I. MECHANIC’S LIEN BASICS

RCW 60.04 creates a lien upon property in favor of those who provide labor and materials on the property, when the labor and materials were provided at the request of the property owner or his/her agent. These “mechanic’s” or “materialmen’s” liens are typically enforced against real property, but, in some cases, may be enforced against specific personal property.

In Washington, mechanic’s and materialmen’s liens are entirely statutory. Because the statutes are in derogation of the common law, they are strictly construed.

The procedure necessary to enforce a lien is detailed; therefore, a complete review of the code must be completed before proceeding with a claim under a mechanics’ lien. The necessity of exact as opposed to substantial compliance with the verification and authentication requirements was recently affirmed in Williams v. Athletic Field, Inc., 155 Wn. App. 434; 228 P.3d 1297, rev. granted, 169 Wn.2d 1021 (2010). On appeal to the Washington Supreme Court, these exacting standards were ameliorated somewhat. The Supreme Court of Washington disagreed and held that a claim of lien in the sample form was valid despite the absence of a proper acknowledgment. In this unique instance, given that both parties reasonably interpreted the ambiguous acknowledgment requirement in Wash. Rev. Code § 60.04.091(2), it was inequitable for one party alone to bear the costly burden of this litigation. In the interest of justice, the court declined to award attorney fees to either party for the trial or appellate proceedings. Williams v. Athletic Field, Inc., 172 Wn.2d 683; 261 P.3d 109 (2011).

Although the appellate court’s strict reading of the verification and authentication requirement were somewhat less unforgiving, a savvy practitioner would be well served by following both the letter and intent of the law in this area. A claimant must clearly demonstrate satisfaction of all the statutory lien claim requirements in order to have a valid and enforceable lien. The following is intended only to provide a general overview of the steps necessary to establish a lien. The code itself must be consulted in detail to ensure strict compliance with the statutory requirements for perfection of a mechanics lien.

A. Persons Entitled to Lien.
Any person who furnishes labor, professional services, materials, or equipment for the improvement of real property has the right to claim a lien on the improvement. RCW 60.04.021. The lien covers the contract price of labor, professional services, materials, or equipment that was provided at the instance of the owner or the owner's agent.

**B. Pre-Claim Notice.**

Those entitled to a lien must give the owner of the property, and the prime contractor, if any, written notice of the right to claim a lien. RCW 60.04.031. The notice may be given at any time. However, for general construction providing notice only protects the right to claim a lien for materials, services, or equipment furnished within 60 days preceding the date the notice is given. For new construction of a single-family residence, the notice only covers 10 days preceding the date notice is given.

Certain categories of persons are exempt from the general notice requirements. These include: (1) persons who contract directly with an owner or the owner's common law agent; (2) laborers, and (3) subcontractors who contract directly with the prime contractor.

**C. Claim of Lien – Contents, Form, and Recording.**

A claim of lien must be filed within 90 days from the date of cessation of the performance of labor, the furnishing of materials, the supplying of equipment, or from the date the contributions to any type of employee benefit plan were due. The claim of lien must include specific information set forth in the statute, including an identification of the claimant, lien property, and dates of services, and lien amount. RCW 60.04.091. The claim of lien should be recorded with the county auditor for the county where the property is located. Failure to record the lien makes it subordinate to the interest of any subsequent mortgagee and invalid as to the interest of any subsequent purchaser.

**II. PUBLIC PROJECT CLAIMS**

**A. State and Local Public Work**

Public works are governed by Title RCW 39 which applies to all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality, or which is by law a lien or charge on any property therein. The statute requires general contractors on public works to execute and deliver a bond to the public agency for the protection of all laborers, mechanics, subcontractors and material suppliers performing such contract work. Puget Sound Elec. Workers Health and Welfare Trust v. Merit Co., 123 Wn.2d 870 P.2d 960 (1994). RCW 39.08 is Washington’s Little Miller Act.

**i. Notices and Enforcements**

All subcontractors or suppliers who are not contracting directly with the prime contractor must supply pre-claim notice within 10 days of first supplying materials or equipment. The notice of claim must then be brought within 30 days of acceptance of the improvement by the
public body. The notice must be delivered to the public works owner. Suit may then be brought to foreclose on the payment bond claim within four months of filing of the claim. The limitations periods will either be set forth in the bond or it will be three four or six years after the notice of bond claim is served. In Washington, the basic form for the bond claim is set out by statute and must include the name of the claimant, the amount of claim, the name of the general contractor, the surety, and a description of the project and labor and/or materials furnished.

Under Washington’s Prompt Pay Act, prime contractors are entitled to payment within 30 days after the public agency’s receipt of the invoice. If the public agency intends to withhold payment, it must notify the contractor in writing within 8 days stating why payment is being withheld and what actions are required by the contractor in order to receive payment. Subcontractors must be paid within 10 days of prime contractor’s receipt of payment.

B. Claims to Public Funds

RCW 39.08.015 provides liability for failure to take bond. It states:

If any board of county commissioners of any county, or mayor and common council of any incorporated city or town, or tribunal transacting the business of any municipal corporation shall fail to take such bond as herein required, such county, incorporated city or town, or other municipal corporation, shall be liable to the persons mentioned in RCW 39.08.010, to the full extent and for the full amount of all such debts so contracted by such contractor.

i. Notices and Enforcement


III. STATUTES OF LIMITATION AND REPOSE

In Washington, the statute of repose sets a strict limit on the time in which a plaintiff’s claim must accrue in actions arising from construction projects. The statutes of limitations, applicable to all contract actions, set a limit on when an action can be brought. Accrual marks the date of commencement of the applicable statute of limitations. The statutes of limitations and statutes of repose applicable to construction claims have been the subject of much confusion and some seemingly conflicting case law, but recent legislative and judicial clarifications have provided better guidance.

A. Statutes of Limitation and Limitation on Application of Statutes

In Washington, the statute of limitations for breach of an oral contract is three years. RCW 4.16.080. For written contracts, the statute of limitations is six years. RCW 4.16.020. An additional, less frequently discussed, statute of limitations governs actions for taking, detaining or injuring personal property; it provides that those actions must be commenced within three years. RCW 4.16.080. The Washington Condominium Act, RCW 64.34, must be consulted in detail for any construction litigation involving condominiums in the state. Among other things,
it creates warranties of suitability and quality, which are subject to a four year statute of limitations. RCW 64.34.452(1).

Because Washington arguably does not currently recognize a claim for negligent construction, see, e.g., Atherton Condo. Apartment-Owners Ass’n Bd. ofDirs. v. Blume Dev. Co., 115 Wn.2d 506, 799 P.2d 250 (1990), but see Donatelli v. D.R. Strong Consulting Engineers, Inc., 2013 WL 6022171, 312 P.3d 620 Wash. (2013), the vast majority of construction defect claims are brought as, or at least involve, breach of contract claims. The statute of limitations begins to run on these claims, either at termination of services or at “substantial completion” of the project, whichever is later. RCW 4.16.310.

B. Statutes of Repose and Limitations on Application of Statutes

In addition to the statute of limitations, the practitioner must be aware that Washington has a six-year statute of repose, running from the date of substantial completion of construction or the termination of services, whichever is later. RCW 4.16.310. Like other jurisdictions, Washington distinguishes between the two as follows: “A statute of limitation bars plaintiff from bringing an already accrued claim after a specific period of time. A statute of repose terminates a right of action after a specific time, even if the injury has not yet occurred.” Rice v. Dow Chem. Co., 124 Wn.2d 205, 875 P.2d 1213 (1994) (internal citations omitted).

C. The Interplay Between the Statutes of Limitation and Repose.

Applying the statute of limitations and statute of repose involves a two-step analysis. First, the practitioner must be certain that the cause of action accrued within six years of substantial completion. If it did not, the claim is barred by the statute of repose. 1000 Virginia L.P. v. Vertecs Corp., 158 Wn.2d 566, 146 P.3d 423 (2006). Second, the plaintiff must have filed suit within the applicable statute of limitations. 1000 Virginia L.P. v. Vertecs Corp., 158 Wn.2d 566, 146 P.3d 423 (2006). The statute of limitations, however, only begins to run once the cause of action has accrued. RCW 4.16.005.

A simple example of the interplay between the statute of limitations and statute of repose involves a personal injury action, arising out of construction, where the injury occurred in the fifth year following substantial completion. The first step is to determine whether the plaintiff’s

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1 The accuracy of this longstanding idiom has been called into question recently in the recent case of Affiliated v. LTK Consulting, 170 Wn.2d 521, 243 P.3d 531 (2010), where the court recognized an “independent duty” owed in certain circumstances that is separate and actionable in tort. This new wrinkle in the longstanding economic loss rule will likely create a new cause of action in certain relationships such a those with architects and engineers based on the expectations created by their “professional” status. It is likely that any such cause of action, where allowed would be subject to the 3 year statute of limitations applicable to claims for negligence. RCW 4.16.080.

2 Substantial completion is statutorily defined as “the state of completion reached when an improvement upon real property may be used or occupied for its intended use.” RCW 4.16.310. In practice, this is typically construed as the date the certificate of occupancy was issued.
cause of action accrued within the six-year statute of repose. In this hypothetical it did, and therefore the claim is not barred by that statute.

The second step is to determine if the claim is barred by the statute of limitations, which began running upon accrual (in this example, upon injury). Therefore, to determine whether plaintiff’s claim is barred by the three year personal injury statute of limitations, the practitioner must ask him/herself whether more than three years have lapsed since plaintiff’s injury.

In determining running of the statutes of repose and limitations, a practitioner must be cognizant of the triggering of each statute. RCW 4.16.310 is clear that the time begins to run upon substantial completion of a project. Thus, the commencement of the period is measured from the latter of termination of services or date of substantial completion. Substantial completion runs from the point when an improvement “may be used;” actual use or occupancy is not required for construction to be substantially complete. Lakeview Blvd. Condominium Ass’n v. Apartment Sales Corp., 144 Wn. 2d 570, 29 P.3d 1249 (2001). A claim that accrues before substantial completion of the improvement starts the running of the statute of limitations. RCW 4.16.040(1); RCW 4.16.080(3). See also, Phillips v. King County, 87 Wn. App. 468, 943 P.2d 306 (1997).

D. The Discovery Rule in Construction Defect.

The Supreme Court adopted the discovery in all construction defect cases in Architechtonics Constr. Management, Inc. v. Khorram, 111 Wn. App. 725, 737, 45 P.3d 1142 (2002), rev. denied, 148 Wn.2d 1005, 60 P.3d 1212 (2003). In response to the Architechtonics decision, the Washington Legislature enacted RCW 4.16.326(1)(g), which specifically rejected the discovery rule in the context of written construction contracts, but which is silent as to oral contracts.

Following the Architechtonics decision and the adoption of RCW 4.16.326(1)(g), there was considerable confusion in Washington as to precisely how the discovery rule applied to construction defect claims. The Supreme Court clarified the situation in 1000 Virginia L.P. v. Vertecs Corp., 158 Wn.2d 566, 146 P.3d 423 (2006). In construction defect claims, RCW 4.16.310 is a statute of repose that terminates an action for construction defects that does not accrue within six years from the time of substantial completion of construction or termination of services, whichever is later. RCW 4.16.310. Under RCW 4.16.040, an action upon a contract in writing must be commenced within six years. Generally, a statute of limitation runs from the time a claim accrues; a claim accrues when a party has the right to apply to a court for relief, which may be at the time the claim is discovered. 1000 Virginia, 158 Wn.2d at 575-76. But in July 2003, RCW 4.16.326(1)(g) went into effect, requiring that construction defect claims be filed within six years of substantial completion of construction or termination of services, whichever is later, regardless of when the claim was discovered. RCW 4.16.326(1)(g).

There, the Supreme Court criticized the Architechtonics decision, but went on to hold that the discovery rule was appropriate in construction defect cases involving latent defects that the plaintiff would be unable to detect at the time of the breach. This holding and reasoning was recently affirmed in Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc., 166 Wn.2d 475, 209 P.3d 863 (2009).
At the same time, the Supreme Court was bound by the adoption of RCW 4.16.326(1)(g). Thus, it ultimately held that if there is a latent defect, a plaintiff may take advantage of the discovery rule in the context of oral contracts. \textit{Id.} With respect to written contracts, it is essential for defendants to plead RCW 4.16.326(1)(g) in order to receive its benefits. If a defendant fails to plead RCW 4.16.326(1)(g) as an affirmative defense, the Supreme Court held that the discovery rule may also be applied to the statute of limitations for written contracts.

IV. PRE-SUIT NOTICE OF CLAIM AND OPPORTUNITY TO CURE

On June 13, 2002, Washington’s statutory scheme for pre-suit notice of claim and opportunity to cure in construction defect cases became effective. Prior to that date, such requirements existed only to the extent they were required by the parties’ contract. Currently, the requirements are found at RCW 64.50.

A. Notice of Claim.

The claimant must serve a written notice of claim on construction professional 45 days before filing an action. RCW 64.50.020(1). The notice must state the general nature of the defect with sufficient detail.

B. Response.

Within 21 days after receiving a notice of claim, the construction professional must serve a written response with the following:

1. A proposal to inspect the residence within a specified time frame. Or, a statement based upon the inspection with an offer to remedy, compromise by payment or dispute;

2. An offer to compromise and settle by payment without inspection. This may include offer to purchase and pay relocation costs; or

3. A statement that the construction professional disputes the claim and will neither remedy nor settle.

RCW 64.50.020(2).

C. Inspection.

If a claimant allows an inspection as set forth in a construction professional’s proposal, the claimant is required to allow reasonable access during normal working hours.

Within 14 days of an inspection, the construction professional must serve on the claimant:
1. A written offer to remedy at no cost, with a report on the scope of inspection, findings and results, a description of additional construction necessary to remedy the defect(s) described in the claim, and a timetable for completion;

2. A written offer to compromise and settle; or

3. A written statement that the construction professional will not further remedy the claimed defect(s).

RCW 64.50.020(4).

D. Filing of Action.

1. After the Initial Notice of Claim:

If the construction professional disputes the claim or makes no response, the claimant can file a lawsuit without further notice.

If the construction professional makes a proposal, and the claimant rejects that proposal, the claimant must provide written notice of the rejection prior to filing suit.

If there is no acceptance or rejection by claimant within 30 days, the construction professional may terminate the proposal or offer by serving written notice; if that happens, the claimant can then commence suit.

2. After an Inspection has been Completed:

If the construction professional does not proceed to remedy within the agreed timetable, or fails to comply with these requirements, the claimant can file action without further notice.

If the claimant rejects the offer to remedy or settle, the claimant must serve written notice. Following the written notice, the claimant can file the lawsuit.

If the construction professional does not receive rejection or acceptance within 30 days, he/she may terminate offer by written notice.

If the claimant accepts the proposal, the claimant must provide written notice of acceptance within reasonable time after receipt of offer, not later than 30 days. The claimant is required to provide access during normal working hours to perform and complete the construction within the timetable.

RCW 64.50.020(3), (4).

E. Noncompliance.
The general rule is that any action commenced without complying with this statute shall be dismissed without prejudice. The claimant may not recommence the action until he/she is in compliance. RCW 64.50.020(6). However, one of the first cases interpreting RCW 64.50, *Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge L.P.*, 156 Wn.2d 696, 131 P.3d 905 (2006), reminded practitioners that the construction professional has his/her own notice requirements under RCW 64.50.050. That section of the code requires the construction professional to give notice to the claimant of the pre-suit notice and opportunity to cure requirements at the time that the parties enter into a contract.

The Supreme Court explained that the two notice provisions operated together to give effect to the legislature’s dual goals of reducing potentially burdensome and expensive construction defect litigation and preserving rights and remedies for property owners. Reading the statutory scheme as an integrated whole and in light of these purposes, the Supreme Court held that, if the construction professional did not provide notice pursuant to RCW 64.50.050, then the claimant was excused from the pre-suit notice and opportunity to cure requirements of RCW 64.50. These statutes were authoritatively construed in *Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Limited Partnership*, 156 Wn.2d 696, 131 P.3d 905 (2006). There the court determined that a builder could not assert the statutory notice bar of subsection .020 without first having complied with the notice requirements of subsection .050. *Id.* at 703. The decision reversed the Court of Appeals' opinion in the same case that had enforced the purchaser's prelitigation notice requirement even though the builder had not given the statutory notice. 156 Wn.2d at 698.

V. INSURANCE COVERAGE AND ALLOCATION ISSUES

A. General Coverage Issues.

In order to determine whether insurance coverage exists, Washington Courts engage in a two-step process. *Graff v. Allstate Ins. Co.*, 113 Wn. App. 799 (2002). First, the insured must demonstrate that the loss falls within the scope of the policy’s insured losses. *Id.* Second, if the insured has successfully established that such coverage does potentially exist, in order to defeat coverage, the burden shifts to the insurer to show that a specific exclusion applies. *Id.*

When a construction defect claim is made, most contractors tender the claim to the insurance company that issued their commercial general liability policy or “CGL” policy. Speaking generally, CGL policies provide broad coverage for claims of “property damage.” Again, speaking very generally, three things that are required to trigger coverage under the standard CGL insuring agreement are: (1) physical injury to tangible property (or loss of use of tangible property); (2) that takes place during the policy period, and (3) is caused by an “occurrence” (or sometimes by an “event”). *See Yakima Cement Prods. Co. v. Great Am. Ins. Co.*, 93 Wn.2d 210, 608 P.2d 254 (1980); *Gruol Construction Co. of North America*, 11 Wn. App 635, 524 P.2d 427 (1974).

While these guidelines above are generally accurate, like all contracts, insurance contract analysis is specific to the language of the contract (i.e., the policy); this in turn means that when a policy defines its terms, the policy’s definitions apply. *Getz v. Progressive Specialty Ins. Co.*, 106 Wn. App 184, 187, 22 P.3d 835 (2001). Often, in determining whether there is coverage for
a construction defect claim under a CGL policy, the policy’s definition of “property damage” and “occurrence” will be central to the analysis.

Thus, the question often becomes, does the claim or complaint allege “property damage” resulting from an “occurrence” during the policy period, as those terms are defined in the policy.

### B. Trigger of Coverage and Allocation Among Insurers.

Most contractors’ CGL policies are occurrence policies, rather than claims made policies. Under an occurrence policy, the insurer’s obligations are triggered if the covered event took place during the policy period. *See Wellbrock v. Assurance Co. of America*, 90 Wn. App. 234, 951 P.2d 367, review denied, 136 Wn.2d 1005, 966 P.2d 902 (1998).³

Continuous and progressive damage can trigger coverage under multiple insurance policies. As a matter of law, once coverage is triggered, the insurer will be liable for an entire loss, including portions that took place outside its policy period. *See American Nat’l Fire Ins. Co. v. B & L Trucking and Constr. Co.*, 134 Wn.2d 413, 428, 951 P.2d 250 (1998). Conversely, if there is no damage during the policy period, there is no coverage regardless of any other issue. *Wellbrock*, supra. *See also Villella v. Pub. Employees Mut. Ins. Co.*, 106 Wn.2d 806, 725 P.2d 957 (1986).⁴

### C. Additional Insured Requirements.

Construction contracts often contain requirements that prime contractor and subcontractors obtain “additional insured” coverage for the developer and/or contractor for whom the work is being performed. Some CGL polices contain “blanket additional insured” endorsements that automatically extend additional coverage if required by a written contract entered into by the named insured. More often, CGL policies extend coverage to additional insureds only if specifically requested, with appropriate paperwork completed.

In Washington, a contractor’s failure to obtain coverage when required by contract may be deemed a breach of contract. If a contractor is successfully pursued for such a breach, the breaching contractor is essentially required to take on the role of the developer’s or general contractor’s insurer. *U.S. Oil & Refining Co. v. Lee & Eastes Tank Line, Inc.*, 104 Wn. App. 823, 16 P.3d 1278 (2001).

### VI. CONTRACTUAL INDEMNIFICATION

Absent an express warranty, in Washington, implied indemnity (often mistakenly called “equitable indemnity”) is normally not available in the context of construction contracts, although some trial courts have been known to interpret the concept broadly for remedial

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³ In contrast, claims made policies provide coverage for a (covered) claim if the claim is made during the policy period, without regard to when the actions giving rise to the claim occurred.

⁴ That said, as a practical matter, insurers often share in the payment of a settlement or judgment in the case based upon their time on the risk after substantial completion.
purposes. *Urban Dev., Inc. v. Evergreen Bldg. Prods., L.L.C.*, 114 Wn. App. 639, 59 P.3d 112, *aff’d sub nom. on other grounds, Fortune View Condominium Assoc. v. Fortune Star Dev. Co.*, 151 Wn.2d 534, 90 P.3d 1062 (2003). However, the parties are free to, and often do, bargain for and include indemnity provisions in their contracts.

Historically, there has been some dispute as to whether a contractor’s indemnity rights applied to both defective work and to tort claims, or if they were limited to only tort claims. There had been no appellate court guidance on the subject until recently, when the Court of Appeals issued its decision in *MacLean Townhomes, L.L.C. v. P.J. Interprize, Inc.*, 133 Wn. App. 828 (2006).

In *MacLean*, a general contractor had sued its subcontractor, seeking, among other things, to enforce an indemnity clause in the subcontract. The indemnity clause required the subcontractor to defend and indemnify the general contractor for “any and all claims” arising from the subcontract. The subcontractor moved for partial summary judgment, arguing that the indemnity clause applied only to tort-based claims and not to construction defect claims. The clause at issue was a fairly standard indemnity provision, which stated:

```plaintext
SUBCONTRACTOR shall defend, indemnify, and hold
CONTRACTOR harmless from any and all claims, demands,
losses and liabilities to or by third parties arising from, resulting
from, or connected with, services performed or to be performed
under this Subcontract by SUBCONTRACTOR or
SUBCONTRACTOR'S agents, employees, subtier Subcontractors,
and suppliers to the fullest extent permitted by law and subject to
the limitations provided below:
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The limiting clauses barred indemnity for bodily injury or property damage arising from the prime contractor’s sole negligence. The clauses also stated that in the case of concurrent negligence, the subcontractor would be liable only for damages caused by its own negligence. Additionally, the subcontractor expressly waived its immunity under RCW Title 51.5

The basis for the argument that indemnity provisions such as these apply only to tort-based claims had historically been the inclusion of the language pertaining to negligence, and the fact that there is no viable cause of action in Washington for negligent construction. Prior to *MacLean*, this argument met with varying levels of success in the trial courts.

The Court of Appeals made clear, however, that indemnity provisions in contracts are construed in accordance with general rules of contract construction. *MacLean Townhomes, L.L.C.*, 133 Wn. App. at 831. Thus, the court would not construe the contract in such a manner as to make any term absurd or meaningless. *Id.* (citing *Seattle-First Nat’l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985)). It would not read the term “all claims” out of the contract. *Id.* at 832. A better drafted indemnity agreement could conceivably limit that risk appropriately.

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5 Pursuant to Title 51 RCW, Washington’s workers compensation system exempts an employer from liability for its own worker’s injuries absent the employer’s intent to injure the worker.
Ultimately, the Court ruled that the contract was properly read to include specific limitations on tort actions, but not to limit the indemnification obligations to tort actions. *Id.* at 833. Thus, the indemnity obligations applied to construction defect actions as well. *Id.* The *MacLean* decision provided much needed guidance in interpreting similar clauses; however, each indemnity agreement will need to be interpreted and applied based on the language agreed to by the parties.

The Washington Supreme Court affirmed the reasoning and holding in *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475; 209 P.3d 863 (2009). Specifically, the court held that a standard indemnity provision that refers to “any and all claims, demands, losses and liabilities to or by third parties arising from, resulting from, or connected with services performed or to be performed” under the contract and that does not specifically limit indemnifiable claims to tort claims does not prohibit the indemnitee from seeking indemnification for nontort claims. Additional language limiting the indemnitor's liability when the underlying claim is due to the indemnitee's sole negligence or fault does not operate to restrict the indemnity provision to tort claims only.

**VII. CONTINGENT PAY AGREEMENTS**

**A. Enforceability.**

Pay if paid clauses will be enforced in Washington only if they unambiguously reflect the parties’ intent that the payment obligation under the subcontract is subject to an express condition precedent of payment from the owner. *Amelco Electric v. Donald M. Drake Co.*, 20 Wn.App. 899, 902-903, 583 P.2d 648 (1978).

**B. Requirements.**

The intent to allocate the risk of non-payment for the subcontractors work to the subcontractor must be expressly set forth in the contract. Words to such as “payment by [owner] shall be an express condition precedent to any obligation owing by [general] to [subcontractor]” have been held sufficiently unambiguous to be enforceable.

**VIII. SCOPE OF DAMAGE RECOVERY**

**A. Personal Injury Damages vs. Construction Defect Damages.**

Washington does not currently recognize a claim for negligent construction. Thus, construction defect claim damages are primarily governed by contractual damages principles. In *Eastlake Constr. Co., Inc. v. Hess*, 102 Wn.2d 30, 686 P.2d 465 (1984), the Supreme Court discussed construction contract damages at length and adopted the Restatement (Second) of Contracts § 348, which provides for the following measures of damages:

1. If a breach delays the use of property and the loss in value to the injured party is not proved with reasonable certainty,
he may recover damages based on the rental value of the property or on interest on the value of the property.

(2) If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on

(a) the diminution in the market price of the property caused by the breach, or

(b) the reasonable cost of completing performance or of remediing the defects if that cost is not clearly disproportionate to the probable loss in value to him.

B. Attorney’s Fees Shifting and Limitations on Recovery.

The general rule regarding the availability of attorney fees and costs in Washington is that each party to a civil action bears its own fees and costs absent modification by contract, statute, or a recognized ground in equity. City of Seattle v. McCready, 131 Wn.2d 266, 274, 931 P.2d 156 (1997). Additionally, the Washington Condominium Act (the “WCA”) makes attorney fees and costs available to any person or class of persons who must sue to enforce their rights under the WCA. RCW 64.34.455

Construction contracts often contain a prevailing party attorneys’ fees clause. If the clause is drafted to only apply to one of the contracting parties, Washington courts will interpret it as applying to both parties to the contract. RCW 4.84.330.

Parties to a contract may also place limitations on recovery. This may include a limitation on the time in which one has to bring a claim on the contract. It may also include limitations on the amount or type of damages that may be recovered.

C. Consequential Damages.

Damages recoverable for a breach of contract, including construction contracts, are those which “may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself. Or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable resolt of the breach.” Crest, Inc. v. Costco Wholesale Corp., 128 Wn.App. 760, 115 P.3d 349 (2011). Washington courts have held that a party “injured by a breach of contract may recover all damages that accrue naturally from the breach, including any incidental or consequential losses the breach caused.” Floor Express, Inc., v. Daly, 138 Wn.App. 750 158 P.3d 619 (2007).

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6 RCW 4.84.080 does provide for $200 in statutory attorneys fees to the prevailing party. Certain limited costs are also taxed to the losing party under RCW 4.84.
D. Delay and Disruption Damages.

With respect to owner delays, every construction contract carries an implied condition that the owner will not hinder the contractor’s performance, and if the owner does, then the contractor may recover additional compensation. *Bignold v. King County*, 65 Wn.2d 817, 399 P.2d 611 (1965). A contractor may be held liable for damages that result from the contractor’s delay in performing the contract. *Brower Co. v. Garrison*, 2 Wn.App. 424, 468 P.2d 469 (1970).

Parties may include or limit remedies for delay or disruption damages. Often, an extension of time for performance may be the remedy for delay. When compensation is allowed, delay damages redress the loss from being unable to work, where disruption damages compensate a party for the damage suffered from actions that made the work more difficult and expensive than anticipated.

E. Economic Loss Doctrine.

Historically, Washington courts have applied the economic loss rule to hold parties to their contract remedies when a loss potentially gives rise to both tort and contract relief. The rule prohibits plaintiff from recovering in tort economic losses to which their entitlement flows only from a contract because tort law is not intended to compensate parties for losses suffered as a result of breach of duties assumed only by agreement. Where economic losses occur, recovery is confined to contract to ensure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract. See generally *Stuart v. Coldwell Banker*, 109 Wn.2d 406, 745 P.2d 1284 (1987), and *Atherton Condo. Apartment-Owners Ass’n v. Blume Development Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990) (Washington Supreme Court declined to recognize any tort cause of action for “negligent construction.”).

The continued application of the economic loss rule in Washington was recently revisited by the Washington State Supreme Court in *Affiliated v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 243 P.3d 521 (2010), where the court recognized that in some instances there may be an “independent duty” owed that is separate and apart from the contract. In that case the court seemed to draw a distinction between a construction contract and contracts for professional services with architects and engineers. Specifically, expectations associated with those professions give rise to duties independent of the terms of the contract. *Id.* Although the court in *Affiliated* focused on design professionals, the independent duty rule has not been explicitly limited to those relationships.

The continued viability of the economic loss rule was further called into question in the recent case of *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 179 Wn.2d 84, 312 P.3 629 (2013). D.R. Strong was a professional engineering company hired by the Donatellis to provide the engineering plans to develop two plats of land. Because of case overruns, the developer did not complete the project and the plats were foreclosed upon the unbuilt houses. This seems to be consistent with Washington court’s decisions to apply the independent duty doctrine to licensed design professionals such as engineers and architects. It remains to be seen if the independent duty doctrine will be deemed to apply to general contractors or other providers of labor as opposed to design expertise. If a line is to be drawn, that would be the most logical delineation.
In *Pacific Boring, Inc. v. Staheli Trenchless Consultants, Inc.* 2015 WL 5794260 (October 5, 2015) a federal district court recently found that an engineering consultant did not owe a professional, statutory duty to a subcontractor beyond that owed to the general public.

An attorney representing a design professional should also review *Michael v. CH2M Hill, Inc.*, 171 Wn.2d 587 (2011), where the independent duty of licensed engineers in certain circumstances was affirmed.

**F. Interest.**

Prejudgment interest may be awarded when the claim is liquidated or readily determinable, as opposed to an unliquidated claim, regardless of the characterization of the claim as sounding in tort or contract. *Hansen v. Rothaus*, 107 Wn.2d 468, 730 P.2d 662 (1986). Additionally, the parties’ contract may provide for inclusion of interest.

**G. Punitive Damages.**


**H. Liquidated Damages.**


However, liquidated damages agreements will be found to be unenforceable if there is either an intent to punish a contractor for breaching the contract, or if it is illegal. *Wallace Real Estate Investors, Inc., v. Groves*, 124 Wn.2d 881, 881 P.2d 1010 (1994).