STATE OF UTAH CONSTRUCTION LAW COMPENDIUM

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I. CONSTRUCTION AND DESIGN LAW

Construction projects involve a number of relatively complex relationships which are uniquely prone to disputes and litigation. When problems arise on construction projects, a variety of different plaintiffs may appear and assert claims under a wide range of legal theories. Claims may be asserted for breach of contract, negligence, breach of warranty, products liability and claims under the Uniform Commercial Code. Normally, liability must be premised upon the breach of a duty which arises out of the relationship of the contractor or design professional to the project. The existence, nature and extent of such duty depends upon several factors regarding the party's involvement with project. When defects occur in the design or construction of a project, complex issues arise in sorting through the through the potential liability of the various parties to a construction project. These materials discuss in a very general fashion a few of these issues which commonly arise in construction and design disputes.

A. Contract

It is fundamental under Utah law that when a party fails to perform a duty under a construction contract, such failure is a breach of the contract for which the non-breaching party may recover its damages. Quagliana v. Exquisite Home Bldrs., Inc., 538 P.2d 301 (Utah 1975).

B. Negligence

The Utah Supreme Court has articulated the essential elements of a negligence action as follows:

> The essential elements of a negligence action are: (1) a duty of reasonable care owed by the defendant to the plaintiff; (2) a breach of that duty; (3) the causation, both actually and proximately of injury; (4) the suffering of damages by the plaintiff.

Williams v. Melby, 699 P.2d 723, 726 (Utah 1985)

In DCR, Inc. v. Peak Alarm Co., 663 P.2d 433, 437 (Utah1983), the Court defined negligence as the "failure to exercise the degree of care which a reasonable person would have exercised under the same circumstances, whether by acting or by failing to act." Id. at 434-45. In cases of failure to act, the Court noted that the plaintiff must show the existence of a special relationship giving rise to a duty to act and exercise due care on behalf of the plaintiff. Id. at 435. With respect to the standard of care, the Court stated:

> ...in applying the universally accepted standard of care: that of the ordinary, reasonable and prudent man under the circumstances, the term "ordinary" should be given its true meaning by not requiring the conduct of an extraordinarily careful person. Such an "ordinary" man is not necessarily a supercautious individual devoid of human frailties and constantly preoccupied with the idea that danger may be lurking in every direction about him at any time.

Id. at 435, n. 5 (Quoting Whitman v. W.T.Grant Co., 16 Utah 2d 81, 395 P.2d 918 (1964); In Erickson v. Bennion, 28 Utah 2d 371, 503 P.2d 139 (1972) the court held that "the degree of care increases in proportion to the hazards to be anticipated..." Id. at 374.

1. Duties of Contractors and Design Professionals

A. Contractors

Construction contractors generally have a duty to perform in a fashion which will meet and satisfy the project specifications, Corbetta Construction Co. v. Lake County Public Building Commission, 64 Ill. App.3d 313, 381 N.E.2d 758 (1978).and to perform the work in a reasonably prudent and workmanlike manner. Morin Building Products Company, v. Baseton Construction, 717 F.2d 413 (1983). As a general proposition, the contractor is required to follow the specifications. Mayor v. City Council, Etc. v. Clark-Dietz, Etc, 550 F.Supp. 610 (N.D. Miss. 1982). This obligation, however, requires analysis of whether the specifications are design specifications or performance specifications.

In Sundance Develop., Inc. v. Standard Lbr and Hard. Co., 520 P.2d 1056 (Colo. App. 1974), the Court held:

> For construction to be done in a good and workmanlike manner, there is no requirement of perfection; the test is reasonableness in terms of what the workman of average skill and intelligence (the conscientious worker) would ordinarily do.

Id. at 1058; Waggoner v. Midwestern Development, Inc., 154 N.W.2d 803 (1967); Fairbanks, Morse & Co. v. Miller, 195 P. 1083 (1921).

B. Design Professionals

Design professionals similarly owe a duty to perform their services with reasonable care. Architects and engineers are held to the standard of care exercised by other design professionals in the locality. However, design professionals are not held to a standard of perfection and are not considered to warrant perfection of their services.

> The responsibility of an architect does not differ from that of a lawyer or physician. When he possesses the requisite skill and knowledge, and in the exercise thereof has used his best judgment, he has done all the law requires. The architect is not a warrantor of his plans and specifications. The result may show a mistake or defect, although he may have exercised the reasonable skill required.
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> . . .
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> The liability of architects is based upon professional negligence with respect to which only those qualified in the field can testify as to the standard of competence

> and care possessed by professional men in the locality and whether there has been a breach of that standard of care.

Nauman v. Harold K. Beecher & Assocs., 24 Utah 2d 172, 178-182 (Utah, 1970).

C. Warranty

Warranties on construction projects may arise in appropriate circumstances under Utah law. To the extent applicable, warranties may arise under the provisions of the Utah Uniform Commercial Code. U.C.A. 70A-2-313 (1954 as amended). Typically warranties have also been found to arise regarding construction work by way of contractual provisions and reliance by the parties. SME Indus., Inc. v. Thompson,Ventulett,Stainback & Assocs., Inc., 2001 UT 54, P21-P22 (Utah 2001); Management Comm. of Graystone Pines Homeowners Ass'n on behalf of Owners of Condominiums v. Graystone Pines, 652 P.2d 896, 900 (Utah 1982).

D. Misrepresentation and Fraud

The elements of fraud under Utah law are as follows:

> "Fraud is 'a false representation of an existing material fact, made knowingly or recklessly for the purpose of inducing reliance thereon, upon which plaintiff reasonably relies to his detriment. '" To have made a false representation recklessly, defendants would have to know they had insufficient knowledge upon which to base the representation made.

Rawson v. Conover, 2001 UT 24, ¶28, 20 P.3d 876 (citation omitted).

The elements for negligent misrepresentation have also been established under Utah law:

> Negligent misrepresentation occurs "[w]here one having a pecuniary interest in a transaction, is in a superior position to know material facts, and carelessly or negligently makes a false representation concerning them, expecting the other party to rely and act thereon, and the other party reasonably does so and suffers loss in that transaction...."

Culp Constr. Co. v. Buildmart Mall, 795 P.2d 650, 655 (Utah 1990); *Christensen v. Common Wealth Land Title Ins. Co.*, 666 P.2d 302 (Utah 1983).

Each of the essential elements of the claim for fraud and negligent misrepresentation must be proved by clear and convincing evidence. *Franco v. Church of Jesus Christ of Latter Day Saints*, 2001 UT 25, ¶33, 21 P.3d 198 (Fraud); *Jardin v. Brunswick Corp*., 18 Utah 2d 378, 423 P.2d 759 (Utah 1967)(Negligent misrepresentation).

In *Yazd v. Woodside Homes*, 2006 UT 47, the Utah Supreme Court noted that normally a person has no duty to disclose information to another unless a sufficient relationship exists to

give rise to such a duty. The Court held that the status of a builder-contractor gives rise to a duty of disclosure of material information to home buyers. P. 18. The court held that the duty is extinguished under Smith v. Frandsen, 2004 UT 55 where the information is communicated or otherwise acquired by the party to whom the duty was owed. P. 23.

The court identified the elements of fraudulent concealment as:

> (1) there is a legal duty to communicate information, (2) the nondisclosed information is known to the party failing to disclose, and (3) the nondisclosed information is material.

P. 35. The court specifically held that "a developer-builder may owe his buyer a duty to disclose information known to him concerning real property, including property other than that conveyed to the buyer, when that information is material to the condition of the property purchased by the buyer." P. 35.

E. Strict Liability

In Schafir v. Harrigan, 879 P.2d 1384 (Utah App. 1994), the Utah Court of Appeals rejected a claim for strict liability against the builder as a seller of defective goods. The Utah Court of Appeals held that the builder is not a "seller" of defective materials where the builder "merely utilized the defective components, if any, in building the house." *Id.* at 1388. The Court further noted that a claim for strict liability requires a showing that the defective products were unreasonabley dangerous to people occupying the building. *Id.*

II. INDEMNITY, CONTRIBUTION AND THIRD PARTIES.

A. Indemnity

Indemnity provisions in construction contracts are subject to the normal rules of contract interpretation applicable to other contract terms. Fundamental principles of contract interpretation require that the contract, including indemnity provisions, be viewed as a whole and that all provisions be construed together to give meaning to all provisions of the contract. In some contexts, indemnity provisions regarding an indemnitee's own negligence may also be subject to an additional rule of strict construction. Pickhover v. Smith's Management Corp., 771 P.2d 664, 666-667 (Utah App. 1989); Freund v. Utah Power & Light Co., 793 P.2d 362, 370 (Utah 1990); Bishop v. GenTec, Inc., 48 P.3d 218, 224 (Utah 2002). In some instances, an indemnity agreement may impact the protection an employer may otherwise have under the exclusive remedy provision of the Workmen's Compensation Act. See also Freund v. Utah Power & Light Co., 793 P.2d 362, 370 (Utah 1990).

B. Indemnification in Construction Contracts

1. Former Statute

For construction contracts entered into before May 5, 1997, the Utah Code had a provision regarding indemnification agreements in construction contracts which provided:

> A 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 . . . purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitee, is against public policy and is void and unenforceable. Utah Code Ann. § 13-8-1 (1996).

Based on the authority of the statute, the Utah Court of Appeals held that "an indemnity agreement in the construction industry violates public policy if it requires indemnification of the indemnitee for its sole negligence." Healey v. J.B. Sheet Metal, Inc., 892 P.2d 1047, 1051 (Utah Ct. App. 1995).

2. Current Statute: U.C.A. § 13-8-1

For construction contracts entered into after May 5, 1997, the statute has been amended to make all indemnity agreements void when such agreements were made by those involved in the construction of an improvement to real property. Utah Code Ann. §§ 13-8-1 and 2 (2003).

Utah Code Ann. § 13-8-1, governs the validity and impact of indemnity provisions in construction contracts. That section renders unenforceable indemnity agreements in a "construction contract" between a construction manager, general contractor, subcontractor, sub-subcontractor, supplier or any combination of the foregoing. Utah Code Ann. §13-8-1 prohibits a clause which requires indemnification against damages "caused by or resulting from the fault of the promisee, indemnitee, others, or their agents or employees." An indemnity provision is unenforceable under Utah Code Ann. §13-8-1 to the extent it is interpreted to provide indemnification for the indemnitees' own fault. See Jacobsen Constr. v. Blaine Constr. Co., 863 P.2d 1329, 1331 (Utah App. 1993)(Where scope of indemnification provision includes prohibited indemnity, entire provision unenforceable).

The current statute makes an exception where the construction contract is entered into between an owner and the contractors, suppliers or construction manager unless the owner also acts as a contractor, supplier or construction manager. However, §13-8-1(3) provides that when an indemnification provision is included in a construction contract between an owner and a contractor, "the fault of the owner shall be apportioned among the...[construction manager, general contractor, subcontractor, sub-subcontractor, supplier]...pro rata based on the

proportional share of fault of each of" those parties if the damages are caused in part by the owner at a time when the owner was not acting as a contractor.

C. Indemnification Provisions in Design Professional Contracts.

Utah Code Ann. §13-8-2 prohibits contractual provisions designed to limit a "design professional's" liability for claims arising out of that professional's services. That section provides that in a contract between an owner and a contractor, no provision may:

> [l]imit the owner's or a design professional's liability to the contractor for any claim arising from services performed by the design professional in connection with the development of the land.

Utah Code Ann. §13-8-2.

D. Apportionment of Fault and Contribution

Under Utah law, parties sued in tort are generally liable only for their own proportionate fault. U.C.A. §§ 78-27-38 and 40 provide that a defendant can only be liable for its own fault and not for the fault of any other party. The Utah courts have not yet determined whether this apportionment of fault applies to contractual liability where multiple defendants are sued in contract and tort arising out of the same incident or construction project. In construction cases this may be an important legal issue where contractors, subcontractors, architects, engineers, product manufacturers and others are sued under contract, warranty, products liability and tort theories.

E. Third Party Beneficiaries

Construction projects often involve or affect a number of different parties. Although these parties are brought together on the project, contractual relationships normally do not exist between all the different parties. Questions often arise as to whether a third party may have a cause of action against a contractor or design professional with which it has no contractual relationship.

Normally only the parties to a contract have rights under the contract. Under Utah law "it is axiomatic in the law of contract that a third party not in privity cannot not sue on contract." Shire Dev. v. Frontier Investments, 799 P.2d 221, 223 (Utah App. 1990). Unless the third party is a third party beneficiary, the third party has no rights under the contract. Tracy Collins Bank & Trust v. Dickamore, 652 P.2d 1314 (Utah 1982)(Only intended third party beneficiary can claim contract rights).

Absent a contractual right, an injured third party may assert a claim for negligence. In order for a contractor or design professional to be liable for construction defects, in negligence, there must be a duty on the part of the contractor regarding the alleged defect. It is fundamental

that "without a duty, there can be no negligence as a matter of law, and summary judgment is appropriate." Tallman v. City of Hurricane, 985 P.2d 892 (Utah 1999).

In Tallman v. City of Hurricane, 985 P.2d 892 (Utah 1999), the Utah Supreme Court adopted the forseeability doctine based upon the rule articulated in the *Restatement (Second) of Torts § 385*. The court held that under Utah law, "[t]he creator of an artificial condition on land may be liable to others – both upon or outside of the land – for physical harm caused by its dangerous nature." Tallman, 985 P.2d at 895. A full discussion of the history and background of this rule is beyond the scope of these materials. Analysis is required of potential exceptions to this doctrine as applied under Utah law in particular circumstances.

III. STATUTE OF LIMITATIONS/STATUTE OF REPOSE

Utah has a statute of limitations applying specifically to actions related to improvements to real property. There is also a provision granting a period of repose for construction service providers. These statutes have been amended over the years, and the former statutes may still apply depending upon when the cause of action accrued.

A cause of action accrues upon the happening of the last event necessary to give rise to a cause of action. Brigham Young Univ. v. Paulsen Constr. Co., 744 P.2d 1370, 1373 (Utah 1987). "In construction contract cases, as opposed to negligence or other types of cases, an owner's claim of defective construction against a general contractor is generally considered to accrue on the date that construction is completed." Id. Generally, "mere ignorance of the existence of a cause of action does not prevent the running of the statue of limitations." Id. at 1374. However, the legislature has adopted a discovery rule in certain circumstances as discussed below.

A. Current Statute

The current version of the statute applies to causes of action that accrue after May 3, 2003. See Utah Code Ann. § 78-12-21.5 (2004). Under this statute, an action based in *contract or warranty* must be brought *within six years of the date of completion* of the improvement or abandonment of construction. However, the statute allows parties to change this period through an express provision in a contract or warranty.

An action based upon *anything other than a breach of contract or warranty* must be commenced within two years after the cause of action is discovered or should have been discovered. Notwithstanding this rule, an action may not be commenced against a constractor or design professional more than 9 years after completion of the improvement or abandonment of construction. In the event the cause of action is discovered or discoverable in the eighth or ninth year of the 9-year period, the injured person has two additional years from that date to commence an action.

B. 1999 Version

The statute as amended in 1999 applies to causes of action that accrued before May 3, 2003, but after May 3, 1998. Compare Utah Code Ann. § 78-12-21.5 (2003) with Utah Code Ann. § 78-12-21.5 (2004). Under this statute, an action based in *contract or warranty* must be brought *within six years of the date of completion* of the improvement or abandonment of construction. Again, parties may change this period through an express provision in a contract or warranty.

All other actions must be commenced within two years after the cause of action is discovered or should have been discovered. However, if the cause of action is discovered before the improvement in completed, the action must be brought within two years of the time the improvement is completed or abandoned. Notwithstanding this rule, an action may not be commenced against a provider more than 12 years after completion of the improvement or abandonment of construction. In the event the cause of action is discovered or discoverable in the eleventh or twelfth year of the 12-year period, the injured person has two additional years from that date to commence an action.

C. Pre-1999 Statute

The statute as it existed before the 1999 amendment applies to causes of action which accrued before May 3, 1998. The prior version also only applies to claims seeking relief for injuries to persons or other property. In other words, claims for solely economic loss do not fall within the purview of this statute. See *Utah Code Ann.* § 78-12-25.5(1)(a)(1998); Cathco v. Valentiner Crane Brunjes Onyon Architects, 944 P.2d 365 (Utah 1997).

Under this version, an action based in contract or warranty must be brought *within six years of the date of completion* of the improvement or abandonment of construction. However, if the breach "is discovered in the first through sixth year of the six-year period, the injured person has *five additional years* from the date of discovery to commence an action." Utah Code Ann. § 78-12-25.5(4)(1998).

All other actions must be commenced within five years after the breach of duty should have been discovered. However, if the breach is discovered before the improvement is completed, the action must be brought within five years of the time the improvement is completed or abandoned.

The earlier statute also provides a 12-year period of repose. However, the earlier statute allows an additional five years in the event the breach is discovered or discoverable in the seventh through twelfth year of the 12-year period.

IV. ECONOMIC LOSS DOCTRINE

The economic loss rule provides generally that one "may not recover economic losses under a theory of non-intentional tort" absent physical damage to other property or bodily injury.

American Towers Owners v. CCI Mechanical, Inc., 930 P.2d 1182, 1189 (Utah 1996). Economic losses, of course, represent costs of repair, lost profits, lost business opportunities, and lost wages. Under this rule, economic losses may not be recovered under a negligence claim unless there are bodily injuries or property damage.

In a construction context, this rule was applied in American Towers Owners v. CCI Mechanical, Inc. where a condominium association brought suit against the defendants who designed, developed and constructed the condominium complex. American Towers, 930 P.2d 1182 (Utah 1996). The allegations in the complaint generally concerned problems with the complex's plumbing and mechanical system. In part, the association alleged that the defendants negligently failed to design, construct, supervise and inspect the construction of the property. As a result, the association alleged that it incurred substantial and ongoing reparation costs, the substantial diminution of the value of the property and other special and consequential damages. The trial court granted the defendant's motion for summary judgment on the basis that the claim failed as a matter of law because "the alleged damages are for economic loss, not for injury to persons or other property." Id. On appeal the Utah Supreme Court affirmed. In doing so, the court explained the above principles of law and held:

> The Association contends that the complex's plumbing and mechanical systems do not meet their expectations, resulting in a diminution in value of their purchase measured by the cost of repair. This deterioration of the complex does not qualify for the "damage to other property" exception to the economic loss doctrine. This interpretation is consistent with the court of appeals' decisions applying the economic loss rule . . . where the plaintiff's claimed that construction defects caused water leakage into other parts of their homes.

American Towers, 930 P.2d at 1191 (citations omitted).

A number of subsequent Supreme Court cases have applied these principles in particular situations. Several of these cases dealt with the scope of the economic loss doctrine, the existence of independent duties apart from contract, and the impact of professional or licensing status of the parties involved. The impact of these decisions following American Towers is beyond the scope of this overview.

In 2008, the Utah legislature enacted U.C.A., §78B-4-513 (2008) which addresses issues presented by the economic loss doctrine. The statute provides:

§ 78B-4-513. Cause of action for defective construction

(1) Except as provided in Subsection (2), an action for defective design or construction is limited to breach of the contract, whether written or otherwise, including both express and implied warranties.

(2) An action for defective design or construction may include damage to other property or physical personal injury if the damage or injury is caused by the defective design or construction.

(3) For purposes of Subsection (2), property damage does not include:
(a) the failure of construction to function as designed; or
(b) diminution of the value of the constructed property because of the defective design or construction.
(4) Except as provided in Subsections (2) and (6), an action for defective design or construction may be brought only by a person in privity of contract with the original contractor, architect, engineer, or the real estate developer.
(5) If a person in privity of contract sues for defective design or construction under this section, nothing in this section precludes the person from bringing, in the same suit, another cause of action to which the person is entitled based on an intentional or willful breach of a duty existing in law.
(6) Nothing in this section precludes a person from assigning a right under a contract to another person, including to a subsequent owner or a homeowners association.

V. EMOTIONAL DISTRESS CLAIMS

In Samms v. Eckles, 11 Ut.2d 289, 358 P.2d 344 (1961), the Court discussed the standard for infliction of emotional distress in the context of alleged indecent proposals.

> Due to the highly subjective and volatile nature of emotional distress in the variability of its causation, the court has historically been wary of dangers in opening the door to recovery therefore. This is partly because such claims may easily be fabricated; or as sometimes stated, are easy to assert and hard to defend against.

Id. at 291.

In White v. Blackburn, 787 P.2d 1315 (Ut. App. 1990), the court discussed in detail the elements of a cause of action for intentional infliction of emotional distress:

> To support a cause of action for intentional infliction of emotional distress, appellant must show the following elements: (1) outrageous conduct by the defendant; (2) the defendant's intent to cause, or the reckless regard of the probability of cause, and emotional distress; (3) severe emotional distress; and (4) an actual and proximate causal link between the conduct and emotional distress.
>
> The Utah Supreme Court has recognized some of the dangers inherent in allegations of intentional infliction of emotional distress:
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> > Due to the highly subjective volatile nature of emotional distress and the variability of its

> causation, the courts have historically been wary of dangers in opening the door to recovery therefore. This is partly because such claims may be easily fabricated; or as sometimes stated, are easy to assert and hard to defend against.

> Consequently in an action for severe emotional distress, the court has held that the plaintiff must show the offensive behavior to be perpetrated: (a) within the purpose of inflicting emotional distress, or, (b) where any reasonable person would have known that such would result; and his actions are of such a nature as to be considered outrageous and intolerable and that they defend against the generally accepted standards of decency and morality.

Id. at 1317.

VI. ECONOMIC WASTE

In Rex T. Fuhriman, Inc. v. Jarrell, 21 Utah 2d 298, 445 P.2d 136 (1968), the Court recognized the principal of economic waste in the context of the measure of damages for failure of a contractor to apply an asphalt emulsion to foundation walls below ground level. The result was leaking foundation walls. The Court quoted the Restatement of the Law Contracts, Section 346(1) as the proper measure of damages:

> (a) For defective or unfinished construction he can get judgment for either
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> (i) the reasonable cost of construction in accordance with the contract, if this is possible and does not involve unreasonable economic waste; or
>
> (ii) the difference between the value that the product contracted for would have had and the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste.

Id. at 302-03.

VII. DELAY DAMAGES

In Higgins v. City of Fillmore, 639 P.2d 192 (Utah 1981), the Court held:

> Damages may be recovered for loss of efficiency as a natural consequence of the breach of a construction contract. See Luria Brothers & Co. v. United States, 369 F.2d 701, 177 Ct.Cl 676 (1966); Abbett Electric Corp. v. United States, 142 Ct.Cl. 609, 162 F.Supp. 772 (1958).

Id. at 194. Liquidated damages may also be available for delay under appropriate contract provisions.

VIII. RECOVERABLE DAMAGES

a. Direct Damages

In Bevan v. J.H. Const. Co., Inc., 669 P.2d 442 (Utah 1983), the Court addressed the measure of damages for breach of a contract for construction of a home:

> ...the general rule of damages which arms the trial court with the discretion to place the litigants as nearly as possible in the position they would have enjoyed had the contract not been breached. Furthermore, the subject damages arose fairly and reasonably from the breach of contract, and they may reasonably be supposed to have been within the contemplation of the parties at the time they made the contract, and when adequately proven, said damages clearly fall within the purview of this courts...

Id. Similarly, Utah courts have recognized that "the general objective of tort law [is] to place an injured person in a position as nearly as possible to the position he would have occupied but for the defendant's tort." Acculog, Inc. v. Peterson, 692 P.2d 728, 731 (Utah 1984).

b. Stigma

In Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1246-1247 (Utah 1998), the Utah Supreme Court has held that "stigma damages are a facet of permanent damages, and recovery for stigma damages is compensation for a property's diminished market value in the absence of "permanent 'physical'" harm." The Court further stated that "stigma damages are therefore recoverable in Utah when a plaintiff demonstrates that (1) defendants caused some temporary physical injury to plaintiff's land and (2) repair of this temporary injury will not return the value of the property to its prior level because of a lingering negative public perception."

c. Loss of Use

The Restatement (Second) Torts states that "[w]hen one is entitled to a judgment for the conversion of chattel or the destruction or impairment of any legally protected interest in land or other thing, he may recover . . . compensation for the loss of use." Restatement (Second) Torts § 927(1)(d) (1979). Where a person has lost the use of his chattel, "damages can properly include an amount *for expenses in procuring a necessary substitute* or for the value of the use of a substitute until a replacement of the subject matter can be made." Restatement (Second) Torts § 927 cmt. o (1979) (emphasis added). Utah courts have also declared that "an award of consequential damages for the loss of use of converted [personal] property is an appropriate . . . [measure of] damages." Henderson v. For-Shor Co., 757 P.2d 465, 470 (Utah Ct. App. 1988). Furthermore, "'[t]ypically, the measure of damages in trespass and nuisance cases involving

"permanent" [or indefinite] injury has been the diminished market value of the property,' *plus consequential losses to the use of the land*." Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238 (Utah 1998) (quoting L. Neal Ellis, Jr. & Charles D. Case, Toxic Tort and Hazardous Substance Litigation § 6-5(a) (1995)) (emphasis added).

d. Punitive Damages

"[P]unitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others." Utah Code Ann. § 78-18-1(1)(a).

Commenting on the appropriate amount of punitive damages, the Utah Supreme Court has stated that an award that is less that $100,000 will not generally be found to be excessive if the award does not exceed the actual damages by more than a ratio of approximately 3-to-1. Larger awards will be scrutinized more carefully to ensure that relevant factors were clearly considered in reaching the award. These factors include: the wealth of the defendant, the nature of the alleged misconduct, the relationship of the parties and the amount of actual damages awarded. An award in excess of the 3-to-1 ratio may still be sustained if the trial court carefully articulates the basis for the award. Crookston v. Fire Ins. Exch., 817 P.2d 789 (Utah 1991).

The United States Supreme Court recently issued an important punitive damage decision in a Utah case, State Farm Mutual Automobile Insurance Company v. Campbell, 123 S. Ct. 1513 (2003), in which the Court reversed an unusually high jury award for punitive damages. Campbell went to the U.S. Supreme Court on a Writ of Certiorari from the Utah Supreme Court. The Utah court had approved a $145,000,000 punitive damages award against State Farm in a third-party bad faith failure-to-settle case.

The compensatory damages totaled $1,000,000, thus resulting in a 145-to-1 ratio of punitive-to-compensatory damages. The U. S. Supreme Court reversed and held that the punitive award violated the due process clause of the United States Constitution. It held that, under its earlier decision in BMW v. Gore, a punitive award "at or near the amount of compensatory damages" would be justified. The court further held that the award of punitive damages must be based upon injury to the plaintiffs in the underlying case and cannot be the product of generic evidence of wrongdoing against the corporate defendant. Specifically, the court rejected the Utah Supreme Court's acceptance of evidence of alleged wrongful acts committed in other states by State Farm which were not substantially similar to the harm suffered by the Campbells as a basis to support the large punitive award. Thus, extraterritorial evidence of wrongdoing that is not substantially similar to the harm done to the specific plaintiffs cannot be considered for purposes of determining a constitutionally valid punitive award. Finally, the court also indicated that ratios in excess of 9-to-1 would probably not pass the constitutional test.

e. Attorneys Fees

In general, attorney fees may be awarded to the prevailing party only if allowed by statute or contract. See Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 782 (Utah 1994).

f. Expert Fees and Costs

In general, costs of litigation such as filing fees and deposition costs may be recovered so long as the "'trial court is persuaded that [the depositions] were taken in good faith and, in the light of the circumstances, appeared to be essential for the development and presentation of the case.'" Highland Constr. Co. v. Union Pac. R.R., 683 P.2d 1042, 1051 (Utah 1984). In Young v. State, 2000 UT 91, 16 P.3d 549 (Utah 2000), the Utah Supreme Court denied recovery of expert expenses and fees beyond the statutory witness fee.

IX. SELECTED INSURANCE ISSUES

Construction contracts often contain provisions requiring one or both parties to obtain various insurance coverages. In addition to these requirements, it is often desirable to be named as an additional insured under the other party's liability insurance policy. The following is a general discussion of some of the ramifications of failing to obtain the contractually required insurance and the potential for waiver of such provisions.

Although insurance provisions are common in construction contracts, it is important for the parties to follow up on the contract requirements to make sure the required insurance and additional insured status are in place. The party seeking such insurance protection should obtain proof of insurance. The documentation provided by the other contracting party regarding insurance and additional insured status should be carefully reviewed. It is not uncommon for a "certificate of insurance" to be provided which contains an express statement that the certificate does not constitute insurance or proof of insurance. In addition, it is important to follow up on the insurance issues to avoid the possibility of a waiver of such provisions.

A. Waiver of Insurance or Additional Insured Provisions

Utah recognizes the general common law concept of waiver. In Flake v. Flake (In re Estate of Flake), 71 P.3d 589 (Utah 2003), the Utah Supreme Court reiterated the doctrine of waiver by stating that "[w]aiver of a contractual right occurs when a party to a contract intentionally acts in a manner inconsistent with its contractual rights, and, as a result, prejudice accrues to the opposing party or parties to the contract." In Utah, "[w]aiver is an intensely fact dependent question, requiring a trial court to determine whether a party has intentionally relinquished a known right, benefit, or advantage." Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n., 857 P.2d 935, 940 (Utah 1993). In order to find that a waiver occurred, the Utah Supreme Court has held that "a fact finder need only determine whether the totality of the circumstances warrants the inference of relinquishment." Id. at 942. Although "any waiver 'must be distinctly made . . . it may be express or implied.'" Id. at 940 (quoting Phoenix, Inc. v. Heath, 61 P.2d 308,

311 (Utah 1936)). Finally, the intent to waive may only be shown by a preponderance of the evidence. See Soter's at 942, n. 6.

Although the Utah courts have not addressed the issue directly, some courts have found that the failure to require proof of additional insured status prior to commencement of work may, in certain circumstances, result in a waiver of the additional insured requirement. In Whalen v. K Mart Corporation, 519 N.E.2d 991 (Ill. App. 1988), the plaintiff, Whalen, brought a personal injury action against the general contractor, Schostak Brothers, Inc., K-Mart and the landowners. Id. at 992. The general contractor and the landowners, as third-party plaintiffs, filed a third-party complaint against A. W. Christianson & Sons, Inc., the painting subcontractor, for contribution and indemnity based on Christianson's agreement to procure insurance naming third-party plaintiffs as an insured. Id. The general contractor also filed a counterclaim against Martin Cement Company, the cement subcontractor, for contribution and indemnity based on Martin's agreement to procure insurance naming the general contractor and landowners as an insured. Id. The contracts also contained a provision stating:

> The Subcontractor shall not commence work under this Subcontract until he has obtained all insurances required by the General Conditions and as hereinafter set forth and certificates of insurance delivered to the Contractor.

See id.

The subcontractors moved to dismiss the third-party complaint and counterclaim and alleged that the general contractor and landowners waived the contractual insurance requirement. Id. Both subcontractors alleged, in their motions to dismiss, that the general contractor did not insist upon their compliance with the contractual insurance requirements of their respective subcontracts. Id. at 993. Both subcontractors performed under their contracts and were paid in full. The trial court dismissed the third-party complaint against both subcontractors. Id.

On Appeal, the court held that "[a] party to a contract may not lull another into a false assurance that strict compliance with a contractual duty will not be required and then sue for noncompliance." Id. The court also stated that, "it is undisputed that [the general contractor] drafted the contracts. The requirement that proof of insurance be submitted before the subcontractors could commence work and be paid was clearly for [the general contractor's] benefit." Id. at 994. Additionally, the court stated that "[The general contractor] is presumed to know those things which reasonable diligence on its part would bring to its attention, namely, the absence of proof of insurance." Id. Finally, the court found "that [the general contractor] never demanded any proof of insurance; both [subcontractors] completed their performance under the contract; and both were paid in full for their services." Id. The court affirmed the trial court's finding of waiver and stated that "[a]n implied waiver of a legal right may arise when conduct of the person against whom waiver is asserted is inconsistent with any other intention than to waive it." Id.; See also Geier v. Hamer Enters., Inc., 589 N.E.2d 711, 722 (Ill. App. 1992)(stating that waiver of contractual provisions may be established by conduct indicating that strict compliance with the provision will not be required.)

B. Impact of U.C.A. §13-8-1 on Insurance Provisions in Construction Contracts.

Utah Code Ann. §13-8-1 imposes restrictions on the use of indemnity provisions in construction contracts for indemnification against the negligence or fault of parties other than the indemnitor. Notwithstanding these restrictions, the Utah Court of Appeals has ruled that a construction contract may include a provision requiring a party to provide insurance to indemnify the other party from negligence of others. In Meadow Valley Contrs., Inc. v. Transcon. Ins. Co., 27 P.3d 594 (Utah App. 2001), the general contractor, Meadow Valley, hired BT Gallegos Construction Company, Inc. ("BT Gallegos") as a subcontractor to extend existing drainage lines on a roadway project and to tie those lines into an existing drainage system. The subcontract agreement between BT Gallegos and Meadow Valley required BT Gallegos to purchase an insurance policy with an endorsement naming Meadow Valley as an additional insured. BT Gallegos purchased a commercial general liability insurance policy, with the required endorsement, from Transcontinental Insurance. Id. at 596.

Following a severe rainstorm, during the installation of the drainage system, a number of nearby businesses were damaged by water diverted from the roadway. These businesses submitted claims to Meadow Valley who, in turn, tendered these claims to Transcontinental. Id. Initially, Transcontinental refused the tender submitted by Meadow Valley stating that BT Gallegos could not be required to insure or indemnify Meadow Valley for its own negligence. Id. In the later action that ensued, Transcontinental claimed that it was not required to "provide insurance coverage, investigate, defend, or indemnify Meadow Valley for its own negligence." Id at 597. Meadow Valley moved for summary judgment, which was granted by the trial court, against Transcontinental claiming that Transcontinental was required to insure and indemnify Meadow Valley. Id. On Appeal, Transcontinental argued, citing Utah Code Ann. § 13-8-1(2)(Lexis 2004), that "BT Gallegos was statutorily prohibited from purchasing any sort of insurance policy which would insure Meadow Valley for Meadow Valley's own negligence." Id at 598. Utah Code Ann. § 13-8-1(2) states that "an indemnification provision in a construction contract is against public policy and is void and unenforceable." Id. That section also states that:

> "Indemnification provision" means a covenant, promise, agreement or understanding in, in connection with, or collateral to a construction contract requiring the promisor to insure, hold harmless, indemnify, or defend the promisee or others against liability if:
>
> (I) the damages arise out of:
> A. bodily injury to a person;
> B. damage to property; or
> C. economic loss; and
>
> (ii) ***the damages are caused by or resulting from the fault of the promisee, indemnitee, others, or their agents or employees***.

Id. (emphasis added).

The Court stated that "the plain meaning of [this] statute voids only agreements requiring one party in a construction contract to ***personally*** insure against liability stemming from the other party's negligence." Meadow Valley, at 598 (emphasis added).

Interestingly, the Court distinguished between BT Gallegos's obligation to purchase insurance (which it found enforceable) and any obligation on the part of BT Gallegos to personally indemnify Meadow Valley for Meadow Valley's own negligence (which the court affirmed is unenforceable pursuant to Utah state law). The Court concluded that:

> In this case, the insurance provision of the subcontract agreement requires BT Gallegos to procure insurance and to name Meadow Valley as an additional insured. ***The provision does not, however, require BT Gallegos to personally insure or indemnify Meadow Valley for liability arising out of Meadow Valley's own negligence. Therefore, the insurance provision of the subcontract agreement does not violate section 13-8-1.***

Id. (emphasis added).

C. Liability for Failure to Obtain Contractually Required Insurance

Utah courts have not examined the specific issue of liability for failure to obtain insurance required by a provision in a construction contract. However, cases from other jurisdictions have established the principle that "where a party breaches its contractual obligation to procure liability insurance on behalf of another, it is liable for damages resulting from the breach, ***including the amount of any judgment up to policy limits and costs of defending any suit that would have been defended by the insurer***." Nelson v. Metro-North Commuter R.R., 1999 U.S. Dist. LEXIS 1773, *9 (S.D.N.Y. 1999)(emphasis added); See also Kinney v. G.W. Lisk Co., Inc., 556 N.E.2d 1090, 1092 (N.Y. 1990)(stating that because a subcontractor breached its agreement to procure liability insurance covering the general contractor, it is liable for the resulting damages, including the general contractor's liability to plaintiff); Schumacher v. Lutheran Community Services, Inc., 177 A.D.2d 568, 569 (N.Y.2d Dept. 1998)(stating that because a lessee breached its agreement to obtain liability insurance covering a lessor, it is liable to indemnify the lessor for any payments made by the latter to plaintiffs); Roblee v. Corning Community College, 134 A.D.2d 803, 805, (N.Y.3d Dept. 1987)(stating that since a food service vendor breached its agreement to procure general liability coverage for the college, it is liable for the college's resultant damages, i.e., its payments in discharge of liability to injured third persons to the extent of the required policy limits and the costs of defending a suit which would have been defended by the insurer under such a policy.)

D. Other Additional Insured Issues

When a contract requires a party to be named as an additional insured under required insurance, the scope of the additional insured protection is governed by the underlying policy. It is important to note that "the additional insured is subject to the same exclusions applicable to the named insured and may receive no greater insurance coverage than the named insured."

Willett Truck Leasing Co. v. Liberty Mut. Ins. Co., 410 N.E.2d 376, 379 (Ill. App. 1980). This is consistent with Utah law wherein "[i]nsurers 'may exclude from coverage certain losses by using language which clearly and unmistakably communicates to the insured the specific circumstances under which the expected coverage will not be provided.'" Utah Farm Bureau Ins. Co. v. Crook, 980 P.2d 685, 686 (Utah 1999)(citing Alf v. State Farm Fire & Cas. Co., 850 P.2d 1272, 1275 (Utah 1993).

X. MECHANICS LIENS AND PAYMENT BONDS

I. Mechanics' Liens.

A mechanics' lien is an important remedy that may give an unpaid contractor security to obtain payment for work performed and materials furnished. As the name suggests, a mechanics' lien is a lien against the real property where the project is located. If the contractor is not paid, the contractor may foreclose the lien, have the property sold, and have the proceeds applied to the amount owed to the contractor.

The Utah Mechanics' Lien Statute contains numerous procedural requirements which must be performed in a timely fashion in order to successfully recover payment under the Mechanics' Lien.

A. Private projects.

A private project may be liened if the owner fails to make payment for the construction work. The Utah Mechanics Lien Statute, however, specifically provides that "the provisions of this chapter shall not apply to any public building, structure or improvement." U.C.A. §38-1-1. The Utah legislature has partially filled this gap for subcontractors by requiring that prime contractors furnish payment bonds for the protection of those furnishing labor, materials, or services on public construction projects. The federal statutes also provide payment bond remedies in place of mechanics lien rights on federal construction projects. These payment bond provisions are discussed later in these materials.

B. Who is Entitled to a Mechanics Lien.

The Utah Mechanics' Liens Statute, Utah Code Ann. §38-1-1, et seq. (1953 as amended) provides contractors, subcontractors, design professionals, and other persons performing services or furnishing or renting materials or equipment in the construction or improvement of buildings and structures on the real property where the project is located. U.C.A. §38-1-3 provides:

> Contractors, subcontractors, and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner and licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of

> cost, surveys or superintendence, or who have rendered other like professional service, or bestowed labor, shall have a lien upon the property upon or concerning which they have rendered service, performed labor, or furnished or rented materials or equipment for the value of the service rendered, labor performed, or materials or equipment furnished or rented by each respectively, whether at the instance of the owner or of any other person acting by his authority as agent, contractor, or otherwise except as the lien is barred under Section 38-11-107 of the Residence Lien Restriction and Lien Recovery Fund Act. This lien shall attach only to such interest as the owner may have in the property.

The lien extends to that portion of the land reasonably necessary for convenient use and occupation of the land. U.C.A. §38-1-4. The mechanics lien statute is intended to protect those providing work and materials for the improvement of property. Stanton Transp. Co. v. Davis, 9 Utah 2d 184, 341 P.2d 207 (1959).

C. Notice of Commencement and Preliminary Notices.

The mechanics lien law in Utah underwent a major transformation due to major changes made in the 2004 and 2005 legislative sessions. The requirements for notice of commencement and preliminary notices were a major part of these changes.

1. State Construction Registry

The notice of commencement and preliminary notice requirements were dramatically revised in the 2004 and 2005 legislative sessions. On projects for which a notice of commencement is filed on or after May 1, 2005, notices of commencement and preliminary notices are filed electronically in the State Construction Registry ("SCR"), a statewide electronic data base created pursuant to U.C.A. §38-1-30. See U.C.A. §38-1-37. Notices of completion, a new type of notice under the 2004 statutory revisions, are also filed electronically in the SCR.

a. Notice of Commencement

Under U.C.A. §38-1-31, a governing authority issuing a building permit is required, within fifteen days of issuing the permit, to enter the building permit application and permit information electronically into the SCR. This entry forms the basis of the notice of commencement. U.C.A. §38-1-31(1)(i)(B). An original contractor or owner-builder may also file a notice of commencement based upon the building permit. A notice of commencement activates the preliminary notice requirements and may provide added protection to interested parties.

Within 15 days after commencement of physical construction, the original contractor or owner-builder may file a notice of commencement with the SCR regardless of whether a building permit is issued. An owner of construction or original contractor may file a notice oc

commencement within 15 days of issuance of a building permit, if a permit is issued, or 15 days after physical construction. U.C.A. §38-1-31(1)(c).

The SCR assigns a unique project number to each project which links all notices filed for that project. U.C.A. §38-1-31(1)(e). If duplicate notices of commencement are filed, they are combined into a single notice of commencement for the project. U.C.A. §38-1-31(1)(d). The notice of commencement is effective as to work, materials and equipment furnished to the project after the notice of commencement is filed.

The notice of commencement must include the following information if available on the building permit:

1. The name and address of the owner of the project;

2. The name and address of the original contractor;

3. The name and address of the surety providing any payment bond for the Project. If no payment bond exists, the notice of commencement must state that a payment bond was not required;

4. The project address if the project can be reasonably identified by an address or the name and general description of the location of the project if it cannot be reasonably identified by an address;

A notice of commencement need not include all of the above items if a building permit is issued for the project and all the above items that are available on the building permit are included in the notice of commencement. U.C.A. §38-1-31(2)(c).

A notice of commencement may include a general description of the project and the lot or parcel number and any subdivision, development or other project name of the real property where the project is located if the project is subject to mechanics liens.

If a notice of commencement is not filed within the appropriate time frames, the provisions in U.C.A. §38-1-32 and §38-1-33 regarding preliminary notices and notices of completion do not apply. U.C.A. §38-1-31(3).

When a building permit is issued, each original contractor is required to conspicuously post at the project site a copy of each building permit issued for the project. U.C.A. §38-1-31(6).

c. Preliminary Notice Requirements

All subcontractors are required to file a preliminary notice with the SCR. U.C.A. §38-1-32(1)(a). The preliminary notice is required to be filed within the later of 20 days after commencing its own labor, service, equipment or materials or 20 days after filing a notice of commencement. The preliminary notice is effective for all work and materials furnished for the

project. Id. A preliminary notice filed after the 20-day time period does not become effective until 5 days after the filing of the preliminary notice. U.C.A. §38-1-32(1)(a).

Failure to file the preliminary notice within the 20-day time period precludes the subcontractor or supplier from filing any claim for compensation earned for work or materials furnished prior to 5 days after the filing of the preliminary notice except against the party with whom the subcontractor or supplier contracted. U.C.A. §38-1-32(1)(c). The preliminary notice must be filed before the filing of a notice of lien under U.C.A. §38-1-7. U.C.A. §38-1-32(1)(d)(i).

The preliminary notice must include the following information:

1. The building permit number for the project, or number assigned by the SCR.

2. The name, address and telephone number of the person furnishing the labor, service, equipment or material.

3. The name and address of the person who contracted with the claimant for the furnishing of the labor, service, equipment, or material.

4. The name of the record or reputed owner of the project.

5. The name of the original contractor under which the claimant is performing or will perform work.

6. The address or a description of the location of the project or improvement.

U.C.A. §38-1-32(1)(d)(ii).

A subcontractor or supplier is only required to file one preliminary notice for a project unless it provides labor, services, equipment, or material to more than one original contractor. In such case, a separate preliminary notice is required for the labor, services, equipment or material furnished under each original contract. U.C.A. §38-1-32(2)(c),(d). Although §38-1-32(1) says a preliminary notice is effective for all work on a project even if performed for more than one contractor or subcontractor, it is important to keep in mind that §38-1-32(2)(d) provides that a separate preliminary notice is required for each original contractor under which a subcontractor or vendor provides labor, services, materials or equipment.

If an owner, original contractor, subcontractor or other interested party believes a preliminary notice has been improperly filed, it may request proof of the validity of the preliminary notice. The party filing the preliminary notice must provide such proof within 10 days of the request. If the proof cannot be provided, the filing party must remove the preliminary notice from the SCR. U.C.A. §38-1-32(3).

d. Notice to Subcontractors

U.C.A §38-1-27.2 requires original contractors to provide notice to requesting subcontractors of preliminary notices filed on the project. Within 14 days after receipt of a subcontractor request, the original contractor must provide notice of all preliminary notices received by the contractor for the project.

e. Notice of Completion

Following final completion of work on a project, the owner, an original contractor, lender, or surety on the project may file a notice of completion. Final completion is generally defined as the date of issuance of a permanent certificate of occupancy if such is required by the local governmental entity having jurisdiction. If no certificate of occupancy is required, but a final inspection is required by the local governmental entity, the final completion is the date of such required final inspection. If no certificate of occupancy or final inspection is required by the local governmental entity having jurisdiction, then final completion is the date on which no substantial work remains to be completed on the project. U.C.A. §38-1-7(1)(a)(ii). Substantial work does not include repair or warranty work. U.C.A. §38-1-7(1)(c). Substantial completion does not occur where work remains to be completed for which the owner is holding payment to ensure completion of the work. U.C.A. §38-1-7(1)(d); U.C.A. §38-1-33(1)(d)

If a subcontractor performs substantial work after the above dates defining final completion of the project, such work of the subcontractor shall be considered an original contract for the sole purpose of determining the time for the subcontractor to file a lien under §38-1-7(1) and for the contractor to file a lien under §38-1-7(1) with respect to the subcontractor's work. U.C.A. §38-1-7(1)(b); 38-1-33(1)(b).

U.C.A. §38-1-33(1)(e)(i) provides that electronic notice of the notice of completion shall be provided to each person filing a notice of commencement, each person filing a preliminary notice and to each interested party requesting such notice.

f. Preliminary Notice if Notice of Completion Filed

U.C.A. §38-1-33(1)(e)(iv) provides language regarding the interplay between a notice of commencement and preliminary notices which may create a hazard for the unwary. That section provides:

> Upon the filing of a notice of completion, the time periods for filing preliminary notices stated in Section 38-1-27 are modified such that all preliminary notices shall be filed subsequent to the notice of completion and shall be filed within ten days from the day on which the notice of completion is filed.

According to representatives of DOPL and the Utah Attorney General's Office, this provision is intended to allow a curative preliminary notice within ten days of filing of a notice of completion. If a subcontractor fails to timely file a preliminary notice, this provision appears to

provide that the filing of a notice of completion allows this failure to be cured by filing a preliminary notice within ten days of the filing of the notice of completion. The subcontractor, however, must track the filings on the project to determine if a notice of completion has been filed.

The reference to modification to filing times under §38-1-27 may be problematic because after May 1, 2005, the amended §38-1-27 does not contain the filing time provisions. This appears to be an erroneous reference. The filing times for preliminary notices are now found in §38-1-32.

The above provision, if read literally, may be construed to require a second preliminary notice in the event a notice of completion is filed. The provision provides that if a notice of completion is filed, the time for filing a preliminary notice is modified "such that all preliminary notices shall be filed subsequent to the notice of completion and shall be filed within ten days from the day on which the notice of completion is filed." This may be read to mean that if a notice of completion is filed, all preliminary notices must be filed "subsequent to the notice of completion" and within ten days thereafter. Such interpretation would mean that even if a notice of completion has otherwise been timely filed, if a notice of completion is filed, a second preliminary notice must be filed during the ten days after the notice of completion is filed.
The statute also provides that an additional notice of completion is not required for work or materials furnished to a subcontractor considered to be an original contractor due to performing substantial work after final completion of the project as defined above if a preliminary notice has already been provided for such work or materials. Id.

If an owner, original contractor or subcontractor believes that a notice of completion has been improperly filed, it may request evidence establishing the validity of the notice of completion. The party filing the notice of completion must provide such evidence. If it is unable to do so, the notice of commencement must be removed from the SCR.

g. SCR Data Base Abuse

U.C.A. §38-1-34 provides that a person abusing the SCR is liable to interested and affected parties for the greater of twice the actual damages incurred by such affected party or $2,000. Abuse of the SCR occurs when a person files a notice with the SCR without a good faith basis for doing so, for the purpose of exacting more than is due from the project owner or other interested party, or to obtain an unjustified advantage or benefit. U.C.A. §38-1-34(2).

h. Miscellaneous SCR Provisions

No filings may be made with the SCR if the filer is delinquent in paying its fees to the SCR. §38-1-27(8). The filing of documents with the SCR does not provide constructive notice as with the recording of documents with a county recorder under §57-3-102.

D. Notice of Claim of Lien.

1. Recording with County Recorder where Project Located

A lien claimant must file a notice of claim of lien with the county recorder where the project is located. U.C.A. §38-1-7.

2. Time For Recording Lien

The written notice of lien must be recorded within 90 days from the date a notice of completion is filed under U.C.A. §38-1-33 or 180 days after final completion of the original contract if no notice of completion is filed. U.C.A. §38-1-7(1)(a). Final completion is generally defined as the date of issuance of a permanent certificate of occupancy if such is required by the local governmental entity having jurisdiction. If no certificate of occupancy is required, but a final inspection is required by the local governmental entity, the final completion is the date of such required final inspection. If no certificate of occupancy or final inspection is required by the local governmental entity having jurisdiction, then final completion is the date on which no substantial work remains to be completed on the project. U.C.A. §38-1-7(1)(a). Substantial work does not include repair or warranty work, or work for which the owner is not holding retention funds to ensure completion of the work. U.C.A. §38-1-7(1)(c).

If a subcontractor performs substantial work after the above dates defining final completion of the project, such work of the subcontractor shall be considered an original contract for the sole purpose of determining the time for the subcontractor to file a lien §38-1-7(1) and for the contractor to file a lien under §38-1-7(1) with respect to the subcontractor's work. U.C.A. §38-1-7(1)(b).

3. Content of Notice of Lien

The notice of claim of lien must contain the following information:

1. The name of the reputed owner if known, or if not known, the name of the record owner of the property.
2. The name of the person by whom the claimant was employed or to whom the claimant furnished the equipment or material.
3. The time when the first and the last labor or service was performed or the first and last equipment or material was furnished.
4. A description of the property where the project is located sufficient for identification.
5. The name, address and telephone number of the lien claimant.
6. The amount of the lien claim.
7. The signature of the lien claimant or its authorized agent.
8. An acknowledgment or certification sufficient for recording of documents with the County Recorder under Title 57, Chapter 3, Recording of Documents.

9. If the lien is on an owner occupied residence as defined in §38-11-102, a statement of the steps an owner, as defined in §38-11-102, may take for removal of a lien pursuant to §38-11-107.

U.C.A. §38-1-7(2). A lien against two or more buildings or improvements owned by the same person may be included in one claim. However, the claim must designate the amount claimed on each building or improvement. U.C.A. §38-1-8. Several Utah cases have addressed the impact of this apparently simple provision and the consequences resulting from failure to make the designation of amounts due on each improvement. The resolution of these issues depends upon the specific facts and circumstances of each case.

As with other recorded documents affecting real property, recording of the mechanics lien imparts constructive notice of the mechanics lien to all persons. U.C.A. §38-1-9.

E. Notice to Owner.

A copy of the Notice of Lien must be delivered or mailed by certified mail to the reputed owner or record owner of the property. This must be accomplished within 30 days after recording the notice of lien. If the address of the record owner is not known, the notice may be served at the last known address of the record owner from the tax assessment rolls of the county where the property is located. Failure to deliver or mail the notice of lien to the reputed or record owner precludes the lien claimant from recovering its costs and attorneys fees against the reputed owner or record owner in an action to enforce the lien. §38-1-7(3).

F. Action to Foreclose the Lien

1. Time for Suit.

The lien claimant must sue in court to enforce the lien within 180 days of the date of filing the notice of lien under §38-1-7. U.C.A. §38-1-11(2). Within the same time period, a lis pendens must be recorded. Failure to record the lis pendens voids the lien except as to parties to the lien action and those with actual knowledge of the commencement of the action. U.C.A. §38-1-11(3), (4). The lien claimant should communicate with its legal counsel in advance of these deadlines in order to allow sufficient time for preparation of the lawsuit. Although lien services are available, when payment issues arise, the lien claimant is well advised to consult as early as possible with legal counsel to assist in complying with the notice requirements necessary to preserve the lien claim.

2. Joinder of Multiple Lien Claims

Lien claimants not contesting each others claims may join together in a single action. If separate lien actions are filed on the same project, the court may consolidate the actions. Any party claiming a lien which does not join as a plaintiff may be joined as a defendant. Any lien claimant may also intervene at any time prior to the final hearing. U.C.A. §38-1-13.

3. Special Provisions for Residences Under §38-11-102

If the lien action involves a residence under §38-11-102, the lien claimant must serve with the complaint instructions and a form affidavit regarding the owner's rights and steps to exercise those rights under the Residence Lien Restriction Act and Lien Recovery Fund Act. The instructions and form affidavit must comply with rules promulgated by the Division of Occupational and Professional Licensing. Failure to provide the required information bars the lien claim against the residence. §38-1-11(6).

If the owner commences, within 30 days of service of summons in a lien enforcement action, administrative proceedings with DOPL for a certificate of compliance with the Residence Lien Restriction provisions, the judicial action shall be stayed for a reasonable time to obtain such certification or denial of certification. U.C.A. §38-1-11(6)(d). An owner making application for a certificate of compliance is required to mail a copy of the application to all lien claimants by certified mail. DOPL is required to notify all lien claimants of DOPL's decision on the application. U.C.A. §38-1-11(f).

4. Foreclosure, Priority and Distribution of Proceeds from Sale Relation Back and Priority of Lien

A mechanic's lien provides another advantage in that the lien relates back to, and is effective as of, the date of "commencement to do work or furnish materials on the ground" for the improvement. U.C.A. §38-1-5. For purposes of priority, all mechanics liens on a project for work, labor or materials are on an equal footing. U.C.A. §38-1-10.

5. Attorneys Fees and Costs.

U.C.A. §38-1-18 provides that in an action to enforce a mechanics lien "the successful party shall be entitled to recover a reasonable attorneys fee" to be taxed as costs in the matter. If the party against whom the lien is asserted makes an offer of judgment under Rule 68, U.R.Civ.P., which is not accepted, and the judgment is less than the offer, the party asserting the lien must pay the other parties attorneys fees incurred after the offer was made. U.C.A. §38-1-18(3).

II. Residence Lien Restriction and Lien Recovery Act.

In 1994 the Utah Legislature enacted the Utah Residential Lien Restriction and Lien Recovery Act, U.C.A. §38-11-101 et seq., which includes special provisions applicable to mechanics liens on residential projects. The Act restricts the availability of mechanics liens on owner-occupied residences.

A. Restrictions on Residential Liens

Generally, lien claimants are precluded from asserting a lien against residential property if certain requirements are met by the residential project owner. The residential project must be

an “owner- occupied” residence. A residence for purposes of such restrictions is a primary or secondary detached single-family dwelling or a multifamily dwelling up to and including a duplex. U.C.A. §38-11-102(22). An owner-occupied residence is one which will be occupied by the owner, or its tenant, as a primary or secondary dwelling, within 180 days after completion of the improvements. U.C.A. §38-11-102(18). Contractors are required to include in their contracts with owners of owner-occupied residences a notice explaining the steps necessary for the owner to obtain the protections under the Residence Lien Restriction Act. U.C.A. §38-11-108.

A contractor claiming a lien on an owner-occupied residence covered by the Residential Lien Restriction Act is precluded from asserting the lien if (1) the owner had a written contract (2) with a licensed or exempt contractor for construction (or real estate developer or factory built housing retailer for purchase) of the residence, and (3) the owner has paid in full the general contractor (or developer or retailer) in accordance with the written contract and any amendments. U.C.A. §38-11-107, §38-11-204(4). A subsequent purchaser of the residence who occupies the residence as a secondary or primary residence within 180 days of transfer is deemed to have satisfied the requirements if the prior owner had met the requirements. U.C.A. §38-11-107(b).

The Division of Occupational and Professional Licensing may issue a certificate of compliance after an informal administrative proceeding and determination that the owner is in compliance with the Act. U.C.A. §38-11-110.

B. Recovery from the Lien Recovery Fund.

Generally, if the owner complies with these provisions, the lien claimant has no lien against the property and must pursue the general contractor or other contracting party to recover payment. U.C.A. §38-11-107, §38-11-204. Under certain circumstances, the subcontractor or vendor may seek recovery of the amount it is owed by application to the fund created under U.C.A. §38-11-201. The claimant must qualify as a “qualified beneficiary” under U.C.A. §38-11-102(19). Generally, this requires that the claimant performed services on the project and complies with licensing requirements. If the claimant obtains a judgment against the general contractor and is unable to collect, or if the contractor files for bankruptcy, certain procedures exist whereby the claimant may make application for compensation from the lien recovery fund established by the act. The application to the fund must be made within one year of obtaining judgment against the contractor or the date the contractor filed for bankruptcy. U.C.A. §38-11-204(2).

Among other things, the claimant must establish in its application that the owner complied with the requirements for protection from the liens, i.e., the owner occupied residence entered into a written contract with a licensed contractor, that the owner has paid the general contractor in full, and that the general contractor failed to pay the claimant subcontactor. U.C.A. §38-11-204(4).

In order to recover under the fund, the contractor must file an action against the general contractor for payment within the earlier of 180 days of filing a notice of claim under §38-1-7 or

270 days of completion of the original contract pursuant to §38-1-7(1). U.C.A. §38-11-204(4)(d). The claimant must obtain a judgment and an order requiring the general contractor to appear in court and answer under oath concerning its property and if assets are discovered in this process, must obtain a writ of execution on such property. U.C.A. §38-11-204(4)(d)(iii). If the general contractor has filed for bankruptcy, the claimant is not required to obtain a judgment but must timely file a proof of claim in the bankruptcy. U.C.A. §38-11-204(4)(d), (5).

The award may include interest, costs in the amount stated in the judgment, and attorneys fees in the amount stated in the judgment, but not to exceed 15% of the qualified services. U.C.A. §38-11-203(3)(f). Payments from the fund are limited to $75,000 per project. If total claims exceed this amount on a project, the amount will be apportioned on a pro rata basis with each claimant receiving an identical percentage of its claim. U.C.A. §38-11-203(4).

C. Attorneys Fees on Residential Liens

The Residence Lien Restriction Act modifies the provisions for recovery of attorneys fees in actions relating to mechanics' liens. U.C.A. §38-11-107(3) provides that a lien claimant who files a mechanics' lien upon a residence falling within the Residence Lien Restriction Act is not liable for costs or attorneys fees, or for damages arising from a civil action relating to the lien, if the lien claimant releases the lien within 15 days from the date the owner obtains a certificate of compliance under the Residence Lien Restriction Act and sends a copy to the lien claimant by certified mail.

The Residence Lien Restriction and Lien Recovery Act is relatively complex and a contractor claiming a lien or seeking compensation from the fund on a residential construction project should consult legal counsel to assist in working through the relatively complex requirements and alternatives under the Residential Lien Restriction Act.

III. Payment Bond Claims (Private Projects).

In addition to mechanics' lien rights, subcontractors on private construction projects in Utah have an additional avenue to obtain payment against a payment bond obtained by the prime contractor or directly against the owner if the owner fails to obtain the required payment bond even though there is no direct contract with the owner. These provisions impact the prime contractor because the prime contractor is required to obtain the bond. In view of the indemnity normally accompanying a payment bond, the contractor may consider requiring similar payment bonds from its subcontractors to add some protection to the prime contractor.

A. Bond Requirement.

U.C.A. §14-2-1(2) provides that an owner entering into a commercial construction contract exceeding $50,000 in amount shall obtain from the contractor a payment bond "for the protection of all persons supplying labor, services, equipment or material in the prosecution of the work provided for in the commercial contract." The payment bond is required in the amount of the full original commercial contract price. U.C.A. §14-2-1(3).

A subcontractor, supplier or other person providing, labor, services, equipment or material and who has not been paid in full within 90 days after the last labor, service, equipment or materials, has a right of action on the payment bond required by the statute. U.C.A. §14-2-2(4).

Commercial construction is defined as construction of a building, structure or improvement that is not residential. Residential construction is defined as single family detached housing or multifamily attached housing up to and including a fourplex. U.C.A. §14-2-1(d).

B. Notice of Commencement.

The notice of commencement provisions under U.C.A. §38-1-31 apply under the private project payment bond statute.

C. Preliminary Notice.

A payment bond claimant must file with the SCR the preliminary notice required under §38-1-32 of the Mechanics Lien Act. U.C.A. §14-2-5(1). The preliminary notice requirement does not apply where no notice of commencement is filed with the SCR as required under §38-1-31. Id. The preliminary notice requirements under §38-1-32 are discussed in greater detail above in the section on Mechanics Liens. No payment bond claim may be made if the required preliminary notice is not filed. U.C.A. §14-2-5(2). The preliminary notice must be filed before any action on the bond. U.C.A. §14-2-5(3).

D. Failure to Obtain Bond: Direct Action Against Owner

In the event the owner of the project fails to obtain the payment bond, the owner is directly liable to subcontractors for the reasonable value of the labor, services, equipment or materials up to the contract price. The unpaid contractor may sue the owner directly even though it has no direct contract with the owner. U.C.A. §14-2-2.

E. Time for Suit.

Actions on the payment bond must be brought within one year after the last work or materials were furnished by the claimant. Actions must be filed in the county where the commercial construction contract was performed. U.C.A. §14-2-1(5). Similarly, actions against the owner for failure to obtain a bond must be filed within one year of the last work or materials. U.C.A. §14-2-2.

F. Attorneys Fees.

In an action on a private payment bond the court shall award reasonable attorneys fees to the prevailing party. U.C.A. §14-2-1(7). The court may award reasonable attorneys fees to the prevailing party in an action against the owner for failure to obtain a bond. U.C.A. §14-2-2(3).

G. Residential Lien Restriction and Lien Recovery Act.

As discussed above, the payment bond statute does not apply to residential construction. An interesting question is presented by the slightly different definitions of residential construction under the payment bond statute and under the Residential Lien Restriction Act. The payment bond statute does not apply to multifamily dwellings up to and including a fourplex. The Residence Lien Restriction Act only applies up to a duplex. Accordingly, it appears that a three-plex or four-plex is not subject to the Residential Lien Restriction Act but are also not subject to the payment bond statute.

IV. Payment Bond Claims (Public Projects).

As discussed above, public construction projects are not subject to mechanics liens. U.C.A. §38-1-1. Utah state and federal statutes generally require payment bonds on public construction projects.

A. State and Municipal Projects in Utah.

1. Bond Requirement.

Prime contractors awarded public construction contracts in the State of Utah are required to provide a payment bond in an amount equal to the contract price "for the protection of each person supplying labor, service, equipment or material for performance of the work provided for in the contract." U.C.A. §63G-6-505(1). A claimant may assert prosecute a payment bond claim if it has not been paid within 90 days of the last work or materials. §63G-6-505(4).

U.C.A. §14-1-18 provides that the payment bond provisions of §63G-6-505 applies to "political subdivisions" which are defined as "any county, city, town, school district, local district, special service district, community development and renewal agency, public corporation, institution of higher education of the state, public agency of any political subdivision, and to the extent provided by law, any other entity which expends public funds for construction." U.C.A. §14-1-20 provides that the preliminary notice requirements of §38-1-32 apply to payment bond claims on municipal projects.

U.C.A. §14-1-19 provides that if the public entity owning the project fails to require the payment bond from the prime contractor, persons who otherwise could make a claim against the payment bond and who have not been paid within 90 days of the last work on the project may sue the state or municipality directly in the county where the work was performed. The claimant must give written notice to the State or municipality within 90 days from the last work on the project. The notice must state the designation of the construction project, its location, the amount claimed, and the name of the party for whom the labor or services were performed or to whom the material or equipment was supplied. The notice must be served by registered or certified mail. A lawsuit directly against the state on municipality must be filed within one year after the last work, services, materials or equipment on the project. Id.

2. Notice of Commencement.

The notice of commencement provisions under U.C.A. §38-1-31 apply under the public project payment bond statutes. See §14-1-20(1)(b); §63G-6-506.

3. Preliminary Notice.

A payment bond claimant must file with the SCR the preliminary notice required under §38-1-32 of the Mechanics Lien Act. U.C.A. §63G-6-506; §14-1-20. No payment bond claim may be made if the required preliminary notice is not filed. U.C.A. §63G-6-506; §14-1-20. The preliminary notice must be filed before any action on the bond. U.C.A. §63G-6-506; §14-1-20. However, the preliminary notice requirement does not apply where no notice of commencement is filed with the SCR as required under §38-1-31. Id. The preliminary notice requirements under §38-1-32 are discussed in greater detail above in the section on Mechanics Liens.

4. Time for suit.

Lawsuits to recover on a payment bond under U.C.A. §63G-6-505 must be filed within one year after the last day in which the claimant performed the labor or service or supplied the equipment or material on which the claim was based. The action must be filed in the county where the construction services or materials were performed or furnished.

6. Attorneys Fees.

In a suit on a payment bond under §63G-6-505, the court shall award reasonable attorneys fees to the prevailing party. §63G-6-505(6).

B. Federal Projects.

The payment bond provisions applicable to federal construction projects are found in the statute commonly known as the "Miller Act." 40 U.S.C. §270a.

1. Bond Requirement.

The Miller Act provides that prime contractors on federal construction projects are required to furnish a payment bond for the protection of persons furnishing labor and material in prosecution of the work. 40 U.S.C. §270a(a). Every person furnishing labor or material on a federal construction project and who has not been paid in full within 90 days after the last labor or material was furnished or supplied by the claimant shall have a right to sue on the payment bond. 40 U.S.C. §270(b).

2. Notice of Claim Requirements.

Payment bond claimants having a direct contract with a subcontractor, but no contractual relationship with the prime contractor furnishing the payment bond, shall have a right of action upon the payment bond upon giving written notice to the contractor within 90 days from the date when the claimant last performed labor or furnished material on the project. The notice must state with substantial accuracy the amount claimed and the name of the party for whom the material was furnished or supplied. The notice must be served by registered mail, postage prepaid and addressed to the contractor at any place the contractor maintains an office or conducts business. The notice may also be served by a United States Marshall of the district where the project is located.

The Federal Tenth Circuit Court of Appeals has held that proper notice is a condition precedent to an action on the payment bond under the Miller Act. United States v. Hesselden Const. Co., 404 F.2d 774 (10th Cir. 1968). The Courts have also acknowledged that the notice requirement under the Miller Act is to be liberally construed so as to effect the purpose of protecting those supplying labor and materials but that liberal construction cannot do away with the notice requirement itself. U.S. v. Tusson Mechanical Contracting, 921 F.2d 911 (9th Cir. 1990). Although liberal construction may be employed to correct certain defects in the notice of claim requirement, notice of the bond claim is nevertheless required.

3. Remote Subcontractors, Suppliers, etc.

The protection of the payment bond provisions under the Miller Act are limited to those who have a contractual agreement with the prime contractor or with a subcontractor of the prime contractor and does not extend to protect those in more remote contractual relationships. F.D. Rich Company v. United States, 417 U.S. 116, 40 L.Ed. 2d 703, 94 S.Ct. 2157 (1974).

4. Time for Suit.

Every lawsuit for recovery on a payment bond on federal projects must be commenced within one year after the day on which the last of the labor was performed or material supplied by the claimant.

5. Attorney Fees.

Attorneys fees generally are not recoverable in a Miller Act action absent a provision in a contract or a payment bond providing for attorneys fees. F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 40 L.Ed 2d 703, 94 S.Ct. 2157 (1974); United States v. Western States Mechanical Contractors, 834 F.2d 1533, 1542-43 (10th Cir. 1987).

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