PENNSYLVANIA

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I. MECHANIC'S LIEN BASICS

Pennsylvania law provides sturdy support for the lien rights of contractors and suppliers. If a contractor or supplier is not paid on a Pennsylvania job, then the contractor/supplier can seek to file a lien to expedite their payment or protect themselves. However, there are specific requirements and rules that must be followed.

A. Requirements

Although this Commonwealth provides strong protection for contractors and suppliers, eligibility is quite rigid for those who may seek a lien. Only project participants directly in contact with the property owner, general contractor or subcontractor with direct contractual relation to the general contractor are entitled to Pennsylvania's mechanic's lien rights. Thus, "third tier" subcontractors and suppliers do not have rights. Design professionals such as architects and engineers must have direct contact with the property owner and must provide certain services (including project supervision or repair) in order to be entitled the lien rights.

There are to steps to obtain a mechanic's lien. First, a mechanic's lien claim must be filed and perfected pursuant to 49 P.S. § 1501-10. Then, the lien holder must institute an action to enforce the lien pursuant to the Pennsylvania Rules of Civil Procedure. *See* 49 P.S. § 1701(a).

A Notice of Intent to Lien must be provided to an owner thirty (30) days before the Lien Claim is filed for subcontractors and sub-subcontractors. For all claimants, the Lien Claim must be filed in court within six (6) months of the claimant's *last* work. Written notice of the lien filing must be served on the owner within one (1) month after filing of the initial claim. An affidavit of service then must be filed with the court within twenty (20) days after service of the written notice to the owner. No further action is necessary for two (2) years. This procedure allows contractors to protect their rights inexpensively.

Also, a potential lien claimant on a Searchable Project has no obligation to file a Notice of Furnishing and will not forfeit lien rights unless a Notice of Commencement has been filed and posted in accordance with the statute. *See* 49 P.S. §1501.3(b)

B. Enforcement and Foreclosure

To enforce a claim, the claimant must eventually obtain a judgment upon the claim filed by filing a Complaint to Enforce – just as one would seek judgment on a contract. The Complaint to Enforce is filed with the prothonotary (or clerk of the court). The complaint must identify:

- The name and address of each party to the action.
  - If the action is commenced by a subcontractor, the complaint must include the name and the address of the contractor.
- The court, term and number.
- The date of filing the claim.
  - A copy of the claim must be included as an exhibit.
- A demand for judgment.

A mechanic's lien has higher priority than most other liens on the property because it "relates back" to the time when work visibly commences. Usually, a mechanic's lien on new construction will have priority over all liens on the property, except for the rights of certain creditors including an acquisition loan or construction loan. Further, lien rights for new construction will also survive any foreclosure or sale of the property, except foreclosure on an acquisition loan or construction loan.

Owners of projects costing more than over one and a half million dollars ($1,500,000) have the option of filing a Notice of Commencement of construction. If an owner files a Notice of Commencement, then all potential lien claimants that wish to preserve lien rights must file a Notice of Furnishing within forty-five (45) days after first supplying labor or material to the project.

The bankruptcy of an owner or upstream contractor should delay enforcement of a mechanic's lien by filing a lawsuit. It is not permissible to enforce a mechanic's lien without permission of the Bankruptcy Court, but the claimant is provided additional time later to enforce the mechanic's lien. The "automatic stay" of the United States Bankruptcy Code does not stay the perfection of the mechanic's lien claim for new construction because the lien is inchoate (the claimant already had the lien, therefore the filing cannot change anything and is not a preference). In fact, it is important to keep in mind that the Formal Notice of Intent must still be served on the owner and the Lien Claim must be filed within the normal time limits.

C. Ability to Waive and Limitations on Lien Rights

Some general contractors have the ability to waive a subcontractor's right to a mechanic's lien, a distinct feature to the mechanic's lien law of this Commonwealth. In fact, contractors are able to waive lien rights for lower tier subcontractors on most residential projects and on *all* projects *if* the general contractor posts a payment bond to cover the value of the labor

and materials provided. A general contractor can waive such liens by filing a Stipulation Against Liens with the prothonotary's office where the project is located and ensuring that such Stipulation is properly indexed.

Most owners of owner-occupied residential projects have a defense of payment to a subcontractor lien if the owner has paid the general contractor in full. As for commercial projects in the state, the owner does *not* have an automatic defense of payment. However, *any* owner can protect itself from paying for the project twice by recording a copy of the general contract with the prothonotary or clerk of court before any work is performed on the project.

A mechanics lien cannot be filed in this Commonwealth if:

- The amount is any less than $500;
- The private property is used for solely public purpose;
- The property owner has an agreement with the general contractor, in writing, that the property is not lienable and has given all subcontractors notice of this agreement;
- The agreement can also be considered valid if it has been submitted in writing with the office of prothonotary before work began or within 10 days of terminating either a general or subcontractor.

II. PUBLIC PROJECT CLAIMS

A. State and Local Public Work

Mechanics' liens cannot be filed on public works projects as a matter of law. Public works projects provide labor and material payment bonds as a security in exchange for giving up right to file a mechanics' lien.

In Pennsylvania, public construction projects are nearly always governed by the Separations Act, a law that was passed more than 100 years ago. The Separations Act (variations of which also appear in statutes governing boroughs, townships, and other governmental/municipal entities) provides as follows:

> Hereafter in the preparation of specifications for the erection, construction, and alteration of any public building, when the entire cost of such work shall exceed four thousand dollars, it shall be the duty of the architect, engineer, or other person preparing such specifications, to prepare separate specifications for the plumbing, heating, ventilating, and electrical work; and it shall be the duty of the person or persons authorized to enter into contracts for the erection, construction, or alteration of such public buildings to receive separate bids upon each of the said branches of

work, and to award the contract for the same to the lowest responsible bidder for each of said branches.

Since the Act became law, except for a limited number of exceptions, Pennsylvania's public projects have been constructed utilizing a "multiple-prime delivery system", meaning a system without a general contractor. The Act therefore compels the owner to serve as its own general contractor. Pennsylvania is one of only a few states with a this type of law which has generated some controversy because the contract requirements for public projects do not extend to private projects.

i. Notices and Enforcement

The Pennsylvania Procurement Code applies to public contracts with a Commonwealth purchasing agency. Projects subject to this Code involving contracts between $25,000 and $100,000, the contractor must provide a performance bond or other acceptable security in an amount equal to at least 50% of the contract price as the purchasing agency, in its discretion, determines is necessary to protect the interests of the Commonwealth. *See* 62 Pa. C.S.A. § 903(a). For projects (subject to this Code) involving contracts over $100,000, the contractor must provide a performance bond or other acceptable security in an amount equal to 100% of the contract price. *See* 62 Pa. C.S.A. § 903(a)(1). This Procurement Code provides that the performance bond shall be solely for the protection of the purchasing agency which awarded the contract. *See* 8 P.S. § 193.1(a)(1); *see also* 62 Pa. C.S.A. § 903(b).

For public building construction in excess of $4,000, all public owners must prepare separate specifications, solicit separate bids, and award separate contracts for general construction, plumbing, heating and ventilating, and electrical work.

B. Claims to Public Funds

i. Notices and Enforcement

According to the Separation Act, work on a "public building" covers potentially any building paid for with public funds.

III. STATUTES OF LIMITATION AND REPOSE

A. Statutes of Limitation and Limitations on Application of Statutes

The statute of limitations on claims for damages for injury to person or property that are founded on negligent, intentional, or otherwise tortious conduct, or any other action or proceeding sounding in trespass, including deceit or fraud, is two years. 42 Pa.C.S. §5524. The statute of limitations for actions upon contracts is four years. 42 Pa.C.S. §5525. This includes contract actions alleging latent real estate construction defects. *Gustine Uniontown Associates, Ltd. ex rel. Gustine Uniontown, Inc. v. Anthony Crane Rental, Inc.*, 842 A.2d 334 (Pa. 2004), *on remand*, 892 A.2d 830 (Pa. Super. 2006).

B. Statutes of Repose and Limitations on Application of Statutes

The Pennsylvania Statute of Repose is codified at 42 Pa.C.S. §5536. Said Statute sets out that "a civil action or proceeding brought against any person lawfully performing or furnishing the design, planning, supervision, or observation of construction, or construction of any improvement to real property must be commenced within twelve (12) years after completion of construction of such improvements." This includes actions to recover damages for:

1. Any deficiency in the design, planning, supervision or observation of construction of the improvement;

2. Injury to property, real or personal, arising out of any such deficiency;

3. Injury to the person or for wrongful death arising out of such deficiency; and,

4. Contribution or indemnity for damages sustained on account of any injury mentioned in paragraph (2) or (3)."

Our Supreme Court holds that for a party to establish the immunity set out in the Statute of Repose, that party must establish that:

1. What is supplied is an improvement to real estate;

2. More than twelve years have elapsed between the completion of the improvements to the real estate and the injury; and,

3. The activity of the moving party must be within the class which is protected by the Statute.

McConnaughey v. Building Components, Inc., 637 A.2d 1331 (Pa. 1994). *See also Noll by Noll v. Harrisburg Area Y.M.C.A.*, 643 A.2d 81 (Pa. 1994); *Vargo v. KoppersCo., Inc.*, 715 A.2d 423 (Pa. 1998). The twelve year period begins to run when the entire construction project is so completed that it can be used by the general public. *Noll*, 643 A.2d at 84.

The Supreme Court has defined an improvement to real property as a "valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes" *McCormick v. Columbus Conveyor Co.*, 564 A.2d 907, 909 (Pa. 1989). Further, the *McCormick* court stated that whether a particular party is within the class of persons protected by the Statute of Repose depends on whether that party "performed or furnished the design, planning, supervision of construction, or construction of an improvement." *Id*. at 910.

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

Subcontractors involved in the alteration or repair of property must file a Preliminary Notice of Intent to File Lien *prior* to the completion of work. Thereafter all subcontractors, even those involved in alteration or repair, must file a Formal Notice of Intent to File Lien at least thirty (30) days *before* a claim for lien, or suit, is filed.

Pennsylvania law allows for a notice from the property owner to the contractor advising the contractor that a subcontractor has provided the owner with notice that a lien may be filed. The notice may also demand that the contractor pay the claim or undertake to defend it.

The Mechanic's Lien act contains similar provisions in the event that a withholding a payment be found to be arbitrary or vexatious. An owner/contractor may withhold payment to a contractor/subcontractor *only* if notice is provided to that party that alleged defects exist in the materials or work performed.

The owner must first give the contractor notice and opportunity to cure despite how evident the cause and effect of a delay is. This notice shall describe the deficiency in performance with detail and clearly advise the contractor that it will be terminated unless the problem is corrected. Where a breach is curable, the contractor must be given opportunity to do so even in those cases where the breach is considered incurable, and the opportunity must be real and genuine. This means that demands to "do the impossible" must be viewed by the Court as illusory and the termination predetermined – a tactic that will backfire on the arguing owner and aid the position of the contractor.

V. INSURANCE COVERAGE AND ALLOCATION ISSUES

A. General Coverage Issues

Generally speaking, an indemnitee, pursuant to a contractual indemnity provision, is not considered an insured under the indemnitor's insurance policy. As such, an indemnitee does not enjoy the same rights and protections that the indemnitor does under its insurance policy. However, if the indemnitee is named as an additional insured under the indemnitor's policy, the indemnitee has a direct right to defense coverage and/or indemnification for insured claims under the indemnitor's policy, separate from the enforceability of the indemnity provision in the contract. This treats the additional insured as if it were a party to the subcontractor's CGL policy. In other words, being named an additional insured provides the additional insured, the same rights to insurance coverage as the primary insured.

Unlike indemnity, the allocation of risk in these circumstances is not assumed by the primary insured/indemnitor but is assigned to the insurer.

B. Trigger of Coverage

In *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. St. John*, 106 A.3d 1 (Pa. 2014), our Supreme Court decided that, absent a narrow exception for asbestos-type claims, the proper coverage

trigger under a standard ISO CGL policy is "first manifestation." Namely, this is only the policy in effect when "either bodily injury or property damage becomes reasonably apparent" is triggered.

This coverage trigger (which restricts coverage to a single policy year despite the instance where bodily injury or property damage occurs progressively over multiple policy years) has been categorized by at least one legal source as "clearly the minority view" and "resoundingly rejected" as a coverage trigger theory.[1]

Pennsylvania has observed "first manifestation" as the standard for some time, meaning that only the policy on the risk when underlying bodily injury or property damage is first known or reasonably ascertainable must respond to a loss. The Pennsylvania Supreme Court adopted the continuous trigger rule in *J.H. France*, that involved coverage for bodily injury arising out of asbestos claims. *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502 (Pa. 1993). The continuous trigger rule has also been applied to other cases, including pollution claims

C. Allocation Among Insurers & Issues with Additional Insurance

An additional insured might be defined as a person or entity that is neither a named insured, nor qualified as an insured under the "Who Is An Insured" provisions of a given policy, but for which the named insured's policy affords insured status by endorsement. This is accomplished through endorsements either conferring insured status upon designated entities by name or description, or on a "blanket" basis using language which broadly applies to any person or entity for which the policyholder has agreed to procure coverage under a contract.

VI. CONTRACTUAL INDEMNIFICATION

It is well-established law in Pennsylvania that a general contractor is not liable for injuries resulting from work entrusted to a subcontractor. *Leonard v. Pennsylvania Dept. of Transp.*, 771 A.2d 1238 (Pa. 2001). With this in mind, Pennsylvania courts use general rules of contract construction in construing express indemnity provisions. *Brotherton Construction Co. v. Patterson-Emerson-Cornstock, Inc.,* 178 A.2d 696 (Pa. 1962). When interpreting a broadly written indemnity provision, however, courts tend to find unenforceable an indemnity agreement that is drafted so broadly that would literally allow the indemnitee to recover for any and all events, unless significant extrinsic evidence indicates an intent to be bound by the provision. *Deskiewicz v. Zenith Radio Corp.*, 561 A.2d 33, 35 (Pa. Super. 1989).

There is no statute prohibiting contractual indemnification if the intent of the parties to do so is clearly and unequivocally stated in the contract. See *Perry v. Payne*, 217 Pa. 252, 66 A. 553 (Pa. 1907); *Ruzzi v. Butler Petroleum Co.*, 527 Pa. 1, 588 A.2d 1 (Pa. 1991). Otherwise, this Commonwealth has deemed broad-form indemnity provisions unenforceable.

A contract that entitles a party to indemnification for its own negligence is permissible, but such a contract term must be unmistakable. *Ratti v. Wheeling Pittsburgh Steel Corp.*, 758 A.2d

[1] Randy Maniloff and Jeffrey Stempel, *General Liability Insurance Coverage—Key Issues in Every State*, 3d ed., © Matthew Bender & Company, Inc., January, 2015, pp. 539, 543.

695, 702 (Pa. Super. 2000). Indemnity clauses are construed most strictly against the party who drafts them, especially when that party is the indemnitee. *Ratti*, 758 A.2d at 702. Pass through agreements in a subcontract indemnifying one party for the negligence of another are only enforceable where stated in clear and unequivocal terms. *Bernotas v. Super Fresh Food Markets, Inc.*, 863 A.2d 478 (Pa. 2004).

VII. CONTINGENT PAYMENT AGREEMENTS

A contingent payment clause is a contractual provision that makes payment contingent upon the happening of some event. In the context of construction subcontracts, contingent payment clauses make the subcontractor's payment contingent upon the payment of the contractor by the owner. These clauses take on one of two forms in subcontract agreements:

- Pay-*when*-paid clauses: clauses that connect the timing of the subcontractor's payment to the time payment is made by the owner. If the owner stalls payment to the subcontractor by a number of months in paying the contractor, the contractor has no duty to pay the subcontractor during that period of delay.

- Pay-*if*-paid clauses: clauses that state the owner must pay the contractor *in order for* the subcontractor to *ever* receive payment, which shift the entitlement to payment. If the owner never pays the contractor, the contractor has no duty to pay a subcontractor.

Because a pay-when-paid clause controls only the timing of payment (as opposed *whether* any payment is due), Pennsylvania courts generally permit suits by subcontractors against contractors for non-payment where a reasonable amount of time has passed following the subcontractor's first demand.

A. Enforceability

62 Pa. C.S. § 3933(c) governs the payment provisions with respect to public contracts. According to this section, the subcontractor shall be paid the full or proportional amount received for each subcontractor's work and material fourteen (140 days after receipt of a progress payment.

73 P.S. §507(a) governs a party's entitlement to payment with respect to private contracts. Performance by a subcontractor "shall entitle the subcontractor to payment from the party with whom the subcontractor has contracted." 73 P.S. §507(c). In which case, the subcontractor shall be paid "the full or proportional amount received for each subcontractor's work or materials" fourteen (14) days after receipt of each progress or final payment or fourteen (14) days after receipt of the subcontractor's invoice, whichever is later.

B. Requirements [*If enforceable]

If the intent of the parties is unambiguous, a "pay-if-paid" clause will establish a condition precedent to payment. *C. M. Eichenlaub Co. v. Fid. & DepositCo.*, 437 A.2d 965 (Pa. Super. Ct.1981).

VIII. SCOPE OF DAMAGE RECOVERY

A contractor/subcontractor is entitled to the full balance due, interest on the balance due, a penalty of one percent per month on the balance due, and attorneys' fees and expenses incurred in attempting to collect the money owed. When a party to a contract seeks to enforce provisions of a contract to recover damages for a breach, that seeking party must do so with "clean hands," meaning that it must prove its performance all of its own obligations under the contract. *See Trumbull Corp. v. Boss Construction, Inc.*, 801 A.2d 1289 (Pa. Commw. 2002); *Evergreen Cmty. Power LLC v. Riggs Distler & Co., Inc.*, 513 F. App'x 236, 240 (3d Cir. 2013)

A. Personal Injury Damages vs. Construction Defect Damages

Under Pennsylvania law, damages for emotional distress are generally not recoverable in an action for breach of contract. *Spack v. Apostolidis*, 510 A.2d 352, 355 (Pa. Super. 1985).

B. Attorney's Fees Shifting and Limitations on Recovery

Generally, attorney's fees are not recoverable as damages in the absence of a contractual or statutory provision to the contrary, or some other established exception. *See*, *e.g.*, *Putt v. Yates-American Mach. Co.*, 722 A.2d 217, 226 (Pa. Super. 1998).

This Commonwealth also permits parties to contractually agree to the recovery of attorney's fees. Generally, where one party expressly contracts to pay the other's fees, such an obligation will be enforced.

C. Consequential Damages

Compensation for loss of use sustained due to the repairable damage to real property is appropriate under Pennsylvania law. *Kincade v. Laurel Courts, Inc.*, 644 A.2d 1268 (Pa. Super. 1994).

D. Delay and Disruption Damages

In contract cases, prejudgment interest is awardable at the legal rate of 6% per annum, but the parties to a contract may agree to a higher rate. 41 P.S. §202; *see Pittsburgh Constr. Co. v. Griffith*, 834 A.2d 572, 590 (Pa. Super. 2003). Statutory post-judgment interest is a matter of right where damages are ascertainable by computation, even though a bona fide dispute exists as to the amount of the indebtedness

In tort actions, prejudgment interest (a.k.a. delay damages) is permissible under Rule of Civil Procedure 238, which fixes as the rate for calculating delay damages "the prime rate as

listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus 1%, not compounded." Pa.R.C.P. 238(a)(3).

In breach of contract claims alleging property damage, our Supreme Court holds that Rule. 238 does *not* permit delay damages in a breach of contract action where the damages were measurable by actual property damages. *Touloumes v. E.S.C. Inc.*, 899 A.2d 343 (Pa. 2006). The Court stated that, in a breach of contract action, "pre-judgment interest is the appropriate vehicle to secure monies for the delay of relief." *Id.* at 349.

Clauses which waive a party's ability to seek delay damages are generally enforceable. However, Pennsylvania recognizes that exculpatory provisions in a contract cannot be raised as a defense where there is an affirmative or positive interference by the owner with the contractor's work, or there is a failure on the part of the owner to act on some essential matter necessary to the prosecution of the work.

Compensation for loss of use sustained due to the repairable damage to real property is appropriate under Pennsylvania law. *Kincade v. Laurel Courts, Inc.*, 644 A.2d 1268 (Pa. Super. 1994).

E. Economic Loss Doctrine

Pennsylvania upholds the economic loss doctrine, which precludes recovery of economic losses in tort actions absent physical injury or property damage. *David Pflumm Paving & Excavating Inc. v. Foundation Services Co.*, 816 A.2d 1164 (Pa. Super. 2003). However, where a building owner seeks damages in a defective construction case for loss of personal property, cleaning costs, rent and lost profits, in additional to damage to the building itself, the tort claims will not be barred by the economic loss doctrine. *Clouser's Auto Body, Inc. v. Jewell Bldg. Systems, Inc.*, 41 Pa. D. & C.4th 271 (Pa. Com. Pl. 1998).

Another important exception is provided by Restatement (Second) of Torts §552. *Bilt-Rite Contractors v. Architectural Studio*, 866 A.2d 270 (Pa. 2005). This exception has only been applied to instances where the individual whose misrepresentation was relied upon is a professional in the business of designing or building, such as architects and other design professionals. *Rock v. Voshell*, 2005 U.S. Dist. LEXIS 36942, 2005 WL 3557841 (E.D. Pa. 2005).

F. Interest

Pennsylvania's Procurement Code, 62 Pa. C.S.A. §§3901 *et seq*., discussed above, and the Contractor and Subcontractor Payment Act, 73 P.S. §§501 *et seq*, which applies to private work, contain penalty provisions that may be applied against an owner or general contractor for failure to make timely payments to a general contractor or subcontractor respectively. The logic of both the Code and the Act is that the performance pursuant to the contract should entitle the contractor or subcontractor to its payment.

The Act and the Code provide for, in certain circumstances, an award of interest. The Code may permit an interest penalty of 1% per month, as well as attorney's fees where payments were withheld in bad faith. The Act includes similar protections in the event that a withholding a payment be found to be arbitrary or vexatious.

G. Punitive Damages

The Pennsylvania Supreme has Court adopted the Restatement (Second) of Torts §908(2) with respect to punitive damages. *Feld v. Merriam*, 485 A.2d 742 (Pa. 1984) ("punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.") Where "the defendant has acted in a merely negligent manner, or even a grossly negligent manner, there is insufficient culpability and awareness by the defendant of the nature of his acts and of their potential results either to warrant punishment or effectively to deter similar future behavior." *Phillips v. Cricket Lighters*, 883 A.2d 439, 445 (Pa. 2005).

To constitute sufficient reckless conduct to create a jury question on the issue of punitive damages, Pennsylvania law requires that the "actor knows, or has reason to know. . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or fail to act, in conscious disregard of, or indifference to, that risk." *Smith v. Celotex*, 564 A.2d 209, 211 (Pa. Super. 1989); *see also SHV Coal, Inc. v. Continental Grain Co.*, 587 A.2d 702, 704-05 (Pa. 1991). The act or failure to act must be intentional, reckless, or malicious. *Smith*, 564 A.2d at 211. Therefore, in determining whether punitive damages should be awarded, "the act, or the failure to act, must be intentional, reckless or malicious." *Phillips*, 883 A.2d at 445. *See also Smith*, *supra*.

Punitive damages are not recoverable in Pennsylvania in an action based solely upon breach of contract and are generally not awarded. *Johnson v. Hyundai Motor America*, 698 A.2d 631 (Pa. Super. 1997), appeal denied, 712 A.2d 286 (1998); *Skurnowicz v. Lucci*, 798 A.2d 789, 797 (Pa. Super. 2002). To be entitled to punitive damages on a breach of contract claim, a plaintiff must prove that the defendant's actions show some "reckless indifference to the rights of others" to warrant such damages. *Skurnowicz,* at 797. A claim for punitive damages arises out of the underlying cause of action, and absent a viable cause of action, an independent claim for punitive damages may not stand. *Costa v. Roxborough Memorial Hospital*, 708 A.2d 490, 497 (Pa. Super. 1998).

Punitive damages cannot be recovered unless the plaintiff recovers compensatory damages. *Houston v. Texaco, Inc.*, 538 A.2d 502, 505 (Pa. Super. 1988)

H. Liquidated Damages

Liquidated damage clauses are generally accepted as a necessary part of the law governing construction contracts, with Pennsylvania being no exception. *Sutter Corp. v. Tri-Boro Mun. Auth.*, 338 Pa. Super. 217, 487 A.2d 933 (Pa. Super. 1985). Parties to a contract may include a liquidated damages provision that ensures recovery in cases where computation of actual damages would be speculative. *Brinich v. Jencka*, 757 A.2d 388 (Pa. Super. 2000). These

clauses are enforceable provided, at the time the parties enter into the contract, the sum agreed to is a reasonable approximation of the expected loss rather than an unlawful penalty. *See also* Restatement (Second) of Contracts, 356(1) (1981) ("Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss[;][a] term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.")

I. Other Damage Limitations [*If necessary]

IX. CASE LAW AND LEGISLATION UPDATE

On June 19, 2019, the House State Government Committee voted 15-10 in favor of amending House Bill 163 to remove the language of the Separations Act, discussed *supra*, which would have allowed public projects to be completed by one of four different project delivery methods. Instead, the amended HB 163 now simply repeals the Separations Act in its entirety. The Committee also voted 15-10 to report the amended HB 163 out of the Committee.