



# STATE OF HAWAII CONSTRUCTION LAW COMPENDIUM

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This outline is intended to provide a general overview of construction law in the state of Hawaii. The discussion of any particular topic is not necessarily an indication of the total law related to an area of Hawaii's construction law and nothing herein is intended to provide any legal advice and should not be relied on by any recipient.

## **I. BREACH OF CONTRACT**

Construction projects are characterized by detailed and comprehensive contracts that form the foundation of the industry's operations. City Express, Inc. v. Express Partners, 87 Haw. 466, 470 (1998). Generally speaking, a promisor is bound to perform his or her agreement according to its terms, or in case of unjustifiable failure to perform, to respond in damages for his or her breach of contract. Warner v. Denis, 84 Haw. 338, 347 (1997). In the case of building contracts, a builder can recover compensation if his performance has not been complete in every detail, so long as the building is not unfit for the intended use and the structure has been completed in accordance with the specifications, except for only slight or unimportant defects. Lansing v. Dondero, 21 Haw. 736, 738-39 (Haw. Terr. 1913).

A contractor's suit for breach of contract may be barred if he or she failed to make certain disclosures to the owner. Hawaii statutes require that prior to entering into a contract with an owner or applying for a building permit, licensed contractors shall make detailed written and verbal disclosures of: (1) the lien rights of all parties performing under the contract; (2) the owner's option to demand bonding on the project, how the bond would protect the owner and the approximate expense of the bond; and (3) all information pertaining to the contract and its performance, as well as any other information that the Contractors License Board may require by rule. HRS § 444-25.5. A general contractor who fails to comply with the disclosure requirements is prohibited from bringing action to enforce contract in law or equity, but may still recover in quantum meruit. Hiraga v. Baldonado, 96 Haw. 365, 371-72 (Haw. App. 2001).

By statute, a contractor's claim to recover compensation for unlicensed work is unenforceable. HRS §444-22 will bar a breach of contract action even when the owner was aware that the contractor was unlicensed. Butler v. Obayashi, 71 Haw. 175, 177 (1990). § 444-22 does not bar a member of the public, who is a party to such a contract, from bringing suit to recover breach of contract damages from an unlicensed contractor. Id.

Additionally, Hawaii courts have held that existing law is a part of the contract. Unless there is a stipulation to contrary, a builder is contractually obligated to comply with applicable building code requirements. Quedding v. Arisumi Bros., Inc., 66 Haw. 335, 338 (1983).

## **II. NEGLIGENCE**

Hawaii courts recognize actions to recover damages for injury to real or personal property, or for bodily injury or wrongful death, arising out of a deficiency or negligence, in the planning, design, construction, supervision and administering of construction, and observation of construction. See Lindgard v. Residuary Ltd. P'ship, 113 Haw. 159 [published in full-text format at 2006 Haw. App. LEXIS 768, \*13 n.9 (2006)]. A contractor generally has a duty to use reasonable care both in

his or her work and in the course of performing such work. The duty of reasonable care is not, of course, owed to the world at large, but only to those who might reasonably be foreseen as subject to injury by their breach. Pulawa v. GTE Hawaiian Tel, 112 Haw. 3, 16 (2006).

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

Applicable building codes in Hawaii may require compliance with said codes. For example, the City and County of Honolulu's building code, Ordinance Section 16-10.1, provides that "It is unlawful for any person, firm or corporation to erect, construct, enlarge, alter, repair, move, improve, remove, convert or demolish, equip, use, occupy or maintain any building or structure or cause or permit the same to be done in violation of this code." There are no known reported Hawaii cases specifically holding that violation of a building code is negligence per se. However, in AOAO of Newtown Meadows v. Venture 15, Inc., 115 Haw. 232, 299, 167 P.3d 225, 292 (2007), the Hawaii Supreme Court, when addressing whether the economic loss doctrine applied to negligence claims based on alleged violation of a building code, held that "a homeowner may pursue a negligence claim against a builder where it is alleged that the builder has violated an applicable building code, despite the fact that the homeowner suffered only economic losses." With respect to its ruling concerning violation of building code, the court generally agreed with the approach taken by the South Carolina Supreme Court which concluded that "a cause of action in negligence will be available where a builder has violated a legal duty, no matter the type of resulting damage." Id., 115 Haw. at 189-190 (citing Kennedy v. Columbia Lumber & Manufacturing, 299 S.C. 335, 384 S.E.2d 730 (1989)). However, the Hawaii Supreme Court did not address whether it would adopt other exceptions to the economic loss rule adopted by the Kennedy court.

### **III. BREACH OF WARRANTY**

"A warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely." Au v. Au, 63 Haw. 210, 218, 626 P.2d 173, 179 (1981). A warranty is intended to relieve the "promisee of any duty to ascertain the fact for himself" and "it amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue . . ." Id. An express warranty results from a contractual relationship, and it can be oral or in writing. Id. at 219, 626 P.2d at 180. In real estate transactions "[r]epresentations made to a prospective purchaser by a vendor concerning the condition of a dwelling is (sic) an express warranty." Id. at 218, 626 P.2d at 179.

A party's "liability for breach of an express warranty derives from, and is measured by, the terms of that warranty." Kawamata Farms, Inc. v. United Agri. Products, 86 Haw. 214, 236, 948 P.2d 1055, 1077 (1997).

An action for breach of warranty is in nature of assumpsit, inasmuch as warranty arises from contractual relationship between buyer and seller, and breach of warranty constitutes a breach

of contract. Schultz v. Honsador, 67 Haw. 433, 436 (1984) (overruled on other grounds by Blair v. Ing, 96 Haw. 327 (2001)).

Hawaii's Uniform Commercial Code, Article 2 governing the sale of goods, also regards express warranties. Haw. Rev. Stat. § 490:2-313 (2008). In Cieri v. Leticia Query Realty, Inc., 80 Haw. 54, 66, 905 P.2d 29, 41 (1995), however, the Hawaii Supreme Court, relied upon definitions of "goods" under UCC provisions when holding that, for the purposes of the Hawaii consumer protections statute, Haw. Rev. Stat. § 480-2, real estate and residences are not "goods."

The Hawaii Supreme Court has discussed the application of an implied warranty of habitability in new home purchases in Ass'n of Apt. Owners v. Venture 15, Inc., 115 Haw. 232, 255, 167 P.3d 225, 248 (2007). The court stated that the fundamental reason for recognizing this implied warranty of habitability with respect to the sale of new homes by a builder-seller was because of the "unusual dependent relationship of the vendee to the vendor" and that "[p]urchasers from a builder-seller depend on his ability to construct and sell a home of sound structure. Purchasers from a developer-seller depend on his ability to hire a contractor capable of building a home of sound structure." Id. (quoting Tassan v. United Dev. Co., 410 N.E.2d 902, 908 (Ill. App. 1980)).

The Hawaii Supreme Court also went on to address an argument by the developer that a Hawaii statute (Haw. Rev. Stat. § 514A-6) allowed the developer to disclaim warranties. The court noted that "even assuming arguendo" that the statute applied, the developer had a "very high" burden to establish that it disclaimed the implied warranty of habitability. Id., at 256, 167 P.3d at 249. The court noted that the majority of states permit a disclaimer of the implied warranty of habitability but such disclaimers must be "clear and unambiguous," and are "strictly construed against the [defendant]." Id. at 256, 167 P.3d at 249 (quoting Tusch Enters. v. Coffin, 740 P.2d 1022, 1030 (Idaho 1987)).

#### **IV. MISREPRESENTATION AND FRAUD**

Under Hawaii law, a party claiming fraud must establish the following elements: (1) false representations made by the defendant; (2) with knowledge of their falsity (or without knowledge of their truth or falsity); (3) in contemplation of plaintiff's reliance upon these false representations; and (4) plaintiff's did rely upon them. Shoppe v. Gucci American, 94 Haw. 368, 386, 14 P.3d 1049, 1067 (2000).

With respect to the tort of negligent misrepresentation, the Hawaii Supreme Court has followed Restatement (Second) of Torts §552 wherein "(1) [O]ne who, in the course of his [or her] business, profession or employment, or in any other transaction in which he [or she] has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he [or she] fails to exercise reasonable care or competence in obtaining or communicating the information. (2) The liability stated in subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons whose benefit and guidance he [or she] intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he [or she] intends the information to influence

or knows that the recipient so intends or in a substantially similar transaction.” City Express Inc. v. Express Partners, 87 Haw. 466, 469, 959 P.2d 836, 893 (1998); see also Shaffer v. Earl Thacker Co., 6 Haw. App. 188, 716 P.2d 163 (1986). However, in the context of construction litigation regarding the alleged negligence of design professionals, a tort action for negligent misrepresentation alleging damages based purely on economic losses is not available to a party in privity of contract with the design professional. City Express, 87 Haw. at 470, 959 P.2d at 840. (See also section herein regarding the Economic Loss Rule).

Moreover, in order to be actionable, a false representation must relate to a past or existing material fact, and not to the happening of future events. Pancakes of Hawaii, Inc. v. Pomare Properties Corp., 85 Haw. 300, 312 (1997). Generally, unfulfilled promises cannot form the basis for fraud unless it can be proved that the promisor had no intention of fulfilling the promise. *Id.* Likewise, an actionable misrepresentation must generally “relate to fact and cannot be based on an expression of opinion or a prediction” unless the person making the prediction or stating an opinion “has specialized knowledge upon which another party is entitled to rely.” Joy A McElroy, M.D. Inc. v. Maryl Group, Inc., 107 Haw. 423, 432, 114 P.3d 929, 938 (2005).

## **V. STRICT LIABILITY CLAIMS**

Among other things, with respect to a strict products liability claim, the plaintiff has the burden to show (1) a defect in the product which rendered it unreasonably dangerous for its intended or reasonably foreseeable use; and (2) a causal connection between the defect and plaintiff’s injuries. Acoba v. General Tire Inc., 92 Haw. 1, 16-17, 986 P.2d 288, 303-304) (1999) citing Tabieros v. Clark Equipment Co., 85 Haw. 336, 354, 944 P.2d 1279, 1297 (other citations omitted).

A plaintiff may establish a defect under three approaches: (1) the consumer expectation test; (2) the risk-utility test; and (3) the latent danger test. *Id.* at 17, 986 P.2d at 304. These tests may be generally described as follows: (1) the consumer expectation test is that the product is defective in design if plaintiffs establish that it failed to perform as safely as an ordinary user of the product would expect when used in an intended or reasonably foreseeable manner, including reasonably foreseeable misuses; (2) the risk utility test is that the product is defective in design if plaintiffs prove that the product’s design was a legal cause of the injuries and defendant fails to prove that the benefits of the design outweigh the risk of danger inherent in the design; and (3) the latent danger test is that the product is defective in design, even if faultlessly made, if the use of the product in a manner that is intended or reasonably foreseeable, including reasonably foreseeable misuses, involves a substantial danger that would not be readily recognized by the ordinary user of the product and the manufacturer fails to give adequate warnings of the danger. See Tabieros, 85 Haw. at 367, 944 P.2d at 1310. In addition, whether a product is unreasonably dangerous is generally a question for the trier of fact. Acoba, 92 Haw. at 17, 986 P.2d at 304.

The Hawaii Supreme Court has adopted a “case-by-case” approach to defining what may constitute a “product” for purposes of a strict products liability cause of action. Armstrong v. Cione, 69 Haw. 176, 182 (1987); Messier v. AOA of Mt. Terrace, 6 Haw. App. 525, 533-534, 735 P.2d 939, 946-947 (1987) (citing Kaneko v. Hilo Coast Processing, 65 Haw. 447, 654 P.2d 343 (1982)). In Kaneko, the court agreed that strict liability principles can apply to “assembly-type

situations” and held that “a prefabricated building that must be assembled is a product where the seller-manufacture may be found strictly liable for injuries caused by a defective component part.” 65 Haw. at 457, 654 P.2d at 350 (affirming judgment in favor of injured ironworker, who fell from a girt apparently because of a defective weld, against the manufacturer of the prefabricated building). In Bidar v. AMFAC, Inc., 66 Haw 547, 669 P.2d 154 (1986), the court addressed a situation where a plaintiff was injured when the towel bar in her hotel room’s bathroom tore loose from the wall as she attempted to pull herself up from the toilet. The Hawaii Supreme Court distinguished the case from Kaneko declaring that “an identified component of a prefabricated building can hardly be likened to ‘a portion of the leased or rented premises ...[that] proves[s] defective.’ We perceive no good reason here to lend a more expansive meaning to “product” than we did in Kaneko ...” Id., 66 Haw. at 556-557, 669 P.2d at 161 (affirming judgment in favor of hotel owner and operator in plaintiff’s strict liability claim). Likewise in Messier, the Hawaii Intermediate Court of Appeals held that the trial court properly granted summary judgment against the strict liability claim of a plaintiff who was injured when a metal panel that had been attached to the roof became dislodged and struck the worker. 6 Haw. App. 525, 735 P.2d 939. Like the Hawaii Supreme Court in Bidar, the Intermediate Court of Appeals also declined to hold that the building at issue was a product and noted that “the policy considerations that form the basis for the strict products liability rule do not compel its application in the instant case. ... [Plaintiff] does not face the kind of difficulty in proving the negligence of [defendants] in the construction of the building as is faced by plaintiffs in other cases where the doctrine of strict liability has been applied.” Id., 6 Haw. App. at 535, 735 P.3d at 947.

## **VI. INDEMNITY CLAIMS**

Contracts of indemnity are to be strictly construed, particularly where the indemnitee claims that it should be held safe from its own negligence. Kamali v. Hawaiian Electric Co., Inc., 54 Haw. 153, 161 (1972).

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

## **VII. STATUTE OF REPOSE/STATUTE OF LIMITATIONS**

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

HRS § 657-8 provides that “[n]o action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of any deficiency or neglect in the planning, design, construction, supervision and administering of construction, and observation of construction relating to an improvement to real property shall be commenced more than two years after the cause of action accrued, but in any event not more than ten years after the date of completion of the improvement.

HRS § 657-1 (1) provides that “actions for the recovery of any debt founded upon any contract, obligation, or liability, excepting such as are brought upon the judgment or decree of a court” shall be commenced within six years after the cause of action accrues.

### **VIII. ECONOMIC LOSS DOCTRINE**

Hawaii courts have applied the economic loss doctrine in the construction context to, in general but not in all circumstances, bar recovery in tort for purely economic loss. Among other things, the economic loss doctrine is designed to prevent disproportionate liability and to avoid blurring the distinction between contract and tort law. Generally speaking, economic losses include losses such as those that pertain to the costs related to the operation and value of a building including additional costs, lost rent, and cost of remedying building defects. City Express, Inc. v. Express Partners, 87 Haw. 466, 469, 969 P.2d 836, 839 (1998).

In general, the economic loss rule does not operate to bar actions based on negligent misrepresentation or fraud. State by Bronster v. U.S. Steel Corp., 82 Haw. 32, 40, 919 P.2d 294, 302 (1996) (recognizing that a cause of action in products liability or negligent design or manufacture theory will not lie where a plaintiff alleges purely economic losses stemming from injury to the product itself but also that the economic loss rule did not bar a claim for negligent misrepresentation because, among other things, the tort of negligent misrepresentation is founded on the breach of a duty separate and distinct from the duty abolished by the economic loss rule). In City Express, however, the court held that “in the context of construction litigation, where a party is in privity of contract with a design professional, economic loss damages are limited to contractual remedies, and a negligence action may not be maintained.” City Express, 87 Haw. at 469, 959 P.2d at 839. Among other things, the court noted that in the context of construction litigation involving design professionals, sound policy reasons counsel against providing open-ended tort recovery to parties who have negotiated a contractual relationship. Id. 87 Haw. at 470, 959 P.2d at 840. The Hawaii courts have also ruled that the economic loss rule does not apply to negligence claims based on violation of applicable building codes. Ass’n of Apt. Owners of Newtown Meadows v. Venture 15, Inc., 115 Haw. 232, 295 (2007).

### **IX. ECONOMIC WASTE**

Damages, resulting from a contractor's breach of contract are to be measured by the cost of correcting the defective construction unless the cost of correction is grossly and unfairly out of proportion to the good to be attained. Ritchey v. Sato, 39 Haw. 500, 503 (1952). Only if the cost of correction is grossly and unfairly disproportionate does court apply a rule of difference or loss in property value to determine the assessment of damages. Id.

## X. DAMAGES

### A. Direct Damages

The measure of damages in building contracts is generally cost of correction. Quedding v. Arisumi Bros., Inc. 66 Haw. 335, 338 (1983). Such costs, however, are limited to correction according to original plans and specifications, assuming such plans are adequate. Izumi v. Kwan Doo Park, 44 Haw. 123, 129 (1960). Moreover, as owners are under a duty to minimize damages, the amount of damages is to be measured by the reasonable cost of repairs within a reasonable time after discovery. Id. at 128 (holding that a contractor is not liable for the portion of damages associated with an increase in building costs in the four years since the defect was discovered).

### B. Punitive Damages

Punitive damages may be awarded only in cases where the wrongdoer has “acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations, or where there has been some willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to circumstances.” Masaki v. Gen. Motors, Co., 71 Haw. 1, 16-17, 780 P.2d 566, 575 (1989). The standard of proof for all punitive damages claims is “clear and convincing.” Id. at 16, 780 P.2d at 575.

In addition, the Hawaii Supreme Court has explained that “punitive damages are in no way compensatory and are not available as a matter of right. An award of punitive damages is purely incidental to the cause of action. They may be awarded by the grace and gratuity of the law. They also act as a means of punishment to the wrongdoer and as an example and deterrent to others.” Kang v. Harrington, 59 Haw. 652, 660, 587 P.2d 285, 291 (1978).

In a case involving, among other things, the alleged wrongdoing of a site development general contractor and a soils compaction subcontractor, the court remarked that “a positive element of conscious wrongdoing is always required” and “punitive damages are not awarded for mere inadvertence, mistake, or errors of judgment.” Ass’n of Apt. Owners of Newtown Meadows v. Venture 15, Inc., 115 Haw. 232, 297-298, 167 P.3d 225, 290-291 (2007) (citing Masaki, 71 Haw. at 7, 780 P.2d at 570-71).

### C. Emotional Distress

The general rule is that damages for emotional distress arising from a breach of contract are only recoverable where they are specifically provided for in the contract or where nature of the contract is such that emotional distress damages are within the contemplation or expectation of the parties. Francis v. Lee Enters., Inc., 89 Haw. 234, 244 (1999). However, courts may still award emotional distress damages in two types of situations: (1) where the emotional distress is accompanied by a bodily injury; or (2) where, because of the nature of the contract, serious emotional distress is a particularly foreseeable result of a breach. Id.

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

#### D. Delay Damages

The Hawaii Supreme Court has held that, “[w]here time of performance is of the essence of the contract, a party who does any act inconsistent with the supposition that he continues to hold the other party to his part of the agreement will be taken to have waived it altogether. When a specific time is fixed for the performance of a contract and is of the essence of the contract and it is not performed by that time, but the parties proceed with the performance of it after that time, the right to suddenly insist upon a forfeiture for failure to perform within the specified time will be deemed to have been waived and the time for performance will be deemed to have been extended for a reasonable time.” Stevens v. Cliffs at Princeville Assocs., 67 Haw. 236, 243-44, 684 P.2d 965, 970 (1984) (citations omitted).

In addition, Hawaii courts have held that when time is of the essence or a delay has become so serious as to justify discharge of the contractor, an owner may assume control of the work, cause it to be completed, and hold the contractor for his reasonable expenditures if in excess of the unpaid balance of the contract price. Mayer v. Alexander & Baldwin, Inc., 56 Haw. 195, 198 (1975).

Liquidated damages, determined at the time of contract formation, are also available to remedy delayed performance. Associated Eng’rs & Contractors v. State, 58 Haw. 187, 208, 567 P.2d 397, 412 (1977).

#### E. Attorney’s Fees and Costs

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

HRS §607-14 also provides that attorney’s fees and costs in actions in the nature of assumpsit are to be paid by the losing party. Fees are limited to those that the court determines to be reasonable, provided that the amount does not exceed twenty-five per cent of the final judgment. For a claim to be “in the nature of assumpsit” it must be a common law action for the non-performance of a contract. Blair v. Ing, 96 Haw. 327, 332 (2001).

## XI. INSURANCE COVERAGE FOR CONSTRUCTION CLAIMS

### A. Interpretation of Insurance Contracts

As contracts, insurance policies are subject to the general rules of contract construction; thus, the terms of the policy should be interpreted according to their plain, ordinary, and accepted sense in common speech. Each policy is to be interpreted according to the entirety of its terms and conditions. Tri-S Corp. v. Western World Ins. Co., 110 Haw. 473, 489 (2006).

Nevertheless, adherence to the plain language and literal meaning of insurance contract provisions is not without limitation. As insurance contracts are generally contracts of adhesion, Hawaii courts have long recognized that insurance policies should be construed liberally in favor of coverage. Sturla Inc. v. Fireman's Fund Insurance Co., 67 Haw. 203, 209 (1984).

### B. Duties to Defend and Indemnify

Hawaii adheres to the "complaint allegation rule." Pancakes of Hawaii v. Pomare Properties Corp., 85 Haw. 286, 292 (Haw. App. 1997). Thus, the duty to defend is limited to situations where the pleadings alleged claims and facts which fall within the insurance contract's terms of coverage. Where the pleadings fail to allege any basis for recovery within the coverage clause, the insurer has no obligation to defend. Hawaiian Holiday Macadamia Nut Co. v. Industrial Indus. Indem. Co., 76 Haw. 166, 169 (1994).

The Hawaii Supreme Court has held that allegations of an intentional breach of contract do not meet the definition of an "accident" or "occurrence" under a standard commercial general liability (CGL) insurance policy. See Hawaiian Holiday, 76 Haw. 166, 171 (1994). The court held that an intentional breach is not an "accident," and thus, the insurer had no duty to defend or indemnify when the injury was the expected or reasonably foreseeable result of the insured's own intentional acts or omissions.

The Ninth Circuit Court of Appeals addressed the issue of insurance coverage for construction related claims in Burlington Ins. Co. v. Oceanic Design and Construction, Inc., 383 F.3d 940 (9<sup>th</sup> Cir. 2004). The Ninth Circuit held that, under Hawaii law, contract and contract-based tort claims are not covered within the scope of CGL policies. Relying on the precedent set in Hawaiian Holiday, the court reasoned that any claims resulting from breach of contract did not fall within the definition of an "occurrence" as provided for in the policy. Id. Thereafter, in Group Builders, Inc. v. Admiral Ins. Co., 123 Haw. 147, 148-49, 231 P.3d 67, 73-74 (Haw. Ct. App. 2010) (superseded in part by statute, Haw. Rev. Stat. § 431:1-217(a), as recognized in Ill. Nat'l Ins. Co. v. Nordic PCL Constr., Inc., 870 F.Supp. 2d 1015 (D. Haw. 2012)), the Hawaii Appellate Court held that construction defect claims do not constitute an occurrence under a CGL policy; thus breach of contract claims for shoddy performance and tort-based claims derivative of such breach of contract claims were also not covered.

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

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

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

### XII. RIGHT TO REPAIR STATUTE

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

### XIII. MECHANIC'S LIENS

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

The Hawaii Supreme Court has recognized that licensed contractors might not be entitled to a mechanic's lien on the property unless all requirements of the licensing statute, Chapter 444 of the Hawaii Revised Statutes, are followed. 808 Dev., LLC v. Murakami, 111 Haw. 349, 141 P.3d 996 (2006). In general, the procedural requirements for perfecting a mechanic's lien are strictly

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

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

The return hearing on an application for a lien is held within 3 to 10 days after the filing of the application. Haw. Rev. Stat. § 507-43(a). A copy of the application for a lien and the notice of lien must be served on the appropriate parties in the manner prescribed under Hawaii law for service of summons. If any person entitled to notice cannot be served as so provided, then notice may also be given by posting the application and notice on the improvement itself. Haw. Rev. Stat. § 507-43(a). At the return hearing, the respondents then admit or deny the allegations. If the application for mechanic’s lien is contested then the matter will proceed to a probable cause hearing.

At the probable cause hearing, the lien applicant typically must prove (1) the existence of contract; (2) the labor or materials provided; (3) the price agreed to be paid (provided that the price does not exceed the value of the labor and materials) and/or the fair and reasonable value of the labor and materials; and (4) payment was demanded but not paid. The lien applicant has the burden of proof but the standard is probable cause rather than the normal preponderance of the evidence. The court then decides if a lien should attach and in what amount applying the standard of the reasonable probable outcome of trial.

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

**This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While an 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.**