Updates in Construction Law: A Review of Key Construction Law Decisions in the Past Year

September 14, 2020

2:00 p.m. – 4:00 p.m.

CT Bar Association

Webinar

CT Bar Institute Inc.

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NY: 2.0 CLE Credits (AOP)

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Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging I acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

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Updates in Construction Law: A Review of Key Construction Law Decisions in the Past Year (2020CLC-CL03)

Agenda

40 min: Ben Berger, Di Gioia & Berger: Discussion of key case decisions relating to Arbitration and Design Professionals

40 min: Ray Garcia, Garcia & Milas: Discussion of COVID impacts on the Construction Industry (including practice suggestions)

40 min: Niel Franzese, Robinson & Cole: Discussion of key case decisions relating to Dunkin' Donuts Ballpark

Faculty Biographies

Benjamin J. Berger, Di Gioia Berger LLC

Ben is an Owner and Member of Di Gioia Berger, LLC. He is a member of the Connecticut Bar Association and the Hartford County Bar Association and serves on the Executive Committee of the Connecticut Bar Association's Construction Law Section. He is admitted to practice in the State of Connecticut, the U.S. District Court, District of Connecticut and the Commonwealth of Massachusetts. He is the former co-chair of the Construction Section of the Connecticut Bar Association's Young Lawyers' Committee, and has been a participant in the Hartford College Construction Institute.

Ben obtained his J.D. from Boston University School of Law in 2002.

Niel P. Franzese, Robinson+Cole

Niel Franzese is an attorney with Robinson+Cole's Construction Practice Group and represents clients in all areas of the industry, including owners, general contractors, subcontractors, sureties, and design professionals with respect to contract drafting and negotiation, and dispute resolution. Niel routinely assists clients in the drafting and negotiation of design, construction and professional service contracts for both public and private projects in a wide range of industries. Niel handles claims of all types which arise during a project, including allegations of defective design and construction, claims concerning the allocation of unforeseen costs, delay claims, mechanics' liens, bid disputes, and surety bond claims and claim management.

Raymond A. Garcia, Garcia & Milas PC

Mr. Garcia is the founding principal of the firm. He has enjoyed the distinction of being named to the Connecticut Super Lawyers® list since 2006 for Construction Litigation. He combines 10 years of hands-on construction industry experience (described below) with more than 32 years of legal experience litigating complex commercial construction and franchise disputes. Ray has tried 50 construction cases to conclusion before courts and juries. He has tried to conclusion over 30 franchise cases. He has conducted successful appeals before state and federal appellate courts. Some of the cases he has tried and subsequent appeals are described below. He has settled many cases in which individual clients have recovered in excess of $20,000,000. The cases span a wide range of subjects from public works contract claims for additional compensation to claims based on the Connecticut Unfair Trade Practices including franchise and bad faith litigation, based on common law and statutory principles. The cases also involve working out defaulted contractors and negotiating resolution of claims under general indemnity agreements. The trials have been conducted before arbitration panels, juries or to the court sitting without a jury.

Mr. Garcia has lectured and written extensively on many subjects. Please contact the firm for a list and copies of articles and seminar papers. Most recently he authored articles about the application of the Due Process Clause of the United States Constitution to arbitral awards of punitive damages, use of chess clock arbitrations and mediation ethics and tactics.

Professional Associations: He is a member of the American Arbitration Association's Connecticut Policy Board and on the National Panel of Arbitrators for large commercial cases. He also serves as an Arbitrator by appointment for the American Dispute Resolutions Center.

He is currently a member of the ABA Franchise Law Section, the ABA Litigation Section, the Construction Industry Forum, the ADR Committee and the Construction Litigation Committees of the ABA Litigation Section. He is a member of the Associated General Contractors of America's National Surety and Bonding Committee. He is a past President and director of the Connecticut Building Congress and a member of its prestigious Industry Practice Committee.

Education: Ray attended John Marshall Law School in Chicago, Illinois. He was one of the most honored members of his class. He served as an editor of the John Marshall Journal of Practice and Procedure, the school's law review, for two years. He was elected to the Gavel Society and other prestigious leadership organizations.

When he returned to Connecticut from Chicago, he joined Pullman, Comley, Bradley and Reeves in Bridgeport, Connecticut as an associate. In 1981 he formed Garcia and Associates, P.C., forerunner of Garcia and Milas, P.C.

Donald W. Doeg, Updike Kelly & Spellacy PC

DONALD W. DOEG is shareholder of Updike, Kelly & Spellacy, P.C., where he devotes the majority of his practice to construction and design law. He chairs the firm's construction law practice group and co-chairs the litigation section of the firm. Mr. Doeg is also a Professional Engineer. He is the current Chair of the CBA's Construction Law Section. He is a frequent speaker before construction industry groups on topics related to his areas of practice. Mr. Doeg received his B.S. degree from Duke University, his M.B.A. degree from the University of Southern Mississippi and his J.D. degree from the University of Connecticut. He is a member of the State and Federal Bars of Connecticut, Massachusetts and Rhode Island. He is a member of the State of Connecticut Codes and Standards Committee. He is the past President and currently on the Board of Directors of the Connecticut Society of Professional Engineers and a member of the Board of Directors of ACEC of Connecticut.

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Updates in Construction Law: A Review of Key Construction Law Decisions in the Past Year

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Presenters

- Construction Law – Arbitration and Design Professionals
  - Ben Berger, Di Gioia Berger
- COVID-19 and its Impacts to the Construction Industry
  - Raymond A. Garcia, Garcia & Milas
- Dunkin' Donuts Park Cases and Other Notable Decisions
  - Niel Franzese, Robinson+Cole
- Moderator
  - Donald W. Doeg, Updike, Kelly & Spellacy, PC

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September 14

Construction Law – Arbitration and Design Professionals

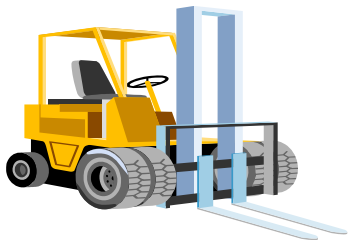
Ben Berger, Di Gioia Berger

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CONSTRUCTION LAW-ARBITATION

Asselin & Vieceli P'ship, LLC v. Washburn

-Key Question: Restricted v. Unrestricted Submission
-Arbitrator afforded wide latitude and authority
-Failure to specify a set of rules (e.g. AAA) means arbitrator not bound to follow certain guidelines
- Manifest disregard of the law a very limited analysis

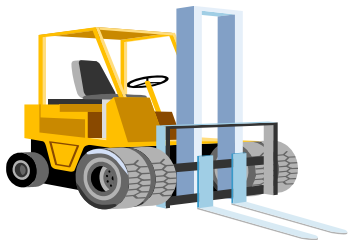


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CONSTRUCTION LAW-ARBITATION

Clasby v. Zimmerman

-Failure to file a timely application to vacate modify or correct an award required trial court to confirm
-Once again, the agreement to arbitrate given great weight, even though unusual
-Failure to specify a set of rules (e.g. AAA) means arbitrator not bound to follow certain guidelines

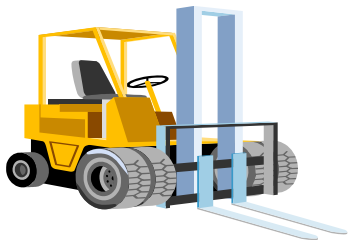


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CONNECTICUT LEGAL CONFERENCE
CONSTRUCTION LAW-ARBITATION

330 R.R. Ave., LLC v. JCS Constr. Grp., Inc.

-Courts will honor parties' intent to arbitrate
-Conflicts within the parties' agreement will not preclude arbitration
-Public policy questions adjudicated by reviewing court after award rendered
-Waiver requires a showing of substantial prejudice

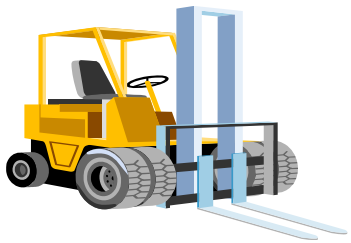


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CONNECTICUT LEGAL CONFERENCE CONSTRUCTION LAW- ARBITRATION/DESIGN PROFESSIONALS

Girolametti v. Michael Horton Assocs., Inc.

-GC is in privity with its subs
-Outcome of arbitration between Owner/GC res judicata to the subs in privity with GC
-Rebuttable Presumption that any claims Owners had against subs could have been raised against GC

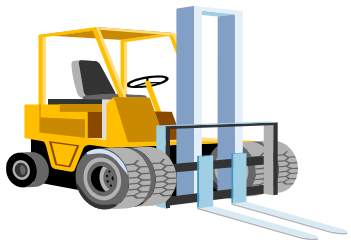


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CONNECTICUT LEGAL CONFERENCE CONSTRUCTION LAW-DESIGN PROFESSIONALS

Crosskey Architects, LLC v. Poko Partners, LLC

-Court willing to pierce corporate veil in construction payment dispute
-Even if project does not go forward, quantum meruit damages still allowable because developer still received a benefit
-Lack of legitimate purpose is not an element of veil-piercing under identity theory

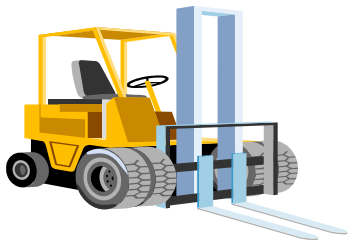


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CONNECTICUT LEGAL CONFERENCE CONSTRUCTION LAW-DESIGN PROFESSIONALS

Morganti Group, Inc. v. Stamford Phase Four JV, LLC

-Court review of the economic loss rule
-Rule generally states that a plaintiff cannot recovery in tort for a purely economic injury
-Court denied motion and pointed to a test of foreseeability
-Also pointed to public policy as a grounds to allow claim

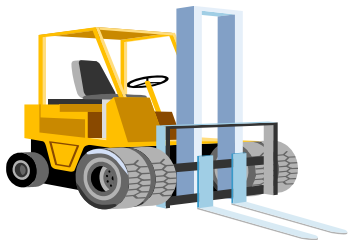


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CONNECTICUT LEGAL CONFERENCE CONSTRUCTION LAW-DESIGN PROFESSIONALS

Tancreti Construction, LLC. City of Stamford

-Third party claim by City against design professional
-Court found no implied warranty of fitness running from DP to Owner



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COVID-19 and its Impacts to the Construction Industry

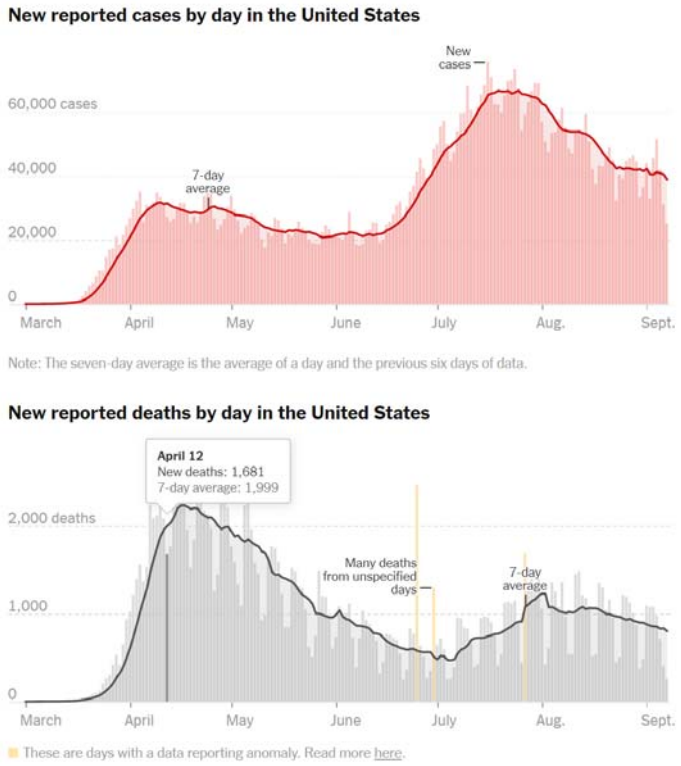
Raymond A. Garcia, Garcia & Milas

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The COVID-19 Pandemic: Some Numbers

- United States Case Count:
  (as of September 8, 2020)
  - 6,317,200 total cases.
  - 189,000 total deaths.



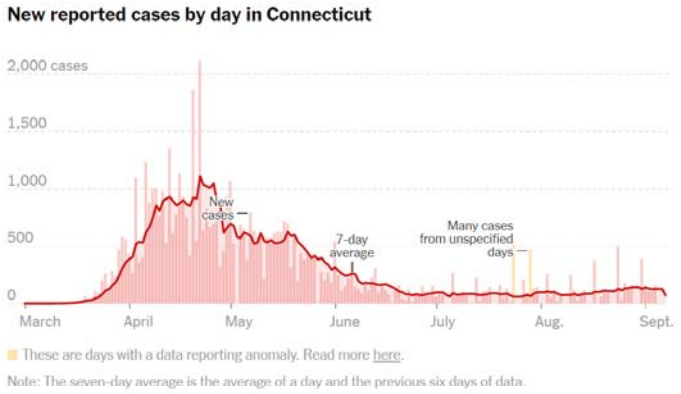
*Data as charts provided by the New York Times
https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html

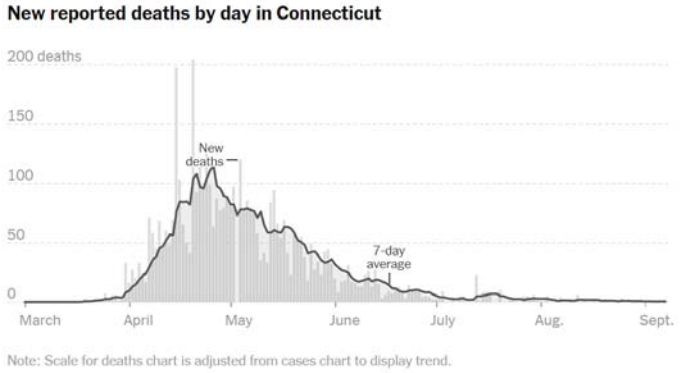
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The COVID-19 Pandemic: Some Numbers

- Connecticut Case Count:
  (as of September 8, 2020)
  - 53,395 total cases.
  - 4,468 total deaths.

*Data as charts provided by the New York Times
https://www.nytimes.com/interactive/2020/us/connecticut-coronavirus-cases.html





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Impact on the Construction Industry

- COVID-19 has changed the working conditions of virtually every construction project.
- Contractors must now:
  - Employ jobsite screening protocols;
  - Operate under state and local social distancing rules;
  - Consider the use of barriers (plastic sheathing, etc.);
  - Provide additional santization facilities;
  - Employ cleansing practices;
  - Provide necessary PPE (N95 respirators);
  - Provide employee training;
  - Shutdown sites in the event of an outbreak;
  - Engage in contact tracing;

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Worksite Signage



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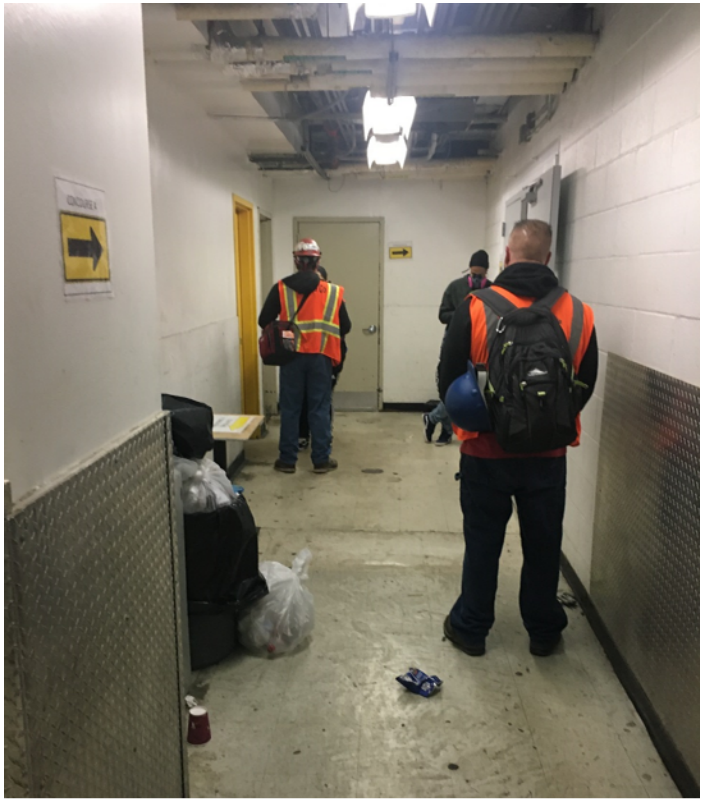
Worksite Sanitization

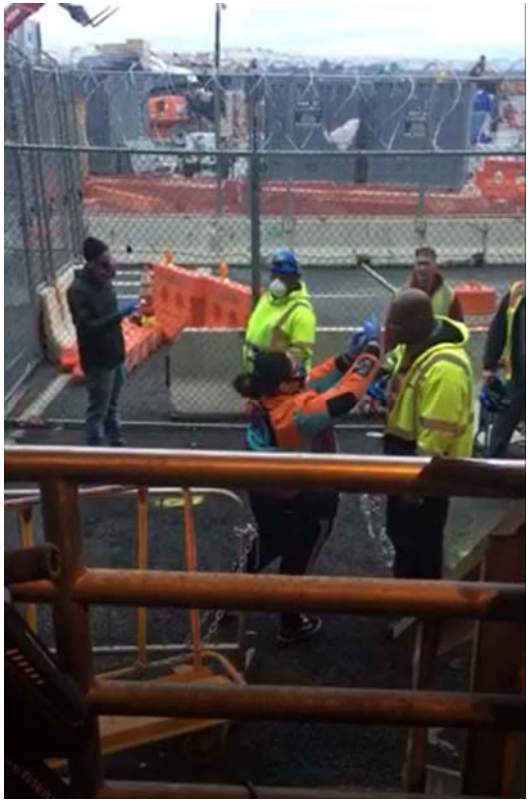




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Worksite Access and Screening





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The COVID-19 Issue

- The Impact:
  - Project Delays
  - Cost Overruns
- The Question:
  - Who is responsible for these project delays and cost overruns?

COVID-19 as a Changed Condition

- "[a] differing site condition is generally a subsurface or other unknown physical condition at a site that differs materially from that indicated in the public contract or from that which is ordinarily encountered, which leads to a material change in the cost of construction." 64 Am. Jur. 2d Public Works and Contracts § 166

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COVID-19 as a Barrier to Site Access

- "In Connecticut, it is well settled that [a] contractor shall be permitted to proceed with his construction in accordance with the contract and that he shall be given possession of the premises to enable him to do so" *The implied obligation of site access*, 13 Conn. Prac., Construction Law § 1:3

Insurance Considerations

- First Party Coverage vs Third Party Coverage.
- Generally for coverage to trigger interruption coverage there must be:
  - Direct physical Loss or damage to covered property;
  - Arising out of a covered peril;
  - Resulting in the suspension of business operations.
- Policy exclusions:
  - Pollution/Contaminant Exclusion;
  - Virus or Bacterial Exclusion;
  - Nuclear, Biological, Chemical or Radiological Materials Exclusion (NBCR);or
  - Communicable Disease exclusion.

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Insurance Considerations: Continued

- Notable COVID-19 Cases:
  - *Gavrilides Management Co. LLC v. Michigan Insurance Co.*, Case No. 20-258-CB-C30 (Mich. Cir. Ct., Ingham Cty.):
    - Holding that an order preventing customers from dining-in at a restaurant was not a "direct physical loss" and the phrase "accidental direct loss of or damage to property" required "some physical alteration to or physical damage or tangible damage to the integrity of the building."
  - *Turek Enterprises, Inc., d/b/a Alcona Chiropractic v. State Farm Mutual Automobile Insurance Company, State Farm Fire and Casualty Company,* No. 20-11655, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020)
    - Dismissing Plaintiff's claim for loss of income and extra expenses arising from the suspension of operations in compliance with State Order. COVID-19 never entered Plaintiff's premises and the plaintiff did not "demonstrate some tangible damage to Covered Property" as required by the policy.

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Dunkin' Donuts Park Cases and Other Notable Decisions

Niel Franzese, Robinson+Cole

September 14

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Of Note

We have prepared this presentation on the basis of the most recent information available, but you should conduct your own research or consult with counsel and verify that this information not changed before relying on this information.

This presentation is intended to raise broad-based considerations; the information in this presentation does not constitute legal advice. If legal advice or other assistance is required, please contact the attorney of your choice directly.

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The Dunkin’ Donuts Park Cases



The Dunkin' Donuts Park Cases





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DDP Cases Reported in the Construction Section Case Law Summaries – Damages

- Centerplan Construction Company, LLC v. City of Hartford, Superior Court, Judicial District of Hartford, Docket No. X07-HHD-CV-16-6069748, 2019 WL 3219502 (June 18, 2019) (Moukawsher, J.)

Damages

ADD

Contract amount $ *Fixed sum*

Value of the contract changes $ *Fixed sum*

Reasonable value of construction change directives $____

SUBTOTAL $____

SUBTRACT

Amounts already paid by Hartford $ *Fixed sum*

EQUAL DAMAGES: TOTAL: $____

DDP Cases Reported in the Construction Section Case Law Summaries – Contract Interpretation

- Centerplan Constr. Co., LLC v. City of Hartford, No. X07HHDCV16-6069748S, 2019 WL 3406815, at *1 (Conn. Super. Ct. June 26, 2019) (Moukawsher, J.)

  "Direct damages refer to those which the party lost from the contract itself – in other words, the benefit of the bargain – while consequential damages refer to economic harm beyond the immediate scope of the contract."

DDP Cases Reported in the Construction Section Case Law Summaries – Bonds

- Arch Ins. Co. v. Centerplan Construction Co., LLC, 2019 WL 554868 (D. Conn. Feb. 12, 2019)
- Arch Ins. Co. v. Centerplan Construction Co., LLC, 368 F. Supp. 3d 350, (D. Conn. 2019)
- Arch Ins. Co. v. Centerplan Construction Co., LLC, 2019 WL 3080920 (D. Conn. July 15, 2019)

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Other Notable Decisions from the Case Law Summaries

- Hanley Construction, LLC v. Crystal Ballroom of New Britain, LLC, No. X07HHDCV176078056S, 2019 WL 1281406 (Conn. Super. Feb. 4, 2019)

- Pleasant Beginnings, LLC v. Campisi, No. CV166027026S, 2019 WL 1594787 (Conn. Super. March 11, 2019)

Questions / Comments?



Ben Berger
Di Gioia Berger



Raymond A. Garcia
Garcia & Milas



Niel Franzese
Robinson+Cole

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CONSTRUCTION LAW SECTION

2019 CONSTRUCTION CASE LAW SUMMARY & LEGISLATIVE REVIEW

Laurann Asklof, Esq.
Executive Editor

Paul R. Fitzgerald, Esq.
Assistant Editor

INTRODUCTION

The 2019 Construction Case Law Summary & Legislative Review was prepared by members of the Construction Law Section of the Connecticut Bar Association. Its purpose is to provide the practitioner with a comprehensive review of cases and legislation for the year 2019 that affect the practice of construction law in Connecticut.

This year's review was edited by Laurann Asklof of Shipman & Goodwin, LLP and Paul Fitzgerald of Michelson, Kane, Royster & Barger, P.C. The individual sections were authored by the following:

I. **Bids** - Beth N. Mercier of Michelson, Kane, Royster & Barger, P.C.

II. **Arbitration** - Lauren L. Crowe and Jane Milas of Garcia & Milas, P.C.

III. **Contract Interpretation** - Rory M. Farrell of McElroy, Deutsch, Mulvaney & Carpenter, LLP

IV. **Design Professionals** - Pascal F. Naples of Shipman & Goodwin LLP

V. **Mechanic's Lien** - Paul R. Fitzgerald of Michelson, Kane, Royster & Barger, P.C.

VI. **Bonds** - Dennis C. Cavanaugh, Martin A. Onorato and Choity R. Khan of Robinson & Cole

VII. **Damages** - Megan Y. Carannante, Johanna Katz and Thomas Lambert of Pullman & Comley, LLC

VIII. **Home Improvement Act** - Michael J. Barnaby of Law Offices of Michael J. Barnaby, LLC

IX. **CUTPA** - Andrea L. Gomes of Shipman & Goodwin LLP

X. **Statutes of Limitation** - Benjamin Schimelman of Gfeller Laurie LLP

XI. **Legislation** - Kevin W. Munn of Murtha Cullina LLP

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I. BIDS

Gemalto Cogent, Inc. v Connecticut State Department of Emergency Services, Superior Court X07-HHD-CV-19-6112340S, 2019 WL 4733537(Conn. Super. 2019) (Moukawsher, J.)

[Trial court denied motion to dismiss Complaint for lack of standing where contractor alleged no-bid contract and sufficient facts of favoritism had subverted bidding process.]

The State filed a Motion to Dismiss Gemalto Cogent, Inc.'s, ("Gemalto") complaint alleging favoritism on the grounds of lack of standing and failure to exhaust administrative remedies. Gemalto had alleged that the state replaced it with another contractor in a no-bid secret contract which increased state costs and harmed the public. In denying the motion to dismiss, the trial court relied on the holding in *Unisys v. Department of Labor*, 220 Conn. 689 (1991) where the bidding requirements were drafted so narrowly that only a single vendor could qualify and the Connecticut Supreme Court held that the contractor had standing and no administrative remedy to exhaust because the complaint sufficiently alleged favoritism. The trial court reiterated that a party alleging financial loss and a subversion of the purpose and integrity of the bidding process has standing and no remedies to exhaust.

Town of New Milford v. Standard Demolition Service, Inc., Superior Court LLI-CV-16-6013214S, 2019 WL 7812388 (Conn. Super. 2019) (Shaban, J.)

[Trial court holds that Contractor cannot prove element of reliance in negligent misrepresentation claim against Town based on bid information as to site conditions, where bid and contract contain disclaimer provisions.]

The Town of New Milford brought a breach of contract action against Standard Demolition Service, Inc. ("Standard") regarding the demolition, abatement and remediation of an abandoned industrial building. In its counterclaim for negligent

misrepresentation, Standard alleged that the City expressly represented in the bid that the steel was not contaminated by PCBs so that the steel, once demolished could be recycled. In reliance on this information, Standard's bid did not provide for the remediation, abatement, and disposal of the contaminated structural steel on the site.

The trial court found that the Town made available all public information it had on the history of the work done and governmental actions taken during the two prior phases of the project. The trial court further noted that the bid documents and the contract made express references to the fact that the bidder was responsible for investigating the physical condition of the site, the interpretation of any historical data provided by the City relative to the site, and that the City provided no warranties relative to the character or condition of the site or materials or as to the accuracy of the information provided. The disclaimer provision in the bid provided,

> 1. [t]hese Bid Documents may reference or include as attachments various reports, surveys or drawings. Such sources of information were obtained for the OWNER'S [i.e., the plaintiff's] use and are offered in good faith for information only, solely for the purpose of placing the CONTRACTOR in receipt of all information known to the OWNER at this time, unless otherwise provided. The OWNER does not warrant or represent that the information contained in these reports is complete or accurate, but only that it constitutes a disclosure of the information known to the OWNER at this time regarding these conditions.

The trial court held that the disclaimer provisions in the bid and contract documents were sufficient to defeat a claim of negligent misrepresentation as to the site conditions.

II. ARBITRATION

Clasby v. Zimmerman, 191 Conn. App. 143, 213 A.3d 1144 (2019)

[The Appellate Court reversed the Trial Court's denial of the contractor's application to confirm an earlier arbitration award and held that a subsequent arbitration award that modified the previous award was binding.]

The plaintiffs brought claims against defendant Bradford Estates, LLC, the general contractor hired to perform remodeling work on the plaintiffs' shoreline home after Hurricane Sandy damaged it.

Following years of litigation, the parties stipulated to resolve their differences through private arbitration and agreed on a three-member arbitration panel, including an engineer and building professional, both of which would supervise the defendant's completion of the remaining work on the plaintiffs' home. The stipulation provided that the plaintiffs would pay "any remaining amounts determined by the [a]rbitrators to be due for the completion of the [p]roject…"

On February 4, 2017, the arbitration panel issued an award titled "Interim Award/Final Award" which included a spreadsheet listing project items that were not yet completed. The arbitrators indicated "the award should be viewed as final as to allocations of costs of items proven to date, but interim as to cost to complete."

Neither party filed an application to vacate, modify, or correct the arbitration award within the statutory period and the defendant resumed its work on the plaintiffs' home.

On August 23, 2017, the arbitration panel issued a second award, "Interim Award (revised)" in an attempt to resolve the parties' dispute over cabinetry work referenced on the prior award's spreadsheet. The second award provided:

> Despite numerous discussions between the [supervising members of the arbitration panel] and the [defendant], [the defendant] continues to insist to the [arbitration panel] that its [February 4, 2017 award] requires that it be paid $76,500 for cabinetry work, whether or not this amount is ever proven as the actual cost of the cabinetry. The [defendant's] position is groundless and untenable. While the [arbitration panel] found there was a contract between the parties, which included a "total price," because the actual costs were unknown, this price was only a placeholder for whatever the actual construction costs turned out to be.

According to the arbitration panel, the $76,500 noted on the spreadsheet was representative of costs paid by plaintiffs but any award as to future costs were "subject to change as any construction cost might be, for such items and events as change orders, unforeseen and/or hidden costs, and delay." The original amount of cabinetry work planned was reduced after a design change.

As with the previous award, neither party filed a timely application to vacate, modify, or correct the arbitration panel's decision. On November 22, 2017, the defendant filed an application to confirm the first award and requested the court "vacate any such subsequent order(s) from the arbitration panel which are contrary to the terms of the award originally rendered." The plaintiff objected, arguing the defendant had misinterpreted the first award.

The Trial Court denied the application to confirm the February 4, 2017 award and held, because the arbitration panel had broad authority to address the issues, the defendant could not "deprive the arbitrators of the very authority granted to them." The defendant appealed arguing that because the defendant filed its application to confirm the February 4, 2017 award within the one-year period and neither party filed applications to vacate, modify, or correct the award within the thirty-day period provided by statute, the decision to deny the application was in error. The Court agreed.

The defendant additionally claimed that in denying its application to confirm the first award, the Trial Court validated the second award, which modified the amount for the cabinetry work. The Court rejected this argument finding that in failing to challenge the second award, the defendant had consented to its terms, and that both parties had notice that the amounts on the spreadsheet from the first award were subject to change.

Asselin & Vieceli P'ship, LLC v. Washburn, 194 Conn. App. 519, 221 A.3d 875 (2019)

[The Appellate Court affirmed the Trial Court's denial for a trial de novo and granting of application to confirm the arbitration award, holding that the arbitrator did not exceed her powers or manifestly disregard the law and the contractor failed to preserve certain claims for appeal.]

At issue in this case was the construction of a bulkhead at a marina in Old Lyme. The plaintiff property owner initiated a court action against the defendant contractor claiming negligence, innocent misrepresentation, and violation of the Connecticut Unfair Trade Practices Act ("CUTPA"). The defendant was granted its motion to stay pending arbitration.

The parties signed an agreement indicating that the arbitration would "proceed on an ad hoc basis, without an administrating organization." The arbitrator awarded $275,607 to the plaintiff, finding that defendant was negligent in the bulkhead's construction and that his negligence caused its total loss.

After the decision was issued, the defendant filed a "Demand for Trial De Novo." The plaintiff objected to the defendant's demand and filed an application to confirm the arbitration award. The Trial Court denied the defendant's demand and confirmed the arbitration award and the defendant appealed.

On appeal, the defendant claimed the award should be vacated because: (1) the arbitrator failed to affirm the mandatory oath required by C.G.S. § 52-414(d); (2) the plaintiff failed to follow C.G.S. § 52-421(a) by not filing documents required to be submitted with an application to confirm the award; and (3) the arbitrator exceeded or failed to properly execute her powers under C.G.S. § 52-418(a)(4).

The Appellate Court declined to address the first two claims but considered the defendant's claim that the arbitrator "exceeded or imperfectly executed her powers by issuing the award in derogation of § 52-418(a)(4)."

The Court first examined whether the parties' submission to arbitration was restricted or unrestricted and determined that the agreement was unrestricted because the parties had agreed upon an arbitrator and failed to include any limitations on the issues, reservations of rights, or language regarding court review.

In the case of an unrestricted submission to arbitration, the Court's review is limited if: "(1) the award rules on the constitutionality of a statute… (2) the award violates clear public policy… [and] (3) the award contravenes one or more of the statutory proscriptions of § 52-418." *Id*. at 528 (quoting *Harty v. Cantor Fitzgerald & Co.*, 275 Conn. at 81, 881 A.2d 139; internal quotations omitted).

The defendant first argued that the arbitrator failed to conduct the arbitrations under the American Arbitration Association's ("AAA") construction industry rules. However, because the arbitration agreement did not reference the AAA's rules or any other rule set, the Court found the arbitrator did not exceed her authority.

Second, the defendant argued that the arbitrator failed to consider the contractual relationship between the parties when determining an award, thereby, exceeding her authority and disregarding the law. The Court rejected this agreement because the defendant failed to show that the award reflects an egregious or patently irrational rejection of clearly controlling legal principals. *Id*. (quoting *Garrity v. McCaskey*, 223 Conn. at 11, 612 A.2d 742; internal quotations omitted). Consequently, the Court concluded that the Trial Court properly granted the plaintiff's application to confirm the arbitration award.

330 R.R. Ave., LLC v. JCS Constr. Grp., Inc., 2019 WL 3546730, 68 Conn. L. Rptr. 807 (Conn. Super. Ct. July 10, 2019)

[The Trial Court granted the defendant's motion to stay the acting pending arbitration holding that the defendant's rights were not waived, the arbitration clause was enforceable, impossible to perform provisions of the arbitration agreement are severable, and public policy issues were reserved for the arbitrator.]

The substituted plaintiff, the assignee of New England Masonry and Roofing Company ("New England"), brought a subcontract action in court against defendant JCS Construction Group ("JCS") for the reconstruction of an office building. The subcontract contained an arbitration clause that provided for "arbitration pursuant to the Construction Industry Rules [("Rules")] of the American Arbitration Association [("AAA")], but shall be heard by Arbitrator, as determined by the Contractor…" Based on the arbitration clause, JCS filed a motion to dismiss the litigation, or, in the alternative, a motion to stay pending arbitration. *Id*. The Court denied the motion to dismiss but considered the defendant's motion to stay pursuant to C.G.S. § 52-409.

In opposition to the motion to stay and the arbitration, the plaintiff argued that: (1) JCS, through its conduct, waived its right to arbitrate; (2), the arbitration clause is

unenforceable due to mutual mistake; (3) by its terms, the arbitration clause was impossible to perform; and (4) the arbitration clause violates public policy.

In support of its claim for waiver, the plaintiff accused JCS of failing to demand arbitration at the start of the action; however, because the action began as a foreclosure brought by New England, the Court found it was not unreasonable for JCS to wait for an outcome on the foreclosure action prior to seeking a stay. Furthermore, the court concluded that JCS was not involved in "substantial litigation" as required to find waiver. Citing *Hartford v. McKeeer*, 139 Conn. App. 277, 285 (2012)).

Although the parties had agreed to conduct the arbitration pursuant to the Construction Industry Rules of the AAA (the Rules), they also required that the AAA not administer the arbitration, creating an inherent conflict within the arbitration agreement. The court analyzed this conflict in light of principles of mutual mistake/impossibility of performance, materiality and severability.[1]

The court determined that neither mutual mistake nor impossibility of performance applied to the facts of the case. To show mutual mistake, both parties must have had a mutual misunderstanding as to a material fact and relied on that mistake when contracting. The related concept of impossibility of performance results, when "after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made," thereby, rendering the duty to perform discharged, "unless the language or the circumstances indicate the contrary. The court also concluded that the usability of the

[1] This summary encapsulates these principles, but an in-depth review of the court's analysis is encouraged.

Rules was not material to their agreement to arbitrate because § 52-411(b) provides a statutory remedy, which would fill the gap left if the subject provision was severed from the agreement. Accordingly, the court concluded:

> [B]ecause the overarching intent of the parties was to arbitrate, (a) the Rules are not a material part of the arbitration agreement; (b) the parties may proceed to arbitration under any appropriate set of rules; (c) if the parties cannot agree on a set of rules resort may be had to the court pursuant to [C.]G.S. § 52-411(b).

Id. at *7

In further support of its argument that the provision is severable from the remainder of the contract, JCS relied on a provision of the agreement, which made clear that the invalidity or unenforceability of any provision shall not render other provisions invalid or unenforceable. The Court concluded that it may sever the portion of the clause that conflicts with the Rules, allowing the parties to retain the right to arbitration as originally intended. *Id*.

As to the plaintiffs contention that the arbitration provision is unenforceable because it violates public policy, the Court held, “it is the policy of this jurisdiction that a reviewing court adjudicate public policy issues after the award has been rendered”, which is when the public policy issue will arise. The Court opted to reserve the public policy issue for the arbitrator and the action was stayed pending arbitration.

III. CONTRACT INTERPRETATION

Elec. Contractors, Inc. v. 50 Morgan Hosp. Grp., LLC, et al, No. X07HHDCV-186088917S, 2019 WL 2305068, at *1 (Conn. Super. Ct. Apr. 30, 2019) (Moukawsher, J.)

[A pay-if-paid clause contained in a general contractor's contract with a subcontractor protected the general contractor from claims of non-payment when it was undisputed that an owner had not paid the general contractor.]

In this case, a subcontractor sued a general contractor for payment for work performed on a hotel renovation project. The general contractor sought summary judgment based on a pay-if-paid clause contained in the subcontract agreement between it and the subcontractor, which provided that: "payment by the Owner to the [general contractor] is a condition precedent to [the general contractor's obligation to make partial or final payment to [subcontractors]."

The trial court found it undisputed that the hotel owner had not paid the general contractor any of the amounts that were in dispute. The trial court rejected the subcontractor's argument that the pay-if-paid provision should be interpreted to merely delay payment for a reasonable period of time, noting that the provision created a clear and unambiguous condition precedent that was not fulfilled. Relying on our Appellate Court's holding in *Suntech v. Brunoli*, 143 Conn. App. 581 (2013), the trial court held that, "[t]he obvious import of the contract language in this case is that if the general contractor never gets paid then neither do its subcontractors." The trial court, however, held that its ruling did not preclude the subcontractor from seeking payment from the general contractor should the general contractor receive payment from the hotel owner in the future.

The trial court also addressed the subcontractor's contention that the general contractor violated the implied covenant of good faith and fair dealing by relying on the pay-if-paid clause and allegedly failing to diligently pursue collection from the hotel owner. The trial court noted that, in an affidavit appended to its summary judgment motion, the general contractor asserted that it had diligently pursued the collection of payment from the hotel owner at significant cost. The court determined that any evidence that could possibly support bad faith did not support the subcontractor's allegations that the general contractor had acted in bad faith, and that the subcontractor had not met its burden of proof to avoid summary judgment on that issue.

The trial court rendered summary judgment in favor of the general contractor on the subcontractor's breach of contract claims and its claim for breach of the implied covenant of good faith and fair dealing.

Standard Demolition Servs., Inc. v. Wall St. Theater Co., Inc., et al, No. FSTCV17-6033831S, 2019 WL 2369525, at *1 (Conn. Super. Ct. Apr. 25, 2019) (Sommer, J.)

[A pay-if-paid clause was enforced in favor of a general contractor against a subcontractor after alleged ambiguities concerning the contractual payment provisions were construed against the subcontractor as required by the contract documents.]

On a private construction project, a subcontractor asserted claims for non-payment against a general contractor. In response, the general contractor moved for summary judgment based on numerous pay-if-paid clauses contained in the contract documents between the general contractor and the subcontractor. Those pay-if-paid clauses provided generally that the subcontractor was only entitled to payment from the general contractor,

"unless, until, and then only" to the extent that the general contractor received payment from the project owner.

The trial court found that the pay-if-paid language contained in the contract documents was clear and unambiguous, set forth in multiple provisions, and created an express condition precedent that was not fulfilled in this case because the trial court also determined that the general contractor had not received payment for any portion of the amounts claimed by the subcontractor. Relying on *Suntech v. Brunoli,* 143 Conn. App. 581 (2013), the trial court determined that the pay-if-paid language was enforceable and barred the subcontractor's contract claims for non-payment. The trial court also determined that the subcontractor's claims under CUTPA, and its claim for estoppel, also failed because each was based on the general contractor's alleged failure to issue payment, which payment was not required in light of the pay-if-paid clause.

The trial court also rejected the subcontractor's contention that the pay-if-paid clause did not apply to certain extra work performed by the subcontractor, which was memorialized in certain of the subcontractor's standard form change order documents that contained a thirty (30) day due date for payment. The trial court found that the payment term in those documents did not override the pay-if-paid language in the contact documents.

The trial court also held that, even if the language in the subcontractor's change order documents rendered the payment terms of the parties' agreement ambiguous, such ambiguity was to be resolved in favor of the general contractor pursuant to another contract clause that provided: "In the event there is a conflict or discrepancy between the

obligations stated in this document or other Contract Documents, the more stringent shall govern."

Centerplan Constr. Co., LLC v. City of Hartford, No. X07HHDCV16-6069748S, 2019 WL 3406815, at *1 (Conn. Super. Ct. June 26, 2019) (Moukawsher, J.)

[If a developer prevailed on its breach of contract claim following its termination from a ball park project, it was only entitled to "benefit of the bargain" damages which did not include amounts the developer was obligated to pay its completing performance bond surety.]

In this case, the trial court considered the nature of damages a developer would be entitled to if it prevailed on its breach of contract claim against a city, following a ballpark construction project on which the developer was terminated.

The developer argued that if it succeeded at trial in proving that its termination was wrongful and not justified, it would be entitled not only to its unpaid contract balance but also reimbursement for certain losses it was obligated to pay its surety who supplied a performance bond and completed the project when the developer was terminated by the city.

In determining the measure of the developer's damages, the trial court first concluded that the parties' agreement contained an express mutual waiver of consequential damages clause, which the trial court also determined barred the developer from recovering the loss related to its surety relationship. The trial court rejected the developer's argument that the loss it was obligated to pay, which arose after the city declared it to be in default, was a form of direct damages. The trial court relied on *Coppola v. Hoffman* which held that: "[T]he general rule is that a contractor who substantially performs under a building or construction contract is entitled to recover the

contract price minus the cost of repairing the defects or completing the unfinished part of the work so as to bring the construction up to the level required by the contract."

On that basis, the trial court determined that, if successful at trial, the developer would only be entitled to its so-called "benefit of the bargain" damages, which precluded any recovery for the surety's loss. The trial court reasoned that: "[t]he benefit of the bargain here is made up of everything [the city] would have to pay [developer] if the contract were completed" and that "[w]hat [developer] has to pay [its surety] is not in this category."

Henderson v. Bismark Constr. Co., Inc., No. FBTCV17-6062488S, 2019 WL 3546481, at *1 (Conn. Super. Ct. July 10, 2019) (Stewart, J.)

[An indemnification clause that violated Connecticut's anti-indemnification statute still required a sub-subcontractor to provide a defense to a subcontractor after an employee of the sub-subcontractor sustained personal injuries on a construction project.]

On a construction project, an employee of a sub-subcontractor sustained injuries and asserted a personal injury action against the general contractor. The general contractor thereafter impleaded its subcontractor, who in turn impleaded the sub-subcontractor, based on, among other things, contractual indemnity.

Specifically, the subcontractor alleged that it was entitled to a defense and indemnity from the sub-subcontractor pursuant to a contractual indemnity clause, which required the sub-subcontractor to defend, hold harmless, and indemnify the subcontractor from all claims arising out of the sub-subcontractor's work on the Project. The indemnification clause, however, specifically excluded from its scope the "sole negligence" of the subcontractor.

In reviewing the indemnification clause, the trial court held that the clause violated Connecticut's so-called anti-indemnification statue because it purported to indemnify the subcontractor for its own negligence, even if not the "sole negligence" of the subcontractor. Seemingly, the indemnification clause was drafted to comply with a prior version of C.G.S. § 52-572k -- effective prior to 2001 -- which precluded only an indemnified party from being indemnified for its "sole negligence" as opposed to the current version of that statute which precludes indemnification for any aspect of the indemnified party's negligence.

Although the trial court determined that the subcontractor's claim for indemnification failed, it determined that the sub-subcontractor still owed the subcontractor a defense, noting that the duty to defend was separate from the duty to indemnify. In rendering its conclusion, the trial court noted that there was no appellate authority as to whether § 52-572k applied to the duty to defend, but it noted that the vast majority of superior court decisions considering the issue have held that § 52-572k does not apply to the duty to defend. The trial court reasoned that the duty to defend and the duty to indemnify are distinct and separate, and that while § 52-572k bars the duty to indemnify under certain circumstances, it makes no mention of the duty to defend.

IV. DESIGN PROFESSIONALS

SUPREME COURT OF CONNECTICUT:

Girolametti v. Michael Horton Assocs., Inc., 332 Conn. 67, 208 A.3d 1223 (June 25, 2019)

[*Supreme Court affirmed Appellate Court opinion reversing in relevant part a trial court decision denying defendant-subcontractors' summary judgment motions in suit by owners of construction project following arbitration, holding that subcontractors (who were not parties to the arbitration) are presumptively in privity with the general contractor on a construction project for res judicata purposes*.]

Plaintiffs-owners brought an arbitration action against a defendant-general-contractor to resolve various disputes arising out of the construction of an expansion to a Party Depot Store. The subcontractors on the construction project were not parties to the arbitration. Ultimately, the arbitrator awarded judgment to the owners.

The owners subsequently brought claims against defendants-subcontractors related to the design and construction of steel joists used to support the second floor of the building in question. Both the general contractor and the subcontractors moved for summary judgment, claiming that res judicata barred the owners' suit.

The trial court granted the general contractor's motion for summary judgment, but denied the subcontractors' motions, reasoning that the subcontractors were not parties to the arbitration and were not in privity with the general contractor.

The Supreme Court, like the Appellate Court, held that "a general contractor is in privity with all of its subcontractors on a construction project. Therefore, if an owner and a general contractor choose to arbitrate the typical post construction disputes at the end of a project, then the outcome of that arbitration will be res judicata as to all subcontractors (assuming that the other elements of res judicata are satisfied)." Referencing the standard

AIA prime contract between the owner and general contractor, the Court then held that there is a rebuttable presumption that the owners could reasonably expect that any claims they had against the general contract's subcontractors could have been raised against the general contractor in the arbitration.

Crosskey Architects, LLC v. Poko Partners, LLC, 192 Conn. App. 378, 218 A.3d 133 (Sept. 10, 2019)

[*Appellate Court affirmed a trial court judgment in favor of plaintiff-architectural-firm in suit against defendants, real estate developers and their owners, arising out of four projects for which the architectural firm performed work but was not paid, holding that trial court properly pierced the corporate veil and awarded statutory prejudgment interest on quantum meruit claim*.]

Plaintiff-architectural-firm filed suit against defendants, real estate developers and their owners, alleging that the developers failed to pay the architectural firm for its work in connection with four projects. The trial court found in favor of the architectural firm as to each of the four projects, entering judgment for the firm on three counts of breach of contract and one count of quantum meruit. The court also pierced the corporate veil and held the owners personally liable for the damages incurred by the developers.

On appeal, the developers/owners first argued that the trial court improperly pierced the corporate veil. First, the developers/owners claimed that the trial court misapplied the identity theory (which allows piercing when the identity of the entity and the owner are one and the same) by basing its determination solely on evidence that the owners controlled the developers. The Court rejected this claim, explaining that the trial court had every right to rely on evidence of control and that, in any event, the evidence showed that the real actors were the owners. Second, the developers/owners claimed that the trial court erroneously concluded that the corporate entity served no legitimate purpose.

The Court rejected this claim, as well, explaining that the lack of a legitimate purpose is not an element of a veil-piercing claim under the identity theory.

The developers/owners next asserted that the firm was not entitled to damages under quantum meruit. First, the developers/owners argued that they received no benefit from the firm's architectural services because the project never went forward. The Court rejected this argument, pointing out that the developers/owners nevertheless received a benefit from the firm's services, in and of themselves. Second, the developers/owners challenged the Court's damages calculation. The Court also rejected this argument, agreeing with the trial court's conclusion that an implied in fact contract existed, even if the developers/owners never actually signed the contract in question.

Finally, the developers/owners argued that the Court wrongly awarded statutory prejudgment interest on the plaintiff's claim for quantum meruit. Relying on its prior precedent in an unjust enrichment case, the Court rejected this argument, as well.

Morganti Grp., Inc. v. Stamford Phase Four JV, LLC, No. FSTCV186038150S, 2019 WL 4898707, at *1 (Conn. Super. Ct., J.D. of Stamford-Norwalk at Stamford, Sept. 11, 2019) (Povodator, J.T.R.)

[*Court denied defendant-architect's motion to strike plaintiff-contractor's claim for negligence for breach of a purported duty of care in architect's performance of contract with owner despite architect's argument that the economic loss rule barred recovery.*]

Plaintiff-contractor filed suit against, among others, defendant-architect in connection with the construction of condominium, alleging "negligence for breach of a 'duty of care in the performance of its duty under [defendant-architect's] Contract with the Owner." Specifically, the contractor claimed that the architect's drawings contained errors that delayed the contractor's construction activities and, as a result, the contractor incurred

financial losses related to changes and delays to its work. Notably, the contractor and the architect did not enter into a contractual relationship.

In a motion to strike, the architect argued that the economic loss rule barred the contractor's claim. The economic loss rule generally "reflects the principle that a plaintiff cannot sue in tort for purely monetary loss unaccompanied by physical injury or property damage." The parties did not dispute that the contractor's damages were purely economic, but disagreed as to whether the economic loss rule applied to the contractor's claim.

The Court, after surveying the case law surrounding the economic loss rule, denied the architect's motion to strike, holding that the contractor could maintain its claim despite the economic loss rule. The Court reasoned that the contractor's harm was certainly foreseeable by the architect, as the architect should have expected that the contractor would rely upon the architect's drawings. The Court rejected the architect's argument that the contractor should have understood, based on the economic loss rule that it would not be entitled to recover under the contract, as foreseeability "also requires consideration of the conduct and relationship between the parties . . . ." The Court also concluded that the public's interest in safe construction weighed in favor of recognizing the cause of action. Ultimately, the Court sided with a number of other Superior Court decisions holding that the economic loss rule does not bar recovery in construction project cases merely because the parties are not in privity.

Falzarano v. C.E. Floyd & Co., Inc., No. CV176031537, 2019 WL 1938067 (Conn. Super. Ct., J.D. of New London at New London, April 4, 2019) (Swienton, J.T.R.)

[*Court denied defendant-architect's motion for summary judgment against plaintiff-individual, who claimed that architect defectively designed a glass wall in a hotel, causing the individual to suffer injuries when he walked into the glass wall, rejecting*

***architect's claim that expert in professional negligence case involving an architect need be licensed.*]**

Plaintiff-individual filed suit against, among others, defendant-architect in connection with injuries that he suffered when he ran into a glass wall at the Mystic Hilton Hotel. The individual claimed a variety of violations of Chapter 10, Section 1007.1 of the 2003 International Building Code, as well as common law professional negligence.

The architect argued that summary judgment was warranted because the individual failed to disclose a qualified expert necessary to opine on the standard of care. Though the plaintiff disclosed an expert, the expert disclosed was not a licensed architect.

The trial court denied the motion for summary judgment, explaining that one need not be a licensed architect to testify as an expert in a professional negligence case about the standard of care among architects. The court relied heavily on Superior Court decisions allowing experts to testify as to the professional standard of care for engineers despite a lack of licensure, while distinguishing cases of legal and medical malpractice.

Tancreti Constr., LLC v. City of Stamford, No. CV196088262, 2019 WL 7813777 (Conn. Super. Ct., J.D. of New Haven at New Haven, December 24, 2019) (Abrams, J.)

[*Court granted third-party-defendant-design-professional's motion to strike against third-party-plaintiff-city, which asserted a contractual indemnity claim and implied warranty of fitness claim, finding no inherent indemnification arising out of professional standard of care and rejecting applicability of implied warranty of fitness in professional services context.*]

Third-party-plaintiff-city asserted implied contractual indemnity and implied warranty of fitness claims against third-party-defendant-design-professional. Design professional moved to strike.

The design professional first argued that city's implied contractual right of indemnification could not lie where an express agreement existed between the parties. The City responded that the right of indemnification did not arise from the express agreement *or* an implied contractual right, but that it arose from the design professional's breach of the professional standard of care. The Court rejected the notion of any such obligation and struck that count.

The design professional moved to strike the city's implied warranty of fitness claim, arguing that such a claim is not cognizable in Connecticut. Though the Court acknowledged that it could find no appellate authority on the issue, the Court agreed with the other Superior Courts to consider the question and held that no such warranty exists in the context of professional services.

V. MECHANIC'S LIENS

A. LIEN PRIORITY- Conn. Gen. Stat. § 49-33(d)

Marjoram Supply Company v. 50 Morgan Hospitality Group, LLC, No. X07HHDCV186093573S, 2019 WL 2374336 (Conn. Super. May 6, 2019)

[A cellular tower easement is an "encumbrance" under Conn. Gen. Stat. §49-33(d) and any mechanic's liens originating before the filing of the easement will have priority over those originating after the filing.]

Connecticut General Statutes §49-33(d) states that if a "valid encumbrance" is filed on property during the course of a construction project, any mechanic's lien originating prior to the filing will have priority over both that encumbrance and all liens originating after the filing of the encumbrance. Typically, the term "encumbrance" refers to a mortgage. However, the statute does not specifically define the term.

The issue in this case was whether an easement to permit a cellular telephone tower is an "encumbrance" under the statute. The issue was significant because the easement was filed after the origination date of several mechanic's liens, but prior to the origination date of several other mechanic's liens, thereby separating the two groups of lienholders into different classes of priority. The plaintiff, whose lien originated after the filing of the easement, argued that in order to constitute an encumbrance which divides liens into separate classes, the encumbrance must reduce the value of the property, much like a mortgage.

The court disagreed, noting that the "if the legislature wanted to limit the impact of the word 'encumbrance' to things that significantly reduce property values it could have

done so." The court also noted that it was debatable whether the easement increased or decreased the property value.

B. SUBCONTRACTOR SUBROGATION/LIENABLE FUND/GOOD FAITH PAYMENTS TO GENERAL CONTRACTOR- Conn. Gen. Stat. §49-33(e)-(f), §49-35, §49-36

Hanley Construction, LLC v. Crystal Ballroom of New Britain, LLC, No. X07HHDCV176078056S, 2019 WL 1281406 (Conn. Super. Feb. 4, 2019)

[Where a contract requires changes to be made in writing, a general contractor cannot file a mechanic's lien for more than the original amount of the contract which is based on alleged oral changes to the contract.]

The defendant property owner agreed to pay the plaintiff general contractor a maximum of $2.5 million to perform work on the property. The written contract between the parties stated that any changes to the agreement must be in writing. The defendant ultimately paid the general contractor and its subcontractors more than $3 million for their collective work on the property.

The plaintiff claimed it was owed additional sums for certain extra work the plaintiff performed pursuant to alleged oral changes to the contract. The plaintiff liened the property in order to secure its claim and subsequently foreclosed the lien. The owner moved for summary judgment on the basis that the lien exceeded the amount agreed to by the parties (the decision does not specify the amount of the defendant's lien).

The court granted summary judgment in the owner's favor, noting that Conn. Gen. Stat. §49-33(a) only allows liens to the extent they are justified "by virtue of an agreement." The court further noted that this limitation is important because "it prevents parties from tying up property interests during protracted litigation with liens supported only by unproved oral claims for sums that may be vastly in excess of any expressly

contracted amount. Limiting liens to matters covered by the parties' express agreement usually means the court can, without long pre-trial delays, look at a document signed by both sides and allow a prejudgment lien in the amount the document says is the agreed price."

Sanford & Hawley, Inc. v. Seeley, No. HHDCV186091015S, 2019 WL 1453076 (Conn. Super. Feb. 25, 2019)

[Owner entitled to credit for payment made in good faith to general contractor before receiving notice of subcontractor's lien.]

Pursuant to Conn. Gen. Stat. §49-33(f), a subcontractor is subrogated to the rights of the general contractor through whom he claims, such that a subcontractor only can enforce a mechanic's lien to the extent that there is unpaid contract debt owed to the general contractor by the owner. Thus, a subcontractor's right to enforce its lien against property hinges on whether the general contractor could recover from the property owner because the subrogation doctrine only allows a subcontractor to recover to the extent that a general contractor could.

In this case, the plaintiff subcontractor claimed that it had not been paid in full by the general contractor and filed a lien in order to secure its claim. Significantly, however, at the time the plaintiff filed its lien, the property owners did not owe the general contractor any unpaid contract debt. As such, there was no lienable fund to which the plaintiff's lien could attach.

The plaintiff argued that the owners should not be entitled to a credit for payments made to the general contractor because the payments were allegedly not made in good faith. Pursuant to Conn. Gen. Stat. § 49-36(c):

> In determining the amount to which any lien or liens may attach upon any land or building, or lot or plot of land, the owner of the land or building or lot or plot of land shall be allowed whatever payments he has made, in **good faith**, to the original contractor or contractors, before receiving notice of the lien or liens.
> (Emphasis added.)

The court held that the owners did not make any bad faith payments to the general contractor. All of the payments were made for work performed, and there was no evidence that the owners colluded with the general contractor to defeat the rights of the plaintiff. Therefore, because the defendant was entitled to credit for its payment to the general contractor, there was no lienable fund available to pay the plaintiff's claim, and consequently the plaintiff's lien was discharged.

First Massey FNG, Inc. v. Skanska USA Building, Inc., No. FSTCV176031940S, 2019 WL 3412468 (Conn. Super. July 1, 2019)

[In the absence of default by the general contractor, the lienable fund is equal to the unpaid contract debt owned by the owner to the general contractor.]

In this case, the plaintiff subcontractor filed a mechanic's lien that was subsequently bonded off by the general contractor. The defendant surety argued that it was entitled to summary judgment because the lienable fund had been exhausted by payments made by the project owner to the general contractor prior to the filing of the plaintiff's lien, as well as payments made to complete the contract after the lien was filed. The plaintiff countered that payments made to complete the contract are only properly deducted from the lienable fund in the event of the general contractor's default, which did not occur here.

The court agreed with the plaintiff, noting that "in the absence of default by the general contractor, the lienable fund is equal to the unpaid contract debt owned by the owner to the general contractor. The lienable fund available to a subcontractor does exist

by virtue of subrogation, and if the entire contract price is paid prior to the lien's filing, then the lienable fund is indeed exhausted. If an unpaid amount on the contract exists at the time of the lien's filing, however, then a lienable fund persists."

The court noted that at the time the plaintiff filed its lien, there was an unpaid contract balance owed by the owner to the general contract, which exceeded the amount of the plaintiff's lien. Therefore, the lienable fund had not been exhausted, and the defendant was not entitled to summary judgment. Note that as a result of this holding, the owner is potentially required to pay twice for the same work.

SHD Glenbrook Gardens, LLC v. D.S.O. Mechanical Corp., No. FSTCV186036725S, 2019 WL 4331968 (Conn. Super. Aug. 15, 2019)

[Subcontractor's lien cannot include retainage withheld from subcontractor by general contractor, where retainage was not also withheld from the general contractor by the property owner.]

The court in this case examined whether a subcontractor could include in its mechanic's lien an amount which was withheld from the subcontractor by the general contractor as retainage, but which amount was not similarly withheld from the general contractor by the owner. After citing Connecticut's "lienable fund" caselaw, the court held that the subcontractor could not file a lien which included retainage when the owner had already paid such amount to the general contractor. The court concluded that the subcontractor's only recourse would be to seek payment of the retainage from the general contractor. The holding of this case would appear to be limited, as it is highly unusual for a general contractor to withhold retainage from a subcontractor when the general contractor itself is not subject to retainage.

C. LIMITATION PERIOD- Conn. Gen. Stat. §49-34

Yale Electric East, LLC v. Semac Electric Co., Inc., No. FSTCV166029448-S, 2019 WL 5856625 (Conn. Super. Sept. 30, 2019)

[Plaintiff subcontractor's untimely lien not saved as a result of plaintiff's work completed on a separate contract with a third party.]

Pursuant to Conn. Gen. Stat. § 49-34, a mechanic's lien must be filed within 90 days of the last date the lienor performed work on a project. The Connecticut Supreme Court has held that a lienor is only required to file one certificate of lien in instances where the lienor has multiple contracts with a property owner, without reference to when the work under any particular contract was begun or ended. *See* Parsons v. Keeney, 98 Conn. 745 (1923). At issue in this case was whether the plaintiff's lien, which was filed more than 90 days after the plaintiff's last date of work for one party, could be saved by virtue of the plaintiff's timely work for another party.

The plaintiff subcontractor entered into a contract with another subcontractor, Semac Construction, to provide electrical wiring on a project. The plaintiff subsequently contracted with the general contractor to provide additional wiring. The plaintiff filed a lien on the project more than 90 days after the completion of work for Semac, but argued that its lien was saved as a result of the plaintiff's work completed for the general contractor, citing Parsons.

The court disagreed with the plaintiff, noting that the contracts at issue in Parsons were between the same parties, not different parties as here. Therefore, because the plaintiff failed to timely file its lien against Semac, the lien was invalid.

Astoria Federal Mortgage Corp. v. Genesis Limited Partnership, No. AANCV096001340S, 2019 WL 1504337 (Conn. Super. Feb. 19, 2019)

[Evidence did not support defendant's claim that its lien was filed within 90 days of the last date defendant substantially completed work on the project.]

The plaintiff mortgage-holder in this case challenged the validity and priority of a mechanic's lien filed by the defendant contractor. The plaintiff argued that the defendant had not filed its lien within 90 days of the last day that the contractor had substantially completed work on the property. In response to this argument, the defendant produced a change order which stated that the contractor's work was substantially complete within 90 days of the date that the lien was recorded. The plaintiff countered that the work described in the change order was never performed, and that the change order was manufactured by the defendant for the sole and improper purpose of falsely modifying the date of substantial completion in order to purportedly timely file a lien.

The court agreed with the plaintiff, stating that "a reasonable inference from the evidence is that the work was performed at the initiative of [defendant] for purposes of saving its lien and defeating the mortgages by extending the completion date through the use of questionable, if not manufactured, change orders." Therefore, judgment was rendered in favor of the plaintiff.

D. ATTORNEY'S FEES- Conn. Gen. Stat. §52-249(a)

Pleasant Beginnings, LLC v. Campisi, No. CV166027026S, 2019 WL 1594787 (Conn. Super. March 11, 2019)

[Plaintiff entitled to partial award of attorney's fees in action to foreclose lien.]

The plaintiff in this case obtained a judgement in the approximate amount of $15,000.00 and foreclosed on its lien in that amount. Thereafter, the plaintiff filed a motion for attorney's fees pursuant to Conn. Gen. Stat. §52-249, seeking fees in the approximate amount of $50,000.00. The defendants objected, arguing that the fees were excessive.

In evaluating the plaintiff's motion, the court noted that §52-249 has been construed as unambiguously providing for the allowance of attorney's fees in actions for foreclosures of mortgages and liens. However, whether any award is to be made and the amount of the award lie within the discretion of the trial court. The fact that the claimed fees are more than the damages awarded at trial does not, standing alone, merit a reduction of the fees. Rather, the key consideration in evaluating a claim for litigation expenses is the overall extent of the success achieved.

The court ultimately awarded the plaintiff $12,000.00 in fees, noting that the plaintiff was not successful on all of its claims. The plaintiff's limited success merited a reduction in attorney's fees.

E. RELATION TO HOME IMPROVEMENT ACT ("HIA")- Conn. Gen. Stat. §20-418 et. seq.; 20-429(a)

Tanius v. Villwell Builders, LLC, No. LLICV196020800S, 2019 WL 1950174 (Conn. Super. April 4, 2019)

[Homeowner can discharge a mechanic's lien on the ground that the contract under which the work was performed fails to comply with the HIA.]

This case deals with the validity of a mechanic's lien that is based on work performed pursuant to a home improvement contract that does not comply with the HIA. The HIA provides in relevant part:

> "No home improvement contract shall be valid or enforceable against an owner unless it: (1) Is in writing, (2) is signed by the owner and the contractor, (3) contains the entire agreement between the owner and the contractor, (4) contains the date of the transaction, (5) contains the name and address of the contractor, (6) contains a notice of the owner's cancellation rights in accordance with the provisions of chapter 740, (7) contains a starting date and completion date, and (8) is entered into by a registered salesman or registered contractor ...."

The provisions of the HIA are mandatory, and a contract, which fails to comply with those requirements, is typically void and unenforceable. Under most circumstances, a mechanic's lien based on a home improvement contract, which is unenforceable under the provisions of the HIA, must be discharged.

The plaintiff homeowner filed a motion to discharge the defendant contractor's lien on the basis that the contract at issue failed to conform to the requirements of the HIA, and therefore the lien was invalid. Specifically, the contract did not contain the following information: a provision for the extra work performed by the defendant; the defendant's registration number; a notice of cancellation; a specific start or completion date; and a statement as to whether the defendant had been a shareholder, member of a limited liability company, partner or owner of another company which had been a home improvement contractor within the last five years.

Noting that the requirements of the HIA are mandatory and must be strictly construed, the court held that the agreement was invalid under the HIA. The court further determined that there was no evidence that the defendant acted in bad faith by asserting the defense and thus the HIA did not allow recovery. Based on the foregoing, the court granted the plaintiff's application to discharge the lien.

Dunbar v. Gulick Construction, LLC, No. CV196084487S, 2019 WL 4898699 (Conn. Super. Sept. 6, 2019)

[Defendant's lien discharged, where defendant failed to comply with the HIA and plaintiff homeowners did not act in bad faith.]

The plaintiff homeowners in this case filed an application to discharge the defendant's mechanic's lien on the basis that the contract between the parties did not comply with the HIA. The defendant, in opposition, asserted that there was probable cause to sustain the lien because even when a contract fails to comply with the requirements of the HIA, a contractor may still recover in quantum meruit for the value of work performed where the homeowner asserting the HIA has acted in bad faith.

The court rejected the defendant's argument, noting that the defendant's noncompliance with the HIA gave rise to a genuine, good faith disagreement between the parties. Specifically, the defendant's failure to include language in the contract stating that any changes must be in writing and signed by the parties deprived the plaintiffs of the opportunity to make informed decisions during the course of the project. As such, the plaintiffs' application to discharge the lien was granted.

F. MISCELLANEOUS

O&G Industries, Inc. v. American Home Assurance Co., No. FSTCV176032643S, 2019 WL 3318479 (Conn. Super. June 25, 2019)

[General contractor cannot compel a supplier to waive its right to file a mechanic's lien.]

In this case, the general contractor on a large construction project demanded that a supplier prospectively waive its lien rights in exchange for the general contractor entering into a joint check agreement with the supplier. The court noted that the supplier was within its rights to reject the joint check agreement that the general contractor offered since

the agreement contained a waiver of the right of the supplier to file a lien. Such a term violates Conn. Gen. Stat. § 42-158l, which provides in relevant part: "Any provision in a construction contract…that purports to waive or release the right of a contractor, subcontractor or supplier…to claim a mechanic's lien…for services, labor or materials which have not yet been performed and paid for shall be void and of no effect."

VI. PAYMENT BONDS

Arch Ins. Co. v. Centerplan Construction Co., LLC, 2019 WL 554868 (D. Conn. Feb. 12, 2019)

[Surety was not compelled to stay litigation and pursue mediation pursuant to the terms of the bonded contract because surety was not party to the bonded contract; surety's claims arose solely out of its indemnity agreements with the bond indemnitors, which contained no such mediation obligation.]

This lawsuit arose from the issuance of payment and performance bonds for the construction of the Yard Goats MLB stadium in Hartford, Connecticut. The performance and payment bond surety filed suit to enforce certain indemnity agreements executed by the defendant-general contractor and certain of its affiliates (collectively the "bond indemnitors") as a condition of the surety's issuance of the bonds. Upon satisfying claims on the project, the surety demanded to be indemnified and thereafter alleged that the bond indemnitors breached their obligations under the indemnity agreements by failing to comply with those demands. The bond indemnitors, after over a year of active and extensive litigation, moved to stay the litigation and compel the surety to mediate the case in accordance with the terms of the bonded contract.

In seeking a motion to stay and compel mediation, the bond indemnitors argued that the surety's claim at issue arose out of the bonded contract and therefore the surety was obliged to mediate its claims as the bonded contract required. The surety countered the bond indemnitors' stance, asserting that the case arose out of, and was governed by, the indemnity agreements executed by the bond indemnitors in favor of the surety.

The District Court denied the bond indemnitors' motion to stay litigation and compel mediation on the grounds that the surety was never party to the bonded contract

which contained the mediation clause obliging mediation of claims. Specifically, while the performance and payment bonds issued by the surety incorporated the bonded contract, the incorporation language did not state that the surety was a party to the bonded contract requiring mediation or that the surety agreed to be bound by the terms of that contract. The bonded contract was between the bond indemnitors and the developer of the project alone, and included no provision, nor contemplated any provision, permitting any third-party to make itself a party to that contract. The incorporation of the bonded contract into the payment and performance bonds served only to identify the contract the surety was bonding. The Court further found that the surety's claim arose solely out of the bond indemnitors' alleged breach of the indemnity agreement. Accordingly, the District Court ruled that the mediation clause of the bonded contract did not govern this dispute.

Arch Ins. Co. v. Centerplan Construction Co., LLC, 368 F. Supp. 3d 350 (D. Conn. 2019)

[Bond indemnitors were required to indemnify the surety when the surety settled payment and performance bond claims in good faith in accordance with the indemnity agreements, regardless of actual liability under the bonds.]

This case also involves the issuance of payment and performance bonds for the construction of the Yard Goats MLB stadium in Hartford, Connecticut, as well as other related construction projects, as discussed previously. In this case, the performance and payment bond surety filed suit to enforce certain indemnity agreements executed by the defendant-general contractor and certain of its affiliates. The indemnity agreements were provided in consideration for the surety's issuance of the payment and performance bonds, certain of which the general contractor was required to obtain as a condition of the construction contract for the project. Upon receiving and paying various bond claims, the

surety demanded indemnification from the indemnitors and thereafter alleged that the bond indemnitors breached their obligations by failing to comply with those demands. The surety filed suit seeking to recover on theories of, *inter alia*, contractual indemnification, contractual collateral security, and specific performance under the indemnity agreements in the form of disclosure of financial information. The bond indemnitors contended that the surety was not entitled to indemnification, collateral security, or to compel the disclosure of certain financial information because the surety had acted in bad faith and thereby breached its obligations to the indemnitors by, among other things, making payments and performing pursuant to claims made by allegedly improper claimants.

In support of their bad faith claim, the bond indemnitors argued that the indemnity agreements, as they related to the project, could not be read alone to ascertain the extent of the surety's obligations. The bond indemnitors argued that the interplay between the terms of the indemnity agreements, the bonds, and the terms of the design-build agreement and other project-related documents created a complex and contradictory set of rights and obligations which demonstrated that the claimants were not entitled to make claims against the bond and, thus, the surety should not have made payments or performed on the bonds. More specifically, the indemnitors argued that the conditions set forth in a multiple obligee rider to the bonds excused the general contractor, and, therefore, the surety from further performance under the bonded contract when the project owner, the City of Hartford, failed to pay the general contractor pursuant to the terms of the contract documents, as required by the rider to the bonds.

On the surety's motion for summary judgment, the District Court rejected the bond indemnitors' bad faith argument. The Court held that the indemnity agreements and not the bonds at issue governed the surety's right to indemnification. The Court held that the indemnity agreements were clear and unambiguous and did not incorporate the terms of the bonds at issue (including the multiple obligee rider) or the construction contract documents. Additionally, the Court reasoned that the most recent indemnity agreement executed by the bond indemnitors, which post-dated the bonds and the multiple obligee rider, superseded the rider and evidenced the parties' present agreement with respect to the surety's right to indemnification. Because the clear terms of this indemnity agreement established that the surety had the right to indemnification for payments made in good faith "under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, *whether or not such liability, necessity or expediency existed*," any potentially conflicting terms in the bond rider were of no consequence. *Id.* at 365.

The District Court went on to discuss that the only remaining issue on which the bond indemnitors could avoid summary judgment on contractual indemnification was if they raised a genuine issue of material fact as to whether the surety acted in bad faith. After considering other evidence and arguments before it and concluding that the bond indemnitors failed to raise a genuine issue of material fact as to this issue, the Court granted the surety's motion for summary judgment as to contractual indemnification. In doing so, the Court affirmed the widely held principle that a surety is entitled to indemnification without regard to actual liability so long as the surety acts in good faith.

The District Court also granted the surety's motion for summary judgment with regard to its contractual claim for collateral security. The bond indemnitors did not dispute that the operative indemnity agreement was clear and unambiguous with regard to the surety's right to demand the posting of collateral and instead made several other arguments in opposition to the motion. First, the bond indemnitors repeated their argument that the indemnity agreement must be read in conjunction with the bonds and other contract documents, which was again rejected by the Court. Second, the bond indemnitors argued that defenses to liability on the claims precluded them from having to post collateral. In rejecting this argument, the Court observed that "success of this argument would controvert the purpose of collateral security. Collateral security is an interim remedy meant to provide protection to a surety guarantor in the face of anticipated exposure as a result of bonds issued on behalf of the principal. A surety is entitled to such protection because its obligation is always secondary to the principal's. Refusing to provide security until after liability is litigated would defeat the very purpose of it." *Id.* at 381. Lastly, the indemnitors again alleged that the surety acted in bad faith in settling claims, which would preclude a demand for the posting of collateral under the terms of the indemnity agreement. This argument, too, was rejected on the grounds that the indemnitors failed to present evidence sufficient to raise a genuine issue of material fact as to whether the surety acted in bad faith. Notably, the Court went on to conclude that "[e]ven if they had, it would be unavailing to defeat [the surety's] demand for collateral security," citing Second Circuit precedent that an indemnitor's allegations of bad faith do not implicate a surety's right to the interim remedy of collateral security. *Id.* at 382.

The District Court granted the surety's motion for summary judgment with respect to specific performance under the indemnity agreements in the form of disclosure of financial information because it was uncontested by the indemnitors. The Court dismissed the remaining counts of the surety's Complaint, along with its motion for a preliminary injunction seeking specific performance, as they were moot following its granting of summary judgment on the counts discussed above.

Arch Ins. Co. v. Centerplan Construction Co., LLC, 2019 WL 3080920 (D. Conn. July 15, 2019)

[Surety did not owe a duty to bond indemnitors to not pay payment and performance bond claims despite allegations of claimant's failure to strictly adhere to the terms of the bonded contract.]

This case is the last of the trilogy of cases between the general contractor of the Yard Goats MLB stadium constructed in Hartford, Connecticut, and the contractor's surety. The City of Hartford awarded a contract to develop the project to DoNo Hartford, LLC, who in turn entered into a design-build agreement with the general contractor. Thereafter, the general contractor began work on the project after obtaining the requisite payment and performance bonds from the surety in exchange for indemnity agreements in favor of the surety. During performance, the project was substantially delayed, and the City eventually declared the general contractor to be in default of its agreement. Before terminating the agreement, the City notified the surety of the general contractor's default, and the surety made clear to the City that it would not perform under the bonds unless the general contractor's agreement was terminated. The City then terminated the general contractor's agreement and the surety stepped in to ensure completion of the project. The

surety later filed this lawsuit against the bond indemnitors for damages related to the bonds and the bond indemnitors responded by filing counterclaims against the surety.

The bond indemnitors subsequently filed a counterclaim against the surety, alleging, *inter alia*, that the surety breached the bonds by performing when the City failed to appropriate funds for project change orders pursuant to the terms of the bonds. Specifically, the bond indemnitors asserted that: (1) the surety owed a duty to the indemnitors under the multiple obligee rider to the bonds to not pay claims under the bonds where the owner had failed to appropriate funds for change orders as per the bonded contract and (2) the surety breached the terms of the rider to the bonds by performing when it had no obligation to perform because the bond indemnitors were not in default but the City *was*. The surety moved to dismiss the counterclaim on the grounds that the bond indemnitors failed to sufficiently set forth the particular contractual duty alleged by the bond indemnitors and the bond indemnitors failed to allege a breach or assert that the surety acted as a volunteer based on the City's breach of a specific relevant contractual duty.

On the merits of the bond indemnitors' breach of duty claim, the Court found that the subject bonds did not impose any duty on the surety to deny claims under the bonds where the owner had failed to strictly perform under the contracts. In coming to this conclusion, the District Court looked closely at the rider to the bonds. The rider contained a clause that the surety and principal were not liable under the bonds unless the obligees performed their obligations under the bonded contract. The Court noted, however, that this provision did not create an affirmative duty upon the surety to withhold payment in the

event the City fails to strictly perform under the bonded contract. The Court went on to explain that the general indemnity agreements support this conclusion, as they provide the surety with the *exclusive* right to decide and determine whether any claim against the surety on any bond will be paid and the surety's decision thereon is final and binding on the bond indemnitors.

On the merits of the bond indemnitors' claim of breach of the terms of the obligee rider to the bonds, the District Court reiterated that the surety was not obligated to deny the claims against the bonds based upon the City's failure to strictly adhere to bonded contract terms. The Court went on to state that even if such a duty on the surety existed, the bond indemnitors failed to allege that the City breached the terms of the bonded contract, as the terms of the bonded contract itself did not require the City to appropriate funds for change orders.

Accordingly, the District Court granted the surety's motion to dismiss on the grounds that the bond indemnitors failed to allege a duty imposed upon the surety in favor of the bond indemnitors and failed to sufficiently allege a breach of the terms of the bonds.

O&G Industries, Inc. v. American Home Assurance Co., 2019 WL 3318479 (Conn. Super. Ct. June 25, 2019)

[A requirement that a claimant present an agreement as a condition to a claim on a private payment bond does not require a single, written, integrated agreement; equitable defenses are not applicable in an action at law seeking monetary damages and relief permitted by the bond.]

This trial decision adjudicates a supplier's claim against a payment bond (and bond in substitution of mechanic's lien, not addressed in this summary) regarding the construction of The Trinity Stamford-PSW Condominium-Phase Four Unit, 1011

Washington Boulevard, Stamford, CT project. The supplier prevailed, overcoming numerous legal and equitable defenses by the surety.

The plaintiff supplied concrete to the project for a number of months pursuant to a direct contract with the general contractor, for which it was paid. Then the plaintiff began supplying concrete to the project under a contract with the concrete subcontractor, for which it was not paid. The supplier submitted a claim against the surety on the contractor's payment bond and subsequently initiated a two-count complaint against the surety in the amount of $484,919.30. The matter was adjudicated before a Judge Trial Referee (Tierney, JTR).

In considering the supplier's prima facie claim against the payment bond, the court was faced with a defense by the surety that the supplier was not a proper claimant because it did not strictly comply with one of the claim requirements under the terms of the bond. Specifically at issue was a provision of the bond which required that the claimant provide "a copy of the agreement or purchase order pursuant to which labor, materials or equipment was furnished for use in the performance of the Construction Contract." At trial, the supplier failed to provide a copy of a single separate, signed agreement for the concrete and equipment furnished. The supplier did, however, introduce copies of each of the signed delivery tickets and invoices supporting the amount claimed. These documents were prepared on the supplier's forms and bore the name of the subcontractor, the project name and address, the dates, and most (though not all) were either signed or initialed by the subcontractor's agent or employee. The supplier also offered into evidence a price quotation addressed to the subcontractor for the project and a credit agreement executed by

the subcontractor containing detail billing and credit conditions of the subcontractor's agreement with the materials supplier. The court reasoned that the terms of the payment bond did not require that the agreement or contract be a single, integrated writing, or fully and completely executed. Furthermore, terms of the bond did not exclude oral contracts. The court therefore found that the supplier was a proper claimant on the payment bond and that the supplier satisfied its burden of proof.

The court then turned to evaluating and rejecting the surety's nine special defenses, of which only three were briefed. The first five special defenses pleaded varieties of equitable defenses based on alleged reckless conduct on the part of the supplier that: barred the claim; constituted unclean hands; failed to mitigate damages; constituted estoppel; and amounted to laches. As a preliminary matter, the court determined that equitable defenses are not applicable to an action at law, in which the claimant does not seek equitable relief. In this case, the supplier sought only monetary damages and other relief permitted by the statutes and the payment bond, which rendered it an action at law. Departing from (and distinguishing) Supreme Court cases from 1973 and 1908, which were cited for the proposition that equitable defenses may be raised in actions at law, the Court, found that the equitable special defenses raised by the surety were not applicable. The court then bolstered the decision by making detailed findings of fact suggesting that the surety and contractor, rather than the supplier, were actually the ones that acted recklessly, unfairly, and unreasonably. As support, the court highlighted that neither the surety nor the contractor took even minimal steps to validate the subcontractor's creditworthiness or to ensure that money paid to the subcontractor was paid to the supplier. The court found for

the supplier on its payment bond claim and on all the surety's special defenses, and awarded a judgment in the amount of $484,919.30.

United Illuminating Co. v. Whiting-Turner Contracting, Co., 2019 WL 2231222 (D. Conn. May 23, 2019)

[Contractor's claim against subcontractor's performance bond surety was not subject to motion to dismiss on grounds that the contractor had failed to take action to remedy the default.]

This performance bond claim arose four years after the completion of the United Illuminating Central Facility project in Orange, Connecticut. The project involved the construction of an office building, an operations building, and related parking lots and common driveways. The contractor hired a site subcontractor to construct the parking lots and common driveways on the project, and required that the subcontractor provide a performance bond. Construction of the parking lots and common driveways was completed in 2012.

Four years later, in 2016, the general contractor made a claim on the site subcontractor's performance bond, alleging that the subcontractor had breached and defaulted on its subcontract by: (1) installing an insufficient quantity of asphalt or otherwise improperly and/or incompletely installing the asphalt for the parking lots and driveways; (2) failing and refusing to remove and replace its nonconforming work; and (3) breaching its warranties. The general contractor brought an action in District Court to enforce the performance bond. The surety moved to dismiss the contractor's claims on several grounds, including the failure to remediate the nonconforming work. The surety argued that it had no obligation to reimburse the contractor because the terms of the bond required the contractor to take action, stating:

> The surety shall, within ten (10) calendar days after notice of default from the Obligee, notify the Obligee of its election either to promptly proceed to remedy the default or promptly proceed to complete the contract in accordance with and subject to its terms and conditions. In the event the Surety does not elect to exercise either of the above stated options, then the Obligee thereupon **shall** have the remaining work completed, Surety to remain liable hereunder for all expenses, including attorney's fees of completion.

(Emphasis in original). The contractor argued that its completion of the corrective work is not a condition precedent to establishing the liability of the surety under the performance bond, and in fact the express terms of the bond and other incorporated contract documents make it clear that he surety is to remain liable in the event of subcontractor nonperformance. Drawing all reasonable inferences in favor of the contractor, the District Court (Eginton, J.) denied the surety's motion to dismiss, but left the door open in allowing the parties to revisit the issue of whether the general contractor's remediation was a prerequisite to the subcontractor's liability at summary judgment.

VII. DAMAGES

Semac Electric Company, Inc. v. Skanska USA Building, Inc., 195 Conn. App. 695 (2020)

[When a contract expressly provides for potential changes to scope, sequence and time, the subcontractor ought to anticipate such changes, negating the possibility of a cardinal change; damages for wrongful termination can be awarded on an alternative basis when the billings of the requesting party are so irregular and unreliable.]

The parties, Skanska ("general contractor") and Semac ("subcontractor") entered into a contract pursuant to which the subcontractor would perform all necessary electrical work on the expansion and renovation of Stamford Hospital, for the sum of $14,785,462. After several months of work, the subcontractor sent a "Notice of Cardinal Change and Material Breach of Subcontract" to the general contractor, indicating that "there has been a cardinal change to [the] subcontract due to the drastic and unforeseen modifications and changes that have been made to Semac's sequence of construction and the schedule parameters set forth in the subcontract, which has unreasonably altered the character of the work and unduly increased its cost." The subcontractor proceeded to state that it could continue to perform only if the general contractor agreed to increase the contract price. The general contractor responded that the subcontractor's refusal to proceed under the terms of the subcontract constituted a default, and that unless the subcontractor cured the default, the general contractor would pursue its contractual rights. The next day, the general contractor terminated the subcontractor and notified it that it was taking possession of its material, tools, appliances and equipment. The subcontractor then accused the general contractor of material breach of the subcontract on the ground of wrongful termination.

The subcontractor brought an action against the general contractor alleging breach of contract, wrongful termination, quantum meruit, breach of the implied covenant of good faith and fair dealing, violation of CUTPA, conversion and civil theft. The general contractor filed a counterclaim alleging that the subcontractor had breached the contract by failing to perform and complete the work, and committed fraud and civil theft in submitting billing for work it had not performed and goods it had not procured.

Following a multi-day hearing, the trial court issued a decision concluding that both parties had breached the contract. Specifically, the court concluded that the subcontractor breached the contract when it refused to perform its contractual obligations, but that the general contractor breached the contract by terminating the subcontractor without affording it 48 hours to cure its breach. The court then determined that the subcontractor completed 65% of the work it had contracted to complete, and was therefore entitled to be paid for this work. It then found, however, that the amount of work performed had already been billed and paid, and that the general contractor had further paid the subcontractor for labor and materials, in excess of those actually paid by the subcontractor. In addition, the court determined that the subcontractor had improperly marked up its labor costs. Based on these calculations, the court ordered that the subcontractor reimburse the general contractor approximately $3.8 million, plus prejudgment interest.

On appeal, the subcontractor argued that the trial court had erred in rejecting its claim that there had been a cardinal change in the terms of the contract, thus excusing its breach. As this issue had not been previously addressed by Connecticut courts, the Appellate Court looked to analogous situations and decisions from other jurisdictions. The

Court explained that in deciding whether a cardinal change is present, the court should look to whether the modified job was essentially the same work as the parties bargained for when the contract was awarded, and found that there is a cardinal change if the ordered deviations altered the nature of the thing to be constructed. In this case, The Court concluded there had not been a cardinal change because the contract expressly provided for potential changes to the scope, sequence and time of the work. The subcontractor was accordingly required by the contract to anticipate issues of this nature when it submitted its bid and signed the subcontract. Moreover, the court found that the subcontractor was actually inflating its bills to make a profit on every hour worked, a fact which belied its claim that the changes to the project so materially affected its costs that it had no choice but to abandon the project.

Next, the court rejected the general contractor's appellate claim that the trial court improperly concluded that it too materially breached the contract by failing to provide the subcontractor with a full 48-hour cure period before terminating its contract. The trial court had reasoned that although the general contractor had the right to terminate the subcontractor at any time under the contract, the contract further provided that for the general contractor to terminate the subcontractor for cause and take the subcontractor's equipment, it was required to give the subcontractor 48-hours to cure its breach. The Appellate Court affirmed the trial court's decision, determining that to hold otherwise would essentially rewrite the contract, which the court is not permitted to do.

Next, both parties challenged the court's award of damages. The Appellate Court reviewed the general rule that

> [i]t is axiomatic that the sum of damages awarded as compensation in a breach of contract action should place the injured party in the same position as he would have been in had the contract been performed.... The injured party, however, is entitled to retain nothing in excess of that sum which compensates him for the loss of his bargain.... Guarding against excessive compensation, the law of contract damages limits the injured party to damages based on his actual loss caused by the breach.... The concept of actual loss accounts for the possibility that the breach itself may result in a saving of some cost that the injured party would have incurred if he had had to perform....

Then, applying the clearly erroneous standard to the damages award, the Appellate Court affirmed the trial court's decision. The general contractor argued that the parties' contract entitled it to expectation damages. The court rejected this argument due to its finding that the general contractor, too, had breached the contract. For its part, the subcontractor argued that because it had not been afforded the 48-hour period to cure its default, that the termination for cause was transformed into a termination for convenience under the parties' contract. The court rejected this argument because the trial court had in fact expressly concluded that the subcontractor was entitled to the termination payment, but that its billing practices were too irregular to confidently award damages based upon its invoices, as contemplated by the contract. The trial court had therefore employed an alternative method of calculating the termination payment. It ascertained the percentage of the entire contract that Semac fulfilled and multiplied that percentage by the total amount of the contract. Although the Appellate Court found that the calculation may have been somewhat imprecise, it was not clearly erroneous.

Finally, the general contractor argued that the trial court erred in failing to find that the principals of the subcontractor company committed fraud when they swore under oath that their invoices were accurate. The trial court rejected this claim, reasoning that the

chief financial officer credibly testified that although he signed the invoices, he presumed that others at the company had vetted them first. Similarly, the president of the company "never bothered to read the entire contract or the waivers being signed." The trial court thus determined that there was not "clear and convincing evidence of intent or recklessness; merely strained and self-interested interpretations." The Appellate Court affirmed, explaining that its role was not to "second-guess the trial court's credibility assessments."

Centerplan Construction Company, LLC v. City of Hartford, Superior Court, Judicial District of Hartford, Docket No. X07-HHD-CV-16-6069748, 2019 WL 3219502 (June 18, 2019) (Moukawsher, J.)
Centerplan Construction Company, LLC v. City of Hartford, Superior Court, Judicial District of Hartford, Docket No. X07-HHD-CV-16-6069748, 2019 WL 3406815 (June 26, 2019) (Moukawsher, J.)

[These trial court decisions provide a helpful review of the limits on the types of damages parties may seek based upon contract language in this high-profile trial.]

These two decisions from the Superior Court were issued during the course of the trial between plaintiffs DoNo Hartford LLC ("DoNo") and its affiliate, Centerplan Construction Company, LLC ("Centerplan"), and the City of Hartford ("the City"). Among other agreements, the City entered into a Development Services Agreement with developer DoNo and a Design Build Contract with contractor Centerplan for the mixed-use development of Dunkin' Donuts Park, Hartford's new baseball stadium. Subsequently, the City terminated both agreements claiming that DONO and Centerplan were in breach of contract. As a result of being terminated, Centerplan was sued by the project surety that promised to complete the stadium if Centerplan defaulted. Centerplan and DoNo in turn

brought suit to recover, in part, consequential and restitution damages from the City for what needed to be paid to the surety.

In considering motions in limine relating to the issue of damages, Judge Moukawsher first pointed to Paragraph 7(c)(2) of the Development Services Agreement which stated that if the City defaults, DoNo "may take whatever action at law or in equity may appear necessary or desirable to collect ... amounts then due and thereafter to become due ... or to recover any other amounts owed hereunder, ancillary damages suffered ... and for specific performance or injunctive relief ..."

Moreover, Section A.4.1.10 of the Design Build Contract stated that Centerplan and the City "waive claims against each other for consequential damages arising out of or relating to the Design-Build Contract." Finally, the court noted that Section A.14.2.4 of the Design Build Contract also addressed damages:

> If the unpaid balance of the Contract Sum exceeds costs of finishing the Work and other damages incurred by the Owner and not expressly waived, such excess shall be paid by the Design-Builder. If such costs and damages exceed the unpaid balance, the Design Builder shall pay the difference to the Owner.

The court found this language to be "the touchstone of damages in this case." Taken together, these provisions limited DoNo and Centerplan's damages, if any, to only those for expectation damages, not consequential or restitution damages.

Citing to Coppola Construction Co., Inc. v. Hoffman Enterprises Ltd. Partnership, 157 Conn. App. 139, (2015), the court noted how expectation damages are the basic form of damages at common law. Generally, "a contractor who substantially performs under a building or construction contract is entitled to recover the contract price minus the cost of repairing the defects or completing the unfinished part of the work so as to bring the

construction up to the level required by the contract ..." Id. at 160-61. The court also found support in treatises, specifically, PROVING AND PRICING CONSTRUCTION CLAIMS, wherein the author, Robert Cushman, wrote that the contractor's basic damage remedy for wrongful termination during the project is "[t]he contract price, less the cost of completion, less any progress payments ..." According to the court, the only time a prevailing contractor's damages are measured the way DoNo and Centerplan wanted them to be measured, specifically in the form of restitution damages, is when the contract is unenforceable—such as would have been the case if the City had repudiated the contract, if the contract became unenforceable, or if the contract terminated for some other reason.

The court rejected DoNo and Centerplan's reliance on the Supreme Court's decision in Edward De V. Tompkins, Inc. v. Bridgeport, 94 Conn. 659 (1920), used for the proposition that the plaintiffs should be entitled to restitution damages. The court explained that DoNo and Centerplan confused terminating the contract with terminating DoNo and Centerplan for breaching the contract, leading them to believe they were entitled to damages not only for breach of contract, but also for damages that could be recovered in the absence of, or following the termination of, a contract. The court found that to allow DoNo and Centerplan the right to elect restitution would go beyond allowing them to recover the money they bargained for, but would also cancel the contract and rewrite the bargain. As the court pointed out, "if DoNo and Centerplan underbid the job, this would offer them an unbargained-for-bonanza rather than place them in the position they would be in if the contract had been honored."

Finally, the court rejected Centerplan's and DoNo's arguments that Hartford repudiated the contract when it announced that it had no more money to put into the project and through its number and character of construction change directives.

The court then provided a rubric for how damages were to be calculated in this case, as follows:

Damages

ADD
Contract amount $ *Fixed sum*
Value of the contract changes $ *Fixed sum*
Reasonable value of construction change directives $____
SUBTOTAL $____
SUBTRACT
Amounts already paid by Hartford $ *Fixed sum*
EQUAL DAMAGES: TOTAL: $____

Following the court's ruling, both plaintiffs, DoNo and Centerplan, moved to reargue, though this motion was denied. The court reiterated how the plaintiffs had ignored the language of Section A.14.2.4 of the Design Build Contract. The court found that while the plaintiffs would normally be entitled to consequential damages on top of expectation damages, the damages were waived by operation of § A.4.1.10 of the Design Build Contract.

The case is currently on appeal with the Connecticut Appellate Court.

Viking Construction, Inc. v. 777 Residential, LLC, 190 Conn. App. 245 (2019)

[Damage to windows during the cleaning of the façade was a direct result of the contracted work, it was not a covered peril and the resulting loss clause operates to reinstate coverage only if the excluded cause results in a separate and distinct covered peril that causes the loss.]

This case involved a major renovation project on a high-rise residential project in Hartford, CT owned by 777 Residential LLC ("owner"). Owner hired Viking Construction ("general contractor") to be the general contractor for the project. The general contractor, in turn, subcontracted with Armani Restoration ("subcontractor") to clean the building's concrete façade. The subcontractor's cleaning methods utilized a crushed glass cleaner sprayed onto the building using power washes, which inadvertently damaged the building's windows. The windows had to be replaced due to the damage at a cost of more than $4 million. The owner sought insurance coverage for the damage from Liberty Mutual, and Liberty Mutual denied coverage.

The relevant insurance policy covered "direct physical loss or damage caused by a covered peril." The policy did not define the term "covered peril," but under the heading "Perils Covered" the policy stated that it covered "risks of direct physical loss or damage unless the loss is limited or caused by a peril that is excluded." The policy's "Defects, Errors, And Omissions" exclusion precluded coverage for "loss or damage consisting of, caused by, or resulting from an act, defect, error, or omission (negligent or not) relating to: a) design, specifications, construction, materials, or workmanship; b) planning, zoning, development, siting, surveying, grading, or compaction; or c) maintenance, installation, renovation, remodeling, or repair." The exclusion, however, contained an exception, which the court described as the "resulting loss" clause, which provided: "[I]f an act, defect, error, or omission as described [in the exclusion] results in a covered peril, [Liberty Mutual] do[es] cover the loss or damage caused by that covered peril." Although the policy's insuring agreement covered buildings "while in the course of construction,

erection, or fabrication," an optional renovation endorsement expanded the policy's insuring agreement to cover "direct physical loss or damage caused by a covered peril to 'building materials' and 'existing buildings' that are part of [the insured's] 'rehabilitation or renovation project.'"

The general contractor brought a breach of contract action against the owner, in response to the owner's refusal to remit the outstanding contract balance. The general contractor then filed a motion to cite-in the insurance company and the subcontractor. The owner ultimately settled with the general contractor and the subcontractor for $1.6 million and sought the balance from the insurance company. The owner and insurance company each filed cross motions for summary judgment, and the trial court granted the owner's motion and denied the insurance company's motion. The insurance company then appealed on the grounds that the defects, errors and omissions exclusion in the insurance policy barred coverage and that the resulting loss clause in the insurance policy did not operate to reinstate coverage. The Appellate Court agreed and reversed and remanded the trial court's decision with direction to deny the owner's motion for summary judgment, to grant the insurance company's motion for summary judgment, and to render judgment for the insurance company.

In reaching this decision, the court first looked to the dictionary definitions of the undefined terms in the policy. The court determined that the damage to the windows was "related to" the renovation, despite the fact that the windows themselves were not to be changed as part of the renovation. The court reasoned that the cleaning of the façade was part of the renovation and, therefore, the damage to the windows was a "direct result" of

the cleaning. The court further reasoned that the parties' actions supported this conclusion, because the specifications for the renovation project specifically required the subcontractor to take steps to avoid harm to the windows. The subcontractor thus had an obligation to protect the adjacent surfaces, which included the windows.

Reversing the trial court, the Appellate Court found that the trial court had erroneously applied the resulting loss clause even though an excluded cause, not a separate covered cause or peril, caused the loss. The Appellate Court explained that resulting loss clauses operate to reinstate coverage only if the excluded cause results in a separate and distinct covered peril that causes the loss. Here, there was only one cause of the owner's loss—the spraying of the building—and because that was not a covered peril, the resulting loss clause did not apply.

VIII. HOME IMPROVEMENT AND NEW HOME CONTRACTS

Reyes v. Vivona, Superior Court, J.D. Stamford-Norwalk, April 10, 2019 (Genario, J.)

[The construction of the treehouse falls within the scope of the Home Improvement Act.]

Plaintiff, a carpenter, contracted with defendant, a landscape contractor, for the construction of a "tree house" on defendant's property located in Greenwich, Connecticut, to be used by the children of the defendant/homeowner. Defendant agreed to pay plaintiff $6,000 for the work and to supply various materials and supplemental labor. There was no written contract between the parties and preliminary negotiations took place via telephone and email.

Since defendant was anxious to complete the "tree house" as rapidly as possible, defendant requested that plaintiff immediately commence work which plaintiff did. When plaintiff requested an initial payment from defendant after its fourth day of work, on a Friday afternoon, the parties disagreed on the value of the work performed to date and on the amounts and timing of future payments. At the end of the day that same Friday, the parties finally agreed on an initial payment of $3,000 and defendant then gave plaintiff a check in the amount of $3,000.

Subsequently, the following weekend, the parties then had additional disagreements regarding the timing and amounts of future payments and as a result, defendant stopped payment on the initial $3,000 check. In a seven-page decision, the court answered the following issues:

First, the court found that the construction of the "tree house" did fall within the scope of the Home Improvement Act.

Second, the court held that the plaintiff was a home improvement contractor as defined by the Home Improvement Act.

Third, the court held that the plaintiff failed to comply with the mandatory requirements governing written contracts and the Home Improvement Act.

Fourth, the court held that as a result of the plaintiff's failure to comply with the Home Improvement Act, plaintiff could not obtain the "reasonable value" of its services.

Interestingly, however, the court then analyzed the possibility of a recovery by plaintiff as a result of defendant's "bad faith." Citing to the Connecticut Supreme Court's decision in Burns v. Adler, 325 Conn. 14 (2017), the court held that defendant had engaged in "bad faith" when it stopped payment on the $3,000 check it had tendered to plaintiff after his fourth day of work and that plaintiff could recover only the amount of that initial check reasoning that the parties had reached a definitive agreement concerning that initial dispute. The court then held that plaintiff could not recover for any other amounts for work performed because of plaintiff's failure to comply with the Home Improvement Act.

Onofrio v. Mineri, Superior Court, J.D. New Haven, June 14, 2019 (Blue, J.)

[Seller and builder of new home liable to purchaser of home for breach of contract, misrepresentation, violation of New Home Warranty Act, and CUTPA, where seller and builder failed to inform purchaser of water issues in the home.]

Plaintiffs/homeowners purchased a new home in North Branford, Connecticut from co-defendant G&M Properties, LLC. The plaintiffs claimed that G&M and related co-defendants sold them a new home without informing them of water issues in the basement.

Plaintiffs commenced the action against the seller of the new home (G&M), the builder of the new home (Timberwood Homes, LLC) and a principal and co-owner of both

of those business entities (Joseph Mineri). In their complaint, plaintiffs asserted six counts against all three defendants namely for breach of contract, misrepresentation, negligence, breach of the New Home Warranty Act, fraudulent concealment, and CUTPA. After trial, in a detailed eleven-page decision, the court addressed the liability of all three of the defendants under the aforementioned six counts.

With respect to plaintiffs' claims for breach of contract and misrepresentation, the court found it significant that G&M was aware that the basement had been flooding at the time it sold the new home to plaintiffs and failed to disclose that knowledge. Since G&M had a direct contract with plaintiffs, the court held G&M liable pursuant to these counts.

With respect to the count for negligence, the court found no negligence at issue.

With respect to the count for a violation of the New Home Warranty Act, the court analyzed the precise wording contained in the New Home Warranty Act and concluded that G&M and Timberwood were both "vendors" as contemplated by the Act. Specifically, the court held that G&M was a "vendor" because it was a corporate "person to whom a completed improvement had been granted for resale in the course of its business" and that Timberwood was a "vendor" because it is a corporate "person engaged in the business of erecting or creating an improvement on real estate." Therefore, the court held G&M and Timberwood liable for violating the Act.

With respect to the count for fraudulent concealment, the court found no evidence against any defendants concerning that assertion.

Finally, and significantly, with respect to plaintiffs' count for a violation of CUTPA, the court held that the actions of G&M, as described in the court's findings

concerning count one, constituted "immoral, oppressive or unscrupulous" conduct pursuant to CUTPA. Moreover, because of the close relationship between G&M, Timberwood and Mineri, the court held that all of those defendants collectively violated CUTPA. As such, the court awarded judgment, including attorneys' fees, against all defendants concerning the CUTPA claim, declining to award punitive damages.

IX. CONNECTICUT UNFAIR TRADE PRACTICES ACT (CUTPA), C.G.S. § 42-110a *et seq*.

CONNECTICUT SUPERIOR COURT:

330 R.R. Ave., LLC v. JCS Constr. Group, Inc., No. FSTCV176033286S, 2019 WL 1399471 (Conn. Super. Ct., J.D. of Stamford-Norwalk at Stamford, Feb. 13, 2019) (Taggart, J.T.R.)

[*Court granted plaintiff-owner's motion to strike defendant-contractor's CUTPA counterclaim where counterclaim merely restated contractor's breach of contract claim and failed to sufficiently allege aggravating factors to bring the claim within the auspices of CUTPA.*]

Plaintiff-owner filed suit against defendant-contractor in connection with the construction of an office building, alleging claims of breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment and violation of CUTPA. The contractor counterclaimed, alleging breach of contract, unjust enrichment, violation of CUTPA, and breach of the covenant of good faith and fair dealing.

Before the Court in this opinion was the owner's motion to strike, *inter alia*, the contractor's counterclaim that the owner had violated CUTPA. Specifically, the contractor claimed that the owner had: (1) caused and / or directed the architect to instruct the contractor to continue with construction and then refused to pay for the work; (2) caused and / or directed the contractor to continue with construction of the project on a cost-plus basis, then terminated the contract to avoid paying for the work; (3) failed to provide 100 percent of the construction documents; (4) failed to issue the appropriate construction documents prior to making changes to the project; (5) terminated the contractor without cause and after the project had been substantially completed; and (6) failed to pay the amounts due to the contractor for its work on the project.

In granting the owner's motion to strike the contractor's CUTPA counterclaim, the Court noted that the contractor's CUTPA claim merely repeated the allegations of its breach of contract claim and then added the conclusory allegation that "such unfair and deceptive actions constitute a violation of" CUTPA. The contractor's allegations, the Court found, did not "sufficiently allege aggravating factors to bring a breach of contract claim within the auspices of CUTPA." Instead, the Court held, "the aggravating factors alleged must 'constitute more than a failure to deliver on a promise.'"

330 R.R. Ave., LLC v. JCS Constr. Group, Inc., No. FSTCV176033023S, 2019 WL 3318549 (Conn. Super. Ct., J.D. of Stamford-Norwalk at Stamford, June 5, 2019) (Mottolese, J.T.R.)

[*Court denied owner's request for a prejudgment remedy for punitive damages pursuant to CUTPA and C.G.S. § 42-158j where the general contractor / its principal used the owner's payments in an unauthorized manner but nevertheless for purposes of the construction project.*]

Plaintiff-subcontractor filed suit against defendant-owner to foreclose on its mechanic's lien in connection with the construction of an office building. The subcontractor also named the general contractor on the project as a defendant, alleging that the general contractor had breached its agreement with the subcontractor. During the course of litigation, the subcontractor and owner entered into a settlement agreement whereby the subcontractor assigned to the owner all of its legal rights and claims against the general contractor and its principal. The subcontractor thereafter withdrew its complaint against the owner and the owner was substituted as the sole party plaintiff. The owner added the general contractor's principal, Justin Shaw, as a party defendant and amended its complaint against the general contractor / Shaw, alleging claims of, *inter alia*, breach of contract, violation of CUTPA, and noncompliance with C.G.S. § 42-158j

(Connecticut's prompt payment statute for private projects). Before the Court in this opinion was the owner's request for a prejudgment remedy in the total amount of $539,020.86, which amount included a request for punitive damages pursuant to CUTPA.

In denying the owner's request for a prejudgment remedy for punitive damages pursuant to CUTPA, the Court noted first that the owner's "base claims" derived from the general contractor's / Shaw's alleged breach of contract and violation of C.G.S. § 42-158j for utilizing the owner's payments for purposes not permitted by the contract and to the owner's detriment. The Court then stated that the evidence showed that the contractor used the owner's payments in an unauthorized manner "but nevertheless for purposes of the construction project." Because the evidence before it did not provide probable cause to support a likelihood of the owner's success on the merits of its CUTPA claim, the Court denied the owner's request for a prejudgment remedy for punitive damages pursuant to CUTPA.

Broadley v. Papageorge, No. FBTCV186070550S, 2019 WL 2517065 (Conn. Super. Ct., J.D. of Fairfield at Bridgeport, May 14, 2019) (Jennings, J.T.R.)

[*Court found plaintiffs-homeowners failed to prove CUTPA claim against defendants where plaintiffs failed to prove, inter alia, ascertainable loss as a result of defendants' Home Improvement Act violations.*]

Plaintiffs-homeowners filed suit against defendant-contractor and its sole member, Mr. Papageorge (collectively, "contractor" or "defendants"), in connection with the replacement of a roof on the plaintiffs' residence, alleging claims of breach of contract, breach of the covenant of good faith and fair dealing, and violations of CUTPA. The Court found that the following facts had been proved by a preponderance of the evidence at trial: approximately four to five years after the contractor had installed the roof on the

plaintiffs' home, the plaintiffs' noticed that the roof was leaking. The contractor thereafter returned to the home on three separate occasions in an attempt to find and fix the leak; the contractor never charged the plaintiffs a fee for these visits. After failing to fix the leak, the contractor informed the plaintiffs that the leak likely was caused by the flashing on the roof; flashing was not part of the contractor's original scope of work. As such, the contractor offered to fix the flashing on the roof and the water-damaged portion of the plaintiffs' ceiling for a fee. The plaintiffs never accepted the contractor's offer. Instead, the plaintiffs hired a new roofing contractor to replace the roof, and a different contractor to replace the damaged ceiling. The plaintiffs thereafter filed suit against the contractor.

In evaluating the plaintiffs' CUTPA claim, the Court first dismissed the contractor's statute of limitations special defense premised upon C.G.S. § 52-576. Specifically, the Court found that CUTPA has its own three-year statute of limitations in C.G.S. § 42-110g(f) and, since the contractor failed to specifically plead of identify the CUTPA statute of limitations in its special defense, the Court rejected the special defense premised on § 52-576.

The Court then evaluated the merits of the plaintiffs' CUTPA claim and found that the plaintiffs had proved the following violations of the Home Improvement Act, C.G.S. § 20-418, *et seq*. ("HIA"), which are also deemed to be violations of CUTPA: using a false LLC on the contract; failing to provide the contractor's registration number on the contract; and failing to disclose interests of entities in which the owner or contactor have been an owner or shareholder in the previous five years. However, the Court also found that the plaintiffs failed to present evidence that these allegations constituted the proximate

cause of an ascertainable loss of money or property. Indeed, the Court noted, the contractor made no effort to hide from or avoid the plaintiffs, responded promptly to their calls, and made substantial efforts to diagnose and repair the leak.

The Court also found that the plaintiffs failed to prove that the defendants violated CUTPA by "negligently and intentionally installing a substandard roof that failed a little over 4 years." In so concluding, the Court noted that the contractor was not hired to replace or repair the flashing when it originally installed the new roof and the plaintiffs failed to present any evidence -- including expert testimony -- that the roof installed by the defendants was, in fact, "substandard." Based on the foregoing, the Court entered judgment in favor of the defendants on the plaintiffs' CUTPA claim.

Main St. Bus. Mgmt., Inc. v. Moutinho, No. FBTCV186073550S, 2019 WL 4060738 (Conn. Super. Ct., J.D. of Fairfield at Bridgeport, Aug. 13, 2019) (Welch, J.)

[*Court found plaintiff's CUTPA claim was barred by the three-year statute of limitations in C.G.S. § 42-110g(f), noting that C.G.S. § 52-595 (fraudulent concealment of a cause of action) did not toll the applicable statute of limitations.*]

Owner of property filed suit against former owner ("Moutinho") and its construction company ("Mark IV"), alleging that, during Moutinho's ownership of the property, Moutinho individually, or through Mark IV, used contaminated construction / demolition waste as fill on the property. The plaintiff's complaint alleged that the defendants were, *inter alia*, negligent and violated CUTPA. Before the Court in this opinion was the defendants' motion for summary judgment on the grounds that, among other things, plaintiff's CUTPA claim was barred by the applicable statute of limitations in C.G.S. § 42-110g(f). Section 42-110g(f) states, "[a]n action under this section may not be brought more than three years after the occurrence of a violation of this chapter."

In finding that the plaintiff's CUTPA claim was barred by the statute of limitations in § 42-110g(f), the Court dismissed the plaintiff's argument that C.G.S. § 52-595 (pertaining to the fraudulent concealment of a cause of action) tolled the statute of limitations for CUTPA claims, citing the Connecticut Supreme Court's opinion in *Fichera v. Mine Hill Corp.*, 207 Conn. 204, 216-17 (1998). Because the alleged violation of CUTPA took place during the defendants' ownership of the property between 1986 and 2009, and the plaintiff did not file suit against the defendants until September 13, 2018, the Court found that the plaintiff's CUTPA claim was barred by the statute of limitations in § 42-110g(f).

Zettergren v. Turn Key Renovations, LLC, No. NNHCV186078820S, 2019 WL 1596807 (Conn. Super. Ct., J.D. of New Haven at New Haven, Mar. 1, 2019) (Pierson, J.)

[*Defendants' motion to strike CUTPA claims denied where the plaintiffs had sufficiently alleged violations of the New Home Construction Contractor Act and multiple breaches of contract and unscrupulous conduct by the defendants, including various misrepresentations by one particular defendant.]*

Plaintiffs-homeowners purchased a newly-constructed home owned by defendant, Turn Key Renovations, and built by co-defendants, Lombardo Building and Vincent Lombardo. By way of a seventeen-count complaint, the plaintiffs filed suit against the above-named defendants and Turn Key's managing member, Christopher Bjorklund, alleging, *inter alia*, breach of contract and violations of CUTPA.

Before the Court in this opinion was Turn Key's and Bjorklund's motion to strike, *inter alia*, the CUTPA claims asserted them. Specifically, the plaintiffs alleged that Turn Key and Bjorklund violated CUTPA by: conveying and / or building a home that was not free of faulty materials, constructed according to sound engineering standards, constructed

in a workmanlike manner and fit for habitation, at the time of the delivery of the deed; not registering as a new home contractor, in violation of C.G.S. §§ 20-417b and 20-417d (the New Home Construction Contractor Act or "NHCCA"); failing to provide the plaintiffs with a copy of their certificate of registration, in violation of C.G.S. § 20-417d of the NHCCA; and acting deceptively and with a dishonest purpose by deliberately omitting work and completing work poorly in an effort to meet deadlines, deliberately ignoring town codes adopted from the International Residential Code, and deliberately using substandard materials in an effort to cut costs. The plaintiffs also alleged that Bjorklund individually had acted with a dishonest purpose, in violation of CUTPA, by: conveying an improvement to an intermediate purchaser to evade C.G.S. § 47-116 *et seq*. (Connecticut's New Home Warranty Act); providing misleading change orders to the plaintiffs which included the names of two non-party entities managed by him; providing misleading change orders to the plaintiffs which presented the appearance that he was the builder of the home; omitting work in an effort to meet deadlines; completing work poorly in an effort to meet deadlines; deliberately ignoring town codes; and / or deliberately using substandard materials.

In their motion to strike, Turn Key and Bjorklund argued that the plaintiff's CUTPA claims alleged mere breaches of contract and were "conclusory, containing no specific facts supporting the same." Turn Key and Bjorklund also argued that the plaintiffs' CUTPA allegations pertaining to the NHCCA were insufficient because the allegations failed to plead facts identifying an ascertainable loss.

In denying Turn Key's and Bjorklund's motion to strike, the Court first found that the plaintiffs' NHCCA allegations were sufficient to support a CUTPA claim. Specifically, the Court reiterated that a violation of the NHCCA constitutes a per se violation of CUTPA and noted that, with respect to the ascertainable loss alleged by the plaintiffs, "[the] question of whether a plaintiff has suffered ascertainable losses as a result of a CUTPA violation is a question of fact to be determined by the trier." The Court also found that the plaintiffs' remaining CUTPA allegations were sufficient to support their claims for a CUTPA violation against Turn Key and Bjorklund where the plaintiffs alleged multiple breaches of contract and unscrupulous conduct by the defendants, including various misrepresentations by Bjorklund. Allegations of misrepresentation, the Court found, "can constitute an aggravating circumstance that would allow a simple breach of contract claim to be treated as a CUTPA violation; it would, in effect, be a deceptive act."

X. STATUTES OF LIMITATIONS

Broadley v. Papageorge, FBTCV186070550S, 2019 WL 2517065 (Conn. Super. Ct. May 14, 2019)

[Where there is no statute of limitations specifically applicable to a cause of action, the court will borrow the most suitable one, taking into consideration the nature of the cause of action or the right sued upon. Further, a special defense of statute of limitations must specifically plead or identify the statute by number.]

This action arose from a 2010 contract to remove and install roofing. Approximately four years after the installation was completed, the plaintiffs discovered water intrusion in their ceiling. Over the course of several months, the defendants attempted to discover the source of the leak eventually concluded that the flashing was the issue. The contract did not call for the replacement of flashing, but rather to install the roofing over the existing flashing. The plaintiffs rejected the defendants' proposal to replace the flashing and repair the water damage and instead engaged a third-party to replace the entire roof and apply new flashing in the area where the defendants had identified the source of the leak. The plaintiffs commenced this action with three counts: breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of the Connecticut Unfair Trade Practices Act ("CUTPA"). The action was brought pursuant to the Connecticut Accidental Failure of Suit Statute because the substance of the complaint was previously filed and dismissed upon finding the defendants had not been properly served.

The defendants pleaded a special defense that the claims were time barred by the statute of limitations under Conn. Gen. Stat. § 52-576. The case was tried to the court and after the plaintiffs rested, the defendants "filed an oral 'motion for directed verdict' which

the court construed to be a Motion to Dismiss under Practice Book § 15-8." The motion was based on the evidence showing the cause of action accrued more than seven years earlier and that the plaintiffs had failed to make a prima facie case under any of counts. The court noted that the operative statute of limitations under Conn. Gen. Stat. § 52-576 is six years after a right of action accrues. The court then found that the cause of action accrued upon completion of the work specified in the contract—May 13, 2010. Further, the court found that in the previously filed action, the improper service was made on May 23, 2017, seven years and thirteen days after the action accrued. The court concluded that the Connecticut Accidental Failure of Suit Statute failed to preserve the plaintiffs' action as it only applies when the prior action was timely commenced. The plaintiffs argued that the statute of limitations had tolled based upon a continuing course of conduct. The court dismissed this argument when it noted that the plaintiffs had failed to adequately respond to the special defense and left the court without the necessary "constellation of facts" to establish that duty existed and to determine whether that duty was continuing.

As to the second count, for breach of the implied covenant of good faith and fair dealing, the court noted that "[w]hen there is no statute of limitations specifically applicable to a cause of action the court will borrow the most suitable statute of limitations on the basis of the nature of the cause of action or the right sued upon." The court applied Conn. Gen. Stat. § 52-576 on the grounds that breach of the covenant of good faith and fair dealing "sounds in breach of contract" and is therefore subject to the six-year statute of limitations. Accordingly, the court summarily stated that the analysis of the first count was

equally applicable to the second count and the special defense of statute of limitations prevailed.

Finally, as to the third count, violation of CUTPA, the court noted that "CUTPA has its own three-year statute of limitations in § 42-110g(f) . . . [and an] allegation of special defense of statute of limitations must specifically identify the statute by number." Id. (citing Practice Book § 10-3(a) and Avon Meadow Condominium Assoc., Inc. v. Bank of Boston Connecticut, 50 Conn. App. 688, 698 (1998)). Because the defendants had failed to specifically plead or identify CUTPA's statute of limitations, the court rejected this special defense. Despite this, the court ultimately held that the plaintiffs had not proved all the elements of their claim and judgment entered in favor of the defendants on all three counts.

XI. LEGISLATION

The following are summaries of select Public Acts, passed during the 2019 session of the Connecticut General Assembly, which may be of interest to and have an impact on the construction industry. These summaries are meant to be handy reference tools, not substitutes for the text of any Public Act. The Office of Legislative Research ("OLR") of the Connecticut General Assembly is credited for the text of summaries of the Public Acts. In several instances, the text of an OLR summary has been shortened to exclude summaries of those portions of the Public Acts that are unrelated to the construction industry.

PA 19-35: An Act Concerning a Green Economy and Environmental Protection

[This act addresses various issues relating to renewable energy programs and energy efficiency standards.]

Section 11 of the act establishes new requirements for DEEP regulations on energy efficiency for certain state-funded construction projects, including public school facilities. The act requires DEEP to adopt new regulations for the state building construction standards, which must be based on a nationally recognized model for sustainable construction codes that promotes the construction of high performance green buildings that:

1. have reduced emissions;
2. have enhanced building occupant health and comfort;
3. are designed to conserve water resources;
4. are designed to promote sustainable and regenerative materials cycles; and
5. provide enhanced resilience to natural, technological, and human-caused hazards.

The act also removes provisions that (1) require DEEP, in consultation with DAS, to exempt facilities from complying with these standards if the facility cannot be defined

as an eligible building type in the Energy Star Target Finder tool and (2) establish a separate standard for such exempted facilities.

PA 19-126: An Act Concerning Applications for Prequalification by Contractors and Substantial Subcontractors

[This act relates to the application form used by DAS to prequalify state public works contractors.]

Prior law required applicants for state public works contracts to provide information about any legal or administrative proceedings pending or concluded adversely against them, their principals, or key personnel within the last five years concerning the procurement or performance of any public or private construction contract. Prior law also required applicants to disclose knowledge of any pending investigation. In order to conform with current DAS practice, the act eliminates the requirement that applicants provide information on pending investigations and proceedings.

The act also requires applicants to provide information about any legal or administrative proceedings concluded adversely against them or their principals or key personnel, within the last five years concerning the nonpayment or underpayment of employee wages or benefits during the performance of any public or private construction contract.

PA 19-141: An Act Requiring the Prompt Payment of Contractors

[This act addresses contractual provisions relating to the obligation of general contractors to pay subcontractors and suppliers.]

The act requires that commercial construction contracts contain provisions requiring general contractors to pay any subcontractor or supplier for labor and materials within 25 days after receiving payment from the owner, instead of within 30 days as under

prior law. It also requires general contractors to include in each subcontract a requirement that subcontractors and suppliers pay sub-subcontractors and sub-suppliers within 25 days after receiving payment from the contractor, instead of within 30 days as under prior law. The act does not change prior law requiring owners to pay amounts due for labor and materials within 30 days after receiving a written request for payment.

PA 19-177: An Act Making Changes to Department of Consumer Protection Enforcement Statutes

[This act makes changes to various statutes relating to the authority of the Department of Consumer Protection.]

Prior law required DCP-licensed tradesperson contractors to include their license number on printed advertisements, bid proposals, contracts, invoices, and stationery used in their business. Section 1 and 2 of the act provide that the license number must be included on any such written materials, whether printed or not. The act also provides that failure to comply with the license number display requirements may subject the offending contractor to a fine of up to $500, except for a first violation.

PA 19-1: An Act Concerning Authorization of State Grant Commitments for School Building Projects

[This act relates to the funding of various school construction projects under the state school construction grant program.]

Under the state school construction grant program, the state reimburses towns and local districts for a percentage of eligible school construction costs. The towns pay the remaining costs. This act (1) authorizes 8 school construction grants totaling $160 million, (2) makes various changes to the school construction laws, and (3) grants certain

exemptions and waivers from state law for specified school construction projects in Hartford and Tolland.

COVID-19 and its Impacts to the Construction Industry

By, Raymond A. Garcia and Jonathan A. Krumeich

I. Introduction

Twelve months ago, the COVID-19 virus began working its way into our lives and since then has greatly impacted every facet of our life. Shelter in place orders issued by governors stopped the economy. PPE loans keep small businesses alive for two months but then ran out. We in the construction industry were recognized as an "essential" segment of our economy and for the most part allowed to continue working when the rest of the country was shut down by the shelter in place directives issued by federal and state authorities. Over a period of a few weeks, work rules were promulgated which were the product of the virologists, epidemiologist and other public health official's opinion about what was necessary to manage the spread of the virus in our society at large. For the foreseeable future, the circumstances under which we live and work have been altered in what were unforeseeable ways, each of which has affected the cost of doing business. As time passed people began to measure the impact. People often remark now about the trade off in lives compared to the economic impact in an industry or the economy as a whole.

The construction industry has been dramatically affected and had to adapt to new work rules on the fly. Work put under contract spanning the last year and potentially into the unforeseeable but not the less unavoidable future will be dramatically and adversely affected by the new work rules which for the most part are driven by concerns over health and safety. Those rules cause inefficient working conditions, project delays, and generate cost overruns. This paper discusses how the additional cost associated with or caused by the COVID-19 virus and related health and safety rules may be recovered. It considers changed condition provisions, unforeseen condition provisions and force majeure event definitions as potential avenues for claims to recover such costs and offers some ideas about some common contract provisions which can be the basis for a request for an extension of time or for additional compensation. This article also surveys insurance coverage and other sources of money to cover the economic impact of the virus and the processes we as a society have adopted to enable us to work while we await some cure or mediating medication.

II. Background

Viral threats to our lives have existed since the beginning of time. Many of us share the common history of every child in New England raised by ethnic parents grandparents who emigrated to this country in the early 1900s. Our grandparents lived through the Spanish Flu two world wars, the Great Depression, the Korean Conflict, the Vietnam War, the Real Estate Debacles of the 80's and 90's, the tech bubble crash, and the crash of 2008, just to list a few common events. Each of us will have vivid memories of a grandmother telling us on cold New England days to dress warmly for fear we would catch a death of a cold.

Each of us should keep in mind that most viruses once acquired, never leave our system. Think Chicken Pox, or HIV, or other virus driven illnesses we have overcome or simply manage. Keep in mind as well that we have some therapies that teat the influenza (the Flu) but after years

of trying, no vaccine exists that knocks it out. In the context of explanations of why this pandemic is so threatening and the government lock down is perceived as the best way to control its spread, we hear stories of epidemics and economic collapses happening every 10 years or so. Those stories should be both warning signs to bred caution and also the beacon of hope demonstrating that we can overcome that which we have to overcome.

The Baby Boomers were born in a time of influenza, chicken pox, polio and other airborne threatening viruses. The cold war raged. They had bomb shelters. They feared the atom bomb. The Russian threat was real. Each time a vaccine was developed to reduce or in some cases eradicate the effects of a pandemic threat of a virus. We remember Polio and having friends who were ravaged by the illness. The Baby Boomers found ways to manage and live in a time of viral threat and uncertain exposure to life threatening illness and social circumstances. The named generations following, Gen X, Millennials, Gen Y and so forth are collecting their experience now as well.

Statistics produced by the public health services[1] broadcast by the news media indicate how pervasive illnesses were that kill or threatened our overall health, like heart disease, cancer, tuberculosis and car accidents then and now relative to the COVID virus[2] and how devastating each have been to segments of our population. Boomers remember a time before health insurance and listening to parents discuss how they might pay doctor's bills. Many lawyers specialized in debt collection for hospitals and doctors. They were apparently wealthy men who had a seemingly endless line of cases. They came to be viewed as almost as bad a plague as the illnesses that forced families to run up bills for the health care so necessary to keep each of us alive. Yet they were in time critical parts of the health care system until legislation regulated debt collection practices and some lawyers came to prominence suing the collection lawyers and their clients for unfair practices. Industries rise and fall based on health threats and other environmental threats.

Many like to think we matured as a society. Current purveyors of hope point out that Microsoft, Appel and many of the prominent industries of the day were founded during economic downturns. Health insurance has become more prevalent. The quality of health care available reduced the mortality of the viral diseases. Awareness helped cure other common causes of death, like looking right before turning or driving at 25 mph or less in the major cities. Debt collection practices fell under increasingly more restrictive regulations. We learned over time to manage the health problems and the business issues. Medicine developed and became more responsive.

One attribute we did not possess is the ability to foresee the future. Hence our most recent experience with the current pandemic looking back over the last nine months is much like most of the others. We are reacting to it rather than applying the lessons of the years and managing it. Part of the group reaction is framed by the politics of the times. Which politician was more or less effective in managing his or her section of the population. The national agenda played out through the local agendas of governors. This piece is not intended to be political or comment on political

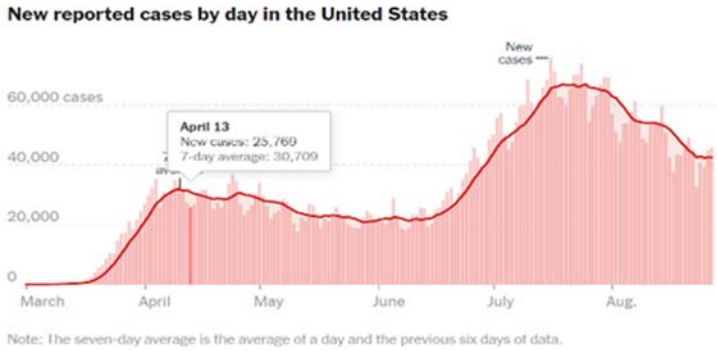
[1] https://webappa.cdc.gov/cgi-bin/broker.exe . The chart offers the view of the top ten leading causes of death in 2018 by age. https://webappa.cdc.gov/sasweb/ncipc/leadcause.html enables one to find data on the top causes of death over a period from 1981 to 2018 by cause, state, and other collected data sets.

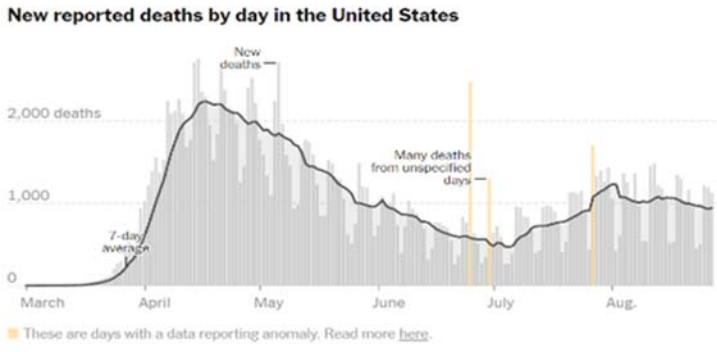
[2] https://covid.cdc.gov/covid-data-tracker/#cases This is the CDC link for the current data on COVID.

agendas. It is just offering observations. It is indented to provide an encyclopedic review of the apparent effects of COVID-19 on the construction industry.

III. The Advent of COVID-19

Sometime in the late fall of 2019, apparently the World Health Organization ("WHO"), the Center for Disease Control ("CDC") and the governments in many countries became aware of the COVID-19 virus spreading out from South East Asia and specifically China. The virus spread by simply breathing the air and sharing it with others. Slowly at first then with more rapidity, more and more people became infected with the virus. Since the beginning of this pandemic, the human cost has been dramatized as we acquire more data about the long term effects of the virus.





A recent study of student athletes has to be sobering as it found a statistically significant occurrence of swelling of the heart muscle[3] and the sack around the heart in college athletes.[4] In our country alone there have been nearly 6,014,500 cases in the and over 183,100 deaths reported[5]. On August 30th, at least 374 new coronavirus deaths and 42,082 new cases were reported in the United States.[6] Since our country's peak in 7 day average new cases in July[7], we have seen a measured decline in new cases, however, COVID-19 is very much a reality that our country continues to grapple with and the effects of this pandemic are not going away soon.

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[3] This provides a definition of the condition, not the statistics referred to in the text. https://www.nhlbi.nih.gov/health-topics/heart-inflammation#:~:text=Myocarditis%20is%20inflammation%20of%20the,the%20heart%20and%20cause%20inflammation.

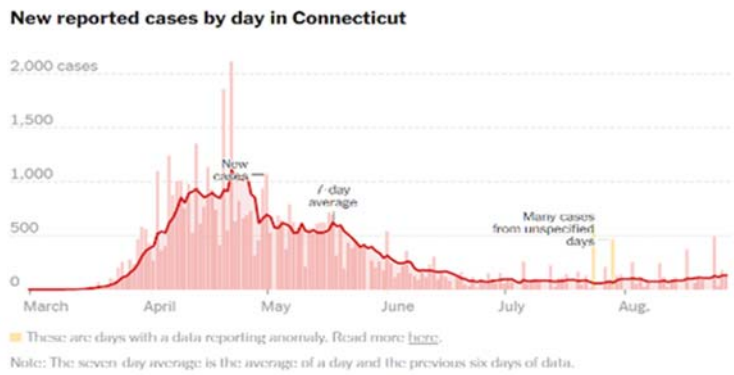
[4] https://www.espn.com/college-football/story/_/id/29633697/heart-condition-linked-covid-19-fuels-power-5-concern-season-viability

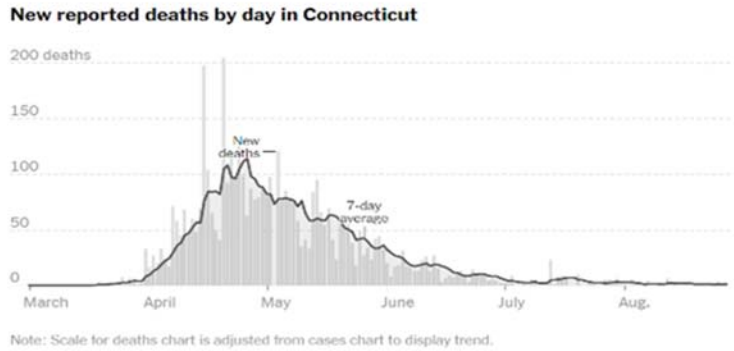
[5] *Coronavirus in the U.S.: Latest Map and Case Count*, The New York Times, available at https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html?action=click&module=Top%20Stories&pgtype=Homepage#states (last visited August 31, 2020)

[6] *Id*.

[7] *Connecticut Coronavirus Map and Case Count*, The New York Times, available at https://www.nytimes.com/interactive/2020/us/connecticut-coronavirus-cases.html (last visited August 31, 2020)

While Connecticut has seemingly turned the corner, there has been a recent up-tick in new cases for our state.[8] On August 30, 2020 there no coronavirus deaths and or cases reported in Connecticut. Over the past week, we have experienced an average of 139 cases per day, an increase of 69 percent from the past average two weeks ago.[9] And most recently the death rate has dropped to zero, despite new cases rising slightly. Since the beginning of the pandemic, there have been at least 52,495 Coronavirus cases and 4,465 deaths in Connecticut.[10]





Controlling the virus in the foreseeable future depends on contract tracing infected symptomatic people, understanding how they may have contracted the virus and whom they may have infected. Social distance and masks present the least intrusive and least expensive method to stop the spread of the illness. We have to realize that so much of our society relies on being together with our fellow humans to be what we are. We have found that we are stronger together. We are most vulnerable to the virus when we are together. The basic behavior that makes us strong as a society can kill us as individuals.

According to a top yale pathologist, Dr. Sheldon Campbell, MD, Ph.D., "COVID-19 will be with us indefinitely" and believes we are "unlikely to eradicate it".[11] Drawing a comparison to measles, Dr. Campbell explains that despite an "absolutely superb" measles vaccine, measles still is not eradicated 50 years later.[12] Opposed to eradication, his best-case scenario is achieving a "new normal" where the where the surge levels off, outbreaks are contained, vaccine trial progresses, and cheap and rapid testing becomes available.[13] If Dr. Campbell is correct, every construction industry professional must deal with the reality that is COVID-19.

A construction project requires people to work in close proximity to each other with poor circulation around many bicontaminants. Proximity to people is predicted by task and timing. Start

[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] Leah Groth, *I'm an Infectious Disease Doctor and Here's When COVID Will 'End'*, Yahoo!life, available at https://www.yahoo.com/lifestyle/im-infectious-disease-doctor-heres-113047962.html (Aug. 29, 2020)
[12] *Id*.
[13] *Id*.

with the job trailer. Often cramped and dirty, it is the starting point for virtually every contact with a project. Teams of people work on defined segments of projects. The survey crew, the excavators and pile drivers, the reinforcing steel crew, the concrete crew, the site work crew, the electricians, the plumbers, the tin knockers, the carpenters, the group at the coffee wagon or the deli truck for lunch. Sometimes there are restricted access points for a project because of security concerns. Consider working at the major New York Airports or a high rise office tower. There are weekly job meetings, coordination meetings, requisition review meetings, and a myriad of other meetings. There are unlimited need and opportunities for collection and collaboration and even more opportunities for individuals to be forced together to be able to perform critical tasks. Rarely do construction workers work alone.

Simply speaking, health and safety rules arising because of COVID-19 have changed the entire working environment in which workers on a construction site are able to perform their work. Where contractors previously did not and could not have foreseen working under stringent COVID-19 protocols such as stop work orders, social distancing, sanitization, personal protective equipment, contract tracing, record keeping, any of the other litany of other virus-related safety protocols and procedures, contractors now must account for the effects of these realities on their projects. The impact of these requirements has been increased project costs and delays in project completion. For contractors that have acquired work before the advent of COVID-19, the problem becomes who pays for these cost increases attendant to the now necessary personal protective equipment issues and new health and safety rules, and why?

Consultants have prepared papers discussing the impact of COVID safety procedures on productivity. See Pandemics and Construction Productivity: Quantifying the Impact, Maxim Consulting Group, May 2020. Common industry accounting software allows discrete cost tracking which should enable most industries to establish measured mile standards for most if not all common processes. Since most of us did not see this coming and most lawyers did not draft standard contract provisions to allocate risk of job inefficiencies caused by responses to pandemics there is little or no case law discussing potential themes which would support an effort to recover the additional costs. This paper surveys some of the common arguments that could support recovery.

IV. Changes in Working Conditions and Unforeseen Site Access

The changed working conditions provision should be the first stop in the process of analyzing the cost impact of new health and safety rules. Those rules affect site access as well as the basic working conditions. The provision is a familiar item and often litigated element of dispute in construction contracting. Changed conditions can delay performance, cause loss of efficiency, shut a project down intermittently, and delay completion of the work. The challenge is fitting COVID-19's impacts into an existing contractual provision and quantifying the effect. Most often the changed condition arises because of a direction from an Owner or Contractor that affects some element of the project. The health and safety rules affect the entire project. Changes to the health and safety rules are a classic changed condition.

Differing or unforeseeable site conditions also provide an opportunity for recovery of COVID related additional expenses. Most often associated with underground or otherwise hidden conditions, unforeseen site condition provisions can take many forms. As a general rule, a differing site condition is an unforeseeable condition. A good general definition is: "[a] differing site condition is generally a subsurface or other unknown physical condition at a site that differs materially from that indicated in the public contract or from that which is ordinarily encountered, which leads to a material change in the cost of construction."[14] COVID-19 has impacted construction sites in many ways that have changed the conditions of the work and have interrupted access to jobsites through shutdowns and inefficiencies due to social distancing, disinfecting, and other new COVID-19 based site protocols.

Almost a knee jerk reaction – instinctive actually – should be to provide notice to the Owner or Contractor of the event. Second, and perhaps even more importantly, the perceptive contractor will attempt to track the effect. Work up a measured mile. Collect and track the cost from the prior history and compare it to the experience of working under the changed COVID affected conditions. The two elements are the foreseeability of the cause and damage.

Whether or not a contractor or subcontractor is entitled to compensation for these delays in performance is a question that requires review of the specific contract. Sometimes there is a changed condition provision of a contract that applies. It is also possible that the express contract provisions do not apply. The following is a typical provision allowing for changes in the work for a common public works subcontract:

> [Section x] Owner shall have the right in its discretion at any time prior to final completion of the Work on written notice to Contractor (and without notice to Contractor's sureties), to direct a "Change". In the event of a Change, the Contract Amount and/or Contractor's time for performance shall be adjusted, if at all, by way of a written amendment or "Change Order" to the Contract set forth in Sections 123 and 1234. Unless directed by Owner to proceed immediately with a Change, Contractor shall submit a written request to Owner for a Contract adjustment provided in Section 123 prior to proceeding with a Change. No such adjustment shall be made for any such changes performed by the Contractor that have not been so ordered by the Owner in writing.

There may also be a similar provision allowing a contractor to submit a proposed change order under its own volition based on the encounter of unforeseen conditions:

> [Section y] Contractor shall submit, in accordance with Section 123, a Change Order Proposal as quickly as possible to permit Owner maximum time to respond without causing a delay to the Critical Path, but in any event not later than ten (10) Business Days after the date of the event or decision giving rise to such Claim. Any claims by Contractor for increased compensation or extension of completion deadlines shall be irrevocably waived and released unless Contractor provides such

[14] 64 Am. Jur. 2d Public Works and Contracts § 166

... written notice and thereafter submits such detailed statement for the Claim to Owner within the time periods specified.

A typical changed condition likely arises from some aspect of the job site such as an unsuitable soil condition, defective plans and specification, some mistake in planning, or other literal change from the original plan. As practitioners, we are all familiar with these change requests. COVID-19 has created a circumstance where a contractor simply cannot use the means and methods or perform the work as planned due to the pandemic in general or a work site outbreak. In some cases, you may be obligated to stop work while quarantine or social distancing requirements are in effect. Workers could be forced to use attenuated access protocols so proper health screening can be performed. A stop work order may trigger a common law claim based on denial of access to the site. If the stoppage results from a direction from an Owner or government safety process, then you may have a "change in the work" which may fit into the change provision allowing for both a schedule adjustment and compensation associated with performance delay. A direct order is the clearest event allowing a contractor to claim additional expense for demobilization and remobilization and the accumulation of time necessary to get the crew working at an efficient rate of production, along with other costs associated with a suspension of work due to COVID-19. And, even if there is no specific provision of the Contract applicable to a specific situation, that does not mean there is no claim.

Delay claims under a provision such as this could also be framed as a site access issue. Under a typical contract, a project owner or general contractor must coordinate the work and provide meaningful uninterrupted access to the site. "In Connecticut, it is well settled that [a] contractor shall be permitted to proceed with his construction in accordance with the contract and that he shall be given possession of the premises to enable him to do so".[15] Typically, providing access to the site and area where work must be performed is the responsibility of the project owner. A typical access provision is as follows, "The owner will provide to the Contractor, either by ownership, easement or permit the right of entry to the site of Work. The Contractor shall at its own expense make any access improvements required for performance of the Work." Lack of access to a job site can critically delay a project in terms of time and money. In Connecticut, "[e]ven in the absence of an express covenant, there is an implied one that the contractor shall be permitted to proceed with his construction in accordance with the contract and that he shall be given possession of the premises to enable him to do so".[16] "A delay caused by the owner may constitute a breach excusing performance as required by the contract."[17] Failure of a project owner to deliver a construction site and give a contractor access to the site for an unreasonably long period of time can be grounds for a contractor's delay claim.[18] Typically, "the delay in delivery of the site must be due to a factor within the owner's control."[19]

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[15] The implied obligation of site access, 13 Conn. Prac., Construction Law § 1:3 (Internal quotation marks omitted)

[16] *Hartford Elec. Applicators of Thermalux, Inc. v. Alden*, 169 Conn. 177, 182, (1975)

[17] *Id*. at 183

[18] See *Walter Kidde Constructors, Inc. v. State*, 37 Conn. Supp. 50, 58, 434 A.2d 962, 966 (Super. Ct. 1981)

[19] § 7:24.Compensable delay—Denial of access, 33 N.Y.Prac., New York Construction Law Manual § 7:24 (2d ed.)

There has to be consideration of the idea that may be the Owner is not denying site access, perhaps the building department or some other authority that directs or confronts health safety issues is the cause of the site access issues. Whether the owner is responsible when the governor orders shelter in place will be a thorny issue. However, when the order is to put in place safety protocols like wearing masks or social distancing or testing, imposition of those processes may provide a more direct cause of action.

The classic delay claims due to an owner's failure to provide adequate access involve the "failure to obtain timely issuance of necessary permits, requisite approvals, necessary right-of-way easements, promised removal of site utility poles or other obstructions, timely completion of preceding work, disclosure of known restrictions, or failure to maintain physical access or to arrange adequate financing."[20] COVID-19 may prevent contractors from accessing job sites in a way that has typically not been seen before the pandemic such as screening procedures and social distancing requirements. For example, consider a situation in which a project owner, contractor, or even the government imposes quarantine restrictions in response to COVID-19 and these restrictions interfere with the ability of a contractor or subcontractor to perform the work under the contract. Due to social distancing regulations, it may be impossible for multiple contractors to access the site at the same time or in the proper sequence.

Depending on the facts and circumstances of the project, such access restrictions may constitute a constructive change that, if appropriately presented and supported, may entitle a contractor to a contract price adjustment under a clause such as this one. If the contractor can establish that any increased costs were the result of some act or omission of the project owner in conjunction with a force majeure event.

Under the standard contract between owner and contractor, a contractor is responsible for site safety and compliance with all applicable laws to prevent damage, injury, or loss. A contractor may share some responsibility for ensuring that COVID-19 protocols are imposed and followed that do not hamper access to the site. Still, the result of these safety and access issues are bound to be inefficient performance of the work, project delays, and subsequent cost increases. The question becomes, is the contractor due an extension of time or additional compensation as a result? Depending on the language of your contract, the provisions dealing with access to the work site may provide some relief. Some delay may be excusable but not compensable.

V. Force Majeure Clauses

A Force Majeure provision is a contract clause that excuses a party performance of its contractual obligations because of unforeseen occurrences most associated with "Acts of God." Black's Dictionary defines an "Act of God" as: "[a]n overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado." Black's Law Dictionary (11th ed. 2019). The provision often defines a force majeure event. The basic idea is that if an

[20] § 15:51.Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Compensable" delay: Delay within the contractee's "control"—"Compensable" delay due to providing untimely or restricted access to site, 5 Bruner & O'Connor Construction Law § 15:51

event is an "Act of God" it is outside the control of the parties and therefore is an excuse for slow, delayed or inefficient performance. If something unforeseen should happen, that severely disrupts a contractor's ability to perform under the contract, and is reasonably outside of the contractor's control, then performance may be excused, and there is no actionable breach. Such "acts of God" typically include earthquakes, hurricanes, tsunamis or other natural disasters, but can also include manmade acts such as war or terrorist attacks.

A typical force majeure clause reads something like this:

> [Section x] FORCE MAJEURE. Neither Party will be liable for any failure or delay in performing an obligation under this Agreement that is due to any of the following causes, to the extent beyond its reasonable control: acts of God, accident, riots, war, terrorist act, civil commotion, breakdown of communication facilities, breakdown of web host, breakdown of internet service provider, natural catastrophes, governmental acts or omissions, changes in laws or regulations, national strikes, fire, explosion, generalized lack of availability of raw materials or energy or any unforeseeable events beyond the party's reasonable control.

Even if the words Force Majeure are not listed, a contract clause that states the basic idea that the parties are not liable due to situations such as these is a force majeure clause. It is likely that parties define specific events that the parties agree are force majeure events. COVID-19 has created a reality that will certainly change the concept of Force Majeure events. As a result of the COVID-19 pandemic, we will likely see language appended to these specific events that include [epidemic, pandemic, quarantine] as defined events. Nevertheless, courts will enforce the plain language of the clause as written and will treat the list as if the parties had negotiated and agreed to every word.

While they may not always be typical, some force majeure clauses specifically list public health emergencies such as disease, pestilence or pandemics as force majeure events. If not, your client still may have an option. Occasionally, this sample clause also has a general catch-all provision appended to the list of specific events. If there is not agreement as to if a specific event general definitional language can create ambiguity which Courts will then have to interpret by discerning the parties' intent.

VI. Insurance Coverage Considerations

Insurance coverage presents another opportunity to recover some of the money spent to manage COVID-19 generated project conditions. There are many theories available. Begin in some part by the idea that the virus can live on hard surfaces common on construction projects. Consider that good air circulation is thought to be a key element of a safe environment. The anecdotal information is that social distance and masks are the most currently apparently effective to stop the spread of the virus. The COVID-19 coverage issues have been articulated in pending litigation. But, for now, that litigation has focused on venue and process. It will be months if not years before we have a body of law considering the effect of the virus and business interruption and extra expense coverage for clients facing losses associated with COVID-19. Your client's

may have first party coverage for these claims including builder's risk policies. Some of the COVID-19 related losses your clients may face on their projects include:

- Job site or project shutdowns, or other impacts caused by governmental and business reactions to COVID-19;
- Expenses associated with having to work remotely due to civil authority and shelter in place orders to protect public health;
- Negligence claims based on failure to provide a safe environment;
- Salaries of employees who are ill with COVID-19 and absent due to civil authority requirements; and
- Additional cleaning costs.

This list is certainly not exhaustive. When we are talking about first party coverage and builder's risk coverage, most of these extra expense type of damages and business interruption losses are precisely the sort of losses recoverable under a first party property policy. However, coverage typically exists only if the underlying cause of these losses is a covered, and not an excluded hazard or peril. A pandemic may be specifically excluded under the policy. The specific policy forms, endorsements and language contained in the policy will be key.

Most insurance coverage issues resolve around exclusions in policies. It is said that everything is covered unless it is not. Even if there has been a physical loss or damage by a covered peril, most policy forms contain a litany of exclusions that can prevent recovery. A typical policy will include a Pollution/Contaminant Exclusion, a Virus or Bacterial Exclusion, a Nuclear, Biological, Chemical or Radiological Materials Exclusion (NBCR), or a Communicable Disease exclusion. Most often ambiguous exclusions are interpreted strictly to affect coverage only for the clearest exclusions. It is too early to tell if these exclusions may be tested in the courts, however, if a policy contains these exclusions, recovery is unlikely.

Arguments are being made that the virus damages property because you have to clean the surfaces more often and as a result some surfaces, and equipment made degrade faster or be more difficult to maintain. These arguments concern property damage claims.

Your policy may also have coverage for lack of ingress or egress or prevention of access. A typical policy reads, "Loss of Ingress or Egress: This policy covers loss sustained during the period of time when, as a direct result of a peril not excluded, ingress to or egress from real and personal property not excluded hereunder, is thereby denied." These coverages could provide reimbursement for expenses and loss of earnings caused by a government mandated shut-down of, or an inability to access, a project site or any other location within a specified distance. This specific coverage provision will be litigated in the coming months and case law may yield a different interpretation.

Conclusion

The COVID-19 pandemic has caused a significant loss of life. It has also had what appear to be long term adverse health effects as well. The list of symptoms and effects is long and detailed. In our country alone, we have suffered thousands of losses and millions of people have been afflicted. Every industry has been affected. It poses significant challenges for the construction

industry. The issue of safe construction site has a different focus than simply avoiding injury. We are just at the beginning of the pandemic as well. The effect of the shelter in place orders is being studied. In the coming months as more data becomes available theories will be refined. There is no certainty except the uncertainty.