



STATE OF MARYLAND CONSTRUCTION LAW COMPENDIUM

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This outline is intended to provide a general overview of Maryland's construction law. The discussion on any particular topic is not necessarily an indication of the total law related to an area of Maryland's construction law. Most construction disputes are governed by contract law. With a few variations, the law applicable to construction disputes in Maryland is similar to that found in other states. One important variation to keep in mind is that in negligence claims, Maryland is a contributory negligence state and not a comparative negligence state.

I. BREACH OF CONTRACT

Maryland recognizes claims for breach of contract between owner and general contractor and between general contractor and subcontractor. There is a general three year statute of limitations when bringing a breach of contract claim in Maryland. *MD Code, Courts and Judicial Proceedings, § 5-101*. The running of the statute is triggered by the "discovery rule" which states that the statute begins running when the plaintiff knows or reasonably should know of the wrong. *DeGroft v. Lancaster Silo Co., Inc.*, 527 A.2d 1316, 1320 (Md.App. 1987). The exception to the general three year statute of limitations is found in § 5-102(a)(5), which provides a twelve year statute of limitations for contracts made under seal. *MD Code, Courts and Judicial Proceedings, § 5-102*.

The amount of damages recoverable for breach of contract is that which will put the injured party in the monetary position he would have been in had the contract been performed. *Hall v. Lovell Regency Homes Ltd. Partnership*, 708 A.2d 344, 349-350 (Md.App. 1998). In a breach of contract action for defective performance of a real estate construction contract, the primary measure of damages is the cost of repairing or remedying the defect. *Id.* However, if this proves impractical, the acceptable secondary measure of damages is the loss in value of the property caused by the breach, *i.e.*, the difference between the fair market value of the property without the defect and the fair market value of the property with the defect. *Id.* Compensatory damages for breach of contract may be recovered subject to "limitations of remoteness and speculativeness." *Id.*

However, a contractual obligation, by itself, does not create a tort duty. *Wilmington Trust Co. v. Clark*, 424 A.2d 744, 754 (Md. 1981). While a tort action can be founded upon a duty arising out of the contractual relationship, the duty giving rise to the tort cause of action must be independent of the contractual obligation. Mere failure to perform a contractual duty, without more, is not an actionable tort. *Id.*

II. NEGLIGENCE

Recovery in an action for negligence requires (1) proof of some duty, (2) a breach of that duty, (3) proximate causation, and (4) damages. *Wells v. Polland*, 708 A.2d 34, 39 (Md.App. 1998). Recovery for negligence may be limited by the Economic Loss Rule, which generally holds that plaintiffs cannot recover in tort for purely economic losses. Purely economic losses are often the result of a breach of contract and ordinarily should be recovered in contract actions. *Pulte Home Corp. v. Parex, Inc.*, 2007 WL 1501112, *23 (Md.App.) (Md.App. 2007).

Maryland is a contributory negligence state and not a comparative negligence state. In Maryland, where a defendant's negligence consists of the violation of a statute, ordinance, or an administrative regulation, and the action for negligence is based upon such a violation, the contributory negligence of a plaintiff will ordinarily bar his recovery. *Brady v. Ralph M. Parsons Co.*, 609 A.2d 297, 305 (Md. 1992).

Homeowners who are subsequent purchasers can assert a common law negligence action against the original builder of a home. Subsequent purchasers not in privity with the builder who sold the home to the original purchasers have a cause of action for negligent construction and design. *Milton Co. v. Council of Unit Owners of Bentley Place Condominium*, 708 A.2d 1047, 1056 (Md.App. 1998). Where an unreasonably dangerous condition is discovered in a building, an action in negligence will lie against the architect or builder for the recovery of the reasonable cost of correcting the condition. *St. James Const. Co. v. Morlock*, 597 A.2d 1042, 1046 (Md.App. 1991).

Maryland follows the general rule that the employer of an independent contractor is not liable for the negligence of the contractor or his employees. *Restatement (Second) of Torts, section 409 (1965)*. Exceptions to this rule, found in Comment b of section 409, fall into three broad categories:

1. Negligence of the employer in selecting, instructing or supervising the contractor.
2. Non-delegable duties of the employer arising out of some relation toward the public or the particular plaintiff.
3. Work which is specially, peculiarly, or inherently dangerous.

Parker v. Neighborhood Theatres, Inc., 547 A.2d 1080, 1082-1083 (Md.App. 1988).

The owner of land owes a nondelegable duty to those who may come upon the land. The nature and extent of that duty is fixed by the status of the person claiming it. *Council of Co-Owners v. Whiting-Turner*, 517 A.2d 336 (Md. 1986). As the agents of a landowner, contractors owe the same duty to those who come upon the land. *Casper v. Chas. F. Smith & Son, Inc.*, 526 A.2d 87, 92 (Md.App. 1987). The duty of builders and designers is to use due care in the design, inspection, and construction of a project and this duty extends to those persons foreseeably subjected to the risk of personal injury because of a latent and unreasonably dangerous condition resulting from that negligence. *Id.*

While some jurisdictions hold that a contractor's employees are within the class to whom the owner owes a duty, the majority of jurisdictions, including Maryland, hold that an owner's vicarious liability does not extend to employees of independent contractors. *Parker v. Neighborhood Theatres, Inc.*, 547 A.2d 1080, 1082-1083 (Md.App. 1988). Moreover, a landowner may not be held vicariously liable based upon a statutory non-delegable duty where the injuries to an employee of a contractor arise solely from the negligence of the contractor in failing to maintain a reasonably safe work place.

In Maryland liability of an owner for the negligence of an independent contractor can also be based under the Restatement (Second) of Torts, section 414, which states: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise

reasonable care, which is caused by his failure to exercise his control with reasonable care.” Although the premise owner must exercise reasonable care to ensure that his or her property is safe for the employees of an independent contractor at the onset of the work, the owner will not be liable during the progress of work unless it is demonstrated that he or she has control of the details and the manner in which the work is to be accomplished. *Wajer v. Baltimore Gas and Elec. Co.*, 850 A.2d 394, 405 (Md.App. 2004). This requires the retention of a right of supervision by the owner such that the contractor is not entirely free to do his work in his own way. *Parker v. Neighborhood Theatres, Inc.*, 547 A.2d 1080, 1085 (Md.App. 1988).

III. BREACH OF WARRANTY

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

In Maryland there is a general two year statute of limitations on breach of warranty claims. *MD Code, Real Property, § 10-204*. The statute of limitations begins running when the injury and its general cause are discovered or should have been discovered or within two years of the expiration of the warranty, whichever occurs first. *Lumsden v. Design Tech Builders, Inc.*, 749 A.2d 796, 804 (Md. 2000).

A. Breach of Express Warranty

Under Maryland Real Property Article § 10-202(a) the means by which an express warranty may be created by a vendor include:

- (1) Any written affirmation of fact or promise which relates to the improvement and is made a part of the basis of the bargain between the vendor and the purchaser creates an express warranty that the improvement conforms to the affirmation or promise.
- (2) Any written description of the improvement, including plans and specifications of it, which is made a part of the basis of the bargain between the vendor and the purchaser creates an express warranty that the improvement conforms to the description.

MD Code, Real Property, § 10-202.

In contracts for the construction of new homes in Maryland, builders are required to register with the Consumer Protection Division of the Office of the Attorney General pursuant to § 10-603 of the Real Property Article. They are also required to offer a new home warranty security plan, which at the minimum must warrant:

- (1) For one year, the new home is free from any defects in materials or workmanship.
- (2) For two years, the new home is free from any defect in the electrical, plumbing, heating, cooling, and ventilating systems; and
- (3) For five years, the new home is free from any structural defect.

MD Code, Real Property, § 10-604.

The measure of damages for the breach of an express warranty in the sale of real property is the same as the measure of damages for breach of contract. *Hall v. Lovell Regency Homes Ltd. Partnership*, 708 A.2d 344, 349-350 (Md.App. 1998).

B. Breach of Implied Warranty

In the construction context, the obligation to use ordinary skill and care in constructing a house or performing other work is implied by law independent of any contract. *Worthington Const. Corp. v. Moore*, 291 A.2d 466, 467 (Md. 1972).

Under the common law of Maryland, except in unusual circumstances, there is no implied warranty in the sale of a completed residence. *Andrulis v. Levin Const. Corp.*, 628 A.2d 197, 199-200 (Md.,1993). However, Maryland Real Property Article § 10-203 provides a cause of action for the breach of implied warranties in the sales of newly constructed homes. *MD Code, Real Property, § 10-203*. § 10-203(a) provides that “in every sale, warranties are implied that, at the time of the delivery of the deed to a completed improvement or at the time of completion of an improvement not completed when the deed is delivered, the improvement is:

- (1) Free from faulty materials;
- (2) Constructed according to sound engineering standards;
- (3) Constructed in a workmanlike manner; and
- (4) Fit for habitation.”

MD Code, Real Property, § 10-203.

However, breach of warranty claims brought under § 10-203 apply only to new home sales by developers and real estate brokers; they do not apply to claims brought against manufacturers of construction materials. *Morris v. Osmose Wood Preserving*, 667 A.2d 624, 638 (Md. 1995).

As regarding condominium units, warranties statutorily implied under § 10-203 apply where condominium units are sold by a vendor to a purchaser. *Milton Co. v. Council of Unit Owners of Bentley Place Condominium*, 729 A.2d 981, 990-991 (Md. 1999). In addition to § 10-203, implied warranty claims covering condominiums are found in the Maryland Condominium Act. *Id.* Maryland Real Property Article § 11-131(b) provides for a one year warranty for transfers of individual units from developers to owners that requires the developer to correct any “defects in materials or workmanship in the construction of walls, ceilings, floors, and heating and air conditioning systems in the unit.” *MD Code, Real Property, § 11-131(b)*.

Real Property Article § 11-131(c) provides that there is a three year implied warranty on common elements in transfers from a developer to a council of unit owners, but only a council of unit owners (not individual unit owners) can bring suit under this provision. *Milton Co. v. Council of Unit Owners of Bentley Place Condominium*, 729 A.2d 981, 990-991 (Md. 1999). Breach of warranty actions brought under § 11-131 require that notice be provided during the three year statutory period and that any suits be filed within one year of the expiration of the warranty period. *MD Code, Real Property, § 11-131(d)*.

The Court of Appeals has held that breach of warranty suits involving condominiums can be brought both under § 10-203 and under § 11-131. *Milton Co. v. Council of Unit Owners of Bentley Place Condominium*, 729 A.2d 981, 994 (Md. 1999).

IV. BREACH OF CONTRACT/WARRANTY UNDER THE UCC

Under Maryland's adaptation of the Uniform Commercial Code (UCC) there is a general four year statute of limitations for breach of contract claims in contracts for transactions in goods. Commercial Law Article § 2-725 states:

(1) *An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.*

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

MD Code, Commercial Law, § 2-725 (emphasis added).

Section 2-102 of Maryland's adaptation of the UCC provides that the UCC applies to contracts for "transactions in goods," a term which has been said to be broader than the sale of goods. *Burton v. Artery Co., Inc.*, 367 A.2d 935 (Md. 1977). The UCC does not apply to service contracts or to materials used or supplied in connection with the performance of service contracts. *DeGroft v. Lancaster Silo Co., Inc.*, 527 A.2d 1316, 1321 (Md.App. 1987).

However, there is a third category of contracts that are "hybrid" or mixed sales and service contract. This is the category that is most likely to arise in a construction context. The test to determine whether the UCC applies to mixed sales and service contracts is not whether they are mixed, but, granting that they are mixed, whether their *predominant factor*, their purpose, reasonably stated, is the rendition of a service, with goods incidentally involved (*e.g.*, a contract with an artist for a painting) or is a transaction of sale, with labor incidentally involved (*e.g.*, the installation of a water heater in a bathroom). *DeGroft v. Lancaster Silo Co., Inc.*, 527 A.2d 1316, 1321 (Md.App. 1987). The former example would not be subject to the UCC, while the latter example would be a transaction for a good under the UCC. Courts have generally looked principally to the language of the parties' agreement and the circumstances surrounding its making in determining the predominant thrust of the transaction. *Id.* at 1322.

V. FRAUD AND MISREPRESENTATION

The Maryland Consumer Protection Act covers cases of fraud and misrepresentation in construction disputes. Maryland Commercial Law Article § 13-303(1) prohibits "unfair or deceptive trade practices" in the sale of consumer goods, consumer realty, or consumer services. § 13-408(a) creates a civil cause of action for damages resulting from practices prohibited by the Act. *MD Code, Commercial Law, § 13-101.*

A misrepresentation is within the purview of § 13-301(1) if it is "false" or "misleading" and "has the capacity, tendency, or effect of deceiving or misleading consumers." *Hartford Acc. and Indem. Co. v. Scarlett Harbor Associates Ltd. Partnership*, 674 A.2d 106, 118 (Md.App. 1996).

Liability for negligent misrepresentation is more restricted than that for fraudulent misrepresentation, and liability for negligent misrepresentation resulting only in pecuniary loss is more restricted than that for negligent misrepresentation resulting in physical harm. *Village of Cross Keys, Inc. v. U.S. Gypsum Co.*, 556 A.2d 1126, 1133 (Md. 1989).

In a claim for the tort of negligent representation the plaintiff must prove:

- (1) the defendant, owing a duty of care to the plaintiff, negligently asserted a false statement;
- (2) the defendant intended that his statement would be acted upon by the plaintiff;
- (3) the defendant had knowledge that the plaintiff would probably rely on the statement, which, if erroneous, would cause loss or injury;
- (4) the plaintiff justifiably took action in reliance on the statement; and
- (5) the plaintiff suffered damage proximately caused by the defendant's negligence.

Goldstein v. Miles, 859 A.2d 313, 331-332 (Md.App. 2004); *Weisman v. Connors*, 540 A.2d 783, 794 (Md. 1988).

Negligent misrepresentation is an actionable tort when the negligent misrepresentation is used to induce the party to sign a contract. However, a claim of negligent misrepresentation is difficult to sustain in a construction claim if there is already a signed contract between the parties. Maryland law holds that a claim for negligent misrepresentation is improper when the only relationship between the parties is contractual, both parties are equally sophisticated, and the contract does not create an express duty of due care in making representations. *Martin Marietta Corp. v. International Telecommunications Satellite Organization*, 978 F.2d 140, 144 (C.A.4 (Md.),1992).

To prevail on a claim for fraudulent misrepresentation the plaintiff must prove:

- (1) the defendant made a false representation to the plaintiff;
- (2) its falsity was either known to the defendant or the representation was made with reckless indifference as to its truth;
- (3) the misrepresentation was made for the purpose of defrauding the plaintiff;
- (4) the plaintiff relied on the misrepresentation and had the right to rely on it; and
- (5) the plaintiff suffered compensable injury resulting from the misrepresentation.

Goldstein v. Miles, 859 A.2d 313, 331-332 (Md.App. 2004).

Plaintiffs will usually seek punitive damages when alleging fraudulent misrepresentation. However, in order for punitive damages to be awarded for fraud the plaintiff must show by clear and convincing evidence that the defendant had actual knowledge that his misrepresentation was false. *Bowden v. Caldor, Inc.*, 710 A.2d 267, 276 (Md. 1998). When there is fraud concealing a cause of action, § 5-203 of the Courts and Judicial Proceedings Article of the Maryland Code provides that the cause of action will accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered, the fraud. *Bragunier Masonry Contractors, Inc. v. The Catholic University of America*, 796 A.2d 744, 755 (Md. 2002).

In tort actions based on misrepresentation, the aim of compensation is to put the buyer in the position he would have been had he not been defrauded. *Beardmore v. T.D. Burgess Co.*, 226 A.2d 329 (Md. 1967). In fraudulent or negligent misrepresentation actions in which a plaintiff has purchased real property that was not as it was represented to be, Maryland law applies a

“flexible” measure of damages that allows the plaintiff to choose between two tests for damages. *Ward Development Co. v. Ingrao*, 493 A.2d 421 (Md.App. 1985).

The preferred test is the “out of pocket” rule which is “the difference between the amount of the purchase price the buyer has paid and the actual value of the property on the date it was sold.” *Hall v. Lovell Regency Homes Ltd. Partnership*, A.2d 344, 349 (Md.App. 1998). Out of pocket damages are determined from the time at which the transaction was made. The other measure of damages for misrepresentation is the “benefit of the bargain” test, in which damages are “the difference between the actual value of the property at the time of making the contract and the value that it would have possessed if the representations had been true.” *Id.* When determining the loss in fair market value under the “benefit of the bargain” test, to obtain an accurate determination of damages one needs a comparison of the separate valuation figures from one point in time. *Id.* at 351.

VI. STRICT LIABILITY

To recover for injury under strict liability, a plaintiff must establish that: (1) the product was in a defective condition at the time that it left the possession or control of the seller; (2) that it was unreasonably dangerous to the user or consumer; (3) that the defect was a cause of the injuries, and (4) that the product was expected to and did reach the consumer without substantial change in its condition. *Lloyd v. General Motors Corp.*, 916 A.2d 257, 272 (Md. 2007).

Maryland has adopted the theory of strict liability found in the Restatement (Second) of Torts § 402A (1965):“Special Liability of Seller of Product for Physical Harm to User or Consumer

“(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer or his property, if

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

“(2) The rule stated in Subsection (1) applies although

- (a) the seller has exercised all possible care in the preparation and sale of his product, and
- (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.”

A.J. Decoster Co. v. Westinghouse Elec. Corp., 634 A.2d 1330, 1334 (Md. 1994).

The Court of Appeals has held § 402A to be applicable in situations in which it is alleged that property damage resulted from a defect in the product which rendered the product unreasonably dangerous. *A.J. Decoster Co. v. Westinghouse Elec. Corp.*, 634 A.2d 1330, 1337 (Md. 1994).

VII. INDEMNITY

A. Express Indemnity

When there is an express indemnity clause in a contract, it cannot be read as indemnifying someone against their sole negligence. *Heat & Power Corp v. Air Products & Chemicals, Inc.*, 578 A.2d 1202, 1206 (Md. 1990). This would be void against both Maryland public policy and against the Maryland Courts & Judicial Proceedings Article § 5-305, which reads:

A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relating to the construction, alteration, repair, or maintenance of a building, structure, appurtenance or appliance, including moving, demolition and excavating connected with it, *purporting to indemnify the promisee against liability for damages arising out of bodily injury to any person or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.* This section does not affect the validity of any insurance contract, workmen's compensation, or any other agreement issued by an insurer.

Md.Code Ann., Cts. & Jud. Proc. § 5-305 (1995) (emphasis added).

However, if a contract provision or sentence can properly be construed as reflecting two agreements, one providing for indemnity if the promisee is solely negligent and one providing for indemnity if the promisee and promisor are concurrently negligent, only the former agreement is voided by the statute. *Heat & Power Corp v. Air Products & Chemicals, Inc.*, 578 A.2d 1202, 1206 (Md. 1990).

B. Implied Indemnity

When an indemnity provision is not expressly found in a construction contract, there may be a right to implied indemnity. Indemnity requires that, where one of the wrongdoers is primarily liable, that wrongdoer must bear the whole loss. Indemnity implies a shifting of the entire loss from the party who paid the judgment to the tortfeasor who should in fairness bear it. *Board of Trustees of Baltimore County Community Colleges v. RTKL Associates, Inc.*, 559 A.2d 805, 810 (Md.App. 1989).

Frequently occurring situations in which a right to implied indemnity between tortfeasors has been recognized include when a tortfeasor is liable: (1) vicariously for the conduct of another, (2) for failing to discover a defect in a chattel supplied by another, (3) for failing to discover a defect in work performed by another, and (4) for failing to discover a dangerous condition on land created by another. *Max's Of Camden Yards v. A.C. Beverage*, 913 A.2d 654, 659 (Md.App. 2006).

Maryland relies on a passive/active negligence analysis to determine if there is a right to implied indemnity. Under this analysis, a party is only entitled to indemnification when the party's actions, although negligent, are considered to be passive or secondary to those of the primary tortfeasor. *Board of Trustees of Baltimore County Community Colleges v. RTKL Associates, Inc.*, 559 A.2d 805, 810 (Md.App. 1989). However, it is well established under Maryland law that someone who is guilty of active negligence cannot obtain tort indemnification, regardless of whether the alleged tortfeasor from whom indemnity is being sought was also actively negligent. *Franklin v. Morrison*, 711 A.2d 177 (Md. 1998).

C. Comparative Indemnity

Although some jurisdictions may adopt comparative indemnity schemes based upon comparative negligence concepts, Maryland is a contributory negligence state. As such, it does not have comparative indemnity in construction cases.

D. Third-Party Beneficiary

In determining whether a party is a third party beneficiary to a contract, the controlling issue is whether the contract's terms, in light of the surrounding circumstances, reveal an intent to make the promise to the third party in fact if not in form. *Flaherty v. Weinberg*, 492 A.2d 618 (Md. 1985). A third party who is only an incidental beneficiary acquires no rights in the contract. *Bolick v. Board of Education*, 260 A.2d 31 (Md. 1969). Both the promisee and the beneficiary may enforce the contract with the third party beneficiary bound by the contract provisions. *College of Notre Dame of Maryland, Inc. v. Morabito Consultants, Inc.*, 752 A.2d 265, 276-277 (Md.App. 2000).

The Court of Appeals has explained that “a third party beneficiary takes subject to the same defenses against the enforcement of the contract, as such, as exist between the original promisor and promisee.” This means that in a situation where a third party beneficiary sues a promisor, the promisor may utilize precisely the same defenses available against the promisee. *District Moving & Storage Co. v. Gardiner & Gardiner, Inc.* 492 A.2d 319 (Md.App. 1986)(quoting *Shillman v. Hobstetter*, 241 A.2d 570 (1968)).

Those involved in a contract that is forbidden by a regulatory statute will not be able to recover for either materials or work, and cannot enforce such an illegal contract either directly (through the contract itself) or indirectly (e. g. mechanic's lien or third-party beneficiary). *United Elec. Supply Co. v. Greencastle Gardens Section III Ltd. Partnership*, 373 A.2d 42, 46 (Md.App. 1977).

VIII. STATUTE OF REPOSE

Maryland's Statute of Repose is found in the Courts and Judicial Proceedings Article of the Maryland Code in § 5-108. The relevant language of § 5-108 states:

- (a) Except as provided by this section, no cause of action for damages accrues and a person may not seek contribution or indemnity for damages incurred when wrongful death, personal injury, or injury to real or personal property resulting from the *defective and unsafe condition of an improvement to real property occurs more than 20 years after the date* the entire improvement first becomes available for its intended use.
- (b) Except as provided by this section, a cause of action for damages does not accrue and a person may not seek contribution or indemnity from any architect, professional engineer, or contractor for damages incurred when wrongful death, personal injury, or injury to real or personal property, resulting from the defective and unsafe condition of an improvement to real

property, occurs *more than 10 years after the date* the entire improvement first became available for its intended use.

(c) Upon accrual of a cause of action referred to in subsections (a) and (b) of this section, an action shall be filed within 3 years.

MD Code, Courts and Judicial Proceedings, § 5-108 (emphasis added).

The purpose of § 5-108 was to protect builders, contractors, realtors, and landlords from suits for latent defects in design, construction, or maintenance of an improvement to real property that are brought more than twenty years after the improvement is first put to use. *Carven v. Hickman*, 763 A.2d 1207, 1212 (Md.App. 2000).

The Maryland statute of repose for actions resulting from improvement to real property applies to both contractors and subcontractors. *Hartford Ins. Co. of Midwest v. American Automatic Sprinkler Systems, Inc.*, 1998, 23 F.Supp.2d 623, 629 (D.Md. 1998). However, a purely financial injury does not fall within the purview of the Maryland statute of repose. *Carven v. Hickman*, 763 A.2d 1207, 1216 (Md.App. 2000).

IX. ECONOMIC LOSS RULE

Losses related to product liability claims may be categorized generally as (1) personal injuries, (2) physical harm to tangible things, and (3) intangible economic loss resulting from the inferior quality or unfitness of the product to serve adequately the purpose for which it was purchased. Generally, plaintiffs cannot recover in tort for this third category of purely economic losses. This is the Economic Loss Rule. These losses are often the result of a breach of contract and ordinarily should be recovered in contract actions. *Pulte Home Corp. v. Parex, Inc.*, 2007 WL 1501112, *23 (Md.App.) (Md.App. 2007).

In certain circumstances, however, the Court will allow the Economic Loss Rule to be bypassed. The Court of Appeals in *Council of Co-Owners v. Whiting-Turner* held that the determination of whether a duty in tort will be imposed in an economic loss case should depend upon the risk generated by the negligent conduct, rather than upon “the fortuitous circumstance of the nature of the resultant damage.” 517 A.2d 336 (Md. 1986). To be able to bring a tort action for purely economic loss there must be a risk of death or personal injury, and recovery of the reasonable cost of correcting the dangerous condition can be sought in tort. *Morris v. Osmose Wood Preserving*, 667 A.2d 624, 631 (Md. 1995).

The Court of Appeals has devised a two part approach to determine the degree of risk required to circumvent the economic loss rule. They examine both the nature of the damage threatened and the probability of damage occurring to determine whether the two, viewed together, present a clear, serious, and unreasonable risk of death or personal injury. If the possible injury is extraordinarily severe then the probability of the injury occurring does not have to be as high as it would if the possible injury threatened was less severe. Likewise, if the probability of the injury occurring is extraordinarily high, the injury does not have to be as severe as it would if the probability of injury were lower. *Morris v. Osmose Wood Preserving*, 667 A.2d 624, 631 (Md. 1995).

There is another exception to the Economic Loss Rule. When the failure to exercise due care creates a risk of economic loss only, courts have generally required an *intimate nexus* between the parties, satisfied by “privity of contract or its equivalent,” as a condition to the imposition of tort liability despite the absence of any risk that personal injury will result. In contrast, where the risk created is one of personal injury, such a direct relationship does not need to be shown. *Milton Co. v. Council of Unit Owners of Bentley Place Condominium*, 708 A.2d 1047, 1054 (Md.App. 1998).

X. RECOVERY FOR INVESTIGATIVE COSTS

The Maryland Court of Appeals has not specifically ruled on the issue of investigative costs alone. However, it appears that parties are free to contract as to who will be responsible for the payment of investigative costs should litigation arise. This appears somewhat frequently in insurance contracts. Under certain circumstances, an insured may be liable for the costs of investigation and, if so, the insurer may be required to indemnify its insured for such expenses. The general rule is that if an insured must resort to litigation to force its insurer to perform its duty to defend the insured and provide liability coverage, then the insured may recover the fees, costs and expenses of the litigation. *Aetna Ins. Co. v. Aaron*, 685 A.2d 858, 873 (Md.App. 1996).

XI. EMOTIONAL DISTRESS

There is currently no Maryland law directly on point as to whether a homeowner can recover emotional distress damages for a construction defect in their homes. At least one Maryland case has upheld the dismissal of plaintiffs’ emotional distress claims in a case involving newly constructed homes. See *Hall v. Lovell Regency Homes Ltd. Partnership*, 708 A.2d 344, 347 (Md.App. 1998)(where the trial court’s dismissal of plaintiffs’ emotional distress claims based on the fact that the basements of the newly constructed homes were improperly waterproofed and had persistent water problems was affirmed by the Court of Special Appeals). The general law of Maryland is that a plaintiff cannot ordinarily recover for emotional injuries sustained solely as a result of negligently inflicted damage to the plaintiff’s property. However, this rule does not apply to emotional injuries caused by a plaintiff’s reasonable fear for personal safety. *Dobbins v. Washington Suburban Sanitary Com’n*, 658 A.2d 675, 679-680 (Md. 1995).

XII. ECONOMIC WASTE

The ordinary measure of damages in a defective performance breach of contract action is “cost of repair” damages. However, this is limited by the Economic Waste Doctrine. The Economic Waste Doctrine provides that if the cost to repair the defect will result in unreasonable economic waste, the proper measure of damages becomes the difference between the fair market value of the property as contracted for (without the defect) and as performed (with the defect). *Hall v. Lovell Regency Homes Ltd. Partnership*, 708 A.2d 344, 351 (Md.App. 1998). In an action involving improvements to real estate, whether repair will produce economic waste is a question of “disproportionality” that must be determined by comparing the cost to cure to “any difference between the value of the property after the corrective work is done with the value of the property absent the corrective work.” *Id.*

The burden of proving economic waste is on the party that breached the contract and that invokes the doctrine in an effort to limit expectation interest damages. *Andrulis v. Levin Const. Corp.*, 628 A.2d 197, 208 (Md. 1993).

XIII. STIGMA DAMAGES

Stigma damages is another name for diminution in value because of a perceived problem with the property. There is no Maryland case law exactly on point that provides for the recovery of stigma damages; however, there is case law on diminution in value in both breach of contract and breach of express warranty claims.

In a breach of contract action for defective performance of a real estate construction contract, the recovery of ordinary cost of repair damages is limited by the economic waste doctrine. *Hall v. Lovell Regency Homes Ltd. Partnership*, 708 A.2d 344, 349-350 (Md.App. 1998). When the economic waste doctrine applies in such a situation the acceptable secondary measure of damages is the diminution in value of the property caused by the breach, *i.e.*, the difference between the fair market value of the property without the defect and the fair market value of the property with the defect. *Id.* This same measure of damages is applied in a claim for breach of express warranty. *Id.*

XIV. DELAY DAMAGES

Maryland case law generally allows for the recovery of delay damages. The Court of Appeals has recognized that a contractor is entitled to be compensated for delays in work occasioned by faulty plans and specifications. *Gladwynne Const. Co. v. Mayor and City Council of Baltimore*, 807 A.2d 1141, 1156 (Md.App. 2002).

The *Eichleay Formula* can be used to determine delay damages in construction contracts with the government. In order for a contractor to recover under the *Eichleay Formula*, three elements must be satisfied:

- (1) The plaintiff must prove that the contract was suspended, delayed, or disrupted by the government;
- (2) The plaintiff must prove that he/it was forced to “stand by” during the delay;
- (3) The plaintiff must prove that, while “standing by” during the suspension, delay, or disruption, he/it was unable to take on other work.

Gladwynne Const. Co. v. Mayor and City Council of Baltimore, 807 A.2d 1141, 1158 (Md.App. 2002).

The *Eichleay Formula* compensates contractors who are unable to take on replacement work because their standby status prevents the contractor from doing so. *Gladwynne Const. Co. v. Mayor and City Council of Baltimore*, 807 A.2d 1141, 1158 (Md.App. 2002). Although the standby status must be attributable to the government, the standby test does not require that the contractor's work force be idle. Nor must the work be entirely suspended. *Id.* A contractor may be unable to take on additional work if the owner causes delay of uncertain duration or the contractor's bonding capacity is limited. *Id.*

Delay damages have not been recoverable where the contract contained no clause forbidding delay and where the increased costs were found to be the result of a unilateral contract modification. *General Federal Const., Inc. v. D.R. Thomas, Inc.*, 451 A.2d 1250, 1257 (Md.App. 1982).

XV. RECOVERABLE DAMAGES

A. Direct Damages

In Maryland, damages to real property are generally measured by the cost of repairing or remedying the defect, so long as that cost is reasonable. *Hall v. Lovell Regency Homes Ltd. Partnership*, 708 A.2d 344, 349-350 (Md.App. 1998). If the cost of repair is impractical, the difference between the fair market value of the property without the defect and the fair market value of the property with the defect will be used to determine the damages owed. *Id.*

B. Stigma Damages

There are currently no Maryland cases that deal directly with the question of whether stigma damages are recoverable in construction cases. However, Maryland courts generally allow recovery for diminution of value (See above).

C. Loss of Use

Maryland allows for recovery of 'loss of use' compensation. When personal or real property has been damaged, recovery is not limited to the cost of repair but may include the value of the use of the property during the time that it would take to repair it. *Superior Const. Co. v. Elmo*, 102 A.2d 739, 743 - 744 (Md. 1954). The Court of Appeals in *Elmo* awarded damages in tort to compensate homeowners who were living in and enjoying the use of their homes until the defendants' building operations disrupted their use and enjoyment of their land. *Bernardini v. Stefanowicz Corp.*, 349 A.2d 287, 293 (Md.App. 1975).

However, The Court of Appeals declined to extend the holding of *Elmo* to a construction case in which plaintiffs sought loss of use damages when the construction of their new homes was delayed for months. *Bernardini v. Stefanowicz Corp.*, 349 A.2d 287, 293 (Md.App. 1975). Here the Court found that the trial judge did not abuse his discretion in refusing to allow for loss of use damages when the plaintiffs' homes were not constructed on time. *Id.*

D. Punitive Damages

Under Maryland law, punitive damages are allowable only in a tort action and only when there is an award of compensatory damages based on that tort. *VF Corp. v. Wrexham Aviation Corp.*, 715 A.2d 188, 192 (Md. 1998). With respect to both intentional and non-intentional torts "... an award of punitive damages must be based upon actual malice, in the sense of conscious and deliberate wrongdoing, evil or wrongful motive, intent to injure, ill will, or fraud." *Montgomery Ward v. Wilson*, 664 A.2d 916, 932 (Md. 1995). While cases of fraud may arise in the construction context, in order for punitive damages to be awarded for fraud the plaintiff must

show by clear and convincing evidence that the defendant had actual knowledge that his misrepresentation was false. *Bowden v. Caldor, Inc.*, 710 A.2d 267, 276 (Md. 1998).

E. Emotional Distress

The general law of Maryland is that a plaintiff cannot ordinarily recover for emotional injuries sustained solely as a result of negligently inflicted damage to the plaintiff's property. However, this rule does not apply to emotional injuries caused by a plaintiff's reasonable fear for personal safety. *Dobbins v. Washington Suburban Sanitary Com'n*, 658 A.2d 675, 679-680 (Md. 1995). In such a situation, it appears that emotional distress damages can be awarded.

F. Attorney's Fees

In Maryland the general rule is that costs and expenses of litigation, other than the usual and ordinary court costs, are not recoverable in an action for compensatory damages. *Bresnahan v. Bresnahan*, 693 A.2d 1, 10 (Md.App. 1997). Attorney's fees may be awarded where a statute allows for the imposition of such fees, and where parties to a contract have an agreement regarding attorney's fees. *Id.* Where the wrongful conduct of a defendant forces a plaintiff into litigation with a third party, the plaintiff may recover from the defendant, as damages, reasonable counsel fees incurred in the action with the third party. *Id.* The principal exception to this general rule is recovery of counsel fees incurred by an insured in successful litigation with a liability insurer which denied coverage or a duty to defend. *Id.* However, on the whole it is quite rare for attorney's fees to be awarded.

G. Expert Fees and Costs

Expert fees and costs ordinarily are not recoverable from the unsuccessful party. *Burdette v. Lascola*, 395 A.2d 169, 178 (Md.App. 1978); *Freedman v. Seidler*, 194 A.2d 778, 783 (Md. 1963). Fees may be awarded when expressly provided for in a contract or in certain other circumstances, but as a general rule expert fees and costs are not recoverable.

XVI. INSURANCE COVERAGE

Under a typical liability policy, an insurer has a duty to both provide the insured with a defense and to indemnify the insured for a judgment up to policy limits. The sole source of these duties is the insurance contract. The damages for breach of these contractual promises are the insured's defense expenses, including attorney fees, and the amount of an underlying tort judgment against the insured up to policy limits. *Mesmer v. Maryland Auto. Ins. Fund*, 725 A.2d 1053, 1065 (Md. 1999). Since the source of the duties to defend and to indemnify are entirely contractual, a liability insurer breaches no tort duty when, upon learning of a claim, it erroneously denies coverage and refuses to undertake any defense against the claim. *Id.*

However, a tort duty arises when an insurer acknowledges a claim but then refuses to settle within policy limits. Since the insurer "makes no promise that it will settle [a] claim within policy limits," breach of contract damages are not available for violation of any duty to settle a claim within policy limits. *Allstate Ins. v. Campbell*, 639 A.2d 652, 658 (Md. 1994). Instead,

any duty to settle within policy limits is strictly a tort duty which only arises when the insurer undertakes to provide a defense. *Mesmer v. Maryland Auto. Ins. Fund*, 725 A.2d 1053, 1065 (Md. 1999). The damages for breach of that duty may be recovered only in a tort action. *Id.* The amount of damages ordinarily recoverable in a bad faith failure to settle case is the amount by which the judgment rendered exceeds the amount of insurance coverage. *Kremen v. Maryland Auto. Ins. Fund*, 770 A.2d 170 (Md. 2001).

Consequently, when a liability insurer erroneously takes the position that it has no contractual obligation with respect to a particular claim, and refuses to undertake any defense against the claim, it is liable only for breach of contract. A tort action based upon a liability insurer's bad faith failure to settle a claim within policy limits can arise only if the insurer undertakes to provide a defense against the claim. *Mesmer v. Maryland Auto. Ins. Fund*, 725 A.2d 1053, 1064 (Md. 1999). Moreover, in Maryland the rule is clear that if an insured must resort to litigation to force its insurer to perform its duty to defend the insured and provide liability coverage, then the insured may recover the fees, costs and expenses of the litigation. *Aetna Ins. Co. v. Aaron*, 685 A.2d 858, 873 (Md.App. 1996).

XVII. MECHANIC'S LIENS

A Mechanic's Lien is a claim against real property for work done or materials supplied for the property. Maryland's Mechanics' Lien Law can be found in the Md. Code Ann., Real Prop. Art. §9-101 et seq. The most important aspect of filing a claim for a Mechanic's lien is notice. If the notice requirements are not met, there will be no recovery. The notice must also meet certain substantive criteria pursuant to Md. Code Ann., Real Prop. Art. §9-104(b). A contractor or subcontractor wishing to file a claim for a mechanic's lien must **within 120** days after doing the work or furnishing the materials, provide notice to the property owner. See, Md. Code Ann., Real Prop. Art. §9-104(a). The form of the notice must be as follows to comply with Maryland law.

Notice to Owner or Owner's Agent of
Intention to Claim a Lien

(Subcontractor) did work or furnished material for or about the building generally designated or briefly described as _____. The total amount earned under the subcontractor's undertaking to the date hereof is \$_____ of which \$_____ is due and unpaid as of the date hereof. The work done or materials provided under the subcontract were as follows: (insert brief description of the work done and materials furnished, the time when the work was done or the materials furnished, and the name of the person for whom the work was done or to whom the materials were furnished).

I do solemnly declare and affirm under the penalties of perjury that the contents of the foregoing notice are true to the best of the affiant's knowledge, information, and belief. (Individual) on behalf of (Subcontractor)

(Insert if subcontractor is not an individual)"

Notice can be served via certified mail or personal delivery. Once the property owner has been provided notice and there is still non-payment, the filing party may then commence the process of obtaining a lien on the subject property. It is important to know what Maryland County the

property is located to be compliant with the law. The claim must be filed in the circuit court for the county where the land or any part of the land is located **within 180 days** after the work has been finished or the materials furnished. See, Md. Code Ann., Real Prop. Art. § 9-105(a).

The filing itself should be a Petition to establish the mechanic's lien, which must include similar information provided in the Notice to the Owner (i.e.: the name and address of the petitioning contractor, name and address of the owner, nature of the work done, the time when the work was done, the name of the person for whom the work was done and the amount or sum claimed to be due, less any credit recognized by the petitioner, description of the land and facts showing that the notice required under Md. Code Ann., Real Prop. Art. § 9-104 of this subtitle was properly mailed). Service of notice by certified mail will make satisfying this part of the code easier as the return receipt will establish the date of notice.

The Petition should also include an affidavit by the subcontractor explaining the facts that are the basis for the petition as well as original or certified documents that support the claim. The petitioner should make an exhaustive effort to include all documents that support the claim because once filed; the court will review the filings and make its initial determination on the petition and accompanying documents. See, Md. Code Ann., Real Prop. Art. § 9-106(a)(1). The Court will then issue a show cause order that requires the owner of the property to establish why a lien upon the land or building should not be ordered. The property owner may then appear at the show cause hearing and present evidence or file a counteraffidavit establishing the supporting facts against a lien.

Once a court has been provided materials from both petitioner and property owner, it will make a determination as to whether or not the lien should attach. If a lien is attached, the petitioner has one year from the day the petition to establish the lien was first filed to exercise its right to enforce a lien. See, Md. Code Ann., Real Prop. Art. § 9-109.

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