

DELAWARE

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I. MECHANIC'S LIEN BASICS

The process and procedure for mechanic's liens in Delaware is governed by statute. *See* 25 *Del. C.* § 2701 *et. seq.* The Mechanics' Lien Statute allows for "any person having performed or furnished labor or material, or both, to an amount exceeding \$25 ... for the erection, alteration, or repair of any structure, in pursuance of any contract ... with the owners ... or with the agent of such owner ... to obtain a lien upon such structure and upon the ground upon which the same may be situated or erected."¹ "The general purpose of a mechanic's lien is to provide protection for contractors or other laborers who furnish labor or other services on a structure pursuant to a contract with its owners."² Under the mechanic's lien statute, "labor" includes both physical and supervisory labor.³

The statute defines "structure" to "include[] a building or house."⁴ Mechanic's liens may also be obtained by those furnishing labor or materials for the construction of or improvements to mills, factories, bridges, wharves, piers, and docks.⁵ In the absence of a contract between the contractor and landowner that has been signed by the landowner, as well as meeting other enumerated requirements as contained in the statute, a lien may not attach to improvements that are made solely to the land alone, that is, those not made for the benefit of or improvement to any structure thereon.⁶ *In personam* claims, such as breach of contract, can also be filed concurrently with a mechanic's lien claim.⁷

Because the right to a mechanic's lien derives solely from the statute, the rights and remedies are in derogation of the common law, and the statute is strictly construed.⁸ Delaware courts have explained that "[s]trict compliance with the statute is required as powerful relief is afforded that was unavailable at common law."⁹

A. Requirements

It is well-settled Delaware law that the Mechanics' Lien Statute requires strict compliance with the statute from those seeking a lien on real property.¹⁰ Section 2712 sets forth the statute's "requirements of [a] complaint or statement of [a] claim."¹¹ Pursuant to 25 *Del. C.* § 2712, a mechanic's lien action requires a plaintiff to file complaints or statements of claims for mechanic's liens in the county where the structure is situated, and must include certain information as enumerated in the mechanic's lien statute.¹² Lastly, Section 2712 also requires that the complaint be supported by the affidavit of the plaintiff that the facts therein are true and correct.¹³

This section, however, is not an exhaustive list of all necessary pleading requirements for mechanics' lien claims, and plaintiffs/claimants should also be otherwise careful to adhere to general principles of contract law.¹⁴ Additionally, where improvements are made to the land alone, Section 2703 prohibits a lien from attaching unless a contract is signed by the landowner.¹⁵ When a mechanics lien is sought by a party who did not contract directly with the landowner (*i.e.*, a subcontractor), it is sufficient to show that the subcontractor contracted with a third party who did have a contract with the landowner.¹⁶

It should also be noted that, while Delaware courts have dismissed complaints for non-compliance with the above statutory requirements,¹⁷ the courts have also held that strict construction of the statutory requirements “does not mean unreasonable or unwarranted construction.”¹⁸ The statute, for example, requires the party seeking the lien to list the owner or reputed owner of the property, but courts may infer property ownership from circumstantial evidence if ownership is not clearly established by plaintiff's lien application.¹⁹

B. Enforcement and Foreclosure

Contractors who have contracted directly with the owner of a structure must file a statement of claim within 180 days after the completion of the structure.²⁰ A claim made under the Mechanics' Lien Statute is deemed timely if it is filed within 180 days of any of nine (9) enumerated events in the construction process.²¹ Alternatively, those not having a contract directly with the owner have 120 days from the date labor or delivery of materials was completed, or from the date final payments were due or made to the contractor, to file a statement of claim.²² Delineating a finishing date in a Statement of Claim is “‘essential ... for the creation of any mechanics' lien’ in part because it is necessary to determine the running of the statute of limitations.”²³ If claims for liens are made against multiple structures, the claimant must designate in the complaint the amount that is claimed due on each structure.²⁴

If the contractor obtains a judgment upon a claim made under the statute, a lien will attach to the structure at issue and the grounds upon which it sits.²⁵ A resulting judgment lien relates back in time to when work first began.²⁶ A claimant is required to proceed by writ of *levari facias* in order to execute on a judgment obtained under the mechanic's lien statute.²⁷ A judgment lienholder may file a writ of *scire facias* commanding a sheriff's sale of the property in order to recover his lien interest.²⁸ The statute does not provide for the priority or preference of claims. If the proceeds of the sale are insufficient to satisfy all outstanding liens obtained pursuant to the statute, the proceeds are divided on a *pro rata* basis between those claimants proceeding under the statute.²⁹

C. Ability to Waive and Limitations on Lien Rights

The right to a mechanics' lien may be waived only under certain limited circumstances.³⁰ Pursuant to Section 2706, lien waivers are enforceable only if “executed and delivered . . . simultaneously with or after payment for the labor performed and the materials supplied”³¹ As the Delaware Superior Court explained, “[t]he waiver ‘must be given no broader coverage than that which clearly results from a reasonable application of the language of the contract.’”³² Accordingly, a waiver of a mechanics' lien must be certain in its terms.³³ Any ambiguities are to be resolved against any waiver.³⁴

II. PUBLIC PROJECT CLAIMS

A. State and Local Public Work

Chapter 69 of Title 29 of the Delaware Code governs the award of contracts for public improvements. Although a state agency generally is required to award a public works contract to the lowest responsible bidder, that principle is not without exceptions. Indeed, per 29 *Del. C.* § 6907, an agency has discretion to award the contract to another bidder where “in the opinion of the agency or its delegated representative, the interest of the State . . . shall be better served by the awarding of the contract to some other vendor . . . provided the agency shall set down in its minutes the reason or reasons for granting the contract to the person other than the lowest responsible vendor, and clearly describing how the interest of the State . . . is better served by awarding the contract to other than the lowest vendor.” The agency must not exercise such discretion arbitrarily or capriciously.³⁵

Titles 29 and 19 were amended in 2019 to clarify the definitions and registration requirements of construction contractors who may obtain contracts with public entities in Delaware. These amendments are discussed in Section IX, *infra*.

B. Claims to Public Funds

As a general rule, absent statutory provisions to the contrary, a mechanic’s lien will not attach to state owned property used for the benefit of the public.³⁶ As the Delaware Supreme Court has explained, such a rule serves the public interest by not only preventing the disruption of essential public services or functions, but also precluding the satisfaction of private debts out of public property.³⁷

III. STATUTES OF LIMITATION AND REPOSE

A. Statutes of Limitation and Limitations on Application of Statutes

Actions based upon a construction contract must be commenced within three (3) years from time of breach.³⁸ Delaware courts have extended the limitations period in construction defect claims where the construction defect was “inherently unknowable.”³⁹

B. Statutes of Repose and Limitations on Application of Statutes

A six-year limitations period applies to claims for death or injury arising out of construction on real property.⁴⁰ Known as Delaware’s “builder’s statute,” this statute of repose provides a limitations period that runs from the earliest date of various events in the construction process, such as substantial completion and/or acceptance by the owner.⁴¹ The statute also states that to the extent the previous statutes provide for a shorter time period, they shall control.⁴² The statute does not apply to someone in actual control such as an owner or a tenant at the time when the undertaking of an improvement to property constitutes the proximate cause of injury or death.⁴³

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

In the construction context, there are no statutory requirements that a party provide pre-suit notice prior to filing a mechanic's lien (except as to certain governmental entities noted below) or initiating an action for breach of warranty. The courts, however, have dismissed a homeowner's claims for non-compliance with the notice provisions contained in their warranty.⁴⁴ The courts will enforce contractual pre-suit notice provisions between parties.⁴⁵

Pre-suit notice of claims is required by statute when a suit involves certain municipalities as defendants.⁴⁶ For example, no claims for damages relating to physical injuries, death, or injury to property and alleging negligence against the City of Wilmington or any of its departments, officers, agents or employees may be brought, unless written notice is provided to the Mayor within one year of the date of such injury, denoting the time, place and manner of injuries sustained.⁴⁷

V. INSURANCE COVERAGE AND ALLOCATION ISSUES

A. General Coverage Issues

Standard commercial general liability ("CGL") policies provide policyholders with insurance against liability for all sums the insured becomes legally obligated to pay as damages because of bodily injury or property damage caused by an occurrence.

B. Trigger of Coverage

Whether coverage is triggered under CGL policies depends on policy interpretation and application of the requirements that the bodily injury or property damage occur during the policy period, and that such injury or damage is caused by an occurrence.

The Delaware Superior Court has applied a continuous trigger analysis to claims of pollution resulting from leaching from a landfill.⁴⁸

C. Allocation Among Insurers

Delaware courts have taken divergent positions in coverage and allocation cases. The courts have distinguished injuries-in-fact, that is, discrete physical injuries or damage to property, from injuries that result from continuous conduct that extends over a period of time. In determining when an "occurrence" happens under applicable policies of insurance, Delaware courts undertake a fact-specific analysis.

The Delaware Supreme Court has held that insuring agreement language providing for "indemn[ty] for 'all sums' which an insured is obligated to pay ... caused by an occurrence" is inconsistent with *pro rata* allocation based upon time on the risk.⁴⁹ The *Monsanto* court, applying Missouri law, held that, without an express proportional limitation in the applicable policy, an insurer would be liable for the entirety of damages, up to the limits of coverage for the applicable policy periods. However, in the *E. I. du Pont de Nemours & Co.*, the Delaware Supreme Court imposed a *pro rata* allocation based on time on the risk on equitable grounds,

stating: “it is illogical to compress all of this damage into one policy period and hold each insurer fully liable. The presumption of continuous damage logically and fairly requires the imposition of the modified *pro rata* allocation of damage.”⁵⁰

D. Issues with Additional Insurance

Delaware courts have distinguished agreements to procure insurance from agreements to indemnify. The Supreme Court has held that liability insurance purchased for another remains enforceable when a party seeks coverage under that policy, despite the provisions of 6 *Del. C.* § 2704(a).⁵¹ Where a party fails to honor their contractual agreement to purchase insurance coverage for another, an enforceable cause of action for breach exists.⁵² The Delaware Supreme Court has held that certain terms in an additional insured clause are construed broadly under Delaware law.⁵³

On a motion for judgment on the pleadings “[t]he test is whether the underlying complaint, read as a whole, alleges a risk within the coverage of the policy...”⁵⁴ In doing so, the Court may look to contracts and policy documents, including additional insured endorsements in determining whether an entity is an “additional insured” under another’s policy and will not disrupt unambiguous contract or endorsement language.⁵⁵

VI. CONTRACTUAL INDEMNIFICATION

Contractual provisions in certain construction contracts that purport to obtain indemnification for a party’s own negligence are void as a matter of legislatively-defined public policy.⁵⁶ However, contracts can provide for limitations of liability.⁵⁷ The Delaware Superior Court has held that when a construction contract contains a severability clause, 6 *Del. C.* §2704(a) may invalidate only the parts of the agreement that indemnify a party against that party’s own conduct.⁵⁸ The extent to which indemnification clauses are severable, however, depends upon the express language of the indemnification provision.⁵⁹

The common law recognized the right to indemnity only if it was based upon contract, express or implied.⁶⁰ Under modern Delaware law, however, indemnification may also be based upon “equitable principles” —generally meaning “principles of fairness or justice.”⁶¹

Generally, an indemnity contract must be construed “to give effect to the parties’ intent so that ‘only losses which reasonably appear to have been intended by the parties are compensable’ under the contract.”⁶² However, contract provisions must be crystal clear and unequivocal if requiring a contractor to assume all liability for damage claims, regardless of which party is guilty of negligence actually causing the injury.⁶³ Contracts relieving a party of its own negligence are not favored, are strictly construed, and will not be interpreted to provide indemnification unless the intent of the parties is so expressed in very clear terms.⁶⁴

In addition, where the contract is silent on indemnification, Delaware provides several circumstances that can give rise to an implied obligation to indemnify. The first arises from an implied duty of workmanlike performance. Others involve special relationships in which a party with superior expertise or knowledge of a danger or risk of danger may be held to indemnify another.

Typically, if an indemnity provision specifically addresses, and permits, indemnification in a situation where the negligence of the indemnitor and indemnitee combine and concurrently cause a loss, that provision will be enforced. Delaware courts permit parties, by contract, to provide that each party would bear the loss proportionate to its fault.⁶⁵

An employer is immune from contribution claims due to the exclusivity provisions of Delaware's worker's compensation statute.⁶⁶ However, the Delaware Supreme Court has held that contractual claims for indemnification based upon express contract terms may be maintained against a plaintiff's employer.⁶⁷ The Delaware Superior Court has held that even implied indemnification claims may survive in certain cases where no express indemnification provision exists on the face of the contract.⁶⁸

VII. CONTINGENT PAYMENT AGREEMENTS

A. Enforceability

In interpreting "pay-when-paid" clauses, Delaware courts have concluded that "[i]n the absence of an unambiguous intent to make receipt of payment by [the prime contractor] a condition precedent of its obligation to pay [the subcontractor], a pay-when-paid clause 'must be interpreted as providing the time for payment' rather than a condition precedent."⁶⁹

B. Requirements

Delaware courts require that the subcontractor be paid in a reasonable time where the owner has failed to provide payment.⁷⁰

VIII. SCOPE OF DAMAGE RECOVERY

A. Personal Injury Damages vs. Construction Defect Damages

Delaware courts generally adhere to the Restatement (1st) of Contracts in determining damages in construction defect cases: "[I]f a party to a construction contract fails to perform its obligations under the contract, the aggrieved party is entitled to damages measured by the amount required to remedy the defective performance unless it is not reasonable or practicable to do so."⁷¹ Additionally, Delaware's Building Construction Payments Act governs building construction contracts and payment for such services.⁷²

B. Attorney's Fees Shifting and Limitations on Recovery

Delaware follows the "American Rule," whereby a prevailing party is expected to pay its own attorney's fees and costs.⁷³ Generally, Delaware courts will not order the payment of attorney's fees as part of costs to be paid by the non-prevailing party unless a statutory or contractual basis exists for the award of such fees.⁷⁴

C. Consequential Damages

In a contract action, a party may recover damages for those injuries that are reasonably foreseeable or anticipated to flow from the breach.⁷⁵ In a construction contract action, compensatory damages have been equated to a plaintiff's "out-of-pocket" actual loss."⁷⁶

D. Delay and Disruption Damages

Delaware courts have allowed delay damages where a construction contract provided for same in a liquidated damages provision.⁷⁷

E. Economic Loss Doctrine

Under the Economic Loss Doctrine, a party may recover in tort only if damages include bodily injury or property damage.⁷⁸ Delaware courts have adopted an exception to this rule as set forth in the Restatement (Second) of Torts § 552, which provides a basis for recovery for economic losses against those supplying false information.⁷⁹ In order to successfully meet the exception in a negligent misrepresentation claim, a plaintiff must show that (1) defendant supplied the information to the plaintiff for use in business transactions with third parties, (2) the defendant is in the business of supplying information, and (3) that the third-party justifiably relied on the information.⁸⁰ Another exception to the Economic Loss Doctrine in Delaware is for improvements to residential properties.⁸¹ Fraud is a recognized exception to the Economic Loss Doctrine but only if the fraud claim relates to the inducement of the contract and not to performance under the contract.⁸²

Delaware courts have allowed purely economic tort claims to extend to suppliers of information.⁸³

F. Interest

A prevailing party in a contract action is entitled to pre- and post-judgment interest.⁸⁴ Pre-judgment interest is awarded as a matter of right.⁸⁵ As a general rule, pre-judgment interest is computed from the date payment is due under the contract.⁸⁶ When there is a discrepancy between the date of the tort and the injury, the date of the injury will be used.⁸⁷ The legal rate of interest is defined as 5% over the Federal Reserve Discount Rate.⁸⁸

G. Punitive Damages

Punitive damages generally are not recoverable in a breach of contract action.⁸⁹ However, the Delaware Supreme Court has stated that punitive damages are recoverable where "the defendant's conduct exhibits a wanton or willful disregard for the rights of [the] plaintiff."⁹⁰ A finding of "ill-will, hatred or intent to cause injury" is required in order to support a claim for punitive damages in a contract action.⁹¹

H. Liquidated Damages

"The validity of a liquidated damages provision involves a review of the intent of the

parties to the contract.”⁹² A contractual liquidated damages provision in a contract will not be disturbed where the damages are uncertain and the amount agreed upon is reasonable.⁹³

IX. CASE LAW AND LEGISLATION UPDATE

On September 1, 2014, the Delaware Legislature enacted a statute requiring all contractors, subcontractors, and independent contractors performing work under a public works contract to have an occupational and/or business license and imposes a civil penalty for non-compliance.⁹⁴

Titles 29 and 19 of the Delaware Code were further amended in 2019 to clarify the definitions and registration requirements of construction contractors who may obtain contracts with public entities in Delaware. According to the Delaware legislative synopsis, the amendments to the Act provide “a fair bidding environment for contractors who obey the law and protects the interests of workers and taxpayers by implementing recommendations from the review of the Workplace Fraud Act.”⁹⁵ The amendments also increased monetary penalties for failure to properly comply with the statutes under Chapter 69. The amendments were signed into law on July 30, 2019 and become effective on October 1, 2020.

The Delaware Legislature also recently amended the Delaware Code to allow parties to specify the length of the applicable statute of limitations on a “written contract, agreement, or undertaking involving at least \$100,000.00 ...” up to a maximum of 20 years.⁹⁶ Before the amendment, the statute of limitations extended to 20 years only for certain written contracts entered into and executed “under seal.”

¹ 25 Del. C. § 2702(a).

² *Commonwealth Constr. Co. v. Cornerstone Fellowship Baptist Church, Inc.*, 2006 WL 2567916, *16 (Del. Super. Ct. Aug. 31, 2006), citing *J.G. Justis Co. v. Spicer*, 95 A. 239 (Del. Super. Ct. 1915).

³ See *A.J. Bradbury v Adeleke*, 2008 WL 5048427, at *3 (Del. Super. Ct. Nov. 25, 2008), citing *Constr. Res. Mgmt. v. Littleton*, 2008 WL 4117186, at *3 (Del. Super. Ct. Aug. 28, 2008).

⁴ 25 Del. C. § 2701(3).

⁵ 25 Del. C. § 2702(b).

⁶ See 25 Del. C. § 2703; see also *Whittington v. Segal*, 193 A.2d 534 (Del. Super. Ct. 1963) (holding that provisions contained in a lease did not comport with the statutory requirement of a contract signed by the owner for the work performed); see also *C&J Paving v. Hickory Commons, LLC*, 2006 WL 3898268, *2 (Del. Super. Ct. Jan. 3, 2007) (dismissing mechanic’s lien action for paving work that was not appurtenant to or did not service any structure on the land, where plaintiff failed to allege any specific structure benefited by the materials delivered or the work performed); Cf. *Jones v. Julian*, 195 A.2d 388, 390 (Del. 1963) (finding that mechanic’s lien law applied to paving work done by a subcontractor around a motel then under construction because the paving was a “component part of [the] motel,” rather than an improvement to land alone (not requiring the pleading of a written contract signed by the owner)).

⁷ See *Commonwealth Constr. Co. v. Cornerstone Fellowship Baptist Church, Inc.*, 2006 WL 2567916 (Del. Super. Ct. Aug. 31, 2006) (citation omitted).

⁸ *ITEC Drywall, LLC v. S. Main St. Plaza, LLC*, 2021 WL 3783645 at *2 (Del. Super. Aug. 3, 2021); *Geo-Technology Assocs., Inc. v. Capital Station Dover, LLC*, 2020 WL 2557139 at *3 (Del. Super. May. 15, 2020); *Wyo. Concrete Indus., Inc. v. Hickory Commons, LLC II*, 2007 WL 53805, at *2 (Del. Super. Ct. Jan. 8, 2007) citing *Dep't of Cmty. Affairs & Econ. Dev. V.M. Davis & Sons, Inc.*, 412 A.2d 939, 942 (Del. 1980).

⁹ *C&J Paving*, 2006 WL 3898268, at *2 (citing *J.O.B. Constr. Co. v. Jennings & Churella Servs., Inc.* 2001 WL 985106, at *2 (Del. Super. Ct. Aug. 9, 2001); see *King Constr., Inc. v. Plaza Four Realty, LLC*, 2008 WL 4382798 (Del. Super. Ct. Sept. 29, 2008), *aff'd* 976 A.2d 145 (Del. 2009), citing *E.J. Hollingsworth Co. v. Continental-Diamond Fiber Co.*, 175 A.2d 266, 268 (Del. 1934)) (There is no right to a mechanic's lien unless the statement of claim complies all of the applicable statutory requirements).

¹⁰ *Capossere v. Levine*, 2008 WL 484442, at *2 (Del. Super. Ct. Feb. 20, 2008) (citing *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998)).

¹¹ See 25 Del. C. § 2712.

¹² See 25 Del. C. § 2712(b). Among the eleven (11) enumerated requirements of the complaint under subsection (b) are: (1) the name of the plaintiff; (2) the name of the owner of the structure; (3) the name of the contractor and whether the contract of the plaintiff-claimant was made with such owner or his agent or with such contractor; (4) the amount of the claim due; (5) the time when the doing of the labor or the furnishing of materials was commenced; (6) the time when the doing of the labor was completed; (7) the location of the structure, sufficiently identified; (8) an indication that the labor was provided on the credit of the structure; (9) the amount of plaintiff's claim (which must exceed \$25); (10) the amount which plaintiff claims to be due him on each structure; (11) the time of recording of the first mortgage; see also *Commonwealth Constr.*, 2006 WL 2567916, at *16.

¹³ See 25 Del. C. § 2712(c); see also *Gray's Landing Dev. LLC v. Blackston Cove Dev., LLC*, 2023 WL 2609633 at *3 (Del. Super. Ct. Mar. 21, 2023) (holding that plaintiff failed to comply with statute by only averring that the facts and allegations were true “to the best of [Plaintiff's] knowledge”) (emphasis in original) (alterations in original).

¹⁴ See, e.g., *King Constr.*, 2008 WL 4382798, *aff'd* 976 A.2d 145 (Del. 2009), citing 25 Del. C. § 2712 (dismissing mechanic's claim for failure to plead lessor's written consent for work performed for its tenant) (“Although not explicitly referenced in the pleading requirements of § 2712, the statutory requirement of prior written consent has long been construed by Delaware courts to impose a pleading requirement upon that ‘special class of mechanics’ liens for labors or supplies contracted for by the tenant.”).

¹⁵ *Wyo. Concrete Indus., Inc. v. Hickory Commons, LLC II*, 2007 WL 53805, at *2 (Del. Super. Ct. Jan. 8, 2007) (citing 25 Del. C. § 2703).

¹⁶ *Think Architecture, LLC v. Cheer, Inc.*, 2019 WL 245195, at *2 (Del. Super. Ct. Jan. 16, 2019) (“Under (b)(3) you can have a contract between the owner of the structure and a contractor and a contractor and subcontractor.”).

¹⁷ See *Wyo. Concrete Indus., Inc.; C&J Paving, Inc.*, *supra*.

¹⁸ *Rockland Builders, Inc. v. Endowment Mgmt., LLC*, 2006 WL 2053418, *3 (Del. Super. Ct. July 10, 2006) (quoting *Ceritano Brickwork, Inc. v. Kirkwood Indus., Inc.*, 276 A.2d 267, 268 (Del. 1971)).

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- ¹⁹ See *K.C. Co., Inc. v. WRK Constr., Inc.*, 2019 WL 338671, at *2 (Del. Super. Ct. Jan. 24, 2019) (court finding that “by providing [co-defendant’s] name, mailing address, and electronic mailing address on the contract, established sufficient grounds for [plaintiff] to believe that Ballard was the reputed owner of the property.”)
- ²⁰ See 25 Del. C. § 2711(a) (1).
- ²¹ See 25 Del. C. § 2711(a) (2) (a-i).
- ²² See 25 Del. C. § 2711(b).
- ²³ *King Constr.*, 2008 WL 4382798 *3 (citing *Poole v. Oak Lane Manor, Inc.*, 118 A.2d 925, 926 (Del. Super. Ct. 1955)), *aff’d* 124 A.2d 925 (Del. 1956).
- ²⁴ See 25 Del. C. § 2713.
- ²⁵ 25 Del. C. § 2718.
- ²⁶ *Id.* Section 2718 grants priority protection to a first mortgage lien for which at least 50% of the loan proceeds are used for the payment of labor or materials, or both.
- ²⁷ 25 Del. C. § 2719.
- ²⁸ 25 Del. C. §§ 2714, 2715.
- ²⁹ 25 Del. C. § 2720.
- ³⁰ *Daystar Sills, Inc. v. Anchor Invs., Inc.*, 2007 WL 1098129, at *6 (Del. Super. Ct. Apr. 12, 2007).
- ³¹ 25 Del. C. § 2706(b).
- ³² *Daystar Sills*, 2007 WL 1098129, at *6.
- ³³ *Id.*
- ³⁴ *Id.*
- ³⁵ *Harmony Constr., Inc. v. State Dep’t Transp.*, 668 A.2d 746, 749 (Del. Ch. 1995).
- ³⁶ *Dep’t of Cmty. Affairs & Econ. Dev. V.M. Davis & Sons, Inc.*, 412 A.2d 939, 941 (Del. 1980).
- ³⁷ *Id.*
- ³⁸ See 10 Del. C. § 8106; *see also Nardo v. Guido DeAscanis & Sons*, 254 A.2d 254, 256 (Del. Super. Ct. 1969).
- ³⁹ See *Descano v. Walters*, 1992 WL 9078, *3 (Del. Super. Ct. Jan. 15, 1992), *aff’d* 614 A.2d 1275 (Del. 1992) (TABLE).
- ⁴⁰ See 10 Del. C. § 8127; *see also St. Philip's Evangelical Lutheran Church of Wilmington v. Delmarva Power & Light Co.*, 2018 WL 3650214, at *3 (Del. Super. Ct. July 31, 2018) (a six year limitation period applies to “actions for injury to real property flowing from a deficiency in the construction or alteration of an improvement”).
- ⁴¹ *Id.*; *see, e.g., McConaghie v. Wakefern Food Corp.*, 2004 WL 1195391 (Del. Super. Ct. May 25, 2004) (six-year limitations period ran from the date the certificate of occupancy was issued).
- ⁴² See 10 Del. C. § 8127.
- ⁴³ See *id.*
- ⁴⁴ See *Commercial Union Ins. Co. v. S&L Contractors, Inc.*, 2002 WL 31999352, *2 (Del. Com. Pl. Nov. 8, 2002).
- ⁴⁵ *U.S. Bank Nat. Ass’n v. U.S. Timberlands Klamath Falls, L.L.C.*, 2004 WL 1699057, *3, (Del. Ch. July 29, 2004) (citing *Harper v. Del. Valley Broadcasters*, 743 F. Supp. 1076 (D. Del. 1990)) *aff’d*, 932 F.2d 959 (3d Cir. 1991).
- ⁴⁶ 10 Del. C. § 8124.
- ⁴⁷ See 10 Del. C. § 8124; *see also City of Wilmington v. Spencer*, 391 A.2d 199, 202 (Del. 1978); *Sadler v. New Castle Cnty.*, 524 A.2d 18, 26 (Del. Super. Ct. 1987).

⁴⁸ See *Nat'l Union Fire Ins. Co. v. Rhone-Poulenc Basic Chems. Co.*, 1992 WL 22690, at *18-19 (Del. Super. Ct. Jan. 16, 1992) (finding that “every policy from the start of the injurious process is triggered”) (citing *New Castle County v. Continental Cas. Co.*, 725 F. Supp. 800, 809-812 (D. Del. 1989) (*aff'd in part, rev'd in part*, *New Castle Cnty. v. Hartford Acc. and Indem. Co.*, 933 F.2d 1162 (3d Cir. 1991)); but see *Olde Colonial Village Condo. Council v. Millers Mut. Ins. Co.*, 2002 WL 122885, at *10 (Del. Super. Ct. Jan. 28, 2002) (rejecting the continuous trigger analysis, finding that an engineer’s recommendations to evacuate a building, coupled with the condemnation of the building equated to the “collapse” of the building: “a collapse provision’s trigger is the collapse itself, not what led to it”).

⁴⁹ See *Monsanto Co. v. C.E. Heath Comp. & Liab. Co.*, 652 A.2d 30, 34-35 (Del. 1994) (applying Missouri law); cf. *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 489 (Del. 2001) (holding that “*pro rata* allocation is inconsistent with the ‘all sums’ provisions in the [applicable] policies”; finding that insurers who agreed to indemnify for “all sums” in policies covering the applicable period were jointly and severally liable).

⁵⁰ See *E. I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 1995 WL 654020, at *15 (Del. Super. Ct. Oct. 27, 1995) (imposing *pro rata* allocation based on time on the risk on equitable grounds: “it is illogical to compress all of this damage into one policy period and hold each insurer fully liable. The presumption of continuous damage logically and fairly requires the imposition of the modified *pro rata* allocation of damage.”), *aff'd*, *Travelers Cas. and Sur. Co. v. E.I. DuPont de Nemours & Co.*, 933 A.2d 1250 (Del. 2007) (TABLE).

⁵¹ See *Chrysler Corp. v. Merrell & Garaguso, Inc.*, 796 A.2d 648 (Del. 2002); see also 6 Del. C. § 2704(b).

⁵² *DaimlerChrysler Corp. v. Pa. Nat'l Mut. Ins. Co.*, 2003 WL 1903766 (Del. Super. Ct. Mar. 17, 2003).

⁵³ See *Pacific Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1257 (Del. 2008) (holding that the term “‘arising out of’ is broadly construed to require some meaningful linkage between the two conditions imposed in the contract [*i.e.*, the contractors’] operations and the [landowner’s] resulting liability . . .”).

⁵⁴ See *Mumford & Miller Concrete v. Marinis Bros., Inc., et al.*, 2015 WL 1914731 at **4 (Del. Super., April 27, 2015), citing *Pacific Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1254-1255 (Del. 2008).

⁵⁵ See *Id.* at *5.

⁵⁶ See 6 Del. C. § 2704(a); *Alberici Constr. Co. v. Mid-West Conveyor Co., Inc.*, 750 A.2d 518, 521 (Del. 2000); see also *Washington House Condo. Ass'n of Owners v. Daystar Sills, Inc.*, 2018 WL 6046714, at *5 (“Under Section 2704(a) of the Delaware Code, ‘a contractual provision requiring one party to indemnify another party for the second party’s own negligence, whether sole or partial, is against public policy and is void and unenforceable.’”) (Del. Super., Nov. 13, 2018); *Kempski v. Toll Bros., Inc.*, 582 F. Supp. 2d 636, 641 (D. Del. 2008) (applying Delaware law).

⁵⁷ *Delaware State Univ. v. Thomas Co., Inc.*, 2020 WL 6799605 at *42-45 (D. Del. 2020).

⁵⁸ See *Handler Corp. v. State Drywall Co., Inc.* 2007 WL 3112466, at *3 (Del. Super. Ct. Sept. 27, 2007) (where an indemnification provision between a contractor and subcontractor expressly provided that the subcontractor was required to indemnify the contractor for the negligence of either party, and the contract contained a severability clause, the court voided only the language of the provision requiring the subcontractor to indemnify the contractor for its own negligence, and held that the rest of the indemnification provision, providing that subcontractor was required

to indemnify the contractor for vicarious liability, was enforceable), *see also Menkes v. Saint Joseph Church*, 2011 WL 1235225, at *3 (Del. Super. Ct. Mar. 18, 2011); *Patton v. 24/7 Cable Co., LLC*, 2013 WL 1092147, at *4 (Del. Super. Ct. Jan. 30, 2013).

⁵⁹ *See Kempski v. Toll Bros., Inc.*, 582 F.Supp.2d 636, 641 (D. Del. 2008) (applying Delaware law) (granting Summary Judgment for the subcontractor, refusing to apply a severability clause to the indemnification provision, holding that “the duties to indemnify for the conduct of the [contractor] and the actions of [the subcontractor] were expressed together as a single obligation, and were “not severable ... distinct[,] or distinguishable.”), *citing Handler Corp.*, 2007 WL 3112466, at *3.

⁶⁰ *Ins. Co. of North American v. Waterhouse*, 424 A.2d 675 (Del. 1980); *Allstate Investigation Sec. Agency, Inc. v. Turner Constr. Co.*, 301 A.2d 273 (Del. 1972).

⁶¹ *Clark v. Teeven Holding Co., Inc.*, 625 A.2d 869, 878 (Del. Ch. 1992).

⁶² *Washington House Condo. Ass'n of Owners v. Daystar Sills, Inc.*, 2018 WL 6046714, at *5 (Del. Super. Ct. Nov. 13, 2018).

⁶³ *State v. Interstate Amiesite Corp.*, 297 A.2d 41, 44 (Del. 1972).

⁶⁴ *Waller v. J.E. Brenneman Co.*, 307 A.2d 550 (Del. Super. Ct. 1973).

⁶⁵ *Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403 (Del. 1995).

⁶⁶ *See* 19 Del. C. § 2304; *see also Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 407 (Del. 1995) (“Because the employer cannot be held liable as a joint tortfeasor, it is not obligated to provide contribution to the third party.”); *Echevarria v. State of Delaware Ins. Coverage Office*, 2019 WL 1077689, at *3 (Del. Super. Mar. 7, 2019) (“Under the pre-amended version of 19 Del. C. § 2304, Plaintiff’s remedies are exclusive to those provided by the Workers’ Compensation Act”).

⁶⁷ *See Precision Air*, 654 A.2d at 407; *see also Verbitski v. Diamond State Port Corp.*, 2019 WL 1501111, at *2 (Del. Super. Apr. 4, 2019).

⁶⁸ *See Davis v. R.C. Peoples, Inc.*, 2003 WL 21733013 (Del. Super. Ct. July 25, 2003); *see also Thompson v. Murta Wiedemann, Inc.*, 2010 WL 596504, at *2 (Del. Super. Ct. Feb. 19, 2010).

⁶⁹ *McAnulla Elec. Constr., Inc. v. Radius Techs., LLC*, 2010 WL 3792129, at *7 (Del. Super. Ct. Sept. 24, 2010).

⁷⁰ *Id.*; *Worthy Bros. Pipeline Corp. v. Acierno*, 1996 WL 527347, at *2 (Del. Super. Ct. July 26, 1996).

⁷¹ *See Council of Unit Owners v. Carl M. Freeman Assocs., Inc.*, 564 A.2d 357, 361 (Del. Super. Ct. 1989), *citing Farny v. Bestfield Builders, Inc.*, 391 A.2d 212, 214 (Del. Super. Ct. 1978); *Carey v. McGinty*, 1988 WL 55336, at *6, (Del. Super. Ct. May 18, 1988); *see also* Restatement, Contracts § 346 (1932) (Section 346 provides that compensatory damages for defective construction may be either: (i) the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste (repair rule); or (ii) the difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste [value rule].).

⁷² 6 Del. C. § 3501(4). For the statute to apply, the parties must fall within the definitions outlined under Section 3501. *See also Cont'l Elec. Servs., LLC v. Delaware Hall Condo. Apartments Ass'n*, 2019 WL 339978, at *9 (Del. Com. Pl. Jan. 16, 2019).

⁷³ *See Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 227 (Del. 2005).

⁷⁴ See *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 370 (Del. Super. Ct. 1982); see also *Stempien v. Marnie Properties, LLC*, 2019 WL 1224557, at *4 (Del. Ch. Feb. 11, 2019) (absent any qualifying language that fees are to be awarded claim-by-claim or on some other partial basis, a contractual provision entitling the prevailing party to fees will usually be applied in an all-or-nothing manner.); but see *Dover Historical Soc’y, Inc. v. City of Dover Planning Comm’n*, 902 A.2d 1084, 1091 (Del. 2006) (“The Superior Court does hear cases in which it is occasionally required to apply equitable principles. In such cases [, to control its own process,] the Superior Court has jurisdiction to award attorneys’ fees even if no contract or statute requires it.”), citing *Burge v. Fid. Bond & Mortg. Co.*, 648 A.2d 414, 421-22 (Del. 1994) (upholding award of attorneys’ fees in a Superior Court action involving a mortgage foreclosure, which is inherently equitable);

⁷⁵ *Clemens v. Western Union Telegraph Co.*, 28 A.2d 889, 890 (Del. Super. Ct. 1942).

⁷⁶ *Hazlett v. Pompeo*, 2002 WL 32074651 (Del. Com. Pl. Dec. 27, 2002), citing *Strassburger v. Earley*, 752 A.2d 557, 579 (Del. Ch. 2000).

⁷⁷ See *Joseph T. Dashiell Builders v. Andrews*, 2002 WL 31819895 (Del. Super. Ct. Dec. 10, 2002).

⁷⁸ *Christiana Marine Serv. Corp. v. Texaco Fuel & Marine Mktg., Inc.*, 2002 WL 1335360, at *22 (Del. Super. Ct. June 13, 2002).

⁷⁹ See *Guardian Constr. Co. v. Tetra Tech Richardson*, 583 A.2d 1378, 1385-1386 (Del. Super. Ct. 1990).

⁸⁰ See *White v. Mood*, 2020 WL 996736 at *3 (Del. Super. 2020); *Christiana Marine Servs. Corp.*, 2002 WL 1335360, at *6, citing *Danforth v. Acorn Structures, Inc.*, 1991 WL 269956 (Del. Super. Ct. Nov. 22, 1991).

⁸¹ 6 Del. C. §§ 3651-52. See also *Griffith v. Energy Independence, LLC*, 2017 WL 6403509, at *3 n.13 (Del. Super. Ct. Dec. 13, 2017) (“[t]he [Home Owner’s Protection Act] eliminated the economic loss doctrine in residential home improvement cases and furthered the legislative intent to allow negligence actions in such cases even when the only loss is economic. *Casale Constr., LLC v. Best Stucco LLC*, 2014 WL 1316150, *2 (Del. Super. Mar. 28, 2014).”).

⁸² *GEA Sys. N. Am. LLC, v. Golden State Foods Corp.*, 2020 WL 3047207 at *7 (Del. Super. 2020) (citing *Kuhn Const. Co. v. Ocean & Coastal Consultants, Inc.*, 844 F.Supp.2d 519, 529 (D. Del. 2012)).

⁸³ As to design engineers (See *Guardian*, 583 A.2d at 1385), as to accountants (see *Carello v. PricewaterhouseCoopers, LLP*, 2002 WL 1454111, at *7 (Del. Super. Ct. July 3, 2002), as to financial advisors, *Outdoor Technologies Inc. v. AllFirst Financial Inc.*, 2000 WL 141275, at *5 (Del. Super. Ct. Jan. 24, 2000), as to title searchers (see *Ruger v. Funk*, 1996 WL 110072, at *10 (Del. Super. Ct. Jan. 22, 1996). But cf. *Millsboro Fire Co. v. Construction Management Services, Inc.*, 2006 WL 1867705, (Del. Super. Ct. June 7, 2006) (refusing to apply an exception to a subcontractor, finding that plans and design drawings provided by a subcontractor did not place them in the “business of supplying information”).

⁸⁴ See *Bishop v. Progressive Direct Ins. Co.*, 2019 WL 2009331, at *5 (Del. Super. May 3, 2019); *Cont’l Elec. Servs., LLC v. Delaware Hall Condo. Apartments Ass’n*, 2019 WL 339978, at *9 (Del. Com. Pl. Jan. 16, 2019); see also 6 Del. C. § 2301; but see *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 961 A.2d 521, 525 (Del. 2008) (denying Appellant’s argument that it was entitled to pre-judgment interest as a matter of right and denying request for pre-judgment interest as untimely in a quasi-contract claim for unjust enrichment; affirming the Chancery Court’s decision to deny pre-judgment interest, where Appellant requested interest in its

Amended Complaint, but did not specifically request pre-judgment interest until including it in a proposed form of Order).

⁸⁵ *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1982); *but see Reserves Dev. LLC v. Severn Sav. Bank, FSB*, *supra*, at FN 132.

⁸⁶ *Moskowitz v. Mayor & Council of Wilmington*, 391 A.2d 209, 210 (Del. 1978).

⁸⁷ *Salt Meadows Homeowners Assoc., Inc. v. Zonko Builders, Inc.*, 2023 WL 1370997 at *8 (Del. Super. Ct. Jan. 31, 2023).

⁸⁸ 6 Del. C. §2301(a).

⁸⁹ *Horizon J.J. White, Inc. v. Metro. Merch. Mart*, 107 A.2d 892 (Del. Super. Ct. 1954).

⁹⁰ *Cloroben Chem. Corp. v. Comegys*, 464 A.2d 887, 891 (Del. 1983), *citing Riegal v. Aastad*, 272 A.2d 715, 718 (Del. 1970), or “for willful or malicious breaches of contract.” *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 529 (Del. 1987); *see also Casson v. Nationwide Insurance Co.*, 455 A.2d 361 (Del. Super. Ct. 1982), *citing McClain v. Faraone*, 369 A.2d 1090 (Del. Super. Ct. 1977); *Tigani v. C.I.P. Mgmt., LLC*, 2019 WL 3322409, at *6 (Del. Super. July 24, 2019) (“punitive damages may be awarded when a defendant’s conduct is “outrageous” or involve”).

⁹¹ *See Casson*, 455 A.2d at 368. *See also Affordable Autos, Inc. v. Dietert*, 2016 WL 1169244, at *7 (Del. Super Ct. March 24, 2016), *citing Jardel Co. v. Hughes*, 523 A.2d 518, 529 (Del. 1987); *Data Mgmt. Internationale, Inc. v. Saraga*, 2007 WL 2142848 (Del. Super. Ct. July 25, 2007).

⁹² *Del. Bay Surgical Servs., P.C. v. Swier*, 900 A.2d 646, 650 (Del. 2006); *see id.* (“Liquidated damages are a sum to which the parties to a contract have agreed, at the time of entering into the contract, as being payable to satisfy any loss or injury flowing from a breach of their contract. It is, in effect, the parties’ best guess of the amount of injury that would be sustained in a contractual breach, a way of rendering certain and definite damages which would otherwise be uncertain or not easily susceptible of proof.”).

⁹³ *Lee Builders, Inc. v. Wells*, 103 A.2d 918, 919 (Del. Ch. 1954). *See, e.g., CRS Proppants LLC v. Preferred Resin Holding Co., LLC*, 2016 WL 6094167, *2-6 (Del. Super. Ct. Sept. 27, 2016).

⁹⁴ *See* 29 Del. C. §6967.

⁹⁵ *See* Senate Substitute 1 for Senate Bill 95, Delaware General Assembly webpage, (last visited 9/9/2019), <http://legis.delaware.gov/BillDetail?LegislationId=47576>.

⁹⁶ *See* 10 Del. C. §8106(c). “Section 8106(c) supplants the statute of limitations in Section 8106(a) if: (1) the claims are based on a written contract; (2) involve at least \$100,000; and (3) the contract specifies a period for claims to accrue.” *Hydrogen Master Rights, Ltd. v. Weston*, 228 F.Supp.3d 320, 329 (D. Del. 2017). *See also, Bear Stearns Mortg. Funding Trust 2006-SL1 v. EMC Mortg. LLC*, 2015 WL 139731 (Del. Ch. Jan. 12, 2015).