FORUM ON CONSTRUCTION LAW
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CONSTRUCTION LAW UPDATE:

Case Law & Legislation Affecting the Construction Industry

(2015-2016)

Presented by

Division 10 – Energy and Environment

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10 Anniversary EDITION

INTRODUCTION

Division 10 is proud to present the Tenth Edition of the annual publication, ***Construction Law Update: Case Law & Legislation Affecting the Construction Industry (2015-2016).*** Can you believe it has been ten years already? For this special anniversary, Division 10 has published a limited number of hard-copies to be distributed at the Annual Meeting in Nashville, Tennessee.

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 (2006-2014) on Division 10's main website at:

http://apps.americanbar.org/dch/committee.cfm?com=CI110000

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 **Amber Floyd** for providing invaluable time and effort for bringing this year's update to publication. She worked 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. The submissions in this publication are made throughout the 2015-2016 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!

Matthew J. DeVries

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Alabama

Case law:

1. In *Crouch v. North Alabama Sand & Gravel, LLC*, 177 So.3d 200 (Ala. 2015), Roland and Sandra Crouch ("the Crouches") asserted negligence, wantonness, trespass and nuisance claims against Alliance Sand & Gravel ("Alliance") and Austin Powder Company ("Austin"), alleging that blasting operations performed by Austin to loosen sand and gravel at Alliance's quarry caused damage to their property. The trial court granted summary judgment for Alliance, finding that Alliance had not conducted blasting operations under abnormally dangerous conditions, that its blasting was performed with reasonable care consistent with industry and governmental standards, and that blasting did not cause damage to the Crouches' property.

On appeal, the Alabama Supreme Court reversed in part, explaining that under the factors outlined in Restatement (Second) of Torts Section 520, whether the defendant was engaged in an abnormally dangerous activity and whether there is proximate causation, are normally questions for the jury to decide. The Court found that testimony from the Crouches that they could hear and feel blasting operations, and an affidavit from their son, a contractor, testifying that blasting likely damaged his parents' house, were enough to create a triable question of fact for the jury.

The Alabama Supreme Court also reversed the trial court's summary judgment against the Crouches' nuisance claim, finding enough evidence that blasting operations may have interfered with the Crouches' use and enjoyment of their property to submit the claim to a jury. The Court did not redefine the standard for proving nuisance, but instead viewed the evidence submitted by the Crouches more favorably than the trial court had viewed it.

The Supreme Court affirmed summary judgment against the Crouches' wantonness and trespass claims. The Crouches had not submitted enough evidence of reckless indifference by Alliance to support a wantonness claim, and they could not show that any blasting debris landed on their property to support a trespass claim. Mere concussion caused by blasting operations is not a trespass under Alabama law. *See Borland v. Sanders Lead Co.*, 369 So.2d 523, 528 (Ala. 1979).

2. In *Southeast Construction, LLC v. WAR Construction, Inc.*, 159 So.3d 1227 (Ala. 2015), the court reviewed an arbitration between a contractor and developer over an apartment project that resulted in a $373,939 award to the contractor. The parties engaged in protracted litigation over enforcement of the award that yielded three separate trips to the Alabama Supreme Court. In the final decision, the Supreme Court affirmed the trial court's ruling that the contractor had provided the developer with all of the subcontractor releases required by the arbitration award and, therefore, was entitled to be paid the principal award. The Supreme Court reversed the trial court's decision to award interest from the date of the award, however, reasoning that interest only began to accrue when the contractor had complied fully with the arbitration award and provided all of the releases required by the award.

3. In *Cooper v. Ziegler*, 2015 WL 5511322, (Ala. Sept. 18, 2015), property owners brought an inverse-condemnation claim against the Director of the Alabama Department of Transportation in his official capacity seeking declaratory and injunctive relief to enjoin him from prohibiting the property owners from obtaining permits to build houses on their property. The property lies below and alongside an interstate highway, and ALDOT had an easement over the

plaintiffs' property which described specific activities that ALDOT had the right to prohibit where deemed necessary to protect the integrity of the interstate highway. The owners asked to build 7-8 houses on pilings on the property, and were denied the request, because construction would require digging, cutting trees, and removing soil: activities that the ALDOT had the right to protect. The owners sued, arguing that the director acted fraudulently, in bad faith, beyond his authority, or under a mistaken interpretation of law.

After a bench trial, the circuit court entered an order finding that the property owners had a right to injunctive relief, relying on the testimony of an engineer that there was no evidence that building the homes would have any negative impact on the interstate, as well as the lack of testimony by ALDOT to refute that position. The Supreme Court reversed, finding that the Director was entitled to sovereign immunity because he did not act fraudulently, in bad faith, beyond his authority or under a mistaken interpretation of law in denying the owners' request to build on the property. The Supreme Court analyzed the testimony from the bench trial and found that the purpose of the easement was to protect and preserve the general area, and that the owners' predecessors in title were properly compensated. The Court found that the record contained no evidence that the Director acted beyond the scope of his authority in exercising ALDOT's rights under the easement, and so the claim was due to be dismissed.

4. In *Barrett v. Roman,* 181 So.3d 364 (Ala.Civ.App. 2015), home purchasers attempted to assert claims against subcontractors that had installed allegedly defective roof and brick veneer on the home they purchased, including claims for negligence and wantonness. The trial court granted summary judgment in favor of the subcontractors. On appeal, the Alabama Supreme Court transferred the appeal to the Court of Civil Appeals, which affirmed. In addition to finding that the claims were barred by the two-year statute of limitations, the Court of Civil Appeals found that the subcontractors did not owe any duty to the purchasers that could support a claim for negligence or wantonness, relying on *Keck v. Dryvit Systems, Inc.*, 830 So.2d 1 (Ala. 2002).

Unlike the plaintiffs in *Keck* who purchased their home from prior homeowners, the plaintiffs in *Barrett* purchased their home directly from the homebuilder that subcontracted with the roof and brick veneer subcontractors. The Court rejected this distinction, however, reasoning that the plaintiffs still were not the intended purchasers while the home was being built, and, therefore, the subcontractors could not have reasonably anticipated that the plaintiffs would purchase the home or rely on the quality of their work.

5. In *Diamond Concrete & Slabs, LLC v. Andalusia-Opp Airport Authority*, 181 So.3d 1071 (Ala.Civ.App. 2015), the Alabama Court of Civil Appeals addressed an attorneys' fee claim by a subcontractor that prevailed against a general contractor and owner under Alabama's prompt payment statute, Ala. Code § 8-29-1 *et seq*. (1975), also known as the Miller Act. The subcontractor installed an allegedly defective concrete slab in an airport hanger, and litigated for over three years to prove that the slab was properly poured and to recover its unpaid subcontract balance of $14,055. After a five-day trial, the jury found for the subcontractor, awarding $14,055 and rejecting the counterclaims alleging defective workmanship.

The subcontractor incurred $247,275 in fees under an hourly rate based fee agreement with its attorney, but the trial court only awarded $5,622 in fees based on a percentage of the amount recovered by the subcontractor at trial. The Court of Civil Appeals reversed, explaining that the amount recovered by the subcontractor on its claim against general contractor and airport authority under the Prompt Payment Act could not be sole basis for the amount of

attorneys' fees awarded to subcontractor. The Court of Appeals recited twelve factors -- including most importantly the amount of time consumed -- that should be considered by a trial judge in determining a reasonable attorneys' fee. The Court declined the invitation to rule on the proper amount of fees in this case, but made it clear that it expected the trial court to take into account the complexity and duration of the case in determining the amount of fees to award.

6. In *Inline Electric Equipment Supply Co. v. Eskildsen*, No. 2140917, 2015 WL 8567254 (Ala.Civ.App. Dec. 11, 2015), the Court of Civil Appeals defined whether an unpaid contract balance existed for the purpose of a subcontractor's unpaid balance lien claim. The Eskildsens entered into a $550,000 contract with a homebuilder for the construction of a new home. During the construction of the home, Plaitiff Inline delivered electrical materials in the amount of $6,690.68. When the homebuilder failed to pay Inline, Inline served notice of its intent to file a lien on the Eskildsens on June 17, 2013, and then filed a lien on June 19, 2013. On June 21, 2013, the Eskildsens made payments by check directly to two subcontractors pursuant to "joint check agreements" they had entered into with the homebuilder and the two subcontractors. The joint check agreements had been executed before the Eskildsens received notice of Inline's intent to file the lien. Thereafter, the homebuilder abandoned the project, and the Eskildsens hired other contractors to complete their home.

On July 5, 2013, Inline filed a civil action against numerous defendants, including the Eskildsens, to enforce the lien. The Eskildsens filed a motion for a summary judgment against Inline, asserting that there was no unpaid balance owed to the homebuilder at the time they received the notice of lien from Inline. The trial court entered summary judgment in favor of the Eskildsens, finding that no unpaid balance existed against which Inline could claim a lien.

Under Alabama law, a full-price lien can arise by virtue of either an express or an implied contract between the subcontractor and the owner, but neither party asserted that such a lien was available to Inline. Instead, Inline sought a lien pursuant to Ala. Code § 35-11-210 (1975), a so-called "unpaid balance" lien. An unpaid-balance lien gives an unpaid subcontractor a lien on any funds in the hands of the owner that the owner owes to the original contractor.

The Court of Civil Appeals considered whether an unpaid balance existed between the Eskildsens and their homebuilder, a determination made more challenging because the homebuilder had abandoned the project. The Court explained that, in determining the "unpaid balance" to which a lien can attach, the trial court should have looked at the amount the Eskildsens owed on the original contract with the home builder, if it had been performed, less the expenses the Eskildsens incurred in having their home completed in conformance with the contract. According to the Court, the "unpaid balance" is not determined by the actual amount that the homebuilder was owed for work that it had completed at the time it abandoned the project, but by the amount the homebuilder would have been paid had it completed the project, less the amount of the Eskildsens' expenses to complete the construction project in conformance with the contract.

The Court of Civil Appeals reversed the summary judgment in favor of the Eskildsens, explaining that neither party presented evidence as to how much work remained to be completed at that time the homebuilder abandoned the project, how much of the contract price had already been expended, or how much the Eskildsens were required to pay to have the construction project completed in conformance with the contract. According to the Court, the record contains no information from which the trial court could have determined the unpaid balance of the original contract or the amount that should have been deducted from that

balance for expenses needed to complete the construction project.

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Alaska

Case law:

1. In *Silver Bow Construction v. State of Alaska*, 330 P.3d 922 (Ak 2014), the Alaska Supreme Court reviewed whether the State could find that a bidder whose bid exceeded the 10-page limit for bids could nonetheless be awarded the contract in question. In November 2010, the State issued a request for proposals to perform exterior renovations to the Governor's House in Juneau. The request imposed specific submission requirements and guidelines. Paragraph 8 of the request included the instructions relevant to this appeal, which provided:

> The maximum number of attached pages (each printed side equals one page) for criteria Responses shall not exceed: 10 pages.

Paragraph 8 warned that "Criteria Responses which exceed the maximum page limit or otherwise do not meet requirements stated herein, may result in disqualification." One contractor submitted a 7-page proposal; Silver Bow submitted a 10-page proposal; another contractor submitted an 11-page proposal; and Alaska Commercial Contractors (the awardee) submitted a 15-page proposal.

Silver Bow protested the bid and argued that the over-length bid by Alaska Commercial was non-responsive and that the successful bidder should have been disqualified. The State countered that the page count was a matter of form and did not confer an advantage on the winning bidder.

On appeal, the Alaska Supreme Court concluded that the State reasonably found that the over-length bid did not confer an unfair advantage on the winning bidder. It then upheld the State's bid award as being within its discretion, particularly where (by use of the permissive word "may" in Paragraph 8 of the instructions) the State had the discretion to decide whether a failure to comply with this requirement could be a basis for disqualification.

Legislation:

1. **S.B. 193, Bonding requirements** -- Effective January 1, 2015, the required construction contractor bonding amounts are incrased as follows:

> (1) general contractor shall be $25,000;
>
> (2) general contractor with a residential contractor endorsement under AS 08.18.025 who performs exclusively residential work shall be $20,000;
>
> (3) mechanical or specialty contractor or home inspector shall be $10,000; or (4) contractor whose work on one project with an aggregate contract price of $10,000 or less, including all labor, materials, and other items, when the work is

not part of a larger or major operation or otherwise divided into contracts of less than $10,000 to evade a higher bonding requirement, shall be $5,000."

Under the amended law, in lieu of a surety bond, the license applicant may file with the Commissioner a cash deposit or other negotiable security acceptable to the Commissioner in the amount of the required bond.

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Arizona

Case law:

Little Miller Act Notice Requirements

1. In *Cemex Construction Materials South, LLC v. Falcone Brothers & Associates, Inc.*, 349 P.3d 210 (Ariz. Ct. App. 2015), the Court of Appeals addressed the notice requirements before recovery against a payment bond surety under Arizona's "Little Miller Act," A.R.S. § 34-223. The Little Miller Act is a mechanism to protect the rights of subcontractors and material suppliers who supply labor or material to an Arizona public project. It does so by requiring the general contractor to post a bond.

The Little Miller Act requires a claimant acting on the bond to provide a written preliminary twenty-day notice, and a later ninety-day notice. The statute describes the notice requirements—service by registered or certified mail—immediately after listing the ninety-day notice. Further, the statute used the term "notice" in the singular. The question of statutory construction, whether the requirement for service by registered or certified mail applies to both the twenty-day and ninety-day notices, led to the appeal.

The case arose when Cemex, who provided concrete for the project, filed its initial complaint alleging that it had not been paid. Cemex claimed that it had served four preliminary twenty-day notices pursuant to the Little Miller Act. Cemex did so via first class mail with a certificate of mailing, which was the standard and historical procedure for serving a preliminary notice under A.R.S. § 32-992.01 as a prerequisite for a mechanic lien. Falcone argued that this was not enough to satisfy the statutory requirement, arguing that registered or certified mail was required for both types of notice required by the statute. The Court agreed with Falcone, and held that the statute requires both the preliminary twenty-day notice and the later ninety-day notice be sent by registered or certified mail.

Since this above provision of the Little Miller Act is incorporated into Title 41 (state projects) and into A.R.S. § 33-1003 (payment bond in lieu of lien rights), the *Cemex* decision calls into question the enforceability of every such pending payment bond claim in Arizona if service of the preliminary notice was not served by registered or certified mail. However, the Court acknowledged that proof of actual receipt by the bond principal may overcome the failure of proper service. Understanding that this will likely be contested, the best practice for all contractors, subcontractors, and suppliers on any Arizona projects in which they may want to pursue a bond claim is to serve the preliminary notice by registered or certified mail.

Residential Contractors' Recovery Fund

2. *In Pinnamaneni v. Arizona Registrar of Contractors, 347 P.3d 593 (Ariz. Ct. App. 2015)*, the Arizona Court of Appeals examined the definition of a "person injured" for the purposes of recovering compensation from the Residential Contractors' Recovery Fund ("Fund"). Plaintiff, acting through his LLC, contracted for the construction of a home to be built on land owned by his trust. However, there were defects in the construction and plaintiff sought to recover from the fund. On appeal, the Court found that "an individual who occupies or intends to occupy the residence, and who is the trustor, trustee and beneficiary of a revocable trust that owns the property," meets the ownership requirements necessary to recover from the Fund. In addition, the Court found that there was no requirement for contractual privity between the owner and contractor for recover. Finally, the Court also found that the statute did not require participation in the underlying complaint to the Registrar of Contractors when seeking to recover from the Fund.

Loan Subrogation

3. In *HACI Mechanical Contractors, Inc. v. BMO Harris Bank, No.1 CA-CV 13-0147 2015 WL 1455204 (Ariz. Ct. App. Mar. 31, 2015)*, the Court of Appeals considered the priority battle between a bank claiming equitable subrogation arising out of of construction loans versus a mechanic lien claimant. The case arrived before the Court of Appeals after the state Supreme Court vacated a decision the Court of Appeals had relied upon in its previous decision to wholly preclude the bank's efforts to claim priority over the contractor's mechanic's lien.

HACI was hired as a subcontractor for a project on the Owner's property. The Owner was not a party to this case. HACI served a preliminary twenty-day notice on Owner and the Bank as a prerequisite for later recording its mechanics' lien.

After this, the Bank issued a construction loan to the Owner for nearly $40 million. As a closing condition, the bank required that the Owner satisfy previous liens totaling nearly $7 million on the property. The Owner did so. The Bank then made the loan and recorded a first position deed of trust, fifty-six days after HACI's earlier preliminary lien notice.

The Bank later declared the owner in default. The pertinent issue was if the Bank's lien via its deed of trust had priority under the doctrine of equitable subrogation over HACI's mechanics' lien. Despite HACI's arguments that there is a statutory preference for mechanics' liens (A.R.S. § 33-992), the Court of Appeals looked to the recent state Supreme Court decision permitting equitable subrogation of mechanics' liens. *Weitz Co. L.L.C., v. Heth, 235 Ariz. 405 (2014)*.

However, citing *Sourcecorp, Inc. v. Norcutt, 229 Ariz. 270 (2012)* and the Restatement (Third) of Property § 7.6, the Court of Appeals limited the amount to which the Bank was entitled to equitable subrogation to the amount of the loan used to discharge an earlier loan. The Bank had issued construction loans for nearly $40 million, approximately $7 million of which was used by the Owner to pay off the previous loans. The Court of Appeals held that the Bank was only entitled to priority via the doctrine of equitable subrogation for the smaller amount used by the Owner to pay off the previous loans.

Statute of Limitation

4. In *Aprajita Nakra v. Porter Bros., Inc., No. 1 CA-CV 12-0739 2015 WL 1729134 (Ariz. Ct. App. Apr. 14, 2015)*, the Court of Appeals affirmed a trial court's summary judgment

ruling that the statute of limitations had run for plaintiffs' construction defects claim. Plaintiffs were two doctors who owned multiple offices within a business park. There were construction defects within their offices. . Despite plaintiffs' claims that the injuries were not known until after a complete "architectural" review, the Court applied the discovery rule, and reviewing the matter *de novo*, found that the injury to plaintiffs was clear at a date that would preclude their claim because the statute of limitations had run. The record revealed that plaintiffs were aware of the issues from that earlier date.

Legislation:

1. **H.B. 2578, Revisions to the Purchaser Dwelling Act.** The legislation amended the statutes governing Purchaser Dwelling Actions, A.R.S. § 12-1361, et seq., and Homeowner Association Dwelling Actions, A.R.S. § 33-2001, et seq. The amendments alter and increase the requirements that must be fulfilled before initiating a dwelling action by granting sellers a greater opportunity to repair defects. The changes benefit construction professionals by (1) defining what constitutes a construction defect; (2) requiring notice of reasonable detail of all alleged defects; and (3) providing sellers a right to repair all alleged defects prior to the buyer filing a claim for construction defects.

The legislation defined "construction defect" to be a material deficiency in the design, construction, manufacture, repair, alteration, remodeling or landscaping of a dwelling that is the result of one of the following: violations of construction codes, the use of defective material, products, components or equipment, or the failure to adhere to generally accepted workmanship standards in the community. A.R.S. § 12-1361(4). The legislation redefined additional terms, with the most notable being the inclusion of construction professionals, such as subcontractors, within the broader definition of "seller." See A.R.S. § 12-1361(10).

When the purchaser gives notice to the seller of alleged defects they are now no longer permitted to use a representative sample. A.R.S. § 12-1363(A). Additionally, the legislation expands the definition of reasonable detail to include a description of the impairment to the dwelling. A.R.S. § 12-1363(O).

Construction professionals further benefit from the legislation as they now enjoy a right to repair any alleged defect. A.R.S. § 12-1362(B). Now, when a seller receives notice of an alleged defect, he or she will have the option to repair the alleged defect. The seller must reply to a complaint within sixty days of a notice of alleged defect. If the seller includes a notice of intent to repair, the purchaser may not bring a dwelling action until the intended repair is complete. A.R.S. § 12-1362(B), -1363(C).

The legislation additionally altered the notice requirements for a Homeowner Association Dwelling Action. The legislation requires that an HOA must now share with its members the nature of the action, as well as anticipated expenses or fees it will incur, before initiating a dwelling action. A.R.S. § 33-2002.

2. **H.B. 2336, Arizona Design Professionals Prompt Pay Act.** Effective on July 3, 2015, the legislature amended statutes to extend the right to prompt payment to design professionals on certain public projects. The legislation affects contracts with cities, towns and other public entities (but not the Arizona Department of Transportation), as well as contracts with the state. A.R.S. §§ 34-221, 41-2577. Design professional services were defined to include architectural, engineering, land surveying, geologist, or landscape architectural services. A.R.S. §§ 34-221(L)(2), 41-2571(4). Design professionals now enjoy the same prompt pay

rights that subcontractors and material suppliers previously enjoyed. A.R.S. §§ 34-221(G), 41-2577.

However, the prompt payment right was not equally extended to design professionals for contracts with the state Department of Transportation, which are governed by A.R.S. § 28-411. Instead, payment is to be made per agreement between the department and the design professional, or pursuant to a limited notice from the department's authorized agent made before the execution of a contract or contract modification. A.R.S. § 28-411(G).

3. **S.B. 1446, Transaction Privilege Tax Reform.** The legislation was a third attempt at altering the Prime Contracting Transaction Privilege Tax ("TPT"). The legislation, signed by the governor and retroactively applicable to Jan. 1, 2015, affects the collection of TPT. The legislation redefines and clarifies when a project and the purchase of materials for it are subject to TPT. Notably, projects that are Maintenance, Repair, Replacement, or Alteration (MRRA), are not subject to TPT. The legislation clarifies which projects qualify as MRRA by providing better definitions for its terms, such as "Alteration." The legislation defines alteration, depending on the type of job (i.e. residential or commercial), by using either the contract's value or the relative area of the existing space affected by the project.

The legislation addressed additional issues. For example, in case of change order, it tied tax treatment to the original contract if the change order directly relates to the scope of the original project, otherwise tying it to the nature of the change order. Additionally, it ensured consistent tax treatment for maintenance, repair, replacement or alteration (MRRA) projects with tax-exempt parties or property. Finally, the law provides guidance for the tax treatment of materials purchased when a TPT license is canceled, as well as a safe harbor for bids or contracts before May 1, 2015.

The state's Department of Revenue recently published a tax notice addressing the implementation of the legislation and its effect on contractors. The tax notice goes into depth about the changes caused by the legislation, as well as providing examples of how the TPT could be applied. See https://www.azdor.gov/Portals/0/TPTSimplification/TPN%2015-1.pdf

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California

Case law:

1. In *Blois Construction, Inc. v. FCI/Fluor/Parsons*, 16 C.D.O.S. 3103 (Ca. Ct. App. Mar. 24, 2016), the court of appeal held that, under California's Prompt Payment Act, a subcontractor is not entitled to prompt payment penalties when the general contractor continues to withhold retention payments to the subcontractor, where the owner has not released those retention payments to the general contractor, although the owner did stop withholding retentions once the general contractor completed 50% of the project. In other words, the court of appeal found that the owner's decision to stop withholding future retentions and pay full progress payments to the general contractor was not the equivalent of payment by the owner of past retentions.

2. In *JMR Const. Corp. v. Environmental Assessment and Remediation Mgmt. Inc.,* Ca. Ct. App. Dec. 30, 2015, 2015 WL 9592252, the court of appeal, as matter of first impression determined that it is legally permissible to use the Eichleay formula to calculate general

contractor's home office overhead recoverable from its subcontractor on public works project where "but for" the subcontractor's concurrent delay, the general contractor would have recovered those delay damages from the public owner. It also held that a modified total cost method to calculate damages for delay is valid where it is impractical to prove actual losses directly, the bid to perform the work was reasonable, the actual cost to perform the work was reasonable, the claimant was not responsible for the added costs, and the calculation relates only to the impacted phase of the project. Finally, the court held that the general contractor is not required to give the subcontractor's surety notice of default absent clear language in the bond making notice a condition precedent to the surety's performance.

3. In *Blackwell v. Vasitas*, 2016 Cal.App. Lexis 47, (CA Ct. Appeal Feb. 24, 2016), the court of appeal held that a construction project owner could be liable for injuries suffered by an employee of a contractor, pursuant to California Labor Code section 2750.5. Section 2750.5 provides a rebuttable presumption that a worker performing services for which a license is required is an employee rather than an independent contractor, which presumption is rebutted by proof that the worker's company was properly licensed. The owner could also escape liability if it proved that the work did not require a license in the first place. This case highlights how important it is for project owners to assure that all contractors working on their projects are properly licensed.

4. In *DeSilva Gates Construction LP v. Dept. of Transportation*, Case No. C074521(CA Ct. Appeals Dec. 14, 2015), the court of appeal issued a writ of mandate requiring CalTrans to award a contract to DeSilva Gates Construction LP and not Papich Construction Co. DeSilva was the low bidder. Papich was the second low bidder. Initially, CalTrans determined Papich's bid was non-responsive because it failed to acknowledge an Addendum. Then, DeSilva added a new subcontractor to its list of subcontractors. Thereafter, CalTrans rejected DeSilva's bid because of the late submittal of subcontractor information, waived the defect in Papich's bid in failing to acknowledge the Addendum, and awarded the contract to Papich. The court of appeal, in issuing the writ, determined that DeSilva did not need to provide the information regarding the subcontractor because the value of its subcontractor was below the required threshold. It also ruled that CalTrans had abused its discretion in waiving the Papich defect because CalTrans had previously declared that the Addendum acknowledgement was a material term of the bid such that CalTrans could not waive it.

5. In *Apex Directional Drilling, LLC v. SHN Consulting Engineers & Geologists, Inc.,* 2015 WL 4749004 (No. Dist. Cal., Aug. 11, 2015), the court held that the contractor adequately alleged that it was owed a duty of care by the lead engineer/project manager, as required to state a claim under California law for breach of professional duty, that the contractor adequately alleged it was a member of a specific class of persons that the lead engineer/project manager intended its information to influence, as required to state a claim under California law for negligent misrepresentation, and that the California statute requiring the filing of a certificate of merit in negligence actions against professional engineers was procedural, not substantive, and thus did not apply under Erie Doctrine, such that the certificate of merit is not required in diversity case.

6. In *Vita Planning and Landscape Architecture, Inc. v. HKS Architects, Inc.*, 240 Cal.App.4th 763 (Ct. App. Sep. 25, 2015), the court held that, as a matter of first impression, an architectural firm was a "contractor" and a landscape design firm (a sub-consultant) was a "subcontractor" within the meaning of California Code of Civil Procedure section 410.42, which precludes out-of-state contractors from requiring California subcontractors to litigate certain contractual disputes in the contractor's home state.

7. In *Zoom Elec., Inc. v. Horak*, 617 Fed. Appx. 677 (9th Cir. Jun 11, 2015) the court held that the general contractor, on a California public works project, is liable for amounts that an unlicensed subcontractor owed to the union based on that subcontractor's failure to comply with the project's Project Labor Agreement. The Ninth Circuit found that California Labor Code section 2750.5's presumption that the general contractor is the employer of its unlicensed subcontractor and its employees is conclusive and operates to impose vicarious liability on the general contractor for the unlicensed subcontractor's liabilities.

8. In *James L. Harris Painting & Decorating, Inc. v. West Bay Builders, Inc.,* 239 Cal.App.4th 1214 (CA Ct. Appeal, Sep. 3, 2015), the court of appeal upheld the trial court's finding that neither party is a prevailing party under the prompt payment statutes if the jury finds that both parties failed to perform under their contract, if the jury does not award damages to either party, and if the prompt payment claim was not plead as a separate cause of action.

9. In *Pacific Caisson & Shoring, Inc. v. Bernard Bros. Inc.,* 236 Cal.App.4th 1246 (CA Ct. Appeal May 19, 2015), the court held that if a contractor has a license that is associated (shares the same responsible managing officer) with a different contractor and the former contractor has a judgment entered against it for failure to pay employee benefits under a collective bargaining agreement and that former contractor fails to report that judgment to the California Contractor's State License Board, as it is obliged to do under the California Contractor's Licensing Law, it is proper for the Board to suspend the license of the associated contractor. The impact of that suspension is that the associated contractor, having a suspended license, cannot recover payment on its contract even though it has performed the work and it must pay back (disgorge) all amounts it already received on its contract.

10. In *Judicial Council of California v. Jacobs Facilities, Inc.*, 239 Cal.App.4th 882 (CA Ct. Appeal, Aug. 20, 2015, the court of appeal held that a contractor who failed to maintain its contractor's license under the Contractor's State License Law for a year under the contract, notwithstanding that its sister company who was licensed performed the contract work, must disgorge all payments made to it and cannot recover for work performed but unpaid, if contractor cannot prove it substantially complied with the licensing laws, as defined by the governing code section on substantial compliance.

11. In *East West Bank v. Rio School District*, 235 Cal.App.4th 742 (CA Ct. Appeal 2015), the court held that, although California Public Contract Code section 7107 allows a public entity to withhold funds due a contractor when there is a good faith dispute concerning whether the work was properly performed, it does not allow the public entity to withhold funds where there is a dispute over the contract price arising from a dispute over proposed change orders. The court of appeal noted that it disagreed with a prior California court of appeal decision, *Martin Brothers Construction, Inc. v. Thompson Pacific Construction, Inc.* (2009) 179 Cal.App.4th 1401, which held otherwise.

12. In *Roy Allan Slurry Seal, Inc. v. American Asphalt South Inc.,* 2015 WL 738675 (Ca. Ct. Appeal Feb 20, 2015, the court of appeal held, in a matter of first impression, that a second-place bidder on a public works contract may sue the winning bidder, who allegedly underpaid workers less than the statutorily-required prevailing wage, allowing it to win the bid, for the tort of intentional interference with prospective economic advantage. The California Supreme Court has granted review.

13. In *State Ready Mix, Inc. v. Moffatt & Nichol*, 2015 WL 109869 (CA Ct. Appeal Jan. 8, 2015), the court held that the economic loss rule bars a concrete supplier's causes of action for equitable indemnity/contribution or implied contract/promissory estoppel against an engineer because the supplier breached its own contract with contractor, there was no property damage, and the engineer owed no duty to supplier. The court also found concrete supplier's cause of action for promissory estoppel also failed because the engineer made no promise to the supplier upon which the supplier justifiably relied, and because the supplier could not recast its contract claim into a tort theory of liability. The court further held that the engineer owed no duty to the supplier based on a public policy and on a Good Samaritan theory.

14. In *United Riggers & Erectors, Inc. v. Coast Iron & Steel Co*., 243 Cal.App.4th 151 (CA Ct. Appeal 2015), the court followed *East West Bank v. Rio School District*, 235 Cal.App.4th 742 (CA Ct. Appeal 2015) and held that a general contractor cannot withhold payment to a subcontractor when the dispute is not applicable to retention but rather the subcontractor's affirmative claims for changed work.

15. In *Jeff Tracy, Inc. v. City of Pico Rivera*, 240 Cal.App.4th 510 (CA Ct. Appeal 2015), the court held that the question of whether the responsible managing employee, in connection with licensure, was a sham or not was a question of fact for the jury. The court also held that, even if the contractor had the appropriate license as called for under the law, if the contractor did not have the type of license that the contract called for, it was "unlicensed" for purposes of the governing law, California Business and Professions Code section 7031(b). It further confirmed that disgorgement under that statute was not apportionable.

16. In *Womack v. Lovell*, 237 Cal.App.4th 772 (CA Ct. Appeal 2015) the court held that, even if the contractor was not licensed, if the plaintiff alleged that it was in its complaint, the plaintiff was bound by that admission pursuant to the sham pleading doctrine.

17. In *Ahdout v. Hekmatjah*, 2015 WL 4322018 (CA Ct. Appeal Aug. 4, 2015), the court held that the public policy to give deference to arbitration awards does not apply to disgorgement actions involving contractor licensure.

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Legislation:

Licensing

1. SB 467 – Removes the requirement that contractor license applicants prove they have $2,500 in working capital as a condition of issuance of a contractor's license and increases the amount of the license bond all contractors are required to post from $12,500 to $15,000.

2. SB 560 – Expands the jurisdiction of the Contractors State License Board's enforcement division to issue notices to appear in court if a contractor fails to carry workers' compensation insurance when required.

3. SB 561 – Streamlines the home improvement salesperson registration process by eliminating the requirement that home improvement salespersons register separately for each contractor in which they are employed.

Prevailing Wages

4. AB 219 – Expands the application of the prevailing wage laws to the hauling and delivery of ready-mixed concrete to state and local public works projects effective July 1, 2016.

5. AB 852 – Expands the application of the prevailing wage laws to the construction, alteration, demolition, installation or repair of done under private contract for general acute care hospitals, except rural general acute care hospitals with a maximum of 76 beds, when the project is funded in whole or in part with conduit revenue bonds issued on or after January 1, 2016.

Project Delivery

6. SB 63 – Authorizes the use of enhanced infrastructure financing districts for seaport and harbor projects.

7. AB 1171 – Authorizes regional transportation agencies to use the construction manager/general contractor project delivery method for the design and construction of certain expressways that are not on the state highway system.

8. AB 1185 – Establishes a pilot program authorizing the Los Angeles Unified School District to use a best value procurement method for bid evaluation and selection for public works projects that exceed $1 million through December 31, 2020.

9. AB 1290 – Authorizes the Mayers Memorial Hospital District to use the design-build project delivery method for improvements at the Mayers Memorial Hospital.

10. AB 1358 – Removes, effective July 1, 2016, the $2.5 million minimum threshold for school districts to use the design-build project delivery for school projects, and replaces it with a lower $1 million minimum threshold through January 1, 2025.

11. AB 1431 (2015) – Expands the use of job order contracting, which was formerly limited to the Los Angeles Unified School District, to all school districts that: (1) have entered into project labor agreements; (2) for school projects in excess of $25,000, through January 1, 2022.

12. SB 374 – Authorizes the San Diego Association of Governments to use the design-build project delivery method for public works projects adjacent, or physically of functionally related, to transit facilities developed by the association.

13. SB 562 – Authorizes the City of Long Beach to use the public-private procurement method to revitalize and redevelop the Long Beach Civic Center.

14. SB 762 – Establishes a pilot program authorizing the the Counties of Alameda, Los Angeles, Riverside, San Bernadino, San Diego, Solano and Yuba to select bidders on the basis of best value for public works projects in excess of $1 million.

Public Works

15. AB 323 – Extends, from January 1, 2016 through January 1, 2020, the exemption of repairs, maintenance, or minor alterations to existing roadways by cities and counties with populations of less than 100,000 from the California Environmental Quality Act.

16. AB 413 – Amends existing law which allowed a child or spouse of a disabled veteran who was/is the majority owner of a disabled veteran business enterprise to continue the enterprise for 3 years after the death or certification of permanent medical disability of such disabled veteran, but only for contracts entered into before the death or certification of permanent medical disability of such disabled veteran, by eliminating the restriction on contacts entered into before death or certification of permanent medical disability.

17. AB 552 – Makes unenforceable, for public works contracts entered into on or after January 1, 2016, provisions making a contractor responsible for delay damages to a public entity, unless the delay damages have been liquidated to a set amount in the contract.

18. AB 566 – Requires, through January 1, 2019, that lease-leaseback school project contracts include certain pre-qualification requirements regardless of the funding source for the public works projects, and a skilled and trained workforce including at least 30 percent (30%) journeymen who have graduated from approved apprenticeship programs for contracts entered into on or after January 1, 2016.

19. AB 1308 – Revises the conditions which must be met to justify the approval of a new apprenticeship program if one of the following conditions is met: (1) There is not existing apprenticeship program serving the same craft or trade and geographic area; (2)an existing apprenticeship program does not have the capacity, or neglects or refuses, to dispatch sufficient apprentices; (3) an existing apprenticeship program has been identified by the California Apprenticeship Council as deficient in meeting their obligations.

20. SB 184 – Amends the Uniform Public Construction Cost Accounting Act in several respects, including, (1) authorizing notices inviting informal bids to be faxed or emailed to appropriate contractors lists or trade journals; and (2) authorizing governing bodies to designate a representative to adopt plans, specifications and working details for public works projects exceeding $175,000. Authorizes counties, whether general law or charter counties, with populations of less than 500,000, to award individual annual contracts for repair, remodeling or other repetitive work according to unit prices not to exceed $3 million, adjusted annually.

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Colorado

Case law:

1. In *S K Peightal Engineers, LTD et al. v. Mid Valley Real Estate Solutions V, LCC,* 342 P.3d 868 (Colo. 2015), the Colorado Supreme Court decided two issues stemming from a court of appeals' interlocutory appeal pursuant to C.A.R. 4.2:

> (1) whether entities that did not exist at the time relevant contracts were completed can still be subject to the economic loss rule through the interrelated contracts doctrine; and (2) whether commercial entities situated similarly to Respondent [Mid Valley], which was a third-party beneficiary to a contract that interrelated to the contract by which the home at issue was built, are among the class of plaintiffs entitled to the protections of the independent tort duty to act without negligence owned by construction professionals to subsequent homeowners when constructing residential homes.[1]

The case stemmed from a series of contracts regarding construction of a "spec" home. S K Peightal Engineers, LTD (Peightal) was hired as a subcontractor by the developer, Sun Mountain Enterprises LLC (Sun Mountain) to perform soil analyses and engineering for the home site. The court found that Sun Mountain had an oral contract with the general contractor, Shannon Custom Homes (Shannon), and considered whether that contract contained an "explicit duty of care". Petitioner, Hepworth-Pawlak Geotechnical Inc. (H-P Geotech) had a written contract with Sun Mountain that contained a provision requiring H-P Geotech to "conduct all services 'in a manner consistent with that level of care and skill ordinarily exercised by members of the professional currently practicing under similar conditions in the same locale'".[2]

Sun Mountain secured project financing with three intertwined construction loans with Alpine Bank. Unfortunately, the home was not sold before the construction loan matured. Therefore, Sun Mountain and Alpine Bank entered into an Agreement for Deed-in-Lieu of Foreclosure, which released Sun Mountain as personal guarantors, but required a deed transfer to Alpine Bank and a lump sum payment of the difference between the home's appraised value and the remaining debt due on the loan. Alpine Bank created a wholly-owned subsidiary, Mid Valley, which took title to the home.[3]

Subsequently, large cracks were discovered in the home's walls, purportedly due to soil settling beneath the foundation. Mid Valley filed suit for monetary damages under a negligence theory of breach of duty and standard of care. Petitioners filed a motion for summary judgment stating that the economic loss rule barred assertion of a tort claim since Mid Valley was "contractually interrelated" through the Deed-in-Lieu and construction loan contracts. The trial court denied the motion "finding that Mid Valley did not have a contract with anyone involved in the construction project".[4] The court of appeals affirmed the trial court, but on different grounds. The appeals court determined that petitioners were subcontractors that owed the "same independent duty" as they would to "any natural home buyer", and therefore the economic loss rule did not apply.[5]

Since the issue involved a motion for summary judgment, the court reviewed this matter with a *de novo* standard of review.[6] The court then turned to the fact that the economic loss rule is intended "to maintain the boundary between contract law and tort law, and focuses on the source of the duty".[7] In short, if a duty arises from a contract, then a remedy in tort is not

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[1] *S K Peightal, et al. v. Mid Valley Real Estate Solutions V, LLC*, 342 P.3d at 869.

[2] *Id. at* 870.

[3] *Id.* at 871.

[4] *Id*.

[5] *Id*.

[6] *Id.*, citing *Pierson v. Black Canyon Aggregates, Inc.*, 48 P.3d 1215, 1218 (Colo. 2002).

[7] *Id.* at 872, citing *Town of Alma v AZCO Constr., Inc.*, 10 P.3d 1256, 1259 (Colo. 2000).

allowed, but if the duty arises independently from the contract, then a tort action may be appropriate. The rule is not affected by whether the case involves a single contract or a number of interrelated contracts.[8] The rule also is not affected the plaintiff is a party to d by whether the case involves a direct contracting party or a third party beneficiary.[9] In sum,

> absent an independent tort duty, a plaintiff is generally barred from suing in tort if (1) the plaintiff seeks redress for breach of a contractual duty that caused only economic losses, (2) the plaintiff is a party to a contract or a third-party beneficiary of a contract as defined above, and (3) that contract defines the duty of care that the defendant allegedly violated or is interrelated with another contract that defines that duty of care. If, however, the defendant owes a duty of care to the plaintiff *independent* from the duty contained in the interrelated contracts, then the plaintiff may still sue in tort for violation of that independent duty.[10]

The court turned to the first issue of whether Mid Valley can be subject to the interrelated contracts doctrine even though it did not exist until the home was completed. The court reviewed a general intent provision stating that it was the "*express intent* and understanding of the Parties to this Agreement that *Mid Valley Real Estate Solutions V, LLC shall become the immediate and absolute full fee owner of and have complete and indefensible title to the Real Estate Collateral and Personal Property*".[11] Clearly the parties expressly intended Mid Valley to benefit directly from the agreement; however, other documents and the oral agreement gave rise to some unanswered questions.[12] As such, the court concluded that "[e]ntities that were nonexistent when the contract containing the duty was formed can still be subject to the interrelated contracts doctrine"; however, the court remanded the determination regarding Mid Valley in this case as there was not enough evidence to rule definitively on the motion for summary judgment.[13]

The court then turned to the issue of "independent duty", and reminded us that certain "special relationships", such as the one ascribed to a construction professional, bear judicially-recognized independent duties.[14] Previously, the court held that construction professionals owe an independent duty to act non-negligently, but "limited this duty so as to allow only 'subsequent home owner[s]' to maintain an action against a builder".[15] In keeping with this precedent, the court determined that Mid Valley is not a "subsequent home owner". As such, there is no independent duty owed by Peightal, and Mid Valley cannot rely upon an exception to the economic loss rule.[16] However, the court noted,

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[8] *Id.*, citing *Town of Alma*, 10 P.3d at 1262, and *BRW, Inc. v Dufficy & Sons, Inc.*, 99 P.3d 66, 72 (Colo. 2004).

[9] *Id.,* citing *Town of Alma* at 1264 n.12, and *Parrish Chiropractic Ctrs., P.C. v. Progressive Cas. Ins. Co.*, 874 P.2d 1049, 1056 (Colo. 1994).

[10] *Id*.

[11] *Id.* at 873.

[12] *Id.*

[13] *Id.* at 873-74.

[14] *Id.* at 875.

[15] *Id.* at 876, citing *Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041, 1042 (Colo. 1983), citing *Town of Alma* at 1265-66.

[16] *Id.*

> While the independent duty established in Cosmopolitan Homes does not provide Mid valley with an exception to the economic loss rule, it remains to be determined by the trial court whether the Construction Loan Contract is sufficiently interrelated to Petitioners' contracts, whether Petitioner S K Peightal's oral contract contained a duty, and whether Petitioners' duties (if any) under their respective contracts were the same as their general tort duties such that the economic loss rule would bar Mid Valley from suing in tort. If yes to all, then Mid Valley may sue for breach of contract but not in tort. If no to any, then Mid Valley will be able to assert at least some general tort claims as appropriate within the strictures of this opinion.[17]

2. In *Vallagio at Inverness Residential Condo. Ass'n v. Metropolitan Homes, Inc. et al.*, No. 14CA1154 (2015 COA 65), the Colorado Court of Appeals decided an issue regarding mandatory arbitration clauses concerning a construction defects claim.

In 2007, Inverness, the community's developer, recorded the community's declaration that contained a mandatory arbitration provision for construction defects.[18] In September 2013, subsequent to Inverness' turnover of board control to the unit owners, those owners voted to amend the declaration to remove the mandatory arbitration provision, without Metro's consent.[19] Shortly after the amendment, the Association filed an action in district court claiming "construction defects, negligence, negligence per se, negligent repair, breach of implied warranty, misrepresentation/non-disclosure, violations of the Colorado Consumer Protection Act (CCPA), and breach of fiduciary duty".[20] Defendants moved to compel arbitration pursuant to the original declaration. The Association argued that

> (1) the declaration was validly amended to remove the arbitration provision; (2) the declarant consent requirement in section 16.6 violated CCIOA [the Colorado Common Interest Ownership Act]; (3) Metropolitan Homes, Krause, and Kudla lacked standing to enforce the declaration's arbitration provision; (4) the Association was not bound by individual unit owners' purchase agreements; and (5) the CCPA claims were non-arbitrable.[21]

The district court denied the motion to compel, concluding that Metro's consent was not required for declaration amendments because (1) the document contained conflicting requirements for amendments that created an ambiguity that must be construed against the document drafter, Metro, and that the declarant consent requirement violated CCIOA and was therefore void and unenforceable. Further, the district court ruled that the Association was not bound by the unit owners' purchase agreements because it was not a party to those agreements and had not asserted claims on any unit owner's behalf. The district court did not rule on the issues of the Defendants' standing or the arbitrability of the CPA claims. Defendants filed an interlocutory appeal.[22]

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[17] *Id.* at 877.

[18] *Vallagio*, No. 14CA1154 at ¶¶2-4.

[19] *Vallagio* at ¶¶5-6.

[20] *Id.* at ¶7.

[21] *Id.* at ¶9.

[22] *Id.* at ¶¶10-11.

The court reminded us that "[a]rbitration is favored in Colorado as a convenient and efficient alternative to resolving disputes by litigation," and that a valid arbitration provision "divests the court of jurisdiction over all arbitrable issues."[23] The arbitrability issue is a question of law to be reviewed *de novo*.[24] The court determined there was no ambiguity, and that according to the "declaration's plain language", amendments to the construction defects provision required Metro's consent.[25]

The court then addressed the issue of whether the consent requirement for amending the construction defects provision violated CCIOA, and was therefore void and unenforceable. As a question of law, this statutory interpretation is reviewed *de novo*.[26] The court had four CCIOA sections to review (§§38-33.3-302(2), 217(1)(a)(I), 104, and 303(5),CRS 2014). As to the first section, the court determined that there was no violation, because "requiring declarant consent for amendments does not limit any 'power' of the Association".[27] Regarding the second section, the court determined that although the original declaration requires a 67% majority vote, requiring declarant consent does not count in the percentage calculation, and therefore does not violate the statutory prohibition against requiring a majority percentage greater than 67%.[28] With regard to the third provision, the court determined that requiring declarant consent does not allow Metro to "control the votes of the unit owners", and therefore does not create a voidable and unenforceable provision.[29] And, to the final provision, the court concluded that this provision regarding declarant consent for "association" actions does not apply to the declaration amendments that are the subject of this case.[30]

Upon determining that a valid arbitration provision is at hand, the court turned to the question of who may enforce that provision. While the Association does not dispute Metro's standing, the other defendants' standing (or lack thereof) is disputed. Since the district court did not address this matter, the court remanded the issue of whether the other defendants have third-party beneficiary standing and the Association's claim of equitable estoppel.[31]

Metro also argued that defendants should be able to rely upon the arbitration provisions in the individual unit owner agreements. Since the issue of the owner agreements' applicability may arise on remand if the district court determines that the other defendants don't have standing to enforce the declaration's arbitration provision, the court chose to decide that issue.[32] The court reminded us that "a non-party to an agreement containing an arbitration provision generally may not compel or be subject to arbitration, unless that was the intent of the parties".[33] The court noted that it was undisputed that neither the Association nor the defendants other

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[23] *Id.* at ¶13, citing *City & Cnty. of Denver v. Dist. Ct.*, 939 P.2d 1353, 1357, 1362 (Colo. 1997), and *Eychner v. Van Fleet*, 870 P.2d 486, 489 (Colo. App. 1993).

[24] *Id.* at ¶15, citing *Eagle Ridge Condo. Ass'n v Metro Builders, Inc.*, 98 P.3d 915, 918 (Colo. App. 2004).

[25] *Id.* at ¶18.

[26] *Id.* at ¶¶25-26.

[27] *Id.* at ¶33.

[28] *Id.* at ¶35.

[29] *Id.* at ¶40.

[30] *Id.* at ¶46.

[31] *Id.* at ¶¶49-58.

[32] *Id.* at ¶59.

[33] *Id.* at ¶61, citing *Eagle Ridge,* 98 P.3d at 917.

than Metro were parties to the owner agreements. And, despite third-party beneficiary language in the owner agreements, "because Plaintiff asserts rights on its own behalf rather than in its representative capacity it cannot be bound to purchase agreements to which it was not a party".[34] As such, the court affirmed the district court and stated that "the Association is not a party to the individual unit owners' purchase agreements, its claims do not arise from those agreements, and it does not bring claims on behalf of individual unit owners", and as Metro may not rely upon those agreements.[35]

Lastly, the court reviewed the Association's claim that CCPA claims are not arbitrable. While preceding case law provides some potentially conflicting precedence, the court ruled that if the general assembly had wanted to make the CCPA §6-1-113 "civil action" right unwaivable, it would have done so explicitly.[36]

Legislation:

1. **HB 15-1197, Concerning Limitations on Indemnity Obligations in Public Construction Contracts,** was signed on April 10, 2015 to amend CRS §13-50.5-102, and specifically includes architectural, engineering, surveying and design services. The statute requires that a contract provision to indemnify or hold harmless void against public policy to be enforceable only to the extent of the negligence or fault attributable to the indemnitor, its agents, representatives, subcontractor or suppliers. The statute further states that for the four service categories listed above, the indemnitor's obligations may only be determined after liability or fault has been determined by adjudication, alternative dispute resolution or mutual agreement.

2. **HB 15-1209, Concerning the Highway Maintenance Division of the Department of Transportation,** was signed on March 30, 2015 to amend CRS §24-1-128.7 and redefines the roles of the highway maintenance division (formerly the highway operations and maintenance division), the director of the highway maintenance division, and the chief engineer.

3. **HB 15-1249, Concerning Amendments to the Fees Associated with Water Pollution Control, and, in Connection Therewith, Making and Reducing Appropriations**, was signed on June 4, 2015, and sets annual fee schedules including industrial storm water, preliminary effluent limitations for individual permits, and wastewater site applications and design reviews.

4. **HB 15-1333, Concerning the Creation of a Regional Center Depreciation Account in the Capital Construction Fund for Maintenance of the State's Regional Centers, and, in Connection Therewith, Making an Appropriation,** was signed on June 5, 2015 to amend CRS §24-75-302 and created the regional center depreciation account within the capital construction fund, which shall be funded by all money received by the department of human services for depreciation of the state's regional centers. The funds may only be used for capital construction, capital renewal or controlled maintenance of the state's regional centers.

5. **HB 15-1357, Concerning the Establishment of the Ratio of Valuation for Assessment for Residential Real Property,** was signed on June 5, 2015 to amend CRS §39-

[34] *Id.* at ¶64.

[35] *Id.* at ¶66.

[36] *Id.* at ¶67-71, discussing *Ingold v. AIMCO/Bluffs, L.L.C. Apartments,* 159 P.3d 116 (Colo. 2007) and *Lambdin v. Dist. Ct.*, 903 P.2d 1126 (Colo. 1995).

1-104.2 and established the target percentage and ratio of valuation for assessing residential real property between January 1, 2015 and January 1, 2017.

6. **SB 15-112, Concerning the Transfer of Moneys from the General Fund to the Building Regulation Fund,** was signed on March 13, 2015 to amend CRS §24-32-309 and provides for transfer of $300,000 from the general fund to the Building Regulation Fund on April 1, 2015, and for a transfer of $200,000 on July 1, 2016. A waiver of the target reserve requirement was included for the 2014-15 fiscal year.

7. **SB 15-170, Concerning a Transfer from the General Fund to the Capital Construction Fund for the 2014-15 State Fiscal Year,** was signed on March 13, 2015 to amend CRS §24-75-302 and provides an extension of funding from July 1, 2014 until April 1, 2015 for the capital construction fund, and includes an additional transfer from the general fund on April 1, 2015 in the amount of $23,800,332.

8. **SB 15-208, Concerning Capital-related Expenditures, and, in Connection Therewith, Granting the Controller Authority to Allow Expenditures for Capital Construction Budget Appropriations if Nonmonetary Adjustments are Needed When the Legislature is Not in Session, Adding a Capital Development Committee-approved Waiver for the Arts in Public Places Requirements, and Clarifying the Types of Capital Construction Projects to Which the Arts in Public Places Requirement Applies,** was signed on May 29, 2015 to amend CRS §24-75-111.5 to provide additional authority to the controller regarding certain nonmonetary expenditures for capital construction when the legislature is not in session.

9. **SB 15-211, Concerning an Automatic Funding Mechanism for Payment of Future Costs Attributable to Certain of the State's Capital Assets,** was signed on May 11, 2015 to amend CRS §24-30-1310 to provide for automatic funding mechanisms for controlled maintenance and capital renewal projects.

10. **SB 15-253, Concerning the Funding of Colorado Water Conservation Board Projects, and, in Connection Therewith, Making an Appropriation,** was signed on May 14, 2015 and states that beginning on July 1, 2015, $1,000,000 is allocated to the CWCB Construction Fund for continued planning and engineering studies as well as implementation activities to address a variety of ongoing water issues around the state. The bill also provided that $1,200,000 is to be allocated for CWCB's participation in developing tools and methods for determining large rain events and designing and regulating dam spillways. The bill also provides for a transfer of $500,000 for CWCB's use in continuation of the watershed restoration program.

11. **SB 15-278, Concerning an Amendment to the Annual General Appropriation Act for the 2013-14 Fiscal Year to Allow Unspent Moneys Appropriated for the Colorado State Capitol Dome Restoration Project to be Used for the Next Planned Phase of the Colorado State Capitol Restoration,** was signed on June 5, 2015 to allow for unspent money for the capitol dome project to be used for the next planned phase of the capitol restoration project.

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Connecticut

Case law:

1. In *Lawrence v. O&G Industries, Inc. et al.*, 319 Conn. 641 (2015), the Connecticut Supreme Court upheld the trial court's granting of a motion to strike claims brought by power plant employees seeking to recover economic damages (i.e. lost wages) because their employment was terminated following a gas explosion at the power plant, allegedly caused by the negligence of the defendant-contractors. In *Lawrence,* the Supreme Court relied on, *inter alia*, *RK Constructors, Inc. v. Fusco Corp.*, 231 Conn. 381(1994), as well as the four-factor public policy "totality of circumstances" test, first articulated in *Jaworski v. Kiernan*, 241 Conn. 399 (1997), and held that "the defendants, whose alleged negligence caused the explosion at the power plant, did not owe a duty of care to the plaintiffs, who were employees that sustained only economic losses as a result of the explosion."

2. In *Dept. of Transportation v. White Oak Corp.*, 319 Conn. 582 (2015), the Connecticut Supreme Court held that the defendant-contractor's notice and demand to the owner, which stated approximated damage calculations and the general grounds for such damages, was sufficient to satisfy the requirements of General Statutes § 4-61 as it "alerted the department of the general nature of that claim." The Supreme Court noted that § 4-61, waives the state's sovereign immunity with respect to any claim arising under a public works contract when the contractor gives timely notice of such claim. The court discussed the legislative history of § 4-61 and noted that the notice provision should "not be applied so restrictively as to prevent contractors from pursuing meritorious claims and, accordingly, to defeat the purpose of § 4-61." The court further noted that, "in close cases, the scale tips in favor of affording the contractor the right to pursue its claim."

3. In *Old Colony Construction, LLC v. Southington*, 316 Conn. 202 (2015), the Connecticut Supreme Court addressed whether a municipality can recover liquidated damages for a contractor's failure to timely complete a public works contract if the municipality terminated the contract for convenience and contributed to at least a portion of the delay. The Supreme Court held that because the contract clearly provided that the town could terminate the contract without cause and without prejudice to any of its other rights or remedies, the town's termination of the contractor for convenience did not preclude recovery of liquidated damages. The Court further held delays caused by the town did not abrogate its liquidated damages claim, observing that the modern legal trend favors apportionment of liquidated damages where there is owner-caused delay, in particular where the liquidated damages clause provides a mechanism to extend the contract completion date, thereby reducing potential liquidated damages for delays not attributable to the contractor.

4. In *Burns v. Adler*, 158 Conn. App. 766 (2015), the Connecticut Appellate Court upheld the trial court's judgment in favor of a plaintiff-home improvement contractor for unpaid work, despite his non-compliance with the Connecticut Home Improvement Act (General Statutes § 20-418 et seq.), relying on the home owner's bad faith in refusing to pay the contractor. The Appellate Court held that, irrespective of the timing of the owner's alleged bad faith conduct, *any* reliance on the Home Improvement Act to avoid a contractual obligation for a dishonest or sinister purpose is a proper basis for application of the bad faith exception to the rule that would otherwise preclude a contractor from recovering amounts owed for work performed under a contract that violates the Home Improvement Act.

5. In *Connecticut v. Bacon Construction Co.*, 160 Conn. App. 75, cert. denied, 319 Conn. 953 (2015), the Connecticut Appellate Court affirmed the trial court's denial of the defendant's motion for summary judgment and held that the plaintiff's claims were not barred by the doctrines of res judicata and collateral estoppels due to a prior arbitration. The Court noted that under Connecticut law, where party did not pursue claims in a prior action the party is not foreclosed from pursuing such claims in a subsequent action even if related to the subject matter of the prior action. The Court affirmed the trial court's rulings that a determination in the new action that the work performed by the defendant was deficient would not be contrary to the arbitrator's prior determination that the defendant had completed such work, and that collateral estoppel did not bar claims regarding the quality of the contractor's work, which was an issue that had not been "actually litigated" in the arbitration.

6. In *Coppola Construction Co. v. Hoffman Enterprises, LP*, 157 Conn. App. 139, cert. denied, 2015 Conn. LEXIS 271 (Sept. 9, 2015), the Connecticut Appellate Court held that the trial court improperly concluded that the defendant's actions constituted a *de facto* termination of the parties' contract for convenience. Noting the absence of any case law in which a "de facto" termination of a contract was determined to have occurred, the Appellate Court held that the defendant's failure to follow the contractual notice provisions governing termination was a material breach. The Court reasoned that any other result would excuse the defendant's nonperformance of its contractual obligation governing termination, and would create a new and different agreement than that agreed to by the parties. The Court further held that the plaintiff-contractor violated the Connecticut Unfair Trade Practices Act by inflating the value of a mechanic's lien by $463,000 to pressure the defendant into paying the plaintiff more money than it was owed for its work.

7. In *P&D Mechanical, Inc. v. Gar-San Corp.*, Superior Court, judicial district of Middlesex, Docket NO. CV-14-6011423, 2015 WL 5133872 (July 9, 2015, *Aurigemma, J.*), the court held that a payment bond surety was not entitled to summary judgment on grounds that the plaintiff's payment bond claim was time barred, because savings provision in General Statutes § 52-593a, applicable where a marshal receives process to be served before expiration of the applicable statute of limitations, applies to payment bond claims made under General Statutes § 49-42(a). The court, however, granted summary judgment on other grounds, because the plaintiff's notice of a claim to the surety lacked substantial accuracy as to the amount claimed as necessary to satisfy the notice requirements of General Statutes § 49-42(a), because the plaintiff failed to comply with the statutory requirements for service an adequate written notice of claim to *both* the surety and contractor.

8. In *Suntech of Connecticut, Inc. v. Lawrence Brunoli, Inc.*, Docket No. CV-10-6012751-S, 2015 Conn. Super. LEXIS 2037 (July 31, 2015, *Wahla, J.*), the court held that a subcontractor could not recover for costs it incurred for having to work extra time to overcome the contractual interferences allegedly caused by the general contractor, in light of an unambiguous contractual provision precluding delay damages unless the owner of the project accepts responsibility for the delay. Further, the court in *Suntech* noted that in Connecticut there is no cause of action for "hindrances and interferences" that is independent from a contractor's claim for delay.

9. In both *Electrical Contractors, Inc. v. Fidelity & Deposit Co. of Maryland*, 2015 U.S. Dist. LEXIS 39860 and *Electrical Contractors Inc. v. Pike Co.*, 2015 U.S. Dist. LEXIS 70092, the Connecticut District Court granted a general contractor's motions for summary judgment on the ground that the plaintiff-subcontractor's failure to comply with contractual notice of claim provisions, requiring written notice to the contractor within a certain period of time, was

fatal to the subcontractor's claims. The Court further held that the party alleging waiver of a notice provision must demonstrate the parties' intent to waive the contractual notice requirement.

10. In *Joseph General Contracting v. Couto*, 317 Conn. 565 (2015), a contractor sued property owners for breach of contract and sought to foreclose a mechanic's lien on a residential construction project. The property owners counterclaimed and also brought a separate action against the contractor's principal. The Supreme Court held that the contractor's owner could not be held personally liable for breach of contract; however, in an issue of first impression, the Court held that the company owner could be held liable for violating the Connecticut Unfair Trade Practices Act, Connecticut General Statutes §42-110a et seq. ("CUTPA").

Legislation

1. Public Act No. 15-28. An Act Concerning the Applicability of the Statute of Limitations to Construction and Design Actions Brought By the State or a Political Subdivision of the State. This act becomes effective on October 1, 2017, and subjects the state and its political subdivisions to a statute of limitations for bringing certain actions and claims arising out of construction-related work involving the improvement of real property. The period of time for bringing such actions and claims depends on the date the improvement is substantially complete as well as the nature of the action or claim. This legislation was enacted in response to the Connecticut Supreme Court's decision in *State v. Lombardo Bros. Mason Contractors*, 307 Conn. 106 (2012).

Under the act, the state or political subdivision must bring an action to recover damages for a deficiency arising out of construction-related work, or personal or property injury or wrongful death arising out of such deficiency: 1) within ten (10) years of the date of substantial completion for an improvement that is substantially complete on or after October 1, 2017; or 2) by October 1, 2027, for an improvement that is substantially complete before October 1, 2017.

Further, the state or political subdivision must bring an action or claim for contribution or indemnity arising out of construction-related work by the later of: three (3) years after the determination of an action or claim against the state or political subdivision; or ten (10) years after the date of substantial completion for an improvement that is substantially complete on or after October 1, 2017; or October 1, 2017 for an improvement that is substantially complete before October 1, 2017.

However, certain claims are exempt from this limitations period, including, *inter alia*, contractual claims that expressly provide for a longer effective period.

2. Public Act No. 15-131. An Act Concerning Demolition Licensure and Demolition Permits. This act amends General Statutes § 29-402 and expands the type of activities that are exempt from the licensure requirements for those engaged in the demolition business. Specifically, this act exempts from registration for a demolition permit a person engaged in the disassembly of nonstructural building materials for the purpose of reusing and recycling the building materials. Also, this act requires an applicant for a demolition permit to furnish a separate written declaration, instead of attesting on the required demolition insurance certificate, that the town where the demolition is taking place will be held harmless from any claims arising from the negligence of the applicant, or the applicant's agents or employees during the demolition.

3. Public Act No. 15-60. An Act Making Minor and Technical Changes to Department of Consumer Protection Statutes. This act amends General Statutes § 20-417i and removes the requirement that consumers who apply to the Home Improvement and New Home Construction Guaranty funds submit certified copies of court judgments and clarifies that consumers may receive payment under these funds if they receive court orders and decrees, as well as court judgments. Also, this act removed certain licenses that are exempt from the licensing requirement for an automatic sprinkler system layout technician, and provides that any person who is a professional engineer shall be exempt from such requirements.

4. Effective October 1, 2015, Connecticut's set-aside requirements for small contractors and minority-owned business enterprises, as well as Connecticut's statutory non-discrimination and affirmative action requirements, apply to construction contracts for state-assisted public school construction projects that meet the definition of a "Municipal Public Works Contract" (defined in under C.G.S. §4a-60g). All Municipal Public Works Contracts and subcontracts thereunder are required to include the non-discrimination language set forth in C.G.S. §§4a-60a(a) 4a-60(a) and contractors are required to take certain affirmative actions.

There are different requirements for Municipal Public Works Contracts valued at less than $50,000 per year, contracts valued at $50,000 or more but less than $500,000 and contracts with a value in excess of $500,000.

Under the SBE/MBE Requirements, once a contractor is awarded a contract, the contractor must, on the basis of the competitive bidding process, set aside at least twenty-five percent of the total value of the state funding for the project for award to subcontractors that are small contractors and, of that set-aside amount, no less than twenty-five percent must be specifically reserved for award to subcontractors who are minority business enterprises.

5. Public Act 13-3 revisions, address school construction security and safety standards were published on November 19, 2015 and are available on the SSIC's web page: http://das.ct.gov/cr1.aspx?page=421

6. Connecticut Regulation § 20-289-7 was revised to allow architects to use electronic seals on digital documents. However, many municipal building departments in Connecticut do not yet accept electronic documents. Architects planning to use an electronic seal need to file their seal with the Architecture Licensing Board, and use of the seal must meet the criteria in the Regulation.

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Delaware

Case law:

1. In *Duncan v. JBS Construction, LLC*, No. CPU6-14-469, 2016 WL 1298280 (Ct. Com. Pl. Mar. 31, 2016), the trial court resolved a dispute between a residential homebuyer and a homebuilder regarding the construction of a new home. Following a trial, the court determined

that an express warranty did not exist because the owner did not given any consideration. The court next held that the owner failed to show that the builder breached the implied warranty of good quality and workmanship.

2. In *D.W. Burt Concrete Construction, Inc. v. Dewey Beach Enter., Inc.*, No. 513L-10-043-RFS, 2016 WL 639653 (Super. Ct. De. Feb. 17, 2016), a subcontractor filed complaint for breach of contract and statement of claim for mechanics' lien against a general contractor. The general contractor counterclaimed seeking damages for breach of contract. The superior court held that: (1) the subcontractor properly pleaded its mechanics' lien claim and proved construction commencement date; (2) the general contractor grossly overstated disputed amount of claim when it discharged lien and, therefore, an additional award of damages was appropriate; (3) the general contractor was not entitled to a set-off for supplemental work it did; and (4) the general contractor was not entitled to attorney fees.

Legislation:

1. **H.B. 169, Design build pilot project** – This legislation, which allows the Department of Transportation to use design-build contracting methodology for Transportation Trust Fund projects, passed the House and Senate. In 1999, the General Assembly gave the DOT the authority to conduct a pilot program to use design-build contracting on 12 projects. Over the past 15 years, the Department has seen this method proven effective through improved project delivery time so they will be given authority to use it on more projects. A copy of the legislation can be reviewed at the following address from the General Assembly: http://legis.delaware.gov/LIS/lis148.nsf/vwLegislation/HB+169/$file/legis.html?open

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Florida

Case law:

1. *In Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.,* No. 13-80831-CIV, 2015 WL 3539755 (S.D. Fla. June 4, 2015), the court held that a notice pursuant to Chapter 558 can act as a "claim" for insurance, but the lack of a decision maker and forum precludes Chapter 558's alternative dispute resolution mechanism from being a "civil proceeding" that would trigger coverage. An insurer denied its insured's demand for defense and indemnity after the insured, a general contractor, received a notice of claim for construction defects pursuant to Florida statutes Chapter 558, arguing that the 558 notice did not trigger the duty to defend because the case was "not in suit." The Southern District concluded that Chapter 558 did not bar the insured's claim because Section 558.004(13) provides that *provision* of the notice is not a claim—it does not say that the *notice* itself is not a claim. However, Chapter 558's alternative dispute resolution mechanism did not constitute a "civil proceeding" under the insurance policy, and coverage was therefore not triggered. Relying on definitions from *Black's Law Dictionary*, the court concluded that a "civil proceeding" requires a forum and a decision maker. Because Chapter 558 provides neither, the case was not a "suit" under the policy. The court accordingly granted summary judgment in favor of the insurer.

2. In *Taylor Morrison Services, Inc. v. Ecos,* No. 1D14-2663, 2015 WL 3407929 (Fla. 1st DCA May 28, 2015), the court held that whether a business is considered licensed turns on whether that business has a qualifying agent for the type of work to be performed as of

the contract's effective date, regardless of whether that business's qualifying agent ultimately obtains the permits and supervises the construction. Homeowners sued their homebuilder for negligence by an unlicensed contractor, arguing that the builder was unlicensed because the building permits were pulled in the name of a qualifying agent no longer associated with the business and who had not supervised the construction. On appeal from a final judgment for the plaintiff, the Second District Court of Appeal reversed, finding that the trial court improperly looked to whether the "qualifying agent" had performed its supervisory duties as defined in Fla. Stat. § 489.105 to determine whether the construction company was licensed. However, pursuant to § 489.128, whether an individual or business entity is licensed is determined at the time of contracting, and at that time it is unknown whether or by whom the qualifying agent's duties will be performed. Instead, the First District Court of Appeal held that licensure is determined by whether the business had associated with it an individual licensed for the work at the time of the contract. Looking to the Department of Business and Professional Regulation's records, the court noted that the builder had four qualifying agents, one of whom was properly licensed for the requisite work at all times material, and both he and the builder considered him to be the qualifying agent. The builder was therefore licensed.

3. In *Cypress Fairway Condominium v. Bergeron Const. Co. Inc.,* No. 5D13-4102, 2015 WL 2129473 (Fla. 5th DCA May 8, 2015), the court held that for statute of repose purposes, the "completion … of the contract" occurs when final payment under the contract is made. In a construction defect suit, the case turned on whether the statute of repose commenced on the date on which final application for payment was made or the date of actual final payment. Applying the plain language of § 95.11(3)(c), Florida Statutes, the Fifth District Court of Appeal held that "completion . . . of the contract" means complete performance by both contracting parties rather than performance by just the contractor. Here, the date of completion was the date final payment was made under the contract. The court therefore reversed the trial court's dismissal of the plaintiff's claims.

4. In *Carithers v. Mid-Continent Casualty Company,* No. 14-11639, 2015 WL 1529038 (11th Cir. Apr. 7, 2015), the court held that a commercial general liability policy's "Your Work" exclusion precludes coverage for defective installation when no damage occurs beyond the defective work of a single subcontractor. General contractor entered into consent judgment with, and assigned its claims against its insurer to, homeowner who sued for construction defects. On appeal from summary judgment in homeowner's favor, the Eleventh Circuit affirmed many of the trial court's conclusions. First, the date property damage occurred ("injury-in-fact"), rather than when it was discovered ("manifestation"), triggered coverage under the CGL policy. Second, the insured had a duty to defend because it knew that Florida courts have yet to decide whether the injury-in-fact or manifestation date triggers coverage; therefore, coverage was possible. Third, the insured's motion to amend its answer to assert a coverage defense it had known for more than a year was unreasonably delayed and thus denied. And fourth, the homeowners were entitled to recover the cost to rebuild the defective balcony that damaged their garage as a cost to repair damage caused by defective work. However, the Eleventh Circuit reversed the award for brick damage caused by improper application of brick coating. The homeowners failed to prove that different subcontractors installed the bricks and applied the exterior coating. Absent proof of different subcontractors, the CGL policy's "your work" exclusion would preclude recovery. For the same reason, the court also reversed an award for property damage to tile caused by inadequate adhesive and mud base that included replacement cost of both the tile and the mud base. It was irrelevant that the homeowners purchased the tile. No coverage exists for defective installation where no damage occurs beyond that subcontractor's defective work. The Eleventh Circuit reversed and remanded on these issues.

5. In *Sanislo v. Give Kids the World, Inc.,* No. SC12-2409, 2015 WL 569119 (Fla. Feb. 12, 2015), the Florida Supreme Court held that a clear and unambiguous exculpatory clause releasing its drafter from "any and all claims and causes of action of every kind" is not per se ineffective to bar negligence actions despite not expressly referencing "negligence" or "negligent acts*."* A mother injured at a resort brought a negligence action against the non-profit organization providing the "storybook vacation" for the family's seriously ill child. The family had signed two releases: one contained in the wish request form and a second was signed upon arriving at the resort after the "wish" had been granted. The trial court granted plaintiff's partial summary judgment motion on defendant's affirmative defense of release. On appeal the Fifth District reversed, holding that clear and unambiguous language exculpating defendant from "any and all claims and causes of action of every kind" barred plaintiff's negligence action despite no express reference to defendant's negligence. The Fifth District certified its decision to the Florida Supreme Court as conflicting with decisions of the First, Second, Third, and Fourth Districts, which relied on Florida Supreme Court's holding in *University Plaza Shopping Ctr., Inc. v. Stewart*, 272 So. 2d 507 (Fla. 1973), that indemnity agreements must expressly identify "negligence" in order to indemnify the indemnitee for damages caused by his sole negligence. In approving the Fifth District's decision and disapproving those of the other districts, the Florida Supreme Court held that the differences between indemnity agreements and exculpatory clauses militated against extending *University Plaza* and its progeny to exculpatory clauses. "[B]ecause indemnification agreements allocate the risk of liability for injuries to an unknown third party [to the indemnitor], specificity is required so that the indemnitor is well aware that it is accepting liability for both its negligence and the negligence of the indemnitee. Exculpatory clauses, however, primarily release a party from liability for its own negligence and not vicarious liability." Thus, in contrast to indemnity agreements, clear and unambiguous exculpatory clauses do not require a specific reference to "negligence" in order to bar such claims.

6. In *Villanueva v. Reynolds, Smith and Hills, Inc.,* No. 5D13-3186, 2015 WL 585545 (Fla. 5th DCA Feb. 13, 2015), the court held that the signing and sealing of design plans by a successor engineer does not place full and exclusive liability for those plans on the successor engineer. A fatal vehicle collision occurred within a County road-expansion project, for which the engineer's signed and sealed plans called for a 55 mile per hour speed limit and advance-warning signs. After construction had begun, the County had submitted its own highly similar plans that changed the speed limit and were signed and sealed by the County's own engineer. In plaintiff's suit against the original engineering firm and the County, the trial court granted summary judgment for the firm, finding that the conflicting evidence favored the engineering firm's argument that the accident scene was constructed using the County's plans. The Fifth District reversed, holding that the trial court erred in weighing evidence on summary judgment. The Fifth District also reversed the trial court's conclusion that the County's plans, signed and sealed by its own engineer, absolved the original engineer from liability, as no precedent provided such a rule.

7. In *Jax Utilities Management, Inc. v. Hancock Bank,* No. 1D14-664, 40 Fla. L. Weekly D948 (Fla. 1st DCA Apr. 22, 2015), the court held that because Florida Statute § 713.3471(2) immunizes a lender from liability to a contractor or lienor for ceasing disbursement of loan advances when the lender notifies the contractor of same, the statute derogates the common law and therefore precludes equitable lien claims. After a project owner failed to pay a contractor for its work, the contractor sued the owner for breach of contract and the owner's lender, who foreclosed the project, for unjust enrichment and the foreclosure of an equitable lien. On appeal, the First District Court of Appeal affirmed the trial court's grant of summary judgment for the lender on both claims. First, the contractor failed to file its equitable lien claim within the one-year statute of limitations provided in § 95.11(5)(b), Florida Statutes, that runs

from the last furnishing of labor, services, or materials, which had long since expired when the contractor filed suit. Second, the trial court properly concluded that § 713.3471(2) precluded the contractor's recovery under its common law equitable lien and unjust enrichment claims. Section 713.3471(2) provides that a lender will not be liable to a contractor for construction work where the lender ceases making advances of construction loan funds prior to full disbursement so long as the lender provides written notice of the contractor. If the lender fails to provide this notice, the lender is liable to contractors and lienors as calculated by the statute, but this statutory claim cannot interfere with foreclosure actions and cannot form the basis of an equitable lien. On a matter of first impression, the court concluded that because § 713.3471(2) changed the common law by imposing a duty to notify and granting immunity to lenders who comply, the legislature had regulated this area of law such that it was "so repugnant to the common law such that the two cannot exist." Although the record did not indicate that the lender's predecessor in interest provided the requisite notice, the contractor chose to bring common law claims for equitable lien and unjust enrichment which were repugnant to and displaced by the comprehensive statutory remedy in § 713.3471(2). Therefore, summary judgment in favor of the lender was proper.

Legislation:

1. **Florida Statutes Chapter 558, Construction Defects.** In Florida, Chapter 558 of the Florida Statutes is an alternative dispute resolution mechanism that helps expedite the resolution of construction defect claims by requiring that contractors receive a pre-suit notice of alleged construction defect claims and an opportunity to investigate and remedy any alleged defects. In House Bill 87, the Florida legislature recently changed some sections of Florida's Chapter 558.

When drafting the notice of claim under Chapter 558, a claimant is now required to visually examine the premises and sufficiently identify in its notice the location of each alleged defect so that the responding party can locate and inspect the alleged defects without undue burden. § 558.004(1)(b).

When served with a request, claimants and any person served with a Ch. 558 notice must now also exchange maintenance records and other documents related to the cause, investigation, and extent of the alleged defect along with any resulting damages. § 558.004(15). However, the revision removes "any documents detailing the design drawings or specifications" from the list of items that may be requested, but leaves intact the other categories. § 558.004(15). In responding to information and document requests under § 558.004(15), parties are now also permitted to assert any claim of privilege recognized by Florida law, such as the attorney-client privilege or trade-secret privilege.

The definition of the term "Completion of a building or improvement" has been expanded to include the issuance of certificates of occupancy, whether temporary or otherwise, that allow for occupancy or use of the entire building or improvement. § 558.002(4). This revision emphasizes the function of the certificate over its actual title so that parties are not confused as to whether the various types of certificate of occupancy that a local government might issue satisfy the definition of "Completion of a building or improvement."

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Georgia

Case law:

1. In *Vinings Bank v. Brasfield & Gorrie, LLC,* No. S14G1876, 2015 WL 4067814, at *1 (Ga. July 6, 2015), Vinings Bank made a $1.4 million loan to Wagener Enterprises, Inc. ("WEI"). As collateral, WEI granted the Bank a security interest in all of its accounts and accounts receivable, including WEI's contract to provide drywall services work for general contract (B&G) on multiple construction projects. WEI defaulted on the loan and the Bank filed suit against B&G, seeking to collect on WEI's accounts receivable and alleging conversion. The Bank then froze WEI's general deposit account for approximately four weeks and later applied those funds to WEI's loan indebtedness. During that time, WEI could not access the construction payments B&G had been making into WEI"s account in order to pay its subcontractors. As such, B&G paid all of WEI's subcontractors individually.

In response to the Bank's suit, B&G asserted a counterclaim alleging conversion. The Court of Appeals affirmed the trial court's finding that Vinings Bank was not entitled to summary judgment with regard to the counterclaim for conversion. On appeal, the Supreme Court of Georgia granted the Bank's motion for summary judgment on B&G's counterclaim for conversion, finding that B&G lacked standing to bring such a claim because B&G had no direct relationship with the Bank; B&G was not a subcontractor to WEI entitled to any of the payments; B&G did not have a direct contractual relationship with any of WEI's subcontractors, and B&G had no fiduciary relationship with any of WEI's subcontractors.

2. In *Smith v. Dill's Builders, Inc.,* No. A15A0580, 2015 WL 3634699, at *1 (Ga. Ct. App. June 12, 2015), Sharon T. Smith and Meiko A. Camp entered into a contract to build a new home with Dill's Builders, Inc. ("DBI"). A dispute arose regarding discrepancies between the construction plans and the usable square footage of the house, as well as the workmanship of the house. Smith refused to pay the balance on the contract and DBI filed a lien against the property and, later, a suit. In response, the Defendants counterclaimed for breach of contract, fraud, and slander of title. DBI moved for summary judgment, which was granted because the trial court found that Smith's affidavit in response to DBI's motion was insufficient to establish genuine issues of material fact as to whether DBI adequately performed under the contract. On appeal, the Court held that the trial court prematurely granted summary judgment because of its failure to address one of the owner's defenses of insufficient service of process and lack of personal jurisdiction.

Smith argued that the trial court erred in granting summary judgment to DBI because genuine issues of material fact existed as to whether DBI adequately performed under the contract, and whether as a result, DBI was entitled to full payment under the contract. The Court held that when a party to a building contract is also present during the walk-through, her affidavit opposing summary judgment is based on personal knowledge and can be used to set forth specific facts showing a genuine issue to be decided. As such, the Court of Appeals of Georgia reversed the trial court's holding.

3. In *City of College Park v. Sekisui SPR Ams., LLC,* 331 Ga. App. 404 (Ga. Ct. App. 2015), Sekisui SPR Americas, LLC, a subcontractor that worked on a sewer project for the City of College Park, sued the City when the general contractor failed to pay Sekisui for work performed, alleging that the City was liable because it had failed to ensure the contractor obtained a payment bond in violation of O.C.G.A. § 36-91-90. Sekisui also raised claims of

quantum meruit, unjust enrichment, implied obligation to pay, and sought attorney fees. The trial court granted summary judgment in favor of Sekisui.

On appeal, the City contended that the trial court erred in denying its motion to dismiss Sekisui's complaint on the ground that Sekisui failed to give proper ante litem notice under O.C.G.A. § 36-33-5. The Court disagreed, finding that O.C.G.A. § 36-33-5's statutory requirements apply only to tort claims regarding personal injury or property damages, not actions arising out of a contract. The Court concluded that none of Sekisui's claims were torts regarding personal injury or property damage, therefore, Sekisui was not required to comply with the ante litem notice requirements before filing suit.

In addition, the City contended that the trial court erred in denying its motion for summary judgment because the City was not required to obtain a payment bond since the Embassy Drive Project was necessitated by an emergency. The Court of Appeals of Georgia held that, because the main sewer line on Embassy Drive had collapsed and needed to be replaced, constituting an emergency, the City was exempt from securing a payment bond under O.C.G.A. § 36-91-1 *et seq.,* which would otherwise require a payment bond. Finally, the City contended that Sekisui's claims for unjust enrichment, quantum meruit, and implied obligation to pay were barred because O.C.G.A. § 36-91-91 provided the exclusive remedy by which Sekisui could sue the City. The Court found that Sekisui, as a subcontractor, could only file suit against the City for the statutory remedies provided by Georgia's lien statute, and not for implied contract theories.

4. In *Georgia DOT v. Wyche,* No. A15A0346, 2015 WL 3895645 (Ga. Ct. App. June 25, 2015), Larry J. Bowen, Jr. was killed while employed as a construction worker by Reeves Construction Company. Reeves was performing paving work on Eisenhower Parkway in Macon, Georgia pursuant to a contract with the DOT. The only DOT employee present that evening was Johnny Moss, a field materials inspector. Cedric Howard, an employee of Moreland Altobelli Associates, Inc., which was under contract with the DOT to perform inspections and ensure that Reeves was in compliance with the DOT contract, was also at the scene.

Mary Wyche, surviving mother of Bowen, filed a complaint against the DOT and Moreland, asserting claims of ordinary and professional negligence against both defendants, alleging that their lack of inspection of the construction site and planning left drivers without positive guidance. With respect to the DOT, Wyche claimed that the DOT failed to inspect and enforce its contract with Moreland when it did not provide appropriate signage and lighting ta the intersection and failed to oversee and train its employees. The DOT filed a motion to dismiss on the grounds of sovereign immunity, which the trial court denied.

On appeal, the Court reversed, rejecting Wyche's argument that the State waived its sovereign immunity as to claims that the DOT negligently inspected the project because the claims fell within the inspection powers exception to sovereign immunity. Thus, the DOT was immune from those claims. In addition, the Court rejected Wyche's argument that the State waived its sovereign immunity as to claims that the DOT negligently approved Reeves' paving project because there is nothing in the Georgia Code that prohibits the DOT from delegating its responsibilities to a private contractor through a construction contract. Thus, the Court found that Wyche's claims against the DOT for negligence relating to the paving operations on the night of the accident, including the alleged failure to provide appropriate signage and lighting at the intersection, were claims based on the actions of one or more independent contracts and barred by the doctrine of sovereign immunity.

5. In *Ashton Atlanta Residential, LLC v. Ajibola*, 331 Ga. App. 231 (2015), Okakunle Ajibola and 31 other plaintiffs, homeowners in the Chattahoochee Bluffs townhouse community, filed a civil action against developer Ashton Atlanta Residential, LLC for damages resulting from broken and damaged water lines at the community. Ashton filed a motion for summary judgment, which was granted in part and denied in part. On appeal, the Court concluded that the trial court erred in denying Ashton's motion for summary judgment on the Plaintiffs' claim of negligent construction because the action was filed on February 5, 2013. As such, the Plaintiffs' action was barred by Georgia's statute of repose, which provides:

> [n]o action to recover damages:
>
> (1) For any deficiency in the survey or plat, planning, design, specifications, supervision or observation of construction, or construction of an improvement to real property; [or]
>
> (2) For injury to property, real or personal, arising out of any such deficiency; …
>
> Shall be brought against any person performing or furnishing the survey or plat, design, planning, supervision or observation of construction, or construction of such an improvement more than eight years after substantial completion of such an improvement.

O.C.G.A. § 9-3-51. In order to avoid running afoul of the statute of repose, the action should have been filed before December 8, 2012 because the sale of the last townhouse sold to the Plaintiffs closed on December 8, 2004. As such, the Court of Appeals of Georgia reversed the trial court's holding.

6. In *AAA Restoration Co. v. Peek,* No. A15A0555, 2015 WL 4232299, at *1 (Ga. Ct. App., July 14, 2015), a fire occurred at Plaintiff's residence in Newnan, resulting in the destruction of a significant portion of the home. Approximately three weeks later, Plaintiff signed a written agreement ("the Agreement") with AAA for the demolition of her damaged residence and for the construction of a new home on the same lot. The Agreement contained an arbitration clause, initialed by Plaintiff and a representative of AAA. A dispute arose between the two parties and Plaintiff filed suit against AAA. In its answer, AAA asserted that the trial court lacked jurisdiction, as the Agreement required the parties to arbitrate their dispute. AAA also filed a motion to dismiss for lack of jurisdiction and a motion to stay the action and compel arbitration.

In response, Plaintiff asserted that the arbitration clause was void and unenforceable because the designated arbitral forum, Construction Arbitration Association (of Atlanta), did not exist. AAA then filed a reply in which it claimed that it intended the Agreement to designate "Construction Arbitration Associates, Ltd.," as the arbitrator. Following a hearing on the motion to compel arbitration, the trial court denied the motion. At the request of AAA, the trial court certified its order for immediate review. The Court of Appeals of Georgia then granted AAA's application for an interlocutory appeal. On appeal, the Court declined to reform the contract to reflect that the parties intended a corporate entity other than the one designated as the arbitral forum, finding that the restoration company made a unilateral mistake when it named a non-existent association as the arbitral forum. In addition, the Court found that the fact the named arbitral forum did not exist did not render the remainder of the arbitration clause unenforceable because the designation of the arbitral forum was an ancillary concern and was not an integral part of the parties' agreement to arbitrate any dispute that arose out of the parties' agreement.

7. In *Atlanta Flooring Design Ctrs., Inc. v. R. G. Williams Constr., Inc.*, No. A15A0664, 2015 WL 4311070, at *1 (Ga. Ct. App., July 16, 2015), R. G. Williams Construction, Inc. (R.G.), the general contractor on a construction project, hired Atlanta Flooring Design Centers, Inc. (AFDC) as the flooring subcontractor for the project. The parties entered into a written contract requiring that disputes be resolved by arbitration. After a dispute was submitted to arbitration, and the arbitrator rendered an award, AFDC filed a motion seeking a court order vacating the award on the basis that its rights were prejudiced in the arbitration proceeds.

R.G. moved to dismiss on the grounds that the parties' contractual agreement stated that they would not challenge the validity of the arbitration or the award. The trial court ruled that the contract precluded any challenges to the award and granted the motion to dismiss AFDC's motion to vacate the award. On appeal, the Court of Appeals of Georgia reversed, finding that the Georgia Arbitration Code does not permit contracting parties who provide for arbitration of disputes to contractually waive or eliminate a party's right to apply to a court to vacate or modify an award on the statutory grounds set forth in O.C.G.A. §§ 9-9-13, 9-9-14. Thus, the contract provision stating that the parties "expressly agree not to challenge the validity of the arbitration or the award" conflicts with and frustrates Georgia public policy as expressed in the Georgia Arbitration Code and was held to be void and unenforceable to the extent it prevents AFDC from challenging the validity of the arbitration or the award by filing a motion under OCGA § 9-9-13 for the court to vacate the award.

8. In *Brown v. Seaboard Constr. Co.,* 330 Ga. App. 778, (Ga. Ct. App. 2015), Marietta Brown was injured in a vehicular accident that she attributed to a poorly paved road. Defendant Seaboard Construction had performed paving work on the road several years before the accident. Brown and the vehicle's driver, Oscar Mangram, sued Seaboard, alleging that Seaboard's employees had negligently performed the paving work and that Seaboard had negligently failed to warn of the road's dangerous and defective condition. The trial court granted summary judgment to Seaboard, and Brown appealed.

On appeal, the court cited the general rule "a road contractor cannot be held responsible for completed work over which it no longer exercises any control." In addition, "the contractor is not liable to third persons for damages or injuries subsequently suffered by reason of the condition of the work, even though he was negligent in carrying out the contract, at least, if the defect is not hidden but readily observable on reasonable inspection." Applying this principle, the Court of Appeals of Georgia affirmed the trial court's grant of summary judgment, noting that Seaboard procured an affidavit from Jeffrey Kicklighter, who had worked for Seaboard for more than 20 years and had personal knowledge of the repaving. The affidavit stated that the DOT had accepted the work in 1998. In addition, the Court found that nothing in the record suggested that the causeway had a hidden defect when the DOT accepted the work or that any of the other exceptions to the general rule regarding road contract liability should apply. In conclusion, the Court stated that Seaboard discharged its burden as movant for summary judgment, and Brown failed to point to specific evidence in the record that created a genuine issue of material fact.

9. In *Savage v. State of Georgia,* No. S15A0277, 2015 WL 3937118, at *1 (Ga. June 29, 2015), Plaintiffs Savage, Pellegrino, and Hobgood challenged the trial court's validation of revenue bonds that would be used to help finance a new stadium in Cobb County for the Atlanta Braves major league baseball team. The bonds were to be issued pursuant to an intergovernmental agreement between Cobb County and the Cobb-Marietta Coliseum and Exhibit Hall Authority. Under the Agreement, the Authority agreed to issue bonds to cover much of the cost of constructing the stadium and the County agreed to pay the authority amounts

sufficient to cover the bond payments not covered by the licensing fees paid by the Braves. Plaintiffs argued that the Intergovernmental Agreement was not valid; that the issuance of the revenue bonds that would be used to help finance the new stadium violated the Georgia Constitution's debt limitation clause, gratuities clause, lending clause, and Georgia's revenue bond laws; and that the process used to validate the bonds was deficient. The trial court validated the stadium project bonds.

On appeal, the Court upheld the constitutionality of the Intergovernmental Agreement between the County and the Authority, noting that the contract has the following characteristics: it is between "political subdivision[s] of the state"; it is for a period "not exceeding 50 years"; it is a contract for services; and the agreement "deal[s] with activities, services, or facilities which the contracting parties are authorized by law to undertake or provide."

Savage and Hobgood, pointing to the laws governing the Authority, argued that, even if the Authority and the County were authorized to provide a stadium, they were not authorized to provide this particular stadium, because it would not benefit the public. The Supreme Court of Georgia disagreed, citing to the Operating Agreement. Specifically, the Court found that the Authority and the County made a specific determination that the project would benefit the public by providing "a significant and much needed catalyst for revitalization and continuing redevelopment of the property in the vicinity of the stadium." Further, in approving the Bond Resolution, the Authority determined that "the financing, acquisition, construction, and equipping of the Project will be in furtherance of the Authority's public purpose," and the County determined that the project would provide its citizens "continuing recreational benefit and other benefits" and "will promote tourism, promote the economy, and bring other benefits to the County and the State." As such, the Court concluded that the stadium project would provide public benefits.

Savage and Hobgood further argued that the issuance of the stadium project bonds would violate the Constitution's debt limitation clause because no referendum would be held for the County's voters to approve or disapprove new debt. The Supreme Court of Georgia held that the County was not violating the debt limitation clause because the debt the County was incurring under the terms of the Intergovernmental Agreement, agreeing to pay the Authority up to $25 million per year for the next 30 years to cover the principal interest, should not be controlled by the debt limitation clause because the County's pledge was made through a valid Intergovernmental Contract. Debt incurred under a valid intergovernmental contract is not subject to the debt limitation clause

In addition, the Court found that the Intergovernmental Agreement does not violate the Constitution's lending clause because the County would not be paying, with appropriated funds or credit, for anything to be owned by the Braves parties. Instead, the stadium and stadium site would be owned by the Authority, with the Braves paying license fees to the Authority, for at least 30 years, at the end of which the bonds the County would be paying off wwould be fully redeemed.

In response to Savage and Pellegrino's argument that the bonds should not be validated because they do not comply with the requirements set forth in the constitutional provision and statutes governing revenue bonds, the Court held that the bonds meet the requirements set forth in the statutes and provisions because the license fees paid by the Braves to use the stadium would cover part of the bond payments, and the remainder would come from payments made by the County. As such, the revenue bonds were contemplated as part of a valid Intergovernmental Agreement and payments made under the contract constitute project

revenue. Finally, the Court rejected Pellegrino and Hobgood's argument regarding the validity of the bond validation process.

10. In *Auto Owners Ins. Co. v. Gay Constr. Co.,* No. A15A0145, 2015 WL 4069602, at *1 (Ga. Ct. App. July 6, 2015), Gay Construction Company ("GCC"), a general contractor, filed suit against Auto Owners Insurance Company to recover directly as an additional insured under the commercial liability ("CGL") policy issued by Auto Owners to Dai-Cole Waterproofing Company, Inc. ("Dai-Cole"), GCC's subcontractor on a project. Specifically, GCC sought to recover from Auto Owners for costs associated with allegedly faulty workmanship by Dai-Cole. Believing itself to be an additional insured under Dai-Cole's policy, GCC filed a first-party claim, seeking reimbursement for the costs of repairing and replacing the defective terrace. After Auto Owners ultimately denied GCC's claim, GCC filed a lawsuit against Auto Owners, claiming breach of contract.

The policy in question contained a business risk exclusion that excluded "loss or damage caused by … [f]aulty, inadequate[,] or defective … [d]esign, specifications, workmanship, repair, construction, [or] renovation. …". Auto Owners moved for summary judgment. The trial court denied its motion. On appeal, the Court of Appeals of Georgia noted that GCC filed a first-party claim seeking reimbursement of costs associated solely with the repair and correction of faulty workmanship by Dai-Cole; there was no claim for damage to nondefective property not covered by GCC's or Dai-Cole's scope of work. As such, the claim was barred by the business risk exclusions in the Auto-Owners policy. The Court pointed out that Auto Owners did not guarantee the work of Dai-Cole, and the business risk exclusions in the policy removed from coverage the defective workmanship by Dai-Cole that caused damage to the project. GCC, as the general contractor, was responsible for all work done within the scope of work, which it contracted to perform. The Court concluded that to limit the business risk exclusions to only that work performed by Dai-Cole would permit GCC more coverage as an additional insured than that granted to Dai-Cole as policy-holder and would effectively require Auto Owners to financially guarantee Dai-Cole's work. Further, the business risk exclusions expressly excluded property damage to the work of a named insured arising out of the work, and the policy contemplated the possibility of qualifying an additional insured under the policy. As such, the Court concluded that the trial court erred by denying summary judgment on the issue.

11. In *Greene County Development Authority v. State of Georgia,* 296 Ga. 725 (2015), to finance the construction of a facility for the use of the Academy, the Greene County Development Authority proposed in 2014 to issue $14 million in revenue bonds. The Authority entered into an intergovernmental agreement with Greene County, whereby the County contracted to pay amounts over to the Authority for repayment of the indebtedness on the bond amounts that the County contemplated would be raised by an ad valorem tax.

The Authority also proposed a lease agreement with the Academy, whereby the Academy generally would have use of the facility for so long as the indebtedness on the bonds remained outstanding, and the Authority would sell the facility to the Academy for $1 when that indebtedness was retired. The State of Georgia filed a petition to validate the bonds, and several Green County residents intervened to object to validation. The trial court refused validation. The County, the Authority, and the Academy appealed. On appeal, the Court held that it could glean from the proposal some of the concerns the trial court would have had with the proposal. As such, the record permitted a finding that the Authority's proposal was not sound, feasible, and reasonable and therefore the trial court did not err when it refused to validate the bonds.

12. In *Cottrell v. Atlanta Dev. Auth.,* 297 Ga. 1 (2015), the Superior Court of Fulton County validated roughly $200 million in municipal bonds to be issued by the Atlanta Development Authority d/b/a Invest Atlanta. Invest Atlanta and the Geo L. Smith II Georgia World Congress Center Authority proposed to have the bonds issued for the purpose of funding a portion of the cost of developing, constructing, and operating a new stadium facility in downtown Atlanta for the Atlanta Falcons professional football team. On February 4, 2014, the State of Georgia filed a Petition for Bond Validation in the superior court to authorize the issuance of the bonds. Rev. William L. Cottrell, Sr., Mamie Lee Moore, Tracy Y. Bates, John H. Lewis III, and Joe Henry Beasley (collectively "Cottrell") moved to intervene in the proceedings to file objections to the bond validation, and the trial court allowed them to do so. The New Stadium Project and the Georgia Dome would be funded in part by a Hotel/Motel tax levied under O.C.G.A § 48-13-51(a)(5).

Cottrell contended that the statute, which allows for an extended time period in which a county or municipality may levy a Hotel/Motel tax for purposes of funding a "successor facility" to an existing "multipurpose domed stadium facility," was an unconstitutional special law that violates the uniformity clause of the Constitution. The Supreme Court of Georgia disagreed and held the exception to be a constitutional general law exception.

Cottrell also argued that the Hotel/Motel Tax Funding Agreement between the City and Invest Atlanta was illegal and unconstitutional because O.C.G.A. § 48-13-51(a)(5)(B) requires that tax proceeds collected to fund the successor stadium facility be expended only through a contract with the certifying state authority, and the City's contract with Invest Atlanta was not a contract with such an authority. The Court found that Cottrell failed to consider that the Hotel/Motel Tax Funding Agreement works in conjunction with the Bond Proceeds Funding and Development Agreement to ensure that the New Stadium Project Tax Proceeds are expended in a manner consistent with the requirements of OCGA § 48-13-51(a)(5)(B).

In addition, Cottrell argued that the proposed bond transaction violates Ga. Const. of 1983, Art. IX, Sec. VI, Par. I and OCGA § 36-82-66 of the Revenue Bond Law because Invest Atlanta would not own or operate the New Stadium Project. As such, Cottrell argued that the revenue from the New Stadium Project to be paid to Invest Atlanta by the City would not actually be revenue “derived from the project.” In response, the Supreme Court of Georgia held that there is no requirement that Invest Atlanta own the New Stadium Project in order for it to issue revenue bonds to fund the project or for the tax proceeds paid to Invest Atlanta to be considered as part of the “revenue” to pay for the bonds.

Cottrell further argued that the bond transaction would violate the Intergovernmental Contracts Clause in that the New Stadium Project was not an authorized “project” of Invest Atlanta. More specifically, Cottrell argued that, because the New Stadium Project was really a “project” of the Congress Center Authority, and not a project actually being developed by Invest Atlanta, the New Stadium Project was not eligible for bond financing under the Developmental Authorities Law. The Supreme Court of Georgia found that there is no requirement that Invest Atlanta actually construct the New Stadium Project in order to properly issue revenue bonds for the purpose of financing the project.

Cottrell further argued that the trial court erred in failing to hold that City Resolution 13-R-0615, which extends Atlanta's existing Hotel/Motel tax to fund a portion of the construction and maintenance costs of the New Stadium Project, was illegal. He argued, primarily, that City Resolution 13-R-0615 was void because the City enacted it in March 2013, over a year before the Congress Center Authority provided the City with a tax certification required by OCGA § 48-

13-51(a)(5)(B) to allow for the City to pass such a resolution. The Supreme Court of Georgia rejected this argument, finding that, by its plain terms, OCGA § 48-13-51(a)(5)(B) dictates that a seven percent Hotel/Motel tax may be "*levied* … and continue to be *collected* through December 31, 2050" to fund a successor facility if the appropriate certification is given by the state authority involved.

Finally, Cottrell contended that the trial court erred in failing to find that the Hotel/Motel Tax Operation and Maintenance (O&M) Agreement violates the Intergovernmental Contracts Clause of the State Constitution, in that the Agreement between the City and the Congress Center Authority requires the City to reimburse StadCo, a private company, for certain expenses incurred from events and other activities at the New Stadium Project. The Supreme Court of Georgia disagreed, concluding that just because StadCo pays some of the operating expenses for the New Stadium Project and is then reimbursed by the Congress Center Authority from funds that are specifically earmarked for covering "costs relating to the operation, maintenance and improvements for the New Stadium Project" does not somehow make the O&M Agreement invalid.

13. In *Gause v. Fidelity Bank,* No. A15A0284, 2015 WL 4098562, at *1 (Ga. Ct. App. July 8, 2015), Gause obtained a $1.1 million loan from Fidelity's predecessor in interest, Securities Exchange Bank ("SEB"), for the purchase of 25 lots in a subdivision. The loan was evidenced by a contemporaneous promissory note signed by Gause. That same day, as part of the security for the loan, Gause signed an unconditional guaranty of the note on behalf of Gause Construction, as well as a corporate resolution authorizing him to execute the Guaranty and a corporate W-9 form. On April 28, 2010, Gause renewed the Note for a two-year term in the principal amount of $1,100,900. Gause and Gause Construction admittedly failed to pay the Note in full by the due date. The Defendants contended that the trial court erred in granting summary judgment to Fidelity on the Note and Guaranty. The Court of Appeals of Georgia held that Fidelity established a prima facie case by producing the Note; the undisputed evidence showed that the Note was duly executed and was admittedly in default; and Defendants failed to establish a defense to enforcement of the Note. Accordingly, the Court found that the trial court properly determined that Fidelity was entitled to summary judgment on its claim for breach of the Note.

Defendants also argued that a question of fact remained regarding mutual assent to the Guaranty. Specifically, Defendants argued that the page bearing Gause's genuine signature on the Guaranty was attached without his knowledge or consent. The Court of Appeals of Georgia held that, as the nonmoving party to Fidelity's summary judgment motion, the Defendants were not required to present conclusive proof that Gause's signature was invalid. Rather, Defendants only had to point to evidence giving rise to a triable issue of material fact, which they did by submitting Gause's affidavit averring that he did not sign the Guaranty.

In addition, Defendants contended that the trial court erred in granting summary judgment on the Defendants' counterclaims for setoff and recoupment. Defendants argued that they were entitled to setoff and recoupment based on $200,000 in loans to SEB, which Gause made between December 30, 2008 and January 2, 2009. Gause's own deposition testimony, however, shows that the loans in question were made to a separate and distinct entity, SEB Bancorp, Inc., and not to Fidelity's predecessor in interest, SEB. Accordingly, the Court of Appeals of Georgia found that the trial court did not err in granting summary judgment to Fidelity on the Defendants' counterclaims for set-off and recoupment.

14. In *Carnett's Props., LLC v. JoWayne, LLC,* 331 Ga. App. 292 (2015), Carnett sold to JoWayne a parcel of approximately 1.69 acres of its 13.85-acre property, and the parties executed an Agreement, pursuant to which Carnett provided JoWayne with a drainage easement over the property it retained after the sale, and JoWayne agreed to pay 12 percent of costs associated with the maintenance, upkeep, redesign, or improvement of the detention facility serving the total 13.85 acres of Carnett's original property. Because of various regulations, Carnett added a detention pond to the property in order to service all of the various property owners of the 13.85 acres. Carnett invoiced JoWayne for the 12 percent of the price, but JoWayne refused to pay, contending that the agreement did not encompass the construction of a new detention pond. Carnett brought suit-claiming breach of contract, and the parties filed cross-motions for summary judgment. The trial court granted summary judgment to JoWayne. The trial court also found that the Agreement only referred to "*the* Detention Facility," such that the plain language concluded that JoWayne was liable only for 12 percent of the sums related to the maintenance and upkeep of the then-existing detention pond and not a newly constructed detention pond.

On appeal, the Court of Appeals of Georgia pointed out that other terms in the contract lent support to the conclusion that "facility" could mean any number of ponds in addition to or in place of the original one. Redesign, for instance, means "to revise in appearance, function, or content" or to "design (something) again in a different way." The Court also noted that the contract did not limit "upkeep and maintenance" only to those listed possibilities, which renders erroneous the trial court's conclusion that the parties' failure to include "construction of a new separate detention pond" in the list of actions constituting "maintenance and upkeep" was an intentional omission that relieves JoWayne of liability for such costs. Thus, the Court concluded that the trial court's conclusion that the language of the contract was clear and unambiguous was incorrect.

15. *SFG Venture LLC v. Lee Bank & Tr. Co.,* No. A15A0271, 2015 WL 4114064, (Ga. Ct. App. July 9, 2015), involved a commercial real estate loan for approximately $15 million, which was originated by Specialty Finance Group LLC ("SFG") in 2008 to DOC Milwaukee LP ("the borrower") to fund the construction of a hotel in Milwaukee, Wisconsin. The hotel was part of the collateral for the loan. After SFG originated the Loan, Lee Bank bought a 3.36% interest in the loan for $500,000, the sale of which was memorialized in a "Participation Agreement." The agreement contained specific provisions governing any breaches of the participation agreement by SFG or by Lee Bank. The borrower eventually defaulted on the loan by failing to make loan payments and by halting construction of the hotel. Shortly thereafter, the loan guarantors declared bankruptcy. In May 2009, SFG's parent company, Silverton Bank, was closed and, a year later, the FDIC was appointed receiver for Silverton and SFG. The FDIC sold SFG's loan portfolio, including SFG's interest in the instant loan, to an affiliate of Venture. By letter dated January 3, 2013, Lee Bank informed Venture that it believed that the expenses incurred in connection with the loan were grossly unreasonable. It considered Venture to be in breach of the Participation Agreement by failing to notify it of "material adverse information." Lee Bank demanded that "Venture acknowledge that the Participation Agreement [has] been terminated and to restore [Lee Bank's] consideration by repurchasing [its] participation interest[] within thirty (30) days" of the date of the letter. Lee Bank also demanded that Venture remit to it its pro-rata share of any proceeds of the sale of any collateral "without offset or diminution." On January 31, 2013, Venture sued Lee Bank for breaching its obligation under the Participation Agreement. Lee answered, denying responsibility for the expenses, and brought counterclaims for breach of contract and rescission.

Venture contended that the trial court erred in concluding that Paragraph 17 of the Participation Agreement, a clause that limited SFG's (and hence Venture's) liability to acts or omissions that amounted to gross negligence or willful misconduct, was unenforceable because it was not sufficiently prominent in the agreement. The Court of Appeals of Georgia held that the provision was prominently placed and the agreement itself was drafted partly by Lee Bank and, therefore, Lee Bank should have been aware of its contents. As such, the Court found that the trial court erred in concluding that the provision was unenforceable.

Lee Bank further argued that the limitation of liability clause was ambiguous as to whether it applied to breach of contract claims. The Court concluded that Lee Bank failed to identify any such ambiguity. Thus, the Court held that the limitation of liability clause specifically limited SFG's (and hence successor-in-interest Venture's) potential liability for breaches of the agreement to those breaches arising from a specific type of conduct—gross negligence or willful misconduct.

Lee Bank also argued that the limitation of liability clause conflicted with other provisions of the agreement defining what circumstances constitute a breach of the agreement and, because those provisions do not reference or specifically incorporate the limitation of liability, the limitation of liability clause should be stricken. The Court disagreed, finding that there is no Georgia law, nor did Lee Bank cite to any, that requires every contract provision that may be affected by a contract's limitation-of-liability clause or an exculpatory clause to reference the clause.

Finally, Venture argued that Lee Bank failed to return the payments it received under the agreement; therefore, Lee Bank's claim for rescission must fail. The Court found that Lee Bank offered to restore the consideration it received in its initial answer and counterclaims and repeated the offer in its amended pleadings. It also made the offer during oral argument on its motion for summary judgment. Thus the Court concluded that, under such circumstances, requiring Lee Bank to remit a check to Venture for the funds it had received pursuant to the participation agreement prior to rescinding the contract would not restore the “status quo” between the parties to the agreement. Under such circumstances, the Court did not find error in the trial court's finding that a jury question remained concerning whether Lee Bank's offer to restore to Venture any benefits that it may have received under the agreement were reasonable.

16. In *Seaboard Constr. Co. v. Kent Realty Brunswick, LLC,* 331 Ga. App. 742 (2015), Harbor Development LP began a development project for residential lots and condominiums. Harbor contracted with Seaboard Construction Company (“Seaboard”), to perform certain site preparation work on Phase I. During the performance of the site work, Harbor received 17 applications for payment and paid the company $6,261,192.52. A total of $326,661.50 remained unpaid when a dispute arose between the parties. Seaboard subsequently filed five materialman's liens against five separate properties of the development, two of which were owned by Kent, and one of which was owned by Harbor. As a result, the aggregate amount of Seaboard's liens against Kent's properties was twice the contract balance. The aggregate amount of liens on all five properties was five times the contract balance.

Four months after filing the liens, Seaboard filed suit against Harbor seeking payment of the unpaid retainage. Three days later, Kent filed a complaint asserting defamation of title and seeking injunctive relief. Seaboard answered and counterclaimed to foreclose upon the liens. Shortly after the filing of Kent's suit, Seaboard filed a “Notice of Filing of Action for Claim on Materialman's Lien” for each of the Kent liens. The trial court granted Kent's motion and denied

Seaboard's. During the hearing, however, the trial court concluded that the liens were invalid because they were not filed in the name of the lien holder and were excessive under O.C.G.A. § 44-14-361.1(e). The court concluded further that there was a jury issue remaining on Kent's slander of title claim.

Seaboard contended that the trial court erred in granting Kent's motion for summary judgment on the validity of the liens. On appeal, the Court of Appeals of Georgia agreed with the trial court that the liens were excessive under O.C.G.A. § 44-14-361.1(e), and therefore the Court did not err in granting Kent's motion for summary judgment. Specifically, the Court found the liens to be excessive because the aggregate amount of liens filed against Kent's property exceeded the remaining contract price for improvements made or services performed on Kent's property.

Seaboard also argued that the trial court erred in failing to grant it summary judgment on Kent's slander of title claim. On appeal, the Court of Appeals of Georgia agreed, citing O.C.G.A. § 51-9-11, which provides that an "owner of any estate in lands may bring an action for libelous or slanderous words which falsely and maliciously impugn his title if any damage accrues to him therefrom." However, "[i]n order to sustain an action of this kind, the plaintiff must allege and prove the uttering and publishing of the slanderous words; that they were false; that they were malicious; that he sustained special damage thereby; and that he possessed an estate in the property slandered." The Court held Kent "could recover only such special damages as [it] actually sustained as a consequence of the alleged wrongful acts, and [it was] required to plead them plainly, fully, and distinctly." The Court explained that, as the movant for summary judgment, Seaboard had demonstrated that there was no evidence sufficient to create a genuine issue of material fact on an element of Kent's special damages, and, since Kent offered no evidence of special damages, an essential element of the claim for slander of title, the trial court erred in denying Seaboard's motion for summary judgment on the claim.

Legislation:

1. **S.R. 26, A Resolution.** This resolution authorizes the granting of nonexclusive easements for the construction, operation, and maintenance of facilities, utilities, roads, and ingress and egress in, on, over, under, upon, across, or through property owned by the State of Georgia in the counties of Baldwin, Barrow, Bartow, Chatham, Clarke, Clayton, Cobb, DeKalb, Floyd, Fulton, Gordon, Houston, Laurens, Liberty, Lowndes, Macon, McIntosh, Meriwether, Newton, Polk, Richmond, Troup, Walton, and Wayne.

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Hawaii

Case law:

1. In *Dist. Council 50 of the Int'l Union of Painters & Allied Trades v. Colon*, 2015 Haw. LEXIS 605 (Haw. Dec. 21, 2015), a dispute arose over the subcontractor's repair and remodeling of glass jalousie windows at the Lanakila Elementary School Project. DC 50 filed a petition with the Contractors License Board (CLB) to determine whether a general building contractor with a B-license could engage in work requiring a C-22 subcontractor license under the general contractor's license. The CLB found that "incidental and supplemental" in Haw. Rev. Stat. §444-8 (c) meant "work in other trades directly related to and necessary for the completion

of the project undertaken by a licensee pursuant to the scope of the licensee's license." Under this standard, the CLB denied the petition.

The Hawaii Supreme Court reversed, 129 Haw. 281, 298 P.3d 1045 (2013), and remanded the case to the CLB "to reconsider whether the jalousie window work qualified as 'incidental and supplemental' to the Project in light of the cost and extent of work involved." On remand, the CLB found that "the jalousie window work was subordinate to and directly related and necessary for the completion of the work of greater importance that is within the scope of the C-5 license." The circuit court affirmed the CLB's order and DC 50 again appealed.

The Hawaii Intermediate Court of Appeals affirmed, finding that the CLB's order was consistent with the Hawaii Supreme Court's decision. The Supreme Court noted that "the 'incidental and supplemental' work must not make up the majority of the project, and must instead be 'subordinate' and in addition to licenses work 'of greater importance.'" The CLB's order was consistent with the Supreme Court's directive.

Legislation:

1. **No new legislation to report. Current Legislative Session ends May 5, 2016.**

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Idaho

Case law:

1. In *Hap Taylor & Sons, Inc. v. Summerwind Partners, LLC, 157 Idaho 600, 338 P.3d 1204 (2014)*, the Idaho Supreme Court held that the mechanic's lien right of an engineer has a priority date of when the engineer commences his or her professional services, regardless of where the services are rendered. The Court rejected the lender's argument that the priority date would be the date upon which visible construction work commenced. Instead, the Court held that the priority date of an engineer's lien is commensurate with the engineer's commencement of his or her services. Practically speaking, the Court's ruling in puts lenders and contractors at somewhat of a disadvantage inasmuch as no examination of the property (or the county records) will reveal whether an engineer has commenced services for which he or she may have a lien right.

2. In *Sims v. ACI Northwest, Inc., 157 Idaho 906, 342 P.3d 618 (2015),* the Idaho Supreme Court reaffirmed earlier case law which indicated that a lien claim covering multiple improvements must designate the amount owing for each improvement in order to maintain a priority over others with an interest in the property. The Court held that the construction of roadways and cart paths (unlike grading work) constitute improvements which one may have to value separately for the purposes of maintaining lien priority. The Court held that a series of roadways could constitute a single improvement; however, the Court indicated that such a determination was factually specific to each case. Practically speaking, when a contract for grading and paving work is expanded by a change order (which may be characterized as a separate improvement), the contractor may find itself at a disadvantage if it fails to separately account for the work performed under the change order, even though that work is identical to the work of the base contract.

Legislation:

1. **Idaho Code §45-507 Claim of Lien**

Idaho Code section 45-507 was modified by the 2015 legislature to address two recent Idaho Supreme Court decisions which created confusion in connection with foreclosing property subject to mechanic's lien claims. In the 2013 Supreme Court decision in *Park West Homes v. Barnson 154 Idaho 678, 302 P.3d 18 (2013)*, the Idaho Supreme Court indicated that to properly foreclose a mechanic's lien encumbered by a deed of trust, it would be obligatory to name and foreclose upon the trustee's interest as well as the interest of the lender (the beneficiary), even though the trustee is only vested with the power of sale upon default, and even though it is common practice to appoint title insurance companies as trustees without their knowledge or consent. The *Park West* decision was reaffirmed in *Sims* (above). The 2015 legislature altered the mechanic's lien statutes by providing that a trustee of a deed of trust is not an owner of real property for purposes of a mechanic lien claim.

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Illinois

Case law:

1. In *Garecht v. Prof'l Transp., Inc.,* 14-cv-0378-SMY-DGY, 215 U.S. Dist. LEXIS 618 (S.D. Ill. Jan. 5, 2015), the Illinois district court held that the Illinois Prevailing Wage Act (IPWA) applies to all subcontractor employees under contracts for public works who perform work that directly facilitates construction, even if the employee did not engage in construction as a construction worker themselves. The plaintiff was a subcontractor's employee who directly facilitated construction by driving the railroad crew around the construction site. The court held that the legislature could have reasonably intended the plaintiff to be included because the statute's term "all work" could include transportation services when the construction crews would otherwise be unable to efficiently carry out their duties in the worker's absence.

2. In *West Bend Mut. Ins. Co. v. Athens Constr. Co.*, 2015 IL App (1st) 140006, 29 N.E.3d 636 (2015), the Illinois appellate court held that a subcontractor was not required to name the contractor as an additional insured on the subcontractor's commercial general liability policy in the absence of a provision of the prime contract requiring that the subcontractor obtain insurance to cover the contractor. The subcontract at issue specified that the subcontractor assume towards the contractor all obligations that the contractor assumed towards the owner including the requirement to obtain commercial general liability insurance. The court's holding relied on the absence of an express provision in the subcontract requiring the subcontractor to name the contractor as an insured.

Legislation:

1. **735 ILCS 5/15-1501 Foreclosure -- Special Representative**

Amended Senate Bill 735 amends the lien laws to extend exemptions from the requirements of a special representative to defend a deceased mortgagor in a foreclosure action when: (1) an entity owns 100% interest in a property, (2) a deceased mortgagor conveyed title to a beneficiary prior to death, (3) a person, persons, or entity that received title from the deceased mortgagor's probate estate by the administrator or executor, or (4) a trust

that received title to the property by either the deceased mortgagor prior to death or by one of the other exempted person, persons, or entity identified in this section.

2. **415 ILCS 5/3.135 Safety – Coal Combustion By-Product**

Amended Senate Bill 543 defines coal combustion by-product that may be used as structural fill to include synthetic gypsum which is: a) generated by the lime or limestone forced oxidation process; b) having a calcium sulfate dehydrate content greater than 90% by dry weight; c) is registered with the Illinois Department of Agriculture as a fertilizer or soil amendment and is used as a fertilizer or soil amendment; d) is a functionally equivalent substitute for mined gypsum used as a fertilizer or soil amendment; e) is used in accordance with recommendations of a qualified agricultural professional or institution; and f) has not been mixed with any waste.

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Indiana

Case law:

1. In *Board of Com'rs of County of Jefferson v. Teton Corp.*, 30 N.E.3d 711 (Ind. 2015), the Indiana Supreme Court held, as a matter of first impression, that a waiver of subrogation clause in a County's contract extended to all losses covered by the County's property insurance, whether the claimed loss was damage to work or non-work property. The County, which had entered into a construction contract with the general contractor for courthouse renovation, filed suit against the general contractor and the subcontractors alleging that the subcontractor's negligence was the primary cause of a fire that occurred during renovation that severely damaged the courthouse. The Indiana Supreme Court gave great weight to the plain language of the American Institute of Architects Contract which waived subrogation rights for all "damages caused by fire or other perils to the extent covered by property insurance" and contained language that the County was "directed to insure the construction project and the building it pertain[ed] to, and to waive claims against the associated contractors for losses covered by its insurance."

2. In *Illinois Mechanical Sales, LLC v. Stevens Engineers and Constructors*, No. 2:14 CV 342 PPS, 2015 WL 333062 (N.D. Ind. Jan. 23, 2015), a school district solicited bids to replace a boiler at a high school. After the bidding concluded, an equipment supplier for a losing bidder complained that the bidding was rigged. Using the court's diversity jurisdiction, the supplier brought suit against the contractor pursuant to Indiana's Antitrust Act. The court, however, held that the supplier did not have standing to bring the antitrust claim because the equipment supplier was not a member to the bidding. Specifically, the court held that in order to maintain an antitrust action, a plaintiff has to suffer a direct injury, and because the equipment supplier was not a party to the bidding, its injury was not direct enough to warrant an antitrust claim.

3. In *Indiana Dept. of Transp. v. Sadler*, No. 64A04-1411-CT-544, 2015 WL 3612991 (Ct. App. Ind. Jun. 10, 2015), a road worker was killed after being struck by a vehicle as he performed road work on an interstate. His estate filed a wrongful death action against the Indiana Department of Transportation ("INDOT"), alleging that his death was caused by INDOT's negligence in failing to temporarily close or block a median crossover as a safety

measure during the road work. INDOT filed a summary judgment motion, arguing that it was immune from liability pursuant to the Indiana Tort Claims Act ("ITCA"). Specifically, INDOT asserted that it had "discretionary function" immunity pursuant to the ITCA which provides that a "governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from . . . [t]he performance of a discretionary function."

The court used the "planning-operational" test to determine whether INDOT was engaged in a discretionary function and thereby shielded from tort liability. Under the test, "a governmental entity will not be held liable for negligence arising from decisions which are made at a planning level, as opposed to an operation level." A decision is considered a "planning" action where it involves "the formulation of basic policy characterized by official judgment, discretion, weighing of alternatives, and public policy choices. . . . Government decisions about policy formation which involve assessment of competing priorities, a weighing of budgetary considerations, or the allocation of scarce resources are also planning activities." In contrast, a decision is an "operational" action when it involves the execution or implementation of already formulated policy.

In this case, the court determined that a genuine issue of material fact existed as to whether INDOT's decision not to close the median was made at the planning level or the operational level. Thus, it denied INDOT's motion for summary judgment.

4. In *J.F. New & Associates, Inc. v. International Union of Operating Engineers, Local 150, ALF-CIO*, No. 3:14-CV-1418 RLM, 2015 WL 1455258 (N.D. Ind. Mar. 30, 2015), an Indiana corporation (the "Corporation") learned from its general contractor ("GC") that a construction project (the "Project") it was participating on required the use of union subcontractors. Thus the Corporation, a nonunion firm, contacted officials of the International Union of Operating Engineers, Local 150 (the "Union") to discuss the possibility of satisfying the union subcontractor requirement by entering into a "project specific agreement" with the Union to complete the Corporation's portion of the Project. A project specific agreement "allows a nonunion contractor to employ union labor for a single construction project of a limited duration. . . . In that way, the contractor is able to maintain its nonunion status, yet perform construction work on a union construction project."

The Corporation maintained that the Union agreed to allow the Corporation to use labor provided by the Union for the Project without entering into a collective bargaining agreement. However, a few months later, company officials reviewed the memoranda that had been signed by the parties and determined that they incorporated certain "Master Agreements," which were later identified as collective bargaining agreements ("CBA's"). Believing that these CBA's were mistakenly included in the contract, the Corporation requested that the Union correct the error and forward the project specific agreement that was originally discussed. However, after several unsuccessful attempts to correct the agreement, the Corporation notified the Union in writing that it was rescinding and terminating the memoranda and the CBA's. In response, the Union accused the Corporation of violating the termination provisions of the memoranda and CBA's.

The Corporation then filed a declaratory judgment action pursuant to 28 U.S.C. § 2201(a) and Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), alleging that the Union fraudulently induced the company into signing the memoranda and that the memoranda were signed based on a mistake by the parties about the content of the documents. The Union moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction or, alternatively, under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

The court denied both the Union's 12(b)(1) and 12(b)(6) motions. Specifically it held that the Corporation had properly brought its declaratory judgment action under 28 U.S.C. § 2201(a) and Section 301(a) of the Labor Management Relations Act, and that genuine questions of material fact existed which needed to be addressed by the jury.

5. In *Lee v. GDH, LLC*, 25 N.E.3d 761 (Ind. Ct. App. 2015), the Indiana Court of Appeals held that a construction manager did not assume a duty of care to an independent contractor's employee who was injured on the job even though the manager, pursuant to the terms of its contract with the client, requested copies of contractor's safety program, agreed to correct safety problems that it became aware of, staffed the project with a safety coordinator, and held weekly meetings with contractors on topics including safety. The manager's contract also explicitly excluded responsibilities for direct control or charge of the contractors on the project. Additionally, the client's contract with the contractor specified that the contractor shall be solely responsible for all safety precautions.

The court first looked to the plain meaning of the provisions of the contractual agreements between the manager and the client. It found that the manager contractually disclaimed any responsibility for the safety of contractors' employees and placed the duty of administering safety programs related to the contractors' work on the contractors. The court reasoned that although the manager's contract included a provision requiring the manager to react to safety problems when it became aware of them, this is different than promising to be responsible for safety at the construction site. As for the manager's actions, to assume a legal duty of care for jobsite-employee safety when the manager is not contractually obligated to provide jobsite safety, the manager must undertake specific responsibilities "beyond those set forth in the original contract."

6. In *Skyline Roofing & Sheet Metal Co. v. Ziolkowski Const., Inc.*, 26 N.E.3d 1024 (Ind. Ct. App. 2015), the Indiana Court of Appeals held that there were genuine issues of material fact as to whether a general contractor ("GC") and a union violated Indiana's Antitrust Act by unlawfully restraining open and free competition in bidding for a public project.

A school district enlisted the union to help pass a referendum to eventually fund a new middle school. During a pre-bid meeting, the superintendent made it clear that any submitted bid must include a list of subcontractors and specified that he did not want to see any non-union names on the lists. After being awarded the bid, the GC notified a non-union subcontractor ("SC") that it was the low bidder for the roofing system and that the GC had used the non-union SC's bid. When the union discovered that the GC was using SC, a non-union subcontractor, it complained to the superintendent and expressed that it would love to have the job. The superintendent then emailed the GC and reminded it of the pre-bid meeting stipulations and that he did not want to see any non-union subcontractors. The GC's president met with the superintendent and within the next few days informed the superintendent that the GC was able to negotiate terms with its union subcontractor even though their financial terms were not completely satisfactory. Subsequently, the specifications for the roofing system were revised and the non-union SC was not invited to bid on the revised specifications. Thereafter, the GC executed a subcontract with a union contractor for the roofing work. During the roofing work on the project, the union contributed funds towards the employment of its members.

The non-union SC filed a complaint alleging that the GC colluded with the school district to exclude the SC as the roofing subcontractor in favor of the union in violation of Indiana's Antitrust Act (the "Act"). The Act provides that "A person who engages in any scheme, contract,

or combination to restrain or restrict bidding for the letting of any contract for private or public work, or restricts free competition for the letting of any contract for private or public work, commits a Class A misdemeanor," and provides a private right of action for "[a]ny person whose business or property is injured by a violation of [the Act]."

The non-union SC claimed that the designated evidence established a genuine issue of material fact that the GC engaged in a scheme in violation of the Act to replace the SC with a union contractor for the roofing work on the project. The GC represented that the decision not to use the SC was made on the merits based off of its references and experience. The Court of Appeals, however, found that a reasonable inference could be derived that the change order was mere subterfuge to make it easier to get rid of the SC. Thus, it held that a genuine issue of material fact had been raised that the GC violated the Act by unlawfully restraining open and free competition in bidding for a public project by colluding to substitute a non-union contractor with a union contractor.

7. In *Sterling Const. Corp. v. SOS Const. and Roofing, Inc.*, No. 3:14-cv-1959, 2015 WL 2189588 (N.D. Ind. May 11, 2015), a dispute arose between a general contractor and one of its subcontractors on a large construction project in Nebraska. Both parties agreed that this dispute needed to be arbitrated, but disagreed as to the location of the arbitration. The subcontract provided that it would be governed by the laws of the State of Nebraska, but included a clause that any arbitration related to subcontract disputes should be conducted solely in St. Joseph County, Indiana. The subcontractor argued that the arbitration had to take place in Nebraska because Nebraska law governed the subcontract, and the Nebraska Construction Prompt Pay Act prohibited matters relating to construction work performed within Nebraska from being arbitrated outside of Nebraska. The court, however, held that the Nebraska Construction Prompt Pay Act is preempted by the Federal Arbitration Act, which the Supreme Court has made clear nullifies any state law that is geared towards invalidating arbitration agreements. Because of this, and because the subcontract clearly mandated that any arbitrations take place in St. Joseph County, Indiana, the court agreed it was the proper location to arbitrate.

Legislation:

1. H.E.A. 1019, An Act Repealing the Indiana Common Construction Wage Act, eliminates local boards that had previously set minimum wages for public construction projects in Indiana. The Act, effective July 1, 2015, prohibits public agencies from mandating a wage scale or wage schedule for a public works contract awarded by the public agency after July 1, 2015, unless a federal or state law provides otherwise.

In addition to repealing the Common Construction Wage Act, the Act also contains requirements for public works construction contractors. Specifically, the Act requires that Tier 1 contractors must contribute at least 15% of the contract price in work, materials, services, or any combination thereof. Additionally, the Act prohibits contractors from paying their employees in cash, and requires that they E-Verify each employee on a project and certify that they are in compliance with the Federal Labor Standards Act (FLSA) and the Indiana Minimum Wage Law. Finally, the Act makes clear that contractors may be required to establish drug testing programs in accordance with IC 4-13-18, and that they must maintain required levels of general liability insurance.

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Kansas

Case law:

1. In *Gleason & Son Signs v. Rattan*, 50 Kan. App. 2d 952 (Kan. Ct. App. 2014), the Kansas Court of Appeals held that a subcontractor cannot recover from a property owner on a quasi-contract theory if the subcontractor has failed to avail itself of an available statutory remedy. Here, a mechanic's lien was not an available remedy for the relief sought by a subcontractor, and thus the subcontractor's failure to file a mechanic's lien did not bar recovery under an unjust enrichment theory.

2. In *Unified School District 467 v. Leland A. Gray Architects, LLC*, 112 F. Supp. 3d 1223 (D. Kan. 2015), the United States District Court of Kansas held that, under Kansas law, a general contractor's allegations that a manufacturer was involved in the design, installation, inspection, and service of a HVAC system for the owner school district, and that the HVAC subcontractor was acting as the manufacturer's authorized dealer, were sufficient to state a plausible claim against the manufacturer for breach of implied warranties of fitness and merchantability, despite lack of contractual privity between the contractor and manufacturer.

3. In *Bowen Engineering Corp. v. Pacific Indemnity Co.*, 83 F. Supp. 3d 1185 (D. Kan. 2015), the United States District Court of Kansas held that a supplier to a second tier subcontractor was too remote to invoke the protection of Kansas' mechanic lien statute even though the entity that hired the subcontractor was the owner's agent, where that entity also acted as the general contractor for the project and supplier had acknowledged the entity was the general contractor. The Court also held that a Kansas Fairness in Private Construction Act provision requiring that actions under the statute be brought in the county in which real property was located did not preclude application of a forum selection clause where the parties were not Kansas citizens, freely and voluntarily agreed to litigate all matters in another forum, and given that Kansas courts routinely enforce forum selection clauses that are reasonably related to the transactions at issue.

4. In *Herr Industrial, Inc. v. CTI Systems, SA*, 112 F. Supp. 3d 1174 (D. Kan. 2015), the United States District Court of Kansas held that the enforcement of a forum selection clause in a supplier's agreement with a foreign contractor did not violate Kansas public policy concerning mechanic's lien. Policy related to mechanic's liens was irrelevant given that contractor's lien was replaced by a bond, and while the Kansas Fairness in Private Construction Contract Act deems against public policy any provision in a construction contract that purports to extinguish procedural litigation rights, the Act did not apply, there was no Kansas public policy against forum selection clauses generally, and neither the Kansas legislature or courts have established a public policy against the enforcement of forum selection clauses in construction contracts.

Legislation:

1. H.B. 2224, Technical Professions. This bill amended K.S.A. § 74-7003 to clarify definitional provisions applicable in statutes governing technical professions by adding the word "architectural" to describe the types of designs included in the definition of professional architectural services. In addition, the bill adds "preparing and providing drawings, specifications and other technical submissions" as a common technical service offered by licensed technical professional.

2. H.B. 2254, Roofer Registration Act. This bill amended K.S.A. § 50-6,122 to exempt general contractors from the Roofer Registration Act who meet certain alternative conditions established by the bill, and do not engage in door-to-door sales. If required conditions are met, the general contractor may request that the Attorney General issue a letter of exemption stating that the general contractor is an exempt general contractor as defined by the Act. The Act otherwise requires the registration of contractors engaged in the roofing services business, or who solicit roofing-related services.

3. H.B. 2267, Alternative Project Delivery. This bill amended K.S.A. §§ 72-6760f, 75-37,143, 75-37,144, 75-37,145, 76-7,131 and 76-7,132 and revises the notice requirements and the process for evaluating and selecting bidders on construction projects involving schools, district, state agencies, and the Board of Regents that utilize an alternative project delivery method. The respective body must give notice of a request for qualifications and/or proposals for the required project services to all active general contractor industry associations in Kansas at least 15 days before such request is published elsewhere. Local boards of education also must give notice to the Associated General Contractors of Kansas. Prequalified firms must submit a list of proposed fees to the Secretary of Administration, who then scores and ranks the submitted proposals and reports the findings and recommendations to the appropriate body charged with selecting a firm. These scores are open for public review and may not account for more than 25 percent of the total possible score. For Board of Regents projects, a construction manager or general contractor may perform construction services if the bid proposal is submitted prior to all other bids.

4. H.B. 2395, State Building Projects. This bill amended K.S.A. § 75-1253 by increasing the threshold of capital improvement costs to $1 million before the secretary of administration must convene a negotiating committee to negotiate with and select a design firm to provide services for the anticipated public project. The law also repeals separate threshold amounts previously applicable to architectural, engineering, and land surveying services.

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Kentucky

Case law:

1. In *DCI Props.-DKY, LLC v. Coppage Constr. Co.,* No. 2013-CA-001932-MR, 2015 Ky. App. LEXIS 26 (Ky. App. Feb. 27, 2015), DCI was building a sewer line with public funds, and subcontracted with Coppage to complete the construction. After significant project delays led to the termination of the construction contract, Coppage filed a $3.7 million dollar lien under KRS 376.210. Coppage then filed suit to enforce the lien. The trial court enforced the lien, but also entered an order that the lien amount was excessive. DCI then filed a complaint seeking damages caused by Coppage's excessive lien under KRS 376.220(3). Coppage argued that the excessive lien claim should have been raised in the original enforcement action as a compulsory counterclaim, and the claim should be barred by res judicata.

The trial court dismissed DCI's damages claim with prejudice. The Court of Appeals, in an issue of first impression, reversed the dismissal and agreed with DCI that its cause of action was not a compulsory counterclaim to Coppage's initial lien enforcement action and is not barred by res judicata. Prior to the conclusion of the initial enforcement action, the contractor's injury was merely speculative because it was not known whether the subcontractor's lien was

valid or excessive. The contractor's cause of action for damages did not accrue until the enforcement action was concluded. Ultimately, a cause of action for damages from an excessive lien does not accrue until it is known whether the lien itself is valid or excessive.

2. In *PBI Bank, Inc. v. E-Z Constr. Co.*, No. 2014-CA-000605-MR, 2015 Ky. App. Unpub. LEXIS 316 (Ky. App. May 8, 2015), a contractor performed all excavation work on a condominium project and filed a mechanic's lien when owner failed to pay in full. The lien was bonded off with a release of lien bond by PBI Bank as the financier under KRS 376.100. Contractor filed suit to foreclose its lien and obtained a default judgment for the full amount of unpaid invoices and contract interest of 18%. PBI Bank appealed, arguing that the interest rate should be the statutory 12% and not the 18% provided for in the contract.

The Court of Appeals said the applicable interest rate was 18%, reasoning that the underlying contractual obligation cannot be disconnected from the lien claim and resulting judgment because the lien and judgment flow from the contract. The interest rate agreed to in the contract trumps the statutory default rule. The court also held that interest runs from the date of the outstanding invoices and not the date of the lien. 18% interest was recoverable and accrued from the date of the outstanding invoices.

3. In *Lore, LLC v. Moonbow Invs., LLC*, No, 2012-CA-001305-MR, 2014 Ky. App. Unpub. LEXIS 99 (Ky. App. Feb. 7, 2014), the general contractor sought summary judgment of fraud, breach of contract, and professional negligence claims, arguing it did not breach its contract when a building settled and walls cracked due to soil issues. The circuit court agreed that the contract was only for the construction-phase of the project. There was no provision requiring the general contractor to provide soil compaction testing or soil removal, so the damages were outside the scope of work contained in the contract. As a result, the general contractor did not breach the contract because the building was constructed in conformity with the plans and specifications provided by the engineering and architecture professionals.

In regard to the statute of limitations, the court reasoned that mere cosmetic cracking–without more–would not be enough to trigger the discovery rule and commence the running of the statute of limitations. However, the owner had knowledge of sufficient facts to put the owner on inquiry notice in 2008. As a result, the statute began to run in 2008 making this complaint untimely. Summary judgment for appellees was affirmed on statute of limitations grounds.

4. In *Ervin Cable Constr., LLC v. Lay,* No. 2014-CA-001047-MR, 2015 Ky. App. LEXIS 43 (Ky. App. Apr. 3, 2015), a subcontractor's employee sued a contractor for work-related injuries sustained on a job site. The court held that the contractor was entitled to "up-the-ladder" absolute immunity under KRS 342.690, because a contractor/subcontractor relationship existed between the contractor and the employee's employer (subcontractor), and because the employee received workers' compensation benefits.

The contract for this specific project did not require the subcontractor to provide workers' compensation insurance. But, as a practical matter, the contractor and subcontractor's long relationship meant that a written agreement concerning workers' compensation benefits for the specific project was not necessarily required. A specific insurance agreement between a contractor and subcontractor is not required for each individual project to provide up-the-ladder immunity for the contractor as long as the employee received workers' compensation benefits from the employer (subcontractor). Contractor's summary judgment motion was granted because the appellee was currently receiving workers' compensation benefits from the subcontractor. The contractor was entitled to absolute immunity.

5. *Commonwealth v. Colwell*, 2013-SC-000371-WC, 2014 Ky. Unpub. LEXIS 76 (Ky. Sept. 18, 2014) involved a workers compensation claim as an up-the-ladder employer. A car dealer did not hire a general contractor to construct a building to house his dealership, but only hired subcontractors. The car dealer performed the work of a general contractor himself to save 10-15% on construction costs. He did not act as a general contractor for anyone other than himself. Subcontractor's employee was injured while building the car dealership and filed for benefits from the Uninsured Employers' Fund because the subcontractor did not carry worker's compensation insurance.

The Court of Appeals held that car dealer was not a "contractor" under KRS 342.610 because he did not hire subcontractor to perform work "of a kind which is a regular or recurrent part of the work of [car dealer's] trade, business, occupation, or profession." Undertaking duties that a general contractor would perform for the purpose of expanding your own business is not the type of "regular or recurrent" work contemplated by the statute. The Supreme Court affirmed the Court of Appeals and held that up-the-ladder liability for workers compensation benefits paid to injured employee of the subcontractor does not attach to the car dealer under KRS 342.610(2)(b) or KRS 342.700(2).

6. *Dugan & Meyers Constr. Co. v. Superior Steel, Inc*., No. 2012-CA-000440-MR, 2015 Ky. App. Unpub. LEXIS 3 (Ky. App. Jan. 9, 2015) arose from a complex construction contract case involving the building of a condominium complex. The owner contracted with a design builder, who subcontracted with a construction management company. The construction management company then subcontracted with a steel fabrication company. The steel fabrication company sued the construction management company after a dispute over payment for extra work. The lower court awarded damages to the steel fabrication company, but ordered the owner and design builder to indemnify the construction management company for the damages. The lower court also awarded attorneys' fees to the steel fabrication company and held the other three parties jointly liable for payment of those fees.

The court remanded for a new trial because the steel fabrication company did not have a legal right to indemnification under either a contractual or common law theory, and there were faulty jury instructions regarding breach of contract and negligence claims. The construction management company was not provided with any indemnification rights for attorneys' fees or extra work in the contract between the owner and the design builder. Because there was an indemnification clause in that contract between the owner and the design builder, that represented the whole of the parties' agreement on that subject and did not extend to the construction management company.

The court also held that at the new trial another subcontractor who did not have written contract with the construction management company would not be entitled to recover its attorneys' fees because that company was not a party to the original contract between the construction management company and steel fabricator company that provided for the recovery of attorneys' fees. Under Kentucky law, attorneys' fees are not awarded to the prevailing party unless there is a statute permitting it or if there is an indemnity clause in a contractual agreement between the parties. Because there was no contract between the subcontractor and the construction management company, the indemnity provision did not extend to that subcontractor. *See Bell v. Commonwealth,* 423 S.W.3d 742, 748 (Ky. 2014).

7. In *Renaissance/Valley Farms, LLC v. T&C Contr., Inc.,* No. 14-6400, 2015 U.S. App. LEXIS 9451 (6th Cir. 2015) the court held that KRS 177.106 (relating to the expense of removing or relocating encroachments on roadways) places costs on the encroachment permit

holder, not any subcontractors. The statutory obligations did not apply to the subcontractor in this case because the subcontractor was not a permittee. The subcontractor did not breach its subcontract with the general contractor because the subcontractor complied with the engineering plans provided by the project owner. Summary judgment was proper. The court also granted summary judgment on the negligence claim because subcontractors do not have a common law duty to second guess the engineering plans provided to them. Instead, the subcontractor has a duty to comply with the engineering plans provided from the owner.

8. In *Treved Exteriors, Inc. v. Lakeview Constr., Inc.,* No. 13-82-DLB-JGW, 2014 U.S. Dist. LEXIS 34736 (E.D. Ky. Mar. 18, 2014) two construction subcontracts contained language incorporating by reference terms and conditions that were attached to the contract and contained an arbitration clause. The subcontractor was not relieved from its obligation to arbitrate because the terms and conditions were properly incorporated by reference under state law. Ignorance of the terms does not remove an obligation contained in such terms and conditions. The scope of the arbitration clause covers this dispute, so the motion to dismiss was granted and the parties must arbitrate.

Legislation:

1. **KRS § 198B.110, Effective dates for Uniform State Building Code - Exemptions.** This statute was repealed effective January 1, 2015. The statute detailed when the Uniform State Building Code became effective in cities of different classes, delaying the effective date of the Code from six months to three years.

2. **KRS § 45A.183, Selection committee procedures to apply when capital project is to be constructed using the construction management-at-risk method – Competitive process consistent with code to apply when construction project is to be constructed using the construction manager-general contractor method.** Section (2) was added to this statute in the Model Procurement Code which details the process to be used when a construction project is to be constructed using the construction manager-general contractor method. The statute details the requirements of the procurement process, provides guidelines for selecting the construction manager-general contractor, requires construction manager-general contractors to bid the subcontracts through public notice and award to the lowest responsive and responsible bidder, and requires a final change order to be entered detailing the final construction cost and completion date after finalizing subcontracts.

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Louisiana

Case law:

1. In *Tymeless Flooring, Inc. v. Rotolo Consultants, Inc.*, No. 2014-1392, 2015 WL 2412296 (La. App. 4 Cir. May 20, 2015), the Louisiana Fourth Circuit Court of Appeal addressed whether a provision in a construction contract should be construed as a "pay-when-paid" clause—a term of payment—or whether the provision at issue was a "pay-if-paid" clause—a suspensive condition (condition precedent). The plaintiff appealed the trial court's order sustaining the defendant's dilatory exception of prematurity. The Louisiana Fourth Circuit Court of Appeal reversed and remanded, finding that the trial court erred in construing the language from the underlying contract as a "pay-if-paid" clause.

Tymeless served as a sub-subcontractor on the construction of the Dryades YMCA Natatorium and Wellness Center in New Orleans, Louisiana. The subcontract agreement between Tymeless and Rotolo contained the following provision:

> Payments are to be made as follows: 90% of Sub-Contractor's approved invoices or pay request will be paid subject to the conditions following, after payment by the Owner for Sub-Contractor's work. Retention of 10% will be released upon satisfactory completion of this contract and release of final payment by the Owner.

Rotolo made partial payment to Rotolo. Thereafter, Rotolo argued that the additional amounts Tymeless claimed it was owed were not required to be paid by Rotolo "unless and until" Rotolo received payment from the project's general contractor. In reversing the trial court's ruling, the court cited extensively to the "seminal Louisiana case on 'pay-when'paid' clauses." *Southern States Masonry, Inc. v. J.A. Jones Constr. Co.*, 507 So.2d 198 (La. 1987). Specifically, the court in *Tymeless* held that "[t]he *Southern States* case stands for the proposition that to create an enforceable 'pay-when-paid' clause the parties' intent to do so must explicitly expressed in their agreement."

Thus, the court distinguished *Imagine Const., Inc. v. Centex Landis Const. Co.*, 97-1653 (La. App. 4 Cir. 2/11/98)—one of the cases cited by Rotolo in support of its position that the provision above constituted a "pay-if-paid" provision—from the underlying contractual provision. The court noted that the provision at issue in *Imagine* specifically included language that the subcontractor agreed that payment from the owner was a condition precedent to payment by the general contractor. Since the payment provision included in the subcontract between Rotolo and Tymeless did not specifically use the terms "condition precedent" or other language that specifically points out that the risk of nonpayment by the owner was being shifted and accepted by the subcontractor, the court held that the language of the payment provision between Rotolo and Tymeless was a "pay-when-paid" clause, which required Rotolo to pay Tymeless within a reasonable time after Tymeless completed its work on the project regardless of whether Rotolo received payment from the owner.

The second case relied on by Rotolo—*Coastal Dev. Group, L.L.C. v. Int'l Equip. Distributors, Inc.*, 10-1202 (La. App. 1 Cir. 2/11/11), 2011 WL 766608—was not addressed by the court in *Tymeless* but provides an interesting comparison for the potentially conflicting interpretations handed down by Louisiana state courts of appeal concerning whether contractual provisions constitute "pay-when-paid" or "pay-if-paid" clauses.

2. In *Landry v. Williamson,* No. 2014-1232, 2015 WL 2093658 (La. App. 1 Cir. May 1, 2015), the Louisiana First Circuit Court of Appeal addressed the manifestation trigger theory for claims against a commercial general liability insurer. In affirming the trial court's grant of summary judgment in favor of one of the defendant insurance carriers (Scottsdale Insurance Company) the court of appeal held that because the property damage claimed by the plaintiffs did not manifest until after the expiration of Scottsdale's insurance policy, the alleged damage did not occur during Scottsdale's policy period and Scottsdale could not be liable for the claimed construction defects.

The plaintiffs purchase a home on August 28, 2002. Water was first noticed leaking into the home on September 26, 2022. However, the plaintiffs did not become aware that the leaks (and attendant water damage) were the result of a failure to install a secondary water barrier until 2004.

In Louisiana, the manifestation trigger theory entails that insurance coverage is triggered when damage manifests and is discovered during a policy period, "not when the causative negligence took place." Since Scottsdale's insurance policy expired on August 1, 2002, nearly a month before the plaintiffs even purchased the home, the court applied the manifestation trigger theory and held that summary judgment in favor of Scottsdale was proper.

3. In *Pierce Foundations, Inc. v. Jaroy Const., Inc.,* No. 14-669, 2015 WL 1393224 (La. App. 5 Cir. May 25, 2015), the Louisiana Fifth Circuit Court of Appeal construed the Louisiana Public Works Act (La. R.S. 38:2242, *et seq*.) and held that the subcontractor's failure to timely file a sworn statement of claim and privilege (a lien) deprives the subcontractor of a right of action on the public project's payment bond.

The court found that since La. R.S. 38:2247 provides that no "claimant, as defined in this Part and who has complied with the notice and recordation requirement of R.S. 38:2242(B)" shall be deprived of a right against the payment bond on a Louisiana Public Works Act project, only those claimants who have complied with the referenced notice and recordation requirements are granted a right of action against the payment bond.

In so holding, the court strictly construed the terms of the Louisiana Public Works Act and cited extensive persuasive jurisprudence from other Louisiana state courts of appeal that have consistently held that filing a sworn statement of claim and privilege after the 45 day time period established in La. R.S. 38:2242(B) results in a subcontractor not having a right of action against the Public Works Act payment bond surety.

The court also disagreed with both the holding and the method of statutory interpretation employed by the Louisiana Fourth Circuit Court of Appeal's decision in *"K" Const. v. Burko Const.*, 93-1338 (La. App. 4 Cir. 12/16/93), 629 So.2d 1370, *writ denied*, 94-0149 (La. 3/11/94), 634 So.2d 391, where the Fourth Circuit Court of Appeal permitted a subcontractor to maintain a cause of action against a Louisiana Public Works Act payment bond surety despite the fact that the subcontract did not timely file a sworn statement of claim and privilege. The subcontractor in *Burko* filed only a sworn statement of the outstanding balance with the recorder of mortgages, not a sworn statement of claim.

Thus, the Fifth Circuit Court of Appeal in *Pierce* affirmed the trial court's grant of summary judgment in favor of the payment bond surety.

4. In *Gilchrist Construction Co., LLC v. State, Department of Transportation & Development*, No. 2013-2101, 2015 WL 1020860 (La. App. 1 Cir. Mar. 9, 2015), *reh'g denied* (Apr. 7, 2015), *writ denied* (June 30, 2015). Gilchrist Construction Company, LLC ("Gilchrist"), the general contractor under a public works contract with the Louisiana Department of Transportation and Development ("DOTD"), brought suit against DOTD to recover delay costs incurred due to DOTD's error in underestimating the quantity of embankment and lime necessary to complete the project.

Before turning to the issue of delay damages, the Louisiana First Circuit Court of Appeal held that the trial court erred in refusing to accept DOTD's proffered expert in critical path method ("CPM") scheduling. *Id.* at *4. The First Circuit reasoned that the expert's education and experience qualified him as an expert in CPM, finding that, although the expert's curriculum vitae did not detail his CPM experience, it did reflect that he had used the method for over thirty years in the course of his work as a civil engineer. *Id.* at *6. The court also noted that the expert took classes in CPM scheduling at both Texas A&M and Stanford University. *Id.*

The court then turned to the main issue on appeal - whether Gilchrist proved that the increased quantities of embankment and lime actually delayed the project. *Id.* at *7. Gilchrist calculated the alleged delay damages by modifying the original baseline CPM schedule approved by DOTD to take into account the additional embankment and lime quantities. *Id.* at *8. DOTD argued that, "[b]ecause the CPM schedule was not updated in advance of the extra quantities being incorporated into the work[,]" it was inappropriate to use a modified CPM schedule to determine delays. *Id.* at *11. DOTD reasoned that CPM schedules are used for forward-looking projections, but once the facts are available after the construction is complete, there is no need to resort to projections. *Id.* DOTD argued that, based on the actual progress of the work, no delay was caused by the additional quantities. *Id.*

The court conceded that the schedule used by Gilchrist as evidence of delays contained an error in the projected distribution of the embankment, reflected a production rate much lower than that achieved, and did not account for a change in the embankment construction sequence. *Id.* at *12. The court held that despite the discrepancies in the schedule, "the impacted schedules [were] more in conformity with the parties' contractual agreement for determination of the issue of delay than simply considering the [facts] as suggested by the DOTD." *Id.* at *14. The court recognized the logic in simply relying on the facts, which established that "the embankment work was actually completed in roughly the same amount of time as originally planned[,]" but reasoned that doing so would give "DOTD the unbargained for advantage of reaping the benefits of Gilchrist's efforts to increase productivity to such a rate that the extra quantities did not, in fact, retard the progress of the embankment work." *Id.* Accordingly, the court held that Gilchrist sufficiently proved that the project was delayed due to the additional quantities of lime and embankment, that the overrun was due to an error in the quantities listed by DOTD in its bid advertisement, and that Gilchrist was entitled to recover the damages it incurred due to the delay. *Id.* at *14-15.

Considering the items of delay damages claimed by Gilchrist, the court held that it was entitled to recover its project overhead, plant overhead, and the costs of idle equipment and material stockpiling attributable to the delay. *Id.* at *15. The court, however, held that Gilchrist was not entitled to recover on its claim for home office overhead under the *Eichleay* formula. *Id.* at *17-18. Specifically, the court held that one of the factors essential to recovery under the *Eichleay* formula - that the contractor show a suspension of most if not all of the contract work - was not met because "there was no work stoppage" on the project. *Id.* at *17-18.

5. In *Boes Iron Works, Inc. v. M.D. Descant, Inc., et al*, 154 So.3d 555 (La. App. 1 Cir. 2014), the City/Parish of Baton Rouge brought a a claim for indemnity Rouge against an architect due to alleged deficiencies by the architect in the construction plans. The city's claim was dismissed by the trial court upon a peremptory exception, which was upheld by the First Circuit Court of Appeal. The claim was perempted because the city failed to properly plead it in response to the original petition, and the court could not permit an amendment to relate back after the peremptory period had elapsed. Since "… a cause of action no longer exists after the after the termination of a peremptive period and any right to assert the claim is destroyed, there is nothing to which an amended or supplemental pleading can relate back."

6. In *Wallace C. Drennan, Inc. v. St. Charles Parish*, 2014 WL 4243154 (La. App. 5 Cir. Aug. 28, 2014), a petition for mandamus against the Parish was sought due to non-payment. In response to the petition for mandamus, the Parish argued that mandamus was not appropriate because Drennan had alternatives avenues to seek relief. In holding that mandamus was appropriate, the Fifth Circuit cited La. R.S. 38:2191, and held that that statue

allows a contractor to maintain an action against a public entity when final sums are due, and that a contractors is not limited to ordinary proceedings.

7. In *Fisk Electric Co. v. Woodrow Wilson Construction Co., Inc.*, No. 13-86, 2015 WL 328306 (ED La. Jan. 26, 2015), the United States District Court for the Eastern District of Louisiana granted and denied in part the plaintiff-subcontractor's ("Fisk") motion for summary judgment seeking penalties and attorney fees under Louisiana's prompt pay statute against defendant-general contractor ("Woodrow"), and denied Woodrow's motion for summary judgment seeking statutory attorney fees incurred in defending the action.

The Louisiana prompt pay statute, La. R.S. 9:2784, provides, in relevant part, that:

> When a contractor receives any payment from the owner for improvements to an immovable . . . the contractor shall promptly pay such monies received to each subcontractor and supplier in proportion to the percentage of work completed . . . by such subcontractor and supplier . . . .
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> * * *
>
> If the contractor or subcontractor without reasonable cause fails to make any payment to his subcontractors and suppliers within fourteen consecutive days of the receipt of payment from the owner . . . , the contractor or subcontractor shall pay to the subcontractors and suppliers, in addition to the payment, a penalty in the amount of one-half of one percent of the amount due, per day, from the expiration of the period allowed herein for payment after the receipt of payment from the owner. . . . In addition, the contractor or subcontractor shall be liable for reasonable attorney fees for the collection of the payments due the subcontractors and suppliers. However, any claim which the court finds to be without merit shall subject the claimant to all reasonable costs and attorney fees for the defense against such claim.

Based on a prior ruling in the case, the court noted that Woodrow lacked "reasonable cause" for not remitting payment to Fisk within the statutory fourteen-day period. *Id.* at *3. Accordingly, the court held that Fisk was entitled to the statutory penalty for the amounts withheld by Woodrow, but offset those amounts by the amount of a lien filed by one of Fisk's subcontractors, the premium paid by Woodrow to obtain a bond covering the lien, the amount of a counterclaim asserted by Woodrow, the outstanding punch list items attributable to Fisk, the subcontract retainage amount, and certain change order amounts sought by Fisk. *Id.* The court also held that Fisk was entitled to recover the reasonable attorney fees it incurred to collect payment under its subcontract with Woodrow. *Id.* However, the court held that because "La. R.S. 9:2784 does not *expressly* authorize recovery of attorney's fees incurred in seeking the penalties and attorney's fees allowed thereunder . . . those fees shall *not* be included in the amount to be awarded to Plaintiff." *Id.* Consistent with the awards to Fisk, the court concluded that Woodrow was not entitled to recover attorney fees it incurred in defendant against Fisk's action. *Id.*

8. The issue in *Landis Construction Company v. St. Bernard Parish*, 151 So. 3d 959 (La. App. 4 Cir. Oct. 22, 2014), *writ denied*, 159 So. 3d 467 (La. Feb. 13, 2015), was whether the general contractor under a public-bid contract, Landis Construction Company, L.L.C. ("Landis"), or the owner, St. Bernard Parish ("SBP"), was to bear the cost of the windstorm

deductible on the "ALL RISK" insurance policy provided by Landis under the terms of the general contract. *Id.* at 961.

The text of the contract at issue was "wholly furnished by" SBP, and was based on AIA Form A201, with certain alterations made by SBP. *Id.* Form A201 in its unaltered state provides that it is the owner's responsibility to obtain "ALL RISK" builder's insurance, and that if the policy is subject to deductibles, "the Owner shall pay costs not covered because of such deductibles." *Id.* (quotation marks omitted). SBP rejected this provision of Form A201, and replaced it with a provision requiring Landis to furnish the "ALL RISK" policy. *Id.* SBP also added a provision to the form contract stating that Landis had "the right to purchase coverage or self-insure any exposures not required by the bid specifications[,]" and that Landis "shall be held liable for all losses, deductibles, self-insurance [sic] for coverages not required." *Id.* (quotation marks omitted).

SBP argued that just as the standard Form A201 requires the owner to obtain an "ALL RISK" policy and also bear the cost of any deductible, because Landis was obligated to furnish the policy under the modified contract, it was also required to cover the deductible. *Id.* at 962. Landis countered that if that was intended, the modified contract would have expressly stated that Landis was required to pay costs not covered due to the "ALL RISK" policy deductible, which it did not. *Id.* Landis further argued that it was not responsible for the deductible on the required "ALL RISK" policy because the contract distinguished between required and non-required insurances, and expressly stated that Landis was responsible only for deductibles on non-required insurances. *Id.*

The court found that both SBP's and Landis' construction of the contract was reasonable, and, therefore, that the contract was ambiguous. *Id.* at 963. The court then turned the principles of contract interpretation codified in Louisiana Civil Code Article 2056 providing that an ambiguous contractual provision "must be interpreted against the party who furnished its text[,]" and that any doubt as to the interpretation of a standard form contract provided by one party must be resolved in favor of the other party. *Id.* at 964. Because SBP unilaterally selected AIA Form A201 and modified its text, the court held that both the standard and modified provisions had to be interpreted in favor of Landis. *Id.* Accordingly, the court held that SBP was responsible for the losses not covered due to the windstorm deductible of the "ALL RISK" builder's insurance policy furnished by Landis. *Id.* at 964.

Legislation:

1. **La. R.S. 38:2225.2.4 – Act No. 163.** Effective June 23, 2015, Act No. 163 amends La. R.S. 38:2225.2.4(A)(3), (F)(5), and (G)(5) to authorize a construction management at risk pilot program. This amendment establishes a pilot program whereby public entities may use the construction management at risk contracting method for a single project that is established to cost at least $3 million. Each public entity is only permitted to use the construction management at risk pilot program once, and the pilot program is limited to no more than 10 total projects on a "first-come, first served basis." A public entity wishing to utilize the construction management at risk pilot program must first submit a proposal to the Louisiana House and Senate transportation, highways, and public works committees for review and approval. Section (G)(5) is amended to clarify that the determination of whether the design of a project is not more than 30% complete rests solely with the professional opinion of the owner's design professional.

2. **La. R.S. 48:251.5, 48:256.5, 48:256.6, 48:256.7 – Act No. 29.** Effective May 29, 2015, Act No. 29 amends various sections of the statutes governing Louisiana Department of Transportation and Development ("DOTD") construction projects. Specifically, Act No. 29 amends the following statutes:

La. R.S. 48:251.5 – Under the prior law, in the event the DOTD failed to make final payment due to a contractor after recordation of formal final acceptance and within 45 days of its receipt of a clear lien certificate, the DOTD could be held liable for legal interest on contract balances due and could further be required to release retainage or other payments to a contractor if the final estimate was not complete. Under the new law, the DOTD is now liable for legal interest on the balance due on a contract if the DOTD fails to make any final payment within 100 days after receipt of a clear lien certificate.

La. R.S. 48:256.5 – The prior law required a claimant, after maturity of his claim and within 45 days of recordation of final acceptance of work by the DOTD or notice of default of the contractor or subcontractor, to file a copy of a sworn statement of the amount due with the DOTD and to record the original statement with the recorder of mortgages for the parish where the work was performed. The new law changes this to now require that the claimant record the original sworn statement of the amount due him in the office of the recorder of mortgages for the parish in which the work is done and file a certified copy of the recorded sworn statement of the amount due, showing the recordation data, with the undersecretary of the department.

La. R.S. 48:256.6 – Under the prior law, if a statement of claim or privilege was improperly filed or if the claim or privilege preserved by the filing of a statement of claim or privilege was extinguished, the public entity, contractor, subcontractor, or other interested person could require the person who filed the statement of claim or privilege to give a written authorization directing the recorder of mortgages to cancel the statement of claim or privilege from his records. The new law adds an option for the claimant to instead file an original lien cancellation certificate with the recorder of mortgages and to submit a certified copy of the recorded lien cancellation certificate, showing recordation data, with the undersecretary of the DOTD.

La. R.S. 48:256.7 – The prior law required a party who files a bond or other security to guarantee payment of a statement of claim or privilege to give notice to the DOTD, the claimant, and the contractor by certified mail. The new law adds a requirement for the party to also file a certified copy of the cancelled statement of claim or privilege, showing recordation data, with the undersecretary of the DOTD by certified mail.

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Maine

Legislation:

1. **10 M.R.S.A § 3251, as amended by L.D. 485, An Act to Allow Foresters to Use Mechanics Liens (2015).** This act, which became law as of May 8, 2015, allows licensed foresters to use mechanics liens, just like surveyors, architects, engineers, and real estate agents, in the event of nonpayment for services rendered related to real property.

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Maryland

Case law:

1. In *Ross Contracting, Inc. v. Frederick County, Maryland*, 221 Md. App. 564, 109 A.3d 1276 (Md. App. 2015), Ross Contracting, Inc. ("Ross") contracted with Frederick County, Maryland to replace a bridge, with the project requiring removal of existing supporting abutments and excavation for new supports. During excavation, Ross encountered hard rock material at a higher level than the County's bid information had shown. The County issued a revised design and Ross subsequently submitted a proposed change order requesting that the contract price be adjusted to account for the added costs and time required by the revisions. The County denied the request and, under the contract's dispute resolution terms, a hearing before a county hearing officer was conducted with Ross largely unsuccessful. Ross filed a petition for judicial review in the Circuit Court for Frederick County, and the judge affirmed. Ross then attempted to take an appeal to the Maryland Court of Special Appeals (the intermediate appellate court in Maryland); but the appellate court ruled that it did not have jurisdiction over the appeal. According to the appeals court, under the statutory framework relating to the County, while there was statutory authorization that allowed the circuit court to entertain a petition for judicial review of the county hearing officer's decision, there was no statutory authorization that allowed the intermediate appellate court to exercise further appellate review. The Court therefore dismissed Ross's appeal.

2. In *O'Brien & Gere Engineers, Inc. v. City of Salisbury*, 222 Md. App. 492, 113 A.3d 1129 (Md. App. 2015), *cert. granted*, 444 Md. 638 (August 24, 2015), the City of Salisbury, Maryland contracted to upgrade an outdated wastewater treatment plant to comply with federally mandated standards; however, after the City had paid over $80 million for the upgrade work, the plant still failed to meet the standards. The City sued the project engineer, O'Brien & Gere Engineers, Inc. ("OGE"), and the construction manager, Construction Dynamics Group ("CDG"), various subcontractors, and various sureties. The City and OGE entered into a settlement which included, among other provisions, payment of $10 million to the City, the release and dismissal of OGE, and a non-disparagement clause. In a subsequent trial against the remaining defendants, counsel for the City made various statements that OGE viewed as disparaging – *e.g.,* "the engineering was a mess," "most of the problems were design problems," and the problems were not reported because OGE and the construction manager allegedly were "in bed together." OGE brought suit based upon the comments; and the City asserted that an absolute litigation privilege applied because the statements were made during the course of court proceedings. OGE argued that, pursuant to the agreements in the settlement agreement, the City contractually waived or otherwise was unable to assert that privilege. Affirming the trial court's dismissal of OGE's lawsuit based upon the litigation privilege, the Maryland Court of

Special Appeals held that an individual contractual right to redress will yield to absolute litigation privilege. *[Note: A writ of certiorari for further review was granted by Maryland's highest court, the Maryland Court of Appeals. No decision has been rendered as of the date of this publication.]*

3. In *Mason Builders, Inc. v. Bancroft Construction, et al.*, No. ELH-15-00046, 2015 WL 4040415 (D. Md. June 30, 2015), Bancroft construction ("Bancroft") contracted with the Board of Education for Queen Anne's County, Maryland as general contractor for a middle school construction project. Bancroft subcontracted with JLN Construction Services, LLC ("JLN") for masonry work, and JLN separately hired *D.C. Mason Builders, Inc.* ("DCMB") as a sub-subcontractor. JLN eventually suspended DCMB from work on the project and then terminated DCMB, allegedly done at the direction of Bancroft. DCMB sued Bancroft, JLN, and Bancroft's payment bond surety alleging, among other things, that Bancroft tortiously interfered with DCMB's contractual relationship with JLN. Bancroft moved to dismiss the tortious interference claim, arguing that it was a party to the "economic relationship" underlying the sub-subcontract at issue. DCMB countered that Bancroft's economic relationship with the sub-subcontract was irrelevant, because Maryland law does not turn upon being a party to an underlying economic relationship, but rather, upon whether one is a party to the *contract*. The federal court ruled that where a plaintiff alleges tortious interference with contract and the defendant is a party to the underlying economic relationship but not to the contract at issue, the tort creates a claim for liability based on the defendant's inducement of a third party's breach *because* the injured party could not bring a breach of contract claim against the defendant.

4. In *Advance Telecom Process, LLC v. DS Federal, Inc.*, 224 Md. App. 164, 119 A.3d 175 (2015), DS Federal, Inc. ("DSF") and Advance Telecom Process, LLC ("ATP") entered into a teaming agreement to secure a government contract under which DSF would be the prime contractor. ATP sued when DSF subsequently failed to execute a subcontract with ATP. Affirming the trial court's dismissal of the lawsuit, the Maryland Court of Special Appeals held that the parties did not reach mutual assent to reasonably certain terms with regard to the subcontract. The court noted that the teaming agreement included "some language suggesting an obligation by to issue a subcontract to the subcontractor." However, the court determined that, when read as a whole, the remainder of the teaming agreement indicated that the parties only reached an agreement to negotiate a future subcontract. Since the teaming agreement envisioned that future negotiations were required before a subcontract would be executed, the parties merely reached an "agreement to agree" on a future subcontract which was unenforceable.

Legislation:

1. Chapter 29 of 2015 Maryland Laws – enactment concerning Underground Utility Damage Prevention and Connecting Buildings to Water Supply Systems and Sewerage Systems (adding to Maryland Environment Article Section 9–223.1 and to Maryland Public Utilities Article Sections 12–129 and 24–107). This legislation requires that any new or replacement piping that is buried or installed for the purpose of connecting a building to a water supply system or sewerage system be buried or installed with insulated copper tracer wiring that is suitable for direct burial and has an American wire gauge (AWG) of at least 10, or an equivalent product that makes the piping detectable.

2. Chapter 174 of 2015 Maryland Laws – enactment concerning the Construction of Overhead Electricity Transmission Lines (repealing and reenacting with certain changes Maryland Public Utilities Article Sections 1–101(a), (h), and (u) and 7-207). This legislation now authorizes a person – rather than solely an electric company – to obtain a certificate of public

convenience and necessity (CPCN) to begin construction of an overhead transmission line that is designed to carry voltage in excess of 69,000 volts or exercise a right of condemnation with the construction, subject to specified conditions. Similarly, statutory requirements and conditions for construction, related to an existing overhead transmission line are expanded to include any person, rather than solely an electric company.

3. Chapter 239 of 2015 Maryland Laws – enactment concerning modifications to Maryland Building Performance Standards regarding Energy Codes (repealing and reenacting with amendments Maryland Public Safety Article Section 12-503). This legislation requires the Maryland Department of Housing and Community Development ("DHCD") to adopt modifications to the Maryland Building Performance Standards that allow any innovative approach, design, equipment, or method of construction that can be demonstrated to offer performance that is at least the equivalent to the requirements of the International Energy Conservation Code (IECC); Chapter 13, "Energy Efficiency," of the International Building Code (IBC); or Chapter 11, "Energy Efficiency," of the International Residential Code. Under the bill, DHCD is also required to review, consider, accept or reject, and hold hearings on alternative energy efficiency code proposals from local jurisdictions and private organizations.

4. Chapter 290 of 2015 Maryland Laws – enactment concerning Public-Private Partnership Agreements and Security Requirements for Construction Contracts (repealing and reenacting with amendments Maryland state finance and Procurement Article Section 10A-401). This legislation clarifies that the requirements for the amount of payment security and any performance security in the form of a performance bond submitted for construction contracts under a public-private partnership (P3) be established on the value of the respective construction elements and not on the total value of the P3 agreement.

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Massachusetts

Case law:

1. In *Cocchi v. Morais Concrete Serv., Inc.,* 2015 Mass. App. Div. 49 (Dist. Ct. 2015), the court ruled in favor of defendant contractor, holding that a contract between a contractor and a subcontractor to perform tree removal for a municipality was not void, despite the fact the contract did not expressly state that the subcontractor's workers were entitled to the prevailing wage. The court noted that though M.G.L. c. 149 § 26 requires laborers on public projects to be paid the prevailing wage for their work, there is nothing in the statute that requires a contract or subcontract to expressly state that laborers are so entitled as long as they are actually paid the required wage. The court also held that a general contractor's signatures on invoices were a subsequent promise to pay for work already performed and therefore were not valid contracts. Performing an existing legal obligation is not sufficient consideration for the formation of a new contract under Massachusetts law. The court therefore found that invoices signed for work already performed as part of an initial contract failed as modifications to the contract for want of consideration.

2. In *Rodrigues v. Tribeca Builders Corp.,* 2015 WL 1421380 (Mass. Super. Mar. 6, 2015), the court granted summary judgment in favor a defendant project management firm against a plaintiff hired by a carpentry subcontractor and injured on the job. The court found that there was no cognizable negligence claim against the project manager because the firm did not

owe the plaintiff a legal or contractual duty of care. The court stated that the general contractor's contract with the owner made the general contractor solely responsible for the safety of workers on the job and that the project manager's contract with the owner only described administrative duties in no way related to project safety. Further, the project manager's contractual duty to provide scheduling and coordination services to the project was not evidence of control over the work site sufficient to give rise to a legal duty of care.

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Michigan

Case law:

1. In *Macomb Mechanical, Inc. v LaSalle Group, Inc.,* 2015 WL 1880189 (Mich. 2015), the Michigan Court of Appeals relaxed the normally strict enforcement of both "No Damages for Delay" and "Pay-if-Paid" provisions contained in certain construction contracts. The court held that a "No Damages for Delay" provision does not apply where the parties to the contract did not contemplate extensive delays at the time of contracting. The Appeals Court also held that a "Pay-if-Paid" provision in a subcontract may not apply to compensation for additional work where no change order was issued and the additional work never became part of the subcontract.

With respect to the first topic, the Court noted its previous ruling, in *Phoenix Contractors, Inc. v. Gen. Motors Corp.*, 355 N.W.2d 673 (Mich. App. 1984), that "no damages for delay" clauses are generally enforceable in Michigan, subject to several exceptions: "where the delay (1) was of a kind not contemplated by the parties; (2) amounted to an abandonment of the contract; (3) was caused by bad faith on the part of the contracting authority; or (4) was caused by the active interference of the other contracting party." In addition to these four exceptions, the Court held that damages caused by "unreasonable delays" also were not subject to a "no damages for delay" clause.

With respect to the second topic, the Court reiterated that "pay-if-paid" clauses, when the payor's obligation is clearly made subject to the condition precedent that the payor has itself received payment, are generally enforceable. However, such clauses are subject to an important limit: "A contracting party who prevents or renders impossible the satisfaction of a condition precedent may not rely on that condition to defeat liability." Finding that a subcontractor had raised triable issues with respect to the enforceability of both the "no damages for delay" clause and the "pay-if-paid" clause, the Court reversed the trial court's summary dismissal in favor of the general contractor on those points.

2. In *Lawrence M. Clarke, Inc. v Draeger,* 2015 WL 205182 (Mich. 2015), the Michigan Court of Appeals rejected recovery under a theory of unjust enrichment due to the fact the subject matter of the claim was covered by an express written contract. The court upheld the principal that recovery under a theory of quantum meruit, or unjust enrichment, is not available where an express contract governs the matter at issue. *See Morris Pumps v. Centerline Piping, Inc.,* 273 Mich. App. 187, 194; 729 N.W.2d 898 (2006). The context for the ruling was the (also) familiar situation in which multiple claims and assertions (in this case between a general contractor and a subcontractor) defied easy contractual analysis. As the trial court candidly admitted, "The parties could not figure out among themselves which party owed the other money, so they approached a trial judge that was otherwise ignorant about the transaction and gave him the authority to apply his ignorance to the hundreds of transactions that were

documented during the course of the project." The complexity of the contractual analysis was no excuse for resorting to an unjust enrichment theory, however: "mere inconvenience in determining contractual obligations is not a reason to eschew contract law in favor of unjust enrichment principles." The Court of Appeals reversed the trial court's judgment in favor of the general contractor and sent the case back.

3. In *Epps v 4 Quarters Restoration, LLC,* 498 Mich 518; 872 N.W.2d 412 (2015), the Michigan Supreme Court addressed three issues arising from a suit by a homeowner against an unlicensed builder: first, whether the unlicensed builder could defend against claims asserted by the owner; second, whether the statute prohibiting the unlicensed builder from maintaining an action for compensation (MCL 339.2412(1)) provided the owner with an independent cause of action; and third, whether the unlicensed builder's contract was void *ab initio* or merely voidable. As to the first issue, the Court held that MCL 339.2412(1) merely prohibited a suit for compensation by the unlicensed builder; it does not prevent the builder from defending against claims brought by the owner. As to the second issue, however, the Court held that, "MCL 339.2412(1) does not afford a homeowner a separate and independent right to demand that an unlicensed builder return funds paid for work conducted when the builder lacked the requisite license." Rather, the Court held, homeowners are protected from the performance of unlicensed work through existing and traditional common law causes of action in tort and contract. Finally, the Court held that an unlicensed builder's contract is merely voidable at the election of the owner, not void *ab initio*. As a result, and contrary to the conclusion reached by the Court of Appeals, the plaintiff-homeowner was not entitled to a summary determination that the defendant-contractor converted funds it received from the homeowner's insurance company. Because the contract was merely voidable, the defendant-contractor's receipt of those funds pursuant to the contract's assignment and power of attorney addenda was not without legal authority at the time he received them.

4. In *Windrush, Inc., v Lee Van Poppering, Shagbark Development, Inc. and Northland Management, Inc.* 2015 WL 5314831 (Mich. 2015), the Michigan Court of Appeals affirmed personal liability for violations under the Michigan Builders Trust Fund Act, MCL 570.151 *et seq*. The Court found that the building contractor's sole shareholder was responsible for financial decisions, and regardless of his "subjective intent to defraud or obtain personal financial benefit," the individual was held personally liable for the debt due his subcontractor. The building contractor received funds due to the subcontractor for proper work performed and materials supplied, but utilized those funds for purposes other than to pay the subcontractor. The sole shareholder was held personally liable because "he managed all of the relevant transactions and accounts," and he was responsible for the building contractor's "financial decisions and actions."

5. In *Rieth-Riley Construction Co., Inc. v Ecopath Contracting LLC,* 2015 WL 3604633 (Mich. 2015), the Michigan Court of Appeals reversed a lower court decision dismissing the case based on a forum selection clause. In its holding, the Court ruled that while the parties contracted to submit to the jurisdiction of Arizona courts, there was nothing in the agreement indicating that Arizona was the *exclusive* forum in which disputes *could* be resolved. The statute, MCL 600.745(3) states in that an action may be dismissed if the parties agree in writing that an action shall be brought only in another state. The contract at issue failed to use exclusionary language such as "only" and therefore, the statute did not require dismissal. Because the forum selection clause at issue did not grant the Arizona courts exclusive jurisdiction, the Court reversed the trial court's dismissal.

6. In *Travelers Prop. Cas. Co. of Am. v. Peaker Servs., Inc.*, 855 N.W.2d 523 (Mich. App. 2014), the Michigan Court of Appeals construed a CGL policy's exclusion for "contractual liability" to apply only where the insured has assumed the liability of another. The case involved the insured's installation of equipment at a power plant at the University of Michigan. Under the insured's contract with the University, the insured agreed to be responsible for costs to return to "as was" condition any property damaged by the insured in the course of performing its work. In a separate lawsuit the University alleged that the insured defectively installed the equipment, causing extensive damage to the power plant. The insurer, in this declaratory judgment action, argued that the term "assumption of liability" provision of the "contractual liability" exclusion included all contracts wherein the insured assumed any liability, including its own liability. The Court of Appeals rejected this argument, stating that, "'assumption of liability' in the context of a CGL policy's contractual-liability exclusion refers to those contracts or agreements wherein the insured assumes the liability of another."

7. In *U.S. ex rel. Walter Toebe Const. Co. v. Guarantee Co. of North America*, 66 F. Supp. 3d 925 (E.D. Mich. 2014), the United States District Court for the Eastern District of Michigan, applying Michigan law, held that the general rule that a claim for unjust enrichment will not lie where an express contract covers the same subject matter was inapplicable where the express contract created different rights and duties, albeit on the same construction project. The case involved a performance bond surety who took over performance of the work for the prime contractor. A sub-subcontractor on the project filed a claim under the payment bond and also made a claim for unjust enrichment. As to the latter claim, the District Court rejected the surety's argument that the performance bond constituted an express contract covering the same subject matter thereby defeating the sub-subcontractor's claim. Rather, the District Court held, "[t]he unjust enrichment claim is not precluded by the existence of any express contract between the parties because there was no such contract. The payment bond, to the extent that it involved [the surety] and [the sub-subcontractor], did not directly govern the nature of the work [the sub-subcontractor] was to perform or the terms of payment for that work. And the performance bond provided no benefit to [the sub-subcontractor] at all. There was no contract involving the construction work between [the prime contractor] and [the sub-subcontractor], and by extension there was no contract between [the surety] and [the sub-subcontractor] once [the surety] took over as the completion contractor." The District Court denied the surety's motion to dismiss the unjust enrichment claim.

Legislation:

1. S.B. 309, Condominiums. This bill amended Section 66 of the Condominium Act (MCL 559.101 *et seq.*) to require all condominium subdivision plans to be prepared by, "a licensed architect, licensed professional surveyor, or licensed professional engineer and [to] bear the signature and seal" of such licensed professional. The amendment further specifies the contents of a complete condominium subdivision plan. The purpose of the amendment is to ensure that such plans will no longer be prepared by unlicensed professionals and to align the new requirements with the official titles of professionals, as used in the Occupational Code (MCL 339.101 *et seq*.).

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Minnesota

Case law:

1. In *J.D. Donovan, Inc., et al. v. Minn. Dep't of Transp., et al.*, Nos. A14-0863, A14-1021, 2015 WL 404666 (Minn. Ct. App. Feb. 2, 2015), the Minnesota Court of Appeals rejected contractors' challenges to MnDOT's authority to request payroll records under the Minnesota Prevailing Wage Act (MPWA). MnDOT awarded two highway-construction contracts to two different prime contractors. Those prime contractors used subcontractors to haul and supply materials. During the project, MnDOT demanded that one of the prime contractors, along with the hauling subcontractors, turn over payroll records to verify compliance with the MPWA. The contractors collectively refused and sued MnDOT, alleging that MnDOT did not have the authority to demand their records. The contractors first argued that the hauling work was not "work under the contract" as that term is defined in the MPWA, and therefore that the MPWA did not apply, because the hauling subcontractors were not performing a "construction activity" by simply hauling materials from commercial refineries to the prime contractor's facility. The court disagreed, noting that the Minnesota Administrative Rules broadly define "construction activity" to include a contractor that hauls materials. In addition, the court found that a contractor need not actually visit the construction site to be doing "work under the contract." Finally, the court found that the hauling activity did not fit under an exemption in the MPWA. Ultimately, while the court was "sympathetic" to the contractors' plight, MnDOT was within its statutory rights to demand payroll records.

2. In *Corval Constructors, Inc. v. FPD Power Development, LLC*, No. A14-0706, 2015 WL 1280963 (Minn. Ct. App. March 23, 2015), the Minnesota Court of Appeals held that a subcontractor's failure to follow the contract's written change order requirements precluded it from recovering for its costs in performing the work, and that where the subcontractor did not raise arguments of estoppel, waiver, and contract modification early in the pleadings, it was prevented from doing so later. Corval's subcontract agreement with FPD required that any request for additional compensation under the contract be submitted as a change order within three days of a directed change. Substantial changes occurred on the project, and nearly one-third of all of the approximately 150 change orders were approved and paid, despite FPD's failure to follow the three-day notice requirement and change order process. Weeks after the contract was complete, FPD submitted several additional requests seeking extra compensation and filed a lien against the property when Corval did not pay. Corval tendered a payment bond as substitute security and filed its lawsuit. FPD countersued for breach of contract, claiming that it was in compliance with all of the contract's terms, and Corval had breached the contract by failing to make payment. FPD later revised its argument, asserting that Corval's actions had waived the written change order requirement. The Court refused to allow this new argument, and found that by not complying with the change order process, FPD was not entitled to additional amounts under the contract.

3. In *Construction Services, Inc. of Duluth v. Town of Alborn*, No. A14-0977, 2015 WL 1880250 (Minn. Ct. App. April 27, 2015) the Minnesota Court of Appeals held that the contractor's indemnity agreement with its surety assigned to the surety all of the contractor's rights and interests following the contractor's default, including a claim for additional amounts owed. The case involved a contract for the construction of a wastewater-treatment facility, which due to delays, the town eventually terminated. North American Surety Insurance stepped in to fulfill its performance bond obligations, and sought to recover from the town any remaining contract funds due to its position under the indemnity agreement, which the town paid to it. The contractor filed suit to recover funds it asserted it was owed under the contract. The district

court concluded that the contractor was not entitled to seek relief because the plain terms of its indemnity agreement assigned any right to recovery to its surety in the event of default. The Court of Appeals agreed. The contractor argued that it had not materially breached the contract, however the Court found the numerous delays in the record did constitute material breach. The Court also found that the town has not breached the contract by failing to pay the sixth progress payment, since the contractor had not followed the contract's terms for resubmitting a payment application. While the town admitted that it did not follow the proper claims procedure to adjust the contract price following its denial of the payment, the Court found that this was proper, as it offset the contract price against expenses incurred as a result of the contractor's delay. Finally, the Court found the contractor's general claim for breach of contract did not encompass a claim that the town had not followed the proper process in terminating it, and thus declined to address this argument.

4. In *Unison Co., Ltd. v. Juhl Energy Development, Inc.*, 789 F.3d 816 (8th Cir. 2015), the Eighth Circuit reversed the Minnesota District Court's decision and required the parties to submit their claims to arbitration. Unison, a South Korean company that manufactures, sells, delivers and services wind turbine generators ("WTG'") and the defendants, (collectively, "JEDI"), entered into two agreements. In the first agreement ("TSA"), Unison agreed to design, manufacture, and sell two WTGs to JEDI in exchange for over $2.5 million; the effective date for the TSA was April 16, 2010. The second agreement was a financing agreement ("FA") where Unison agreed to lend JEDI the amount of the TSA contract price, $2.5 million; the effective date for the FA was April 14, 2010. Subsequently, Unison brought suit against JEDI in the District Court of Minnesota asserting 17 claims, all relating to the FA. JEDI filed a motion to compel arbitration based on the arbitration clause contained in the TSA. The District Court denied JEDI's motion and JEDI appealed to the Eighth Circuit. The terms of the TSA require the parties to submit disputes in relation to or in connection with the TSA to binding arbitration. The FA did not contain an arbitration provision. The question to the Court was whether the FA, which makes no mention of arbitration, embodies a "legal relationship" that is either "associated with or contemplated by" the TSA in order to compel Unison to submit its claims to arbitration. Several factors were listed in the Eighth Circuit's decision, including that the FA refers to the TSA, the FA conditions Unison's obligation to loan money upon receiving each Project Document which included the TSA, and there were several other references to the TSA contained within the FA. The Court found these cross references, along with the interdependent nature of the parties' obligations under both the TSA and the FA, made it difficult to read these documents without reaching a conclusion that they are two parts of one overarching business plan between the parties. Overall, the Court reversed the trial court's decision and required the parties to resolve the disputes under the FA through binding arbitration.

5. In *Goodin Co. v. City of Prior Lake*, No. A14-1144, 2015 WL 1013947, (Minn. App. Mar. 9, 2015), the Minnesota Court of Appeals held that a city was not liable to a supplier even though the city had not required the project's general contractor to post a payment bond. The city contracted with a general contractor to replace a boiler for $14,780. The general contractor ordered a $5,942 boiler from the supplier, but did not pay the supplier. The supplier sued the city, claiming that the Public Contractor's Performance and Payment Bond Act required the city to obtain a payment bond (or another form of security) from the general contractor and, because the city did not obtain a bond, the city was liable for the general contractor's nonpayment. The Court rejected the supplier's argument, noting that, under the relevant statutory provision a public body is only liable for a general contractor's nonpayment if the public body fails to obtain a bond or other security "*as required by the act*." Minn. Stat. § 574.29 (emphasis added). And because the Act only requires a public body to obtain a bond

when the estimated cost of a project is greater than $100,000, *see id.* § 574.26, subd. 2, the city was not required to obtain a bond and, therefore, was not liable for the general contractor's nonpayment.

6. In *The Jamar Co. v. Independent Sch. Dist. No. 2142*, No. A14-1187, 2015 WL 2341325 (Minn. App. May 18, 2015), the Minnesota Court of Appeals held that an arbitrator's prevailing-party determination was enforceable and, therefore, awarded attorney's fees to the respondent-school district even though the arbitrator had determined that the school district owed the claimant-contractor money. In this case, a contractor agreed to install a sure-white roof on a school building over the winter, but later told the school district that installing such a roof would be impossible because of the colder temperatures. The contractor recommended a different type of roof system; the school district agreed and issued a construction change directive. Once the different type of roof system was installed, the contractor estimated that the different roof system cost an additional $183,000 to install. The school district refused to pay that amount, and the contractor initiated arbitration seeking $149,308.65. The contractor later reduced its claim to $86,786.72, and was ultimately awarded $40,809.22. The arbitrator stated that, if the contractor had accurately calculated its costs from the outset, the dispute probably would have been avoided. Therefore, the arbitrator proclaimed the school district the prevailing party, awarding the school district its attorney's and expert witness fees.

The court of appeals upheld the arbitrator's prevailing-party determination, noting that the parties' contract stated that the arbitrator shall determine the prevailing party and, because the term "prevailing party" was not defined by the contract, the parties gave the arbitrator complete discretion to name the prevailing party. The court also held that, even if the arbitrator's determination was based on a mistake of law or fact, there was no evidence that the arbitrator acted outside the scope of his authority, committed fraud or other misconduct, or mistakenly applied his own methods. Therefore, the court held that it could not vacate the arbitrator's decision to name the school district the prevailing party and award it attorney's and expert witness fees.

7. In *Assoc. Elec. & Gas Ins. Serv. v. BendTec, Inc.*, 2015 WL 3915805 (D. Minn. June 25, 2015), the United States District Court for the District of Minnesota applied the two-year statute of limitations in Minn. Stat. § 541.051 for improvement to real property applied to a materials subcontractor's sale of turbine piping, rather than the general six-year statute of limitations for negligence. The subcontractor fabricated turbine piping to the contractor's specifications, then cleaned it with grit blasting, inspected it, capped it, and delivered it for contractor installation. The piping was later discovered to have grit blast remnants that were blown into the turbine, affecting its ability to generate power. The court declined to apply the exception in § 541.051(e) for the manufacturer or supplier of equipment or machinery installed on real property. The court noted that this only applied in exceptional circumstances and that equipment or machinery is considered large scale items, not integral to or incorporated in the building, and which can exist outside the building structure. The court determined that the piping, built to contractor specifications with no independent function, was instead building material incorporated into the construction work outside the manufacturer's control, and so any claim against the materials subcontractor would be subject to the two-year statute of limitations.

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Mississippi

Case law:

1. In *Hanco Corp. v. Goldman*, 178 So.3d 709 (Miss. Sep. 17, 2015), the issue was whether a general contractor and its subcontractor had waived defenses available under the Mississippi Workers' Compensation Act. In that case, Wayne Kelly and two other employees leased by a subcontractor were killed while connecting sewer lines at a construction site when a trench caved in and buried them. The leasing company's workers' compensation insurance paid out on the claim. The decedent's family then sued the project's general contractor, Hanco Corporation, and its subcontractor American Air. The Hanco/American Air subcontract required that American Air carry workers' compensation and employers' liability insurance and that American Air provide Hanco with "valid certificates of insurance prior to commencement of work verifying that insurance requirements and limits have been met." Hanco and American Air argued that summary judgment was appropriate because workers' compensation benefits were paid. The trial court denied the summary judgment motion submitted by Hanco and American Air. Although the Mississippi Workers' Compensation Act provides the exclusive remedy to claimants seeking compensation for on-the-job injuries, the Mississippi Supreme Court found that Hanco waived its exclusive-remedy affirmative defense by actively participating in the litigation for 26 months without pursuing the enforcement of the affirmative defense. Even though Hanco had asserted the exclusive-remedy defense in its answer, it waived the affirmative defense by not bringing it to the Court's attention until the summary judgment motion. The trial court's judgment denying Hanco's motion for summary judgment was therefore affirmed.

2. In *Inn by the Sea Homeowner's Ass'n v. Seainn, LLC*, 170 So.3d 496 (Miss. 2015), the issue was whether two engineering expert witnesses were properly excluded under a *Daubert* challenge. The plaintiff, a homeowners association, brought suit against multiple defendants involved in the development, design and construction of condominiums rebuilt after Hurricane Katrina. Significant problems with the building became evident within a year of the reconstruction. During a *Daubert* challenge, one engineer disclosed that the vast majority of his estimates (22 of 23 estimates) on alleged structural damages were based on a five-year-old RS Means manual. The trial court found a second engineer unqualified to provide expert testimony where he stated that a range of $1.66M and $4.2M was his general estimate, and that to establish anything more specific would require bringing in someone more qualified. The trial court then granted summary judgment to the defendants after excluding the testimony of the Plaintiff's expert witnesses. On appeal, the Mississippi Supreme Court found that the trial court did not abuse its discretion in excluding the plaintiff structural engineers' testimonies under the Mississippi Rule of Evidence 702 concerning cost damages arising from defects in the design and construction of condominiums. The trial court's order granting summary judgment to the defendants was affirmed.

3. In *Hill v. City of Horn Lake*, 160 So.3d 671 (Miss. Jan. 15 2015), the Mississippi Supreme Court held that Section 31-5-51 of the Mississippi Code, which requires contractors for public works projects to furnish proof of general liability insurance, does not create a private cause of action for personal injuries against government entities, like cities, that let contracts without first obtaining proof of insurance. The Court found no genuine issue of material fact because it was not shown that the City exercised more than a supervisory role over the project which led to Plaintiff Hill's serious injury when a trench collapsed on itself. This supervisory role was found to be insufficient to trigger a master-servant relationship.

4. In *Logan v. Mississippi Department of Transportation and Mississippi Transportation Commission*, 174 So.3d 249 (Miss. 2015), the issue was whether state agencies had sovereign immunity for an accident caused by a damaged bridge. The trial court found that there was no basis in fact to infer that either of two state agencies knew or should have known that a bridge repair had been damaged, and that a dangerous condition had been created. On appeal, the Mississippi Supreme Court found that the trial court failed to perform an immunity analysis of the failure-to-warn claim, and remanded the matter back to the trial court for a detailed summary-judgment analysis.

5. In *City of Magee v. Jones*, 161 So.3d 1047 (Miss. Apr. 23, 2015), the issue was once again one of governmental sovereign immunity. Raw sewage entered Connie Jones' house through a shower drain and flooded several rooms of the house. Ms. Jones sued the City of Magee for negligent installation and maintenance of the sewage lines that provided service to her home. After suit, the Mississippi Supreme Court issued its ruling in *Fortenberry v. City of Jackson*, 71 So.3d 1196 (Miss. 2011) that a plaintiff's suit against the City of Jackson for negligent sewage-system maintenance was barred by the discretionary-function exception of the Mississippi Tort Claims Act. The City of Magee then filed a summary judgment motion in light of the *Fortenberry* decision, arguing that Ms. Jones' suit was barred by the MTCA's discretionary-function exception because her claim was based on acts of sewage-system maintenance. The trial court denied the City's motion, finding that once the City had chosen to operate a sewage system, it then had a ministerial duty to maintain the system. The City filed an interlocutory appeal over the issue of whether the City was immune from suit under Section 11-46-9(1)(d) for its alleged acts and omissions concerning the maintenance of its sewer system. The Mississippi Supreme Court noted that the trial court had relied upon the *Fortenberry* decision in denying the City's motion, but that the test outlined in *Fortenberry* has been overruled by the decision in *Brantley v. City of Horn Lake*, 152 So.2d 1106 (Miss. 2014)(holding that Section 11-46-9(1)(d) applies to governmental functions, rather than acts, and does not limit immunity to decisions involving policy considerations). Under the *Brantley* test, the Court must determine first whether the governmental function at issue is discretionary or ministerial. The second prong involves an examination by the Court as to whether there is any narrower duty associated with the activity at issue in order to determine whether there is any law that renders the duty at issue a ministerial duty, even if it were performed within the scope of a broader discretionary function. The Mississippi Supreme Court vacated the trial court's denial of the City's motion for summary judgment, and remanded the matter for the parties to present evidence and arguments in light of the *Brantley* ruling.

6. In *The Hotboxxx, LLC v. City of Gulfport*, 154 So.3d 21 (Jan. 8, 2015), the chancery court ruled that, because Plaintiff Hotboxxx submitted an invalid privilege license application which rendered its commercial property lease void, Hotboxxx lacked standing to sue the City of Gulfport over the constitutionality of a zoning ordinance. On appeal, the Mississippi Supreme Court affirmed the chancellor's judgment.

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Missouri

Case law:

1. In *Shelter Products, Inc. v. OMNI Construction Company, Inc.*, 479 S.W.3d 189 (Mo. App. W.D. 2016), the Missouri Court of Appeals held that the Federal Arbitration Act (FAA)

mandated a stay of the litigation of a general contractor's cross-claim against a property owner for breach of contract. The arbitration agreement between the owner and general contractor was enforceable regardless of the existence of multiple mechanic's liens that created a basis for an equitable mechanic's lien action. As to the remaining claims not subject to arbitration, the Court held the litigation was not in its entirety subject to a mandatory stay under the FAA or Missouri law requiring all equitable mechanic's lien claims to be resolved in one case. The remedy available to the general contractor was to seek a discretionary stay from the trial court.

2. In *Klenc v. John Beal, Incorporated*, No. ED 102819, 2015 WL 8229738 (Mo. App. E.D., Dec. 8, 2015), the Missouri Court of Appeals held that where condominium unit owners are neither parties nor third-party beneficiaries to a construction contract, they lack standing to bring an action against a contractor for breach of contract regarding work performed on the common elements of the condominium. While the rights of condominium unit owners are expressly preserved in Missouri's Condominium Property Act, nothing in the statute actually confers standing on the unit owners to bring such actions.

3. In *Consolidated Service Group, LLC v. Maxey*, 452 S.W.3d 768 (Mo. App. S.D. 2015), the Missouri Court of Appeals held that a homeowners refusal to give a roofing contractor an opportunity to cure defects in a new roof installation, despite the presence of a right-to-cure provision in the parties' contract, was an anticipatory breach of contract by the homeowner that excused the roofing contractor from its contractual obligations. And because the homeowners breached the parties' contract, the roofing contractor was entitled to proceed on a breach of contract action against the homeowners and seek recovery of damages resulting from the homeowners' failure to pay any amount of the contract price to the roofing contractor.

4. In *Rapp v. Eagle Plumbing, Inc.*, 440 S.W.3d 519 (Mo. App. E.D. 2014), the Missouri Court of Appeals considered a bricklayer's negligence action asserted against a plumbing contractor for injuries sustained when the bricklayer at a construction site fell into a trench that was being used by a plumbing contractor for the placement of drainage pipes. The court affirmed that subcontractors in Missouri owe "a duty to exercise reasonable care not to cause injury to the employees of others" for the reason that a subcontractor is in charge of and has control of its own work. But, as a consequence, the open and obvious doctrine applies to a subcontractor's work and is available as a defense. The trench, even though not flagged or otherwise barricaded, was an open and obvious danger, which obviated the plumbing contractor's duty to protect the bricklayer from any hazard posed by its presence.

5. In *John Knox Village v. Fortis Construction Company, LLC,* 449 S.W.3d 68 (Mo. App. W.D. 2014), the Missouri Court of Appeals held that fraudulent misrepresentations made by a contractor, including that all work for which payment was requested would be free and clear of liens and claims, that contractor would timely pay subcontractors for work performed, and that payments received by contractor would be used to pay subcontractors for work itemized on a payment application, were sufficient to support a judgment piercing the corporate veil to hold owners individually responsible for resulting damages.

6. In *Systemaire, Inc. v. St. Charles County*, 432 S.W.3d 783 (Mo. App. E.D. 2014), the Missouri Court of Appeals reversed a summary judgment granted in favor of a mechanical contractor awarding damages, and prompt pay attorney fees and costs to a mechanical contractor that installed two cooling towers and performed other related work for a Missouri county. The court found a material issue of fact existed as to whether all conditions precedent to payment, including the providing of required close out documents, had been satisfied under the project contract, which was necessary to trigger the Missouri Public Prompt Pay Act.

7. In *Captiva Lake Investments, LLC v. Ameristructure, Inc.*, 436 S.W.3d 619 (Mo. App. E.D. 2014), the Missouri Court of Appeals upheld a grant of summary judgment in favor of an architect on an owner's claims of negligence, breach of contract, and breach of implied warranties. Original owner of a condominium project defaulted on its obligations to project lender. A new entity was created and took assignment of the lender's interest in the project; the new entity then foreclosed on the project and sued the project architect. The court found that the architect owed no duty to the new owner, who was not a party to the architect's subcontract with the general contractor.

8. In *Developer Services Corp. v. Triple J Const., Inc.* 440 S.W.3d 437 (Mo. App. W.D. 2014), the Missouri Court of Appeals held that a contractor was deemed an "original contractor" under the Missouri's mechanic's lien statutes even though the owner acted as its own general contractor. "Original contractor" is not synonymous with "general contractor" under the lien statutes. And because the statutory notice required from an original contractor was not provided to the owner prior to the contractor asserting its lien claim, the lien was invalid and the claim failed.

9. In *Hall v. Fox*, 426 S.W.3d 23 (Mo. App. W.D. 2014), the Missouri Court of Appeals considered a contractor's action against a nursing home and its owner for breach of contract arising from a bid of $50,000 to construct an addition. During construction, the contractor billed the nursing home on a time and materials basis. Near the end of the project, the nursing home realized the contractor's bills had exceeded the $50,000 bid and refused further payment. Contractor refused to finish the project and a replacement contractor was hired. In response to the contractor's suit for breach of contract, the nursing home counterclaimed and asserted a breach of contract by the contractor, arguing that a fixed price contract existed based on nursing home's acceptance of the bid, and that contractor had breached the contract and overbilled for the construction work. The court affirmed judgment in favor of the nursing home, finding the parties' mutual assent to a fixed price contract was evident from the parties' words and actions. Specifically, the contractor prepared the bid; the bid laid out the estimated costs of the different components of the project; the bid was based on the architectural plans of the addition; and the bid quoted $50,000 for price for the project and was signed by the contractor.

10. In *Drury Co. v. Missouri United School Ins. Counsel,* 455 S.W.3d 30 (Mo. App. W.D. 2014) the Missouri Court of Appeals considered a roofing subcontractor's suit against a school district's builders risk insurer to recover for breach of contract and statutory vexatious refusal to pay for damage sustained to a roof deck installed in connection with a school addition project. The insurer challenged the subcontractor's standing to bring the claim and argued the subcontractor was not covered by the policy by arguing that the subcontractor was not a co-insured or third-party beneficiary under the policy. The court disagreed and held the roofing subcontractor was a third-party beneficiary of the school district's builder's risk policy with standing to bring its claims based on the plain and unambiguous language of the policy, which expressed an intent that the policy benefit an identifiable class of persons—subcontractors on construction project. As a result, the court held that the policy covered such subcontractors as third-party beneficiaries of the policy, even though the policy did not specifically name any individual subcontractors as insureds.

11. In *City of Chesterfield v. Frederich Construction, Inc.*, 475 S.W.3d 708 (Mo.App. E.D. 2015), the Missouri Court of Appeals, Eastern District, found that absent a dispute resolution clause in the parties' contract designating arbitration and the rules of the American

Arbitration Association in awarding attorney's fees, fees would not have been awarded. In this case, the contract did not expressly provide for an award of attorney's fees. However, as the parties adopted the rules of AAA, the Court allowed the arbitration award of fees to stand.

12. In *Clyde Woodall v. Christian Hospital NE-NW*, 473 S.W.3d 649 (Mo.App. E.D. 2015), the Missouri Court of Appeals, Eastern District, held that an employee of an asbestos abatement contractor cannot sue the owner of the property for injuries received while on the job. Specifically, the Court found that the owner did not retain possession and control over the worksite and, therefore, was not subject to premises liability. However, the Court did allow the employee to proceed with a general negligence claim against the owner related to its conduct in removing a handrail and failing to warn of possible hazards. Since there were disputed factual questions about whether the owner was negligent, the Appellate Court remanded on this issue.

Legislation:

1. H.B. 137, Competitive Bidding. This bill amended Mo. Rev. Stat. §§ 34.040, 67.617 and 136.055 relating to competitive bidding. The bill amended § 34.040 to require the director of Missouri's Department of Revenue to follow bidding procedures and granted the director the right to promulgate rules necessary to establish such procedures. Section 67.617 now provides that all leases, agreements, contracts, or subleases for space, usage, or services in any convention center or related facilities that are owned or operated by a regional convention and visitors commission may be considered private records not subject to disclosure if disclosure would negatively impact competitiveness of the business or prospects of the commission or otherwise provide an unfair advantage to competitors. Section 136.055 now requires the competitive bidding process to give priority to certain organizations that qualify for tax exemptions as social welfare organizations, with special consideration given to organizations that reinvest a minimum of 75% of the net proceeds in charitable organizations.

2. H.B. 1052, Land Surveyors. This bill amended Mo. Rev. Stat. § 327.272 to provide that documents purporting to affect Missouri real property rights that were prepared between August 27, 2014 and August 28, 2015 by providers of utility or communications services remain valid and enforceable even if a legal description contained in such a document was not prepared by a professional land surveyor. This creates an exception to the general rule under § 372.272.2 that the preparation of documents purporting to affect real property rights is an exclusive duty of professional land surveyors.

3. Lien Fraud. Under the current version of Mo. Rev. Stat. § 429.014, Lien fraud, the penalty against any original contractor, subcontractor or supplier for failing to pay any subcontractor, materialman, supplier or laborer for services or materials provided, for which the original contractor, subcontractor or supplier was paid, is a class C felony. An amendment to this law will go into effect on January 1, 2017 changing the penalty to a class D felony. This change will reduce the maximum sentence from seven years to five years.

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Montana

Case law:

1. In *Beaverhead County v. Montana Assoc. of Counties Jt. Powers Ins. Auth.*, 2014 MT 267, 376 Mont. 413, 335 P.3d 721, the Montana Supreme Court upheld summary judgment in favor of a county insurer on the issue of whether a claim brought by a contractor against the county triggered the insurer's duty to defend. The case arose out of a public bridge replacement and stream rehabilitation project. Coleman Construction ("Coleman"), the low bidder, obtained the job but was unable to complete the project on time or within budget. Later, Coleman sued Beaverhead County ("County") and others for damages related to alleged defective plans and specifications. Although Coleman asserted ten separate claims against the County, seven of the claims were contract-based claims. The other three claims were labeled: negligent misrepresentation, negligence, and professional negligence.

After service of the lawsuit, the County tendered defense of the lawsuit to its carrier, MACo. Upon review of the allegations in the complaint, and later some discovery responses from Coleman, MACo denied coverage and refused the County's request for a duty to defend, citing a policy exclusion which denied coverage for "Any claim arising out of a claimed breach of contract for breach of contract against the Insured."

Following MACo's coverage denial, the County filed a declaratory judgment action against MACo, seeking a declaration that MACo violated its duty to defend. The parties filed competing motions for summary judgment and the district court ruled in favor of MACo. On appeal, the Montana Supreme Court affirmed, finding that the three non breach of contract-labeled claims were claims that arose out of the County's alleged breach of contract, thus the claims were not covered under MACo's policy and therefore MACo did not breach its duty to defend.

2. In *A.M. Welles, Inc. v. Montana Materials, Inc.*, 2015 MT 38, 378 Mont. 173, 342 P.3d 987, the Montana Supreme Court reversed a trial court's summary judgment award in favor of a subcontractor on an indemnity claim filed by a general contractor for damages incurred by third parties on a highway paving project.

The case involved a state highway paving project near Ennis, Montana. The plaintiff, A.M. Welles, was the general contractor on the project and had subcontracted portions of the project to L.S. Jensen. Pursuant to its subcontract, L.S. Jensen applied a primer oil and blotter material to the road on a certain day. That evening, a rainstorm struck the area, causing the primer to emulsify overnight. As a result of the emulsification of the primer material, several cars travelling the road in the following days experienced oil splatter damages to their vehicles. These car owners filed claims against the State of Montana resulting from these damages. In total, the State paid out approximately $600,000 in claims related to these damages.

After paying out the various claims, the State sought indemnification of the same from the general contractor, A.M. Welles, pursuant to the provisions of the parties' general contract. Although A.M. Wells reimbursed the State, A.M. Welles, in turn, tendered an indemnification request to L.S. Jensen, pursuant to the terms of the parties' subcontract. The provision at issue stated as follows:

> The Subcontractor shall indemnify the Contractor against and save it harmless from any and all claims, suits or liability for injuries to property, injuries to persons

including death, and from any other claims, suits or liability *on account of any act or omission* of the Subcontractor, or any of his officers, agents, employees or servant[s].

At the district court, L.S. Jensen argued that unless A.M. Welles could establish that the damages resulted from some kind of negligence or other wrongful conduct on the part of L.S. Jensen, the indemnification provision would not be triggered. The district court agreed with L.S. Jensen and dismissed A.M. Welles' indemnification claim.

On appeal, the Montana Supreme Court applied a plain language analysis to the subject indemnification provision and found that L.S. Jensen's indemnification obligations had been triggered. The Court noted that pursuant to contract, L.S. Jensen agreed to indemnify A.M. Welles for *any* act or omission and that there was no explicit limitation to only negligent or wrongful acts or omissions. Because L.S. Jensen had agreed to indemnification language for any of its acts or omissions, instead of negligent or wrongful acts or omissions, the Court reversed the district court and held that L.S. Jensen was liable for indemnification to A.M. Wells for the oil splatter damages caused by the emulsification of L.S. Jensen's oil primer.

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Nebraska

Case law:

1. In *Commercial Contractors Equip., Inc. v. Lower Platte N. Natural Res. Dist.*, No. A-14-260, 2015 WL 3380052, at *1 (Neb. Ct. App. May 26, 2015), the General Contractor, Commercial Contractors Equip., Inc. ("Commercial") filed a lawsuit against the Lower Platte N. Natural Resource District ("NRD") for payment due on the construction of a dam. The contract provided for substantial completion in July 2010 and full completion in August 2010. The contract contained a liquidated damages provision which was the crux of the dispute. The liquidated damages provision entitled NRD to a $1,000 a day, subject to the claims procedure in the contract requiring that NRD provide notice to Commercial within 30 days after the start of the event which gave rise to the claim. NRD did not provided notice until July 2011, several months past the 30 day period. NRD argued that the claim procedure did not apply to the liquidated damages provision, that they did comply with the claim procedure and that Commercial had not fully completed the project entitling them to payment. The Nebraska Court of Appeals found that the plain and unambiguous language in the contract conditioned NRD's right to liquidated damages on complying with the claim procedure and they failed to comply. Therefore, NDR was not entitled to liquidated damages.

Legislation:

1. **L.B. 312, amended Neb. Rev. Stat. §§ 39-1348 to 39-1353 and 81-1701, the public letting requirements used by the Nebraska Department of Roads when seeking bids.** The amended statutes provide that construction and maintenance projects exceeding $100,000 must be advertised and sealed bids requested via publication in the official county newspaper once a day for three consecutive weeks. In addition, L.B. 312 adds a new subsection (2) to Neb. Rev. Stat. § 39-1348 which provides when the Nebraska Department of Roads determines that a contract not exceed $100,000, the department has the sole discretion to request bids from three potential bidders. The Bids are to be opened at a time designated by

the department if at least one responsive bid is received. When the Nebraska Department of Roads utilizes the new procedure for projects less than $100,000, the bidders do not need to be pre-qualified. In the event of an emergency, the bidders are also excused from pre-qualification. The amended statutes also includes a new subsection (4) to Neb. Rev. Stat. § 39-1349 which provides that the Nebraska Department of Roads may allow a federal agency to let contracts for construction and maintenance of state highways and bridges if it is determined to be in the public interest. All bidders under this subsection must be pre-qualified, unless the project is less than $100,000.

2. **L.B. 540, amended Neb. Rev. Stat. §§ 71-6403 and 71-6406, relating to the state building code.** L.B. 540 updates the state building code by adopting the 2012 version of the International Building Code, which governs all newly constructed buildings, but excludes two-family dwellings. L.B. 540 also adopted the 2012 version of the International Residential Code, which only governs construction of one- and two-family dwellings. Lastly, L.B. 540 adopted the 2012 versions of the International Existing Building Code.

3. **L.B. 23, amended Neb. Rev. Stat. §§ 81-3401 to 81-3504, known as the Engineers and Architects Regulation Act.** L.B. 23 amended the Engineers and Architects Regulation Act's (the Act) definitional language in order to simplify, modernize and create consistency throughout the statutes. The Act added sections that relate to coordinating professionals and services, which applies to projects having more than one licensed architect or professional engineer. When more than one professional engineer or architect works on a project there must be one coordinating professional for the entire project. The coordinating professional is responsible for reviewing the technical documents. Also, the coordinating professional's seal shall be denoted on the cover sheets of all documents. The Act also created a separate section, transferring the language regarding professional seals.

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Nevada

Legislation:

1. **AB 106. Revises Indemnity Provisions Related to Public Works.** This legislation modifies NRS 338.155 by deleting the authority of a public entity to include a provision in a contract with a design professional that requires the design professional to defend the public entity in any lawsuit that alleges negligence, errors and omissions, recklessness or intentional misconduct. In such circumstances, the design professional must reimburse the entity a proportionate share of the attorney's fees and costs.

2. **AB 125. Revises Provisions Relating to Constructional Defects.** This legislation substantially overhauls Nevada's construction defect laws (NRS Chapter 40). The changes are dramatic, and include, among other things, changes to the definition of what constitutes a construction defect, shortening the applicable statute of repose, limitations on homeowners association standing, the elimination of attorney's fees as a recoverable damage, changes to the pre-litigation notice procedures, and limitations on indemnity obligations.

3. **AB 172. Revises Prevailing Wage Provisions Relating to Public Works.** This legislation revises NRS 338.030, 338.075 and 338.080. It reduces the prevailing wage rates for school district and Nevada System of Higher Education projects to 90% of the prevailing wage

rate for other public works and increases the threshold amount for prevailing wages to be applicable from projects costing $100,000 to projects costing $250,000 for projects awarded after June 9, 2015.

4. **AB 218. Revises Provisions Relating to the Payment of Prevailing Wages on Public Works.** This legislation revises NRS 338.010, 338.015, 338.018, 338.035, 338.075, 338.090, and 338.1908, and allows a contractor or subcontractor on public works projects to discharge its obligation to pay prevailing wages by providing "bona fide fringe benefits" in the name of the worker.

5. **AB 345. Revises Provisions Relating to the Posting of Security on Certain Government Contracts.** This legislation permits certain alternate forms of security, including individual sureties, cash, letters of credit, and other forms of security, as approved by the public entity, to be posted by bidders and those persons protesting the award of a public works contract.

6. **SB 122. Revises Provisions Relating to Contractors Recycling Solid Waste.** This legislation modifies NRS Chapter 624 and requires contractors to dispose of solid waste produced by construction, demolition, or similar work at a materials recovery facility under certain circumstances.

7. **SB 194. Revises Provisions Relating to Contractor's Requirement to Obtain Industrial Insurance.** This legislation modifies NRS 616B.710 to revise the threshold cost of a construction project or series of projects at which a consolidated insurance program can be installed to be $50,000,000, modifies NRS 616B.727 to allow a designated plan administrator to serve as the administrator for more than one consolidated plan, and requires the project owner or primary contractor access to a project and the records of any injured worker.

8. **SB 223. Revises Provisions Relating to General Contractors' Liability for Labor Costs of Subcontractors.** This legislation revises NRS 608.150 relating to the liability of prime contractors for the indebtedness incurred by a subcontractor for labor costs, and revises NRS 108.245 to require the prime contractor or subcontractor to give an employee trust fund or plan notice of the name and location of the project upon commencement of work.

9. **SB 254. Revises Contract Retention Provisions Relating to Construction.** This legislation revises NRS 338.515 (public works) and NRS 624.609, 624.620 and 624.624 (private works) to permit the withholding of 5% retention on construction projects.

10. **SB 375. Revises Various Provisions Governing Mechanics' and Materialmen's Liens.** This legislation revises NRS Chapter 108 by requiring certain owners or lessees to obtain the services of an escrow agency and establish trust accounts for amounts withheld from payment to contractors and subcontractors. It also modifies provisions related to the payment of retention and increases the types of activities and items sufficient for a mechanic's lien to take priority over a deed of trust (in response to the Nevada Supreme Court's decision in *J.E. Dunn Nv., Inc. v. Corus Construct. Ventures, LLC*, 127 Nev. Adv. Op. 5, 249 P.3d 501 (Mar. 3, 2011)).

11. **SB 371. Revises Provisions Governing the Use of Apprentices on Public Works.** This legislation creates a new section in NRS Chapter 610, modifies NRS 610.095 and 610.185, creates a new section in NRS Chapter 338 and modifies NRS 338.010 and 338.015, to permit the use of apprentices on public works.

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New Hampshire

Case law:

1. In *Congswell Farm Condominium Ass'n v. Tower Group, Inc.,* 110 A.3d 822 (N.H. 2015), the court reversed the Superior Court's grant of summary judgment in favor of the defendant, a liability insurer for a condo developer acting as the project's general contractor. The dispute stemmed from whether the damage to condos from a faulty water barrier was excluded from coverage under the insurance policy. The court found that an exclusion within the carrier's coverage was subject to more than one reasonable interpretation regarding whether coverage exists or was excluded. Under New Hampshire law, such an ambiguity must be read against the insurer and in favor finding coverage. The court declined to base their decision on the general purpose of a particular insurance policy, stating that in New Hampshire, "whether coverage exists begins with an examination of the insurance policy language."

2. In *Ingram v. Drouin,* 111 A.3d 1104 (N.H. 2015), the court affirmed a grant of summary judgment in favor of a defendant contractor against a plaintiff homeowner in an action for negligent construction; the court found the claims time-barred by the statute of repose. The court rejected the plaintiff's argument that the statute was inapplicable because the builder was also the former owner and occupant of the home. The court held the statute of repose applies even when a builder-owner is sued for negligent construction because to do otherwise "would be contrary to the legislature's intent – which was to protect the building industry." The court also ruled that the plaintiff mistakenly relied only on the state's discovery rule, despite the fact that the court had previous explained that a plaintiff "must satisfy both the statute of repose and the applicable statute of limitations."

3. In *Murray v. McNamara,* 2015 WL 1263362 (N.H. 2015), the court partially reversed the trial court's verdict in favor of plaintiff homeowner against defendant contractor in an action for breach of the implied warranty of workmanlike quality and violation of the Consumer Protection Act (CPA) stemming from latent structural defects that caused mold to grow within the plaintiff's home. The court, facing an issue of first impression on a new formulation of the CPA, held that the plaintiff's claim was not covered by the CPA because the alleged wrongful transaction, the construction of the plaintiff's home for a previous owner, occurred more than three years before the plaintiff knew or could have known of the wrongdoing because the plaintiff purchased the house five years after it was built by the defendant.

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New Jersey

Case law:

1. On April 30, 2015, the New Jersey Supreme Court decided *State of New Jersey v. Perini Corporation, et al. 2015 N.J. LEXIS 388 (N.J. Supr. Ct. April 30, 2015)*, which is likely to become a seminal case on how the ten-year limitations period of New Jersey's Statute of Repose, N.J.S.A. 2A:14-1.1(a), is applied in construction cases, in particular those involving multi phase projects. The Perini case is also noteworthy for its ruling that the statute of repose does not apply to claims against manufacturers and suppliers of allegedly defective materials supplied on a project.

In February 1995, the State retained Perini Corporation to design and build a twenty-six building correctional facility. L. Robert Kimball & Associates, Inc. acted as the architect and engineer on the project, and Natkin & Company was the principal contractor for heating, ventilation, and air conditioning. The project included an underground high-temperature hot water distribution system ("HTHW") to serve the entire facility. It also included a central plant from which the hot water was distributed to the various buildings that comprised the project. Perma-Pipe, Inc. manufactured the underground piping used in the HTHW system, and Jacobs Facilities, Inc. was retained by the State to provide construction oversight services throughout the entire project.

The project was designed to be constructed in three phases. Phase I encompassed the central plant which contained the boilers and heat exchangers for the HTHW system. Certificates of substantial completion for those various elements were executed on May 16, 1997. Phase IIA included several other buildings, with certificates of substantial completion for those buildings executed between July 15, 1997 and October 27, 1997. Phase II encompassed approximately ten buildings, including a minimum-security unit and a garage. The certificates of substantial completion for the minimum-security unit and the garage identify May 1, 1998 as the date of substantial completion. The various buildings comprising the project were connected to the HTHW distribution system as they were completed. A certificate of substantial completion was not issued specifically for the HTHW system.

On April 28, 2008, the State filed a complaint against Perini, Kimball, Natkin, Jacobs, and Perma-Pipe in which it claimed that the HTHW system had failed on several occasions as a result of various defects. The State alleged that the first failure occurred in March 2000 with several other failures subsequent to that date. The State asserted breach of contract against Perini, negligence and professional malpractice against Kimball, negligence and breach of contract against Natkin, and breach of contract against Jacobs. Against Perma-Pipe, the State asserted a claim under the New Jersey Products Liability Act ("PLA"), N.J.S.A. 2A:58C-1 (2013), as well as breach of implied warranties, negligence, and strict liability in tort.

All defendants moved for summary judgment on the basis that the Complaint was time barred under the statute of repose because it was brought more than ten years after the first phases of the project were substantially complete. The State argued that the date of substantial completion of the project was not until May 1, 1998 at the earliest, the date a Certificate of Substantial Completion was issued for the final Phase. The trial court granted defendants' motions, relying primarily on the occupancy of inmates at the facility on or before April 28, 1998. However, the trial court denied Perma-Pipe's motion for summary judgment, concluding that it was a manufacturer of goods and therefore its liability was governed by the PLA and the statute of repose did not apply to it.

The State and Perma-Pipe appealed the trial court's decision, and the Appellate Division reversed the trial court's order granting summary judgment to Perini, Kimball, Natkin and Jacobs and affirmed the order denying summary judgment to Perma-Pipe. The Appellate Division held that the statute of repose does not provide for separate trigger dates for components of a project but begins to run when the entire project is substantially complete, which here was no earlier than May 1, 1998, the substantial completion date for the last phase of the project.

The New Jersey Supreme Court affirmed the Appellate Division's decision, holding that the statute of repose does not begin to run on claims involving an improvement that serves an entire project such as the HTHW system "until all buildings served by the improvement have been connected to it." Regarding the claims against Perma-Pipe, the court held that the statute of repose was inapplicable because those claims related solely to manufacturing defects, which are not covered by the statue of repose but subject to the PLA.

In reaching its decision, the Court first ruled as a preliminary matter that the statute of repose applies to the HTHW system as it falls under the statute's definition of an "improvement to real property". Generally, calculation of the statute's ten-year limitations period commences one day after the certificate of substantial completion is issued. With regard to this project, the State argued that it should be considered a "unitary undertaking" notwithstanding that it was divided into phases, and that the HTHW "system could be considered substantially complete only when the last of the buildings it was designed to service were connected to the system." Defendants took the opposite view, asking the court to calculate the ten-year period from completion of each phase of the project. In particular, the defendants pointed to the central plant completed on May 15, 1997, which encompassed the entire HTHW system. The Court rejected that view and found that "the HTHW system is designed to form a unified whole that interacts with and is connected to every structure of the prison complex". The defendants' position ignored the design of the HTHW system of which the boilers are only a component part, and that the HTHW system was not designed to only serve the buildings in Phase I. Also significant was that a separate certificate of substantial completion was not required or issued for only the HTHW system, indicating that neither the owner nor the designer and builder ever contemplated that the system would be completed on a piecemeal basis.

Regarding the claims against Perma-Pipe, the Court found that manufacturers and sellers of standardized products are not subject to the statute of repose but are covered by the statute of limitations applicable to the PLA. The Court indicated that had Perma-Pipe also installed the pipe instead of just supply it, it would be subject to both the PLA and statute of repose, but Perma-Pipe's technical assistance and support during installation by a separate contractor did not rise to the level of installation to put it within the reach of the statute of repose.

While the New Jersey Supreme Court's decision in Perini is good for owners in that it provides a more advantageous view on when substantial completion on a multi-phase project occurs, the sound practice is to assert claims as soon as practicable to avoid any statute-of-limitation challenge. Filing claims sooner rather than later also decreases the impact of the passage of time on witnesses' memories and the unavailability of written evidence.

2. In *Allied Building Products v. J. Strober & Sons, LLC,* 97 A.3d 1169 (N.J. Super. Ct. App. Div. 2014), the Contractor rejected a performance bond issued by a surety to secure a subcontractor's obligation under an agreement with the contractor to perform roofing work on a university construction project. The court held that even though the contractor rejected the bond, the surety was not relieved of its duty to the subcontractor, as primary obligor, under the surety contract.

3. In *Hill International, Inc. v. Atlantic City Board of Education*, 106 A.3d 487 (N.J. Super. Ct. App. Div. 2014), an Affidavit of merit ("AOM") from an engineer was provided to support claims of malpractice and professional negligence against an architectural firm and the firm's architect. The Appellate Division held that an AOM from a like-licensed architect was necessary to support the claims and that an engineer was not qualified to produce the AOM. However, even though a compliant AOM was not provided, the general contractor's malpractice and professional negligence claims against the architect and his architectural firm were not dismissed, and instead, the case was be remanded to allow general contractor a reasonable opportunity to procure a suitable AOM from a qualified architect to substitute for the AOM from engineer.

4. In *Bozzi v. City of Atlantic City*, 84 A.3d 277 (N.J. Super. Ct. App. Div. 2014), Bid specifications for a proposed contract to provide maintenance services to county were not covered by the Local Public Contracts Law, which permitted local public entities to charge a fee for the provision of bid specifications. However, the documents fell within New Jersey's Open Public Records Act's ("OPRA") definition of government records, and, thus, any fee charged by the City could not have exceeded copying costs provided for in the OPRA.

Legislation:

1. **N.J.S.A. 18A:64A–25.13, Local Public Contracts Law.** An amendment to the Local Public Contracts Law ("LPCL") was enacted that prohibited local public entities from requiring a financial statement from bidders when a bid guarantee is also required in the form of a certified check, cashier's check, bid bond or surety company certificate.

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New Mexico

Case law:

1. In *Little v. Jacobs*, 2014-NMCA-10, 36 P.3d 398 (Ct. App. 2014) the New Mexico Court of Appeals considered, for the first time, the effect on New Mexico's statute of repose for construction defects where the work was performed by an unlicensed contractor. New Mexico has a statute of repose that bars any claim for personal injury or property damage arising out of improvements to real property, including claims for indemnification or subrogation, not brought within ten years of substantial completion of the improvements. NMSA 1978, §37-1-27. Defendant constructed a deck on a rental property in 2000. Plaintiff was injured in 2009, brought suit against the landlord in 2011 and amended to bring a cause of action against Defendant in 2013 once, during discovery, it was determined he had constructed the deck. Defendant prevailed on summary judgment that the statute of repose barred the litigation against him. Plaintiff appealed, arguing that the statute of repose did not apply to unlicensed contractors.

The Court of Appeals, after citing the plain language rule of statutory construction and noting that there was nothing in the plain language of the statute that would prevent application of the statute of repose, considered the legislative purpose behind the Construction Industries Licensing Act in holding that, despite any statutory support, unlicensed contractors were not

entitled to the benefit of the statute of repose. Presumably, this holding would apply with equal force to New Mexico's various statutes of limitations.

Legislation:

1. NMSA 1978, § 13-4-19. Commencing July 1, 2015, this section of the New Mexico version of the Miller Act has been amended to alter, potentially, the evidentiary standard for bond claims on public projects in New Mexico and to alter what is covered by the bond. In the 2015 legislative session, New Mexico's version of the Miller Act received several clerical and linguistic changes, only one clause of which should have any effect on prior law. The 2015 amendments inserted a new clause limiting and defining what may be recovered under the bond as follows: "sum or sums justly due for the labor done or performed or materials furnished to be used in the construction of the project; provided, however, that sums justly due shall be determined according to the subcontract or other contractual relationship directly with the contractor furnishing the payment bond." The legislation was initially brought by ABC to insert a requirement that a claimant prove actual incorporation of the labor or materials into the bonded project in order to recover on the bond.

During the course of the legislative session, the legislation was significantly modified, resulting in the language quoted above. The first portion of the quote—the language through to the semi-colon—is taken from New Mexico's Mechanics' and Materialmen's Lien statute, which has been interpreted to require proof of incorporation, although there is a rebuttable presumption created upon proof of delivery. The actual language itself, however, only requires that the labor or materials be furnished to be used in the bonded project so it is entirely possible that a court would interpret the revised statute to mirror the Miller Act and not require proof of delivery. The second portion of the quoted language—from the semi-colon on—was intended to limit the types of damages recoverable under the payment bond to those allowed in the direct contract with the bonded contractor. So a supplier filing a bond claim based on its purchase order with a subcontractor that allows the recovery of interest and attorney fees would be able to recover those damages under the bond only to the extent that the customer subcontractor's subcontract with the bonded contractor allowed recovery of interest and attorney fees. It is unclear whether the additional language would also have the effect of allowing a principal or surety to successfully assert a conditional payment clause contained in the direct subcontract as a defense to a claim from a remote claimant not otherwise bound by the conditional payment clause.

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New York

Case law:

1. In *U.W. Marx, Inc. v. Koko Contracting, Inc.*, 124 A.D.3d 1121, 2 N.Y.S.3d 276 (3d Dept. 2015), a roofing subcontractor ceased performing work after going unpaid for three months, but failed to provide the seven days written notice of suspension. The general contractor responded with a three day notice to cure, in response to which subcontractor belatedly gave written notice required by a stop-work provision. The contractor declared the subcontractor in default and terminated based on subcontractor's removal of its workers. The Third Department affirmed the trial court's ruling that general contractor's reasons for withholding payment were unsubstantiated and unjustified and that its failure to pay was a prior

material breach of the subcontract that excused the subcontractor's failure to give timely notice that it was stopping work.

2. In *Beys Specialty, Inc. v. Euro Construction Services, Inc.,* 125 A.D.3d 911, 5 N.Y.S.3d 153 (2d Dept. 2015), a sub-subcontractor on a NYCHA project performing concrete and masonry work executed nine lien and claim waivers in connection with interim and final payment, which stated in pertinent part: "The Undersigned does hereby waive and release all liens, demands, claims or rights of lien of the undersigned on the following described premises and improvements thereon or on the monies or other considerations due or to become due from…" the public owner or the subcontractor. No exceptions were noted in the waivers. Quantities could be adjusted based on actual conditions and partial payments were subject to later adjustment. The subcontractor alleged overpayment $1.1 million and sued. In response the sub-subcontractor filed a mechanic's lien for amounts it claims it was not paid, foreclosed upon the lien and asserted a counterclaim against the subcontractor alleging breach of contract. The Second Department ruled the lien and counterclaim were barred by virtue of the executed lien releases.

3. In *Peter Scalamandre & Sons, Inc. v. FC 80 Dekalb Associates, LLC,* 129 A.D.3d 807, 12 N.Y.S.3d 133 (2d Dept. 2015), a contractor executed a lien waiver that stated, in pertinent part, "In consideration of the amounts and sums previously received, and the payment of the Balance Due, the below named Contractor or Supplier hereby waives, releases and relinquishes any and all claims, rights or causes of action in equity or law whatsoever arising out of, through or under mentioned Contract and the performance of work pursuant thereto and including the date hereof." The Second Department held that the executed lien waiver was treated by the parties as a mere receipt of payment of the amount stated and was not intended to encompass or preclude claims contractor subsequently presented to the owner for additional work.

4. In *Chenango Contracting, Inc. v. Hughes Associates, Landscape Architects PLLC,* 128 A.D.3d 1150, 8 N.Y.S.3d 724 (3d Dept. 2015), a supplier of artificial athletic turf sued an owner consultant for tortious interference with contract for one project and tortious interference with prospective business as to others, alleging the consultant plotted with a competing supplier and crafted specifications to mirror a competing proprietary product. The appellate court agreed with the lower court's refusal to dismiss the claims. While normally an Article 78 proceeding against the public owner is the remedy for violations of the competitive bidding laws, a narrow exception exists when an action alleges a party working on behalf of the public entity is engaging in egregious conduct unknown to the public entity and aimed at subverting the bid process.

5. In *Mary Imogene Basset Hosp. v. Cannon Design, Inc.,* 127 A.D.3d 1377, 9 N.Y.S.3d 687 (3d Dept. 2015), a ruling against a designer for breach of contract and malpractice for failing to comply with the International Building Code for seismic retrofit work was reversed in part. The Third Department found no evidence in the contract itself that the designer agreed to comply with the IBC, and refused to read such compliance into the contract. Further, a breach of contract claim could not be based on the "common law duty of care" contract language. The finding of professional malpractice was affirmed based on incorrect calculations for the seismic upgrade which showed the improvements would not protect the structure.

6. In *Anthony DeMarco & Sons Nursery, LLC v. Maxim Construction Service Corp.*, 130 A.D.3d 1409, 14 N.Y.S.3d 235 (3d Dept. 2015), a court found a subcontractor's verified statement of trust funds pursuant to Lien Law §76 so deficient that it awarded a sub-

subcontractor summary judgment on liability in its action for payment on a public improvement project. The verified statement failed to set forth the dates and amounts of the trust assets receivable, trust accounts payable or trust funds received, nor did it sufficiently detail the total amount of payments made with trust funds. Despite having ample time to provide a proper accounting, the contractor failed to account for sizeable sums or offer any explanation for the deficiencies, all of which led the lower and appellate courts to conclude the contractor failed to overcome the statutory presumption of an improper diversion of trust funds.

7. In *Citi Structure Construction v. Zurich American Insurance Co.,* 2015 WL 4934414 (S.D.N.Y 2015), a surety was able to dismiss the claimant's bond claim because the underlying subcontract agreement contained an exclusive forum-selection clause requiring suit in state court. Although not a signatory to the subcontract, the court found the clause valid and enforceable by the surety. Employing the four-part test applicable in the Second Circuit, the district court held that the forum-selection clauses were "reasonably communicated", mandatory, applied to the claims and parties involved, and that claimant failed to rebut the presumption of enforceability by showing that enforcement of the forum selection clause would be unjust or unreasonable.

8. In *Laws Construction Corp. v. Town of Patterson,* 135 A.D.3d 830, 23 N.Y.S.3d 355 (2d Dept. 2016), the Second Department rejected a contractor's attempt to seek escalation costs resulting from a delayed contract award on a public project. The contractor had been given the opportunity to withdraw its bid and elected not to. Only with its final payment application did the contractor seek to recover for increased labor and material costs. The town argued that the contractor was improperly attempting to modify a competitive bid after the fact. The court rejected the contractor's argument that the town was estopped from opposing the escalation costs based on a statement by the town supervisor suggesting there was no prohibition against the application of contingency monies toward increased costs due to delayed award. The statement did not establish an agreement on the escalation costs.

Legislation:

1. Licensing Requirements for Mold Inspection, Assessment and Remediation. Amendment to Article 32 of the New York State Labor Law establishing licensing requirements and minimum work standards for professionals engaged in mold assessment and remediation, beginning January 1, 2016. New law includes the definition of mold and addresses training and licensing requirements and minimum work standards.

2. Industrial Development Agencies. S.5867/A.7915 addresses the accountability, efficiency and transparency of industrial development agencies and authorities by requiring agencies to develop standard application forms for requests for financial assistance, uniform criteria for evaluation and selection and project agreements.

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North Carolina

Case law:

1. In *Earl v. CGR Development Corp.,* 773 S.E.2d 551 (N.C. App. 2015), the denial of defendants' motion to compel arbitration was reversed because the trial court's order did not

contain findings of fact or conclusions of law supporting its ruling. Plaintiffs owned two lots in a residential subdivision. CGR Development was the developer of the subdivision and Carefree Cove Community Association was the homeowner's association. Plaintiff filed suit against CGR Development and the HOA alleging that the defendants had not relinquished control of the HOA board and management of certain common elements. The defendants moved to compel arbitration and their motion was denied. The defendants appealed and the North Carolina Court of Appeals reversed the trial court's decision.

The court found that the bylaws of the Carefree Community Association required all disputes involving the HOA were to be submitted to binding arbitration. In reviewing an arbitration agreement, the trial court must determine "whether the parties had a valid agreement to arbitrate and also whether the specific dispute falls within the substantive scope of that agreement." A trial court's findings as to the existence of the arbitration agreement are "conclusive on appeal where supported by competent evidence even where the evidence might have supported findings to the contrary." In this case, however, the trial court's order was simply a recitation that the trial court had considered the motion and arguments of counsel and that the motion was denied. Under long standing precedent, a trial court must make findings of fact and conclusions of law regarding the existence and scope of an arbitration agreement when considering a motion to stay. Such finding and conclusions allow an appellate court to conduct a meaningful review of the trial court's decision. The Court of Appeals held that the trial court had not made the required findings of fact and conclusions of law; therefore, the order denying the motion to compel arbitration had to be reversed.

2. In *R & L Construction of Mt. Airy, LLC v. Diaz*, 770 S.E.2d 698 (N.C. App. 2015), where parties failed to include hearing transcripts in their record on appeal, the North Carolina Court of Appeals was unable to determine whether the trial court abused its discretion in awarding fees under N.C.G.S §44A-35. Plaintiff R&L Construction of Mt. Airy, LLC ("Contractor") brought a breach of contract and lien enforcement action against Defendant Javier Diaz ("Homeowner") based on allegedly unpaid home renovation work performed by the Contractor. The Contractor sought $11,175.49 plus attorneys' fees. At mediation, the Contractor offered to settle for $9,000.00. The Homeowner rejected the settlement offer and the parties reached an impasse. The Homeowner then filed a motion for summary judgment and won. Later, the Homeowner moved for and was awarded attorneys' fees. The Contractor appealed on the ground that, under N.C.G.S. §44A-35, the trial court made an improper finding that the Contractor unreasonably refused to settle. The Court of Appeals affirmed.

The Court began its analysis by noting that an award of fees under N.C.G.S. §44A-35 is reviewed on an abuse of discretion standard. Because the parties did not include transcripts from the hearings on either the Homeowner's motion for summary judgment or motion for fees, the Court was unable to review the arguments presented to the trial court. In particular, the Court could not determine how evidence of the settlement negotiations at the mediation was brought before the trial court, since such discussions are confidential under N.C.G.S. §7A-38.1 (note: the statute is erroneously cited as "70A-38.1"). On these grounds, the Court also denied the Homeowner's motion for fees on appeal.

3. In *Christie v. Hartley Construction, Inc.*, 766 S.E.2d 283 (N.C. 2014), the N.C. Supreme Court determined that a defendant waives the protections of the statute of repose by providing an express warranty longer than the repose period. Plaintiffs George and Deborah Christie ("Homeowners") built a new home in Orange County. Defendants GrailCoat Worldwide, LLC and GrailCo, Inc. (together "Sellers") sold the Homeowners an exterior cladding product, which was applied to the home in the latter half of 2004. A certificate of occupancy was issued

on March 22, 2005. In April 2011, the Homeowners discovered moisture intrusion issues and made a warranty claim to the Sellers. While the Sellers offered to replace the product, they refused to pay any other damages. On October 31, 2011, the Homeowners filed suit, alleging, *inter alia*, breach of warranty. The Sellers moved for summary judgment based on the six-year statute of repose for improvements to real property in N.C.G.S. §1-50(a)(5) of the N.C. General Statutes. The Homeowners opposed the motion on the grounds that the Sellers offered a twenty-year express warranty for the product on their website, which waived or extended the repose period. The trial court granted the Sellers' motion and the court of appeals affirmed. The North Carolina Supreme Court reversed.

In deciding the case, the Court weighed two competing public policies: the desire to avoid "potentially limitless legal exposure" as expressed through the statute of repose and the importance of allowing parties the freedom of contract. Similar disputes have been resolved by deferring to parties' freedom of contract, provided such contract provisions do not violate the law or public policy. Ultimately, the Court saw "no public policy reason why the beneficiary of a statute of repose cannot bargain away, or even waive, that benefit." This conclusion was influenced by the Court's concern that the Sellers' argument would permit warrantors to offer sham warranties which they knew to be a nullities because they exceeded the statute of repose.

4. In *Brown's Builders Supply, Inc. v. Johnson*, 769 S.E.2d 653 (N.C. App. 2015), the North Carolina Court of Appeals determined that a fixture installer that contracted directly with the owner did not need a general contractor's license when the installer was only responsible for a small portion of the project. The Court also determined that a trial court must make specific findings of fact to support an award of attorneys' fees under N.C.G.S. §44A-35. Plaintiff Brown's Builders Supply, Inc. ("Installer") furnished and installed kitchen fixtures as part of an overall remodel of Defendants John and Angela Johnson's home ("Homeowners"). The Installer was paid directly by the Homeowners, though its work was overseen by a construction supervisor separately retained directly by the Homeowners. The Installer was not paid in full, filed a lien on the real property, and brought suit for breach of contract and *quantum meruit*. The matter was tried before a judge and the court awarded damages, plus interest, costs, and attorneys' fees. The Homeowners appealed. The Court of Appeals affirmed in part and reversed and remanded in part.

On appeal, the Homeowners argued that the Installer could not recover because it lacked a general contractor's license under N.C.G.S. §87-1 and the value of the contract exceed $30,000.00. The Court of Appeals rejected this argument on the grounds that the Installer did not exercise the requisite amount of control over the entire project to require a license. Instead, the Installer's role was limited to work in the kitchen.

The Homeowners also challenged the trial court's award of attorneys' fees under N.C.G.S. §44A-35, arguing that the trial court did not find that the Homeowners unjustifiably refused to settle the matter. The Court of Appeals disagreed, since the trial court's order specifically stated that "Defendants' refusal to resolve the lien was unreasonable." This finding satisfied N.C.G.S. §44A-35.

However, the Homeowners also challenged the amount of the fee award on the grounds that the record did not support the trial court's findings. The court of appeals agreed. When otherwise permitted by statute, an award of attorneys' fees also requires findings of fact as to the time and labor expended by counsel, the skill required, the customary fee for similar work, and the experience or ability of the attorney. These findings allow an appellate court to determine the reasonableness of the fee awarded, and, therefore, whether the trial court abused

its discretion under N.C.G.S. §44A-35. In the instant case, the trial court did not make findings regarding (1) the skill required to litigate the matter, (2) the customary rate charged for similar work, and (3) the experience or ability of the Installer's attorney. The case was remanded to the trial court for further findings related to attorneys' fees.

5. In *ACC Construction, Inc. v. Suntrust Mortgage, Inc*., 769 S.E.2d 200 (N.C. App. 2015), the Court of Appeals resolved a long-standing dispute over the priorities between a contractor mechanic's lien and a bank's deed of trust. The case arose out of the construction of a single family residence in Henderson County, North Carolina. The developer deeded the undeveloped lot to NC Land Finders on April 3, 2007. NC Land Finders in turn deeded the property to the homeowners on April 5, 2007. The homeowners also signed a deed of trust in favor of Suntrust in the amount of $765,000.00. The deed to the homeowners and the deed of trust to Suntrust were properly recorded. Unfortunately, the deed from developer to NC Land Finders was not recorded at that time. That deed was not recorded until May 16, 2007. ACC Construction began work on the house in June 2007. In September 2007, the deed from NC Land Finders to the homeowners and the deed of trust were re-recorded. The homeowners could not pay ACC Construction for its work and could not make their mortgage payments. ACC Construction filed a lien against the property and Suntrust initiated foreclosure proceedings.

ACC Construction filed suit seeking, in part, enforcement of its lien and a declaration of the priority of interests in the property between its lien claim and Suntrust's deed of trust. In that litigation, ACC Construction argued that the gap in the chain of title meant that its lien claim had priority over Suntrust's deed of trust. ACC Construction also intervened in the foreclosure proceeding; however, there ACC Construction conceded that Suntrust had a valid first lien for the purchase amount of the property but asserted that it was entitled to the sales proceeds over that amount under *West Durham Lumber Company v. Meadows*, 179 N.C. App. 347, 635 S.E.2d 301 (2006). The foreclosure went forward but there was nothing in the record regarding the outcome of ACC Construction's claim; however, all sales proceeds were paid to Suntrust. Suntrust moved for summary judgment on ACC Construction's claims still pending in the trial court on the grounds that its deed of trust was superior to ACC Construction's lien claim and the foreclosure had extinguished that claim. The trial court granted Suntrust's motion and ACC Construction appealed. Its appeal was subsequently dismissed by the trial court for failure to prosecute.

ACC Construction then filed a new suit arguing that Suntrust's deed of trust had priority only for the purchase amount of the real property and Suntrust had been unjustly enriched when it received all the sales proceeds. This position was completely contrary to its arguments in the first lawsuit. Suntrust moved for summary judgment on the grounds that the adverse earlier decision barred the second action under the doctrine of *res judicata*. The trial court granted Suntrust's motion and ACC Construction appealed.

The North Carolina Court of Appeals upheld the trial court's ruling. The doctrine of *res judicata* precludes a second lawsuit between the same parties over the same claims when a final judgment had been entered in the first action. The trial court's summary judgment in the first action became the final judgment when ACC Construction's appeal was dismissed. ACC Construction argued that its second action was for a distinct harm separate from its earlier claim. The Court disagreed and held that ACC Construction's second lawsuit was an improper collateral attack on the earlier judgment. Even if ACC Construction did not actually litigate its claim to a portion of the sales proceeds, it had the opportunity to do so and had actually asserted such claims in some limited fashion. The doctrine of *res judicata* bars both claims that

were actually litigated and claims that could have been included in the first action. The Court found that ACC Construction's claims to the excess sales proceeds could have and should have been included in the first lawsuit.

The trial court also awarded Suntrust its attorneys' fees incurred in the second action as a sanction against ACC Construction under N.C.G.S. §6-21.5 and Rule 11. The Court of Appeals affirmed the award. The Court upheld the finding that ACC Construction's lawsuit lacked any justiciable issues and, therefore, sanctions under N.C.G.S. §6-21.5 were appropriate. Likewise, the Court found that ACC Construction had maintained its second lawsuit for an improper purpose which included an attempt to collaterally attack the judgment entered in the first action. Lastly, the Court found that the amount of the sanctions were properly supported by findings of fact and conclusions of law. The Court further found that ACC Construction's pursuit of the appeal was itself frivolous and authorized the entry of additional sanctions.

6. In *Town of Black Mountain v. Lexon Insurance Company*, 768 S.E.2d 302 (N.C. App. 2014), the Town of Black Mountain ("Town") and Buncombe County ("County") sued Lexon Insurance Company and Bond Safeguard Insurance Company ("Sureties") to enforce several subdivision performance bonds. The County sought and the Sureties provided bonds for two subdivision projects. The bonds were provided under N.C.G.S §153A-331 which permit a county to obtain subdivision performance bonds to provide for orderly growth and development. The bonds identified the County as the obligee and the subdivision developers as the bond principals and were conditioned upon the Sureties receiving notice that the promised improvements had not been installed or completed. At the time the bonds were issued, the subdivisions were in an unincorporated part of the County. However, over a period of two years, the Town annexed the subdivisions. Thereafter, the developers failed and the County sought consent from the Sureties to assign the County's rights under the bonds to the Town. The Sureties refused and the County assigned the bonds anyway. After providing notice of their claim, the Town and County filed suit. Both the Town and County and the Sureties moved for summary judgment. The trial court entered summary judgment for the Town and County and the Sureties appealed. The Court of Aappeals affirmed.

The Sureties' first argument on appeal was that neither the Town nor County had standing to bring suit because once the Town annexed the subdivisions, the bonds were extinguished. Specifically, the sureties argued that once a town annexes territory that is the subject of a private contract between the county and a private citizen, the annexation effectively nullifies the contract. This argument was based on *Stillings v. City of Winston-Salem*, 311 N.C. 689, 319 S.E.2d 233 (1984), wherein annexation terminated an exclusive garbage collection franchise in annexed areas based on a statute which required municipalities to provide free trash collection in annexed areas. The Court of Appeals distinguished *Stillings* on the grounds that there was no such conflict between the bonds and the Town's police power.

The Court of Appeals also determined that the assignment of the bonds was valid and found nothing in bonds themselves or the law which would prevent an assignment. Indeed, public policy supported assignment under the facts of the case, as it was uncontested that large portions of the subdivisions were incomplete. Therefore, the Town was permitted to enforce the bonds.

The Sureties second argument on appeal was that the statute of limitations had run against the Town's claim. The parties agreed that bond claims generally are governed by N.C.G.S. §1-52(1) which provides a three-year limitations period for contract actions. But the

Town argued it was not subject to the three-year limitation based on the doctrine of *nullum tempus occurrit regi*, which allows governmental bodies to be exempt from statutory time limitations in bringing civil actions. Similar to an immunity analysis, the applicability of the doctrine is based on whether the governmental body is engaged in a governmental or proprietary function. The Court stated the rule as follows: "If the function at issue is governmental, time limitations do not run against the State or its subdivisions unless the statute at issue expressly includes the State. If the function at issue is proprietary, time limitations do not run against the State and its subdivisions unless the statute at issue expressly excludes the State." Since N.C.G.S. §1-52 is silent with respect to its applicability to governmental bodies, the issue turned on whether the Town was engaged in a governmental or proprietary function. The Court ultimately determined that the function was governmental because the subdivision was to permit public access, including limited public use of the subdivision's clubhouse, and because the developers were required to include easements in the subdivision to allow the Town to maintain waterlines. Additionally, the very purpose of the bonds was to assure orderly development, which is a duty owed to the general public. The Court concluded, therefore, that the limitation of N.C.G.S. §1-52(1) was inapplicable to the Town.

7. In *Trillium Ridge Condo. Association, Inc. v. Trillium Links & Village, LLC*, 764 S.E.2d 203 (N.C. App. 2014), the plaintiff, the HOA for Trilium Ridge Condominiums, a six building condominium complex, sued Trillium Links & Village, LLC, the developer of the complex, and Trillium Construction Company, LLC, the general contractor, among other related parties, for negligent construction and other claims arising out of water intrusion damage discovered at the property.

Construction on the project began around 2003. In February 2007, the developer turned over control of the HOA to the unit owners. Once the HOA was under the control of unit owners, it commissioned a reserve study which indicated that the wood siding for the condo buildings had a shorter lifespan than anticipated. The HOA then commissioned another study from Prof. Andy Lee of Clemson University to obtain a second opinion ("Lee Report"). The Lee Report noted that "some metal flashings are either too narrow or missing, which require immediate correction" among other problems. However, Prof. Lee noted that the siding was in otherwise "good or excellent" shape. Following recommendations in the Lee Report, the HOA determined that it could extend the life of the siding by "continuous caulking" the gaps in the siding and flashing.

In October 2010, the HOA discovered leaks, extensive water damage, and rotting in two of the condo buildings. The HOA hired a professional engineer to inspect one of the buildings. The engineer submitted a report which noted that "improper flashing details at the doors, windows, and horizontal transitions" had caused serious water damage and that these defects were "probably endemic through the community." The HOA then discovered substantial water intrusion problems throughout the other buildings.

The HOA filed suit in August 2011. The developer and general contractor subsequently moved for summary judgment on several bases, including the statutes of limitation and repose. The trial court granted the motions and the HOA appealed. The Court of Appeals reversed in part.

As to the statute of limitations, the HOA argued that there were genuine issues of material fact concerning the date upon which its claims accrued. The Court of Appeals noted that the applicable statute was the three year limitations period of

N.C.G.S § 1-52(16) under which claims accrue when "bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." The defendants argued that the HOA had actual notice of the missing and inadequate flashings as of November 2007 when Prof. Lee delivered his report and that such notice was enough to alert the HOA of the defects it later discovered in 2010. The Court disagreed and believed there were genuine issues of material fact. Given that the Lee report suggested that the flashing and siding problems could be corrected by "continuous caulking" there was a genuine issue of fact as to whether the problems had been corrected. Additionally, the record contained evidence that HOA did not believe any further investigation beyond the Lee report was necessary and was never advised to make a further investigation. Lastly, the defects noted in the HOA's complaint bore no relation to the flashing problems discussed in the Lee Report. Thus, there was a genuine issue of material fact as to whether the HOA was on notice of the defective work as of late 2007.

The court next turned to the HOA's argument under the statute of repose. N.C.G.S. §1-50(a)(5)(a) provides that "no action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion." Since certificates of occupancy were issued for two of the buildings in 2004 and the lawsuit was not filed until 2011, the claims involving those two buildings were not brought within six years of substantial completion. The HOA also argued that repairs to the deck of a condo unit in 2006 were the last act or omission giving rise to the action. The Court rejected this argument on the grounds that repairs cannot constitute a last act or omission unless they are required by the parties' construction contract. Since the parties' contract was not part of the record and the plaintiff bears the burden of showing its action is timely, the Court could not determine whether repairs were part of the agreement. Thus the repair was not a last act or omission.

The HOA also argued that the developer and contractor could not claim the benefit of the statute of repose because, under N.C.G.S. §1-50(a)(5)(d), the defense could not be asserted by "any person in actual possession or control, as owner, tenant, or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action in the event such person…either knew, or ought reasonably to have known, of the defective or unsafe condition." The HOA was controlled by the developer until 2007 and there were genuine issues of material fact as to whether it should have been aware of the conditions. However, the Court saw no reason why the contractor—though a related entity to the developer—could not rely on the statute of repose.

The HOA also argued that the Defendants were equitably estopped from asserting either the statute of limitations or the statute of repose as defenses. It argued that the developer was estopped because its property manager received a copy of the Lee Report but advised the HOA that further investigation would not be necessary. The Court rejected this argument because other HOA members also received the report, no material facts were concealed by the developer, and the HOA was not induced delay filing suit.

As to the contractor, the HOA argued that because the contractor placed other building materials over its allegedly defective work, it concealed facts and was also equitably estopped. The contractor in turn argued that the Lee Report put the HOA on notice of defects and prevented it from asserting equitable estoppel. Given the Court's earlier determination on whether the Lee Report put the HOA on notice as to the statute of limitations, it also found that

there was a genuine issue of whether the HOA was prevented from asserting equitable estoppel in connection with its claims against the contractor.

The HOA asserted breach of fiduciary duty claims against two HOA board members who served on the board during the time it was controlled by the developer, and against the developer itself. The claims against the board members were based on N.C.G.S. §47C-3-103(a) in the Condominium Act, which imposes a fiduciary duty on HOA board members. The Court reversed summary judgment in favor of the individual HOA board members on the grounds that there was a genuine dispute of fact as to whether their knowledge of certain defects and failure to act thereon breached their fiduciary duty. The Court also reversed summary judgment in favor of the developer, which had argued that it had no fiduciary duty to the HOA. The Court found otherwise, based upon the developer's dominance of the HOA board and the fact that unit owners had no choice but to rely on the developer to protect their interests. However, the Court affirmed summary judgment for the Defendants on the HOA's constructive fraud claim, since the Plaintiff was not able to produce any evidence tending to show that the Defendants sought or gained any benefit from taking advantage of their relationship with the HOA.

The developer and contractor argued that the HOA's claim for breach of warranty was barred by the three year statute of limitations and six year statute of repose. The Court determined that the same disputed facts which precluded summary judgment on the HOA's negligence claim also made summary judgment on the warranty claim inappropriate.

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8. In *KRG New Hill Place, LLC v. Springs Investors, LLC*, No. 13-CVS-14770, 2015 WL 4113368 (Super. Ct. N.C. July 8, 2015), the court decided whether a development agreement required the contractor to complete certain infrastructure work by December 31, 2010. The parties disputed whether the agreement required the contactor to "endeavor" to complete the work by the target date, or whether it was a hard date for completion. The trial court determined that the contract was ambiguous:

> The Court concludes that the language of Section 2 of the Development Agreement is ambiguous, and that its meaning must be determined by a jury. The terms "shall endeavor" and "shall be completed" as used in Section 2 appear to be inconsistent with one another, the former suggesting that the deadline is aspirational and the latter that the deadline is a firm requirement. The language of the last sentence of Section 2 suggests that while the parties wished to meet a December 31, 2010 deadline, the construction work under the agreement needed only to "be performed in as expeditious a manner as reasonably possible." In addition, the evidence regarding the intent of parties with regard to Section 2 is disputed, with both parties presenting evidence supporting their respective interpretations. *See Root v. Allstate Ins. Co.*, 272 N.C. 580, 590 (1968) ("[I]f the writing itself leaves it doubtful or uncertain as to what the agreement was, parole evidence is competent ... to show and make certain what was the real agreement between the parties; and in such case what was meant, is for the jury, under proper instructions from the court.").

The trial court also concluded that there were material facts in dispute as to whether the owner waived the December 31, 2010 completion date. Accordingly, summary judgment was improper.

9. In *Gaylor, Inc. of North Carolina v. Vizor, LLC*, No. 15-CVS-839, 2015 WL 6659662 (Super. Ct. N.C. Oct. 30, 2015), the court considered which of a subcontractor's claims against a general contractor were subject to the parties' arbitration agreement, as well as whether litigation of the subcontractor's claims should be stayed pending the outcome of the arbitration proceedings. The parties' agreement contained a broad arbitration provision:

> All claims, disputes and other matters in question between [Vizor] and [Plaintiff] ... arising out of, or relating to this Agreement or the breach thereof ... shall be subject to arbitration.... Such arbitration shall be conducted in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect....

The disputes clause also provided that "the agreement to arbitrate contained herein shall be interpreted and decided upon by the arbitrator or arbitrators appointed in the arbitration."

The parties agreed that the breach of contract claims were subject to arbitration. However, they disputed whether the unfair and deceptive practices claims were subject to arbitration. The court held that the incorporation of the AAA rules met the "clear and unmistakable" standard in *AT&T Techs. V. Commun. Workers of Am.*, 476 U.S. 643, 649 (1986). Thus, the court concluded that the unfair and deceptive practices claim must be submitted to the arbitrator to determine arbitrability. The court also found that a stay of litigation was proper to avoid piecemeal litigation.

10. In *TM Construction, Inc. v. Marco Contractors, Inc.*, 780 S.E.2d 588 (N.C. App. 2015), TM Construction brought an action against Marco, seeking judgment on its claim related to the construction of a retail store. After participating in discovery, Marco filed a motion for summary judgment and, in the alternative, a motion to compel arbitration. The appellate court held that the trial court was not required to make a determination of whether the arbitration agreement was enforceable before denying the motion to compel arbitration and Marco surrendered its right to arbitrator by failing to timely demand arbitration.

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Legislation:

1. **Public Procurement –** In 2014, the North Carolina Legislature enacted vast changes to the process by which prospective bidders on public construction contracts are prequalified. N.C. Sess. Laws 2014-42, amending N.C. Gen. Stat. § 143-135.8. Prequalification is defined as "[a] process of evaluating and determining whether potential bidders have the skill, judgment, integrity, sufficient financial resources, and ability necessary to the faithful performance of a contract for construction or repair work."

Prior to this legislation, § 143-138.5 read simply: "Bidders may be prequalified for any public construction project." With only those words as their guide, public owners have been prequalifying bidders for years. Some have challenged public owners' prequalification determinations as shrouded in secrecy or too subjective to be of any value. To add some consistency and transparency to the prequalification process, the Legislature established specific requirements and conditions for the continued use of prequalification in the award of public construction projects.

With this legislation, there are now specific criteria, conditions and limitations on prequalification. For contracts awarded on or after October 1, 2014, the public owner may use a prequalification process only if all of the following conditions are met:

(1) The public owner is using single-prime, multi-prime or dual bidding under N.C. Gen. Stat. § 143-128(a1). Note: prequalification may not be used for the qualification-based selection of architects or engineers, design-builders, or construction managers at risk.

(2) The public owner adopts an "objective prequalification policy" applicable to all construction work prior to the advertisement of the contract for which the owner intends to prequalify bidders.

(3) The public owner adopts the assessment tool and criteria for that specific project, which must include the prequalification scoring values and minimum required score for prequalification on that project.

To qualify as an "objective prequalification policy," the following criteria must be met:

(1) Be uniform, consistent, and transparent in its application to all bidders.

(2) Allow all bidders who meet the prequalification criteria to be prequalified to bid on the construction project.

(3) Be rationally related to construction work.

(4) Not require that the bidder to have previously been awarded a construction project by the public owner.

(5) Permit bidders to submit history or experience with projects of similar size, scope, or complexity.

(6) Clearly state the assessment process of the criteria to be used.

(7) Establish a process for a denied bidder to protest to the public owner denial of prequalification. The process must be completed prior to the opening of bids and allow sufficient time for a bidder subsequently prequalified pursuant to a protest to submit a bid on the contract for which the bidder is subsequently prequalified.

Outline a process by which the basis for denial of prequalification will be communicated in writing, upon request, to a bidder who is denied prequalification.

If the public owner opts to prequalify bidders for a particular project, all bids submitted by bidders who are not prequalified "shall be deemed nonresponsive." This rule does not, however, apply to a bidder who was initially denied prequalification and subsequently prequalified following a successful protest to the public owner pursuant to the required protest policy.

There is often confusion as to what it means to be a "prequalified bidder." On public projects let pursuant to competitive bidding, the award is to be made to the lowest responsive, responsible bidder. Without prequalification, a public owner determines upon opening of the bids which of

the bidders are responsible bidders. By utilizing a prequalification procedure, the public owner determines which bidders are responsible prior to receiving and opening the bids. At bid opening, the public owner still must determine which bid is the lowest responsive bid.

Public owners throughout the state have long used prequalification processes on certain construction projects. There was no uniformity of application or interpretation of the criteria and standards by which certain prospective bidders were successfully prequalified and others rejected. More often than not there was no mechanism for one to challenge the rejection.

The intent of this legislation is to legislate into the competitive bidding process greater objectivity and consistency at least with regard to the prequalification of bidders. For without being prequalified where such was a prerequisite to bidding, bidders were being closed out (unfairly according to some) of even the opportunity to submit a bid.

2. **H.B. 376, Expert witnesses and costs.** The legislation amends North Carolina's expert discovery rules and synchronizes them with many of the key provisions of the Federal Rules of Civil Procedure. The law amends Rule 26(b)(4) of the N.C. Rules of Civil Procedure with the following notable changes, which take effect on October 1, 2015:

- **Disclosure of Expert Witnesses.** Revised Rule 26(b)(4)(a)(1) requires the party to identify their expert witnesses as a matter of course. This eliminates the requirement to affirmatively request such information through interrogatories. This revision essentially adopts its federal counterpart. Note, however, that the statute does not appear to set a deadline for these mandatory disclosures, though, as discussed below, it does establish deadlines for other expert discovery.

- **Expert Reports Optional.** In contrast to the federal rules, testifying experts are not required to prepare written reports. Instead, under revised Rule 26(b)(4)(a)(2), the parties may agree to accompany their expert disclosures with a written report. The reports must contain virtually the same information as that required of expert reports under the federal rules.

- **Interrogatories Re: Experts not Providing Reports.** If the parties elect not to provide expert reports, then the parties may obtain through interrogatories "the subject matter on which the expert is expected to testify," "the substance of the facts and opinions" the expert will offer, and a "summary of the grounds for each opinion." Note that the information a party can obtain through interrogatories is more limited than the information which must be included in the elective expert reports discussed above.

- **Disclosure Deadlines.** Pursuant to revised section 26(b)(4)(a), unless the parties otherwise agree or there is a scheduling order, expert reports must be provided 90 days before trial. Interrogatories seeking information on experts must also be served 90 days before trial. Rebuttals must be provided 30 days after the other party makes its disclosure. If disclosures are not timely, a court may prevent the party from offering the expert testimony at trial.

- **Depositions of Expert Witnesses.** Revised Rule 26(b)(4)(b) eliminates the requirement that a party obtain leave of court for any expert discovery beyond interrogatories. Now a party may, as of right, depose any expert witness. However, the deposition may only take place after the witness has provided a report or been identified in response to an interrogatory.

- **Consultants and Non-Testifying Experts.** Discovery in the form of depositions and interrogatories from consultants and non-testifying experts is generally prohibited under revised Rule 26(b)(4)(b)(2). There are minor exceptions, including a showing that it is impracticable to obtain the same information from other means.

- **Payment of Experts for Deposition Time.** Under revised Rule 26(b)(4)(c), the party noticing an expert deposition must pay the expert for the time spent in deposition.

- **Protection of Draft Expert Reports.** Under revised Rule 26(b)(4)(d), draft expert reports are not discoverable "regardless of the form in which the draft is recorded."

- **Protection of Communications with Experts.** Attorneys' communications with expert witnesses are protected from disclosure under revised section 26(b)(4)(e) unless they relate to (1) the expert's compensation, (2) facts or data provided by the attorney and considered by the witness, or (3) assumptions the attorney provided to the witness.

- **Expert Fees as Awardable Costs.** The law also amends section 7A-314(d) to clarify that expert witness fees which may be awarded as costs are limited to fees charged by the expert for testifying in a trial, deposition, or other proceeding.

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Ohio

Case law:

1. In *Ohio Bell Telephone Company v. Kassouf Company, No. 101970, 2015-Ohio-3030 (Cuyahoga Ct. App. July 30, 2015),* the Court held that a subcontractor was not negligent per se under an underground protection services statute even though the subcontractor did not conduct field tests to determine the depth of utility lines because the subcontractor relied on inaccurate information provided by the utility.

Plaintiff-Appellant Ohio Bell Telephone Company, d/b/a AT&T Ohio ("AT&T"), suffered damages in excess of Three Hundred Thousand Dollars ($300,000) when its lines were cut by Defendant-Appellee Leon Riley, Inc. ("Riley"). Riley was a subcontractor of the Kassouf Company ("Kassouf") which was the general contractor on a storm sewer project undertaken by the Northeast Ohio Regional Sewer District. Kassouf engaged Riley to horizontally bore a portion of the sewer line from a bore pit prepared by Kassouf to an existing sewer manhole.

Generally, Ohio case law provides that an excavator has a nondelegable duty to inform itself as to whether utility lines exist underground. Section 153.64 of the Ohio Revised Code,

however, requires that a utility owner either mark the location of underground utility facilities or provide drawings that depict the location of the facilities. The statute also requires the owner of the project to include in the plans and specifications the identity and location of the facilities as indicated in the drawings provided by the utility owner. Finally, the statute requires the utility owner to mark the location and approximate depth of its utility facilities and provides that a subcontractor that complies with its obligations under the statute is not responsible if facilities are encountered that were not marked, unless the subcontractor had actual notice of the facilities.

The Court ultimately held that while Riley had notice that AT&T's lines were in the area, Riley did not have notice that the lines were at the depth at which Riley was to bore because the plans and specifications showed the lines were 9 to 10 feet above the level of the bore. In addition, the Court held that Riley was not under any obligation to perform field tests to determine the depth of the lines because such tests were not common practice in the industry and could themselves damage the lines.

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Pennsylvania

Case law:

1. In *Conway v. Cutler Group, Inc.*, 57 A.3d 155 (Pa. Super. 2012), the Superior Court of Pennsylvania answered the question of whether a remote purchaser of a home has standing to sue a builder based on the theory of breach of implied warranty of habitability for defects in the construction of the home. Reversing the lower court, which had granted the preliminary objections of the builder, the Superior Court held that the implied warranty of habitability extended beyond the initial user-purchaser of the home to subsequent purchasers. Going further, the court reasoned that an action for breach of warranty is based on public policy and not contract, so privity of contract is not required for the home owner to assert a cause of action based on breach of implied warranty of habitability against the builder.

2. In *Bricklayers of Western Pennsylvania Combined Funds, Inc. v. Scott's Development Company, et al.*, 58 A.3d 748 (Pa. 2012), the trustees of union employee benefit funds filed mechanics' lien claims for unpaid contributions owed to union workers under the collective bargaining agreements between a contractor and the union. The Supreme Court of Pennsylvania reversed the Superior Court, holding that the Mechanics' Lien Law of 1963 was not intended to include within the definition of "subcontractor" employees of the primary contractor, so the union had no standing as a subcontractor.

3. In *Berks Products Corp. v Arch Insurance Co.*, 72 A.3d 315 (Pa. Cmwlth. 2013), a material supplier asserted a claim against *Arch*, the surety, who had bonded the general contractor on a public school project. The Pennsylvania Procurement Code contains a safe harbor provision which provides that once a contractor pays a subcontractor, future claims against that contractor and its surety are barred. Arch sought safe harbor protection. The Commonwealth Court of Pennsylvania rejected Arch's defense, holding that the language in the payment bond controlled and Arch waived protection under the Code's Safe Harbor provisions.

4. In *Scunglio Borst & Associates v. 410 Shurs Lane Developers, LLC and Kenworth II, LLC and Robert DeBolt*, 106 A.3d 103 (Pa. Super. 2014), the Superior Court of Pennsylvania held that Robert DeBolt, a principal in 410 Shurrs Lane Developers, LLC was not

individually liable to plaintiffs for damages under Pennsylvania's Contractor and Subcontractor Payment Act ("CASPA"), affirming the trial court's order granting DeBolt's motion for summary judgment. The court reasoned that to impose statutory penalties for breach of contract upon non-parties like Mr. DeBolt would be contrary to well-established agency and contract law principles. There was no allegation in the pleadings that Mr. DeBolt, through his actions, created a new contract between himself and Scunglio Borst & Associates.

5. In *A. Scott Enterprises, Inc. v. City of Allentown*, 102 A.3d 1060 (Pa. Cmwlth. 2014), the Commonwealth Court was asked to determine whether the trial court, over objection, have erred in allowing the issue of the City's bad faith to be presented to the jury. Under Pennsylvania's Procurement Code, a governmental agency must timely pay a contractor for conforming work and cannot withhold payment for non-conforming work unless it notifies the contractor of any deficiency items within the time set forth in the contract or within 15 days after the application for payment is received. The Procurement Code provides for penalties and reasonable attorneys' fees if the governmental agency withholds payment in bad faith. Although the jury found that the City acted in bad faith, the trial court did not award penalties or attorneys' fees. The Commonwealth Court's opinion focuses on whether language in the Procurement Code, wherein it was stated that the prevailing party "may" be awarded reasonable attorneys' fees in an amount to be determined by the court, required the trial court to hold a hearing to determine the proper amount to be awarded for attorneys' fees. The Commonwealth Court held that the trial court must hold a hearing on remand to determine the amount of penalties and attorneys' fees to be awarded.

6. In *Gongloff Contracting, LLC v. L. Robert Kimball & Associates, Architects and Engineers, Inc.*, 119 A.3d 1070 (Pa. Super. 2015), the Superior Court held that §552 of the Restatement (2nd) of Torts, does not require that a pleading set forth in explicit detail the allegations of negligent misrepresentation. Rejecting Kimball's argument that the allegations of negligent misrepresentation must be explicit, the court found that the Amended Complaint adequately pled that Kimball's design documents provided false information, and did not require the specificity demanded by Kimball. Pennsylvania adapted §552 as an exception to the Economic Loss Doctrine. There is no requirement of privity with respect to lawsuits against professionals based on §552. Although it did not cite the Spearin Doctrine, the court concluded that the design itself can be construed as an “actual representation” that, if followed, would result in a successful project. However, a contractor must still plead with some specificity that the information provided by the design professional contained false information.

7. In *Clipper Pipe & Service, Inc. v. The Ohio Casualty Insurance Co.*,; *Contracting Systems, Inc.*, 115 A.3d 1278 (Pa. 2015), the Supreme Court of Pennsylvania accepted the certification of the United States Court of Appeals for the Third Circuit to determine whether the Contractor and Subcontractor Payment Act ("CASPA"), a Pennsylvania statute addressing payment to contractors and subcontractors, applies to a public works project. The federal district court denied the appellants' motion for summary judgment based on the argument that the governmental entity is not an "owner" under CASPA. Clipper prevailed at trial and was awarded interest, penalties and attorneys' fees under CASPA. Appellants filed an appeal in the United States Court of Appeals for the Third Circuit which found for the appellants adopting the opinion of the Pennsylvania Supreme Court that since the owner was a governmental body and since the governmental bodies are not defined as owners in CASPA, that statute does not apply to a construction project where the owner is a governmental body.

8. In *Terra Technical Services, LLC v. River Station Land, L.P., et al.*, 124 A.3d 289 (Pa. 2015), the Supreme Court of Pennsylvania decided that the Mechanics' Lien Law did not

require a claimant, seeking to enforce a mechanics' lien, to file a complaint to enforce under a new court term and number. In so holding, the Supreme Court reversed the order entered by the lower court, which was affirmed by the Superior Court, which found that it was improper to file a complaint to enforce under the same docket number as mechanics' lien claim.

9. In *F. Zacheri, Inc. v. Flaherty Mechanical Contractors, LLC, et al.*, 2016 WL 56242, Flaherty was the mechanical prime on a school project. Zacheri, its subcontractor, filed a claim under Flaherty's payment bond. Because of Flaherty's deficient performance, including failure to pay Zacheri, the School District terminated Flaherty's contract. A verbal agreement was reached between Zacheri and the School District, whereby Zacheri agreed to continue work on the project in return for payment by the School District. The School District and Flaherty's surety failed to pay Zacheri. Zacheri's complaint named Flaherty, its surety and the School District as defendants. The defense asserted by the School District was that the agreement it entered into with Zacheri was not enforceable because it had not been approved by the School Board. The Commonwealth Court held that as an exception to the general rule that School Boards have to approve contracts entered into with completion contractors, the work performed by Zacheri had been previously approved and did not have to be approved again.

10. In *John Spearly Construction, Inc. v. Penns Valley Area School District*, 121 A.3d 593 (Pa. Commw. Ct. 2015), the Pennsylvania Commonwealth Court held that the active interference exception to enforcement of a “no damages for delay” clause applied. The court upheld the trial court’s determination that the failure of the architect to timely provide information and process change orders, and the lack of schedule coordination, constituted active interference by the owner. The court also upheld the trial court’s refusal to enforce the “no damages for delay clause,” which purported to exclude ordering changes and rescheduling the work from the definition of the active interference exception.

11. In *Butch-Kavitz, Inc. v. Mar-Paul Company, Inc.*, Civil Action No. 3:14-CV-00159, 2015 WL 7736761 (M.D. Pa. Dec. 1, 2015), the Middle District of Pennsylvania held that underpayments in a negligible amount were not a material breach of the subcontract and did not justify the subcontractor’s abandonment of its contractual obligations and the project. The subcontractor’s abandonment constituted an act of default, entitling the prime contractor to recover the additional costs to complete the subcontractor’s work.

12. In *Elliott-Lewis Corporation v. Skanska USA Building, Inc.*, Civil Action No. 14-03865 2015 WL 4545362 (E.D. Pa. July 28, 2015), the Eastern District of Pennsylvania granted a motion to dismiss, holding that the economic loss doctrine barred the claims of architects and engineers against a pump manufacturer and the manufacturer’s representative. The court concluded that the pump manufacturer and its representative were not “professional information provider[s],” such as design professionals, accountants, and lawyers, and, as a result, did not fall within the limited *Bilt-Rite* exception to the economic loss doctrine.

13. In *United States f/u/b/o Marenalley Construction, LLC v. Zurich American Insurance Co.*, 99 F.Supp.3d 543 (E.D. Pa. Mar. 13, 2015), the Eastern District of Pennsylvania denied the motion of a prime contractor and its payment bond surety to dismiss and/or stay a subcontractor’s Miller Act lawsuit, concluding that the subcontractor was not required to exhaust the administrative dispute resolution remedies in the prime contract and could proceed with its Miller Act claim in federal court. The court reached its conclusion despite references to the prime contract claims and disputes provisions in the subcontract.

14. In *Staron v. Workers' Compensation Appeal Board (Farrier),* 121 A.3d 564 (Pa. Commw. Ct. 2015), the Commonwealth Court of Pennsylvania held that a worker's employment status did not change to that of an independent contractor for workers' compensation purposes because a written contract for services did not exist at the time of the worker's injury, despite the worker's execution of such a contract subsequent to the injury. With this holding, the Court clarified Pennsylvania's Construction Workplace Misclassification Act, mandating an independent contractor agreement be signed prior to an injury to classify the injured worker as an independent contractor for workers' compensation purposes.

Legislation:

1. H.B. 874, approved by the Senate and signed into law by Governor Wolf, closes the loophole in the law which allowed employees and employers to engage in harassment without penalty during a labor dispute. The law now permits law enforcement officers and prosecutors to intervene to prevent harassment, stalking, or threats to "use weapons of mass destruction." This bill eliminates a carve-out in existing legislation.

2. H.B. 473, passed into law in 2014, made a number of revisions to the Pennsylvania mechanic's lien statute, one of which will take effect in 2016. The law requires Pennsylvania's Department of General Services to create, by Dec. 31, 2016, a State Construction Notices Directory that will serve as a statewide system for registering and tracking construction projects within the Commonwealth in excess of $1.5 million. If an owner elects to register a project on the Directory by filing a "Notice of Commencement," subcontractors will be required to file a "Notice of Furnishing" with the Directory within 45 days after commencing work or first providing materials to the jobsite. This notice is in addition to the other notice requirements under the mechanic's lien statute, and must include: a general description of the labor or materials furnished, the name and address of the person supplying the services, the name/address of the person that contracted for the services, a description sufficient to identify the project, and the date when the labor, work, or materials were first provided. A subcontractor that fails to file the Notice of Furnishing forfeits its lien rights.

3. H.B. 430, No. 468, Proposed Amendment to Pennsylvania's Mechanics Lien Law of 1963. The amendment would add the terms "architect, engineer, or other licensed design professional" to the definition of "contractor" and "subcontractor" that have mechanics' lien rights. The Bill looks to remove the requirement that design professionals must perform onsite work to have mechanics' lien rights. The Bill is sponsored by Republican Representative Dan Truitt of Chester County, Pennsylvania, and is currently before the House's Labor and Industry Committee.

4. Pennsylvania's Mechanics' Lien Law of 1963 has undergone multiple amendments, the most recent of which establishes a State Construction Notices Directory, to be operational by December 31, 2016. The Directory will provide a standardized statewide system for filing construction notices. 49 P.S. § 1501.1. A contract for a "searchable project" must include written notice that the failure to file a timely Notice of Furnishing will result in loss of lien rights. The amendment also provides that the project owner or agent of the searchable project may file a Notice of Commencement.

5. Philadelphia Administrative Code, Chapter 10, A-1001.4(R), Worker Training Requirements. All contractors, subcontractors, and their employees performing construction or demolition work are required to complete OSHA 10 safety training. Moreover, all contractors

licensed under § 9-1004 of the Philadelphia Code must employ a supervisory employee who is certified under OSHA 30 safety training within the last five years.

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Rhode Island

Case law:

1. In *Atwood Health Properties, LLC v. Calson Const. Co.,* 111 A.3d 311, 313 (R.I. 2015), subsequent to the expiration of the general contractor's one-year warranty with the owner, compressors for an HVAC system designed and installed by a subcontractor failed. The owner replaced the entire system and then initiated arbitration to recover all costs. In the consolidated proceeding, the arbitrator found in favor of the owner and also required the subcontractor to indemnify the general contractor for all costs. The trial court denied the subcontractor's motion to vacate and affirmed the award.

On appeal, the Supreme Court acknowledged that judicial review of arbitration awards under Rhode Island law is "limited in nature" and rejected each of the subcontractor's arguments that the "award was irrational or the arbitrator manifestly disregarded the law." Of particular note to practitioners was the court's holdings concerning manifest disregard. First, the subcontractor had argued that the arbitrator irrationally invoked the indemnification provision between the general contractor and the subcontractor because the arbitrator never found that the subcontractor was negligent. Because a finding of negligence was a prerequisite to indemnity, the Court agreed with the subcontractor's appeal but nonetheless concluded that the decision was not in "manifest disregard of the contract." The Court observed there were other contract provisions, albeit not cited by the arbitrator, regarding defective work that required the subcontractor to make the general contractor whole. Accordingly, because there was a basis somewhere in the contract, the court declined to disturb the award. Next, the subcontractor argued that the owner's claim was time-barred because the owner did not challenge the general contractor's claim within the one-year warranty specified in the contract. The Court was not persuaded noting that the general contractor failed to raise this argument in the arbitration and that the subcontractor could not rely on a provision contained in the owner-general's contract. The Supreme Court affirmed the award.

2. In *South County Post & Beam, Inc. v. McMahon,* 116 A.3d 204 (R.I. 2015), a subcontractor performed work, including additional work added without a formal change order, on a house-building project. During the project, the subcontractor addressed all its invoices to the general contractor. In one instance, the owners paid the subcontractor directly. Subsequently, when the subcontractor was not paid for the extra work, it sued the owner under theories of breach of contract and unjust enrichment. The trial judge dismissed the contract claims for lack of privity, but confirmed that the owner was unjustly enrichment and must make full payment to the subcontractor.

On appeal the Court affirmed the decision. It first observed that although the "plaintiff in this case styled its cause of action as one for unjust enrichment, . . .[it] is actually seeking to recover the value of the services rendered for which defendants have thus far declined to pay, i.e., to recover in quantum meruit." The Court confirmed that the subcontractor was entitled to pursue the owner in quasi-contract "even though [the] subcontractor had not attempted to collect outstanding balance from general contractor." The Court held that the because (1) the owner had made at least one direct payment to the subcontractor and (2) the owner was included on contemporaneous communications with the subcontractor when the subject work was occurring the quantum meruit remedy was available. Accordingly, the court rejected that this equitable theory was only available in the absence of a remedy at law.

3. In *HK & S Const. Holding Corp. v. Dible*, 111 A.3d 407 (R.I. 2015), a town issued an invitation for bids on a drainage improvement project, which involved the installation drainpipe and outfalls. A consultant for the town tabulated and evaluated the bids. One term for the bid required that all documents must be submitted by a certain date and time. At the public bid meeting, the plaintiff was revealed as the low bidder but had failed to include the company profile and subcontractor identification in its bid. The town opted to go with the next highest bidder. The plaintiff sued the town and the consultant. The trial court granted summary judgment against both parties.

On appeal, the Supreme Court affirmed the decision. With respect to the town, the Court observed that it "is well settled that, in reviewing a public bidding process, the courts will not interfere with the award of a state or municipal contract unless the awarding authority 'acted corruptly or in bad faith, or so unreasonably or arbitrarily as to be guilty of a palpable abuse of discretion.'" Here, because the plaintiff failed to submit documents by the deadline, its bid was nonresponsive. The town was free to reject its bid. Accordingly the appeal was denied. The Court also noted in dicta that authority exists to award contracts to an entity "other than the lowest bidder when the awarding authority deems it in the public interest to do so.'"

4. In *Emond Plumbing & Heating, Inc. v. Banknewport,* 105 A.3d 85 (R.I. 2015), the court upheld the grant of summary judgment in favor of defendant mortgagor against plaintiff subcontractor. The dispute arose when the mortgagee defaulted, and the mortgagor purchased the property out of the mortgagee's bankruptcy estate. The subcontractor's claims against the mortgagee were never paid, and the subcontractor sued the mortgagor, arguing unjust enrichment. The court, using the third prong of the unjust enrichment standard, held that the mortgagor was not unjustly enriched because there was no relationship between the mortgagor and subcontractor that would lead to an expectation of compensation, and no allegation that the mortgagor engaged in fraud or other misconduct when it purchased the property in foreclosure. Without either a relationship or misconduct, the court ruled that the mortgagor's ownership of the property, including the subcontractor's improvements to the property, did not constitute unjust enrichment.

Legislation:

1. **R.I. Gen. Laws § 5-65.3-1 et seq.** established a new statutory regime for underground utility contractors with provisions for licensing, qualifications, and discipline.

2. **R.I. Gen. Laws § 5-65-14** established that the contractors' registration and licensing board now must be comprised of 17 members (rather than 15) appointed by the governor. Of these 17 members, 10 (rather than 8) must be registered contractors, one must

be the executive director of the Utility Contractors Association of Rhode Island and one must be the executive director of the Rhode Island Independent Contractors and Associates.

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South Carolina

Case law:

1. In *S.C. Elec. & Gas Co. v. Anson Constr. Co., Inc.*, 2015 WL 2231894 Op. No. 2015-UP-248 (S.C.Ct.App. filed May 13, 2015), Contractor entered into a purchase order with Utility Company to perform installation of a concrete vault. The parties' purchase order provided that Contractor would perform all of its work pursuant to the general terms and conditions. The general terms and conditions contained an indemnity provision and an additional clause that stated that the purchase order would be formed when the Contractor rendered work for the Utility Company. The contract negotiation process began when Contractor issued a quotation to Utility Company. Utility Company subsequently issued a counteroffer in the form of a purchase order, which contained the general terms and conditions. Contractor then proceeded to perform its work after receiving Utility Company's purchase order. The trial court granted partial summary judgment as to the Utility Company's contractual indemnity claim, holding that the Contractor's quote, the Utility Company's purchase order, and terms and conditions all governed the parties' contractual relationship.

On appeal, Contractor argued that the terms and conditions did not make up part of the parties' contract. The Court of Appeals affirmed the trial court, holding that Contractor accepted Utility Company's counteroffer when it began its work on the Project as governed by the general terms and conditions found within the purchase order issued by the Utility Company. The Court also held that the "documents exchanged by the parties unambiguously provided [Utility Company] with a right of indemnity."

2. In *Crossman Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 411 S.C. 506, 769 S.E.2d 453 App. (Ct. App. 2015), Developers constructed multiple condominium projects in South Carolina between 1992 and 1999 and were later sued by many of the projects' homeowners as a result of construction defects. Developers settled the suits for approximately $16.8 million. Subsequent to the settlements, Developers filed a declaratory judgment action seeking coverage for the settlement payments made from multiple insurers, including Insurer I and Insurer II. Insurer I provided Developer with CGL primary and excess coverage with a $1 million per occurrence limit and a $2 million products completed operations aggregate limit between July 1993 and August 1998. The excess policies provided a $10 million each occurrence limit. Insurer II provided excess umbrella policies from July 1998 to July 2002 with $10 million in coverage for each occurrence annual limit and annual aggregate limit. During the trial, both parties stipulated to the facts and damages and only presented coverage questions to the court.

Among other things, the parties stipulated to damages in the amount of $7.2 million in the event that there was an occurrence, where the damages at the respective condominium projects resulted from water intrusion that met the definition of property damage. The parties also stipulated that the damage began within 30 days after the Certificate of Occupancy was

issued for each building, and the damage progressed until repaired or until the settlement of the cases, whichever came first. The primary issues before the trial court were: (1) Did the property damage amount to an occurrence? and (2) In the event the Court found that there was an occurrence or occurrences, how should the $7.2 million in damages be allocated, via either joint and several or time on risk? During the first hearing on remand, the parties agreed that the stipulations "remained the status quo, a part and partial [sic] of [the] case."

In 2007, the trial court found coverage under the policies, that the stipulated loss was $7.2 million, that the condominium projects sustained property damage during the policy periods. The court entered judgment against Insurer I in the amount of $7.2 million, and held that because the $7.2 million in damages were to be allocated joint and several, there was no need to rule on whether Insurer II's excess policies were triggered. Insurer I appealed the trial court's order and the Supreme Court affirmed the trial court's finding of coverage, but reversed the trial court's finding that damages were to be allocated jointly and severally. The Court instead, imposed the time on risk methodology for allocating damages and remanded the issue of whether or not Insurer I had any liability. On remand, the trial court attributed roughly $1.6 million in damages to Insurer I based on the time on risk methodology. The trial court also found that Insurer II's excess policies were not triggered due to the fact that the "underlying CGL policies were not exhausted, and [Insurer II] was not precluded from litigating this issue by not appealing the 2007 judgment." The trial court also found that Insurer II's policies could only be triggered if "the underlying policies were exhausted either by paying the full limits available or by [Developers] funding the difference between a settlement for less than the full limits and the limits of the relevant policies." The court noted that "the excess policies would be triggered if the amount of the damages paid in settlement of the underlying cases, as calculated using the time on risk method, exceeded the limits of the underlying insurance for each policy period." The trial court noted that Insurer II paid around $16.7 million to settle the condominium lawsuits, where roughly $9.6 million was left over to repair "defective construction", but relied on the parties' stipulation that the covered damages amounted to $7.2 million. After applying a daily calculation of losses on each project, the trial court did not find that the excess coverage was triggered. Developers filed a motion to reconsider which the trial court denied.

On appeal, the Court of Appeals affirmed the trial court, holding that the stipulations the parties entered into were "clear, unambiguous, and binding on [the Developers]." The Court rejected the Developers arguments that payments made in other states should have been considered in determining whether the policy limits were exhausted, holding that Developers failed to submit any "information specifying the portions of these [other] payments that related to property damage as defined under the policies compared to the costs related to defective construction, which were not covered under the policies." Finally, the Court noted that the trial court applied the correct methodology in calculating whether or not the policy limits had been exhausted, emphasizing that "all of the damage that happens in one policy year constitutes a single occurrence, and therefore progressive environmental damage creates a separate occurrence in each policy year."

3. In *Moorhead Constr. Inc. v. Enterprise Bank of S.C.*, 410 S.C. 386, 765 S.E.2d 1 (Ct. App. 2014), General Contractor contracted with Subcontractors for work on a development involving three tracts of land. Bank provided the construction loan for the Project to Owner. After two years, Owner stopped paying General Contractor and Subcontractors and defaulted on its loan payment. Owner executed a deed-in-lieu of foreclosure to Bank to one tract and obtained title to the other two tracts. General Contractor and Subcontractors filed mechanic's liens on all three tracts and also asserted claims for breach of contract and the Owner and foreclosure against the Bank. The trial court entered money judgments against the Bank.

On appeal, the Court of Appeals held that the trial court did not have the authority to enter money judgments against the Bank. The Court held that Bank "cannot be liable for money judgments because [General Contractor and Subcontractors] had no contractual relationship with [the Bank] or any other right to recover damages." The Court emphasized that "the exclusive remedy available to [General Contractor and Subcontractors] is foreclosure of their mechanic's liens." The Court remanded the remaining issues to the trial court. General Contractor and Subcontractors argued that foreclosure was not an issue due to the fact that Bank bonded off the mechanic's lien. The Court rejected this argument holding that the record only supported the fact that the bond "served to stay execution of money judgments" under S.C. Code 18-9-130 as opposed to the mechanic's lien under section 29-5-110. The Court also held that even if the bond were effective under 29-5-110, the foreclosure action must proceed as General Contractor and Subcontractors would still have to establish their right to foreclosure of their mechanic's liens.

4. In *Greens of Rock Hill, LLC v. Rizon Commercial Contracting, Inc.*, 411 S.C. 152, 766 S.E.2d 876 (Ct. App. 2014), Owner hired General Contractor to construct portions of a riverfront project in Rock Hill. Part of the work involved the demolition of an abandoned manufacturing facility, grading, and the installation of roads. After the demolition phase, there were large pieces of scrap concrete that still remained. General Contractor hired Subcontractor to crush the concrete into usable material. Subcontractor performed its work and subsequently filed mechanic's liens in the amount of $295,591 pursuant to S.C. Code § 29-5-20. Owner filed a petition to vacate the lien arguing that Subcontractor "did not provide labor, material, or supplies for the improvement of real property." Subcontractor sought foreclosure of its lien. The trial court vacated Subcontractor's liens and dismissed its foreclosure claim. The court found that Subcontractor was not a laborer as "it did not . . . do anything to improve the real estate" or "improve the real property," and "[Subcontractor] did not meet the requirements for a mechanic's lien under section 29-5-20."

On appeal, the Court of Appeals reversed the trial court, holding that Subcontractor was a "laborer that performed work for the improvement of real estate." The Court emphasized that Subcontractor was a laborer because it "rented equipment and provided all the labor, fuel, and supervision necessary to remove the scrap concrete from the property – a component of the work necessary for the development project to continue – by crushing it into a material that went directly back into the project." The Court also noted that the "legislature has expanded the scope of the mechanic's lien statute to cover persons performing a component of the labor necessary to complete construction and development projects, even though the labor performed [does] not go into something which has attached to and become part of the real estate."

5. In *C.R. Meyer & Sons Co. v. Custom Mech. CSRA, LLC*, 2015 WL 3609137 (Ct.App. 2015), General Contractor subcontracted certain industrial pipe work to Subcontractor on an industrial facility project in Beech Island, South Carolina. Subcontractor borrowed money from two separate lenders to fund its work and the lenders perfected security interests in Subcontractor's accounts receivable. Subcontractor obtained a labor force for its work under its subsidiary that had a labor union. Labor Union had a plan whereby its employees could set aside a percentage of their wages for a vacation fund, which was paid out twice a year. After General Contractor suspended Subcontractor's work on the project, Subcontractor's subsidiary stopped making payments to the vacation fund. Subcontractor filed a breach of contract action against General Contractor and prevailed at arbitration, receiving an award of roughly $2 million.

General Contractor challenged the arbitration award in circuit court, which the trial court affirmed. Subcontractor also filed a third-party complaint against its creditors, which included

both lenders and the employees who participated in the vacation fund. The two lenders asserted security interests in the arbitration award proceeds and sought a declaratory judgment that their security interests had priority over all other liens held by General Contractor's creditors. The employees asserted a first lien priority to the funds based upon S.C. Code § 29-7-10.

After the trial court affirmed the arbitration award, the parties settled for $1.8 million. The settlement provided that the trial court would order General Contractor to pay the funds into Subcontractor's attorneys' trust account while the court determined the priority of the creditors. The case was referred to a special referee, who ordered all of the funds to be disbursed to the lenders, except for $325,000. Both the lenders and employees filed cross-motions for summary judgment, claiming priority in the remaining $325,000. The special referee granted the lenders motion, holding that the employees were not entitled to a first lien under 29-7-10 because they were not directly employed by Subcontractor. The special referee also held that the employees were not entitled to a first lien because the monies had not come into the hands of the Subcontractor, and that they "did not have an independent claim to the unpaid vacation funds because the union brought a claim for the funds that had already been litigated and resolved."

On appeal, the Court of Appeals reversed the special referee's finding and remanded the case for trial, holding that 29-7-10 does not require that "laborers to be directly employed by the contractor who receives the money in order for them to be entitled to a first lien." The Court noted that 29-7-10 establishes "a first lien in favor of laborers who worked on the erection . . . of buildings regardless of their specific employer." The Court also emphasized that the employees were "not prohibited from establishing a first lien on [Subcontractor's] arbitration award merely because the $325,000 balance remains in [Subcontractor's] attorney's trust account pursuant to a court order." The Court held that the trial court's order outlined that Subcontractor "retained ownership of the funds even though the funds were held pending resolution of any claims asserted by [Subcontractor's] creditors because they could only be disbursed pursuant to further Order of the Court." The Court noted that "[t]he lien attached once [Subcontractor's] attorneys received the funds on its behalf, and section 29-7-10 gave the lien first priority." The Court also emphasized that "the Legislature did not intend the creation of a lien under section 29-7-10 to turn on how the contractor received the funds – whether physically, in its own bank account, or in the account of an escrow agent." Finally, the Court of Appeals held that the employees had "independent claims regarding their entitlement to the funds regardless of whether the union also brought a claim."

Legislation:

1. H 3568, Legislation Granting Sales Tax Exemptions on Construction Materials for Non-Profits. On June 15, 2015, Governor Nikki Haley signed H 3568 into law. This legislation grants tax exemptions on certain construction materials used by non-profits that build or repair homes for low-income families. The law goes into effect on January 1, 2016, and will largely benefit the state's largest non-profit home builder, Habitat for Humanity.

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South Dakota

Case law:

1. In *Northern Border Pipeline Co. v. South Dakota Dept. of Revenue,* 2015 SD 69, 868 N.W.2d 580 (2015), the South Dakota Supreme Court considered a determination by the South Dakota Dept. of Revenue regarding the tax assessment under the use tax statutes for the value of the shippers' gas that the shippers allowed Northern Boarder to burn as fuel in compressors that moved the gas through the pipeline. The decision addresses the definition of a "taxable use".

2. In *Puetz Corp. v. South Dakota Dept. of Revenue,* 2015 SD 82, 871 N.W.2d 632 (2015), the South Dakota Supreme Court addressed whether construction management at-risk services were subject to a contractors' excise tax under S.D.C.L. § 10-46A-1. The Court determined that the construction management at-risk services were subject to excise tax and upheld the assessment by the Depart. of Revenue.

3. In Midwest Rail Car Repair, Inc. v. South Dakota Dept. of Revenue, 2015 SD 92, 872 N.W.2d 79 (2015), the South Dakota Supreme Court addressed imposition of an assessment for use tax on parts and materials used in servicing rail cars and also for repair services provided.

4. In *Aggregate Construction, Inc. v. Aaron Swan & Associates, Inc.,* 2015 SD 79, 871 N.W.2d 508 (2015), the South Dakota Supreme Court considered the effect of a Release entered between a contactor and the South Dakota Dept. of Transportation on claims the contractor may have against a subcontractor. The South Dakota Supreme Court determined the Release executed between the South Dakota Dept. of Transportation and the contractor precluded attempts by the contractor to recover from the subcontractor.

5. In *Johnson v. Hayman & Associates, Inc.,* 2015 SD 63, 867 N.W.2d 698 (2015), the South Dakota Supreme Court addresses the scope of duty owed by certain professionals in connection with allegations of improper construction or repair applicable to residential property.

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Tennessee

Case law:

1. In *Gibbs v. Gilleland*, No. M2015-00911-COA-R3-CV, 2016 WL 792418 (Tenn. App. Feb. 29, 2016), the Court of Appeals of Tennessee held that rescission was unavailable in a land sales contract. The buyers purchased the land in question for the purpose of building a new house. At the time of contracting, the buyers and sellers believe that the property was suitable for construction. After the building permits were obtained and commencement of construction began, the county informed the buyers that the property was below the required Base Flood Elevation, and the construction must cease immediately. Following a dispute between the parties, the buyer sued for rescission of the contract. The trial court found that at the time the contract was entered, the property was suitable for construction of the house and that it was only after construction began that the action of the county in setting the Base Flood Elevation, which caused the unsuitable determination. On appeal, the court determined that, at the time of contracting, the parties were operating under a mutual mistake as to a

contemporaneously verifiable fact. The contract assigned the risk of mistake to the buyers. Therefore, rescission on the ground mutual mistake was not available.

2. In *McNatt v. Vestal*, No. W2015–00870–COA–R3–CV, 2016 WL 659847 (Tenn. App. Feb. 18, 2016), the contractor agreed to build and obtain the required licensing for an assisted living facility for the owner. The facility was constructed and licensed according to the parties' contract. Following completion, the owner refused to pay the balance of the contract amount, arguing that the contractor did not have a contractor's license, as well as numerous construction defects. The contractor sued the owner for breach of contract, and the owner counterclaimed for violations of the Contractors Licensing Act and Tennessee Consumer Protection Act. The trial court concluded that the contractor did not violate the Contractors Licensing Act or the Tennessee Consumer Protection Act, dismissed the owner's counterclaims, and awarded the contractor a judgment in the amount of $96,280.11. The appellate court concluded that the trial court erred in concluding that the contractor did not violate the Contractors Licensing Act, but affirmed the judgment to the contractor based upon proof of the actual document expenses. The judgment in favor of the contractor was modified for a lesser amount. Although the appellate court found that the contractor violated the Consumer Protection Act, it affirmed the trial court's dismissal of that claim because there was no ascertainable loss.

3. In *Avery Place, LLC v. Highways, Inc*., No. M2014–02043–COA–R3–CV, 2015 WL 8161848 (Tenn. App. Dec. 7, 2015), the developer of a subdivision brought a breach of contract action against the contractor who had been engaged nine years previously to pave the roads in the subdivision. The contractor refused to complete the second phase of paving for the roads at the price specified in the contract. At the trial court, the contractor moved for summary judgment on the grounds that the provision in the contract relating to the second phase of paving was a separate offer which had not been accepted by the developer and that the action was barred by laches and the statute of limitations. The developer also moved for summary judgment, seeking damages for the increase cost of paving. The trial court granted summary judgment to developer and denied summary judgment to contractor.

4. In *Anil Construction, Inc. v. McCollum*, No. W2014–01979–COA–R3–CV, 2015 WL 4274109 (Tenn. App. July 15, 2015), the general contractor hired a subcontractor to build and install cabinetry for a movie theater. The subcontract provided that the work should be completed by the date the theater was scheduled to open. However, at the theater's opening, several items remained unfinished. The general contractor refused to pay despite the subcontractor's demand for payment. The general contractor filed suit alleging breach of contract for failure to complete the project in a timely manner and for defective work. The subcontractor counterclaimed for breach of contract for failure to pay under the contract. After a bench trial, the trial court found in favor of the subcontractor and awarded damages. The trial court held, and the appellate court affirmed the finding, that the delays on the project were caused by a number of reasons, including the plans being incomplete, weather, interferences by other subcontractors, and interferences by the contractor. Ultimately, however, the case was remanded to the trial court for a determination of damages.

5. In *Lasco Inc. v. Inman Constr. Corp.*, 2015 Tenn. App. LEXIS 12 (Tenn. App. Jan. 9, 2015), the Court of Appeals of Tennessee reversed the trial court by granting attorney's fees to a subcontractor who won an arbitration dispute with a contractor. The contract between the general contractor and subcontractor incorporated the Construction Industry Arbitration Rules. *Id.* at *2. Rule 45 permits awarding attorney's fees if "all the parties have requested such an award or it is authorized by law or their arbitration agreement." *Id.* at *15 (quoting Am. Arb. Ass'n. Constr. Indus. Arb. R-45(d)(ii)). The Court observed that satisfying only one of these

categories is sufficient to grant attorney's fees, and the Court found that both parties requested an award of attorney's fees during arbitration. *Id.* at *16-17. The Court, therefore, concluded that granting attorney's fees was appropriate despite no attorney's fees provision in the underlying agreement. *Id.* at *21.

In coming to this conclusion, the Court rejected the argument that *D & E Const. Co., Inc. v. Robert J. Denley Co., Inc.*, 28 S.W.3d 513 (Tenn. 2001) required attorney's fees to be expressly included in an agreement. *Id.* at *18-19. The Court held that this case merely required that the parties have an "understanding" that attorney's fees may be awarded. *Id.* at *19. In the case, this understanding was evident due to the parties' incorporating the Construction Industry Arbitration Rules. *Id.*

6. In *Lewellen v. Covenant Health*, 2015 Tenn. App. LEXIS 450 (Tenn. App. June 9, 2015), the Court of Appeals of Tennessee affirmed the trial court's granting summary judgment due to plaintiff's having exceeded the time limits of Tennessee's statute of repose. The plaintiff, alleging negligent construction of a hospital radiation device, disagreed with the trial court as to which date to begin the four-year limit. *Id.* at *1-2. According to Tennessee's statute of repose, plaintiffs must bring a claim for deficient construction within four years of the project's "substantial completion." *Id.* at *14 (quoting Tenn. Code Ann. § 28-3-202 (2000)). By statute, substantial completion occurs when the owner can use the improvement for "the purpose for which it was intended." *Id.* (quoting Tenn. Code Ann. § 28-3-201(2) (2000)). The plaintiff argued that because the defendant failed to construct a protective barrier, the project was not complete. *Id.* at *15 The Court disagreed, observing that the use of the radiation device was undisputed during the trial court's statute of repose date. *Id.* at *19. According to the Court, permitting an extension of the statute of repose for a deficiency such as failure to install a protective wall would defeat the purpose of the statute of repose: no defective project would ever be considered substantially complete. *Id.* at *17. The ruling reiterated that the statute of repose begins when the project is used according to its intended use.

7. In *Diaz Constr. v. Indus. Dev. Bd. of the Metro. Gov't of Nashville & Davidson County*, 2015 Tenn. App. LEXIS 107 (Tenn. App. Mar. 6, 2015), the Court of Appeals of Tennessee affirmed the trial court's dismissal on summary judgment of a subcontractor's mechanic's lien when the subcontractor failed to provide notice to its prime contractor. In order for a remote contractor to receive a mechanic's lien, Tennessee's mechanic's lien statute requires the remote contractor to service a notice of nonpayment on the owner of a project as well as the "prime contractor in contractual privity with the remote contractor." *Id.* at *1 (quoting Tenn. Code. Ann. § 66-11-145(a) (2007)). At issue was whether "in contractual privity" required a direct contract between the remote contractor and the prime contractor. *Id.* at *6. The subcontractor filing the mechanic's lien argued that this requirement only applied to prime contractors in direct contractual privity with the remote contractor. *Id.* at *1-2. The Court disagreed. It contrasted statutory usage of "in direct privity of contract" with "in contractual privity," and it elaborated upon the purpose of the statute in giving general contractors notice of nonpayment. *Id.* at *13-14. Due to this interpretation, a subcontractor seeking a mechanics' lien is not limited in reporting nonpayment to the owner and those with whom the subcontractor has a direct contract.

Instead, the subcontractor must always report to the general contractor overseeing that subcontractor's work. The Court further elaborated that large projects may have multiple general contractors for various aspects of the project. *Id.* at *15-16. The Court argued that it would not make sense for a subcontractor working on one aspect of the project to provide notice to a general contractor overseeing a different aspect of the project. *Id.* Ultimately, the Court

believed that "the only reasonable interpretation is that the legislature intended remote contractors to give notice to the prime contractor upstream from them." *Id.* at *17. In order to qualify for a mechanic's lien, the Court ruled that the subcontractor was required to give notice of nonpayment to the general contractor overseeing the subcontractor's aspect even if there is no direct contractual privity them. *Id.* at *16-17.

8. In *Preston McNeese Specialty Woodworking, Inc. v. Daniel Co. (DANCO), Inc.*, 2015 Tenn. App. LEXIS 71 (Tenn. App. Feb. 13, 2015), the Court of Appeals of Tennessee vacated trial court's judgment that the doctrine of equitable estoppel entitled subcontractor to recover additional sums over the contract price. During the course of work, the subcontractor submitted a change request that detailed an additional cost to the project. *Id.* at *5-6. This was not signed by the general contractor. *Id.* at *6. The subcontractor submitted a number of pay applications that reflected revised sums and included the additional costs. *Id.* at *6-7. The general contractor paid partial payments while neither agreeing nor objecting to the additional costs. *Id.* at *7. The general contractor was slow in making payments and then objected to the payments after the subcontractor had substantially completed the project. *Id.*

The general contractor argued that the proposed changes were never accepted, and so, they were not enforceable obligations. *Id.* The subcontractor sued, and the trial court held that the general contractor had to pay the subcontractor in accordance with the doctrine of equitable estoppel. *Id.* at *8. The trial court reasoned that overarching aspects of fairness dictated the general contractor to pay. *Id.*

The Court of Appeals instead turned to the terms of the contract. The Court of Appeals observed that the subcontract included merger clauses that expressly stated the subcontract contained the entire agreement. *Id.* at *11. The subcontract further detailed that the additional work that the subcontractor performed was within the discretion of the architect—and not the subcontractor. *Id.* at *12. Because the contract specifically addressed the work in controversy, and because it explicitly declared to be the entire agreement, the Court ruled that the trial court lacked sufficient basis to employ equitable estoppel. *Id.* at *12-13. Absent a concealment or misrepresentation of facts, intent that facts be acted upon, and knowledge of true facts, the doctrine of estoppel does not apply. *Id.* at *13. According to the court, there was no concealment of facts in the case, and the subcontractor had the means to know the terms of the contract, so equitable estoppel was not appropriate. *Id.* at *13-14.

Legislation:

1. **H.B. 1183; S.B. 0877 – Mechanic's Lien.** The legislation revises various provisions of the lien laws, specifically Section 124 (Enforcement methods; exception) and Section 142 (Lien discharge; bond). Effective April 10, 2015, these sections provide as follows:

> **§ 66-11-126. Enforcement methods; exception**
>
> Liens under this chapter, except as provided in subdivision (5)(A), shall be enforced only by the filing of an action seeking the issuance of an attachment in the manner as follows:
>
> (1) For a prime contractor, the lien shall be enforced in a court of law or equity by complaint and writ of attachment or in a court of general sessions having jurisdiction by a warrant for the sum claimed and writ of attachment, filed under oath, setting forth the facts, describing the real property, with process to be

served on the person or persons whose interests the prime contractor seeks to attach and sell;

(2) For a remote contractor, the lien shall be enforced in a court of law or equity by complaint and writ of attachment or in a court of general sessions having jurisdiction by a warrant for the sum claimed and writ of attachment, filed under oath, setting forth the facts and describing the real property with process to be served on the person or persons whose interests the remote contractor seeks to attach and sell. In the discretion of the plaintiff or complainant, the complaint or warrant may also be served on the prime contractor or remote contractor in any degree, with whom the plaintiff or complainant is in contractual privity. In either event, the person or persons whose interest the remote contractor seeks to attach and sell shall have the right to make the prime contractor or remote contractor a defendant by third-party complaint or cross-claim as is otherwise provided by law;

(3) An action under this chapter is timely filed if a suit seeking the issuance of an attachment is filed within the applicable period of time, even if the attachment is not issued or served within the applicable period. The clerk of the court in which the suit is brought shall issue the attachment writ without obtaining fiat of a judge or chancellor;

(4) The clerk of the court to whom application for attachment is made shall, before issuing the attachment, require the plaintiff, or the plaintiff's agent or attorney to execute a bond with sufficient surety, payable to the defendant or defendants in the amount of one thousand dollars ($1,000) or the amount of the lien claimed, whichever is less; provided, that a party may petition the court for an increase in the amount for good cause shown, and conditioned that the plaintiff will prosecute the attachment with effect or, in case of failure, pay the defendant or defendants all costs that may be adjudged against the defendant or defendants and all such damages as the defendant or defendants may sustain by the wrongful suing out of the attachment; and

(5) (A) Where a bond has been provided pursuant to § 66-11-124, § 66-11-136, or § 66-11-142, an attachment on the real property shall not be necessary after the bond has been recorded, and the claim shall be enforced by an action on the bond before the circuit or chancery court, or before a court of general sessions where the amount is within its jurisdiction, filed under oath, setting forth the facts and describing the real property with process to be served on the obligors on the bond. In the discretion of the plaintiff or complainant, the complaint or warrant may also be served on the owner or owner's agent, prime contractor or remote contractor in any degree with whom the plaintiff is in contractual privity. In either event, the obligors on the bond shall have the right to make the owner or owner's agent, prime contractor, or any remote contractor of any degree a defendant by third-party complaint or cross-claim as is otherwise provided by law. Any action on the bond shall be filed in the county where any portion of the real property is located;

(B) Where a lien is enforced pursuant to this subdivision (5), or after suit is commenced on a bond provided pursuant to § 66-11-124, § 66-11-136, or § 66-11-142, the plaintiff shall, in case of failure to prosecute the suit with effect,

pay the defendant or defendants all costs adjudged against the defendant or defendants and all the damages the defendant or defendants may sustain by the wrongful assertion of the lien; and

(C) Where an action is brought pursuant to this subdivision (5), or after suit is commenced on a bond provided pursuant to § 66-11-124, § 66-11-136, or § 66-11-142, the defendants shall retain all defenses to the validity of the underlying lien.

* * * * *

§ 66-11-42. Lien discharge; bond

(a) If a lien, other than a lien granted in a written contract, is fixed or is attempted to be fixed by a recorded instrument under this chapter, any person may record a bond to indemnify against the lien. The bond shall be recorded with the register of deeds of the county in which the lien was recorded. The bond shall be for the amount of the lien claimed and with sufficient corporate surety authorized and admitted to do business in the state and licensed by the state to execute bonds as surety, and the bond shall be conditioned upon the obligor or obligors on the bond satisfying any judgment that may be rendered in favor of the person asserting the lien. The bond shall state the book and page or other reference and the office where the lien is of record. The recording by the register of a bond to indemnify against a lien shall operate as a discharge of the lien. After recording the bond, the register shall return the original bond to the person providing the bond. The register shall index the recording of the bond to indemnify against the lien in the same manner as a release of lien. The person asserting the lien may make the obligors on the bond parties to any action to enforce the claim, and any judgment recovered may be against all or any of the obligors on the bond.

(b) (1) When a prime contractor or remote contractor has provided a valid payment bond for the benefit of potential lien claimants, a copy of that bond may be recorded, in lieu of the recording of another bond, to discharge a lien asserted by the lien claimants. A copy of the bond may be recorded with the register of deeds in lieu of the bond provided in subsection (a) to discharge such a lien. Upon recording with the register of deeds, the contractor or owner shall notify the surety executing the bond, and the lien on the property shall be discharged. The person asserting the lien may make the obligors on the bond parties to any action to enforce the claim, and any judgment recovered may be against all or any of the obligors on the bond.

(2) The bond recorded pursuant to this subsection (b) shall:

(A) Be in a penal sum at least equal to the total of the original contract amount;

(B) Be in favor of the owner;

(C) Be executed by:

(i) The original contractor as principal; and

(ii) A sufficient corporate surety authorized and admitted to do business in this state and licensed by this state to execute bonds as surety; and

(D) Provide for payment of the lien claimant, whether the lien claimant was employed or contracted with by the person who originally contracted with the owner of the premises or by a remote contractor.

(c) The register of deeds may record any bond recorded under this section and return the original to the person providing the bond.

2. **H.B. 0823; S.B. 0978 – Architects.** As enacted, the legislation increases, from $25,000 to $50,000, the threshold for public works projects that require a registered architect, registered engineer, or registered landscape architect. Effective May 8, 2015.

3. **H.B. 0787; S.B. 0474 – Fire sprinkler systems.** As enacted, the legislation prohibits the requirement of fire sprinkler systems for townhouses; authorizes local governments to adopt mandatory sprinkler requirements for townhomes by local ordinance in same manner utilized for one-family and two-family dwellings. Effective April 30, 2015.

4. **H.B. 0069; S.B. 0079 – Fire Marshall; penalties.** As enacted, the legislation makes various changes to the manner in which the state fire marshal and the commissioner of commerce and insurance assess civil penalties against violators of state law, and rules promulgated pursuant to such law, regarding fire protection sprinkler systems, fire extinguishers and related equipment, and liquefied petroleum gas. Effective May 8, 2015.

5. **H.B. 0068; S.B. 0105 – Licensing Board.** As enacted, the legislation expands types of activities the state board for licensing contractors may penalize; increases the amount of civil penalties that may be levied against contractors; changes evidentiary requirements for obtaining a court order to enforce the board's penalties. Effective April 24, 2015.

6. **H.B. 0071; S.B. 0081 – Architects and Engineers**. The legislation authorizes the state board of examiners for architects and engineers to deny certain certificates of registration to persons with felony convictions; removes certain board notifications to governmental entities when revoking or suspending certificates of registration; revises other various provisions governing certain regulatory boards. Effective April 24, 2015.

7. **H.B. 0084; S.B. 0095 – Higher education; public procurement**. The legislation authorizes public institutions of higher education to participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of goods or services with one or more other states or local governments in accordance with an agreement entered into between the participants; revises the protest process for challenging a solicitation, award, or proposed award of a state contract; revises provisions governing authorized limitations of liability in certain state contracts.

8. **TN Code Ann. § 12-4-402, Prevailing Wage Act for State Highway Construction Projects.** This statute was modified from “streets, highways or bridges” to “any public highway” pursuant to H.B. 0226 and S.B. 0330. Present law requires a prevailing wage rate to workers on state highway projects. This amendment specifies that this is only applicable to public highway projects and not to privately maintained highways, roads, and streets.

9. **H.B. 0654; S.B. 0644, Workers' Compensation for Out-of-State Construction Services Providers.** This removes the prior reciprocity provision that exempted temporary out-of-state employees from the Tennessee Workers' Compensation Law. Now, out-of-state construction services providers and their employers must comply with the law even for temporary projects. This amends TN Code Ann. §§ 50-6, 56.

10. **H.B. 1027; S.B. 1370, Public Construction Contractor Safety Act.** This requires Tennessee's Department of Transportation to consider bidders' occupational safety and health record when awarding contracts. It amends Tenn. Code Ann. § 54-5.

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Texas

Case law:

Insurance Coverage

1. In *U.S. Metals, Inc. v. Liberty Mutual Grp., Inc*., No. 14–0753, 2015 WL 7792557 (Tex., Dec. 4, 2015), the Texas Supreme Court, responding to a certified question from the Fifth Circuit, stated that "physical injury" does not result merely from the installation of a defective component of a product, and therefore does not cause "property damage." The Court further stated that materials destroyed while repairing the defective produce may constitute "property damage."

Sovereign Immunity

2. In *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015), the Court declined to extend sovereign immunity to a private engineering firm retained by a governmental unit to design and construct a roadway. The Court held that the engineering firm was an independent contractor, not an "employee" to whom governmental immunity might extend. The Court also found that the plaintiffs sought only to hold the engineering firm responsible for its own independent conduct, and that the lack of control by the governmental unit was determinative.

3. In *The Gil Ramirez Group, L.L.C. v. Houston Independent School District,* 786 F.3d 400 (5th Cir. 2015), the Fifth Circuit held that a school district is immune from a contractor's RICO claims because of RICO's mandatory trebling provision and because a public entity cannot form the required *mens rea* to create a RICO claim. A school board trustee, however, was not entitled to immunity because he is not an "employee" of the school district, the school district had no right to control the trustee, and because "bribery and peddling influence" were not within the scope of his duties as a school board trustee. Finally, the Fifth Circuit held that the contractor's equal protection claims were without merit because discrimination in favor of another contractor did not show that the plaintiff contractor was discriminated against.

Arbitration

4. In *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502 (Tex. 2015), the Court held that the issue of whether the failure to meet a contractual deadline waived the right to arbitrate was for the arbitrator to decide, rather than a "question of arbitrability" for the court to decide, because the contractual deadline does not determine the existence, enforceability, or scope of an arbitration, but instead imposes a procedural limit on the ability to arbitrate.

Additionally, the Court held that subcontractors and design professionals could not rely on the prime contract between the general contractor and the developer (to which the design professionals and subcontractors were not parties), to require the developer to arbitrate its disputes against them, even though the arbitration provision in the prime contract applied to any "Claim arising out of or related to the Contract" and included a joinder provision.

Lien and Bond Claims

5. In *Moore v. Brenham Ready Mix*, 463 S.W.3d 109 (Tex. App.—Houston [1st Dist.] 2015), the court held that a lienholder may only enforce the pro-rata share of a lien against subdivided, individually-owned lots, even though the lien attached to the entire, undivided property.

6. In *Bond Restoration, Inc. v. Ready Cable, Inc*., 462 S.W.3d 597 (Tex. App.—Amarillo 2015, pet denied), the court held that a supplier was not required to prove that materials furnished to a subcontractor were actually used in a public works project. Additionally, evidence that the subcontractor picked up materials from the supplier was sufficient to prove delivery. Finally, the court held that there was no right to consequential damages when a contractor failed to provide the information required by TEX. GOV'T CODE § 2253.024(e).

Personal Injury

7. In *Abutahoun v. Dow Chemical Co*., 463 S.W.3d 42 (Tex. 2015), the Court held that Tex. Civ. Prac. & Rem. Code Chapter 95, which pertains to a property owner's liability for the acts of independent contractors, applies even when a claim is based on the property owner's own negligence and not the independent contractors' work.

Legislation:

OCIP's and CCIP's

1. Texas Insurance Code Chapter 151 was amended to require disclosure of certain key terms regarding a "consolidated insurance program" (statutorily defined) or "CIP" be disclosed prior to contracting. Effective January 1, 2016, eight categories of information must be disclosed to a contracting party 10 days before entering into an agreement, such as a summary of insurance coverages to be provided to the contractor under the program, per occurrence and aggregate limits of insurance coverages, and any material endorsements to the policy. A person may opt not to enroll in the CIP if they are not furnished the information in a timely manner. In addition, the principal of the CIP must furnish a copy of the actual insurance policy within a statutorily specified time shortly after commencement of the project. Failure to furnish the policy in the time required is a material breach of the contract. These obligations cascade from the principal down the contracting chain.

Mandatory Disclosures for Public Contracting

2. **Texas Gov't Code Chapter 2252** was amended to add section 2252.908, which requires a "disclosure of interested parties" before governmental entities and state agencies can enter into certain contracts greater than $1,000,000.00.

Prohibition Architect as Construction Manager-At-Risk on Public Projects

3. **Texas Government Code § 2269.252** was amended prohibit a governmental entity's architect or engineer, or a related entity, from also serving as the construction manager-at-risk.

Design Professionals and Indemnity on Public Projects

4. **Texas Local Government Code § 271.904** was amended prohibit a governmental entity from requiring a duty to defend from architects and engineers on public projects, but allows for reimbursement of "a governmental agency's reasonable attorney's fees in proportion to the engineer's or architect's liability." The amendment also established the standard of care for engineering or architectural services for public projects, and provides that any provision establishing a different standard of care is void and unenforceable.

Condominiums and Design Defects

5. **Texas Property Code Chapter 82** was amended by adding sections 82.119 and 82.120, which require certain condition precedents be met before instituting litigation or arbitration pertaining to the construction or design of a condominium unit, including obtaining an inspection and report from an independent third party, obtaining approval from unit owners by more than 50 percent of the total votes, providing written notice of the inspection to every party subject to a claim, and allowing those parties to inspect and correct any conditions identified by the third-party report. The amendment also requires that a condominium association must provide each unit owner with, among other things, a copy of the proposed contract with the attorney and a description of the attorney's fees, expert fees, consultant fees, and costs for which the association may be liable as a result of prosecuting the claim. The amendment tolls the limitations period for one year from the date the procedures are initiated by the association, if the procedures are initiated during the final year of the limitations period. Finally, the amendment provides that the declaration may require binding arbitration, and if binding arbitration is required, the declaration may not be later amended to retroactively modify the mandatory arbitration provision.

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Utah

Case law:

1. In *2 Ton Plumbing, L.L.C. v. Thorgaard*, 2015 UT 29, 345 P.3d 675, the Supreme Court of Utah evaluated the 2009 version of Utah's mechanic's lien statutes. The Court evaluated the very narrow issue of what may be included in a lien claimant's notice of lien as it pertains to the amount of alternate security. Posting alternate security "causes the lien to no longer be secured by the original real estate, and instead the lien becomes secured by the bond or cash equivalent posted." This gives an owner a way to clear title to its property while

disputing a lien claim. In this case, the contractor, 2 Ton Plumbing filed a mechanic's lien. Extensive effort was required to foreclose this lien, and 2 Ton Plumbing incurred significant attorney fees and costs in the process. 2 Ton Plumbing amended its notice of mechanic's lien twice to include its incurred attorney fees and costs. In responding to these foreclosure actions, the defendant posted alternative security to clear the title to its property. The defendant posted the additional security based on the original notice of lien that did not include the attorney fees and costs. In evaluating whether this security adhered to the requirements set forth in the mechanic's lien statutes, the Court determined that amending the amount of a notice of lien to include attorney fees and costs would be problematic because "[a] party seeking to post alternate security would be chasing a moving target, because as the lien amount increased, the amount required for alternate security would correspondingly increase." The Court therefore held that it is improper to add attorney fees to a notice of mechanic's lien for the purpose of adjusting the required amount of alternative security.

2. In *Reeve & Associates, Inc. v. Tanner*, 2015 UT App 166, 355 P.3d 232, the Utah Court of Appeals reviewed the 2009 version of Utah's mechanic's lien statutes. The court evaluated whether attorney fees had been properly awarded. The case arose from the proposed sale and development of real property in Weber county Utah. The landowners entered into an agreement with a developer to sell their land. Before the sale could be completed, the developer hired Reeve & Associates, Inc. ("Contractor") to be the contractor and perform the work. The Contractor performed work on the property, but was not paid for this work. When the developer was unable to obtain financing, the real estate purchase fell through, and the developer failed to pay the Contractor. The Contractor put a lien on the property, and the landowners brought an action to invalidate the lien. The trial court found that the lien was invalid because the landowner had not authorized the Contractor to perform the work and that the Developer was not the landowner's agent. The trial court then held that attorney fees could not be awarded under the mechanic's lien statutes because there had not been a valid mechanic's lien. The Court of Appeals overturned the trial court's ruling as to attorney's fees, citing to the statute and holding that attorney's fees are appropriate even if a mechanic's lien is deemed invalid.

3. In *Willis v. DeWitt*, 2015 UT App 123, 350 P.3d 250, the Utah Court of Appeals evaluated whether Utah Code Ann. § 78B-2-225(3)(a) is a statute of limitation subject to equitable tolling or a statute of repose, which acts as a strict bar on actions. This code section governs actions related to improvements in real property based in contract. The code states "An action by or against a provider based in contract or warranty shall be commenced within six years of the date of completion of the improvement or abandonment of construction." The court noted that the plain language of the statute "bars all actions after a specified period of time has run from the occurrence of some event other than the occurrence of an injury." The court held that this statute is a statute of repose which begins to run at the completion of the improvement. The plaintiffs had brought their claim more than six years after the completion of the improvement on their property, so the court upheld the dismissal of their untimely action.

4. In *Pentalon Const., Inc. v. Rymark Properties, LLC*, 2015 UT App 29, 344 P.3d 180, the Utah Court of Appeals reviewed the issue of when "commencement of work" under the 2009 Mechanic's lien statutes occurs. Commencement of work establishes priority for mechanic's lien actions and occurs when the work provides notice that "lienable work was underway" to a "person using reasonable diligence in examining the property." The court explained that site preparation, such as surveying, staking, and soil testing generally does not provide the requisite notice to qualify as commencement of work. These examples of site preparation were not at issue in the instant case. The court was evaluating whether nearly completed excavation for a building's footings and foundation provided the requisite notice. The

court attached color photos of the project showing excavation, including geotextile fabric lined trenches, along with heavy machinery and mounds of dirt scattered throughout the property. The court held that this level of excavation constituted commencement of work.

5. In *VCS, Inc. v. Countrywide Home Loans, Inc.*, 2015 UT 46, 349 P.3d 704, the Supreme Court of Utah reviewed an issue of first impression: "where there are three or more creditors who hold an interest in the same collateral, what is the effect of a subordination agreement between fewer than all of the creditors?" In this case, the property owner sought construction funding from two different lenders. Each lender recorded multiple deeds of trust, and the contractor recorded a mechanic's lien. Throughout the project, the two lenders entered into multiple subordination agreements. The contractor argued that although its mechanic's lien was originally junior to one of the deeds of trust because it was recorded later, it gained priority over the deed of trust as a result of various subordination agreements between the two lenders. The Court chose to adopt the partial subordination approach followed by the majority of jurisdictions as opposed to the complete subordination approach proposed by the contractor. This partial subordination approach was described by the Court through the following hypothetical:

> A, B and C have claims against the debtor which are entitled to priority in alphabetical order. "A" subordinates his claim to "C." After foreclosure of the secured interest, the resulting fund is insufficient to satisfy all three claims. The proper distribution of the fund is as follows.
>
> 1. Set aside from the fund the amount of "A" 's claim.
> 2. Out of the money set aside, pay "C" the amount of its claim, pay "A" to the extent of any balance remaining after "C" 's claim is satisfied.
> 3. Pay "B" the amount of the fund remaining after "A" 's claim has been set aside.
> 4. If any balance remains in the fund after "A" 's claim has been set aside and "B" 's claim has been satisfied, distribute the balance to "C" and "A".
>
> Thus, "C", by virtue of the subordination agreement, is paid first, but only to the amount of "A" 's claim, to which "B" was in any event junior. "B" receives what it had expected to receive, the fund less "A" 's prior claim. If "A" 's claim is smaller than "C" 's, "C" will collect the balance of its claim, in its own right, only after "B" has been paid in full. "A", the subordinator, receives nothing until "B" and "C" have been paid except to the extent that its claim, entitled to first priority, exceeds the amount of "C" 's claim, which, under its agreement, is to be first paid.

The Court held that the contractor was junior to the lenders just as claimant B was junior to both A and C, despite the subordination agreements.

Legislation:

1. **Utah Code Ann. § 38-1a-308, Intentional submission of excessive lien notice – Criminal and civil liability.** Effective May 12, 2015, the Utah legislature provided an option for claims $50,000 or less on residential property as defined in the statute may arbitrate the disputed excessive lien notice rather than pursue recovery through the courts. The

arbitration proceedings are subject to this statute or as agreed to by the parties. Generally, each party pays its own fees. An arbitration award may be reduced to judgment by the court, unless "any party within 20 days after the day on which the arbitration award is served, files a notice requesting a trial de novo in district court." If the moving party's judgment or liability is not altered by at least 10 percent, the moving party must pay the non-moving party's costs for the trial. Attorney fees may be awarded if the district court determines that the moving party sought trial de-novo in bad faith.

2. **Utah Code Ann. § 38-1a-805, Failure to file notice—Petition to nullify preconstruction or construction lien—Expedited proceeding.** Effective May 12, 2015, the Utah legislature created an expedited proceeding for nullifying preconstruction or construction liens where either the notice of preconstruction service or preliminary notice was not timely filed. To be entitled to this expedited relief, the owner must send a written request to withdraw the lien to which the lien claimant refused to comply. The court may grant a hearing to decide only whether the lien claimant filed a notice of preconstruction service or a preliminary notice and whether the lien claimant's preconstruction lien or construction lien is valid if the claimant failed to file a notice of preconstruction service or a preliminary notice.

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Vermont

Case law:

1. In *Stratton Corp. v. Engelberth Construction, Inc.,* No. 2013-336, 2015 WL 1948509 (Vt. 2015), the court upheld a jury verdict in favor of plaintiff developer against defendant contractor for breach of contract and also held that third-party defendant subcontractor was obligated to indemnify the contractor. Based on a dispute and settlement between a condo association and developer for construction defects, the developer sued the contractor for failure to indemnify it as required by the agreement between the two entities. The contractor in turn sued its subcontractor, whose work resulted in the alleged defects, for indemnification. The court held that the third-party defendant subcontractor could not appeal from a pretrial denial of a motion for summary judgment because the jury verdict rendered that motion moot. The court further held that the subcontractor had failed to preserve other arguments on appeal, because it relied on the contractor to raise any defenses at trial, rather than raising the issues itself.

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Virginia

Case law:

1. In *Wetlands America Trust, Inc. v. White Cloud Nine Ventures, L.P.*, 782 S.E.2d 131 (Va. 2016), thhe holder of conservation easement sought a declaratory judgment that property owner's construction activities and intended commercial use of new facility on property violated the easement's restrictive covenants. The trial court entered judgment in favor of property owner. On appeal, the Supreme Court of Virginia affirmed the trial court's conclusions, holding that: (a) the farm building was permitted on subject property; (b) the erodibility of site of new construction was to be tested after site had been graded; (c) the grading of site for parking

area did not violate terms of easement; (d) the property owner was not required to receive easement holder's written approval before grading for permitted parking area; and (e) the property owner's construction and use of new facilities did not significantly interfere with easement's conservation values or property's environment.

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Legislation:

1. Effective July 1, 2015, any provision of a construction contract or lien waiver that "waives or diminishes" the payment bond or mechanic's lien rights of a subcontractor, lower-tier subcontractor or material supplier before services are rendered is "null and void" in Virginia. The language in Va. Code § 11-4.1:1 and Va. Code § 43-3 represents a sharp turn from previous Virginia law on payment bonds and mechanic's liens, which expressly allowed such waivers "at any time."

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Procurement

2. **HB 907 Term Contracts for A&E Services.** Provides higher monetary caps on architectural and engineering services term contracts for transportation district commissions and localities with populations greater than 78,000 (amends Code § 2.2-4303.1).

3. **HB 1108 Experience Modification Restriction.** Prohibits the use of any experience modification factor as a condition of eligibility to participate in a solicitation for construction services, even for those projects not covered by the VPPA. "Experience modification factor" is defined as a value assigned to an employer by a rate service organization per its uniform experience rating plan required by Code § 38.2-1913 (amends Code §§ 2.2-4302.1, 4302.2, 11-9.8)

4. **HB 1166 Small Purchase Procedures.** Authorizes the establishment of purchase procedures not using competitive sealed bidding or competitive negotiation for a single or term contract less than $25,000 for transportation-related construction and for goods less than $100,000 (amends Code § 2.2-4303).

5. **SB 169 Request for Proposals for Architectural or Engineering Services.** Provides that offerors in the selection process for architectural or engineering services shall not be required to list any exceptions to proposed contractual terms and conditions until after the qualified offerors are ranked (amends Code § 2.2-4302.2).

6. **SB 418 Authorizing Cooperative Procurement for Artificial Turf.** Authorizes the purchase of installation of artificial turf and track surfaces and all associated and necessary construction using cooperative procurement (amends Code § 2.2-4304).

7. **SB 465 Consideration of Alternative Technical Concepts during RFP Process.** Provides the submission and consideration of "alternative technical concepts" during the RFP process for a design-build transportation project. "Alternative technical concepts" are defined as proposed changes to agency-supplied design, scope or construction criteria that

provide a solution that is equal to or better than the requirements in the RFP (amends Code § 33.2-209).

Workers' Compensation

8. **HB 44 Injuries Presumed to be in Course of Employment.** Revises the provision creating a presumption, in the absence of a preponderance of evidence to the contrary, that an injury is work related if the factual circumstances indicate an accident arose during employment and the employee dies without regaining consciousness, dies at the accident location, or is found dead at the employment site (amends Code § 65.2-105).

Employment

9. **HB 66 Grants for Earning Workforce Training Credentials; New Economy Industry Credential Assistance Training Grants.** Establishes a program that would pay grants of $2,000 to individuals who complete eight hours of community service and who subsequently complete a noncredit workforce training program and earn a credential in a high-demand field. The grant would be limited to payment of tuition charged for the training program, the cost of any required textbooks, and the cost of any examination required to earn the credential (creates new Title 23.38:10 et seq.).

10. **HB 691 Additional Hours to Report Work-Related Injuries.** Extends from eight to 24 hours the time period in which an employer is required to notify the Virginia Department of Labor and Industry of any work-related incident resulting in hospitalization, amputation, or loss of an eye (amends Code § 40.1-51.1).

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Washington

Case law:

1. In *Dania, Inc. v. Skanska USA Building Inc.,* 185 Wn. App 359, 340 P.3d 984 (2014), Division II of the Washington State Court of Appeals addressed the "nexus" required for a construction defect action's statute of limitations to run from termination of services instead of substantial completion. In Dania, a warehouse Owner found leaks in its warehouse roof and sued the Contractor and roofing Subcontractor. The Contractor filed a summary judgment motion and argued that the suit was time-barred because it was filed in April 2012, and the warehouse was substantially complete in January 2006. The Contractor argued that RCW 4.16.310 (the statute of repose, which bars any action for construction defects that fail to accrue within six years of substantial completion or termination of services) barred the suit. In response, the Owner argued that because the roofers did not install the final layer of roofing—the mineral cap sheet—until June 2006, substantial completion of the project could not have occurred in April 2006.

The Contractor, in its motion for summary judgment, introduced deposition testimony which established that the roof was watertight without the mineral cap sheet, which was installed only to provide UV protection. When the Owner failed to produce any evidence that the mineral cap sheet caused the leaks, the trial court granted summary judgment for the Contractor. On appeal, the Court of Appeals noted that the statute of repose in RCW 4.16.310 only requires a claim to accrue within six years, and once the claim accrues, the applicable

statute of limitations determines whether a suit is timely. To reduce contractors' exposure, RCW 4.1.326(1)(g) provides contractors with an affirmative defense that cuts off liability on any claim for breach of a written construction contract that is not filed within six years of substantial completion or the termination of services, whichever is later. The court held that a nexus between the post-substantial completion work and the cause of action was required for the six-year limitations period to run from the termination of services date instead of substantial completion.

Even though the Owner failed to produce any evidence that the mineral cap sheet installation affected the roof's waterproof integrity, the court focused on the connection between the work—which was performed on the warehouse roof—and the owner's cause of action—based on a leaking roof. The appellate court held that the requisite nexus was sufficiently established to overcome the Contractor's summary judgment motion.

2. In *Shelcon Construction Group, LLC v. Haymond,* 187 Wn. App. 878, 351 P.3d 895 (2015), Division II of the Court of Appeals held that a lien release does not extinguish a contractor's right to refile a new lien for work that was covered under a preceding lien but remains unpaid. In *Shelcon*, a Contractor liened a property after the Landowner failed to pay the Contractor for site development services. When the Landowner applied for additional financing, the Lender refused to lend additional money until the Contractor's lien was released. The Contractor released the lien after the Landowner promised to pay its debt with the new financing. However, the lien release did not contain any conditions or limitations, and did not address whether the Contractor had in fact been paid for the work covered under the lien. The Lender did not take any further action to verify that the Contractor was paid for the work, and released the funds to the Landowner.

The Contractor performed additional work, the Landowner again failed to pay, and the Contractor recorded a second lien. When the Contractor filed an action to foreclose the second lien, the Lender argued that the second lien was invalid because it included work that was covered under the first lien, which the Contractor had released. Additionally, the Lender argued that the Contractor was equitably estopped from recording a second lien on work for which it had signed a lien release. The Court of Appeals held that a lien release does not prevent the lien claimant from recording a second lien when the underlying work remains unpaid. The court held that under RCW 60.04.071, the mechanic's lien statute only requires that a lien be released upon request when full payment is made, and the statutory scheme does not address the effect of a lien release.

The court held that the Lender's equitable estoppel argument also failed because the Lender's reliance on the lien release was unreasonable. The Lender did not take any further actions to determine whether the Contractor had actually been paid for the work prior to releasing the funds, and the court did not believe that it was plausible for the Landowner, who was seeking additional financing, to be able to immediately pay off a lien in full to obtain the additional funding.

3. In *Hayfield v. Ruffier,* 187 Wn. App. 914, 351 P.3d 231 (2015), Division II of the Court of Appeals held that attorneys' fees must be awarded to the prevailing party in an action brought under Chapter 19.122 RCW, the "Underground Utility Damage Prevention Act"—Washington's "One Call Statute." In *Hayfield*, a Landowner crushed an underground drainage pipe while attempting to remove a tree stump with a backhoe. The drainage pipe was connected to a Neighbor's basement drainage system, and the damage to the pipe caused extensive and repeated flooding on the Neighbor's property.

The Neighbor prevailed in a suit for damages under Chapter 19.122 RCW because the Landowner failed to take any steps to identify utilities before excavating, which included failing to call in utility locates as required under the statute. The trial court judge, however, refused to award the Neighbor attorneys' fees because, even though the Landowner "technically violated" the One Call statute, the underground drainage pipe would not have been located even if the Landowner had complied, and the damage would not have been prevented.

The Court of Appeals reversed the trial court's denial of fees. The Court of Appeals held that RCW 19.122.40(4) provides no discretion in the award of fees: "In any action brought under this section, the prevailing party is entitled to reasonable attorneys' fees."

4. In *SAK & Associates v. Ferguson Construction, Inc.,* 189 Wn. App. 405, 357 P.3d 671 (2015), Division 1 of the Washington State Court of Appeals upheld the validity of a termination for convenience clause in a private subcontract when supported by consideration, and determined that it is not limited by the implied duty of good faith and fair dealing. In *SAK*, a Contractor terminated a Subcontractor's contract through the subcontract's termination for convenience clause. The Subcontractor had completed 24 percent of the work due under the Subcontract. The Subcontractor argued that the termination for convenience provision lacked consideration because the Contractor could terminate the subcontract at its discretion. Additionally, the Subcontractor argued that the Contractor failed to terminate the subcontract in good faith because it did so only to increase its own profits on the job. The Court of Appeals recognized that while termination for convenience clauses are common in government, and now standard form contracts, there is little authority addressing their validity in private construction contracts.

The Court of Appeals held that the Subcontractor's partial performance (and proportionate receipt of the Subcontract amount) validated the clause. The Court stated that the outcome may have been different if the Contractor terminated the subcontract prior to any work or after only a nominal amount of work had been performed. Finally, the Court held that the covenants of good faith and fair dealing do not trump express terms or unambiguous rights in a contract.

Legislation:

1. **S.H.B. 1575, Retainage Bond Good Cause Exception Eliminated for Public Contracts.** RCW 60.28.011 was revised by Substitute House Bill 1575, effective July 24, 2015. The revision eliminates a public bodies' option to reject a contractor's retainage bond "for good cause." The statute now provides that the public body must accept the bond if the contractor submits a retainage bond in a form acceptable to the public body from an authorized surety insurer (the public body can require a minimum A.M. Best financial strength rating, so long as such minimum does not exceed A-).

2. **1595, "Labor Hours" Under Apprentice Utilization Statute No Longer Limited to Hours Worked On Site.** The definition of "labor hours" in the apprenticeship utilization statutes has been revised by House Bill 1595, effective July 24, 2015. The definition now includes hours that workers are employed "upon" a project, rather than limiting the hours to those that workers are employed "on the site" of the project. By broadening the language, the definition now mirrors Washington's prevailing wage requirements, and includes work not performed directly on the site of the project.

3. **1601, County Public Works Contract Provisions Limiting Venue for Civil Actions to that County Are Void and Unenforceable.** Clauses in public works contracts that require suit to be brought in the superior court of the county where the action arises are now void and unenforceable. House Bill 1601, effective July 24, 2015, prevents counties from avoiding the effects of RCW 36.01.050, which allows suits against a county to be brought in either that county's superior court, or the superior court of either of the two nearest judicial districts.

4. **1695, Recycled Construction Aggregates and Recycled Concrete Requirements Expanded.** The Washington State Department of Transportation ("WSDOT") is now required to use, cumulatively, at least 25% recycled aggregate and concrete materials across all of its projects, so long as the materials are available and cost effective. Engrossed Substitute House Bill 1695, effective January 1, 2016, also requires any local government with 100,000 or more residents to give a bid preference to those bidders who propose to use the highest percentage of "construction aggregate and recycled concrete materials." However, the bill establishes that the preference will only be given if it is at "no additional cost."

Additionally, any local government with less than 100,000 residents is also required by the bill to: (1) review its capacity for utilizing recycled construction content, (2) establish strategies to meet that capacity, and (3) implement those strategies. Furthermore, those local governments with less than 100,000 residents, or any local government constructing a transportation or public works project, must adopt the WSDOT standards regarding use of recycled materials found in its Standard Specifications for Road, Bridge, and Municipal Construction.

5. **1749, Contractor Registration Requirement Modified to Exclude Owners Contracting with Registered General Contractor.** The Contractor Registration Act was modified by Substitute House Bill 1749, effective July 24, 2015, to allow a property owner to sell improved property in the pursuit of an independent business without having occupied or used the improved property for more than one year, despite not being a registered contractor. To do so, the owner must have contracted with a registered general contractor to perform the work and could not have superintended any part of the work. Previously, the Contractor Registration Act's definition of contractor included owners who sold improved property in the pursuit of a business if the owner offered the property for sale without occupying or using the improvements for more than one year following substantial completion, regardless of whether the owner actually performed or superintended any of the work. The legislative history suggests this modification was intended to relieve "house flippers" from either having to register as a contractor or obtain the requisite bond.

6. **E.S.S.B. 5997, Minimum Project Value for WSDOT to Utilize Design-Build Delivery Reduced to $2 Million.** Second Engrossed Substitute Senate Bill 5997, effective July 6, 2015, revised RCW 47.20.780. The bill expanded WSDOT's authority to contract for projects using the design-build delivery method. Previously, WSDOT was authorized to utilize design-build on projects greater than $10 million and on five "pilot projects" between $2 million and $10 million. The bill eliminates the pilot project provision and reduce the project cost threshold to $2 million.

Before a project can be eligible for a design-build contract, the project must still: (1) involve highly specialized construction activities, (2) present an opportunity for innovation and efficiencies between the designer and builder, or (3) allow for significant savings in project delivery time if the design-build delivery method is utilized. A further effect of the bill is to direct

the Joint Transportation Committee to review the WSDOT's implementation of design-build contracts, and direct WSDOT to develop a construction program business plan that will incorporate the findings of the Committee.

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West Virginia

Case law:

1. *Brooks v. City of Huntington,* 768 S.E.2d 97 (W. Va. 2014) overturned years of precedent regarding what a claimant can recover for property damage. Previously, a party claiming property damage was required to determine whether the cost of repair would exceed fair market value of the property before it was damaged, and damages were either the loss of the fair market value or the cost to repair, whichever was less. The new rule is that if a property owner can establish that the pre-damage FMV "cannot be fully restored by repairs and that a permanent appreciable residential diminution in value will exist even after repairs are made, then the owner may recover both the cost of repair and such remaining diminution in value." Now both cost of repairs and loss of value can be recovered if the repairs will not restore the property back to its pre-damage fair market value.

Negligent maintenance of a storm-water management system caused flooding in petitioners' neighborhood. Expert testified that petitioners lost 35-75% of the value of their homes. Expert said the market in this neighborhood "died" as a result of the flooding and would never recover even if the flooding did not continue, because the homes now sat in a flood plain. Trial court said petitioners should be awarded the lesser of either their cost to repair or the decrease in value of their property. The Supreme Court of Appeals reversed, holding that when residential property is damaged, the owner may recover the reasonable cost of repairing it even if the costs exceed its fair market value before the damage. The owner may also recover the related expenses stemming from the injury and loss of use during the repair period. If the damage cannot be repaired, the owner may recover the fair market value of the property before it was damaged, plus the related expenses stemming from the injury and loss of use during the time the owner was deprived of his property.

Loss of fair market value and costs of repairs can both be recovered as long as they are not duplicative of any other element of damage. The court says only in "extraordinary" cases will repair of damaged residential real property not fully restore its prior market value. It's unclear whether this new rule extends to commercial property, because the case involved residential property.

2. In *Sneberger v. Morrison,* No, 14-0662, 2015 W. Va. LEXIS 732 (W. Va. June 11, 2015), a homeowner sued the builder of her log home for negligence, fraud and misrepresentation, breach of contract, breach of implied warranties, and outrageous conduct. The jury returned a verdict in favor of homeowner only on her negligence claim, finding the builder negligent and awarding $40,000 in damages. The jury also found that homeowner failed to mitigate her damages and was comparatively negligent. The owner was 40% at fault and was not entitled to a new trial because she took an active role in the design and construction, and changed the size and design of the home during construction. She also insisted that certain lumber be used after being advised that it was inappropriate for the intended use.

Homeowner's sagging roof could have resulted from removal of support walls at homeowner's discretion by another contractor during remediation work, and not from the work by the original contractor. The jury could have found that the removal of the support walls caused, or at least contributed to, the alleged defect in the home. Therefore, the jury's comparative fault finding was not against the clear weight of the evidence, nor was the amount of damages awarded. The lower court's order is affirmed, and homeowner is not entitled to a new trial.

3. In *BPI, Inc. v. Nationwide Mut. Ins. Co*., No. 14-0799, 2015 W. Va. LEXIS 675 (W.Va. May 20, 2015) the court held that the holding in *Cherrington v. Erie Insurance Property & Casualty Co., 745 S.E.2d 508 (W.Va. 2013)* should be applied retroactively to any pending claim. In *Cherrington,* the court held that defective workmanship causing bodily injury or property damage is an "occurrence" under a commercial general liability insurance policy. Using the general rule of retroactivity, any claim not final at the time of the *Cherrington* decision should apply the court's holding in that case. The general rule of retroactivity has exceptions, which are articulated using the factors in the *Bradley* decision. *See Bradley v. Appalachian Power Co.,* 256 S.E.2d 879 (1979). The five *Bradley* factors were used to determine that an exception to the general rule of retroactivity was not warranted in this case.

4. In *SBA Network Servs., LLC v. Tectonic Eng'g & Surveying Consultants, P.C.,* No, 1:12CV164, 2014 U.S. Dist. LEXIS 105137 (N.D. W. Va. Aug. 1, 2014) summary judgment was denied because a question of material fact existed with regard to the professional negligence claim. SBA, a wireless communications company, built a telecommunications tower and roadway which were designed by Tectonic. The roadway leading to the tower had stress fractures and earth movement was observed, so a new road had to be constructed rather than repairing the existing roadway. SBA sued Tectonic for professional negligence, breach of contract, and breach of warranty claiming over $400,000 in damages.

Tectonic argues that SBA's decision to use a different type of rock in constructing the road than the type used in Tectonic's design caused the shifting, not negligent acts by Tectonic. SBA argued that any deviations from Tectonic's design were immaterial and not the cause of the earth movement. Summary judgment was denied because whether using a different type of rock in constructing the road than the type used in Tectonic's design constituted a material deviation from Tectonic's design was a question of material fact. The defendant's initial burden on summary judgment was satisfied by pointing to evidence linking the deviations from its design to the alleged instability of the tower site and roadway. It is unclear at this point in the litigation whether Tectonic breached its professional duty by failing to include a storm water protection plan in its design, or whether SBA materially deviated from Tectonic's design.

5. *Velasquez v. Roohollahi*, No. 13-1245, 2014 W. Va. LEXIS 1166 (W. Va. Nov. 3, 2014) was a challenge to the lower court's failure to award prejudgment interest on reimbursement sums awarded to the plaintiff. Plaintiff was a member in an LLC created to build an apartment complex. Plaintiff made an out-of-pocket payment for labor and materials for the project and sought reimbursement from the LLC. This case reiterates that disputes concerning construction contracts sound in contracts, so prejudgment interest is not mandatory but is left to the fact-finder's discretion under W.Va. Code 56-6-27.

Legislation:

1. **West Va. Code § 5-22-3, The Fair and Open Competition in Governmental Construction Act: Certain labor requirements not to be imposed on contractor or**

subcontractor. This statute was enacted in 2015 to promote open competition in governmental construction contracts. Project labor agreements are not a part of the competitive bid process and are not a condition for a grant, tax abatement or tax credit. These labor requirements are not to be imposed on contractors or subcontractors under the Act.

2. **West Va. Code § 38-2-21, Effect of payment by owner to contractor or subcontractor.** Beginning July 1, 2015 it is an affirmative defense, or an affirmative partial defense, in any action to enforce a mechanic's lien that the owner is not indebted to the contractor or is for less than the amount of the lien sought to be perfected when property is: (1) an existing single-family dwelling, (2) residence constructed by owner prior to its occupancy as the owner's primary residence, (3) or a single-family, owner-occupied dwelling.

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Wisconsin

Case law:

1. In *Acuity v Chartis Specialty Ins. Co.,* 2015 WI 28, 361 Wis.2d 396 (2015), the Wisconsin Supreme Court determined that the escape of natural gas from a damaged pipe was a pollution condition under a Contractor's Pollution Liability ("CPL") policy and that the pollution caused bodily injury and property damage alleged in four lawsuits. As a result, the CPL insurer was required to pay its equal share of defense costs and indemnity payments in underlying lawsuits.

Dorner, Inc. ("Dorner") previously contracted with the Wisconsin Department of Transportation for a road construction project that included underground excavation. During excavation, Dorner employees discovered a pressurized natural gas pipe, incorrectly concluded that it was no longer in use and attempted to remove the pipe. The pipe was damaged in the process, causing natural gas to escape. Shortly thereafter, the gas that had leaked out of the pipe exploded, causing a fire. The explosion and fire caused property damage to a church and residence, in addition to causing personal injury to people at the scene. Four separate lawsuits ensued and were consolidated. Acuity, which provided Dorner with its Comprehensive General Liability ("CGL") policy, provided Dorner's defense in the four lawsuits. Both Dorner and Acuity filed a third-party complaint against Chartis Specialty Insurance Co. ("Chartis") seeking, among other things, a declaration that Chartis had a duty to defend and indemnify Dorner in the four lawsuits under the CPL policy Chartis had issued to Dorner. Acuity did not contest its own duties or liability under the CGL policy, but instead sought reimbursement from Chartis for one-half of the defense fees incurred in representing Dorner and one-half of the indemnity payments made on Dorner's behalf.

Chartis denied coverage under its CPL policy, which covered Dorner's liability for "Bodily Injury [or] Property Damage … caused by Pollution Conditions…" by asserting that neither the natural gas-fueled explosion and fire, nor the resulting bodily injury and property damage, were "caused by Pollution Conditions" as required by the CPL policy. The Circuit Court, finding in favor of Acuity, concluded that Chartis breached it duties of defense and indemnification under the CPL Policy, determining that the natural gas that leaked from the damaged pipe constituted a "contaminant" under the CPL policy and thus, its release from the damaged pipe was a "pollution condition". The Circuit Court ordered Chartis to share the cost of defending and indemnifying Dorner with Acuity "on a 50-50 basis." The Court of Appeals reversed, , holding

that the claims of bodily injury and property damage asserted against Dorner were "due only to the explosion and fire, not to contact with the escaped natural gas itself because the gas intrinsically is an 'irritant or contaminant…'" Given this rationale, the Court of Appeals found coverage under Chartis' CPL policy was fairly debatable and thus, Chartis had no duty to defend Dorner in the underlying lawsuits.

The Wisconsin Supreme Court reviewed the Court of Appeals' reversing orders and the original judgment of the Circuit Court by analyzing three arguments regarding Chartis' obligations to defend and indemnify its insured. First, the Court reexamined whethere the escape of natural gas from the damaged pipe constituted a pollution condition. Chartis' CPL policy defined "Pollution Conditions" as the "release or escape of any ... gaseous ... irritant or contaminant ... [into] the atmosphere ... provided such conditions are not naturally present in the environment in the concentration or amounts discovered." In agreeing with the Circuit Court that natural gas constitutes a "contaminant," the Supreme Court noted:

> Natural gas is, of course, 'gaseous.' Natural gas is also a 'contaminant' under the circumstances of the instant case. Natural gas was 'release[d] or escape[d]' from the damaged natural gas pipe, and there is no dispute that natural gas is 'not naturally present in the environment in the concentration' that caused the explosion and fire.

The Supreme Court therefore found that the natural gas constituted a "contaminant" under the facts as presented and that the escape of natural gas from the damaged pipe was a pollution condition covered under Chartis' CPL policy.

The second argument the Court addressed was whether this pollution condition caused the property damage and bodily injury alleged in the four lawsuits brought against Dorner. In concluding that the bodily injury and property damage alleged in the underlying lawsuits were "caused by Pollutions Conditions", the Supreme Court reasoned:

> Each of the four lawsuits against the insured alleges that the actions of the insured's employees led to a natural gas leak that ultimately resulted in an explosion and fire, causing bodily injury and property damage. There is no dispute that the natural gas leak caused the explosion and fire. There is no dispute that the explosion and fire caused the alleged bodily injury and property damage. This sequence of events is sufficient to establish that the escape of natural gas (a pollution condition) caused the alleged bodily injury and property damage.

The final argument the Supreme Court addressed was Chartis' contention that concurrent coverage under Acuity's CGL policy and Chartis' CPL policy is not possible in this case in that "'the Acuity CGL policy is intended to cover [the insured's] liability for bodily injury or property damage *not caused by pollution*, and the Chartis Pollution Policy is intended to cover liability for bodily injury or property damage *caused by pollution*.'" The Supreme Court rejected this argument and determined that the "very terms of Chartis' CPL policy supported [the Court's] position that the two policies can simultaneously cover the insured's liability."

2. In *Peter v. Sprinkmann Sons Corp.,* 2015 WI App 17, 360 Wis.2d 411 (2015), an employee sued an employer after he was diagnosed with asbestos-related mesothelioma. After the employee's death, his widow added a claim for wrongful death. The Circuit Court entered summary judgment for the employer on the basis of the construction statute of repose and the

widow appealed. The Wisconsin Court of Appeals determined (1) that the employee suffered "damages" within the meaning of an exception to a ten-year statute of repose when the employee was diagnosed with asbestos-related mesothelioma, not on the date that he suffered injuries due to inhalation of asbestos fibers, and (2) that daily repairs to insulation on machine pipes were not "improvements to real property" within the meaning of the construction ten-year statue of repose so as to bar the employee's claims.

Sprinkmann Sons Corporation ("Sprinkmann") was a contractor hired by Pabst Brewery to install, maintain, and repair the asbestos insulation on the steam pipes used in various stages of Pabst's beer production. In 1959, Donald Peter ("Donald") started work with Sprinkmann as a maintenance machinist at Pabst and was employed primarily in the Pabst "Bottle House" for over thirty-six years. In May 2012, Donald was diagnosed with malignant pleural mesothelioma and sued Sprinkmann, alleging that his exposure to Sprinkmann's "installation, removal and maintenance of asbestos containing pipe and block insulation at Pabst Brewery" caused his injury. Donald died in October 2013, and thereafter, his wife ("Mrs. Peter")added a wrongful death claim.

Sprinkmann filed a motion seeking summary judgment on two grounds: (1) Mrs. Peter could not show that Sprinkmann's products caused Donald's injuries; and (2) the construction statue of repose barred Mrs. Peter's claims. In agreeing with Sprinkmann that the statue barred Mrs. Peter's claims and dismissing the action, the Circuit Court ruled that an exception in the statue of repose did not apply and that Sprinkmann's work was an "improvement" to real property. The Circuit Court did not address causation. Mrs. Peter appealed and the Court of Appeals ("Court") addressed whether the construction statute of repose barred Mrs. Peter's lawsuit either 1) because Sprinkmann's work was an improvement to real property or 2) because the lawsuit did not fall within the statute's damages exception.

The Court began its analysis by addressing Wisconsin's ten-year statute of repose and its related damages exception (Wis. Stat. § 893.899), which states that no cause of action may accrue after ten years following the date of substantial completion of an improvement to real property, unless such damages were sustained before April 29, 1994. This exception has previously resulted in spilt decisions in Circuit Courts: some circuit courts have found that the exception removes asbestos cases from the statue of repose bar based on expert testimony opining that the plaintiff's lungs were damaged at the time he or she was exposed to asbestos; other courts have ruled that the damages exception in the statue of repose did not save the asbestos cases because "damages" in Wis. Stat. § 893.89(4)(d) meant legally actionable damages (i.e., the plaintiff must have showed that he or she could have sued before April 29, 1994). As such, the Court was faced with deciding whether the legislature intended the word "damages" to mean a *physical injury* (inhalation of asbestos fibers during exposure) or *legally actionable injury* (diagnosis of mesothelioma or manifestation of symptoms upon which a lawsuit could be filed).

The Court of Appeals, based on four separate reviews of statute language, concluded that the only reasonable interpretation of the statute is that "damages" means a *legally compensable injury*: First, it looked to the specific and legal definition of the word "damages" as provided by the Wisconsin Supreme Court - "pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another," c*iting Thomas v. Iowa Nat'l Mut. Ins. Co.,* 132 Wis. 2d 18, 24, 390 N.W.2d 572 (quoted source omitted). In applying this definition to the facts of this case, the Court stated that Mrs. Peter did not have any legally cognizable claim for injuries before April 29, 1994, because Donald was not

diagnosed with mesothelioma until 2012 and it was, therefore, not until 2012 that the Peters could sue Sprinkmann.

Second, the Court noted that the legislature used both terms "damages" and the term "injury" in a single sentence in the statue of repose: "no cause of action may accrue and no action may be commenced … to recover *damages* for any *injury* to property, for any *injury* to the person, or for wrongful death…." Wis. Stat. § 893.89(2). The Court stated that based on the legislature's use of both words in the same sentence, it presumed that "damages" has a different meaning than "injury": "[d]amages cannot mean injury because it would render Wis. Stat. §893.89(2) absurd. Rather, the sentence makes damages mean something other than injury—something that a party can recover as a result of the injury."

Third, the Court discussed the significance of the legislature using the plural form, "damages" in the exception, not the singular tense, "damage." Although Mrs. Peter argued that the singular and plural of a word have identical meanings, the Court quoted *Anderson v. Procter & Gamble Paper Prod. Co.* to show that each word has a distinct legal meaning:

> Damages is not simply the plural of damage, it is a legal term connoting compensation for injury, not the injury itself. BLACK'S LAW DICTIONARY makes the distinction clear within the definition of "damage" itself. Damage means "loss, injury, or deterioration." BLACK'S LAW DICTIONARY 389 (6th Ed.1990.) *"The word is to be distinguished from its plural, 'damages' which means a compensation in money for a loss or damage." Id.* The Restatement of the Law of Torts, which the Wisconsin Supreme Court usually follows, also defines the term "damages" in this way. *See* RESTATEMENT (SECOND) OF TORTS § 12A ("the word 'damages' is used throughout the Restatement of this Subject to denote a sum of money awarded to a person injured by the tort of another.").
>
> No. 11-C-61, 2013 WL 5506875 at *2 (E.D. Wis. Oct. 4, 2013)

Fourth, the Court looked to the purpose of the statue of repose: "the purpose of the construction statue of repose is 'to provide protection from long-term liability for those involved in the improvement to real property,'" c*iting Kalahari Dev., LLC v. Iconica, Inc.,* 2012 WI App 34, ¶ 6, 340 Wis. 2d 454, 811 N.W.2d 825 (quoted source omitted). Given the purpose of the statue of repose in general and the reason for the damages exception in particular, the Court found that it would not make sense to interpret "damages" to mean injury. Overall, the Court concluded that "damages" means "legally actionable damages" and that Mrs. Peter's claim is not saved by the exception. Mrs. Peter did not have an actionable claim for damages before April 29, 1994, and, therefore, the damages exception in Wis. Stat. § 893.89(4)) does not apply.

The second issue the Court of Appeals analyzed was whether Sprinkmann's work during Donald's employment was considered an "improvement to real property" or whether it was merely routine repairs and maintenance to which construction lien rights would not apply. Wis. Stat. § 893.899 would apply to bar Mrs. Peter's action only if Sprinkmann's work was considered an improvement to real property. The statue bars an action against "any person involved in improvement to real property" if an action is not brought within ten years of the substantial completion of the improvement. The Court found that the repairs were not permanent additions, rather, they were maintenance done to keep the pipes in proper condition. The Court stated, [t]he purpose of the statue of repose is to protect contractors who are involved in permanent improvements to real property. Daily repairs are not improvements to real property as that phrase is used in the statue of repose." The Court continued by stating that the initial

installation of insulation into a building or house may be considered an improvement to real property, however, that was not the situation before the Court. Mrs. Peter did not claim that Donald was exposed to asbestos from initial installation of all the insulation on the Pabst pipes. Rather, Mrs. Peter's claim was that Donald's injury occurred during the daily exposure when Sprinkmann's employee performed regular maintenance and repair work to the insulation around the pipes.

As such, the Court determined that the statute of repose does not bar Mrs. Peter's action and therefore, the Court reversed the summary judgment and remanded for further proceedings consistent with their opinion.

3. In *Advanced Waste Services, Inc. v. United Milwaukee Scrap, LLC,* 2015 WI App 35, 361 Wis.2d 723 (2015), a contractor alleged that water from an insured's facility contained polychlorinated biphenyls ("PCBs") that contaminated the contractor's processing plant. The insured filed a third-party complaint against its liability insurer to recover for breach of duty to defend and indemnify the insured in a suit. The Court of Appeals affirmed the trial court's grant of summary judgment and concluded that a total pollution exclusion barred coverage.

United Milwaukee Scrap, LLC ("United Milwaukee Scrap") contracted with Advanced Waste Services, Inc. ("Advanced Waste") to remove the wastewater from its facilities. United Milwaukee Scrap is a company that buys, processes, and sells scrap metals generated from industrial waste, obsolete materials, and construction demolition. Advanced Waste is a waste-hauling service that recycles oily waste waters and resells the used oil.

In February of 2013, Advanced Waste sued United Milwaukee Scrap for negligence, intentional misrepresentation, negligent misrepresentation, strict responsibility, and breach of contract, among other causes of action, alleging that the wastewater removed from United Milwaukee Scrap's facility was contaminated with PCBs, which contaminated the treatment facility that Advance Waste brought its water to for processing. Advance Waste further alleged that it remained unaware of the PCBs until after the wastewater circulated throughout substantial portions of the treatment facility, thus contaminating the facility, equipment, and product. After Advance Waste filed its claim, United Milwaukee Scrap notified its insurer, Illinois National, however, Illinois National refused to defend the lawsuit and denied coverage on the basis of its "TOTAL POLLUTION EXCLUSION WITH A HOSTILE FIRE EXCEPTION," which prohibited coverage for:

> (1) ... "property damage" which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time....
> (2) Any loss, cost or expense arising out of any:
> (a) Request, demand, order or statutory or regulatory requirement that any insured or others ... clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants."

United Milwaukee Scrap also filed a third-party complaint alleging that Illinois National had breached its duty to defend and indemnify under the policy. Illinois National, in turn, filed a motion for summary judgment, arguing that it had no duty to defend the claim against United Milwaukee Scrap because the allegations fell within the policy's "total pollution exclusion." The trial court granted summary judgment in Illinois National's favor and United Milwaukee Scrap appealed the decision.

United Milwaukee Scrap offered several arguments in its favor, including 1) that because it did not disperse the pollutant (the PCBs were not released until after the wastewater left United Milwaukee Scraps' possession), the exclusion should not apply; 2) citation to a New Jersey case (*Nestle Foods Corporation v. Aetna Casualty and Surety Co.*) that states that a pollution exclusion only applies if the insured "intentionally discharges a known pollutant" and 3) that the pollution exclusion is ambiguous. The Court of Appeals rejected all three of United Milwaukee Scrap's arguments and concluded that the exclusion bars coverage, stating, "the exclusion at issue here bars coverage for occurrences involving the dispersal of pollutants, and such an occurrence is exactly what Advanced Waste's complaint against United Milwaukee Scrap alleged. United Milwaukee Scrap does not deny this. Rather, it attempts to read into the exclusion a limiting factor that simply does not exist under the policy's clear and unambiguous language and that has no basis in Wisconsin law."

Legislation:

1. Wisconsin Act 1 (2015 S.B. 44). Enacted March 9, 2015, Act 1 prohibits membership in a labor organization or payments to a labor organization as a condition of employment, and provides a penalty for violation of such statute. This Act first applies to a collective bargaining agreement containing provisions inconsistent with this Act upon the renewal, modification, or extension of the agreement occurring on or after the effective date of this subsection.

Pertinent modifications include:

Section 111.01 of the statutes, which was the Declaration of Policy regarding Employment Peace is repealed.

Section 111.02(9g) of the statutes is created to read:

> "Labor organization" means any employee organization in which employees participate and that exists for the purpose, in whole or in part, of engaging in collective bargaining with any employer concerning grievances, labor disputes, wages, hours, benefits, or other terms or conditions of employment.

Section 111.04(2) of the statutes is amended to read:

> Employees shall have the right to refrain from self-organization; forming, joining, or assisting labor organizations; bargaining collectively through representatives; or engaging in activities for the purpose of collective bargaining or other mutual aid or protection.

Section 111.04(3) is created to read:

> (a) No person may require, as a condition of obtaining or continuing employment, an individual to do any of the following:
>
> 1. Refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization.
> 2. Become or remain a member of a labor organization.
> 3. Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value, to a labor organization.

4. Pay to any 3rd party an amount that is in place of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of, or employees represented by, a labor organization.

(b) This subsection applies to the extent permitted under federal law. If a provision of a contract violates this subsection, that provision is void.111.06 of the statutes is amended to read:

(1) It shall be an unfair labor practice for an employer individually or in concert with others:

c. To encourage or discourage membership in any labor organization, employee agency, committee, association, or representation plan by discrimination in regard to hiring, tenure, or other terms or conditions of employment.

i. To deduct labor organization dues or assessments from an employee's earnings, unless the employer has been presented with an individual order therefor, signed by the employee personally, and terminable by the employee giving at least 30 days' written notice of the termination. This paragraph applies to the extent permitted under federal law.

Section 111.06(1)(c)2. and 3. of the statutes are repealed. These sections **previously** read:

1. It is a not a violation of this subchapter for an employee engaged primarily in the building and construction industry where employees of such employer in a collective bargaining unit usually perform their duties on building and construction sites, to negotiate, execute and enforce an all-union agreement with a labor organization which has not been subjected to a referendum vote as provided in this subchapter.

2. It is not a violation of this subchapter for an employer engaged in the truck transportation of freight in the motor freight industry as a common or contract carrier of property as defined in s. 194.01(1) and (2) to negotiate, execute and enforce an all-union agreement with a labor organization representing employees in a multi-state bargaining unit which has not been subjected to a referendum vote as provided in this subchapter; except that an election shall be held if a petition requesting such election is signed by 30% of the employees affected.

Section 947.20 of the statutes is created to read:

Right to work. Anyone who violates s. 111.04 (3) (a) is guilty of a Class A misdemeanor.

2. 2015 Wisconsin Act 11 (2015 A.B. 2). Enacted April 8th, 2015, Act 11 relates to laying out, altering, or discontinuing a town line highway, and amends Wis. Stat §82.21(2) to read:

> Contents of the Application or Resolution. An application or resolution under sub. (1) shall contain a legal description of the highway to be discontinued or of the proposed highway to be laid out or altered and a scale map of the land that would be affected by the application. Upon completion of the requirements of sub. (1), the governing bodies of the municipalities, acting together in cooperation, but voting upon applications or resolutions as separate governing bodies, shall proceed under ss. 82.10 to 82.13.

Administrative Code:

3. Wisconsin Administrative Register No. 708B dated December 31, 2014, effective January 1, 2015 removes a Note at NR 216.02(3) related to permit coverage required for storm water discharge permits. The note previously identified a number of municipalities previously identified by the U.S. EPA as "urbanized areas."

4. Wisconsin Administrative Register February 2015 No. 710B dated February 23, 2015, effective March 1, 2015, amends SPS 384.30(4) to read:

> WATER SUPPLY SYSTEMS. Water supply systems shall be of such material and workmanship as set forth in this subsection. All materials in contact with water, in a water supply system, shall be suitable for use with the water within the system. All pipes and pipe fittings for water supply systems shall be made of a material that contains a weighted average of not more than 0.25 percent [lead] in the wetted surface material.
>
> NOTE**:** CR 13-062 inadvertently omitted the word "lead". A correction will be made in subsequent rulemaking.

5. Wisconsin Administrative Register No. 711B, dated March 31, 2015, effective April 1, 2015, adds a Note to NR 706.05(1)(b) (related to general requirements for responsible parties for hazardous substance discharge notification and source confirmation requirements) as follows:

> NOTE: If a notification of a natural gas discharge is made to the National Response Center in compliance with 49 C.F.R. § 191.5 (Code of Federal Regulations) it is not necessary to report under this chapter. The department does not require natural gas discharges which are not reportable to the National Response Center to be reported to the Department. The department will receive natural gas discharge notifications through the National Response Center.

6. Wisconsin Administrative Register No. 712B dated April 27, 2015, effective May 1, 2015, amended PSC 184.03(3) to read:

> (a) A utility shall obtain a certificate from the commission before constructing, purchasing, installing, modifying, replacing, or placing in operation any plant not exempt under sub. (4) if the project cost exceeds the cost threshold specified in s. 196.49 (5g) (a), Stats., as revised under par.(b).

NOTE: Examples of projects that typically require a certificate include all of the following:
1. Groundwater wells, surface water intakes, and other sources of water supply.
2. Water treatment, purification, and disinfection facilities.
3. Elevated tanks, reservoirs, and other storage facilities.
4. Pumping stations, pressure-reducing stations, and associated facilities.
5. Utility buildings.
6. Utility main if a portion of the main is located outside of the utility's service area or if the main is eight inches or greater in nominal diameter and three or more miles long.
7. Sewer facilities, including any pumping facilities or sewage treatment and disposal plant.

(b) Beginning on May 1, 2014, and on May 1 of each successive even-numbered year thereafter, the commission shall adjust the cost thresholds in s. 196.49 (5g) (a), Stats., to reflect changes to the cost of water utility construction based on the applicable industry cost index numbers published in the "Handy-Whitman Index of Public Utility Construction Costs."

(c) The commission shall notify all water utilities of the resulting adjusted cost limits by May 15 of each even-numbered year and shall publicize the adjusted cost limits on the commission's website. If the Handy-Whitman Index is no longer available, an equivalent successor index may be used which is generally recognized by the water industry and acceptable to the commission.
NOTE: The commission maintains or has access to the Handy-Whitman Index of Public Utility Construction Costs and this reference or a copy may be reviewed by contacting the commission's offices.

7. Wisconsin Administrative Register No. 712B dated April 27, 2015, effective May 1, 2015, amends PSC 133.03(1)(e) (identifying instances when a gas public utility must obtain a certificate of authority before construction, installation or operation of certain projects) to include:

1. A single gas pipeline project and associated plant, or any plant or addition to plant the cost of which exceeds the cost threshold specified in s. 196.49 (5g) (a), Stats., as revised under subd. 2., except for any of the following:
a. Plant installed in accordance with filed extension rules and rates.
b. Plant installed in compliance with commission orders.
c. Gas pipelines and associated plant ordered to be relocated or modified to accommodate highway or airport construction.

2. Beginning on May 1, 2014, and on May 1 of each successive even-numbered year thereafter, the commission shall adjust the cost thresholds in s. 196.49 (5g) (a), Stats., to reflect changes to the cost of gas utility construction based on the applicable industry cost index numbers published in the "Handy-Whitman Index of Public Utility Construction Costs."

3. The commission shall notify all gas utilities of the resulting adjusted cost limits by May 15 of each even-numbered year and shall publicize the adjusted cost limits on the commission's website. If the Handy-Whitman Index is no longer

available, an equivalent successor index may be used which is generally recognized by the gas industry and acceptable to the commission.

NOTE: The commission maintains or has access to the Handy-Whitman Index of Public Utility Construction Costs and this reference or a copy may be reviewed by contacting the commission's offices.

8. Wisconsin Administrative Register No. 712B dated April 27, 2015, effective May 1, 2015, amended PSC 112.05(3) related to construction of electric public utility facilities and extensions of electric service, to read:

(a) Cost thresholds for projects requiring commission review and approval under this section are those specified in s. 196.49 (5g) (a), Stats., as revised under par. (b).

(b) Beginning on May 1, 2014, and on May 1 of each successive even-numbered year thereafter, the commission shall adjust the cost thresholds in s. 196.49 (5g) (a), Stats., to reflect changes to the cost of electric utility construction based on the cost index numbers published in the "Handy-Whitman Index of Public Utility Construction Costs, Cost Trends of Electric Utility Construction — North Central Region for Total Transmission Plant".

(c) The commission shall notify all electric utilities of the resulting adjusted cost limits by May 15 of each even-numbered year and shall publicize the adjusted cost limits on the commission's website. If the Handy-Whitman Index is no longer available, an equivalent successor index may be used which is generally recognized by the electric industry and acceptable to the commission.

NOTE: The commission maintains or has access to the Handy-Whitman Index of Public Utility Construction Costs and this reference or a copy may be reviewed by contacting the commission's offices.

9. Wisconsin Administrative Register No. 712B dated April 27, 2015, effective May 1, 2015, modified requirements for telephone solicitations as follows:

Sections Added:

ATCP 127.80(5). "National do-not-call registry" means the national database established by the federal trade commission under 47 USC 227 (c) (3) that consists of telephone numbers of residential customers who object to receiving telephone solicitations.

ATCP 127.80(6r). "State do-not-call registry" means the portion of the national do-not-call registry that consists of numbers with Wisconsin area codes.

ATCP 127.82(1). OBTAINING THE REGISTRY. Registered telephone solicitors must obtain and use a current state do-not-call registry from the national do-not-call registry website at least once every 31 days.

NOTE: The state do-not-call registry can be obtained at this website http://telemarketing.donotcall.gov/. Registration with the FTC and a valid Subscriber Access Number are required.

ATCP 127.82(3). STATE DO-NOT-CALL REGISTRY NOT OPEN TO PUBLIC INSPECTION. The department may not release a state do-not-call registry, except that the department may release a state do-not-call registry as necessary to enforce this subchapter, or to comply with a subpoena or judicial process, subject to any protective orders that may be necessary to ensure the confidentiality of the list.

ATCP 127.84.
(1) RECORDS REQUIRED. Persons who employ or contract with individuals to make telephone solicitations shall keep all of the following records:
(a) The telephone numbers and SMS accesses to make telephone solicitations.
(b) Each written agreement provided pursuant to s. ATCP 127.80 (10) (c) and s. ATCP 127.83 (2) (b).
(c) The records required pursuant to s. ATCP 127.18 (1).

(2) KEEPING RECORDS.
(a) A seller shall keep each record required under sub. (1) for at least 3 years after the seller creates that record.
(b) The department, pursuant to an investigation of possible violations of this subchapter, may ask a seller to provide copies of records under sub. (1) that are reasonably relevant to that investigation. The seller shall provide the requested copies within a reasonable time specified by the department.

Amended to read:

ATCP 127.83(2)(b). No person may… Use an electronically prerecorded message in a telephone call for the purpose of encouraging a covered or noncovered telephone customer to purchase property, goods, or services, without first obtaining a written agreement that contains the telephone number and signature of the customer to be called. The agreement shall disclose in writing that the customer is not required to sign the agreement as a condition of making a purchase and, by signing the agreement, the customer authorizes telemarketing calls from that person. This paragraph does not apply if that person meets the provisions of s. ATCP 127.80 (10) (a) or (b).
NOTE: A written agreement and disclosures may be in an electronic form as provided in s. 137.15, Stats.

10. Wisconsin Administrative Register No. 713B dated May 26, 2015, supplemented May 27, 2015, effective June 1, 2015, related to architect, landscape architect, professional engineer, designer and land surveyor registration seals, adds the following language:

A-E 2.02(7)(a). …Seals or stamps may be applied by crimp type, rubber stamp or by electronic means provided the electronic seal or stamp meets the requirements of subch. II of ch. 137, Stats., a security procedure is used, and electronic submissions are permitted by the governmental unit that is to receive the plans, drawings, documents, specifications, and reports.

A-E 2.02(7)(a)1. The stamp authorized by the Board must be one of crimp type, rubber stamp type, or computer generated.

A-E 2.02(7)(b). All seals and stamps on plans, drawings, documents, specifications, and reports to be filed as public documents shall be signed and dated by the registered professional in one of the following manners:

2. Utilizing an electronic signature, meeting the requirements of subch. II ch. 137, Stats., a security procedure is used and if permitted by the governmental unit that is to receive the plans, drawings, documents, specifications, and reports. A scanned image of an original signature shall not be used in lieu of an electronic signature with a security procedure as found in s. 137.11 (13), Stats.

NOTE: Section 137.11 (13), Stats., of the statutes reads as follows: "Security procedure" means a procedure employed for the purpose of verifying that an electronic signature, record or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes identifying words or numbers, encryption, callback, or other acknowledging procedures.

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Wyoming

Case law:

1. In *Horning v. Penrose Plumbing & Heating, Inc.*, 2014 WY 133, 336 P.3d 151, the Wyoming Supreme Court reversed a district court's award of summary judgment in favor of an HVAC subcontractor on statute of repose grounds. The court ruled that although the HVAC contractor's completed its work more than 10 years before suit was filed, the building where the HVAC system had been installed did not obtain its occupancy permit until a few years later, bringing it within the statute of repose filing deadline.

The case began when a pair of condominium owners sued their general contractor and HVAC subcontractor for damages stemming from carbon monoxide poisoning which had resulted from a ruptured exhaust pipe in their furnace. It was later determined that the pipe rupture resulted from the HVAC contractor's improper installation of the exhaust pipe. The case turned on whether it had been filed within Wyoming's statute of repose deadlines.

Construction of the subject condominium unit began in 2001. The project manager, Woodcraft, Inc. ("Woodcraft"), hired Penrose Plumbing & Heating, Inc. ("Penrose") to install unit's HVAC system. Penrose completed its HVAC installation work in August of 2001. Woodcraft achieved substantial completion of the condominium unit in early 2002. However, the developer of the project did not obtain a certificate of occupancy for the unit until August of 2003. The plaintiffs eventually purchased the unit in 2004 and suffered the carbon monoxide poisoning in January of 2012. They eventually filed suit against Woodward and Penrose in November of 2012. The trial court dismissed the claims against Penrose, citing Wyoming's ten year statute of repose found at Wyo. Stat. Ann. § 1-3-111.

On appeal, the plaintiffs argued that since the original certificate of occupancy for the condominium had not been issued until 2003, they were within the statute of repose period when they filed their complaint in late 2012. Penrose argued that since it had completed its portion of the condominium work in 2001 and because the unit itself was substantially complete by early 2002, the plaintiffs' claims were barred.

In deciding the issue, the Wyoming Supreme Court analyzed the plain wording of the Wyoming statute of repose found at § 1-3-111. That statute provides, in part, that: ". . . no action to recover damages, whether in tort, contract, indemnity, or otherwise, shall be brought more than ten (10) years after substantial completion of an improvement to real estate . . ." *Id.* The court also focused on the definition of "substantial completion" which Wyoming defines as "the degree of completion at which the owner can utilize the improvement for the purpose for which it was intended." Wyo. State. Ann. § 1-3-110. Based on these statutes, the court held that the statute of repose begins to run on a project when the overall "improvement", i.e. the overall condominium unit, has reached a sufficient level of completion to allow the owner to use the product. Under the court's analysis, it determined that the unit could not be utilized until an occupancy permit had been issued. Since this did not occur until 2003, the plaintiffs' claims, which were filed within 10 years of the date the permit was issued, were timely filed.

2. In *Hatch v. Walton*, 2015 WY 19, 343 P.3d 390 (Wyo. 2015), the Wyoming Supreme Court held that for homeowners to prevail against contractor on their breach of implied warranty of workmanship claim, expert testimony was required to prove a construction defect resulted from "substandard workmanship" as a matter of law.

3. In *Electrical Wholesale Supply Co., Inc. v. Fraser*, 2015 WY 105, 356 P.3d 254 (Wyo. 2015), the Wyoming Supreme Court held that for construction projects commenced before July 1, 2011, the notice provision at Wyo. Stat. Ann. § 29-1-301(c) (requiring that notice be sent "promptly" after lien statement is filed) applies, and that for construction projects commenced on or after July 1, 2011, the notice provision at Wyo. Stat. Ann. § 29-1-312(c) applies (requiring that notice be sent "within five (5) days" after lien statement is filed).

4. In *Rogers v. Wright*, 2016 WY 10 (Wyo. Jan. 22, 2016), the Wyoming Supreme Court upheld enforcement of "as is," merger, and disclaimer provisions contained in contract to buy and sell real estate. The Wyoming Supreme Court also held that the builder of a home has a legal duty to build the home in a "reasonable and workmanlike manner," and that this duty is an "independent tort duty" for purposes of the economic loss rule.

5. In *CSC Group Holdings, LLC v. Automation & Electronics, Inc.*, 2016 WY 26 (Wyo. Feb. 24, 2016), the Wyoming Supreme Court held that district court retained subject matter jurisdiction when it allowed contractor to amend its complaint to add alleged alter egos of property owner, even after a stipulated judgment had been entered, since at that time the case involved multiple claims and parties, and the judgment had not been certified as final under W.R.C.P. 54(b).

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Legislation:

1. S.F. 117, Air Quality Construction Permitting. This bill created an exception to the requirement that a permit be obtained before commencing construction or modification of any industrial facility capable of causing or increasing air or water pollution in excess of established standards. Specifically, except for certain sources required to have a permit before commencing construction or modification, if an applicant for an air quality permit for an oil or gas exploration or production well has applied for a permit to construct or modify within ninety days of the first date of production of the oil and gas operation, the applicant's failure to have a permit is not a violation of Wyo. Stat. Ann. § 35-11-801.

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