1. BREACH OF CONTRACT

If a contract has been formed and one party fails to perform on the contract which results in damages, the damaged party may sue for breach. “Accompanying every contract is a common law duty to perform the contract with care, skill, reasonable experience and faithfulness the thing agreed to be done. A negligent failure to perform these duties is a tort and a breach of contract.” *Leak-Gilbert v. Fahle*, 55 P.3d 1054, 1059 (Okla. 2002).

An action for breach of contract and an action in tort may arise from the same set of facts. *Id.* "A breach of contract is a material failure of performance of a duty arising under or imposed by agreement. Although torts may be committed by parties to a contract, a tort is a violation of a duty imposed by law independent of contract. If the contract is merely the inducement which creates the occasion for the tort, the tort, not the contract, is the basis of the action." *Lewis v. Farmers Ins. Co., Inc.*, 681 P.2d 67, 69 (Okla.1983). In some cases, “[t]ort may then be the basis for recovery even though it is the contract that created the relationship between the parties.” *Woods Petrol. Corp. v. Delhi Gas Pipeline Corp.*, 700 P.2d 1023, 1027 (Okla. Civ. App. 1983).

“The law is settled in Oklahoma that when a contractor and builder has in good faith endeavored to comply with the terms of a contract, literal compliance in all details is not essential to recovery, especially where the owner has taken possession of the building.” *Collins v. Baldwin*, 405 P.2d 74, 81 (Okla. 1965) (quoting *Kizziar v. Dollar*, 268 F.2d 914, 916 (10th Cir.1959)).

2. NEGLIGENCE

There are three essential elements of a negligence case. These elements are: (1) a duty of care owed by the defendant to protect the plaintiff from injury, (2) a failure to properly perform that duty, and (3) the plaintiff’s injury being caused by the defendant’s breach of that duty. *Graham v. Keuchel*, 847 P.2d 342, 348 (Okla.1993)

2.1 Joint and Several Liability

Okla. Stat. tit. 12, § 832, governs the distribution of liability for a damage award where there are multiple tortfeasors. The relevant language states:

When two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them except as provided in this section…The right of contribution exists only in favor of a tort-feasor who has paid more than their pro rata share of the common liability, and the total recovery is limited to the amount paid by the tort-feasor in excess of their pro rata share. No tort-feasor is compelled to make contribution beyond their pro rata share of the entire liability. There is no right for
contribution in favor of any tort-feasor who has intentionally caused or contributed to the injury or wrongful death...This [section] will not impair any right of indemnity under existing law. When one tort-feasor is entitled to indemnity from another, the right of indemnity obligee if for indemnity not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any part of the indemnity obligation.

2.2 The Duty of the Design Professional

Architects and engineers are required to exercise ordinary professional skill and diligence in rendering their professional services. See Waggoner v. W & W Steel Co., 657 P.2d 147 (Okla. 1982). However, an architect or engineer’s understanding does not guarantee a perfect plan or a satisfactory result. Whenever the circumstances attending a situation are such that an ordinarily prudent person could reasonably see that, as the natural and probable consequences of the act, another person will be in danger of receiving an injury, a duty to exercise ordinary care to prevent such injury arises. Boren v. Thompson & Associates, 999 P.2d 438, 446-47 (Okla. 2000).

The court has stated:

[A]t common law, privity of contract was required before an action in tort could arise from a breach of duty created by a contract. However, in Truitt v. Diggs, 611 P.2d 633 (Okla. 1980), we indicated that in cases involving physical injury to third parties [like the general public], that restriction has in many cases been eliminated or modified. Therefore, it is possible for an architect to be liable for injuries received by a person with whom he has no privity, but there can be no standard rule. The determination must be made by considering the nature of the architect's undertaking and his conduct pursuant thereto.

Waggoner, 657 P.2d at 149. A design professional can limit his or her duties and hence potential liabilities, by contract. Id at 150. When “it [is] the duty of the contractor … to supervise the job and employ all reasonable safety precautions, the [design professional] cannot be held liable for injuries sustained as a result of unsafe construction procedures.” Id at 151.

2.3 The Duty of the Contractor

“Generally, as matter of public policy, builder's liability to third persons for negligent construction is terminated on acceptance of property by builder's grantee, but where builder has willfully created condition which he knows to be immediately dangerous to persons other than his grantee, who will necessarily be exposed to such danger, considerations of public policy do not require application of general rule.” Lowe v. Francis Const. Co., 373 P.2d 51, 52 (Okla. 1962). However, in Oklahoma, a contractor is not liable for negligently creating defect that causes injury where condition or defect alleged is patent, open, and discoverable on reasonable inspection. Pickens v. Tulsa Metro. Ministry, 951 P.2d 1079, 1089 (Okla. 1997).
2.4 The Accepted Work Doctrine

In Oklahoma, the Accepted Work Doctrine, no longer subscribed to by many jurisdictions, still relieves an independent contractor of liability for injuries to third parties after the contractor has completed the work and the owner or employer has accepted the work, regardless of the contractor’s negligence in completing the project. See Pickens, 951 P.2d 1079. However, see 2.3 The Duty of the Contractor herein.

3. BREACH OF WARRANTY

A warranty is an expressed or implied statement of something undertaken as a part of a contract. Pauls Valley Milling Co. v. Gabbert, 78 P.2d 685 (Okla. 1938). With regards to construction law, a warranty can be based upon either an express provision stated in the contract between the owner and the contractor, or implied by law

3.1 Breach of Implied Warranty

Implied warranties are provided for in Oklahoma by Okla Stat. tit. 15, § 171, which provides that “[s]tipulations which are necessary to make a contract reasonable or conformable to usage are implied in respect to matters concerning which the contract manifests no contrary intention.”

Furthermore, “where [a] general contractor contracts to perform work for another requiring exercise of care, skill and knowledge, there is an implied warranty that work which he undertakes shall be of proper workmanship and reasonable fitness for its intended use.” McCool v. Hoover Equip. Co., 415 P.2d 954, 958 (Okla. 1966). In Miller v. Guy H. James Const. Co., the court held that, “[a]bsent open and obvious design defects which should be apparent to prudent contractor and called to prime contractor’s attention, [an owner] who furnishes plans and specifications impliedly warrants them to be fit for their intended use.” 653 P.2d 221, 224 (Okla. Civ. App. 1982).

The Oklahoma Supreme Court has held that where there was no contractual provision calling for acceptance by architects or requiring that work shall be done to architects' satisfaction but contract did require contractor to perform in a good and workmanlike manner, a contractor could not escape liability on theory that architects had accepted building. Smith v. Goff, 325 P.2d 1061 (Okla. 1958). The Court has also held that when a contract of employment of architects specifically recited that architects would endeavor to guard but did not guarantee the performance, architects did not guarantee a perfect plan for construction of building or satisfactory results and would be liable only for failure to exercise reasonable care and professional skill in performing their services. Wills v. Black & West, 344 P.2d 581, 584 (Okla. 1959).

As for the implied warranty of habitability, Oklahoma case law allows parties to contractually waive it. Specifically, “to relieve a builder-vendor of its obligation under an implied warranty of habitability, there must be clear and conspicuous language evidencing builder’s disclaimer of its obligations arising under an implied warranty of habitability.” Bridges v. Ferrell, 685 P.2d 409, 410 (Okla. Civ. App. 1984).
3.2 Breach of Express Warranty

When a contract contains an express warranty within the terms of the contract, the warranty will determine the extent and duration of the builder’s responsibility, unless that responsibility is provided for by an implied warranty at law. “A construction contractor who has followed plans and/or specifications furnished by [the owner], his architect or engineer, and which have proved to be defective or insufficient, will not be responsible to [the owner] for loss or damage which results – at least after the work is completed – solely from the defective or insufficient plans or specifications, in the absence of any negligence on the contractor’s part, or any express warranty by him as to their being sufficient or free from defects.” Woods v. Amulco Products, 235 P.2d 273, 276 (Okla.1951).

4. STATUTE OF LIMITATIONS

A statute of limitations is a law that bars claims after a specified period. Specifically, a statute of limitations establishes a time limit for filing suit in a civil case, based on the date when the claim accrued. The statute of limitations for actions arising in either contract or tort law are provided in Okla. Stat. tit. 12, § 95. With respect to contracts, that section states in relevant part:

Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards: 1. Within five (5) years: An action upon any contract, agreement, or promise in writing; 2. Within three (3) years: An action upon a contract express or implied not in writing; an action upon a liability created by statute other than a forfeiture or penalty; and an action on a foreign judgment.

“When applied to construction contracts, the general rule is that the limitations period does not begin until the work is completed. The completion of the construction is the accrual date for a plaintiff’s claim for breach of contract against a general contractor. The rationale behind this rule is that there is no breach for defective performance if the defects can be remedied by the date of completion.” Samuel Roberts Noble Foundation, Inc. v. Vick, 840 P.2d 619, 622 (Okla. 1992) (emphasis in original) (internal citations omitted).

Okla. Stat. tit. 12, § 95 also defines the statute of limitations for an action arising in tort as two (2) years, subject only to the discovery rule. In Smith v. Johnston, 591 P.2d 1260 (Okla. 1978), the court applied the discovery rule to the claimant’s tort action against the defendant contractor. In Smith, the claimant did not discover the contractor’s negligence until more than two years from the date of completion of the contract; however, the Court held that the statute of limitation did not begin running from the date of completion of the construction contract, but rather (pursuant to the discovery rule) from the date of discovery of the contractor’s negligence. In Oklahoma, the tort action two-year statute of limitations does not begin to run until the property owner “learn[ed] of or, in the exercise of reasonable care and diligence should have learned of the harm through discovery of the hazardous condition caused by the hidden defect.” Id at 1264.
5. THE DISCOVERY RULE

In construction and maintenance cases, Oklahoma courts apply the discovery rule to determine when a cause of action accrues and the statute of limitations begins to run. *Lee v. Phillips & Lomax Agency, Inc.*, 11 P.3d 632, 634-35 (Okla. 2000). Under the discovery rule, the statute of limitations begins to run once the property owner has learned of the damage or in the exercise of reasonable care and diligence should have learned of the act complained of. *Id.* at 635.

6. STATUTE OF REPOSE

A statute of limitations and a statute of repose are significantly different since a statute of limitation merely extinguishes the plaintiff's remedy while a statute of repose bars a cause of action before it arises. Practically, “a statute of repose marks the boundary of a substantive right whereas a statute of limitation interposes itself only procedurally to bar the remedy after a substantive right has vested.” *Reynolds v. Porter*, 760 P.2d 816, 820 (Okla. 1988).

An action in tort arising from design, planning or construction of improvement to real property, for injury or damage arising from the design or construction of such improvement, must be brought within 10 years from the date of substantial completion of the improvement. Okla. Stat. tit. 12, § 109. This statute covers designers, builders, owners, lessors and persons in possession.

It is important to note that work performed by a contractor as “maintenance” is not the same thing as “improvement” and is therefore not subject to the statute of repose, but rather governed by the two (2) year tort statute of limitations and subject to the discovery rule. *Lee*, 11 P.3d at 634.

7. MISREPRESENTATION AND FRAUD

7.1 Actionable Fraud

If a contractor makes a false assertion that damages the owner, the contractor can be sued under the theory of fraud. The elements of actionable fraud in Oklahoma are: (1) that defendant made a material representation; (2) that it was false; (3) that he made it when he knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that the plaintiff thereby suffered injury. *State ex rel. Southwestern Bell Tel. Co. v. Brown*, 519 P.2d 491, 495 (Okla. 1974); *see also* Okla. Stat. tit. 76, §§ 2, 4. All facts must be proven with a reasonable degree of certainty, and all of them must be found to exist; the absence of any of them is fatal to a recovery. *Ramsey v. Fowler*, 308 P.2d 654 (Okla. 1957). Further, the reliance by the plaintiff must be justifiable. *Brown*, 519 P.2d at 495.

7.2 Fraud as Defense

Whenever fraud is asserted as a defense, it “is never presumed, but it must be affirmatively alleged and proven by the party who relies on it, and cannot be inferred from facts which may be consistent with honesty of purpose.” *Stafford v. McDougal*, 42 P.2d 520 (Okla. 1935).
8. DELAY DAMAGES

8.1 Delay in Performance

The duty to perform a contract within a certain amount of time may be established through essentially two different means. First, pursuant to well-established general contract law, parties to a contract may agree to a specified date by which a builder must perform. It is important to note, certain delays are anticipated and included in the time allotted for performance of the contract, and not; therefore, considered excuses for delay. Second, where no time is specified for the completion of the project, a reasonable time is allowed by operation of law. Okla. Stat. tit. 15, § 173.

When calculating damages, an owner is entitled to compensation for “all the detriment proximately caused” by a Builder’s breach, or detriment which would likely result in the ordinary course of things from the Builder’s breach. Okla. Stat. tit. 23, § 21. Damages which are not ascertainable in nature and origin cannot be recovered. Id.

8.2 Excuses for Delay

As stated above, certain delays are anticipated and included in the time allotted for performance of the contract, and are not; therefore, considered excuses for delay. The anticipated, and thus, included in the time allotted for completion of the project, delays are unique to each contract; a typical example would be days accounting for inclement weather.

An implicit waiver of a contracted-for time limit may be found where an owner continues to make the progress payments and otherwise assents to a delay. E.V. Cox Const. Co. v. Brookline Associates, 604 P.2d 867, 871 (Okla. Civ. App. 1979). Once the specified time limit became inoperative as a result of this implicit waiver by the owner, the contractor became subject to an implied duty to perform within a reasonable time pursuant to Okla. Stat. tit. 15, § 173. Id.

An owner may not recover for damages resulting from any delay he caused. Scroggins v. Gaddis, 990 P.2d 302, 305 (Okla. Civ. App. 1999). Under these circumstances, the trial court should determine the period of delay, the relative responsibility of each party for that delay, and attribute to each party the commensurate amount of damages. Id.

8.3 No Damages for Delay Clauses

9. RECOVERABLE DAMAGES

9.1 Attorney’s fees

Prevailing parties in Oklahoma are generally not entitled to recover attorney’s fees, absent an authorizing statute or valid contract. *Moses v. Hoebel*, 646 P.2d 601, 603 (Okla. 1982). Okla. Stat. tit. 12, §936 governs the viability of claims for attorney’s fees where cases arise directly from the rendition of labor or services and is an authorizing statute. It states:

In any civil action to recover for labor or services rendered, or on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, unless otherwise provided by law or the contract which is the subject of the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs.

The controlling case regarding the applicability of Okla. Stat. tit. 12, § 936 is *Cook v. Okla. Bd. of Public Affairs*, 736 P.2d 140 (Okla. 1987). In *Cook*, the court stated that before counsel fees may be awarded the case must be one that falls clearly within the express language of the authorizing statute. *Id.* at 154. The underlying nature of the action determines the applicability of the § 936 labor-and-services provision. *Id.* If the damage arises directly from the rendition of labor or services, rather than from an aspect that relates collaterally to labor and services, then the provisions of Okla. Stat. tit. 12, § 936 are applicable. *Id.*

9.2 Direct Damages

Okla. Stat. tit. 23, § 21 governs the identification and measure of direct damages. It provides in relevant part:

For the breach of an obligation arising from contract, the measure of damages…is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. No damages can be recovered for a breach of contract, which are not clearly ascertainable in both their nature and origin.

Additionally, when a contractor or builder has breached the contract by defective construction and the defects may be remedied by repair to comply with the contract, the measure of damages is limited to the cost of the repairs. *Smith v. Torr*, 310 P.2d 378, 380 (Okla. 1957).

9.3 Expert Fees and Costs

As a general rule, expert fees are not part of recoverable costs to the prevailing party. Okla. Stat. tit. 12, §3226(B)(3)(c) governs claims for expert’s fees and costs. That provision provides:

Unless manifest injustice would result: (1) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under division (2) of subparagraph a of this paragraph and
subparagraph b of this paragraph; (2) The court shall require that the party seeking discovery for respect to discovery obtained under subparagraph b of this section, pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.


9.4 Lost Profits

The damaged party in a contract breach may recover for lost profits. “Loss of anticipated profits, if within the contemplation of the parties at the time contract was entered into, is recoverable in an action for breach of contract. These damages must flow proximately from the breach and be capable of accurate measurement.” *Cook*, 736 P.2d at 153.

9.5 Mitigation of Damages

The law governing mitigation of damages is succinctly stated in *Bailey v. J.L. Roebuck Co.*, 275 P. 329 (Okla. 1929). “The duty imposed upon one to reduce or minimize his damage goes only to the amount of recovery, and cannot be an absolute defense to an injury already sustained. As to whether defendant performed such duty, and, if not, how much his damage was enhanced by his failure to do so are questions of fact to be determined by a jury, or by the court in a trial without a jury." *Id* at 330.

10. STRICT LIABILITY CLAIMS

The strict liability theory of recovery was originally adopted in 1974. *Northrip v. Montgomery Ward & Co.*, 529 P.2d 489 (Okla. 1974). Although strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit a manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. *Marathon Battery Co. v. Kilpatrick*, 418 P.2d 900, 915 (Okla. 1965). Additionally, though strict liability does eliminate negligence as a basis for recovery, it does not dispense with the requirement of proximate cause. *Minor v. Zidell Trust*, 618 P.2d 392, 396 (Okla., 1980). In *Garner v. Halliburton Co.*, 10th Cir., 474 F.2d 290 (1973), the Court noted: "Regardless of whether the action is thought of in terms of liability for negligence or implied warranty ... or as a strict liability case, it is essential that there be evidence to establish that the defendant acted or failed to act in relationship to the plaintiffs in such a manner as to create an unreasonable risk or harm ... or the defendant must have created a defective condition unreasonably dangerous to the user or consumer ..." *Jones v. Stemco Mfg. Co.*, Inc. 624 P.2d 1044, 1048 (Okla., 1981).
11. INDEMNITY CLAIMS

11.1 Express Indemnity

In Oklahoma, agreements to indemnify a party against its own negligence or liability are strictly construed. *Transpower Constructors v. Grand River Dam Auth.*, 905 F.2d 1413, 1420 (10th Cir. 1990) (citing *Fretwell v. Protective Alarm Co.*, 764 P.2d 149, 152 (Okla. 1988) (applying Oklahoma law). “To be enforceable, the agreement must meet the following three conditions: (1) the parties must express their intent to exculpate in unequivocally clear language; (2) the agreement must result from an arm's-length transaction between parties of equal bargaining power; and (3) the exculpation must not violate public policy.” *Transpower Constructors*, 905 F.2d at 1420 (citing *Fretwell*, 764 P.2d at 152-53).

11.2 Implied Indemnity

Generally, “one without fault, who is forced to pay on behalf of another, is entitled to indemnification.” *Nat'l Union Fire Ins. Co. v. Western Skyways, Inc.*, 784 P.2d 52, 54 (Okla. 1989). If a party is held vicariously liable for the acts of another, an implied indemnity right is created against the responsible party – but only if the party seeking indemnification is blame free.

“Noncontractual indemnity is sometimes referred to as implied indemnity and may arise out of a contractual or special relationship between parties and from equitable considerations.” *Noble Steel, Inc. v. Williams Bros. Concrete Const. Co.*, 49 P.3d 766, 770 (Okla. Civ. App. 2002) (citations and internal quotations omitted). “Implied indemnity rests upon fault of another which has been imputed or constructively fastened upon him who seeks indemnity.” *Id.* Implied indemnity is similar to common-law contribution; “one who is only constructively or vicariously obligated to pay damages because of another's tortious conduct may recover the sum paid from the tortfeasor.” *Id.*

The right to indemnification may arise out of "an independent legal relationship [such as a joint venture], under which the indemnitor owes a duty either in contract or tort to the indemnitee apart from the joint duty they owe to the injured party." *Safway Rental & Sales Co. v. Albina Engine & Mach. Works, Inc.*, 343 F.2d 129, 132 (10th Cir.1965) (applying Oklahoma law) (internal quotations omitted).

12. ECONOMIC LOSS DOCTRINE

The economic loss doctrine is defined as “the principle that a plaintiff cannot sue in tort to recover for purely monetary loss -- as opposed to physical injury or property damage -- caused by the defendant” *Black’s Law Dictionary* (8th ed. 2004). The term “economic loss” is defined as “monetary loss such as lost wages or lost profits.” *Black’s Law Dictionary* (8th ed. 2004).

Oklahoma law has applied this doctrine to manufacturer product’s liability actions, see *Waggoner v. Town & Country Mobile Homes, Inc.*, 808 P.2d 649 (Okla. 1990), and would likely apply it construction negligence claims as well, since they sound in tort.
13. ECONOMIC WASTE

Oklahoma law limits recovery of restoration costs so that the recovery cannot exceed the diminished value of the land, in order to prevent economic waste. See Peevyhouse v. Garland Coal & Min. Co., 382 P.2d 109 (Okla.1962). Also, damages are measured by the diminution in the value of the property, rather than by the cost of remediation when the cost to restore the land is grossly disproportionate to the loss in the value of the property. See Schneberger v. Apache Corp., 890 P.2d 847 (Okla.1994).

Most of the cases in this area are in the context of environmental problems, such as water pollution or land deformation. However, in the construction context the rule would probably also be applied. It is likely that if the cost of repairing the defect is grossly disproportionate to the loss in value of the property, the damages awarded would be the diminution in value, in order to prevent economic waste. For example, the court, in State ex rel. Burk v. Oklahoma City, 556 P.2d 591, 592 (Okla. 1976), stated that, “equity will not insist on an absolute and literal restoration of the parties to status quo where it would be purposeless, useless, and foolish.”

14. PAY IF PAID CLAUSES

There are no true “pay-if-paid” Oklahoma cases, but one federal court decision suggests that Oklahoma would follow the general rule of courts looking with disfavor upon contractual provisions conditioning payment upon some future event such as payment by the project owner or general contractor. The court will likely not find that a condition precedent to payment exists unless required to do so by plain and unambiguous language in the contract. See Byler v. Great Am. Ins. Co., 395 F.2d 273 (10th Cir. 1968) (applying Oklahoma law).

Pay-when-paid clauses are generally enforceable for a reasonable length of time after the date upon which payment should have been made to the party relying on the clause. These clauses are designed to allow delay of payment for a reasonable time to allow for a fair opportunity for the party to collect the earnings from the owner or general contractor. These provisions do not shift the credit risk or affect one’s obligation to pay. See Byler, 395 F.2d 273 and Moore v. Cont’l Cas. Co., 366 F.Supp. 954 (W.D. Okla. 1973).

For public projects, Okla. Stat. tit. 61, § 224 is a statutory pay-when-paid clause providing a time limit for payment to subcontractors, sub-subcontractors, and material suppliers. Under that provision, if they have performed in accordance with their contract, they are entitled to receive payment no later than ten calendar days after the prime contractor receives its corresponding payment.

15. FLOW DOWN/FLOW THROUGH CLAUSE

Flow-down clauses provide that all duties and obligations the contractor owes the owner are owed by the subcontractor as well. Flow-down provisions are generally accorded validity, but courts vary on whether they will be enforced fully according to their terms. These clauses generally incorporate the technical provisions and specifications without a problem, but courts are often reluctant to enforce general flow-down provisions when it is not entirely clear what the
parties actually intended or when the prime contract provision doesn’t fit the circumstances of the subcontract. Exculpatory, or liability relieving, provisions are generally construed narrowly or denied validity at all where there are inconsistencies between the prime and the sub contract. If you want a flow-down clause to be enforceable, it must be clearly stated within the contract.

Oklahoma has not directly addressed the issue, but the United States District Court in Kansas has found that flow-down clauses are upheld when they are plain and unambiguous. If there is any ambiguity, the contract or clause therein is construed against the drafter. See United Tunneling Enters., Inc. v. Havens Constr. Co., Inc., 35 F.Supp.2d 789 (D. Kan. 1998).

16. WAIVER OF SUBROGATION

A waiver of subrogation occurs when an insurance carrier gives up its right, pre-loss, to recover from others. This usually occurs because the insured does business with a third party (like the government or a general contractor) and the third party requires the insured’s carrier to waive its right to subrogate against the third party. Waivers of subrogation are generally upheld as they are written and are limited by the terms of the contract or waiver. Courts will usually preclude claims when there is a valid waiver of subrogation provision.

Oklahoma has found that an insurer’s waiver of subrogation as to the insured does not apply to a contractor hired by the insured. Therefore, a contractor is not considered a co-insured so as to be immune from liability per the waiver of subrogation. See Travelers Ins. Cos. v. Dickey, 799 P.2d 625, 628 (Okla. 1990). However, a tenant is considered a co-insured under a lessee/landlord insurance policy, even without being named on the policy, and is thus immune from liability on an insurer’s subrogation claims. See Sutton v. Jondahl, 532 P.2d 478, 481 (Okla. Civ. App. 1975) and Kansas City Fire and Marine Insurance Co. v. Rogers, 871 P.2d 443 (Okla. Civ. App. 1994). These cases essentially illustrate that a party must have an insurable interest in the property in order to be considered a co-insured for purposes of waiving rights to subrogation.

17. MECHANICS AND MATERIALMEN’S LIENS

Okla. Stat. tit. 42, § 141 grants any person working under an oral or written contract with the owner of real property the right to file a lien against the property and its improvements to secure payment, provided certain requirements are met. A person with an express oral or written or implied contract with the owner of the property is an original contractor and eligible to file a lien under section 141. Rogers v. Crane Co., 68 P.2d 520, 521 (Okla. 1937). Liens filed under section 141 attach only to real property and not to personal property. Abel v. Bachmann, 400 P.2d 151, 155-56 (Okla. 1965). Oklahoma law prohibits liens from attaching against public projects and public utilities. Hydro Conduit Corp. v. American-First Title & Trust Co., 808 F.2d 712, 715 (10th Cir. 1986) (applying Oklahoma law) (collecting cases).

An original contractor claiming a lien under section 141 must file a statement in the office of the county clerk where the property is situated within four (4) months after the last date labor or materials were furnished. Okla. Stat. tit. 42, § 142. This statement must contain: the amount due; the items provided as nearly as practicable; the name of the owner, the name of the contractor, the name of the claimant (the person seeking the lien and here the contractor), and the
legal description of the property upon which a lien is claimed. *Id.* One (1) business day after the filing of such a lien, a notice of the lien must be mailed, certified mail, return receipt requested, to the owner of the property on which the lien is imposed. Okla. Stat. tit. 42, § 143.1. This notice must include the date of filing for the lien, the name and address of the lien claimant (i.e. the contractor) and the owner of the property, a legal description of the property, and the amount claimed. *Id.* Any original contractor falsifying a statement regarding any liens is guilty of a felony upon conviction. Okla. Stat. tit. 42, § 142.4.

### 17.1 Subcontractor’s Liens – Pre-Lien Notice Requirement

Subcontractors who provide materials, equipment, or labor may obtain a lien against real property and improvements thereon to the same extent as an original contractor for the amount owed to him. Okla. Stat. tit. 42, § 143. To claim such a lien, a subcontractor must file a statement with the county clerk where the property is situated within ninety (90) days after the last date which material or labor was furnished. *Id.* This statement must be verified by affidavit, set forth the amount due to the lien claimant, the items provided by claimant as nearly as practicable, the name of the property owner, the name of the contractor, the name of the claimant (i.e. the subcontractor), and a legal description of the property over which the lien is claimed. *Id.* The owner of land affected by any subcontractor lien is not liable to the claimant for any amount greater than the amount of the original contract. *Id.* One (1) business day after the filing of such a lien, a notice of the lien must be mailed, certified mail, return receipt requested, to the owner of the property on which the lien is imposed. Okla. Stat. tit. 42, § 143.1. This notice must include the date of filing for the lien, the name and address of the lien claimant (i.e. the subcontractor) and the owner of the property, a legal description of the property, and the amount claimed. *Id.*

Prior to filing the lien statement required under section 143, Oklahoma law also requires a claimant to send a pre-lien notice to the last known address of the original contractor and the owner of the property to which the lien will attach within seventy-five (75) days after the last date which material or labor was furnished. Okla. Stat. tit. 42, § 142.6(B)(1). The pre-lien notice must be written and include: a statement that it is a pre-lien notice; the complete name, address, and telephone number of the claimant or his representative; the date of the supply of the materials or labor; the description of the materials or labor; the name and last-known address of the person who requested that the claimant provide the material or labor (which would generally be the original contractor); the address and legal description of the property; a statement that the dollar amount of the material and labor exceeds $2,500; and the signature of the claimant or his representative. Okla. Stat. tit. 42, § 142.6(B)(4). This notice may be hand delivered, sent via an automated transaction in accordance with Oklahoma law (found at Okla. Stat. tit. 12A, § 15-115), or sent via certified mail, return receipt requested. Okla. Stat. tit. 42, § 142.6(B)(5).

The practical effect of this pre-lien notice requirement is that a subcontractor must notify both the original contractor and the property owner of his intent to pursue a lien within seventy-five (75) days after last supplying materials or labor in order to preserve his lien rights. After proper pre-lien notice has been given, a subcontractor must still actually file the lien, as discussed above, within ninety (90) days after the last material or work is supplied. Failure to comply with the pre-lien requirements imposed by Oklahoma law will render that portion of the lien, for which there was no notice, invalid and unenforceable. Okla. Stat. tit. 42, § 142.6(D).
Additionally, a subcontractor’s lien requires the filing of an affidavit, stating compliance with the pre-lien notice. Okla. Stat. tit. 42, § 142.6(C). Falsification of this affidavit is a misdemeanor, with a penalty upon conviction of a fine of up to $5,000 or thirty (30) days imprisonment in the county jail, or both. *Id.*

The pre-lien notice requirement is not applicable against residential property (single family dwelling up to four dwelling units – but see the following section for residential liens) or where the aggregate claim is less than $2,500. Okla. Stat. tit. 42, § 142.6(B)(3).

**17.2 Liens Against Residential Property**

No lien created under Okla. Stat. tit. 42, §§ 141 – 153 is valid against “property presently occupied as a dwelling by an owner” unless prior to the first performance of labor or first provision of materials by the lien claimant (either original contractor, subcontractor, laborer or materialman), a notice in substantially the following form is given to the homeowner:

**NOTICE TO OWNER**

YOU ARE HEREBY NOTIFIED THAT ANY PERSON PERFORMING LABOR ON YOUR PROPERTY OR FURNISHING MATERIALS FOR THE CONSTRUCTION, REPAIR, OR IMPROVEMENT OF YOUR PROPERTY WILL BE ENTITLED TO A LIEN AGAINST YOUR PROPERTY IF HE IS NOT PAID IN FULL, EVEN THOUGH YOU MAY HAVE PAID THE FULL CONTRACT PRICE TO YOUR CONTRACTOR. THIS COULD RESULT IN YOUR PAYING FOR LABOR AND MATERIALS TWICE. THIS LIEN CAN BE ENFORCED BY THE SALE OF YOUR PROPERTY. TO AVOID THIS RESULT, YOU MAY DEMAND FROM YOUR CONTRACTOR LIEN WAIVERS FROM ALL PERSONS PERFORMING LABOR OR FURNISHING MATERIALS FOR THE WORK ON YOUR PROPERTY. YOU MAY WITHHOLD PAYMENT TO THE CONTRACT OR IN THE AMOUNT OF ANY UNPAID CLAIMS FOR LABOR OR MATERIALS. YOU ALSO HAVE THE RIGHT TO DEMAND FROM YOUR CONTRACTOR A COMPLETE LIST OF ALL LABORERS AND MATERIAL SUPPLIERS UNDER YOUR CONTRACT, AND THE RIGHT TO DETERMINE FROM THEM IF THEY HAVE BEEN PAID FOR LABOR PERFORMED AND MATERIALS FURNISHED.

Okla. Stat. tit. 42, § 142.1. Only one notice to the homeowner during the course of work is required. Okla. Stat. tit. 42, § 142.5. For the purposes of Oklahoma lien law, persons providing labor directly to a homeowner or persons providing materials directly to a homeowner are not eligible to claim a lien. Okla. Stat. tit. 42, § 142.3. The apparent purpose of this section is to
protect homeowners from potential liens from home improvement stores that provided materials or day laborers, employed directly by the homeowner, for home improvement work.

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