IDAHO

Andrew Burns
Joshua Kennedy
Josephine C. Kovacs
Cosgrave Vergeer Kester
900 SW 5th Avenue, 24th Floor
Portland, Oregon 97204
Telephone: (503) 323-9000 Fax: (503) 323-9019
aburns@cosgravelaw.com
jkennedy@cosgravelaw.com
jkovacs@cosgravelaw.com

I. MECHANIC LIEN BASICS

A. Idaho Code § 45-501 *et seq.* - Liens of Mechanics and Materialmen

Every person who provides professional services, labor, material, equipment or otherwise improves real property, or improvements situated thereon, may record a lien against the real property to secure due and owing payment. Idaho law provides lien rights regardless of the nature of the project; that is, commercial or residential. Idaho Code § 45-501 *et seq.*

The purpose of these lien statutes is to compensate those who perform labor upon or furnish material to be used in the construction, alteration, or repair of a structure. *Franklin Bldg. Supply Co.*
v. Sumpter, 139 Idaho 846, 850, 87 P.3d 955, 959 (2004) (*quoting Barber v. Honorof*, 116 Idaho 767, 768-69, 780 P.2d 89, 90-91 (1989)).

Materialman lien statutes are liberally construed in favor of the person who performs labor upon or furnishes material to be used in the construction, alteration, or repair of a structure. *Hap Taylor & Sons, Inc. v. Summerwind Partners, LLC*, 157 Idaho 600, 608, 338 P.3d 1204, 1212 (2014). However, the liberal construction of Idaho's lien statutes "does not permit the court to create a lien where none exists." *L&W Supply Corp. v. Chartrand Family Trust*, 136 Idaho 738, 743, 40 P.3d 96, 101 (2002) (*quoting Great Plains Equip., Inc. v. Nw. Pipeline Corp.*, 132 Idaho 754, 760, 979 P.2d 627, 633 (1999)). These liens are creatures of statute and, as such, require substantial compliance with the statute. *Parkwest Homes, LLC v. Barnson*, 154 Idaho 678, 684, 302 P.3d 18, 24 (2013). Accordingly, while Idaho's lien statutes must be liberally construed, "'the statutory requirements must be substantially complied with in order to perfect a valid mechanic's lien.'" *L&W Supply Corp.*, 136 Idaho at 743, 40 P.3d at 101 (*quoting Pierson v. Sewell*, 97 Idaho 38, 41, 539 P.2d 590, 593
(1975)).

129 The information set forth herein is for general background information and not intended as legal advice and is not to be relied upon for any purpose other than reference to relevant law. An Idaho attorney should be consulted before providing or relying on any information set forth herein.

B. Time to File Lien

Any party claiming a mechanics lien must file a claim of lien within ninety (90) days after "the completion of labor or services, or furnishing of materials." I.C. § 45-507(2). The ninety-day time period begins to run from the date the contract was substantially completed. *Hap Taylor & Sons, Inc.*, 157 Idaho at 608, 338 P.3d at 1212. Once the contract has been substantially completed, trivial labor done or materials furnished will not extend the time in which the lien must be filed. *Franklin Bldg. Supply Co.*, 139 Idaho at 851, 87 P.3d at 959 (discussing numerous cases involving attempts to provide additional work and revive an untimely lien).

C. Place of Filing

The claim of lien must be filed with the county recorder for the county in which the property, or some part of the property, is situated. I.C. § 45-507(1).

D. Claim of Lien Contents

The claim must contain:

(a) A statement of his demand, after deducting all just credits and offsets;

(b) The name of the owner, or reputed owner, if known;

(c) The name of the person by whom he was employed or to whom he furnished the materials; and

(d) A description of the property to be charged with the lien, sufficient for identification.

I.C. § 45-507(3).

The claim must also be verified by the oath of the claimant, his agent, or his attorney, "to the effect that the affiant believes the same to be just." I.C. § 45-507(4). The purpose of the verification requirement is to frustrate the filing of frivolous lien claims. *ParkWest Homes, LLC v. Barnson*, 154 Idaho at 603, 606, 238 P.3d 203, 206 (2010). Also, a builder's statement in claim of lien that "I have read said mechanics' lien and know the contents thereof," and that "the same is true to my knowledge," did not render mechanics' lien invalid for builder's failure to state that he believed claim to be "just". *Id.* at 606, 238 P.3d at 206.

A verification is a formal declaration made in the presence of someone authorized to administer oaths, such as a notary public. *First Fed. Sav. Bank of Twin Falls v. Riedesel Eng'g, Inc*, 154 Idaho 626, 631, 301 P.3d 632, 637 (2012). An acknowledgement, on the other hand, is not a verification by oath. *Id.*

E. Notice of Lien Claim

Within five (5) business days of the filing of the claim, the claimant must serve a true and correct copy of the claim of lien on the owner or reputed owner of the property. Service may be

accomplished by personal service or by certified mail to the last known address. I.C. § 45-507(5).

F. Foreclosure of Lien

A suit to foreclose the lien must be commenced within six months of the filing date. I.C. § 45-510(1). The time limitation is a limitation of liability and is a condition attached to the right to sue. *Sims v. ACI Nw., Inc.*, 157 Idaho 906, 910, 342 P.3d 618, 622 (2015). Thus, a mechanic's lien is lost as against the interest of any person not made a party to an action to enforce the lien within the six-month period. *Id.* Even if an action is brought to enforce a lien within six months, however, it is lost against the interests of persons not named. *Parkwest Homes, LLC v. Barnson*, 154 Idaho at 684, 302 P.3d at 24.

Where payment on account is made or an extension of credit is given with an expiration date, the lien is valid six months (6) after the date of such payment or expiration of extension provided that the payment to credit and expiration date is endorsed on the record of lien. I.C. § 45-510(1).

Importantly, a lien claimant seeking to enforce a mechanics lien against property encumbered by a deed of trust must name the trustee of the deed of trust within the statutory period to give effect to the mechanics lien against subsequent holders of legal title. *See Sims v. ACI Nw., Inc.*, 157 Idaho at 912, 342 P.3d at 624; *Parkwest Homes, LLC v. Barnson*, 154 Idaho at 685, 302 P.3d at 25.

G. Lien Priority

Idaho Code § 45–506 governs the priority between a mechanic's lien and a mortgage. It provides:

> The liens provided for in this chapter shall be on equal footing with those liens within the same class of liens, without reference to the date of the filing of the lien claim or claims and are preferred to any lien, mortgage or other encumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, equipment, materials or fixtures were rented or leased, or materials or professional services were commenced to be furnished; also to any lien, mortgage, or other encumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, equipment, materials or fixtures were rented or leased, or materials or professional services were commenced to be furnished.

I.C. § 45–506. The Court has interpreted this provision to mean that in order for a claimant's lien to attach, the claimant must fit into one of three categories: (1) the claimant must have commenced to furnish professional services (such as engineering or surveying); (2) the claimant must have commenced the physical construction of building, improvement, or structure; or (3) if the claimant was not involved with either of the first two activities, it must have begun to work or furnish materials. *Ultrawall, Inc. v. Washington Mut. Bank, FSB,* 135 Idaho 832, 835, 25 P.3d 855, 858 (2001). In sum, "whichever of these events occurred first would determine the priority for all liens as against a mortgage lien holder." *Id.*

> A mechanic's lien generally "relates back to the date of commencement of the work or improvement of the commencement to furnish the material." *White v. Const. Mining & Mill. Co.,* 56 Idaho 403, 420, 55 P.2d 152, 160 (1936). However, this rule is not without exception. In *Terra–West,* this Court explained that "[c]entral to our analysis [in *White*] was the fact that all of the work claimed under the mechanic's lien was completed pursuant to one continuous employment contract, and therefore, the lien attached at the time the work began and encompassed all work subsequently done under the contract." *Terra–West,* 150 Idaho 393, 400, 247 P.3d 620, 627 (2010). This Court went on to hold: "so long as a lien is filed within ninety days after the completion of the labor or services, the lien may encompass the entirety of the work performed under the contract." *Id.*

Credit Suisse AG v. Teufel Nursery, Inc., 321 P.3d 739, 748-49 (2014).

Importantly, an engineer has priority from the date any professional services commence, including services performed off-site and before construction starts. *Hap Taylor & Sons, Inc.*, 157 Idaho at 607, 338 P.3d at 1211 ("we hold that an engineer under contract has a lien for professional services furnished with a priority date of when the engineer commenced to furnish 'any authorized, professional services' under the contract regardless of where the services were rendered."); *see also Contractor's Equip. Supply Co. v. Prizm Grp. & Constr., LLC*, No. 1:10- CV-045-BLW, 2011 U.S. Dist. LEXIS 138290, at *5 (D. Idaho Nov. 30, 2011).

H. Attorney Fees

Idaho's mechanic lien statutes have a provision for recovering attorney fees addressed in I.C. § 45-513: "The court shall also allow as part of the costs the moneys paid for filing and recording the claim, and reasonable attorney's fees." The costs of filing and recording a lien, as well as the associated attorney fees, are incidental to the foreclosure of a lien, and thus the award of attorney fees as part of the enforcement of the lien is a mandatory award. *Credit Suisse AG*, 156 Idaho at 203, 321 P.3d at 753.

Idaho Code section 12–120(3) generally mandates an award of attorney fees to the prevailing party on appeal as well as at trial. *Sims v. Jacobson*, 157 Idaho 980, 342 P.3d 907, 914 (2015) (citing *Bott v. Idaho State Bldg. Auth*., 122 Idaho 471, 481, 835 P.2d 1282, 1292 (1992)).

II. Public Project Claims

A. State and Local Public Work

Under the "Public Contracts Bond Act" enacted in 1965, Idaho requires contractors to obtain performance and payment bonds on county and state public works projects. Idaho Code § 54-1925, *et seq.* It is closely modeled after the federal Miller Act, 40 U.S.C. §§ 54-1926, 1927, and is sometimes referred to as a "Little Miller Act." The Idaho Supreme Court has held that Idaho Courts should consider applicable decisions construing the Miller Act when considering claims raised under the Idaho Public Contracts Bond Act. *City of Weippe v. Yarno*, 96 Idaho 319, 321-22, 528 P.2d 201, 203-04 (1974).

Both the Public Contracts Bond Act and the Miller Act "were enacted to protect persons who furnish labor or materials to public works projects. The statutes serve a remedial purpose. Normally, in private construction projects, those who furnish labor and materials without receiving payment may file and foreclose mechanics' liens. However, because such liens cannot be asserted against public property, the payment bond is required by statute." *La Grand Steel Prods. Co. v. A.S.C. Constructors*, 108 Idaho 817, 818, 702 P.2d 855, 856 (Ct. App. 1985). The Miller Act should be liberally construed and applied in order to properly carry out the Legislature's intent to protect those whose labor and materials go into public projects. *United States ex rel. Austin v. Western Electric Co.*, 337 F.2d 568, 572 (9th Cir. 1964).

Under the Public Contracts Bond Act, every person who has "furnished labor or material or rented, leased, or otherwise supplied equipment in the prosecution of the work" provided for in a public contract has the ability to make a claim on the payment bond. I.C. § 54-1927. In *La Grand Steel Prods. Co. v. A.S.C. Constructors*, 108 Idaho 817, 818, 702 P.2d 855, 856 (Ct. App. 1985), the Idaho Court of Appeals discussed the scope of potential claimants to the payment bond, which is limited to two categories of potential claimants: "First, those who have a direct contractual relationship with the prime contractor may recover against the payment bond. Second, those who have a direct contractual relationship with one of the prime contractor's 'subcontractors' also may recover."

A subcontractor is defined, within the context of the Miller Act, as "one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract. . . ." *Id.* This definition considers the "substantiality and importance" of the relationship between the subcontractor and the prime contractor. *Id.* "These broad phrases must be read in light of the overriding purpose of limiting the protection of the payment bond to those who are in direct contractual relationships with the prime contractor or its subcontractors." *Id.*

The United States Supreme Court explained:

> The relatively few subcontractors who perform part of the original contract represent in a sense the prime contractor and are well known to him. It is easy for the prime contractor to secure himself against loss by requiring the subcontractors to give security by bond, or otherwise, for the payment of those who contract directly with the subcontractors. But this method of protection is generally inadequate to cope with remote and undeterminable liabilities incurred by an ordinary materialman, who may be a manufacturer, a wholesaler or a retailer. Many such materialmen are usually involved in large projects; they deal in turn with innumerable sub-materialmen and laborers.

Clifford F. MacEvoy Co. v. United States, 322 U.S. 102, 110-11 (1944).

Idaho Code § 54-1927 provides that any claimant who has a direct contractual relationship with a subcontractor of the general contractor furnishing payment bond, but no contractual relationship with that general contractor, only has a right of action upon the payment bond if written notice is provided to the general contractor. *Consolidated Supply Co. v. Babbitt*, 96 Idaho 636, 640, 534 P.2d 466, 470 (1975). Claimants must provide written notice to the contractor within ninety (90) days from the date on which person performed the last labor or furnished or supplied the last material. The notice must state with "substantial accuracy" the amount claimed and the

name of the person to whom the material or equipment was furnished or supplied, or for whom the labor was done or performed. Additionally, the notice must be made by registered or certified mail.

However, the purpose of I.C. § 54-1927 "is to protect laborers or suppliers by obligating the prime contractor on his bond to satisfy their unpaid claims. That purpose will not be frustrated where there has been substantial compliance with the procedure prescribed for notifying the contractor of the unpaid claim." *School Dist. v. Taysom*, 94 Idaho 599, 603, 495 P.2d 5, 9 (1972). Thus, if a written notice is sent by regular mail (rather than by certified or registered mail), the defect is not fatal because the registered or certified mail requirement is intended to assure receipt of the notice—not to deny right to suit when the required written notice was actually given and received within the specified time. *Consolidated Concrete Co. v. Empire W. Constr. Co.*, 100 Idaho 234, 236, 596 P.2d 106, 108 (1979).

If a contractor or supplier is unpaid after the ninety-day period expires following the last labor or material furnished, and has given the proper notice, if required, then it may institute a lawsuit immediately. Idaho Code § 54-1927 limits the time within which the action may be brought on the bond: either one year after the date the claimant supplied the last of the materials for which the action is brought; or one year from the date the final payment under a subcontract became due, if the claimant is a subcontractor or contractor. The suit must be filed in the appropriate court in any county in which the contract was to be performed.

The statute of limitations for filing suit against a surety issuing a payment bond may be extended by the terms of the bond. *Yarno*, 94 Idaho at 259, 486 P.2d at 270. "[W]here the parties agree to lengthen the statutory period within which suit can be instituted, the law will not interfere to shorten the period." *Id.*

The Idaho Supreme Court specifically declined to adopt a rule that the time to commence a bond claim begins to run upon substantial completion of the work. In *Evco Sound & Electronics, Inc. v. Seaboard Surety Co.*, 148 Idaho 357, 223 P.3d 740 (2009), the Court considered and rejected an argument by the surety that a lower-tiered subcontractor failed to timely provide notice of a claim because such notice was not served within ninety days of substantial completion of the claimant's work. The Court in *Evco* relied on a Ninth Circuit case to reach its ruling. *Id.* at 362-63. In *Unites States ex rel. Austin v. Western Electric Co.*, 337 F.2d 568 (9th Cir. 1964), the Ninth Circuit held:

> We do not find the phrases 'substantially performed' or 'substantially completed' used in any of the decided case. A more accurate statement of the test to be applied is whether the work was performed and the material supplied as a 'part of the original contract' or for the 'purpose of correcting defects, or making repairs following inspection of the project.'

Id. at 572-73. The Idaho Supreme Court was persuaded by this reasoning for the purpose of interpreting and applying when the time periods begin to run under Idaho's Public Bonds Contract Act. *Evco*, 148 Idaho at 363, 223 P.3d at 746. Therefore, the test in Idaho is "whether performing the labor or furnishing or supplying the material or equipment was done as part of the original contract," not whether substantial completion of the project has been achieved. *Id.*

Under Idaho law, a defendant may be estopped from asserting a statute of limitations defense. *Twin Falls Clinic & Hospital Building Corp. v. Hamill*, 103 Idaho 19, 644 P.2d 341 (1982); *Zumwalt v. Stephan, Balleisen & Slavin*, 113 Idaho 822, 748 P.2d 406 (Ct. App. 1987). The elements of equitable estoppel applicable to this rule are: (1) a false representation or concealment of a material of fact with actual or constructive knowledge of the truth; (2) the party asserting estoppel did not know or could not discover the truth; (3) the false representation or concealment was made with the intent that it be relied upon; and (4) the person to whom the representation was made or from whom the facts were concealed, relied and acted upon the representation or concealment to his detriment. *Twin Falls*, 103 Idaho at 22, 644 P.2d at 344.

The prevailing party in litigation regarding a contractor's bond is entitled to an award of attorney fees, both in the initial litigation and on appeal, pursuant to I.C. § 54-1929. *Evco Sound & Elecs., Inc.*, 148 Idaho at 367, 223 P.3d at 750.

B. <u>Bid Bonds and Mistakes</u>

Idaho Code § 54-1904B provides that a public works contractor, who has submitted a bid to a public entity in competitive bidding for the construction, alteration, repair, or improvement of public works construction, may obtain relief from the bid because of a mistake. If the awarding authority for the public entity determines that a bidder is entitled to relief because of a mistake, then the authority shall prepare a written report of its findings, which are to be kept as a public record. I.C. § 54-1904B(a).

Under I.C. § 54-1904B(b), a bidder who claims a mistake in the bid submitted is entitled to relief from the bid and the return of any bid security only if the bidder satisfies all of the conditions of I.C. § 54-1904C. If the bidder does not satisfy those conditions, then the bid security is forfeited. Idaho Code § 54-1904C provides:

The bidder shall establish to the satisfaction of the public entity that: (a) A clerical or mathematical mistake was made; (b) The bidder gave the public entity written notice within five (5) calendar days after the opening of the bids of the mistake, specifying in the notice in detail how the mistake occurred; and (c) The mistake was material.

The Idaho Supreme Court has interpreted the term "clerical or mathematical mistake":

> There is a difference between mere mechanical or clerical errors made in tabulating or transcribing figures and errors of judgment, as, for example, underestimating the cost of labor or materials. The distinction between the two types of error is recognized in the cases allowing rescission and in the procedures provided by the state and federal governments for relieving contractors from mistakes in bids on public work. Generally, relief is refused for error in judgment and allowed only for clerical or mathematical mistakes. Where a person is denied relief because of an error in judgment, the agreement which is enforced is the one he intended to make, whereas if he is denied relief from a clerical error, he is forced to perform an agreement he had no intention of making. The statement in the bid form in the present case can

> be given effect by interpreting it as relating to errors of judgment as distinguished from clerical mistakes.

Boise Junior College District v. Mattefs Construction Co., 92 Idaho 757, 761-62, 450 P.2d 604, 608-09 (1969) (internal quotation and citations omitted).

More recently, the Idaho Supreme Court clarified its ruling in *Mattefs*:

> In *Mattefs* we distinguished between an error in judgment on one hand and a clerical or mathematical mistake on the other. The example given for a mistake in judgment was an error in underestimating the cost of labor or materials. The example given for a clerical mistake was an error made in tabulating or transcribing figures. We see no difference between an error in tabulating or transcribing figures and an error in interpreting the wording used in a subcontractor's bid, as is alleged in this case. For example, an error in transcribing figures could result from either misreading the figures or miswriting them. They would both be clerical errors. An error in misreading figures is a clerical error even if it results from misinterpreting what was written. In the dichotomy between errors in judgment on the one hand and clerical or mathematical mistakes on the other, misinterpreting someone's handwriting, or in this case the meaning intended by the words "plus rock," is not an error in judgment. If, as contended by Westway, it made a mistake in its revised bid because it misinterpreted the meaning of "plus rock" in a subcontractor's bid, such mistake would be a "clerical mistake."

Westway Constr., Inc. v. Idaho Transp. Dep't, 139 Idaho 107, 116, 73 P.3d 721, 730 (2003).

C. Claims to Public Funds

Idaho does not have a statute or any case law adopting the public fund remedy.

III. STATUTES OF LIMITATION AND REPOSE

A statute of limitation bars a 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.

A. Statute of Repose

Idaho has a statute of repose pertaining to the design or construction of real property:

> Actions will be deemed to have accrued and the statute of limitations shall begin to run as to actions against any person by reason of his having performed or furnished the design, planning, supervision or construction of an improvement to real property, as follows:

(a) Tort actions, if not previously accrued, shall accrue and the applicable limitation statute shall begin to run six (6) years after the final completion of construction of such an improvement.

(b) Contract actions shall accrue and the applicable limitation statute shall begin to run at the time of final completion of construction of such an improvement.

I.C. § 5-241(a)-(b). There is no discovery rule that supersedes the statute of repose and this rule does not extend any separate statute of limitation that has expired. The one exception is that equitable estoppel can toll the statute of repose or statute of limitation if the party seeking to use those statutory time limits is guilty of some form of deceit that prevents the injured party from learning of the breach or tortuous conduct or bringing a lawsuit within the time limits. *See Twin Falls Clinic & Hospital Bldg. Corp.*, 103 Idaho 19, 644 P.2d 341.

B. Statutes of Limitation

1. Written and Oral Contracts

Idaho also has statutes of limitation. An action upon any contract, obligation, or liability founded upon an instrument in writing must be commenced within five years. I.C. § 5-216. An action upon a contract, obligation or liability not founded upon an instrument of writing (i.e., an oral contract) must be commenced within four years. I.C. § 5-217.

2. Uniform Commercial Code (Sales of Goods)

The Idaho version of Article 2 of the UCC provides:

(1) An action for breach of any contract for sale must be commenced within four (4) years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one (1) year but may not extend it.

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

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six (6) months after the termination of the first action unless the termination resulted from voluntary discontinuance or from

dismissal for failure or neglect to prosecute.

> (4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this act becomes effective.

Idaho Code § 28-2-725.

3. Personal Injuries, Negligence, and Professional Malpractice

Generally, an action to recover damages for professional malpractice, or for an injury to the person, or for the death of one caused by the wrongful act or neglect of another, including any such action arising from breach of an implied warranty or implied covenant, must be filed within two (2) years of the occurrence giving rise to the injury. I. C. § 5-219(4).

4. All Other Claims

To the extent the Idaho legislature has not identified a particular limitation period for an action for relief, such action must be commenced within four (4) years after the cause of shall have accrued. I.C. § 5-224.

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

Idaho Code § 6-2501 *et seq.* (Notice and Opportunity to Repair Act) requires a claimant to give the "construction professional" an opportunity to repair a construction defect before filing an "action." The claimant must provide written notice to the construction professional, which states that the claimant asserts a construction defect claim against the construction professional and describes the claim in reasonable detail sufficient to determine the general nature of the defect. I.C. § 6- 2503(1).

Idaho Code § 6-2502(1) defines "action" as:

> any civil lawsuit or action in contract or tort for damages or indemnity brought against a construction professional to assert a claim, whether by complaint, counterclaim or cross-claim, for damage or the loss of use of real or personal property caused by a defect in the construction of a residence or in the substantial remodel of a residence. "Action" does not include any civil action in tort alleging personal injury or wrongful death to a person or persons resulting from a construction defect.

If a claimant files an action without giving notice and an opportunity to repair to the construction professional, then the statute allows the court to dismiss, *without* prejudice, the claimant's suit. I.C. § 6-2503(1).

Once notice of the claim is served, the construction professional has twenty-one days to serve a

written response to the claimant. I.C. § 6-2503(2). The written response must: (a) propose to inspect the residence that is the subject of the claim and to complete the inspection within a specified time frame; (b) offer to compromise and settle the claim by monetary payment without inspection; or state that the construction professional disputes the claim and will neither remedy the construction defect nor compromise and settle the claim. I.C. § 6-2503(2).

Importantly, Idaho's Notice and Opportunity to Repair Act does not apply to commercial construction. Rather, this section applies only to "a homeowner or association that asserts a claim against a construction professional concerning a defect in the construction of a residence or in the substantial remodel of a residence." I.C. § 6-2502(3).

V. INSURANCE COVERAGE AND ALLOCATION ISSUES

A. General Coverage Issues

Standard commercial general liability insurance policies may provide coverage for liability related to property damage that occurs during the applicable policy period. *See Melichar v. State Farm Fire & Cas. Co.,* 143 Idaho 716, 720-21, 152 P.3d 587, 591-92 (2007); *Millers Mut. Fire Ins. Co. of Texas v. Ed Bailey, Inc.,* 103 Idaho 377, 378, 647 P.2d 1249, 1250 (1982).

B. Trigger of Coverage

To determine whether a particular claim for property damage arises under a particular policy, Idaho courts apply the rule that an "accident" or "occurrence," unless defined otherwise in the policy, is not the time the wrongful act was committed but the time the complaining party was actually damaged. *Millers Mut. Fire Ins. Co.*, 103 Idaho at 379, 647 P.2d at 1251.

C. Allocation Among Insurers

When losses are less than combined limits of all applicable policies, and in cases of concurrent coverage, losses should be allocated pro rata in proportion to amount of insurance provided by respective parties. *Empire Fire & Marine Ins. Co. v. N. Pac. Ins. Co.*, 127 Idaho 716, 719, 905 P.2d 1025, 1028 (1995). There is no repugnancy in arbitrarily selecting one insurer over the other for payment, so long as the rule is chosen and uniformly invoked than the risk can be allocated actuarially by the insurance companies.

VI. CONTRACTUAL INDEMNIFICATION

Any covenant, promise, agreement, or related matter that is in connection with or collateral to, a contract or agreement that relates to construction, maintenance, or repair of a building, structure, highway, or anything similar that purports to indemnify the promisee against liability for damages arising out of bodily injury to persons or property damage caused by or resulting from the sole negligence of the promisee, his agents, or employees, is against public policy and is void and unenforceable. I.C. § 29-114

However, if an indemnitor seeks indemnity for other people's negligence, Idaho courts will

likely uphold a contractual indemnification clause. In *Beitzel v. City of Coeur d'Alene*, 121 Idaho 709, 711, 827 P.2d 1160, 1162 (1992), a telephone company was contracted with an asphalt company and a digging company after it was issued a permit to install underground phone lines by the city. The plaintiff, unrelated to the project, was seriously injured when his motorcycle fell into the unmarked ditch at night. *Id.* The plaintiff was found to not be negligence, while the city (35%), telephone company (30%), contractor (25%), and asphalt company (10%) all shared varying degrees of liability. *Id.* There was a provision in the contract between the telephone company and the contractor which provided that the contractor would indemnify the telephone for any damages for personal injuries resulting from the project work or caused by his employees or agents, but precluded any indemnification for damages caused solely by the negligence of the telephone company. *Id.* The Idaho Supreme Court held that this indemnification clause was valid and enforceable and required the contractor to indemnify the telephone company. *Id.* at 718, 827 P.2d at 1169.

VII. CONTINGENT PAYMENT AGREEMENTS

Contingent payment agreements ("pay-if-paid" or "pay-when-paid") have not been explicitly dealt with by Idaho Courts. The validity and enforceability of contingent payment clauses, while not addressed in Idaho, has been addressed in other states. *See, e.g.*, *Ursa Major Underground, Inc. v. Liberty Mut. Ins. Co.*, No. 1:14-cv-00162-DBH, 2015 U.S. Dist. LEXIS 156869, at *19-24 (D. Me. Nov. 19, 2015); *Evans, Mechwart, Hambleton & Tilton, Inc. v. Triad Architects, Ltd.*, 965 N.E.2d 1007, 1010-18 (Ohio Ct. App. 10 Dist. 2011) (containing extensive string-cites of cases discussing the issues).

How an Idaho Court would decide on such an issue is difficult to predict, but it is likely that if such a clause were drafted so as to preclude a right of recovery by a subcontractor who had actually performed work on a project and was indisputably entitled to compensation, the Idaho courts would not enforce such a provision. While Idaho would likely frown upon a "pay-if-paid" contingent payment agreement, a "pay-when-paid" contingent agreement would likely be followed in Idaho because it creates less risk of unconscionability or impermissible forfeiture. To be safe, the subcontractor and his counsel should seek to add provisions to their payment clauses that clarify that the general contractor is not relieved from the ultimate obligation of payment to the subcontractor, despite the owner's failure to remit payment to the contractor. The subcontractor should also require that a schedule of payment dues be included in the contract so that it is clear it is entitled to payments on periodic dates consistent with the time within each stage of the subcontractor's work that is completed.

VIII. DAMAGE LIMITATIONS

A. Personal Injury Damages Versus Construction Defect Damages

Idaho has statutory limitations on damages that can be awarded in a personal injury action when the injured party dies "from causes not related to the wrongful act or negligence." I.C. § 5- 327(2). The personal injury claim does not abate but "the damages that may be recovered in such action are expressly limited to those for: (i) medical expenses actually incurred, (ii) other out-of- pocket expenses actually incurred, and (iii) loss of earnings actually

suffered, prior to the death of such injured person and as a result of the wrongful act or negligence." I.C. § 5-327(2).

In Idaho, under the Notice and Opportunity to Repair Act that applies only to residential construction, the claimant may recover only the following damages proximately caused by a construction defect: the reasonable cost of repairs necessary to cure any construction defect, including any reasonable and necessary engineering or consulting fees required to evaluate and cure the construction defect, that the contractor is responsible for repairing; the reasonable expenses of temporary housing reasonably necessary during the repair period; the reduction in market value, if any, to the extent that the reduction is due to structural failure; and reasonable and necessary attorney's fees. I. C. § 6-2504(1).

If a construction professional fails to make a reasonable offer, or fails to make a reasonable attempt to complete the repairs specified in an accepted offer, or fails to complete, in a good and workmanlike manner, the repairs specified in an accepted offer, the limitations on damages and defenses to liability provided by the Idaho Code does not apply. I. C. § 6-2504(2).

If a claimant denies a request to inspect, unreasonably rejects an offer to remedy the construction defect, or does not permit the construction professional a reasonable opportunity to repair the defect pursuant to an accepted offer of settlement, the claimant may not recover an amount in excess of: the reasonable cost of the offered repairs which are necessary to cure the construction defect and which are the responsibility of the construction professional; or the amount of a reasonable monetary settlement offer made; or the amount of reasonable and necessary attorney's fees and costs incurred before the offer was rejected or considered rejected. I. C. § 6-2504(3).

The total damages awarded in a suit subject to the Notice and Opportunity to Repair Act may not exceed the greater of the claimant's purchase price for the residence or the current fair market value of the residence without the construction defect. Principles of comparative negligence are applicable and a builder can rely upon numerous defenses, including an unforeseen act of nature; the homeowner unreasonably failed to minimize or prevent those damages in a timely manner; the homeowner or his or her agent, employee, subcontractor, independent contractor, or consultant failed to follow the builder's or manufacturer's recommendations or commonly accepted homeowner maintenance obligations; the damage or loss was caused by the homeowner's or his or her agent's or an independent third party's alterations, ordinary wear and tear, misuse, abuse or neglect, or by the structure's use for something other than its intended purpose; the time period for filing actions bars the claim; the builder has obtained a valid release; or the builder's repair was successful in correcting the defect. I.C. § 6-2504(4)-(6).

B. Attorney's Fees Shifting and Limitations on Recovery

Idaho adopted the "American Rule," which holds that an award of attorney's fees to the prevailing party is not allowed unless made pursuant to a contract provision or statute. *Hellar v. Cenarrusa*, 106 Idaho 571, 578, 682 P.2d 524, 531 (1984). There are several statutes that may allow for attorney's fees to be recovered by the prevailing party in construction litigation. *See,*

e.g., I.C. §§ 12-120(1) (any action where the amount pleaded is $35,000 or less and requisite written demand made prior to litigation), 12-120(3) (litigation regarding a "commercial transaction"), 12-120(4) (personal injury action where damage claim does not exceed $25,000 and requisite written demand prior to litigation), 12-121 (frivolous claims or defenses), 45-513 (mechanics' liens), 12-117 (lawsuits involving governmental entities), 12-120(5) (allowing reasonable postjudgment fees and costs incurred in attempting to collect on the judgment), and Idaho Appellate Rule 41 (allowing recovery of fees on appeal for the same reasons as in underlying litigation).

Idaho law allows contractual attorney's fee provisions to be one-sided and to potentially redefine basic terms, such as "prevailing party" and "reasonable" versus "actual" fees. *Zenner v. Holcomb*, 147 Idaho 444, 450-52, 210 P.3d 552, 558-60 (2009); *Farm Credit Bank of Spokane v.*
Wissel, 122 Idaho 565, 569 n.4, 836 P.2d 511, 515 n.4 (1992); *Barnes v. Hinton*, 103 Idaho 619, 621, 651 P.2d 553, 555 (Ct. App. 1982)

C. Consequential Damages and Lost Profits

"In Idaho, consequential damages are not recoverable unless they were contemplated by the parties at the time of contracting." *Strate v. Cambridge Telephone Co., Inc.,* 118 Idaho 157, 160-61, 795 P.2d 319, 322-23 (Ct. App. 1990); *see also Brown's Tie & Lumber Co. v. Chicago Title,* 115 Idaho 56, 61, 764 P.2d 423, 428 (1988) (Consequential damages "need not have been precisely and specifically foreseeable, but only such as were reasonably forseeable and within the contemplation of the parties at the time they made the contract." (internal quotations and citation omitted)). Lost profits are generally not recoverable in contract unless there is something in that contract that suggests lost profits were within the contemplation of the parties and are proven with reasonable certainty. *Silver Creek Computers, Inc. v. Petra, Inc.*, 136 Idaho 879, 884-85, 42 P.3d 672, 677-78 (2002); *Taylor v. Browning*, 129 Idaho 483, 491-92, 927 P.2d 873, 882 (1996).

D. Delay and Disruption Damages

A party may recover actual damages caused by delay. *See City of Idaho Falls v. Beco Const. Co., Inc.,* 123 Idaho 516, 521-22, 850 P.2d 165, 170-71 (1993). A general contractor may recover from a subcontractor for delay under a liquidated damages clause. However, "a general contractor cannot recover from its subcontractor for delay under a liquidated damages clause where the general contractor contributed to the delay by failing to perform a contractual duty, such as failing to provide adequate equipment." *Seubert Excavators v. Eucon Corp*., 125 Idaho 409, 414, 871 P.2d 826, 831 (1994). If liquidated damages for delay cannot be recovered, then actual damages from the delay can be recovered instead. *Schroeder v. Partin*, 151 Idaho 471, 476, 259 P.3d 617, 622 (2011); *City of Idaho Falls*, 123 Idaho at 522, 850 P.2d at 171.

E. Economic Loss Doctrine

The economic loss rule or doctrine prohibits recovery of purely economic losses in negligence actions because there is no duty to prevent economic loss to another. *Blahd v. Richard*

B. Smith, Inc., 141 Idaho 296, 300, 108 P.3d 996, 1000 (2005). Generally, a plaintiff may not recover in tort where the sole allegation is that the defendant prevented the plaintiff from gaining a purely economic advantage. *Aardema v. U.S. Dairy Sys.*, 147 Idaho 785, 790, 215 P.3d 505, 510 (2009).

> The economic loss rule does not limit the damages recoverable in a negligence action. "Unless an exception applies, the economic loss rule prohibits recovery of purely economic losses in a negligence action because there is no duty to prevent economic loss to another." Damages from harm to person or property are not purely economic losses. "[E]conomic loss is recoverable in tort as a loss parasitic to an injury to person or property." . . . Rather, the economic loss rule limits the actor's duty so that there is no cause of action in negligence. The seller has no duty under the law of negligence to design, manufacture, or sell property that will conform to the buyer's economic expectations.

Brian & Christie, Inc. v. Leishman Elec., Inc., 150 Idaho 22, 28, 244 P.3d 166, 172 (2010) (internal citations omitted); *Aardema*, 147 Idaho at 790, 215 P.3d at 510. Economic loss includes costs of repair and replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits for use. *See Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.,* 97 Idaho 348, 351, 544 P.2d 305, 309 (1975). A party may recover "property damage" so long as the damage is not the subject of the transaction. *Aardema*, 147 Idaho at 790, 215 P.3d at 510. It is the subject of the transaction that determines whether a loss is property damage or economic loss, not the status of the party being sued. *Stapleton v. Jack Cushman Drilling and Pump Co. Inc.*, 153 Idaho 735, 742, 291 P.3d 418, 425 (2012).

F. Interest

Idaho Code § 28-22-104(2) governs post-judgment interest: “The legal rate of interest on money due on the judgment of any competent court or tribunal shall be the rate of five percent (5%) plus the base rate in effect at the time of entry of the judgment. . . . The legal rate of interest as announced by the treasurer on July 1 of each year shall operate as the rate applying for the succeeding twelve (12) months to all judgments declared during such succeeding twelve (12) month period.” I. C. § 28-22-104(2).

Pre-judgment interest is 12% “when there is no express contract in writing fixing a different rate of interest” and when the damages are liquidated or certain. I. C. § 28-22-104(1). A contractual interest rate controls (over I.C. § 28-22-104(1)) and Idaho’s usuary laws were repeated by the legislature in 1983. Idaho does have laws regarding unconscionable contract terms and requires both procedural and substantive unconscionability. *See, e.g., Lovey v. Regence Blueshield of Idaho*, 139 Idaho 37, 42, 72 P.3d 877, 882 (2003).

G. Punitive Damages

Idaho Code § 6-1604(1) allows for punitive damages so long as a plaintiff can prove,

"by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted." Punitive damages "are not favored in the law and should be awarded in only the most unusual and compelling circumstances, and are to be awarded cautiously and within narrow limits." *Manning v. Twin Falls Clinic & Hosp.*, 122 Idaho 47, 52, 830 P.2d 1185, 1190 (1992); *Payne v. Wallace*, 136 Idaho 303, 308, 32 P.3d 695, 699 (Ct. App. 2001) (internal citation and quotations omitted).

Punitive damages cannot be pled in initial complaint but must be pled through a motion to amend. I.C. § 6-1604(2). The standard for amendment, as determined by the trial court's exercise of discretion, is whether "the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." I.C. § 6-1604(2). An award of punitive damages depends on whether the plaintiff is able to establish the requisite intersection of two factors: a bad act and a bad state of mind. *Hall v. Farmers Alliance Mut. Ins. Co*., 145 Idaho 313, 319, 179 P.3d 276, 282 (2008). To justify punitive damages, a defendant must have: (1) acted in a manner that was an extreme deviation from reasonable standards of conduct, with an understanding of or disregard for its likely consequences, and (2) acted with an extremely harmful state of mind, whether that be termed malice, oppression, fraud or gross negligence; malice, oppression, wantonness; or simply deliberate or willful. *Seiniger Law Office, P.A. v. N. Pac. Ins. Co.*, 145 Idaho 241, 250, 178 P.3d 606, 615 (2008).

As amended in 2003, "no judgment for punitive damages shall exceed the greater of two hundred fifty thousand dollars ($250,000) or an amount which is three (3) times the compensatory damages contained in such judgment." I.C. § 6-1604(3). Punitive damages are not available if a wrongdoer has died. I.C. § 5-327(1).

H. Non-Economic Damages

Idaho Code § 6-1603(1) provides that "[i]n no action seeking damages for personal injury, including death, shall a judgment for noneconomic damages be entered for a claimant exceeding the maximum amount of two hundred fifty thousand dollars ($250,000)." The cap adjusts annually, pursuant to I.C. §§ 6-1603, 72-409(2). This cap applies to "the sum of: (a) noneconomic damages sustained by a claimant who incurred personal injury or who is asserting a wrongful death; [and] (b) noneconomic damages sustained by a claimant, regardless of the number of persons responsible for the damages or the number of actions filed." I.C. § 6-1603(2).

The non-economic damage cap is not disclosed to the jury and does not apply to causes of action arising out of willful or reckless misconduct or causes of action arising out of an act or acts which the trier of fact finds beyond a reasonable doubt would constitute a felony under state or federal law. I.C. § 6-1603(3) & (4). An objective "should-have-known" standard is the appropriate standard of recklessness under this section, and it is sufficient for a finding of recklessness that the risk and high probability of harm are objectively foreseeable. *See Hennefer v. Blaine County Sch. Dist. #61*, 158 Idaho 242, 249, 346 P.3d 259, 266 (2015).

The non-economic damage cap applies to each individual bringing a cause of action—not on a per-claim basis—and it is applied separately to each judgment debtor, after apportionment of damages. *Aguilar v. Coonrod*, 151 Idaho 642, 650, 262 P.3d 671, 679

(2011); *Horner v. Sani-Top, Inc.*, 143 Idaho 230, 234-35, 141 P.3d 1099, 1103-04 (2006).

In sum, in cases involving alleged misconduct greater than ordinary negligence, punitive damages (with its automatic cap) and the non-economic damage cap will likely both be at issue. A plaintiff will be trying to prove an intersection of a bad act and bad state of mind such that punitive damages can be asked for at trial and a plaintiff will be trying to prove willful or reckless misconduct such that there will be no limit on the noneconomic damages that the jury can award.