STATE OF HAWAII
CONSTRUCTION LAW
COMPENDIUM

Prepared by
Lennes N. Omuro
Goodsill Anderson Quinn & Stifel LLP
1099 Alakea Street
Suite 1800
Honolulu, HI 96813
(808) 547-5600
www.goodsill.com
This outline is intended to provide a general overview of construction law in the state of Hawaii. The discussion of any particular topic is not necessarily an indication of the total law related to an area of Hawaii’s construction law and nothing herein is intended to provide any legal advise and should not be relied on by any recipient.

I. BREACH OF CONTRACT

Construction projects are characterized by detailed and comprehensive contracts that form the foundation of the industry's operations. City Express, Inc. v. Express Partners, 87 Haw. 466, 470 (1998). Generally speaking, a promisor is bound to perform his or her agreement according to its terms, or in case of unjustifiable failure to perform, to respond in damages for his or her breach of contract. Warner v. Denis, 84 Haw. 338, 347 (1997). In the case of building contracts, however, a builder can recover compensation if his performance has not been complete in every detail, so long as the building is not unfit for the intended use and the structure has been completed in accordance with the specifications, except for only slight or unimportant defects. Lansing v. Dondero, 21 Haw. 736 (Haw. Terr. 1913).

A contractor’s suit for breach of contract may be barred if he or she failed to make certain disclosures to the owner. Hawaii statutes require that prior to entering into a contract with a owner or applying for a building permit, licensed contractors shall make detailed written and verbal disclosures of: (1) the lien rights of all parties performing under the contract; (2) the owner's option to demand bonding on the project, how the bond would protect the owner and the approximate expense of the bond; and (3) all information pertaining to the contract and its performance, as well as any other information that the Contractors License Board may require by rule. HRS § 444-25.5. A general contractor who fails to comply with the disclosure requirements is prohibited from bringing action to enforce contract in law or equity, but may still recover in quantum meruit. Hiraga v. Baldonado, 96 Haw. 365(Haw. App. 2001).

By statute, a contractor’s claim to recover compensation for unlicensed work is unenforceable. HRS §444-22 will bar a breach of contract action even when the owner was aware that the contractor was unlicensed. Butler v. Obayashi, 71 Haw. 175 (1990). § 444-22 does not bar a member of the public, who is a party to such a contract, from bringing suit to recover breach of contract damages from an unlicensed contractor. Id.

Additionally, Hawaii courts have held that existing law is a part of the contract. Unless there is a stipulation to contrary, a builder is contractually obligated to comply with applicable building code requirements. Queding v. Arisumi Bros., Inc., 66 Haw. 335 (1983).

II. NEGLIGENCE

Hawaii courts recognize actions to recover damages for injury to real or personal property, or for bodily injury or wrongful death, arising out of a deficiency or negligence, in the planning, design, construction, supervision and administering of construction, and observation of construction. See Lindgard v. Residuary Ltd. Partnership, 113 Haw. 159 (2006). A contractor generally has a duty to use reasonable care both in his or her work and in the course of performing such work. The duty of reasonable care is not, of course, owed to the world at large,
but only to those who might reasonably be foreseen as subject to injury by their breach. Pulawa v. GTE Hawaiian Tel, 112 Haw. 3, 16 (2006).

In a claim for professional negligence, an architect's or engineer's standard of care must be established by expert testimony and without such testimony, a prima facie case of negligence is not established. City Exp., Inc. v. Express Partners, 87 Haw. 466, 468 (1998).

III. BREACH OF WARRANTY

A warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended precisely to relieve the promisee of any duty to ascertain the fact for himself; it amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue, for obviously the promisor cannot control what is already in the past. Au v. Au, 63 Haw. 210, 218 (1981).

An action for breach of warranty may be based on express warranty provisions or warranties implied by law. Representations made to a prospective purchaser by a vendor concerning the condition of a dwelling are an express warranty. Au v. Au, 63 Haw. 210, 218 (1981).


IV. MISREPRESENTATION AND FRAUD

Under Hawaii law, civil fraud requires proof (1) false representations made by the defendant as to present and existing conditions; (2) with knowledge of their falsity (or without knowledge of their truth or falsity); (3) in contemplation of plaintiff's reliance upon them; and (4) plaintiff's detrimental reliance. The recipient of a fraudulent misrepresentation can recover for resulting pecuniary losses only if he relies on the misrepresentation, and such reliance is justifiable. Restatement (Second) of Torts § 537.

In order to be actionable, a false representation must relate to a past or existing material fact, and not to the happening of future events. Pancakes of Hawaii, Inc. v. Pomare Properties Corp., 85 Haw. 300 (1997). Generally, unfulfilled promises cannot form the basis for fraud unless it can be proved that the promisor had no intention of fulfilling the promise. Id.

V. STRICT LIABILITY CLAIMS

The doctrine of strict liability has eased the plaintiff's burden of proof in a design defect case by eliminating the requirement that the plaintiff prove the manufacturer's negligence. The plaintiff's burden in such a case is to prove (1) a defect in the product which rendered it unreasonably dangerous for its intended or reasonably foreseeable use; and (2) a causal connection between the defect and plaintiff's injuries. Ontai v. Straub Clinic and Hospital, Inc., 66 Haw. 237, 243 (1983).

Ontai establishes two alternative tests to ascertain whether a product is defective: the consumer expectation test and the risk-utility test. The consumer expectation test requires that the plaintiff
show that the product failed to perform as safely as an ordinary consumer would expect when it was used in its intended or reasonably foreseeable manner. Under the risk utility test, once the plaintiff proves that the product's design caused the injury, the defendant must prove that the benefits of the design outweigh the risk of danger inherent in that design. Ontai, 66 Haw. at 242.

The Hawaii Supreme Court has adopted a “case-by-case” approach to defining what may constitute “product” for purposes of a strict products liability cause of action. Armstrong v. Cione, 69 Haw. 176, 182 (1987). Following other jurisdictions, the court has extended the doctrine of products liability to parts of buildings that were mass produced, holding that the seller-manufacturer may be found strictly liable for injuries caused by a defective component part. Kaneko v. Hilo Coast Processing, 65 Haw. 447 (1982).


VI. INDEMNITY CLAIMS

Absent an “independent duty” or a contract for indemnity, a valid claim for indemnity shall not lie. Messier v. Association of Apartment Owners of Mt. Terrace, 6 Haw. App. 525 (1987). Contracts of indemnity are to be strictly construed, particularly where the indemnitee claims that it should be held safe from its own negligence. Kamali v. Hawaiian Electric Co., Inc., 54 Haw. 153, 161 (1972).

HRS § 431-10-222 provides that “any covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance or appliance, including moving, demolition or excavation connected therewith, purporting to indemnify the promisee against liability for bodily injury to persons or damage to property caused by or resulting from the sole negligence or willful misconduct of the promisee, the promisee's agents or employees, or indemnitee, is invalid as against public policy, and is void and unenforceable.” This statute invalidates any promise to indemnify the promisee against liability flowing from the negligence or misconduct of persons other than the promisee. It does not affect promises to indemnify against liability resulting from the promisor’s own negligence. Espaniola v. Cawdrey Mars Joint Venture, 68 Haw. 171 (1985).

VII. STATUTE OF REPOSE/STATUTE OF LIMITATIONS

Under Hawaii law, some statutes of limitation and a statute of repose that may apply to construction law claims are as follows:

HRS § 657-8 provides that “[n]o action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of any deficiency or neglect in the planning, design, construction, supervision and administering of construction, and observation of construction relating to an improvement to real property shall be commenced more than two years after the cause of action accrued, but in any event not more than ten years after the date of completion of the improvement.
HRS § 657-1 (1) provides that “actions for the recovery of any debt founded upon any contract, obligation, or liability, excepting such as are brought upon the judgment or decree of a court” shall be commenced within six years after the cause of action accrues.

VIII. ECONOMIC LOSS DOCTRINE

Hawaii courts apply the economic loss doctrine, which bars recovery in tort for purely economic loss. The economic loss doctrine is designed to prevent disproportionate liability and allow parties to allocate risks by contract. Generally speaking, additional costs, lost rent, and cost of remedying building defects can be recovered in contract only. City Express, Inc. v. Express Partners, 87 Haw. 466, 469 (1998).

The economic loss rule does not operate to bar actions based on negligent misrepresentation or fraud. Hawaii courts have reasoned that the duty to exercise reasonable care or competence in obtaining or communicating information in business transactions is distinct from the duty eliminated by the economic loss rule. State by Bronster v. U.S. Steel Corp., 82 Haw. 32 (1996). Because of policy reasons, however, this exception to the economic loss rule may not apply in construction litigation involving design professionals in a contractual relationship with the complaining party. City Express, 87 Haw. at 470. The Hawaii courts have also ruled that the economic loss rule does not apply to negligence claims based on violation of applicable building codes. Assn. of Apt. Owners of Newtown Meadows v. Venture 15, Inc., 115 Haw. 232 (2007).

IX. ECONOMIC WASTE

Damages, resulting from a contractor's breach of contract are to be measured by the cost of correcting the defective construction unless the cost of correction is grossly and unfairly out of proportion to the good to be attained. Ritchey v. Sato, 39 Haw. 500 (1952). Only if the cost of correction is grossly and unfairly disproportionate does court apply a rule of difference or loss in property value to determine the assessment of damages. Id.

X. DAMAGES

A. Direct Damages

The measure of damages in building contracts is generally cost of correction. Quedding v. Arisumi Bros., Inc. 66 Haw. 335 (1983). Such costs, however, are limited to correction according to original plans and specifications, assuming such plans are adequate. Izumi v. Kwan Doo Park, 44 Haw. 123 (1960). Moreover, as owners are under a duty to minimize damages, the amount of damages is to be measured by the reasonable cost of repairs within a reasonable time after discovery. Id. at 128 (holding that a contractor is not liable for the portion of damages associated with an increase in building costs in the four years since the defect was discovered).

B. Punitive Damages

In a breach of contract action, there must be sufficient evidence that the breaching party’s conduct amounts to wanton, oppressive, malicious, or reckless behavior to justify an award of punitive damages. Quedding v. Arisumi Bros., Inc., 66 Haw. 335 (1983). This is in keeping with the general rule that punitive damages may be awarded only in cases where wrongdoer has
acted wantonly, oppressively, or with such malice as implies spirit of mischief or criminal
indifference to civil obligations, or where there has been some willful misconduct or that entire
want of care which would raise presumption of conscious indifference to consequences. Id.

C. Emotional Distress

The general rule is that damages for emotional distress arising from a breach of contract are only
recoverable where they are specifically provided for in the contract or where nature of the
contract is such that emotional distress damages are within the contemplation or expectation of
the parties. Francis v. Lee Enters., Inc., 89 Haw. 234 (1999). However, courts may still award
emotional distress damages in two types of situations: (1) where the emotional distress is
accompanied by a bodily injury; or (2) where, because of the nature of the contract, serious
emotional distress is a particularly foreseeable result of a breach. Id.

Furthermore, HRS § 663-8.9 provides that no party shall be liable for the negligent infliction of
serious emotional distress or disturbance arising solely out of damage to property or material
objects, unless the distress results in physical injury to or mental illness.

D. Delay Damages

Hawaii courts have held that when time is of the essence or a delay has become so serious as to
justify discharge of the contractor, an owner may assume control of the work, cause it to be
completed, and hold the contractor for his reasonable expenditures if in excess of the unpaid

E. Attorney’s Fees and Costs

When its opponent’s arguments are “frivolous,” a party may request reimbursement of attorney’s
fees and costs. A court has the discretion to order payment of reasonable attorney’s fees and
costs under HRCP Rule 11 sanctions. Reimbursement for monies spent defending against
frivolous claims is also mandated by statute. HRS §607-14.5 empowers the court to assess, as it
deems just, fees and costs to either party upon a finding that all or a portion of the party's claim
or defense was frivolous.

HRS §607-14 also provides that attorney’s fees and costs in actions in the nature of assumpsit are
to be paid by the losing party. Fees are limited to those that the court determines to be
reasonable, provided that the amount does not exceed twenty-five per cent of the final judgment.
For a claim to be “in the nature of assumpsit” it must be a common law action for the

XI. INSURANCE COVERAGE FOR CONSTRUCTION CLAIMS

A. Interpretation of Insurance Contracts

As contracts, insurance policies are subject to the general rules of contract construction; thus, the
terms of the policy should be interpreted according to their plain, ordinary, and accepted sense in
common speech. Each policy is to be interpreted according the entirety of its terms and
Nevertheless, adherence to the plain language and literal meaning of insurance contract provisions is not without limitation. As insurance contracts are generally contracts of adhesion, Hawaii courts have long recognized that insurance policies should be construed liberally in favor of coverage. *Sturla Inc. v. Fireman’s Fund Insurance Co.*, 67 Haw. 203 (1984).

**B. Duties to Defend and Indemnify**

Hawaii adheres to the “complaint allegation rule.” *Pancakes of Hawaii v. Pomare Properties Corp.*, 85 Haw. 286 (Haw. App. 1997). Thus, the duty to defend is limited to situations where the pleadings alleged claims and facts which fall within the insurance contract’s terms of coverage. Where the pleadings fail to allege any basis for recovery within the coverage clause, the insurer has no obligation to defend. *Hawaiian Holiday Macadamia Nut Co. v. Industrial Indus. Indem. Co.*, 76 Haw. 166 (1994).

The Hawaii Supreme Court has held that allegations of an intentional breach of contract do not meet the definition of an “accident” or “occurrence” under a standard commercial general liability (CGL) insurance policy. See *Hawaiian Holiday*, 76 Haw. 166 (1994). The court held that an intentional breach is not an “accident,” and thus, the insurer had no duty to defend or indemnify when the injury was the expected or reasonably foreseeable result of the insured's own intentional acts or omissions.

The Ninth Circuit Court of Appeals recently addressed the issue of insurance coverage for construction related claims in *Burlington Ins. Co. v. Oceanic Design and Construction, Inc.*, 383 F.3d 940 (9th Cir. 2004). The Ninth Circuit held that, under Hawaii law, contract and contract-based tort claims are not covered within the scope of CGL policies. Relying on the precedent set in *Hawaiian Holiday*, the court reasoned that any claims resulting from breach of contract did not fall within the definition of an “occurrence” as provided for in the policy. *Id.*

**C. The Business Risk Exclusion and Faulty Workmanship**

CGL policies generally contain a business risk exclusion that excludes coverage for losses associated with the work or work product of the insured. Typically, these exclusions attempt to negate coverage for the contractual liability of an insured for product or work which is defective or otherwise unsuitable. *Sturla, Inc. v. Fireman’s Fund Ins. Co.*, 67 Haw. 203, 209 (1984).

The business risk exclusion is limited in scope. Hawaii courts have held that, when construed liberally in favor of coverage, a business risk exclusion excludes only those losses confined to the insured's own work or work product. *Hurtig v. Terminix Wood Treating & Contracting Co.*, 67 Haw. 480, 481 (1984). Thus, where the loss claimed exceeds the work or product furnished, the insurer may still have a duty to indemnify.

**XII. RIGHT TO REPAIR STATUTE**

In 2004, the Hawaii Legislature passed a bill that provides an alternative dispute resolution mechanism for construction defects in residential structures. HRS § 672E requires a claimant to serve a notice of claim on the responsible construction personnel in order to allow such personnel an opportunity to resolve the dispute by way of repairs or monetary settlement. If the parties are unable to reach a settlement, §672E also requires that they attempt to resolve the
dispute through mediation, even if mediation is not otherwise required by contract documents. The claimant must follow the procedure set forth under § 672E before the claimant can commence legal action against a contractor or other responsible construction professional.

XIII. MECHANIC’S LIENS

A mechanic’s lien is a remedy for non-payment available to anyone “furnishing labor or material in the improvement of real property.” Haw. Rev. Stat. § 507–42. “Labor” may include professional services for preparation of plans and supervision if and to the extent used in or for the improvement of real property. Haw. Rev. Stat. § 507-41; see also Nakashima Assoc. v. Pacific Beach Corp., 3 Haw. App 58 (1982). The lien attaches upon the improvement and the interest of the owner of the improvement in the real property upon which it is situated or for the benefit of which it was constructed. Haw. Rev. Stat. § 507-42. If a lessee contracts for the improvement, then the lien will only attach to the lessee’s interest provided, however, that if the lease requires the improvement at issue, then the lien may attach to the interest of the lessor. In addition, under Hawaii’s Condominium Property Regime law, the lien attaches to the unit and unit owner’s interest in the common elements, but not to the common elements as a whole. Haw. Rev. Stat. § 514B-43. Projects developed by the federal and state government are not subject to mechanic’s liens. Federal and state statutes require a bond by the contractor under the Miller Act and the State Procurement Code.

In general, the procedural requirements for perfecting a mechanic’s lien are strictly enforced. An application for a lien and a notice of a lien must be filed in the circuit court no later than 45 days after the date of completion of the improvement at issue. Haw. Rev. Stat. § 507-43(b). The term “date of completion” is defined under Haw. Rev. Stat. § 507-43(f) and, in general, refers to the time of the filing of an Affidavit of Publication in the circuit court as to the publication of notices by the owner or the general contractor of the completion or abandonment of the improvement. If a valid notice of completion is not published and filed within one year after the actual completion or abandonment of the improvement, then the “date of completion” is deemed to be one year after actual completion or abandonment. Haw. Rev. Stat. § 507-43(g).

The information required when making a claim for a mechanic’s lien is primarily set forth in Haw. Rev. Stat. § 507-43. Among other things, the application should include: (1) a description of the contract; (2) a description of the labor and/or materials; (3) a description of the real property sought to be made subject to the lien; (4) the amount of the claim; and (5) the names of necessary parties as set forth under the statute. Reference should be made to Hawaii’s mechanic’s liens statutes for additional required details and information.

The return hearing on an application for a lien is held within 3 to 10 days after the filing of the application. Haw. Rev. Stat. § 507-43(a). A copy of the application for a lien and the notice of lien must be served on the appropriate parties in the manner prescribed under Hawaii law for service of summons. If any person entitled to notice cannot be served as so provided, then notice may also be given by posting the application and notice on the improvement itself. Haw. Rev. Stat. § 507-43(a). At the return hearing, the respondents then admit or deny the allegations. If the application for mechanic’s lien is contested then the matter will proceed to a probable cause hearing.
At the probable cause hearing, the lien applicant typically must prove (1) the existence of contract; (2) the labor or materials provided; (3) the price agreed to be paid (provided that the price does not exceed the value of the labor and materials) and/or the fair and reasonable value of the labor and materials; and (4) payment was demanded but not paid. The lien applicant has the burden of proof but the standard is probable cause rather than the normal preponderance of the evidence. The court then decides if a lien should attach and in what amount applying the standard of the reasonable probable outcome of trial.

If the court determines that a lien should attach, it will issue an Order Directing Lien to Attach. The lien will expire three months after the entry of said Order unless proceedings are commenced within that time period to collect the amount due by enforcing the lien. Haw. Rev. Stat. § 507-43(e). In other words, the lienor has three months within which to file a complaint for foreclosure. (In addition, if the property involved is registered in Hawaii’s Land Court system, then a certified copy of Order Directing Lien to attach must also be registered/filed within seven days after entry of the Order to preserve the lienor’s rights against subsequent encumbrances and purchasers). Foreclosure is a new proceeding and the lienor must prove the lien claim by the normal preponderance of the evidence standard. The court’s determination of probable cause in the proceeding on the application for a mechanic’s lien has no effect on issues in the action to enforce the lien.

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.