NORTH CAROLINA

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I. Mechanic's Lien Basics

N.C. Gen. Stat. Chapter 44A, Article 2 controls mechanics liens in North Carolina. Any person who performs or furnishes labor or professional design or surveying services or furnishes materials or rental equipment pursuant to a contract with the owner of real property for the making of an improvement on that property has the right to file a claim of lien on real property to secure payment of all debts for labor done, services rendered, or materials or equipment furnished. *See* N.C. Gen. Stat. § 44A-8. In addition, a first, second, or third tier subcontractor has the right to enforce by subrogation the property lien rights of the general contractor. N.C. Gen. Stat. § 44A-23.

A. Requirements

1. Filing with Clerk of Court

The claim of lien on real property must be filed in with the Clerk of Superior Court in the county for each county where the property that is the subject of the claim of lien is located no later than 120 days after the last furnishing of labor or materials at the site. Claims of lien on real property are to follow the form laid out in N.C. Gen. Stat. § 44A-12(c) and must include the following:

- Name and address of person claiming the claim of lien on real property;
- Name and address of record owner of the real property, and if the lien is being asserted through subrogation, the name of the contractor through which subrogation is being asserted;
- Description of real property upon which the claim of lien on real property is claimed. "Street address, tax lot and block number, reference to recorded instrument, or any other description of real property is sufficient, whether or not it is specific, if it reasonably identifies what is described." N.C. Gen. Stat. § 44A-12(c)(3);
- Name and address of person with whom claimant contracted;
- Date of first furnishing of labor or materials;

- Date of last furnishing of labor or materials;

- General description of the labor performed or materials furnished; and he amount claimed.

- A certification that the claimant has served the owner and any contractor through which subrogation is being claimed.

Once a notice of lien is filed, it may not be amended. N.C. Gen. Stat § 44A-12(d). It may be withdrawn and re-submitted so long as it is done within the original 120 period for filing, however priority of the lien will not relate back to the original claim of lien.

2. Service on Lien Agent (Projects over $30,000.00).

In addition to the filing requirements, on any projects involving $30,000.00 or more in costs (except for improvements made to some existing residential buildings and public buildings) owners and claimants must comply with the Lien Agent provisions of N.C. Gen. Stat. §§ 44A11.1 and 11.2.

An owner is required to designate a lien agent at the time that the contract for improvements is entered into. N.C. Gen. Stat. § 44A-11.1(a). Contact information for the lien agent must be provided to contractors upon written request, and must be posted conspicuously on the property until the completion of construction. *See*, N.C. Gen. Stat. § 44A-11.2. If an owner fails to comply with the provisions, then potential claimants may be relieved of their obligations under N.C. Gen Stat. § 44A-11.1.

Potential lien claimants may, but are not required to, serve the lien agent with a Notice to Lien Agent that contains the following information:

- Contact information for the potential lien claimant, including email address;

- Name of the party that the potential lien claimant has contracted with to make improvements.

- Property description sufficient to identify the property subject to the lien (name of project or description on building permit is sufficient)

- Statement "I give notice of my right subsequently to pursue a claim of lien for improvements to the real property described in this notice."

As a practical matter, designation of lien agents and service of notices are handled online though LiensNC (www.liensnc.com). Online filing is not required, and physical filing information is available at http://www.liensnc.com/Filing_Locations.html.

For all projects where a lien agent is required, a lien is not considered to be perfected until the filing requirement with the Clerk of Court has been met <u>and</u> one of the following conditions is met:

- The lien agent has received a Notice to Lien Agent from the claimant no later than 15 days after claimant first furnished materials or labor, or

- The lien agent has received a Notice to Lien Agent from the claimant prior to the time that the property is subsequently conveyed to bona fide purchaser, or

- The lien agent has received a Notice to Lien Agent prior to recordation of the transfer to the bona fide purchaser.

N.C. Gen. Stat. § 44A-11.2(l).

B. Action to Enforce Claim of Lien on Real Property

An action to enforce a claim of lien on real property must be commenced within 180 days after the last furnishing of labor or materials at the site. A judgment enforcing the lien may then be entered for the principal amount shown to be due, and the judgment shall direct a sale of the real property subject to the lien. The amount recoverable under the lien is limited to the amount claimed in the initial claim of lien on real property. *See* N.C. Gen. Stat. § 44A-13; *Jennings Glass Co., Inc. v. Brummer*, 88 N.C. App. 44, 51, 362 S.E.2d 578, 583 (1987). However if the amount recovered is greater than the amount claimed in the initial claim of lien, then the excess may be collected upon as an ordinary civil judgment.

C. Claim of Lien upon Funds

Subcontractors and suppliers who furnished labor, materials, or rental equipment at the site of the improvement are entitled to a lien upon funds owed to the contractor with whom the subcontractor dealt and that arise out of the improvement on which the subcontractor worked or furnished materials. In addition to the ability to lien funds owed to the party with whom the subcontractor dealt, second and third tier subcontractors and suppliers are entitled to a lien on funds owed to any party above them in the chain of their contract through subrogation. In other words, as long as money is owed to each party above them in the contract chain, these lower tiered subcontractors and suppliers can lien funds owed to the general contractor. N.C. Gen. Stat. § 44A-18. A Notice of Claim of Lien upon Funds must set out the information identified in N.C. Gen. Stat. § 44A-19:

- Name and address of person claiming the lien on funds;

- Description of real property upon which the claim of lien on real property is claimed;

- Name and address of person with whom claimant contracted;

- Name and address of each person against or through whom subrogation rights are claimed;

- General description of the contract and the person against whose interest the lien upon funds is claimed; and

- Amount of the lien upon funds claimed by the lien claimant under the contract.

Upon receipt of the notice of claim of lien upon funds, the obligor has a duty to retain any funds subject to the lien upon funds. *See* N.C. Gen. Stat. § 44A-20(a).

While public property cannot be subject to a lien, a subcontractor can exercise the lien on funds up to the general contractor.

D. Ability to Waive and Limitations on Lien Rights

The North Carolina Court of Appeals held in *Wachovia Bank Nat. Ass'n v. Superior Const. Corp.*, 213 N.C. App. 341, 352, 718 S.E.2d 160, 167 (2011), that the lien waiver executed by the parties did not change the date of first furnishing, and the waiver merely precluded the contractor from asserting a lien relating to the amounts already paid for the work performed at the project.

As referenced above, N.C. Gen. Stat. § 44A-23 grants to a first tier subcontractor a lien upon improved real property based upon a right of subrogation to the direct lien of the general contractor on the improved real property. Pursuant to N.C. Gen. Stat. § 44A-23, no action of the general contractor will be effective to prejudice the rights of the subcontractor without his written consent upon the filing of notice and claim of lien and the commencement of an action. Prior to that time, the general contractor is free to waive its lien rights and to bar effectively the subcontractor's rights by way of subrogation. *Mace v. Bryant Construction Corp.*, 48 N.C. App. 297, 269 S.E.2d 191 (1980).

E. Liens May be Bonded Off

N.C. Gen. Stat. § 44A-16 allows a property owner or debtor to bond off a lien. The bond takes the place of the real property and allows the real property to be unencumbered by the claim of lien. A debtor has the option of depositing the full amount of the claim of lien with the clerk of court, or posting a surety bond for one and one quarter of the amount claimed. N.C. Gen. Stat. § 44A-16(a)(5) & (6). The clerk of court will then release the funds or bond upon receipt of a written agreement of the parties, a final judgment, or a consent order. N.C. Gen. Stat. § 44A-16(b).

II. Public Project Claims

N.C. Gen. Stat. § 44A-25 *et seq.*, more commonly known as the "Little Miller Act" after its federal counterpart, governs actions on payment bonds for public projects. Although public real property cannot be encumbered by a lien, when the total amount of construction contracts awarded for any one project exceeds $300,000, a performance and payment bond is required by the contracting body from any contractor or construction manager at risk with a contract more than $50,000. N.C. Gen. Stat. § 44A-26. (Note, the size of the project changes to $500,000 if the construction involves the State department, State agencies, or the University of North Carolina. *See* N.C. Gen. Stat. § 44A-26(a).)

A. State and Local Public Works

The North Carolina performance bond provisions apply only to construction contracts for the "construction, reconstruction, alteration or repair to any public building or other public work or public improvement, including highways" when the "contracting body" is a "department, agency, or political subdivision of the State of North Carolina which has authority to enter into construction contracts." N.C. Gen. Stat. § 44A-25(2).**Notices and Enforcement**

Contractors and first-tier subcontractors who performed labor or furnished materials in the prosecution of the work required by any contract for which a payment bond was issued pursuant to the Little Miller Act may bring an action to recover any amount due after 90 days from the last date materials or labor were furnished. N.C. Gen. Stat. § 44A-27(a). Second and third-tier subcontractors have 120 days from the last date materials or labor were furnished to provide written notice to the contractor. N.C. Gen. Stat. § 44A-27(b). Actions on payment bonds must be brought within one year of either (a) the last date that labor or materials were furnished, or (b) the final settlement was made with the contractor. N.C. Gen. Stat. § 44A-28(b). The parties may not contract around the notice requirement or limitation period described above. N.C. Gen. Stat. § 44A-30(a).

B. Claims to Public Funds

North Carolina's Little Miller Act does not allow claimants to make claims on public funds.

III. Statutes of Limitation and Repose

This section provides a brief overview of the statute of limitations and the statute of repose applicable to construction defect claims and highlights some of the important case law interpreting these provisions.

A. Statute of Limitations

The three year statute of limitations in N.C. Gen. Stat. § 1-52 applies to contract actions; torts, including negligence; and claims for indemnification or contribution.[1] *See* N.C. Gen. Stat. §§ 1-52(1), (2). A statutory "discovery rule" offers a claimant additional time in certain contract or negligence actions to have the opportunity to discover the harm before the three-year statute of limitations begins to accrue. Pursuant to N.C. Gen. Stat. N.C. Gen. Stat. § 1-52(16), for personal injury or physical damage to property, the cause of action does not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or should have become apparent to the claimant, whichever occurs first, although no cause of action may accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action. *See Pompano Masonry Corp. v. HDR Architecture, Inc.*, 165 N.C. App. 401, 409, 598 S.E.2d 608, 613 (2004) (holding that masonry subcontractor's negligence claim alleging that project expediter failed to properly schedule and coordinate work on public university's construction project accrued, and three-year limitations period began to run, when subcontractor discovered alleged negligence during coordination meetings.)

A four-year statute of limitations applies to breach of warranty actions involving the sale of goods under North Carolina's Uniform Commercial Code. *See* N.C. Gen. Stat. § 25-2-725(1). A cause of action for breach of warranty accrues when tender of delivery is made, even if the aggrieved party is unaware of the breach. *See* N.C. Gen. Stat. § 25-2-725(2). However, where a warranty expressly extends to future performance of goods so that discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered. *Id.*

B. Statutes of Repose

The statute of repose for construction defect claims is six years. Pursuant to N.C. Gen. Stat. § 1-50(a)(5), "no action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement."

This statute of repose shortens the 10-year statute of repose contained in N.C. Gen. Stat. § 1-52(16). *See* N.C. Gen. Stat. § 1-50(a)(5)(g) ("The limitation prescribed by this subdivision shall apply to the exclusion of ...G.S. 1-52(16) ....").

According to *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 241, 515 S.E.2d 445, 450 (1999), repairs do not reset the running of the statute of repose. "A duty to complete performance may occur after the date of substantial completion, however, a 'repair' does not qualify as a 'last act' under N.C. Gen. Stat. § 1-50(5) unless it is required under the improvement contract by agreement of the parties." *Id.*

There are two statutory exceptions to the six year limit. (1) a person who is in actual possession or control of the improvement at the time that the defective condition caused the injury cannot assert the statute as a defense if that person either knew should have known of the defective or unsafe condition, and (2) a person cannot assert the defense in cases of fraud, or willful or wanton negligence. N.C. Gen. Stat. § 1-50(d) and (e).

Equitable estoppel may also defeat a statute of repose defense. *One N. McDowell Ass'n of Unit Owners, Inc. v. McDowell Dev. Co.*, 98 N.C. App. 125, 389 S.E.2d 834 (1990). An express warranty may also extend liability beyond the six-year statute of repose. *Christie v. Hartley Const., Inc.*, 367 N.C. 534, 766 S.E.2d 283 (2014).

IV. Pre-Suit Notice Of Claim And Opportunity To Cure

North Carolina has no requirement of notice and opportunity to cure.

V. Insurance Coverage And Allocation Issues

A. General Coverage Issues

The standard form commercial general liability policy provides coverage for "property damage" caused by an "occurrence." The policy defines "property damage" as "[p]hysical injury

to tangible property, including all resulting loss of use of that property" and "[l]oss of use of tangible property that is not physically injured."

North Carolina law holds that faulty workmanship alone does not constitute "property damage" as the term is defined in a standard form CGL policy. In other words, damages for the cost of repairing and completing an insured's own work do not constitute "property damage" as generally defined by CGL policies. *See e.g. Production Systems, Inc. v. Amerisure Ins. Co.***,** 167 N.C. App. 601, 605 S.E.2d 663 (2004) (the term "property damage" in an insurance policy has been interpreted to mean damage to property that was previously undamaged**,** and not the expense of repairing property or completing a project that was not done correctly or according to contract in the first instance); *Hobson Constr. Co.. Inc. v. Great Am. Ins. Co.,* 71 N.C. App. 586*,* 322 S.E.2d 632 (1984) (holding that damage "in the nature of repair and costs of completion" of a project does not allege physical injury or destruction of tangible property which might be compensable under a standard CGL policy); *Travelers Indem. Co. v. Miller Bldg. Corp.*, 221 Fed. Appx. 265, 2007 WL 685230 (4th Cir. 2000) (holding, that to the extent the plaintiff is seeking to recover from the insured the cost of correcting the insured's faulty workmanship, the claims do not fall within the scope of the policy issued by Travelers, because faulty workmanship does not constitute 'property damage'); *Wm. C. Vick Constr. Co. v. Penn. Nat'l Mut. Cas. Ins. Co.*, 52 F. Supp. 2d 569 (E.D.N.C. 1999), (concluding that pursuant to *Hobson*, "damages based solely on shoddy workmanship — i.e., damages seeking repair costs and/or completion costs — are not "property damage" within the meaning of a standard form CGL policy...").

When the insured is a general contractor, the whole building is considered their work regardless of whether the general contractor, or subcontractors, actually performed the work. Therefore, the cost of: (1) completing or repairing the building; and (2) fixing damage to previously undamaged components (i.e. framing and interior finishes like drywall or flooring) that was caused by the faulty workmanship in the original construction does not constitute "property damage" when the insured is a general contractor. *See Wm. C. Vick Constr. Co.,* 52 F.Supp.2d at 581-582 (concluding that claims against a general contractor for faulty workmanship in roofing and waterproofing done by subcontractors do not constitute "property damage"); *Prod. Sys., Inc.,* 167 N.C. App. at 606, 605 S.E.2d at 666 (2004) (defects in feed line system the insured was hired to design, construct and install, which the insured contended were caused by the negligence of its subcontractors, did not constitute "property damage" caused by an "occurrence").

However, damage to previously undamaged property *other than the insured's own work* product constitutes property damage. *Builders Mutual Ins. Co. v. Mitchell*, 210 N.C. App. 657, 709 S.E.2d 528 (2011); *Travelers Indemnity Co. v. Miller Building Corp.*, 97 Fed. Appx. 431, 434 (4th Cir. 2004); *Amerisure Mut. Ins. Co. v. Superior Const. Corp.,* No. 3:07-cv-00276, 2008 WL 3842958 at p. 4 (W.D.N.C. Aug. 15, 2008) (unpublished opinion). Such damage can occur when, for example, the insured repairs or remodels an existing building and their work damages pre-existing components. Such damage can also occur when the insured's faulty work damages upgraded finishes provided directly by the owner.

An "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The term "accident" is not defined by the

policy, but is defined by North Carolina case law as "'an unforeseen event, occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence.'" *See e.g., Builders Mutual*, 210 N.C. App. at 660, 709 S.E.2d at 531 (quoting *Tayloe v. Indemnity Co*., 257 N.C. 626, 627, 127 S.E.2d 238, 239-40 (1962)). North Carolina courts have concluded that mere faulty workmanship does not constitute an "occurrence."

B. Trigger of Coverage

The seminal North Carolina Supreme Court case on the trigger of coverage is *Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 303, 534 S.E.2d 558, 565 (2000). The court held that "where the date of the injury-in-fact can be known with certainty, the insurance policy or policies on the risk on that date are triggered." In applying *Gaston County Dyeing*, some North Carolina appellate courts have held that the date of the "injury-in-fact" is the date that the faulty construction was performed. *See, e.g., Hutchinson v. Nationwide Mut. Fire Ins. Co.*, 163 N.C. App. 601, 594 S.E.2d 61 (2004) (holding, that because it was clear that the general contractor's negligence in constructing a retaining wall was the source from which all damages flowed, the date of the faulty construction was the trigger of coverage); *Harleysville Mut. Ins. Co. v. Berkley Ins. Co*., 169 N.C. App. 556, 610 S.E.2d 251 (2005) (holding that the property damage was caused by faulty construction which was completed prior to the effective date of the insurance policy in question); *Miller v. Owens*, 166 N.C. App. 280, 603 S.E.2d 168 (2004) (unpublished) (holding that there was no coverage under the subject insurance policy when the evidence showed that the homeowner's damages flowed from the general contractor's negligence at the time the home was constructed). *See also Auto-Owners Ins. Co. v. Northwestern Housing Enterprises, Inc*., No. 5:06cv88, 2008 WL 901176, at *5 (W.D.N.C. Mar. 31, 2008) (holding that the trigger of coverage is the date of the defective work).

However, other cases have looked past when the faulty construction was performed and focused on when the property damage happened in determining which policy is triggered. In *Builders Mut. v. Mitchell*, 210 N.C. App. 657, 664-665, 709 S.E.2d 528, 534 (2011), the court distinguished previous Court of Appeals cases that deem the trigger to be the date of the faulty work and instead focused on when the damages occurred. Similarly, in *Alliance Mut. Ins. Co. v. Guilford Ins. Co*., 210 N.C. App. 490, 711 S.E.2d 207, at p. 4 (Mar. 15, 2011) (unpublished), the Court of Appeals found coverage under the policy in effect at the time the property damage occurred. *Erie Ins. Exchange v. Builders Mut. Ins. Co*., 227 N.C. App. 238, 742 S.E.2d 803 (2013), also held that the trigger of coverage is the date of the resulting damage rather than the date of the defect or faulty work. *Erie* distinguished prior decisions of the North Carolina Court of Appeals (*Hutchinson*, *Harleysville*, and others) as involving property damage occurring over time.

C. Allocation Among Insurers

North Carolina case law is still undeveloped on cases involving continuous damages over several policies. *Gaston County Dyeing* held that the only policy triggered was the one in effect when the damage in fact first took place, specifically rejecting the continuous trigger of coverage approach and finding no coverage under the policy in effect while the vats of dye were continuing to be contaminated. However, the Easter District of North Carolina recently applied the multiple trigger theory to a construction defect case involving water intrusion from

defective roofing performed by the insured. *Harleysville Mut. Ins. Co. v. Hartford Cas. Ins. Co.*, 90 F.Supp. 3d 526 (E.D.N.C. 2015). There, the roofing work was performed at three separate multifamily residential construction projects in three different cities over a five year period. The defective roofing work was the subject of three separate lawsuits which all settled without reaching trial.

The Court reasoned as follows:

> When, as in this case, the alleged accidents that cause the injuries-in-fact occur on dates that are not certain, there are possible multiple occurrences. ... Thus, all policies on the risk on the possible dates of those injury-causing events are triggered. ... Such an approach remains consistent with *Gaston* because it still "look[s] to the cause of the property damage," e.g., the dates the roofs failed and water intruded, rather than the ultimate "effect" of such water intrusion, e.g., manifestation of rotten structural elements or mold. ... The key difference leading to a multiple trigger of coverage rather than single trigger of coverage, is that the dates of the injuries-in-fact are inherently uncertain and cannot be established as a single trigger of coverage.
>
> In addition, unlike in *Gaston*, where a single vessel rupture caused all subsequent damages, the damages in the underlying cases here are alleged to have occurred in multiple different buildings. Thus, while in *Gaston* damages could be pinpointed to the exact date of a single rupture, no such single date is appropriate where water intrusion may have taken place in some buildings prior to others. Thus a multiple trigger theory of coverage is necessitated by the facts as alleged in the underlying lawsuits.
> ...
> In sum, because it is inherently uncertain based on the allegations in the underlying lawsuits when property damage alleged in the underlying lawsuits commenced, a multiple trigger of coverage test applies.

Id. at 547-548 (internal citations omitted).

VI. Contractual Indemnification

North Carolina's anti-indemnification statutes provides that indemnity and hold harmless provisions in construction contracts that attempt to indemnify or hold harmless a party against its own negligence are against public policy, void, and unenforceable. N.C. Gen. Stat. § 22B-1.

This statue was amended in 2019. Under the amended statute, design professionals can no longer be contractually required to defend other parties to their contracts. A contract's indemnity agreement may still be drafted to require the designer to indemnify others, but the duty to defend has been declared "against public policy, void, and unenforceable." This prohibition applies only to certain design professionals: architects, landscape architects, engineers, land surveyors, geologists, and soil scientists.

VII. Contingent Payment Agreements

A. Enforceability

Contingent payment agreements are unenforceable. *See* N.C. Gen. Stat. § 22C-2 ("Payment by the owner to a contractor is not a condition precedent for payment to a subcontractor and payment by a contractor to a subcontractor is not a condition precedent for payment to any other subcontractor, and an agreement to the contrary is unenforceable."); *see also Am. Nat. Elec. Corp. v. Poythress Commercial Contractors, Inc.*, 167 N.C. App. 97, 101, 604 S.E.2d 315, 317 (2004) ("Pay-when-paid" clauses, like "pay-if-paid" clauses, are unenforceable in North Carolina).

VIII. Scope Of Damage Recovery

A. Personal Injury Damages vs. Construction Defect Damages

Plaintiffs in North Carolina may seek damages for personal injury arising out of the defective or unsafe condition of an improvement to real property, subject to the six-year statute of repose. N.C. Gen. Stat. § 1-50(a)(5)(b)(3)

B. Attorneys' Fees

Attorney's fees may only be recovered if there is a statute that allows the claim. There are several statutes that may allow for the recovery of attorney's fees in the field of construction:

1. N.C. Gen. Stat. § 6-21.6 allows reciprocal attorney's fees provisions in business contracts and allows a court to award reasonable attorney's fees in accordance with the contract.

2. N.C. Gen. Stat. § 6-21.2 allows for the enforcement of attorney's fees provisions in "any note, conditional sale contract or other evidence of indebtedness." Recovery is limited to 15% of the amount owed. In lien claims a court may award attorney's fees to the prevailing party "upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter . . . ."

3. N.C. Gen. Stat. § 44A-35. This statute also applies to claims for public projects under North Carolina's Little Miller Act.

4. Effective August 2019, N.C. Gen. Stat. §22B-1(d) expressly authorizes an award of attorneys' fees in the context of indemnification. This change now expressly validates indemnity agreements that require the indemnitor to reimburse the indemnitee for the indemnitee's attorneys' fees incurred in defending against claims brought by third parties that arise from the indemnitor's actions. This new section applies to all parties in construction and design contracts.

C. Consequential Damages

Consequential damages may be excluded by contract. In the sale of goods, North Carolina's U.C.C. allows parties to limit or exclude consequential damages unless the limitation or exclusion is unconscionable. N.C. Gen. Stat. § 25-2-719(3).

D. Delay and Disruption Damages

Delay and disruption damages are be recoverable in North Carolina unless they are excluded by contract. The North Carolina Court of Appeals has defined "delay damages" to include a contractor's "extended 'general conditions' expenses, that is, the cost of keeping tools and equipment on the site for the extended period." *S. Seeding Serv., Inc. v. W.C. English, Inc.*, 217 N.C. App. 300, 305, 719 S.E.2d 211, 215 (2011). Moreover, North Carolina courts have consistently distinguished delay damages from damages incurred for increased costs arising out of the same delay circumstances. *See, e.g., APAC–Carolina, Inc. v. Greensboro–High Point Airport Auth.*, 110 N.C. App. 664, 675, 678, 431 S.E.2d 508, 514, 516 (1993) (denying APAC's delay damages claim and separately rejecting APAC's request for a unit price increase because the contract contained no price-escalation provision); *Davidson & Jones, Inc. v. N.C. Dep't of Admin.*, 315 N.C. 144, 150–51, 337 S.E.2d 463, 466–67 (1985) (specifically distinguishing between damages sought for increased work and the damages for duration-related expenses).

Under the principle of "concurrent delay," where two or more parties proximately contribute to the delay of the completion of the project, none of the parties may recover damages from the other delaying parties, "unless there is proof of clear apportionment of the delay and expense attributable to each party." *Biemann & Rowell Co. v. Donohoe Cos.*, 147 N.C. App. 239, 245, 556 S.E.2d 1, 5 (2001) (citing *Blinderman Const. Co., Inc. v. United States*, 695 F.2d 552, 559 (Fed.Cir.1982)).

E. Economic Loss Doctrine

The economic loss doctrine applies to contract cases, including construction cases. In *Land v. Tall House Bldg. Co.*, 165 N.C. App. 880, 884, 602 S.E.2d 1, 4 (2004), the court recognized that when a component part of a product or a system injures the rest of the product or the system, only economic loss has occurred. In *Land*, the contractor applied direct exterior finish systems ("DEFS") to a house. Negligence claims against the manufacturer of DEFS were barred because "any damage caused by the DEFS constitutes damage to the house itself. Since no other property damage has resulted, this is purely economic loss."**Interest**

In an action for breach of contract, the amount awarded on the contract bears interest from the date of the breach. N.C. Gen. Stat. § 24-5. For a tort claim, interest accrues at the legal rate from the date that suit is filed. *Id.* The legal interest rate is 8 percent. N.C. Gen. Stat. § 241.

F. Punitive Damages

N.C. Gen. Stat. § 1D-15 provides that punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: 1) fraud, 2) malice, or 3) willful or wanton conduct. The aggravating factor must be proved by clear and convincing evidence. Punitive damages shall not be awarded

against a person solely on the basis of vicarious liability or breach of contract. N.C. Gen. Stat. § 1D-15(c).

G. Liquidated Damages

Liquidated damages provisions "have long been held valid and consistent with public policy" in North Carolina. *Ledbetter Bros. v. N. Carolina Dep't of Transp.*, 68 N.C. App. 97, 104, 314 S.E.2d 761, 766 (1984). However, penalties are unenforceable under North Carolina law. *City of Kinston v. Suddreth*, 266 N.C. 618, 146 S.E.2d 660 (1966). The North Carolina Supreme Court formulated the following test to assess whether a stipulated sum is a penalty or a valid liquidated damages provision:

> [A] stipulated sum is for liquidated damages only (1) where the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach or is reasonably proportionate to the damages which have actually been caused by the breach.

Knutton v. Cofield, 273 N.C. 355, 361, 160 S.E.2d 29, 34 (1968).

IX. Case Law and Legislative Update

The most significant update for 2019 are the changes to North Carolina's anti-indemnity statute, N.C. Gen. Stat. § 22B-1. The legislation expanded *and* restricted the permissible scope of certain indemnity agreements. On the expansion front, § 22B-1(d) expressly authorizes an award of attorneys' fees in the context of indemnification. This was ambiguous prior to the amendment. On the contraction front, design professionals can no longer be contractually required to defend other parties to their contracts. These amendments apply to any contract entered into, amended, or renewed after August 1, 2019. The amendments are discussed in Sections VI amd VII.B.4, above.