NEW JERSEY

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I. MECHANIC'S LIEN IN NEW JERSEY

In New Jersey, mechanics' liens are governed by the Construction Lien Law ("CLL"), N.J.S.A. § 2A:44A-1 to -38, which took effect on April 22, 1994 and replaced the prior Mechanics' Lien Law ("MLL"). Under the prior regime, as a condition precedent to filing a lien claim, a supplier of labor and/or materials for residential or commercial construction contracts was required to file a mechanic's notice of intention before performing any labor or furnishing any materials.[1] After satisfying this requirement, an unpaid contractor or supplier had four months from the date the last labor was performed or materials were provided to bring an action to enforce the lien.[2] If the unpaid contractor or supplier failed to file the notice of intention, that party was precluded from later filing a lien claim. In addition to being complicated and confusing for contractors and suppliers alike, the prior statute engendered distrust and friction between contractors and owners.

The CLL was passed to simplify the lien process, promote contractors' lien rights, and eliminate the tension created between contractors and owners by the prior statutory framework. Under the current statute, "[a]ny contractor, subcontractor or supplier who provides work, services, material or equipment pursuant to a contract, shall be entitled to a lien for the value of the work or services performed, or materials or equipment furnished in accordance with the contract and based upon the contract price." N.J.S.A. § 2A:44A-3. N.J.S.A. § 2A:44A-2 defines a "contract" as "any agreement, or amendment thereto, in writing ... evidencing the respective responsibilities of the contracting parties ... [which] in the case of a supplier ... shall include a delivery or order slip ... signed by the party against whom the lien claim is asserted."[3] Thus, a party can file a lien for unpaid monies only pursuant to a written contract.[4] The CLL bars lien waivers as void against public policy unless the waiver is given "in consideration for payment for the work, services, materials, or equipment" provided. N.J.S.A. § 2A:44A-38. Even then, a waiver is effective only upon and to the extent that the payment is actually received.

A. Requirements

As noted above, the CLL eliminated the requirement from the MLL that as a condition precedent to filing a lien claim on a residential or non-residential construction contract, a contractor or supplier had to file a mechanic's notice of intention before performing any labor or furnishing any materials. For non-residential construction contract cases, the CLL requires that a party file a lien claim within 90 days following the date the last work, services or materials were provided for which payment is claimed. N.J.S.A. § 2A:44A-6(a)(2). In residential cases, the maximum time period to file a lien has been extended from 90 days to 120 days. In both the

residential and commercial contexts, even a timely filed lien claim will be invalid if a superior party in the contractual chain (owner to general contractor or general contractor to subcontractor, for example) has filed for bankruptcy, because New Jersey lien claims do not relate back to before the time of a bankruptcy filing.[5] The lien claim must be filed in "substantially" the same form as that shown in N.J.S.A. § 2A:44A-8. Once a lien claim has been filed, the lien claimant must bring an action to enforce the lien in the Superior Court in the county where the property is located within one year of the date of the last work, services, material, or payment for which the lien claim was filed, or within 30 days following receipt of written notice from the owner requiring the claimant to begin the action to enforce the lien claim. N.J.S.A. § 2A:44A-14(a). Failure to comply with these requirements results in forfeiture of all rights to enforce the lien. A party seeking to enforce a lien will also forfeit its rights if the lien claim is without basis, is willfully overstated, or is not filed in the form or manner required by the statute. N.J.S.A. § 2A:44A-15(a).

Under N.J.S.A. § 2A:44A-7, within 10 days following the filing of a lien claim, the claimant must serve notice on the owner through a copy of the completed and signed lien claim substantially in the form in N.J.S.A. § 2A:44A-8 by personal service or mail (registered or certified). The lien claimant must serve or mail a copy of the lien claim to the last known business address or place of residence of the owner, community association, or any contractor and/or subcontractor against whom the claim is asserted. Before filing the lien claim for residential construction contracts, the lien claimant must have also complied with the additional requirements of N.J.S.A. §§ 2A:44-20 and -21, discussed below.

A lien claim may be amended for "appropriate" reasons, including but not limited to correcting inaccuracies or errors in the original claim form, revising the amount claimed because of either partial payment of the claim or release of a proportionate share of an interest in real property from the lien, and adjusting for additional work, services, material or equipment provided. N.J.S.A. § 2A:44A-11. However, a lien claim may not be amended to cure a violation of N.J.S.A. § 2A:44A-15, which outlines the improper filing of lien claims and forfeiture of rights.

B. Community Associations

The CLL provides that community associations are subject to lien claims and states that a construction lien can attach to a community association the same way it can attach to a property owner. N.J.S.A. § 2A:44A-2 defines a community association as "a condominium association, a homeowners' association, a cooperative association, or any other entity created to administer or manage the common elements and facilities of a real property development that, directly or through an authorized agent, enters into a contract for improvement of the real property."

After reasonable notice, and in a manner directed by the court, an unpaid judgment obtained against a community association may be enforced by assessment against unit owners in the same way liability would be assessed for any other common expense payable by the unit owners. N.J.S.A. § 2A:44A-24.1(h). In ordering assessments, the court should look to the master deed, bylaws or other documents governing the association. The CLL prohibits judgments from being enforced by the sale of any common elements, common areas or common buildings or structures of the property development.

C. Residential Property

The MLL did not differentiate between residential and non-residential (commercial) construction contracts, but the CLL does, and later revisions further clarified the meaning of residential construction as "construction of or improvement to a dwelling, or any portion thereof, or any residential unit, or any portion thereof." N.J.S.A. § 2A:44A-2. The revised CLL also clarifies the definition of a "residential construction contract" to include the construction or improvement of units, dwellings, or any other portion of a residential real property development. N.J.S.A. § 2A:44A-2.[6] Where a residential construction contract is at issue,[7] the CLL imposes not only the timing, notice, and form of lien statement requirements discussed above, but also additional requirements on contractors or suppliers seeking to file a mechanics' lien.[8] For residential construction contracts a lien claimant must file and serve a Notice of Unpaid Balance and Right to File Lien ("NUB") as a condition precedent to the filing of any lien claim. N.J.S.A §§ 2A:44A-20 and -21. While a lien claimant must always file a NUB when residential property is at issue, a lien claimant may also file a NUB when non-residential property is at issue. The NUB is essentially notice to the owner of the property of a "potential construction lien."[9] The NUB must be in substantially the same form as shown in N.J.S.A. § 2A:44A-20, and it must be filed within 60 days from the last day that work or materials were provided. The NUB remains effective for 120 days, but it does not constitute the filing of a lien claim, nor does it extend the time for the filing of a lien claim. N.J.S.A. § 2A:44A-20(f). The lien claimant must also represent and verify certain information, including that the NUB was filed within the 60-day period. N.J.S.A. § 2A:44A-20(b).

The CLL imposes mandatory arbitration on parties to a residential construction contract. N.J.S.A. § 2A:44A-21(b)(3). Unless the parties have otherwise agreed in writing to an alternative dispute resolution mechanism, the lien claimant must serve a demand for arbitration within ten days of service of the NUB, and fulfill all the requirements and procedures of the American Arbitration Association. N.J.S.A. § 2A:44A-21(b)(3). The revised CLL attempts to streamline the arbitration process by providing that, whenever possible, all arbitrations of NUB's pertaining to the same residential construction shall be determined by the same arbitrator. N.J.S.A. § 2A:44A-21(b)(3). The contractor or supplier must also comply with any additional requirements contained in N.J.S.A. §§ 2A:44A-20 and -21 for the lien to attach and be enforceable.

D. Non-Residential Property

As previously discussed, the CLL eliminated the MLL requirement that as a condition precedent to filing a lien claim, a contractor or supplier had to file a mechanic's notice of intention before performing any labor or furnishing any materials. Under the CLL, where a non-residential construction contract is at issue, a lien claimant must comply only with the timing, notice, and form of lien statement requirements discussed above or contained elsewhere in the statute.

While a lien claimant must always file a NUB when residential property is the subject of the potential lien claim, a lien claimant may also file a NUB when non-residential property is at issue and the "potential lien claimant desires to seek priority over subsequently filed conveyances, leases, or mortgages affecting the real property to which improvements have been made."[10] N.J.S.A. § 2A:44A-20. The NUB serves as appropriate notice on the record of the lien

claimant's desire for priority.[11] However, the filing of a NUB does not constitute the filing of a lien claim, nor does it extend the time for the filing of a lien claim. N.J.S.A. § 2A:44A-20(f).

E. Owner's Options

Once a lien claim is filed, the owner basically has four options under the CLL: (1) the owner or the party owing the lien claimant can pay the lien claimant, and the claimant must discharge the lien claim,[12] N.J.S.A §§ 2A:44A-12 and 30; (2) the owner can post a bond equal to 110% of the lien claim as substitute security for the liened property, N.J.S.A. § 2A:44A-31; (3) the owner can serve a demand on the lien claimant to commence a lawsuit within 30 days, N.J.S.A. § 2A:44A-14(a)(2); or (4) the owner can do nothing and the lien claimant has one year from the date the last work was provided to initiate a lawsuit.[13] N.J.S.A. § 2A:44A-14(a)(1).

Once the claim has been paid, satisfied or settled by the parties or forfeited by the claimant, the claimant or his successor in interest or attorney must file a certificate with the county clerk directing the clerk to discharge the lien claim of record. N.J.S.A. § 2A:44A-30(a). The certificate must be filed within 30 days of payment, satisfaction or settlement or within 7 days of demand by any interested party. Failure to file this certificate allows any interested party to file an order to show cause with the Superior Court, and a judge may then order the lien claim discharged. N.J.S.A. § 2A:44A-30(b). Additionally, a claimant which fails to properly discharge the lien claim as required is subject to court costs and reasonable legal expenses. N.J.S.A. § 2A:44A-30(e).

F. Prohibited Liens

The CLL prohibits certain liens enumerated in N.J.S.A. § 2A:44A-5. In brief, no lien may attach or be filed (1) for materials that are provided subject to a security agreement under N.J.S.A. § 12A:9-101 et seq.; (2) for public works or improvements to real property contracted for and awarded by a public entity (although this provision does not affect any rights or remedies available under the "municipal mechanic's lien law," found at N.J.S.A § 2A:44-125 et seq.); or (3) for work or materials provided pursuant to a residential construction contract, unless there is strict adherence to the requirements of N.J.S.A. §§ 2A:44A-20 and -21.

II. PUBLIC PROJECT CLAIMS

While the CLL prohibits liens for public works or improvements to real property contracted for and awarded by a public entity, relief may be sought under the Municipal Mechanic's Lien Law found at N.J.S.A § 2A:44-125 et seq. ("MMLL"). The MMLL governs contracts for any public improvement made between any person and a public agency authorized by law to make contract for the making of public improvements. N.J.S.A § 2A:44-128(a). Liens filed under the MMLL require written notice to be filed with the municipal clerk, the chief financial officer of the county or the chairman of the commission, or board of authority within twenty days of the first performance of work or delivery of labor or materials to a subcontractor. N.J.S.A § 2A:44-128(b). Failure to timely file shall be a bar to secure a lien or materials provided, unless there is money owing from the contractor to the subcontractor to who the labor or materials were provided, in which case the lien shall be limited in value to a sum not greater than the money owing from the contractor to the subcontractor. N.J.S.A § 2A:44-128(b).

Under N.J.S.A. § 2A:44-128(b), the written notice shall be substantially in the following form:

In accordance with the terms and provisions of the "Municipal Mechanic's Lien Law," N.J.S.A. § 2A:44-125 et seq., notice is hereby given that:

1. (Name of person supply labor or materials) of (address of person supplying labor or materials) has on (date) provided to (name of subcontractor) the following: (description of labor or materials). My telephone number is (telephone number of person supply labor or materials).

2. The (description of labor or materials) were provided for the (name of public improvement) in (name of municipality), New Jersey.

Signed: _____

For: _____

*Individual, firm or corporation*_____

Additionally, a claim on the funds of a public agency shall not be binding unless an action to enforce the lien is brought within sixty days from the time when the whole work to be performed by the contractor is either completed or accepted by resolution of the public agency. N.J.S.A § 2A:44-138. Such claim may first be brought at the commencement of the work.

III. PUBLIC PRIVATE PARTNERSHIPS

As discussed in greater detail in Section X.A below, effective February 10, 2019, local governments, school districts, state government entities, and public colleges and universities are entitled to enter into agreements with private organizations where the private entity would assume financial and administrative responsibility of the development, construction, reconstruction, repair, alteration, improvement, extension, operation, and maintenance of a government-related project ("P3").[14] For school districts or local government entities ("LGE"), the private organization must fully fund the project with the exception of the land.[15]

LGEs, for example, are permitted to enter into P3s for revenue producing projects such as public buildings, roads, or facilities in exchange for up front or structured financing from the private entity in exchange for the private entity receiving the revenue outline in the P3 agreement itself and excess revenue reverting to the LGE at the end of the term.[16]

Unsurprisingly, the P3 law requires significant state-level oversight of all such proposed agreements, projects, and private partners. All LGE P3 projects must be submitted to the State Treasurer for review and approval, which shall be done in consultation with the Commissioner for the Department of Community Affairs, and all projects with a transportation component shall also be review by the Department of Transportation.[17] School district agreements are overseen by the State Treasurer, Commission of Department of Education, and Chief Executive Officer of the Schools Development Authority.[18] Agreements entered into with state government entities or state/county colleges do not have the same state-level oversight but do require public hearing and findings of the benefits of such a P3 agreement.[19]

While the Treasury Department is in the process of writing regulations, reviewing comments, and finalizing the rules, the statute makes clear that the obligations on the private entity are rigorous as well. P3 agreements should be thought of as "public contracts but more so." Private entities must be qualified to take part in the procurement process, a review overseen under guidelines developed by the State Treasurer, New Jersey Economic Development Authority, and Department of Community Affairs.[20] Similarly, project labor agreements and prevailing wage are required for P3 projects across the state.[21]

IV. STATUTES OF LIMITATION AND REPOSE

A statute of limitations sets a time limit within which a party can file a lawsuit or claim after that party has discovered injury or deficiency. A statute of repose, on the other hand, sets a time limit within which a party can file a lawsuit or claim following substantial completion of construction or services and operates without regard to the discovery of the injury or deficiency.[22]

A. Statutes of Limitations

New Jersey provides that an action for breach of any contract for the sale of goods must be commenced within four years after the accrual of the cause of action. N.J.S.A. § 12A:2-725(1). Under this statute, a cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. N.J.S.A. § 12A:2-725(2).

The statute of limitations generally governing breach of contract claims, express or implied, is six years. N.J.S.A. § 2A:14-I. The statute expressly states that its time bar does not apply to any action governed by N.J.S.A. §12A:2-725, contracts for the sale of goods. However, courts have ruled that whether N.J.S.A § 12A:2-725 applies depends on how the contract between the parties may be accurately characterized: as one involving a transaction of goods plus incidental services, or as one for services plus the incidental sale of goods.[23]

The statute of limitations governing personal injury actions is two years from the date the cause of action accrues. N.J.S.A. § 2A:14-2. The statute of limitations governing claims for damage to real or personal property is six years from the date the cause of action accrues. N.J.S.A. § 2A:14-1. A cause of action accrues on the date when "'the right to institute and maintain a suit' first arises.[24]

B. Statutes of Repose

New Jersey's statute of repose, N.J.S.A. § 2A:14-1.1, provides that "[n]o action, whether in contract, in tort, or otherwise, to recover damages for any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property ... or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property ... shall be brought against any person performing or furnishing the design, planning, surveying or supervision of construction or construction of such improvement to real property, more than 10 years after the performance or furnishing of such services and construction." N.J.S.A. § 2A:14-1.1(a).

The ten-year limitation does not apply "to actions against any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and

unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought." N.J.S.A. § 2A:14-1.1(a).[25] The statute of repose period begins to run when there has been "substantial completion," which generally occurs with the issuance of a certificate of occupancy.[26] Additionally, the statute of repose contains four exemptions for actions by a governmental unit: (1) written guarantee, warranty, or express contract for longer effective period; (2) willful misconduct, gross negligence, or fraudulent concealment; (3) work performed under any environmental remediation law or for a governmental unit's responsibilities under an environmental remediation law; and (4) contracts for application, enclosure, removal, or encapsulation of asbestos. N.J.S.A. § 2A:14-1.1(b).

The statute of repose "impliedly incorporates" the two-year statute of limitations for all personal injury actions found under N.J.S.A. § 2A:14-2, which thus "restrict[s] the period in which actions can be initiated for accidents occurring within ten years after construction."[27] In other words, an injured party must bring a personal injury claim arising out of any deficiency of an improvement to real property within two years of discovering the injury, which in addition, must have been discovered within ten years of substantial completion. Claims for contribution and indemnification must also be brought within the ten year period, commencing from substantial completion. N.J.S.A. § 2A:14-1.1(a).[28]

The purpose behind the enactment of the statute of repose was to limit the expanding liability of contractors, builders, planners and designers.[29] The New Jersey Supreme Court has explained that the New Jersey Legislature passed the statute in response to the expanding application of the discovery rule, the abandonment of the completed and accepted rule, and the expansion of strict liability and tort for personal injuries caused by defects in new homes to builders and sellers of those homes.[30] Based on that legislative purpose, New Jersey courts tend to read the statute broadly.[31] However, application of the statute of repose is restricted in that only designs that result in unsafe and defective conditions implicate the statute.[32]

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

A. Generally

Generally, absent specific contractual provisions, there is no obligation to provide a pre-suit notice nor a right to cure in New Jersey. Unlike some other states, there is no statutory right to cure after the contractor has completed the project, and no New Jersey court has extended either the obligation to notify or the right to cure through case law for contracts which are primarily for the provision of services.[33] On contracts for the delivery of goods, however, the Uniform Commercial Code's right to cure provisions are effective.[34]

B. New Home Warranty and Builders' Registration Act

In 1978, the New Jersey Legislature enacted The New Home Warranty and Builders' Registration Act [the "Act"], N.J.S.A. §§ 46:3B-1 to -20, creating the Home Warranty Security Fund [the "Fund"] to provide moneys sufficient to pay claims by owners against participating builders for defects in new homes covered by the Act. N.J.S.A. § 46:3B-7(a).[35] The Fund receives its moneys from the builders of new homes. If the builder fails to make repairs "within a reasonable time or . . . [if the repairs] are not satisfactory to the owner," the homeowner is then

allowed to make a claim against the Fund. N.J.S.A. § 46:3B-7(c).[36] Section 46:3B-3(b) sets forth the types of claims covered and the applicable periods of the warranty for each claim: (1) one year for "defects caused by faulty workmanship and defective materials due to noncompliance with the building standards;" (2) two years for "defects caused by faulty installation of plumbing, electrical, heating and cooling delivery systems;" and (3) ten years for "major construction defects," as defined by the Act. N.J.S.A. § 46:3B-3(b)(1), (2) and (3).[37]

Under the Act and its regulations, all entities engaged in the business of constructing new homes must register with the Department of Community Affairs prior to constructing or advertising as being able to construct new homes. N.JA.C. § 5:25-2.1.

If a defect falls within the purview of the Act, the builder may choose to repair or replace the defect or pay the owner the reasonable costs of repair or replacement. N.J.A.C. § 5:253.3(b). The builder is also responsible for "reasonable shelter expenses" incurred by the homeowner while repairs are ongoing. N.J.A.C. § 5:25-3.3(b).

Prior to making a claim against the Fund for defects covered by the warranty, an owner must first notify the builder in writing of the defects found in the home and must allow the builder a reasonable time to make repairs. N.J.S.A. § 46:3B-7(c). Once the builder receives notice, the builder has 30 days to inspect the defect and provide the owner with a "written statement setting forth the action the builder will take to correct the defect and the time by which the defect will be corrected." N.J.A.C. § 5:25-5.5(a)(5). If the repairs are not made within a reasonable time or are not satisfactory to the owner, the owner may then file a claim against the Fund. N.J.S.A. § 46:3B-7(c). The Act contains procedures governing the dispute resolution process. N.J.A.C. § 5:25-5.5(c)(3).

VI. COVERAGE AND ALLOCATION ISSUES

Generally, under a commercial general liability ("CGL") policy the insurer is required to pay sums that the insured would be liable to pay as damages because of property damage occurring during the policy period resulting from an occurrence. For liability to attach under a CGL policy, the injury must occur during the policy period. Under New Jersey law, to determine whether a liability policy has been triggered, the determining issue "is not the time the wrongful act was committed but the time when the complaining party was actually damaged."[38] A determination regarding when a complaining party was actually damaged and whether a policy was triggered hinge on the specific facts of the case.

Under New Jersey law, defective workmanship causing damage to property other than the insured's work, is an occurrence under a CGL policy. *Cypress Point Condo. Ass'n. v. Adria Towers, L.L.C.*, 226, N.J. 403 (2016). However, New Jersey courts follow the majority rule that faulty or defective workmanship resulting only in damage to the insured's work or product is not covered under a contractor's CGL policy.[39] This "business risk" exclusion is justified on the grounds that the contractor is in the best position to control the quality of products and workmanship and should thus bear the risk of repairing or replacing construction defects.[40] The exclusion to CGL coverage applies only to damage claims arising out of an insured contractor's own faulty workmanship and does not apply to claims for damages caused by the defective work to the property of others or to personal injuries arising out of the faulty workmanship.[41]

New Jersey courts will enforce a coverage exclusion where the insurer can show that the policy's exclusion is "specific, plain, clear, prominent, and not contrary to public policy."[42] Such exclusions are to be narrowly construed, with the burden on the insurer, but courts should not disregard the clear intent of the policy exclusion.[43]

If the injury or damage is caused by a single occurrence, then the insurers who issued the policy or policies covering the risk at the time of the occurrence are liable for the losses. Where the occurrence is ongoing (the injury or damage is continuous over a number of policy periods), the "continuous-trigger" theory applies.[44] That is, multiple insurance policies are "triggered," making it necessary to determine to what extent each triggered policy covers the loss. The New Jersey Supreme Court has held that losses are to be allocated among insurers on a pro rata basis in proportion to the degree of risk transferred or retained during the years of exposure.[45] Any model or formula used must reflect both time on the risk and degree of risk assumed, with weight given to certain circumstances including primary and excess coverage and the order in which the policies were triggered.[46]

VII. CONTRACTUAL INDEMNIFICATION

In New Jersey, a promise or agreement in a construction contract purporting to indemnify for "sole negligence" is void and unenforceable. N.J.S.A. § 2A:40A-1. The statute provides that "[a] . . . promise . . . [or] agreement . . . relative to the construction, alteration, repair, maintenance, servicing or security of a building, structure [or] highway . . . purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury . . . caused by or resulting from the sole negligence of the promisee, his agents, or employees, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workmen's compensation or agreement issued by an authorized insurer." In light of this statute, New Jersey courts have held that parties to a construction contract "may no longer agree that the indemnitor shall indemnify the indemnitee for injuries caused by the sole negligence of the indemnitee."[47]

A similar statute expressly extends the prohibition against the indemnitee assuming liability for the sole negligence of architects, engineers and surveyors. N.J.S.A § 2A:40A-2. This statute allows an indemnitor to indemnify an engineer, architect or surveyor for its own negligence, but not for injuries resulting solely from that negligence. In other words, under N.J.S.A. § 2A:40A-2, a "hold harmless"[48] construction agreement indemnifying an architect or engineer constitutes a per se violation of public policy if it indemnifies the architect or engineer for "damages . . . caused by or resulting from the sole negligence of the [indemnitee] in the giving of or the failure to give directions or instructions." [49]

The Assembly Committee Statement accompanying N.J.S.A. § 2A:40A-1 expressly recognizes that it would "effectively allow indemnification clauses where contributory negligence is involved." [50] The law as written, however, does not indicate what degree of contributory negligence by the indemnitee might trigger the invalidation clause. At least one court in New Jersey has said that under this statute, while "a promise to indemnify for sole negligence is unenforceable . . . a promise to indemnify for 99% negligence may be enforced."[51]

Where an indemnitor agrees to indemnify for the indemnitee's own negligence, the promise must be clearly expressed.[52] This principle also applies to the indemnitee's defense costs.[53]

VIII. CONTINGENT PAYMENT AGREEMENTS

New Jersey courts permit the enforcement of contingent payment clauses in construction subcontracts in the form of "pay-if-paid" and "pay-when-paid." To enforce a "pay-if-paid" clause the subcontract must be unambiguously clear that the "parties intended to shift any and all circumstances of Owner's nonpayment" to the subcontractor.[54]

A "pay-when-paid" clause is also enforceable as long as the clause is "designed to postpone payment for a reasonable period of time after the work was completed, during which the general contractor would be afforded the opportunity of procuring from the owner the funds necessary to pay the subcontractor." [55] In the absence of express "pay-if-paid" language, a contingent payment clause will be interpreted as "merely permitting payment to be postponed for a reasonable time, but not a condition precedent that would excuse the general contractor's payment obligation entirely."[56]

IX. DAMAGES LIMITATIONS

A. Attorneys' Fees

In New Jersey, attorneys' fees are recoverable if authorized by statute, court rule, contract, certain third party practice, in certain cases involving attorney malpractice, and bad faith by a party during an action.[57] The CLL provides that a party may be liable for reasonable legal expenses, including attorneys' fees, "incurred by the owner, contractor or subcontractor, or any combination . . . in defending or causing the discharge of the lien claim" that is "without basis," is "willfully overstated," or "is not lodged for record in substantially the form or in the manner or at a time not in accordance with this act." N.J.S.A. § 2A:44A-15.

B. Consequential Damages

A party who breaches a contract is liable for the natural and probable consequences resulting from that breach.[58] The amount of the damages must have been reasonably within the contemplation of the parties at the time the contract was formed.[59]

C. Delay and Disruption Damages

New Jersey allows "no damage for delay" clauses in construction contracts.[60] In cases involving "multi-prime construction" contracts, the intent of the parties governs whether to afford a third party a right to sue for delay. If the requisite contractual intent is found, contractors may have valid causes of action against one another for damages caused by the unjustifiable delay of one of the contractors.[61]

D. Economic Loss Doctrine

The "economic loss" doctrine prohibits recovery of damages in tort in cases where a product defect results in an economic loss but does not damage other property or cause any

personal injury, i.e. the product defect causes damage only to the product itself.[62] Where additional property is damaged, a court will not bar the case.[63] Regarding construction contracts, New Jersey applies the "predominant factor" test, which states that a construction contract will be treated as a contract for goods or services depending on whether the predominant factor is for services, with goods incidentally involved, or vice versa.[64]

E. Interest

N.J. Court Rule 4:42-11(a) sets the interest rate on judgments at fixed percentages based on the date of entry, "[e]xcept as otherwise ordered by the court or provided by law." Under this rule, claims collect simple interest at a specified rate from the date of judgment until payment.[65]

Post-judgment interest is "ordinarily not an equitable matter within the court's discretion but is, as a matter of long-standing practice, routinely allowed" pursuant to N.J. Court Rule 4:42-11.[66] On the other hand, pre-judgment interest is governed by court rule only in tort actions. N.J. Court Rule 4:42-11(b). In contract actions, litigants do not have a right to prejudgment interest and the decision whether or not to award it is within the court's discretion, guided by equitable considerations and principles, even if the claim is liquidated.[67]

Under certain circumstances in contract actions, where the court finds "particular equitable reasons for doing so," a judgment creditor may be awarded a higher interest rate than the one specified in N.J. Court Rule 4:42-11(a).[68]

F. Punitive Damages

In breach of contract cases, punitive damages are not available unless the breach of contract also constitutes a tort.[69] Under the New Jersey Punitive Damages Act, the actions underlying the claim for punitive damages must have been driven either by actual malice or "wanton and willful disregard" for those who could foreseeably have been harmed.[70] While all evidence should be considered, four specific components are the focus when determining whether or not punitive damages should be imposed: (1) likelihood at the time that serious harm would come from the action(s); (2) defendant's awareness of its reckless disregard for potential harm to others; (3) how the defendant acted when it learned that its action(s) were likely to cause harm; and (4) the duration of the action(s) or whether defendant tried to conceal the conduct.[71] Because punitive damages are disfavored, the trial judge must review the award and confirm that it is reasonable under the circumstances. The judge may, at his or her discretion reduce or eliminate the award, and under no circumstances may the defendant be liable for more than the greater of five times compensatory damages or $350,000.00.[72]

X. CASE LAW AND LEGISLATION UPDATE

A. Notable Legislation

On August 14, 2018, New Jersey Governor Murphy signed into law P.L. 2018, c.90, which permits local government entities, school districts, state government entities, and public colleges and universities to enter into public-private partnership (P3) arrangements. This represented a significant expansion of New Jersey's P3 legislation. Under the prior law, P3 projects were limited to state government entities and certain higher education institutions.

Additionally, a wider range of projects and now available. Under the current regime, any municipality can enter into a partnership arrangement with a private entity where the public provides the land and the private entity provides the capital. While the applicable regulations are in the process of adoption and finalization, the statute does require significant state-level agency oversight and review of all project agreements, as well as the payment of prevailing wages for all applicable construction work on a P3 project.

In the Diane B. Allen Equal Pay Act ("Act"), the NJ Legislature strengthened the existing Law Against Discrimination. Employers must not pay any employee who is a member of a protected class, which includes race, creed, color, age, sex, and disability, at a rate of compensation, including benefits, which is not less than the rate paid to employees who are not members of that class for substantially similar work. With regard to female employees, the Act now requires temporary, reasonable accommodations for pregnancy and breastfeeding. The Act also specifically prohibits employers from retaliating against employees who discuss compensation with co-workers. The Act is of particular concern for public work projects, where certified payrolls must be submitted.

B. Notable Case Law

In *Ace American Ins. Co. v. American Medical Plumbing, Inc.*, 458 N.J. Super. 535 (App. Div. 2019), the Appellate Division, on a matter of first impression, interpreted the waiver of subrogation provision of the AIA A201-2007. The court held that the plain language of the clause indicated that the purpose was to "transfer the risk of construction-related losses to insurers and to preclude lawsuits among contracting parties." While subrogation waivers have been considered valid in New Jersey for decades, the court for the first time here held that the subrogation waiver clause did not have a spatial or temporal limitation. The court held that even if the damage were to property other than the work specifically insured, and which had failed, and/or the damage occurred after construction activities had ceased, the waiver clause would remain effective. New Jersey joined the majority of states in this decision.

In *In re Accutane Litigation*, 234 N.J. 340 (2018), the New Jersey Supreme Court opined on expert qualifications that will have a direct impact on construction litigation through Rules of Evidence 702 and 703 and provided clarity to trial court judges and attorneys. The Court referenced the "non-exhaustive" list of factors in *Daubert*, but focused on four general factors for consideration by a trial court in its "gatekeeping function": (1) whether the scientific theory can be, or at any time has been, tested; (2) whether the scientific theory has been subjected to peer review and publication, noting that publication is one form of peer review and is not a "sine qua non"; (2) whether there is any known or potential rate of error and whether there exists any standards for maintaining or controlling the technique operation; and; (4) whether there does exist a general acceptance in the scientific community about the scientific theory. Ultimately, the Court provided a roadmap on the requirements for admissibility that is substantially in line with *Daubert*.

[1] *See, e.g., Mansion Supply Co. v. Bapat*, 702 A.2d 509, 510 (N.J. App. Div. 1997) (discussing the requirements of N.J.S.A. § 2A:44-71 (repealed April 22, 1994)).

[2] N.J.S.A. § 2A:44-98 (repealed April 22, 1994).
[3] The contract must be "signed" in accordance with the decision in *Gallo v. Sphere Construction Corp.*, 293 N.J. Super. 558, 564, 566 (Ch. Div. 1996) and *D.D.B. Interior Contr., Inc. v. Trends Urban Renewal Ass'n, Ltd.*, 176 N.J. 164, 167 (2003). See comments by the court in *Legge Industries v. Joseph Kushner Hebrew Academy*, 333 N.J.Super. 537, 559-60 (App. Div. 2000) regarding delivery of separate delivery slips "signed for" by authorized representatives of the parties in the construction chain.
[4] N.J.S.A. 2A:44A-2 defines "contract" as any agreement, or amendment thereto, in writing, evidencing the respective responsibilities of the contracting parties, which, in the case of a supplier, shall include a delivery or order slip signed by the owner, contractor, or subcontractor having a direct contractual relation with a contractor, or an authorized agent of any of them. *Patock Constr. Co. v. GVK Enters.*, 858 A.2d 1148, 1152 (N.J. App. Div. 2004) ("Under the construction lien law, only a contractor who performs services pursuant to a contract is entitled to file a lien.").
[5] *In re: Linear Electric Co., Inc.*, 8523 F.3d 33 (3rd Cir. 2017).
[6] This definition is an adoption of the New Jersey Bankruptcy Court's holding in *Kara Homes v. Central Kitchens*, 374 B.R. 542, 552 (Bankr. D.N.J. 2007).
[7] The statute defines a residential construction contract as any written contract for the construction or improvement to a one-, two-, or three-family dwelling, or any portion of the dwelling, which shall include any residential unit in a condominium, any residential unit in a housing cooperative, any residential unit contained in a fee simple townhouse development, any residential unit contained in a horizontal property regime, and any residential unit contained in a planned unit development.
[8] These additional requirements are contained in N.J.S.A. §§ 2A:44A-18, -20 and -21, subject to certain exceptions contained in N.J.S.A. §§ 2A:44A-7 and -8 (as specified by N.J.S.A. § 2A:44A-6).
[9] *Mansion Supply Co. v. Bapat*, 702 A.2d at 511
[10] *Id.*
[11] *Id.*
[12] Although not expressly provided by statute, the court in *Kvaerner Process, Inc. v. Barham-McBride Joint Venture*, 368 N.J. Super 190, 198-200 (App. Div. 2004), held that a summary proceeding to discharge a construction lien, brought by the general contractor, not the owner, was nonetheless appropriate for those lien claims that were paid, satisfied, settled or forfeited in the event the claimant fails or refuses to file a certificate discharging the lien.
[13] *Thomas Group v. Wharton Senior Citizen Housing*, 750 A.2d 743, 746 (N.J. 2000)
[14] P.L. 2018, c. 90 (S-865).
[15] N.J.S.A. 40A:11-52.b; 18A:18A-60.b-c.
[16] N.J.S.A. 40A:11-52.b(2).
[17] N.J.S.A. 40A:11-52.f.
[18] N.J.S.A. 18A:18A-60.
[19] N.J.S.A. 18A:64-85.f; 52:34-26.f.
[20] *See e.g.*, N.J.S.A. 40A:11-52.j.
[21] *See e.g.*, N.J.S.A. 40A:11-52.e.
[22] A statute of repose is a "statute barring any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury." A statute of limitations is a "law that bars claims after a specified period; a statute establishing a time limit for suing ... based on the date when the claim accrued (as when the injury occurred or was discovered)." Black's Law Dictionary, (9th ed. 2009). *Greczyn v. Colgate-Palmolive*, 842 A.2d 895, 898 (N.J. App. Div. 2004), rev 'd on other grounds, 869 A.2d 866 (N.J. 2005)
[23] *Custom Communications Eng'g v. E.F. Johnson Co.*, 636 A.2d 80, 83 (N.J. App. Div. 1993).
[24] *Russo Farms v. Vineland Board of Educ.*, 675 A.2d 1077, 1083-84 (N.J. 1996).
[25] The New Jersey Supreme Court noted this distinction in *Town of Kearny v. Brandt*, 67 A.3d 601, 611 (N.J. 2013). Other courts in New Jersey found that this phrase "insulate[s] contractors, architects, planners and designers from all claims, whether in tort or contract or by way of contribution or indemnity, by owners, tenants or third persons after ten years . . . [but] preserve[s] . . . the right to make a claim against a person 'in actual possession or control as owner, tenant or otherwise' at the time of the injury." *Salesian Society v. Formigli Corp.*, 295 A.2d 19, 22-24 (N.J. Sup. Ct. Law Div. 1972), aff'd by 306 A.2d 466 (N.J. App. Div. 1973); *O'Connor v. Altus*, 303 A.2d 329, 333 (N.J. App. Div. 1973); *Gilliam v. Admiral Corp.*, 268 A.2d 338, 341 (N.J. Sup. Ct. Law Div. 1970).
[26] *Russo Farms, Inc. v. Vineland Board of Educ.*, 675 A.2d at 1093-94.
[27] *O'Connor v. Altus*, 335 A.2d 545, 553 (N.J. 1975)

[28] *Salesian Society v. Formigli Corp.*, 306 A.2d 466, 466 (N.J. App. Div. 1973) (rejecting plaintiffs argument that the statute of repose did not apply to a cause of action based in part on claims breach of warranty and strict liability in tort. "The act by its operative terms provides — 'no action whether in contract, in tort, or otherwise [. ..] shall be brought [...] more than ten years after [...] performance [...] construction.' Court was satisfied that this language limited any action to which the statute applied, "regardless of its genesis or label."
[29] *Newark Beth Israel Medical Center v. Gruzen*, 590 A.2d 1171, 1173-74 (N.J. 1991)
[30] *Id.* (stating that "[t]hose judicial trends created the potential for liability for injuries occurring long after design and construction professionals had completed a project" and the statute was enacted in order to "cut back on the potential of this group to be subject to liability for life.") (internal citations omitted).
[31] *Id.* at 1174
[32] *Id.*
[33] *Quality Guaranteed Roofing, Inc. v. Hoffman-La Roche, Inc.*, 302 N.J. Super. 163, 167-68 (App. Div. 1997).
[34] N.J.S.A. 12A:2-508.
[35] *Aqua Beach Condominium Ass'n v. Dep't of Cmty. Affairs, Bureau of Homeowner Protection*, 890 A.2d 922, 930 (N.J. 2006).
[36] *Id.*
[37] *Id.*
[38] *Yarrington v. Camarota*, 351 A.2d 353, 355 (N.J. App. Div. 1971)
[39] *Firemen's Ins. Co. of Newark v. National Union Fire Ins. Co.*, 904 A.2d 754, 762-63 (N.J. App. Div. 2006) (stating that if the court reached a contrary holding, "the CGL policy would be more like a performance bond, which guarantees the work, rather than like an insurance policy, which is intended to insure against accidents.").
[40] *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788, 791 (N.J. 1979) ("The insured-contractor can take pains to control the quality of the goods and services supplied. At the same time he undertakes the risk that he may fail in this endeavor and thereby incur contractual liability whether express or implied. The consequence of not performing well is part of every business venture; the replacement or repair of faulty goods and works is a business expense, to be borne by the insured-contractor in order to satisfy customers.").
[41] *Aetna Cas.& Sur. Co. v. Ply Gem Indus.,* 778 A.2d 1132, 1142-43 (N.J. App. Div. 2001).
[42] *Flomerfelt v. Cardiello*, 202 N.J. 432, 441 (2010) (quoting *Princeton Ins. Co. v. Chunmaung*, 151 N.J. 80, 95 (1997)).
[43] *Flomerfelt*, 202 N.J. at 442; *Am. Motorists Ins. Co. v. L-C-A Sales Co.*, 155 N.J. 29, 41 (1998).
[44] *Id.* At 1145-49 (discussing the continuous trigger theory).
[45] *Carter-Wallace, Inc. v. Admiral Insurance Co.,* 712 A.2d 1116, 1124-25 (N.J. 1998); *see also Universal-Rundle Corp. v. Commercial Union Insurance Co.,* 725 A.2d 76, 86-87 (N.J. App. Div. 1999) (stating that the New Jersey Supreme Court has determined that insurers' liability for losses is pro rata in the continuous trigger context).
[46] *Universal-Rundle Corp.,* 725 A.2d at 86-87 *(*discussing *Owens-Illinois, Inc. v. United Insurance Co.,* 650 A.2d 974 (N.J. 1994)).
[47] *Grippo v. Schrenell & Co.,* 538 A.2d 404, 409 (N.J. App. Div. 1988).
[48] The phrase "hold harmless" comes from the statutory language providing that a contract is void where such contract allows for a party to "be indemnified or held harmless for damages, claims, losses or expenses." N.J.S.A. § 2A:40A-2.
[49] *Cidalina v. Carvalho v. Toll Bros. & Developers,* 675 A.2d 209, 215 (N.J. 1996).
[50] *Secallus v. Muscarelle,* 586 A.2d 305, 306 (N.J. App. Div. 1991), *aff'd by* 597 A.2d 1083 (N.J. 1991).
[51] *Secallus v. Muscarelle*, 586 A.2d at 306.
[52] *Ramos v. Browning-Ferris Industries of South Jersey, Inc.,* 510 A.2d 1152, 1159 (N.J. 1986).
[53] *Mantilla v. NC Mall Assocs.,* 770 A.2d 1144, 1152 (N.J. 2001) ("[A]bsent explicit contractual language to the contrary, an indemnitee who has defended against allegations of its own independent fault may not recover the costs of its defense from an indemnitor.")
[54] *Fixture Specialists, Inc. v. Glob. Constr., LLC*, Civil Action No. 07-5614(FLW), 2009 U.S. Dist., at *7-8 (D. N.J. Mar. 30, 2009).
[55] *Seal Tite Corp. v. Ehret, Inc.*, 589 F. Supp. 701, 1984 U.S. Dist. (D. N.J. 1984).
[56] *Avon Bros., Inc. v. Tom Martin Constr. Co., Inc.*, 2000 WL 34241102 (N.J. Super. App. Div. 2000).
[57] *Packard-Bamberger & Co., Inc. v. Collier,* 771 A.2d 1194, 1202 (N.J. 2001); *Saffer v. Willoughby,* 670 A.2d 527, 534-35 (N.J. 1996); N.J.S.A. § 2A:15-59.1 (governing frivolous claims and/or defenses brought in bad faith).
[58] *Pickett v. Lloyd's,* 621 A.2d 445, 454 (N.J. 1993).
[59] *Id.*

[60] *Broadway Maintenance Corp. v. Rutgers State University,* 434 A.2d 1125, 1130 (N.J. App. Div. 1981), *aff'd by* 447 A.2d 906 (N.J. 1982).
[61] *Broadway Maintenance Corp. v. Rutgers State University,* 447 A.2d 906, 909 (N.J. 1982).
[62] *Alloway v. General Marine Indus., L.P.,* 695 A.2d 264, 275 (N.J. 1997) (discussing the economic loss doctrine and stating that "a tort cause of action for economic loss duplicating the one provided by the U.C.C. is superfluous and counterproductive.").
[63] *See, e.g., Lacroce v. M. Fortuna Roofing, Inc.*, Civil Action No. 14-7329, 2017 DIST. LEXIS 203990 (D.N.J. Dec. 12, 2017).
[64] *Docteroff v. Barra Corp. of America, Inc.,* 659 A.2d 948, 953 (N.J. App. Div. 1995).
[65] *Estate of Kolker,* 515 A.2d 286, 292 (N.J. Sup. Ct. Law Div. 1986).
[66] at 291
[67] *Id.* at 292 (discussing *Bak-A-Lum Corp., v. Alcoa Building Prod.,* 351 A.2d 349, 353 (N.J. 1976)).
[68] *R. Jennings Mfg. v. Northern Electric,* 669 A.2d 819, 822 (N.J. App. Div. 1995).
[69] *See e.g., Ellmex Constr. Co. v. Republic Ins. Co.,* 494 A.2d 339, 345-46 (N.J. App. Div. 1985); *Villa Enters. Mgmt. v. Fed. Ins. Co.* 821 A.2d 1174, 1189 (N.J. Sup. Ct. Law Div. 2002).
[70] N.J.S.A. 2A:15-5.12.a.
[71] *Id.*
[72] N.J.S.A. 2A:15-14.a, b.