INDIANA

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I. MECHANIC'S LIEN BASICS

Indiana permits mechanics liens for nearly all types of work. The Mechanic's Lien Act is found at I.C. 32-28-3-1 *et seq.* The notice requirements for Indiana's Mechanic's Lien run from the last date work or equipment is provided.

A. Requirements.

I.C. 32-28-3-3 requires that a person seeking a Mechanic's Lien must file a Notice of Intention to Hold a Lien in the Recorder's office for the county for the amount of the claim.

The Notice must provide the following:

i. The amount claimed;
ii. The name and address of the claimant;
iii. The owner's name and address;
iv. The legal description and street number of the property; and
v. Must be filed within ninety (90) days of the last date of work or furnishing of materials or equipment.

B. Enforcement and Foreclosure.

There is no requirement to perfect a Mechanic's Lien in Indiana. Suit may be filed to foreclose on the lien in a circuit or superior court. I.C. 32-28-3-6 requires that suit be filed within one year after the Notice of Intention is filed.

C. Ability to Waive and Limitations on Lien Rights.

A failure to file suit to foreclose upon a Mechanic's Lien within one year of the filing of the Notice of Intention to Hold a Mechanic's Lien operates as a waiver of the lien.[1]

II. PUBLIC PROJECT CLAIMS

A. State and Local Public Work.

Public work project statutes are found at I.C. 4-13.6-7-1 *et seq.* (certain public works), I.C. 5-16-5-1 *et seq.* (state public works not governed by Title 4), I.C. 8-23-9-1 *et seq.* (state and highway projects), and I.C. 36-1-12-1 (local public works).

1. Bond Requirements. A payment bond by the contractor in the amount of the contract price is required when the project cost is $200,000 or more. I.C. 4-13.6-7-6; I.C. 36-1-12-13.1. Title 5 requires the contractor to execute a bond to the state, approved by the public body, in an amount equal to the total contract price. However, a contractor is not required to execute a bond under this section in the case of a contract entered into by a state educational institution, if the amount to be paid under the contract is less than five hundred thousand dollars ($500,000) and the state educational institution agrees to waive the requirement. I.C. 5-16-5-2. If the indebtedness is not paid in full after 30 days, the person may bring an action in a court of competent jurisdiction upon the bond. The action must be brought not later than 60 days after the date of the final completion and acceptance of the public work. An action on the bond against a surety is barred if not brought within this time. I.C. 5-16-5-2.

A performance bond by the contractor is required in the amount of the contract price on public work projects when the project cost is $200,000 or more; if the project cost is less than $200,000 the division may require a performance bond. I.C. 4-13.6-7-7. In state public work projects, the contractor must furnish a valid performance bond, which is acceptable to the state agency, in an amount equal to the total contract price. This does not apply to a contract entered into by a state educational institution if the amount to be paid under the contract is less than ($500,000) and the institution agrees to waive the requirement. I.C. 5-16-5.5-4. With limited exceptions under the Indiana stadium and convention building authority, the contractor shall furnish the board with a performance bond equal to the contract price. I.C. 36-1-12-14. The state highway statute required a combined performance/payment bond collectively called "performance bond." I.C. 8-23-9-8. The department requires each bidder to submit a performance bond if the estimated cost of the project is more than $200,000 and may require it if the estimated cost of the project is less than $200,000.

B. Claims to Public Funds.

1. Notices and Enforcement. A person making a claim against retainage/contract proceeds or payment bonds under Titles 4, 5, or 36 will be required to file their claim with the public body and deliver a copy of the claim to the contractor not later than 60 days after the date the last labor was performed, the last material was furnished, or the last service was rendered by that subcontractor or supplier. I.C. 4-13.6-7-10; I.C. 5-16-5-1; I.C. 36-1-12-12.

The claimant may not file suit against the contractor's surety on the contractor's bond before 30 days after filing of the claim with the division and delivering a copy of the claim to the contractor. If the claim is not paid in full at the expiration of the 30 days, the claimant may bring an action in a court of competent jurisdiction in the claimant's own name upon the bond. I.C. 4-

13.6-7-10; I.C. 5-16-5-2. The action must be brought not later than 60 days after the date of the final completion and acceptance of the public work.

There is a 90-day time limitation for filing suit following notice of contract proceeds claim or its rejection. I.C. 8-23-9-34.

III. STATUTES OF LIMITATION AND REPOSE

A. Statutes of Limitation and Limitations on Application of Statutes.

The statute of limitations for personal injury, personal property damage or wrongful death claims in Indiana for adults is 2 years.[2] The statute of limitations for claims based upon a written contract is 10 years.[3]

B. Statutes of Repose and Limitations on Application of Statutes.

An action to recover damages for personal injury, personal property damage or wrongful death based upon improvements to real property may be brought within the earlier of 10 years after substantial completion or 12 years after the completion and submission of plans to the owner if the action is for a design defect.[4] If personal injury or wrongful death occurs during the 9th or 10th years after substantial completion, then the action may be brought within 2 years after date of injury. However, the action may not be brought more than 12 years after substantial completion, or 14 years after the completion and submission of plans to the owner if the action is for design defect, whichever comes first.[5]

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

When one party repudiates a contract, the injured party has the option of pursuing one of three remedies: 1) he may treat the contract as rescinded and recover upon *quantum meruit*; 2) he may keep the contract alive for the benefit of both parties, being at all time, ready and able to perform, and at the end of the time specified in the contract for performance, sue to recover under the contract; or 3) he may treat the repudiation as putting an end to the contract and sue to recover the damages caused by refusing to carry out the contract.[6] When the injured party treats the other's breach or repudiation as putting an end to the contract for all purposes of performance, the injured party is not bound to give further notice of its election before a suit is brought and is not bound to show it has been ready, willing and able to perform its part of the repudiated contract.[7] If the injured party was not at fault at the time of the repudiation and was adhering to contract when repudiated by the other party, it has discharged its obligations.[8]

However, when a party deviates from strict performance called for by the contract, the former cannot suddenly declare the deviation a breach of contract.[9] Notice must be given to the other party that strict performance will be required in the future, then, if the party continues to deviate, a default can be declared.[10] Similarly, when both parties to a contract acquiesce to a delay, neither side can suddenly declare the contract rescinded and simply walk away. Notice must be given to the other party along with an opportunity to perform within a reasonable time.[11]

Upon entering a contract for sale, construction, or substantial remodeling of a residence, a construction professional must provide notice to each home owner of the construction professional's right to offer to cure construction defects before a homeowner may commence litigation against the construction professional. I.C. 32-27-3-12.

At least 60 days before filing a construction defect action against a construction professional, the claimant must serve written notice of claim on the construction professional. I.C. 32-27-3-2. The notice must describe the claim in reasonable detail sufficient to determine the general nature of the defect. The construction professional must serve a written response on the claimant within 21 days after service of a notice of claim. The written response must either propose to inspect the residence, 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 defect nor compromise and settle the claim. If the construction professional disputes the claim, the claimant may bring an action against the construction professional. Note that a homeowner is not required to serve additional written notices for additional defects discovered after the homeowner has served an initial written notice.

If the construction professional does not respond to the claimant's notice of claim within 21 days, the claimant may bring an action against the construction professional without further notice. I.C. 32-27-3-3. If the construction professional does not receive acceptance or rejection of the proposal or settlement offer within 60 days, the construction professional may terminate the proposal. If the proposal is terminated, the claimant may bring an action against the construction professional.

V. INSURANCE COVERAGE AND ALLOCATION ISSUES

A. General Coverage Issues.

Standard CGL policies provide coverage for those sums that the insured becomes legally obligated to pay due to "bodily injury" or "property damage". The coverage applies to "bodily injury" or "property damage" if the bodily injury or property damage is the result of an occurrence resulting during the policy period. Coverage is excluded if the damages result to "your work" which is generally defined to be the scope of work described by the construction agreement.

B. Trigger of Coverage.

In order to trigger coverage, there must be a claim for "bodily injury" or "property damage" as a result of an "occurrence." For many years, Indiana case law held that coverage was not afforded for damages to the work of the insured based upon the reasoning that there was no "occurrence" under the policy. However, in 2010, the Indiana Supreme Court has reversed that line of cases. In *Sheehan Constr. Co. v. Cont'l Cas. Co.*,[12] the Indiana Supreme Court held that the "your work" exception, created the presumption that an occurrence as defined under the standard CGL policy included faulty workmanship. Thus, the Court held that claims for faulty workmanship may trigger coverage under the policy along with any other event constituting an "occurrence."

C. Allocation Among Insurers.

In Indiana, there must be more than a casual connection between the insured's operations and a loss in order for the coverage of the insured to extend to other operations. For claims involving multiple coverages, liability for the insurer will be afforded according to the reading of the "other insurance" clauses in the policies. In the event of a conflict, coverage will be afforded on a pro-rata basis. *See Monroe Guar. Ins. Co. v. Langreck*, 816 N.E.2d 485 (Ind. Ct. App. 2004). Indiana has no so-called "targeted tender" doctrine as the same has not yet been addressed by Indiana appellate courts.

D. Additional Insureds.

An agreement to insure is an agreement to provide both parties with the benefits of insurance regardless of the cause of the loss (excepting wanton and willful acts). *Exide Corp. v. Millwright Riggers, Inc.,* 727 N.E.2d 473, 482 (Ind. Ct. App. 2000). Where neither party has a legal duty to insure but each foresees the potential of a loss occurring by negligence or accident, the reasonable expectation of both in expressly imposing the duty to insure against the loss upon one of them is that the other will be protected as fully as if he had assumed the duty himself. *Morsches Lumber, Inc. v. Probst,* 388 N.E.2d 284, 286-87 (Ind. Ct. App. 1979).

As a matter of interpretation, indemnification agreements that require one party to compensate the other party for the other party's own negligence are construed much more strictly than insurance agreements. *Exide Corp.* v. *Millwright Riggers, Inc.,* 727 N.E.2d 473,482 (Ind. Ct. App. 2000). A stricter reading is given to such indemnification clauses because indemnification for another party's own negligence is a harsh burden that a party would not lightly accept. *Id.* Therefore, such indemnification provisions will not be held to provide complete indemnity unless the indemnity is expressed in clear and unequivocal terms.

An agreement to insure differs from an agreement to indemnify in that, with an agreement to insure, the risk of loss is not intended to be shifted to one of the parties, but is instead intended to be shifted to an insurance company. *Id.* Neither party intends to assume a potential liability because both are demonstrating appropriate business foresight in avoiding liability by allocating it to an insurer. *Id.* Therefore, standard rules of contract interpretation apply to insurance agreements, rather than the strict construction given to self-indemnification clauses. *Id.* If the insurance provision and the indemnification provision appear in separate sections of the contracts, then a reasonable interpretation is that the indemnity clause and duty to insure clause create separate and unrelated duties. *Id.*

A party, who agrees to purchase insurance for the benefit of another party, becomes that party's insurer to the extent of the agreement to purchase insurance. *LeMaster Steel Erectors, Inc. v. Reliance Ins. Co.,* 546 N.E.2d 313, 317 (Ind. Ct. App. 1989).

VI. CONTRACTUAL INDEMNIFICATION

In Indiana, contractual indemnification provisions are not *per se* invalid although they are frowned upon and, as such, they are strictly construed by Indiana courts. Accordingly, a party may contract

to indemnify the other party for the other party's own negligence.[13] However, this may only be done if the indemnitor knowingly and willingly agrees to such indemnification.[14] Such clauses indemnifying the indemnitee's own negligence are strictly construed and will not be held to provide indemnification unless the obligation is stated in clear and unequivocal terms. Indiana courts disfavor these indemnity clauses because "to obligate one party to pay for the negligence of another is a harsh burden that no party would likely accept."[15]

Indiana statutory law renders as void and unenforceable any construction contract which purports to indemnify the indemnitee against liability for personal injury or property damage arising from its own "sole negligence" or "willful misconduct."[16] State highway contracts are exempted from this provision.

VII. CONTINGENT PAYMENT AGREEMENTS

No Indiana appellate court has addressed the matter of contingent payment or so-called "pay-when-paid" agreements. Unless the provision can be demonstrated to be unconscionable, an Indiana court will likely enforce such a provision. The Seventh Circuit Court of Appeals has predicted that Indiana would enforce a "pay-when-paid" provision and enforced the same in litigation arising in Indiana in *BMD Contractors, Inc. v. Fidelity and Deposit Co. of Maryland*.[17]

VIII. SCOPE OF DAMAGE RECOVERY

A. Personal Injury Damages vs. Construction Defect Damages.

There is no statutory limitation on compensatory damages in Indiana.

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

Indiana has adopted a Qualified Settlement Offer Statute. That statute is found at I.C. 34-50-1-1 *et seq*. and allows a party to extend an offer of settlement at least 30 days before trial. I.C. 34-50-1-2. If the offer is not accepted and the trial result is more favorable to the offeror, the court shall award attorney's fees, costs, and expenses to the offeror upon the offeror's motion. I.C. 34-50-1-6. The attorney's fees, costs and expenses recoverable are limited to $1,000.00, however. *Id.*

C. Consequential Damages.

Consequential Damages are recoverable under Indiana damage law. Limitations on consequential damages are enforceable so long as they are not construed as being unconscionable. However, the Indiana Commercial Code may provide limitations on consequential damages depending on the nature of the claim being made, pursuant to I.C. 26-1-2-719.

D. Delay and Disruption Damages.

Delay and Disruption damages are recoverable in Indiana.

E. Economic Loss Doctrine.

Damage from a defective product or service may be recoverable under a tort theory if the defect causes personal injury or damage to other property, but contract law governs damage to the product or service itself and purely economic loss arising from the failure of the product or service to perform as expected. In this respect, Indiana law is consistent with admiralty law, and the law of most other states. "Economic losses" occur when there is no personal injury and no physical harm to other property. Rather these losses are viewed as disappointed contractual or commercial expectations.[18]

F. Interest.

Pre Judgment interest may be recoverable in Indiana pursuant to I.C. 34-51-4-9 between 6 and 10%; post judgment interest accrues on all judgments at an annual rate of 8%.[19]

G. Punitive Damages.

Punitive Damages are recoverable in Indiana for personal injury claims, but not for wrongful death or contract claims. Punitive damages are recoverable for claims of insurance bad faith. Punitive damages must be established by clear and convincing evidence.[20] However, a statutory cap on punitive damages of three times compensatory damages or $50,000.00, whichever is greater, is imposed by I.C. 34-51-3-4. Additionally, 75% of any punitive damages recovered must be paid to the Indiana Violent Crimes Victims Compensation Fund.[21]

H. Liquidated Damages.

Indiana courts apply a two-part test to determine the enforceability of liquidated damages provisions: (1) does the liquidated damages provision attempt to secure an amount for the nonbreaching party which is reasonably proportionate to the amount of actual damages which will be sustained in the event of a breach; and (2) is the provision for liquidated damages designed to represent the measure of actual damages, or is it an apparent effort to penalize the breaching party so that the damages will be disproportionate to the actual damages sustained? *Czech v. Van Helsland,* 241 N.E.2d 272, 274-75 (Ind. Ct. App. 1968). If facts sustain the conclusion that the parties were attempting, in good faith, to agree upon reasonable liquidated damages rather than merely imposing a penalty, the provision will be judged by its reasonableness. *Rajski v. Tezick,* 514 N.E.2d 347, 349 (Ind. Ct. App. 1987). In *Rajski,* the court held that the provision was a penalty and emphasized the fact that the provision was not a result of direct negotiation between the parties, it applied to trivial and non-trivial breaches, and that it was not paid to parties interested in compensation for the breach. *Id.*

I. Other Damages Limitations.

Exculpatory clauses must be entered into knowingly, willingly, and free of fraud. *Marsh v. Dixon,* 707 N.E.2d 998, 1000 (Ind. Ct. App. 1999). A party seeking to limit liability exposure for its own negligence must specifically and explicitly refer to a release of liability for the party's own negligence. *Id.*

Courts in Indiana recognize exculpatory clauses and presume the contracts represent the

freely bargained agreement of the parties. However, some exceptions do exist where the parties have unequal bargaining power, the contract is unconscionable, or the transaction affects the public interest such as utilities, carriers, and other types of businesses generally thought to be suitable for regulation or which are thought of as a practical necessity for some members of the public. *Indiana Dep't Of Transp.* v. *Shelly & Sands, Inc.,* 756 N.E.2d 1063, 1072 (Ind. Ct. App. 2001).

IX. CASE LAW AND LEGISLATION UPDATE

The Indiana Supreme Court has recently given an expansive reading to the AIA waiver of subrogation provision holding that the provision bars all claims, both insured and uninsured, in the event of a fire loss.[22] In this case, the Court adopted the so-called "majority approach" rejecting the "work vs. non-work" distinction in applying the waiver-of-subrogation provision. The Court held that the plain meaning of the contract defined the scope of the waiver based on the extent and source of coverage, not the nature of the property damaged. Therefore, the Court adopted the "any insurance" approach and applied the plain meaning to bar recovery for all damages covered by the same property insurance policy used to cover construction-related damages.

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1 I.C. 32-28-3-6.
2 I.C 34-11-2-4.
3 I.C. 34-11-2-9.
4 I.C. 32-30-1-5.
5 I.C. 32-30-1-6.
6 *Indianapolis v. Twin Lakes Enterprises*, 568 N.E.2d 1073, 1080 (Ind. Ct. App. 1991) trans. denied.
7 *Twin Lakes,* 568 N.E.2d at 1080.
8 Id.
9 *Pierce v. Yochum,* 330 N.E.2d 102, 112, (Ind. Ct. App. 1975) *trans. denied.*
10 *Id.*
11 *Keliher v. Cure,* 534 N.E.2d 1133, 1137 (Ind. Ct. App. 1989).
12 *Sheehan Constr. Co. v. Cont'l Cas. Co.*, 935 N.E.2d 160 (Ind 2010).
13 *Moore Heating & Plumbing, Inc. v. Huber Hunt & Nichols*, 583 N.E.2d 142, 145 (Ind. Ct. App. 1991).
14 *Weaver v. American Oil Company*, 276 N.E.2d 144 (Ind. 1971).
15 *Henthorne v. Legacy Healthcare, Inc.,* 764 N.E.2d 751, 757 (Ind. Ct. App. 2002).
16 I.C. 26-2-5-1.
17 *BMD Contractors, Inc. v. Fidelity and Deposit Co. of Maryland*, 679 F.3d 643 (7th Cir. 2012).
18 *KB Home Ind., Inc. v. Rockville TBD Corp.,* 928 N.E.2d 297, 304 (Ind. Ct. App. 2010).
19 I.C. 24-4.6-1-101.
20 I.C. 34-51-3-2.
21 I.C. 34-51-3-6.
22 *Bd. of Comr's of Jefferson v. Teton Corporation*, 30 N.E.3d 711 (Ind. 2015).