



# **STATE OF KANSAS CONSTRUCTION LAW COMPENDIUM**

Prepared by  
Lee B. Brumitt  
Patrick K. McMonigle  
Dysart Taylor Cotter McMonigle & Montemore, P.C.  
4420 Madison Avenue  
Kansas City, MO 64111  
(816) 931-2700  
[www.dysarttaylor.com](http://www.dysarttaylor.com)

This outline is intended to provide a general overview of Kansas Construction Law. While the authors have described several topics below, the discussion of any particular topic is not intended to be a total analysis of the area.

## I. ACTIONABLE CLAIMS IN CONSTRUCTION DEFECT LITIGATION

### A. Breach of Contract

Kansas recognizes a cause of action in the construction context for breach of contract claims, but one who claims damages on account of breach of contract must show not only the injury sustained, but also, with reasonable certainty, the amount of damages suffered as a result of the injury or breach. In order for the evidence to be sufficient to warrant a damages award, there must be some reasonable basis for computation that will enable the jury to arrive at an approximate estimate thereof. *State of Kansas ex rel. v. Carla Stovall*, 278 Kan. 3, 91 P.3d 531 (2004).

Damages recoverable under breach of contract are limited to those damages that may fairly be considered as arising in the usual course of things from the breach, or as may reasonably be assumed to have been within the contemplation of both parties as the probable result of the breach. Damages which are not a result of the breach, but rather remote, cannot serve to support a judgment. *Kansas State Bank v. Overseas Motosport, Inc.*, 222 Kan. 26, 563 P.2d 414 (1977).

Loss of profits resulting from a breach of contract may be recoverable as damages when such profits are proved with reasonable certainty and may reasonably be considered to have been contemplated by the parties. *Vickers v. Wichita State University*, 213 Kan. 614, 518 P.2d 512 (1974); *Zenda Grain & Supply Co. v. Farmland Industries, Inc.*, 20 Kan.App.2d 728, 894 P.2d 881 (1995). See also *MLK, Inc., v. University of Kansas*, 940 P.2d 1158, 23 Kan.App.2d 876 (2006).

A contracting party whose performance is prevented by an adverse party is not obligated to perform; prevention is itself a breach of contract, making the preventing party liable for damages for the breach, and excusing the other party from completion of his performance. *Briney v. Toews*, 150 Kan. 489, 95 P.2d. 355 (1939).

In *Ford Motor Credit Co. v. Suburban Ford*, 237 Kan. 195, 699 P.2d 992 (1985), the Kansas Supreme Court held that tort claims could not be maintained between parties in a contractual relationship to impose tort duties concerning matters that the parties had allocated themselves by contract.

When the elements of both tort and breach of contract are present, the key difference is whether the contract calls for specific results. When the contract does not call for the specific result at issue, the action is more in the nature of violation of the duty imposed by law instead of failure to perform a duty arising by reason of agreement. In such a case, plaintiff's complaint is not that the defendant failed to perform the contract, but that the defendant failed to perform it with due care. *Hunt v. KMG Main Herdman*, 17 Kan.App.2d 418, 839 P.2d 45 (1992). Kansas courts have held that comparative or

contributory negligence principles do not apply to breach of contract cases where a plaintiff has requested only economic damages as a remedy. *Foodbrands Supply Chain Services, Inc. v. Terracon, Inc.*, 2003 WL 23484633 (D. Kan. 2003); *Haysville U.S.D. No. 261 v. Gaf Corp., et al.*, 233 Kan. 635, 666 P.2d 192 (1983).

“Liquidating agreements” designed to overcome legal impediments due to privity of contract and allow contractors to bring an action against the owner on behalf of their subcontractors have three basic elements: (1) the imposition of liability upon the general contractor for the subcontractor’s increased costs, thereby providing the general contractor with a basis for legal action against the owner; (2) a liquidation of liability in the amount of the general contractor’s recovery against the owner; and (3) a provision that provides for the “pass-through” of that recovery to the subcontractor. *Roof-Techs International, Inc. v. The State of Kansas*, 30 Kan.App.2d 1184, 57 P.3d 538 (2002).

Kansas courts have routinely found contracts enforceable even though one or more terms were left open at the time the contract was formed.” K.S.A. 84-2-204. In *Christopher & Son v. Kansas Paint & Color Co.*, 215 Kan. 185, 523 P.2d 709, the court considered whether the parties entered into a binding and enforceable oral contract. In that case, the defendant questioned the existence of a contract at the time its bid was accepted, arguing that an oral contract regarding a sale of paint was unenforceable because at the time it was made many essential matters were not covered. The court recognized any contractual relationship was necessarily based on the specifications for the paint and the bid. The court laid out the pertinent statutory section, K.S.A. 84-2-204(3) as set forth above, and stated: “[T]hose drafting the statute intended that the omission of even an important term does not prevent the finding under the statute that the parties intended to make a contract.” 215 Kan. at 193, 523 P.2d 709 (quoting *Southwest Engineering Co., Inc. v. Martin Tractor Co., Inc.*, 205 Kan. 684, 692, 473 P.2d 18 [1970]).

## B. Negligence

Negligence actions remain viable remedies for construction defect claims where there is no contractual privity. *Kristek v. Katron*, 7 Kan.App.2d 495, 644 P.2d 480 (1982). A purchaser may recover property damage caused by a leak from an improperly constructed roof against a builder in negligence in the absence of contractual privities. A claim may not be available in circumstances in which the matter is covered by contract. A general contractor may be liable for a failure to keep premises in a safe condition even though the general contractor had turned his keys over to a third party because the contractor had returned to the building and instructed workers to prevent access to dangerous areas. *Miller v. Zep Mfg. Co.*, 249 Kan. 34, 815 P.2d 506 (1991).

But the owner of a construction company, who looked at the church’s structural damage at the church’s request and pointed out his recommendations to an engineer, could not be liable for his failure to warn the neighbors of the church who were killed when the church collapsed on their residence. *Gooch v. A.M.E. Church*, 246 Kan. 663, 792 P.2d 993 (1990). Such contractor did not assume the duty owed by church to warn the neighbors because his inspection was conducted for his own benefit in determining whether to bid on repair job.

However, negligence claims carry with them the application of comparative fault, which may provide a defense or at least a mechanism for reduction of exposure to the party against whom it is brought. K.S.A. 60-258a. The concept of comparative negligence/fault in Kansas as applied to all causes of action is based on the “less than or 49% rule.” The injured or damaged party may recover only when his fault is less than the fault of the parties against whom claim for recovery was made. If the plaintiff and the defendant(s) are equally at fault, there can be no recovery. K.S.A. 60-258a. The Kansas Comparative Negligence Act abolished joint and several liability, contribution among tortfeasors, and active/passive negligence, but permits modified implied comparative indemnity where a tortfeasor settles with the plaintiff for the full amount and proceeds after the other tortfeasors in the chain of distribution in product liability cases or contracting parties in construction defect cases. The Act did not abolish the defense of mitigation of damages and the defense of assumption of risk in a very restricted periphery. *Jackson v. City of Kansas City, Kansas*, 235 Kan. 278, 680 P.2d 877 (1984).

Tort claims, such as negligence and implied warranty in tort, are subject to the Economic Loss Rule where there is no personal injury or fiscal damage to property. *Prendeville v. Contemporary Homes, Inc.*, 32 Kan.App.2d 435, 83 P.3d 1257 (2004). However, the Kansas Supreme Court recently held, that the economic loss doctrine should *not* bar claims by *homeowners* seeking to recover economic damages resulting from negligently performed residential construction services when the homeowner alleges the breach of a common law or statutory duty beyond the breach of a mere contractual duty. *David v. Heck*, 270 P.3d 1102 (Kan. 2011).

### C. ImpliedWarranty

#### 1. Implied Warranty of Workmanlike Performance

The law in Kansas is that there is “implied in every contract for work or services a duty to perform it skillfully, carefully, diligently, and in a workmanlike manner.” *Zenda Grain & Supply Co. v. Farmland Industries*, 20 Kan.App.2d 728, 894 P.2d 881 (1995) quoting 17A Am.Jur.2d, Contracts § 627, p. 636. See also *Crabb v. Swindler*, 184 Kan. 501, 337 P.2d 986 (1959).

Although implied warranties are occasionally referred to as “promises,” they are not promises at all. An express warranty is a promise; an implied warranty is imposed upon the parties by operation of law and is only consensual in the most liberal use of that term. 17A Am.Jur.2d, Contracts § 627, pp. 636-37. The cause of action sounds either in contract or tort, or both. *Ware v. Christenberry*, 7 Kan.App.2d. 1, 637 P.2d 452 (1981). The most significant differences between contract and tort theories are the applicable statutes of limitation, the application of comparative fault statutes and the Economic Loss Doctrine. The implied warranty theory is subject to a three (3) year statute of limitations that begins to run at the time of the breach. *Ruthrauff v. Kensy*, 214 Kan. 185, 519 P.2d 661 (1974). By contrast, the tort based implied theory carries a two-year statute that begins to run when substantial damage first occurs or the fact of injury becomes reasonably ascertainable to the injured party. *Chavez v. Saun*, 1 Kan.App. 2d 564, 571 P.2d 61 (1977). If the owner chooses to proceed in tort, the comparative fault statute and the Economic Loss Doctrine will apply, except in residential construction cases. K.S.A. 60-258a; *Prendeville v. Contemporary Homes, Inc.*, 32 Kan.App.2d 435, 83 P.3d 1257 (2004); *David v. Heck*, 270 P.3d 1102 (Kan. 2011).

## 2. Spearin Doctrine-Plans and Specifications

The Spearin Doctrine states that an owner of a construction project impliedly warrants the contract documents, including but not limited to the plans, are accurate and suitable such that the contractor can perform its work in accordance therewith. *Roof-Techs International, Inc. v. State of Kansas*, 30 Kan.App.2d 1184, 1196, 57 P.3d 538, 548 (2002). In *Heman Construction Co. v. Mason*, 112 Kan. 648, 212 P. 1089 (1923), the Kansas Supreme Court quoted from *Spearin* with apparent approval. But in dicta the court held that the Spearin Doctrine was not available to the contractor who had failed to follow the plans and specifications and therefore could not blame the resulting problems on them. In *Green Construction Company v. The Kansas Power & Light Company*, 1 F.3d 1005 (10<sup>th</sup> Cir. 1993), applying Kansas law, acknowledged that if the owner impliedly warranted the plans and specifications, and then breached the warranty, the contractor could recover. And the contractor has a duty to make an independent inspection and reliance on the owner's specifications may very well be unreasonable.

Thus, based on the *Heman* dicta and *Green*, Kansas recognizes the owner's implied warranty concerning plans and specifications. This effectively relieves the contractor from responsibility for a bad result if it is caused by the defective plans and specifications. But this warranty may be effectively undercut if the contractor was allocated responsibility to independently determine the defective aspect of the documents and information provided, or if the contractor is otherwise placed on sufficient notice that reliance on the information is or may not be appropriate.

### D. Breach of Warranty - UCC

Suppliers and others who provide goods, not services, generally fall within the ambit of the Uniform Commercial Code concerning contract theories. K.S.A. 84-2-102, *Kansas Structural Steel Co. v. L.G. Barcus & Sons, Inc.*, 217 Kan.App. 94, 535 P.2d 419 (1975). But when both goods and services are provided, the problem is more complex in characterizing the primary nature of the relationship. Tort based theories against suppliers in connection with defects also may fall within the Kansas Products Liability Act. K.S.A. 60-3301, et seq.

### E. Misrepresentation and Fraud

Notwithstanding limitations on tort actions, it appears that an action for fraud, at least fraud that induced the contracted issue, may still be applicable between parties litigating responsibility for construction defects. *Green Construction Co. v. Kansas Power & Light Co.*, 732 F.Supp. 1550 (D. Kan. 1990). In that case the court permitted the contractor to maintain a fraud claim against the owner who was alleged to have withheld knowledge of unsatisfactory soil conditions during the bidding process.

The necessary elements of fraud are: (1) that the representation was made as a statement of a material fact; (2) that the statement was known to be untrue by the party making it, or was made in reckless disregard for the truth; (3) that the party alleging fraud was justified in relying upon the statement; (4) that the party alleging fraud actually did rely upon the statement; and (5) that as a result of this reliance, the party alleging fraud was damaged. *Miles v. Love*, 1 Kan.App.2d 630, 631-32, 573 P.2d

622, 624 (1977).

But Kansas courts follow the established rule that innocent misrepresentations cannot support an affirmative claim for money damages. *Triolo v. ECRI*, 1997 WL 728247 (D. Kan. 1997). A developer, whether or not liable in contract or warranty, could be held liable in fraud for failure to disclose soil problems even in the absence of privity where claimants were within a class of persons reasonably expected to rely upon the misrepresentation or concealment of the latent defect. *Griffith v. Byers Construction Co. of Kansas, Inc.*, 212 Kan. 65, 510 P.2d 198 (1973). Also a seller of a house may be liable in fraud for non-disclosure of knowledge of a roof defect. *Sippy v. Cristich*, 4 Kan.App.2d 511, 609 P.2d 204 (1980).

#### F. Strict Liability Claims

Product liability claims are governed by the requirements and restrictions of the Kansas Products Liability Act, K.S.A. 60-3301, et seq. Even claims of failure to warn or instruct, misrepresentation, concealment or non-disclosure (where negligent or innocent) as well as strict liability and breach of warranties, expressed and implied, are “product liability claims” within the meaning of the Product Liability Act.

In K.S.A. 60-3302(d) defines “harm” as follows:

1. Damage to property;
2. Personal physical injuries, illness and death;
3. Mental anguish or emotional harm attended to such personal physical injuries, illness or death. The term “harm” does not include direct or consequential economic loss.

These claims cannot be brought in tort according to the “Economic Loss Rule” which states that in part, a products liability action based on tort cannot be maintained for pure economic loss has been found by Kansas courts to include “the loss of the bargain of damages, costs of replacement or repair, loss of profits, loss of good will and loss of business reputation.” *Professional Lens Plan, Inc., v. Polaris Leasing Corp.*, 234 Kan.742, 675 P.2d 887 (1984). In *Koss Construction v. Caterpillar, Inc.*, 25 Kan.App.2d 200, 960 P.2d 255 (1998), the Court of Appeals held that the Economic Loss Doctrine applies to damage to the product itself as between a commercial buyer and its seller, absent privity. In *Prendiville v. Contemporary Homes Inc., supra*, the Court of Appeals held that the Economic Loss Rule barred a plaintiff’s negligence claim in a residential home defect case. In *David v. Heck, supra*, the Kansas Supreme Court excepted homeowners in residential construction cases from the economic loss doctrine in negligence cases, but it is unclear whether the David case extends to strict liability claims.

#### G. Kansas Consumer Protection Act (KCPA)

The Kansas Consumer Protection Act, K.S.A. 50-623, et seq. applies to consumer transactions including the construction of a home or any remodeling of the home. Generally, the purpose of the KCPA is “to stop...(deceptive and unconscionable acts)...(and) to provide consumers with an avenue to recover damages suffered.” *Alexander v. Hall*, 268 Kan. 812, 822-23, 1 P.3d 899, 907 (2000). The supplier

in a consumer transaction may not exclude, modify or limit the implied warranties of merchantability and fitness for a particular purpose, nor may he exclude, modify or limit any remedy provided by law, which includes the measure of damages available for breach of implied warranty. The consumer may bring an individual or a class action. Attorney's fees are recoverable. K.S.A. 50-634. Civil penalties are also available. K.S.A. 50-636.

H. The Kansas Construction Defects Act - K.S.A. 60-4701, et seq.

In 2003, the Governor of the State of Kansas signed the Kansas Construction Defect Act, K.S.A. 60-4701, et seq. This concerns the construction of single family houses, duplexes or multi-family units designated for residential use in which the title to each individual unit is transferred to the owner under a condominium or cooperative system including common areas or improvements owned or maintained by the association. It does not apply to manufactured homes.

Before an action can be brought against a contractor for the construction of a dwelling, the claimant must serve an initial notice of claim asserting a contract defect claim. Within fifteen (15) days the contractor shall serve a copy of the notice on all subcontractors. Within thirty (30) days each contractor notified shall serve a written response on the claimant either proposing an inspection, an offer to remedy the defect at no cost to the claimant by a specific date, an offer to compromise and settle the claim by monetary payment without inspection within a specific date, or a statement rejecting the disputed claim.

If the contractor does not respond in any way to the claimant's defect claim or refuses service of the claim, the claimant can bring a lawsuit. But if the claimant agrees to an inspection, it shall occur within thirty (30) days of the claim. Within thirty (30) days after the inspection, the contractor shall serve a written offer either to remedy the defect, offer a compromise settlement, or state that the contractor will not proceed with any further remedy of the defect. If the contractor does not respond or if the claimant receives a written statement that the contractor will not precede further to remedy the defect, the claimant may bring an action against the contractor without further notice.

If the claimant rejects the offer made by the contractor to either remedy the construction defect or to make the monetary payment, the claimant shall serve written notice of the claimant's rejection on the contractor. Thereafter, the claimant may bring an action against the contractor without further notice.

Any claimant accepting an offer of the contractor to remedy the construction defect shall do so by serving the contractor with written notice of acceptance no later than thirty (30) days after receipt of the offer. If the claimant accepts the contractor's offer to repair a defect described in the notice of claim, the claimant shall provide the contractor and its agent with reasonable access to the claimant's dwelling during normal working hours to perform and complete the construction by the timetable stated in the offer.

Absence of good cause shall preclude the contractor from asserting that the claimant did not comply with the provisions of this Act.

The Kansas Construction Defects Act does not address defective remedial work or payment of attorney's fees if the judgment in the lawsuit is less than the amount of the proposed fix. The Act does provide, however, for tolling of statute of limitations. In *Prendiville v. Contemporary Homes, supra*, the Kansas Court of Appeals held, as a matter of first impression, that the economic loss doctrine applied to a claim against a contractor in residential construction defect cases where the rights and liabilities of the parties were governed by contract and an express warranty. The Prendiville court specifically noted that the Kansas Residential Construction Defect Act is silent on which legal theories such lawsuits must be based. *Id.* at 446. However, the Kansas Supreme Court recently held that the economic loss doctrine should *not* bar claims by *homeowners* seeking to recover economic damages resulting from negligently performed residential construction services when the homeowner alleges the breach of a common law or statutory duty beyond the breach of a mere contractual duty. *David v. Heck, supra*.

## I. Indemnity Claims

### 1. Express Indemnity

Express indemnity requires a written indemnity agreement or provision. Like any other contractual provision, if the indemnity is clear and unambiguous, it will be enforced according to its terms. *Nolde v. Hamm Asphalt, Inc.*, 202 F.Supp.2d 1257, 1266 (D. Kan. 2002). Any provision which requires one party to indemnify the other for that party's negligence is disfavored under Kansas law. *Id.* at 1268. Such a provision must be expressed in "clear and unequivocal language." *Id.*

A construction company does not have the right under a subcontract to be indemnified for its own negligence absent clear and unequivocal language to that effect. In *Nolde supra*, the subcontractor agreed to indemnify the construction company for claims "on account of any act or omission of subcontractor or any of his officers, agents, employees or servants." *Id.*

### 2. Implied Contractual Indemnity

In Kansas, an action for implied contractual indemnity arises where one party without fault is compelled to pay for the tortious acts of another. *Nolde v. Hamm Asphalt, Inc.*, 202 F.Supp.2d 1257 (2002). See also *Fleming Cos., Inc. v. GAB Bus. Serv., Inc.*, 103 F.Supp.2d 1271, 1275 (D. Kan. 2000). The claim is not applicable to situations wherein a principal is obligated, pursuant to the doctrine of respondeat superior, to pay a third party for the negligent acts of an agent. *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980). See *Nolde*, 202 F.Supp.2d at 169-70. Under Kansas law, however, one who employs an independent contractor, as compared to his own agent, is generally not vicariously liable for the negligent acts of the contractor. See *Mitzner v. State*, 257 Kan. 258, 891 P.2d 435, 438 (1995).

The key to bringing an implied indemnity action is that the liability of the claimant must not be based on its own negligence, but instead exclusively on its contractual agreement to be liable for its



subcontractor. *U.S. Fidelity & Guar. Co. v. Sulko, Inc.*, 939 F. Supp. 820 (D. Kan. 1996) (applying Kansas law). In essence, the claimant's liability must be derivative; a cause of action for implied contractual indemnity is not available to joint tortfeasors. *Id.* The adoption of the comparative fault statute has not abrogated the rule that a principal must be without fault in order to recover in an implied indemnity case against its agent. *Med James, Inc., v. Barnes*, 31 Kan.App.2d 89, 61 P.3d 86 (2003).

### 3. Comparative Implied Indemnity

"Comparative implied indemnity is an equitable remedy available to a single defendant among a number of tortfeasors, who by settling with the plaintiff or paying a judgment, pay the other tortfeasors' share of liability." *Schaefer v. Horizon Bldg. Corp.*, 26 Kan.App.2d 401, 985 P.2d 723, syl. 1 (1999).

In *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980), the Supreme Court adopted the concept of comparative implied indemnity between tortfeasors, an equitable remedy available to a single tortfeasor among a number of tortfeasors. Where a settlement for the claimant's entire injuries or damages has been made by one tortfeasor during the pendency of a comparative negligence action and a release of all the liability has been given by plaintiff to all who may have contributed to the damages, an apportionment of responsibility can be pursued in that action by a tortfeasor who has settled claimant's claim. In such an action for apportionment of responsibility, the settling tortfeasors are required to establish the reasonableness of the amount of the settlement.

But, in a case where a defendant has paid damages on behalf of another yet does not have the benefit of joinder, the period to file an equitable implied indemnity claim is keyed to the statute of limitations on plaintiff's underlying case. *Schaefer, supra*. The Court of Appeals affirmed the trial court's summary judgment dismissing the defendant builder's third-party petition against its subcontractor/excavator for negligent construction of a residential foundation. The Court noted that the excavator was neither a named party nor at risk of suit because the defendant builder did not bring the third-party claim until after the two year statute of limitation for the original action had expired. *Id.*

### 4. Anti-Indemnity Statutes in Kansas

In 2004, the Kansas legislature took on "broad form indemnity" clauses in construction contracts and made such clauses void, unenforceable, and against public policy. K.S.A. 16-121(b). Such clauses, customarily found in agreements between the owner and the general contractor and between the general and its subcontractors, compel either the general to indemnify the owner or a subcontractor to indemnify the general for the owner's or general's own negligence or intentional acts or omissions. As part of the Fairness in Private Construction Contract Act (2005) and Fairness in Public Contract Act (2007), the Kansas legislature made construction contract provisions which waived, released or extinguished insurance subrogation rights void and unenforceable. K.S.A. 16-1803(b)(3) and 16-1903(b)(3). By invalidating broad form indemnity clauses and, later, subrogation waivers in Kansas, the liability of parties to construction contracts was limited to their own negligence and their insurance

carriers were free to seek reimbursement for paid claims from the party or parties whose negligence caused the damages.

Nevertheless, it was still a common practice to require subcontractors to name general contractors as “additional insureds” on a subcontractor’s insurance coverage. As evidenced by case law from other jurisdictions which held that naming a party as an “additional insured” was a legal way to indemnify that party, this practice effectively thwarted the public policy that each contracting party should be responsible for its own negligence. The Kansas legislature amended its anti-indemnity statute to expressly void any provisions in a construction contract in which a party is required to provide liability coverage as an additional insured for another. K.S.A. 16-121(c). The statute also nullifies similar provisions found in motor transportation contracts, dealer agreements, and franchise agreements.

There are some notable exceptions in the Kansas anti-indemnification statute for indemnification provisions which are part of a settlement agreement, 16-121(d)(3), and for “a separately negotiated provision or provisions whereby the parties mutually agree to a reasonable allocation of risk, if each such provision is: (A) Based on generally accepted industry loss experience; and (B) supported by adequate consideration,” 16-121(d)(5).

#### J. Third-Party Beneficiary

To be a third-party beneficiary to a contract, the contract must be made for the third party’s benefit as its object and the third-party must be intended to be benefited in order to be entitled to sue upon it. The third-party beneficiary can enforce the contract if the third-party is one that the contracting parties intended should receive a direct benefit from the contract. Contracting parties are presumed to act for themselves, so therefore, an intent to benefit a third-party must be clearly expressed in the contract. It is not necessary, however, that a third-party be the exclusive beneficiary of all the promised performance. The contract may also benefit the contracting parties as well. *State of Kansas, ex rel. v. Carla Stovall*, 278 Kan. 3, 91 P3d 531, syl. 7 (2004); *Fasse v. Lower Heating & Air Conditioning, Inc.*, 241 Kan. 387, 736 P.2d 930 (1987).

#### K. DesignProfessionals

Design professionals are responsible for the scope of work they have agreed to perform in their contract with the owner. In addition, the architect or engineer is subject to an implied warranty of workmanlike performance. *Tamarac Development Co., Inc. v. Delamater, Freund & Associates, P.A.*, 234 Kan. 618, 622, 675 P.2d 361, 365 (1984). The design professional also has an obligation to exercise due care to make sure the project as designed does not create harm to other people or property. *Johnson v. Board of County Commissioners of Pratt County*, 259 Kan. 305, 913 P.2d 119 (1996) (confirming adoption of Restatement Second of Torts §324a, liability to third person for negligent performance or undertaking).

## II. DAMAGES

### A. Economic Loss Doctrine

A claim based purely on economic loss cannot be alleged in tort according to the “Economic Loss Rule.” Under Kansas law, a products liability action based on tort cannot be maintained for pure economic losses. *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569 (10<sup>th</sup> Cir 1994). Economic loss has been found by Kansas courts to include “the loss of the bargain of damages, costs of replacement or repair, loss of profits, loss of good will and loss of business reputation.” *Professional Lens Plan, Inc., v. Polaris Leasing Corp.*, 234 Kan.742, 675 P.2d 887 (1984).

In *Koss Construction v. Caterpillar, Inc.*, 25 Kan.App.2d 200, 960 P.2d 255 (1998), the Court of Appeals held that the Economic Loss Doctrine applies to damages to the product itself as between a commercial buyer and its seller, absent privity. In *Prendiville v. Contemporary Homes Inc.*, *supra* the Court of Appeals held, as a matter of first impression, that the Economic Loss Rule barred a plaintiff’s negligence claim in a residential home defect case. In that situation, damages may be limited to those recoverable under contract and warranty theories. Under this doctrine, a buyer of a defective product is prohibited from suing in tort where the injury consists only of damages to the goods themselves. *Lexington Insurance Co. v. Western Roofing Co., Inc.*, 316 F.Supp.2d 1142 (D. Kan. 2004). In *Lexington*, wire mesh screens which were allegedly negligently installed over downspouts and overflow scuppers on office/warehouse building roof were part of integrated roof system, which in turn was part of the building. As such, the economic loss doctrine applied to preclude tort recovery against roofing company for damage to building and business interruption caused by collapse of roof after drains became clogged. *Id.* However, the Kansas Supreme Court recently held that the economic loss doctrine should *not* bar claims by *homeowners* seeking to recover economic damages resulting from negligently performed residential construction services when the homeowner alleges the breach of a common law or statutory duty beyond the breach of a mere contractual duty. *David v. Heck, supra*.

However, the economic loss doctrine is being eroded in Kansas. In 2013, the Kansas Supreme Court refused to expand the economic loss doctrine to bar tort claims for economic recovery in the context of a negligent misrepresentation claim. In *Rinehart, LLC v Morton Buildings, Inc.*, 297 Kan. 926, 932, 305 P.3d 622 (2013), Plaintiffs contracted with Morton to construct a building for personal use and for their business entity, Midwest Slitting. A dispute arose as to workmanship and delays in construction. Midwest Slitting, not a party to the underlying contract, sued Morton for negligent misrepresentation claiming that Morton misrepresented the completion date of the building, that the building would accommodate Midwest Slitting’s business operations, and that the building would be constructed pursuant to industry standards. The jury found for Midwest Slitting and awarded it \$150,000.

Morton appealed contending that the economic loss doctrine bars tort claims for economic recovery when the only alleged injury is damage to the product itself. The Court of Appeals disagreed and held that that the economic loss doctrine did not apply, because of the lack of privity between Midwest Slitting and Morton. The Kansas Supreme Court affirmed but held that the economic loss doctrine did not bar Midwest Slitting’s negligent misrepresentation claims for different reasons stating that the bright-line “lack of privity” rule proposed by the lower court would conflict with the existing

application of the doctrine as a bar in product liability claims even where no contract exists. The Supreme Court first determined that absent a claim for negligent misrepresentation, Midwest Slitting would have no remedy at all. The Supreme Court had previously applied this rationale to hold that the economic loss doctrine does not bar residential construction claims alleging negligence. *David v. Hett*, 293 Kan. 679, 270 P.3d 1102 (Kan. 2011). Second, the court reasoned that the elements of the negligent misrepresentation claim impose a duty when a defendant's course of business is supplying information to guide others and the universe of those who may pursue such claims is limited to those for whose benefit the defendant supplied the information.

#### B. Economic Waste

In the *State of Kansas ex rel Carla J. Stovall v. Reliance Insurance Company*, 278 Kan. 3, 91 P.3d 531 (2004) the Supreme Court reversed the trial court's ruling that the State's damages should be limited to a diminished value (the difference between the value of the earth trench system in its defective condition and the cost of installation of an earthen trench system). Otherwise, the trial court opined that the State would receive an improper windfall because of the passage of time (economic waste). The Kansas Supreme Court reversed the finding that there was no windfall to the State that needs preventing because it is not seeking a better system than what it originally bargained for. It simply is seeking to replace the deficient system with a comparable one. Accordingly, the State's direct damages as a matter of law should be the costs to replace the earthen trench system on the date of discovery as mitigated by its election to replace with a less expensive concrete trenching system. The fact that the costs may be significantly greater than the original one because the prison is now occupied is a cost to be born by the defendant. *Id.*

The basic principle of damage is to make a party whole by putting its back in the same position, not to grant a windfall. *State ex rel Stephan v. Wolfenbarger and McCulley, P.A.*, 236 Kan. 183, 690 P.2d 380 (1984). In *Service Iron Foundry, Inc. v. M.A. Bell Co. and Particulate Controls, Inc.*, 2 Kan.App.2d 662, 588 P.2d 463 (1978) the Kansas Court of Appeals affirmed the trial court's restriction of the Foundry's damages to the original purchase price and incidental expenses rather than the cost of a better more expensive replacement that complied with the Kansas Health Code than had been originally bargained for. In short, the Court refused to allow a windfall to the Foundry.

#### C. Stigma Damages

When damage to real estate is temporary and of such a character that the property can be restored to its original condition, the measure of damages is the reasonable cost of repair necessary to restore it to its original condition plus a reasonable amount to compensate for loss of use of the property but not to exceed the fair and reasonable market value before the injury. *Anderson v. Rexrod*, 180 Kan. 505, 306 P.2d 137 (1957); *McBride v. Rice*, 23 Kan.App.2d 380, 930 P.2d 631 (1997).

However, Kansas courts allow testimony about fear in the market place affecting the property value of land with regard to electrical transmission lines, easements, termites, etc. *Horsch v. Terminex International Company, L.P.*, 19 Kan.App.2d 134, 865 P.2d 1044 (1993). Fear of the market place that reduces the value of the property is a factor considered by qualified witnesses at arriving at an opinion

on value of a specific piece of land. The qualified witness is entitled to express his or her opinion. The factors on which the opinion is based go only to the weight of the testimony not to the admissibility. "The trial court did not err in its ruling that the jury could consider the award of cost of repair damages and diminution of the value of damages." *Id.*

However, a jury cannot award an additional ten percent reduction for contamination where the jury determining the value of the property took into consideration the fact of contamination of the property. The Court instructed the jury to consider the factors "not as separate items, but as a whole how they affect the market value." *Id.*

#### D. Delay or Liquidated Damages

Under Kansas law, parties to a contract may agree on liquidated damages, a set amount of damages in the event of a breach of the contract if the set amount is determined to be reasonable and the amount of damages is difficult to ascertain. *United Tunneling Enterprises, Inc. v. Havens Construction Co., Inc.*, 35 F.Supp.2d 789 (D. Kan.1998). In order for a liquidated damages provision to be enforceable, the amount must represent a reasonable approximation of the expected loss. An amount that exceeds the anticipated loss may be classified by the court as an unenforceable penalty. Kansas courts have looked at liquidated damage in the amount established in the contract to determine whether the amount has some relationship to the anticipated cost or the loss/profit associates with late completion. *Id.*

#### E. Emotional Distress Claims

##### 1. Negligence

A long-standing rule in Kansas is that a plaintiff cannot recover for emotional distress that is caused by the negligence of a defendant unless it is accompanied by or results in physical injury to the plaintiff. The exception to this rule occurs where the injurious conduct is willful or wanton, or the defendant acts with intent to injure. *Hoard v. Shawnee Mission Medical Center*, 233 Kan. 267, 662 P.2d 1214 (1983). Moreover, a plaintiff seeking to recover for negligent infliction of emotional distress must show "that the physical injuries complained of were the direct and proximate result of the emotional distress caused by the [defendant's] alleged negligent conduct." *Holdren v. General Motors Corp.*, 31 F. Supp.2d 401 (D. Kan. 1998).

In cases where recovery has been allowed for physical injury resulting from emotional harm, Kansas courts have required that the physical injury occur contemporaneously with or shortly after the incident causing the emotional distress. Further, courts have routinely required that the plaintiff exhibit symptoms of physical distress more severe than insomnia, headaches, weight gain and general physical upset. *Weathers v. American Family Mut. Ins. Co.*, 1990 U.S. Dist. LEXIS 17865 (D. Kan. 1990). There is no laundry list of what constitutes severe and extreme emotional distress, but headaches, sleeplessness, irritability, anxiety, depression, listlessness, lethargy, intermittent nightmares, and other similar distress probably do not rise to the requisite level of severity. *Valadez v. Emmis Communications*, 477 P.3d 389, 395 (Kan. 2010). If the emotional distress only manifests itself through mental symptoms, those

symptoms need to be long lasting and debilitating in order to rise to the requisite level of severity. *Id.* Moreover, the absence of psychiatric or medical treatment related to the emotional distress weighs against a finding of extreme emotional distress. In *Reynolds v. Highland Manor, Inc.*, 24 Kan.App.2d 859, 954 P.2d 11 (1998), the Court found that there was no evidence of physical injury sufficient to sustain a claim for negligence and question of emotional distress from a patron of the hotel inadvertently retrieving a used condom under the hotel bed.

In *Neufeldt v. L.R. Foy Construction Co., Inc.*, 236 Kan. 664, 693 P.2d 1194 (1985) the Kansas Supreme Court held that the conduct of the construction supervisor by telephoning his wife and telling her that the sheriff was looking to arrest her husband because of two bounced checks was not so outrageous as to warrant liability. Liability for extreme emotional distress does not arise from mere insults and indignities, threats, annoyances, petty expressions, or other trivialities. Members of the public are necessarily expected and required to be hardened to a certain amount of criticism, rough language, and occasional acts or words that are definitely inconsiderate and unkind. Conduct to be sufficient to be based for an action to recover for emotional distress must be outrageous to the point that it goes beyond the bounds of decency and is utterly intolerable in a civilized society. *Id.* See also *Roberts v. Saylor*, 230 Kan. 289, 292-93, 637 P.2d 1175 (1981).

## 2. Intentional Infliction of Emotional Distress

To prevail on a claim for intentional infliction of emotional distress, a plaintiff must prove that: (1) the conduct of the defendant was intentional or in reckless disregard of the rights of the plaintiff; (2) the conduct was extreme and outrageous; (3) there was a causal connection between the defendant's conduct and the plaintiff's mental distress; and (4) the plaintiff's mental distress was extreme and severe. *Valdez v. Emmis Communications, supra* at 394 (Kan. 2010). Liability for extreme emotional distress has two threshold requirements which must be met and which the court must, in the first instance, determine: (1) whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery; and (2) whether the emotional distress suffered by plaintiff is so severe and extreme that the law must intervene because no reasonable person should be expected to endure it. *Id.*

In *Valdez*, the plaintiff sued a television station after it incorrectly reported that he was a suspect in the "Bind, Torture, Kill" Murders that plagued Wichita, Kansas from 1974 through 1986. *Id.* at 392. In addition to other counts, plaintiff asserted a claim against the television station for outrage, which under Kansas law, is the same as the tort of intentional infliction of emotional distress. *Id.* at 393-94. A jury found that the defendants' conduct was extreme and outrageous and awarded the plaintiff \$800,000 in damages for his extreme and severe emotional and mental suffering *Id.* at 393. On appeal, the defendants argued that the plaintiff failed to establish that emotional distress was extreme and severe, and therefore, could not establish a claim for intentional infliction of emotional distress as a matter of law. *Id.* at 394.

Plaintiff testified that he felt physically ill as a result of the publicity and that he was afraid to go back to his home for more than a month. *Id.* at 395. Plaintiff's daughter testified that he was crying when he watched the newscast, that he became more private and more afraid of being alone after the

newscast, and that he broke down in tears anytime his physician asked him how he was doing. *Id.* However, plaintiff did not seek medical treatment or psychological counseling for these conditions. *Id.* The Kansas Supreme Court, after reciting the law set forth above, concluded that those symptoms, as a matter of law, were insufficient to meet the requisite emotional distress necessary to establish a claim for intentional infliction of emotional distress. *Id.* As such, it overturned the verdict entered against the defendants. *Id.*

Other conditions which are insufficient to constitute emotional distress sufficient enough to justify a finding of intentional infliction of emotional distress include: (1) a severe case of nerves which caused the plaintiff to break out in hives. *Anspach v. Tomkins Industries, Inc.*, 817 F.Supp. 1499 (D.Kan. 1993); (2) sleeplessness. *S. Star Cent. Gas Pipeline, Inc. v. Cline*, 754 F. Supp. 2d 1257 (D. Kan. 2010); and (3) elevated fright, continuing concern, embarrassment, worry, and nervousness. *Roberts v. Saylor*, 637 P.2d 1175 (Kan. 1981).

#### F. Loss of Use

Even if there is no injury to property, loss may be covered if attributable to defective work if the owner has been deprived of the use of the property. For example, the removal of contaminated stucco material that had asbestos. This would have been so regardless of whether the application of the asbestos contained material constituted physical damage to tangible property. *Johnson v. Studyvin*, 839 F.Supp. 1490 (D. Kan. 1993).

#### G. Punitive Damages

Pursuant to K.S.A. 60-3701, *et. seq.*, the trier of fact determines whether to allow punitive damages. The court in a separate proceeding determines the amount. The plaintiff must prove by clear and convincing evidence that the defendant acted with willful or wanton conduct, fraud or malice. The damages are limited to the lesser of five million dollars or the defendant's highest gross annual income during five (5) years before the wrongful act, except that the court may award 1.5 times the amount of profit the defendant earned or will earn from the wrongful act. The person or entity may purchase insurance covering vicarious liability for punitive damages payable when the insured lacks actual prior knowledge of the tortfeasor's acts or omissions. K.S.A. 40-2,115. Otherwise punitive damages are not covered by insurance as a matter of public policy.

Damages for breach of contract are limited to pecuniary losses sustained. Exemplary or punitive damages are not recoverable in the absence of an independent tort. *The CIT Group/Sales Financing Inc., v. E-Z Pay Used Cars, Inc.*, 29 Kan.App.2d 676, 32 P.3d 1197 (2001).

#### H. Direct Economic Loss v. Consequential Economic Loss - Breach of Contract

Direct economic loss includes ordinary loss of the bargained damages: the difference between the actual value of the goods accepted and the value it would have been had they not been warranted. *State of Kansas, ex rel. v. Carla Stovall*, 278 Kan. 3, 91 P3d 531, syl. 3 (2004). Direct economic damages

also may be measured by the purchaser's cost to replace them or the cost to repair. A consequential economic loss, on the other hand, encompasses all economic harm a purchaser suffers beyond direct economic loss. Thus, consequential economic loss includes loss of profits resulting from failure of the goods to function as warranted, loss of good will and loss of business reputation.

Consequential economic loss includes loss of profits, loss of good will or business reputation and other loss proximately resulting from a defective product beyond direct economic loss. *White & Summers, Uniform Commercial Code* (2d ed. 1980). The vast majority of courts do not allow non-privity consumer purchasers to recover for consequential economic loss. *Id.* Kansas concurs with this majority view. *Professional Lens Plan, Inc. v. Polaris Leasing Corp., et al.*, 234 Kan. 742, 675 P.2d 887 (1984).

#### I. Disclaimer of Liability/Limited Liability

Generally it is true that the policy of the law in general is to permit mentally competent parties to arrange their own contracts and fashion their own remedies where no fraud or overreaching is practiced and that contracts freely arrived and fairly made are favorites of the law. *Kansas City Structural Steel Co. v. L.G. Barcus & Sons, Inc.*, 217 Kan. 88, 95, 535 P.2d 419 (1975); *Kansas Power & Light Co. v. Mobil Oil Co.*, 198 Kan. 556, 559, 426 P.2d 60 (1967).

But effective disclaimer of liability for one's own negligence, waiver of liability of the other party for the latter's negligence, or indemnification of the other party for its negligence is subject to strict construction and explicit expression. *Elite Professionals, Inc. v. Carrier Corp.*, 16 Kan.App. 2d 625, 827 P.2d 1195 (1992). Contracts for exemption for liability from negligence are not favored by the law. They are strictly construed against the party relying on them. *Mid-America Sprayers, Inc. v. United States Fire Ins. Co.*, 8 Kan.App.2d 451, 455, 458, 660 P.2d 1380, *rev. denied* 233 Kan. 1092 (1983).

The fact that limitation of liability in contract between contractor which built the pipeline and the owner was drafted by contractor did not require that the limitation be construed against the contractor where limitation was drafted by owner. Both parties had agreed to write the limitation into the contract and the limitation was bargained for by two large and sophisticated companies of equal bargaining power. *Wood River Pipeline Co. v. Willbros Energy Services Co.*, 241 Kan. 580, 738 P.2d. 866 (1987).

#### J. Mitigation of Damages

One claiming damages for breach of contract has the same duty to mitigate his loss as does a tort claimant, but a duty to mitigate damages is not an unlimited one. An injured party is bound only to assert reasonable effort to avoid damages. His duty is limited by the rules of common sense. *Steele v. J.I. Case Co. and Western Implement Co., Inc.*, 197 Kan. 554, 419 P.2d 902 (1966); *Lindsley v. Forum Restaurants, Inc.*, 3 Kan.App.2d 489, 596 P.2d 1250 (1979). In Kansas, mitigation of damages in an affirmative defense, the establishment of which devolves upon the party asserting it. *Rockey v. Bacon*, 205 Kan. 578, 470 P.2d 804 (1970); *Leavenworth Plaza Assoc., L.P. v. L.A.G. Enterprises*, 28 Kan.App.2d 269 (2000).



### III. STATUTE OF REPOSE/STATUTE OF LIMITATIONS

A. Express Contracts: An action upon any agreement, contract or promise in writing must be brought within five (5) years. K.S.A. § 60-511.

B. Implied Contracts: All actions upon contracts, obligations or liabilities expressed or implied but not in writing. K.S.A. § 60-512.

C. Negligence Actions: Negligence actions must be brought within two (2) years from the date the act giving rise to the cause of action first causes substantial injury. But if the injury is not reasonably ascertainable until sometime after the initial act, then the period of limitation does not commence until the fact of injury becomes reasonably ascertainable to the injured party. However, the action may not be commenced more than ten (10) years beyond the time of the act giving rise to the cause of action. K.S.A. § 60-513(b).

The interpretation and application of a statute of limitations is a question of law for which the appellate court's review is unlimited. *Dougan v. Rossville Drainage Dist.*, 270 Kan. 468, 472, 15 P.3d 338 (2000). When a statute of limitation begins to run is a question of law over which this court has unlimited review. *Brown v. State*, 261 Kan. 6, 8, 927 P. 2d 938 (1996). The two-year statute of limitation begins to run at the point in time when the fact of injury became reasonably ascertainable.

### IV. INSURANCE COVERAGE FOR CONSTRUCTION CLAIMS

#### A. Notice Requirement

Any time an insured becomes aware of a potential problem, the matter should be brought to the insurer's attention. If notice is not timely given, the insurer may claim that the coverage is voided. The insurer has the burden of proving that it was prejudicial as a result of an untimely filing of a notice before it can avoid liability under a policy. *National Union Fire Insurance Co. of Pittsburg, Pa. v. FDIC*, 264 Kan.733, 957 P.2d 357 (1998); *Cessna Aircraft Co. v. Hartford Acc. & Indemnity. Co.*, 900 F. Supp. 1489 (D. Kan. 1995). The insurer has the burden to prove that actual prejudice resulted from late notice of a claim. *Johnson v. Westoff Sand Co., Inc.*, 31 Kan. App.2d 259, 62 P.3d 685 (2003).

#### B. Duty to Cooperate

Once notice is given, the insured has a duty to cooperate with the insurer during the investigation and defense of the claim. The insurer can only raise the defense of failure of its insured to cooperate when it actually assumes the defense. *Id.* Again, the insurer must provide specific evidence of substantial prejudice. *Cessna Aircraft Co. v. Hartford Acc. & Ind. Co., supra* (D. Kan. 1995).

### C. Choice of Law

A contract of insurance is considered to be made in the state in which the application for insurance is accepted by the insurer. *Alliance Life Ins. Co. v. Ulysses Volunteer Fireman's Relief Assn.*, 215 Kan. 937, 529 P.2d 171 (1974). Contractors who conduct business in other states should be aware that the provisions of the policy may be interpreted pursuant to the laws of the state where the project is located. *Green Construction Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 771 F. Supp. 1000 (W.D. Mo. 1991). Therefore, a determination of the meaning of a specific provision of any insurance policy must be made with an understanding of the state common law that will apply.

### D. Duty to Defend and Indemnify

Generally, the insurer has a duty to both defend and indemnify the insured for claims falling within policy coverage. Under Kansas law, the general rule is that the insurer has the duty to defend its insured whenever there is a possibility of coverage, even when the possibility is remote. *Johnson v. Studyvin*, 839 F. Supp. 1490 (D. Kan. 1993) citing *Catholic Diocese of Dodge City v. Raymer*, 16 Kan. App.2d 488, 825 P.2d 1144, affirmed 251 Kan. 689, 840 P.2d 456 (1992).

An insurer's duty to defend is broader than its duty to indemnify. *Advantage Homebuilding, LLC. v. Assurance Co. of America*, 2004 WL 433914 (D. Kan. 2005). Advantage contracted with various individuals to construct homes in Johnson County, Kansas. Various homeowners filed suit against Advantage damages to the windows in their homes, alleging negligence, breach of contract, and violations of the Kansas Consumer Protection Act, K.S.A. § 50-623. Advantage Homebuilding, LLC. and its insured, Maryland Casualty, disputed whether Advantage's policy included coverage for negligence. The Court ruled that Advantage had not met its burden to show a possibility of coverage and therefore denied Advantage's Declaratory Judgment action. *Id.* at \*5.

In Kansas, unlike some jurisdictions, a determination of a duty to defend is not solely based on the plaintiff's pleadings "The possibility of coverage must be determined by a good faith analysis of all the information known to the insured or all information reasonably ascertainable by inquiry in investigation." *Spruill Motors, Inc. v. Universal Underwriters Ins. Co.*, 212 Kan. 681, 512 P.2d 403 (1973). An insurer may incur the duty to defend even though it may not have the ultimate obligation to indemnify the insured; however, the determination of whether there is a duty to defend ultimately depends upon whether coverage exists under the insurance policy. *Patrons Mut. Ins. Ass'n v. Harmon*, 240 Kan. 707, 732 P.2d. 741 (1987).

The insurer's duty to indemnify runs only to the insured and only for the insured's damage that fall under the general liability policy. *Fidelity & Deposit Co. of Maryland v. Hartford Cas. Ins. Co.*, 216 F. Supp.2d 1240 (D. Kan. 2002). The insurer's duty to indemnify an insured for payments made in settlement of a dispute is determined from the facts forming the basis of the settlement. Although the insurer's duty to defend under Kansas law is determined by the allegations of the underlying complaint and by the facts discoverable by the insurer, the duty to indemnify is determined by the facts as they are established at trial or as they are finally determined by some other means such as summary judgment or settlement. *New Hampshire Ins. Co. v. Westlake Hardware, Inc.*, 11 F. Supp.2d 1298 (D. Kan. 1998).

Where the insured proposes to defend an insured under a reservation of rights, the insurer must provide a timely, clear notice to the insured that it disclaimed liability under the policy. If it fails to provide the required notice, the insurer may not disclaim liability under its policy in a later garnishment proceedings. *Sours v. Russell*, 25 Kan.App.2d 620, 967 P.2d 348 (1998).

#### E. Occurrences That Trigger Coverage

Kansas courts have defined an accident as “unusual unexpected event, happening without negligence, an undesigned, sudden, unexpected event, chance or contingency happening by chance or unexpectedly or an event from an unknown cause or unexpected event from a known cause.” *Midland Constr. Co. v. U.S. Cas. Co.*, 214 F.2d 665 (10<sup>th</sup> Cir. 1954); *Maryland Cas. Co. v. Mike Miller Companies, Inc.*, 715 F. Supp. 321 (D. Kan. 1989).

In *Lee Builders, Inc. v. Farm Bureau Mutual Insurance Co.*, 281 Kan. 844, 137 P.2d 486 (2006), the Kansas Supreme Court addressed for the first time whether a claimed construction defect constitutes an “occurrence” under a standard commercial general liability policy. The Court reviewed the CGL policy in an attempt to determine what the word “accident” means under the policy. Because the word “accident” was not defined in the policy, the court applied the generally accepted meaning as “a sudden and unexpected event usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force.” The court then held that unforeseen and unintended damage resulting from continuous leakage from a faulty and negligently installed window installed by the insured’s subcontractor was caused by an “occurrence” within the meaning of CGL insurance policy. Therefore, under Kansas law, property damage occurring as a result of faulty or negligent workmanship constitutes an “occurrence” as long as the insured did not intend for the damage to occur. . An occurrence within the meaning of CGL insurance policy is avoided only when an act result in an intentional injury. *Id.* And nothing in the basic coverage language of the CGL insurance policy supports any definitive tort/contract line of demarcation for purposes of determining whether a loss is covered by the CGL policy’s initial grant of coverage; occurrence is not defined by reference to the legal category of the claim. *Id.*

In *Potomac Ins. Co. of Illinois v. Huang*, 2002 U.S. Dist. Lexis 4710 (D. Kan. 2002), the Court concluded that leaky windows were an unprecedented, unpredictable and unforeseen event which was not expected by the installer, manufacturer, or the home owner.

Under Kansas law, injury in fact or the actual injury trigger, rather than a manifestation trigger, governed when ground water contamination became an occurrence under a comprehensive general liability policy. *Cessna Aircraft Co. v. Hartford Acc. & Ind. Co.*, 900 F. Supp. 1489 (D. Kan. 1995). The damage that occurs as result of faulty or negligent workmanship constitutes an “occurrence” as long as the insured did not intend for the damage to occur. *American States Insurance Co. v. Powers*, 262 F.Supp.2d 1245 (D. Kan. 2003); *Employers Reinsurance Corp. v. Newcap Ins. Co., Ltd.*, 209 F.Supp.2d 1184 (D. Kan. 2002).

## F. Coverage Exclusions - CGL Policy

Even if an occurrence is established under an insurance policy, an insurer may still be excused from its duty to defend if, as a matter of law, policy exclusions apply to preclude coverage. *American States Insurance Co. v. Powers*, 262 F.Supp.2d 1245 (D. Kan. 2003); *Fidelity & Deposit Co. of Maryland v. Hartford Cas. Ins. Co.*, 189 F.Supp.2d 1212, 1224 (D. Kan. 2002). The insurer has the burden of establishing that the policy exclusions apply to the circumstances of the particular case. *Marquis v. State Farm Fire and Casualty Co.*, 265 Kan. 317, 961 P.2d 1213 (1998). A claim which is not clearly excluded from coverage under a CGL policy is presumed to be included within the policy coverage. *City of Salina, Kansas v. Maryland Cas. Co.*, 856 F.Supp. 1467 (D. Kan. 1994). The insurance company has the burden of proving facts that bring a claim within an exclusionary clause of the policy. *Milliken v. Fidelity & Cas. Co. of New York*, 338 F.2d 35 (10 Cir. 1964).

### 1. Exclusion j(6) "Your work"

The exclusion typically found in j(6) excludes coverage for property damage that to that particular part of any property that must be repaired because "your work" was incorrectly performed. This exclusion does not apply to property damage included within the products completed operations hazard provisions. Thus, if the work is completed, then the exclusion does not apply. *Potomac Ins. Co. of Illinois v. Huang*, 2002 U.S. Dist. Lexis 4710 (D. Kan. 2002). In addition, this provision excludes coverage to any property that must be restored, repaired, or replaced because the contractor's work was incorrectly performed. *American States Insurance Co. v. Powers*, 262 F. Supp. 2d 1245 (D. Kan. 2003). Therefore, this provision may exclude not only damage to the contractor's work but also to damage to the property of a third party.

A construction contractor's commercial general liability policy exclusion for property damage to "that particular part of any property that must be restored, repaired or replaced because of "your work" was incorrectly performed on it which was expressly made inapplicable to the property damage included in the product's completed operation hazard did not apply where the insured's work on the building was complete at the time the owner discovered the alleged faulty workmanship. The policy deemed insured's work complete even if work needed service, maintenance, correction, repair or replacement if it was otherwise complete. *American States Ins. Co. v. Powers*, 262 F.Supp.2d 1245 (D. Kan. 2003).

### 2. Exclusion j(5)

Exclusion j(5) of the CGL policy typically precludes coverage for property damage to "that particular part of the real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations." This exclusion is intended to bar coverage for the work being done by a contractor when the claim arises at a time when the work is being performed. *American States Insurance Co. v. Powers..* However, it does not exclude damage that is beyond the scope of the operations. *Utility Maintenance Contractors, Inc. v. West American Ins. Co.*, 19 Kan.App.2d 229, 866 P.2d 1093 (1994). In *Utility Maintenance*, the contractor was hired to remove a clog in the sewer pipe in a specific section of the line.

When attempting to remove the clog, the pipe was damaged, not only in the location of the clog where the contractor was working, but also in a section further up the line where the contractor was not working. After examining the exclusionary language in the contractor's policy, the court found that the damage to the pipe in the area of the clog was not covered as this clearly was within the area of the contractor's scope of work. However, the court found that the line damage outside the scope of the work (up line) may be covered by the policy as this is outside the scope of contractor's immediate work. *Id.*

The language of exclusion j(5) unambiguously focuses on when the "property damage" at issue occurs, not when a legal claim accrues against the insured. More specifically, the language of exclusion j(5) refers to "property damage" (defined under the Policy as physical injury to, or loss of use of, tangible property) occurring to real property during the course of the insured's work. See Emy Poulad Grotell, *Understanding The Basics of Commercial General Liability Policies*, 652 PLI/Lit 63, (Practicing Law Institute, Litigation and Administrative Practice Course Handbook Series, 2001) (noting that "[s]ome commentators indicate that the exclusion only applies to the extent that the damage occurred while the insured was performing and to the extent that the damage occurred after the operations have ceased the exclusion would not apply"). *Advantage Homebuilding, LLC. v. Maryland Cas. Co., supra.*

It has been held that exclusion j(5) applies whenever property damage "arise[s] out of the work of the insured, its contractors, or its subcontractors while 'performing operations.'" *Id.*; F. Malcolm Cunningham, Jr. & Amy L. Fischer, *Insurance Coverage in Construction--The Unanswered Question*, 33 *Tort & Ins. L.J.* 1063, 1093 (Summer 1998). "Hence, the exclusion applies only to damage from ongoing work, and not damage after completion." *Id.* see Robert J. Franco, *Insurance Coverage For Faulty Workmanship Claims Under Commercial General Liability Policies*, 30 *Tort & Ins. L.J.* 785, 796 (Spring 1995) ("Exclusion j(5) ... bar[s] coverage for damage to the work being done by the insured at the time of the damage."); e.g., *McMath Const. Co. v. Dupuy*, 897 *So.2d* 677, 682 (La.App.2004) (concluding that identical exclusionary language was not applicable "because [the insured's] work was not being performed when the damage occurred, but was complete").

### 3. Exclusion k-Damage to "your product"

Several courts and commentators have suggested that a building would be considered "real property" for purposes of exclusion k, thus rendering the exclusion inapplicable. See *Prisco Serena Sturm Architects, Ltd. v. Liberty Mutual Ins. Co.*, 126 F.3d 886, 892 (7th Cir.1997) ("your product" exclusion did not preclude coverage to architectural firm for negligence of general contractor's building; even assuming firm's "product" was the building, exclusion (k) presumably would be inapplicable by its terms); see also Emy Poulad Grotell, *Understanding the Basics of Commercial General Liability Policies*, 652 PLI/Lit 63, 77 (Practicing Law Institute, Litigation and Administrative Practice Course Handbook Series, 2001) (where the CGL policy definition of "your product" expressly excludes real property, the "your product" exclusion will not apply to the named insured who is erecting a building).

Under Kansas law, the "general rule is that a building is normally considered to be part of real estate and that the burden of showing that it is otherwise is upon the party who claims that the building

is personal property.” *Stalcup v. Detrich*, 27 Kan.App.2d 880, 886-87, 10 P.3d 3 (2000). The factors to be considered in determining whether a building is personal property or a fixture on the real estate are: (1) annexation to the realty; (2) adaptation to the use of that part of the realty with which it is attached; and (3) the intention of the party making the annexation. *Id.* at 886, 10 P.3d (citing *U.S.D. No. 464 v. Porter*, 234 Kan. 690, 695, 676 P.2d 84 (1984)). The burden, then, would be on American States to show that the building constructed by Mr. Powers constitutes personal property. American States has offered absolutely no evidence that might bear on this issue. Thus, the court cannot conclude that the building is personal property such that exclusion k might preclude coverage and American is not entitled to summary judgment based on exclusion k.

#### 4. Exclusion I-Damage to “your work”

Exclusion I is intended to apply only to work within the products-completed operations hazard and, thus, exclusion I has no bearing on operations in progress or uncompleted operations. See Robert J. Franco, *Insurance Coverage for Faulty Workmanship Claims Under Commercial General Liability Policies*, 30 Tort & Ins. L.J. 785, 799 (Spring 1995). In other words, exclusion I bars claims for damage occurring after construction is complete. See *Cunningham & Fischer*, *supra*, at 1092; accord 4 Bruner & O'Connor Construction Law § 11.46 (May 2002) (Exclusion I “performs the lion's share of the labor in reducing coverage for losses arising from a contractor's poor workmanship in a completed operations context.”).

#### 5. Your Product

The CGL policy typically defines “your product” as any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by you. These exclusions have been interpreted to preclude coverage for any materials or goods “handled” by the contractor. *American Mercury Ins. Group v. Urban*, 2002 U.S. Dist. LEXIS 998 (D. Kan. 2001). However, these exclusions do not apply to property damage to a third party’s property arising out of the insured’s product. *Potomac Insurance of Illinois v. Huang*, 2002 U.S. Dist. LEXIS 4710 (D. Kan. 2002); see also *Hartzell Industries Inc. v. Federal Ins. Co.*, 168 F. Supp. 2d 789 (S.D. Ohio 2001); *Fisher v. American Family Mut. Ins. Co.*, 579 N.W. 2d 599 (N.D. 1998). Therefore, the exclusions do not bar coverage for injury to property that is not that of the insured’s. *Potomac Insurance of Potomac Insurance of Illinois v. Huang.*

#### G. Insurance Umbrella Policy

A subcontractor’s umbrella insurance policy “loss of use” exclusion, applicable to the loss of use of tangible property not physically injured or destroyed resulting from insured’s delay in performance or non-performance, did not apply to owner’s action against the insured alleging negligent workmanship on construction project even though owner’s action was, in part, a loss of use claim where the property in question was physically injured, including cracked masonry walls and cracked or crushed blocks within walls. The purpose of the exclusion was to preclude coverage for failure of property to perform as warranted as opposed to physical breakdown of the insured’s product. *Fidelity & Deposit Co. of Maryland v. Hartford Casualty Insurance Co.*, 189 F.Supp.2d. 1212 (D. Kan. 2002).

Reduction in damages recoverable from commercial general liability insurer under an umbrella policy for insured's faulty workmanship on a construction project, which occurred after the project owner allegedly sent Stop Work Order, was not warranted. Even if the letter from the insured was intended to stop work order requiring insured to stop working, owner's subsequent actions, particularly in paying some of the insured's pay applications, clearly indicate that the owner withdrew or revoked the order to stop work. *Fidelity & Deposit Co. of Maryland v. Hartford Cas. Ins. Co.*, 215 F.Supp.2d 1171 (D. Kan. 2002).

#### H. Drop-down Coverage

A subcontractor's umbrella insurance policy would drop down to provide primary coverage in the event that its commercial general liability policy did not apply due to the exclusions in CGL policy rather than functioning merely as an excess coverage. Since an umbrella policy's coverage terms were broader than the CGL policy, the umbrella policy covered insured's liability "in excess of the self-insured retention when no underlying insurance applies." *Fidelity & Deposit Co. of Maryland v. Hartford Cas. Ins. Co.*, 189 F.Supp.2d 1212 (D. Kan. 2002)

#### I. Waiver of Insurer's Defenses

Waiver and estoppel cannot be used to expand coverage of an insurance policy unambiguously excludes coverage for the insured's claim. *Allied Mut. Ins. Co. v. Moeder*, 30 Kan.App.2d 729, 48 P.3d 1 (2002).

#### J. Attorneys' Fees

Although attorney's fees incurred by the insured contractor in defending the underlying action by project against it for faulty workmanship were recoverable from commercial general liability insurer under the umbrella policy, the insured's fees incurred in defending the project surety's action to enforce indemnification agreement were not recoverable. The policy only provides for defense of the insured in suits seeking damages on account of property damage. The suit to enforce indemnification agreement did not seek such damages. Contractor's commercial general liability insurance policies coverage of "property damage" defined as physical injury to tangible property, include physical injury to the insured's work product. *Fidelity & Deposit Co. of Maryland v. Hartford Cas. Ins. Co.*, *supra*.

Judgment against commercial general liability (CGL) insurer entitled insured to attorney fees under statute requiring award of fees if judgment is rendered against any insurance company on any policy given to insure any property in state against loss by fire, tornado, lightning or hail; the policy was a commercial package policy with commercial property coverage, and the judgment arising out of property damage from water leaks was based on an insurance policy that insured certain property against loss by fire, lightning, windstorm, and hail. *Lee Builders, Inc. v. Farm Bureau Mutual Insurance Co.*, *supra*; K.S.A. 40-908.

## K. Pollution

A pollution exclusion clause in a liability insurance contract defining pollution as solid, liquid, gaseous or thermal irritant or contaminate was unambiguous and did not exclude liquids from cement cleaner, which spilled causing damage to the leased premises, because it was finished product, not raw material, as there was no exception made for finished consumer products from list of pollutants. *Atlantic Avenue Associates v. Central Solutions, Inc.*, 29 Kan. App. 169, 24 P. 3d 188 (2001).

## L. Controlled Insurance Programs Act

In 2009, the Controlled Insurance Programs Act became law in Kansas. K.S.A. 40-5401, *et. seq.* The phrase “controlled insurance program” is defined in the Act as “a program of liability or worker’s compensation insurance coverage, or both, that is established by an owner or contractor who contractually requires participation by contractors or subcontractors who are engaged in work required by a construction contract.” K.S.A. 40-5402(d). Such programs include, but are not limited to, “coverage programs that are for a fixed term of coverage on a single construction site or project or multiple projects, and a consolidated or wrap-up insurance program as the term is defined in” K.S.A. 16-1803(b)(3). *Id.* The Act expressly excludes surety or builder’s risk from its scope. *Id.* In essence, the Act covers what is commonly known as owner controlled insurance programs (“OCIPs”) or contractor controlled insurance programs (“CCIPs”).

Among other things, the Act requires quarterly reporting of a participant’s respective claims details and loss information to that participant (40-5403(a)(1)), prohibits cancellation of such coverage prior to completion of work unless replacement coverage is purchased by the establishing owner or contractor (40-5403(a)(2)), prohibits charging of a deductible in excess of \$2,500 per occurrence (40-5403(a)(3)), requires disclosure of specific requirements for safety or equipment prior to accepting bids (40-5403(a)(5)), and disallows the levying of monetary fines for safety violations by anyone but a governmental agency (40-5403(a)(6)). Additionally, if the program includes CGL coverage, the Act prohibits cancellation of any completed operations liability coverage before the statute of limitations has expired. 40-5403(b)(1). However, CGL coverage shall not be required of project participants except for liabilities not arising on the site or sites of construction project, (40-5403(b)(2)), and any such coverage must provide for severability of interests “so that participants shall be treated as if separately covered.” 40-5403(b)(3). Limits of liability for any participating contractor or subcontractor cannot be less than the coverage limit for the sponsoring participant. 40-5403(b)(4). Participants cannot be required to waive rights of recovery for claims against other participants. 40-5403(b)(5). Lastly, the Act provides rules for worker’s compensation coverage. (40-5403(c).

## V. CONSTRUCTION LIENS

The law that governs this dispute is purely statutory. In that regard, those claiming a mechanic’s lien must comply with the provisions of the authorizing mechanic’s lien statute. *Haz-Mat Response, Inc. v. Certified Waste Services, Ltd.*, 259 Kan. 166, 910 P.2d 839, 843 (1996). However, the statute is intended to be remedial and is designed for the benefit and protection of persons designated by the Act. Therefore, once the lien has attached, the law is to be liberally construed in favor of the claimant. *Id.*



Under the Kansas mechanic's lien statute,

Any person furnishing labor, equipment, material, or supplies used or consumed for the improvement of real property...shall have a lien upon the property for the labor, equipment, material or supplies furnished.

K.S.A. § 60-1101. Persons claiming a lien are required to file with the Clerk of the District Court of the county in which the property is located a verified statement showing (1) the name of the owner; (2) the name and address sufficient for service of process of the claimant; (3) a description of the real property; and (4) a reasonably itemized statement in the amount of the claim. K.S.A. § 60-1102(a). The name of the owner and contractor must be identified correctly and with specificity and failure to properly identify those parties will cause the mechanic's lien to be defective. *National Restoration Company v. Merit General Contractors, Inc.*, 41 Kan.App.2d 1010, 208 P.3d 755, (2009). Under the Kansas lien law, architects and design professionals do not have the right to file a mechanic's lien for unpaid work.

Labor, equipment, materials, and supplies, as well as the transportation of them, as long as they are used or consumed for the purpose of improving the real property, are the basis for a lien on the property by a person or persons who furnished them. The meaning of "lienable labor" originally referred to physical labor, but the Kansas Mechanic Lien Statutes can be liberally construed to include physical and mental toil, bodily or intellectual exertion. *Mark Twain Kansas City Bank v. Kroh Brothers Development Co.*, 14 Kan.App. 2d 714, 798 P.2d 511 (1990).

Generally, lienable material must enter into and becomes a part of and remain with the completed work. *Road Supply & Metal Co. v. Bechtelheimer*, 119 Kan. 560, 240 P. 846 (1925), The Kansas Supreme Court has held under the Kansas mechanic's lien statute, in order to recover thereunder, it is imperative to prove that at least some of the materials purchased were used in the construction or improvement. *Hope's Architectural Products, Inc. v. Lundy's Construction, Inc.*, 762 F.Supp. 1430 (D. Kan. 1991).

K.S.A. 60-1101 and 60-1102 provide for the lien of a general contractor or prime contractor. The distinction between a contractor and a subcontractor or supplier is that a general contractor has a direct contract with the owner, trustee, agent or spouse of the owner of real property. A person cannot have a lien unless he furnishes material under a contract with a named owner or under an agreement with someone having a contract with the named owner. *Construction Materials, Inc. v. Becker*, 8 Kan.App.2d 394, 659 P.2d 243 (1983).

K.S.A. 60-1103 provides for a lien for subcontractors, suppliers and other persons furnishing labor, equipment, materials or supplies. Such individuals must be performing or supplying under an agreement with the contractor, subcontractor, owner/contractor in order to obtain a lien. Although a contractual privity with some entity and privity with the owner is required, when the chain of privity becomes too long or remote, the claimant is not entitled to lien rights. A supplier to a subcontractor is entitled to a lien, but a supplier to a supplier or a supplier to a sub-subcontractor are not entitled to a lien. Specific rules govern a subcontractor's filing of mechanic's liens on residential property. See K.S.A. 60-1103a and 1103b.

A general contractor has four (4) months after the date upon which the last material, equipment or supplies are furnished or the last labor was performed under the contract in which to file a Mechanic's Lien. K.S.A. 60-1102. On the other hand, a subcontractor, supplier or other person has three (3) months after the date that the last supplies, materials, equipment or labor were last furnished. K.S.A. 60-1103. On commercial projects, the lien of a general contractor or a subcontractor may be extended to a total of five (5) months after the last material, equipment, or supplies were furnished or the last labor was performed by filing a Notice of Extension within the original statutory lien period. K.S.A. 60-1102(c) and 60-1103(e). Liens may not be extended on residential projects.

In Kansas, the test for determining when work is completed and the period for filing begins is whether the last work completed "was a part of the work necessary to be performed under the terms of the original contract to complete the job and comply in good faith with the requirements of the contract." *Benner-Williams, Inc. v. Romine*, 200 Kan. 483, 487, 437 P.2d 312, 315 (1968). While a subcontractor might provide numerous materials and make separate purchases during the life of a project, the key is whether the materials and labor required to install the materials are considered "parts of one continuing transaction." *Id.* at 486, 315. Where the work performed is not gratuitous but is "performed in an effort to satisfy the demands and complaints of the owner regarding the work performed under the contract," the deadline to file a lien does not begin until that work is completed to the owner's satisfaction. *Eisenhut v. Steadman*, 13 Kan.App.2d 220, 767 P.2d 293, 295 (1989). By contrast, repairs in the nature of warranty work do not extend the time within which to file a mechanic's lien, because the original work under the contract has already been completed. See *Manhattan Mall Co. v. Shult*, 254 Kan. 253, 864 P.2d 1136 (1993); See also *Ottawa Plumbing, Heating and Air Conditioning, Inc. v. Moore*, 190 Kan. 201, 372 P.2d 1011 (1962)(mere inspection, regulation and testing of equipment does not extend the time.)

Suit must be filed to enforce a lien within one (1) year of filing the mechanic's lien. K.S.A. 60-1105. In general, the suit must include the parties to the lien claimant's contract, the owners of the property, and any other parties claiming an interest in the property. K.S.A. 60-1106. The lien enforcement suit will determine the validity of the lien claim as well as the priority of any valid mechanic's lien compared with other liens on the property. Questions of priority are governed by K.S.A. § 60-1101. In pertinent part, that provision states as follows:

...The [mechanic's] lien shall be preferred to all other liens or encumbrances which are subsequent to the commencement of the furnishing of such labor, equipment, material or supplies at the site of the property subject to the lien. When two or more such contracts are entered into applicable to the same improvement, the liens of all claimants shall be similarly preferred to the date of the earliest unsatisfied lien of any of them.

However, under the statute, the date of attachment of a mechanic's lien may change depending on settlements. "If an earlier unsatisfied lien is paid in full or otherwise discharged, the commencement date for all claimants shall be the date of the next earliest unsatisfied lien." *Id.*

In Kansas, a mechanic's lien right may be bonded off through a release of lien bond prior to the commencement of a construction project or after a mechanic's lien is filed. K.S.A. 60-1110. After a bond is filed, suit may be brought against the surety and principal on the bond. *Id.* In that case, the claimant is only required to "prove the material or labor was supplied by the claimant and was used in the improvement of the real property which was the subject of the lien." *Bob Eldridge Constr. Co., Inc. v. Pioneer Materials, Inc.*, 235 Kan. 599, 604, 684 P.2d 355 (1984). Defenses to the bond claim suit based on the claimant's alleged failure to meet the statutory requirements for the filing and perfection of the mechanic's lien lose relevance once the bond is filed and the lien discharged against the property. *Wagner Interior Supply of Wichita, Inc. v. Dynamic Drywall, Inc.*, 389 P.3d 205 (2017).

## VI. THE FAIRNESS IN PRIVATE CONSTRUCTION CONTRACT ACT

On July 1, 2005, the Kansas Fairness in Private Construction Contract Act, codified at K.S.A. 16-1801, *et. seq.* took effect. As its title indicates, the Act only applies to private construction contracts. Under the Act, payment of undisputed amounts must be paid by the owner to the contractor within thirty (30) days of a timely, properly completed pay request. Then, payment of undisputed amounts to subcontractors must be made by the contractor within seven (7) business days after receipt of payment from the owner if a timely, properly completed pay request has been made by the subcontractor. If either the owner or general contractor fails to pay within that time frame, the owner or general contractor "shall pay interest beginning on the thirty-first day after receipt of the request for payment, computed at a rate of 18% per annum on the undisputed amount." K.S.A. 60-1803(e) and (g). In addition, if payments are not made within seven (7) business days after the payment date set forth in the Act, the general contractor and any subcontractors may upon seven (7) additional business days' written notice suspend work. Retainage is limited to 10% of any undisputed amount. K.S.A. 60-1804(a). If the owner releases retainage, it must be paid out to the subcontractors under the same terms as regular payments.

The Act also invalidates several contractual provisions, including clauses regarding the waiver or release of the right to resolve disputes through litigation or limit a party's rights in such litigation. In addition, contract provisions stating that payment from a contractor or subcontractor is contingent on receipt of payment from any other private party, including the owner ("pay-if-paid"), are not a defense to a claim to enforce a mechanic's lien or payment bond. This statute would seem to fully protect a subcontractor's lien and bond rights, even in the face of a pay-if-paid clause and non-payment by the owner to the general contractor.

However, in the *Faith Technologies, Inc. v. Fidelity & Deposit Co. of Maryland*, No. 10-2375-MLB (D.Ks. 2011), a Kansas federal district court limited the protection this statute seemingly afforded to subcontractors. In *Faith Technologies*, the lender of a development withdrew funding prior to completion of the project. A number of mechanic's liens were filed together with a mortgage foreclosure action by the lender. As a result of the liens and foreclosure action, the owner filed bankruptcy. In the bankruptcy proceeding, the court ruled that the lender's mortgage was prior and superior to the various mechanic's liens and that upon the sale of the property, the mechanic's lien claimants would receive nothing. However, the general contractor had obtained a payment bond and the subcontractors whose

liens were invalidated by the lender's mortgage, filed claims on the payment bond. The surety took the position that the pay-if-paid clauses in the various subcontract agreements barred the bond claims.

Acknowledging that the Kansas Fairness In Private Construction Contract Act provides that a pay-if-paid clause is not a defense to a claim to enforce a bond, the court held that the Act "has not declared payment to a subcontractor contingent upon receipt of payment from a private party to be **against public policy**." (emphasis added). While K.S.A. 16-1803(b) lists several practices which the legislature determined were against public policy and, therefore, void, the use of pay-if-paid clauses was not among them. Therefore, the court in *Faith Technologies* reasoned, the use of a pay-if-paid provision was not considered against public policy. In fact, the court went to far as to state that "K.S.A. 16-1803(c) providing that a pay-if-paid clause could not be used as a defense to a bond claim does not apply to private bonds." Secondly, the court found that the liability of a surety on a payment bond is co-extensive with that of its principal. Therefore, since the various subcontracts contained pay-if-paid provisions, the surety was entitled to its principal's defense regardless of the absence of a pay-if-paid clause in the actual surety bond.

#### VII. THE FAIRNESS IN PUBLIC CONSTRUCTION CONTRACT ACT

The Kansas Fairness in Public Construction Contract Act enacted in 2007 applies to all public construction work with the exception of road, highway, or bridge work and incorporates the same pay provisions noted above in relation to the Private Act. One difference between the Acts is that under the Public Act, the public owner, general contractor, and subcontractor may withhold no more than 5% retainage. However, the Act gives the owner and others the discretion to increase the retainage to 10% "to insure performance" or if the terms of the contract are otherwise not being met. On road and bridge work, retainage is limited to 10%. K.S.A. 68-411. Early-completing subcontractors may obtain release of retainage if the owner, contractor, and design professional determine that the subcontractor has completed performance satisfactorily and retainage can be released without risk or additional cost.

## **About the Authors**

Lee B. Brumitt and Patrick K. McMonigle are directors and shareholders in the law firm of Dysart Taylor Cotter McMonigle & Montemore, P.C., handling a wide variety of cases arising within the construction industry. Lee can be reached at (816) 714-3027 or at [lbrumitt@dysarttaylor.com](mailto:lbrumitt@dysarttaylor.com). Pat can be reached at (816) 714-3039 or at [pmcmonigle@dysarttaylor.com](mailto:pmcmonigle@dysarttaylor.com).

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