



STATE OF NEW HAMPSHIRE CONSTRUCTION LAW COMPENDIUM

Prepared by
Jeanne P. Herrick
Ari B. Pollack
Gallagher, Callahan & Gartrell, P.C.
P.O. Box 1415
214 North Main Street
Concord, NH 03301
(603) 228-1181
www.gcglaw.com

General Limitation on Actions for Damages Arising Out Construction: “[A]ctions to recover damages for injury to property, injury to the person, wrongful death or economic loss arising out of any deficiency in the creation of an improvement to real property, including without limitation the design, labor, materials, engineering, planning, surveying, construction, observation, supervision or inspection of that improvement, shall be brought within 8 years from the date of substantial completion of the improvement, and not thereafter.” N.H. Rev. Stat. Ann. § 503:4-b, I. Further, “the standard of care used to determine negligence shall be the standard of care applicable to the activity giving rise to the cause of action at the time the activity was performed, rather than a standard applicable to a later time.” N.H. Rev. Stat. Ann. § 504:4-b, IV. This statute, which begins to run from the date of substantial completion of the improvement wholly independent of the accrual of any cause of action, is intended to relieve potential defendants in construction actions from infinite liability perpetuated by the discovery rule. Big League Entertainment, Inc. v. Brox Indus., Inc., 821 A.2d 1054, 1057 (N.H. 2003).

I. Breach of Contract

“A breach of contract occurs when there is a failure without legal excuse to perform any promise which forms the whole or part of a contract.” Lassonde v. Stanton, 956 A.2d 332, 338 (N.H. 2008). Typically, a breach of construction contract claim can be asserted by an owner or purchaser against the general contractor, as well as by the general contractor against its subcontractors and vice versa. A breach of contract claim in New Hampshire is subject to a three-year statute of limitations, which provides that all personal actions must be brought within three years of the act or omission. See N.H. Rev. State. Ann. § 508:4. While a breach of contract action generally accrues at the time of the breach, the discovery rule applies to contract claims and the statute of limitations may not begin to run until such time as the non-breaching party knows or should have known of the injury and the causal connection between the injury and the alleged conduct of the defendant. See Kelleher v. Marvin Lumber and Cedar Co., 891 A.2d 477, 487 (N.H. 2005). The same standard applies for breach of warranty claims. Id. at 490-91.

II. Negligence

Generally, an injury incurred due to negligent construction may give rise to an action for breach of a contractor’s common law duty of care, or negligence. Not every breach of contract, however, gives rise to a tort action. An action for negligence in construction could be based upon the contractor’s poor workmanship, supervision, or design.

Economic Loss Doctrine: The negligence claim against the general contractor may be limited by the economic loss rule. The economic loss doctrine is based on the theory that contract law, the law of warranty, in particular, is better suited than tort law for dealing with purely economic loss. See Plourde Sand & Gravel, Co. v. JGI Eastern, Inc., 917 A.2d 1250, 1253 (N.H. 2007). The doctrine operates generally to preclude contracting parties from pursuing tort recovery for purely economic losses related to the contact relationship. Id. This rule, in New Hampshire, bars a plaintiff from recovering under tort law when the damages claimed is limited to the cost of

repairing or replacing the defective work. See Lempke v. Dagenais, 547 A.2d 290, 296-97 (N.H. 1988). Where there is damage to property beyond the defective work, a cause of action for negligence may exist, and it is subject to the three-year statute of limitations for personal actions. N.H. Rev. Stat. Ann. § 508:4.

Allocation of Fault: New Hampshire statutory framework for allocation of fault is a hybrid between contributory negligence and comparative fault.

Contributory negligence. “A plaintiff’s [contributory] negligence involves a breach of the duty to care for oneself.” Boughton v. Proulx, 880 A.2d 388, 396 (N.H. 2005). To prove contributory negligence, the defendant must prove that the plaintiff failed to exercise care and that such failure was a substantial factor in bringing about his/her injury.

Comparative negligence. “Contributory fault shall not bar recovery in an action by any plaintiff or plaintiff’s legal representative, to recover damages in tort for death, personal injury or property damage, if such fault was not greater than the fault of the defendant, or the defendants in the aggregate if recovery is allowed against more than one defendant, but the damages awarded shall be diminished in proportion to the amount of the fault attributed to the plaintiff by general verdict. The burden of proof as to the existence or amount of fault attributable to a party shall rest upon the party making such allegation.” N.H. Rev. Stat. Ann. § 507:7-d. Consequently, under New Hampshire law a plaintiff may recover when the plaintiff’s own negligence is not greater than the causal negligence of the defendant or defendants, if more than one. When the percentage of negligence attributable to the plaintiff is 50% or less, the amount recovered is calculated by reducing the total damages, as determined by the finder of fact, in proportion to the negligence of the plaintiff.

Multiple defendants. N.H. Rev. Stat. Ann. § 507:7-e provides:

I. In all actions, the court shall:

(a) Instruct the jury to determine, or if there is no jury shall find, the amount of damages to be awarded to each claimant and against each defendant in accordance with the proportionate fault of each of the parties; and

(b) Enter judgment against each party liable on the basis of the rules of joint and several liability, except that if any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall be liable only for the damages attributable to him.

(c) RSA 507:7-e, I(b) notwithstanding, in all cases where parties are found to have knowingly pursued or taken active part in a common plan or design resulting in the harm, grant judgment against all such parties on the basis of the rules of

joint and several liability.

II. In all actions, the damages attributable to each party shall be determined by general verdict, unless the parties agree otherwise, or due to the presence of multiple parties or complex issues the court finds the use of special questions necessary to the determination. In any event, the questions submitted to the jury shall be clear, concise, and as few in number as practicable, and shall not prejudice the rights of any party to a fair trial.

III. For purposes of contribution under RSA 507:7-f and RSA 507:7-g, the court shall also determine each defendant's proportionate share of the obligation to each claimant in accordance with the verdict and subject to any reduction under RSA 507:7-i. Upon motion filed not later than 60 days after final judgment is entered, the court shall determine whether all or part of a defendant's proportionate share of the obligation is uncollectible from that defendant and shall reallocate any uncollectible amount among the other defendants according to their proportionate shares. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

IV. Nothing contained in this section shall be construed to modify or limit the duties, responsibilities, or liabilities of any party for personal injury or property damage arising from pollutant contamination, containment, cleanup, removal or restoration as established under state public health or environmental statutes including, but not limited to, RSA 146-A, RSA 147-A and RSA 147-B.

Apportionment. Under New Hampshire law, apportionment of liability may include all parties to a transaction or occurrence giving rise to a plaintiff's injuries. "[A]llegations of a non-litigant tortfeasor's fault must be supported by adequate evidence before a jury or court may consider it for fault apportionment purposes." DeBenedetto v. CLD Consulting Eng'rs, Inc., 903 A.2d 969, 982 (N.H. 2006).

Effects of New Hampshire Comparative Fault Statute. Passage of the New Hampshire Comparative Fault Statute subsumed doctrine of contributory negligence within doctrine of comparative negligence. See Bazazi v. Michaud, 856 F. Supp. 33 (D.N.H. 1994); Bohan v. Ritzo, 679 A.2d 597 (N.H. 1996).

III. Breach of Warranty

In construction cases, plaintiffs typically assert causes of action for breach of warranty. The breach of warranty can be based on express warranty provisions contained in the contract between the plaintiff and the general contractor and, more typically in New Hampshire, warranties implied by law.

Where the construction claim involves the sale of goods, a cause of action may be brought under the Uniform Commercial Code (UCC), N.H. Rev. Stat. Ann. § 382-A:2-313 - :2-318. :2-725.

See Kelleher, 891 A.2d at 499-508. A breach of warranty claim arising under the UCC is subject to a four-year statute of limitations and commences upon delivery of the goods unless it is a warranty for future performance, which must await the time of such performance. See Rev. Stat. Ann. § 382-A:2-725. The cause of action for a warranty for future performance accrues when the breach is or should have been discovered.

Most warranty claims arising out of construction in New Hampshire are brought under common law implied warranty that the construction be performed in a workmanlike manner. See Lempke v. Dagenais, 547 A.2d 290, 296-97 (N.H. 1988). When the terms of a contract provide the plans and specifications, however, the contractor may not be held liable for damages caused by defects in the plans and specifications furnished by the other party so long as he performs his work in a workmanlike manner. See Perkins v. Roberge, 39 A. 583 (N.H. 1897). A warranty claim brought under common law is subject to a three-year statute of limitations and the discovery rule may apply. See Lempke, 547 A.2d 297-97.

IV. Misrepresentation and Fraud

Intentional Misrepresentation or Fraud: Under certain circumstances, general contractors can be sued by homeowners under the theory of misrepresentation or fraud. Such claims in New Hampshire may be brought under the common law or the Consumer Protection Act, N.H. Rev. Stat. § 358-A et seq. Each claim is subject to a three-year statute of limitations. To prevail on a fraud or intentional misrepresentation claim, the plaintiff must show that: (1) the defendant made a representation with knowledge of its falsity or with conscious indifference to its truth with the intention to cause another to rely upon it; and (2) the plaintiff justifiably relied on the misrepresentation, which caused the plaintiff to suffer damage or injury. See Snierson v. Scruton, 761 A.2d 1046, 1049 (N.H. 2000). Such a claim may not be alleged in general terms, but must specifically allege the essential details of the fraud and the facts of the defendant's fraudulent conduct. A plaintiff who asserts an intentional misrepresentation claim may additionally seek and be awarded enhanced compensatory damages, if it is shown that the defendant committed the tort wantonly, maliciously or oppressively. See Munson v. Raudonis, 387 A.2d 1174, 1177 (N.H. 1978).¹

Negligent Misrepresentation: Negligent misrepresentation requires proof of similar elements except that the plaintiff need only show that the misrepresentation was made negligently made. See Snierson, 761 A.2d at 1049-50.

Consumer Protection Act: The Consumer Protection Act generally prohibits the use of any unfair or deceptive practice which includes "[r]epresenting that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model,

¹ Under New Hampshire common law, punitive or exemplary damages are not allowed. Raudonis, 387 A.2d at 1177. A plaintiff is to be awarded compensatory damages only. When the act involved is wanton, malicious, or oppressive, however, enhanced or liberal compensatory damages may be awarded to reflect the aggravating circumstances. Id.

if they are of another.” N.H. Rev. Stat. Ann. § 358-A:2, VIII. Plaintiffs often bring claims under this statute for construction defects. See Boynton v. Figeroa, 913 A.2d 697, 709 (N.H. 2006). A plaintiff who prevails on a Consumer Protection Act claim shall be awarded the cost of suit and reasonable attorney’s fees. N.H. Rev. Stat. Ann. § 358-A:10. Further, a plaintiff who shows that the unfair and deceptive conduct was willful or knowing may be award double or treble damages. Id.

V. Strict Liability Claims

Strict liability claims in construction cases in New Hampshire have generally been limited to those cases where a defective product was integrated into the work. New Hampshire has adopted the doctrine of strict liability of manufacturers for product defects in section 402A (1) of the Restatement (Second) of Torts, which states: “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.” Thus, in the construction context a claim may be made where the defective product caused substantial damages to property other than the defective product itself. See Kelleher, 891 A.2d at 494.

VI. Indemnity Claims

Generally. Indemnity is a common law remedy that shifts the entire loss from one who is compelled by legal obligation to pay a judgment occasioned by the initial negligence of another, despite no active fault on his part, and for which that person only is liable secondarily. Jaswell Drill Corp. v. General Motors Corp., 529 A.2d 875, 878 (N.H. 1987). “[O]ne joint tortfeasor ha[s] a right to indemnity ‘against another where the indemnitee’s liability is derivative or imputed by law . . . or where an express or implied duty to indemnify exists.’” Id.

Express or implied. The right of indemnification may be based upon a contract to indemnify. “[E]xpress language is not necessary to obligate a contractor to protect against injuries resulting from the owner’s negligence where the parties’ intention to afford such protection is clearly evident.” Commercial Union Assurance Co. v. Brown Co., 419 A.2d 1111, 1113 (N.H. 1980). “In interpreting indemnity provisions the same rules apply as are used to interpret contracts generally.” Id. The New Hampshire Supreme Court has “found an implied duty to indemnify in two cases: Sears, Roebuck & Co. v. Philip, 294 A.2d 211 (1972), and Wentworth Hotel v. Gray, Inc., 272 A.2d 583 (1970). In each case the indemnitor had agreed to perform a service for the indemnitee. In each, the indemnitor was assumed to have performed negligently. And in each, the result was a condition that caused harm to a third person in breach of a non-delegable duty of the indemnitee. In neither was the indemnitee assumed to have been negligent, at least beyond a failure to discover the harmful condition.” Collectramatic v. Kentucky Fried Chicken Corp., 499 A.2d 999, 1000 (N.H. 1985). “The rationale for finding an implied agreement to indemnify in that situation is based on ‘the fault of the indemnitor as the source of indemnitee’s liability in the underlying action and, conversely, the indemnitee’s freedom from fault in bringing about the dangerous condition.’” Jaswell

Drill Corp. v. General Motors Corp., 529 A.2d at 878.

Indemnification for own negligence. Although New Hampshire law generally prohibits exculpatory contracts which indemnify a person for his own negligence, the court will enforce them if: (1) they do not violate public policy; (2) the plaintiff understood the import of the agreement or a reasonable person in his position would have understood the import of the agreement; and (3) the plaintiff's claims were within the contemplation of the parties when they executed the contract. See Barnes v. N.H. Karting Assoc., 509 A.2d 151 (N.H. 1986). In interpreting an exculpatory contract, the court gives the language used by the parties its common meaning and gives the contract itself the meaning that would be attached to it by a reasonable person. As long as the language clearly and specifically indicates the intent to release the defendant from liability for personal injury caused by the defendant's negligence, the agreement will be upheld. We strictly construe exculpatory contracts against the defendant. Id.

Statutory Prohibition Against Indemnification Agreements: N.H. Rev. Stat. Ann. § 338-A:1 renders void against public policy any agreement whereby persons engaged in certain activities related to construction projects seek to be held harmless or indemnified for damages arising out of their own negligence.

Joinder. While New Hampshire's Workers' Compensation Law operates to deprive an injured employee of his rights of action at common law against his employer and the employer's insurer, it expressly preserves the employee's right to proceed against third persons in tort. N.H. RSA 281:13. Hence New Hampshire's compensation law most often presents no obstacle to the maintenance of the employee's action at common law against a third party and the consequent action over by the third party against the employer. "[T]he mere conferral upon the employee of rights to compensation against the employer should not operate to deprive third persons of common-law rights against the employer which they may have as a result of breach by the employer of separate obligations to them." Wentworth Hotel v. F. A. Gray, Inc., 272 A.2d 583, 584 (N.H. 1970)

VII. Statute of Repose

As noted above, in addition to the statutes of limitations to claims arising under the common law and statutory provisions, New Hampshire has a statute of repose, which provides: "[A]ll actions to recover damages for injury to property, injury to the person, wrongful death or economic loss arising out of any deficiency in the creation of an improvement to real property, including without limitation the design, labor, materials, engineering planning, surveying, construction, observation, supervision or inspection of that improvement shall be brought within 8 years from the date of substantial completion of the improvement, and not thereafter." Thus, all civil actions in tort, contract, or otherwise for defects in design or construction must be commenced within three years after the cause of action accrues, and any action that accrues more than 8 years after

substantial completion of construction is barred. See Big League Entertainment, Inc. v. Brox Indus., Inc., 821 A.2d 1054, 1057-58 (N.H. 2003). The limitation, however, “shall not apply to actions involving fraudulent misrepresentations, or to action involving the fraudulent concealment of material facts upon which a claim might be based. Such action shall be brought within 8 years after the date on which all relevant facts are, or with due care ought to be, discovery be the person bringing the action.” N.H. Rev. Stat. Ann. § 508:4-b, V(a).

VII. Emotional Distress Claims

General emotional distress damages have been allowed in tort cases but only where they have arisen from direct physical injury or intentional torts. See O’Donnell v. HCA Health Servs. of N.H., Inc., 883 A.2d 319, 325 (N.H. 2005). Otherwise, to recover for negligent infliction of emotional distress, a plaintiff must prove that the defendant’s conduct caused emotional harm significant enough to cause physical symptoms. See id. “[E]xpert testimony is required to prove physical symptoms suffered from alleged negligent infliction of emotional distress.” Silva v. Warden, N.H. State Prison, 839 A.2d 4, 6-7 (N.H. 2003).

To recover for intentional infliction of emotional distress, a plaintiff must show that the defendant acted intentionally or recklessly; the acts were extreme and outrageous; and that the caused distress was severe. Morancy v. Morancy, 593 A.2d 1158, 1159 (N.H. 1991).

VIII. Stigma Damages

Stigma damage is another name for diminution in value because of a perceived problem with the property. New Hampshire case law does not provide specifically for the claim of stigma damages. Rather, when a contractor breaches his agreement by defective performance, the usual measures of damages is the cost of remedying the defective work. See M.W. Goodell Constr. Co., Inc. v. Monadnock Skating Club, Inc., 429 A.2d 329, 330 (N.H. 1981).

IX. Economic Waste

As noted above, the ordinary measure of damages is the cost of remedying the defective work. If physical reconstruction in completion in accordance with the contract would involve unreasonable economic waste by destruction of usable property or otherwise, the injured party may be awarded the difference between the value the building would have had it been constructed as promised. See id.

X. Delay Damages

There are no New Hampshire cases specifically allowing or precluding recovery of delay damages. New Hampshire generally allows for recovery of direct and consequential damages in contract cases. Further, contracts providing recovery of liquidated damages for delay are enforceable. A liquidated damages provision will be enforceable where: (1) the damages to be anticipated as resulting from the breach are uncertain in amount or difficult to prove; (2) it is

demonstrated that there was an intent on the part of the parties to liquidated them in advance; and (3) the amount stipulated is a reasonable one, that is to say, not greatly disproportionate to the presumable loss or injury. See Langlois v. Maloney, 64 A.2d 697, 701-02 (N.H. 1949).

XI. Contract Damages

Direct Damages: Under New Hampshire law, the “fundamental principle of compensatory damages in a contract action is to put the injured party in as good a position, so far as money damages can put him, as he would have occupied had the defendant fully performed.” Dunn, 265 A.2d at 8. Thus, in construction cases the measure of damages arising out of failure to perform by a contractor is the cost of remedying or completing the work. See Lempke, 547 A.2d at 296-97. If physical reconstruction and completion in accordance with the contract would involve unreasonable economic waste by destruction of usable property or otherwise, the injured party may be awarded the difference between the value the building would have had if constructed as promised and its value as actually constructed. See M.W. Goodell Construction Co. Inc. v. Monadnock Skating Club, Inc., 429 A.2d 329, 330-31 (N.H. 1981).

Consequential Damages: Generally, in an action for breach of contract, in addition to direct damages, a plaintiff may recover specific consequential damages if he can prove that such damages were sustained as a result of the defendant’s breach and were reasonably foreseeable by the defendant at the time the contract was formed and that he could not have reasonably avoided or mitigated such damages. Drop Anchor Realty Trust v. Hartford Fire Ins. Co., 496 A.2d 339 (N.H. 1985). Recoverable consequential damages may include lost profits if there is sufficient relevant data support a finding that profits were reasonably certain to result in the absence of the breach. Independent Mechanical Contractors, Inc. v. Gordon T. Burke & Sons, Inc., 635 A.2d 487, 490 (N.H. 1993).

Emotional Distress Damages: In New Hampshire, emotional distress damages are not recoverable for breach of contract claims. See Young v. Abalene Pest Control Servs., Inc., 444 A.2d 514, 515-16 (N.H. 1982); J. Dunn & Sons, Inc. v. Paragon Homes of New England, Inc., 265 A.2d 5, 8 (N.H. 1970).

XI. Punitive Damages

Punitive damages are not available in New Hampshire. See Vratsenes v. N.H. Auto, Inc., 289 A.2d 66 (N.H. 1972).

XII. Attorney’s Fees

Absent statutory exceptions or an express contractual provision, the general rule in New Hampshire is that a party bears his own attorney’s fees. Judicial exceptions for the general rules

have been created for cases where “litigation has been instituted or unnecessarily prolonged through a party’s oppressive, vexatious, arbitrary, capricious or bad faith conduct.” Harkeem v. Adams, 377 A.2d 617 (N.H. 1977). A court may also award attorney’s fees against any party whose frivolous or unreasonable conduct has caused the filing of a motion or the holding of a hearing. N.H. Super. Ct. R. 59. The party seeking fees bears the burden of accounting for their time and justifying the time and expenses submitted. See Funtown USA, Inc. v. Town of Conway, 529 A.2d 882 (N.H. 1987).

XIII. Expert Fees and Costs

In New Hampshire, a prevailing party may be awarded costs. See Van Der Stok v. Van Voorhees, 866 A.2d 972 (N.H. 2005). Fees of the clerk, fees for service of process, witness fees, expense of view, cost of transcripts and other costs shall be awarded. See N.H. Super. Ct. R. 87(c). Stenographic cost of an original and 1 copy of each deposition (including videotaping costs if appropriate) and actual costs of expert witnesses may also be awarded. See id.

XIV. Insurance Coverage for Construction Claims

“It is well-settled in New Hampshire that an insurer’s obligation to defend its insured is determined by whether the cause of action against the insured alleges sufficient facts in the pleadings to bring it within the express terms of the policy.” Webster v. Acadia Ins. Co., 934 A.2d 567, 570 (N.H. 2007). “An insurer’s obligation is not merely to defend in cases of perfect declarations, but also in cases where by any reasonable intendment of the pleadings liability of the insured can be inferred and neither ambiguity nor inconsistency in the underlying plaintiff’s complaint can justify escape of the insurer from its obligation to defend.” Broom v. Continental Cas. Co., 887 A.2d 1128 (N.H. 2005). “When the alleged facts do not clearly preclude an insurer’s liability, inquiry may proceed into underlying facts. An analysis into facts underlying the writ is necessary in such circumstances to avoid permitting the pleading strategies, whims, and vagaries of third party claimants to control the rights of parties to an insurance contract.” M. Mooney Corp. v. U.S. Fidelity & Guar. Co., 618 A.2d 793, 796 - 797 (N.H. 1992) (citation omitted).

While the duty to defend is broader than the duty to indemnify, “[a]n insurer’s breach [of the duty to defend] . . . should not be used as a method of obtaining coverage for the insured that the insured did not purchase.” A.B.C. Builders, Inc. v. American Mut. Ins. Co., 661 A.2d 1187, 1191 (N.H. 1995).

“In deciding the scope of coverage, a court must compare the policy language with the allegations in the original suit, inquiring into the underlying facts if necessary, to see if the claim falls within the express terms of the policy.” Id. at 1190. Ambiguous policy language is construed in favor of providing coverage to the insured. Coakley v. Maine Bonding & Cas. Co., 618 A.2d 777, 781 (N.H. 1992). While an insurance company remains free to limit its liability and exclude coverage, it must use clear and unambiguous policy language to do so. A.B.C. Builders, 661 A.2d at 1190.

Occurrences Related to Defective Workmanship: In construction defect cases, the issue most often litigated in a coverage action is whether the defect caused property damage, which would bring the claim within the definition of “occurrence.” The New Hampshire Supreme Court has concluded coverage exists for property damage caused by defective workmanship where “occurrence” includes “an injurious exposure to continuing conditions as well as a discrete event.” High Country Assocs. v. N.H. Ins. Co., 648 A.2d 474, 477-78 (N.H. 1994); Webster v. Acadia Ins. Co., 934 A.2d 567, 572-73 (N.H. 2007). Where the claim alleges damages related to the defective work only, however, and does not allege that such defects caused damage to any property other than the work product, the court has concluded that the allegations in the underlying action do not allege an “occurrence” and therefore coverage does not exist. McAllister v. Peerless Ins. Co., 474 A.2d 1033, 1035-36 (N.H. 1984).

XV. Mechanic’s Liens

A Mechanic's Lien is an interest perfected upon real property to secure payment for work done or materials supplied for the property. New Hampshire’s Mechanics' Lien Law can be found in the New Hampshire Revised Statutes Annotated (RSA) chapter 447. The two most important factors in preserving a mechanic’s lien are notice and perfection. A general contractor’s right to a mechanic’s lien arises as a matter of law by virtue of “perform[ing] labor or furnish[ing] materials to the amount of \$15 or more for erecting or repairing a house or other building or appurtenances, or for building any dam, canal, sluiceway, well or bridge, or for consumption or use in the prosecution of such work” RSA 447:2. Subcontractors are similarly entitled to a mechanic’s lien, “provided, that [they] give notice in writing to the owner or to the person having charge of the property that [they] shall claim such lien before performing the labor or furnishing the material for which it is claimed.” RSA 447:5. If notice is not given prior to commencing work but given at a later time, a lien may still be claimed but it is limited to “the amount then due or that may thereafter become due to the contractor, agent or subcontractor of the owner.” RSA 447:6. In addition, after having provided notice, subcontractors must provide an account in writing of the labor performed or materials furnished as often as every 30 days. RSA 447:8.

The lien created by the Mechanic’s Lien Statute shall continue for 120 days after the services are last performed or the materials are furnished. RSA 447:9. In order to perfect the lien, it must be “secured by attachment of the property upon which it exists at any time while the lien continues.” RSA 447:10. The attachment is obtained by filing a petition for writ of attachment with the court which expressly states that the purpose of the writ is to secure a mechanic’s lien attachment. Thus, the petition should name the property owner as a defendant and include: (1) a statement that it is for the purpose of securing a mechanic’s lien pursuant to RSA 447, (2) a description of the property upon which the work was performed, (3) a statement of the amount due, and (4) a statement that the work was last performed within 120 days.

The petition is typically filed ex parte. Once the attachment is granted, it must be served on the defendant within the time set forth in the court's order and should also be served on the registry of deeds where the property is located to give notice of the attachment. The writ and order must include a notice to the defendant of a right to request a hearing on the attachment within 14 days of service.

The attachment shall take precedence over all prior claims except for liens on the account of taxes. RSA 447:9. It also shall have precedence and priority over any construction mortgage except to the extent that the mortgagee shows that the proceeds of the mortgage loan were disbursed either toward payment of invoices from or claims due subcontractors and suppliers for work on the mortgaged premises and the mortgagee obtained an affidavit from the contractor that the subcontractors and suppliers have been paid or will be paid from the disbursement. RSA 447:12-a. To the extent there is more than one mechanic's lien attaching the same property, the mechanic's lien creditors shall share pro rata in accordance with the amounts of their respective lien judgments in the property attached or in its proceeds. RSA 447:12.

Subcontractors and suppliers may seek a mechanic's lien for public projects. Such liens shall not become perfected, however, unless filed within 90 days after completion and acceptance of the project by the state, municipality or other political subdivision. RSA 447:15. To provide security for such liens, contractors in projects valued over \$25,000 must post a bond in an amount equal to 100% of the value of the contract. To enforce a claim against a bond, a claimant shall within one year after filing a lien claim, file a petition in superior court for the county within which the contract was principally performed, with a copy to the principal and surety.

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.