



STATE OF ALABAMA CONSTRUCTION COMPENDIUM OF LAW

**Prepared by
Kathy R. Davis, Esq.
Carr Allison
100 Vestavia Parkway
Birmingham, AL 35216
(205) 949-2953
krdavis@carrallison.com
www.carrallison.com**

2016 Version

This outline includes a general overview of Alabama's construction law. The discussion on any particular topic is not necessarily an indication of the total law related to an area of construction law.

Alabama is a contributory negligence state and not a comparative negligence state. Contributory negligence in Alabama is negligence on the part of the plaintiff that proximately contributed to his injuries. Alabama is also a joint and several liability state which means a jury must return a single verdict that is based, in part, on the total culpability of all defendants. Alabama does not recognize individual degrees of culpability among multiple defendants, and the jury has no discretion to assess damages against each individual defendant, because without recognition of each defendant's degree of culpability the jury would have no basis on which to apportion damages among the defendants. See Campbell v. Williams, 638 So. 2d 804 (Ala. 1994).

Due to the harshness of the contributory negligence rule, Alabama juries sometimes disregard the court's instructions and engage in "jury nullification" on the issue of contributory negligence. See Royal and Richey v. Safety Coatings, Inc., 655 So. 2d 927 (Ala. 1994). As in all courts, an Alabama jury verdict carries a presumption of correctness, and this presumption is strengthened when the trial court denies a motion for a new trial, especially when the trial court did not give incorrect, misleading, or erroneous jury instructions, and the trial court did not err in failing to give the requested jury instructions.

I. Breach of Contract

Typically, a breach of contract claim can be asserted by the purchaser against the general contractor, as well as by the general contractor against its subcontractors. A breach of contract claim in Alabama is subject to a six year statute of limitations. See ALA.CODE 6-2-34 (1975). The statute of limitations does not begin to run when the contract is entered into, but rather when the cause of action accrues. See City of Birmingham v. Cochrane Roofing & Metal Co., Inc., 547 So. 2d 1159 (Ala. 1989); See also Stephens v. Creel, 429 So. 2d 278 (Ala. 1983). In a claim based on breach of warranty to construct a building in a workmanlike manner, the cause of action accrues, and the statute of limitations begins to run, on the date that the defendant completes performance. . . . Id. at 1163. The court in Cochrane opined that the breach of contract occurs when the builder fails to construct the house in an appropriate workmanlike manner. Id. Alabama law is clear that a breach-of-warranty cause of action against a contractor or architect accrues upon the completion of the building in regard to which the contractor or architect's work was done. Mitchell v. Richmond, 754 So. 2d 627, 629 (Ala. 1999).

Under the new statute of repose, all civil actions in tort, contract, or otherwise for defects in design or construction must be commenced within two years after the cause of action

accrues, and any action that accrues more than 13 years after substantial completion of construction is barred unless the injured party can show fraudulent concealment. ALA.CODE 6-5-221 (1975). This is basically a restatement of the two year statute of limitations for a negligence action and the six year statute of limitations on a breach of contract claim. See ALA.CODE 6-2-34 (1975). Though it has been held that the new statute of repose does not affect a surety's ability to assert the statute of limitations available to its principle, this new statute has not been fully interpreted by the courts. See Housing Auth. v. Hartford Accident & Indem. Co., 954 So. 2d 577, 582-83 (Ala. 2006).

II. Negligence

Generally, an injury incurred due to negligent construction may give rise to an action for breach of a contractor's common law duty of care, or negligence. An action for negligence in construction could be based upon the contractor's poor workmanship, supervision, or design.

The negligence claim against the general contractor may be limited by the economic loss rule. This rule, in Alabama, bars a plaintiff from recovering under tort law when the product caused property damage only to itself. Carrell v. Masonite Corp., 775 So. 2d 121 (Ala. 2000); see also Lloyd Wood Coal Co. v. Clark Equip. Co., 543 So. 2d 671 (Ala. 1989). Therefore, the recovery of purely economic losses resulting from damages to the building itself falls within the area of contract law, not tort law. Id. Where there is damage to personal property, however, other than to the structure itself and/or personal injury, a cause of action for negligence exists, and it is subject to Alabama's two-year statute of limitations. See ALA.CODE 6-2-38(1) (1975).

III. Breach of Warranty

In construction cases, plaintiffs typically assert causes of action for breach of warranty. The breach of warranty can be based on express warranty provisions contained in the contract between the plaintiff and the general contractor and/or warranties implied by law.

A cause of action based upon a breach of an implied warranty accrues under either ALA. CODE 7-2-725 (1975), concerning "goods" under the Uniform Commercial Code, or under "contract law which would require that the construction be performed in a workmanlike manner." B&B Prop. v. Dryvit Systems, Inc., 708 So. 2d 189, 192 (Ala. Civ. App. 1997). A breach of warranty claim arising under the Code has a four year statute of limitations, while a claim brought under contract law has a six year statute of limitations. Id. at 192; see ALA. CODE 7-2-725 (1975).

"Alabama cases hold that a breach-of-warranty cause of action against a contractor or architect accrues upon the completion of the building in regard to which the contractor or architect's work was done." Mitchell v. Richmond, 754 So. 2d 627, 629 (Ala. 1999); City of Birmingham v. Cochrane Roofing & Metal Co., 547 So. 2d 1159 (Ala. 1989); Stephens v. Creel, 429 So. 2d 278 (Ala. 1983).

There is a strong argument that a breach of warranty claim, brought under the Uniform Commercial Code, set out in ALA CODE 7-2-725 (1975), should not be allowed in construction cases if the building component used in the construction of the building does not meet the definition of a “good.” Under ALA.CODE 7-2-314 (1975), a warranty of merchantability is implied in a contract for the sale of goods. Further, ALA.CODE 7-2-105(1) defines “goods” as “all things...which are moveable at the time of identification to the contract for sale,” including “things attached to realty.” See Keck v. Dryvit Systems, Inc., 830 So. 2d 1, 8 (Ala. 2002). This recent Alabama case defined whether an attachment to a building is still considered a good under the Code. “The test for determining whether an attachment to realty is a good under the UCC is whether the ‘thing’ attached to the realty is capable of severance without material harm to the realty.” Id. at 8.

In Keck, the Supreme Court of Alabama confirmed the plaintiffs did not have a valid claim for breach of the implied warranty of merchantability because EIFS (Exterior Insulation Finishing System) is not a “good” under the Uniform Commercial Code. Id. at 8. The court opined that “because removal of the EIFS would unquestionably result in material harm to the homeowners’ home, the EIFS cannot be considered a ‘good’ within the meaning of the UCC.” Id. at 8-9.

The court in Keck also set out certain items which the court considered a good and certain items which it would not consider a good relating to a residential dwelling. This discussion is further set out in the Strict Liability Section below. In Keck, homeowners, who were subsequent purchasers of a home alleging damage by the application of an EIFS, sued the parties involved in the manufacturing, distribution, and installation of the EIFS alleging their house sustained damage because the EIFS failed to prevent water intrusion. Keck, 830 So. 2d 1.

IV. Misrepresentation and Fraud

Under certain circumstances, general contractors can be sued by homeowners under the theory of fraud, suppression, or misrepresentation. In Alabama, fraud claims are subject to a two year statute of limitations. See ALA.CODE 6-2-38 (1975). For a valid fraud or misrepresentation claim, the plaintiff must show that any alleged misrepresentation caused the property damage. Whether punitive damages are available against the homebuilder depends on whether the misrepresentations were negligent or fraudulent. Failure to exercise reasonable care is the level of fault that gives rise to a claim of negligent misrepresentation. See Berkel and Co. Cont., Inc. v. Providence Hosp., 454 So. 2d 496, 503 (Ala. 1984). On the other hand, Alabama courts have held that a finding of fraudulent misrepresentation can give rise to a claim for punitive damages. Village Toyota Co., Inc. v. Stewart, 433 So. 2d 1150 (Ala. 1983).

Fraudulent misrepresentation requires proof: (1) that the defendants made a false representation; (2) of a material existing fact; (3) on which the plaintiffs reasonably relied; and (4) which proximately caused the injury or damage to the plaintiffs. Boackle v. Bedwell Constr. Co., Inc., 770

So. 2d 1076, 1080 (Ala. 2000) (quoting Bethel v. Thorn, 757 So. 2d 1154, 1161 (Ala. 1999)). Under Rule 9(b) of the Ala. R. Civ. P., plaintiffs are not required to state each and every element with particularity, but they must use more than generalized or conclusory statements to set out the fraud complained of. Id. at 1158; see Phillips College of Ala. v. Lester, 622 So. 2d 308, 311 (Ala. 1993). The pleading must show the time, place and the contents or substance of the false representations, the fact misrepresented, and an identification of what has been obtained. Id.

V. Strict Liability Claims

Although often pled by plaintiffs, strict liability claims in construction cases have not been widely accepted in Alabama. Alabama judicially created the Alabama Extended Manufacturer's Liability Doctrine (AEMLD) to apply the doctrine of strict liability for damage or injuries caused by allegedly defective products. Keck v. Dryvit Systems, Inc., 830 So. 2d 1, 5 (2002); see Casrell v. Altec Indus., 335 So. 2d 128 (Ala. 1976). In determining whether an item that is incorporated into real property may be considered a "product" for the purposes of the AEMLD, a court considers "whether the item is a part of the structural integrity of the house or building that is reasonably expected to last for the useful life of the house or building. If it is, then the item cannot be considered a 'product' for the purposes of the AEMLD." Id. at 6. Staircases, fireplaces, and exterior brick walls, according to the court in Keck, are examples of components that a homeowner should reasonably expect to have the same useful life as the house itself. Id. Conversely, an item may be considered a 'product' under the AEMLD "if the item is attached or incorporated into the real property, and yet its very function and nature clearly makes it an item that one would reasonably expect to repair or to replace during the useful life of the realty. ..." Id. Paint and wallpaper, for instance, would satisfy the definition of a 'product' for purposes of the AEMLD.

In Keck, homeowners, who were subsequent purchasers of a home alleging damage by the application of EIFS, sued the parties involved in the manufacturing, distribution, and installation of EIFS alleging their house sustained damage because the EIFS failed to prevent water intrusion. Keck, 830 So. 2d 1. The Alabama Supreme Court declined to impose strict liability on the defendants, holding that the AEMLD did not apply because the EIFS did not satisfy the definition of a "product." Id. at 12-13.

VI. Indemnity Claims

A. Express Indemnity

Express indemnity agreements are contract provisions in which one party to the contract agrees to pay costs incurred by the other party to the contract as a result of the other party being held liable to a third party or having to defend against a claim filed by a third party. Generally, indemnity provisions in construction contracts are valid in Alabama. Cochrane Roofing & Metal Co., Inc. v. Callahan, 472 So.2d 1005, 1008 (Ala. 1985) (citing Industrial Tile, Inc. v. Stewart, 388 So. 2d 171

(Ala. 1980)). The enforceability of an indemnity agreement does not depend on whether the indemnitee is liable vicariously or is liable only for his own negligence. Nationwide Mutual Ins. Co. v. Hall, 643 So. 2d 551, 555 (Ala. 1994). Rather, courts look to the following three factors: (1) contractual language, (2) identity of the draftsman of the language, and (3) the indemnitee's retention of control. Royal Ins. Co. of America v. Whitaker Cont. Corp., 824 So.2d 747, 751 (Ala. 2002) (citing Brown Mech. Cont., Inc. v. Centennial Ins. Co., 431 So. 2d 932, 946 (Ala. 1983)).

While particular language in an indemnity agreement is not required, the requisite intent of the parties must be clear. Id. Ambiguous language in the indemnity agreement is construed against the drafter. Id. As to "the indemnitee's retention of control," the more control the indemnitee retains over the activity or property giving rise to the liability, the less reasonable it is for the indemnitor to bear the responsibility for injuries that occur in that area. City of Montgomery v. JYD Int'l., Inc., 534 So. 2d 592, 595 (Ala. 1988).

In Alabama, agreements that purport to indemnify another for one's intentional conduct are void as a matter of public policy. Pruet v. Dugger-Holmes & Asso., 162 So. 2d 613 (Ala. 1964). Indemnity agreements purporting to indemnify any party for loss or damage resulting from the indemnitee's own negligence are enforceable only if the indemnity provisions are unambiguous and unequivocal. City of Montgomery, 534 So.2d at 594 (citing Industrial Tile, 388 So. 2d 171 (Ala. 1980)).

When viewing indemnity cases, Alabama courts have stressed the importance of notice. In Metmor Fin. v. Commonwealth Land Title Ins. Co., the Supreme Court of Alabama held that because a financial company failed to give its insurance company timely notice of a previous action for fraud relating to construction defects, the financial company was not entitled to indemnity. Metmore Fin. v. Commonwealth Land Title Ins. Co., 655 So. 2d 940 (Ala. 1994). The Court noted that "notice is essential so that the indemnitor can properly investigate the claim and prepare a defense against it, and the failure to give notice will absolve the indemnitor from the duty to save . . . the other party." Id. at 942.

Recently, in Holcim, Inc. v. Ohio Cas. Ins. Co., The Supreme Court of Alabama addressed the issue of whether, under Alabama law, an indemnitee could enforce an indemnification provision and recover damages from an indemnitor resulting from the combined or concurrent fault or negligence of the indemnitee and indemnitor. Holcim, Inc. v. Ohio Cas. Ins. Co., 38 So. 3d 722 (Ala. 2009). In the case, Holcim, Inc., argued that the indemnity language provided indemnification for the combined negligence of the parties. The Court ruled that if two parties knowingly, clearly, and unequivocally entered into an agreement whereby they agree that the respective liability of the parties will be determined by some type of agreed-upon formula, then Alabama law will permit the enforcement of that agreement as written and thus, a combined or concurrent fault can be enforced. Id. at 729.

B. Implied Indemnity

The basis for indemnity is restitution under the concept that one person is unjustly enriched at the expense of another when the other discharges liability that should be his responsibility. Amerada Hess Corp. v. Owens-Corning Fiberglass Corp., 627 So. 2d 367 (Ala. 1993). In Alabama, “indemnity will not be allowed among joint tortfeasors.” Walter L. Couse & Co. v. Hardy Corp., 49 Ala. App. 552, 557, 274 So. 2d 316, 320 (Ala. Civ. App. 1972); see Mallory S.S. Co. v. Druhan, 17 Ala. App. 365, 84 So. 874 (1920). Additionally, there is no contribution between joint tortfeasors in Alabama. Consolidated Pipe & Supply Co., Inc. v. Stockham Valves & Fittings, Inc., 365 So. 2d 968, 970 (Ala. 1978).

However, an exception to this rule “is that a joint wrongdoer may claim indemnity where he has not been guilty of any fault, except technically or constructively, or where both parties are at fault, but the fault of the party from whom indemnity is claimed was the efficient cause of the injury.” Couse, 274 So. 2d at 320. The Alabama Supreme Court has “recognized the principle that a master may be indemnified against his servant when the master is liable solely by reason of the negligence of his servant.” Id. at 320; see American Southern Ins. Co. v. Dime Taxi Service, 275 Ala. 51, 151 So. 2d 783 (1963). “Put another way, the one seeking indemnity has been allowed to do so since its liability to a third person was only vicarious or derivative.” Couse, 274 So. 2d at 320. Alternatively, where one tortfeasor is guilty of only passive or constructive negligence and the other of active negligence, and no causal relation can be established, there can be a claim or cross-claim for indemnity. See City of Mobile v. George, 253 Ala. 591, 45 So. 2d 778 (1950); Walter L. Couse & Co. v. Hardy Corp., 49 Ala. App. 552, 274 So. 2d 316 (1972).

C. Comparative Indemnity

Although some jurisdictions have developed comparative indemnity schemes based upon comparative negligence concepts, Alabama is a contributory negligence state. Alabama does not apportion damages in a construction litigation case.

D. Third Party Beneficiary

The controlling principles concerning the proof of third-party beneficiary claims are well established in Alabama. “O]ne who seeks recovery as a third-party beneficiary of a contract must establish that the contract was intended for his direct, as opposed to his incidental, benefit.” H.R.H. Metals, Inc. v. Miller, 833 So. 2d 18, 24 (Ala. 2002) (citing Mills v. Welk, 470 So. 2d 1226, 1228 (Ala. 1985)). Further, in order to recover under a third-party beneficiary theory, the plaintiff

“must show: (1) that the contracting parties intended, at the time the contract was created, to bestow a direct benefit upon a third party; (2) that the plaintiff was the intended beneficiary of the contract; and (3) that the contract was breached.” Sheetz, Aiken & Aiken, Inc. v. Spann, Hall, Ritchie, Inc., 512 So. 2d 99, 101-02 (Ala. 1987).

On several occasions, the Alabama Supreme Court has concluded that an employee of a subcontractor was a third-party beneficiary of the contract between the contractor and subcontractor. For instance, a scrap-metal dealer agreed to follow and maintain a safety program for subcontractors “sufficient to prevent injury or illness to such persons resulting from their presence” in the buildings. Miller, 833 So. 2d at 24-25. The appellate court affirmed the trial court’s conclusion that this safety provision in the contract unambiguously reflected a clear intention to bestow a direct benefit upon the employee of the subcontractor who actually removed one of the buildings. Id. Thus, the employee was held to be a third-party beneficiary of the contract. Id. at 24.

Likewise, in both Blount Brothers Const. Co. v. Rose, 149 So. 2d 821 (Ala. 1962), and Tennessee Coal, Iron & R. Co. v. Sizemore, 62 So. 2d 459 (Ala. 1952), the provisions in the contract between the contractor and the subcontractor provided for the safety of the subcontractor’s employees. Miller, 833 So. 2d at 25. In Blount Brothers, the Court held that the provisions of a prime contractor’s contract with the government to furnish safety devices for the project enured to, and were made for, the benefit of employees of subcontractors on the project. Blount Brothers, 149 So. 2d 821. Such contract, the Court concluded, “imposed the duty on [the contractor] to provide a reasonably safe place for [the employee of the subcontractor] and his fellow workers to work on this project.” Id. at 830 (citing Tennessee Coal, Iron and R. Co. v. Sizemore, 62 So. 2d 459 (Ala. 1952)). Further, in Tennessee Coal, the court recognized that an injured employee “who is a party to the contract or one for whose direct benefit was made, may sue for its breach in assumpsit, or may sue in tort for negligence in failing to perform a duty imposed by law.” 62 So. 2d at 464. Accordingly, the injured employee “has an election in that respect.” Id.

VII. Statute of Repose/Statute of Limitations

In 1994, Alabama enacted statutes to limit the period in which actions can be brought against architects, engineers, and builders. ALA.CODE 6-5-220, 6-5-228 (1994). If the damage or injury is latent, the action against the architect, the engineer, or the builder accrues at the time that the damage or injury is or in the exercise of reasonable diligence should have been first discovered. See ALA.CODE 6-5-220 (1975).

In 2011, Alabama amended its statute of repose and cut the time from 13 years to seven. Under the new statute of repose, all civil actions in tort, contract, or otherwise for defects in design or construction must be commenced within two years after the cause of action accrues, and any action that accrues more than seven years after substantial completion of construction is barred

unless the injured party can show fraudulent concealment. ALA.CODE 6-5-221 (1975). This is basically a restatement of the two year statute of limitations for a negligence action. Additionally, a breach of contract claim in Alabama is subject to a six year statute of limitations. See ALA.CODE 6-2-34 (1975).

VIII. Economic Loss Doctrine

The economic loss rule in Alabama bars a plaintiff from recovering under tort law when the product caused property damage only to itself. See Carrell v. Masonite Corp., 775 So. 2d 121 (Ala. 2000); see also Lloyd Wood Coal Co. v. Clark Equip. Co., 543 So. 2d 671 (Ala. 1989). Therefore, the recovery of purely economic losses resulting from damages to the home itself falls within the area of contract law, not tort law. Id.

IX. Recovery for Investigative Costs

At this time, Alabama courts have not addressed the specific issue of recovery for investigative costs. These type of damages may be recoverable in a negligence or contract case.

X. Emotional Distress Claims

In Alabama, a homeowner or home buyer can recover compensatory damages for emotional distress because of construction defects to their home. See Keck v. Dryvit Systems, Inc., 830 So. 2d 1, 15 (Ala. 2002) (Mental anguish resulting from damage to a home is a legally recognizable and compensable form of personal injury.); Horton Homes Inc. v. Brooks, 832 So. 2d 44, 50 (Ala. 2001); Southern Energy Homes, Inc. v. Washington, 774 So. 2d 505 (Ala. 2000). Alabama courts have indicated that there are “three elements that are essential to the right to recover mental-anguish damages for the breach of a home-construction contract, namely: (1) that the breach be egregious, i.e., that it result in *severe* construction defects; (2) that those defects render the home virtually uninhabitable; and (3) that the breach *necessarily or reasonably* result in mental anguish or suffering.” Baldwin v. Panetta, 4 So. 3d 555, 567-68 (Ala. Civ. App. 2008) (emphasis in original). To recover, the emotional distress generally must have been prompted by concerns “about the structural integrity of the house, the safety and security of the dwelling, where they would reside while repairs were made, or the possibility of financial ruin.” Id. at 568. Concerns about aesthetic defects or mistakes cannot, without more, support an emotional distress claim. Id.

Although noting that damages for mental anguish are not generally recoverable for breach of contract, the Alabama Supreme Court recognized an exception to this general rule in B&M Homes, Inc. v. Hogan, 376 So. 2d 667, 671 (Ala. 1979). The court concluded that it was “reasonably foreseeable” by B&M that faulty construction of the Hogans’ home would cause them “severe mental anguish.” Id. at 672. Opining that the largest single investment the average American

family will make is the purchase of a home, the court limited the availability of emotional distress damages for breach of contract to cases involving personal residences. Id. at 672.

XI. Stigma Damages

Stigma damages is another name for diminution in value because of a perceived problem with the property. Alabama case law does not provide specifically for the claim of stigma damages. There is case law on diminution claims involving negligence claims. Additionally, a stigma claim or diminution in value claim may be a part of contractual damages allowed in a case.

Diminution in value has been held to be the proper measure of damages for a building contractor's breach of contract resulting in a number of construction defects including unlevel floors, a poorly constructed roof, and many other defective or unsightly aspects of the construction. Lowe v. Morrison, 412 So. 2d 1212 (Ala. 1982). The Alabama Supreme Court noted that the proper damages were the "diminution in value of the house as constructed from the value it would have had if it had been constructed in a workmanlike manner." Id. at 1213-14. See also Alabama Pool & Const. Co. v. Richard, 418 So. 2d 149 (Ala. Civ. App. 1982) (applying diminished value measure to a case involving construction of a swimming pool). The Lowe jury allowed the contractor to recover the balance due on the contract for construction of the house, and awarded the plaintiff homeowners damages, amounting to a percentage of the total contract price, for the contractor's breach of contract and breach of implied warranty of workmanlike performance. Id. at 1213. The Lowe court further noted "[t]here is ample authority for allowing a contractor to recover the balance due on his contract, while at the same time allowing the owner to recover substantial damages for unworkmanlike or incomplete performance." Id. at 1213-14 (citing Fox v. Webb, 105 So. 2d 75 (Ala. 1958)).

"The question of whether or not diminution in value is in itself 'property damage' has not been decided by the Alabama Supreme Court." Bibb Allen, *Alabama Liability Insurance Handbook* § 8-11(f). The Eleventh Circuit court, deciding Alabama law, has held that diminution in value could be damage to tangible property. Perkins v. Hartford Ins. Co., 932 F.2d 1392 (11th Cir. 1991). The Alabama Supreme Court limited this holding four years later though in American States Ins. Co. v. Martin, 662 So. 2d 245 (1995), when it said that "[t]o the extent that Perkins suggests that strictly economic losses could be losses to tangible property, we decline to follow it." Id. at 249.

XII. Economic Waste

Generally, the measure of damages for a breach of contract by a general contractor is the cost to remedy the defect. LORD, 24 WILLISTON ON CONTRACTS 66:17 (4th Ed. 2003). However, where an award based on this measure of damages would result in "economic waste", the proper measure of damages would be the difference in the fair market value between the building as it should have been constructed and the fair market value of the property as it was actually constructed. See

Kohn v. Johnson, 565 So. 2d 165 (Ala. 1990); Lowe v. Morrison, 412 So. 2d 1212, 1213-14 (Ala. 1982). Under a construction contract, economic waste generally exists when the cost of replacement or repair is grossly out of proportion to the good to be attained.

XIII. Delay Damages

Delay damages are generally recoverable in Alabama. The proper measure of damages for failure to erect a building on time is the rental value of the building, as completed according to the contract, for the time elapsing between the time fixed for its completion and the time when it was delivered and turned over to the owner. Huntsville Elks Club v. Garrity-Hahn Bldg. Co., 57 So. 750 (Ala. 1911).

XIV. Recoverable Damages

A. Direct Damages

In Alabama, damages for injuries to real property are generally measured by the difference between the market value before and after the injury, together with any special damages proximately and naturally resulting from the wrong. See Alabama Great Southern R.R. v. Russell, 48 So. 2d 249 (Ala. 1950). However, if property can be restored or repaired, and the cost of the restoration/repairs is reasonable, the proper measure of damage is the repair, not to exceed the loss in market value. See Kohn v. Johnson, 565 So. 2d 165, 168-69 (Ala. 1990).

B. Stigma

There are currently no Alabama cases directly on point as to whether stigma damages are recoverable in construction cases. However, Alabama courts generally allow damages for diminution in value (See above Section on diminution in value damages).

C. Loss of Use

There are currently no Alabama cases directly on point as to whether loss of use damages are recoverable in construction cases. However, under the Uniform Commercial Code, as set out in ALA. CODE 7-2-715 (1975), a party can recover damages that are both incidental and consequential to a breach of contract.

D. Punitive Damages

In Alabama, an award of punitive damages must be supported by evidence of “oppression, fraud, wantonness, or malice.” ALA. CODE '6-11-20(a) (1975). Traditionally, punitive damages have been allowed in some tort actions, but have not been recoverable for breach of contract. Geohagan v.

General Motors Corp., 279 So. 2d 436 (Ala. 1973). Further, punitive damages may be recoverable in an action for fraud, which may arise in a construction contract setting. Shiloh Const. Co., Inc. v. Mercury Const. Corp., 392 So. 2d 809 (Ala. 1981). Punitive damages are subject to review under the Alabama case of BMW v. Gore, 701 So. 2d 507 (Ala. 1997), and its progenies. In BMW, the Alabama Supreme Court enumerated specific guideposts by which it would review a punitive damages award: (1) the degree of reprehensibility of the defendant's conduct, (2) the ratio of actual or likely harm to the punitive damages, (3) the comparison of sanctions that could be imposed for comparable misconduct, (4) whether the punitive damages award removes the defendant's profit, (5) the financial position of the defendant, (6) the costs of litigation, (7) whether criminal sanctions have been imposed for the conduct, and (8) whether other civil actions have been filed. Id. at 512-515. In Green Oil Co. v. Hornsby, the Court again listed the following factors that should be taken into consideration by the trial court in determining whether the jury award of punitive damages is excessive or inadequate: (1) punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater. (2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or 'cover-up' of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility. (3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss. (4) The financial position of the defendant would be relevant. (5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial. (6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award. (7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award. Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-224 (Ala. 1989).

E. Emotional Distress

In Alabama, "mental-anguish damages may be awarded in certain cases for breach of contract, provided that the subject matter of the contract is so closely associated with matters of mental concern, or with the emotions of the party to whom the duty is owed, that a breach of that duty can reasonably be expected to result in mental anguish or suffering." Sanderson Group v. Smith, 809 So. 2d 823, 828-29 (Ala. Civ. App. 2001); B & M Homes, Inc. v. Hogan, 376 So. 2d 667, 671 (Ala. 1979) (holding that mental-anguish damages were properly awarded in a breach-of-contract case involving construction of a new home) (internal quotation marks and citations omitted); and see Lawler Mobile Homes, Inc. v. Tarver, 492 So. 2d 297, 306 (Ala. 1986) (holding that mental-anguish damages were properly awarded in breach-of-contract case involving the purchase of a mobile home).

F. Attorney's Fees

In Alabama, the general rule is that attorney's fees and expenses of litigation are not recoverable as damages, in the absence of a contractual or statutory duty, other than by a few recognized equity principles. See Austin Apparel, Inc. v. Bank of Prattville n/k/a Whitney Bank, 872 So. 2d 158, 165-66 (Ala. Civ. App. 2003). The reason for the rule disallowing attorney fees as an element of damages is that such fees are considered a remote loss. Highland Underwriters Ins. Co. v. Elegante Inns, Inc., 361 So. 2d 1060, 1066 (Ala. 1978).

G. Expert Fees and Costs

In Alabama, expert fees are not awarded as a matter of costs unless provided for by statutory authority. Davis v. Davis, 686 So. 2d 1245 (Ala. Civ. App. 1996); Cooper v. Cooper, 57 Ala. App. 674, 331 So. 2d 689, 694-95, cert. denied, 331 So. 2d 695 (Ala. 1976); Hartley v. Alabama Nat'l Bank of Mont., 247 Ala. 651, 25 So. 2d 680 (1946).

XV. Insurance Coverage for Construction Claims

In Alabama, it is well established that the duty to defend an insured is more extensive than the duty to indemnify the insured. Lawler Machine & Foundry Co. v. Pacific Indemnity Ins. Co., 383 So. 2d 156, 157 (Ala. 1980). Insurers have a duty to defend when a complaint is made against the insured that alleges a set of facts that are within the policy coverage. United States Fid. & Guar. Co. v. Armstrong, 479 So. 2d 1164, 1168 (Ala. 1985). If the complaint's allegations do not implicate coverage then other facts outside of the complaint may be taken into consideration in determining whether the complaint alleges a covered injury. Pacific Indemnity Co. v. Run-A-Ford Co., Inc., 161 So. 2d 789, 795 (Ala. 1964). If a complaint is amended, it is the insurer's duty to re-evaluate the claim and determine whether the amended claims are covered claims under the policy. See Ajarodini v. State Auto Ins. Co., 628 So. 2d 312 (Ala. 1993) (the amended complaint was never turned over to the insurer, but there were covered counts). An inventive plaintiff's counsel can usually state claims which fall within covered claims under the policy.

The duty to defend and the duty to indemnify are separate. The Alabama Supreme Court has established the following guidelines governing an insurer's duty to defend:

- (1) Whether an insurance company owes a duty to provide an insured with a defense to proceedings instituted against him, must be determined primarily from the allegations of the Complaint. . .

- (2) If the injured party's Complaint alleges an accident or occurrence which comes within the coverage of the policy, the insurer is obligated to defend, regardless of the ultimate liability to the insured. . .
- (3) If the Complaint suggests that the injury alleged may not be within the coverage of the policy, then other facts outside the Complaint may be taken into consideration.

United States Fid. & Guar. Co. v. Armstrong, 479 So. 2d 1164, 1167 (Ala. 1985) (citations omitted).

A. Occurrences That Trigger Coverage

In Alabama, the most important consideration in analyzing coverage is the time of the occurrence which gives rise to liability. The Court has opined the time of the occurrence of an accident for purposes of determining coverage under an occurrence policy is "not the time the wrongful act was committed, but the time the complaining party was actually damaged." United States Fid. & Guar. Co. v. Warwick Dev. Co., 446 So. 2d 1021, 1024 (Ala. 1984).

In a recent case involving pest infestation, the Alabama Supreme Court held that "coverage under a policy of insurance is afforded only when 'loss of property is suffered during the policy period irrespective of when the negligent act was performed.'" Mutual Fire, Marine & Inland Ins. Co. v. Safeco Ins. Co., 473 So. 2d 1012, 1013-14 (Ala. 1985). When no termites were found during the policy period and "all of the pertinent events took place after the expiration of the [] policy" the court found that the "damage did not occur until after the [] policy was terminated" and the insurance company was relieved of any liability under the policy. Id.

The court pointed out in the Mutual Fire case no termites were found during the three inspections during the covered period just as there was no damage found during any inspection or during the occupancy of the apartments until approximately four years after the work was performed by Component. Id. "The clear meaning of the policy language is that coverage is afforded only when bodily injury, or damage to or loss of property is suffered during the policy period irrespective of when the negligent act was performed, which later resulted in such bodily injury or damage to or loss of property." Utica Mutual Ins. Co. v. Tuscaloosa Motor Co., Inc., 295 Ala. 309, 313, 329 So. 2d 82, 85 (Ala. 1976) (emphasis in original).

In Alabama, an argument can be made for a continuous trigger in construction cases. Although there have been no construction cases involving continuous trigger, this argument is often raised and has not yet been addressed by the Alabama Supreme Court. In other opinions, examples of continuous torts have included "(1) when an employer exposes its employee on a continuing basis to harmful substances and conditions . . . (2) when there is a 'single sustained method pursued in executing one general scheme,' as in a blasting case . . . and (3) when a plaintiff landowner seeks damages for the contamination of a well or stream." Moon v. Harco Drugs, Inc., 435 So. 2d 218, 220-221 (Ala. 1983) (cites omitted). In a recent case, which did not involve construction issues, the

Alabama Supreme Court affirmed its previous rulings related to an occurrence date, and held that the occurrence was not continuous and determined the occurrence date was when the damage occurred. See Liberty Mutual Ins. Co. v. Wheelwright Trucking Co., Inc., 851 So. 2d 466 (Ala. 2002) (occurrence was the failure of the trailers and not the cracking that occurred in the trailers over a long period of time.)

In a construction case, courts looking at occurrence issues often ask whether the loss in question is unanticipated, or is merely a natural and probable consequence of the contractor's business. See, e.g., Id.; United States Fid. & Guar. Co. v. Bonitz, 424 So. 2d 569, 572 (Ala. 1982). In Bonitz, the court required one of the insurers to defend and in so holding noted the absence of any evidence indicating the contractor expected or intended the roof to begin leaking. Alabama courts generally give a liberally inclusive definition to the term "accident." See, e.g., Id.; United States Fid. & Guar. Co. v. Armstrong, 479 So. 2d 1164 (Ala. 1985). Basically, Alabama courts have interpreted the meaning of accident to include human fault or negligence. See Bonitz, 424 So. 2d at 571 (Ala. 1982).

Further, "[a] majority of courts have held that in order to have liability under the terms of such a policy the 'occurrence' must arise during the policy period, for it is the insurance that is in force at the time of the property damage that is applicable rather than insurance that was in force when the work was performed." State Farm Fire & Cas. Co. v. Gwin, 658 So. 2d 426, 428 (Ala. 1995). citing Deodato v. Hartford Ins. Co., 143 N.J. Super. 396, 363 A.2d 361 (1976); Singaas v. Diederich, 307 Minn. 153, 238 N.W.2d 878 (1976); Oceanonics, Inc. v. Petroleum Distributing Co., 280 So. 2d 874 (La.Ct.App. 1973).

If there is an occurrence, there must be either property damage or personal injury caused by the occurrence before coverage is triggered. The typical CGL policy states as follows:

This insurance applies to bodily injury and property damage only if:

- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
- (2) The "bodily injury" or "property damage" occurs during the policy period.

B. Bodily Injury

Typical CGL policies define "bodily injury" as physical injury, "sickness, or disease sustained by a person, including death resulting from any of these at any time." Allegations in a complaint of physical injury generally will constitute a covered injury. Additionally, the Alabama Supreme Court has held that "bodily injury" includes mental anguish. See American States Ins. Co. v. Cooper, 518 So. 2d 708 (Ala. 1987). Therefore, if a complaint alleges emotional distress, mental anguish or any

other wording which could be considered a bodily injury, it may be a covered claim. However, some CGL policies specifically exclude coverage for mental anguish and emotional distress.

C. Property Damage

Typically, property damage is defined in CGL policies as “physical injury to tangible property, including all resulting loss of use of that property” or “loss of use of tangible property that is not physically injured.” According to the Alabama Supreme Court, “tangible property” is that which may be felt or touched; such property as may be seen, weighed, measured, and estimated by the physical senses.” See American States Ins. Co. v. Martin, 662 So. 2d 245, 248 (Ala. 1995) citing Prince v. Higgins, 572 So. 2d 1217 (Ala. 1990). Further, the Court stated, “tangible property (such as real estate) is property that is capable of being handled, touched, or physically possessed. Purely economic losses are not included in this definition.” Id. at 248. Specifically, “strictly economic losses like lost profit, loss of an anticipated benefit of a bargain, and loss of an investment do not constitute damage or injury to ‘tangible property’”. Id. at 249. Of course, a complaint can make a claim for loss of money *and* lost property. If one claim in the lawsuit is covered, the insurer has the duty to defend.

D. Defective Workmanship

In Alabama, generally a construction contractor who follows plans and specifications will not be liable for defects resulting from the specifications unless he has expressly warranted their sufficiency. See Commercial Cont., Inc. v. Sumar Cont., Inc., 302 So. 2d 88 (Ala. 1974). For instance, in Alabama Society for Crippled Children & Adults v. Still Const., 309 So. 2d 102 (Ala. Civ. App. 1975), a contractor who had followed his reasonable interpretation of the contract documents was not responsible for inoperable windows.

The holding in one case, however, goes against this general rule. In United States Fid. & Guar. Co. v. Jacksonville State Univ., 357 So. 2d 952 (Ala. 1978), the architects had specified a particular product, Boncoat, which was furnished by the general contractor. The Boncoat was defective, resulting in leakage in aggregate panels. Jacksonville State brought suit against the contractor for the defects, and also claimed against the architect for breach of an implied warranty that the plans and specifications were sufficient to prevent water leakage. The Supreme Court of Alabama ruled in favor of Jacksonville on the ground that the contract provided the general contractor should be “fully responsible to the Owner for the acts and omissions of his subcontractors,” as well as for those of his own employees. Apparently, the Court held the contractor liable because [a]lthough the draftsmanship could have entailed more specificity with respect to the liability of the parties, the contract terms do not clearly exonerate the general contractor. Id. at 956.

XVI. Mechanic’s Liens

A Mechanic's Lien is a claim against real property for work done or materials supplied for the property. Alabama's Mechanics' Lien Law can be found in ALA. CODE § 35-11-210 et seq. (1975). The statute creates two different types of liens. The first type, an Unpaid Balance Lien, provides the contractor with a lien against the property in the amount of any unpaid balance owed to the contractor.

The second type of lien created by the statute is a Full Price Lien, which is typically a lien accruing to suppliers of the contractor or subcontractor who have no direct contact with the owner. In order to create a full price lien, the supplier must, before providing any materials, give a preliminary notice in writing to the owner or his agent of the property that certain materials will be provided by the contractor or supplier. If the owner or agent does not object, the contractor or supplier will be able to assert a lien against the property for the full price of any materials provided. See ALA. CODE § 35-11-210 (1975).

In order to perfect an Unpaid Balance lien, there is no need for a preliminary notice to be sent to the owner prior to providing materials or services. However, prior to filing a Verified Statement of Lien, a contractor must first provide a Notice of Intent to file such a statement in writing to the owner, the general contractor, and the construction lender stating that the contractor intends to claim a lien, the amount of money claimed, describing the property subject to the lien, and the identity of the entity which owes the lien. This must be done before filing of a Verified Statement of Lien. Failure to provide a Notice of Intent prior to filing a Verified Statement of Lien renders the lien invalid. See ALA CODE § 35-11-218 (1975) and Buckner v. ALFA Lumber, 628 So. 2d 450 (Ala. 1993).

After the notice of intent has been provided, the contractor must file with the Probate Court of the county where the subject property is located a Verified Statement of Lien setting forth a description of the property on which the lien is claimed (sufficient to allow it to be located and identified), the amount claimed, and the identity of the owner of the property. The statement must be based on the personal knowledge of the lien claimant. See ALA. CODE § 35-11-213 (1975). There is a form for the Verified Statement of Lien provided by Alabama Code § 35-11-213 (1975). However, so long as the substantive requirements of that statute are followed, the Verified Statement of Lien need not be identical to the form provided by the statute.

ALA. CODE § 35-11-215 (1975) provides various time limits for the filing of a Verified Statement of Lien by different types of lienors. Original contractors must file within six months after the last item of work on the property is completed. Laborers must file within 30 days after the last item of work is completed. Every other type of claimant must file within four months of the completion of the last item of work on the property.

Perfecting a full price lien, after the preliminary notice requirement has been met, involves the same procedure used to perfect an Unpaid Balance Lien and discussed above. The Notice of Intent

and Verified Statement of Lien should be filed in the same manner as described above. For this purpose, a Full Price Lien claimant is considered an original contractor and therefore must file the Verified Statement of Lien within six months of the completion of the work. See Southern Sash of Huntsville, Inc. v. Jean, 235 So. 2d 842 (Ala. 1970).

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