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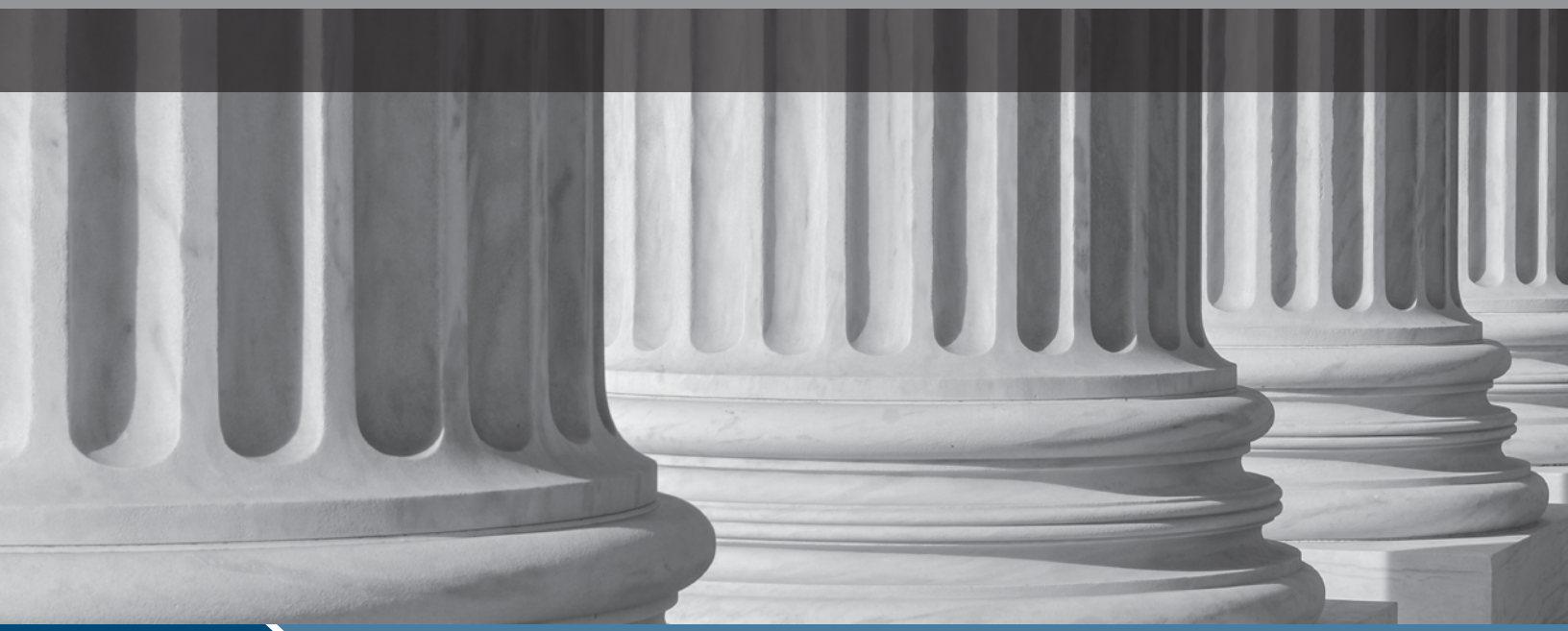

# DELAWARE Construction Law Compendium

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***The Delaware Construction Law Compendium is not intended to provide specific legal advice or opinions, but rather to provide general information. If you need additional information regarding Construction law, or in relation to a specific claim, please do not hesitate to call upon us. (Revised April 2020)***

This outline is intended to provide a general overview of Delaware's construction law. The discussion on any particular topic is not necessarily an indication of the totality of the law related to any particular area of Delaware's construction law.

# I. BREACH OF CONTRACT

## A. Statute of Limitations

10 *Del. C.* 1827 sets forth the statute of limitations for alleged deficiencies in the construction of improvements to real property. Due to the structure of the statute, it operates like a statute of repose. It states that:

> (b) No action, whether in or based upon a contract (oral or written, sealed or unsealed), in tort, or otherwise, to recover damages or for indemnification or contribution for damages . . . shall be brought against any person performing or furnishing, or causing the performance or furnishing of, any such construction of such an improvement or against any person performing or furnishing, or causing the performing or furnishing of, any such designing, planning, supervision, and/or observation of any such construction or manner of construction of such an improvement, **after the expiration of 6 years from whichever of the following dates shall be earliest**:
>
> > a. The date of purported completion of all the work called for by the contract as provided by the contract if such date has been agreed to in the contract itself;
> >
> > b. The date when the statute of limitations commences to run in relation to the particular phase or segment of work performed pursuant to the contract in which the alleged deficiency occurred, where such date for such phase or segment of work has been specifically provided for in the contract itself;
> >
> > c. The date when the statute of limitations commences to run in relation to the contract itself where such date has been specifically provided for in the contract itself;
> >
> > d. The date when payment in full has been received by the person against whom the action is brought for the particular phase of such construction or for the particular phase of such designing, planning, supervision, and/or observation of such construction or manner of such construction, as the case may be, in which such alleged deficiency occurred;
> >
> > f. The date when the construction of such an improvement as called for by the contract has been substantially completed;

> g. The date when an improvement has been accepted, as provided in the contract, by the owner or occupant thereof following the commencement of such construction;
>
> h. For alleged personal injuries also, the date upon which it is claimed that such alleged injuries were sustained; or after the period of limitations provided in the contract, if the contract provides such a period and if such period expires prior to the expiration of 2 years from whichever of the foregoing dates is earliest.

For claims not covered by the above statute, there is a general three year statute of limitations when bringing a breach of contract claim in Delaware. *10 Del. C., § 8106.* The running of the statute is triggered by the date on which the cause of action accrues, generally the time of the wrongful act. *Lincoln Nat. Life Ins. Co. v. Snyder*, 722 F. Supp.2d 546 (Del. 2010). The "Time of Discovery" rule is an exception to the general rule that the statute of limitations begins running on the date of the breach of the contract, and may serve to extend the period beyond three years. *Cavalier Group v. Strescon Industries, Inc.*, 782 F. Supp. 946 (Del. 1992).

The time of accrual of the statute of limitations can be set by contract, effectively abrogating the discovery rule. *Homsey Architects, Inc. v. Nine Ninety Nine, LLC.*, 2010 WL 2476298 (Del.Ch.). Another exception to the general three year statute of limitations was clarified by the Court of Chancery in *Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, No. 4119 (Del. Ch. March 4, 2010), which provides a twenty year statute of limitations for promissory notes or contracts made under seal. However, 6 *Del. C.* § 2-203 provides "The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer."

**B. Measure of Damages for Breach of Contract**

The amount of damages recoverable for breach of contract is that which will put the injured party in the monetary position he would have been in had the contract been performed. *J.J. White v. Metropolitan Merchandise Mart,*107 A.2d 892 (Del. Super.1954). In a breach of contract action for defective performance of a real estate construction contract, the primary measure of damages is the cost of repairing or remedying the defect. *Farny v. Bestfield Builders, Inc.*, 391 A.2d 212, at 214 (Del. Super. 1978). However, if this proves impractical, the acceptable secondary measure of damages is diminution in value of the property caused by the breach, *i.e.*, the difference between the fair market value of the property without the defect and the fair market value of the property with the defect. *Brandywine 100 Corp. v. New Castle County*, 527 A.2d 1241 (Del. Super. 1987).

Note that a contractual obligation, by itself, does not create a tort duty. *Wilmington Trust Co. v. Clark*, 424 A.2d 744, 754 (1981). While a tort action can be founded upon a duty arising out of the contractual relationship, the duty giving rise to the tort cause of action must be independent of the contractual obligation. Mere failure to perform a contractual duty, without more, is not an actionable tort. *Id*. *See*, discussion regarding the Economic Loss Doctrine at IX.

### C. Contractual Exculpatory Clauses

Contractual exculpatory clauses (a provision relieving a party from liability resulting from a wrongful or negligent act) are not favored in Delaware and will be "construed not to confer immunity from liability" for one's own negligent actions. *Pan American World Airways v. United Aircraft Corp.*, 3 Storey 7, 163 A.2d 582 (Del. Super. 1960).

## II. NEGLIGENCE

### A. General

Recovery in an action for negligence requires (1) proof of a duty, (2) a breach of that duty, (3) proximate causation, and (4) damages. *Lenkewicz v. Wilmington City Ry. Co*., 74 A. 11, 12-13 (Del. Super.1908). Recovery for negligence may be limited by the Economic Loss Rule, which generally holds that plaintiffs cannot recover in tort for purely economic losses. Purely economic losses are often the result of a breach of contract and ordinarily should be recovered in contract actions. In other words, contract law is better suited to remedy those losses. *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194, 1200 (Del. 1992). The Economic Loss Rule is particularly suited to those in privity of contract. *Id.*

The owner of land owes a general duty of care to business invitees, but is under no duty to protect invitees from all potential dangers. The owner must only protect invitees from danger that is reasonably foreseeable. *Achtermann v. Bussard*, 2007 WL 901642, at *4 (Del. Super. Mar. 22, 2007), *aff'd*, 957 A.2d 1 (Del. 2008).

A contractor who is in control of the workplace must provide a safe environment to work. This does not mean that the contractor guarantees or insures the safety of the workplace. The extent of the contractor's duty is to exercise ordinary care, under the circumstances, to see that the workplace is reasonably safe. *DiSabitino Bros., Inc. v. Baio*, 366 A.2d 508, 510 (Del. 1976); *Seither v. Balbec*, Del. Super., C.A. No. 90C-11-257, Quillen, J. (1995); *Rabar v. E.I. duPont de Nemours & Co.*, 415 A.2d 499, 506 (Del. 1980).

Delaware follows the general rule that the employer of an independent contractor is not liable for the negligence of the contractor or his employees. RESTATMENT (SECOND) OF TORTS § 409 (1965). "Neither an owner nor general contractor has a duty to protect on independent contractor's employee from hazards created by the doing of the work or the condition of the premises or the manner in which the work is performed unless the owner or general contractor

retains active control over the manner in which the work is carried out and the methods used." *O'Conner v. Diamond State Telephone CO., 503 A.2d 661, 663 (Del. 1985).* However, Delaware follows several exceptions found in § § 411 and 413 of the Restatement. Under the Peculiar Risk Doctrine, one who employs an independent contractor to do work which the employer should recognize as likely to create a peculiar risk of physical harm unless special precautions are taken, is subject to liability for injuries caused by the absence of such precautions if the employer fails to provide for such precautions" *Delmarva Power and Light v. First South Utility Construction, Inc.,* 2007 WL 3105112 *2. As long as property owners do not control how independent contractors perform their work, an independent contractor's employee cannot rely upon the "Risk" doctrine, to sue those that hire independent contractors for work-related injuries. *Roca v. E. I. du Pont de Nemours and Company,* 842 A.2d 1238 (Del. 2004). Moreover, the peculiar risk doctrine also applies to physical harm to others and not to property damage. Id.

A second exception to the general rule that the employer of an independent contractor is not liable for the negligence of the contractor or his employees is when the employer can be said to have negligently hired the independent contractor. *Bowles v. White Oak, Inc.* 1988 WL 97901 (Del. Super.). The liability of an owner for the negligence of an independent contractor may also be based under the Restatement (Second) of Torts, § 414, which states: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." Thus, the issue of control over the means and methods of performing the work is determinative of liability. *O'Conner v. Diamond State Telephone,* 503 A.2d 661 (Del. Super. 1985).

One who undertakes to render services in the practice of a profession or trade is always required to exercise the skill and knowledge normally held by members of that profession or trade in good standing in communities similar to this one. *Tydings v. Lowenstein*, 505 A.2d 443, 445 (Del. 1986); *Seiler v. Levitz FurnitureCo.,* 367 A.2d 999, 1007-08 (Del.1976); *Sweetman v. Strescon Indus., Inc.*, 389 A.2d 1319, 1324 (Del. 1978). *See also* RESTATEMENT (SECOND) OF TORTS §299A. As such, an architect is bound to perform with reasonable care the duties which are contracted. A client has the right to regard the architect as possessing the necessary skill in the construction of buildings, and to expect that the architect will use this skill as well as ordinary care and diligence to accomplish the purpose for which the architect is retained. *Seiler v. Levitz Furniture Co. of the Eastern Region, Inc.,* 367 A.2d 999, 1007-08 (Del. 1976.

**B. Comparative fault**

Delaware has adopted the doctrine of comparative fault, favoring a determination of the proportionate fault between the parties on a case by case basis. *Spencer v. WalMart Stores East,* 930 A.2d 881, 885 (Del. 2007). Assumption of the risk does not generally act as a bar to recovery, but may serve to reduce plaintiff's recovery, unless it is a bargained for, agreed upon shifting of the risk. Id. @ 885-886. Where the

plaintiff has expressly relived the defendant of a duty (primary assumption of the risk), recovery may be barred. *Koutoufaris v. Dick*, 604 A.2d 390, 398 (Del.1992).

### C. Violation of a Statute

In Delaware, evidence of a violation of a statute may, but does not always, constitute negligence *per se*. In a claim for negligence *per se*, a plaintiff must establish four elements: (1) that the statute in question was enacted for the safety of others; (2) that the statutory violation proximately caused the plaintiff's injury; (3) that plaintiff was a member of the class of persons the statute was intended to protect; and (4) that the statute established a standard of conduct designed to avoid the harm suffered by plaintiff. *NVF Co. v. Garrett Snuff Mills, Inc.*, 2002 WL 130536, at *2.

### D. Joint and Several Liability

Joint tortfeasor liability is governed by the Delaware Uniform Contribution Among Tortfeasors Law, 10 *Del. C.* § 6301, *et seq.* A plaintiff may recover against any or all of the defendants provided that the recovery in total does not exceed the judgment. *Brown v. Comegys*, 500 A.2d 611, 613 (Del. 1985). In order to be considered joint tortfeasors the defendants must share a common liability to the plaintiff. *Ferguson v. Davis*, 102 A.2d 707 (1954); *Lutz v. Boltz*, 9 Terry 197 (Super. 1953).

## III. BREACH OF WARRANTY

An alleged breach of warranty can be based either on express warranty provisions found in the contract between the plaintiff and the contractor or based on warranties implied by law.

In Delaware there is a general four year statute of limitations on breach of warranty claims. 6 *Del. C.* § 2-725. By the terms of the original agreement, however, the parties may reduce the period of limitations to not less than one year. Id. The parties cannot extend the period of limitations past the four years set forth in the statute. Id. The statute of limitations begins running when the breach occurs regardless of a party's lack of knowledge of the breach. Id. "A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and 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." 6 Del. C. § 2-725 (2).

### A. Breach of Express Warranty

Under 6 *Del. C.* §2-313:

> (b) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(c) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

*Id*.

**B. Damages**

The measure of damages for the breach of an express warranty in the sale of real property is the same as the measure of damages for breach of contract. The injured party is entitled to damages that will compensate for the harm caused by the breach. The compensation should place the injured party in the same position he or she would have been in if the contract had been performed. *E.I. DuPont de Nemours and Co. v. Pressman*, 679 A.2d 436, 446 (Del. 1996)

**C. Breach of Implied Warranty**

Delaware has adopted a general implied warranty of habitability, as well as an implied warranty of good quality and workmanship for both new construction and renovated or reconstructed structures. *Council of Unit Owners of Breakwater House Condominium v. Simpler*, 603 A.2d 792 (Del. 1992). However, a developer may negate the implied warranty by including clear, unambiguous language in the contract specifically excluding the implied warranty. *Id*. The implied warranties are generally only available to purchasers of new dwellings and the warranty does not extend to subsequent purchasers. *Council of Unit Owners of Sea Colony East, Phases III, IV, VI, VIII v. Carl M. Freeman Assocs., Inc.*, 1989 WL 48568 at *6 (Del. Super.).

## D. Additional Warranties

Some local jurisdictions have adopted code sections which set forth warranty and third-party warranty insurance requirements with respect to residential construction. Local codes should be consulted.

## E. Condominiums

The Delaware Code sets forth specific warranty requirements for Condominiums, as set forth below:

1. Express Warranty - Chapter 81 of Title 25 of the Delaware Code is named the Delaware Uniform Common Interest Ownership Act (DUCIOA)

a. Under 25 *Del. C.* § 81-413 express warranties may be created, if relied on by the purchaser, by:

i. Any affirmation of fact or promise in writing which relates to the unit, or the uses and benefits of the same, can serve to create an express warranty that the unit and related rights and uses will substantially conform to the affirmation or promise in all material respects;

ii. A model, description, plan or specification can create an express warranty that the common interest community will substantially conform to the said model, description, plan or specification unless it is disclosed that it is only proposed or is subject to change;

iii. A description showing the quantity or extent of the real estate comprising the common interest community can create an express warranty that the community will conform to the description, subject to customary tolerances; and

iv. A provision that a unit may be put to only a specified use by a purchaser will be deemed an express warranty that the specified use is lawful.

The formal words "warranty" or "guarantee," are not required to create such an express warranty. Additionally, there is not requirement that there was a specific intention to make a warranty. The express warranties are in addition to other statutory construction warranty requirements and do not replace or negate any other statutory construction warranty requirements.

2. Implied Warranties - Delaware imposes certain implied warranties regarding the quality of existing condominium units as follows:

a. A declarant and any dealer warrants that a unit will be in as good condition as it was at the time of contracting, excepting reasonable wear and tear;

b. A declarant and any dealer warrants that a unit and the common areas are suitable for their ordinary uses; are free from defective materials; and, are constructed in accordance with applicable law, and in a workmanlike manner.

As with the express warranties, the implied warranties are in addition to any other statutory construction warranty requirements. The applied warranties are applicable to the developer even if an affiliate performed the construction. The warranties can be modified by the express agreement of the parties. A general waiver or disclaimer of the implied warranties will not be effective on residential units, but a disclaimer contained in an instrument signed by the purchaser for a specified defect or specified failure to comply with applicable law is permissible if the defect or failure entered into and became a part of the basis of the bargain.

*See* 25 *Del. C.* § 81-414.

3. Statute of limitations for warranties - Unless a period of limitation is tolled under the Delaware Code, an action for breach of any obligation imposed by the DUCIOA must be commenced within the applicable periods of any applicable statute of limitations or statute of repose, but in all events within 6 years after the cause of action accrues.

A cause of action for breach of warranty of quality, regardless of the purchaser's lack of knowledge of the breach, accrues under the DUCIOA:

a. As to a unit, at the time the purchaser to whom the warranty is first made enters into possession if a possessory interest was conveyed, or at the time of acceptance of the instrument of conveyance if a nonpossessory interest was conveyed; and

b. As to each common element, at the time the common element is completed or, if later, as to:

i. a common element that is added to the common interest community by exercise of development rights, at the time the first unit which was added to the condominium

by the same exercise of development rights is conveyed to a bona fide purchaser, or

ii a common element within any other portion of the common interest community, at the time the first unit is conveyed to a bona fide purchaser.

c. If a warranty of quality explicitly extends to future performance or duration of any improvement or component of the common interest community, the cause of action accrues at the time the breach is discovered or at the end of the period for which the warranty explicitly extends, whichever is earlier.

d. During the period of declarant control, the association may authorize an independent committee of the executive board to evaluate and enforce by any lawful means warranty claims involving the common elements, and to compromise those claims. Only members of the executive board elected by unit owners other than the declarant and other persons appointed by those independent members may serve on the committee, and the committee's decision must be free of any control by the declarant or any member of the executive board or officer appointed by the declarant. All costs reasonably incurred by the committee, including attorneys' fees, are common expenses, and must be added to the budget annually adopted by the association under § 81-315 of this title. If the committee is so created, the period of limitation for claims for these warranties begins to run from the date of the first meeting of the committee, regardless of when the period of declarant control terminates.

25 *Del. C.* § 81-416.

## IV. FRAUD AND MISREPRESENTATION

Delaware defines fraud as consisting of five elements, as follows:

1) A false representation of a fact that is important to another;

2) The knowledge or belief that the representation was false, or was made with reckless indifference to the truth, or the individual making the false representation had a special duty to know whether the representation was false;

3) The false representation was made with the intent to induce another to act on the false representation, or to decline to act;

4) The individual that acted, or declined to act, did so in justifiable reliance on the false representation; and

5) The individual that acted, or declined to act suffered damage as a result of the reliance.

Additionally, a false representation may be asserted by words or by conduct. A fact is important if it would cause a reasonable person to decide to act in a particular way, or if the maker of the misrepresentation knew another person would regard it as important.

*See*: *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 472 (Del. 1992); *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del.1983); *Harmon v. Masoneilan Intern, Inc.*, 442 A.2d 487, 499 (Del. 1982); *Twin Coach Co. v. Chance Vought Aircraft, Inc.*, 163 A.2d 278, 283-84 (Del. 1960).

The **Delaware Consumer Fraud Act** (6 *Del. C.* 2501, *et seq.*) covers cases of fraud and misrepresentation in construction disputes. Under the Delaware Consumer Fraud Act, a person can be liable for making false representation or concealing an important fact from another in connection with the advertising or sale of any merchandise with the intention that the other person will rely on said false representation or concealment of an important fact. An individual that violates the statute may be liable even if he or she was unaware that it was false, or that an important fact had been concealed. 6 *Del. C.* § 2511 *et seq.*; *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983); *Nash v. Hoopes*, 332 A.2d 411, 413 (Del. 1975); *In re Brandywine Volkswagen, Ltd.*, 306 A.2d 24, 28-29, *aff'd sub nom. Brandywine Volkswagen, Ltd. v. State*, 312 A.2d 632, 634 (Del. 1973).

Plaintiffs often seek punitive damages when alleging fraudulent misrepresentation. The standard for an award of punitive damages in Delaware is a showing of outrageous conduct with an evil motive or reckless indifference to the rights of others. Punitive damages are only permissible after a finding that the defendant's conduct was "outrageous," because of "evil motive" or "reckless indifference to the rights of others." *Jardel Co., Inc. v. Hughes*, 523 A.2d 518 (Del. 1987) (citing RESTATEMENT (SECOND) OF TORTS § 908 cmt. b (1979). Mere inadvertence, mistake or errors of judgment which constitute mere negligence will not suffice. *Id*.

Delaware recognizes two measures for damages in cases of fraud or deceit and for violations of the Consumer Fraud Act. Depending on how the damages are pleaded in the complaint, or later amended, a plaintiff may recover under either theory.

**A. Benefit of the Bargain Rule**

Under the benefit of the bargain rule a prevailing plaintiff is entitled to recover an amount that will place the party in the same financial position that would have existed had the false representation been true. Thus, an award under this theory will reflect the difference in value between the actual value of the item and the value represented in the fraudulent representation. *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1076 (Del. 1983)(applying benefit-of-the-bargain rule); *Harman v. Masoneilan Intern Inc.*, 442 A.2d 487, 499 (Del. 1982)(damages

limited to direct and proximate losses, which represent loss-of-the-bargain or actual out-of-pocket losses).

### B. Out-of-Pocket Rule

Under the "out-of-pocket" rule, a party that has prevailed on a theory of fraud or deceit is entitled to damages in an amount that is the difference in value between what the party paid and the actual value of the description of the item fraudulently represented. The "out-of-pocket" rule is intended to place the injured party back in the same financial position the party occupied before the transaction took place. *Nye Oderless Incinerator Corp. v. Felton*, 162 A. 504, 510-11 (Del. 1931)(damages are the difference between the real value of the item and the represented value thereof).

## V. STRICT LIABILITY

Delaware has specifically held the Uniform Commercial Code provisions on sales of goods (6 Del. C. § 2-101 et seq.) preempted the field and prevented the extension of the theory of strict liability to the law of sales. *Cline v. Prowler Industries of Maryland*, 418 A.2d 968 (Del. 1980).

## VI. INDEMNITY

### A. Express Indemnity

The general relevant principle of Delaware law holds that "in order for a party to be entitled to indemnification for the results of its own negligence the contract must be crystal clear or sufficiently unequivocal to show that the contracting party intended to indemnify the indemnitee for the indemnitee's own negligence." *Sweetman v. Strescon Industries, Inc*., 389 A.2d 1319, 1321 (Del. Super. 1978).

Under Delaware law as it relates to construction, however, contracts to indemnify a party against the consequences of its own negligence arising out of a construction project are prohibited and unenforceable as being against public policy. The specific statute is 6 *Del. C.* § 2704(a):

> A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement (including but not limited to a contract or agreement with the State, any county, municipality or political subdivision of the State, or with any agency, commission, department, body or board of any of them, as well as any contract or agreement with a private party or entity) relative to the construction, alteration, repair or maintenance in the State of a road, highway, driveway, street, bridge or entrance or walkway of any type constructed thereon in the State, and building, structure, appurtenance or appliance in the State, including

> without limiting the generality of the foregoing, the moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee or indemnitee or others, or their agents, servants and employees, for damages arising from liability for bodily injury or death to persons or damage to property **caused partially or solely by, or resulting partially or solely from, or arising partially or solely out of the negligence of such promisee or indemnitee** or others than the promisor or indemnitor, or its subcontractors, agents, servants or employees, is against public policy and is void and unenforceable, even where such covenant, promise, agreement or understanding is crystal clear and unambiguous in obligating the promisor or indemnitor to indemnify or hold harmless the promisee or indemnitee from liability resulting from such promisee's or indemnitee's own negligence. This section shall apply to all phases of the preconstruction, construction, repairs and maintenance described in this subsection, and nothing in this section shall be construed to limit its application to preconstruction professionals such as designers, planners and architects . . . .

This statute provides broad protections and stands to void any contractual provision which attempts to indemnify a party for harm which results either *partially* or *solely* from the negligence of the indemnitee.

**B. Implied Indemnity**

When an indemnity provision is not expressly found in a construction contract, there may be a right to implied indemnity. The Delaware Supreme Court has held that contractors may be liable on a theory of implied indemnity if they breach "an obligation to perform [their] work with due care" *Diamond State Tel. Co. v. University of Del.*, 269 A.2d 52, 57 (Del. 1970). Specifically, the court identified three factual scenarios where a party could be liable to a third party for implied indemnity: (1) where the party creates a dangerous condition on the third party's premises and injury results; (2) where the party knowingly permits one of its employees to work under dangerous conditions caused by the third party and injury results; and (3) where the party activates a latent dangerous condition created by the third party and injury results. *Id*. at 57-58.

**C. Third-Party Beneficiary**

Ordinarily, only the parties to a contract may sue to enforce the same. However, the law has recognized an exception to the general rule, and, in certain circumstances, will allow a third party beneficiary to have an enforceable right. *See Stuchen v. Duty Free Int'l, Inc.*, 1996 WL 33167249, at *9 (Del. Super.) ("This principle holds sway unless the parties to the contract intended to confer a benefit upon an unrelated party, making them so-called third party beneficiaries.")

In *Insituform of North America, Inc. v. Chandler*, 534 A.2d 257, 268 (Del. Ch.1987), the court stated that "in order for third party beneficiary rights to be created, not only is it necessary that performance of the contract confer a benefit upon third parties that was intended, but the conferring of a *beneficial* effect on such third party-whether it be a creditor of the promisee or an object of his or her generosity-should be a material part of the contract's purpose." *Id.* at 270.

## VII. STATUTE OF REPOSE

Delaware's Statute of Repose is found at 10 *Del. C.* § 8127. The relevant language states:

> (b) No action, whether in or based upon a contract (oral or written, sealed or unsealed), in tort, or otherwise, to recover damages or for indemnification or contribution for damages, resulting:
>
> (1) From any alleged deficiency in the construction or manner of construction of an improvement to real property and/or in the designing, planning, supervision and/or observation of any such construction or manner of construction; or
>
> (2) From any alleged injury to property, real, personal or mixed, arising out of any such alleged deficiency; or
>
> (3) From any alleged personal injuries arising out of any such alleged deficiency; or
>
> (4) From any alleged wrongful death arising out of any such alleged deficiency; or
>
> (5) From any alleged trespass arising out of any such alleged deficiency; or
>
> (6) From any alleged injury unaccompanied with force or resulting indirectly from any such alleged deficiency;
>
> shall be brought against any person performing or furnishing, or causing the performance or furnishing of, any such construction of such an improvement or against any person performing or furnishing, or causing the performing or furnishing of, any such designing, planning, supervision, and/or observation of any such construction or manner of construction of such an improvement, after the expiration of 6 years from whichever of the following dates shall be earliest:
>
> a. The date of purported completion of all the work called for by the contract as provided by the contract if such date has been agreed to in the contract itself;

b. The date when the statute of limitations commences to run in relation to the particular phase or segment of work performed pursuant to the contract in which the alleged deficiency occurred, where such date for such phase or segment of work has been specifically provided for in the contract itself;

c. The date when the statute of limitations commences to run in relation to the contract itself where such date has been specifically provided for in the contract itself;

d. The date when payment in full has been received by the person against whom the action is brought for the particular phase of such construction or for the particular phase of such designing, planning, supervision, and/or observation of such construction or manner of such construction, as the case may be, in which such alleged deficiency occurred;

e. The date the person against whom the action is brought has received final payment in full, under the contract for the construction or for the designing, planning, supervision, and/or observation of construction, as the case may be, called for by contract;

f. The date when the construction of such an improvement as called for by the contract has been substantially completed;

g. The date when an improvement has been accepted, as provided in the contract, by the owner or occupant thereof following the commencement of such construction;

h. For alleged personal injuries also, the date upon which it is claimed that such alleged injuries were sustained; or after the period of limitations provided in the contract, if the contract provides such a period and if such period expires prior to the expiration of 2 years from whichever of the foregoing dates is earliest.

(c) Nothing in this section shall extend or lengthen, nor shall anything in this section be construed or interpreted as extending or lengthening, the period otherwise prescribed by the laws of this State for the bringing of any action covered by this section.

10 *Del. C.* § 8127.

## VIII. ECONOMIC LOSS RULE

Losses related to product liability claims may be categorized generally as (1) personal injuries, (2) physical harm to tangible things, and (3) intangible economic loss resulting from the inferior quality or unfitness of the product to serve adequately the purpose for which it was purchased. Generally, plaintiffs cannot recover in tort for this third category of purely economic losses. This is the Economic Loss Rule. These losses are often the result of a breach of contract and ordinarily should be recovered in contract actions.

The majority rule holds that a plaintiff cannot recover purely economic damages in tort. Delaware follows the majority rule, with an exception for residential construction. The economic loss rule prevents recovery in tort where only the product itself has been damaged. *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194 (Del. 1999). In 1996, the Delaware General Assembly passed the Home Owner's Protection Act. 6 *Del. C.* §§ 3651-52. The Delaware Superior Court has held that, since the enactment of the Act, the Economic Loss Rule no longer precludes negligence actions in cases involving the construction of residential buildings. The Act reads:

> **§ 3652. Economic loss relating to improvements to residential real property.**
>
> No action based in tort to recover damages resulting from negligence in the construction or manner of construction of an improvement to residential real property and/or in the designing, planning, supervision and/or observation of any such construction or manner of construction shall be barred solely on the ground that the only losses suffered are economic in nature.

The Act expressly does away with the economic loss doctrine in certain residential construction cases. Otherwise, where solely economic losses were sought and no damage to persons or other property has occurred, the plaintiff is limited to remedies under the Uniform Commercial Code, and may not proceed in tort. When two separate parts are integrated into one functioning whole, damage to either integrated piece by the other component does not constitute damage to "other property" for which tort recovery is allowed. *Delmarva Power & Light v. Meter-Treater, Inc*., 218 F. Supp.2d 564 (D. Del. 2002).

## IX. EMOTIONAL DISTRESS

Under Delaware law, if a person intentionally or recklessly causes severe emotional distress to another by extreme and outrageous conduct, that person is liable for the emotional distress and for any bodily harm that results from the distress.

According to the Delaware Pattern Jury Instructions:

> Extreme and outrageous conduct goes beyond all possible bounds of decency and would be regarded as atrocious and utterly intolerable in a civilized community. Emotional distress includes all highly unpleasant

> mental reactions, including fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, and worry. Severe emotional distress is so extreme that no reasonable person could be expected to endure it.

Del. P.J.I. Civ. § 14.1 (2000)

## X. LIQUIDATED DAMAGES

Liquidated damages clauses in contracts are enforceable under certain circumstances. They will be upheld where the damages are uncertain and the amount agreed upon is reasonable. They will not be upheld where "unconscionability" exists in determining the amount of the liquidated damages. *Lee Builders, Inc. v. Wells*, 103 A.2d 918 (Del. Ch. 1954).

## XI. DUTY TO MITIGATE DAMAGES

As previously noted, the general measure of damages for one who is harmed by a breach of contract is the amount that will place the party in the same position he or she would have been if the contract had been properly performed. In other words, the measure of damages is the loss actually sustained as a result of the breach of the contract.

The general rule is modified by the rule requiring that the injured party make a reasonable effort, whether successful or not, to minimize the losses suffered. If an injured party fails to make a reasonable effort to mitigate its losses, the damage award to the party must be reduced by the amount a reasonable effort would have produced under the same circumstances. The reduction, however, must be measured with reasonable probability. *See Lynch v. Vickers Energy Corp.*, 429 A.2d 497, 504 (Del. 1981)(plaintiff with out-of-pocket expenses has duty to mitigate them); *McClain v. Faraone*, 369 A.2d 1090, 1093 (Del. 1977)(duty to mitigate losses in liquidation of property at foreclosure sale of injured party); *Nash v. Hoopes*, 332 A.2d 411, 414 (Del. 1975)(duty in contractual breach to mitigate losses when reasonably possible); *Katz v. Exclusive Auto Leasing, Inc.*, 282 A.2d 866, 868 (Del. 1971)(common law of contracts requires injured party to minimize losses); *See also* RESTATEMENT (SECOND) OF CONTRACTS § 350 (1979).

## XII. MECHANIC'S LIENS

A mechanic's lien is a claim against real property for work done or materials supplied for the property, and is available to persons who have performed or furnished labor or material in an amount exceeding $25. 25 *Del. C.* § 2701 *et. seq*. Due in part of their drastic nature, the mechanic's lien statute is strictly construed by Delaware Courts. In *A&E Drywall Services, LLC. v. Eugene A. Delle Donne & Son, LP*, the Delaware Superior Court clarified a number of the requirements for mechanic's lien claims. 2010 WL 4483233 (Del. Super.).

The Court reaffirmed that both verbal and written contracts can give rise to a claim and be the subject of a valid mechanic's lien claim. It should be noted that a written contract is always preferred, and should be obtained whenever possible. In order to assert a Mechanic's Lien based on a written contract, a copy of the written contract must be attached to the mechanic's lien claim. In the case of a verbal contract, the court will require a bill of particulars to be attached to the statement of claim. The bill of particulars does not have to provide a specific breakdown of the contracted labor and materials, but it must provide the total contracted amount.

Sub-contractors hired by a general contractor are required to include the general contractor as a party to the mechanic's lien claim. Similarly, the Court held that subcontractors who contract out to additional sub-contractors would also be essential parties to the suit. The basis for the requirement is that "the general contractor is the only one who would know of the labor or materials provided by the subcontractor and the prices agreed. Further, the general contractor may be the only one who could allege and prove that the subcontractor's claim is unfounded or has been paid, or make any other defense and avoid the lien." *Id*. at *5.

Strict compliance with the statutory requirements and timelines is imperative. Note that the statute does not permit providers of rental equipment to file a lien. *Griffin Dewatering Corp. v. B.W. Knox Constr. Corp.,* 2001 WL 541476 (Del. Super. Ct. May 14, 2001); 25 *Del. C.* § 2702.

Based on the Court's strict interpretation of the mechanic's lien statute, contractors, subcontractors and materialmen who operate in Delaware should be aware of the statute. The applicable portions are reproduced below:

> **§ 2702. Persons entitled to obtain lien.**
>
> (a) It shall be lawful for any person having performed or furnished labor or material, or both, to an amount exceeding $25 in or for the erection, alteration or repair of any structure, in pursuance of any contract, express or implied, with the owners of such structure or with the agent of such owner or with any contractor who has contracted for the erection, alteration or repair of the same and for the furnishing of the whole or any part of the materials therefor, including any person who has performed or furnished labor or material, or both, for or at such structure under a contract with or order from any subcontractor to obtain a lien upon such structure and upon the ground upon which the same may be situated or erected.
>
> (b) Liens may also be obtained in connection with: labor performed and materials furnished in plumbing, gas fitting, paper hanging, paving, placing iron works and machinery of every kind in mills and factories, bridge building, the erection, construction and filling in of wharves, piers and docks and all improvements to land by drainage, dredging, filling in, irrigating and erecting banks and the services rendered and labor performed and materials furnished by architects.

**§ 2703. Contract requirements to obtain lien based solely on improvement to land.**

No lien shall attach in case the improvements are to the land alone, unless a contract in writing, signed by the owner or owners thereof, setting forth the names of all parties to the contract and containing a description by the metes and bounds of the land to be affected and by a statement of the general character of the work to be done, and of the total amount to be paid thereunder, and the amounts of the partial payments, together with the time when such payments shall be due and payable.

**§ 2705. Duty of contractor to provide list of persons furnishing labor and material; effect of failure to provide list.**

The owner of any structure built, repaired or altered by any contractor or subcontractor may require such contractor or subcontractor from time to time to furnish and submit to the owner complete and accurate list in writing of all persons who have furnished labor or material, or both, in connection therewith, and who may be entitled to avail themselves of the provisions of this chapter. Should any such contractor or subcontractor fail to furnish such list for 10 days after demand made therefor by such owner, the contractor or subcontractor shall be entitled to receive no further payments from the owner until such list be furnished and shall not be entitled to avail himself or herself of any of the provisions of this chapter.

**§ 2706. Waiver of lien.**

(a) Persons entitled to avail themselves of the lien provided for in this chapter shall not be considered as waiving the same by granting a credit or receiving notes or other securities, unless the same be received as payment or the lien expressly waived, but the sole effect thereof shall be to prevent such persons from availing themselves of the liens provided for in this chapter until the expiration of the time agreed upon.

(b) Notwithstanding the provisions of any other law, except as provided in this subsection: Any contract, any agreement or understanding whereby the right to file or enforce any lien created under this chapter is waived, shall be void as against public policy and wholly unenforceable. This section shall not preclude a requirement for a written waiver of the right to file a mechanics' lien executed and delivered by a contractor, subcontractor, material supplier or laborer simultaneously with or after payment for the labor performed or the materials supplied has been made to such contractor, subcontractor, material supplier or laborer nor shall this section be applicable to a written agreement to subordinate, release or satisfy all or part of such lien made after a statement of claim has been filed under this chapter. Nothing in this subsection shall amend, exempt, limit or qualify the provisions of § 2707 of this title.

**§ 2707. Payment of contractor by owner of residence as a defense; certification of payment for labor and materials or release of liens by contractor.**

No lien shall be obtained under this chapter upon the lands, structure, or both, of any owner which is used solely as a residence of said owner when the owner has made either full or final payment to the contractor, in good faith, with whom he contracted for the construction, erection, building, improvement, alteration or repair thereof. Prior to or simultaneous with the receipt of any full or final payment by the contractor, the contractor must provide the owner either:

(1) A notarized, verified written certification that the contractor has paid in full for all labor performed and materials furnished to the date of such full or final payment in or for such construction, erection, building, improvement, alteration or repair or

(2) A written release of mechanics' liens signed by all persons who would otherwise be entitled to avail themselves of the provisions of this chapter, containing a notarized, verified certification signed by the contractor that all of the persons signing the release constitute all of the persons who have furnished materials and performed labor in and for the construction, erection, building, improvement, alteration and repair to the date of the release and who would be entitled otherwise to file mechanics' liens claims.

Failure of the contractor to provide the owner a written certification or a release of mechanics' liens at such time shall constitute sufficient cause for the immediate suspension, revocation or cancellation of the contractor's occupational and business licenses. If the owner has not made full payment in good faith to such contractor, the lien may be obtained in accordance with this chapter, but it shall be a lien only to the extent of the balance of the payment due such contractor, which balance or portion shall be payable pro rata among the claimants who perfect liens. Payments made to the contractor by the owner after service of process, as provided in § 2715 of this title, shall not be deemed to be "in good faith."

**§ 2708. Fringe benefits.**

A mechanics' lien may be used to secure payment of any unpaid amounts due under contract from the contractor arising from a subcontractor's labor including payment of fringe benefit items. As used in this section, the phrase "fringe benefit items" shall have the same meaning as the phrase "benefits or wage supplements" defined in § 1109(b) of Title 19.

## Subchapter II. Enforcement in Superior Court

### § 2711. Time for filing of statement of claim.

(a)(1) A contractor who:

a. Has made that contractor's contract directly with the owner or reputed owner of any structure; and

b. Has furnished both labor and material in and for such structure, or has provided construction management services in connection with the furnishing of such labor and material, in order to avail himself or herself of the benefits of this subchapter, shall file that contractor's statement of claim within 180 days after the completion of such structure.

(2) For purposes of this subsection, and without limitation, a statement of claim shall be deemed timely if it is filed within 180 days of any of the following:

a. The date of purported completion of all the work called for by the contract as provided by the contract if such date has been agreed to in the contract itself;

b. The date when the statute of limitations commences to run in relation to the particular phase or segment of work performed pursuant to the contract, to which phase or segment of work the statement of claim relates, where such date for such phase or segment has been specifically provided for in the contract itself;

c. The date when the statute of limitations commences to run in relation to the contract itself where such date has been specifically provided for in the contract itself;

d. The date when payment of 90% of the contract price, including the value of any work done pursuant to contract modifications or change orders, has been received by the contractor;

e. The date when the contractor submits that contractor's own final invoice to the owner or reputed owner of such structure;

f. With respect to a structure for which a certificate of occupancy must be issued, the date when such certificate is issued;

g. The date when the structure has been accepted, as provided in the contract, by the owner or reputed owner;

h. The date when the engineer or architect retained by the owner or reputed owner, or such other representative designated by the owner or reputed owner for this purpose, issues a certificate of completion; or

i. The date when permanent financing for the structure is completed.

(b) All other persons embraced within this chapter and entitled to avail themselves of the liens herein provided shall file a statement of their respective claims within 120 days from the date from the completion of the labor performed or from the last delivery of materials furnished by them respectively. For purposes of this subsection, and without limitation, a statement of claim on behalf of such person shall be deemed timely if it is filed within 120 days of either of the following:

(1) The date final payment, including all retainage, is due to such person; or

(2) The date final payment is made to the contractor:

a. Who has contracted directly with the owner or reputed owner of any structure for the erection, alteration or repair of same; and

b. With whom such person has a contract, express or implied, for the furnishing of labor or materials, or both, in connection with such erection, alteration or repair.

**§ 2712. Requirements of complaint or statement of claim.**

(a) Every person entitled to the benefits conferred by this chapter and desiring to avail himself or herself of the lien provided for in this chapter, shall, within the time specified in this chapter, file a statement of claim, which may also serve as a complaint when so denominated, in the office of the Prothonotary of the Superior Court in and for the county wherein such structure is situated.

(b) The complaint and/or statement of claim shall set forth:

(1) The name of the plaintiff or claimant;

(2) The name of the owner or reputed owner of the structure;

(3) The name of the contractor and whether the contract of the plaintiff-claimant was made with such owner or his agent or with such contractor;

(4) The amount claimed to be due, and, if the amount is not fixed by the contract, a statement of the nature and kind of the labor done or materials furnished with a bill of particulars annexed, showing the kind and amount of labor done or materials furnished or construction management services provided; provided, that if the amount claimed to be due is fixed by the contract, then a true and correct copy of such contract, including all modifications or amendments thereto, shall be annexed;

(5) The time when the doing of the labor or the furnishing of the materials was commenced;

(6) The time when the doing of the labor or the furnishing of the material or the providing of the construction management services was finished, except that:

a. With respect to claims on behalf of contractors covered by § 2711(a) of this title, the date of the completion of the structure, including a specification of the act or event upon which the contractor relies for such date, and

b. With respect to claims on behalf of other persons covered by § 2711(b) of this title, the date of completion of the labor performed or of the last delivery of materials furnished, or both, as the case may be, or a specification of such other act or event upon which such person relies for such date.

(7) The location of the structure with such description as may be sufficient to identify the same;

(8) That the labor was done or the materials were furnished or the construction management services were provided on the credit of the structure;

(9) The amount of plaintiff's claim (which must be in excess of $25) and that neither this amount nor any part thereof has been paid to plaintiff; and

(10) The amount which plaintiff claims to be due him on each structure.

(11) The time of recording of a first mortgage, or a conveyance in the nature of a first mortgage, upon such structure which is granted to secure an existing indebtedness or future advances provided at least 50% of the loan proceeds are used for the payment of labor or materials, or both, for such structure.

(c) The complaint and/or statement of claim shall be supported by the affidavit of the plaintiff-claimant that the facts therein are true and correct.

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