MISSOURI

John A. Watt
BAKER STERCHI COWDEN & RICE, L.L.C.
2400 Pershing Road, Suite 500
Kansas City, MO 64108
Phone: (816) 471-2121
Fax: (816) 472-0288
E-Mail: watt@bscr-law.com

I. MECHANICS' LIENS

R.S.Mo. § 429.010, *et seq.*, governs the filing and perfection of a mechanic's or materialmen's lien. The purpose of the lien is to protect contractors, subcontractors, and materialmen whose labor and materials increase the value of a property. It provides special priorities over other encumbrances against the property. Courts generally uphold, wherever possible, the rights of laborers and materialmen.

A. Requirements

Every original contractor (aka general contractor) must provide to the person for whom the work or labor is provided a written notice, before payment is received, containing the following disclosure language in ten-point bold face type:

> **NOTICE TO OWNER**
>
> **FAILURE OF THIS CONTRACTOR TO PAY THOSE PERSONS SUPPLYING MATERIAL OR SERVICES TO COMPLETE THIS CONTRACT CAN RESULT IN THE FILING OF A MECHANIC'S LIEN ON THE PROPERTY WHICH IS THE SUBJECT OF THIS CONTRACT PURSUANT TO CHAPTER 429, RSMO. TO AVOID THIS RESULT YOU MAY ASK THIS CONTRACTOR FOR "LIEN WAIVERS" FROM ALL PERSONS SUPPLYING MATERIAL OR SERVICES FOR THE WORK DESCRIBED IN THIS CONTRACT. FAILURE TO SECURE LIEN WAIVERS MAY RESULT IN YOUR PAYING FOR LABOR AND MATERIAL TWICE.**[1216]

For owner-occupied residential property of four units or less, no person, other than the original contractor, may have a lien under Missouri Revised Code Chapter 429 unless the owner consented to be liable for such costs in the event that the costs are not paid. Such consent must be in the same typeset as the above notice, signed separately and contain the following words:

CONSENT OF OWNER

CONSENT IS HEREBY GIVEN FOR FILING OF MECHANIC'S LIENS BY ANY PERSON WHO SUPPLIES MATERIALS OR SERVICES FOR THE WORK DESCRIBED IN THIS CONTRACT ON THE PROPERTY ON WHICH IT IS LOCATED IF HE IS NOT PAID.[1217]

B. Enforcement and Foreclosure

All actions to enforce a mechanic's lien must be commenced by filing a petition in the appropriate court within six months after the lien has been filed. Generally, a subcontractor should also name the original contractor as a party. The petition must (1) contain a description of the property to be charged with the lien, and (2) allege facts necessary for securing a lien, including identity of parties, existence and terms of the contract, dates work was performed, and satisfaction of notice requirements.

The following prescribes general comments regarding collecting:

- If the principal debtor has been personally served – personal judgment and judgment lien;[1218]
- If service is by publication and the debtor has not appeared – judgment can only be levied against the owner's interest in the land;[1219] and
- Interest is includable in any mechanic's lien judgment.[1220]

C. Ability to Waive and Limitations on Lien Rights

Within six months of the indebtedness, a claimant must file with the circuit clerk of the proper county the lien containing a "just and true account" of the amount owed.[1221] Courts construe this requirement to be a condition precedent to the right to establish a mechanic's lien.[1222]

II. PUBLIC PROJECT CLAIMS

A. State and Local Public Work

The requirements for public Missouri work projects is set forth in Missouri Revised Code Chapter 34. For local governments, there is no uniform state statute that governs bids and contracts for local projects. Most local government requirements are set forth either in a statute that pertains to that particular class of government, the type of project, or in the local government's ordinances. For example, Missouri statutes address competitive bidding for cities with a population over 500,000,[1223] counties,[1224] charter cities with a population of 75,000 – 80,000,[1225] initial construction of a city's water works,[1226] school districts,[1227] public libraries,[1228] and sanitation districts.[1229]. All public entities are required to have contractors post a payment bond for projects with costs that exceed $50,000.[1230]

i. Missouri's Public Prompt Pay Act, which includes design professionals as protected parties, limits retainage to five percent on all projects that are covered by the Bonding Act (projects that exceed $50,000). [1231] The public owner is also limited to holding back only 150% of the estimated cost to complete punch list work. [1232]

ii. Missouri courts permit an unsuccessful bidder on a public works project to challenge the award of a contract to another if the bidding procedure did not permit all bidders to compete on equal terms.[1233]

B. Claims to Public Funds

The Missouri Public Prompt Pay Act requires payment, less retainage, within thirty (30) days from the date of the service or delivery of material, the date of the delivery of the contractor's invoice, or the contractor's approval of the public owner's estimate of the completed work. Interest is due on late payments at the rate of one and one-half percent per month following the expiration of the initial thirty (30) day payment period. The contractor is required to pay its subcontractors within fifteen (15) days of receipt of the payment from the public owner, with the same interest penalties imposed upon the contractor for its late payments to subcontractors. Disputes over payments are to be addressed in a civil action. Interest penalties are not to be awarded by the court if the court determines a payment was withheld in good faith for reasonable cause.

III. STATUTES OF LIMITATIONS AND REPOSE

A. Statutes of Limitations and Limitations on Application of Statutes

1. Ten Years:

    a. Action to recover possession of land.[1234]
    b. Action for payment of money or property pursuant to written obligation (does not include U.C.C. actions).[1235]
    c. Tort action against architect, engineer, or builder for defective or unsafe condition of an improvement to real property.[1236]
    d. Civil actions not otherwise mentioned.[1237]

2. Five Years:

    a. Action for trespass on real estate.[1238]
    b. Contract actions not covered by R.S.Mo. § 516.110(1).[1239]
    c. Action for recovery of personal property or injury to a person not arising on contract.[1240]
    d. Actions upon a liability created by statute other than a penalty or forfeiture.[1241]
    e. Action for fraud, that does not accrue until discovery and within 10 10 years of the act constituting fraud.[1242]

3. Accrual

A cause of action for professional malpractice does not begin to run until the plaintiff knew or should have known any reason to question the professional's work.[1243]

4. Inability to Contractually Alter

Parties to a contract cannot directly or indirectly limit the time within which a cause of action can be brought and Missouri statutes provide that any such contractual provisions are null and void.[1244]

5. Fraudulent Concealment

If a person improperly prevents the commencement of an action by absconding, hiding or any other improper act, the statute of limitations begins to run at the time that party is no longer absconding, hiding or preventing the action by the improper act.[1245]

B. Statutes of Repose and Limitations on Application of Statutes

1. Generally

As set forth in Section III.A.1 above, tort actions against builders, architects, and engineers for a defective improvement to real property must be brought within ten (10) years of the improvement's completion or the issuance of an occupancy permit.[1246] The purpose of the statute is to protect those who provide construction services from "indeterminate liability."[1247] A party recently joined in an action by such builder, architect or engineer under the statute has one year to file a third party action (notwithstanding the ten year deadline) arising out of the allegations.[1248]

2. Analyzing the Application

The first issue to determine under the statute is whether the construction services constituted an "improvement" to the property. Missouri law has defined the term "improvement" as "[a] permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs."[1249]

The second issue to determine is whether the alleged property damage occurred within ten years after the builder completed the improvement.[1250]

The final issue is whether the claimed defect that allegedly caused the damage was "concealed." Missouri cases have interpreted "concealed" to mean "an affirmative act, something actually done directly intended to prevent discovery or to thwart investigation."[1251] A concealed defective condition is "one that is not discoverable by reasonable diligence."[1252]

3. Application to Manufacturers

A manufacturer that fabricates or assembles building materials or component parts incorporated within the real property in the construction of an improvement is "performing or furnishing. . . construction services" under R.S.Mo. § 516.097.2.[1253] The application of the statute of repose does not protect a manufacturer whose standard product is fabricated at the manufacturer's factory, made available to the general public, and then "furnished for the inclusion in the improvement by the persons constructing the improvement under circumstances where the manufacturer has no substantial on-site construction activity."[1254] To invoke the affirmative defense of the statute of repose, a manufacturer must have "substantial participation at the construction site in significant activities in installing or incorporating the product into the real property."[1255]

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

A. Express Warranties

Typically, express warranties that accompany a product from the manufacturer will incorporate a time limit by which notice must be given to the manufacturer in order to honor the warranty.

B. Residential Construction Defects

Missouri law requires a contractor to notify a homebuyer that the homebuyer must give the contractor the opportunity to cure construction defects before the homebuyer can began an action in court.[1256] The contractor must give the homebuyer notice of this opportunity to cure "in substantially the following form:

> SECTIONS 436.350 TO 436.365 OF MISSOURI REVISED STATUTES PROVIDE YOU WITH CERTAIN RIGHTS IF YOU HAVE A DISPUTE WITH A CONTRACTOR REGARDING CONSTRUCTION DEFECTS. EXCEPT FOR CLAIMS FILED IN SMALL CLAIMS COURT, IF YOU HAVE A DISPUTE WITH A CONTRACTOR, YOU MUST DELIVER TO THE CONTRACTOR A WRITTEN CLAIM OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE YOUR CONTRACTOR THE OPPORTUNITY TO MAKE AN OFFER TO REPAIR OR PAY FOR THE DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY THE CONTRACTOR. READ THIS NOTICE CAREFULLY. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER SECTIONS 436.350 TO 436.365 WHICH MUST BE OBEYED IN ORDER TO PRESERVE YOUR ABILITY TO FILE A LAWSUIT. OTHER THAN REPAIRS TO WORK DONE BY THE CONTRACTOR THAT ARE NECESSARY TO PROTECT THE LIFE, HEALTH, OR SAFETY OF

PERSONS LIVING IN A RESIDENCE, OR TO AVOID ADDITIONAL SIGNIFICANT AND MATERIAL DAMAGE TO THE RESIDENCE PURSUANT TO SUBSECTION 10 OF SECTION 436.356, YOU MAY NOT INCLUDE IN CLAIMS AGAINST YOUR CONTRACTOR THE COSTS OF OTHER REPAIRS YOU PERFORM BEFORE YOU ARE ENTITLED TO FILE A LAWSUIT UNDER SECTIONS 436.350 TO 436.365.[1257]

The claimant/homeowner's written notice or claim "shall state that the claimant asserts a construction defect claim against the contractor and shall describe the claim in reasonable detail sufficient to determine the general nature of the defect as well as any known results of the defect."[1258] The contractor then has fourteen days (from service of the notice) to respond in writing, which shall:

(1) Propose to inspect the residence that is the subject of the claim and to complete the inspection within a specified time frame. The proposal shall include the statement that the contractor shall, based on the inspection, thereafter offer to remedy the defect within a specified time frame, compromise by payment, or dispute the claim; or

(2) Offer to remedy the claim without an inspection within a specified time frame; or

(3) Offer to remedy part of the claim without inspection and compromise and settle the remainder of the claim by monetary payment within a specified time frame; or

(4) Offer to compromise and settle all of a claim without inspection. A contractor's offer pursuant to this subdivision to compromise and settle a claimant's or association's claim may include, but is not limited to, an express offer to purchase the claimant's residence that is the subject of the claim; or

(5) State that the contractor disputes the claim and will neither remedy the construction defect nor compromise and settle the claim.[1259]

The statute then sets out further procedures to be taken by the claimant and contractor depending upon which option to remedy the defect is offered.[1260] Nothing in the statute interferes with the contractual rights to arbitrate[1261] or mediate[1262] the claim. The statute is inapplicable if the homeowner's action against the contractor is in a counterclaim or if the homeowner asserts an affirmative defense that includes a claim based on a construction defect allegedly caused by the contractor.[1263]

V. INSURANCE COVERAGE AND ALLOCATION ISSUES

A. General Coverage Issues

The burden of showing that a loss and damages are covered under an insurance policy is placed upon the insured, while the burden of showing that there is an applicable exclusion is on the insurer.[1264] Under this principle, the insurer will be required to demonstrate to a Missouri court that there are applicable exclusions to the insurance agreement that negate coverage. An insurer need not show that each exclusion is applicable to preclude coverage, but that any one exclusion is sufficient.[1265]

Punitive damages are not covered unless the policy specifically provides coverage.[1266]

More than one person or organization may be an insured in respect to the same occurrence. Such policies customarily contain a clause that, in effect, makes the policy apply separately to each of the persons insured.

B. Trigger of Coverage

Language of an insurance contract must be given its plain meaning, "without unduly straining the language." [1267] A standard Commercial General Liability ("CGL") policy will contain a clause limiting liability to 'bodily injury' and property damage' only if the 'bodily injury' or 'property damage' occurs during the policy period.

Coverage generally does not exist under a CGL policy for contract claims and breach of warranty.

Several Missouri courts have defined an "occurrence" under a CGL policy as an "accident." A claim for defective workmanship is considered an "occurrence" within the meaning of the CGL policy if the defect was unforeseen or unexpected and includes "injury caused by the negligence of the insured."[1268] If the damage was foreseeable or expected, coverage does not exist because the CGL policy is not intended to function as a performance bond or warranty for the goods or services provided.[1269] The rationale is that a CGL policy is not intended to protect business owners against every risk of operating a business, nor is it intended as a guarantee of the quality of an insured's product or work.[1270] However, if the CGL policy defines an occurrence to mean an accident, Missouri courts consider this to include "injury caused by the negligence of the insured."

C. Allocation Among Insurers

When two or more liability insurers are liable for the same loss, that liability is to be apportioned according to the terms of the policies involved.[1271] However, in the absence of terms controlling apportionment or when such terms are repugnant, generally the loss will be apportioned according to the coverage afforded by each policy involved.[1272] When several limits of coverage are stacked, the insurers are required to contribute pro rata to a loss that is below the combined limits of the several policies.[1273]

D. Issues with Additional Insurance

One method of risk shifting is to require persons with whom you are contracting to obtain insurance and provide a certificate naming you as an additional insured. The additional insured endorsement may require the insurance company to defend you if you are sued as a result of the contractor's work. However, whether an insurance company will be required to provide such a defense depends upon the terms of the additional insured endorsement. The certificate itself will likely contain the following limitation:

> THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

Beware that insurance companies may not be aware of certificates issued by brokers and may attempt to deny that any insurance is afforded as a result of an unauthorized certificate of insurance. You should always request a copy of the policy pursuant to which the additional insured endorsement is issued. This will allow you to review the policy to determine whether the policy contains a blanket insured endorsement.

The two most common additional insured forms are CG 20 33 and CG 20 10.

Form CG 20 33, captioned "Additional Insured – Owners, Lessees or Contractors – Automatic Status When Required in Construction Agreement" modifies the coverage of an insurance policy to include as an additional insured any person or organization for whom a contractor is:

> "performing operations when … [a contractor] and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on … [the contractor's] policy."

Form 20 33 specifically limits coverage to liability arising out of ongoing operations. No coverage is afforded for damages that arise after the insured has completed its work on the project. This can leave the additional insured liable for damages that are not immediately discovered. It also excludes "bodily injury," "property damage," "personal injury" or "advertising injury" that arises out of "the rendering of, or the failure to render, any professional architectural, engineering or surveying services."

Form CG 20 10, captioned Additional Insured Endorsements in Construction, provides that an insured includes as an additional insured any person or organization listed on Form CG 20 10, but limits liability to "bodily injury," "property damage" or "personal and advertising injury" caused by the acts or omissions of the insured or those acting on behalf of the insured.

The insurance, however, does not apply to "bodily injury" or "property damage" that occurs (1) after all the work on the project to be performed by or on behalf of the additional insured has been completed; or (2) the part of the insured's work out of which the injury or damage arises has been put to its intended use by any person other than the contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

Insurance coverage presents complex issues that should be reviewed by an attorney and insurance broker to determine the nature and scope of coverage provided.

VI. CONTRACTUAL INDEMNIFICATION

In 1999, Missouri enacted its first anti-indemnity statute that generally prohibits indemnity agreements in private and public construction contracts. It states in part that "in any contract or agreement for public or private construction work, a party's covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence or wrongdoing is void as against public policy and wholly unenforceable."[1274]

The statute sets forth several exceptions to the prohibition on indemnity agreements, including an exception for "an agreement containing a party's promise to indemnify, defend or hold harmless another person, if the agreement also requires the party to obtain specified limits of insurance to insure the indemnity obligation and the party had the opportunity to recovery the cost of the required insurance in its contract price; provided, however, that in such case the party's liability under the indemnity obligation shall be limited to the coverage and limits of the required insurance." This exception affords parties to construction contracts to obtain a Commercial General Liability Policy to avoid the prohibition on indemnity agreements in public and private construction statutes.

When an action for contractual indemnity is permitted, it is governed by the terms of the contract and is separate from the action against the indemnitee that gives rise to the claim for indemnification. The necessity of a demand for indemnification as a condition precedent to performance by the indemnitor will be governed by the terms of the contract. Indemnity claims are often pled as cross-claims or third-party claims.[1275] In general, indemnity agreements are valid and enforceable, but must be very clear.[1276]

The elements of a contractual indemnity claim are fundamentally the same as any other claim for breach of contract:

1) an agreement between parties capable of contracting;
2) supported by consideration;
3) providing that one party (indemnitor) secures or protects the other (indemnitee) against liability or loss, or a combination of the two; and
4) a breach of the obligation of indemnity; and
5) damages incurred by the indemnitee.[1277]

A petition seeking recovery on a contractual indemnity theory should contain:

1) a description of the parties;

2) allegations of jurisdiction and venue (if the indemnity claim is a cross-claim or third-party claim, jurisdiction and venue may be established by alleging the circumstances of the pending action);

3) allegations showing the existence of a contract of indemnity or other contract giving rise to a claim for indemnity, including allegations of capacity of the parties, the substance of the contract, and consideration;[1278]

4) allegations showing the breach of contract by the indemnitor;[1279]

5) allegations showing breach by the defendant by failing to reimburse plaintiff's actual loss (loss indemnity) or by failing to discharge plaintiff's liability as finally fixed and determined, either by a good-faith settlement or by adjudication (liability indemnity or mixed loss/liability);

6) allegations of demand or tender of defense, if necessary;[1280] and

7) allegations of damage, including sums sought for costs and expenses of the defense of the underlying claim and enforcing the indemnity agreement, if appropriate.

A contract for indemnity, like other contracts, must be sufficiently definite and certain to permit the court to enforce it. If the essential terms of the contract of indemnity are not sufficiently definite for a court to give them an exact meaning, such as where the contract does not clearly specify who is the indemnitor, enforcement will be denied.[1281]

VII. CONTINGENT PAYMENT AGREEMENTS

A. Pay-if-paid clauses:

1. Generally, pay-if-paid clauses, that attempt to shift the payment risk from the general contractor to the subcontractor by relieving the general contractor of payment obligations unless and until it receives payment from the owner, are enforceable.

2. Missouri courts have not directly addressed the issue of whether pay-if-paid clauses in construction agreements violate public policy.

3. When a pay-if-paid provision is included in a contract, Missouri courts will only construe payment to be a condition precedent if the contract terms are plain and unambiguous. When a general contractor puts a risk-shifting provision in a subcontract, the burden of clear expression will be on the general contractor.[1282]

4. Courts consider all incorporated and referenced documents in the subcontract in construing pay-if-paid clauses.[1283]

5. If the clause is ambiguous, it will be interpreted as fixing a reasonable time for payment to the subcontractor.[1284]

B. Pay-when-paid clauses:

1. Generally, pay-when-paid clauses address the timing of payment, rather than the right to payment, and are enforceable.

2. If the language is ambiguous, the pay-when-paid clause will be construed as establishing a reasonable period for payment to subcontractor.[1285]

VIII. SCOPE OF DAMAGE RECOVERY

A. Personal Injury Damages vs. Construction Defect Damages

The ultimate test for damages is whether the award will fairly and reasonably compensate the plaintiff for his or her injuries.[1286]

1. Personal Injury Damages

   The following are basic areas of recovery in personal injury law:

   a. Actual or Compensatory Damages – including pain and suffering;

   b. Special Damages – such as hospitalization, medical expenses or loss of wages (both past and future);[1287]

   c. Future Medical Expenses;

   d. Economic Loss;[1288]

   e. Punitive Damages;[1289] and

   f. Loss of Consortium – of spouse.

2. Construction Defect Damages

   Generally on a construction defect case under a theory of breach of contract, "plaintiffs are entitled to recover as damages only a sum which is the equivalent of performance of the bargain—to be placed in the position they would be in if the contract had been fulfilled in a workmanlike manner."[1290] These may incorporate actual damages, consequential damages, and lost profits.[1291] The plaintiff bears the burden of proving that damages exist, and the amount of those damages.[1292] The plaintiff "must demonstrate the level of damages with reasonable certainty."[1293] "Such proof must rise to the level of substantial evidence, which has been defined as that which a reasonable mind would accept

as sufficient to support a particular conclusion, granting all reasonable inference[s] which can be drawn from it."[1294]

The Missouri Court of Appeals set forth the following standard with respect to the amount of damages recoverable for defective performance:

> When a building contractor breaches his contract by defective performance, . . . two methods are commonly used to measure the resulting damages. One method, called 'cost of repair' is, as its name implies, the cost of repairing the defective work. 5 Corbin, Contracts, § 1089 (1964); Restatement of Contracts, § 346(1)(a) (1932). The second method, called 'diminution in value,' is the difference between the value of the building as promised and its value as actually constructed. *See Kahn v. Prahl*, 414 S.W.2d 269, 282–283 (Mo.1967); *Hotchner v. Liebowits*, 341 S.W.2d 319, 332 (Mo.App.1960). The particular facts of each case determine which measure of damages is to be used.[1295]

The basic rule is that a plaintiff is entitled to recover the lesser of the cost of repair or the diminution of value of the property with the defective condition.[1296]

B. Attorneys' Fees Shifting and Limitations on Recovery

Unlike court costs, attorneys' fees are not generally recoverable from the other party.[1297] Attorney fees are ordinarily only recoverable when 1) called for by contract 2) expressly provided for by statute, 3) as an item of collateral damage, or 4) where equity requires ("very unusual circumstances").[1298]

C. Consequential Damages

Consequential damages are "those damages naturally and proximately caused by the commission of the breach and those damages that reasonably could have been contemplated by the defendant at the time of the parties' agreement."[1299] Missouri Courts permit the recovery of consequential damages.

D. Delay and Disruption Damages

1. Delay Damages

Whether delay in completion of a construction contract is excusable, thus mitigating a potential claim for damages against the contractor, has been explained as follows:

> Excusable delay occurs as a result of events outside a contractor's control, such as acts of God (floods, hurricanes), labor strikes, unusually severe weather, and an inability to obtain critical materials due to plant closings and product shortages. Inexcusable delay is caused by the contractor, due to a failure to properly schedule or supervise the work or to prosecute the work diligently. Generally, an excusable delay entitles a contractor to a contract time extension and relief from a potential or actual liquidated damages assessment but does not allow the contractor to recover the costs of delay.[1300]

A contractual provision that instructs a contractor on a procedure and time limit within which that contractor must request an extension due to delay is enforceable, and failure to abide by such a provision renders delays inexcusable.[1301] In addition, many contracts will require notice before delay is "excused."[1302] The Missouri Supreme Court addressed these issues in *Bloomfield Reorganized School Dist. v. Stites* and strictly enforced the notice provisions regarding extensions due to delay. In *Bloomfield*, a school and a contractor agreed to the construction of a building on the school's campus.[1303] After differences arose, the school sued the contractor to terminate the contract.[1304] The *Bloomfield* contract contained a provision granting extensions of time "for delays beyond the control of the Contractor."[1305] A later provision, however, provided that "[n]o such extension shall be made for delay occurring more than seven days before claim therefore [sic] is made in writing to the Architect."[1306] The contractor applied for an extension nineteen days after the agreed completion date, requesting extensions of time ranging from 45 days to 120 days. The contractor testified that there were delays due to a cement and steel shortage and to the weather, over which neither party had any control. In addition, the contractor claimed that there were numerous delays attributable to the misconduct of the architect, such as "denial of permission to fabricate his own steel, delay in approving various shop drawings, delay in furnishing a paint schedule, delay in supplying information as to light fixtures, refusal to answer inquiries as to two stairways and, in short, just about every item in the plans and specifications."[1307]

The Missouri Supreme Court ruled the school was entitled to liquidated damages for inexcusable delay.[1308] In so ruling, the *Bloomfield* Court noted: "All of these listed delays had occurred in the past, not 'seven days before claim therefore [sic] is made,'" and, "[w]hile the contractual provision [the article discussing delay] may have been intended for the contractor's benefit, he did not comply with it and he is therefore not to be excused for the delays."[1309]

There are, however, exceptions to the general rule that when a construction contract requires a written change order, there is no right to recover for extra work without such a writing or waiver by the owner. For example, if the parties orally agreed upon the extra work or supplies and if such "extras" were

supplied pursuant to this agreement, that may constitute a waiver of the written change order requirement.[1310] In addition, habitual acceptance of extra work done on oral change orders in connection with a contract and payment may constitute a waiver of any contract clause providing that no claims for extra work or material will be allowed unless it is performed pursuant to a written change order.[1311]

2. Disruption Damages

Disruption damages may occur when a change in the project schedule results in additional labor, time or expenses on the project by the contractor/subcontractor. They are contractual in nature.[1312]

E. Economic Loss Doctrine

The economic loss doctrine prohibits a plaintiff from seeking to recover in tort economic losses that are contractual in nature.[1313] In other words, a defendant who has contracted with another owes no duty to a plaintiff who was not the party to the contract, nor can that plaintiff sue for the negligent performance of the contract.[1314] The policy considerations behind this rule aim to (1) prevent excessive and unlimited liability; and (2) prevent restrictions on the right to make contracts by burdening contracting parties with obligations and liabilities to others which they would not voluntarily assume.[1315]

Damages for economic loss may be recovered in certain negligence actions in Missouri. Economic loss includes "cost 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 or use."[1316] Such damages may be recovered in actions for personal injury, damage to property other than the property at issue, destruction of the property sold due to some violent occurrence, and in actions involving negligent rendition of services by a professional.[1317] In 2011, the Missouri Supreme Court held comparative fault applies to property damages and economic loss damages.[1318]

F. Interest

1. Prejudgment Interest

a. Contract Actions

i. Missouri courts permit the recovery of prejudgment interest.[1319]

ii. Absent an agreement between the parties, prejudgment interest is allowed at the rate of 9% annually.[1320]

iii. In the case of written contracts, prejudgment interest begins to accrue when the amount owing becomes "due and payable."[1321]

iv. In contractual obligations other than written agreements, prejudgment interest does not begin to accrue until the amount becomes due and a demand for payment is made.[1322]

v. For actions based upon Missouri's Prompt Pay Act, which concern private construction projects, interest accrues at the rate up to one and one-half percent from the date payment was due pursuant to the contract.[1323]

b. Tort Actions

i. Prejudgment interest is difficult to recover in tort actions, due to the stringent requirements of R.S.Mo. § 408.040.[1324]

ii. Prejudgment interest can be recovered following a demand for payment or a settlement demand, but must be made in compliance with R.S.Mo. § 408.040 as follows:

"[I]f a claimant has made a demand for payment of a claim or an offer of settlement of a claim, to the party, parties or their representatives, and to such party's liability insurer if known to the claimant, and the amount of the judgment or order exceeds the demand for payment or offer of settlement, then prejudgment interest shall be awarded, calculated from a date ninety days after the demand or offer was received, as shown by the certified mail return receipt, or from the date the demand or offer was rejected without counter offer, whichever is earlier. In order to qualify as a demand or offer pursuant to this section, such demand must:

(1) Be in writing and sent by certified mail return receipt requested; and

(2) Be accompanied by an affidavit of the claimant describing the nature of the claim, the nature of any injuries claimed and a general computation of any category of damages sought by the claimant with supporting documentation, if any is reasonably available; and

(3) For wrongful death, personal injury, and bodily injury claims, be accompanied by a list of the names and addresses of medical providers who

have provided treatment to the claimant or decedent for such injuries, copies of all reasonably available medical bills, a list of employers if the claimant is seeking damages for loss of wages or earning, and written authorizations sufficient to allow the party, its representatives, and liability insurer if known to the claimant to obtain records from all employers and medical care providers; and

(4) Reference this section and be left open for ninety days.

Unless the parties agree in writing to a longer period of time, if the claimant fails to file a cause of action in circuit court prior to a date one hundred twenty days after the demand or offer was received, then the court shall not award prejudgment interest to the claimant. If the claimant is a minor or incompetent or deceased, the affidavit may be signed by any person who reasonably appears to be qualified to act as next friend or conservator or personal representative. If the claim is one for wrongful death, the affidavit may be signed by any person qualified pursuant to section 537.080, RSMo, to make claim for the death. Nothing contained herein shall limit the right of a claimant, in actions other than tort actions, to recover prejudgment interest as otherwise provided by law or contract.[1325]

iii. Prejudgment interest in tort actions bears interest at a per annum interest rate equal to the intended Federal Funds Rate, as established by the Federal Reserve Board, plus three percent.[1326] The judgment must set forth the applicable interest rate, which cannot be varied once entered.[1327]

2. Post-judgment Interest

a. Contract Actions

i. Judgments in Missouri for actions in contract accrue interest at the rate of 9% annually, if there is no agreement for a higher rate of interest. However, where the judgment

is founded upon a contract providing for a higher rate of interest, the higher rate applies.[1328]

ii. Interest begins to accrue from the day the judgment is rendered regardless of whether the judgment itself mentions a right to the interest.[1329]

iii. Normally, the pendency of an appeal does not affect accrual of interest.[1330]

b. Tort Actions

i. Judgments in Missouri for actions in tort accrue interest from the date judgment is entered by the trial court at a per annum interest rate equal to the intended Federal Funds Rate, as established by the Federal Reserve Board, plus five percent, until full satisfaction is made.[1331]

ii. The judgment must state the applicable interest rate, which cannot vary once entered.[1332]

G. Punitive Damages

1. Courts are reluctant to read punitive damages into standard insurance clauses that are unambiguous, but have not addressed the issue of whether punitive damages are uninsurable due to a violation of public policy.[1333]

2. Negligence cases:

a. Punitive damages are usually not recoverable in a negligence case because negligence, or the omission of a duty, is not willful or intentional conduct. However, punitive damages can be recovered in Missouri for a negligent act if proven by clear and convincing evidence, meaning that the defendant, at the time of the negligent act, knew of had reason to know that there was a high degree of probability that the action would result in injury.[1334]

b. The standard to prove punitive damages is "complete indifference to or conscious disregard for the safety of others."[1335]

c. Punitive damages are intended to punish and deter defendant and others from like conduct.[1336]

3. Intentional tort cases:

The standard to recover punitive damages is "outrageous conduct because of defendant's evil motive or reckless indifference to the rights of others."[1337]

4. Discovery

Discovery of a defendant's assets is only allowed if the trial court finds it is more likely than not that the plaintiff will be able to present a submissible case on plaintiff's claim for punitive damages.[1338]

5. Except in limited circumstances set forth in statute, the maximum allowed for punitive damages is as follows:

a. $500,000; or

b. Five times the amount of the judgment.[1339]

H. Other Damage Limitations

1. Liquidated Damages

Missouri case law allows sophisticated parties the freedom to contractually limit future liability.[1340] The court's reason that parties have the freedom to make a bad bargain or relinquish fundamental rights.[1341] Further, a contract that did not include a limitation clause would presumably carry a different price than one that does include such a provision.[1342]

The term "liquidated damages" refers to "that amount which, at the time of contracting, the parties agree shall be payable in the case of breach."[1343] Missouri courts generally uphold liquidated damages provisions in contracts "provided they are reasonable and the parties agreed in good faith upon a sum as damages that would likely ensue if the contract were breached."[1344]

[1216] R.S.Mo. § 429.012.

[1217] R.S.Mo. § 429.013.

[1218] R.S.Mo. § 429.240.

[1219] R.S.Mo. § 429.230.

[1220] R.S.Mo. § 429.210.

[1221] R.S.Mo. § 429.080.

[1222] *Farmington Bldg. Supply Co. v. L.D. Pyatt Const. Co.*, 627 S.W.2d 648, 650 (Mo. App. E.D. 1981).

[1223] R.S.Mo. § 8.250.

[1224] R.S.Mo. § 50.660.

[1225] R.S.Mo. § 88.940.

[1226] R.S.Mo. § 91.170.

[1227] R.S.Mo. § 177.086.

[1228] R.S.Mo. § 182.270.

[1229] R.S.Mo. § 248.110.

[1230] R.S.Mo. § 107.170.2.

[1231] R.S.Mo. § 34.057.

[1232] R.S.Mo. § 34.057.1(3).

[1233] *Byrne & Jones Enters. v. Monroe City R-1 School Dist.,* 493 S.W.3d 847, 854 (Mo.banc 2016); *Public Communs. Servs. v. Simmons,* 409 S.W.3d 538, 546-47 (Mo.App. W.D. 2013).

[1234] R.S.Mo. § 516.010.

[1235] R.S.Mo. § 516.110(1).

[1236] R.S.Mo. § 516.097; *See infra,* Section III.B.

[1237] R.S.Mo. § 516.110(3).

[1238] R.S.Mo. § 516.120(3).

[1239] R.S.Mo. § 516.120(1).

[1240] R.S.Mo. § 516.120(4).

[1241] R.S.Mo. § 516.120(2).

[1242] R.S.Mo. § 516.120(5).

[1243] *Deutsch v. Wolff*, 994 S.W.2d 561, 572 (Mo. banc 1999).

[1244] R.S.Mo. § 431.030.

[1245] R.S.Mo. § 516.280.

[1246] R.S.Mo. § 516.097.

[1247] *Magee v. Blue Ridge Professional Bldg. Co., Inc.*, 821 S.W.2d 839, 843 (Mo.banc 1991).

[1248] R.S.Mo. § 516.097.3.

[1249] *Hayslett v. Harnischfeger Corp.*, 815 F. Supp. 1294, 1296 (W.D. Mo. 1993); *See also, Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 836 (Mo.banc 1991) (a central air handling unit was an improvement to real property).

[1250] *Fueston v. Burns & McDonnell Eng'g*, 877 S.W.2d 631, 637-638 (Mo. App. W.D. 1994).

[1251] *Magee v. Blue Ridge Professional Bldg. Co., Inc.*, 821 S.W.2d 839, 844 (steps in a stairwell were not a concealed defect even though there was a subtle variation in the height and width of the individual steps).

[1252] *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 20 (Mo. banc 1995).

[1253] *Travelers Indem. Co. of Am. v. Williams-Carver Co.*, 326 S.W.3d 45, 49 (Mo. App. W.D. 2010), *citing Blaske v. Smith & Entzeroth, Inc*., 821 S.W.2d 822, 837.

[1254] *Id.*

[1255] *Id.*

[1256] R.S.Mo. § 436.353.1.

[1257] R.S.Mo. § 436.353.2.

[1258] R.S.Mo. § 436.356.1.

[1259] R.S.Mo. § 436.356.2.

[1260] R.S.Mo. § 436.356.3.

[1261] R.S.Mo. § 436.365.2.

[1262] R.S.Mo. § 436.362.

[1263] R.S.Mo. § 436.353.4.

[1264] *Am. States Ins. Co. v. Herman C. Kempker Constr. Co.*, 71 S.W.3d 232, 235 (Mo. App. W.D. 2002).

[1265] *See, Id.*

[1266] *Union L.P. Gas Systems, Inc. v. International Surplus Lines Ins. Co.*, 869 F.2d 1109, 1111 (8th Cir. 1989), *citing Schnuck Markets, Inc. v. TransAmerica Insurance Co.*, 652 S.W.2d 206, 208-9 (Mo. App. E.D. 1983); *Crull v. Gleb*, 382 S.W.2d 17, 23 (Mo. App. 1964).

[1267] *Hawkeye-Security Ins. Co. v. Davis*, 6 S.W.3d 419, 424 (Mo. App. S.D. 1999).

[1268] *Vill. At Deer Creek Homeownsers Ass'n v. Mid-Continent Cas. Co.,* 432 S.W.3d 231, 246 (Mo. App. W.D. 2014); *D.R. Sherry Constr., Ltd. v. Am. Family Mut. Ins. Co*., 316 S.W.3d 899, 905 (Mo.banc 2010).

[1269] *Emplys. Mut. Cas. Co. v. Luke Draily Constr. Co*., No. 10-00361-CV-W-DGK, 2011 WL 2582551, at *5 (W.D. Mo. June 29, 2011), *citing American States Ins. Co. v. Mathis,* 974 S.W.2d 647, 649 (Mo. App. E.D. 1998).

[1270] *Id*.

[1271] *Empire Ins. Co. v. Farm Bureau Town & Country Ins. Co.,* 633 S.W.2d 215, 217 (Mo. App. E.D. 1982).

[1272] *National Indem. Co. v. Liberty Mut. Ins. Co.*, 513 S.W.2d 461, 470 (Mo. 1974).

[1273] *State Farm Mut. Auto Ins. v. MFA Mut. Ins. Co.*, 671 S.W.2d 276, 278 (Mo.banc 1984).

[1274] R.S.Mo. § 434.100

[1275] *See, e.g., Burns & McDonnell Engineering Co. v. Torson Constr. Co.,* 834 S.W.2d 755 (Mo. App. W.D. 1992).

[1276] *Alack v. Vic Tanny Int'l*, 923 S.W.2d 330, 334-35 (Mo.banc 1996); *Util. Serv. and Maint., Inc. v. Noranda Aluminum, Inc.*, 163 S.W. 3d 910, 914 (Mo.banc 2005); *Pernoud v. Martin*, 891 S.W.2d 528, 537 (Mo. App. E.D. 1995) ("In determining whether written agreements establish a duty to indemnify, a specific and express intent to indemnify is required.").

[1277] *Honey v. Barnes Hospital*, 708 S.W.2d 686, 697 (Mo. App. E.D. 1986).

[1278] *Dillard v. Shaugnessy, Fickel & Scott Architects,* 884 S.W.2d 722, 723-24 (Mo.App. W.D. 1994).

[1279] *Honey v. Barnes Hospital*, 708 S.W.2d 686, 697.

[1280] *Stephenson v. First Mo. Corp.*, 861 S.W.2d 651, 657 (Mo. App. W.D. 1993).

[1281] *Minden v. Otis Elevator Co.*, 793 S.W.2d 461, 464 (Mo. App. E.D. 1990).

[1282] *Meco Sys., Inc. v. Dancing Bear Entertainment, Inc.*, 42 S.W.3d 794, 806 (Mo. App. S.D. 2001), *citing,* among other cases, *American Drilling Service Co. v. City of Springfield*, 614 S.W.2d 266, 273 (Mo. App. S.D. 1981); *A. Zahner Co. v. McGowan Builders, Inc.,* 497 S.W.3d 779, 784 (Mo. App. W.D. 2016).

[1283] *Meco*, *Sys., Inc. v. Dancing Bear Entertainment, Inc.*, 42 S.W.3d 794, 806–07 (finding ambiguity in general contractor's contract with subcontractors when comparing general contractor's contracts with owner and subcontractor).

[1284] *Id*. at 806.

[1285] *Id.* at 808 (where the ambiguous pay if paid provision was "construed as establishing a reasonable time to pay by MECO rather than creating a condition precedent to MECO's obligation to pay Subcontractors").

[1286] *Sampson v. Mo. P. R. Co.*, 560 S.W.2d 573, 588 (Mo.banc 1978).

[1287] *See, e.g., Hanson v. Tucker*, 303 S.W.2d 126, 129 (Mo. 1957).

[1288] *See infra,* Section VIII.E.

[1289] *See infra*, Section VIII.G.

[1290] *Steffens v. Paramount Properties, Inc.*, 667 S.W.2d 725, 727–28 (Mo. App. E.D. 1984).

[1291] *See, e.g., Catroppa v. Metal Bldg. Supply, Inc.*, 267 S.W.3d 812, 817-18 (Mo. App. S.D. 2008).

[1292] *Id.* at 817 (internal quotations and citation omitted).

[1293] *Id*.

[1294] *Id.*

[1295] *Hensic v. Afshari Enterprises, Inc*., 599 S.W.2d 522, 524 (Mo. App. E.D. 1980).

[1296] *Steffens v. Paramount Properties, Inc.*, 667 S.W.2d 725, 728.

[1297] *Julian v. Burrus*, 600 S.W.2d 133, 141-42 (Mo. App. W.D. 1980).

[1298] *Boone Valley Farm v. Historic Daniel Boone Home, Inc.*, 941 S.W.2d 720, 721–22 (Mo. App. E.D. 1997).

[1299] *Catroppa*, *v. Metal Bldg. Supply, Inc.*, 267 S.W.3d 812, 818 (internal quotations omitted). The theory of consequential damages arises from the English case, *Hadley v. Baxendale*, 9 Ex. 341, 26 Eng. L. & Eq. 398 (1854).

[1300] *Delay of Game*, John D. Darling, 26 Constr. Law. 5, 6 (2006).

[1301] *Bloomfield Reorganized School Dist. v. Stites*, 336 S.W.2d 95, 100 (Mo. 1960).

[1302] *Id*.

[1303] *Id*. at 97.

[1304] *Id*.

[1305] *Id.* at 99–100.

[1306] *Id.* at 100.

[1307] *Id*. at 99.

[1308] *Id*. at 102.

[1309] *Id*. at 100.

[1310] *Winn-Senter Constr. Co. v. Katie Franks, Inc*., 816 S.W.2d 943, 945-46 (Mo.App. W.D. 1991).

[1311] *Id*. at 946.

[1312] Missouri law does not address these provisions specifically. For further discussion, see *Delay of Game*, John D. Darling, 26 Constr. Law. 5 (2006).

[1313] *Captiva Lakes Invs., LLC v. Ameristructure, Inc.,* 436 S.W.3d 619, 628 (Mo.App. E.D. 2014).

[1314] *Fleischer v. Hellmuth, Obata & Kassabaum*, 870 S.W.2d 832, 834, 837 (Mo. App. E.D. 1993) (a professional negligence suit, the Court found the architect was not liable to a general contractor for professional negligence arising out of performance of a contract between the architect and the owner).

[1315] *Id*. at 836.

[1316] *Groppel Co. v. United States Gypsum Co.*, 616 S.W.2d 49, fn. 5 (Mo. App. E.D. 1981), *citing Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.,* 97 Idaho 348, 544 P.2d 306, 309-10 (1975).

[1317] *Clevenger & Wright Co. v. A.O. Smith Harvestore Products, Inc.*, 625 S.W.2d 906, 909 (Mo. App. W.D. 1981); *Autry Morlan Chevrolet, Cadillac, Inc. v. RJF Agencies, Inc.,* 332 S.W.3d 184, 193-94 (Mo. App. S.D. 2010).

[1318] *Children's Wish Found. Int'l., Inc. v. Mayer Hoffman McCann, P.C.*, 331 S.W.3d 648, 653 (Mo. banc 2011).

[1319] R.S.Mo. § 408.020.

[1320] *Id*.

[1321] *Id.; Doerflinger Realty Co. v. Fields*, 281 S.W.2d 609, 613 (Mo. App. 1955).

[1322] R.S.Mo § 408.020*; General Aggregate Corp. v. La Brayere*, 666 S.W.2d 901, 909 (Mo. App. E.D. 1984).

[1323] R.S.Mo. § 431.180.2.

[1324] *See, e.g., Lober v. Kansas City*, 339 Mo. 1087, 100 S.W.2d 267 (Mo. 1936).

[1325] R.S.Mo. § 408.040.3.

[1326] R.S.Mo. § 408.040.4.

[1327] *Id*.

[1328] R.S.Mo. § 408.040.2.

[1329] *Id; Reimers v. Frank B. Connet Lumber Co.*, 273 S.W.2d 348, 349 (Mo. 1954).

[1330] *In re Estate of Thomasson*, 192 S.W.2d 867, 870 (Mo. 1946).

[1331] R.S.Mo. § 408.040.3.

[1332] *Id*.

[1333] *Schnuck Markets, Inc. v. TransAmerica Insurance Co.*, 652 S.W.2d 206, 212.

[1334] *Sharp v. Robberson*, 495 S.W.2d 394, 397-99 (Mo. banc 1973); *Smith v. Brown & Williamson Tobacco Corp*., No. WD65542, 2007 Mo. App. LEXIS 1144, at *168-69, 2007 WL 2175034 (Mo. App. W.D. July 31, 2007).

[1335] *Sharp v. Robberson*, 495 S.W.2d 394, 39*8; Smith v. Brown & Williamson Tobacco Corp.,* No. WD65542, 2007 Mo. App. LEXIS 1144, at * 169, 2007 WL 2175034.

[1336] M.A.I. 10.02; *Burnett v. Griffith*, 769 S.W.2d 780, 787 (Mo.banc 1989).

[1337] M.A.I. 10.01; *Burnett v. Griffith*, 769 S.W.2d 780, 787.

[1338] R.S.Mo. § 510.263.8.

[1339] R.S.Mo. § 510.265.

[1340] *Purcell Tire & Rubber Co. v. Executive Beechcraft, Inc.*, 59 S.W.3d 505, 508 (Mo.banc 2001).

[1341] *Malan Realty Investors v. Harris*, 953 S.W.2d 624, 627 (Mo.banc 1997) (contractual agreement to waive right to a jury trial is enforceable); *High Life Sales Co. v. Brown-Forman Corp.,* 823 S.W.2d 493, 497 (Mo.banc 1992) (forum selection clause in contract is valid so long as not unfair or unreasonable).

[1342] *Util. Serv. & Maint., Inc. v. Noranda Aluminum, Inc.*, 163 S.W.3d 910, 914 (Mo.banc 2005).

[1343] *Warstler v. Cibrian*, 859 S.W.2d 162, 165 (Mo.App. W.D. 1993), *citing Goldberg v. Charlie's Chevrolet, Inc.*, 672 S.W.2d 177, 179 (Mo. App. E.D. 1984); *See also, Taos Constr. Co. v. Penzel Constr. Co.,* 750 S.W.2d 522, 525–26 (Mo. App. E.D. 1988).

[1344] *Warstler v. Cibrian*, 859 S.W.2d 162, 165; *See also, Bloomfield Reorganized School Dist. v. Stites*, 336 S.W.2d 95, 99.