



# STATE OF MAINE CONSTRUCTION LAW COMPENDIUM

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## **OWNER'S CAUSES OF ACTION**

### **Breach of Contract**

Virtually all construction claims start with a breach of contract claim. A contract may be written or oral. Although the lack of a written contract in a residential project may give rise to a claim for the violation of the Home Construction Contract Act, the owner and contractor may still enforce the terms of oral contract. *Runnells v. Quinn*, 890 A.2d 713 (Me. 2006). Unless oral modification is forbidden in the written contract, contracts may be modified both in writing and orally. A contract that has been induced by fraud is voidable. *Barrett v. McDonald Investment, Inc*, 870 A.2d 146 (Me. 2005).

Whether there is a breach of contract normally depends on the language of the contract. A party to a contract breaches the contract if they fail to meet "substantial compliance" with the terms of the contract. An owner warrants the sufficiency of the plans and specifications. *Paine v. Spottiswoode*, 612 A.2d 235 (Me. 1992). Unless the contractor has design responsibility, a contractor cannot be liable if the building is constructed in accordance with the plans and specifications. *Associated Builders v. Oczkowski*, 801 A.2d 1008 (Me. 2002). All construction contracts contain an implied warranty that the work will be completed in a workmanlike fashion. *Paine*, 612 A.2d 235 (Me. 1992).

If a contractor is in substantial compliance with the contract, he may recover the full contract price, less any damages for defects. *Morin v. Atlantic Design & Construction*, 615 A.2d 239 (Me 1992); *F.A. Gray v. Weiss*, 519 A.2d 716 (Me. 1986). A material breach of the contract, on the other hand, allows the other party to terminate the transaction and refuse performance. A material breach is a nonperformance of a duty that is so material and important as to justify the injured party to regard the transaction as over. *Cellar Dwellers, Inc. v. D'Alessio*, 993 A.2d 1 (Me. 2010); *Advanced Construction Corp. v. Pilecki*, 901 A.2d 189 (Me. 2006). Preventing the other party from performing is a material breach warranting the other party's termination of the contract. *Morin*, 615 A.2d 239. In *Morin*, the Court held that the owner breached the contract when it failed to allow the contractor to repair defective siding. To the extent there is a "right to repair" in Maine, it is based on the decision in *Morin*. If a party, through either words or conduct, manifests an intent not to perform on a contract, then an anticipatory repudiation has occurred and the other party may assume that they will not perform. *Wholesale Sand and Gravel v. Decker*. 630 A.2d 710 (Me. 1993) (homeowner could argue anticipatory breach had occurred when company removed equipment and never came back in spite of promises to the contrary); *Martell Brothers v. Donbury, Inc.* 577 A.2d 334 (Me. 1990).

### **Breach of Warranty**

#### **Breach of express warranty**

Maine courts will enforce a contractor's express warranties, which are in addition to the implied warranty of workmanship.

#### **Breach of implied warranty of workmanship**

Every construction contract contains a breach of the implied warranty of workmanship. *Paine v. Spottiswoode*, 612 A.2d 235, (Me.1992). This cause of action is the primary claim in any suit against a contractor. The definition of

“workmanlike” is broad and depends on the circumstances. It requires that a building “be constructed in a reasonably skillful and workmanlike manner. The test is one of reasonableness, not perfection, the standard being, ordinarily, the quality of work that would be done by a worker of average skill and intelligence.” *Wimmer v. Downeast Properties* 406 A.2d 88, 93 (Me. 1979). It has to be “in keeping with competent building practices.” *Paine*, 612 A.2d 235.

A "proper and workmanlike installation" would have to meet code. *Parsons v. Beaulieu*, 429 A.2d 214 (Me. 1981). A builder is not responsible for a code violation which is part of a design on which the builder was relying. *Associated Builders v. Oczkowski*, 801 A.2d 1008. In 2010, Maine adopted the Maine Uniform Building and Energy Code which towns with a population of over 4,000 are required to enforce. The Code adopts four ICC codes and four other standards. 10 MRSA § 9721 et seq.; see also, [www.maine.gov/dps/bbcs](http://www.maine.gov/dps/bbcs).

Workmanlike construction also has to be reasonably fit for the purpose for which it was manifestly designed: "Where a party contracts to build a building for a specified purpose, the law reads into the contract a stipulation that the building shall be erected in a reasonably good and workmanlike manner and when completed shall be reasonably fit for the intended purpose." *Gosselin v. Better Homes, Inc.*, 256 A.2d 629, 639 (Me. 1969). The work must meet this standard "...having regard to the general nature and situation of the projected object and the purpose for which it was manifestly designed." *Id.* The warranty also applies to the sale of a new house by a builder vendor. *Wimmer*, 406 A.2d at 92. A builder vendor also sells the home with an implied warranty of habitability. *Banville v. Huckins*, 407 A.2d 294 (Me. 1979).

There is no Maine law on whether a subsequent owner can bring a breach of implied warranty claim against a contractor under the common law. A subsequent owner of a condominium owner can bring a claim against a declarant for a breach of the statutory warranty of quality for condominium units. 33 M.R.S.A. § 1604-115.

### **Breach of UCC implied warranties**

When the major component of a contract is the construction, installation or repair of a building, the remedies in the Uniform Commercial Code do not apply. The UCC only applies to the sale of “goods.” A construction contract is considered a service contract.

See, *Bourque, Inc. v. Cronkite*, 557 A.2d 193 (Me. 189); *Smith v. Urethane Installations, Inc.*, 492 A.2d 1266 (Me. 1985). There is an exception to this rule for cases that fall under the Home Construction Contract Act. The statute specifically states that the remedies of the Uniform Commercial Code apply. 10 MRSA § 1487(7). There is no case law explaining how and when UCC warranties apply to the construction of a home.

### **Negligence**

A contractor owes a duty to the owner to exercise reasonable care in the construction of a building. *Paine v. Spottiswoode*, 612 A.2d 235 (Me. 1992). Unless the negligent breach of

that duty results in personal injury or damage to property other than the work itself, however, then the economic loss doctrine may bar the negligence count. The proper remedy is in contract. See section on economic loss doctrine below. The owner's comparative fault bars the owner's negligence claim if the owner's fault exceeds the fault of the builder. 14 M.R.S.A. §156. If the owner's fault is less than the fault of the builder, then the verdict is reduced to take into account the owner's fault. *Id.*

## **Misrepresentation and Fraud**

Misrepresentation and fraud often show up as causes of action in construction litigation. They are significant in that they provide a way to obtain judgment against a business owner personally rather than his corporation. In order to prove fraud, a plaintiff must prove that the defendant made a false representation, of a material fact, with knowledge of its falsity or in reckless disregard of whether it is true or false, for the purpose of inducing another to act or to refrain from acting in a reliance upon it, and the plaintiff justifiably relies upon the representation as true and acts upon it to his damage. *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 776 (Me. 1989). Fraudulent statements must be specifically alleged in the complaint. M.R.Civ.P. 9(b).

The elements of fraud must be proven by clear and convincing evidence. *Mariello v. Giguere*, 667 A.2d 588 (Me. 1995) (dealer liable for fraud when telling owner he would install double hung windows and only installed single pane sliding windows). Even though a claimant's reliance must be justifiable, he has no duty to investigate and his own negligence does not bar the claim. *Letellier v. Small*, 400 A.2d 371, 376 (Me. 1979).

Negligent misrepresentation does not require either the intent or the clear and convincing evidence necessary to prove fraud. In order to prove the tort of negligent misrepresentation,

One who in the course of his business profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transaction, is subject to liability for pecuniary loss cause to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

*Chapman v. Rideout*, 586 A.2d 828, 830 (Me. 1990). A plaintiff's own fault is a defense to a negligent misrepresentation claim. Although the issue has been decided in other states and there have been various Maine trial court decisions with different holdings, there is no Maine law whether fraud or negligent misrepresentation claims are barred by the economic loss doctrine.

## **Owner's Statutory Remedies**

### **Unfair Trade Practices Act**

Unfair Trade Practices Act allows any person who purchases goods, services, or property primarily for personal family or household purposes to bring a cause of action against a seller for "unfair and deceptive" trade practices. 5 M.R.S.A. § 207, 213(1). A subsequent owner may be able to bring a UTPA action against the original builder. *McKinnon v. Honeywell International Inc.*, 977 A.2d 420, 427 (Me. 2009). An unfair trade practices claim

is often brought in home construction defect claims. What is “unfair and deceptive” is not well defined and does not require an intentional act. A mere breach of warranty, however, does not constitute an unfair trade practice. Knowingly recording an inflated mechanic’s lien is an unfair trade practice. *Advanced Construction, Inc. v. Pilecki*, 901 A.2d 189 (Me. 2006). The Plaintiff must prove a loss of money or property. *Van Voorhees v. Dodge*, 679 A.2d 1077 (Me. 1996). The loss must be “significant. *McKinnon*, 970 A.2d at 427. The significance of this cause of action is the availability of attorney’s fees. 5 M.R.S.A. § 213(1-A). Before a plaintiff can make a claim for attorney’s fees, however, they must make a written settlement demand thirty days prior to filing suit. *Id.*

### **Home Construction Contract Act**

The Maine Home Construction Contract Act contains specific requirements for any home construction contract worth more than \$3,000. The requirements include including estimates, dates that the work will be completed, the contract price, specific warranties, a method of dispute resolution, and a requirement for written change order. 10 M.R.S.A. § 1486 et seq. Violation of the Home Construction Contract Act is considered a violation of the Unfair Trade Practices Act allowing recovery of attorney’s fees. 10 M.R.S.A. § 1490(1). The statute must contain the Maine State Attorney General’s website, [www.maine.gov/ag](http://www.maine.gov/ag), which is also a source of updated information on what is required by the statute and contains sample contracts. Insulation contractors have additional disclosures that they are required to include in their contract. See, 10 M.R.S.A. § 1481, et seq. Violation of that statute is also a violation of the Unfair Trade Practices Act.

To recover damages, including attorneys’ fees, under either the Home Construction Contract Act or the Unfair Trade Practices Act, the statute requires that the Plaintiff shows a “loss of money or property” as a result of the violation of the statute. *Van Voorhees*, 679 A.2d 1077; *Dudley v. Wyler*, 647 A.2d 90 (Me. 1994). A mere technical violation of the statute should not give rise to recovery under the statute.

## **Indemnity/Contribution/Additional Insured**

### **Contractual Defense and Indemnity Provisions**

Defense and indemnity provisions in construction contracts are enforceable. Provisions that require one party to indemnify the other party for the other party’s own fault, however, are not favored and should not be construed in favor of indemnification. To be enforceable, such a provision must clearly and unequivocally state a mutual intention on the part of the parties to provide indemnity for a party even if that party is at fault. If the provision is considered ambiguous, it should be construed against the party seeking indemnification. *Lloyd v. Sugarloaf Mountain Corp.*, 833 A.2d 1, 4 (Me. 2003); *McGraw v. S.D. Warren Co.* 656 A.2d 1222 (Me.1995); *Emery Waterhouse v. Lea*, 467 A.2d 896 (Me. 1983). Therefore, as long as there is an allegation that the party seeking indemnification is at fault, contractual defense and indemnification agreements are not often honored at the outset of the litigation absent the explicit provision.

### **Contribution**

If there are tort claims, there is a free right of contribution against other tortfeasors. If, however, the economic loss doctrine bars any tort claims, there may be no contribution or indemnification claims. The Law Court has held that contribution claims must be between

joint tortfeasors. See, *Johanson v. Dunnington*, 785 A.2d 1244 (Me. 2001). Therefore, a party may not be able to bring a claim against another potentially liable party without a contractual relationship. That would preclude a claim by an owner or a subcontractor against another subcontractor or against a supplier and a claim by a contractor against an architect.

### **Third Party Beneficiaries**

In order to have standing as a third party beneficiary to a contract and to bring a breach of contract claim, a plaintiff must prove that the parties intended to give the plaintiff the benefit of the performance. It is not enough for the plaintiffs to merely show that they benefited from the contract, but they must prove specific intent that they be benefited. See, *F.O. Bailey Co., Inc. v. LedgeWood, Inc.*, 603 A.2d 466 (unit owners were not third-party beneficiaries of contract between condominium developer and contractor).

### **Additional insured provisions**

An agreement to obtain insurance is not an agreement of insurance. A person promising to obtain insurance does not by that promise become an insurer. He may, however, assume the liabilities of an insurer if he breaches the agreement and fails to see that the other party is named as an additional insured. *Boise Cascade Corp. v. Main-Erbauer, Inc.* 620 A.2d 280, 281 (Me. 1983). If the additional insured provision is not specific, a subcontractor may name the general contractor as an additional insured, only to find out that the subcontractor's policy does not cover that particular loss, either generally or because of the language in an additional insured endorsement. Then, the contractor would not be liable for breach of contract if he named the general contractor as an additional insured, but there is no coverage.

If one party has named the other an additional insured, then the decisions on the duties to defend and indemnify take on the same analysis as though the additional insured had bought the policy. See e.g. *Endre v. Niagra Fire Insurance*, 675 A.2d 511 (Me. 1996) (analyzing carrier's obligation to defend an additional insured). Whether there is a duty to defend will depend on the allegations and the policy language. Whether there is a duty to indemnify normally will not be determinable until the facts have been decided by the pending litigation. A determination of which carrier is primary, whether it is the named additional insured's regular carrier or the carrier which accepts the additional insured, will depend on the insurance policies' "other insurance clauses." *Wright Ryan Construction v. AIG Insurance Co.*, 647 F.3d 411 (1<sup>st</sup> Cir. 2011).

## **Statute of Limitations**

### **Contractors**

Maine's statute of limitations is six years, commencing when the "cause of action accrues." 14 M.R.S.A. § 752. With only a few exceptions, there is no discovery rule.

The cause of action begins to run, regardless of whether any injury is discovered, at the time that the wrongful act produced injury. In a breach of contract, negligence or warranty claim alleging a construction defect, the cause of action accrues at the time that the party breached the contract, normally when they perform the task called for in the contract. *Dunelawn Owner's Assoc. v. Gendreau*, 750 A.2d 591 (Me. 2000) (statute of limitations on

contract, negligence and warranty claims against contractor began to run at time construction contract was completed even though defect was difficult to discover); *Johnson v. Dow & Coulombe, Inc.*, 686 A.2d 1064 (1996) (statute of limitations against surveyor begins to run when surveyor performed survey); See also, *Dugan v. Martel*, 588 A.2d 744 (Me. 1991); *Gile v. Albert*, 943 A.2d 599 (Me. 2008).

The theory under this approach is that the owner has the right to sue the contractor for a defect existing at the time the contractor left the job. Therefore, the six-year statute begins to run at that time.

If the claim is for personal injury or damage to other property, the person injured may not have had any contractual relationship with the contractor. Therefore, he would not have had a right to sue until the date of the injury. Therefore, the six-year statute of limitations would begin to run on the date of injury. If someone was hurt after falling through a porch stair that was poorly built, the statute begins to run on the date of injury, not the date that the porch stair was built. It is not clear when the statute would begin to run on a personal injury plaintiff when the injured party originally had a contract with the owner.

In a claim for contribution, when one party has paid a judgment or settled a case and seeks recovery for all or part of it from another party, the statute does not begin to run until the time of the judgment against the party seeking contribution. *St. Paul Ins. Co. v. Hayes*, 676 A.2d 510 (1996).

Any claim under the Home Construction Contract Act must be brought within two years of the violation. 10 M.R.S.A. § 1490(2).

There are numerous exceptions to the basic statutes of limitation for various circumstances. Among them are death claims, 18-A MRSA § 2-804(b); claims by a minor, 14 MRSA § 853; a defendant who has moved out of state, 14 M.R.S.A. §866; and claims by and against government entities.

### **Architects and Engineers**

There is a special statute of limitations for “architects or engineers duly licensed or registered.” 14 M.R.S.A. § 752-A. The claim shall be commenced “within four years after such malpractice or negligence is discovered, but in no event shall any such action be commenced more than ten years after the substantial completion of a construction contract or the substantial completion of the services provided, if a construction contract is not involved.” In other words, unlike Maine’s general statute of limitations, there is a discovery rule for claims against architects or engineers. In spite of that discovery rule, however, the claim cannot be brought more than ten years after the project.

### **Economic Loss Doctrine**

Maine has adopted the economic loss doctrine. Although there is no Law Court decision specifically applying the doctrine to a construction claim, the case law suggests that the doctrine would bar a negligence claim in the construction context if the only damage was to the work itself. In *Oceanside at Pine Point Condominium Owner’s Assoc. v. Peachtree Doors*, 659 A.2d 267, 269- 70 (Me. 1995), the Court barred a negligence count against a window manufacturer. The defective windows had caused damage to the Plaintiff’s new

construction. Defining the “product” as the end product that the plaintiffs purchased, which was the entire building, as opposed to merely the windows supplied by the Defendant, the Court held that the doctrine barred the owners’ negligence claim. Although the Law Court has not decided any additional cases on the economic loss doctrine, the facts of *Oceanside*, involving a construction project, are a strong indicator that the Law Court would apply the economic loss doctrine to a claim against a contractor. The Federal Court here in Maine held that Maine law would apply the doctrine to a service contract. *Maine Rubber Int’l v. Env’l Mgt. Group, Inc.*, 295 F.Supp.2d 125, 128 (D. Me. 2003) corrected by 298 F.Supp.2d 133 (D. Me. 2004) and would apply to a failed by pass condenser installed during the construction of a waste management facility. *Penobscot Energy Recovery Co. v. Bos-Hatten, Inc.*, 111 F.Supp.2d 55 (D.Me. 2000).

### **Subrogation waiver**

Subrogation waivers are not only enforceable in Maine, but the Law Court favors them as an alternative to litigation. “We have held that ‘waivers of subrogation are encouraged by law and serve important social goals: encouraging parties to anticipate risks and to procure insurance covering those, thereby avoiding future litigation, and facilitating and preserving economic relations and activity.’” *Reliance Nat’l Indemnity v. Knowles Industrial Services Corp.*, 868 A.2d 220, 225 (Me. 2005); *Acadia Ins. Co. v. Buck Construction, Co.* 756 A.2d 515, 520 (Me. 2000).

When presented with subrogation waiver defenses, the Court cites these policy considerations and applies the broadest protection. In *Reliance Indemnity*, the Court declined to carve out an exception for wanton misconduct, interpreted the contract to extend protection to materials suppliers, and applied the bar to contract and product liability claims as well as negligence claims. 868 A.2d at 226-229. In *Acadia Ins. Co.*, the Court held that a contract with insurance procurement clauses, without explicit subrogation waiver provisions, acted as a subrogation waiver. 756 A.2d at 518-520. Therefore, if the construction contract required an owner to purchase property insurance that covered a fire loss, then the property insurer is barred from bringing a subrogation claim against a negligent contractor, even without a specific subrogation waiver.

## **DAMAGES**

### **Property Damages**

Generally, in Maine, the measure of damages for breach of a construction contract is the difference in value between the product promised and the product delivered. *Van Voorhees v. Dodge*, 679 A.2d 1077 (Me.1996). That difference may be proven by a change in market value, but is most often proven by the cost to repair the construction defects. *Id.* If the property has lost value even if repaired, then the owner may recover the cost of repair as well as any remaining difference in value. *Marchesseault v. Jackson*, 611 A.2d 95 (Me. 1992). On the other hand, if the cost of repair is disproportionate to the change in value or has no reasonable relationship to the change in the value of the property as a result of the defect, then the cost to repair would not be considered a fair measure of damages. See, section on betterment/economic waste below. The amount still owed the contractor is deducted from the damages. *Treadwell v. J.D. Construction Co.*, 938 A.2d 794 (Me. 2007).

## **Betterment/Economic Waste**

There is no Maine case specifically holding that an owner cannot recover the cost of repair when the repair constitutes either a betterment or economic waste. It makes sense, however, that a repair that is either a betterment over what was contracted for, or comes at a cost that is disproportionate to the benefit is not a fair measure of “the difference in value between the product promised and the promised delivered.” In practice, an argument that a proposed fix constitutes either betterment or economic waste is frequently made. See, Horton and McGehee, *Maine Civil Remedies*, 247, 260 – 63 (4 ed. 2004).

The owner will undoubtedly respond that the contractor’s proposed repair is insufficient. The owner is not obligated to accept a repair that is less than what he bargained for. *Banville v. Huckins*, 407 A.2d 294, 298 (Me. 1979)(owner not required to accept sump pump as a repair to fix leaking basement); *Parsons v. Beaulieu*, 429 A.2d 214 (Me. 1981) (replacement of septic system was least expensive way to provide homeowner with a working septic system as promised even though it was an upgrade over what was installed).

## **Stigma**

There is no Maine case law whether or not the reputation or stigma of a troubled building is a category of damages. As discussed above, loss of value over and above the cost of repair is recoverable. If a building owner overcame the difficult hurdle of proving stigma damages, without resorting to speculation or conjecture, then Maine courts may allow it.

## **Emotional Distress**

As a rule, emotional distress is not recoverable in a breach of contract action unless the contract is the type of contract that a breach of it will result in a serious emotional disturbance. *Marquis v. Farm Family Mutual Insurance Co.*, 628 A.2d 644, 651 (Me. 1993) (distinguishing insurance contract from contract for the carriage of dead bodies). There is a good argument that a construction contract would not be the type to allow recovery for emotional distress.

If the negligence claim survives the economic loss doctrine, there is no Maine case law holding that a claim for emotional distress is barred because it is brought in the construction contract.

The argument is frequently made that one cannot recover for emotional distress arising merely from the loss of things, but there is no Maine law directly on point.

## **Punitive Damages**

Punitive damages are difficult to recover in Maine. A plaintiff must prove “malice,” which is defined as deliberate ill will towards the plaintiff or conduct so outrageous that ill will may be implied. *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985). It is not enough merely to prove deliberate, gross, wanton or reckless conduct. *Boivin v. Jones & Vining*, 578 A.2d 187 (Me. 1990). Although sometimes alleged, punitive damages are rarely a factor in a construction case in Maine.

## **Attorney's Fees**

Attorney's fees are not recoverable unless allowed by contract or by statute. Violations of the Unfair Trade Practices Act or the Home Construction Contract Act may allow a homeowner to recover fees. See discussion above. The Prompt Payment statute may allow the "prevailing party" to recover fees when a contractor or subcontractor brings suit for nonpayment. See discussion below.

## **CONTRACTOR'S REMEDIES**

### **Common law claims**

A contractor in substantial compliance with the contract may bring a claim for breach of contract, seeking to recover the amount due under the contract. The builder of a residence is entitled to the amount due regardless of a breach of the Home Construction Contract Act. *Runnells v. Quinn*, 890 A.2d 713 (Me. 2006). In addition, a contractor may recover under a theory of quantum meruit. Quantum meruit requires proof that (1) the services were rendered to the owner; (2) with the knowledge and consent of the defendant; and (3) under circumstances that make it reasonable for the plaintiff to expect payment. *Associated Builders v. Ockowski*, 801 A.2d 1008 (Me. 2002). The theory may be used to recover work that was completed either without a contract or beyond the scope of the contract. There is no Maine law regarding the application of a "paid when paid" or a "paid if paid" clause in a contract between a subcontractor and a contractor. *Ursa Major Underground, Inc. v. Liberty Mutual Ins. Co.* 2015 WL 9596001 (D.Me.).

### **Mechanic's Lien**

Under Maine law, one who provides labor or materials used to improve property or to build or repair a house or building enjoys a lien on the property for the value of the work. 10 M.R.S.A. § 3251. The work must be intended to become a part of the property. *Thayer Corp. v. M.S.A.D. #61*, 38 A.3d 1263 (Me. 2012). The contractor must show that the work was done either through a contract with the owner or with the owner's consent. *John Goodwin, Inc. v. Fox*, 725 A.2d 541 (Me. 1999). *Cote Corp. v. Kelley Earthworks*, 97 A.3d 127 (Me. 2014) (landlord). Any contractor, supplier of materials, surveyor, architect, engineer, owner or lessor of equipment used, or even a real estate agent, enjoys the right to assert a mechanic's lien. *Id.* A mortgagee is considered an owner. Therefore, a lien will take priority over the lender's security interest only if work is done with the lender's consent, including the nature and extent of the work. *Gagnon's Hardware and Furniture, Inc. v. Michaud*, 725 A.2d 741 (Me. 1999). To prove consent by either an owner or a mortgagee, a contractor must prove they had knowledge of the nature and extent of the work and engaged in conduct that justified the contractor's belief that owner or mortgagee had consented. *F.R. Carroll, Inc. v. TD Bank, N.A.*, 8 A.3d 646 (Me. 2010). Consent by the owner or lender can be inferred from the circumstances. *Jim's Plumbing and Heating v. Home Loan Investment Bank.*, 55 A.3d 419 (Me. 2012).

If the claimant does not have a contract with the owner, he must file a statement of the lien within 90 days, signed by a notary, which includes the true statement of the amount owed and a sufficient description of the property. 10 MRSA 3253(1). A copy must also be provided to the owner by ordinary mail. The notice does not need to be filed at the Registry when the lienor has a contract directly with the owner. *Id.*, § 3253(2). Anyone seeking a mechanic's lien, regardless of whether they had a contract with the owner or not,

must file a lawsuit within 120 days after the last of the labor or services are performed. *Id.* § 3255(1). An owner of commercial property cannot assert, in response to a subcontractor's lien, that it already paid the general contractor. A "double payment" defense is not available. In the case of property where the work is not done for "a business, commercial or industrial purpose," the owner will not be required to pay the subcontractor when they have already paid the general contractor for the labor, material, or services provided by the subcontractor. *Id.*, § 3255(3). If, however, the subcontractor provides an owner of noncommercial property with a notice using the specific language authorized by the statute, then the owner who pays the general contractor for the subcontractor's work may have to pay twice if the subcontractor has not been paid. *Id.* Once a complaint is filed, the lienor should file a clerk's certificate with the Registry of Deeds within sixty days of filing the complaint. *Id.* § 3261(2).

Once a contractor obtains a judgment, it can require the sale of the property. The Court can limit the sale to a portion of the property only, but the Court cannot require the contractor to accept a money judgment in lieu of a required sale. *Cote Corp. v. Kelley Earthworks*, 97 A.3d 127 (Me. 2014).

### **Prompt Payment Statute**

This prompt payment statute provides a tool that a contractor or a subcontractor can use to collect unpaid bills. 10 M.R.S.A. § 1111, et seq. The statute allows enhanced interest and recovery of attorney's fees. *Id.* § 1118. As a word of caution, the attorney's fees provision allows the "substantially prevailing party" to recover attorney's fees which may mean the owner if the contractor loses. *Id.* § 1118(4). There is no case law one way or the other awarding attorneys' fees against a contractor who alleges a violation of the statute in his effort to collect money owed, but ultimately does not prevail. The attorney's fees award to a contract must bear some relation to the amount actually collected. *Cellar Dwellers, Inc. v. D'Alessio*, 993 A.2d 1 (Me. 2010).

A contractor, subcontractor, or material supplier seeking payment must prove either a breach of contract or a quantum meruit claim that he is entitled to payment. Then, in order for a contractor or subcontractor to recover the additional penalties and fees under the statute, it must prove that the owner did not pay in accordance with the payment terms in the contract. If there is no contract, an owner's payment should be made within twenty days after invoiced. 10 MRSA § 1113. A subcontractor or material supplier without a contract must prove: 1. the services were performed in accordance with the agreement between the parties, 2. the owner has made the progress or final payment; 3. the subcontractor has invoiced the work; and 4. the contractor failed to make payment within seven days after either the invoice or the progress payment for the owner, whichever is later. *Jenkins v. Walsh*, 776 A.2d 1229 (Me. 2001); *Ursa Major Underground, Inc. v. Liberty Mutual Ins. Co.* 2015 WL 9596001 (D.Me.) (subcontractor seeking recovery from a general contractor must prove that the general contractor was paid by the owner.)

The statute allows the owner or contractor to withhold payment "in an amount equaling the value of any good faith claim against the invoicing contractor or subcontractor." *Id.* § 1118(1). If the withholding is in good faith, the party withholding payment is not liable for attorney's fees and enhanced interest even if they ultimately do not prevail. *Id.* *Electrical Engineering and Electronics v. E.L. Shea*, 146 F.Supp.2d 74 (D.Me. 2001).

**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.**