MAINE

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I. MECHANIC'S LIEN BASICS

Mechanic's liens provide a vehicle by which contractors, subcontractors, suppliers, surveyors, architects, engineers, real estate agents, and others can obtain a security interest in real property they improve or that benefit from their services. In Maine, such mechanic's liens are governed by the archaic, entangled provisions of 10 Maine Revised Statutes ("M.R.S.") §3251 *et seq.* Landscape gardeners have their own additional lien provisions, 10 M.R.S. §3501, as do laborers who work with or furnish lime, limerock, granite, and slate, 10 M.R.S. §3651, and those who provide monuments, tablets, headstones, vaults, posts, curbing, and other monumental work or materials, 10 M.R.S. §3701.

A. Requirements

a. Pre-Lien Notice

There is no notice required pre-lien. The lien is created as soon as the claimant provides the labor, furnishes the materials, or performs the services. 10 M.R.S. §3251. However, as discussed below, notice is required in certain circumstances in connection with the enforcement of the lien.

b. Mechanic's Lien Statement

If the claimant is not under contract with the owner, the claimant is required to file a sworn statement in the registry of deeds in the county the property is situated in within 90 days after ceasing to provide labor, to furnish materials, or to perform services. 10 M.R.S. §3253. If the claimant fails to file the statement, the lien granted by Section 3251 is dissolved. The sworn statement should include the net amount due to the claimant, together with a description of the property subject to the lien that is sufficient to identify the property and the owner. 10 M.R.S. §3253(1)(A). A copy of the statement must be mailed to the owner by ordinary mail. 10 M.R.S. §3253(1)(B).

B. Enforcement and Foreclosure

The lien is preserved and enforced by filing an action against the debtor, the owner of the property, and all other interested parties within 120 days after the last of the labor, materials, or

services were furnished. 10 M.R.S. §3255(1). This period is extended under limited circumstances, *id.*, such as when the owner dies, is adjudicated bankrupt, etc. 10 M.R.S. §3256. *Bona fide* purchasers for value have certain protections under the statute. 10 M.R.S. §3255(2).

For residential property, the lien may only be enforced up to the balance due to the person the owner has contracted with. If the owner did not contract for the labor, materials, or services with the claimant directly, the claimant must provide a notice to the owner that states that the owner could be responsible for paying for the services twice if they fail to confirm that the claimant was paid by the party the owner contracted with. 10 M.R.S. §3255(3). The total amount due from the owner to those with whom he did not contract shall not exceed the balance due from the owner to the person with whom he directly contracted. *Id.*

a. Sale

The court may decree that the property liened shall be sold at a particular place and time and under specific conditions and can suspend the sale. The full title of the debtor and owner of the property will be conveyed if, within 3 months from the time the property is sold, the deed of for the sale is recorded in the registry of deeds for the county where the land lies. 10 M.R.S. §3259. For just cause, the owner may be granted a right to redeem the property from such sale. If the court determines that the whole of the land on which the lien exists is not necessary to satisfy the lien, it will describe in the Order of Sale a suitable portion, and only that portion shall be sold. 10 M.R.S. §3259.

In addition to the sale remedy provided, liens can be enforced by attachment obtained by filing an action. The attachment must be made within 180 days after the last day labor, materials, or services were performed or furnished. 10 M.R.S. §3262.

II. PUBLIC PROJECT CLAIMS

A. State and Local Public Work

Payment and performance bonds are required for the full amount of the contract on projects costing more than $125,000. 14 M.R.S. §871. An exception applies for situations when the public body advertises for sealed proposals but no proposals are received from qualified, bonded contractors. In that case, contracts may be awarded to non-bonded contractors. 5 M.R.S. §1745.

The contracting authority may also require bid security to ensure the contractor is bondable. Payments will be returned to unsuccessful bidders. The bid security will be returned to the successful bidder upon the execution and delivery of the payment and performance bonds. 14 M.R.S. § 871(3).

In lieu of a performance or payment bond, an irrevocable Letter of Credit may be provided at the discretion of the public body. 14 M.R.S. § 871(3-A).

a. Notices and Enforcement

Anyone who has not been paid for a period of 90 days after they provide labor or materials for a contractor or subcontractor on a project where a payment bond has been issued, may bring an action to recover payment against the payment bond. The action must state the claimant's own name and the amount or the balance unpaid at the time of the institution of the action.

If the claimant's direct contractual relationship is with a subcontractor of the contractor furnishing the payment bond, but not with the contractor, the claimant must give the contractor notice within 90 days of the work being performed, otherwise the claimant forfeits a cause of action. The notice to the contractor must state with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. 14 M.R.S. §871(4). Such a notice must be served by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office or conducts business, or at the contractor's residence. *Id.*

An action must be commenced within one year from the date on which the last of the labor was performed or material was supplied. If the action is to collect payment for material supplied, the action must be commenced within a year of ascertainable final quantity estimates. The notice of claim from the material supplier to the contractor must be filed within 90 days of determination of the final quantity estimates. 14 M.R.S. §871(4).

Upon written request, the contracting body must provide a certified copy of the payment bond and the contract to a claimant, the party being sued for payment, or the surety of the person being sued. The certified copy of the bond and contract is *prima facie* evidence of the contents of the copy, its execution, and that the original was delivered. The applicant must pay a reasonable fee for the certified copy. 14 M.R.S. §871(4).

III. STATUTES OF LIMITATION AND REPOSE

The statutes of limitation and repose applicable to construction or design defect claims are contained in several statutes, depending on the party against whom the claim is asserted and the tort, contract, or warranty nature of the claim.

A. Statutes of Limitation and Limitations on Application of Statutes

Breach of Contract and Tort: All civil actions for breach of contract and unintentional torts shall be commenced within six (6) years after the cause of action accrues, in general. 14 M.R.S. §752.

Actions for equitable contribution and indemnification are governed by this statute as well, unless asserted against design professionals protected by the statute of repose, 14 M.R.S. §752-A. The cause of action accrues for contribution or indemnification when a judgment or settlement has been paid by the indemnitee or when the indemnitee is subject to some harm, such as liability to injury accompanied by inconvenience or damage.[1]

Sale of Goods: Under the Uniform Commercial Code ("U.C.C."), an action for breach of a contract for the sale of construction materials that are "goods" is four (4) years after the cause of action accrues. 11 M.R.S. §2-725. The parties to a contract may agree to a shorter period of limitation not less than one (1) year, however.

To the extent one material fails and damages another part of the construction, the claim is one for a product's damage to itself. Such claims are governed by the breach of warranty statute of limitations of the Uniform Commercial Code, which is four (4) years.[2] Arguments that the defective materials installed within the structure of a building damaged other parts of the building and, therefore, damaged "other property" so as to trigger tort liability in hopes of gaining the benefit of the longer, six-year statute of limitations provided in 14 M.R.S. §752 have failed.[3]

B. Statute of Repose and Limitations on Application of Statutes

All civil actions for malpractice or professional negligence against architects or engineers duly licensed or registered shall be commenced within four (4) years after such malpractice or negligence is discovered, but in no event shall any such action be commenced more than ten (10) years after the substantial completion of the construction contract or the substantial completion of the services provided, if a construction contract is not involved. 14 M.R.S. §752-A. The parties may change this limitations period by a valid contract.

There is no comparable statute of repose available to builders, and the discovery rule does not apply to parties who are not design professionals.[4]

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

There is no Maine case law requiring notice and an opportunity to cure as a prerequisite to pursuing an action against a contractor for defective construction or a designer for design defects. Maine courts are likely to follow the notice requirements of the contract and the case law of any other jurisdiction they find most persuasive on the issue.

The notice requirements of the Uniform Commercial Code apply to claims for defective goods such as construction materials. The buyer must notify the seller of the breach within a reasonable time after he discovers, or should have discovered, the deficiency in the materials, or else be barred from any remedy. 11 M.R.S. 2-607(3)(a).

A breach of the Home Construction Contract Act ("HCCA"), 10 M.R.S. §1486 *et seq.*, is deemed a *prima facie* breach of the Unfair Trade Practices Act ("UTPA"), 10 M.R.S. §1490(1). A homeowner proving such breach is entitled to attorney's fees, 5 M.R.S. §213(2), and penalties, 10 M.R.S. §1490(2). At least 30 days prior to the filing of an action for damages based on a breach of the Home Construction Contract Act or another unfair trade practice, a written demand for relief must be mailed or delivered to any prospective respondent at the respondent's last known address identifying the claimant and reasonably describing the unfair and deceptive act or practice relied upon and the injuries suffered. 5 M.R.S. §213 (1-A). A person receiving a demand for relief may make a written tender of settlement or, if a court action has been filed, an

offer of judgment. If the judgment obtained in court by a claimant is not more favorable than any rejected tender of settlement or offer of judgment, the claimant may not recover attorney's fees or costs incurred after the more favorable tender of settlement or offer of judgment. *Id.* If a notice is not sent according to the UTPA, then the action still may be maintained, but the homeowner probably does not recover attorney's fees or costs.[5]

IV. INSURANCE COVERAGE AND ALLOCATION ISSUES

A standard commercial general liability ("CGL") policy provides coverage for those amounts that the insured is legally liable to pay because of bodily injury or property damage that occurs during the applicable policy period.

A. General Coverage Issues

Under Maine law, exclusions and exceptions in CGL insurance policies are disfavored and are construed strictly against the insurer. Any ambiguity in an insurance policy must be resolved against the insurer and in favor of coverage. An insurance contract is ambiguous if it is reasonably susceptible to different interpretations.[6]

The duty to defend an insured under a CGL policy in Maine is broader than the duty to indemnify. It is determined using the "comparison test," whereby the allegations in the complaint are compared with the terms of the insurance policy. All evidence extrinsic to the allegations pleaded within the four corners of the complaint is ignored even if the evidence is agreed upon and undisputed by the insured, the third-party claimant, or the insurer.[7] The duty to defend is triggered if the complaint reveals any potential that the facts ultimately proved may come within coverage.[8] In other words, the Court will not uphold an insurer's denial of a defense to its insured unless the allegations in the complaint give rise to no set of facts that would establish coverage.[9]

B. Trigger of Coverage

Maine has not taken a position on which of the various triggers, e.g., manifestation, injury-in-fact, exposure, or continuous, determine which liability policy must answer for the claim. Assuming multiple policies apply to the same claim, Maine courts give effect to the "other insurance" clauses of the policies where possible. Logically inconsistent clauses are to be disregarded as repugnant to one another, and each policy is deemed to provide primary coverage.[10] An example is when multiple policies contain excess insurance clauses. In such situations, Maine has adopted the minority rule requiring each insurer to contribute equally up to the limits of the lower policy, with any remaining portion of the loss then being paid from the larger policy up to its limits.[11]

V. CONTRACTUAL INDEMNIFICATION

Maine common law and statutory law have left the area of contractual indemnification in construction contracts largely unmolested. The parties generally get what the contract states, so long as it is stated clearly and unambiguously. However, indemnification for one's own

negligence is disfavored in Maine. Courts will scrutinize such provisions and construe them strictly against indemnification if they are not expressly, specifically, and clearly worded to achieve that result.[12]

Similarly, insurance procurement clauses are enforceable based on the intent of the parties as evidenced by the written contract. However, the strict scrutiny applicable to indemnity clauses for one's own negligence applies equally to agreements to procure insurance for another party.[13]

Interestingly, Maine courts employ more lenient rules of interpretation for insurance procurement clauses when those clauses operate to waive subrogation rights. In that context, insurance procurement clauses intended to cover a party for its own negligence are not held to the strict scrutiny applicable to indemnification agreements. Contractual allocations of risk to insurers by way of insurance procurement clauses are favored under the law.[14]

VI. CONTINGENT PAYMENT AGREEMENTS

The Maine prompt payment statute provides a tool that a contractor or a subcontractor can use to collect unpaid bills. 10 M.R.S. § 1111 *et seq*. The statute allows enhanced interest and recovery of attorney's fees for the "substantially prevailing party." A contractor, or subcontractor, seeking payment must prove by way of a breach of a contract claim or a *quantum meruit* claim that he is entitled to payment. Then, in order for a contractor or subcontractor to recover the additional penalties and fees under the statute, it must prove that the owner did not pay in accordance with the payment terms in the contract. Absent a contract an owner must pay within twenty days. Absent a contract a subcontractor must prove: (1) the services were performed in accordance with the agreement between the parties; (2) the owner has made the progress or final payment; (3) the subcontractor has invoiced the work; and (4) the contractor failed to make payment within seven days after either the invoice or the progress payment for the owner, whichever is later.[15]

The statute allows the contractor to withhold payment "in an amount equaling the value of any good faith claim against the invoicing . . . subcontractor," even if paid for that subcontractor's work by the owner. 10 M.R.S. § 1118(1). A subcontractor seeking recovery from a general contractor must prove that the general contractor was paid by the owner in order to recover under the statute.

VII. SCOPE OF DAMAGE RECOVERY

A. Personal Injury Damages vs. Construction Defect Damages

In Maine, the measure of damages for breach of a construction contract or construction defect is the difference in value between value of performance contracted for and value of performance actually rendered.[16] This difference may be proved either by diminution in market value or by amount reasonably required to remedy defect.[17]

There is no authority in Maine for personal injury in the course of a construction contract. Any personal injury would be actionable under Maine tort law.

B. Attorney's Fees

Attorney's fees generally are not recoverable unless expressly permitted by contract or by statute. A mere breach of contract does not permit a party to recover attorney's fees unless the contract expressly provides for such a recovery.[18] However, certain egregious conduct will warrant an award of attorney's fees for breaching a contract, for abusing legal process, etc., but only in the most extraordinary circumstances.[19]

Maine has not recognized the "collateral litigation" exception to the American Rule governing the recovery of attorney's fees.[20] That exception applies in other jurisdictions to permit compensation of attorneys fees when prior collateral litigation with a third party was caused by the breach of a contract or breach of a duty and when tortious conduct caused the plaintiff to prosecute or defend an action with a third party.

C. Consequential Damages

The traditional remedies in Maine for breach of contract include full general and consequential damages.[21] However, consequential damages in the nature of "special damages" are recoverable for a breach of contract under the venerable *Hadley v. Baxendale* principle: only if the parties contemplated the particular harm claimed at the time of contracting will damages be recoverable for that harm.[22] The typical measure of recovery for defective or incomplete performance of a construction contract is the difference in value between the value of the performance contracted for and the value of the performance actually rendered.[23] This difference may be proved either by the diminution in market value or by the amount reasonably required to remedy the defect.

D. Delay and Disruption Damages

There is no *per se* rule pertaining to delay and disruption damages in Maine. The intent of the parties determined from the contract language will govern the recovery. Liquidated damages for delay, however, must meet two requirements in order to be recoverable: (1) the damages must be difficult to prove; and (2) the amount fixed must be a reasonable forecast.[24]

E. Economic Loss Doctrine

The economic loss doctrine is a matter of common law, not statute, but it has been adopted in Maine.[25] The economic loss doctrine applies when damages to a product result from the defective product itself. In *Oceanside*, damage to windows occurred when the windows themselves were defective. Any damages would be subject to a product's warranty. [26] However, the U.S. District Court of Maine has recently determined that when a claim has nothing to do with the adequacy of the product or service value, or with the contract itself, then the "economic loss doctrine does not bar the tort or statutory claims.[27]

F. Interest

In all civil actions involving a contract or note that contains a provision relating to pre-judgment interest, interest is allowed at the rate set forth in the contract or note. 14 M.R.S. §1602-B. Otherwise, prejudgment interest is allowed at the one-year United States Treasury bill rate, plus 3%. Prejudgment interest accrues from the time of notice of claim setting forth under oath the cause of action, served personally or by registered or certified mail, until the date on which an order of judgment is entered. If a notice of claim has not been given to the defendant, pre-judgment interest accrues from the date on which the complaint is filed. If the prevailing party at any time requests and obtains a continuance for a period in excess of 30 days, interest is suspended for the duration of the continuance. On petition of the non-prevailing party and on a showing of good cause, the trial court may order that interest be fully or partially waived.

In actions involving a contract or note that contains a provision relating to post-judgment interest, the rate set forth in the contract or note or the rate from the Treasury bill formula applies, whichever is greater. 14 M.R.S. §1602-C. In all other actions, the interest rate is equal to the one-year United States Treasury bill rate plus 6%. Post-judgment interest accrues from and after the date of entry of judgment and includes the period of any appeal. If the prevailing party at any time requests and obtains a continuance for a period in excess of 30 days, interest is suspended for the duration of the continuance. On petition of the non-prevailing party and on a showing of good cause, the trial court may order that interest be fully or partially waived.

G. Punitive Damages

No matter how egregious the breach, punitive damages are not available under Maine law for breach of contract.[28] Punitive damages are recoverable only for tortious conduct.[29] The actionable conduct must be motivated by malice. Malice is defined as actual ill-will or ill-will implied from the outrageousness of the conduct. Mere reckless disregard of the circumstances does not warrant a punitive damage award.[30]

H. Liquidated Damages

Liquidated damages are acceptable in Maine. Damages resulting from a breach must have been very difficult to estimate accurately, and (1) damages contracted for must be a reasonable amount to justly compensate the plaintiff for a loss in the event of a breach, or (2) contracted damages must be for the actual damages to the plaintiff resulting from the breach.[31]

VIII. CASE LAW AND LEGISLATIVE UPDATE

Since the last Compendium, little has changed in the legislative landscape affecting construction law. The Home Construction Contract Act ("HCCA"), 10 M.R.S. §1486 *et seq.*, however, is subject to periodic changes and should be consulted prior to entering a contract with a homeowner to ensure the latest provisions are satisfied.

[1] *Gennings v. Norton*, 35 Me. 308, 312- 13 (1853).
[2] *Oceanside at Pine Point Condo. Owners Ass'n v. Peachtree Doors, Inc.,* 659 A.2d 267 (Me. 1995).
[3] *Id.*
[4] *Bangor Water Dist. v. Malcolm Pirnie Engineers*, 534 A.2d 1326 (Me. 1988).
[5] *Oceanside at Pine Point Condominium Owners Ass'n v. Peachtree Doors, Inc.*, 659 A.2d 267, 273 (Me. 1995).
[6] *Foremost Ins. Co. v. Levesque,* 868 A.2d 244, 246 (Me. 2005).
[7] *Elliott v. Hanover Insurance Co.*, 711 A.2d 1310 (Me. 1998).
[8] *Vigna v. Allstate Insurance Co.*, 686 A.2d 598 (Me. 1996).
[9] *Johnson v. Amica Mut. Ins. Co.,* 733 A.2d 977, 980 (Me. 1999).
[10] *York Mut. Ins. Co. v. Continental Ins. Co.*, 560 A.2d 571, 573 (Me. 1989).
[11] *Carriers Ins. Co. v. American Policyholders' Ins. Co.*, 404 A.2d 216, 221 (Me. 1979); *York Mut. Ins. Co. v. Continental Ins. Co.*, 560 A.2d 571, 573 (Me. 1989).
[12] *McGraw v. S.D. Warren Co.*, 656 A.2d 1222, 1224 (Me. 1995); *Emery Waterhouse Co. v. Lea*, 467 A.2d 986, 993 (Me. 1983); *Doyle v. Bowdoin College,*403 A.2d 1206, (Me. 1979).
[13] *Fowler v. Boise Cascade Corp.,* 739 F.Supp. 671, 675 – 76 (D.Me. 1990), *aff'd* 948 F.2d 49, 57 (1st Cir. 1991).
[14] *Acadia Ins. Co. v. Buck Const. Co.,* 756 A.2d 515 (Me. 2000).
[15] *Jenkins v. Walsh,* 776 A.2d 1229 (Me. 2001); *Ursa Major Underground, Inc. v. Liberty Mutual Insurance Co.*, 2015 WL 9596001 *9 (D. Me. 2015).
[16] *VanVoorhees v. Dodge*, 679 A.2d 1077, 1081 (Me. 1996).
[17] *Id.*; *see also Kleinschmidt v. Morrow,* 642 A.2d 161, 165 (Me.1994) (approving calculation of compensatory damages as the difference between the contract price and the actual total cost to the homeowner of completing the home).
[18] *Soley v. Karll*, 853 A.2d 755, 758 (Me. 2004).
[19] *Id.,* 853 A.2d at 759; *Linscott v.Foy,* 716 A.2d 1017 (Me. 1998).
[20] *Soley v. Karll*, 853 A.2d 755, 758 n. 3 (Me. 2004).
[21] *Marquis v. Farm Family Mut. Ins. Co.*, 628 A.2d 644, 652 (Me. 1993)
[22] *Forbes v. Wells Beach Casino, Inc.*, 409 A.2d 646 (Me. 1979)(no special damages recoverable for loss of use of property as mini-mall and motel where defendant did not know about plaintiff's plans for such uses at the time the contract was entered into); *Susi v. Simonds*, 85 A.2d 178 (Me. 1951)(no knowledge of intended use of property at time of contracting means no recovery of special damages in the nature of lost profits).
[23] *VanVoorhees v. Dodge*, 679 A.2d 1077, 1081 (Me. 1996).
[24] *Brignull v. Albert*, 666 A.2d 82, 84 (Me. 1995).
[25] *Oceanside at Pine Point Condo. Owners Ass'n v. Peachtree Doors, Inc.,* 659 A.2d 267 (Me. 1995).
[26] *Workgroup Technology Partners, Inc. v. Anthem, Inc*., 2016 WL 424960 *18,19 (D. Me. 2016).
[27] *Workgroup Technology Partners, Inc. v. Anthem, Inc*., 2016 WL 424960 *18,19 (D. Me. 2016).
[28] *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 776 (Me. 1989).
[29] *Jolovitz v. Alfa Romeo Distributors of North America*, 760 A.2d 625, 629 (Me. 2000)(citing *DiPietro v. Boynton*, 628 A.2d 1019, 1025 (Me. 1993)). *Colford v. Chubb Life Ins. Co. of America*, 687 A.2d 609, 616 (Me. 1996)(tort recovery for intentional infliction of emotional distress and punitive damages must be based on actions that are separable from the actual breach of contract).
[30] *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985).
[31] *Dairy Farm Leasing Co. v. Hartley*, 395 A.2d 1135, 1137 (Me. 1978).