



STATE OF TENNESSEE CONSTRUCTION LAW COMPENDIUM

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I. Statute of Limitations

A. Generally

In construction cases, there are several statutes of limitation to consider. To determine which statute applies, the claim must first be classified. In Tennessee, courts will look to the gravamen of the complaint or its “substantial point or essence” to determine which period of limitation applies, regardless of whether the claims are designated as an action for breach of contract or tort. *Whaley v. Perkins*, 197 S.W.3d 665, 670 (Tenn. 2006). In analyzing the “gravamen” rule articulated in *Whaley v. Perkins*, the Tennessee Court of Appeals held that courts are not prohibited from applying more than one statute of limitations to a complaint that contains more than one viable claim. *Bluff Springs Apartments, Ltd. v. Peoples Bank of S.*, No. E2009-01435-COA-R3-CV, 2010 WL 2106210, at *7-10 (Tenn. Ct. App. May 26, 2010); *see also French v. Stratford House*, 333 S.W.3d 546, 557 (Tenn. 2011) (stating that courts must ascertain the nature and substance of a claim and not rely on the designation of the claims given by either the plaintiff or defendant).

It is well-settled in Tennessee that if the injury is to the person, the claim must be commenced within one year after the cause of action accrues. Tenn. Code Ann. § 28-3-104 (2012). Injuries to property – real or personal – must be brought within three years after the cause of action accrues. Tenn. Code Ann. § 28-3-105. Breach of contract claims are subject to a six-year statute of limitations. Tenn. Code. Ann. § 28-3-109.

B. The Discovery Rule

As a general rule, the statute of limitations does not begin to run until the action accrues. A claim will not accrue until it would be reasonable for the plaintiff to discover the existence of a claim. Accordingly, the discovery rule is an equitable doctrine that tolls the statute from running under certain circumstances. *Cole v. Wyndchase Aspen Grove Acquisition Corp.*, No. 3:05-0558, 2006 WL 2827452, at *4 (M.D. Tenn. Sept. 28, 2006).

A cause of action against an architect, builder, developer, or engineer accrues at the time of substantial completion of the improvement to the property. *Id.* The term “substantial completion” is defined as the date on “which the owner can use the [property] for the purpose for which it was intended.” Tenn. Code Ann. § 28-3-201.

C. Statute of Repose

The statute of repose bars an action after a certain period of time, regardless of when the plaintiff may have reasonably discovered the injury. The discovery rule does not toll the statute of repose. *Watts v. Putnam Cnty.*, 525 S.W.2d 488, 491 (Tenn. 1975); Tenn. Code Ann. § 28-3-204(a).

Tennessee’s statute of repose for claims relating to real or personal property provides:

All actions to recover damages for any deficiency in the design, planning, supervision, observation of construction, or construction of an improvement to real property, for injury to property, real or personal, arising out of any such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, observation of construction, construction of, or land surveying in connection with, such an improvement within four (4) years after substantial completion of such an improvement.

Tenn. Code Ann. § 28-3-202. If, however, an injury occurs in the fourth year after substantial completion, the plaintiff gains an additional year in which to file suit. Tenn. Code Ann. § 28-3-203.

There are two statutory exceptions to the applicability of the statute of repose. First, if the defendant is in possession or control of the premises, then the defendant is prohibited from relying on the statute of repose as a defense if the improvement is the proximate cause of injury or death underlying a plaintiff’s cause of action. See Tenn. Code Ann. § 28-3-202, -205(a). Second, if a defendant is found guilty of wrongful concealment or fraud in connection with the design, planning, supervision, observation of construction, construction of, or land surveying,” then the statute of repose is not an available defense. See Tenn. Code Ann. §§ 28-3-205(b), -202.

II. Breach of Contract

“In a breach of contract action, claimants must prove the existence of a valid and enforceable contract, a deficiency in the performance amounting to a breach, and damages caused by the breach.” *Fed. Ins. Co. v. Winters*, 354 S.W.3d 287, 291 (Tenn. 2011) (citing *ARC LifeMed, Inc. v. AMC–Tenn., Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005)).

Under Tennessee law, the plaintiff may recover damages to compensate the plaintiff for losses that are the natural and foreseeable result of the breach of contract. *Bush v. Cathey*, 598 S.W.2d 777, 783 (Tenn. Ct. App. 1979) (finding that purchasers were entitled to award of damages to compensate them for additional moving expenses incurred as result of vendor's failure to perform contract for sale of home). In construction cases, damages may include the value of the breaching party's non-performance or partial performance under the contract in addition to the cost of completion or the cost to remedy substantial defects. *See Wilhite v. Brownsville Concrete Co.*, 798 S.W.2d 772, 775 (Tenn. Ct. App. 1990) (holding that contractor defectively built pool and owners were entitled to recover the full cost of repairing the pool); *Allen v. Elliott Reynolds Motor Co.*, 230 S.W.2d 418, 420 (Tenn. Ct. App. 1950) (applying the doctrine of part performance where, in reliance on defendant's promise of exclusive automobile dealership, plaintiff incurred expenses in converting apartment house to automobile sales room and garage).

An arbitration provision in a contract for the construction of residential property must be separately signed or initialed by the parties. Tenn. Code Ann. § 29-5-302(a); *see State Farm Fire & Cas. Co. v. Easyheat, Inc.*, No. M2006-02363-COA-R3-CV, 2007 WL 3306765, at *1, 3 (Tenn. Ct. App. 2007) (holding that the parties were required to arbitrate the dispute although the arbitration provision in the contract for the construction of residential property was unsigned because the Federal Arbitration Act was applicable, which requires the enforcement of a written arbitration agreement when the contract evidences a transaction involving interstate commerce).

III. Negligence

To prevail on a claim for negligence, plaintiff must show: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct falling below the applicable standard of care amounting to a breach of that duty; and (3) causation in fact and proximate cause of damages or injury. *LDI Design, LLC v. Dukes*, No. M2003-02905-COA-R3-CV, 2005 WL 3555543, at *5 (Tenn. Ct. App. Dec. 28, 2005) (citing *McClenahan v. Cooley*, 806 S.W.2d 767, 774 (Tenn. 1991)); *see also United Am. Bank of Memphis v. Gardner*, 706 S.W.2d 639, 642 (Tenn. Ct. App. 1985).

The Tennessee Supreme Court held that contractors have an implied duty to perform services required by their contract with homeowners in a skillful, careful, diligent, and workmanlike manner, even in the absence of a written agreement. *Winters*, 354 S.W.3d at 293. The Court further held that the delegation of performance of a contract to a subcontractor does not relieve the contractor from the duties implicit in the original contract. *Winters*, 354 S.W.3d at 293-96.

IV. Breach of Warranty

A breach of warranty can be based on express warranty provisions contained in the contract between the plaintiff and the general contractor, the contract between the general contractor and a subcontractor or vendor, and/or warranties implied by law.

Tenn. Code Ann. § 47-2-314 provides for an implied warranty of merchantability with respect to goods. The Tennessee Supreme Court found that an implicit warranty exists with respect to the construction of homes: “[T]he home buying public has a legitimate expectation that the workmanship and materials used by the builder-vendor in the construction of a dwelling will meet the standard of the trade for homes in comparable locations and price range and that such a warranty is implicit in the contract and survives the passing of title to the real estate and the taking of possession, as an exception to the doctrine of caveat emptor.” *Dixon v. Mountain City Constr. Co.*, 632 S.W.2d 538, 541 (Tenn. 1982).

V. Indemnity Claims

A. Express Indemnity

Express indemnity claims derive from 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. See *Winter v. Smith*, 914 S.W.2d 527, 541-42 (Tenn. Ct. App. 1995). If one is to be indemnified for his own negligence, the indemnifying agreement must clearly and unequivocally so state. *Summers Hardware & Supply Co., Inc. v. Steele*, 794 S.W.2d 358, 363 (Tenn. App. Ct. 1990); see also *Kroger Co. v. Giem*, 387 S.W.2d 620, 626 (Tenn. 1965) (holding that in Tennessee it is nearly a “universal rule that there can be no recovery where there was concurrent negligence of both indemnitor and indemnitee unless the indemnity contract provides for indemnification in such case by ‘clear and unequivocal terms;’ and general words will not be read as expressing such an intent”).

Tennessee has recognized that the right of parties to allocate liability for future damages through indemnity clauses, under most circumstances, is not contrary to public policy. *Planters Gin. Co. v. Fed. Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 892 (Tenn. 2002). Tennessee courts have found, however, that indemnity clauses are invalid as to damages caused by gross negligence or willful conduct by the party to be indemnified. *Id.*

The Tennessee General Assembly has barred indemnity in certain cases as against public policy, including indemnity for damages resulting from the sole negligence of the indemnitee. Tenn. Code Ann. § 62-6-123.

B. Contribution and Implied Indemnity

The Tennessee Supreme Court, in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992), adopted the principles of comparative fault and, thus, limited the availability of contribution and implied indemnity. *McIntyre*, 833 S.W.2d at 58.

VI. Third-Party Beneficiaries

Tennessee has clearly established its rule on third-party beneficiaries: “[u]nder the modern rule, third parties may enforce a contract if they are intended beneficiaries of the contract If, on the other hand, the benefit flowing to the third party is not intended, but is merely incidental, the third party acquires no right to enforce the contract.” In order to maintain an action as an intended beneficiary, a third party must show: (1) a valid contract made upon sufficient consideration between the principal parties, and (2) the clear intent to have the contract operate for the benefit of a third party. *Owner-Operator Indep. Drivers Assoc., Inc. v. Concord EFS, Inc.*, 59 S.W.3d 63, 68-69 (Tenn. 2001).

Courts have also ruled that “unless the construction contracts involved clearly provide otherwise, prime contractors on construction projects involving multiple prime contractors will be considered to be intended or third party beneficiaries of the contracts between the project’s owner and all the other prime contractors.” *Moore Constr. Co., Inc. v. Clarksville Dep’t of Elec.*, 707 S.W.2d 1, 10 (Tenn. Ct. App. 1985).

If an agreement explicitly provides that there shall be no third-party beneficiary, then that provision should be enforced as a matter of law. *AmSouth Erectors, LLC v. Skaggs Iron Works, Inc.*, No. W2002-01944-COA-R3-CV, 2003 WL 21878540, at *3 (Tenn. Ct. App. Aug. 5, 2003); see *Owner-Operator Indep. Drivers Assoc., Inc.*, 59 S.W.3d at 72.

VII. Economic Loss Doctrine

In general, the economic loss doctrine “prohibits the recovery of purely economic damages for negligence when the plaintiff lacks privity of contract with the defendant.” *John Martin Co., Inc. v. Morse/Diesel, Inc.*, 819 S.W.2d 428, 430 (Tenn. 1991). The rationale behind the economic loss doctrine stems from the theory that a party should not be able to obtain relief under tort law for a dispute that should be settled under contract law. *Trinity Indus., Inc. v. McKinnon Bridge Co., Inc.*, 77 S.W.3d 159, 171-72, (Tenn. Ct. App. 2001).

In Tennessee, plaintiffs may recover on negligent misrepresentation or supervision claims from parties where there is no privity of contract, thus circumventing the economic loss doctrine. *John Martin Co., Inc.*, 819 S.W.2d at 431 (finding that a subcontractor could recover increased labor and material costs when the construction manager provided subcontractor with incorrect measurements for a concrete structure).

VIII. Recovery for Investigative Costs

Tennessee may allow recovery of investigative costs, but these types of damages are rarely awarded. *Chastain v. Tenn. Water Quality Control Bd.*, 555 S.W.2d 113, 115 (Tenn. 1977).

IX. Emotional Distress Claims

In Tennessee, the general rule is that damages for emotional distress claims are not recoverable in contract causes of action. *Johnson v. Woman's Hosp.*, 527 S.W.2d 133, 137 (Tenn. Ct. App. 1975); *Rice v. Van Wagoner Cos., Inc.*, 738 F. Supp., 252 (M.D. Tenn. 1990) (dismissing plaintiffs' claim for mental anguish damages as part of breach of contract damages).

The Tennessee Supreme Court follows the modern trend to "allow damages for mental anguish where it is clearly [foreseeable] within the terms of the contract or transaction and was negligently or wantonly caused by the defendant." See *Greyhound Lines v. Freels*, 144 S.W.2d 743, 745 (Tenn. 1940); see also *Whaley v. Perkins*, 197 S.W.3d at 670. ("Where the act occasioning the injury to the property is inspired by fraud, malice, or like natures, mental suffering is a proper element of damage.")

A homeowner may be able to recover compensatory damages for emotional distress because of injury to real property. For example, the Tennessee Supreme Court has indicated that the recovery of emotional injury damages that stemmed from injury to real property when misrepresentations had been made may be recoverable. See *Whaley*, 197 S.W.3d at 670.

X. Stigma Damages/Diminution In Value

In cases where the diminution in value is greatly exceeded by the cost of repair or completion, courts have held that the appropriate damages should equal the diminution in value. Tennessee courts have "uniformly held that the measure of damages for injury to real estate is the difference between the reasonable market value of the premises immediately prior to and immediately after injury, but if the reasonable cost of repairing the injury is less than the depreciation in value, the cost of repair is the lawful measure of damages." *Redbud Coop. Corp. v. Clayton*, 700 S.W.2d 551, 560 (Tenn. Ct. App. 1985).

XI. Economic Waste

As a general rule, the measure of damages is the cost of correcting the defects or completing the omissions. *GSB Contractors, Inc. v. Hess*, 179 S.W.3d 535, 542 (Tenn. Ct. App. 2005). However, in a case where this measure of damages would result in economic waste, "the courts generally adhere to the view that if a builder or contractor has not fully performed the terms of the construction agreement, but to repair the

defects or omissions would require a substantial tearing down and rebuilding of the structure, the measure of damages is the difference in value between the work if it had been performed in accordance with the contract and that which was actually done, or (as it is sometimes said) the difference between the value of the defective structure and that of the structure if properly completed.” *GSB Contractors, Inc.*, 179 S.W. 3d. at 542.

Despite this rule, there is some authority to the effect that “damages for a contractor's breach of a contract to construct a dwelling, where it is not constructed in accordance with the plans and specifications, are the amount required to reconstruct it to make it conform to such plans and specifications, rather than the difference in loan or market value on the finished dwelling, since unlike a commercial structure, a dwelling has an aesthetic value and must be constructed as the owner wants it, even though the finished dwelling may be just as good.” *Id.*

XII. Delay Damages

Damages for delay and an extension of time for performance are two types of relief available to a contractor when its performance is delayed through no fault of its own. *Moore Constr. Co., Inc.* 707 S.W.2d at 13 (ruling “that a contractor whose performance is delayed through no fault of its own has two types of relief available under the standard contract prepared by the American Institute of Architects. It first has the right to an extension of the time available for performance. In addition to a time extension, a contractor may have the right to be compensated for the increased costs it has incurred as a result of this delay.”).

“No damages for delay” clauses are commonly used in the construction industry. The clauses are meant to further the protection of the public interest and are “aimed generally against the contractor . . . with a view of limiting the cost of an improvement to the sum agreed upon. . . . Courts normally interpret such clauses according to their plain and ordinary meaning.” *Thomas & Assocs., Inc. v. Metro. Gov’t of Nashville*, No. M2001-00757-COA-R3-CV, 2003 WL 21302974, at *13 (Tenn. Ct. App. June 6, 2003).

XIII. Recoverable Damages

A. Direct Damages

Tennessee courts have held that “as a general rule, the measure of damages for defects and omissions in the performance of a construction contract is the reasonable cost of the required repairs. This is especially true when the structure involved is the owner's home. However, in the event that the cost of repairs is disproportionate when compared with the difference in value of the structure actually constructed and the one contracted for, the diminution value may be used instead as the measure of damages.” *GSB Contractors, Inc. v. Hess*, 179 S.W.3d at 543.

In some situations, reconstruction value may be the correct measure of damages:

It seems to us that when an owner contracts to have a dwelling constructed he wants a particular structure, not just any structure that could be built for the same price. We, therefore, think that the trial court was correct in awarding damages equal to the amount required to reconstruct the dwelling so as to make it conform to the specifications, rather than adopting the difference in loan value on the dwelling as the measure of damages, as contended by appellant.

Id. at 542.

B. Punitive Damages

Punitive damages are awarded only in the most egregious cases. A plaintiff must prove the defendant's intentional, fraudulent, malicious, or reckless conduct by clear and convincing evidence to be awarded punitive damages. Tenn. Code Ann. § 29-39-104(a)(1).

Cases in which punitive damages are sought are bifurcated into the compensatory damages phase and, if compensatory damages are awarded, a punitive damages phase. Tenn. Code Ann. § 29-39-104(a)(2).

To determine the amount of punitive damages the court will weigh the following elements: the defendant's financial affairs, financial condition, and net worth; the nature and reprehensibility of defendant's wrongdoing; the defendant's awareness of the amount of harm being caused and defendant's motivation in causing the harm; the duration of defendant's misconduct and whether defendant attempted to conceal the conduct; the expense plaintiff has borne in the attempt to recover the losses; whether defendant profited from the activity, and if defendant did profit, whether the punitive award should be in excess of the profit in order to deter similar future behavior; whether, and the extent to which, defendant has been subjected to previous punitive damage awards based upon the same wrongful act; whether, once the misconduct became known to defendant, defendant took remedial action or attempted to make amends by offering a prompt and fair settlement for actual harm caused; and any other circumstances shown by the evidence that bear on determining the proper amount of the punitive award. Tenn. Code Ann. § 29-39-104(2)-(4).

Absent certain circumstances, the amount of punitive damages recoverable is capped at two times compensatory damages or \$500,000, whichever is greater. Tenn. Code Ann. § 29-39-104(a)(5).

C. Attorneys' Fees

Tennessee follows the "American Rule" providing that attorneys' fees are generally not recoverable in the absence of a contract provision or statute allowing for their recovery. *See Whitelaw v. Brooks*, 138 S.W.3d 890, 893 (Tenn. Ct. App. 2003) (holding that "in the absence of a contract, statute, or recognized ground of equity so providing there is no right to have attorneys' fees paid by an opposing party in civil litigation")

One commonly used statute to recover attorneys' fees in construction cases is the Prompt Pay Act. Tenn. Code Ann. §§ 66-34-101 *et seq.* The Prompt Pay Act allows attorneys' fees in construction cases to be awarded to an unpaid contractor if that contractor is the "prevailing party" and the non-prevailing party acted in "bad faith." Tenn. Code Ann. § 66-34-602(b). The Tennessee Supreme Court has held "bad faith" to include "actions in knowing or reckless disregard of . . . contractual rights." *Trinity Indus., Inc. v. McKinnon Bridge Co., Inc.*, 77 S.W.3d 159, 181 (Tenn. Ct. App. 2001) (quoting *Glazer v. First Am. Nat. Bank*, 930 S.W.2d 546, 549 (Tenn. 1996)) (holding an award of attorney's fees was inappropriate because the general contractor appeared to honestly believe that it did not owe money to the plaintiff).

In addition, a plaintiff may recover attorneys' fees in cases of malicious harassment or frivolous appeals. *See* Tenn. Code. Ann. §§ 4-21-701, 27-1-122.

D. Expert Fees and Costs

Under Tenn. R. Civ. P. 54.04(2), "costs not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. Discretionary costs allowable are reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials, reasonable and necessary interpreter fees for depositions or trials, and guardian ad litem fees; travel expenses are not allowable discretionary costs." *Id.*; *see also Mass. Mut. Life Inc. Co. v. Jefferson*, 104 S.W.3d 13, 38 (Tenn. Ct. App. 2002) (stating that "prevailing parties cannot recover expert witness fees for preparing for depositions or trial, no matter how reasonable and necessary these fees are").

XIV. Insurance Coverage for Construction Claims

It is well established that the duty to defend an insured is more extensive than the duty to indemnify the insured. *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.*, 216 S.W.3d 302, 305 (Tenn. 2007). In determining whether a duty to defend has arisen, the Tennessee Supreme Court has stated:

[W]hether a duty to defend arises depends solely on the allegations contained in the underlying complaint. Accordingly, the insurer has a duty to defend when the underlying complaint alleges damages that are within the risk covered by the insurance contract and for

which there is a potential basis for recovery. The duty to defend arises if even one of the allegations is covered by the policy. The duty to defend is broader than the duty to indemnify because the duty to defend is based on the facts alleged, while the duty to indemnify is based upon the facts found by the trier of fact. Any doubt as to whether the claimant has stated a cause of action within the coverage of the policy is resolved in favor of the insured.

Travelers Indem. Co. of Am., 216 S.W.3d at 305.

When determining coverage questions, the essential elements of a CGL policy should be construed in the following order: the declarations, insuring agreement and definitions, exclusions, conditions, and endorsements. *Standard Fire Ins. Co. v. Chester O'Donley & Assocs., Inc.*, 972 S.W.2d 1, 7 (Tenn. Ct. App. 1998).

If a policy is ambiguous as to when an injury must occur to be covered, then Tennessee law requires "that language must be construed against the insurance company and in favor of the insured." *Am. Justice Ins. Reciprocal v. Hutchison*, 15 S.W.3d 811, 815 (Tenn. 2000). An insurance policy's language is ambiguous if it "is susceptible of more than one reasonable interpretation." *Id.*

Interpreting one "occurrence" policy, the Tennessee Supreme Court has stated that "[a]n 'occurrence policy' is a policy in which the coverage is effective if the negligent act or omitted act occurs within the policy period, regardless of the date of discovery." See *State of Tenn. ex rel. McReynolds v. United Physicians Ins. Risk Retention Grp.*, 921 S.W.2d 176, 177 n.1 (Tenn. 1996).

In a case involving a tree that fell onto an apartment building killing a child, the Sixth Circuit held that even though the tree fell three months after the owner had cancelled the insurance contract and sold the apartment building, the occurrence of negligence, not the injury, occurred during the coverage period. *State Farm Fire & Cas. Co. v. McGowan*, 421 F.3d 433, 440 (6th Cir. 2005) (applying Tennessee law). The Court went on to say that "even though an injury must manifest itself in order to trigger [the insurer's] obligation to defend [the insured], the policy requires only that the occurrence must take place during the policy period, not the resulting injury." *Id.*

Defective workmanship by the insured is usually excluded from coverage under the "Your Work" exclusion of a CGL policy. See, e.g., *Vernon Williams & Son Constr., Inc. v. Cont'l Ins. Co.*, 591 S.W.2d 760, 765 (Tenn. 1979) (stating that "the standard comprehensive general liability policy does not provide coverage to an insured-contractor for a breach of contract action grounded upon faulty workmanship or materials, where the damages claimed are the cost of correcting the work itself"). Some policies include the work performed by a subcontractor under the "Your Work" exclusion, while others do not. See, e.g., *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.*, 216 S.W.3d 302, 310 (Tenn. 2007) ("The subcontractor exception

provides that any damages arising out of the work performed by a subcontractor fall outside the [Your Work] ‘exclusion’ and are covered under the CGL.”). It is important to read the policy and exclusions carefully to determine the parameters of the “Your Work” exclusion.

If an insured’s work causes damage to existing construction or the work of another, the “Your Work” exclusion generally does not apply.

XV. Mechanics’ and Materialmen’s Liens

A. Introduction

The statutory requirements for obtaining mechanics’ and materialmen’s liens (collectively, “mechanics’ liens”) are set forth under Tenn. Code Ann. §§ 66-11-101 *et seq.* As a threshold matter, the statute states that mechanics’ liens are available “on any lot or tract of real property upon which an improvement has been made by a prime contractor and any remote contractor. The lien shall secure the contract price.” Tenn. Code Ann. § 66-11-102(a).

The statute defines “real property” broadly to include “real estate, lands, tenements and hereditaments, corporeal and incorporeal, and fixtures and improvements thereon.” Tenn. Code Ann. § 66-11-101(13).

B. Attachment of the Mechanics’ Lien

Mechanics’ liens “attach and take effect from the time of the visible commencement of operations, excluding, however, demolition, surveying, excavating, clearing, filling or grading, placement of sewer or drainage lines, or other underground utility lines or work preparatory therefor, erection of temporary security fencing and the delivery of materials therefor.” Tenn. Code Ann. § 66-11-104(a).

If “there is a cessation of all operations at the site of the improvement for more than ninety days and a subsequent visible resumption of operations, any lien for labor performed or for materials furnished after the visible resumption of operations shall attach and take effect only from the visible resumption of operations.” Tenn. Code Ann. § 66-11-104(b).

C. Prime Contractor vs. Remote Contractor

Under the statute, a prime contractor is a “person . . . in direct privity of contract with an owner” and can include “any person . . . who supervises or performs work or labor or who furnishes material, services, equipment, or machinery in furtherance of an improvement.”

In contrast, a remote contractor is a “person . . . who provides work or labor or who furnishes material services, equipment or machinery in furtherance of any improvement under a contract with a person other than an owner.” Tenn. Code Ann. § 66-11-101(14). A remote contractor cannot obtain a lien on residential property unless a prime contractor is the owner of the property. Tenn. Code Ann. § 66-11-146(a)(2).

D. Priority and Enforcement – Prime Contractors

1. Perfection of a Prime Contractor’s Lien

A prime contractor does not have to serve or record any notice regarding its lien in order for it to be valid. Tenn. Code Ann. § 66-11-106. A prime contractor should, however, record the lien to place subsequent purchasers and/or encumbrancers for value on notice of the lien. See Tenn. Code Ann. § 66-11-111.

The statute provides a form “Notice of Lien” that a lienor can use under Tenn. Code Ann. § 66-11-112(d).

2. Enforcement of a Prime Contractor’s Lien

In order to enforce the lien, a prime contractor must file a verified complaint in a court of law or equity or in a court of general sessions seeking issuance of an attachment. Tenn. Code Ann. § 66-11-126. The clerk of the court will require the “plaintiff or the plaintiff’s attorney to execute a bond with a sufficient surety payable to the defendant or defendants in the amount of one thousand dollars (\$1,000) or the amount of the lien claimed, whichever is less.” *Id.*

A prime contractor must enforce the lien in a court of competent jurisdiction within one year from the completion of the work. The statute, however, does not require attachment to be issued by a Court within the one-year time period. See Tenn. Code Ann. § 66-11-126(3) (stating that “an action . . . is timely filed if a suit seeking the issuance of an attachment is filed within the applicable period of time, even if the attachment is not issued or served within the applicable period.”); see also Tenn. Code Ann. § 66-11-106 (stating that the applicable period of time to enforce a prime contractor’s lien is “one (1) year after the date the improvement is complete or is abandoned”).

E. Priority and Enforcement – Remote Contractors

1. Notice of Non-Payment

To perfect a lien, “[e]very remote contractor with respect to an improvement, except one-family, two-family, three-family and four-family residential units, shall serve, within ninety days of the last day of each month in which work or labor was provided or materials, services, equipment or machinery furnished and for which the remote contractor intends to claim a lien . . . a notice of

nonpayment . . . to the owner and prime contractor in contractual privity with the remote contractor if its account is, in fact, unpaid.” Tenn. Code Ann. § 66-11-145(a). The statute outlines the necessary information required in the notice and also provides a form “Notice of Non-Payment” under Tenn. Code Ann. § 66-11-145(d). A remote contractor who fails to provide notice under Section 66-11-145(a) loses the right to claim a lien for the month in question. Tenn. Code Ann. § 66-11-145(b).

2. Notice of Lien

The remote contractor must serve a Notice of Lien in writing on the owner of the property on which the remote contractor made improvements within ninety days after the date the improvement is complete or is abandoned. Tenn. Code Ann. § 66-11-115(a)(2) (citing Tenn. Code Ann. § 66-11-112(a)). The Notice of Lien can be in substantially the same form as set forth in Tenn. Code Ann. § 66-11-112(d).

The remote contractor must also record the Notice of Lien to preserve priority:

[T]he lienor . . . is required to record in the office of the register of deeds of the county where the real property, or any part affected, lies, a sworn statement of the amount for, and a reasonably certain description of the real property on, which the lien is claimed Recordation is required to be done no later than ninety days after the date of improvement is complete or is abandoned.

Tenn. Code Ann. § 66-11-112(a).

3. Enforcement of Remote Contractor’s Lien

Like prime contractors, remote contractors must file a verified complaint in a court of law or equity or in a court of general sessions seeking issuance of an attachment to enforce the lien. Tenn. Code Ann. § 66-11-126. The clerk will require the “plaintiff or the plaintiff’s attorney to execute a bond with a sufficient surety payable to the defendant or defendants in the amount of one thousand dollars (\$1,000) or the amount of the lien claimed, whichever is less.” Tenn. Code Ann. § 66-11-126(3).

A remote contractor must enforce the lien in a court of competent jurisdiction within ninety days from the date of service of the Notice of Lien. The statute, however, does not require attachment to be issued within the ninety-day time period. *See* Tenn. Code Ann. § 66-11-126(3) (stating that “an action . . . is timely filed if a suit seeking the issuance of an attachment is filed within the applicable period of time, even if the attachment is not issued or served within the applicable period”); *see also* Tenn. Code Ann. § 66-11-115(b) (stating that “the lien shall continue for the period of ninety days from the date of service of notice

in favor of the remote contractor, and until the final termination of any suit for its enforcement properly brought . . . within that period”).

F. Other Considerations

1. Bond to Discharge the Lien

If a lien is recorded as provided by the statute, “any person may record a bond to indemnify against the lien.” Tenn. Code Ann. § 66-11-142(a). Filing a bond operates as a discharge of the lien. Tenn. Code Ann. § 66-11-142(a)-(b).

If the owner records a payment bond totaling one hundred percent of the prime contractor’s contract price, attachment of the real property is unnecessary and the lien is enforced by making a claim against the bond. Tenn. Code Ann. §§ 66-11-124, 126(5).

2. Notice of Completion

In order to protect the owner or purchaser of improved real property against unrecorded liens, the statute allows the owner to record a Notice of Completion in the office of the register of deeds in the county where the real property or any affected part of the real property is located. Tenn. Code Ann. § 66-11-143. The statute provides a form “Notice of Completion” at Tenn. Code Ann. § 66-11-143(g).

The owner is required to serve a copy of the Notice of Completion on the prime contractor, except such notice is not required when the owner acts as general contractor. Tenn. Code Ann. § 66-11-143(a). The owner is also required to serve a copy of the Notice of Completion on any remote contractor that has served a Notice of Non-Payment. Tenn. Code Ann. § 66-11-143(d).

3. Attorneys’ Fees for Failure to Release a Lien

“If a lienor whose lien has been forfeited, expired, satisfied or adjudged against the lienor in an action on the lien, fails to cause the lien provided by this chapter to be released within thirty days after service of written notice demanding release, the lienor shall be liable to the owner for all damages arising therefrom, and costs, including reasonable attorneys' fees, incurred by the owner.” Tenn. Code Ann. § 66-11-135(a).

4. Amount Exaggeration

If, in any action to enforce the lien provided by this chapter, the court finds that any lienor has willfully and grossly exaggerated the amount for which that person claims a lien, as stated in that person's notice of lien or pleading filed, in

the discretion of the court, no recovery may be allowed thereon, and the lienor may be liable for any actual expenses incurred by the injured party, including attorneys' fees, as a result of the lienor's exaggeration. Tenn. Code Ann. § 66-11-139.

XVI. Retainage

A. Introduction

The Prompt Pay Act of 1991 ("Prompt Pay Act" or the "Act") was created to allow contractors, subcontractors, laborers, and materialmen a mechanism to ensure that they are paid for their services and/or materials within a reasonable time. Tenn. Code Ann. §§ 66-34-101 *et seq.* Under the Prompt Pay Act, all construction contracts on any project in Tennessee, both public and private, allow the owner to withhold up to five percent of the gross amount of the contract. Tenn. Code Ann. § 66-34-103.

B. Releasing the Retainage

The owner shall pay all retainage for work completed pursuant to the terms of any contract to the prime contractor within ninety days after completion of the work or within ninety days after substantial completion of the project for work completed, whichever occurs first. Tenn. Code Ann. § 66-34-103(b). The prime contractor is required to pay all retainage due any subcontractor within ten days after receipt of the retainage from the owner. *Id.* Any subcontractor receiving the retainage from the prime contractor shall pay to any subsubcontractor or material supplier all retainages due the subsubcontractor or material supplier within ten days after receipt of the retainage. *Id.*

C. Funding the Retainage

If a prime construction contract is valued at \$500,000 or greater, the retainage must be deposited in an interest-bearing escrow account, and compliance with the requirements of Tenn. Code Ann. § 66-34-104 may not be waived by contract. Tenn. Code Ann. § 66-34-104(g)-(h).

Failure to abide by the provisions of the Prompt Pay Act may subject violators to daily fines of up to \$3,000, claims for attorneys' fees, and even criminal penalties, including a Class A misdemeanor. Tenn. Code Ann. §§ 66-34-103(e),-602(b).

D. Relief Under the Prompt Pay Act

An unpaid contractor must serve notice upon the party failing to make payment of the provisions of the Prompt Pay Act and of its intent to seek relief under the statute. Tenn. Code Ann. § 66-34-602(a)(1). The notification must be submitted by registered or certified mail, with return receipt requested. *Id.* § 66-34-602(a)(2). If the notified party

fails to make payment or give legal justification for its non-payment within ten calendar days after receipt of the notice, then the unpaid contractor may file suit in the chancery court where the real property is located. *Id.* § 66-34-602(a)(3).

If a plaintiff contractor files suit before the ten calendar day waiting period expires, the right to seek remedies under the Prompt Pay Act will be lost. *Id.* The notified party can foreclose the contractor's right to remedies under the Act by either: 1) submitting payment for the disputed amount within ten days, or 2) sending notice setting forth "adequate legal reasons" for failing to make payment under the contract. *Id.*

E. Limitations to the Prompt Pay Act

There are limitations on the applicability of the Prompt Pay Act. For example, the Act does not apply to residential construction contracts, including improvements to property containing one to four single-family dwellings. Tenn. Code Ann. § 66-34-702. Further, the Act does not apply "to any bank, savings bank, savings and loan association, industrial loan and thrift company, other regulated financial institution or insurance company." Tenn. Code Ann. § 66-34-703.