of the AIS prior to project approval by the Hawaii State Historic Preservation Division and did not allow a phased approach. Therefore, the Supreme Court vacated and remanded as to the claims based upon the failure to complete and AIS for the entire project prior to approval.

Legislation:

1. HB 2573, Relating to Apprenticeship. This legislation amends the state apprenticeship law to confirm to new federal regulations on apprenticeship in 29 C.F.R. Part 29. Signed into law by the Governor on 4/10/12.

2. SB 2167, Land Surveying; Landscape Architects. The bill clarifies the definition of "landscape architect." Replaces the existing definition of "surveyor" or "land "surveyor" with definitions for "land surveying" and "professional surveyor," professional and surveyor," or "land surveyor." The Governor signed the bill on April 26, 2012.

3. SB 2281, Relating to Environmental Impact Statements. This Act authorizes agencies to bypass the mandatory preparation of an environmental assessment and proceed directly to an environmental impact statement (EIS), or to allow an applicant to do the same, if the agency determines that an EIS is likely to be required for a proposed action. The bill was signed by the Governor on June 27, 2012.

4. SB 3010, Relating to Transportation. DOT and its contractors are temporarily exempted from certain state requirements for certain bridge rehabilitation projects. The effective date is July 1, 2012. The Governor signed the bill on July 5, 2012.

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Idaho

Case Law:

1. In *Farrell v. Whiteman*, 152 Idaho 90, 268 P.3d 468 (2012), an architect originally licensed only in Michigan, brought suit against developer, Kent Whiteman, for uncompensated architectural services rendered for Whiteman's condominium project. Whiteman counterclaimed arguing that Farrell was not entitled to compensation because some of his services were rendered before he obtained an architectural license in the State of Idaho and because some of his services were rendered without a written contract. The District Court found that an implied in fact contract existed between the parties and awarded Farrell damages on the theory of quantum meruit for services rendered after he obtained his Idaho license.

The Supreme Court of Idaho upheld the District Court's decision, including the District Court's consideration of the quality of Farrell's work in determining the amount of damages to award under the quantum meruit theory.

2. In *First Federal Savings Bank of Twin Falls v. Riedesel Engineering, Inc.*, 2012 WL 4055357, the developer of a residential subdivision, granted a bank a mortgage in real property to secure the payment of a promissory note. An engineering firm was obtained to perform engineering services in connection with the development secured by the mortgage. The engineering firm recorded a claim of lien against the real property. The developer granted the bank a second mortgage in the real property. That mortgage was recorded along with a "Release of Claim of Lien" and a "Lien Waiver". Despite the waiver, the engineering firm filed a second claim of lien against the property. The bank filed suit to foreclose its two mortgages. The engineering firm counterclaimed, cross-claimed and asserted a third-party claim seeking to foreclose its second lien and prevailed in the trial court. The bank appealed the trial court's decision on the ground that the lien was not verified by oath as required by Idaho Code section 45-507. The Supreme Court of Idaho found that the mechanic's lien was void as the lien did not state that it was sworn to before someone authorized to administer oaths and therefore did not comply with the verification requirement

3. In *Stonebrook Construction, LLC v. Chase Home Finance, LLC*, 152 Idaho 927, 277 P.3d 374 (2012), a contractor entered into a contract to build a home and provided labor and materials for the residence, but was not paid the agreed upon amount. The contractor recorded a claim of lien against the property and then brought an action to foreclose its lien. The bank held a deed of trust against the property and intervened in the contractor's foreclosure action. The bank moved for summary judgment on the ground that the contractor was barred from claiming a lien on the property because it had not registered as required by the ICRA. The trial court granted the bank's motion and dismissed the contractor's lien claim. The contractor appealed.

On appeal, the contractor argued that it was not out of compliance with ICRA (I.C. 54-5203(6)) because the ICRA applies to any "person," and "person" is defined as "any individual, firm, partnership, limited liability company … **or any combination thereof** acting as a unit." In rejecting the contractor's argument, the court concluded that "a plain reading of the statute leads us to conclude that the Act requires the listed entities, including combinations of those entities, to register."

Legislation:

1. I.C. § 67-2805(2)(d). The Idaho legislature amended the procedures for procurement of public works construction by adding language to the Idaho Code Section 67-2805(2)(d) that provides that once a public bid is awarded; all bid documents are now open to public inspection pursuant to the Public Records Act (see I.C 9-337 through 9-347).

2. I.C. § 44-1001 through 44-1009, Buy Idaho First Purchasing Act. The Idaho legislature created a new chapter to the Idaho Code to define terms and to provide preference for resident contractors in public construction. Under the new chapter entitled the "Buy Idaho First Purchasing Act" the legislature gives Idaho-based businesses increased opportunities to win state and local government contracts. The act also provides a preference for Idaho-based businesses and Idaho materials in state and local government contracts by allowing governmental entities to select Idaho-based businesses and materials over out-of-state competitors, as long as the Idaho-based business' bid is no more than 5% higher than the out-of-state bid.

3. I.C. § 54-1016. The Idaho legislature amended existing law to provide exemption to the law regulating electrical contractors and their licenses for the installation, maintenance and wiring for landscape sprinkler controls or communications circuits, wires and apparatus that include telephone systems, telegraph facilities, sound systems, radio and television systems, public address and intercom systems, data communication systems, antenna systems, fiber optics and similar systems.

4. I.C. § 29-110. The Idaho legislature amended I.C. § 29-110 to revise provisions relating to limitations on the right to sue under contract. Under the amendment, the Idaho Code is clarified to include that limitations on the right to sue in a contract which restrict a party from enforcing his rights under the contract in Idaho tribunals, or which prescribe limits of time within the party must enforce its rights are void as against public policy in Idaho.

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Indiana

Case Law:

1. In *Mies v. Steuben Cnty. Bd. of Zoning Appeals*, No. 76A03-1112-PL-564, 2012 WL 2561939 (Ind. Ct. App. July 3, 2012), plaintiffs hired defendant contractor to demolish and discard plaintiffs' deck and stairs from plaintiffs' lake cottage and build a new deck and stairs for plaintiffs' lake cottage. After contractor failed to obtain the necessary permits to build the new deck and stairs, the Steuben County Plan Commission issued a "stop work order" to the plaintiffs because neither the deck nor the stairs complied with the Steuben County Zoning Ordinance ("SCZO") requiring a twenty-foot lakefront setback. The contractor, on behalf of plaintiffs, sought a post construction variance for the newly constructed deck and stairs. The Steuben County Board of Zoning Appeals ("the Board") approved the post construction variance for the stairs with the condition that the deck had to be brought into compliance with the twenty-foot lakefront setback. Plaintiffs refused to comply, arguing that the Board lacked statutory authority to impose conditions on the variance, which made the condition void or, in the

alternative, that the newly constructed deck and stairs did not violate the SCZO because it maintained its nonconforming status. Plaintiffs appealed to the trial court.

The trial court reversed the Board's decision, concluding that the Board's decision granting plaintiffs a post construction variance with a void condition was a legal nullity. Plaintiffs appealed the trial court's decision, arguing that the variance and void condition were severable and that the trial court should have upheld the variance while voiding the condition. Additionally, plaintiffs argued that even if the trial court did not err in voiding plaintiffs' variance, it erred by concluding that the deck that was attached to plaintiffs' cottage had lost its status as a nonconforming structure that is exempted from the development standards ordinances. The Board cross-appealed and argued that the trial court elevated form over substance when it concluded that it imposed an unauthorized condition on the plaintiffs' variance. In the alternative, the Board contended that plaintiffs consented to the condition by not objecting to it.

The Indiana Court of Appeals affirmed the trial court's decision. The court first held that the Board imposed an unauthorized condition on plaintiffs' variance, reasoning that the Board lacked statutory authority to impose an unauthorized condition on plaintiffs' variance. Second, the court held that the contractor's silence, on behalf of plaintiffs, did not indicate plaintiffs' consent to the unauthorized condition imposed by the Board, reasoning that neither the contractor nor the plaintiffs expressly agreed to the condition imposed by the Board. Third, the court held that the void condition imposed on plaintiffs' variance was not severable from plaintiffs' variance, but rather the void condition rendered the variance a complete legal nullity. The court reasoned that the Board "granted a variance subject to a void condition, making the entire act ultra vires and void." Finally, the court held that the deck and stairs attached to plaintiffs' cottage lost nonconforming use status when the deck and stairs were demolished and rebuilt. SCZO § 22.02(f) provides that a structure maintains its nonconforming status as long as the cost of repairing the nonconforming structure does not exceed fifty percent (50%) of its value. Because the cost of replacing the old deck and stairs exceeded fifty percent (50%) of their value, the new deck and stairs lost nonconforming status under § 22.02(f).

2. In *Imperial Ins. Restoration & Remodeling, Inc. v. Costello*, 965 N.E.2d 723 (Ind. Ct. App. 2012), defendant homeowner hired plaintiff home improvement supplier to make repairs to defendant's home. Before plaintiff began work, defendant signed a contract authorizing plaintiff to make repairs to defendant's home. The contract did not describe the proposed home improvements, completion dates, contingencies, or price. After plaintiff completed the repairs to defendant's home, defendant signed a "Certificate of Satisfaction," which stated that plaintiff's repairs were fully completed to defendant's absolute satisfaction as stated in the contractual agreement, and that defendant authorized payment to be made, in full, directly to plaintiff. Defendant's insurance company paid for plaintiff's services by sending a check to defendant, but defendant cashed the check instead of paying plaintiff. Plaintiff sued defendant seeking the money for the services it provided. Both parties submitted briefs on the applicability of the Indiana Home Improvement Contracts Act ("HICA"), which requires home improvement suppliers performing any alteration, repair, or modification to the residential property of a consumer for an amount greater than $150 to provide the consumer with a written home improvement contract. A home improvement supplier that violates HICA commits a "deceptive act" that is actionable by the consumer and subject to the remedies and penalties available to victims of deceptive consumer sales under the Indiana Deceptive Consumer Sales Act ("DCSA"). The trial court granted judgment for defendant.

On appeal, plaintiff argued that defendant did not initiate an action based on plaintiff's deceptive act, but rather defendant asserted the contract's non-compliance with HICA as a

defense to plaintiff's breach of contract claim and argued that the contract was unenforceable. Plaintiff contended that the contract's non-compliance did not, by itself, justify declaring the contract unenforceable, but rather if defendant wanted to void the contract, defendant was required to assert a counterclaim under DCSA to pursue that remedy.

The Indiana Court of Appeals first explained that the contract at issue was governed by HICA, a law enacted to protect consumers by requiring home improvement suppliers to provide detailed information in home improvement contracts. The court further explained that "[defendant], with only a ninth grade education, was in an inferior bargaining position with plaintiff, an experienced home improvement company." The court, however, held that the contract should be enforceable against defendant. The court reasoned that "despite any deficiencies in the contract or disparities in the parties' relative bargaining power, [defendant] ultimately received the benefit of [plaintiff's] services as well as a check to cover its fees. He does not, therefore, need the protections of HICA, and has instead received a windfall, which the law disfavors." The court further reasoned that "the Indiana General Assembly did not intend that every contract made in violation of HICA to be automatically void" since it failed "to use words like 'void' or 'unenforceable' in HICA to describe contracts made in violation thereof, as well as the inclusion of remedial provisions to be invoked in the event of a violation, one of which is voiding the contract."

3. In *Steinrock Roofing & Sheet Metal, Inc. v. McCulloch*, 965 N.E.2d 744 (Ind. Ct. App. 2012), defendant homeowner contracted with plaintiff contractor to repair damages to the roof of defendant's home. Defendant failed to pay the entire amount due under the contract to the contractor because of the contractor's allegedly deficient workmanship. As a result, contractor sued defendant for breach of contract. Contractor also sued defendant for defamation, alleging that defendant made defamatory statements to a third-party that contractor "was allegedly going out of business." Defendant counterclaimed for breach of contract, asserting that contractor had "installed the roof in a negligent and unworkmanlike manner." Evidence presented at trial established that the contractor's work was deficient in a number of respects, and contractor admitted to many of the deficiencies and acknowledged that such deficiencies needed repair. The trial court found that (1) defendant's statement to third-party "did not qualify as a defamatory statement"; (2) defendant breached the contract with contractor by failing to pay the entire amount due under the contract to contractor; and (3) contractor breached its contract with defendant by failing to perform the contract in a "workmanlike manner."

Contractor appealed and argued that (1) the trial court erred in excluding the discovery and potential testimony of an insurance agent who inspected the work and made the payments for repairs on the roof; (2) the trial court should have found in his favor on his defamation claim; (3) the trial court erred in finding a material breach of contract by contractor; and (4) the trial court should have limited defendant's damages to the difference in fair market value in accordance with Indiana Code section 32–27–1–14, the Home Improvement Warranties statute.

The Indiana Court of Appeals affirmed the judgment of the trial court. The court first held that defendant's insurance claims file—containing communications between defendant-insured and defendant's insurer—was not discoverable by the contractor, reasoning that such information was privileged and, therefore, inadmissible at trial. Second, the court held that defendant's inquiry as to whether contractor was still in business was not defamatory, reasoning that (1) "[a]n inquiry about whether a company is still in business does not impute misconduct"; (2) defendant did not say anything disparaging to third-party when defendant simply asked if contractor's business remained open; (3) defendant made no other comments with regard to

that inquiry; and (4) contractor's owner conceded that he had not sustained any business or customer loss as a result of defendant's inquiry. Third, the court held that an overwhelming majority of the evidence demonstrated that contractor materially breached the contract by performing repairs in an "un-workmanlike manner." Finally, the court held that the trial court's damage award was proper, reasoning that contractor failed to preserve for appellate review its claim that the trial court should have limited defendant's damages to the difference in fair market value and applied the Home Improvement Warranties statute.

4. In *E. Porter Cnty. Sch. Corp. v. Gough, Inc.*, 965 N.E.2d 684 (Ind. Ct. App. 2012), plaintiff contractor submitted a bid and bid bond issued by contractor's surety to defendant school to complete construction work for the school. After submitting the bid, contractor tried to inform the school that its bid was based upon a mistaken clerical error. Because contractor was the lowest bidder, the school awarded contractor the contract. Contractor sent the school a letter and stated, "the contract [was] made out in an amount that [was] based upon an incorrect base-bid figure," the "incorrect bid figure [was] the result of an [inadvertent] clerical error that occurred at bid time," contractor would not accept the contract, and contractor made every effort to inform the school to withdraw the bid immediately and that the bid amount was a mistake. The school refused to excuse contractor from contractor's mistaken bid and submitted a claim on the bid bond to contractor's surety.

The Indiana Court of Appeals held that "there was not a meeting of the minds regarding the bid amount and thus that the [s]chool did not acquire the right to enforce [contractor's] erroneous or mistaken bid." The court reasoned that (1) contractor "did not at any time intend to enter an agreement or contract with the [s]chool to complete the work"; (2) shortly after submitting its bid, contractor informed the school that it had submitted a mistaken bid and that it could not complete the project for the quoted price"; (3) the school failed to demonstrate evidence illustrating that "it relied upon [contractor's] erroneous bid amount in a manner which would cause the withdrawal of the bid a short time later and on the same day to be inequitable, unconscionable, or unjust"; and (4) "[t]he general rule is that [b]id errors that result from clear cut clerical or arithmetic errors . . . are the kind of excusable mistake that allows relief." The court concluded that contractor's surety was entitled to be released from its bid bond, reasoning that the surety's principal—contractor—"does not have any liability on the underlying contract."

5. In *Standard Coating Serv., Inc. v. Walsh Const. Co.*, 966 N.E.2d 213 (Ind. Ct. App. 2012) (Unpublished Disposition), the city's department of public works solicited bids for a wet weather treatment and wastewater treatment facility expansion project. Because prime contractors for such projects draw money from the Clean Water and Drinking Water State Revolving Fund, prime contractors are required to seek out as subcontractors businesses that have been certified as Minority Business Enterprises ("MBEs"). Plaintiff MBE subcontractor submitted a bid to defendant prime contractor ("contractor") to perform painting, coating, and waterproofing services for the project. Contractor submitted its bid to the city to complete the project. The bid included two U.S. Environmental Protection Agency ("EPA") forms that named subcontractor as an MBE with whom contractor expected to do business in the event the city accepted contractor's bid, but the bid stated that no contracts had been made with subcontractors at that time. Contractor first responded to subcontractor's bid with silence, but then contractor decided not to use subcontractor's services and selected a different subcontractor for the project. Subcontractor requested the city commission of public works ("commission") to delay approval of contractor's bid and explained that it had learned that day that contractor did not intend to use its services. The commission, however, entered into an agreement designating contractor as the prime contractor for the project. Subcontractor sued

contractor and alleged breach of contract and sought damages as a third-party beneficiary of contractor's agreement with the city.

The Indiana Court of Appeals held that contractor did not breach the contract, reasoning that (1) subcontractor was aware before the commission meeting began that contractor had decided not to use subcontractor's services; (2) contractor's silence in response to subcontractor's offer did not give rise to an inference that contractor's silence amounted to acceptance of subcontractor's bid; (3) subcontractor did not provide any compensable service to contractor, nor did contractor accept the benefit of subcontractor's services; and (4) a prime contractor's communication of a subcontractor's offer in a bid does not amount to acceptance of that offer. The court further held that the contractor and the city never intended to make subcontractor a third-party beneficiary to their agreement, reasoning that (1) contractor rejected subcontractor's bid; (2) subcontractor acknowledged contractor's rejection through its subsequent actions, including its appearance before the commission; and (3) subcontractor and contractor never entered into any agreement.

6. In *Biddle v. Laskowski*, 966 N.E.2d 213 (Ind. Ct. App. 2012) (Unpublished Disposition), defendants hired plaintiff contractor to build a lakeside cottage. During construction of the cottage, contractor sent a final bill to defendants and claimed that defendants owed him more money than defendants allegedly agreed to pay. After defendants paid contractor less money than contractor was allegedly owed by defendants, contractor filed a mechanic's lien and sued defendants to foreclose his mechanic's lien and for breach of contract. Defendants counterclaimed that contractor "had delivered defective workmanship and had 'failed to perform [the] work in a workmanlike manner.' " The trial court held that the contractor was required to correct his workmanship errors. Contractor, however, failed to correct the work as ordered by the trial court, and the trial court ordered specific performance. The court reasoned that contractor was in the best position to correct the errors, make the repairs, and complete the project. After both parties appealed, the contractor died.

The Indiana Court of Appeals held that the trial court did not abuse its discretion when it interpreted the agreement between the parties, reasoning that (1) after the trial court heard testimony from plaintiff and defendants as to what each party considered included within the guidelines and what each party considered to be an addition to the agreement and whether it had been mutually agreed upon, it credited contractor's testimony over defendant's testimony; and (2) appellate courts are "not allowed to assess the credibility of the witnesses on appeal." The court further held that because the contractor died, specific performance, as envisioned by the trial court, was no longer possible. The court reasoned that the current litigious stance of both parties indicated a mutual distrust and loss of respect which would only make specific performance more difficult to obtain.

7. In *Colby v. T.H. Const., Inc.*, 965 N.E.2d 173 (Ind. Ct. App. 2012) (Unpublished Disposition), plaintiffs entered into a construction contract with defendant contractor to construct a new dental office building. Throughout construction several changes were agreed upon by the parties, which required plaintiffs to increase their construction loan. Before plaintiffs made the final payment to contractor, contractor permitted plaintiffs to occupy the building. Within a week of occupancy, plaintiffs complained to contractor concerning low water pressure, but the parties disagreed as to the cause of the problem and the resolution. Contractor eventually agreed to repair the water pressure problem at no charge, but plaintiffs declined contractor's offer and, instead, had a plumber repair the problem by installing a water tap and line from the water tap to the office building. Contractor filed mechanic's liens for the amounts still owed by the plaintiffs. Plaintiffs closed on the loan, all liens were released, and contractor and

subcontractors were paid in full. Plaintiffs sued contractor, alleging breach of contract and deception. Plaintiffs claimed that contractor charged more than the stated contract price, failed to deliver goods and services specified under the contract, and forced plaintiffs to pay the overcharges as a condition of releasing improper liens.

The Indiana Court of Appeals held that plaintiffs were not entitled to summary judgment on their breach of contract claim. The court reasoned that because the parties orally agreed to changes in the construction of the building, there was a question of fact as to whether the parties modified the contract verbally or by their conduct. The court further reasoned that there were questions of fact as to whether the contract covered the water tap that plaintiffs had installed by the plumber, whether the replacement of the tap had anything to do with the water pressure issue, and whether the replacement of the tap made a significant change to the water pressure issue.

8. In *Hunt Const. Grp., Inc. v. Garrett*, 964 N.E.2d 222 (Ind. 2012), subcontractor entered into a contract with the Stadium and Convention Building Authority ("Stadium Authority") to perform concrete work on a football stadium. Defendant construction manager ("manager") also entered into a contract with the Stadium Authority to act as the construction manager for the football stadium. Manager had no contractual relationship with subcontractor. Plaintiff, subcontractor's employee ("employee"), was injured in a workplace accident. Employee sued manager for negligence, requesting a determination that manager was vicariously liable for the actions of subcontractor. Manager argued that it could not be liable to employee for negligence because it did not owe employee a duty of workplace safety under any recognized theory of law.

The Indiana Supreme Court held that manager's contracts did not impose upon it a legal duty of care for jobsite safety to subcontractor's employees. The court reasoned that (1) "[manager] did not undertake in its contracts a duty to act as the insurer of safety for everyone on the project," but rather, "[manager's] responsibilities were owed only to Stadium Authority, not to" subcontractor's employees; and (2) manager's contract expressly stated that "[subcontractor] was the controlling employer responsible for [its own] safety programs and precautions." The court further held that manager did not voluntarily assume a duty of care for jobsite safety to subcontractor's employee through its actions or conduct, reasoning that manager did not undertake any jobsite-employee safety responsibilities beyond those required by its original contract.

9. In *R.T. Moore Co., Inc. v. Slant/Fin Corp.*, 966 N.E.2d 636 (Ind. Ct. App. 2012), the owners of two separate, private construction projects hired a general contractor to provide improvements to their respective projects. The general contractor subcontracted the necessary mechanical work on the projects to plaintiff subcontractor. Subcontractor ordered mechanical equipment from a supplier who then ordered the mechanical equipment from defendant manufacturer. After the supplier delivered the equipment to the projects and subcontractor paid for the equipment, supplier suspended its operations and surrendered its assets to a secured lender without paying the manufacturer for the materials that the manufacturer supplied and that were ultimately installed on the projects. Manufacturer filed "Notice of Personal Liability" claims ("Notices") pursuant to Indiana Code § 32-28-3-9—Personal Liability Notice Statute ("PLN Statute")—to the owners to secure monies that manufacturer claimed it was owed for the equipment supplied and installed on the projects. In response to the Notices, the owners withheld monies owed to project participants on both projects to protect against double payment. As a result, subcontractor did not receive payment for labor and materials it supplied to the projects. Subcontractor sued manufacturer seeking a declaratory judgment that manufacturer, as a "material supplier to a material supplier" on the projects, lacked standing to

assert a claim under the PLN Statute against the owners and was, therefore, not entitled to the protections afforded under the PLN statute.

The Indiana Court of Appeals held that manufacturer was not permitted to seek a mechanics' lien and thus, was not permitted to seek the protections of the PLN statute. The court reasoned that (1) "materialmen supplying others who must themselves be considered materialmen have traditionally been considered outside the ambit of the [PLN] statute"; and (2) "[the supplier] [was] a material supplier to the [p]rojects. [Manufacturer] was a materialman that supplied [e]quipment to [the supplier]. Neither [the supplier] nor [the manufacturer] performed any labor on the [p]rojects. Thus, [manufacturer] was a classic materialman to a materialman."

10. In *Mitchell & Stark Const. Co., Inc. v. Strand Assocs., Inc.*, 961 N.E.2d 1047 (Ind. Ct. App. 2012) (Unpublished Disposition), the city owned a ditch, which consisted of a legal drain and sewer line. The ditch was declared to be in a flood plain, which restricted its use and required surrounding property owners to maintain flood insurance. The Indiana Department of Natural Resources ("Department") studied the ditch and determined that concerns about the flood plain might have been overestimated. The city contracted with defendant engineers to "pull[] back vegetation in the bottom of the [d]itch to make sure the water flowed and replac[e] pipes." During a public bidding process, plaintiff contractor submitted the lowest bid, and the city accepted contractor's bid. The city and engineers entered into an agreement, which provided that the engineers were to observe the contractor's work and report its observations to the city. The contract, however, "expressly prohibited the [e]ngineers from supervising the [c]ontractor and released the [e]ngineers from any responsibility for the [c]ontractor's acts or omissions while working on the [d]itch project." There was no contractual relationship between the contractor and the engineers. The city and the contractor also entered into an agreement, which provided that the contractor was to remove all excess soil from the ditch. Industry practice contemplated that a contractor typically factors the costs for disposing of soil in its bid, and if the soil is contaminated, it must be disposed of in a regulated landfill. Contractor and third-party owner of property adjacent to the ditch ("third-party") entered into a private agreement pursuant to which contractor would put only uncontaminated soil on third-party's property. Years later when the sale of third-party's property was cancelled because an Environmental Site Assessment revealed that the soil from the ditch that the contractor had deposited on third-party's property was contaminated, third-party sued the city and alleged "negligence, nuisance, trespass, and strict liability based upon the failure of the [c]ity and the [c]ontractor to 'comply with applicable federal, state, and local laws and regulations.' " Contractor sued the engineers, alleging that "the [e]ngineers had a common law duty to indemnify it for all damages of judgments the [c]ontractor might be ordered to pay [third-party]."

The Indiana Court of Appeals held that "[b]ecause the [e]ngineers did not cause the harm to [third-party]," the contractor was not entitled to indemnity. The court reasoned that (1) because contractor told third-party that it would not place any contaminated soil on third-party's property and failed to have the soil tested before placing the soil on third-party's property, contractor failed to illustrate that it was without fault; and (2) because the engineers were expressly prohibited from assuming any type of supervisory role or responsibility for the contractor's work on the ditch, the contractor failed to illustrate that the engineers caused the harm to third-party property owner.

11. In *Walsh v. Chris Sweeney Const., Inc.*, 961 N.E.2d 544 (Ind. Ct. App. 2012) (Unpublished Disposition), defendant accepted bids from plaintiff contractor to perform renovations on defendant's home, but contractor did not draft a written contract, and defendant never asked for a contract either. After defendant made several changes to the original

renovation project plans, and contractor informed defendant that changes in the work would require a price increase, defendant requested contractor to make the changes, without asking for specifics on the price increases. Defendant never paid contractor any money on the final labor invoice and dismissed contractor from the jobsite. Contractor stopped working on defendant's home and filed a "Notice of Intention to Hold Mechanic's Lien." Contractor subsequently filed a mechanic's lien and sued defendant, seeking foreclosure of the mechanic's lien and damages for unjust enrichment. Defendant counterclaimed that contractor violated the Indiana Home Improvement Contract Act ("HICA") and, therefore, committed a deceptive act against defendant because contractor failed to provide defendant with a written contract that complied with HICA. The trial court foreclosed on contractor's mechanic's lien, ordered that defendant pay contractor for services rendered and for attorney fees, and denied defendant's counterclaims. Defendant appealed.

The Indiana Court of Appeals first held that contractor's failure to provide a written contract in compliance with HICA did not preclude pursuit of the equitable remedies of unjust enrichment damages and a mechanic's lien. The court reasoned that it would be unjust for defendant to retain the benefit of contractor's services despite its non-compliance with HICA because at defendant's request, contractor provided labor services to defendant that exceeded the original plans, contractor told defendant that there would be charges associated with the changes to the plans, contractor expected to be paid for this additional work, and contractor's services had a fair market value. Second, the court held that the trial court did not err by denying defendant's counterclaim against contractor for contractor's failure to provide defendant with a written contract that complied with HICA. The court reasoned that (1) defendant provided no evidence at trial showing that he notified contractor of his deceptive act or offered contractor the opportunity to cure the deceptive act; and (2) no evidence suggested that contractor's deceptive act was willful or intentional or that it was part of a scheme intended to defraud or mislead defendant. Third, the court held that the trial court's foreclosure of contractor's mechanic's lien was proper, reasoning that (1) defendant was not entitled to thirty days notice of the contractor's intention to file a mechanic's lien; and (2) defendant was afforded adequate notice of contractor's mechanic's lien since contractor stopped work and subsequently filed its notice of intention to hold a mechanic's lien within sixty days of work stoppage. The court finally held that there was evidence in the record to support the trial court's unjust enrichment damages calculation. However, because of a typographical error in the trial court's computation of overall damages, the court remanded to the trial court with instructions to enter an order directing defendant to increase its unjust enrichment damages payment to plaintiff.

12. In *Dave's Excavating, Inc. v. City of New Castle*, 959 N.E.2d 369 (Ind. Ct. App. 2012), plaintiff city and defendant contractor executed a construction contract for a sanitary sewer and water main extension project. Surety guarantied contractor's performance with a performance bond. After the project was underway, the contractor (1) claimed, under a provision of the contract, "Differing Subsurface Conditions" at the site of the project, (2) notified the city that it was "stop[ping] Work until direction has been received [from] the Engineer," and (3) requested an eighty-four percent (84%) increase to the contract price to complete work under the contract due to the alleged differing subsurface conditions at the project site. Engineer directed contractor to "carry on the [w]ork and adhere to the progress schedule during all disputes" with the city. Contractor responded that it was impossible to continue with work until the differing condition issue had been resolved, and the engineer's failure to investigate and propose a change order rendered the city in default of the contract, thereby, allowing contractor the opportunity to rescind the contract, cease work, and avoid any further liability. Engineer notified contractor and surety that the city was considering declaring contractor in default on the contract and requested a meeting within fifteen days in accordance with the

performance bond. In the meantime, the city declared the project an emergency and accepted bids from other contractors to complete the project. The city later met with the contractor and the surety and declared the contractor in default and terminated contractor's right to complete the contract. The city demanded that the surety perform its obligations under the performance bond, and the surety informed the city that it was investigating the city's claim. After reminding the surety that it was obligated to act with reasonable promptness, the city awarded the completion contract to a second contractor. The city gave demand to the surety for payment under the performance bond because the city's costs in completing the project had exceeded the contract price with contractor. The city sued the contractor for payment on the construction contract and the surety for payment under the performance bond.

The Indiana Court of Appeals held that the contractor, not the city, breached the "Differing Substrate Conditions" provision in the construction contract, reasoning that (1) the contract provision did not make continuation of work contingent upon investigation of the physical site or any contract price or time adjustment; and (2) the contract did not require the city to investigate the physical site but rather only to "review the pertinent condition" of the site. The court also held that the surety was liable under the performance bond, reasoning that (1) the surety failed to exercise any of its options to mitigate damages "promptly" under the performance bond, as required to support a finding that surety was liable under the bond; (2) the surety never reported the results of its investigation of the city's claim on the performance bond to the city nor denied liability before the city filed its complaint sixteen months after the city gave written notice that it formally terminated contractor's right to complete the contract and first demanded that the surety perform its obligation under the performance bond; and (3) by hiring a replacement contractor, the city worked to mitigate its damages as instructed by the surety. The court further concluded that the surety was liable for the city's attorney fees.

13. In *Ind. Farm Bureau Ins. Co. v. Harleysville Ins. Co.*, 965 N.E.2d 62 (Ind. Ct. App. 2012), on April 2, 1998, service station owner ("owner") notified the Indiana Department of Environmental Management ("IDEM") of his desire to remove an underground storage tank ("UST") system at his gasoline station. In June of 1998, Heartland Environmental Associates conducted testing of soil samples taken from owner's gasoline station, and its report indicated that the subsurface soil was contaminated from the UST system. IDEM sent owner a letter dated August 23, 2005 and requested further site investigation and testing to determine the extent of contamination. The letter, however, did not indicate that actionable contamination existed or that remediation was required at that time. On December 18, 2008, owner tendered a demand to his commercial property insurers—plaintiff Indiana Farm Bureau Insurance Company ("Farm Bureau") and defendant Harleysville Insurance Company ("Harleysville")—for defense and indemnification related to IDEM's actions, environmental testing, and remediation. Farm Bureau had insured owner in 1998 when Heartland performed the initial soil testing. On August 3, 1998, Harleysville began insuring owner. Harleysville notified owner that it did not have a duty to defend and indemnify owner because (1) any loss related to the IDEM action prior to the initiation of coverage on August 3, 1998; (2) owner breached its policy by failing to notify it as soon as practicable that a loss had occurred, which was required under its insurance policy; and (3) the pollution exclusion of its insurance policies barred owner's insurance coverage. Farm Bureau sued Harleysville for contribution seeking to recover a pro rata share of expenses related to the IDEM action. After the trial court awarded summary judgment to Harleysville, Farm Bureau appealed.

The Indiana Court of Appeals held that a genuine issue of material fact as to whether owner had actual knowledge of subsurface soil contamination at his service station precluded summary judgment on Harleysville's contribution action. The court reasoned that there was no

evidence that IDEM notified owner that actionable contamination existed at owner's service station or that owner learned of it some other way. The court next held that a genuine issue of material fact as to whether owner provided unreasonably late notice to the prejudice of Harleysville precluded summary judgment on Harleysville's contribution action. The court reasoned that both disputed questions of unreasonably late notice and prejudice are questions of fact for the jury. The court finally held that the pollution exclusion in Harleysville's insurance policies did not apply to gasoline, and, thus, did not excuse Harleysville from its duty to defend and indemnify owner against IDEM's contamination action.

Legislation:

1. H.B. 1163 (Ind. Code § 4-13.6-7-3), Standardized Time Limits for Claims on Retainage and Payment Bond. H.B. 1163, effective on July 1, 2012, requires subcontractors and suppliers on state and local public works projects to file any retainage and payment bond claims with the public body and deliver a copy of the claim(s) to the general contractor within 60 days of that subcontractor's or supplier's last day of work. Suit cannot be brought against the surety on the bond until 30 days after the required notice has been submitted to the public body and the general contractor. Thus, notice must be given to both the surety and the contractor.

H.B. 1163 also reduces the retainage on Title 4 projects. For example, pre-H.B. 1163 provided that "upon substantial completion of the work," the division withheld 400% of the value of each item as determined by the architect-engineer. Post-H.B. 1163 provides that "upon substantial completion of the work," the division shall withhold only 200%, which is consistent with Title 5 and Title 36 projects.

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Iowa

Case Law:

1. In *Ideal Ready Mix Co. v. Safeco Insurance Co. of America*, No. 4:11-cv-00142, Docket No. 32 (S.D. Iowa July 16, 2012), the Court reversed a prior findings and conclusions of law. In this case, Grooms and Co. was the general contractor and Safeco Insurance, its surety. Legacy Construction was a subcontractor, and Ideal provided the ready mix concrete. There was no direct contractual relationship between Grooms and Ideal but Grooms observed Ideal bringing the ready mix to the project and employees of both companies discussed the project throughout the course of construction. Ideal sent a document by certified mail titled "Notice" to Grooms stating that they were retained by Legacy. The notice was clear to point out that this was only a notice of retainer and not a bill or lien. After not receiving payment, Ideal filed a complaint March 28, 2011 against Safeco and Grooms asserting a Miller Act claim.

The Court amended its findings from a previous ruling in February, 2012 because it found a later email conversation between Ideal's Controller and a representative of Grooms was sufficient to put a party on notice under the Miller Act despite the absence of firm numbers for the debt owed. Within the email conversation, Ideal stated it would not issue a mechanic's lien waiver until the subcontractor pays Ideal for the ready mix. The Court ruled that this was a clear indication that Grooms knew their subcontractor had not paid Ideal for materials furnished. Further, an interrogatory answer confirmed that Grooms was aware that Ideal was making

payment requests to the subcontractor. The Court ruled that these writings happened within the notice period, they clearly notified Grooms that Ideal had not been fully compensated by the subcontractor, and it implicitly notified Grooms that it was looking for payment. The Court awarded Ideal the amount owed, late fees, interest, and costs.

2. In *Annett Holdings v. Kum & Go*, 801 N.W.2d 499 (Iowa 2011), the newly comprised Iowa Supreme Court has reaffirmed the validity of the economic loss doctrine. The company [Annett] sought to recover economic damages based upon a tort theory only for losses arising out of credit card usage by an employee. The company had the capacity to prevent fraudulent or unauthorized use by its employee. Its subsidiary received a daily report of the employee's transactions, and as soon as a new fuel manager took over, that person noticed the suspicious activity immediately. However, because no one was injured and no property damage occurred, the economic loss doctrine barred recovery.

3. In *Flynn Builders v. Lande*, 2012 Iowa Sup. LEXIS 56, Lande retained Flynn to be the general contractor although Lande was directly involved in most decisions usually reserved solely for the contractor. During the construction process, Lande and his lender discovered that Flynn had marked up materials by $20,000 and they subsequently refused to pay that amount. After this nonpayment, Flynn stopped working on the house and filed a mechanic's lien in the amount of $28,307.50 against Lande. After trial, the district court and the Iowa Court of Appeals found that the markup was reasonable in reference to industry standards and 85% completion constituted substantial completion. The Supreme Court reversed. Even though Lande agreed to perform some tasks that are usually retained by the general contractor, this does not absolve the builder from substantially performing the work the builder agreed to do. The Court found that the work on the house was not substantially completed as evidenced by the plumbing, drywall, paint, carpet, floor coverings, and trim yet to be finished therefore a mechanic's lien could not be enforced yet.

4. In *McCormick v. Nikkel & Associates*, 2012 Iowa Sup. LEXIS 54, this case presented the question of whether a subcontractor that properly performed electrical work on a jobsite owed a duty of care to an employee of the owner electrocuted six days later when the owner fails to deenergize the work site in contravention of various warnings and regulations. The Iowa Supreme Court concluded that no such duty was owed. Thus, it affirmed the summary judgment granted by the district court and vacated the decision of the appellate court which reversed the grant of summary judgment. Even if the energized switchgears were deemed a dangerous condition, the subcontractor owed no special duty because it had reason to expect that the employees would follow mandatory company and OSHA regulations before accessing the locked cabinet. The subcontractor also owed no special duty to protect against harm caused after its charge and control of the work and its privilege to be upon the land was terminated.

5. In *Hart v. Cusick*, 2012 Iowa App. LEXIS 457, the case primarily deals with the awarding of attorney fees and interest in mechanic's lien cases. Cusick filed a mechanic's lien against Hart and Flowers in the amount of $6,284.31 plus interest as stipulated by the work contract. Hart petitioned the district court to cancel the lien and Cusick counterclaimed for the foreclosure of the lien, costs, interest, and attorney fees. The Court awarded Cusick the amount of the lien, interest, and costs but made no mention of attorney's fees. Later, Cusick made an untimely motion for attorney's fees. Hart resisted and the District Court found in his favor. The Iowa Supreme Court affirmed the demand was untimely and the amount of attorney fees was excessive in relation to the judgment itself. The Court also found that interest under the Iowa statute, is to be computed at a simple rate, not on a compound scale.

Legislation:

1. The Governor recently signed into law **House File 675**. The Act creates significant changes to the registration of mechanic's liens in Iowa. As a result of House File 675, effective January 1, 2013 mechanic's liens will no longer be filed with the Clerk of the District Court but must be posted on a "State Construction Registry" website as set out more fully in the Act. The administrator of this site is the Iowa Secretary of State. Until January 1, 2013, liens should be filed with the Clerk of the District Court. H.F. 675 § 28. The Act will create an obligation to provide notice of commencement on residential projects. This will only apply to labor or material furnished after the Act effective date. H.F. 675 § 28(2).

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Kansas

Case Law:

1. In *Mid-Continent Cas. Co. v. Village at Deer Creek Homeowners Assoc.*, 685 F.3d 977 (10th Cir. 2012), the builder's insurer brought a declaratory judgment action against the insured, the builder, and homeowner's association, seeking determination of its obligations related to underlying construction defect litigation. The homeowner's association had filed suit against Greater Midwest Builders, LTD, who had constructed the subdivision and the suit ended with a verdict against Greater Midwest. The Tenth Circuit ruled on appeal that the District of Kansas did not abuse its discretion when it ruled that the declaratory judgment sought would not resolve all issues and agreed that the state court was the appropriate forum to determine the insurer's coverage obligations.

2. In *Faith Technologies, Inc. v. Fid. & Deposit Co. of Maryland*, 2012 WL 4476541, No. 10-2375-KHV (D. Kan. Sept. 27, 2012), following plaintiffs' attempts to enforce liens against the contractor and surety, the District of Kansas found that pursuant to the pay-if-paid clause in the contract between the contractor and subcontractors, the contractor did not have to pay its subcontractors since it had not been paid by the owner. The Court also ruled that the surety was not liable, because the surety could only be liable to the extent of the general contractor.

3. In *VHC Van Hoecke Contracting, Inc. v. Murray & Sons Constr. Co., Inc., et al.*, No. 106,603, 2012 WL 2326027 (Kan. Ct. App. June 15, 2012), the Kansas Court of Appeals interpreted the Kansas Fairness in Public Construction Contract Act ("KFPCA"), K.S.A. § 16-1901, et. seq. The KFPCA requires payment to subcontractors, including retainage, of undisputed amounts within seven business days of receipt of payment from the owner. Interest and attorney fees will accrue if the contractor fails to pay undisputed amounts.

In *Van Hoecke*, the contractor waited more than 8 months to pay the subcontractor's retainage. The contractor initially claimed lien release deficiencies as justification to withhold payment, but eventually admitted it had the lien releases. Regardless, the contract between the contractor and subcontractors required that the subcontractor provide receipts of payments made downstream, but did not require lien waivers. If receipts were lacking, then the contractor could pay the lower-tier subcontractors/suppliers directly. Because lien waivers were not a contractual basis to withhold retainage the court found that there was no real "dispute." The court concluded: "[A contractor] can't create a "good-faith dispute" based on its own

mishandling of paperwork that wasn't even contractually required." The subcontractor was granted 18 percent interest from the date retainage was due and its attorney fees allocated to the successful collection claims.

The court also addressed quantum meruit claims for extra work (similar to unjust enrichment claims). Those were outside the contract, unliquidated, and thus not subject to the KFPCA. The court expressed doubts but left open the issue of whether an oral or implied-in-fact contract for extra work could be subject to the KFPCA protections.

4. In *Neighbors Constr. Co., Inc. v. Woodland Park at Soldier Creek, LLC*, 284 P.3d 1057 (Kan. Ct. App. Aug. 3, 2012), the general contractor attempted to confirm an arbitration award as to a payment dispute and the project owner filed an application to vacate or modify and correct the award. The court held that the arbitrator did not exceed authority when the arbitrator ruled that an architect's decision was not final, because the contract language did not delineate it as final. The arbitrator ruled that such architect decisions were only a condition precedent to arbitration and such clause would not be necessary if the architect's decision was meant to be the final authority. The Court also ruled that the arbitrator did not exceed his power by ruling that the project owner's nonpayment of $200,000 was a material breach of contract and awarded the general contractor attorney fees and interest.

Legislation:

1. H.B. 2429, State Educational Institution Project Delivery Construction Procurement Act. K.S.A. §76-7,125 et seq. The bill removes the expiration date on the State Educational Institution Project Delivery Construction Procurement Act. The Act applies to university construction projects and services funded completely with non-state money. The bill makes the Board of Regents' ability to provide their own services for design and construction permanent. The Board of Regents can use the Department of Design, Construction and Compliance for code review only. The bill became effective July 1, 2012.

2. H.B. 2455. A substitute for H.B. 2455, Long Term Study. The bill requires the Kansas Department of Transportation to meet with the public and interested stakeholders about the long-term feasibility of relying on the motor fuel tax as the primary method for funding the state's highway maintenance and construction program, and as a major contributor of state aid to local government transportation budgets. KDOT must report its findings and recommendations to the Governor and Legislature by January 1, 2014.

3. S.B. 301, An Act Concerning the State Board of Technical Professions Relating to Terms of Members. K.S.A. § 74.7006. The bill staggers the terms of membership for specific positions on the Kansas State Board of Technical Professions to allow more orderly replacements when the respective terms expire. The bill became effective on April 12, 2012

4. S.R. 1804, A Resolution Concerning Transportation; Requesting a Multi-Year Federal Transportation Funding Program at Current Funding Levels. The resolution asks Congress to pass a comprehensive multi-year plan to fund highway construction that maintains current funding levels. The resolution was adopted February 2, 2012 and enrolled on February 7, 2012.

5. S.R. 1805. A Resolution Supporting Livable Streets Policies. The resolution encourages state and local owners to include more pedestrian and bike infrastructure, improve safety for those groups, and encourage developments that facilitate less use of automobiles.

The resolution was adopted as amended on February 23, 2012 and enrolled on February 24, 2012.

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Kentucky

Case Law:

1. In *Wehr Constructors, Inc. v. Assurance Co. of America*, 2012 WL 5285774, No. 2012-SC-221-CL (Ky. 2012), a hospital purchased from insurer a "builder's risk" insurance policy. The hospital contracted with Wehr Constructors for the installation of the subsurfaces and floors as part of its project. After installation, a portion of the floors and subsurface performed by Wehr was damaged. The Hospital sought compensation under the builders risk policy; the insurer denied the claim.

Wehr and the Hospital, meanwhile, settled on Wehr's breach of contract claim. As part of the settlement, the Hospital assigned to Wehr any claim the Hospital had against the insurer arising out of the policy. Wehr, as the Hospital's assignee, sued the insurer in federal district court. Assurance moved for judgment on the pleadings, invoking the policy's anti-assignment provision, arguing that it had not consented to the assignment. The district court requested certification to answer a question of Kentucky law.

The Kentucky Supreme Court concluded that under Kentucky law, a clause in an insurance policy that requires the insured to obtain the insurer's prior written consent before assigning a claim for an insured loss under the policy is not enforceable or applicable to the assignment of a claim under the policy, where the covered loss occurs before the assignment. Further, such a clause would, under those circumstances, be void as against public policy.

2. In *TECO Mechanical Contractor, Inc. v. Com.*, 2012 WL 975732, No. 2009-SC-000821-DG (Ky. 2012), the Kentucky Supreme Court held that the Kentucky Prevailing Wage Act, as applied to a subcontractor, does not violate due process. The subcontractor was not deprived of a property interest as the Labor Cabinet must use the courts to obtain the back wages and civil penalties. Also, the subcontractor was not deprived of its liberty interest when the Labor Cabinet informed the prime contractors of the subcontractor's alleged violation, thereby impugning the subcontractor's reputation. The allegations did not amount to a protected liberty interest under Supreme Court jurisprudence. Finally, the Kentucky Supreme Court held that the prevailing wage delegating alleged legislative or judicial authority to the Labor Cabinet is not an improper delegation of legislative powers.

3. In *Martin v. St. Joseph Hospital System, Inc.*, 2012 W.L. 4036997 (Ky. App. 2012), the court held that a general contractor is liable for unsafe lighting on a temporary walkway until the owner of the project accepts the work. At the request of the owner, the general contractor built a walkway to the parking lot. The contractor put in temporary lighting which turned on with the permanent lighting fixtures of the parking lot; however, an employee fell and suffered a severe shoulder injury before the lights were activated.

The general contractor built the stairway in a workmanlike manner; the fall did not occur because of any defect in the stairway's construction. The issue was whether the general

contractor had to ensure that the stairway was adequately lit and if so, whether the general contractor could rely on the presence of the owner's existing lighting.

The court rejected the assertion that the general contractor's only duty was to construct the stairway in a workmanlike manner. The general contractor could not rely on the owner's lighting. The court adopted Section 384 of the Restatement of the Law of Torts, Second, which provides that when someone builds any structure on land owned or possessed by another, the builder is subject to the same liability as the possessor of land for any physical harm caused to others on the land by any condition while the work is in its charge. Because the hospital had not accepted the stairway, the contractor had the same liability as the hospital owner, imposed the same duty on the contractor to prevent harm as it did on the property owner, and imposed the same duty to provide adequate lighting.

4. In *In re Rust of Kentucky, Inc.*, 464 B.R. 748 (Bankr. W.D. Ky. 2012), an excavation subcontractor established the project suffered from a differing site condition of an artesian condition, exacerbated by unusually wet weather. The court held that the termination of an excavation subcontractor for project abandonment was wrongful where the subcontractor was working diligently in the face of a differing site condition, which the contractor refused to acknowledge. Where water inundation, caused by a combination of an artesian differing site condition and unusually wet weather, led the excavation contractor to incur costs double its estimate, the court awarded damages using a modified total cost method.

5. In *McBride v. Acuity*, 2011 U.S. Dist. LEXIS 141498 (W.D. Ky. 2011), the court held that because a homebuilder has control over the construction of a house, either directly or indirectly, through the subcontractors it chooses, the subcontractor's defective work is not an occurrence under the commercial general liability (CGL) policy. After an incident, a homeowner filed suit against the contractor and subcontractor. The homeowner asserted violations of the Kentucky Building Code, negligence, breach of the implied warranty of habitability, and fraud. At the time the complaint was filed, the contractor was insured under a CGL policy. The CGL policy contained a provision which stated the insurance policy was only applicable if the bodily injury or property damage was caused by an "occurrence." The contractor demanded a defense under the CGL policy, but the insurer denied coverage for the homeowner's claims and declined to defend the contractor in the action. The contractor then filed this action for a declaration of rights against the insurer. The insurer moved for summary judgment.

The court held that a claim for faulty workmanship was not an occurrence under a CGL policy because a failure of workmanship failed to involve the fortuity required to constitute an accident. Because faulty workmanship on its own was not an occurrence under the policy, the policy afforded no coverage to the contractor for the claims of the homeowner. The insurer's motion for summary judgment was granted.

6. In *PCR Contrs., Inc. v. Danial*, 2011 Ky. App. LEXIS 213 (Ky. Ct. App. 2011), the court held that an owner's intent to perform a personal guarantee of payment cannot form the basis of a negligent misrepresentation claim. A contractor argued that the owner's alleged statements of future intent could serve as the foundation of a negligent misrepresentation claim because negligent misrepresentation was always a lesser included claim of fraudulent misrepresentation. The court determined that the owner's intent to perform the promise could not form the basis of a negligent misrepresentation claim. The nature of the owner's alleged promise to guarantee payment to the contractor was such that either the owner knew at the time it was made that he had no intention of fulfilling it, or he intended at that time to fulfill it. Thus, if the contractor proved that the owner made a promise he never intended to carry out, the owner

did not make the promise carelessly, but rather he made it knowing it was false. The court affirmed the lower court's decision to dismiss the negligent misrepresentation claim.

7. In *Dep't of Labor v. Hayes Drilling, Inc.*, 2011 Ky. App. LEXIS 146 (Ky. Ct. App. 2011), the court held that an employer who created a work site safety hazard is liable to a third party under the Kentucky Occupational Safety and Health Act. The subcontractor was required under the contract to drill approximately 800 holes. There was no provision in the contract that obligated the subcontractor to barricade the holes. After a particular hole was completed, the subcontractor's laborer placed unmarked plywood over the hole as a temporary cover. An employee that worked for another subcontractor on-site attempted to move the plywood and fell into the hole.

The subcontractor argued it was not obligated under its contract with the general contractor to barricade the holes and thus, had no responsibility for the violation. The Kentucky Occupational Review Committee (committee) argued under the multi-employer work site doctrine (doctrine), it was obligated to adequately cover the holes since it created the hazard. The doctrine provided that an employer who controlled or created a work site safety hazard was liable under the act, even if the employees threatened by the hazard were employees of another employer. Kentucky expressly adopted the doctrine.

In this case, the subcontractor dug a hole and placed unmarked plywood over the hole, which was a violation of the act's standards because it was not secured in place or marked as a hazard. The committee correctly argued that the subcontractor created the hazard. Since the subcontractor was obligated under the doctrine to abide by all of the act's standards, it owed a duty to the injured employee.

8. In *Dep't of Labor v. Hayes Drilling, Inc.*, 2011 Ky. App. LEXIS 146 (Ky. Ct. App. 2011), the court held that the failure to provide a contractor with a walk around opportunity does not render an OSHA citation void. The subcontractor argued the citations were void because it was not given the opportunity to attend the walk around with the inspector. The committee argued that the circuit court was in error since Federal courts have held a citation was valid even if a contractor failed to attend the walk around. Ordinarily, a citation was not rendered void if the contractor was not provided a walk around opportunity.

The appellate court emphasized that affording walk around opportunities to all contractors which were absent from the work site would pose significant impediments to the enforcement of the act's standards. In this case, the subcontractor had permanently departed the work site when the inspector conducted her investigation. The subcontractor could only have been present if it had been given advance notice. However, advance notice defeated the purpose of assuring a safe work site by an inspection conducted under the usual worksite conditions. Because the inspector had the authority to enter a worksite during regular working hours without advance notice, the citations were valid and the order of the circuit court was in error. The order of the circuit court was reversed.

Legislation:

1. H.B. 62, An ACT Relating to Filing Deeds in Lieu of Foreclosure in the County Clerk's Office. This act amends KRS 382.110, relating to the recording of deeds and instruments, to require a mortgage holder to file a deed in lieu of foreclosure with the county clerk within 30 days of the execution of the instrument's execution; amend KRS 382.990 to assess a penalty in the form of a violation of law for any mortgage holder who fails to file a deed

in lieu of foreclosure pursuant to Section 1 of the Act; amend KRS 142.050, relating to the assessment of a transfer tax on property, to exempt filing deeds in lieu of foreclosure filed pursuant to Section 1 of this Act from the transfer tax.

2. H.B. 215, An ACT Relating to Electrical Inspections and Licensure. This act repeals and reenacts all necessary sections of KRS 227.450 to 227.530, relating to electricians and electrical inspecting, as new sections of KRS Chapter 227A, relating to electrician licensure; establish permit requirements; set conditions for appointment as an electrical inspector, including removal of conflicts of interest; describe conditions where localities, including combinations of localities, may oversee electrical inspection and permitting; establish electrical inspector reporting and surety bond requirements; require the department to promulgate administrative regulations for fee schedules, inspection protocols, and reporting forms; set procedures for inspections and for dealing with work conducted without a permit; amend KRS 227A.010 to define "alteration," "commissioner," "division," "electrical inspector," and "repair"; amend KRS 227A.050 to send fees and other moneys to the department's trust and agency account for the purposes of administering and enforcing all of KRS Chapter 227A; deposit all interest accrued by the account back into the account; amend KRS 227A.130 to add electrical inspection and permitting penalties to KRS Chapter 227A; amend KRS 198B.060 to allow local government petitions for electrical permits; clarify that the state will provide a certified electrical inspector for new building approvals; amend KRS 227.205 to create the electrical division within the department; amend KRS 132.815, 211.350, and 227A.030 to conform; repeal KRS 227.450 and 227.500.

3. H.B. 358, An ACT Relating to Boiler External Piping Inspections. This act will amend KRS 236.010 to define "boiler external piping," "owner facility," "owner's piping inspector," and "independent inspection agency"; create a new section of KRS Chapter 236 to permit facilities subject to piping inspection to conduct inspections in lieu of inspections conducted by an employee of the department; provide for licensure of inspectors and independent inspection agencies through the Department of Housing, Buildings and Construction; specify requirements for licensure; specify licensure fees and license renewal procedures.

4. H.B. 421, An ACT Relating to Insurance Claims for Residential Repairs. This act creates new sections of KRS Chapter 367 to provide for a home owner's right to cancel a contract for the repair or replacement of a roof system upon a determination that the damage is not covered under applicable policies of insurance; require roofing contractors to include conspicuous notice of cancellation rights and procedures in roofing contracts; prohibit roofing contractors from requiring deposits or advance payment, except for emergency repairs necessary to protect the property from further damage, pending insurance claim determination; prohibit roofing contractors from offering or providing financial offsets or incentives against insurance policy deductibles or proceeds for use of their services.

5. H.B. 461, An ACT Relating to Fire Protection Sprinkler System Design and Installation. This act amends KRS 198B.550 to augment the definition of "fire protection sprinkler system" to include connection to the water supply and installations overhead and underground; amend KRS 198B.560 to ensure that persons engaging in the preparation of technical drawings, installation, repair, alteration, extension, maintenance of inspection of a fire protection sprinkler system are supervised by a certificate holder or an employee of a certificate holder; amend KRS 198B.990 to provide that any violation of KRS 198B.550 to 198B.630 or 198B.6401 to 198B.6417 shall be met with a $100 to $1,000 fine, with each day being a separate offense.

6. H.B. 496, An ACT Relating to Open Records. This Act amends KRS 61.870 to exclude funds derived from a state or local authority in compensation for goods or services provided by a contract obtained through a public procurement process from the determination of whether an entity is a public agency under the public records statutes.

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Louisiana

Case Law:

1. In *Greer v. Town Const. Co., Inc.*, 2011-1360 (La. App. 1 Cir. 3/23/12), 92 So. 3d 360, a dispute arose between the homeowners and the general contractor on a residential construction project concerning costs, change orders, workmanship, and timeliness issues. Pursuant to the construction contract, the contractor filed an arbitration demand for the unpaid contract balance, and the homeowners filed a counterclaim for damages in the arbitration proceeding, asking for reimbursement, repairs, and diminution in the value of their home alleging that their home had mold/mildew problems and cracks in the walls due to a structural defect in the foundation or faulty construction of the homes foundation. The arbitrator issued an award to the contractor for the full contract balance plus costs and interest, and also issued an award to the homeowners for reimbursement, repair, or replacement for its structural and foundation defect claims. The arbitrator specifically denied all other claims and counterclaims made by the parties in the arbitration. While the homeowners did request that the arbitrator modify the assessment of costs and fees that had been rendered solely against them, they did not seek any modification or correction regarding the actual merits of the arbitration award. More importantly, there was no evidence of any confirmation of the arbitration award by the district court.

Three years after the arbitration award was issued, the homeowners discovered additional cracks in the floors and walls of their home. They then filed suit against the contractor seeking damages in the form of repair costs and diminution in the value of their home as a result of an alleged defective foundation. The contractor responded by filing a peremptory exception raising the objection of *res judicata*, maintaining that the homeowners' petition should be dismissed because the claims between the parties had already been litigated through an arbitration process. The district court sustained the exception and dismissed the contractor from the lawsuit.

On appeal, the court explained that Louisiana's *res judicata* statute, La. Rev. Stat. § 13:4231, applies only when there is a "valid and final judgment" between the parties "rendered by a court." The court further noted that in the Louisiana Supreme Court's recent decision in *Interdiction of Wright*, 2010-1826 (La. 10/25/11), 75 So. 3d 893, it was held that an unconfirmed arbitration award is not a "valid and final judgment," and has no *res judicata* effect, because it was not "rendered by the court." Although the appellate court questioned the necessity of confirmation of the arbitration award based on the facts in *Greer*, particularly considering that neither party objected to or questioned the merits of the arbitration award or the finality of the award, the court nonetheless found that it was bound to follow the narrowly-decided supreme court precedent established in *Wright*. Accordingly, the court concluded that the district court erred in sustaining the contractor's *res judicata* exception based upon a prior unconfirmed arbitration award, explaining that a district court is obligated to first determine whether a valid

arbitration award was in existence and had been confirmed before considering the merits of a *res judicata* exception. Further, the district court cannot give preclusive effect to an unconfirmed arbitration award, even though the parties do not dispute the existence of or the finality of the unconfirmed award.

2. In *Jones v. Capitol Enterprises, Inc.*, 2011-0956 (La. App. 4 Cir. 5/9/12), 89 So. 3d 474, residents brought a class action against the general contractor, owner, primary insurers, and the excess insurer for damages stemming from a project to sandblast and paint a water tower. As a matter of first impression, the court was called on to decide whether an additional insured provision in the general contractor's excess liability policy that purported to restrict coverage to only liability "arising out" of the general contractor's "work" extended coverage to the additional insured (the owner) for its own negligence. Plaintiffs contended that while the owner was individually at fault, their damages also arose out of the general contractor's operations. Further, they argued that the negligence of the general contractor was paramount and the source of the owner's liability.

3. In *Mentz Const. Services, Inc. v. Poche*, 2011-1474 (La. App. 4 Cir. 3/14/12), 87 So. 3d 273, a contractor on a residential construction project filed suit against the homeowner for non-payment of funds due under the contract. In response, the homeowner filed a reconventional demand against the contractor for breach of contract and added the contractor's insurer as a third-party defendant. The insurer filed a peremptory exception of no right of action, arguing that the homeowner's reconventional demand did not satisfy the requirements of the Louisiana Direct Action Statute ("DAS"), La. Rev. Stat. Ann. § 22:655, because her claims arose out of contract, not tort.

On appeal from the district court's ruling sustaining the insurer's exception, the appellate court explained that Louisiana courts have consistently held that the "injured person" contemplated by the DAS is a person injured as a result of tortious conduct and not one injured as a result of breach of contract. Thus, the court explained that in order to determine whether the homeowner had a right of direct action against the insurer under the DAS, the nature of the claims asserted by the homeowner had to be examined to determine whether they were based in tort or contract. The court found that although the homeowner's claims did sound in tort, they all arose arise from duties both explicitly and implicitly set forth in the contract between the parties. Therefore, the court concluded that because all of the homeowner's claims were based in contract, not tort, the DAS did not provide her a right of direct action against the contractor's insurer.

4. In *Labit v. Palms Casino & Truck Stop, Inc.*, 2011-1552 (La. App. 4 Cir. 5/9/12), 91 So. 3d 540, the plaintiff filed a personal injury action against multiple defendants after being injured in a slip and fall accident in a casino parking lot. Included among the defendants was the subcontractor responsible for renovating the casino parking lot after Hurricane Katrina. The plaintiff asserted that the subcontractor failed to paint a wheel stop, thus creating a hazardous condition. On motion for summary judgment filed by the subcontractor, the court explained that contractors owe third parties a duty to exercise ordinary care and refrain from creating hazardous conditions in the fulfillment of their contractual obligations. However, the court went on to find that the plaintiff had failed to provide any factual support for the assertion that the unpainted wheel stop created a hazardous condition. Therefore, the court found that the subcontractor was entitled to summary judgment as a matter of law.

5. In *Matherne v. Barnum*, 2011-0827 (La. App. 1 Cir. 3/19/12), 2012 WL 909703, the plaintiffs filed suit against the contractor of a bulkhead, boat slip, and deck for damages allegedly caused by the contractor's defective design and workmanship on the bulkhead. In addition to naming the actual construction company, Barnum and Barnum Construction, LLC ("Barnum LLC"), as a defendant, the plaintiffs also filed suit against Barnum LLC's sole member, Mayhew Barnum, in his personal capacity. Mr. Barnum argued that the plaintiffs could not maintain an action against him personally. However, the trial court found that Barnum LLC was "merely a sham entity" at the time that the construction contract was entered into, throughout the time when the work occurred, and afterward. Thus, the trial court found it was appropriate to pierce the corporate veil of Barnum LLC and hold Mr. Barnum personally responsible for the actions and inactions of Barnum LLC. The court went on to conclude that Mr. Barnum had breached the contract by his failure to perform the construction contract in a workmanlike manner.

On review by the appellate court, the court explained that although Louisiana statutory law found in La. Rev. Stat. § 12:1320(B) insulates a member of a limited liability company from personal liability for a debt or obligation of the limited liability company, Subsection D of this same statute provides a cause of action against a member of a limited liability company because of any breach of professional duty, as well as for any fraud or other negligent or wrongful act by such person. Thus, La. Rev. Stat. § 12:1320 was not intended to shield professionals from liability for personal negligence. Applying this reasoning, the court concluded that Mr. Barnum was not acting solely in his capacity as a member of the limited liability company when he designed and constructed the work for the plaintiffs, but rather he was engaged in the construction profession. The court further held that pursuant to La. Rev. Stat. § 12:1320(D), Mr. Barnum was subject to personal liability arising from his own negligence in performing the construction. Notably, unlike the ruling of the trial court, the appellate court's finding of personal liability on the part of Mr. Barnum was based on Mr. Barnum's negligence in performing his professional duties, and not on a veil piercing theory.

6. *Jefferson Door Co., Inc. v. Cragmar Const., L.L.C.*, 2011-1122 (La. App. 4 Cir. 1/25/12), 81 So. 3d 1001, demonstrates the importance of complying with the strict requirements of the Louisiana Private Works Act when filing a statement of claim or privilege. There, the plaintiff furnished materials to the contractor on a residential construction project. Although the contractor was paid by the owner in accordance with the contract, the contractor failed to pay the plaintiff for the materials. The plaintiff filed a Private Works Act statement of claim and privilege against the owner's property in the Orleans Parish mortgage records, and subsequently filed suit to enforce its claim and privilege.

The owner sought to have the claim and privilege cancelled on grounds that the plaintiff's statement of claim and privilege failed to meet the requirements of the Private Works Act, particularly with respect to the requirement in La. Rev. Stat. § 9:4822(G)(4) that the statement of claim and privilege "reasonably itemize the elements comprising it including ... material supplied ...." The plaintiff's statement of claim and privileged described the materials supplied as "certain materials consisting of but not limited to trim, millwork, etc." Additionally, attached to the statement of claim and privilege was an Itemized Statement of Account that stated the plaintiff provided "various materials" that would be "more particularly itemized on the attached invoices." However, the referenced invoices were not attached.

In finding that the plaintiff's statement of claim and privilege failed to meet the strict requirements of the Private Works Act, the court explained that the plaintiff's description of the materials supplied was not a reasonable itemization of materials as required by the Private

Works Act. The court further explained that, although the attached Itemized Statement of Account indicated that the materials supplied would be more particularly itemized on attached invoices, the referenced invoices were not attached, and without them, the statement of claim was inadequate to preserve the plaintiff's Private Works Act claim or privilege. Finally, the court concluded that the plaintiff's failure to fulfill the legal requirements was not a mere technical defect and, therefore, the plaintiff's claim and privilege was invalid.

Legislation:

1. Act 142 Amends and Reenacts La. Rev. Stat. § 38:2212.10 to Clarify the Scope of the Application of E-Verify to Contracts for Public Works. Louisiana Revised Statute § 38:2212.10 was only recently enacted by Act 376 of the 2011 legislative session. The 2011 version of the statute required that any private employer who submits a bid or otherwise contracts with a public entity for the physical performance of services within the state of Louisiana must verify in a sworn affidavit that: (1) the employer is registered and participates in a status verification system to verify that all employees in the state of Louisiana are legal citizens of the United States or are legal aliens; and (2) that the employer will continue to utilize that system throughout the duration of the contract. The employer must also require all subcontractors to submit a similar affidavit about their employees. Failure to provide and obtain the sworn affidavits that the employer contracted with the state entity may result in the cancellation of any public contract and make the employer ineligible for any public contract for a period of not more than three years from when the violation is discovered.

While the 2011 version of La. Rev. Stat. § 38:2212.10 referred to "public contract work" and required all "private employers" bidding on or otherwise contracting with a public entity for "the physical performance of services within the state of Louisiana" to comply with E-Verify, the statute failed to define those terms. Therefore, it was unclear whether La. Rev. Stat. § 38:2212.10 also applied to professional services, such as those offered by architects and engineers, since those professionals are "private employers" who arguably engage in the "physical performance of services" in relation to public contract work. Act 142 amends and reenacts La. Rev. Stat. § 38:2212.10(F) to clarify the scope of the statute's application by providing that its requirements only apply to "contracts for public works," which means "the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity." Based on this definition, it now appears unlikely that the statute applies to architects and engineers, since they generally do not engage in the actual erection, construction, alteration, improvement, or repair aspects of contracts for public work.

2. Act 394 Amends the Time for Filing a Suit to Enforce a Private Works Act Claim or Privilege Set Forth in La. Rev. Stat. § 9:4823(A) to require a claimant under the Private Works Act to file suit to enforce his claim or privilege within one year after filing his statement of claim or privilege. Prior law required the claimant's suit to be filed within one year after the expiration of the time period established by La. Rev. Stat. § 9:4822 (which could be 30, 60, or 70 days depending on the classification of the claimant). Therefore, it was possible for a claimant to have more than a year from the date his statement of claim or privilege was filed in which to file a lawsuit to enforce the claim or privilege. For example, if the claimant had 60 days in which to file his statement of claim, but he actually filed the statement in 30 days, under the prior law he would have one year plus 30 days to file his lawsuit to enforce the claim. Under the new law, the claimant must file his lawsuit within one year from the date he filed his statement of claim.

Act 394 also amends and reenacts various sections of the Private Works Act, including La. Rev. Stat. §§ 4831, 4833, 4835, 4862, 4865, 4872, and 4885, to replace the term "notice of *lis pendens*" with "notice of pendency of action," in order to allow for terminological consistency throughout the Private Works Act and with the notice of the pendency of an action provided for in La. Code Civ. Proc. arts. 3751-3753.

3. Act 425 Amends La. Rev. Stat. § 9:4820 of the Private Works Act, Addressing the No-Work Affidavit and the Effective Date of Private Works Act Privileges. Pursuant to La. Rev. Stat. § 9:4820(A)(1), privileges under the Private Works Act can arise and are effective as to third parties when work is begun by placing materials at the site of the immovable to be used in the work or conducting other work at the site of the immovable the effect of which is visible from a simple inspection and reasonably indicates that the work has begun. This privilege is preserved, and therefore maintains its effectiveness as against third parties, upon the timely filing of a proper statement of claim and privilege. The fact that Private Works Act privileges can arise and take effect as a result of the mere placement of materials or performance of work raises concern for potential construction mortgagees who want to be sure their mortgage takes priority over other encumbrances, including Private Works Act privileges. Louisiana Revised Statute § 9:4820 addresses this problem by providing that a person acquiring or intending to acquire a mortgage, privilege, or other real right in immovable property may conclusively rely upon an affidavit made by a registered or certified engineer or surveyor, licensed architect, or building inspector employed by the city or parish or by a lending institution chartered under federal or state law that states he inspected the immovable at a specified time and work had not then been commenced nor materials placed at the site (the no-work affidavit), provided that the affidavit is filed before or within four business days after the execution of the affidavit, and the mortgage, privilege or other document creating the right is filed before or within four business days of the filing of the affidavit. La. Rev. Stat. § 9:4820(C).

The question that arises under the La. Rev. Stat. § 9:4820 is what happens if work commences or materials are placed in the potential four day window between the filing of the no-work affidavit and the filing of the construction lender's mortgage? This potential gap created the possibility that a construction lender's mortgage could be inferior to a construction lien if work began or materials were delivered during this four day window. Act 425 addresses this issue by adding new Subsection (D) to La. Rev. Stat. § 9:4820, which provides that a mortgage, privilege, or other right under La. Rev. Stat. § 9:4820(C) shall have priority in accordance with La. Rev. Stat. § 9:4821, so long as the document creating the right is filed within four business days of the filing of the no-work affidavit, regardless of whether work began or materials were delivered to the job site after the effective date and time of the affidavit, but prior to the actual recordation of the mortgage, privilege, or other right. Thus, Act 425 now makes it clear that the lender's mortgage will take priority provided that it is filed within four business days of the filing of the no-work affidavit, thus eliminating the potential gap created by the prior law.

4. Acts 684 and 780 Amend La. Rev. Stat. § 9:2780.1, Which Generally Prohibits Clauses in Construction Contracts that Require the One Party to Provide Indemnity to a Third-Party for that Third Party's Own Fault. However, these Acts are in conflict by having enacted different versions of the same subsections. Act 684, which became effective June 7, 2012, amends and reenacts Subsections (A)(2)(a) and (5), (B), (C) and (D), and enacts a new Subsection (G). Act 780, which became effective on August 1, 2012, amends and reenacts a different version of Subsection (A)(2)(a) and (G), and enacts a new Subsection (H).

Act 684's version of Subsection (G) contains two subparts, both of which provide for indemnity in construction contracts under certain circumstances. Act 684's Subsection G(1) provides that nothing in La. Rev. Stat. § 9:2780.1 shall invalidate or prohibit the enforcement of any clause in a construction contract containing the indemnitor's promise to indemnify, defend, or hold harmless the indemnitee if the construction contract also requires the indemnitor to obtain insurance to insure the obligation to indemnify, and there is evidence that the indemnitor recovered the cost of the required insurance in the contract price. The indemnitor's liability under such a clause is limited to the amount of the proceeds that were payable under the insurance policy that the indemnitor was required to obtain. Act 684's Subsection G(2) further provides that nothing in La. Rev. Stat. § 9:2780.1 shall invalidate or prohibit any clause in a construction contract that requires the indemnitor to procure insurance or name the indemnitee as an additional insured on the indemnitor's policy of insurance, but only to the extent that such additional insurance coverage provides coverage for liability due to an obligation to indemnify, defend, or hold harmless authorized pursuant to Subsection G(1), and provided that such insurance coverage is provided only when the indemnitor is at least partially at fault or otherwise liable for damages ex delicto or quasi ex delicto.

Act 780's version of Subsection (G) addresses a completely different topic than Act 684. It provides that nothing in La. Rev. Stat. § 9:2780.1 shall prohibit a motor vehicle operator from securing uninsured motorist coverage. Act 780's new Subsection (H) further provides that nothing in La. Rev. Stat. § 9:2780.1 shall prohibit any employee from recovering damages, compensation, or benefits under workers' compensation laws or any other claim or cause of action.

Acts 684 and 780 also enact contradictory changes to Subsection (A)(2)(a), which previously defined a "Construction contract" as "any agreement for the design, construction, alteration, renovation, repair, or maintenance of a building, structure, highway, road, bridge, water line, sewer line, oil line, gas line, appurtenance, or other improvement to real property, including any moving, demolition, excavation…" Act 684 amends Subsection A(2)(a) to remove agreements for the design, repair, or maintenance of a building, structure, etc. from the statutory definition of a "Construction contract." Act 684 also adds agreements for the repair or maintenance of a highway, road, or bridge as part of the definition of a "Construction contract." Act 780, on the other hand, continues to include agreements for the design, repair, or maintenance of a building, structure, etc. in the definition of a "Construction contract" covered by La. Rev. Stat. § 9:2780.1, and simply adds agreements for the repair or maintenance of a highway, road, or bridge as part of the statutory definition.

Because these seemingly contradictory Acts were enacted in the same legislative session, it was initially unclear which Act would take precedence. The Louisiana Supreme Court has held that if two acts relating to the same subject matter are passed in the same legislative session, "they are to be construed together, if possible, so as to reconcile them, giving effect to each, and thereby avoid an implied repeal, rather than to infer that one destroys the other." City of New Orleans v. Board of Supervisors of Elections for the Parish of Orleans, 43 So. 2d 237, 247 (La. 1949). Thus, the two conflicting Acts should be read together if possible, so that both are applied and given effect. Further, only Act 780 contained a clause providing that the provisions of Act 780 "shall supersede and control to the extent of conflict with the provisions of any other Act of the 2012 Regular Session of the Legislature regardless of the date of enactment." Accordingly, to the extent the Acts conflict, Act 780 should prevail.

The final version of La. Rev. Stat. § 9:2780.1 appears to have been prepared in recognition of these principles, as the amended statute incorporates the amendments of both Acts to the extent they were not in conflict, and where in conflict, Act 780 prevailed. Specifically, because Acts 684 and 780 provided for conflicting definitions of "Construction contract" in Subsection A(2)(a) of La. Rev. Stat. § 9:2780.1, the current version of the statute contains the definition of "Construction contract" provided for in Act 780. Therefore, La. Rev. Stat. § 9:2780.1(A)(2)(a) continues to include agreements for the design, repair, or maintenance of a building, structure, etc. in its definition of a "Construction contract." Likewise, the current version of La. Rev. Stat. § 9:2780.1 contains Act 780's Subsections (G) and (H). However, Act 684's Subsections (G)(1) and (G)(2) also found their way into the current version of the statute as Subsections I(1) and I(2).

5. Act 762 Amends and Reenacts La. Rev. Stat. § 9:2772(A) to Provide a Limited Exception to the Statute's Five Year Preemptive Period. La. Rev. Stat. § 9:2772(A) generally provides that no action, whether *ex contractu*, *ex delicto*, or otherwise arising out of an engagement of planning, construction, design, or building of immovable or movable property shall be brought against any person performing or furnishing land surveying, design, planning, supervision, inspection services, or observation of construction or services for construction of immovables or improvement to immovable property, including a residential building contractor, more than five years after the date of registry in the mortgage office of acceptance of the work by the owner, or more than five years after the owner has taken possession of the improvement. Under the previous version of La. Rev. Stat. § 9:2772, this five year preemptive period extended to every demand arising under the statute, whether brought by direct action, contribution, indemnity, or third-party demand, and whether brought by the owner or by any other person.

Act 762 adds La. Rev. Stat. § 9:2772(A)(1)(c), which provides a limited exception to the five year preemptive period found in La. Rev. Stat. § 9:2772(A) in that if, within 90 days of the expiration of the five year preemptive period, a claim is brought against any person or entity included under Subsection (A), then that person or entity has 90 days from the date of service of the main demand or, in the case of a third-party defendant, 90 days from service of process of the third-party demand, to file a claim for contribution, indemnity, or a third-party claim against any other party.

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Maine

Case Law:

1. In the companion cases of *BlueTarp Fin., Inc. v. Melloul-Blamey Constr. S.C. Ltd.*, 2012 U.S. Dist. LEXIS 26950 (Mar. 1, 2012) and *BlueTarp Fin., Inc. v. Matrix Constr. Co.*, 2012 U.S LEXIS 22199 (Feb. 22, 2012), the United States District Court of the District of Maine dismissed the complaints of BlueTarp Financial, Inc. against Melloul-Blamey Construction ("M-B") and Matrix Construction ("Matrix") for lack of personal jurisdiction over the defendants. M-B and Matrix, both construction companies with a primary place of business in South Carolina, entered into agreements to purchase supplies from a company called Contract Supply. Contract Supply required both M-B and Matrix to open BlueTarp credit accounts as a condition

of purchasing supplies from it. The BlueTarp account application included a choice of law provision providing that the parties could bring suit in the "courts of the State of Maine."

The District Court concludes that the choice of forum provision was permissive and that the phrase "courts of the State of Maine" referred only to Maine state courts and not the United States District Court located in Maine. Finding the forum selection provision to be inapplicable, the District Court employed the standard diversity jurisdictional analysis, concluding that neither M-B nor Matrix has sufficient minimum contacts with Maine to justify the District Court's exercise of personal jurisdiction. In both cases, the District Court concluded that the nexus of facts was in South Carolina, not Maine, and that the sporadic contracts with Maine were insufficient because they were initiated by BlueTarp.

2. In *Witham Family Ltd. P'ship v. Town of Bar Harbor*, 2011 ME 104, 30 A.3d 811, the Maine Supreme Judicial Court, sitting as the Law Court, vacated a lower court's decision dismissing the Witham Family Limited Partnership's (the "Partnership") complaint for lack of standing. The Partnership's complaint arose out of the granting of a permit to developer North South to construct a hotel on property abutting Partnership's land. Prior to obtaining the permit, Bar Harbor's Zoning Board of Appeals conducted two public hearings attended by the Partnership's attorney. The attorney voiced his opposition to the project "as a member of the public" and "never explicitly state[d] that he was there on behalf of the Partnership." After conducting the hearings, the Board remanded the case back to the Planning Board with instructions to issue North South's construction permit.

The Partnership then filed a complaint in Maine Superior Court challenging the Board of Appeals' decision. On North South's motion, the Superior Court dismissed the complaint finding that Partnership's failure to oppose North's South appeal as a "party" and particularize its injury stripped the it of its standing.

In vacating the lower court's decision, the Law Court found that Partnership had standing under 30-A M.R.S. § 2691(3)(G) (2010). Under Section 2691, the Law Court explained that a "party" has standing to pursue a Rule 80B appeal if it has 1) appeared before the board of appeals and 2) particularized its injury. The Court held that, despite the attorney's not specifically stating that he was there on their behalf, as a result of his appearance at the hearings, it should be inferred that it was for the benefit of the Partnership. Likewise, the Court found that as a result of North South's successfully obtaining a permit, an opportunity for continuing injury was created against the Partnership. With both factors satisfied, the Court ruled that the Partnership had standing to challenge the decision.

3. In *Cookson v. Liberty Mut. Fire Ins. Co.*, 2012 ME 7, 34 A.3d 1156, the Supreme Court, sitting as the Law Court, affirmed a lower court's judgment holding that the homeowner's insurance policies excluded an item of heavy construction machinery from loss coverage. In 2007, the homeowner's Case 590 tractor was destroyed by fire while parked on his father's property. The homeowner filed a claim for loss under his homeowner's policy issued by Liberty Mutual. According to the policy, "[m]otor vehicles or all other motorized land conveyances" were excluded from coverage. In addition, the policy contained an exception to its general exclusion that provided coverage for vehicles or conveyances "not subject to motor vehicle registration" which were used "to service an insured's residence." After Liberty Mutual denied the homeowner's claim for coverage under the policy, he sought judicial relief to assess whether the tractor could be covered by the policy.

The Law Court held that the tractor was not the type of vehicle that falls within the limited exception for "vehicles not subject to motor vehicle registration." In doing so, the Court found that the item of heavy construction machinery was not the type of vehicle a homeowner would commonly purchase and employ to simply service one's residence. As a result, the Court affirmed the lower court's determination that the heavy construction machinery was not covered by the homeowner's insurance policy.

4. In *Dunlop v. Town of Westport Island*, 2012 ME 22, 37 A.3d 300, the Supreme Judicial Court, sitting as the Law Court, affirmed an order of the lower court that affirmed the Westport Island Board of Appeals (the "Board') decision to issue a building permit to Plaintiff's neighbor to construct a residential dwelling. The question before the Law Court was whether there was enough evidence before the Board to support a finding that the property was over two acres, thus in accordance with the Town's zoning ordinance. The answer to the question was, in part, dependent on whether the road/driveway portion of her neighbor's lot could be included in the square acreage calculation.

The Law Court, reviewed the Board's interpretation of its zoning ordinance de novo, however afforded the Board's ultimate characterization substantial deference. In assessing the Board's characterization, the Law Court agreed with the ultimate decision by the Board, but arrived at its answer through different analysis. The Law Court found the language of the ordinance controlling, which conclusively provided that the road portion of the neighbor's lot should be included in the calculation. By including the road portion in the calculation, the Law Court held that the Board had sufficient evidence to support a finding that the property contained more than two acres.

5. In *Jim's Plumbing & Heating, Inc. v. Michael Salvaggio*, 2012 Me. Super LEXIS 9 (Jan. 10, 2012), the Maine Superior Court entered judgment in favor of a contractor for his claims of breach of contract, *quantum meruit* and fraud against a real-estate development company and its sole owner. The contractor's claims arose out of the defendant developer's continued failures to pay for plumbing and HVAC installation work the contractor performed in connection with a renovation project of an old church. When the contractor voiced his concerns over non-payment, the developer solicited a letter from his bank, in which he fraudulently represented to the contractor that additional financing was on the way from which he would be paid. Around the same time, the developer proposed to the contractor that in order to secure the additional funding and to keep the project going, he needed an additional lease in his building. The developer proposed leasing a portion of the building to the contractor, in which the contractor would then renovate it. Once additional financing had been obtained, the developer proposed that he would then lease the unit back from the contractor, paying a premium on the monthly rent amount. Over the course of the next year, the contractor provided additional HVAC and plumbing work, paid monthly rent payments of $3,000, and renovated his leased portion of the building. Unbeknownst to the contractor, there was no additional financing on the way. After the contractor and developer got into a disputed about the building, the developer locked the contractor out, and attempted to evict him. The contractor then filed a mechanics lien and commenced this instant law suit.

In ordering that the contractor prevailed on his claims, the Court found, by clear and convincing evidence, that the developer made material false representations to the contractor, with knowledge of their falsify, for the purposes of inducing him to provide additional work and payments of rent, and that the contractor was justifiable in relying on them. The court ordered both compensatory and punitive damages and held that the corporate veil of the developer could be pierced in order to hold the owner personally liable. Lastly, the Court found that

because the bank had knowledge of the project and was aware that the plumbing and HVAC renovations were being done by plaintiff, it should be inferred that, as mortgagee, they consented to work perform. As a result of consenting to the work, the Court ruled that his mechanics lien would take priority over the bank's mortgage, and any other interest of the developer.

6. In *Maillet v. Anderson*, 2011 Me. Super. LEXIS 154 (June 2, 2011) the question before the Court was whether a contractor, hired to provide a septic inspection on behalf of a potential buyer, had a duty of care to a third-party seller of a home for purposes of liability under a claim of negligence or negligent misrepresentation. The case arose after the inspector hired by the buyer issued a report stating that the septic system "Failed-Flooded." As a result of the report, the potential buyer exercised their option to terminate the purchase and sale agreement. After the seller sold the house to another buyer for a lessor amount, the seller sued to recover the difference in the purchase price.

After finding that no contractual relationship existed between the third-party seller and the inspector hired by the buyer, the Court then turned to the negligence claim, and specifically whether a duty existed. In order to have a negligent representation claim against the inspector, the Court explained that the seller would have had to justifiably relied on his information. The Court, however, found the exact opposite was true under this situation. Because seller was trying to discredit the report, not rely on it, the Court found that the seller was could not be expected to justifiably relying on the findings of the report. Consequently, the Court found that the inspector was under no obligation for the benefit of seller, and held that he owed the third-party seller no duty.

7. In *Moore v. Erickson & Ralph, Inc. d/b/a Ralph's Home Sales*, 2011 Me. Super. LEXIS 159 (May 3, 2011), the Maine Superior Court granted both defendants' motions for summary judgment based on a valid statute of limitations defense. The case arose out of plaintiff homeowner's purchase of a modular home package from defendant Ralph's Home Sales in early 2004. The package included, but was not limited to, the construction of a foundation, backfill, drainage, excavation, as well as a modular home to be built to specification by defendant M.M.H. Prestige Homes, Inc. Within a year of moving into their home, the homeowner notified Defendants' of an apparent defective roof and cracked foundation wall. Over the course of the next five years, the homeowner continued to make complaints about problems with the roof and foundation. When the problems were not fixed, the homeowner's brought suit in April 2010 asserting, among other claims, negligence, breach of contract, and breach of warranty.

The Court, in granting the motion for summary judgment claims, first found that the homeowner's breach of contract and warranty claims against defendants were untimely under the 4-year statute of limitation period provided in the U.C.C. In making such finding, the Court ruled that the any breach occurred on the day the house was delivered and the contract was closed. Accordingly, any claim should have been filed in early 2008; not in April 2010. Likewise, the Court found that the warranty provisions contained within the modular home's owner's manual and distributors service policy called for only 1-year of warranty protection. In view of that, plaintiff should have brought its warranty no later than March, 2005.

For the remaining claims, defendants' contended that plaintiffs were barred by Maine's standard six-year statute of limitation for civil actions. Based on the date that the injury occurred, which according to the Court was the day the contract closed, the Plaintiffs should have brought their claims no later than early March 2010. Over plaintiffs' assertion that

defendants' actively concealed the defects, the Court found that no issue of genuine material fact existed to prevent it from finding that the complaint was untimely. As a result, the Court entered summary judgment on behalf of defendants.

8. In *D.L. Overlock Excavation v. Cushing Holdings, LLC*, No. RE-06-01 (Me. Super. Ct. Knox Cty. May 31, 2011), plaintiff-contractor brought an action against defendant developer claiming that he was owed money under a contract for the construction of several roads. The developer counterclaimed, arguing that it had actually overpaid the contractor for the services rendered, and sought to recoup those additional payments. The Court agreed with the developer after finding that the contractor had overstated significantly the materials used, and miscalculated the payment-structure in disagreement with the contract. The Court also found that the contractor was liable for a portion of defects in the road.

Additionally, the developer asserted that the contractor did not meet its contractual deadline for the project, and as a result was subject to the liquidated damages provision of their contract, which required that he pay $600. The contractor argued that he did not extend beyond the contractual deadline because no deadline was actually set as a result of additional work added to the original contract, specifically the construction of three-additional roads, a tennis Court, driveways, and three septic systems. In assessing the liquidated provision, the Court first agreed with the contractor's contentions that a new deadline was never set. In doing so, the Court stated its reluctance to even suggest a date at which liquidated damages could be assessed. Furthermore, the Court found that the developer had not even proved "any actual damages, such as lost sales" as a result of the "length of time" the contractor worked on the problem. As a result, the Court found that it was not entitled to damages, liquidated or otherwise, due to any delays in the contractor's performance.

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9. In *Thayer Corp. v. Maine School Administrative District*, 2012 ME 37, 38 A.3d 1263, the Maine Law Court upheld summary judgment against Thayer's mechanic's lien claim because the alleged improvement was never intended to be a permanent part of the School District's real property. In *Thayer*, the School District had a contract with WoodFuels for the installation of a heating system at the high school. WoodFuels was to provide the high school with metered heat energy and hot water through on-site biomass equipment owned at all times by WoodFuels and not the School District. When the agreement terminated, WoodFuels was required to remove the on-site biomass equipment. Thayer was a subcontractor of WoodFuels hired to install the on-site biomass equipment.

Under Maine Law, mechanic's liens are appropriate only on fixtures. Here, though the on-site biomass equipment was annexed to the building in which it was housed on the School District's property and was adapted to the needs of the school, the on-site biomass equipment was never objectively intended to be a permanent part of the real estate. Therefore, the on-site biomass equipment was not a fixture and the School District's property was not lienable for work related to the on-site biomass equipment.

10. In *U.S. f/u/b/o Maverick Construction Management Services, Inc. v. Consigli Construction Co., Inc.*, No. 2:12-cv-023-NT, 2012 WL 2001619 (D. Me. June 5, 2012), the Maine Federal District Court held that the though Maine Law Court has not definitively ruled on the validity of unilateral arbitration clauses, the Federal Court "thinks it unlikely that Maine will hold that such clauses are generally void for lack of mutuality or consideration." In *Maverick*, Maverick Construction Management Services, Inc. served as a subcontractor to Consigli

Construction Co., Inc. on a project for the U.S. Navy requiring a Miller Act Payment Bond. The contract between Consigli and Maverick contained an arbitration clause under which Consigli could unilaterally determine whether the dispute was to be decided through arbitration or litigation. The Federal Court upheld the arbitration clause because "where a contract as a whole is otherwise supported by consideration on both sides, a unilateral arbitration provision will not be found invalid for lack of consideration."

The Federal Court also held that even if most of Maverick's claims are related to delays caused by the Navy, which could not be compelled to the arbitration, the Navy was not a necessary party because all of Maverick's claims were against Consigli, regardless of whether the Navy was ultimately at fault. Finally, the Court stayed the case against Consigli and its surety, accepting the surety's representation that the surety's liability is coextensive with Consigli's in the arbitration.

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Legislation:

1. L.D. 1648, Site Location of Development Law (125th Legis. 2012). Provides that Maine Site Location of Development law, 38 M.R.S.A. §§ 481-490 (2001 & Supp. 2011), does not apply to reuses of buildings and associated facilities in existence on January 1, 1970; provides that new construction or modification of existing ski area facilities and existing educational campuses are exempt from site review under certain conditions.

2. L.D. 1744, Carbon Monoxide Detectors (125th Legis. 2012). Provides that carbon monoxide detectors must be installed in new construction or renovations to fraternity houses, sorority houses, dormitories, hotels, motels, inns and bed and breakfasts; provides that the carbon monoxide detectors must be powered both by electrical service and batteries.

3. L.D. 1619, Maine Uniform Building and Energy Code (125th Legis. 2012). Provides that if a municipality has adopted provisions for the local enforcement of building codes that does not delineate an appeals process, appeals may be taken in the same manner as provided under Title 30-A M.R.S.A. § 4103(5) (2011); provides a municipality may adopt the Maine Uniform Building Code, the Maine Uniform Energy Code and the Maine Uniform Building and Energy Code by reference as set forth in Title 30-A M.R.S.A. § 3003 (2011); provides that if a building official is appointed by a municipality to enforce the Maine Building and Energy Code, or any portion thereof, that official must be certified in building standards under Title 30-A M.R.S.A. § 4451(2-A)(E); provides that municipal building official enforcing the Maine Building and Energy Code has a duty to inspect each building during construction for compliance unless conducted by 3rd-party inspector; provides that a building in a municipality of more than 2,000 people that have adopted or enforces the Maine Building and Energy Code may not be occupied until the municipal building official has given a certificate of occupancy.

4. L.D. 1803, Implementations of Dig Safe Work Group Recommendations (125th Legis. 2012). Provides exemption from requirements for road grading activities for private roads under certain circumstances; revises notice requirements for ground excavations in areas where there are unground facilities owned or operated by a person who is not an underground facility operator and who is not a voluntary member of the damage prevention system.

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5. L.D. 1314 (125th Legis. 2012), Standardize the Definition of "Independent Contractor." This statute makes a number of procedural changes to the workers' compensation statute, including reducing benefit amounts under some circumstances and placing to a 10-year cap on benefits; tightening eligibility requirements for unemployment compensation and imposing criminal penalties for unemployment fraud; standardizing the definition of "independent contractor" that applies to the workers' compensation and unemployment statutes; and also imposing a fine of $2,000 to $10,000 on employers that intentionally or knowingly misclassify employees as independent contractors. Some of these changes have already taken effect, but all changes will be in effect at the end of 2012.

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Maryland

Case Law:

1. In *Greenstein v. Avalon Court Six Condo.*, 201 Md. App. 186 (2011), the Maryland Court of Special Appeals held, for the first time, that condominium unit owners had a cause of action in negligence against their condominium association for the association's failure to timely pursue construction defect claims against the developer of the condominium.

2. In *Savage v. Centex/Taylor, LLC*, 2012 WL 946698 (D. Md. 2012), the United States District Court for the District of Maryland was presented with a provision in a new home sale agreement which provided that all causes of action—outside of the limited warranty—were subject to a one year statute of limitations and that those causes of action accrued no later than the date of closing. Relying on this provision, the Court held that the homeowner's claims—outside of the limited warranty—which were filed more than a year after closing were time barred. This decision allows a home builder to contractually adjust Maryland's statutory three year statute of limitations and its application of the discovery rule, which provides that causes of action generally do not accrue until a party discovers the cause or should have discovered the cause.

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3. In *MRA Property Management, Inc. v. Armstrong*, 426 Md. 83 (2012), the Court of Appeals addressed liability under the Maryland Consumer Protection Act where the party allegedly in violation of the Act is not a direct seller.

Twenty-five condominium unit purchasers sued the Tomes Landing Condominium Association, Inc. and MRA Property Management, Inc., for violation of the Maryland Consumer Protection Act (MCPA). MRA was the property management company that managed the premises. The Association was comprised of unit owners, and governed by an elected Board of Directors. Plaintiffs alleged that the MCPA was violated on the grounds that the operating budgets supplied by defendants as part of a "resale package" were misleading. They alleged

that the Association and MRA knew about various defective aspects of the property but did not indicate that these problems would require increased repair prices

The first issue before the court was whether the defendants could be liable under the MCPA for issuance of the resale certificates when they were not "sellers" of the property. This court concluded they could be liable, even if not the direct sellers, where their trade practice so "infect[ed] the sale or offer for sale to a consumer that the law would deem the practice to have been committed 'in' the sale or offer for sale," or where their disclosures were integral to the transactions.

Having concluded that the MCPA may apply to disclosures in a resale certificate where issuers were not the direct sellers of the units, defendants argued that they were nevertheless shielded from liability because their disclosures were in full compliance with the Maryland Condominium Act requirements. The court rejected this argument, finding that it does not insulate the defendants from liability. There is no conflict between the two, as the Maryland Condominium Act merely requires disclosure, while the MCPA mandates that they not be deceptive. Compliance with the former did not absolve violation of the latter.

4. In *Stalker Brothers, Inc. v. Alcoa Concrete Masonry*, 422 Md. 410 (2011), the Court of Appeals addressed the enforceability of contacts with unlicensed subcontractors and permitted, for the first time in Maryland, an unlicensed subcontractor to enforce a contract against a contractor.

Alcoa was an unlicensed subcontractor who did work on multiple projects over a multi-year period under Stalker Bros., who acted as general contractor. At first, Alcoa was paid in full, but Stalker Bros. increasingly had trouble rendering payment to Alcoa before finally filing for bankruptcy. As it had never received full payment for its work, Alcoa sought a judgment against Stalker Bros.

There is a long line of precedent in Maryland courts for the proposition that contracts made by an unlicensed entity are illegal and should not be enforced by the courts. This court, however, held that the Home Improvement Law, which requires licenses for enforcement of a contract, did not render this contract unenforceable as the law was designed to protect the *public* from unlicensed contractors and subcontractors, not to protect *contractors* from unlicensed subcontractors. It also concluded that a ruling such as this would further the policy of protecting the public, as it would reduce a general contractor's incentive to enter into contracts with unlicensed subcontractors.

The court further permitted recovery here because Alcoa, though not licensed at the time work was performed, was duly licensed at the time they filed their complaint for recovery. The court found that under the plain language of the statute, the prohibition on paying unlicensed contractors referred to the time of payment, not the time the work was performed.

5. In *Serio v. Baystate Properties, LLC*, 203 Md. App. 581 (2012), the Court of Special Appeals addressed the evidence required in order to pierce the corporate veil.

Vincent Serio, sole member of Serio Investments, LLC, hired Baystate Properties to build houses on lots owned by Serio. Payment from Serio failed to be delivered in full, however, and an agreement to give additional compensation to Baystate upon sale of the improved lots failed to materialize when Serio did not profit from the sale as he had expected. Baystate then

brought this action to recover for the work completed. The trial court entered judgment against Mr. Serio, and held him personally liable for the debts of Serio Investments.

This court reversed the trial court's decision to pierce the corporate veil. The trial court had found that the evidence did not support a finding of fraud, but that "a paramount equity" had been established and upon such a finding, fairness required piercing the corporate veil. On appeal, this court held that Maryland law is averse to piercing the veil without a showing of fraud, and that the trial court had therefore abused its discretion in holding Serio personally liable.

6. In *Baltimore County, Maryland v. Aecom Services, Inc.*, 200 Md. App. 380 (2011), the Court of Special Appeals addressed the importance of mandatory procedural change order requirements on public construction work.

Baltimore County entered into a contract with DMJM H & M, Inc., now known as AECOM Services, Inc., in which DMJM would serve as the architect on the construction of a parking structure at the Baltimore County Detention Center. The contract called for DMJM to be paid $4,516,779.16. The County sued DMJM for breach of contract and negligence, and DMJM filed a counterclaim seeking payment under the contract and for "additional services." These additional services arose from an amendment to the contract, signed by the President of DMJM, the Administrative Officer of the County and the Baltimore County Council Chairman. At trial, the jury awarded $1,653,600 to DMJM, including payment for those additional services. This appeal followed.

Firstly, the court reversed the jury's finding of damages resulting from the "additional services." The contract required that all changes must be approved in writing by the County, and any increase in contract price must be approved by the County Council. DMJM attempted to argue that no such approval was necessary for an amendment to the contract, but the court rejected this, holding that Council approval was also necessary for an amendment to the contract. Further, the court found that Maryland case law is clear that a county may contract only by methods proscribed by the legislature, and by statute, increases needed to be approved by the County Council. DMJM could not recover because they did not comply with the procedures required under the contract.

DMJM also argued that equitable estoppel should apply where both parties acted as if the contract had been validly amended. After first concluding that the issue could not validly be raised because DMJM had failed to raise it at trial, the court held that, alternatively, estoppel is inapplicable to this case. Although estoppel can be applied against municipalities in Maryland, the doctrine is applied narrowly, and does not apply to defeat adherence to strict legal requirements based on an official mistakenly exceeding his authority.

Finally, DMJM raised the issue of prejudgment interest. DMJM contended that the trial judge abused his discretion in failing to submit the question of prejudgment interest to the jury. This court disagreed, holding that where breach of contract damages are unliquidated or not reasonably ascertainable until the verdict, a party is not entitled to a discretional determination on the issue prior to the verdict.

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Legislation:

1. House Bill 890 (Washington Suburban Sanitary Commission – Pipeline Construction). This bill expands the definition of a "facilities construction contract" in the Public Utilities Article of the Maryland Code to include contracts that provide services for the construction of a pipeline. The bill now authorizes the Washington Suburban Sanitary Commission to enter into design/build contracts for pipeline construction with costs exceeding $2,000,000. The bill was approved by the Governor on April 10, 2012, and will take effect on October 1, 2012.

2. Senate Bill 272 / House Bill 1364 (Workplace Fraud Act – Revisions). This bill alters the presumption under the Workplace Fraud Act of 2009 (the "Act") that an employer-employee relationship (versus an independent contractor relationship) exists between an employer and an individual doing work for the employer. The employer may rebut the presumption by producing specified documentation for inspection, including:

- a written contract between the employer and a business entity that describes the nature of the work, describes the compensation to be paid, and acknowledges the business entity's responsibilities under the Act;

- a signed affidavit indicating that the business entity is an independent contractor who performs work for other employers;

- a certificate of good standing for the business entity from the State Department of Assessments and Taxation; and

- proof that the business entity holds all required occupation licenses for the work to be performed. The employer must also provide each individual classified as an independent contractor with the required notice and implications of such a classification. The bill will took effect on July 1, 2012.

3. Senate Bill 764 / House Bill 885 (Fraudulent Insurance Acts – Individual Sureties – Contracts of Surety Insurance). This bill provides, in part, that it is a fraudulent insurance act for an individual surety to solicit or issue a surety bond or contract of surety insurance. An "individual surety" is defined in the bill as a "person that: (1) issues surety bonds or contracts of surety insurance; and (2) does not have a certificate of insurance issued by the [Maryland Insurance] Commissioner." The bill, however, does not apply to contractors authorized to provide individual surety bonds to satisfy the requirements for bid bonds and performance bonds on certain State contracts. The bill, which took effect on June 1, 2012, also requires the Maryland Insurance Administration to conduct a specified analysis of the practices of corporate and individual sureties in Maryland.

4. House Bill 1445 (Plumbing, HVAC, and Refrigeration Employees – Public Contracts – License Requirement). This bill prohibits a person from employing an individual to provide or assist with plumbing, HVAC, or refrigeration services under a public works contract subject to the State's prevailing wage law, unless that person is licensed by the State Board of Plumbing, the Baltimore County Plumbing Board, or the Washington Suburban Sanitary Commission. The bill also prohibits a person from classifying an employee under a public works contract subject to the State's prevailing wage law, who is licensed by the aforementioned regulatory agencies, at a specific work classification that is higher than the employee's license type. The bill will take effect on October 1, 2012.

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5. House Bill 940. This requires that in a newly constructed hotel (this does not include "bed and breakfasts"), all guest rooms must include a master control device, defined as either (a) a control that is activated when a person enters the room through the primary-room access method or (b) an occupancy sensor control that is activated by a person's presence in the room. This device must automatically turn the power off to all lighting fixtures within the room no more than 30 minutes after the guest has vacated. Further, it may control the HVAC default settings 30 minutes after the guest has vacated by increasing or decreasing the temperature by three degrees Fahrenheit.

6. House Bill 1268. This modifies the definition of "lead-free" in plumbing fixtures, creating a stricter federal standard for lead-free fittings and fixtures and pipes and pipe fittings.

7. Senate Bill 236, The Sustainable Growth and Agricultural Preservation Act of 2012. The bill imposes strict controls and septic systems and creates a four-tier system for development and growth in local jurisdictions.

As of December 31, 2012, major residential subdivisions will not be approved for septic unless the local jurisdiction amends the local comprehensive plan to include the Tiered structure. Unless the Tier system is adopted, only minor subdivisions may be approved for septic while major subdivisions must be served by public sewer.

8. Senate Bill 109. This bill alters the continuing education requirement for architects. It requires the Board of Architects to adopt regulations requiring a licensed architect to complete at least 24 hours of professional development activities in order to renew the license.

9. House Bill 158. This bill alters the definition of "high performance buildings," for purposes of tax credits, to include buildings that achieve at least a silver rating according to the International Code Council's 700 national Green Building Standards.

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Massachusetts

Case Law:

1. In *Merit Const. Alliance v. City of Quincy*, CIV.A. 12-10458-RWZ, 2012 WL 1357656 (U.S.D.C. Mass. Apr. 18, 2012), the plaintiff merit-shop contractors and their trade association successfully enjoined the City of Quincy from enforcing its so-called Responsible Employer Ordinance ("REO"). In the continuing battle between organized labor and merit-shop contractors in Massachusetts over opportunities to perform public works construction projects, organized labor has persuaded many municipalities in the Commonwealth to adopt REOs. They often are nearly identical in their language and commonly contain the following requirements as to all contractors and subcontractors working on a municipality's public-works projects, inter alia: 1) a requirement that a certain percentage of the craft labor force of the contractor or subcontractor (typically ranging from 25 -33% or more) be residents of that

municipality; 2) a requirement that all contractors and subcontractors maintain and participate in a state-approved apprenticeship program for each apprenticeable trade in their work force; 3) a requirement that all contractors and subcontractors provide health and hospitalization benefits to its employees working on the municipal project that are comparable to those provided by organized labor and that are paid for 100% by the employer; and 4) a requirement that all contractors and subcontractors provide pension benefits to their employees working on the municipal project that are comparable to those provided by organized labor. The federal court enjoined the residency requirement of the REO as violating the Privileges and Immunities Clause of the United States Constitution, and the apprenticeship, health, and pension provisions of the REO as pre-empted by Employee Retirement Income Security Act ("ERISA").

2. In *Costa v. Brait Builders Corp.*, 463 Mass. 65, 66, 972 N.E.2d 449, 451 (Mass. 2012), the Supreme Judicial Court held that a contractual provision in a construction contract between a general contractor and its subcontractor, by which the subcontractor waived its rights to pursue payment on a statutorily mandated public works payment bond posted by the general contractor, was void and unenforceable as against public policy. The court so held notwithstanding that the public works payment bond statute, M.G.L. c. 149, § 29, unlike the Massachusetts mechanics' lien statute, M.G.L. c. 254, §32, expressly prohibits contractual provisions waiving a party's right to file a mechanics' lien.

3. In *Barr Inc. v. Town of Holliston*, 462 Mass. 112, 967 N.E.2d 106 (Mass. 2012), the Supreme Judicial Court addressed unanswered questions concerning the amount of authority municipal awarding authorities have when considering whether a bidding contractor is qualified to perform the work (i.e., is "responsible"). The Court held that such municipal authorities may look beyond the prequalification determinations of the Commonwealth's Division of Capital Asset Management ("DCAM"). Under the public bidding laws of the Commonwealth, in order to be eligible to bid a public project, a contractor or subcontractor must obtain an annual certificate of eligibility from DCAM. This certificate is granted based upon DCAM's assessments of the bidder's performance on past and current projects, as well as on an "update statement" from DCAM at the time the contractor or subcontractor bid the work. DCAM had certified the low bidder, Barr, Inc., as prequalified. However, after conducting its own independent investigation, the Town of Holliston concluded that Barr, Inc. was not qualified to perform the work, rejected its bid, and awarded the project to the next low bidder. The Court held that there is no statutory prohibition that precludes an awarding authority from conducting its own independent investigation, and rejected Barr, Inc.'s claim to the contrary. In so doing, the Court noted that it was only deciding that narrow legal issue, and was taking no view on whether the town's investigation was appropriately conducted, a matter that the Court emphasized was yet to be adjudicated by the trial court. *Id.* at 112 n.9. The Court did not reach the issue of whether a municipal awarding authority may conduct such an independent investigation of a contractor or subcontractor that has been pre-qualified by that municipality for the project in question under the Commonwealth's contractor or subcontractor prequalification statutes, M.G.L. c. 149, § 44D ½ and § 44D ¾, respectively, because the project at issue was estimated to cost approximately $4.9 million, and mandatory municipal prequalification only applies to projects whose costs are expected to exceed $10 million. This remains an open question in the Commonwealth, although the Office of the Attorney General of Massachusetts, charged with the enforcement of the Commonwealth's public bidding laws, has opined that a municipal awarding authority is not precluded from disqualifying even a low bidder that it previously prequalified for the same project, based upon additional information that comes to its attention after the notice of prequalification has issued.

4. In *Superior Mech. Plumbing & Heating, Inc. v. Ins. Co. of W.*, 81 Mass. App. Ct. 584, 965 N.E.2d 890 review denied, 462 Mass. 1110, 970 N.E.2d 333 (Mass. 2012), the Massachusetts Appeals Court denied a subcontractor the right to maintain a mechanics' lien against the subject property where the general contractor had absconded with a substantial payment of nearly $700,000 from the project owner—without paying any of its subcontractors, and closed its business. This arguably troublesome outcome resulted from an important lien limitation in the Commonwealth's mechanics' lien law and a specific provision in the contract between the owner and absconding general contractor. The mechanics' lien law provides that a subcontractor's mechanics' lien shall not exceed the amount due or to become due to the general contractor under the original contract at the time when the subcontractor's lien is filed. Here, the owner/general contractor's contract provided that in order to be entitled to any payments from the owner, the general contractor had to provide to the owner proof of payment and releases of lien as to earlier payments made by the owner to the general contractor, and that furnishing same was a "condition precedent to [c]ontractor's entitlement to receive such pending payment." The Court reasoned that the general contractor had not, and could not, comply with that condition precedent because it had absconded with the nearly $700,000 from the owner. Hence there was not and never could be any amount due or to become due to the general contractor, and hence under the mechanics' lien law, the subcontractor's lien must fail. The seemingly harsh result was tempered in this case because of the original amount owed to the subcontractor of approximately $106,000, the owner paid the subcontractor approximately half of that amount, notwithstanding the void lien.

5. In *Barret v. Wakefield Crossing, LLC*, CIV.A. 11-2329-D, 2012 WL 4903004 (Mass. Super. Ct. Oct. 4, 2012), the Superior Court granted an architect's motion for summary judgment on a negligent misrepresentation claim brought by third-party purchasers of condominium units designed by the architect. The court held that the purchasers could not have reasonably relied on documents in the nature of code compliance affidavits submitted by the architect to the general contractor, even if the building inspector relied on the architect's affidavits to issue its own certifications of use and occupancy, which were in turn relied upon by the purchasers. The purchasers, alleging "widespread deficiencies in the design and construction" of the condominium units, in support of their negligent misrepresentation claim claimed to have relied upon so-called "Construction Control Affidavits" submitted by the architect to the general contractor, and in turn by the general contractor to the local building code official. These compliance affidavits, mandated by Section 107.6 of 8th edition of the Massachusetts State Building Code, required the architect to attest that its plans met all applicable provisions of the State Building Code, accepted engineering practices, and applicable laws and ordinances for the proposed use and occupancy of the structure. In its final compliance affidavit, the architect also attested that the project work had proceeded in accordance with the construction documents and that the condominium "appeared complete." The purchasers argued that the architect's submissions contained false representations, and that they relied upon them in purchasing the units. The Court granted the architect's motion for summary judgment on this claim because there was no evidence that the architect had "actual knowledge" that these submissions ever would be relied on by the purchasers of the condominium units. Moreover, there was no evidence that the instant purchasers relied on (or even knew about) the architect's submissions. Rather, when they purchased their units, the purchasers relied on the building inspector's Certificates of Use & Occupancy. Even if the building inspector had relied on the architect's Construction Control Affidavits when he issued the Certificates of Use & Occupancy, the Court held that, as a matter of law, the connection between the Construction Control Affidavits and the purchases still was too tenuous to constitute reliance on the part of the purchasers.

6. In *McAnarney v. Clinton Millworks, LLC*, CIV.A. WOCV201102030B, 2012 WL 4048849 (Mass. Super. Ct. Aug. 22, 2012), the Superior Court held that a union benefit fund's suit to enforce its mechanic's lien against the subject property for unpaid union benefits by a project subcontractor survived the property owner's motion for summary judgment. In opposition, the property owner relied upon a provision of the Massachusetts's mechanics' lien statute that provides that a subcontractor's mechanic's lien cannot exceed the amount due or to become due to the general contractor from the owner at the time when the subcontractor's lien is filed. By analogy, it argued that, at the time when the union funds filed its lien against the subject property, there was nothing due to the subcontractor on the project. The Court disagreed and held, inter alia, that the provision denying lien rights to a subcontractor who files a lien when the owner does not owe any more payments to the general contractor has no application to lien claims of laborer-claimants, or to union funds seeking to lien for unpaid benefits for those laborers.

7. In *Certified Power Sys., Inc. v. Dominion Energy Brayton Point, LLC*, BRCV2008-1217, 2012 WL 384600 (Mass. Super. Ct. Jan. 3, 2012), the Superior Court awarded Certified Power Systems, Inc. ("CPS"), a piping subcontractor, over $5 million in damages upon the Court's finding that the general contractor materially breached its subcontract with CPS. Although in Massachusetts parties to construction disputes almost universally raise claims under the Massachusetts Unfair and Deceptive Practices Act, Massachusetts General Law c. 93A §1, et. seq., which can permit double and treble damages recoveries plus attorneys' fees, the courts of the Commonwealth rarely award c. 93A damages. But the Court in CPS was sufficiently upset with the conduct of the general contractor toward its subcontractor, including the indefinite withholding of payments legitimately due and owing, which virtually put the subcontractor out of business, that it found such conduct constituted unfair and deceptive acts.

Legislation:

1. No legislation relevant to the construction industry was amended or enacted in Massachusetts in 2012.

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Michigan

Case Law:

1. In *Miller-Davis Co. v. Ahrens Construction, Inc.*, 498 Mich. 355 (December 2011) the Michigan Supreme Court determined that the limitations period for a breach of contract claim against contractors, architects and/or engineers related to improvements is governed by the six-year breach of contract statute, MCL 600.5807(8), not the statute of repose, MCL 600.5839(1).[1] The *Miller-Davis* Court's decision significantly extends the period in which a claim can be brought against contractors, architects and/or engineers to six years after the claim accrued, instead of a six years after the first use, occupancy or acceptance of the improvement

[1] A statute of limitation bars a party from bringing a claim unless the party files suit within a particular time period after a claim accrues (i.e., after the conduct, injury, or discovery of the claim). A statute of repose extinguishes the right to assert a claim after a specific period of time regardless if any injury occurred.

found in the statute of repose. This was a clarification of prior case law which many argued applied the shortened statute of repose, and not the statute of limitation period.

2. *Ostroth v. Warren Regency*, 474 Mich. 36 (2006) – See Legislation, below.

3. The Michigan Supreme Court in *Fultz v Union-Commerce Assoc*., 470 Mich. 460 (2004) held that that a party to a contract could not be held liable to a non-contracting third-party for negligence unless the duty upon which the non-contracting third-party's lawsuit was based upon alleged a duty which was "separate and distinct" from the duties set forth in the contract at issue. In essence, under Fultz, if a Plaintiff's allegations against a design profession or contractor arose out of its contractual obligations with a third party, the Plaintiff's claim would be bared.

4. Recently, in *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich. 157 (2011), the Michigan Supreme Court "clarified" its decision in the *Fultz* case, and opined that a contracting party's assumption of a contractual obligation does not extinguish or limit separate, pre-existing common law or statutory tort duties owed to a non-contracting third party in the performance of a contract.

Legislation:

1. PA 162 of 2011 – Amended the Statute of Limitations for Tort Claims Against Contractors, Architects and/or Engineers Which Accrue after January 1, 2012. This bill addressed a decision by the Michigan Supreme Court in *Ostroth v. Warren Regency*, 474 Mich. 36 (2006) which applied the six year limitation period found in MCL 600.5839(1) related to claims arising from defective or unsafe conditions, and not the two year limitation period found in MCL 600.5805 for claims against design professionals. Public Act 162 now clarifies the limitations which should be applied to design professions – for claims that accrue after January 1, 2012, a suit must be brought 2 years from the time the design professional discontinued serving the plaintiff in a professional capacity or six months after the plaintiff discovered or should have discovered the existence of the claim, whichever is later (MCL 600.5805; 600.5838(2). Under MCL 600.5805(10), the limitation period for bringing a claim against a contractor after January 1, 2012 is three years from the time of the death or injury.

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Minnesota

Case Law:

1. In *Rochon Corp. v. City of Saint Paul*, 814 N.W.2d 365 (Minn. Ct. App. 2012), an unsuccessful bidder on a municipal construction contract brought action seeking to void a low bidder's contract after city allowed the low bidder to change its bid. The court reversed the district court's granting of summary judgment to the unsuccessful bidder and held that the changes to bid were material, even though the bid remained a low bid, and the contract was void.

2. In *Safety Signs, LLC v. Niles-Wiese Const. Co.*, 820 N.W.2d 854 (Minn. Ct. App. 2012), a subcontractor brought action against payment bond surety, seeking to recover under

payment bond issued under the Public Contractors' Performance and Payment Bond Act. The district court granted summary judgment for subcontractor, and the surety appealed. The court reversed and held 1) as a matter of first impression, notice of claim, which was mailed within 120 days after completion of work, was timely, 2) the surety could challenge defective service on contractor, 3) substantial compliance was insufficient to sustain payment-bond claim; and 4) the surety could not waive defect in notice of claim.

3. In *Eclipse Architectural Group, Inc. v. Lam*, 814 N.W.2d 692 (Minn. 2012), lien holders brought action against a hotel owner and mortgagee to foreclose on mechanic's liens. The court affirmed the Court of Appeals, and held that 1) the rule of civil procedure requiring that service of a summons or other process be made by someone who is not a party to the action is not applicable to service of a mechanic's lien statement, and 2) the statute requiring that a mechanic's lien statement be served personally or by certified mail did not restrict who could make personal service, and thus service of mechanic's lien statements by an agent of lien holders is proper.

4. In *Big Lake Lumber, Inc. v. Sec. Prop. Inv., Inc.*, 820 N.W.2d 253 (Minn. Ct. App. 2012), a lumber supplier brought action to foreclose on their mechanic's liens. The court reversed the district court's judgment for the supplier and general contractor. The court first held that law of the case doctrine did not apply to prohibit trial court on remand from determining whether general contractor's and supplier's mechanic's liens related back to subcontractor's excavation work, as they did not reject the mortgagee's arguments on appeal regarding relation back but rather reversed and remanded the trial court's grant of summary judgment because genuine issues of material fact existed with regard to whether the lien claimants' work was "part of the same continuous improvement" as work performed prior to recordation of the mortgage. To obtain priority over a bank's mortgage, the court noted that a mechanic's lien claimant can only relate a lien back to the actual and visible beginning of a project of improvement on the ground if the lien claimant satisfies its burden to show that the work underlying the lien "bears directly" on the project of improvement and not merely on "the overall project involved." The court next held that excavation work was not part of one continuous project of improvement, and thus the liens did not relate back to the date of excavation. Therefore the mechanic's liens had priority over the bank's mortgage.

5. In *Brothers Fire Protec. Co. v. Heffron Prop., LLC*, 2012 WL 118241, No. A11-357 (Minn. Ct. App. Jan. 17, 2012), the court considered a dispute about the relative priority of a lender's mortgage and several mechanic's liens asserted by contractors that did not receive full payment for work performed on the renovation of a commercial building. The district court granted summary judgment to the contractors on the ground that the beginning of their improvement to the building was visible one day before the lender recorded its mortgage. The court concluded that there were genuine issues of material fact as to whether the contractors began visible work on the improvement one day before the recording of the mortgage or the day of the recording of the mortgage. Because the evidence was in dispute on that material fact, the court reversed and remanded for trial.

6. In *Contractors Edge, Inc. v. City of Mankato*, 2012 WL 118409, No. A11-916 (Minn. Ct. App. Jan. 17, 2012), the appellant argued that 1) respondent (the city) should be equitably estopped from disputing a construction contract change order and refusing to pay for extra work performed, because the city's project engineer executed the change order knowing that the city would not honor it, 2) in the alternative, the appellant was entitled to full recovery under the contract's claim procedures, and the district court failed to analyze this issue, and 3) the appellant is also entitled to recovery under the Minnesota Prompt Payment of Local

Government Bills Act, which was also not addressed by the district court. The court affirmed the district court's decision that the appellant was not entitled to relief under an equitable estoppel theory. But because the district court failed to consider whether the appellant could recover for extra work performed under the contract's claim procedures and under the Prompt Payment Act, the court remanded for consideration of these issues.

7. In *Rock Creek Designers & Builders, LLC v. Bellows*, 2012 WL 360390, No. A11-695 (Minn. Ct. App. Feb. 6, 2012), appellant-property owners argued that 1) the amount of the lien claimed by respondent mechanic's lienor was excessive because, after respondent breached the construction contract, appellants made payments directly to subcontractors that exceed the contract price, 2) the district court erred in not awarding attorney fees to appellants for respondent's breach of contract, and 3) no fees should have been awarded to respondent because it failed to prevail on its mechanic's lien claim. The court affirmed as modified.

8. In *J.J. Larson Elec. Co. v. C&S Elec., LLC*, 2012 WL 1070016, No. A11-1016 (Minn. Ct. App. April 2, 2012), the appellant challenged the district court's judgment dismissing the appellant's claim for recovery under a payment bond, specifically challenging the court's conclusion that the appellant was stopped from succeeding on the claim. The court affirmed as the evidence presented to the district court supports its finding that respondent contractor reasonably relied on appellant's lien waivers as representations that it was receiving timely payments from the subcontractor.

9. In *Newmech Co., Inc. v. Grove Hospitality, LLC*, 2012 WL 1570106, No. A11-1346 (Minn. Ct. App. May 7, 2012) the court affirmed the district court's determinations that 1) the five respondents' mechanics' liens are superior to appellant's mortgage, and 2) that respondent NewMech Companies, Inc.'s mechanic's lien was valid. The court applied a two-step factual inquiry to determine when the mechanics' liens attached. To do so, the court sought to determine the first actual and visible beginning of the improvement on the ground. Analyzing the continuous improvement and visibility of corrective soil work, the court upheld the district court's reliance on the soil work to establish the date on which the mechanics' liens attached. The court next considered the delivery of rebar as an alternative and independent basis upon which to determine the actual and visible beginning of the improvement on the ground, and further upheld the district court's determination that the delivery of rebar constituted the actual and visible beginning of the improvement on the ground. Thus, the court found the district court's alternative conclusions that respondents' liens attached on the date on which the corrective soil work was performed, or the date on which the rebar was delivered, were not erroneous, and affirmed the district court's conclusion that respondents' liens are prior and superior to appellant's mortgage. The court then considered whether respondent NewMech's mechanic's lien was valid despite an omission in the lien statement of the person for or to whom services were performed or materials were furnished. The court held that because appellant conceded that no prejudice arose from the omission on the statement, the district court did not err by concluding respondent NewMech's mechanic's lien was valid.

10. In *In re Rejoice! Church Lots 8, 9, 10; Block 5; Original Plat of Dundas*, 2012 WL 1570048, No. A11-858 (Minn. Ct. App. May 7, 2012), the court affirmed a municipal decision not to require an environmental assessment worksheet (EAW) for the construction of an addition to a church, arguing that an EAW is required under Minn. R. 4410.4300, subp. 31 (2011), which mandates EAWs for projects that will result in the destruction, in whole or in part, of a property listed on the National Register of Historic Places.

11. In *API Elec. Co. v. N. Am. Specialty Ins. Co.*, 2012 WL 1914126, No. A11-1790 (Minn. Ct. App. May 29, 2012), appellant appealed from a summary judgment and argued that its notice of claim on a payment bond issued by respondent was timely under the terms of the bond itself, although not timely under the 120–day time limit set forth in Minn. Stat. § 574.31 (2008). Because the terms of the statute govern where the payment bond does not contain express language expanding the time within which notice of claim can be filed, the court affirmed.

12. In *Langford Tool & Drill Co. v. The 401 Group, LLC*, 2012 WL 3641002, No. A11-1928, A11-1932 (Minn. Ct. App. Aug. 27, 2012) appellants challenged the district court's grant of default judgments against them as a sanction for their failure to attend a pretrial conference and the district court's denial of their motions to vacate those judgments. The court found that respondents did not demonstrate prejudice in allowing the action to proceed and the district court did not consider a less severe sanction before entering default judgment against pro se appellants, and thus concluded that the district court abused its discretion by granting the default judgments, therefore reversing and remanding.

13. In *In re Admin. Reconsideration Hearing Request ex rel. Cent. Specialties, Inc.*, 2012 WL 3641295, No. A12-0024 (Minn. Ct. App. Aug. 27, 2012), the court affirmed an administrative decision concluding that realtor's construction-project bid failed to meet federal regulatory requirements for participation by disadvantaged business enterprises (DBEs). The court concluded that the decision was not arbitrary or unsupported by the evidence, and that realtor was not entitled to a contested-case hearing on reconsideration of its bid.

14. In *Gen. Contracting & Design Serv., Inc. v. Fryberger*, 2012 WL 3892127, No. A11-1863 (Minn. Ct. App. Sept. 10, 2012), the appellant homeowners argued that the district court erred by applying the wrong evidentiary standard and abused its discretion by denying damages for the breach of their construction agreement with respondent building contractor. Because the district court applied the correct preponderance of the evidence standard in evaluating appellant homeowners' damages and because the court deferred to the district court's findings of fact and credibility determinations, and ultimately affirmed.

Legislation:

1. H.F. 1752, Omnibus Bonding Bill – 2012. This appropriation bill authorizes spending to acquire and improve public lands and buildings and for other improvements of a capital nature with certain conditions and to appropriate to various entities proceeds of various bonds. It also authorizes Cook County to form a district for the construction of water facilities and provision of water service.

2. H.F. 2958, Vikings Stadium Bill. This bill provides for the construction, financing, and long-term use of a stadium and related stadium infrastructure as a venue for professional football and a broad range of other civic, community, athletic, educational, cultural, and commercial activities. It also authorizes the sale and issuance of state appropriation bonds and provides for use of certain local tax revenue. Further, it provides for the conditional imposition of certain taxes and collection of other revenues.

3. S.F. 2131, Design-Build Contracting Program for Local Transportation Projects Provisions Modifications. This bill authorizes completion of design-build projects approved by commissioner of transportation.

4. S.F. 1597, Veteran-Owned Small Business Contracts Bid Preference County Program Authority; Transportation Department (DOT) Highway Construction Projects Small Business Contract Bid Preferences Modifications for Veteran-Owned Small Businesses and Small Targeted Group Businesses. This bill permits the commissioner to award preferences in the amount bid for specified construction work to small targeted group businesses, to small businesses located in an economically disadvantaged area, and to veteran-owned small businesses

5. S.F. 1983, Construction Code Fund Transfer to the General Fund Elimination; Fire Safety Premiums Surcharge and Fire Safety Account Allocation Modification. This bill imposes a surcharge on all permits issued by municipalities in connection with the construction of or addition or alteration to buildings and equipment or appurtenances after June 30, 1971. It further eliminates the transfer of funds from the construction code fund to the general fund.

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Mississippi

Case Law:

1. In *Noatex Corporation v. King Construction of Houston, LLC*, 884 F.Supp.2d 478 (N.D. Miss. 2012), Mississippi's Stop-Notice statute was ruled unconstitutional by a federal court.

Mississippi, unlike most if not all other states, limits traditional lien rights on construction projects to prime contractors and others having a direct contract with the owner. Therefore, subcontractors and suppliers who provide labor and materials to construction projects cannot "lien the project" to protect their payment rights. Instead, the Mississippi Stop Notice statute, Miss. Code Ann. § 85-7-181, allows an unpaid subcontractor or supplier to "lien the funds." That statute provides that if an unpaid subcontractor, laborer or materialman of the prime contractor provides written notice to the owner of the amount it is owned, that amount from that date forward is bound in the owner's hands until the claim is resolved (or, if the amount in the owner's hands is less than the amount owed, then the entire amount remaining in the owner's hands is bound). Against that backdrop, a federal district court considered Noatex's challenged to the statutes constitutionality.

Noatex, a general contractor, brought a declaratory judgment action against King Construction, a subcontractor on a project to construct a manufacturing plant, seeking to have King Construction's stop-notice claim and the statute authorizing it declared unconstitutional. Noatex and King Construction worked together from February through June 2011, but then, after Noatex began to question the validity of King Construction's invoices, King Construction filed a stop notice with the project owner, binding just over a quarter of a million dollars. Noatex argued that the stop notice statute violated its due process rights by depriving it of property without proper procedures for notice and hearing.

The federal district court agreed and declared the statute unconstitutional, both facially and as-applied, for violating due process. The federal court compared the statutory scheme, which allowed an unpaid subcontractor to bind monies allegedly owed with the owner solely by

filing a notice, to a prejudgment attachment of the type which had previously been declared unconstitutional. According to the federal court, a traditional mechanic's lien clouds title but does not alienate property, and other states' comparable statutes that have been upheld all provide either notice and a hearing or other safeguards, such as affidavits and security bonds, to minimize the risk of wrongful withholding. Mississippi's alternative offered no immediate process by which to judge the validity of the stop notice or challenge it until a trial on the merits. Although the federal court acknowledged the beneficent aims of the statute, it also recognized that stop notices often had the effect of compounding nonpayment and stopping projects.

The federal district court's decision is currently before the U.S. Court of Appeals for the Fifth Circuit.

2. In *W.G. Yates & Sons Construction Company v. City of Waveland*, 2012 WL 2896207 (Miss. Ct. App. July 17, 2012), Yates, a contractor, filed suit against Waveland for rejecting its bid on the city's sewer reconstruction project, arguing that Waveland's Board of Supervisors incorrectly and without explanation awarded the project to a competing bidder, Reynolds, who failed to comply with statutory—requirements.

In 2009, Waveland advertised for competitive sealed bids for its sewer project. Reynolds and Yates submitted the two lowest bids, and the Board of Supervisors noticed a motion to approve Yates on its agenda. Later, after the Board did not take up the motion, Yates informed the Board that Reynolds' bid should not be considered because it did not comply with the Mississippi public-bid statute or Waveland's bidding documents. Specifically, Yates alleged that Reynolds: 1) was not a "resident contractor" of Mississippi under Miss. Code Ann. § 31-3-21(3), and was thus required to append to its bid a copy of Indiana's (its state of residency) bidding statute, and 2) that Reynolds failed to use the proper bid forms. At its next meeting, without explanation and without granting Yates an opportunity to comment on the record, Waveland's Board awarded the project to Reynolds. Yates then appealed the decision to the circuit court, which upheld Waveland's decision.

On review, the Mississippi Court of Appeals reversed the circuit court on both counts, specifically noting the lack of official action taken by the Board as reflected in its minutes. The court held that there was insufficient evidence to find that Reynolds was a "resident contractor" because it was a wholly-owned subsidiary of a larger company that did business in Mississippi. The court rejected an affidavit offered by Reynolds because, while it mentioned "operating" in the state, the statute requires a full-time office. As such, Reynolds' bid should have been rejected. The court also held that, although the bid instructions did grant Waveland the power to waive certain errors in bids, Reynolds' error pertained to the project's cost, and that the Board could not waive it without taking official action reflected in its minutes. The court remanded to the circuit court to determine damages.

3. In *Moran Hauling, Inc. v. Department of Finance and Administration*, 2012 WL 5908955 (Miss. Ct. App. Nov. 27, 2012), Moran, a general contractor, appealed from a decision of the Department of Finance and Administration ("DFA") and the Public Procurement and Review Board ("PPRB") rejecting its bid on a project as non-responsive.

Moran submitted a bid to DFA for reconstruction of a state park. One section of the bid form required that, if the value of any mechanical or electrical subcontract exceeded $50,000, the bidder was to list the subcontractor. Moran was the only bidder to represent that its subcontracts did not exceed $50,000. When the architect contacted Moran to confirm, Moran represented that it intended to perform the work in-house; however, the next day Moran

contacted the architect and identified a subcontractor. DFA rejected Moran's bid and awarded the project to the next-lowest bidder.

The Mississippi Court of Appeals upheld DFA and PPRB's decision, holding that Moran's amendment to its bid was untimely, occurring over a week after bids were opened, and unconvincing, as Moran did not employ anyone licensed to perform the mechanical or electrical work. The court also rejected Moran's contention that the bid form conflicted with DFA rules which only required a list of subcontractors seven days after notification of an award, holding that DFA had substantial reason to declare Moran's bid non-responsive, that the unambiguous terms of the bid documents controlled over the general language of the rules, and in general deferring to DFA's own interpretation of its guidelines and contracts.

Legislation:

1. H.B. 1301. This amendment to Miss. Code Ann. § 85-7-185 provides that a subcontractor supplying labor or materials the right to request and receive a copy of the project's bond from the owner or contractor.

2. S.B. 2902. This act imposes a requirement upon contractors to obtain an endorsement or other written signed authorization of every co-payee on a joint check. Failure to do so may result in a fine of up to Five Hundred Dollars ($500.00).

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Missouri

Case Law:

1. In *Williams Constr., Inc. v. Wehr Constr., L.L.C.*, 2012 WL 5451725, No. SD31542 (Mo. Ct. App. Nov. 8, 2012), the court held that the first to breach rule (which thereby excuses the other party's subsequent breach) is only applicable if the alleged first breach is material. In this case it was not. Here, the developer/builder terminated a contract with a metal building supplier due to costs and supplier sought recoupment of overhead and anticipated profits. The supplier's failure to provide submittals on time was not material, not only was it not mentioned at the time it was never a cited reason for termination of the contract. Additionally the court stated that: "A party cannot recover both its lost profits and the overhead expenses that are tied to the production of that profit."

2. In *Sakabu and Province v. Regency Constr. Co., Inc.*, 2012 WL 447650, No. ED97934 (Mo. Ct. App. Oct. 2, 2012), the court held that a subcontractor (who in this case caused a fire on the owner's property) is not synonymous with independent contractor. And based on an 8-factor test (i.e. level of control, skill required, items supplied) the subcontractor could be considered an employee of a general contractor. The court also stated that if a subcontractor is considered an employee then there may be an independent duty owed to the owner to supervise the employee/subcontractor.

3. In *R.K. Matthews Inv., Inc. v. Beulay Mae Housing, LLC*, 2012 WL 4344190, No. WD74567 (Mo. Ct. App. Sept. 25, 2012), the court held that the contractor, claiming monies owed, had the burden to show its work was done in a workmanlike manner. And although

certain inadvertent errors on a lien statement will not invalidate a lien, if the items charged are improper (or for defective work) or are intentionally/knowingly erroneous and/or cannot be separated from lienable items, then the entire lien may be invalidated.

4. In *Bob DeGeorge Assoc., Inc. v. Hawthorn Bank*, 377 S.W.3d 592 (Mo. 2012), the court reaffirmed the first spade rule. Mechanic's liens have priority back to the date of the first "stroke of the axe or spade" in construction. Based on that rule and R.S. Mo. §§ 429.050 and 429.060, a purchase-money mortgage did not have priority over mechanic's lien claims because recording of the mortgage was delayed until after construction commenced. The exception, not applicable here, is when a purchase-money mortgage is obtained before the owner has legal title but recorded when title is transferred, even if it is after construction commences.

5. In *Union Elec. Co. v. Energy Ins. Mut. Ltd.*, 689 F.3d 968 (8th Cir. 2012), the court held that a party may ask to transfer a case, but a motion to dismiss is a permissible motion seeking to enforce a forum selection clause. Such motions have different standards and Missouri's public policy against mandatory insurance arbitration provisions must be considered in whether to invalidate a forum selection clause.

6. In *Ozark Mountain Granite & Tile Co. v. Dewitt & Assoc., Inc.*, 2012 WL 3143830, No. SD31529 (Mo. Ct. App. Aug. 3, 2012), the court distinguished between "extra work" and "additional work." The distinction must be made by the fact finder and often determines whether the work is compensable. "Extra work" is work not contemplated by the parties at the time of the contract and entirely independent of what is required in performance of the contract. An "additional work" is work necessarily required in the performance of the contract, but the necessity of which arises from unanticipated conditions. Here improper design led to reworking granite installation in the mock-up suite; hence it was "extra work."

7. In *Altom Constr. Co., LLC v. BB Syndication Services, Inc.*, 359 S.W.3d 146 (Mo. Ct. App 2012), the court favored mechanic's lien claimants over those by a partial purchase-money lender. The lender had loaned $21.6 million, with a disproportionate amount of $17.5 million used for the purchase of real property and the balance used for the construction of improvements. Based on the factual determination of various factors, the court affirmed the lower court's ruling holding the multi-purpose loan was a construction loan. And under Missouri law mechanic's liens have priority over construction loans. The court also held that an engineering firm's services for partially completed plans (who ceased working on the plans due to non-payment) were lienable under Missouri law. The partial plans added value and were "directly connected" with improvements. The plans had been put to use and were a baseline for future development on the site.

8. In *Travelers Prop. Cas. Co. of Am. v. The Manitowoc Co., Inc. v. U.S. Steel Corp.*, No. SC92429 (Mo. Jan. 29, 2013), the Court clarified Missouri pleading practice and stated under current Rules and public policy of efficiency, a third-party claim (or a cross-claim) need not admit fault before claiming indemnification and/or contribution from a separate defendant. Denying plaintiff's claim that it was at fault for damages caused by a crane collapse, Manitowoc pleaded that it was not at fault but it was found to be liable then U.S. Steel was liable under theories of indemnification and/or contribution.

9. In *Secura Ins. v. Horizon Plumbing, Inc.*, 670 F.3d 857 (8th Cir. 2012), the court held that the subcontractor's insurer owed no duty to defend the general contractor (as an additional insured on a CGL policy) against breach of contract claims which did not involve the

subcontractor's work. The owner terminated the contractor on an apartment complex but continued using the plumbing subcontractor. The contractor brought suit against the owner, and the owner counterclaimed for breach of contract, including in part a claim arising out of defective work performed by the subcontractor that led to property damage (flooding and mold growth). The contractor, an additional insured under the subcontractor's CGL policies, tendered its defense to the subcontractor's carriers who paid the contractor for attorney fees and costs it incurred in defending against the owner's claims arising out of the subcontractor's defective work. The court held they were not liable for fees in defending against the owner's entire breach of contract counterclaim.

10. In *Village of Big Lake, Missouri v. BNSF Railway Co., Inc.*, 2012 WL 3656306, No. WD74613 (Mo. Ct. App. Sept. 5, 2012), the court held that federal statutes preempted local floodplain management ordinance regarding buildup of rail bed and intersecting roadway.

Legislation:

1. H.B. 1280 (2012), New R.S. Mo. §537.033, Peer review for Architects and Engineers. After being vetoed in 2011 Missouri passed a narrower "peer review privilege" law for architects, engineers and land surveyors. The 2012 law provides immunity to outside peer reviewers who are engaged to provide only that service, but are otherwise not involved in the project. It also protects from discovery internal "lessons learned" that are taught post-completion in-house to the design firm's employees and partners. The bill expires in January 2023 with the hope from its proponents that it will be renewed and offered as a model for other states.

2. H.B. 1540 (2012), R.S. Mo. §287.120, Worker's Compensation. Amended Missouri's worker's compensation laws with notable change of co-employee liability. An employee will not be liable for a co-employee's workplace injury or death for which compensation is recoverable under the workers' compensation laws, unless the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury. This overturned Robinson v. Hooker, 323 S.W.3d 418 (Mo. Ct. App. 2010), in which the court ruled the exclusive remedy of workers compensation did not provide negligent defendants with immunity for injuries caused to fellow employees.

3. HB 1251, Amending R.S. Mo. §643.225, Amendments to Asbestos Abatement. Certain exemptions from state requirements if subject to federal laws regarding construction work and asbestos. Exemptions apply to state requirements, registration, and certifications for asbestos removal/handling.

4. HB 1647/SB 769, Local Building Codes Supersede Fire Department Codes. Local (City, Town, Village, or County) residential construction regulatory systems supersede any fire protection district (FPD) codes within the same jurisdiction. Any conflicting FPD regulatory system is advisory only and unenforceable.

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Montana

Case Law:

1. In *Dick Anderson Constr., Inc. v. Monroe Property Company, LLC*, 2011 MT 138, 361 Mont. 30, 255 P.3d 1257, the Montana Supreme Court held that a general contractor was entitled to foreclose on its construction lien even though the party it had contracted with was not the owner of the real estate where the improvements were located.

Prior to this decision, the parties had been embroiled in litigation for over ten years, including two separate appeals to the Montana Supreme Court. The case arose out of the construction of several buildings that comprise the Paws Up Ranch, a dude ranch owned by a wealthy out-of-state developer. The general contractor, Dick Anderson Construction, had contracted with the entity Monroe Construction Company ("Monroe Construction") to construct the subject buildings. After Monroe Construction failed to pay Dick Anderson's last pay application, Dick Anderson filed a construction lien against the real estate where the buildings were located. In its lien, Dick Anderson named Monroe Property Company, LLC ("Monroe Property") as the "contracting owner" of the real estate.

At the trial court, Monroe Property challenged its status as a "contracting owner" as that term is defined in Mont. Code Ann. § 71-3-522(4)(a). Monroe Property argued that since it was not a party to the construction contract between Dick Anderson Construction and Monroe Construction, Monroe Property did not meet the definition of a "contracting owner" under the statute. The district court ruled that Monroe Property and Monroe Construction were separate entities and that Dick Anderson had failed to establish that Monroe Construction was an agent of Monroe Property. Thus, Dick Anderson's lien did not extend to the real property owned by Monroe Property.

On appeal, the Montana Supreme Court held that the undisputed facts established Monroe Construction was acting as the agent of Monroe Property for purposes of contracting with Dick Anderson to construct improvements to the Paws Up Ranch. The Court therefore reversed the trial court's determination that Monroe Property was not a "contracting owner" for purposes of the lien statute and ruled that Dick Anderson was entitled to foreclose its construction lien against both the improvements owned by Monroe Construction and the real property owned by Monroe Property.

2. In *Lewistown Miller Constr. Co., Inc. v. Martin*, 2011 MT 325, 363 Mont. 208, 271 P.3d 48, the Montana Supreme Court upheld a contractor's right to payment for oral change requests despite a contractual provision requiring all change orders to be in writing. In addition, the Court reaffirmed its commitment to mandatory attorneys' fees awards in cases in which a construction lien claimant establishes his or her lien.

Lewistown Miller Construction and Martin entered into a fixed price contract for the construction of Martin's "hunting cabin." The contract contained a provision requiring all changes to the contract price to be made in writing. The contract also contained a "prevailing party" attorneys' fees provision. During construction, it was undisputed that Martin orally requested several changes and paid for most of these changes. The parties, however, disputed the extent of these changes and whether some of the changes were compensable. When Martin refused to pay for the contractor's additional work, the contractor filed a construction lien against the project and sued to foreclose on the lien. Martin counterclaimed for deficient work and slander of title.

At trial, Martin argued that he was not required to pay for the additional work performed by the contractor because none of the additional work had been confirmed through a written change order. Despite the language of the contract requiring written change orders, both the district court and Montana Supreme Court ruled that Martin waived the protections of that provision by making oral requests for changes, accepting those changes, and then paying for them. Therefore, Martin was prevented from arguing that the provision should be upheld for other changes that he was disputing.

In addition to finding that Martin waived the written change order requirement, the district court also held that Martin was liable to the contractor for $62,649.51 for unpaid extras, less $10,260.20 to compensate Martin on his counterclaim for deficient work. The contractor argued that he was entitled to his attorneys' fees for establishing his construction lien and Martin argued that he was entitled to recover his attorneys' fees as the prevailing party on his counterclaim. The district court denied both parties' requests for fees. On appeal, the Montana Supreme Court reversed the district court, in part, holding that under the construction lien statutes, an award of attorneys' fees is mandatory if the lien claimant establishes his or her lien. Since the contractor established his lien against Martin's project, he was entitled to recovery of his fees. The Montana Supreme Court did, however, uphold the denial of a fee award to Martin because although Martin won a small amount on his counterclaim, he did not receive a net recovery and thus could not be considered a "prevailing party" under the contractual fees provision.

3. In *Kurtzenacker v. Davis Surveying, Inc.*, 2012 MT 105, 365 Mont. 71, 278 P.3d 1002, the Montana Supreme Court reversed a district court's finding of liability against a professional surveying company under a third party beneficiary theory for breach of contract but upheld the district court's finding that the surveying company was liable for negligent misrepresentation.

The Kurtzenacker case involved a claim by plaintiff lot owners against Davis Surveying for failing to properly locate the plaintiffs' lot boundaries. Although the plaintiffs did not contract with Davis Surveying for surveying services, the plaintiffs argued that they were third party beneficiaries under Davis Surveying's contracts with the preceding owners of plaintiffs' lot. The plaintiffs separately alleged that a Davis Surveying representative visited their property and represented that their lot boundaries were in a location proven to be incorrect.

After the parties proceeded to a bench trial, the district court found Davis Surveying liable for breach of contract under a third-party beneficiary theory and for negligent misrepresentation, as well as holding Davis Surveying's principal personally liable under both theories.

On appeal, the Montana Supreme Court reversed the district court's finding on the third-party beneficiary theory. Under Montana law, only an intended third-party beneficiary may enforce the terms of a contract. The evidence in the record provided no support for a finding that the plaintiffs were intended third-party beneficiaries under Davis Surveying's contracts with the plaintiffs' predecessors. The plaintiffs were never identified in any of the predecessor contracts and there was no evidence that they were intended to benefit from the earlier survey contracts. Thus, they were not entitled to enforce the predecessor contracts.

Despite overturning the district court's finding on the plaintiffs' breach of contract claim, the Montana Supreme Court upheld the court's verdict on the plaintiffs' negligent misrepresentation claim. On that claim, the parties testified directly contrary to one another regarding whether anyone from Davis Surveying had even visited the plaintiffs' property at the

time alleged. Despite these contradictions, the district court found the testimony of Davis Surveying's representatives non-credible. Because the Montana Supreme Court defers to trial courts on issues of credibility, the Court upheld the finding of liability for negligent misrepresentation against Davis Surveying.

Lastly, the Montana Supreme Court reversed the district court's finding of personal liability against Davis Surveying's principal. The Court cited the fact that there was no evidence in the record that the principal personally performed any flagging of the plaintiffs' property or that he had made any representations to the plaintiffs regarding their lot boundaries and therefore there was insufficient evidence to hold him personally liable for the actions of his company.

4. In *B Bar J Ranch, LLC v. Carlisle Wide Plank Floors, Inc.*, 2012 MT 246, 288 P.3d (2012), the Montana Supreme Court upheld an attorneys' fees award in favor of a defendant under Montana's Consumer Protection Act (MCPA). The case involved the installation of wide-plank wood flooring in an upscale guest ranch. The plaintiff, B Bar J Ranch, ordered the flooring materials form Carlisle Wide Plank Floors who in turn hired a third party to install the flooring. Approximately one-third of the flooring began to buckle shortly after its installation. B Bar J Ranch sued Carlisle for the defective materials under negligent misrepresentation and breach of warranty theories and also sought recovery under the MCPA.

Claims under the MCPA are only available to parties who are considered "consumers" under the Act. To be a consumer, the party must use the goods or services in question "primarily for personal, family, or household purposes." During discovery, Carlisle requested production of B Bar J Ranch's tax returns to help establish that B Bar J Ranch was a commercial establishment and thus, not a consumer under the MCPA.

As part of its case-in-chief, Carlisle presented testimony from an accountant who testified that based on its tax returns, B Bar J Ranch used its premises for business, rather than residential purposes. After obtaining a unanimous defense verdict on all of B Bar J Ranch's claims, Carlisle moved the district court for an award of attorneys' fees for successfully defending itself against B Bar J Ranch's MCPA claim.

Under the MCPA, a successful claimant is entitled to recover his/her attorneys' fees, however a defendant under the MCPA is only entitled to recovery of his/her fees if he/she can establish that the claimant's MCPA claim is "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Based on the fact that B Bar J Ranch knew it was operating its premises as a business instead of a residence, the district court found sufficient evidence to award Carlisle its attorneys' fees in defeating the MCPA claim, an award which was upheld by the Montana Supreme Court. This case presents the first time the Montana Supreme Court has upheld an attorneys' award in favor of a defendant defending against a claim under the MCPA.

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5. In *AAA Construction of Missoula LLC v. Choice Land Corp.*, 2011 MT 262, 362 Mont. 264, 264 P.3d 709, the Montana Supreme Court determined a bid constituted a binding contract between a contractor and subcontractor. It also concluded an owner cannot collect attorney fees just because it uses a surety bond to discharge a construction lien. Choice Land Corp ("CLR") hired Waynco as general contractor on a commercial real estate development project. Waynco solicited a bid from AAA Construction of Missoula LLC ("AAA") for a portion of the project. During a walk-through of the jobsite, Waynco's president advised AAA's manager of

the scope of work, and instructed AAA's manager not to include work on the front of the building in its bid. AAA submitted its bid to Waynco's project manager. The project manager signed the bid under the section entitled "Acceptance of Proposal," but he crossed out the words "Acceptance of Proposal" and hand wrote "Pending contract with owner. Final scope/subcontract to follow. Thanks!" Waynco included AAA's bid in its proposal to CLR, which CLR accepted.

When AAA started work on the project, Waynco asked AAA to perform additional work. The parties agreed AAA would perform the work for an additional price. Two weeks after AAA started work, Waynco provided a Subcontract Agreement to AAA which included work beyond what AAA agreed to perform, including work on the front of the building. AAA provided a new bid for all the work listed in the Subcontract Agreement, which doubled the bid amount. Waynco refused AAA's new price for the Subcontract Agreement work. The parties could not reach an agreement, and after a month of work, AAA left the job. Waynco did not pay AAA for any work performed. AAA filed a construction lien. The district court discharged the lien at the owner's request and replaced it with a surety bond.

AAA filed a complaint against CLR and Waynco for breach of contract. Waynco countered with its own breach of contract claims against AAA. The Court determined a contract existed between the parties. The bid constituted AAA's offer which Waynco accepted, supported by these facts: Waynco's president admitted he accepted the bid after CLR awarded Waynco the contract; Waynco controlled access to the jobsite and allowed AAA onto the jobsite to work; work continued for two weeks before Waynco sent the Subcontract Agreement, and Waynco allowed AAA to work for over a month without having the Subcontract Agreement in place.

The Court rejected Waynco's argument its project manager's handwritten note regarding "pending contract with owner" was a counteroffer or that it modified the contract. The parties did not enter into a subsequent written contract nor fully execute an oral agreement to modify. Finally, when Waynco argued AAA's breach of contract precluded recovery, the Court determined it was Waynco, not AAA, who materially breached the contract.

The Montana Supreme Court also determined it would not award attorney fees pursuant to § 71-3-124, MCA, which provides "reasonable attorney fees must be awarded to the defendant against whose property a lien is claimed if the lien is not established." CLR argued because the lien was discharged and substituted by a surety bond, AAA had not proved its lien. The Supreme Court held the Montana legislature "did not intend the lien substitute statute to allow lienees to recover their attorney fees simply by securing a surety bond despite their underlying liability." ¶ 33.

6. In *Hurly v. Lake Cabin Development LLC*, 2012 MT 77, 364 Mont. 425, 276 P.3d 854, the Montana Supreme Court determined an enforceable contract existed which entitled a seller to keep an option payment. Lake Cabin was in the process of purchasing land along the shore of Whitefish Lake to develop into residential units for sale. It offered to buy Hurly's property for $450,000, with $250,000 payable within 30 days as a non-refundable option payment. In addition, Lake Cabin agreed to build two single family homes, and two duplex units for Hurly. The contract also provided the transaction was contingent on Lake Cabin having a 30-day due diligence period.

While Lake Cabin applied for approval of its planned unit development ("PUD") from the City of Whitefish, it worked with Hurly toward closing the transaction, including planning the details of the homes to be built on the property. The City of Whitefish failed to approve the PUD, and Lake Cabin did not pursue it any further. Hurly sued Lake Cabin for breach of contract. Lake Cabin argued an enforceable contract did not exist because the home specifications were not listed in the contract. The Court held the material terms of the agreement were contained in the contract, and pursuant to the contract, Hurly was entitled to keep the non-refundable option payment and was also entitled to an award of his attorney fees.

7. In *Botz v. Bridger Canyon Planning and Zoning Commission*, 2012 MT 262,289 P.3d 180, the Montana Supreme Court affirmed a planning and zoning commission's decision a partially constructed horse barn must be torn down. A homeowner in the Brass Lantern Planned Unit Development ("PUD") started constructing a horse barn when the county's code compliance specialist determined the barn violated zoning regulations and applicable covenants. The certificate of survey on record, the regulations and the covenants together identified the building site for each parcel in the PUD, provided a legend specifying the location of the building site, indicated buildings could not exceed 17,424 square feet, and noted outbuildings had to be constructed within the building site. The owner was not granted a modification of the PUD because a modification would be "detrimental to the health, safety, pace, morals, comfort and general welfare" of the zoning area. ¶ 43.

8. In *Helena Sand and Gravel Inc. v. Lewis and Clark County Planning and Zoning Commission*, 2012 MT 272, 2012 WL 5986785 (Mont.), ___ P.3d ___, the Montana Supreme Court recognized the proper creation of a zoning district which excluded the use of property within the district for mining, but recognized the question remained whether such zoning constituted a taking for which the owner must be compensated.

Helena Sand and Gravel ("HSG") owns 421 acres near East Helena, Montana. In 2008, the Montana Department of Environmental Quality ("DEQ") issued a permit to HSG to mine gravel on 110 of those acres. Before the DEQ granted the permit, citizens in the area submitted a petition to the County seeking to create Special Zoning District Number 43 ("District 43"), which would, among other things, prohibit industrial and mining activities, including any sand and gravel mining on HSG's remaining 311 acres. Pursuant to statutory provisions authorizing the County to create planning and zoning districts "whenever the public interest or convenience may require," the County voted to create District 43. The matter then proceeded to the planning and zoning commission to adopt a development pattern and regulations for the new district. HSG voiced its concerns that the County was illegally gerrymandering, and requested a conditional use permit. The planning and zoning board asked the county attorney to comment on two issues: (1) whether the proposed development pattern complied with the County growth policy; and (2) how the proposed zoning compared with existing uses surrounding the area, which included two gravel mines. After lengthy discussion, hearings, and input from the public and HSG, the County approved the development pattern and regulations.

HSG argued the zoning regulations do not comply with the County growth policy because the zoning board disregarded the actual use of the land. The County's growth policy specifically stated its objectives were to support farming and encourage infill in urban areas. It did not mention mining and industrial uses as a priority for the area. The existing gravel pits did not mean gravel pits must be allowed, but rather recognized the continuation of existing non-conforming uses.

HSG then argued the County's decision to adopt the zoning pattern and regulations was illegal reverse spot zoning. Applying the three-part test to determine whether a county has engaged in illegal spot zoning, the Court determined the County did not depart from the prevailing rural residential use of the area, HSG is the only landowner to be adversely affected, and District 43 is not "special legislation" because it substantially complies with the growth policy.

Finally, HSG argued it has a constitutionally protected property interest of which it was deprived, giving rise to a takings claim. The Court held HSG did not have a constitutionally protected interest in mining because the DEQ has discretion to deny a mining permit. However, the question remains whether the zoning regulations affecting and limited the use of HSG's land to such an extent that a taking occurred. The case was remanded for determination of this limited issue.

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Nebraska

Case Law:

1. In *Centurion Stone of Nebraska v. Trombino*, 19 Neb. App. 643, 812 N.W.2d 303 (2012), a homeowner contracted with contractor to performer stucco and stone work on the exterior of a new home for an agreed contract price. The project was completed, and the homeowner paid the contractor less than the agreed upon price. The contractor sued the homeowner for breach of contract, claiming that it was still owed the balance of the contract price plus additional work. The homeowner asserted a counterclaim, alleging that the contractor's faulty workmanship caused damage to the residence. A jury found against contractor and in favor of the homeowner. The contractor appealed.

The Nebraska Court of Appeals first determined that trial court had implicitly concluded, as a matter of law, that the contractor had "substantially performed" the contract. Based on that conclusion the Court of Appeals determined that, under established Nebraska law, the contractor was entitled to at least the unpaid portion of the agreed upon contract price. Thus, the jury's finding of no damages for the contract on its breach of contract claim was a clear error. The Court of Appeals explained that, due to the trial court's implicit determination that the contractor substantially performed as a matter of law, the jury should have been directed to calculate damages by determining the amount owing the contractor on the contract, then determining if the homeowner was damaged and the cost of remediation, after which it is a simple mathematical calculation to determine who owes whom how much.

2. In *McKinnis Roofing and Sheet Metal, Inc. v. Hicks*, 282 Neb. 34, 803 N.W.2d 414 (2011), a homeowner entered into two contracts with a contractor to repair hail damage to its residence. The first contract was for roof repairs, and the second contract was for awnings repairs. The roofing contract provided that the contractor would replace or repair the roof upon approval and payment from the homeowner's insurance company. It also provided that the homeowner's acceptance under the agreement "cannot be withdrawn after [contractor] ... personnel appear on site ready to perform except by mutual written agreement of the parties." After approval and payment from the homeowner's insurance company, but before the contractor had commenced roofing work, the homeowner notified the roofing contractor that he

was going to replace the roof using a different contractor. The roofing contractor sued the homeowner for lost profits for losing the roof replacement job.

The awning contract provided that the homeowner would pay the contractor the cost of material and labor for job setup "when the same are delivered to the job site" and that the balance would be due upon completion. Despite the ongoing litigation over the roofing contract, the contractor informed the homeowner that it still intended to perform its obligation under the awning contract. However, because of the pending issues involving the roof contract, the contractor demanded payment on the awning contract before it would perform. The homeowner refused to make advance payment, but repeatedly indicated his readiness to adhere to the awning contract. The contractor did not go forward with the awning contract and sued the homeowner for loss of profits for the copper awning job based generally on a theory that the homeowner's refusal to make advance payment was a breach.

The trial court determined that the homeowner had breached both contracts and owed the contractor damages. The trial court also held that, due the homeowner's breach of the roofing contract, the contractor was justified in seeking "assurance of performance" by requesting advance payment before performing under the awning contract. Both parties appealed.

With regard to the roofing contract, the Nebraska Supreme Court held that the trial court erred when it found that the homeowner breached that contract. As the Nebraska Supreme Court explained, the plain language of the contract permitted the homeowner to withdraw and terminate the roof contract at any time before the contractor's personnel appeared on the site ready to perform the work of replacing the roof. While the contractor's personnel had come to the residence several times to inspect and photograph the roof, the Court held that this did not equate to contractor's personnel appearing on site ready to perform the work of replacing the roof. Because the homeowner terminated the roofing contract prior to the contractor's personnel appearing on site to perform the replacement work, the homeowner's withdrawal was not a breach of the roof contract.

The Nebraska Supreme Court concluded that in the absence of a breach of the roof contract by the homeowner, the contractor could not have been justified in seeking prepayment on the awning contract. Thus, the homeowner's refusal to prepay for the awning job was not a breach of the awning contract.

3. In *Bridgeport Ethanol, LLC v. Nebraska Dept. of Revenue*, 284 Neb. 291, 818 N.W.2d 600 (2012), the Nebraska Supreme Court held that an ethanol producer was not entitled to obtain a refund of sales and use taxes paid on building materials used in the construction of its ethanol production plant. The Court held that under Nebraska law, the erroneously collected tax could only be refunded only to the purchaser of the building materials, and the materials here were purchased by the ethanol producer's contractor, not by the ethanol producer itself. The Court also held that the contractor was Option 3 contractor and thus was required to pay use tax on all manufacturing machinery and equipment and any related repair or replacement parts it purchased and annexed for customer, and the contractor was not engaged in manufacturing. The contractor had to pay use tax on manufacturing machinery and equipment even if the contractor had a purchasing agency from a manufacturer. The Court further determined that the construction contract's provision concerning sales and use taxes regarding construction of ethanol plant did not constitute appointment by ethanol producer of contractor as purchasing agent.

Legislation:

1. Neb. Rev. Stat. § 71-6405, 2012 Neb. Laws. L.B. 1001, Building Construction Act. The Nebraska Legislature enacted Legislative Bill 1001 to amend the Building Construction Act. This Bill removed the authority of state agencies to amend the State Building Code.

2. Neb. Rev. Stat. § 44-8603, 2012 Neb. Laws L.B. 943, Insured Homeowners Protection Act. The Nebraska Legislature enacted the Insured Homeowners Protection Act. Under this Act, a person who has entered into a written contract with a residential contractor to provide goods or services to be paid from insurance proceeds may cancel the contract on the later of the third business day after the person has (a) entered into the written contract or (b) has received written notice from the insurer that all or part of the claim is not under the insurance policy. The Act requires that written notice of cancellation be delivered or mailed to the residential contractor at the address of the residential contractor's place of business as stated in the contract. A notice of cancelation is effective upon deposit in the U.S. Mail, if properly addressed. Within 10 days after a contract has been canceled pursuant to these provision, the contractor is required to refund any payments or deposits made by the insured. The Act also prohibits a residential contractor from promising to rebate any portion of an insurance deductible as an inducement to the sale of goods or services.

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Nevada

Case Law:

1. In *Hanover Ins. Co. v. TLC Investing, LLC*, 2011 WL 3841299 (D. Nev. Aug. 26, 2011) (unreported), a surety sought to enforce its rights under an indemnity agreement to require its indemnitors to post collateral upon demand. A prior unreported federal decision in Nevada recognized this remedy in 2009 in *Hartford Fire Insurance Company v. Universal Import, LLC*, 2009 WL 4042699 (D. Nev. Nov. 20, 2009). The *Hartford* court recognized, "where [a surety knows it will] have liability claims filed against it but [does] not know the amount of those claims, the legal remedy of money damages [is] not adequate."

However, in *Hanover*, a different judge for the District of Nevada rejected the reasoning in Hartford, finding it unpersuasive. The *Hanover* district court denied injunctive relief to the surety based on a finding that the surety failed to show a likelihood of irreparable harm (a different prong of the injunction standard than the "inadequate remedy at law" element addressed in Hartford), then denied a motion for reconsideration. *Id*.

2. In *Reyburn Lawn & Landscape v. Plaster Development Company*, 127 Nev. Op. 26, 255 P.2d.268, 274 (2011), the Nevada Supreme Court extended the "express or explicit" test to determine the enforceability of indemnity provisions to provisions allowing for complete indemnification of the indemnitee, even in circumstances of contributory negligence of the indemnitee. By so doing, the court further limited the enforceability of indemnification provisions.

Reyburn involved a claim by a homeowners association for construction defects against the developer/general contractor. The general contractor, in turn, asserted claims against its subcontractors based upon the indemnity provisions in the subcontracts. After the trial court

ruled that certain testimony by the general contractor's president constituted a judicial admission of liability, the jury determined that the general contractor was 99% at fault and the plaintiffs were 1% at fault. Because the trial court had already ruled that the subcontractors were obligated to indemnify the general contractor, the court ruled that the subcontractors were liable for the plaintiffs' award against the general contractor. A subcontractor appealed. The Nevada Supreme Court reversed the trial court's determination.

Under Nevada law, an indemnity provision by which the indemnitor holds the indemnitee harmless against all liability, regardless of whether it involves the sole negligence or gross negligence and willful misconduct of the indemnitee, must expressly and explicitly state that the indemnitor is indemnifying the indemnitee from its own negligence to be enforceable:

> … an express or explicit reference to the indemnitee's own negligence is required to indemnify an indemnitee for his or her own negligence- because "the character of [such an] indemnity [is] so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation, and no inference from words of general import can establish it.

George L. Brown Ins. v. Star Insurance Company, 126 Nev. Adv. Op. 31, 237 P.3d 92, 97 (2010). The Court further stated that "… a general provision indemnifying the indemnitee "against any and all claims," standing alone, is not sufficient." *Id*.

The Nevada Supreme Court in *Reyburn* determined that because the indemnification provision at issue did not expressly or explicitly provide that the subcontractor would indemnify the general contractor for the general contractor's contributory negligence, the extent of the subcontractor's indemnification obligations would be limited to the damages occurring from the subcontractor's own scope of work. *Reyburn*, *supra*, 127 Nev. Op. 26, 255 P.2d.274 – 275.

Legislation:

1. **AB 32 (codified at NRS 624.220).** A licensed contractor that intends to bid on a single construction project that will require an increase in the monetary limit of his or her license must request the increase at least 5 working days in advance of the date the contractor submits the bid.

2. **SB 19 (codified at NRS 624.266).** An applicant for a contractor's license or a contractor to notify the Nevada State Contractors Board ("Board") in writing within 30 days after the applicant or licensee is convicted of, or enters a plea of guilty, guilty but mentally ill, or nolo contender in any state to (1) a crime against a child; (2) a sexual offense; (3) murder; (4) voluntary manslaughter; or (5) a felony or crime involving moral turpitude if the conviction occurred or the plea was entered with the preceding 15 years. The failure to provide such a notice is constitutes grounds for refusing issuance of a license or for disciplinary action by the Board.

3. **AB 144 and AB 574 (codified at NRS 338.0117).** In order to receive the preferential bidder's preferential 5% credit for public works, a contractor, an applicant, or a design-built team must submit to the public entity sponsoring or financing a public work a signed affidavit attesting that the contractor will meet the 5 requirements for the duration of the project:

- At least 50% of the workers on the project must have a Nevada driver's license or identification card;

- All of the non-apportioned vehicles primarily used on the project are registered in Nevada;

- At least 50% of the design professionals who work on the project have a Nevada driver's license or identification card;

- At least 25% of the suppliers of the materials used on the project are located in Nevada unless the public entity requires the acquisition of materials or equipment that cannot be obtained from a supplier in Nevada; and

- Certain payroll records related to the project are maintained and available within Nevada.

The failure to comply with any of the above-stated requirements is a material breach of contract entitling the public entity to 1% of the cost of the contract as liquidated damages, but only against the party responsible for failing to comply with the requirements.

4. SB 236. It is the public policy of Nevada to encourage and promote the use of recycled aggregate, recycled bituminous pavement and recycled rubber from tires in the construction, reconstruction, improvement and maintenance and repair of public highways in Nevada.

5. SB 268. Certain provisions of NRS Chapter 338, which pertains to public works projects, were amended:

- A contractor must replace an unacceptable subcontractor on a public work project without an increase in the amount of the bid;

- A prime contractor must forfeit a portion of a public works contract under certain circumstances;

- Revisions in the manner by which a construction manager at risk may solicited bids and select a subcontractors for a public work;

- Revisions in the manner by which a construction manager of risk is selected for pre-construction services and the construction of public works;

- Revisions in the manner by which a construction manager at risk may solicit bids and select a subcontractor for a public work.

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New Hampshire

Case Law:

1. In *Phaneuf Funeral Home v. Little Giant Pump Company*, No. 2011-151, 2012 WL 2476952 (N.H. June 29, 2012), the New Hampshire Supreme Court held that the manufacturer of a water fountain that was created to be hung on the wall could not take advantage of a statute of repose for improvements to real property, even though the property owner modified the water fountain to be permanently fixed to the wall. In January 1999, a funeral home purchased a water fountain that was made to be hung on the wall, but the funeral home wanted the water fountain to blend into the décor and so hired a contractor, Boyer Interior Design, to affix the water fountain to the wall. In March 2007, a fire broke out and was attributed to a defective pump in the water fountain.

New Hampshire has an eight year statute of repose for damages from construction improvements to real property. The Supreme Court held that the legislature intended to protect only those who are involved in the transformation of a product into an enhancement to the value or use of real estate. Here, the water fountain "was neither manufactured to be an improvement nor specifically designed to become one", therefore, the action against the water fountain manufacturer did not arise from construction improvements to real property and is not barred by the eight year statute of repose. On the other hand, the claim against Boyer Interior Design did arise from construction improvements to real property, and therefore the claim against Boyer Interior Design was barred by the eight year statute of repose.

2. In *Wyle v. Lees*, 33 A.3d 1187 (N.H. 2011), the New Hampshire Supreme Court held that the economic loss doctrine does not bar recovery for misrepresentations of present fact that serve as an inducement for a contract. In such cases, the tort claim is not duplicitous of the contract claim.

In *Wyle*, the plaintiff purchased a rental property from Lees with several code violations and lacking required building permits. As part of the listing for sale, Lees filled out a disclosure, which included the question "Are you aware of any modifications or repairs made without the necessary permits?" Lees answered, "No." Lees also told the plaintiff that "I did everything the town asked." The New Hampshire Supreme Court upheld damages to the plaintiff because plaintiff's claim alleged independent, affirmative misrepresentations unrelated to the performance of the contract and therefore, the claims were not barred by the economic loss doctrine.

3. In *Brown v. Concord Group Insurance Company*, 44 A.3d 586 (N.H. 2012), the New Hampshire Supreme Court held that the "your work" exclusion does not uniformly apply to all work ever performed by the insured but rather excludes coverage on a job by job basis. Accordingly, the "your work" exclusion does not necessarily exclude coverage in a situation where an insured's work causes damage to something that the insured had previously constructed and completed.

In 2003, the insured, Spencer, built a home for a third-party. In 2005, the plaintiffs purchased the home and then two years later, in 2007, the plaintiffs discovered water leaking into the home near a sliding glass door. The insured, Spencer, attempted a fix. In 2009, the plaintiffs again observed water leaking into the home near the same glass door. The plaintiffs hired another contractor who determined that the damage was caused by additional leaks that Spencer did not discover in his 2007 repair and that Spencer probably would have discovered

all of the leaks if he had removed all of the siding on the wall. At all relevant times, Spencer was insured by defendant Concord Group Insurance Company.

Here, the New Hampshire Supreme Court rejected Concord Group's argument that coverage is excluded under the "your work" exclusion because the entire home was Spencer's work. The "your work" exclusion does not necessarily exclude coverage in a situation where an insured's work causes damage to something that the insured had previously constructed and completed. Therefore, if the damage was caused by Spencer's 2007 repair which failed to locate all of the leaks, the "your work" exclusion would exclude coverage for Spencer's 2007 repair, but not damage to his original construction work in 2003, which was a separate act, distinct from the 2007 repair and complete prior to the 2007 repair. If the damage was caused by Spencer's 2003 construction, then all coverage would be excluded.

4. In *Osgood v. Kent*, No. 11-cv-477-SM, 2011 WL 6740411 (D.N.H. Dec. 21, 2011), the Federal Court confirms that one contract creates one indivisible lien, for which the time deadline starts to run on the last date work was performed or materials were provided under the contract. In this case, the deadline to file the mechanics lien started to run upon installation of the temporary I-beams and cribbing and had expired prior to the filing of this action. But once the owner terminated the contract and exerted dominion over the temporary I-beans and cribbing, those items were no longer at the project under the original contract but under some sort of quasi-contractual lease. The contractor then had 120 days from the owner's self-help action to perfect its lien on the I-beans and cribbing. The Court also considers the possibility that the as long as the temporary I-beams and cribbing were in place supporting the structure, the contractor was continuously providing materials to the project until the temporary I-beams and cribbing were removed. Therefore, the contractor had 120 days from when the I-beams and cribbing were removed to file its lien. This was enough to make contractor's mechanic's lien timely as to the I-beams and cribbing, but not as to work completed under the terminated contract.

Legislation:

1. S.B. 371 (2012), Professions and Occupations—Design Services—Lien and Incumbrances. New Hampshire now by statute recognizes that professional design services can be the basis for a mechanic's lien by contractors and subcontractors. "Professional design services" is defined as services provided by a licensed architect, licensed landscape architect, licensed engineer, permitted septic designer, certified wetland scientist, certified soil scientist, or licensed land surveyor that is directly related to the improvement of real property.

2. N.H. RSA 38:22 (2012), Municipal Utilities—Liens and Collections of Charges. Contractors only have a lien upon municipal electric, gas, water, or waste water utility projects in excess of $250 to the extent a written contract exists in accordance with the statute.

3. S.B. 252 (2012), Energy Conservation—Buildings—Contracts. The term of any energy performance contract shall not exceed 20 years from date of project implementation and any energy saving measure will achieve energy cost savings sufficient to recover any project costs or incurred debt service within 20 years from date of project implementation.

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New Jersey

Case Law:

1. In *Potomac Ins. Co. of Illinois v. OneBeacon Ins. Co.*, 2012, N.J. Super. LEXIS 52 (N.J. App. Div. April 13, 2012), Respondent co-insurer OneBeacon Insurance Company ("One Beacon") sued appellant co-insurer Pennsylvania Manufacturers' Association Insurance Company ("Pennsylvania"), seeking reimbursement for appellant's respective share of the defense costs in an underlying action filed against their insured. The insured, Aristone, Inc. ("Aristone"), was the general contractor on a school building sued over allegedly continuous water intrusion, which commenced at the completion of construction in 1993 and continued at least through the filing of suit in 2001. Aristone was insured under standard commercial general liability policies issued by four carriers, which included OneBeacon and Pennsylvania. OneBeacon and another of the carriers assumed Aristone's defense and appointed an attorney to defend Aristone in the litigation with the school. Through counsel appointed by OneBeacon, Aristone filed a declaratory judgment action against Pennsylvania. The declaratory judgment action was settled as was the underlying litigation with the school.

Despite the conclusion of both the declaratory judgment action and underlying litigation, OneBeacon subsequently filed suit seeking contribution from Pennsylvania for the costs and expenses it incurred in defending the underlying action with the school. Pennsylvania argued that OneBeacon's claim against it for reimbursement of defense costs was barred by its settlement with Aristone. Those costs, according to OneBeacon, were paid by OneBeacon, rather than Aristone, and were excluded from the release. The matter was tried and the judge found in favor of OneBeacon, reasoning that Aristone had no right to release Pennsylvania from any obligation that it may have.

Pennsylvania appealed the trial court's ruling; its principal argument on appeal was that the court below erred because New Jersey does not permit an insurer to obtain contribution from a settling insurer under the apportionment doctrine. The question of whether one insurer may pursue another insurer for contribution for defense costs when the second insurer has already settled with the common insured had not been addressed in New Jersey. The question had, however, been addressed on a number of occasions in California, where the court there recognized a direct right of action between coinsurers of the same risk. The Appellate Division therefore held that Pennsylvania's settlement with Aristone was not, in and of itself, a bar to OneBeacon's subsequent suit against it for contribution to defense costs.

Pennsylvania also argued that, even if OneBeacon had a legally cognizable, separate right to seek contribution, it was barred from filing the present action by the release resulting from the settlement between it and Aristone. The Appellate Division disagreed. The language of the release was sufficiently broad to allow for two interpretations, one favorable to Pennsylvania and the other favorable to OneBeacon. There was no meeting of the minds of the drafters of the release with respect to its meaning. The attorney appointed to represent Aristone and Pennsylvania's attorney had different and conflicting understanding in that regard. The appointed attorney testified that he wanted to eliminate any reference to any insurance carrier so that there was no confusion that the release was only between Aristone and Pennsylvania. Pennsylvania's attorney testified that he wanted to have broad language to include the instant claim. However, the attorneys never discussed or resolved directly the issue of whether the settlement of the declaratory judgment action brought by Aristone and the terms of the release settling that action would bar or permit a future claim by OneBeacon against Pennsylvania in a subsequent action. The court also held that the attorneys who filed and defended the coverage

suit had an obligation under the entire controversy doctrine to disclose the potential claim for defense costs by respondent, the non-party co-insurer. Had counsel done so, the judge responsible for the case could have required that all of the issues and parties be included and resolved in that single litigation, rather than in two separate actions.

2. In *Rational Contracting Inc. v. Congregation Agudath Israel of West Essex*, 2012 N.J. Super. Unpub. LEXIS 1648 (N.J. App. Div. July 10, 2012), plaintiff subcontractor filed an action to foreclose on a construction lien filed for moneys owed from defendant Frankoski, a general contractor, to construct exterior panels and a roof on a project to construct a synagogue. Defendant filed a counterclaim alleging that plaintiff failed to perform the work within the terms of the contract, requiring it to retain another roofing company and incur additional costs. In support of its counterclaim, plaintiff introduced the testimony of the president of the replacement roofing contractor, who, although was qualified as an expert, was never offered as such by defendant. The jury ruled in favor of defendant, finding that the testimony of the replacement contractor established the reasonable charges for the work performed to correct plaintiff's work, and awarded defendant $84,490 as compensatory damages and $9,357.55 as prejudgment interest.

On appeal, the plaintiff contended that the judge erred in not finding the testimony of the replacement contractor to be a net opinion and permitting the jury to consider the reasonable value of its services and materials without expert testimony. The appellate court disagreed with plaintiff and found that the replacement contractor, whose firm defendant hired to complete the work, testified as a fact witness, not as an expert, as to the cost to repair and complete the work, that he was the perfect witness to do so, that expert testimony was not required to establish damages with some reasonable degree of certainty, and that his opinion was not a net opinion and it affirmed the award for compensatory damages. The appellate court did reverse the award for prejudgment interest and remanded the matter to the court because the judge provided no reasons for awarding prejudgment interest or for the rate he used to calculate the award, and the judge may have calculated interest from the wrong date.

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New Mexico

Case Law:

1. In *Windham v. L.C.I.2, Inc.*, 2012-NMCA-1, 268 P.3d 528 (Ct. App. 2011), the New Mexico Court of Appeals addressed for the first time the obligation of a commercial general liability carrier to defend a contractor, as an additional insured, under New Mexico's anti-indemnity statute, NMSA 1978, §56-7-1. L.C.I.2 was the general contractor for the construction of a recreation area, which included an enclosed swimming pool. L.C.I.2 hired Newt & Butch to install the roof on the structure over the pool. One of Newt & Butch's employees, Bobby Windham, fell through an uncovered opening while installing the roof and brought suit against L.C.I.2 for negligence in failing to provide coverings for the cutouts for the skylights and in failing to implement safety rules and precautions. Newt & Butch, by contract, had provided additional insured status to L.C.I.2 under its commercial general liability policy issued by Nationwide Mutual Ins. Co.

The complaint filed by Windham alleged only the negligence of L.C.I.2 and made no claims against Newt & Butch. L.C.I.2, however, sought and obtained a defense from Nationwide Mutual Ins. Co. under a reservation of rights as it was "uncertain whether this incident arose out of [Plaintiff's] work for Newt & Butch's or whether [Plaintiff's] injuries arose out of L.C.I.2's individual negligence." Nationwide then brought a declaratory action to declare the extent of coverage, and the parties filed cross motions for summary judgment. The trial court granted summary judgment in favor of L.C.I.2. On appeal, the Court of Appeals affirmed the summary judgment.

On appeal, Nationwide argued that the duty to defend was barred by NMSA 1978, §56-7-1, and in the alternative, that the statute only allows for recovery of attorney's fees incurred in defense after a determination as to proportionate liability has been rendered. Nationwide argued that since section A of the statute identifies the duty to defend as one of the obligations barred as void and section B, in specifying what indemnification obligations are allowed under the statute, is silent as to the duty to defend, then the duty to defend is unenforceable. The Court of Appeals, in addressing this argument, did not interpret the statute, but instead relied on a prior decision which predated the statute at issue, *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009 NMCA 81, 213 P.3d 1146. The Court's analysis of that case, however, appears questionable. The Court of Appeals noted that in *City of Albuquerque* "neither party disputed that the allegations against the City were that the City itself was negligent…". It then went on to state that "requiring BPLW to fulfill its contractual obligation to defend the City against any suit against the City arising out of BPLW's alleged negligence in the performance of the contract does not violate Section 56-7-1 or the policy behind it." The Court of Appeals, however, fails to harmonize its first finding that there was no alleged negligence by BPLW, or Newt & Butch in the instant case, with its later determination that requiring defense of claims arising out of BPLW's negligence does not violate the statute.

In addressing the second argument, the Court of Appeals again looks to the prior decision in *City of Albuquerque* and secondarily relied on the general legal proposition that the duty to defend is different from the duty to indemnify.

It is not clear whether the additional ensured endorsement that was issued by Nationwide and was at issue in this litigation was the New Mexico specific additional ensured endorsement that was drafted to track the statute, CG 32 04, or not.

2. In *State ex rel. Solsbury Hill, LLC v. Liberty Mutual Ins. Co.*, 2012-NMCA-32, 273 P.3d 1 (Ct. App. 2012), the New Mexico Court of Appeals considered whether a material supplier under New Mexico's version of the Miller Act, NMSA 1978, §13-4-18 et seq., was required to prove delivery to or incorporation of materials into a project in order to prevail on a claim against a payment bond. The Court of Appeals followed federal precedent in declaring that all a material supplier needs to prove to recover on a payment bond is that the material supplier supplied the materials under a reasonable good faith belief that the materials were intended for incorporation into the bonded project.

3. In *City of Santa Fe v. Travelers Cas. & Sur. Co.*, 2010-NMSC-10, 228 P.3d 483 (2010), the New Mexico Supreme Court considered the effect of limitations contained in a performance bond on the time to bring suit under the bond. In this case, Travelers has issued a performance bond to the City of Santa Fe on behalf of Lone Mountain Contracting as the principal. The performance bond contained a two-year time-to-sue provision. The contract between the City of Santa Fe and Lone Mountain Contracting did not contain any specific limitation on suits brought against the contractor for breach of contract.

On September 29, 2004, the City of Santa Fe declared Lone Mountain to be in default and demanded performance by Travelers. Travelers denied the claim on October 28, 2005. After further negotiations were unsuccessful, the City of Santa Fe brought suit against Travelers on May 14, 2007, and Travelers defended based on the two-year statute of limitations contained in the bond.

New Mexico's version of the Miller Act does not contain any provision as to the time within which suit must be brought by an obligee under the bond. The Court looked however to the requirement contained in the statute that the bond must be in an amount equal to one hundred percent of the contract and the general rule that a surety steps into the shoes of its principal to require the surety to provide a bond that covers all of the obligations of the contractor. The Court also noted that since the City of Santa Fe did not negotiate the terms of the performance bond, but was presented with a bond prepared by Lone Mountain Contracting and Travelers, the City of Santa Fe was not bound by any limitations contained in the bond. Absent the limitation contained in the performance bond, the surety was bound to the same statute of limitations that would apply to the principal, in this case, six years.

4. In *United Nuclear Corp. v. Allstate Ins. Co.*, *(citation not published at time of writing)*, the New Mexico Supreme Court considered the meaning of the term "sudden" within a commercial general liability policy's pollution exclusion. The Court considered varying definitions of the term, including definitions that conjoined "sudden" with "unexpected" and definitions that contained a temporal sense to the word. The Court also broadly surveyed the case law from other jurisdictions. Finally, the Court determined that, as there were diverging definitions of the term and there was no consensus among the other jurisdictions having addressed the question, it would interpret the term broadly against the insurer and held that "sudden" means "unexpected" from the standpoint of the insured.

Legislation:

1. NMSA 1978, §13-1-22. Commencing January 1, 2012, this statutory section has been amended to provide new requirements for a contractor or business to obtain a resident preference on all publically funded projects. As amended effective January 1, 2012, in order to receive a resident business or resident contractor preference, the business must apply to the Taxation and Revenue Department for the issuance of a certificate. In order to obtain a certificate, the business must provide an application containing an affidavit by a certified public accountant that the business either: (1) has at least one vehicle, has paid property tax or rent on real property in New Mexico in each of the five years prior to application; has paid at least one other tax in each of those years; and has paid unemployment insurance on at least three full-time employees in each of the five years prior to the application; (2) if the contractor is a new business or contractor, defined as one being in existence for less than five years, the owners of the business must have paid property tax or rent on real property and at least one other tax in New Mexico in each of the five years prior to the application; (3) if a relocated business or contractor, at least eighty percent of the total personnel of the business in the prior year must be residents of New Mexico and the business must have leased real property in New Mexico for ten years or purchased real property greater than one hundred thousand dollars in value; or (4) if the contractor is a previously certified contractor, the contractor has changed its name, has reorganized, was purchased by another legal entity but operates in the state as substantially the same enterprise or has merged with another entity but operated in the state as substantially the same enterprise. The statute is currently being interpreted to allow qualification under the fourth requirement only to those businesses and contractors who have been certified after January 1,

2012 under one of the other methods in the statute. Commencing July 1, 2012, the same statute was amended again, this time to add a preference to veteran-owned businesses.

2. NMSA 1978, §13-4-2. This is the companion statute to NMSA 13-1-22 discussed above. Effective July 1, 2012, it provides a five percent preference on all publically funded projects to contractors possessing a resident contractor certificate and a ten percent preference to contractors possessing a veteran certificate where the business has annual revenues of less than one million dollars; an eight percent preference to contractors possessing a veteran certificate where the business has annual revenues of between one million and five million dollars; and a seven percent preference to contractors possessing a veteran certificate where the business has annual revenues of greater than five million dollars. The preference to veteran contractors is not cumulative. The veteran preference may also be subject to a cap of ten million dollars either applied in terms of preference granted by public bodies or based on the amount of preference work contracted by the veteran business. Currently the veteran preference is not being enforced as there is no way of certifying the annual revenue of the certificate other than self-reporting.

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North Carolina

Legislation:

N.C. Gen. Stat. § 44A, Statutory Liens and Charges. On July 12, 2012, North Carolina enacted two controversial bills that made the most significant changes to its mechanic's lien and bond laws in forty years. Senate Bill 42 was crafted by the title insurance industry and introduces an entirely new concept to North Carolina – the Lien Agent. House Bill 1052 was crafted by construction industry stakeholders and contains less controversial modifications to the current lien and bond law scheme. The most controversial changes involve the creation of a Lien Agent and administrative hurdles on the liability of contractors to pay twice for the same work on public projects. Some of changes in these new laws take effect immediately, some take effect on January 1, 2013, and some take effect April 1, 2013.

1. S.B. 42, An Act To Require Persons Furnishing Labor Or Materials In Connection With Certain Improvements To Real Property To Give Written Notice To The Designated Lien Agent Of The Owner Of The Improved Real Property To Preserve Their Lien Rights.

- **Designation of Lien Agent** – Effective April 1, 2013, North Carolina's mechanic's lien law will require potential lien claimants to provide written notice to a "Lien Agent" in order to preserve all the lien rights that they now possess. If the potential lien claimant does not follow the new requirements associated with the Lien Agent, its lien rights could be terminated or subordinated to others' interests.

  New N.C. Gen. Stat. § 44A-11.1 *et seq*. will require the designation of a Lien Agent for all private projects where the total cost of the improvements is $30,000.00 or more, except existing single family residences. The owner will choose the Lien Agent from a list of Lien Agents maintained by the Department

of Insurance. All Lien Agents will be title insurance companies or agents. The Lien Agent may collect from the owner a fee of $50.00 or less.

- **Identification of Lien Agent** – If the project is one that requires a building permit, then the permit is supposed to identify the Lien Agent, and the permit is supposed to be conspicuously and continuously posted on site. If the building permit does not identify the Lien Agent, or if the permit is not posted on site, then a potential lien claimant can submit a written request to the owner, who is then supposed to identify the Lien Agent within seven days.

  A contractor or subcontractor must, within three business days of contracting with a material supplier, provide the supplier with a written notice identifying the Lien Agent. This notice can be given by (1) certified mail, return receipt requested; (2) signature confirmation as provided by the USPS; (3) physical delivery and obtaining a delivery receipt from the Lien Agent; (4) facsimile with a facsimile confirmation; (5) depositing with (a) DHL Express;[1] (b) Federal Express;[2] or (c) UPS;[3] (6) electronic mail with delivery receipt; (7) including the Lien Agent contact information in a written subcontract; or (8) including the Lien Agent contact information in a written purchase order. Any contractor or subcontractor who has received notice of the Lien Agent contact information, whether from the building permit, the inspections office, a notice from the owner, contractor, or subcontractor, or by any other means, and who fails to provide the Lien Agent contact information to the lower-tier subcontractor in the time required under this subsection, will be liable to the lower-tier subcontractor for any actual damages incurred by the lower-tier subcontractor as a result of the failure to give notice.

- **Notice to Lien Agents** – Potential lien claimants who want to preserve their full lien rights must serve a Notice to Lien Agent. The Notice to Lien Agent must include (1) the potential lien claimant's name, mailing address, telephone number, fax number (if available), and electronic mailing address (if available); (2) the name of the party with whom the potential lien claimant contracted; (3) a description of the real property sufficient to identify it; and (4) a notice of the potential lien claimant's right later to pursue a claim of lien for improvements described in the Notice. The Notice to Lien Agent can be served by (1) certified mail, return receipt requested; (2) signature confirmation as provided by the U.S. Postal Service; (3) physical delivery and obtaining a delivery receipt from the Lien Agent; (4) facsimile with a facsimile confirmation; (5) depositing with via (a) DHL Express; (b) Federal Express; or (c) United Parcel Service.; or (6) electronic mail, with delivery receipt.

  Serving a Notice to Lien Agent does not satisfy the requirements for serving a Notice of Claim of Lien Upon Funds. The notices are different. Potential lien claimants that have served a Notice to Lien Agent still must serve, and if

[1] DHL Same Day Service, DHL Next Day 10:30 am, DHL Next Day 12:00 pm, DHL Next Day 3:00 pm, or DHL 2nd Day Service.

[2] FedEx Priority Overnight, FedEx Standard Overnight, FedEx 2 Day, FedEx International Priority, or FedEx International First.

[3] UPS Next Day Air, UPS Next Day Air Saver, UPS 2nd Day Air, UPS 2nd Day Air A.M., UPS Worldwide Express Plus, or UPS Worldwide Express.

appropriate file, a Claim of Lien on Real Property and a Notice of Claim of Lien Upon Funds to perfect their lien rights.

To preserve its full lien rights, a potential lien claimant should (1) serve the Notice to Lien Agent within 15 days after first furnishing labor or materials; (2) serve the Notice to Lien Agent before the owner conveys an interest in the real property (e.g., before the property is sold or a new Deed of Trust is recorded); or (3) file a Claim of Lien on Real Property before the owner conveys an interest in the real property. If the Notice to Lien Agent is not received by the Lien Agent within 15 days after first furnishing labor or materials, or prior to a conveyance of an interest in the real property, then a potential lien claimant's lien rights are (1) terminated if the property is sold or (2) subordinated to the new lender if a new Deed of Trust or mortgage is recorded. Accordingly, the easiest and most cost-effective way for a potential lien claimant to preserve its full lien rights will be to serve a Notice to Lien Agent on every project within 15 days after first furnishing labor or materials.

- **A Contractor's Lien Waiver May Not Prejudice a Subcontractor's Lien Rights** – Under current law, a lien waiver signed by the contractor before a subcontractor files a lawsuit to enforce its Claim of Lien On Real Property waives the subcontractor's right to enforce the contractor's lien on real property (e.g., a contractor's lien waiver waives a subcontractor's subrogated lien rights). Effective April 1, 2013, N.C. Gen. Stat. § 44A-23 will provide that a contractor's lien waiver will not prejudice the rights of the subcontractor if (1) the subcontractor has given notice to the Lien Agent; (2) the subcontractor has served a notice of claim of lien upon funds on the owner; and (3) the subcontractor has delivered a copy of the notice of claim of lien upon funds served upon the owner to the Lien Agent.

2. H.B. 1052, An Act To Make Various Amendments To North Carolina's Mechanics Lien And Payment Bond Laws, As Recommended By The Legislative Research Commission's Mechanics Liens On Real Property Committee.

- **Curtailment of Double Payment on North Carolina's Public Projects** – Effective January 1, 2013, a new scheme is being introduced for North Carolina's public projects that will provide contractors with some protection against double payment. The new scheme requires contractors to furnish any claimant with a copy of the payment bond within seven days of the claimant's written request. It requires contractors to provide all of their subcontractors and suppliers with a "Project Statement." It requires subcontractors to provide all of their subcontractors and suppliers with the contractor's Project Statement, too. A contractor or subcontractor that fails or refuses to provide a Project Statement cannot enforce its contract against the lower tier party until the Project Statement has been provided to the lower tier party.

  The Project Statement must contain: (1) the name of the project; (2) the physical address of the project; (3) the name of the contracting body; (4) the name of the contractor; (5) the name, phone number, and mailing address of an agent authorized by the contractor to accept service of requests for the payment bond, the notice of public subcontract, and the notice of claim on payment bond; and

(6) the name and address of the principal place of business of the payment bond surety.

Upon receipt of a Project Statement, subcontractors and suppliers should serve "Notice of Public Subcontract" upon the contractor. If Notice of Public Subcontract is sent within 75 days of the subcontractor's or supplier's first date of furnishing labor or materials, then the subcontractor or supplier can pursue its full claim. Otherwise, the subcontractor's or supplier's claim will be limited to the greater of (1) the value of the labor or materials provided within 75 days of claim or (2) $20,000.00, unless the contractor has failed to timely furnish a copy of the payment bond to the claimant.

- **Claims of Lien on Real Property Must Be Served** – North Carolina's current laws require filing, but not serving, Claims of Lien on Real Property. Effective January 1, 2013, Claims of Lien on Real Property must be served upon the owner, and if the Claim of Lien on Real Property is being asserted by a subcontractor or supplier (e.g. by subrogation pursuant to N.C. Gen. Stat. § 44A-23), then it must also be served upon the contractor. The Claim of Lien on Real Property will not be perfected until it is both served and filed. Therefore, service and filing of the Claim of Lien on Real Property should occur before 120 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien.

  Service is deemed complete when the Claim of Lien on Real Property is: (1) personally delivered; (2) deposited for delivery via the USPS; or (3) deposited for delivery via (a) DHL Express; (b) Federal Express; or (c) UPS. Parties can be served at (1) the address the party listed on the permit relating the project, (2) the address for the party listed on the tax rolls for any county in North Carolina, or (3) the address for the registered agent of the party listed with the Secretary of State.

- **The Form of the Claim of Lien On Real Property is Changing** – North Carolina law currently does not require a Claim of Lien on Real Property to contain a certification that it was served or require a subrogated lien to name the contractor through which subrogation is asserted. Effective January 1, 2013, each Claim of Lien on Real Property must include a certification of proper service. If the Claim of Lien on Real Property is being asserted by a subcontractor or supplier (e.g., by subrogation pursuant to N.C. Gen. Stat. § 44A-23), then it must also name the contractor through which subrogation is asserted. Chapter 44A also now expressly allows subcontractors and suppliers to use either (a) their own dates of first or last furnishing of labor or materials, or (b) the contractor's dates of first or last furnishing of labor or materials.

- **Notice of Contract Changes** – The current version of N.C. Gen. Stat. § 44A-23 contemplates only the contractor posting and filing the Notice of Contract. Effective January 1, 2013, the statute will allow the owner to post and file the Notice of Contract. Additionally, the deadlines associated with the Notice of Contract will be relaxed. The owner or contractor will be able to comply with the Notice of Contract requirements by posting and filing the Notice of Contract within the latter of (1) 30 days following the date the permit is issued for the improvement of the real property or (2) 30 days following the date the contractor

is awarded the contract for the improvement of the real property involved. The statute does not define "permit."

- **Bankruptcy "Fix"** – Recent bankruptcy cases generated confusion regarding the date that a lien upon funds arises or attaches, and therefore whether a Notice of Claim of Lien Upon Funds could be served after a party in the contractual chain files bankruptcy. Effective January 1, 2013, section § 44A-18 will make clear that a lien upon funds arises, attaches, and is effective immediately upon the first furnishing of labor, materials, or rental equipment at the site of the improvement. This clarification is intended to permit subcontractors and suppliers to serve Notices of Claim of Lien Upon Funds (and related subrogated Claims of Lien on Real Property) after another party in the contractual chain files bankruptcy. The revisions also make clear that until a lien claimant serves a Notice of Claim of Lien Upon Funds, any owner, contractor, or subcontractor against whose interest the lien upon funds is claimed may make, receive, use, or collect payments thereon and may use such proceeds in the ordinary course of its business.

- **Sanctions for False Statements Expanded and Increased** – North Carolina's current law states that a contractor or other person receiving payment for improvements to real property who knowingly furnishes a false statement of the sums due or claimed to be due (e.g., a fraudulent lien waiver) is guilty of a Class 1 misdemeanor. Effective January 1, 2013, the sanctions for such false statements will increase. In addition to the criminal sanctions, fraudulent lien waivers will constitute deceit and misconduct subject to disciplinary action under Chapter 87 of the General Statutes. As a result, a person that knowingly furnishes such a false statement may have its license revoked, suspended, or otherwise restricted. Moreover, an individual involved may also lose his or her ability to act as a qualifying party for a license.

- **Necessary and Proper Parties to Lien Enforcement Lawsuit** - Effective immediately, not all owners, lenders or title insurance companies are necessary or proper parties to lien enforcement actions. N.C. Gen. Stat. § 44A-13 now states that a former owner is not a necessary party in a lien enforcement lawsuit if the former owner holds no ownership interest in the property at the time the lawsuit is commenced and if the plaintiff seeks no relief from the former owner. Subsequent purchasers and lenders also are not necessary or proper parties to lien enforcement lawsuits if the lien has been discharged via cash deposit or via a lien discharge bond. Nothing in the revised statute prevents a lien claimant from asserting any claims that are separate and distinct from enforcement of the lien.

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North Dakota

Case Law:

1. In *Northern Excavating Co Inc. v. Sisters of Mary of the Presentation of Long Term Care*, 2012 ND 78, 815 N.W.2d 280, the North Dakota Supreme Court determined construction lien is not accurate if it overstates the amount owed, entitling the owner to attorney fees.

Sisters of Mary of the Presentation of Long Term Care ("Sisters") hired Northern Excavating Co Inc. ("Northern") to repair a water main break on Sisters' property on a time and material basis. When Northern submitted a bill for $103,244.11, Sisters refused to pay, asserting the repairs were worth approximately $40,000. Northern filed a construction lien and sued Sisters, seeking breach of contract damages in the amount of $98,806.98 and foreclosure of the lien. Sisters counterclaimed for breach of contract, unlawful sales practices, and invalid construction lien/slander of title. Issues other than foreclosure of the construction lien went to the jury, which awarded Northern $81,694.23 plus interest.

After the verdict, Sisters applied for costs and attorney fees in the amount of $34,000, arguing it successfully challenged Northern's lien and therefore the court was required, pursuant to NDCC § 35-27-24.1, to award fees and costs. The district court awarded Sisters $3,231 in fees and costs. The court found Northern was the prevailing party and awarded $743 of its costs pursuant to NDCC § 28-26-06. The parties both appealed, arguing the court's award of attorney fees to the other was inappropriate.

Sisters argued the construction lien was not accurate. The lien amount was $98,806, and the jury's determination of the reasonable value of the time and materials was $81,694, a $17,112 difference. The Supreme Court noted "a determination of whether an owner has successfully contested the 'accuracy of a construction lien,' such that the owner is entitled to an award of full costs and reasonable attorney's fees, must include a requirement of reasonableness as to whether the amount of the lien is accurate." ¶ 7. The Court noted if the difference were ten dollars, it would be absurd to find the owner successfully contested the accuracy of the lien, but in this case, where the difference was more than $17,000, Northern's lien was proved to be inaccurate.

Sisters then argued it should be entitled to all costs and attorney fees, but the Court held the statute limits recovery of fees and costs to those reasonably expended in contesting the lien. Finally, the Court upheld the determination Northern was the prevailing party for the purpose of recovering costs under NDCC § 28-26-06.

2. In *Bakke v. D&A Landscaping Company LLC*, 2012 ND 170, 820 N.W.2d 357, the North Dakota Supreme Court found a jury correctly concluded an individual, not his limited liability company, was liable for breach of contract, fraud and negligence claims. When homeowners asked a landscape supply company for references for a landscaper, the supplier gave them a business card with Andy Thomas' name on it, and the words "D & A Landscaping." Thomas provided the homeowners with an estimate and a drawing with the notation they were submitted by "D & A Landscaping per Andy Thomas." Thomas installed a new retaining wall, but the homeowners were not satisfied with the work. During construction, the homeowners learned D & A Landscaping was a legal entity when they received an invoice from D & A Landscaping Inc. They later learned a D & A Landscaping Company LLC had previously existed but was dissolved. The homeowners sued Thomas and D & A Landscaping Company

LLC. The jury found Thomas was liable individually for breach of contract, negligence and fraud. Thomas never disclosed he was acting as an agent for D & A Landscaping Company LLC. Because he was found individually liable, there was no need to engage in a veil piercing analysis.

3. In *Fines v. Ressler Enterprises Inc.*, 2012 ND 175, 820 N.W.2d 688, the North Dakota Supreme Court upheld the dismissal of a homeowner's claim against a contractor as sanctions for spoliation of evidence. On August 3, 2010, Fines, the homeowner served a complaint on Ressler Enterprises Inc. ("Ressler"), which alleged negligent installation of siding on Fines' home. Ressler answered on Friday, September 3, 2010. That same day, Fines' counsel faxed a letter to Ressler's counsel to notify Ressler the siding would be removed and replaced starting on Monday, September 6, 2010, a Labor Day holiday. Ressler's counsel immediately faxed a letter back demanding the siding not be removed until Ressler and its experts had an opportunity to inspect and examine the siding on the building. Fines went ahead with the removal and replacement. Sanctions for spoliation of evidence are meant to punish the conduct and to serve as a warning to others. Dismissal of the entire case is the most restrictive sanction, but it was appropriate in this case where the removal and replacement of the siding over the objection of opposing counsel was prejudicial to the opposing party as well as offensive.

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Ohio

Case Law:

1. In *Jones v. Centex Homes*, No. 2010-1826, 2012 Ohio 1001, 2012 WL 877561 (Ohio Sup. Ct. March 14, 2012), the Court held that homeowners could not waive their right to enforce a contractor's duty to construct homes in a workmanlike manner.

In two consolidated cases, plaintiff homeowners filed suit after discovering that various electronic devices did not work in their new homes, allegedly because metal joists had become magnetized. Defendant Centex Homes obtained summary judgment from the trial court on the basis that the plaintiffs had waived all warranties, express and implied, except a limited warranty that Centex provided in the contracts with the homeowners. The court of appeals affirmed the trial court's decision.

In reversing the court of appeals, the Supreme Court first examined Ohio law on the duty to construct a home in a workmanlike manner and concluded that the duty is imposed by law. The Court distinguished this duty from an implied warranty of suitability which would hold a contractor strictly liable for defects. Instead, the Court held that the duty to construct in a workmanlike manner "essentially holds a builder liable only for negligence."

Next, the Court considered whether the requirement to construct a home in a workmanlike manner could be waived. The Court determined that the contractual waiver of warranties was not relevant because "the requirement is not an implied warranty, but instead a duty imposed by law." Again, the Court looked at Ohio law and held that the duty to construct a home in a workmanlike manner "is a baseline standard that Ohio home buyers can expect builders to meet. The duty does not require that builders be perfect, but it does establish a

standard of care below which builders may not fall without being subject to liability, even if a contract with the home buyer purports to relieve the builder of that duty."

2. In *Westfield Insurance Company v. Custom Agri Systems, Inc.,* No. 2011-1486, 2012 Ohio 4712, 2012 WL 4944305 (Ohio Sup. Ct. October 16, 2012), the Court held that claims for defective workmanship were not covered by a commercial general liability insurance policy. Contractor Younglove Construction, L.L.C. ("Younglove") sued project owner PSD Development, L.L.C. ("PSD") for non-payment in federal court. PSD answered that it had sustained damages as the result of defects in a steel grain bin constructed by Younglove's subcontractor Custom Agri Systems, Inc. ("Custom"). When Younglove filed a third-party complaint against Custom for contribution and indemnification Custom sought defense by its insurer Westfield Insurance Company ("Westfield").

Westfield intervened and obtained a summary judgment holding that the insurance policy covered claims for defective construction but that exclusions removed the claims from coverage. Custom appealed to the Sixth Circuit Court of Appeals which certified questions about whether defective workmanship was an "occurrence" under a commercial general liability policy and, if it was, whether policy exclusions precluded coverage to the Ohio Supreme Court.

The Supreme Court found that "occurrence" was defined as an accident. In prior decisions, the Court had defined accident as "unexpected, as well as unintended." The Court also adopted the notion that "[i]nherent in the plain meaning of accident is the doctrine of fortuity," and concluded that faulty workmanship claims are not covered because they are not fortuitous. In light of this conclusion, the Court found it unnecessary to answer the second certified question.

3. In *Melampy v. Evans Landscaping, Inc.*, No. CA2011-03-05, 2011 Ohio 675, 2012 WL 562414 (Butler Ct. App. February 21, 2012), the Court, in a matter of first impression, held that a homeowner was not precluded from recovering attorneys fees based upon a material supplier's failure to release a mechanics lien, even though the homeowner had not recorded an affidavit of full payment.

Plaintiff Kenneth Melampy ("Melampy") entered into a contract for landscaping stone work at his home. The contractor ordered stone from Defendant Evans Landscaping, Inc. ("Evans"). Evans claimed that it was not paid for the stone and recorded a lien against Melampy's property. Melampy obtained an affidavit from the contractor stating that Melampy had paid the contractor in full, including for Evans' stone. Melampy provided a copy of the affidavit to Evans but never recorded the affidavit. Evans failed to release its lien and Melampy filed suit for violation of Ohio Revised Code ("RC") Section 1311.011. The trial court found in favor of Melampy and awarded him compensatory damages and attorneys fees.

In affirming the trial court, the Court of Appeals determined that RC 1311.011(B)(1) "provides that a material supplier cannot place a lien on a homeowner's property . . . where (1) the homeowner has paid the original contractor in full and (2) said full payment to the original contractor was made prior to the homeowner's receipt of the lien." If the requirements of RC 1311.011(B)(1) are met, RC 1311.011(B)(3) entitles the homeowner to all damages, including court costs and attorneys fees, incurred in litigation with a lien claimant who fails to release a lien within 30 days after receiving written notice that the homeowner made full payment to the original contractor prior to receiving a copy of the lien.

RC 1311.011(B)(1) also provides that "An owner . . . may file with the county recorder . . . an affidavit that the owner . . . has made payment in accordance with this division." Evans argued that this provision required that the Melampy record an affidavit in order to impose liability on Evans for failure to release its lien. The Court disagreed.

First, the Court found that the use of the word "may" provided "a clear and definite meaning that recording the affidavit is discretionary and not mandatory." Additionally, the Court found that even if the statute was not clear and definite, the legislative intent supported a finding that the affidavit was not required to be recorded. The apparent purpose of RC 1311.01 is to protect the homeowner and RC 1311.22 provides that RC 1311.01 to 1311.22 are to be liberally construed to secure "the beneficial results, intents and purposes thereof."

4. In *Transtar Electric, Inc. v. A.E.M. Electrical Services Corporation*, No. L-12-1100, 2012 Ohio 5986, 2012 WL 6617571 (Wood Ct. App. December 14, 2012), the Court held that a clause stating that receipt of payment from the project owner was a condition precedent to payment to a subcontractor was insufficient to create a "pay-if-paid" clause shifting the risk of non-payment to the subcontractor.

Plaintiff Transtar Electric, Inc. entered into a subcontract with Defendant A.E.M. Electric Services Corporation ("A.E.M.") for certain electrical work involved in the construction of a hotel swimming pool. A.E.M. was the general contractor for the project. The subcontract provided that "Receipt of payment by Contractor from Owner for work performed by Subcontractor is a condition precedent to payment by Contractor to Subcontractor for that work."

The Court stated that ordinarily the risk of insolvency or default by an owner rests with the general contractor because it is in the best position to assess an owner's creditworthiness and to minimize the risk of default by the owner. Contract language, i.e., a "pay-if-paid" clause, which seeks to alter this usual arrangement and shift risk of non-payment by the owner to a subcontract is disfavored and must "clearly and unambiguously indicate that the intent of the parties was to shift the risk . . ." In determining whether a clause meets this test "the *sine qua non* of such a provision is a clear unambiguous statement that the subcontractor will not be paid if the owner does not pay." Provisions which merely state that payment from the owner is a condition precedent or shift of risk are insufficient and must be interpreted to govern only the time at which payment is to be made, i.e., a "pay-when-paid" clause. If no specific time is stated, then payment must be made after a "reasonable delay."

5. In *Oaktree Condominium Association, Inc. v. Hallmark Building Company*, No. 2012-L-011, 2012 Ohio 3891, 975 N.E. 1068 (Wood 2012), the Court upheld the constitutionality of Ohio's construction statute of repose, Section 2305.131 of the Ohio Revised Code, where the complaint was filed more than two years after discovery of the defect.

The statute of repose bars tort actions against design professionals brought more than ten years after completion of construction. Section 16, Article I of the Ohio Constitution protects rights to seek redress in the courts of Ohio. As a result, the issue was whether the statute of repose violated Section 16, Article I by depriving the Plaintiff Oaktree Condominium Association, Inc. ("Oaktree") of a right to a remedy.

After reviewing prior decisions by the Ohio Supreme Court on various statutes of repose, the Court concluded that a statute of repose was constitutional when applied to a plaintiff whose injury occurred beyond the ten-year statutory period, but before the April 7, 2005 effective date of the statute; provided that such a plaintiff was afforded a reasonable time after being "placed

on notice of the like cause of its injury" to file suit. Such a result provided plaintiffs a reasonable time to file before the statute of repose prevented their causes of action from accruing. Based upon its review, the Court also concluded that a reasonable time was two years. Because Oaktree had not filed within that period, its cause of action was constitutionally precluded.

In *Ohio Farmers Insurance Company v. Ohio School Facilities Commission*, No.11AP-547, 2012 Ohio 951, 2012 WL 760842 (Franklin Ct. App. March 6, 2012), the Court held failure to comply with a contract's notice requirements precluded a contractor's claim.

Northern Valley Contractors, Inc. ("NVCI") entered into a contract with the Ohio School Facilities Commission and the Cleveland Municipal School District (collectively, "OSFC") for masonry work on a school project. When financial difficulties arose, NVCI assigned its interests to its surety Ohio Farmers Insurance ("OFI"). OFI filed suit against OSFC for breach of contract and other causes of action. OSFC sought summary judgment on the breach of contract claim due to failure to follow the dispute resolution procedure set forth in Article 8 of the contract documents. Article 8 required that claims be filed prior to completion of construction, "provided the Contractor notified the Architect . . . no more than ten (10) days after the initial occurrence of the facts which are the basis of the claim." Article 8 also required a written claim and a "contemporaneous statement of damages."

Based upon deposition testimony from NVCI to the effect that it had not submitted a "final claim" because damages were ongoing the trial court held that no claim had been filed and that, as a result, NVCI "failed to initiate, let alone exhaust, the contractual dispute resolution procedures." The Court of Appeals upheld the trial court stating that "It is well-settled under Ohio law that when a party has given clear answers to unambiguous questions that negate the existence of any genuine issues of material fact, such party may not thereafter create an issue of fact with an affidavit that merely contradicts, without explanation, previously clear testimony."

Legislation:

1. Sub. Senate Bill No. 224, effective September 28, 2012, Amended Section 2305.06 of the Ohio Revised Code to reduce the statute of limitations for actions on written agreements from fifteen years to eight years.

2. Sub. House Bill No. 275, effective July 3, 2012, Enacted Section 1345.092 of the Ohio Revised Code to provide residential contractors with the opportunity to make a "cure offer." The "cure offer" must contain a disclosure in substantially the form set forth in the statute, must include (1) monetary compensation, (2) reasonable attorney's fees not to exceed $2500 and (3) cost costs and must be submitted to the consumer by certified mail, return receipt requested, within thirty days after service of process is completed by the consumer. The consumer then has thirty days to file notice of acceptance or rejection of the "cure offer" with the court in which the consumer has filed its action and to serve the notice on the contractor. If a "cure offer" is rejected and the consumer is awarded actual economic damages that are not greater than the value of the "cure offer," the consumer is not entitled to (a) treble damages, (b) court costs incurred after receipt of the "cure offer" and (c) attorney's fees incurred after receipt of the "cure offer."

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Oklahoma

Case Law:

1. In *Ameristar Coil Processing, LLC v. William E. Buffington Co., Inc.*, 2012 OK CIV APP 2, 269 P.3d 55, the Court of Civil Appeals reviewed the effect of the claim notice provisions in the AIA A201-1997 General Terms & Conditions form when there is no Architect of Record on a project. Buffington, as general contractor, constructed a manufacturing facility for Ameristar. Post-completion, Ameristar discovered the foundation was improperly constructed and sued Buffington. In the trial court, the parties disputed whether the arbitration clause in the AIA A201 was enforceable because the AIA A201 procedure for submitting claims to the Architect of Record as a condition precedent to initiating arbitration had not been, and could not be, completed. The trial court agreed with Ameristar the arbitration clause was unenforceable without an Architect present to accept any claim notice. The appellate court found the terms governing the A201 claim process to be ambiguous (even if an Architect had been present on the project). The court held the trial court should have conducted an evidentiary hearing to determine what the parties' had intended the contract result to be in the face of that ambiguity, and remanded for further proceedings.

2. In *Mill Creek Lumber & Supply Co. v. First United Bank & Trust Co.*, 2012 OK CIV APP, 278 P.3d 12, the appellate court reviewed the priority between a refinanced construction mortgage and a mechanics' lien. First United Bank provided a construction mortgage to the Williamses in September 2007 to build a new home. Mill Creek supplied materials for the work from November 2007 until February 15, 2008. The Williamses refinanced with the Bank, which released the construction mortgage and recorded a new mortgage on February 28, 2008. This mortgage was "supplemented" in March 2008. At both of these times, the Williamses certified there were no other encumbrances on the property and title was good. Mill Creek filed a mechanics' lien in May 2008, within the statutory deadline, and subsequently brought suit to foreclose. The Bank and Mill Creek disputed priority, and the trial court ruled in favor of Mill Creek. The Court of Civil Appeals affirmed, holding, first, the mortgage did not cover "fixtures" under the UCC and, therefore, the UCC did not give the Bank priority. The court also held the bank was not entitled to equitable subrogation because it was deemed to have constructive notice of Mill Creek's lien retroactive to when Mill Creek began providing materials because Mill Creek complied with the statutory notice and recordation requirements in 42 Okla. Stat. §§142, 142.6.

3. In *Northwest Roofing Supply, Inc. v. Elegance in Wood, LLC*, 2012 OK CIV APP 13, 271 P.3d 800, the Court of Civil Appeals discussed the statutory requirements for properly filing a mechanics' liens on projects involving existing residences. In that case, the Rhoadses contracted with Elegance in Wood to remodel their home and Elegance subcontracted to receive materials from Northwest. After Elegance was paid in full, it failed to pay Northwest and Northwest recorded a mechanics' lien against the Rhoadses property. Northwest later filed suit to foreclose against the Rhoadses, who did not answer, resulting in a default judgment. The Rhoadses later petitioned to vacate the judgment based on Northwest's failure to provide the pre-work notice of its ability to lien the property required by 42 Okla. Stat. §142.1. After the petition was denied, the appellate court reversed on appeal. First, the court disagreed with Northwest's argument that §142.1 did not apply because the Rhoadses were not occupying the home during construction. The court noted the limited record did not support this argument, and also noted earlier case law supporting "constructive occupancy" when residents vacate their home during remodeling work. Accordingly, the court also held that Northwest's lien was not

perfected because it failed to satisfy the pre-contract notice requirement, and the court remanded with instructions to vacate the default judgment.

4. In *Richardson, Richardson & Boudreaux, PLLC v. Morrissey*, 2012 OK 52, 283 P.3d 308, the Oklahoma Supreme Court reviewed the procedures for filing a motion to dismiss when a professional negligence suit does not include an "expert opinion affidavit" required by 12 Okla. Stat. §9. In Richardson, attorneys moved to dismiss a legal malpractice suit for lack of a proper expert affidavit with the initial pleading. The plaintiff later filed the required affidavit out of time with the trial court's permission. Several months later, the attorneys filed another motion to dismiss because the affidavit was signed by the plaintiff's counsel, not the plaintiff, and also failed to verify that a written opinion had been obtained from an expert. The trial court denied the motion to dismiss as untimely. The Supreme Court issued a writ or prohibition instructing the trial judge to dismiss the case because no time limit is imposed in the pleading code on a motion to dismiss. The Court, however, set forth a new rule requiring motions to dismiss for lack of an expert opinion affidavit to be filed on or before a professionally licensed defendant files a responsive pleading. While this case involved a legal malpractice suit, the decision will also impact the use of expert opinion affidavits in suits against licensed design professionals, who are presumably included among the professionals protected by §9.

5. In *QuikTrip Corp. v. Abatement Systems, Inc.*, 2012 OK CIV APP 54, 281 P.3d 250, the Court of Civil Appeals reviewed a verdict from a trial involving a contract for asbestos removal work, the performance of which had been delayed by a fire. While QuikTrip does not reach any new law in its holding, the opinion provides a review of what can constitute appropriate jury instructions for impossibility of performance and modification of contract.

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Oregon

Case Law:

1. In *Pincetich v. Nolan*, 252 Or. App. 42, 285 P.3d 759 (2012), the Court of Appeals of Oregon held that failure to continuously maintain a contractor's license for a period of 14 days during construction barred recovery of amounts owing and the exception in ORS § 701.131(2)(c) is limited to construction-defect proceedings. In Pincetich, after a contractor entered into a contract to construct a residence and commenced performance of the work, the Construction Contractor's Board ("CCB") suspended the contractor's license to perform construction work because he allowed his liability insurance to lapse. The CCB reinstated the contractor's license when he obtained replacement liability insurance 14 days later. Following reinstatement, the contractor continued work for approximately six months on the residence. When the homeowner's refused to make payment of amounts the contractor alleged were due for the construction work, the contractor filed an action for breach of contract, quantum meruit, and claim on account to recover amounts owed.

The homeowners moved for summary judgment on their affirmative defense that the contractor was barred by ORS § 701.131(1) from commencing an action because he had failed to maintain his contractor's license continuously throughout performance of the contract. The contractor opposed the motion claiming there were factual issues as to whether the action was subject to the exceptions found in ORS 701.131(2)(c)(A)-(B). Those provisions provide

exceptions to ORS § 701.131(1) where, among other things, the proceeding arises out of a contractor being directed by a person or entity that provides construction or design labor or services of any kind and arises out of defects, deficiencies, or inadequate performance in the construction, design, labor, services, materials, supplies, equipment, systems or products provided. The contractor argued that the homeowners qualified as residential developers and as such provided the service of paying contractors and others for their work and that plaintiff's claims against defendants arose from their inadequate (i.e. untimely) performance of that service.

The Court of Appeals of Oregon affirmed the trial court's decision that the exception found under ORS 701.131(2)(c) was inapplicable, and thus the contractor's claims were barred for failure to continuously maintain his license while performing construction work pursuant to the parties' contract. In reaching its decision, the court reviewed the history and purpose of the exceptions to ascertain whether the term "services," as used in the statute, includes a developer's contractual obligation to make payments for construction work. The court found that the purpose of the bar to unlicensed contractor's claims is to protect consumers from irresponsible builders. Further, the purpose of the exceptions to the bar was to further benefit consumers by providing authority for unlicensed contractors to pursue third-party claims in construction-defect cases where the unlicensed contractor were sued by consumers for damages resulting from the construction defects. By lifting the bar to allow unlicensed contractors to bring third-party claims against others whose actions had caused or contributed to construction defects, the provision was intended to allow contractors to recover funds from other responsible parties and to thereby better ensure that affected consumers were made whole. The court concluded that the exception only applies to construction-defect proceedings, and consequently, to claims involving services whose inadequacy contributed to the defects that are the subject of the proceedings. Accordingly, the exception was inapplicable.

2. In *Evergreen Pac., Inc. v. Cedar Brook Way, LLC*, 251 Or. App. 194, 284 P.3d 509 (2012), the Court of Appeals of Oregon, held that when a contractor takes a trust deed to secure a construction debt, the contractor forfeits the right to claim a construction lien for the same work. In *Evergreen Pac*., a property owner obtained a $4.49 million line of credit from a bank to develop two parcels of land. The funds were to be disbursed over the course of construction. To secure payment of the debt, the property owner gave the bank a trust deed for the two parcels, which was recorded in August 2007. The property owner then contracted with a paving contractor to pave parking lots on the parcels. The property owner did not pay the paving contractor after a dispute arose over the quality of the work.

The paving contractor filed a construction lien against the property for the amount it alleged was owed. The property owner then filed suit for slander of title by wrongful lien, alleging the work was defective. The property owner and paving contractor then entered into a settlement agreement. The contractor agreed to repair portions of the work, perform new work, and release its lien in exchange for the property owner agreeing to pay for the construction work and for some additional future work. The work was to be paid in part immediately and the remainder after plaintiff finished the new work and repairs. The debt was secured by a trust deed on the two parcels, junior to the bank's trust deed. The settlement agreement also stated, nothing in its terms was "a release or waiver of [paving contractor's] right to record a lien against the property, in accordance with ORS 87.001 *et seq*., for all amounts due in the event of a default of the payment terms of this agreement." The property owner later defaulted on its bank loan and failed to pay the contractor amounts due under the settlement agreement. The contractor filed a new construction lien on the property. The contractor then brought suit to foreclose on the lien, naming the property owner and bank as defendants and claiming that its

lien is superior in priority to the interest the bank had in the property through its trust deed. The bank also brought suit to foreclose on its trust deed.

The trial court ruled that the lien was valid and superior in priority because the bank had notice that under the settlement agreement the contractor had not waived its rights to file a lien against the property. The bank appealed arguing that the contractor's lien was invalid because, among other things, the contractor forfeited its right to a construction lien by accepting a trust deed to secure the debt. The Oregon Court of Appeals agreed and reversed the trial court's decision. In rendering its decision, the court largely relied upon the Oregon Supreme Court's decision in *Trullinger v. Kofoed*, 7 Or. 228, 33 Am. Rep. 708 (1879), where the Supreme Court announced a bright-line rule that when a contractor takes a mortgage to secure a construction debt, the contractor forfeits the right to a construction lien. The Court of Appeals held that *Trullinger* compels the conclusion that, as a matter of law, by taking a trust deed, the contractor forfeited the right to a construction lien.

3. In *Sera Architects, Inc. v. Klahowya Condo., LLC*, 253 Or. App. 348, —P.3d— (2012), the Court of Appeals of Oregon held that an architectural firm's construction lien relates back to the date that the contractor begins preparing the development site for construction and a lender's deed of trust was not entitled to priority under the doctrine of equitable subrogation. In *Sera Architects*, a developer purchased property with a loan to build a mixed-use development. The loan was provided by Triangle Holdings II, LLC ("Triangle") and secured by a trust deed on the development property, recorded in January 2006. In March 2006, the developer entered into a contract with an architectural firm to provide architectural services for the development. The firm commenced work on the plans in March 2006 and held a workshop for consultants, owners, and other interested parties in April 2006, including a representative of a bank that would later provide a loan to the developer. In July 2006, a contractor began preparing the property for construction by demolishing existing cabins and clearing trees. The contractor stopped work in October 2006 without commencing construction. In November 2006, the bank provided the developer with a line of credit, secured by a trust deed on the development property. The trust deed was recorded on November 15, 2006. Using the line of credit, the developer paid off the aforementioned loan from Triangle. The developer paid the architectural firm until early 2007, at which point it stopped making payments and the firm record a claim of lien on June 29, 2007. The firm then filed a cause of action against the developer and the bank seeking to foreclose on its construction lien. The firm alleged that the bank's right, title, or interest in the development property is subordinate to the firm's interest.

The trial court ruled that the bank's trust deed had priority over the architectural firm's lien because it was recorded prior to the lien. The trial court also held that the bank's trust deed on the development property held the same position as the original issuer of the loan, Triangle, by equitable subrogation. The Court of Appeals reversed the trial court on both grounds. First, the court held that the perfection of a construction lien dates back to the date of commencement of the improvement, and thus related back to the date the contractor began preparation on the project, prior to the recording of the bank's trust deed.

Second, the court held that the bank's trust deed was not equitably subrogated to the position of Triangle, the issuer of the initial loan, to the extent that the line of credit was used to pay off the initial loan. Oregon law holds that the doctrine of equitable subrogation will only apply if the lender, claiming a right to subrogation, proves that it was ignorant of the existence of an intervening lien and that its ignorance was not a result of inexcusable negligence. The court held that because the bank was not excusably ignorant of the architectural firm's lien, as it was

aware of the facts that led to the creation of the firm's lien, the doctrine of equitable subrogation was inapplicable.

4. In *Or. Occupational Safety & Health Div. v. CC & L Roofing, Co., Inc.*, 248 Or. App. 50, 273 P.3d 178 (2012), the court held that evidence offered by an employer to demonstrate that it did not and could not with the exercise of reasonable diligence, know of the presence of an Oregon Occupational Safety and Health Division ("OR-OSHA") violation, including promoting safety and employee adherence to OR-OSHA rules, are proper considerations for determining the employer's constructive knowledge of a safety violation. In *CC & L Roofing Co.*, an OR-OSHA inspector issued a citation to a roofing contractor for a "serious" OR-OSHA violation (as defined by ORS § 654.086(2)) when he witnessed two employees of the roofing contractor, a supervisor and other employee, not using fall protection equipment while working more than 10 feet above ground. The inspector determined that both the supervisor and employee were adequately trained in the use of fall protection equipment and that the supervisor's violation of the safety violation, as well as the supervisor's allowance of the employee's violation, could be imputed to the roofing contractor. The inspector issued a citation, with a proposed penalty of $25,000, to the roofing contractor for a "serious" violation of a safety standard under OAR 437-003-1501 for not ensuring that fall protection systems were provided, installed, and implemented when employees were exposed to a hazard of falling 10 feet or more to a lower level. The contractor denied the allegation and requested a hearing.

The Administrative Law Judge ("ALJ") issued an order that vacated and set aside the citation. Because the charged violation is classified as "serious," OR-OSHA was required to prove either actual or constructive knowledge of the violation. The ALJ made the following relevant findings: (1) the contractor had done everything that it could to supply, train, and prepare its employees to work in compliance with OR–OSHA's rules; (2) the contractor had exercised reasonable diligence to ensure that its workers adhered to company policy and OR–OSHA rules regarding fall protection; and (3) the supervisor's failure to wear fall protection was willful misconduct. Thus, the ALJ found that because the employer did everything it could do in the exercise of reasonable diligence to ensure worker adherence, willful misconduct by a supervisory employee should not be imputed to the employer unless the employer actually knew of the conduct and did not take action to stop it. The ALJ held that since OR-OSHA failed to establish actual or constructive knowledge of the violation the citation should be set aside.

The Oregon Court of Appeals affirmed the ALJ's order. Relying on the Oregon Supreme Court's decision in *Don Whitaker Logging, Inc.* (*Or. Occupational Safety & Health Div. v. Don Whitaker Logging, Inc.*, 329 Or. 256, 985 P.2d 1272 (1999)), the court held that that OR-OSHA must prove as part of its prima facie case that: (1) the supervisor committed a serious violation and (2) the supervisor was acting within the scope of his authorized duties. If OR-OSHA proves these elements, the fact that the supervisor knew or could have known of the violation is attributable to the employer. The employer then may offer evidence that it "did not, and could not with the exercise of reasonable diligence, know of the presence of a violation" as evidence that negates the presumption that arises from a supervisor's knowledge of the violation, and as evidence to be considered in determining whether the supervisor's knowledge should be attributed to the employer. Accordingly, the court held that evidence of the particular circumstances can be considered in the determination of constructive knowledge. Thus, the ALJ properly considered the roofing contractor's evidence of a safety program to conclude that it made reasonable efforts to follow OR-OSHA rules and the supervisor's misconduct as relevant to the determination as to whether OR-OSHA met it burden of persuasion to support a citation for a serious violation.

5. In *Cortez v. Nacco Materials Handling Group, Inc.*, 248 Or. App. 435, 274 P.3d 202 (2012), the Oregon Court of Appeals held that a member of an Oregon LLC is not protected from employee injury claims by the exclusive remedy provision of the Workers' Compensation Law. In Cortez, an employee was injured while backing up a forklift owned and operated by his employer, a member-managed LLC. As a result of the injury, the employee filed a claim and obtained workers' compensation benefits from the employer's insurer. The employee then filed an action for damages against the LLC's sole member and owner for a violation of the Oregon Employer Liability Law and negligence. The Defendant Member moved for summary judgment arguing, among other things, that the worker's compensation law provides the employee's exclusive remedy under ORS § 656.018. The trial court agreed and granted the motion for summary judgment. The employee appealed arguing that the exclusive remedy provision applies only to officers and directors of an employer, but not members of an employer.

The text of ORS § 656.018 does not include members of an LLC within the group protected from liability for injuries when statutory workers' compensation remedies are available. The statute does, however, include officers and directors of the employer. As such, the Court of Appeals found that exclusive remedy provision in ORS § 656.018 does not apply to members of an LLC employer. The Defendant Member also argued that as a member, it was immune from suit under ORS § 63.165 which protects members from personal liability for the liabilities of the LLC. The court also rejected this argument noting that the statute does not protect members from all liability, but simply liabilities of the LLC. A member is still liable for his/her own tortious conduct. Because the employee's negligence claim was based on the Defendant Members own tortious conduct, the statute did not serve to shield it from liability. While affirming the trial court's dismissal of the employee's Employer Liability Law claim, the court reversed and remanded the case to the trial court to resolve the employee's negligence claim.

Legislation:

1. **House Bill 4034, 76th Leg. Reg. Sess. (Or. 2012) Amends Oregon Revised Statutes § 279C.515 and Adds Oregon Revised Statutes § 279C.580** relating to prompt progress payments on public improvement contracts. First, the legislation changes the applicable rate of interest for contractor's failure to make timely payments in accordance with prompt payment requirements for public improvement contracts to nine percent per annum. Previously, the applicable rate of interest was equal to three times the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon on the date that is 30 days after the date when payment was received from them contracting agency or from the contractor, but the rate of interest could not exceed 30 percent. Second, the legislation requires public improvement contracts to mandate that the contractor provide the first-tier subcontractors with a standard form for claiming payment and to use the same form and regular administrative procedures to process payments during the entire project. The contractor may change the form or procedure if the subcontractor is given 45 days written notice, and a copy of the changed form or description of the new or changed procedures.

2. **Senate Bill 1533, 76th Leg. Reg. Sess. (Or. 2012) Amends Oregon Revised Statutes §§ 279C.527-.528.** The legislation requires public agencies awarding public improvement contracts for the construction of a public building or reconstruction or major renovation of a public building must include an amount of at least 1.5 percent of the total contract price to be used for appropriate green energy technology. However, this requirement is only applicable to reconstruction or major renovation that exceeds 50 percent of the value of the public building. The legislation provides that if a contracting agency determines that including green energy technology on the subject contract would not be appropriate they may forego the

requirement in lieu of providing 1.5 percent of the subject contract price on green technology on a future contract in addition to the 1.5 percent requirement for the future contract.

3. Senate Bill 1518, 76th Leg. Reg. Sess. (Or. 2012) Adds New Provisions to Oregon Revised Statutes §§ 279A, 279B. The new legislation has three main aspects.

- First, the legislation prohibits state contracting agencies from accepting bids or proposals from a bidder/proposer, or its affiliates, that advised or assisted the state contracting agency concerning the solicitation documents or materials related to public contracts if a reasonable person would believe that by giving advice or assistance the contractor or affiliate would have or would appear to have an advantage in obtaining the subject solicitation. The contracting agency may apply to the Director of Oregon Department of Administrative Services for an exception to the prohibition.

- Second, the legislation also permits bidders/proposers to submit, and the state contracting agencies to consider, personnel deployment disclosures as part of the bid or proposal which should include the number of workers that will be deployed for the project, the number of workers that will be employed within the state, and the number of newly created jobs arising therefrom. The contracting agency may give preference to bidders/proposers that will employ more workers within the state, as long as the bid/proposal otherwise meets the agency's specifications.

- Third, the legislation requires the Oregon Department of Administrative Services to provide a report to the Legislative Assembly every two years regarding special procurements conducted under Oregon Revised Statutes § 279B.085. The required information to be provided in the report includes: the name of each contracting agency that conducted a special procurement, the number of special procurements each contracting agency conducted and the number of contracts awarded, a summary of the reasons for conducting the special procurement and a summary of the special procurement procedures utilized therein, the contract price or estimated contract price for each contract awarded, and a summary of the protests that were filed in connection with such awards. Consistent with this requirement, contracting agencies are required to maintain sufficient records for the Oregon Department of Administrative Services to provide the aforementioned information.

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Pennsylvania

Case Law:

1. In *Bricklayers of Western Pennsylvania Combined Funds, Inc. v. Scott's Development Co.*, 41 A.3d 16 (Pa. Super. Ct. 2012), the Superior Court of Pennsylvania ruled that trustees of union employee benefits funds can file a mechanic's lien on behalf of union members seeking unpaid contributions. In this case, Scott's Development Company ("Scott") hired J. William Pustelak, Inc. ("Pustelak") to perform construction work (the "Project"). Prior to contracting with Scott, Pustelak entered into a collective bargaining agreement with the Bricklayers and Trowel Trades International, Local No. 9 (the "Union") whereby Pustelak agreed to pay certain health, welfare, retirement, and fringe benefits to the Bricklayers of Western Pennsylvania Combined Funds, Inc. (the "Trustee") for each hour of work performed by the Union's members. Thereafter, Pustelak failed to pay the agreed upon contributions to the Trustee for work performed by members of the Union on the Project. As a result, the Trustee filed a mechanic's lien on Scott's property seeking recovery of the unpaid contributions. After the Trustee filed a complaint to enforce the mechanic's lien, Scott filed a demurrer claiming that the Trustee lacked standing because it was not a subcontractor as defined by the Commonwealth's Mechanic's Lien Law, 49 P.S. § 1508. The Superior Court ruled that while a strict compliance standard may be used with certain issues of notice and/or service, a liberal construction of the definition of subcontractors was necessary to effectuate the purposes of the Mechanic's Lien Law. Accordingly, the court found the existence of a contract implied in law by reasoning that the Union contracted with Pustelak pursuant to the terms of a collective bargaining agreement. Thus, the Bricklayers qualified as subcontractors under Pennsylvania's Mechanics' Lien Law. The court also held that certain provisions of the collective bargaining agreement were closely akin to an assignment. Pursuant to the assignment, Pustelak had to make certain payments directly to the Trustee, and as an assignee, the Trustee had standing to bring a Mechanic's Lien Action.

2. In *Ribarchak v. Municipal Authority of Monongahela*, 44 A.3d 706 (Pa. Commw. Ct. 2012), the Municipal Authority of Monongahela (the "Authority") solicited bids for work on a sewage treatment plant project. Galway Bay Corporation ('Galway") submitted a bid with Thomas F. Ribarchak, d/b/a Fisher Associates ("Fisher") listed as a subcontractor. More than 30 days after the award of the contract, Galway requested that the Authority consent to replace Fisher with another subcontractor despite a contract provision that specifically prohibited substitution of subcontractors after 30 days from contract award. Fisher argued that by using Fisher's bid in the final bid submitted to the Authority, Galway had accepted its bid. The Commonwealth Court of Pennsylvania held that there was no contract between Fisher and Galway, as Galway never accepted Fisher's bid. Accordingly, Fisher was neither a party to the contract between the Authority and Galway nor a third party beneficiary. Accordingly, Fisher did not have standing to enforce the terms of the Contract.

3. In *Commerce Bank/Harrisburg, N.A. v. Kessler*, 46 A.3d 724 (Pa. Super. Ct. 2012), Metro Bank, f.k.a. Commerce Bank of Harrisburg, N.A. ("Metro Bank") appealed from the trial court's order granting priority to a mechanic's lien judgment obtained by Michael Ricker ("Ricker") on February 24, 2009, over a default judgment Metro Bank obtained in a foreclosure action on May 22, 2008. On Appeal, the Superior Court of Pennsylvania ruled that the plain language of the 2007 amendments to the Commonwealth's Mechanic's Lien Law, 49 P.S. § 1508, gave priority to certain open ended mortgages over mechanic's liens. Specifically, this priority applied to mechanic's liens that were obtained after the effective date of the amendments even though they related to contracts entered into before the effective date of the

amendments. Additionally, the Superior Court of Pennsylvania interpreted Section 1508(c) of the Mechanic's Lien Law to extend priority only to open ended mortgages where all of the proceeds were used to pay for "all or part of the cost of completing erection, construction, alteration or repair of the mortgaged premises." Because both parties admitted that Metro Bank had used the mortgage proceeds for other purposes in addition to the completion of construction, the Superior Court affirmed the holding that Ricker's mechanic's lien took priority over the bank's mortgage.

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4. In *L.R. Costanzo Co., Inc. v. Am. Fire & Cas. Ins. Co.*, 2012 WL 37018 (M.D. Pa. Jan. 6, 2012), the District Court addressed an insurance company's duty to defend a general contractor and whether alleged faulty workmanship was an "occurrence" under a commercial general liability insurance policy.

Plaintiff L.R. Costanzo Co. (Costanzo) was the general contractor on a project for the Pocono Mountain Regional Police Commission. After completion of the project, Costanzo was sued for damage to the property. Costanzo subsequently brought this action against The Ohio Casualty Insurance Company (OCIC) for a defense under a commercial general liability policy. According to the policy, a duty to defend would be triggered upon an "occurrence," which was defined as "an accident, including continuous exposure to substantially the same general harmful conditions."

The court first concluded that summary judgment was appropriate because it was not clear that OCIC underwrote the policy, and therefore was not a proper defendant. There was confusion over whether the policy was actually issued by OCIC or by American Fire, which shared a parent company with OCIC. The evidence suggested it was actually American Fire, not OCIC, who would have been the proper defendant in the case.

More importantly, the court determined that even if OCIC were the correct defendant, summary judgment would still be appropriate because the duty to defend was not triggered here. The court reached this conclusion because, in Pennsylvania, the rule is that only the language and allegations in the complaint can be used to determine the insurance company's liability under the policy. The underlying complaint alleged only faulty workmanship as the basis of the cause of action, so the court had to determine whether "faulty workmanship" was an "occurrence" under the policy. The court cited substantial case law in holding that faulty workmanship is not an occurrence under such a policy and, therefore, no duty to defend arose on the part of the insurance company.

The court further granted summary judgment to the insurance company on plaintiff's bad faith claim, holding that they were correct to deny the claim where no "occurrence" took place, and finding that the record failed to support Costanzo's allegation that they performed an inadequate investigation.

5. In *Dragani v. Borough of Ambler*, 37 A.3d 27 (Pa. Cmwth. 2012), the Commonwealth Court addressed the waiver of defects in public bid requirements.

Following a public bidding process, the Borough of Ambler awarded a contract for waste hauling to BFI Waste Service despite two alleged defects in their bid proposal. Firstly, the bid specifications required consent from a surety with an underwriting authority of at least $20 million. BFI's surety, Fidelity and Deposit Company of Maryland, had an underwriting authority

of only $16 million. Secondly, the specifications required consent of surety that agreed to provide a performance bond for the entire contract term (three years), but BFI's bid allegedly only contained consent for one. The borough waived these defects, pursuant to a clause in the specifications allowing it to do so, and awarded the contract to BFI. Based on these alleged deficiencies, Dragani requested a preliminary injunction enjoining execution of the contract. This was denied, and Dragani appealed.

On appeal, this court found, first, that the bid did in fact adequately provide unconditional consent of surety for duration of the contract, so no defect was present under that theory. This court reversed the earlier decision, however, and held that the Borough had no authority to waive the requirement that the surety have an underwriting authority of $20 million. On one hand, the specifications did give the Borough authority to waive deficiencies in the bids. Relying on precedent, however, this court held that public entities cannot waive a bid defect that the specifications themselves facially regard as mandatory. These specifications expressly provided that any bid not providing the required consent of surety would not be considered. Thus, the defect was material, the Borough had no discretion to waive this particular defect and the error was therefore legally disqualifying.

6. In *Bennett v. A.T. Masterpiece Homes*, 40 A.3d 145 (Pa. Super. 2012), the Superior Court addressed personal liability for construction defects under the shield of an LLC.

Appellant was the managing member of A.T. Masterpiece, who was retained to construct homes for two different families in York County, the Bennetts and the Hoefferles. During course of the work, he repeatedly told the various plaintiffs that the quality of the work was good, and that the defects being brought to his attention would be taken care of. Nevertheless, upon completion of construction, each residence had various defects and problems. Both parties sued. At trial, the jury concluded his representations to plaintiffs exposed him to personal liability in excess of $225,000.

On appeal, Defendant argued that there was no basis for the finding of personal liability because he was acting as an agent on behalf of the LLC. He further argued that any language attributed to him that may be construed as guarantees were merely figures of speech and should not expose him to any liability. The court disagreed with Defendant and found that the evidence of his reassurances and promises was sufficient for the jury to reach its decision.

The jury also found that defendant was liable under the "catchall" provision of the Unfair Trade Practices and Consumer Protection Law (UTPCPL), pursuant to which the damages award was doubled and counsel fees were assessed. The jury was instructed that a catchall violation could be established by a finding of "misleading conduct." On appeal, defendant argued that a violation of the catchall provision required proof of common-law fraud. This court focused on the 1996 amendment to the UTPCPL catchall provision, which changed a prohibition on "fraudulent conduct that created a likelihood of confusion or misunderstanding," to a prohibition on "fraudulent or deceptive conduct." The court concluded that this was the legislature lessening the degree of proof necessary, and "misleading conduct" was sufficient to find a violation of the Act.

7. In *Mabey Bridge & Shore, Inc. v. Schoch*, 666 F.3d 862 (3d Cir. 2012), the Third Circuit Court of Appeals addressed the constitutionality of the Pennsylvania Steel Products Procurement Act ("Steel Act").

Enacted in 1978, the Steel Act requires that steel used relative to a public works contract must be produced in the United States. Mabey Bridge & Shore, Inc. (Mabey), plaintiff in this case, is a corporation that provides temporary steel bridges for use during construction projects. The steel used by Mabey's bridges is from the United Kingdom, yet Mabey had apparently provided these bridges and their foreign steel in public works projects for over twenty years, including on projects for PennDOT. Nevertheless, in 2010, PennDOT notified a contractor who had subcontracted with Mabey for a bridge that, pursuant to the Steel Act, he could not use Mabey's bridge on the project. Mabey sued, and Summary Judgment was granted to PennDOT by the District Court.

On appeal, Mabey contended, first, that the Steel Act was preempted by the federal Buy America Act, which had similar provisions regarding domestic steel use in public works projects, but also had more exceptions, including that its prohibition is exclusively on "permanently incorporated" steel or iron. Because his bridges are not permanently incorporated, Mabey contended, he would be exempt from the federal prohibition.

The court disagreed with Mabey and concluded that the Buy America Act exhibited Congress' intent to allow states to enact more restrictive steel requirements if they so chose and, as a result, the Steel Act was not preempted. The Buy America Act expressly states that "[t]he Secretary of Transportation shall not impose any limitation or condition….that restricts any State from imposing more stringent requirements that this section…" This, the court concludes, evidences Congress' awareness of and contemplation that states may have more stringent requirements, and that the federal government should not interfere. Thus, the Steel Act is not expressly preempted, nor did Congress intend the Buy America Act to exclusively occupy the field of steel regulations.

Next, Mabey contended that the Steel Act was violative of the Commerce Clause. The court pointed to PA precedent that already concluded the Steel Act did not violate the Commerce Clause. Further, even if it did, it would be subject to the congressional authorization exception and would pass constitutional muster.

Mabey further contended that PennDOT's actions violated the Contract Clause. To prove this, Mabey was required to show that a change in state law has operated as a substantial impairment of a contractual relationship. Further, a Contract Clause violation requires that the contract in question must preexist the passage of the state law. It was uncontested that Mabey's contracts to provide bridges did not preexist the 1978 passage of the Steel Act. Nevertheless, Mabey argued that PennDOT's change in its interpretation of the Steel Act (in other words, PennDOT's sudden conclusion, after years of dealings with Mabey, that the bridges were against state law) is the requisite "change in state law" required to show a Contract Clause violation. The court rejected Mabey's contention, holding that PennDOT's actions were not an exercise of legislative authority, and the Contract Clause did not apply.

Lastly, Mabey argued that PennDOT's application of the Steel Act violates the Equal Protection clause. Mabey made two contentions here, subject to rational basis review: (1) discriminating against out-of-state business does not serve a legitimate state purpose, and (2) PennDOT's distinction between temporary bridges and other temporary items (PennDOT apparently permitted exceptions to the domestic requirement for certain other temporary items) was not rationally related to a legitimate purpose. Because rational basis is such a low standard for the government to meet, the court concluded Mabey had not met its burden on either contention, and the Equal Protection Clause was not implicated.

8. In *Hanusco v. Township of Warminster*, 41 A.3d 116 (Pa. Cmwth. 2012), the Commonwealth Court addressed whether a change in contract price pursuant to an option to extend the contract with a public entity was a new agreement that required a new competitive bid.

In 2005, Warminster Township awarded a contract for waste removal, following a competitive bid, to J.P Mascaro & Sons. It was a five-year contract with an option for two one-year extensions. In late 2009, the township was faced with the question of whether or not to exercise its option or to advertise a new bid. Nearby municipalities had lower rates for similar services, and the town thought it could do better. Rather than re-open bidding, however, the township came to an agreement with Mascaro which had the effect of holding the 2009 prices for the next two years. This was done by having Mascaro "amend" the contract in order to establish this "rebate" that reflected the price reduction. This was the only change to the existing contract.

A suit was filed against the township, seeking to stop implementation of the amended contract and to force the Township to open up a round of competitive bidding. The trial court denied the request, having concluded that the two-year extension was contemplated during the original bidding process and the amendment neither affected the scope or type of services being provided under the contract. Thus, according to the trial court, no new contract had been created, and no re-bid was necessary.

On appeal, the court found against the Township and reversed the trial court's decision. According to this court, price is an essential, definite term of the original contract, and was not open for future negotiation. By negotiating a new price, the Township had entered into a new contract, and it therefore required a public bid.

This court also took a contrasting view of the trial court's analysis of the underlying policy considerations. The trial court apparently "believed that prohibiting the rebate would require Township residents to pay more." This court acknowledged that objective, writing that it understood that the Township wanted to provide savings to its constituents, yet the failure to readvertise a competitive bid "prevented the parties from ever knowing whether greater savings could have been achieved."

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Legislation:

1. Public-Private Transportation Partnerships – In July 2012, Governor Tom Corbett signed into law 2011 Pennsylvania House Bill No. 3., the Pennsylvania Public-Private Transportation Partnership Act (the "P3 Act"). The goal of the P3 Act is to help address Pennsylvania's aging infrastructure by permitting private companies to propose capacity enhancing projects that may relieve congestion, improve infrastructure, and may result in additional construction jobs in the Commonwealth. The P3 Act creates a Public-Private Transportation Board with the authority to evaluate and approve proposed projects. Under the P3 Act, the proposed projects can be for all modes of transportation. However, the P3 Act specifically prohibits the Pennsylvania Turnpike Commission from entering into a public-private partnership that would give substantial control of the Pennsylvania turnpike to a developer without specific approval by the Commonwealth's General Assembly.

2. Public Work Verification Act – On July 5, 2012, Governor Tom Corbett signed 2011 Pennsylvania Senate Bill No. 637, the Public Work Verification Act (the "Act"), into law. Beginning on January 1, 2013, as a precondition to being awarded a public works contract that exceeds $25,000 paid in whole or in part with public funds, contractors and subcontractors (hereinafter collectively referred to as "contractors") are required to verify that their workers are permitted to work in the United States. Additionally, contractors must represent that they will verify the employment eligibility of new employees, and they must provide a certification from the Department of Labor and Industry of the Commonwealth verifying that the contractor has not previously violated the Act.

Failure to comply with the Act can result in a warning letter for the first violation, debarment of 30 days for the second violation, and debarment for no less than 180 days and not more than one year for a third violation. Additionally, if a court finds that a contractor or a subcontractor willfully violated the Act, the contractor or subcontractor can be debarred for up to three years.

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3. 53 P.S. § 68102, Letting Contracts. The Pennsylvania legislature approved an increase in the minimum threshold for mandatory advertising on public projects. Previously set at $10,000, this legislation, Act 84 of 2011, raised the minimum threshold to $18,500. Now, for purchases between $10,000 and $18,500, telephone quotes are all that will be required.

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Rhode Island

Case Law:

1. In *Reilly Electrical Contractors, Inc. d/b/a Relco, Inc. et al. v. State of Rhode Island Department of Labor and Training*, No. 2010-266, 2012 WL 2686094 (R.I. July 6, 2012), the petitioner argued that PVC material is not a "conduit," pursuant to R.I. Gen. Laws § 5-6-2, because it cannot conduct electricity. The petitioner contended that the contractor's work installing the PVC piping was "preparation or excavation", not electrical work, and therefore did not require an electrician's license. The Supreme Court disagreed and affirmed the trial court holding that based on Code definitions, the PVC material was a "conduit," a license is required to install the material, and therefore the contractor had violated the licensing statute.

2. In *GSM Industrial, Inc. v. Grinnell Fire Protection Systems Company, Inc., et al.*, No. 2011-140, 2012 WL 2619129 (R.I. July 5, 2012), the Rhode Island Supreme Court considered whether a subcontractor's Notice of Intention satisfied the Rhode Island mechanics' lien statute. When the subcontractor was not paid by the general contractor, it attempted to execute a Notice of Intention. Its president signed the notice, which was "acknowledged" by a notary public. The owner challenged the notice arguing that it was not sworn "under oath" as required by the statute. The Supreme Court agreed with the owner, affirming the trial justice's finding that the notice was defective because the oath requirement is mandatory under the statute. The Court observed that an "acknowledgement" is a formal declaration that confirms a signature is authentic and made by a free act and deed. In contrast, an "oath" confirms that the

content is not meritless, frivolous, or vexatious by ensuring that the declarant may be subject to legal penalties for false statements. As such, the Court affirmed that the contractor had not complied with the statutory notice requirements of the mechanics' lien statute.

3. In *Shire Corp., Inc. v. The Rhode Island Dept. of Transportation*, PB 2009-5686, 2012 WL 756991 (R.I. Super Ct. March 2, 2012), a Justice of the Rhode Island Superior Court considered whether a contractor must exhaust all administrative remedies under Rhode Island's Purchasing Act, R.I. Gen. Laws 37-2-1 et seq., before it may file a bid protest in a civil action. Based on the plain language of the statute and its purposes, the Justice held that the statute "permits but does not require a plaintiff to take advantage of administrative remedies prior to initiating suit in the Superior Court." Accordingly, the plaintiff's bid protest claim survived summary judgment.

4. In *Process Engineers & Construction, Inc. v. DiGregorio, Inc.*, PC 08-0657, 2012 WL 2946771 (R.I. Super. Ct. July 13, 2012), the plaintiff sought recovery under a construction subcontract claiming breach of contract and quantum meruit. A Justice of the Superior Court held that the subcontractor had failed to abide by an express contractual provision that a change order must be submitted in writing and signed by the Architect, the Owner, and the Contractor. The Justice concluded that this provision was a condition precedent to payment and therefore by not fulfilling its obligations under the contract, the plaintiff could not recover. With respect to plaintiff's alternate theory of quantum meruit, the Justice observed that the plaintiff had not sustained its burden to show that it actually conferred a benefit on the defendant by doing this change order work and that defendant actually accepted the benefit. The Justice's finding was rooted primarily in a credibility determination that the plaintiff had given conflicting testimony as to why it conducted the additional services after its work was supposedly complete.

Legislation:

1. R.I. Gen. Laws § 46–13.2–1 *et seq*. This statute was amended by S.B. 12-2341/ H.B. 12-7323A to provide specific standards for the installation of wells and to ensure that all well drilling contractors conducting business in the state of Rhode Island have the requisite skills. Well drilling contractors are now subject to the jurisdiction of the Contractors' Registration and Licensing Board ("CRLB") and the CRLB statute, R.I. Gen. Laws § 5–65–1 et seq., was likewise amended to reflect this update.

2. R.I. Gen. Laws § 5–65.2–1 *et seq*. This statute was newly enacted by S.B. 12-2341 / H.B. 12-7323A to provide licensing requirements for well drilling contractors. Licensing will be administered by the CRLB.

3. R.I. Gen. Laws § 38–2–2. The definition of a "public record" accessible under the Rhode Island Access to Public Records Act was amended by S.B. 12-3040 / H.B. 12-7615A to include records containing "employees of contractors and subcontractors working on public works projects which are required to be listed as certified payrolls."

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South Carolina

Case Law:

1. In *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 703 S.E.2d 221 (2010), the South Carolina Supreme Court held that, because Homeowner failed to raise the S.C. licensing statute both as an affirmative defense and as a ground for dismissal during trial, the licensing issue was not preserved for appeal. The Court also affirmed the circuit court's holding that Landscaper could prevail on the quantum meruit claim. The Court declined to rule on the question of whether the mechanic's lien was valid since disposition of the prior issue of quantum meruit was dispositive. Chief Justice Toal stated that "[t]he proper manner to couch this issue would be whether there is a statutory prohibition against the enforcement of the alleged contract and mechanic's lien at issue."

2. In *Liberty Mut. Fire Ins. Co. v. J.T. Walker Indus., Inc.*, CIV.A. 2:08-2043-MBS, 2012 WL 4584179 (D.S.C. Sept. 28, 2012), following a ruling that Insured had to pay the full deductible for each policy triggered by progressive damage, Insured filed a motion for reconsideration, arguing that Insurer was judicially estopped from seeking to apply multiple deductibles from each policy triggered by progressive water damage over an extended period. Insured further argued that the court's multiple occurrence framework conflicted with the previous analysis in *Crossmann II*. Insured's policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The South Carolina Supreme Court has defined "accident" as "an unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt." However, defective construction or faulty workmanship will not fall under the definition of "occurrence" and does not trigger coverage under a CGL. The Court reasoned that the installation of Insured's defective windows did not constitute an "occurrence", but that an "occurrence" did occur through the water intrusion made possible by Insured's defective windows. Following the logic from *Crossmann II*, the Court agreed that progressive damage spanning multiple policy periods triggers every policy in effect during the progressive damage period. Insured argued that the progressive water damage over several years should be considered one "occurrence", leaving Insured to pay a single deductible. The Court disagreed, instead opting to divide the entire period of water intrusion into multiple "occurrences" to correspond to each one-year block of property damage. The Court dismissed Insured's argument that this would lead to a "harsh result" because the overall property damage was smaller than the sum of the deductibles over multiple years, leaving Insured to cover the entire repair cost. The Court reasoned that Insured would make the opposite argument had the damage occurred over several years and exceeded a single year's deductible, and determined that public policy favors protecting insured parties from a single, massive loss versus multiple, smaller losses. Under *Crossmann II*, when a defective product causes progressive damage to property, as in this case, an "injury-in-fact" to the property triggers coverage as opposed to an "accident" by the insured that leads to the property damage; therefore, a single occurrence could not cause property damage over multiple policy periods. The Court denied Insured's motion for reconsideration. Finally, the Court denied taxable costs and prejudgment interest for its jury award because of the complexity of the case and any amount could not be determined by a formula.

3. In *Sloan Const. Co., Inc. v. Southco Grassing, Inc.*, 395 S.C. 164, 717 S.E.2d 603 (2011), after Contractor did not pay Subcontractor for highway project, Subcontractor filed action against SC Department of Transportation, alleging negligence and breach of contract. The circuit court found for Subcontractor because SCDOT did not maintain its performance and

payment bond, as required by the Subcontractors and Suppliers Payment Protection Act. The South Carolina Supreme Court agreed with Subcontractor that SCDOT was liable because of a "failure to secure and maintain statutory bonding as required by the SPPA." The Court stated that under S.C. Code Ann. § 29-6-250, SCDOT's obligation was "only to ensure the appropriate bond issued and it proper form" because it would be impractical for a government entity to have a continuing duty to ensure that payment bonds are in place throughout a project. The government entity is only required to take reasonable steps to ensure that the payment bond is maintained. The court held that governmental entities do not have a duty to continuously maintain a bond in these situations and affirmed the circuit court's order.

4. In *Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), the South Carolina Supreme Court reversed its prior decisions which found negligent workmanship resulting in property damage constituted an occurrence under the standard CGL policy and therefore provided coverage. In *Crossmann I*, the Court required an element of fortuity for there to be an "occurrence" under the standard CGL policy; water intrusion and other damages complained of by the HOA were a naturally occurring consequence of faulty workmanship – no "fortuity" component existed; thus, there was no "occurrence" and therefore no coverage. The Court also reversed the trial court's determination that Insured's liability to Homeowner was joint and several with Homeowner's other CGL carriers, and instead adopted a "time on risk" approach to allocation of liability. The ambiguity this created, when construed against the insurer, provided for coverage to Homeowner and resulted in a ruling that was consistent with previous decisions. By utilizing the "time on risk" approach to allocation of liability, the Court used a method it believed best conformed to the terms of a CGL policy, in that it requires an insured to bear a pro rata share of the loss corresponding to any period of progressive damage during which the insured did not have coverage. The Court noted, however, that a strict application of the "time on risk" formula might be inappropriate for this case, where there were numerous buildings in the Project with differing periods of progressive damage. The South Carolina legislature passed S.C. Code Ann. § 38-61-70 in response to this decision, discussed below.

5. In *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012), the South Carolina Supreme Court determined that the FAA would preempt any application of the state UAA, but only if interstate commerce was involved. As this was a novel question for the Court, it looked to the Western District of Kentucky for guidance, which stated, "a residential real estate sales contract does not evidence or involve interstate commerce." The Court applied this rule and agreed with the circuit court that Homeowner's agreement was not subject to the FAA. The national warranty, out-of-state supplier and subcontractors, or out-of-state financiers could not convert the transaction into one of interstate commerce. The Court ruled the FAA did not apply and affirmed the circuit court's denial of Contractor's motion to stay the proceedings and compel arbitration.

6. In *Builders Mut. Ins. Co. v. OakTree Homes, Inc.*, CA 0:11-CV-550-CMC, 2012 WL 1158854 (D.S.C. Apr. 9, 2012), the district court stated that Homeowner misunderstood the nature of the breach of contract and fraud actions; rather than determining how much to reimburse Homeowner, the action was instead to determine the extent of Insurer's liability. The CGL had a provision that excluded liability for any punitive damages, which the court upheld. The court also ruled that any economic injuries Homeowner experienced because of the damage was not "property damage" as covered under the CGL, and any such damages fell outside the coverage of the CGL. Similarly, Homeowners may have suffered economic harm because of the misrepresentation by Contractor, but those injuries did not constitute "bodily injury" or "property damage", and were also excluded. The court reiterated its common law rule

from earlier cases that "property damage" could include negligent or defective construction that results in damage to other property, but "property damage" did not include merely defective construction. Homeowner presented sufficient evidence that showed the cracks resulted from defects in the patio itself, which the *Crossmann* decision would preclude. In addition to not satisfying the definition of "property damage", the Your-Work provision of the CGL would further bar coverage of the defective work. There was evidence that the damage was the result of excessive settlement of the foundation due to inadequate compaction of the soil, and as an external force, the Your-Work exclusion applied. The court granted Insurer's motion for summary judgment in full and declared that Insurer had no duty of indemnification towards the judgment Homeowner won against Contractor.

7. In *Jessco, Inc. v. Builders Mut. Ins. Co.*, 2:08-CV-1759-PMD, 2012 WL 1570015 (D.S.C. May 3, 2012), after the Fourth Circuit remanded to the district court, Contractor filed an Amended Motion for Fees and Costs for attorney's fees and costs associated with Insurer's appeal to the Fourth Circuit. The district court ruled that because the Fourth Circuit affirmed Insurer's duty to defend, rather than the duty to indemnify, Insurer was liable for Insured's appeal-related attorney's fees since Insurer "forced" Insured into further litigation. An insurer's duty to defend an insured is not tied to the finding of liability. The court also found that Appellate Rule 222, which allows for costs of appeal to be awarded, did not exclude it from awarding attorney's fees because the trial and appeal were tied to the same action. The authorities from *Hegler* and Rule 222 are not mutually exclusive. The court granted Contractor's Motion for Award of Fees and Costs after Remand, but required Contractor to submit a Clarification of Fees Statement to the court to make a final determination.

8. In *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., LLC*, 397 S.C. 379, 725 S.E.2d 495 (Ct. App. 2012), reh'g denied (May 2, 2012), the South Carolina Court of Appeals stated that, although S.C. Code Ann. § 29-5-40 does not contain a time limit for providing written notice to the owner, it is impossible for a notice of a lien to precede the actual performance of work that creates the lien. The statute states that "*Whenever work is done or material is furnished* for the improvement of real estate upon the employment of a contractor or some other person than the owner and such ... materialman shall in writing *notify the owner of the furnishing of such labor or material and the amount or value thereof*, the lien given by § 29-5–20 shall attach upon the real estate improved as against the true owner for the amount of the work done or material furnished." The Court found that the notice was inadequate because it was sent before Subcontractor's work was completed, and failed to state the full amount due to Supplier. The Court also found that the circuit court's award of attorney's fees to Owner was not unreasonable under S.C. Ann. Code § 29-5-20(A), which states that "[i]f the party defending against the lien prevails, the defending party must be awarded costs of the action and a reasonable attorney's fee as determined by the court."

Legislation:

1. S.C. Code Ann. § 38-61-70, Commercial general liability policy; coverage for construction professional doing construction related work; definition of occurrence; application. This statute was in response to the *Crossmann* decision, instead requiring that any CGL policy that an insurer issues in South Carolina shall define "occurrence" as including "property damage or bodily injury resulting in faulty workmanship, exclusive of the faulty workmanship itself". This statute explicitly provides coverage for damages resulting from the contractor's faulty workmanship, and applies to any disputes existing on or after May 12, 2011.

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South Dakota

Case Law:

1. In *DT-trak v. Prue*, 2012 S.D. 39, the South Dakota Supreme Court considered contract language that included an arbitration clause and a choice of law provision. One issue raised to challenge the arbitration award was whether the contract provision regarding choice of law controlled the question of whether the Federal Arbitration Act or the State Arbitration Act applied. The South Dakota Supreme Court affirmed the award without deciding the issue finding the same result would be reached under either state or federal law.

2. *Krsnak v. SD Dept. of Environment and Natural Resources, et.al.* 2012 SD 89, considered issues associated with approval of plans and specifications for a sanitary district project. Plaintiffs (owners of neighboring property) challenged the Department's approval of a wastewater treatment facility claiming the Department failed to follow its internal guidelines and manuals. The Court determined the guidelines and manuals had not been codified with in either statute or administrative rules and therefore did not have the force of law.

Legislation:

1. H.B. 1070. Adopting the 2012 edition of the International Building Code, amending S.D.C.L. §11-10-5.

2. H.B. 1115. Amending S.D.C.L. §46A-9-55, to exempt certain contracts from competitive bidding requirements for water user districts, if the cost of the proposed work does not require the use of state or federal funds.

3. In 2010, the South Dakota legislature revised the government procurement laws which impacted construction management as an alternative procurement system for construction of public improvements. **S.D.C.L. §5-18-45 through 54.** A recent opinion from the South Dakota Attorney General determined that a construction manager-at-risk hired under a negotiated contract with respect to public works, may not perform any construction activities, citing S.D.C.L. § 5-18B-43(2) and 5-18B-44. If the public improvement exceeds $100,000, S.D.C.L. § 5-18B-15 prohibits a construction manager-at-risk from performing architectural/engineering services, and also acting as a contractor.

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Tennessee

Legislation:

1. Tenn. Code Ann. §§ 66-34-103, Restitution for Improper Withholding and Handling of Retainage. Under current law, the maximum retainage that can be withheld on any project, public or private, is 5% of the contract amount. Generally, the owner must release and pay retainage to the prime contractor within 90 days of completion. Also, if the amount of the prime contract is $500,000 or more, the retainage must be "deposited in a separate, interest

bearing, escrow account with a third party." This escrow requirement is mandatory and may not be waived by contract. Failure to comply with any of these requirements is currently a Class A misdemeanor, subject to consecutive fines of $3,000 for each day of noncompliance. Further, if the party withholding the retainage fails to properly deposit it into an escrow account, that party is responsible for paying an additional $300 per day to the contractor to whom the funds are owed.

Effective July 1, 2012, failure to comply with any of the foregoing requirements also subjects the offending party to court-ordered "restitution" payable to the contractor. Tenn. Code Ann. § 66-34-103(e)(3). In determining the appropriate amount of restitution, the court is required to use the "formula" established in the criminal statute concerning restitution as a condition of probation. *Id.* This leaves the determination to the discretion of the court, taking into consideration the "financial resources and future ability of the defendant to pay."

2. Tenn. Code Ann. § 66-34-104, New Administrative and Notice Requirements for Retainage Escrow Accounts. Under current law, retainage must be deposited into a separate, interest bearing, escrow account with a third party. As of July 1, the account "must be established upon the withholding of any retainage." Tenn. Code Ann. § 66-34-104(a). As a practical matter, this means that no retainage can be withheld unless and until a proper escrow account has been opened. Failure to comply will subject the withholding party to the penalties discussed above.

As of July 1, the withholding party also will have an "affirmative duty" to provide written notice to the prime contractor that it has complied with the retainage escrow requirements. Tenn. Code Ann. § 66-34-104(d). This notice must be provided "upon withholding" the retained funds "from each and every application for payment." *Id.* Each notice must include (1) identification of the financial institution with which the escrow account has been established, (2) the account number and (3) the amount of retained funds that are deposited in the account. *Id.*

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Texas

Case Law:

1. In *El Paso Field Servs., L.P. v. MasTec North Am, Inc.,* No 10-0648, 2012 Tex. LEXIS 1124, 56 Tex. Sup. J. 174 (Tex. December 21, 2012), the Texas Supreme Court held that a risk-allocation clause pertaining to site conditions in a pipeline construction case prevailed over a due diligence clause because the assumption of risk was made "notwithstanding" any other provision in the contract documents.

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

The contract required El Paso to exercise due diligence in locating foreign pipelines and MasTec to confirm the locations of all such crossings. The Court rejected MasTec's argument that El Paso failed to exercise due diligence in locating the crossings. Instead, the Court looked

to the risk allocation provision by which MasTec represented and warranted that it was fully acquainted with the site conditions and assumed responsibility therefore. The Court held that because MasTec's obligations were made "notwithstanding" anything else in the contract documents, El Paso's due diligence obligations did not alter MasTec's assumption of the risk of unidentified crossings.

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

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

A petition for review has been filed in the Texas Supreme Court, Docket No. 12-0772.

3. In *Vanderbilt Mortgage and Finance, Inc. v. Flores*, 692 F.3d 358 (5th Cir. August 23, 2012), the Fifth Circuit, applying Texas law, held that the discovery rule applied to the filing of a fraudulent lien because such a lien is "inherently undiscoverable," and a public record does not give constructive notice to an existing landowner, as opposed to prospective purchaser or subsequent grantee.

The court also upheld an award of statutory damages, holding that Chapter 12 of the Tex. Civ. Prac. & Rem. Code (the Fraudulent Lien Statute) does not require a finding of actual damages. Additionally, the plaintiffs had standing to bring their fraudulent lien claim, even though the lien had already been released, because "standing for a party complaining of a concrete past violation of a statutory right does not evaporate merely because the defendant has since ceased to violate that right."

4. In *Ewing Const. Co., Inc. v. Amerisure Ins. Co.*, 684 F.3d 512 (5th Cir. July 15, 2012), the Fifth Circuit, relying on the Texas Supreme Court's holding in *Gilbert Texas Const., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118 (Tex. 2010), held that the contractual liability exclusion applied to exclude CGL coverage for damage to property that was the subject of a construction contract, even though negligence was asserted against the contractor seeking coverage, because all of the contractor's liability arose from the contract.

Just three weeks later, the Fifth Circuit withdrew its opinion, and certified questions to the Texas Supreme Court. *Ewing Const. Co., Inc. v. Amerisure Ins. Co.*, 690 F.3d 628 (5th Cir. August 8, 2012). The certified questions are:

- Does a general contractor that enters into a contract in which it agrees to perform its construction work in a good and workmanlike manner, without more specific provisions enlarging this obligation, "assume liability" for damages arising out of the contractor's defective work so as to trigger the Contractual Liability Exclusion.

- If the answer to question one is "Yes" and the contractual liability exclusion is triggers, do the allegations in the underlying lawsuit alleging that the contractor violated its common law duty to perform the contract in a careful, workmanlike, and non-negligent manner fall within the exception to the contractual liability exclusion for "liability that would exist in the absence of a contract."

The Texas Supreme Court accepted the certified questions, and the matter was set for oral argument in February 2013. Docket No. 12-0661.

5. In *Jaster v. Comet II Construction, Inc.*, 382 S.W.3d 554 (Tex. App.—Austin 2012, pet. filed), the court held that the 2005 version of Tex. Civ. Prac. & Rem. Code § 150.002 does not require cross-claimants and third-party plaintiffs to file certificates of merit because the plain language of the statute requires only "the plaintiff" to file a certificate of merit with the "complaint." A petition for review has been filed in this matter, and the Texas Supreme Court has requested briefing on the merits. Docket No. 12-0804.

6. In *Navarro & Associates Eng'g, Inc. v. Flowers Baking Co of El Paso, LLC*, No. 08-10-00236-CV, 2012 Tex. App. LEXIS 8095 (Tex. App.—El Paso, September 26, 2012, no pet. h.), the court held that collective assertions of negligence in a single certificate of merit affidavit filed against two engineering firms was not allowed by chapter 150 of the Tex. Civ. Prac. & Rem Code. The certificate of merit affidavit generically referred to the negligence of one engineering firm "and/or" the other as the cause of the plaintiff's damages.

7. In *Miner Dederick Construction, LLP v. Gulf Chemical & Metallurgical Corp.*, No. 01-11-00325-CV, 2012 Tex. App. LEXIS 10129 (Tex. App.—Houston [1st Dist.] December 6, 2012, no pet. h.), the court held that the lower court abused its discretion by denying spoliation sanctions. The owner denied the original contractor an opportunity to inspect a defective expansion joint, even after the contractor made three written requests. The owner then hired its own forensic investigator to test and inspect the expansion joint, before making repairs that significantly altered the original work. The court found that the owner breached its duty to preserve the evidence to the prejudice of the original contractor. The case was reversed and remanded to the lower court to determine appropriate spoliation sanctions.

8. In *Ashford Partners, Ltd. v. ECO Resources, Inc.*, No. 10-0615, 2012 Tex. LEXIS 340, 55 Tex. Sup. J. 603 (Tex. 2012, April 20, 2012) the Court held that the proper measure of damages under a build-to-suit lease agreement was the cost of repair, rather than the difference in value. Although difference-in-value is the typical measure of damages for breach of a real estate rental agreement, cost-of-repair is the appropriate measure of damages in a construction contract where substantial completion has occurred. The Court reasoned that the difference-in-value approach assumed that the deficiencies could not be remedied, and because the deficiencies had been remedied, the cost-of-repair measure of damages applied. Moreover, because the landlord had already performed the repairs at no cost to the leaseholder, the Court found that leaseholder suffered no damages, reversed the lower court's award of damages and attorney's fees, and rendered a take-nothing judgment.

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Utah

Case Law:

1. In *Lane Myers Constr., LLC v. Countrywide Home Loans, Inc.*, No. 20101047-CA, 2012 UT App 269 (Utah Ct. App. Sept. 27, 2012) the contractor brought an action against the lender seeking to foreclose its mechanics' liens and to have those liens declared prior in right to the trust deeds recorded by the lender to secure the construction financing. The lender argued that the Request and Disbursement forms that the contractor submitted in order to draw funds from the construction loan (the draw requests) had effectively waived any mechanics' lien rights for construction work completed prior to the date of each request because the draw requests contained language representing that there were "no liens or claims that may result in liens." The lender argued on summary judgment, and the trial court agreed, that by including this language and identifying the subject property, the draw requests complied substantially with Utah Code Ann. § 38-1-39 (renumbered § 38-1a-802(2) (Supp.2012)), which governs the existence and enforceability of lien waivers.

On appeal, the Court of Appeals instructed that courts must "interpret the mechanics' lien act strictly when deciding whether a right to a lien exists, ensuring compliance with the statutory provisions that authorize a mechanics' lien and its waiver." The Court of Appeals held that, to substantially comply with section 38-1-39, the purported waiver or release must contain each of the elements specified by statute, including "a statement that the document is intended to be a waiver and release in accordance with Utah law," and "explicit notice to the contractor of the effect that signing the release will have on rights otherwise available to it under the mechanics' lien act and the conditions upon which the waiver of those rights becomes effective." Applying that strict standard to the lender's claim, the Court of Appeals found that the draw requests lacked these essential elements and the contractor therefore did not execute an enforceable waiver and release.

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2. In *VCS, Inc. v. Utah Community Bank*, No. 20110062, 2012 WL 6131065 (Utah Dec. 11, 2012) the Utah Supreme Court held a general contractor's failure to timely record a *lis pendens* rendered it's mechanic's lien void as against a third party. The case involved a suit between a general contractor, VCS, Inc., that performed work on a residential subdivision and the lender, Utah Community Bank ("UCB") that had extended the construction loan on the subdivision. The crux of the dispute was over the validity of a mechanic's lien VCS filed against the subdivision property. UCB asserted that VCS's lien was not valid as against UCB's interest in the subdivision because VCS had failed to timely record a *lis pendens* as required by statute. VCS countered that its lien was valid as against UCB despite VCS's failure to record a timely *lis pendens*.

As is often the case in construction disputes, the facts of the case are important to understand the legal issue resolved by the Court. VCS, Inc. was hired by La Salle Development, LLC as the general contractor for a residential subdivision in Ogden, Utah. Although VCS and La Salle did not enter into a formal agreement until February 22, 2007, VCS began working on the subdivision during the first week of November 2006. And, UCB acquired its initial interest in the subdivision soon thereafter when it extended a construction loan to La Salle, secured by a deed of trust.

Once it began working on the subdivision, VCS took steps to ensure it could hold a valid mechanic's lien if necessary. VCS filed a Notice of Commencement with the State Construction Registry after VCS was terminated by La Salle in September 2007, VCS also recorded a Notice of Mechanic's Lien. VCS then attempted to inform La Salle (but not UCB) of this mechanic's lien. VCS also brought suit against La Salle (but not UCB), but it did not record a *lis pendens* until April 24, 2009, which was over 400 days after it first recorded its notice of mechanic's lien. Further, on April 21, 2009, VCS amended its complaint to add claims against UCB (including claims for mechanic's lien foreclosure. In December 2009, UCB became the owner of a number of lots in the subdivision pursuant to a trustee's sale on its deed of trust.

VCS filed a motion for summary judgment against UCB, claiming that VCS's mechanic's lien was valid against UCB which required the trustee's sale in favor of UCB should be set aside. UCB filed a cross-motion for summary judgment, seeking a determination that VCS's mechanic's lien was void and unenforceable as against UCB because of a failure to file a *lis pendens* in accordance with statute. The district court denied VCS's motion for summary judgment and granted UCB's cross-motion. VCS appealed.

VCS's appeal rested on its interpretation of the *lis pendens* requirement in the mechanic's lien statute. (See Utah Code Ann. §38-1-11(3)(a) (2010)). At the time of suit, that statute provided:

> Within the time period provided for filing [a foreclosure action set forth] in Subsection (2) [i.e. within 180 days after the day on which the lien claimant files its Notice of Mechanic's Lien] the lien claimant shall file for record with the county recorder of each county in which the lien is recorded a notice of the pendency of the [foreclosure] action, in the manner provided in actions affecting the title or right to possession of real property, or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action.

Id. (statute has since been updated and is now found at §38-1-701(3)(a) (2012)).

VCS argued that the statute contained a general rule with two exceptions. The general rule is that a *lis pendens* must be recorded within 180-days after the lien claimant filed its notice of mechanic's lien. The exceptions apply where a person either (a) is made a party to the foreclosure action, or (b) has actual knowledge of the commencement of that action. *Id.* VCS's position was that the 180-day provision applies to the general rule and not to the exceptions. And, because UCB was made a party to the action, albeit after the 180-day time period, VCS contended that it escapes the implications of the 180-day timing under the first statutory exception.

The Court held that while the statutory text does not explicitly make the exceptions subject to the 180-day provision, the 180-day timetable applies to both the general rule and the exceptions. The Court reasoned that to not apply the 180-day provision to the exceptions would effectively nullify the 180-day requirement set forth in the general rule. In other words, if a lien holder who failed to record a *lis pendens* within 180 days could routinely excuse its noncompliance simply by adding a party to a foreclosure action later on (i.e., under the first exception). The Court stated that "such a result would allow the exceptions to swallow the 180–day requirement, and that outcome runs afoul of the settled canon of preserving independent meaning for all statutory provisions." *VCS, Inc.*, 723 Utah Adv. Rep. at 3. Thus, the important implication for those involved in the construction industry is to realize that the 180-day

requirement for filing a *lis pendens* is a hard and fast rule that applies not only to the general rule in §38-1-11(3)(a) but also to the joinder of a party to the foreclosure action.

In light of this holding, lien claimants would do well to record *lis pendens*, within the 180-day time frame, against all interests in the subject property so as to avoid invalidating their lien. Doing so is particularly relevant in the mechanic's lien context where there is often more than one party claiming an interest in the property that secures the lien.

3. In *Commercial Real Estate Investment, L.C. v. Comcast of Utah II, Inc.*, 285 P.3d 1193 (Utah 2012), the Utah Supreme Court swept aside years of conflicting precedent and approaches for evaluating liquidated damage clauses and clarified the standard that Utah courts should apply in determining whether a liquidated damage clause is enforceable. In this case, a tenant challenged an award of approximately $1.7 million in liquidated damages and $2 million in interest to its landlord after the tenant was found to have breached its contractual obligation to operate the leased building during the entire term of the lease. The tenant's lease, which had been drafted by the tenant, contained a specific clause that provided for liquidated damages in the amount of 1/30th of the minimum monthly rent for each month the tenant failed to operate the building as required by the lease.

In evaluating the tenant's challenge that the liquidated damage clause was enforceable, the Court noted that Utah law was filled with conflicting precedent for evaluating liquidated damage clauses. *Id.* At 1198. As such, the Court took the opportunity to clarify the standard that courts should use in evaluating these clauses. Specifically, the Court determined that liquidated damages clauses are not subject to any heightened judicial scrutiny and should be evaluated like any other contractual provision. *Id.* At 1203. Indeed, the Court stated, "[a] party may challenge the enforceability of a liquidated damages clause only by pursuing one of the general contractual remedies, such as mistake, fraud, duress, or unconscionability." *Id.* The Court noted that it is not its "prerogative to step in and renegotiate the contract of the parties" and courts should "recognize and honor the right of person to contract freely and to make real and genuine mistakes when the dealings are at arm's length." *Id.* Instead, the Court stated that "Courts should invalidate liquidated damages clauses 'only with great reluctance and when the facts clearly demonstrate that it would be unconscionable to degree enforcement of the terms of the contract." *Id*. (quoting *Perkins v. Spencer*, 243 P.2d 446, 450-51 (Utah 1952)). The Court did note that this new standard for evaluating liquidated damage clauses "still preserves challenges to penalty clauses." *Id.* at 1203.

As a result, in evaluating whether a liquidating damage clause is unenforceable, Utah courts will engage in a two-part analysis. First, a court will consider whether there is any substantive unconscionability. This analysis "focuses on the contents of an agreement, examining the relative fairness of the obligations assumed." *Id*. (quoting *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 402 (Utah 1998)). However, it is "not sufficient for the liquidated damages clause to be 'unreasonable or more advantageous to one party.'" *Id*. Rather, to be considered substantively unconscionable, the liquidated damages clause must be "so one-sided as to oppress or unfairly surprise an innocent party" or there must "exist[] an overall imbalance in the obligations and rights imposed by the bargain according to the mores and business practices of the time and place." *Id*. Second, a court will considered whether there is any procedural unconscionability. This inquiry focuses on "whether there was overreaching by a contracting party occupying an unfairly superior bargaining position." *Id*. at 43 (quoting *Ryan*, 972 P.2d at 403).

Therefore, parties working in the Utah construction industry would be wise to carefully consider any liquidated damages provisions in their contracts because those clauses will now be reviewed like any other contractual provision and will not be subject to heightened judicial scrutiny.

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Legislation:

1. Utah Code § 38-1a-101 et al., Preconstruction and Construction Liens. Perhaps the most recognizable, albeit minor, change to Utah's mechanic's lien statute is the simplification of the name of the two new liens that were introduced in 2011 by Utah's legislature. The two new liens are now titled "preconstruction lien" and "construction lien." The change in the titles of these liens is the removal of the term "service." Thus, the preconstruction service lien and construction service lien are now simply named preconstruction lien and construction lien respectively. Utah Code Ann. §38-1a-101 (2012).

In addition to the minor change to the titles of the liens, the legislature added definitions of some terms or changed definitions for clarification. While the legislature addressed multiple definitions, there are some terms that are likely to have more impact to those working in the construction field. For example, a "construction loan" was clarified to "not include a consumer loan secured by the equity in [a] consumer's home." §38-1a-102(8). In other words, home equity loans are now included in the definition of a construction loan. In addition, and perhaps most notably, the legislature defined the term "final completion" to mean:

> (a) the date of issuance of a permanent certificate of occupancy by the local government entity having jurisdiction over the construction project, if a permanent certificate of occupancy is required; (b) the date of the final inspection of the construction work by the local government entity having jurisdiction over the construction project, if an inspection is required under a state-adopted building code applicable to the construction work, but no certificate of occupancy is required; (c) unless the owner is holding payment to ensure completion of construction work, the date on which there remains no substantial work to be completed to finish the construction work under the original contract, if a certificate of occupancy is not required and a final inspection is not required under an applicable state-adopted building code; or (d) the last date on which substantial work was performed under the original contract, if, because the original contract is terminated before completion of the construction work defined by the original contract, the local government entity having jurisdiction over the construction project does not issue a certificate of occupancy or perform a final inspection.

Furthermore, presumably for clarification, the legislature added the term "required notice" and defined it as:

> (a) a notice of retention under Section 38-1a-401; (b) a preliminary notice under Section 38-1a-501 or Section 38-1b-202; (c) a notice of commencement; (d) a notice of construction loan under Section 38-1a-601; (e) a notice under Section 38-1a-602 concerning a construction loan default; (f) a notice of intent to obtain final completion under Section 38-1a-506; or (g) a notice of completion under Section 38-1a-507. §38-1a-102(33).

In addition to the definition and clarification of terms, the legislature also added provisions applicable to the State Construction Registry ("SCR"). These provisions now specify that the state is not required to "determine the timeliness of any notice before filing the notice in the registry." §38-1a-203. In fact, the burden of verifying the "accuracy of information entered into the registry, whether the person files electronically, by alternate means, or through a third party" was clarified to be on the person filing the notice of commencement, preliminary notice, or notice of completion. *Id.* Further, the new provisions clarify what information is required to be included in a notice filed on the SCR. *Id.*

Interestingly, the legislature added a section that addresses the contesting of certain notices. That section provides that a person who believes a notice lacks proper basis "may request from the person who filed the notice evidence establishing the validity of the notice." §38-1a-307. (This new section contains nearly the same language that was formerly a part of the former § 38-1-33 dealing with notices of completion. In effect, it appears the legislature removed this language from the notice of completion section and created an entirely new section.) Upon receiving such a request, the person who filed the notice is required to "provide the requesting person evidence that the notice is valid." *Id.* The statute then states that if the person who filed the notice fails to provide "timely evidence of the validity of the contestable notice, the person who filed the notice shall immediately cancel the notice from the registry." *Id.* This section was previously addressed elsewhere, but the legislature apparently decided these provisions deserved their own section.

The legislature also added and clarified the provisions relating to preliminary notices. In particular, the statute now provides:

> (1)(c)(i) A person who desires to claim a construction lien on real property but fails to file a timely preliminary notice within [20 days after the person commenced construction on the property] may, subject to Subsection (1)(d), file a preliminary notice with the registry after the [20 days]. (ii) A person who files a preliminary notice under Subsection (1)(c)(i) may not claim a construction lien for construction work the person provides to the construction project before the date that is five days after the preliminary notice is filed. (d)...a preliminary notice has no effect if it is filed more than 10 days after the filing of a notice of completion under Section 38-1a-507 for the construction project for which the preliminary notice is filed.

§38-1a-501.

The above clarification reinforces the legislature's attempts to balance the competing interests of property owners and those that provide improvements to property that are at play in the construction lien context.

In furtherance of this overarching policy, the legislature also clarified that multiple construction liens on a piece of property are on equal footing. In fact, the statute provides that liens are on equal footing, "regardless of when the notices of construction lien relating to the construction liens are submitted for recording and regardless of when construction work for which the liens are claimed is provided." §38-1a-504.

Moreover, the legislature continued its pursuit of balancing interests when it provided that materials furnished for use in a construction project are "not subject to attachment, execution, or other legal process to enforce a debt owed by the purchaser of the materials, if the

materials are in good faith about to be applied to the construction, alteration, or repair of an improvement that is the subject of the construction project." §38-1a-505.

Some provisions relating to notices of completion were also affected in the 2012 legislative session. Specifically, notice of a notice of completion is no longer required to be given to each person that filed a notice of commencement, a preliminary notice, and all interested persons who have requested that notices be given to them. §38-1a-507.

Again continuing its commitment to balancing interests in the mechanic's lien context, particularly to residential homeowners, the 2012 legislature clarified that home equity loans are now included in the definition of "construction loan" provided in §38-1a-601. In contrast, the legislature also enacted a provision that tips the scale in favor of lien claimants by allowing claimants whose lien is not fully paid through a foreclosure sale to have a deficiency judgment for the unpaid balance and to be able to execute on that judgment in the same manner as judgments are generally executed. §38-1a-705.

The legislature also added a clarifying provision related to costs and attorney fees of subcontractors. That statute requires a court to award a subcontractor costs and reasonable attorney's fees if the subcontractor's lien is valid. §38-1a-706.

Another clarifying section that was added by the legislature deals with the penalty for failure to timely cancel a lien. That section provides:

> (1) After the full amount owing under a preconstruction or construction lien, including costs and cancellation fees, has been paid, a person interested in the property that is the subject of the lien may request the claimant to submit for recording with the office of each applicable county recorder a cancellation of the lien. (2) Within 10 days after receiving a request under Subsection (1), the claimant shall submit to the office of each applicable county recorder a cancellation of the preconstruction or construction lien, as applicable. (3) A claimant who fails to submit a cancellation within the time prescribed in Subsection (2) is liable to the person who requested the cancellation for $100 for each day after the time prescribed in Subsection (2) that the cancellation is not submitted, or the person's actual damages, whichever is greater.

§38-1a-804.

In addition to the preconstruction and construction lien provisions applicable to private projects, the legislature also added and clarified provisions related to government construction projects. Some of the modified provisions are more significant than others. For example, the requirements for private projects regarding notices of intent to obtain final completion and notices of completion now apply to government projects to the same extent. §38-1b-203. Nevertheless, the majority of the changes, additions, and clarifications to the government projects section (i.e., §38-1b-101 et al.) appear to be minor.

Utah Code § 13-8-5, Retention Proceeds. Utah Code §13-8-5 which governs the retention of amounts due under construction contracts underwent some changes in the 2012 legislative session. That section defines "Retention Proceeds" as "money earned by a contractor or subcontractor but retained by the owner or public agency pursuant to the terms of a construction contract to guarantee payment or performance by the contractor or subcontractor of the construction contract." §13-8-5(h). The statute provides that the amount of retainage on a

payment under a construction contract cannot exceed 5% of the amount of the payment. §13-8-5(3). Further, the total retainage under the contract also cannot exceed 5% of the total construction price. *Id.*

In the 2012 legislative session, the Utah Legislature added a provision to the retention statute which provides that retention proceeds and accrued interest are considered to be in a constructive trust for the contractor and subcontractors benefit. §13-8-5(4). Further, the proceeds and interest are not subject to assignment, encumbrance, attachment, garnishment, or execution levy for the debt of any person holding the proceeds and interest. *Id.*

2. Utah Code § 53A-20-101 & 109, Construction of Schools. With respect to the construction of public schools, the 2012 legislature made a notable modification to the statute regarding retainage amounts provided for in school construction contracts. Specifically, the statute now states that a local school board may only withhold up to 5% of the contract price until the project is completed and accepted by the board. §53A-20-101(6). That is a fairly significant change from the previous language which required the school board to withhold at least 10% of the contract price. In effect, with this recent change, the legislature capped retainage amounts in school construction contracts at 5%.

The legislature also created a section that addresses required contract terms for contracts to construct schools. The statute requires that contracts for the construction of school buildings "contain a clause that addresses the rights of the parties when, after the contract is executed, site conditions are discovered that: (1) the contractor did not know existed, and could not have reasonably known existed, at the time that the contract was executed; and (2) materially impacts the costs of construction (§53A-20-109).

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Vermont

Case Law:

1. After a bench trial in *First Quality Carpets, Inc. v. Kirschbaum*, 2012 VT 41, 54 A.3d 465, the trial court ruled in favor of First Quality Carpets, Inc. on its 2008 Prompt Payment Act claim based on First Quality's procurement and installation of carpet at the Kirschbaum home. The Kirschbaums appealed claiming that the Prompt Payment Act was not in effect in 2007 when the parties entered into the contract because the Act had expired on June 30, 1996.

When first enacted, the Vermont Prompt Payment Act had a sunset provision making it expire on June 30, 1996. In April 1996, two months in advance of the sunset date, the Vermont Legislature deleted the sunset provision from the Act, but the legislature was silent on when the deletion would take effect. The Kirschbaums argue that this omission resulted in the expiration of the Act because under Vermont statutory construction, 1 V.S.A. § 212, new enactments take effect on July 1 following the date of passage unless otherwise specified. Therefore, they claim the Act expired on June 30, 1996 prior to the Act-saving deletion taking effect on July 1, 1996. The Vermont Supreme Court rejected this argument, holding that the Act was effective because the explicit and undisputed intention of the legislature was that the Prompt Payment Act remain in effect after June 30, 1996 and the Court's primary obligation is to interpret statutes to effectuate the legislative intent.

2. The case of *Knappmiller v. Boves*, 2012 VT 38, 48 A.3d 607 grew out of a dispute between neighbors after Boves cut down and removed a row of white cedar trees that allegedly straddled the property line. Knappmiller sued Boves and Boves' contractor ("Contractor") alleging that the trees were on his property and were removed without his consent. Contractor cross-claimed against Boves for negligence, breach of contract, and judgment against Boves for indemnity if Contractor is found liable to Plaintiff due to Boves' negligence or breach of contract. A jury found for Boves and per the instructions on the verdict form, never reached Contractor's claim for indemnity. Contractor later filed a post-trial motion seeking recovery of its litigation expenses from Boves. Vermont recognizes an exception to the American Rule regarding attorney's fees when the wrongful act of one person has involved another in litigation with a third person or has made it necessary for that other person to incur expenses to protect his interests. But here, the jury found that Boves had not committed any wrongful acts that would trigger the exception. The Vermont Supreme Court refuses to extend the exception to the American Rule where the jury specifically found "no fault, no liability, and no underlying responsibility."

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Virginia

Case Law:

1. In *United States ex rel. ProBuild Co., LLC v. Scarborough*, 2012 U.S. Dist. LEXIS 111761 (E.D. Va. Aug. 8, 2012), the United States Magistrate Judge's report and recommendation addressed the defendant, Edmund Scarborough's ("Scarborough") Motion for Judgment pursuant to the Federal Rules of Civil Procedure. The case involved the plaintiff, the United States of America for the use and benefit of ProBuild Company, LLC, and ProBuild Company, LLC ("ProBuild"), who filed suit against the defendant to recoup money allegedly owed to ProBuild for materials supplied on a government construction project. Scarborough filed a Motion for Judgment on the Pleadings and the matter was referred to a United States Magistrate Judge.

Because the defendant surety entered into a contract with the government, pursuant to the Miller Act, the defendant was required to tender a payment bond to the United States. According to the standard payment bond form, because individual sureties were involved, a completed Affidavit was required to accompany the bond. The Court noted that although Scarborough argued that the bond was incomplete without the Affidavit, there is no Miller Act or FAR provision which suggests that an Affidavit and payment bond must be merged. As such, the Court recognized that the Miller Act states that a surety's obligations are apparent from the provisions of the bond, and in the present case, the terms of the payment bond did not reference the Affidavit.

The Court also noted that although the payment bond and Affidavit can be read together, the bond does not incorporate the terms of the Affidavit into the bond. Because Scarborough's liability defense under the Miller Act was limited by the Affidavit, and because the Court did not read the Affidavit and bond together and the terms of the bond by itself contained no such liability limitation, the Court recommended that Scarborough's Motion for Judgment on the Pleadings be denied.

2. In *SNC-Lavalin v. Alliant Techsystems, Inc.*, 2012 WL 1563992 (W.D. Va. May 3, 2012), the issues stemmed from the design and construction of an acid concentration plant in Virginia owned by the United States Army and operated by Alliant Techsystems, Inc. ("Alliant"). Alliant and SNC-Lavalin America, Inc. ("SNC") entered into a design-build contract where SNC would provide engineering, procurement, and construction services. The project incurred delays and deadlines were not met, in addition to other contractual issues.

Of particular note is the Court's discussion of Alliant's breach of warranty claim. SNC argued that the claim should fail because Alliant did not offer expert testimony to show that there was a product defect with the Richter pump and control valves at issue in the warranty claim. The Court, however, concluded that unlike products liability cases, commercial cases alleging a violation of an express warranty may not be subject to the same evidentiary standards. Thus, the Court held that a layperson could determine whether or not the Richter pumps and control valves satisfied the warranty provision and no expert testimony was required.

3. In *Carnell Const. Corp. v. Danville Redevelopment & Housing Authority*, 2011 WL 178341 (W.D. Va. Jan. 23, 2012), the case dealt with work performed on a project in Virginia that was funded with both public and private funds. Danville Redevelopment & Housing Authority ("DRHA") entered into a contract with Carnell Construction Corporation ("Carnell") for project site preparation work. Thereafter, Carnell was forced to stop work because another contractor was on the site and delays ensued. Carnell's costs ultimately exceeded the parties' expectations, which gave rise to a disagreement on which party should bear the extra cost. The parties agreed to enter mediation to resolve the issue, but the mediation was ultimately unsuccessful and Carnell filed suit as a result.

On Carnell's breach of contract claim, the Court held that a reasonable jury could find that DRHA agreed to modify and/or waive the right to enforce contractual change orders and dispute resolution procedures when the parties agreed to incorporate the claims into the mediation. The Court noted that DRHA's willingness to mediate their claims was a "business decision" and to the extent that DRHA agreed to modify or waive contractual provisions in that effort, DRHA was bound by its business decisions. As a result, the Court denied DRHA's motion for summary judgment related to Carnell's breach of contract claim.

4. In *Jean Moreau & Associates, Inc. v. Health Center Commission ex rel.*, 283 Va. 128 (2012), the developer, Jean Moreau & Associates ("Jean Moreau") brought breach of contract and quantum meruit claims against the Health Center Commission ("HCC") alleging that HCC's termination of the parties' contract did not relieve HCC from paying deferred compensation as dictated in the contract.

In coming to its decision, the Court discussed the Virginia Procurement Act and its requirements. Notably, the Court stated that a letter sent by Jean Moreau expressing the intent to seek legal remedy regarding fees did not constitute a claim under the Procurement Act. While the Court recognized that the Procurement Act does not precisely express what a writing must contain to be considered a "claim," Jean Moreau's letter did not satisfy the standard. Consequently, on that issue, the Court held that Jean Moreau did not comply with the mandatory procedural requirements of the Virginia Procurement Act in raising its breach of contract claim.

Legislation:

1. Supreme Court of Virginia Rule 2:408, Compromise and Offers to Compromise. As an evidentiary matter for construction cases, it is important to note that, effective July 1, 2012, the Supreme Court of Virginia recognizes that certain admissions made in settlement conferences are admissible. The rule expressly states:

> Evidence of offers and responses concerning settlement or compromise of any claim which is disputed as to liability or amount is inadmissible regarding such issues. *However, an express admission of liability, or an admission concerning an independent fact pertinent to a question in issue, is admissible even if made during settlement negotiations.*

(emphasis added). As such, certain information discussed in settlement negotiations may be admissible if it falls within the purview of the newly effective Virginia Supreme Court Rule.

2. H.B. 928, Mechanics' Liens; Allows Contractors to Obtain Liens in Amount of Value of Work Contracted for Lots. Allows contractors to obtain a mechanics' lien in the amount of the value of the work contracted for by the claimant for site development improvements and clarifies that common areas are not to be included in the fraction used to calculate allocation of the contract amount to each individual lot or unit. The bill also specifies that any payment made to the contractor for an undesignated lot shall be applied to any lot previously sold by the developer.

3. H.B. 33, Public Procurement; State Agency Agreements with Labor Organizations. Requires state agencies to ensure that neither the state agency nor any construction manager acting on behalf of the state agency shall, in its bid specifications, project agreements, or other controlling documents relating to the operation, erection, construction, alteration, improvement, maintenance, or repair of any public facility of public works, (i) require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or related projects, or (ii) discriminate against bidders, offerors, contractors, subcontractors, or operators for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related public works projects.

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Washington

Case Law:

1. In *Williams v. Athletic Field, Inc.*, 172 Wn.2d 683, 261 P.3d 109 (2011), the Washington Supreme Court held that the statutory claim of lien form provided in the Washington Lien Act was valid, despite the form's failure to strictly conform to acknowledgment requirements in chapter 60.08 RCW. Washington's Lien Act, at RCW 60.04.091(2), provides a sample claim of lien form. The statute also states that a claim of lien must be "acknowledged pursuant to chapter 64.08 RCW." 64.08 RCW requires a certification that includes, in part, language indicating that an authorized person executed the claim of lien form freely and voluntarily. As the Court recognized, "[t]he sample form does not contain language indicating a

properly taken acknowledgment under chapter 64.08 RCW" – rather, the form merely states that the lien's contents are based on personal knowledge, believed to be true and correct, and are not frivolous or clearly excessive; further, its proposed notary block language states only "subscribed and sworn to before me…." Overruling the lower court's decision that the sample form was invalid, the Washington Supreme Court explained that the Lien Act expressly states "[a] claim of lien substantially in the following form shall be sufficient." This language, at the least, created an ambiguity that entitled the Court to look beyond the statute's plain language to legislative intent. The Court focused on RCW 60.04.900, which states "RCW … 60.04.011 through 60.04.226 … are to be liberally construed to provide security for all parties intended to be protected by their provisions," and – contrary to Washington's traditional stance that liens are creatures of statute and must be strictly construed to determine whether a lien attaches – held that RCW 60.04.091(2) should be liberally construed to favor lien claimants. The Court reasoned that liens often are initiated by contractors and workers without involvement of legal counsel. Because the lien process caters to non-attorneys, claimants "should not be punished for relying on a sample form that the statute says is sufficient."

2. In *Rawe v. Bosnar*, 167 Wn. App. 509, 273 P.3d 488 (2012), the Washington Court of Appeals, Division 3, held that a defendant owner who failed to timely object or raise the defense that a plaintiff contractor was not properly registered waived that argument for purposes of trial. The underlying statute, RCW 18.27.080, states in pertinent part: "No person engaged in the business or acting in the capacity of a contractor may bring or maintain any action in any court of this state for the collection of compensation for the performance of any work or for breach of any contract for which registration is required under this chapter without alleging and proving that he or she was a duly registered contractor…." Nonetheless, the court found in favor of the contractor, refusing to consider the registration issue because it was not raised by the owner. This decision, of course, begs the question of whether the statute entitles a court to dismiss a plaintiff contractor's claim *sua* sponte.

3. In *Olson Engineering, Inc. v. KeyBank National Association*, 286 P.3d 390 (2012), the Washington Court of Appeals, Division 2, held, as a matter of first impression, that parties to a lien foreclosure action can continue to argue over lien priority after the filing of a release-of-lien bond. The court determined that the legislature must have intended the lien release bond statute, RCW 60.04.161, to allow for later argument over the "correctness and validity" of a lien, despite the fact that priority disputes are not expressly mentioned.

4. In *Brotherton v. Kralman Steel Structures, Inc.*, 165 Wn. App. 727, 269 P.3d 307 (2011), the Washington Court of Appeals, Division 3, held that, on a surety bond claim, an owner was not entitled to recover its attorney's fees in addition to a damages award that fully exhausted the contractor's registration bond. RCW 18.27.040 requires a general contractor to obtain a $12,000 surety bond (or other security, such as an assigned savings account) as a condition of its registration with the state Department of Labor & Industries. A lower court found that the owner was entitled to over $12,000 in damages for the defendant contractor's deficient construction of a driveway, but capped the award at the bond amount. Despite fully exhausting the surety bond, the court held that the owner could also recover fees. The appellate court reversed, explaining: "[t]he $12,000 bond will be consumed by the award of damages, so there is no bond amount remaining from which the attorney fees could be awarded."

5. In *Pacific Continental Bank v. Soundview 90*, 167 Wn. App. 373, 273 P.3d 1009 (2012), the Washington Court of Appeals, Division 1, held that a construction lender did not comply with a statutory stop notice, thereby subordinating its deed of trust to the unpaid contractor's lien. RCW 60.04.221 allows an unpaid contractor to give a "stop notice" to a

construction lender that will, in certain circumstances, require a lender to "withhold from the next and subsequent draws the amount claimed to be due as stated in the notice." Here, the lender did not withhold the stop notice amount from the "next and subsequent draws" but instead established a reserve account in the undisbursed funds – setting aside the stop notice amount from remaining, yet-to-be-requested financing for the entire project, but continuing to pay the prime contractor's payment requests. The Court held that this "reserve" did not comply with RCW 60.04.221, as the stop notice amount should have been withheld from the "next and subsequent draws…." As a result, the Court ordered that the lender's deed of trust should be subordinated to the contractor's lien.

6. In *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 163 Wn. App. 436, 261 P.3d 664 (2011), the Washington Court of Appeals, Division 1, held that professional engineers owe a tort duty of care to their clients separate from contract-based duties, exposing them to negligence-based claims. Plaintiffs signed an engineering services contract with defendant engineering company to perform six phases of a construction project. The parties' contract limited the engineering company's professional liability to $2,500. The engineering company took over six years to complete its task, during which time the preliminary approvals expired and real estate market crashed. Ultimately, the plaintiffs ran out of money and lost the property to foreclosure. Plaintiffs sued the engineering company for over $1,500,000. The engineering company moved for summary judgment based upon Washington's "economic loss rule" (later re-named the "independent duty doctrine" by several intervening Washington Supreme Court cases). The Court of Appeals held that summary judgment should be denied. It reasoned that, engineers owe their clients a duty to exercise reasonable skill and judgment which is independent and arises separately from a services contract.

7. In *Elcon Construction, Inc. v. Eastern Washington University*, 174 Wn.2d 157, 273 P.3d 965 (2012), the Washington Supreme Court held that the "independent duty doctrine" (formerly known as the "economic loss rule") does not apply to claims for fraud. The case is perhaps more significant for the Court's dicta pertaining to when the independent duty doctrine should apply, which proved controversial (provoking a concurring opinion to label part of the majority opinion "mistaken" and that "it will only add to the confusion engendered by this new rule."). The case involved a drilling contractor that argued a university withheld subsurface data needed to properly evaluate a well drilling project. The contractor sued the university for, among other claims, breach of contract and fraud. The university argued that the economic loss rule (later re-named the 'independent duty doctrine) barred the fraud claim. The Court noted that, historically, Washington courts typically have not needed to apply the doctrine to fraud claims because most fraud claims fail on their facts. This case proved no exception, as the Court held that the facts did not support a fraud claim. While its decision could have stopped at that point, the Court also discussed the independent duty doctrine in general, stating that it applied only to a "narrow class of cases," that the Court was "hesitant" to use it, and that it even "directed lower courts not to apply the doctrine to [bar] tort remedies 'unless and until this court has, based upon considerations of common sense, justice, policy and precedent, decided otherwise.'" Again, the concurring opinion did not find this dicta accurate or appropriate, writing: "[T]he majority should refrain from any discussion of the so-called 'independent duty rule' because it has no bearing on the disposition of this case."

8. In *Harmony at Madrona Park Owners Association v. Madison Harmony Development, Inc.*, 160 Wn. App. 728, 253 P.3d 101 (2011), the Washington Court of Appeals, Division 1, held that a prime contractor could recover indemnity damages even though the same damages were time barred under a breach of contract cause of action. On a multi-building condominium project, the homeowners sued the developer which, in turn, sued the prime

contractor. The prime contractor settled with the developer and sued its subcontractors, including a subcontractor that installed exterior trim on several buildings, for breach of contract and failure to indemnify. All of the subcontractors settled except for the subcontractor that installed exterior trim. The trial court awarded prime contractor breach of contract and indemnity damages. On appeal, the breach of contract damage award was reversed on the basis that the contract cause of action was time barred, but the appellate court's opinion suggested that the prime contractor consider requesting the same damages under the theory of indemnity. On remand, the prime contractor received such damages under an indemnity theory. The subcontractor that installed exterior trim again appealed, arguing that the prime contractor should be required to establish how much of the indemnity damages included amounts spent on the defective work of other subcontractors. The appellate court affirmed, holding that this burden of proof fell on the subcontractor as part of its off-set defense.

9. In *Hymas v. UAP Distribution, Inc.*, 167 Wn. App. 136, 272 P.3d 889 (2012), the Washington Court of Appeals, Division 3, held that a jobsite owner did not owe a statutory or common law duty of care to a construction worker that fell into an unguarded trench. The worker argued that the jobsite owner was liable under RCW 49.17.060 (the Washington Industrial Safety and Health Act (WISHA)) because it retained control over its employer's work. The trial court held that the owner owed no such duty as a matter of law. The appellate court affirmed, explaining jobsite owners are not per se liable under WISHA and do not play a role analogous to a general contractor in terms of ensuring WISHA compliance because they do not have as much knowledge or expertise about WISHA requirements. Further, "if a jobsite owner does not retain control over the manner in which an independent contractor completes its work, the jobsite owner does not have a duty under WISHA to comply with [WISHA's] rules, regulations, and orders…." The level of control giving rise to such a duty would be "a retention of a right of supervision that the contractor is not entirely free to do the work in his own way," and not merely a right to start or stop work, inspect its progress, or make suggestions that need not be followed. Here, the court found that the jobsite owner, while interested in jobsite safety, did not act in a manner that dictated how the contractor performed its work and, despite the absence of a general contractor for the project, did not assume general contractor-like duties under WISHA.

10. In *Vision One, LLC v. Philadelphia Indemnity Insurance Company*, 174 Wn.2d 501, 276 P.3d 300 (2012), the Washington Supreme Court held that a "builder's risk" insurance policy covered loss caused by the collapse of a concrete floor, despite the policy's "ensuing loss" provision that specifically excluded losses "caused or resulting" from deficient design or faulty workmanship of a shoring system. The Court held that the insured could not recover for the cost to repair the shoring system. However, the policy did not specifically exclude the peril of "collapse" and that even an excluded peril (faulty workmanship) can "set[ ] in motion a causal chain that included covered perils…." Therefore, the insured could recover "collapse"-related costs, such as losses for the repair and reconstruction of the collapsed floor.

Legislation:

1. Revised Code of Washington § 4.24.115, Changes to Indemnification Statute Relative to Construction Projects. Washington law voids and will not enforce agreements in construction contracts whereby a contracting party agrees to indemnify another contracting party for the other's sole or concurrent negligence. Substituted House Bill 1559, Chapter 160 expanded the statute to include agreements to defend.

2. Revised Code of Washington §§ 39.10.420; 39.10.450, Changes to Public Works Job Order Contracting Procedures. RCW § 39.10.420 now authorizes additional owners (universities and state colleges; Sound Transit) to use the job order contracting procedure, and changed references to "general administration" to "enterprise services," reflecting the new Washington Department of Enterprise Services, a new state agency that consolidated all or part of the departments of General Administration, Information Services, Personnel, Printing, and the Office of Financial Management. RCW § 39.10.450 no longer restricts authorized public bodies to two work order contracts of $350,000 or more in value in a twelve-month contracting year period. The statute was changed to define the contracting year as July 1 to June 30.

3. Revised Code of Washington § 39.12.040, Changes to Filing Procedures for Affidavit of Wages Paid on Public Works Projects. A public works contractor or subcontractor may now submit an Affidavit of Wages paid on behalf of its subcontractor who fails to do so due to cessation of operations or neglect. The filing contractor or subcontractor must accept responsibility for payment of prevailing wages unpaid by the subcontractor on the project pursuant to RCW 39.12.020 and 39.12.065, and is subject to the same monetary fines and penalties for filing false affidavits listed in RCW 39.12.050.

4. Revised Code of Washington § 43.88.160, Changes to Competitive Contracting and Payment Procedures for Institutions of Higher Learning. Institutions of higher education are now exempt from following formal sealed, electronic or web-based competitive bidding procedures for purchases not exceeding $100,000. However, they must document competition for purchases between $10,000 and $100,000, meaning proof of securing quotes from at least three vendors. Further, an institution of higher education must "invite" a quote from at least one certified minority owned business and one certified woman owned business. The bill also authorized institutions of higher education to make payments for certain equipment maintenance services up to 60 months in advance.

5. 2.E.S.S.B. 6406, Changes to Hydraulic Project Approval Process. Second Engrossed Senate Bill 6406 modified programs providing for protection of state natural resources related to "Hydraulic Projects", i.e., "the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of the salt or freshwaters of the state," forest practices and State Environmental Policy Act (SEPA) and Stormwater regulations. It added new sections to Chapter 77.55 RCW, 76.09 RCW, 43.30 RCW, and 43.21C RCW in addition to numerous modifications in Titles 36, 43, 76, 77, 82 and 90 RCW.

6. 2.S.H.B. 2452, An Act Relating to Centralizing the Authority and Responsibility for Development, Process and Oversight of State Procurement of Goods and Services. Effective January 1, 2013, Second Substituted House Bill 2452 will reorganize public procurement rules and add a new chapter to Title 39 RCW. The new chapter intends to promote open competition and transparency for all goods and services contracts entered into by state agencies. It seeks to centralize authority and responsibility for development and oversight of state procurement and contracting policies within one agency (Department of Enterprise Services) and to provide state agency contract data to the public in a searchable manner. New sections include "Ethics in Public Contracting", "Release of Bid Documents," "Prohibition on Certain Contracts", "Provision of Goods and Services", "Cooperative Purchasing Authorized", "Convenience Contract", "Competitive Solicitation" and exemptions, "Emergency Purchases", "Sole Source Contracts", notification, award and protest procedures, "Procurement Management", "Sweat-Free Procurement Policy", bonding requirements, "Authority to Debar", transparency and audits.

7. Notable. Recent unsuccessful legislative bills that would affect the construction industry include H.B. 2508 (minimum standards for sick and safe leave for employment); H.B. 2563 (capital gains tax); S.B. 5310 (state false claims act); and S.B. 6416 (requiring monthly certified payroll filings on public works).

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West Virginia

Case Law:

1. In *Great Am. Ins. c o. v. Hinkle Contr. Corp.*, 2012 U.S. App. LEXIS 24670 (4th Cir. November 28, 2012), the parties entered into a subcontract which included an arbitration provision. The subcontractor provided a performance bond which incorporated the subcontract by reference. After the subcontractor defaulted, the subcontractor's surety filed an action seeking a declaration that it was not liable under the performance bond. The general contractor filed a motion to dismiss based on the arbitration clause in the subcontract. The lower court denied the motion citing language in the subcontract, which at times referred to the subcontractor and the surety, and at times referred only to the subcontractor. The lower court determined that because of these inconsistencies, claims brought by the surety would only be subject to arbitration when they dealt with the rights and obligations of the subcontractor and not when they related to "unique surety claims" or "surety defenses." The 4th Circuit reversed concluding that the arbitration provision applied to all claims bearing a significant relationship to the subcontract and that the surety's declaratory judgment action fell within that scope.

2. In *Dan Ryan Builders, Inc. v. Nelson*, 2012 W.Va. LEXIS 830 (W.Va. November 15, 2012), plaintiff entered into a contract with defendant contractor for the construction of a new home. The contract contained an arbitration clause which provided that all disputes arising under the contract would be subject to arbitration but that defendant contractor reserved the right to seek arbitration or file suit if plaintiff failed to settle on the property within the time required by the contract. Plaintiff brought suit against defendant for construction defects. Defendant filed a petition in federal court seeking to compel plaintiff to submit their claims to arbitration. The 4th Circuit certified the following question to the West Virginia Supreme Court, "Does West Virginia law require that an arbitration provision, which appears as a single clause in a multi-clause contract, itself be supported by mutual consideration when the contract as a whole is supported by adequate consideration?" The West Virginia Supreme Court answered this question in the negative but also noted that if the 4th Circuit found the arbitration clause to lack mutuality then it could decline to enforce it as unconscionable.

3. In *Rawls v. Associated Materials, LLC*, 2012 U.S. Dist. LEXIS 125744 (S.D. W.Va. September 5, 2012), plaintiff purchased siding from defendant after viewing written materials on defendant's website The materials on defendant's website included an express warranty made by the siding manufacturer. Plaintiff sued claiming breach of express warranty. The court denied defendant's motion for summary judgment finding that under both West Virginia law and Magnuson-Moss, a jury could determine that plaintiff reasonably believed that defendant was the express warrantor by publishing the manufacturer's warranty on its website

4. In *Nestor v. Century Steel Erectors, Inc.*, 2012 U.S. Dist. LEXIS 124740 (N.D. W.Va. September 4, 2012), plaintiff's husband was killed in a construction accident and brought

suit against defendant's employer to recover damages, arguing that the West Virginia Workers' Compensation Act did not apply because defendant acted with deliberate intent. The court found that because defendant was aware that its workers routinely failed to use fall protection and addressed such failure in an internal memorandum two weeks prior to the accident, defendant had actual knowledge of a specific unsafe working condition that presented a strong probability of serious injury or death. The court further determined that a jury could find that defendant made a conscious decision not to remedy the known dangerous condition by authorizing its employees on the job site where the accident occurred to use the practice of "cooning" as an alternative to fall protection, which ultimately led to the death of plaintiff's husband.

5. In *Mt. State Mech. Insulation, Inc. v. Bell Constructors LLC*, 2012 U.S. Dist. LEXIS 101399 (N.D. W.Va. July 23, 2012), the general contractor awarded a subcontract to Bell Constructors LLC for a federal project. Bell then issued a Notice to Bidders seeking qualified DBE suppliers and subcontractors. Plaintiff made multiple requests for a bid package but Bell failed to provide it and instead awarded the contract to a company with which it had previously worked. Plaintiff filed suit against the general contractor, Bell and its subcontractor alleging that they had engaged in a "bid rigging" conspiracy in violation of federal bidding laws, the Sherman Antitrust Act, and the West Virginia Antitrust Act. The court dismissed plaintiff's claims with prejudice finding that the federal bidding laws did not provide plaintiff with a private cause of action. The court further determined that plaintiff's claims under both federal and state antitrust laws should be dismissed because plaintiff failed to specifically plead how defendants had conspired to violate competitive bidding laws or that defendants played a "significant role" in the market place such that they caused an unreasonable restraint on trade through their activities.

6. In *Hatfield Enters., Inc. v. Bayer Corp Science, LP*, 2012 U.S. Dist. LEXIS 95181 (S.D. W.VA. July 10, 2012), plaintiff entered into a contract with defendant's predecessor in interest to construct, manage and eventually close two ponds for disposal of coal ash, which were subject to the requirements of the West Virginia Dam Control and Safety Act. Several years after plaintiff had completed its work on the project and closed the ponds, the West Virginia Department of Environmental Protection required that additional work be performed. Plaintiff brought suit against defendant to recover the costs of performing that work. The court found that because the parties' contract provided that it terminated when the ponds were closed plaintiff could not recover the costs it incurred as a result of the DEP's directives under either a breach of contract or quantum meruit theory.

7. In *Ohio Power Co. v. Dearborn Mid-West*, 2012 U.S. Dist. LEXIS 90172 (N.D. W.Va. June 29, 2012), plaintiff brought an action for negligence, strict liability, breach of contract, breach of warranty and indemnity against defendant contractor for an explosion in the structure that defendant had designed and constructed. The court dismissed the case because the plaintiff failed to comply with the contract's mandatory mediation provisions which applied to all claims asserted by plaintiff since they arose out of or were related to the contract. The court held that defendant had not waived its right to enforce the mediation provision by failing to request mediation when it was first notified by plaintiff of its intention to file a complaint. The court further held that plaintiff's request for settlement negotiations did not satisfy the contract's mediation provision.

8. In *Whiteman v. Chesapeake Appalachia, LLC*, 2012 U.S. Dist. LEXIS 78876 (N.D. W.Va. June 7, 2012), plaintiffs owned the surface rights to land whose mineral rights were leased by defendant. The defendant operated three natural gas wells on the property pursuant to the lease. Pursuant to applicable West Virginia regulations, defendant placed large volumes

of drill cuttings, mud and chemical additives in lined pits on plaintiff's property and then covered them with clean soil. Plaintiffs brought suit against defendant claiming that defendant's actions constituted an unlawful trespass. The court determined that the placement of the material in the pits was fairly necessary to the enjoyment of defendant's mineral rights as it was required by West Virginia regulations on exploration, drilling and production of natural gas.

9. In *Safeco Ins. Co. v. Mountaineer Grading Co.*, 2012 U.S. Dist. LEXIS 31793 (S.D. W.Va. March 9, 2012), plaintiff surety, pursuant to an indemnity agreement, provided payment and performance bonds for numerous public construction projects that defendant performed in West Virginia. Subsequently, defendant began having financial difficulties and could no longer continue performing under its contracts without financial assistance from plaintiff. Plaintiff agreed to advance $500,000 to defendant in order to meet payroll on the bonded projects but did not agree to provide any additional funds to defendant or its creditors. Defendant ultimately defaulted under its construction contracts and plaintiff brought suit for indemnity. Defendant filed a counterclaim arguing that plaintiff had breached the covenant of good faith and fair dealing by refusing to pay the costs of defendant's equipment and federal and state withholding taxes on wages owed by defendant, since they were job costs under the performance bonds. The court found that West Virginia law does not provide for a stand-alone claim for breach of the duty of good faith and that plaintiff did not breach its contractual obligations. As a result, the court also found that defendant had failed to demonstrate that plaintiff acted in bad faith.

10. In *State ex rel. Johnson Controls, Inc. v. Tucker*, 729 S.E.2d 808 (W.Va. 2012), plaintiff brought suit against seven defendants, including the general contractor and the company responsible for the manufacture and maintenance of its HV AC system, alleging improper design, construction and maintenance. All defendants filed cross claims against each other. Subsequently, the general contractor and manufacturer claimed that plaintiff was obligated to arbitrate its claims against them pursuant to their respective contracts. The lower court held that the arbitration provisions were unconscionable because enforcement of them would result in the severing of one lawsuit into at least three proceedings, thus wasting judicial resources and providing an insufficient and inequitable resolution of all claims against all parties. The West Virginia Supreme Court granted a writ of prohibition against the lower court's order finding that the Federal Arbitration Act requires that if a lawsuit presents multiple claims, some subject to arbitration agreements and some not, the former must be sent to arbitration even if it will lead to piecemeal litigation.

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Wisconsin

Case Law:

1. In *Kalahari Development, LLC v. Iconica, Inc.*, 340 Wis. 2d 454 (Ct. App. 2012), the resort owner (Kalahari) brought an action against its contractor (Iconica) for breach of contract and professional negligence nearly ten years after substantial completion of a design-build project for Kalahari Resort and Conference Center, which included an indoor water park, hotel, lobby, retail space, and restaurants. The project reached substantial completion in May of 2000. Kalahari's claims arose in May of 2008 after discovering moisture damage to walls in the resort and they filed suit in April of 2010, alleging that Iconica "defectively designed and/or

defectively installed the vapor barriers in the walls," which led to significant costs for inspection and repair.

The Wisconsin Court of Appeals ruled that Kalahari's claim was time-barred by Wisconsin's statute of limitations for contract damages (Wis. Stat. §893.43), which bars breach-of-contract claims six years after the alleged breach. The court found that the alleged breach was the result of defective building construction, so any breach that would have occurred would have happened no later than the date of substantial completion. Therefore, the six-year statute of limitations applied to bar the claim. Kalahari argued that Wisconsin's statute of repose (Wis. Stat. §893.89), which provides that actions against individuals involved in the improvement of real estate are not barred until ten years after substantial completion of a project, extended its time limit to bring claims. The court rejected this argument, stating that the ten-year limit is the maximum time in which to bring a claim involving improvements to real property and cannot be used to extend a statute of limitations.

The Wisconsin Court of Appeals also ruled that the economic loss doctrine precluded negligence claims against Iconica. The economic loss doctrine prevents a party who contracted for a product from recovering tort damages arising from damage to the product itself, but does not bar damage recovery under contracts for services. In this case, the court looked to the contracted scope of work between Kalahari and Iconica and determined that Kalahari contracted for a water park resort and convention center, which its deemed to be products. Concurrently, the Court determined that Kalahari did not contract for the services involved in the project. Since the claimed defects only damaged the products themselves, the action was precluded. Additionally, the Court rejected Kalahari's assertion that professional service negligence claims are categorically exempted from being barred by the economic loss doctrine. The Court held it is irrelevant whether services are professional or non-professional; if the contract is predominantly for a product, the economic loss doctrine bars recovery.

2. In *Acuity v. Society Insurance*, 339 Wis. 2d 217 (Ct. App. 2012), a building owner's insurance company, after having paid its insured, brought subrogation claims against a general contractor and its commercial general liability (CGL) insurer, alleging breach of contract and negligence, and seeking damages stemming from an engine room collapse caused by improper excavation techniques. In May of 2006, the general contractor entered into a contract to remove and reinstall the south wall of the engine room of an animal processing plant. In June of 2006, during the contractor's excavation work of a trench adjacent to the south wall, the soil beneath the engine room concrete slab began to erode, causing the slab to crack and deflect downward. Additionally, the masonry adjacent to the south wall was damaged, the entire second floor and roof deflected downward causing property damage, utilities to the entire plant were disrupted causing loss to the meat stored inside, and a building next to the plant was damaged. The building owner's insurer, Acuity, paid the owner for its damages and subsequently brought subrogation claims against Society Insurance, as the CGL insurer for the general contractor.

The Wisconsin Court of Appeals first looked to the contractor's CGL policy to determine whether the damage could be covered under the policy. For coverage to be triggered, there needed to be "property damage" caused by an "occurrence." Both parties stipulated there was property damage. An "occurrence" was defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful condition." The Court quoted definitions of "accident" such as, "an event or condition occurring by chance or arising from unknown or remote cause" and "an event which takes place without one's foresight

or expectation" and determined that the circumstances leading up to the property damage constituted an "accident."

Society also argued that the economic loss doctrine should bar the claims because the contract was for a product: the wall. The Court explained that the economic loss doctrine would not bar coverage under the contractor's CGL policy because the doctrine applied only to remedies arising out of contracts or torts, and did not extend to bar insurance coverage.

A final issue resolved before making a coverage determination was whether any policy exclusions applied. In a matter of first impression, the Court held that business risk exclusions in the contractor's CGL policy, which barred coverage for damage to "that particular part" of the property on which the contractor worked, were not a bar to coverage. The Court stated that the purpose of business risk exclusions generally is to prevent recovery by an insured contractor for faulty workmanship. The contractor's scope of work in this case was to remove and replace only the south wall of the engine room, but it did not contract to work on any other part of the engine room. Looking to the plain language of the exclusion, "that particular part" of the contractor's work was only the south wall and had only the south wall of the engine room collapsed, the business risk exclusion would have applied. The entire engine room collapsed and ensuing damage was not "that particular part" of the contractor's work; therefore, the business risk exclusion was not a bar to coverage.

3. In *Best Price Plumbing, Inc. v. Erie Insurance Exchange*, 340 Wis. 2d 307 (Wis. 2012), a plumbing company (Best Price) submitted an invoice to the property owner's insurer (Erie) upon completion of work on the owner's property. Erie issued a two-party check, payable to the owner and Best Price, which was sent to the owner. The check was endorsed by both the owner and Best Price (by an employee at a job site) and deposited into the owner's account, but Best Price never received payment from the owner. The contract for payment was silent as to how or to whom payment would be made. Best Price commenced a breach of contract action against Erie after it failed to receive payment.

The jury was given a set of instructions to which neither party objected and returned a verdict for the insurer. The Circuit Court judge changed the verdict and entered judgment for the plumbing company. The Wisconsin Court of Appeals reversed in favor of the insurer and the plumbing company petitioned the Wisconsin Supreme Court for review, alleging that improper jury instructions were issued during the Circuit Court trial.

The Supreme Court found that Best Price forfeited any right to allege error in jury instructions and that there was sufficient evidence to support the jury finding that Erie did not breach the contract. In arriving that that conclusion, the Court found that Best Price failed to request jury instructions that Erie breached contract as a matter of law on grounds that the contract was silent about place of payment and that Erie did not deliver payment check to company's place of business. Best Price failed to present this argument at any time prior to or during trial, and thus, Best Price forfeited any claim for error in jury instructions regarding that argument. The Court concluded by clarifying "the rule that 'when a contract for the payment of money is silent as to the place of payment, the law implies that payment shall be made at the place of business of the creditor, in the absence of any legitimate inferences to the contrary,' can be applied as a matter of law."

4. In *Hirschhorn v. Auto-Owners Insurance Co.*, 338 Wis. 2d 761 (Wis. 2012), homeowners (Hirschhorn) brought an action against their homeowner's insurance (Auto-Owners) for breach of contract and bad faith claims arising from denials of coverage pursuant to

a pollution exclusion clause for damages to their home caused by bat guano. The pollution exclusion clause bars from coverage any "loss resulting directly or indirectly from … discharge, release, escape, seepage, migration or dispersal of pollutants." The Hirschhorn home had become so infested with bat guano that its presence and smell made the home uninhabitable. After repeated unsuccessful attempts by the Hirschhorns and contractors to remedy the issue, the home was demolished. The Circuit Court found in favor of Auto-Owners, while the Court of Appeals reversed and remanded. Auto-Owners appealed to the Wisconsin Supreme Court.

The Hirschhorns argued that the insurance policy pollution exclusion definitions were ambiguous. The Court replied that in interpreting a policy's definitions, it would have to do so "according to its plain and ordinary meaning as understood by a reasonable person in the position of the insured." The Court also stated that terms are considered ambiguous if they are "fairly susceptible to more than one reasonable interpretation" and ambiguities are construed against the insurer. The mere fact that a term has more than one dictionary definition does not render the term ambiguous.

In this case, the policy defined "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gases and waste." The Court stated that considering that guano is comprised of feces and urine, it is "commonly understood to be waste, and … commonly understood to be harmful." Furthermore, the Court determined the accumulation of the guano between the siding and the walls to be considered "discharge, release, escape, seepage, migration or dispersal of pollutants." The Court concluded in dismissing the claims by finding that no ambiguity existed in the pollution exclusion terms and the claims were justly barred under the policy.

5. In *Marnholtz v. Church Mutual Insurance Co.*, 341 Wis.2d 483 (Ct. App. 2012), an individual injured while installing siding on a hunting shack brought suit against the property insurer to recover for personal injury damages after repeated claim denials. In July of 2008, Marnholtz was assisting a friend (Leach) in the installation of siding on a hunting shack that had been Leach's main residence for the previous three years. Leach lived in the shack, which was located on the property of another friend rent-free, in exchange for property maintenance services. Leach erected makeshift scaffolding of boards and ladders for the men to use while affixing the siding, but failed to secure the boards to the ladders. The scaffolding failed when Marnholtz attempted to scale it and he sustained personal injuries as a result.

Church Mutual Insurance Co. insured the hunting shack and property on which it was located with a policy that provided coverage for individuals injured "while performing domestic duties." At issue then was whether Leach was "performing domestic duties" at the time of the injury, and therefore, was an insured under the policy. Marnholtz alleged that because they were performing work on Leach's residence, it was in fact a "domestic duty." Church Mutual alleged that installing siding is "construction work" and does not fall within even the broadest of definitions for "domestic duties."

In interpreting Church Mutual's insurance policy, the Court found the policy itself did not define "domestic duties," so the Court applied a dictionary definition which read, "relating to the household or the family; concerned with or employed in the management of a household or private place of residence" or as "connected with the supply, service, and activities of households and private residences." Given that definition, the Court determined that "domestic duties" included those duties pertaining to a household or private residence. Church Mutual did not offer any other support for its assertion that "construction" work should be held completely independent from "domestic duties," but the Court felt that limits must be placed on the

definitions. The Court stated that had the siding installation been part of the original construction of the dwelling or additions to the dwelling, an argument could be made against it being part of "domestic duties." Given that the installation was part of the maintenance and upkeep of an existing structure, much like painting or fixing a broken pane of glass, it would fall within the definition. The Court, therefore, found for Marnholtz, ruling that siding installation fell within the definition of "domestic duties" for policy coverage purposes. The term "domestic duties" was susceptible to more than one reasonable interpretation and the phrase was ambiguous, so the Court stated it must construe it in favor of coverage.

Legislation:

1. 2011 Wisconsin Act 2 (January 2011 Special Session S.B. 1). Act 2 does the following:

- Provides that in civil product liability actions, the liability of a manufacturer, distributor, seller or promoter of a product is limited based on the claimant's ability to prove that the defendant manufactured, distributed, sold or promoted the product that allegedly caused the injury.

- Provides that in civil product liability actions, no manufacturer, seller, distributor, or promoter of a product may be liable if more than 25 years elapsed from the date when the product was manufactured, sold, distributed, or promoted. In strict liability cases, no more than 15 years may have elapsed from the date when the product was manufactured, sold, distributed, or promoted.

- Defines clear requirements for strict product liability actions against product manufacturers, sellers or distributers.

- Limits the amount of punitive damages that a party may collect at the greater of twice the amount of compensatory damages or $200,000.

- Establishes that opinion lay witness testimony may not be based on scientific, technical or other specialized knowledge the witness may possess.

- Establishes that expert witness testimony must be based upon "sufficient facts and data and be the product of reliable principles and methods reliably applied to the facts of the case."

2. 2001 Wisconsin Act 10 (2011 A.B. 11). Act 10 refers to the powers of the Department of Administration (DOA) in relation to the addition of the Wisconsin Economic Development Corporation (WEDC) to all Act 7 provisions. Act 10 dictates that Wis. Stat. §16.85(2), as affected by 2011 Wisconsin Act 7, is amended to read: "To furnish engineering, architectural, project management, and other building construction services whenever requisitions therefore are presented to the department by any agency. The department may deposit moneys received from the provision of these services in the account under Wis. Stat. §20.505(1)(kc) or in the general fund as general purpose revenue — earned."

3. 2011 Wisconsin Act 32 (2011 A.B. 40). Act 32 does the following:

- Eliminates the Department of Commerce, renames the former Department of Regulation and Licensing (DRL) to the Department of Safety and Professional Services (DSPS) and reassigns all operations of the Division of Safety and Buildings to the DSPS. This includes transferring the Dwelling Code Council, Contractor Certification Council, Plumber's Council, Automatic Fire Sprinkler System Contractors and Journeymen's Council and the Examining Board of Architects, Landscape Architects, Professional Engineers, Designers, and Land Surveyors, to the DSPS. The DSPS now administers all building codes and laws regarding building safety, in addition to issuing licenses, permits and other credentials to all individuals involved in all construction trades.

- Eliminates personal lifts and hoists, including platform and stairway chair lifts, in individual residences from laws regulating elevator construction and maintenance.

- Prohibits the DSPS from enacting a rule that would raise the cost of constructing or remodeling a one or two family dwelling by more than $1,000.

- Exempts UW System building projects that are funded entirely with gifts and grants or cost less than $500,000 from Building Commission approval and DOA supervision and bidding requirements.

- Mandates that whenever a political subdivision issues a public contract by bidding, the bidding is to be conducted on the basis of sealed competitive bids and the contract shall be awarded to the lowest responsible bidder. Additionally, the political subdivision is prohibited from granting preference based on geographic location or utilizing criteria other than the lowest responsible bidder in awarding the contract.

- Prohibits a political subdivision from using its own workforce to perform a construction project for which a private person is financially responsible.

- Prohibits a county from using its own workforce to perform a highway improvement project on a highway under the jurisdiction of another county or municipality that is located in a different county.

- Exempts from local zoning requirements "borrow sites," which are used to excavate soil, gravel, or other materials for use in the construction of embankments or similar earthworks in transportation projects. Also exempted are certain disposal sites for surplus materials from transportation projects.

- Grants a sales tax exemption for modular and manufactured homes used in real property construction activities outside of the state of Wisconsin.

- Establishes the "local roads improvement program" to accelerate the improvement of deteriorated local roads by reimbursing political subdivisions for improvements.

- Increases the allowable amounts for proposed state building projects that require prior approval of the Building Commission, that are required to provide public notice and solicitation of bids, and that require prior legislative authorization:

    - Marquette University Dental Clinic and Education Facility: Increases allowable amount from $15,000,000 to $23,000,000.

    - Lac du Flambeau Band of Lake Superior Chippewa Tribal Culture Center: Allowable amount may not exceed $250,000 in general fund supported borrowing.

- Prohibits a city or village with a population of 5,000 or more from having a highway improvement project performed by a county workforce unless the project is being performed under the local roads improvement program.

- Creates two distinct categories of major highway projects:

    - Major highway projects, as contemplated under preexisting law, where the minimum total criteria increased from $5 million to $30 million. The Department of Transportation (DOT) is allowed to perform engineering and design work prior to obtaining legislative approval for these projects.

    - Major highway projects that do not fall into (i) and that have a minimum total cost of $75 million. The DOT is allowed to prepare an environmental impact statement or environmental assessment without the approval of the Transportation Projects Commission (TPC). An alternate TPC review and authorization process has also been created which permits the DOT to continue with the construction of the project with TPC approval and without additional legislative approval.

- Permits southeast Wisconsin freeway rehabilitation projects, for which funding ended on June 30, 2011, to be eligible for funding as major highway projects or state highway rehabilitation projects.

- Increased the amount of revenue bonds issuable for major highway projects and other transportation facilities to $3.35 billion.

- Establishes “southeast Wisconsin freeway megaprojects” program for construction projects located on southeastern Wisconsin freeways with a total cost of $500 million or more. No funding for the construction of the freeway projects may be delivered without prior legislative approval and they may only be funded from specified appropriations. Certain monies from the southeast Wisconsin freeway rehabilitation program are also authorized to be transferred to the southeast Wisconsin freeway megaprojects. Projects include:

- I-94 north-south corridor project
- Milwaukee County Zoo interchange project
    - Approximately $150 million in additional general obligation bonding is approved to fund these projects.

- Establishes "high-cost state highway bridge projects," which involve creating separate funding sources for the construction or rehabilitation of bridges on the state trunk highway system that exceed $150 million. Additionally, authorization is granted to fund the Hoan Bridge project in Milwaukee County from the DOT major highway projects, state highway rehabilitation projects, and southeast Wisconsin freeway megaprojects programs.

- Establishes that if a DOT highway project forces the realignment on the same site of an outdoor advertising sign that does not conform to a local ordinance, the realignment does not affect the sign's nonconforming status under the ordinance. If the DOT wishes to realign a sign, it must notify the political subdivision that promulgated the nonconforming ordinance, and that political subdivision may then petition the DOT to condemn the sign instead of realigning it, but the political subdivision must then pay the DOT condemnation costs.

4. 2011 Wisconsin Act 61 (2011 S.B. 117). Act 61 establishes that in a civil action where the only defendant is the state or the state board, commission, officer, employee, or agent, the plaintiff has the right to designate the county in which the action is heard. On appeal, the appellant has the right to designate where the action may be heard, provided that it is different from the county of the initial action.

5. 2011 Wisconsin Act 69 (September 2011 Special Session S.B. 14). Act 69 changes the annual interest rate earned on a money judgment in a civil action from 12% to 1% plus the prime rate effective on January 1 of the year in which judgment was entered.

6. 2011 Wisconsin Act 78 (2011 S.B. 242). Act 78 repeals the requirement of Wis. Stat. §254.61(f) that bed and breakfast establishments must have completed, before May 11, 1990, any structural additions to the dimensions of the original structure. Additionally, one- and two- family construction and inspection rules apply to any bed and breakfast structural additions that alter structural dimensions.

7. 2011 Wisconsin Act 92 (September 2011 Special Session S.B. 12). Act 92 creates the presumption that reasonable attorney fees may not exceed three times the amount of awarded compensatory damages. Act 92 also establishes the factors a court may consider in determining reasonable attorney fees:

- Time and labor required by the attorney.
- The novelty and difficulty of the questions involved in the action.
- The skill requisite to perform the legal service property.
- The likelihood that the acceptance of the particular case precluded other employment by the attorney

- The fee customarily charged in the locality for similar services.
- The amount of damages involved in the action.
- The results obtained in the action.
- The time limitations imposed by the client or by the circumstances of the action.
- The nature and length of the attorney's professional relationship with his or her client.
- The experience, reputation, and ability of the attorney.
- Whether the fee is fixed or contingent.
- The complexity of the case.
- Awards of costs and fees in similar cases.
- The legitimacy or strength of any defenses or affirmative defenses asserted in the action.
- Other factors the court deems important and necessary to consider under the circumstances of the case.

8. 2011 Wisconsin Act 110 (2011 S.B. 85). Act 110 establishes that a person who obtains a service and intentionally does not pay for the service is guilty of retail theft and may be liable for penalties depending on the value of the service.

9. 2011 Wisconsin Act 118 (2011 S.B. 368). Act 118 requires the Department of Natural Resources (DNR) to issue wetland general permits for the following purposes:

- A temporary or permanent discharge for routine utility construction and maintenance projects and activities.
- A discharge that is part of a development for industrial purposes, if the discharge does not affect more than 10,000 square feet of wetland. For purposes of this subdivision, the development of a waste disposal site is considered to be a development for industrial purposes.
- A discharge that is part of a development for commercial purposes, if the discharge does not affect more than 10,000 square feet of wetland.
- A discharge that is part of a development for residential purposes, if the discharge does not affect more than 10,000 square feet of wetland.
- A discharge that is part of a development for agricultural purposes, if the discharge does not affect more than 10,000 square feet of wetland.
- A discharge that is part of a development for municipal purposes, if the discharge does not affect more than 10,000 square feet of wetland.

- A discharge that is part of a development for recreational purposes, if the discharge does not affect more than 10,000 square feet of wetland.

- A discharge that is necessary for the construction, reconstruction, or maintenance of a bridge or culvert that is part of a transportation project that is being carried out under the direction and supervision of a city, village, town, or county.

10. 2011 Wisconsin Act 138 (2011 S.B. 425). Act 138 authorizes political subdivisions that make loans or enter into loan repayment agreements with property owners or lessees for Property Assessed Clean Energy (PACE) projects to allow third parties that have provided financing for the projects to collect special charge installment payments from the property owner or lessee. It requires:

- political subdivisions that fund PACE projects equal to or greater than $250,000 to require the owner of the project premises to obtain a written guarantee from the contractor or project engineer that the project will realize greater than a 1.0 savings-to-investment ratio. If that ratio is not achieved, the contractor or project engineer must annually pay the owner any shortfall in savings.

- Authorizes political subdivisions that fund PACE projects equal to or greater than $250,000 to require a third-party technical review of the projected savings prior to making a loan or entering into a loan repayment agreement.

11. 2011 Wisconsin Act 144 (2011 S.B. 504). Act 144 limits municipality authority in the enactment of development moratorium ordinances. Ordinance requirements include:

- Statement describing the problem which gives rise to the need for the moratorium.

- Statement of the specific action that the municipality intends to take to alleviate the need for the moratorium.

- Length of time for which the moratorium is to be in effect.

- Statement describing how and why the governing body decided on the length of time for which the moratorium is to be in effect.

- Description of the area to which the ordinance applies.

- Exemption for any activity that would have no impact, or slight impact, on the problem which gives rise to the need for the moratorium.

12. 2011 Wisconsin Act 146 (2011 S.B. 453). Act 146 provides, in pertinent part:

- Changes to the requirements for membership on the Dwelling Code Council, reducing the size of the council from eighteen to eleven members and reducing membership terms from three to two years.

- Creates alternative requirements for issuance of an elevator mechanic's license.

- Adds all occupational and professional licenses issued by the Department of Safety and Professional Services (DSPS) to the list of licenses that may not be issued or renewed to an individual delinquent on family support payments or taxes.

- Makes some technical changes to occupational regulation for Professional Engineers, Architects, Landscape Architects, and Land Surveyors.

- Authorizes the DSPS to reject the voluntary surrender of a professional license or other credential if a complaint has been filed or disciplinary action against the individual holding the license or credential has been commenced with the DSPS or other appropriate board.

13. 2011 Wisconsin Act 150 (2011 S.B. 156). Act 150 adds regulations for the licensure, registration, qualifications, and fees of individuals engaged in drilling holes for the purpose of installing geothermal closed-loop heat exchange systems to make such regulations align with those governing individuals engaged in water well drilling.

14. 2011 Wisconsin Act 170 (2011 S.B. 472). Act 170 does the following:

- Prohibits a political subdivision from enacting or enforcing a zoning ordinance that prohibits, or restricts based on cost, the repair, maintenance, renovation or remodeling of a structure that no longer conforms to a zoning ordinance, if that structure exists on the date the ordinance becomes effective.

- Prohibits a political subdivision from enforcing a provision in a county shoreland ordinance that regulates the location or repair of a nonconforming structure or that regulates the construction of a structure on a substandard lot if the provision is more restrictive than DNR standards.

15. 2011 Wisconsin Act 210 (2011 S.B. 550). Act 210 requires the DSPS to grant a reciprocal license or other credential for practice in Wisconsin to a professional who is the spouse of a military service member if the both service member and spouse temporarily reside in Wisconsin because of the service member's military service.

16. 2011 Wisconsin Act 214 (2011 S.B. 459). Act 214 removes the Wisconsin Economic Development Corporation (WEDC) from oversight of economic development projects financed by the Wisconsin Housing and Economic Development Authority (WHEDA) and imposes a $150 million aggregate principal limit on bonds and notes WHEDA may issue for economic development activities in each of the three subsequent fiscal years. At the end of the third fiscal year, WHEDA may issue bonds and notes for three additional years, with the approval of the Joint Committee on Finance, if WHEDA establishes that the issuance will promote significant economic development in Wisconsin.

17. 2011 Wisconsin Act 224 (2011 S.B. 378). Act 224 provides a distinction between Commercial Liability Policies and Commercial Automobile Liability Policies. The Act specifies that if a Commercial Liability Policy provides medical payments or uninsured motorist coverages, the coverage limits must comply with the limits of other Commercial Automobile Liability Policies under the Act.

18. 2011 Wisconsin Act 248 (2011 A.B. 152). Act 248 increases the maximum amount the State of Wisconsin may contribute to a building project or building improvement project that is part of an airport improvement project from $500,000 to $1,250,000.

19. 2011 Wisconsin Act 255 (2011 S.B. 464). Act 255, related to professional credentially, provides:

- Prohibits the DSPS or other credentialing board from requiring the submission of fingerprints by an applicant for a license or credential from that board. Exceptions include fingerprints which are authorized under current law, including for criminal background investigations.

- Requires DSPS to develop rules establishing the criteria it uses in determining whether a criminal background investigation is necessary.

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Wyoming

Case Law:

1. In *Big-D Signature Corp. v. Sterrett Properties, LLC*, 2012 WY 138, 288 P.3d 72, 80 (Wyo. 2012), a residential builder commenced a lawsuit alleging breach of contract and unjust enrichment against the project owners. Amongst Big-D's claims were two relating to unsigned change orders, PCCO 3 and 4, for which Big-D sought payment. The District Court granted defendants' motion for partial summary judgment, brought on the grounds that PCCO 3 and 4 were unsigned, in violation of the contract's modification process, and therefore there was no basis for the contractor's claim with regard to these alleged change orders. The Wyoming Supreme Court reversed the District Court's grant of summary judgment and held that evidence demonstrating both (a) that the parties had reached a verbal agreement, and (b) that the contractor had taken action in consistent with the modified terms of the agreement, would be sufficient to establish a change order and entitle the contractor to recovery under its claim. Noting that Big-D had argued that PCCO 3 and 4 were agreed to verbally and by email, the Court found that it was possible that Big-D could provide sufficient evidence to demonstrate that these change orders were enforceable against the defendants.

2. In *KM Upstream, LLC v. Elkhorn Const., Inc.*, 2012 WY 79, 278 P.3d 711, 726 (Wyo. 2012), a subcontractor filed a mechanic's lien claim against the property owner. The property owner argued that the subcontractor failed to properly assert a mechanic's lien. At issue was the fact that in its Lien, the subcontractor cited Wyoming Statutes § 29-1-301 *et seq*., which pertains to all lien statements, and § 29-3-101 *et seq*., which pertains to oil and gas liens, but did not specifically refer to § 29-2-101, pertaining to mechanic's liens. While the Supreme Court noted that lien statutes are to be strictly construed and full compliance with the lien statute is necessary in order to establish a valid lien, the court also stated that a lien containing inadvertent inaccuracies or omissions that were not prejudicial could nonetheless be valid. The court went on to state that the property owner did not claim to be prejudiced and in fact had in a previous motion affirmatively recognized that the subcontractor's lien notice encompassed a

mechanic's lien. Having found no prejudice, the court held that the subcontractor's failure to cite to the mechanic's lien statute did not bar its lien claim.

3. In *Michael's Const., Inc. v. Am. Nat. Bank, Michael's Const., Inc. v. Am. Nat. Bank*, 2012 WY 76, 278 P.3d 701, 703 (Wyo. 2012), a contractor attempted to assert priority of its construction lien over that of the junior mortgagor. When the owner of a construction project defaulted on its obligations, the mortgagor foreclosed on the real property and the contractor and junior mortgagee attempted to secure payment on the funds that had resulted from the foreclosure. The contractor argued that its lien related back to the commencement of architectural work on the project and therefore predated and was superior to the junior mortgagee's claim. The junior mortgagee argued that its lien dated back before the commencement of physical construction on the project and therefore its interest was superior to that of the contractor. The trial court found that the junior mortgagee's claim was superior to that of the contractor's claim. An appeal followed. The Supreme Court held that the plain meaning of construction work is limited to visible, physical work on the project site and therefore, preconstruction architectural services are not encompassed in the definition. Accordingly, the court held that the junior mortgagee's interest was superior to that of the contractor's lien because the junior mortgagee's claim related back to before the commencement of physical work on the project site.

4. In *Shaw Const., LLC v. Rocky Mountain Hardware, Inc.*, 2012 WY 60, 275 P.3d 1238, 1243 (Wyo. 2012), a construction supplier sought recovery directly from a construction manager. The construction manager defended against the supplier's claim by arguing that it had no contract with the supplier and that only the project owner could be liable to the supplier. Affirming the decision of the District Court, the Wyoming Supreme Court found that there was some ambiguity in the contract documents as to whether the construction manager was a party to the contract. Specifically, the court found that the supplier had dealt directly with the construction manager, the construction manager had ordered the materials from the supplier, and the contract documents were the construction manager's documents. Based in part upon this evidence, the Court determined that there was ambiguity as to whether the construction manager was, in fact, a construction manager or the general contractor. The Supreme Court found in favor of the supplier.

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