

Pugh Accardo

ATTORNEYS AT LAW

CONSTRUCTION LAW UPDATE - April 2022

The *Construction Law Update* is published by Pugh Accardo for the benefit of its clients having an interest in the construction industry. It includes discussions of Louisiana state and federal court decisions, and legislative developments concerning construction-related matters. For further information on the decisions and legislative developments covered in this newsletter, please contact **John Stewart, Jr.** at jstewart@pugh-law.com or (504) 799-4529. Licensed in Louisiana, Texas and Colorado.

MILLER ACT CLAIMS NOT ARBITABLE

A subcontractor sued a general contractor for claims, some of which were essentially contract claims and the others subject to the Miller Act. The general contractor sought to refer all of the claims to arbitration in accordance with the subcontract. The magistrate judge for the United States District Court for the Western District of Louisiana found the Miller Act claims were not subject to arbitration, but the other claims were. The magistrate judge recommended to the district court that the non-Miller Act claims be referred to arbitration. He also recommended that the Miller Act claims be stayed pending the outcome of arbitration of the other claims. The Miller Act claims were closely related to the others making a stay of the Miller Act claims pending arbitration proper. *United States of America v. Citi Approved Enterprise, LLC*, 00386 (W.D. La. 8/10/21), 2021 WL 4076579. Report and recommendations of magistrate judge adopted by District Court, *United States of America v. Citi Approved Enterprises, LLC*, 00386 (W.D. La. 9/7/21), 2021 WL 4070929.

ASSESSMENT OF ATTORNEYS FEES

A subcontractor sued a general contractor for damages related to the construction of retaining walls, including, but not limited to, delays, increased costs of labor, equipment, overhead and lost profits and attorney's fees. The Louisiana First Circuit Court of Appeal reversed an award of attorney's

fees in favor of the subcontractor and against the general contractor which were assessed under L.R.S. 9:2784. Paragraph A of the statute provides that when a contractor receives payment from the owner, it shall promptly pay such monies received to each subcontractor and supplier in proportion to the percentage of work completed. Paragraph C provides that if the contractor, without reasonable cause, fails to make any payment to his subcontractors and suppliers within fourteen days of the receipt of payment from the owner, it shall pay to the subcontractors and suppliers a penalty. In addition, the contractor shall be liable for reasonable attorney's fees for the "collection of the payments due." The subcontractor based its claim for attorney's fees only on the statute.

The subcontractor sought attorney's fees based on the total amount of the damages, arguing the statute gave it the right to fees for the collection of "payments due." The court found the attorney's fee provision of L.R.S. 9:2784 was clear and unmistakable. A subcontractor is entitled to recover attorney's fees under Paragraph C for the collection of payments due the subcontractor under Paragraph A. Paragraph A requires the contractor who receives payment from the owner to pay such monies received to subcontractors. In order to be entitled to attorney's fees under Paragraph C, the subcontractor had to demonstrate that the general contractor failed to promptly pay it monies received from the owner for the subcontractor's work. It was undisputed the subcontractor was paid all amounts which it invoiced under the subcontract, with the exception of one invoice for work in the amount of \$39,000.00 which became due after the subcontractor left the project. Attorney's fees were allowed only with respect to that invoice. The court of appeal declined to award fees in the amount of \$2,394,940.00 as sought by the subcontractor. Attorney's fees allowed were \$15,600.00. *A.B.S. Services, Inc. v. James Construction Group, L.L.C.*, 2020-0841 (La.App. 1 Cir. 7/22/21), 2021 WL 3087879.

PRESCRIPTION OF AN OWNER'S CLAIM AGAINST A SUBCONTRACTOR

The magistrate judge for the United States District Court for the Western District of Louisiana found that the prescriptive period for an owner's claim against a subcontractor of the prime contractor was the one-year liberative prescriptive period under Civil Code art. 3493. There was no indication the owner assumed any obligation with respect to the subcontractor. There was also no indication the owner and subcontractor had any other meeting of the minds with respect to the roof installation independent of their respective agreements with the prime contractor. There was no discussion of a third party beneficiary relationship. The findings were submitted as a recommendation by the magistrate that the owner's claims against the subcontractor be dismissed. *Green v. Lowe's Home Centers, LLC*, 16-00698 (W.D. La. 8/17/18), 2018 WL 4307216. The District Court adopted the recommendation of the magistrate judge. *Green v. Lowe's Home Centers, LLC*, 16-00698 (W.D. La. 9/7/18), 2018 WL 4291989.

NOTICE OR MARKING OF EXCAVATIONS

The Louisiana Legislature during its 2021 session amended the requirements of L.R.S. 40:1749.13 concerning excavation or demolishing of streets, highways, public places, or servitudes of any operator, or near the location of an underground facility or utility, or on the premises of a customer served by an underground facility or utility. Those performing such work are required to provide the specific location to the regional notification center or centers servicing the area, or physically mark the route of

the work using white paint, flags, stakes, or similar means under the American Public Works Association guidelines prior to submitting notice. Any physical markings or electronic drawings identifying a specific location as provided for shall not exceed the actual area of excavation or demolition. Acts 2021, No. 9.

SETTLEMENT AGREEMENT AND RES JUDICATA

A contractor and a public entity entered into a construction contract. Disputes arose, and a settlement was reached. The contractor contended the public entity withheld a final payment of \$63,500.00 for alleged liquidated damages, and filed a writ of mandamus to collect the funds. The public entity argued that funds withheld for liquidated damages was one of the subjects of the settlement agreement, and the settlement agreement was *res judicata* of the contractor's claim. The district court agreed. The contractor appealed.

The contractor argued the failure to pay the funds was a violation of L.R.S.38:2191 which requires all public entities to promptly pay all obligations arising under public contracts when the obligations become due and payable under the contract. The provisions of the statute are not subject to waiver. The court of appeal held although a waiver is not permitted under the statute, a compromise is. The settlement was valid and enforceable and not a violation of the statute.

The contractor argued next that the failure to pay the amounts claimed were a violation of L.R.S. 38:2248 which provides limitations for the withholding of portions of payments for public works projects until after recordation of acceptance. The statute states its requirements are not subject to waiver. The contractor contended the settlement was an illegal and unenforceable waiver under the statute. The court of appeal disagreed and held this argument was subject to the settlement as well.

Next, the contractor argued the failure to pay was a violation of L.R.S. 38:2216H which declares that any provision contained in a public contract which purports to waive, release, or extinguish the rights of a contractor to recover costs and damages or obtain equitable adjustment for delays in performing a contract if such delay is caused in whole or in part by acts or omissions within the control of the contracting public entity or persons acting on behalf thereof is void and unenforceable. The contractor contended the settlement agreement which was contained in a change order was a new public contract which violated the statute. The court of appeal disagreed and found the settlement agreement was a compromise between the parties and was not a new public contract.

The concept of *res judicata* bars re-litigation of a subject matter arising from the same transaction or occurrence as a previous lawsuit. The doctrine is usually premised on a final judgment on the merits, but also applies where there is a settlement of a disputed matter. Here, the court of appeal found the elements of *res judicata* were satisfied, and the district court did not err in sustaining the exception of the public entity. *Omega General Construction, LLC v. Recreation and Parks Commission for the Parish of East Baton Rouge*, 2021-0334 (La.App. 1 Cir. 12/22/21), __ So.3d __, 2021 WL 6064212.

ENFORCEMENT OF A PROVISION INCLUDED IN A NULL CONTRACT INCORPORATED INTO A
SUBSEQUENT AGREEMENT WHICH WAS NOT NULL, AND TERMINATION OF A CONTRACT
VS. DISSOLUTION

The court held a master service agreement was a nullity since the contractor did not have a contractor's license when the agreement was executed, but a subsequent agreement signed after the contractor obtained the proper license which included the terms of the master agreement was enforceable. The subsequent agreement expressly incorporated the terms and conditions of the master agreement as if they had been retyped into the document without regard to whether the master agreement itself was enforceable. *Brightergy Louisiana, LLC v. GalCan Electric & General Contracting, LLC*, 20-2018 (E.D. La. 7/26/21), 2021 WL 3164158, appeal filed 7/31/21). See also *Brightergy Louisiana v. GalCan Electric & General Contracting, LLC*, 20-2018 (E.D. La. 8/11/21), 2021 WL 3566314.

In the same proceeding, the court considered the issue of termination versus dissolution of a contract. It held simply terminating a contract as to prospective performance does not *ipso facto* put the parties in the same position that they were in before they contracted, and does not effect a dissolution of the contract so as to relieve the parties of their respective contractual obligations. If a material breach of a contract occurs, a party may have grounds to seek judicial dissolution of the contract and thereby be relieved of a provision of the contract, here a lien waiver. Additionally, according to the circumstances, when an obligor fails to perform, the obligee might regard the contract as dissolved. The failure to pay money owed under a contract, if this did in fact occur, may potentially rise to the level of material breach, which may then allow a party to pursue judicial dissolution, which, if granted, would relieve it of an obligation. *Brightergy, Louisiana, LLC v. GalCan Electric & General Contracting, LLC*, 20-2018 (E.D. La. 1/25/21), 2021 WL 253830.

Although the subcontractor did not waive its right to be paid for the work it performed, it did contractually waive the right to file a lien which was not a necessary part of pursuing its prime contractor for money owed. If dissolution is not available, the filing of a lien by the subcontractor would be considered a breach of the contract, and the subcontractor would have to indemnify its prime contractor for the costs and charges associated with the actions that the prime contractor had to take as a result of the lien. *Brightergy Louisiana, LLC v. GalCan Electric & General Contracting, LLC*, 20-2018 (E.D. La. 3/11/21), 2021 WL 928025.

PROJECT OWNER FOUND TO BE A STATUTORY EMPLOYER OF ITS CONTRACTOR'S
EMPLOYEES

An employee of a contractor retained by Southern University was injured and sued the University in tort for his injuries. The University contended it was entitled to immunity under the Workers' Compensation Law as the statutory employer of the contractor's employees. In order to assert immunity as a statutory employer, there must be a written contract between the principal and the contractor which recognizes the principal as a statutory employer. When there is a written contractual recognition of the relationship, there is a rebuttable presumption of a statutory employer relationship. The presumption may be overcome only by showing that the work is not an integral part of or essential to the ability of the principal to generate its goods, products or services.

In reviewing the contract between the owner and the contractor, the court found, although the contract referenced a statutory relationship, there was not an express recognition of the relationship. The court found the contract which required the contractor to carry workers' compensation insurance and name the University as an additional insured on all of its liability policies sufficiently established a written contract that recognized the University as a statutory employer, and the University was presumed to be the statutory employer. It is not necessary that the recognition be express.

The court also found that the work performed by the contractor to clean up debris following a hurricane was part of the University's business. Maintenance and repair work, which by their very nature allow the smooth and continued operation of a principal's business, have been recognized as essential to the principal's ability to provide its services. Maintaining its campus was integral to the University's ability to provide its services. *Preston v. Southern University Through the Board of Supervisors of Southern University Agricultural and Mechanical College*, 2020-35 (La.App. 1 Cir. 7/13/21), ___ So.3d ___, 2021 WL 2934125, writ not considered, 2021-01217 (La. 11/17/21), 327 So.3d 510.

PEREMPTION UNDER L.R.S. 9:2772

A personal injury plaintiff sued an owner/developer claiming her injuries were caused as a result of the construction of a shopping center. The owner/developer filed exceptions of peremption representing the claims were perempted under the five-year rule of L.R.S. 9:2772. The trial court sustained the exceptions and gave the plaintiff time to amend her petition which she did. In her amended petition, she attempted to characterize the claims as sounding in general negligence in creating a hazardous condition as distinguished from construction. The trial court sustained further exceptions based on peremption under the statute. Plaintiff appealed.

The court of appeal found the plaintiff seemed to continue to seek to impose liability on the owner/developer for its role in the construction. It found the trial court already determined any such claims were perempted, and held that the new claims also fell within the five-year preemptive period of the statute. *Ordeneaux v. Arkel Food Services, LLC*, 2020-1312 (La.App. 1 Cir. 6/4/21), 327 So.3d 521, writ denied, 2021-00967 (La. 10/19/ 21), 326 So.3d 264.

DENIAL OF AN ATTEMPT TO ENFORCE A STATE COURT JUDGMENT IN FEDERAL COURT

A number of plaintiffs obtained a judgment against the Sewerage & Water Board of New Orleans in state court for damages to their property during construction of a flood control project. The plaintiffs brought an action in federal court to enforce the judgment contending the delay by the Sewerage & Water Board in paying the judgment violated the Takings Clause of the Fifth Amendment of the United States Constitution. The plaintiffs brought the action pursuant to 42 U.S.C. §1983 which provides plaintiffs with a cause of action when they have been deprived of federal rights under color of state law. The plaintiffs represented the Sewerage & Water Board's refusal to pay their state-court judgments violated their right to be paid just compensation for the taking of their property by inverse condemnation without unreasonable delay.

The federal court held there is a distinction between a state's taking of property without just compensation and its temporary retention of just compensation that has been fixed and awarded by a state court. A state's temporary delay in paying a state-court judgment does not give rise to a constitutional violation. The Sewerage & Water Board conceded that it had not yet made good on the plaintiffs' damages awards, but insisted that it did plan to pay the plaintiffs in the future. The plaintiffs opening admitted that they sued not to determine the just compensation to which they are constitutionally entitled, but to enforce the state court's determinations of that amount. The court dismissed the claims. *Ariyan, Inc. v. Sewerage & Water Board of New Orleans*, __ F.Supp.3d __ (E.D. La. 2021), 2021 WL 2483575, appeal filed 6/16/21.

WAIVER OF CLAIM FOR ADDITIONAL PAYMENTS

A lessee contracted for work for improvements to property it leased. The first contract was entered into in April 2017. The contractor accepted payments for the work, including payment for an invoice it marked "final payment." The parties entered into a second contract in December 2017 which included an integration clause stating the contract represents the entire and integrated agreement between the parties and supercedes prior negotiations, representations or agreements either written or oral. The contract did not refer to an agreement to pay for work already performed by the contractor or a promise of future work. The contractor submitted invoices after the second contract was signed which it represented included charges for work performed or which were due under the first contract. The lessee failed to pay the amounts charged.

The contractor filed a statement of claim and privilege with respect to the work and its invoices. It contended that while performing the work described in the first written contract, it made oral agreements with the lessee to perform additional work that was beyond the scope of the written contract.

The contractor then filed a petition alleging that contrary to the parties' agreements, the lessee failed to pay the amounts charged in the disputed invoices. The lessee reconvened alleging the statement of claim and privilege was not valid, and moved for summary judgment. The district court granted the motion finding that the contractor's acceptance of final payment waived any claims under the first contract and that the integration clause in the second contract superceded any prior agreements by the parties. The district court determined even if there was evidence of an oral agreement by the parties, the contractor waived its claims by accepting final payment without reserving in writing its rights to an unpaid amount and by signing the subsequent contract which superceded all prior and written agreements.

The court of appeal noted that an integration clause, also known as a merger clause, is a contract provision stating that the contract represents the parties' complete and final agreement. It precludes any prior or contemporaneous agreements which are not set forth in the contract. The contractor did not include in the second contract any provision requiring the lessee to pay additional charges pursuant to an alleged prior oral agreement. The second contract superceded all prior written or oral agreements. It was the entire agreement between the parties and made no provision for payment to the contractor for the changes described in the disputed invoices. The court of appeal held that it could not say the trial court erred in determining that the second contract superceded any prior oral and written

agreements on which the contractor based its claims. The judgment of the trial court granting the lessee's motion for summary judgment was affirmed. *Mark Doyle Construction, LLC v. DVR LA2, LLC*, 53,957 (La.App. 2 Cir. 6/30/21), 324 So.3d 226, writ denied, 2021-01117 (La. 11/10/21), 326 So.3d 1246.

ENFORCEMENT OF AN INDEMNITY AGREEMENT IN FAVOR OF THE SURETY

The United States District Court for the Eastern District of Louisiana held an individual who signed a general indemnity agreement in favor of a surety for two construction projects was liable to the surety in the total amount of \$3,126,903.00 for total losses, costs and expenses and attorney's fees and consulting fees incurred by the surety as a result of the default of the contractor on both projects. The amount of the judgment excluded a claim for additional expenses in the amount of \$657.00 for which evidence was not submitted. *American Contractors Indemnity Company v. Galaforo Construction, LLC*, 20-2860 (E.D. La. 12/20/21), 2021 WL 5998507.

IS L.R.S. 9:2772 APPLICABLE TO INSURERS?

The Louisiana Third Circuit Court of Appeal found that because peremption as provided for in L.R.S. 9:2772 is not a defense that is personal to the insured and therefore unavailable to the insurer, the insurer may avail itself of the same preemptive defense of its insured as provided by the statute. *Daxtreme, Inc. v. Lafayette City-Parish Consolidated Government*, 2021-418 (La.App. 3 Cir. 12/15/21), 322 So.3d 1257.

RIGHT OF A PARTY TO PURSUE AN ACTION AGAINST AN INDIVIDUAL AS OPPOSED TO AN LLC

An owner sued an individual and the individual's LLC seeking to recover damages for defective work. The individual, the manager and sole member of the LLC, moved for summary judgment seeking to dismiss the claims against him representing the owner had no right of action or cause of action against him. The trial court granted the motion. The owner appealed.

The court of appeal reviewed decisions dealing with the liability of an agent when he enters into an agreement without disclosing the identity of his principal. Express notice of the agent's status and the principal's identity is unnecessary if facts and circumstances surrounding the transaction, combined with the general knowledge that persons in that type of business are usually acting as agents, demonstrate affirmatively that the third person should be charged with notice of the relationship. The facts and circumstances of each case determine whether or not an individual sufficiently disclosed that he was acting in a representative capacity so as to alert the other contracting party that the contract was with an entity.

The court of appeal reversed the trial court's grant of summary judgment stating that the trial court may weigh the facts and circumstances presented to determine whether sufficient indicia of the agency relationship were known by the third party to put him on notice of the principal/agent relationship. Any such weighing of evidence, however, is not appropriate for summary judgment.

Rather, material issues of fact remain as to whether the individual defendant adequately disclosed his representative status and/or whether the owner knew or should have known he was doing business with an LLC. *Bourque v. Bergeron*, 21-108 (La.App. 3 Cir. 12/1/21), __ So.3d __, 2021 WL 5625364.

REVERSAL OF CONVICTION FOR RESIDENTIAL CONTRACTOR FRAUD

Thomas Ledbetter was convicted of residential contractor fraud under L.R.S. 14:202.1 for misappropriation. The penalty for a violation of the statute is determined, at least in part, on the amount misappropriated. Although the jury returned a verdict finding Ledbetter was guilty of residential fraud in a specific amount, the Bill of Information did not specify the specific grade of the offense based on the value of the misappropriation. The court held the Bill of Information must properly charge the defendant, and, because Ledbetter was not specifically charged, his conviction must be reversed and sentence vacated. *State of Louisiana v. Ledbetter*, 54,050 (La.App. 2 Cir. 9/22/21), 326 So.3d 976.

DENIAL OF EFFORT TO DISQUALIFY A BIDDER ON A PUBLIC WORKS PROJECT

The Lafourche Parish School Board advertised for bids for a project in Thibodeaux. The bid advertisement required that five items be identified on the bid envelope: 1) job name and owner; 2) architect; 3) date; 4) contractor's name, address and license number; and 5) architect's project number. The bidding instructions required that only four items be identified on the bid envelope: 1) owner; 2) project; 3) contractor's license number; and 4) architect's project number. Byron E. Talbot Contractor, Inc., the apparent second low bidder, identified the five items listed in the bid advertisement on its electronic bid form. LA Contracting Enterprise, LLC, the apparent low bidder, listed only the four items identified in the bidding instructions on its bid form. The issue was whether the failure of LA Contracting to identify the architect as required by the bid advertisement rendered its bid non-responsive. The School Board awarded the contract to LA Contracting. Talbot sued the School Board seeking injunctive and declaratory relief. The trial court denied Talbot's request.

The court of appeal held the public bid law, L.R.S. 38:2212(B)(2), provides an exclusive list of twelve items of information or documentation that a public entity may require bidders to submit in the bidding documents to evaluate the bid's responsiveness. The identification of the architect as required by the bid advertisement is not one of the twelve items identified in the statute. Therefore, the requirement of the advertisement for the identification of the architect was in violation of the public bid law. Because the School Board's bid advertisement requiring the identification of the architect was in violation of the public bid law, LA Contracting's bid was responsive. The judgment of the trial court was affirmed. *Byron E. Talbot Contractor, Inc. v. Lafourche Parish School Board*, 2021-0181 (La.App. 1 Cir. 11/1/21), 3323 So.3d 699.

CONSTRUCTION OF A CONTRACT

In determining how an indemnity provision of a lease should be construed, the United States District Court for the Eastern District of Louisiana held the parties specifically rejected the usual rule of construction that a contract should be construed against the party which prepared the document because both parties participated in its preparation. Additionally, Louisiana courts do not apply Civil Code Article 2056, which provides that a contract must be interpreted against the party who furnished its text, when the contract resulted from negotiations between parties of equal bargaining power. *Avila v. Village Mart, LLC*, 20-1850 (E.D.La. 9/28/21), 2021 WL 4439579.

PRESCRIPTION AND CLAIMS FOR INCREASES IN AMOUNTS TO BE PAID

Although a dispute between a waste collection contractor and its subcontractor did not involve a construction dispute, the issues raised could be relevant for such contracts. The contract between the two parties required additional payments to the subcontractor for each truck load of waste, and increases in pay based on changes in the Consumer Price Index and/or fuel increases equal to the CPI and/or fuel increases received by the prime contractor. The subcontractor sued the prime contractor for increases in pay which it alleged it was due. It argued the claims were personal actions subject to Civil Code art. 3499 which provides a prescriptive period of ten years. The prime contractor asserted the three-year prescriptive period under Civil Code art. 3494 applied, rather than the ten-year period of art. 3499. Art. 3494 provides a liberative prescription of three years for the recovery of compensation for services rendered.

The United States District Court for the Eastern District of Louisiana held the CPI increase claim was an allegation the prime contractor had not paid all of the compensation due for the services provided, and was one for the recovery of compensation for services rendered. It was, thus, subject to the three-year prescriptive period of art. 3494.

The subcontractor contended, nevertheless, its claim for CPI increases was timely under the doctrine of *contra non valentem*. Under that doctrine, the applicable prescriptive period may be interrupted where, among other things, the defendant has done some act effectively to prevent the plaintiff from availing himself of his cause of action. The subcontractor argued the prime contractor's failure to disclose the fact it was receiving CPI increases was fraudulent and effectively prevented it from availing itself of its cause of action. It contended it was under no obligation to inquire or to anticipate CPI increases, and, thus, the prime contractor's failure to disclose the payments received based on the CPI increases effectively prevented it from availing itself of its cause of action. The court disagreed.

Under the terms of the prime contract, both parties acknowledged the fees the prime contractor was to receive would be adjusted up or down based upon fluctuations in the CPI. Therefore, the parties contemplated the amount the subcontractor was to receive could fluctuate yearly based on fluctuations in the CPI. Because fluctuations in the CPI were available to the subcontractor, and the terms of the prime contract made clear that fees would be adjusted each year, the subcontractor was on notice that each year it may have been entitled to an increased amount, but the subcontractor took no action to

determine whether it was entitled to an increase. The fact the prime contractor did not disclose the upward adjustment to the subcontractor did not effectively prevent it from availing itself of its cause of action. The doctrine of *contra non valentem* was not applicable.

As to the claims for an increase in the base price per load under the contract, the subcontractor contended the new terms were never reduced to writing following the extension of the prime contractor's contract, and the subcontractor, nevertheless, continued to perform after the ten-year extension. The subcontractor represented that because there was never an agreement concerning the amount of compensation to be received, the court in the context of contractual interpretation must apply the missing price. The court held that whether the parties ultimately agreed to an increased base price per load as alleged or some other price, the character of the subcontractor's claim was that the prime contractor paid the subcontractor less money than what was owed for the work the subcontractor performed after the start of the ten-year extension of the prime contract. Accordingly, the claim was one for recovery of compensation for services rendered and subject to the three-year prescriptive period. *Metro Service Group, Inc. v. Waste Connections Bayou, Inc.*, 21-1136 (E.D. La. 11/19/21), __ F.Supp.3d __, 2021 WL 5415848.

WHAT IS THE PEREMPTIVE PERIOD UNDER L.R.S. 9:2772?

L.R.S. 9:2772 establishes a peremptive period during which actions against contractors must be brought, otherwise they are lost. The United States District Court for the Western District of Louisiana held in considering a motion to dismiss based on preemption under the statute that although a petition for damages was filed on May 21, 2014, the peremptive period at issue was the ten-year period which was adopted in 1964 for purposes of two contracts, the first was dated March 18, 1977, and the second, which replaced the first, was dated January 19, 1978. The ten-year peremptive period was reduced to seven years in 1999 and to five years in 2003.

The court held because preemption begins to run at the time set forth in the relevant statute, it was "most reasonable" to apply the version of the statute existing at the time the second contract was executed. The court did not use the date the lawsuit was filed. Accordingly, the court applied the period which was effective in 1979 when the second contract was fully executed, i.e., ten years.

In analyzing whether the claims were preempted, the court noted the work had not been accepted. If the work had been accepted, the peremptive period would run from registry of acceptance. The court determined the owner was in possession by October 16, 1987, and the claims were preempted as of April 16, 1998, ten years and six months after October 16, 1987, under the "plain language" of the statute. This appears to be at odds with L.R.S. 9:2772A(2) which states: If no such acceptance is recorded within six months from the date the owner has occupied or taken possession of the improvement, in whole or in part, more than ten years after the improvement has been occupied by the owner. Thus, the peremptive period was ten years from occupancy, since there was no acceptance, and not ten years and six months. The court seems to have treated the six-month period for acceptance for the occupancy or possession rule of the statute as part of the peremptive period and added six months to the ten-year period, but the statute only uses the six-month period to determine if the ten-year peremptive period applies after occupancy by the owner. *Boudreaux v. Axiall Corp.*, 18-0956 (W.D. La. 9/30/21), 2021 WL 4496400.

In considering the motion to dismiss of another party based on peremption, the court held there was not a record of the actual date that party completed its construction activities, and the court could not rely on an uncertain date for purposes of peremption. Additionally, there were claims against that party concerning its operation of the facility. Operational activities are not covered under the statute. The court could not find the claims against the party filing this motion were perempted. *Boudreaux v. Axiall Corp.*, 18-0956 (W.D. La. 10/7/21), 2021 WL 4702810.

CLAIM AGAINST A BOND FURNISHED FOR A FEDERAL PROJECT

The United States District Court for the Eastern District of Louisiana held that a payment bond for a federal project provided by a second tier subcontractor with the second tier subcontractor as the principal and the first tier subcontractor as the obligee was not a Miller Act bond. To be considered a Miller Act bond, it must be provided by the general contractor and must list the United States as the obligee. As a result, the federal court lacked federal question jurisdiction over claims under the bond.

However, the lawsuit filed by a third tier subcontractor for payments due also included a claim for breach of a maritime contract over which the court did have admiralty jurisdiction. The court found the claim for breach of contract was for a claim on the payment bond. It construed the claim under the bond as a claim against the second tier subcontractor which provided the bond and the surety. The court, therefore, had jurisdiction to consider the claim under the bond. The claim against the bond was not dismissed. *United States of America, for the use and benefit of B&S Equipment Co., Inc. v. North American Specialty Insurance Company*, 21-1373 (E.D. La. 10/19/21), 2021 WL 4862947. Query: Would the result be the same under a theory of diversity jurisdiction? It seems the answer would be yes.

MANUAL LABOR EXCEPTION TO THE INDEPENDENT CONTRACTOR RULE OF THE WORKERS' COMPENSATION STATUTE

Although the following did not arise in the context of a construction dispute, the discussion is relevant to the subject matter in general. Elite Protection Solutions contracted with Willie's Chicken Shack to provide security services for Willie's. Elite assigned Nicholas Knox to Willie's store on Bourbon Street in New Orleans. During one of his shifts, Knox and a patron became involved in an altercation inside the premises. Knox was shot in the neck. He sued Elite and Willie's for workers' compensation benefits. Willie's moved for summary judgment seeking dismissal of the claims against it on the basis Knox was an independent contractor, and was not entitled to workers' compensation benefits. Knox contended he fell under the manual labor exception to the independent contractor rule of the workers' compensation law. Knox argued 100% of his security guard job was the anticipation of physical activity. The issue was whether Knox actually performed manual labor sufficient to allow him to claim benefits.

An independent contractor under the workers' compensation law means any person who renders service, other than manual labor, for a specified recompense for a specified result either as a unit or as a whole, under the control of his principal as to the results of his work only, and not as to the means which such result is accomplished, and are expressly excluded from the statute unless a substantial part

of the work time of an independent contractor is spent in manual labor in carrying out the terms of the contract, in which case the independent contractor is expressly covered by the provisions of the law. A workers' compensation claimant who seeks to invoke the manual labor exception must prove: (1) the existence of an independent contractor relationship; (2) the performance of manual labor in carrying out the contract; (3) the independent contractor spent a substantial portion of the work time performing manual labor; and (4) the work was part of the principal's trade, business or occupation. The burden was on Knox to prove he qualified for the manual labor exception by proving these four factors.

Neither Knox nor Willie's disputed that Knox was an independent contractor. As to the two factors dealing with manual labor, the court held it is the hands-on feature of labor combined with the strenuous quality of the work which determines whether a task is manual or not. "Manual labor" has been defined as work where the physical element predominates over the mental element. As to whether the work was a substantial part of the work time of an independent contractor, the court held mathematical precision is not required. The term only means the converse of insubstantial or immaterial.

The record showed Knox's job as a security guard was to visually watch the activities of the patrons and to make mental assessments as to whether there were any potential security issues which might arise from a patron's behavior. Knox's deposition testimony showed the mental element of the security job predominated over the physical element because he spent most of his time mentally analyzing and anticipating the potential for engaging in the physical element. The manual labor exception has been interpreted to mean it must be demonstrated that the claimant actually engaged in manual labor, not that he merely anticipated manual labor. Knox did not demonstrate that he performed manual labor during a "substantial part" of his work time. Other than the subject incident, Knox had not pointed to any instances or tasks to show that he engaged in manual labor for a substantial part of his work time.

In addition to having to show a substantial part of his work time was spent in manual labor, Knox, in order to support a finding that the manual labor exception applied, was required to show that his work was part of Willie's trade, business or occupation. The court held Knox's security duties were not part of Willie's business, but merely incidental thereto. His duties were not specific to the business of serving chicken. He did not demonstrate his job as a security guard was an integral part of Willie's business as a restaurant serving chicken. Knox was not entitled to workers' compensation benefits from Willie's. *Knox v. Elite Protection Solutions*, 2021-0419 (La.App. 4 Cir. 10/13/21), __ So.3d ___, 2021 WL 4771758.

IMMUNITY FROM CLAIMS FOR INDEMNIFICATION AGAINST AN EMPLOYER UNDER THE WORKERS' COMPENSATION ACT

The United States District Court for the Middle District of Louisiana held that while a joint tortfeasor may not seek tort contribution or indemnification from the employer of a personal injury plaintiff, there is no prohibition against an employer contractually agreeing to indemnify another party. To the extent a valid contractual indemnity provision exists, such contractual indemnity is not barred

by the Louisiana Workers' Compensation Act. *Deggs v. Aptim*, 19-00406 (M.D. La. 9/29/21), 2021 WL 4480984.

THE UNITED STATES IS ENTITLED TO PROTECTION UNDER THE LOUISIANA WORKERS' COMPENSATION LAW

The United States District Court for the Western District of Louisiana held the United States as a defendant in a personal injury lawsuit in Louisiana is only liable under the Federal Tort Claims Act (FTCA) in the manner and to the same extent that a private individual under like circumstances would be liable. The FTCA requires that claims against the United States are decided in accordance with the law of the place where the act or omission occurred. Here, the United States claimed it was the statutory employer of the plaintiff under Louisiana law and was entitled to immunity under the Louisiana Workers' Compensation Law. The court, however, found the statutory employer protections were not applicable under the facts presented. *Frantom v. USA*, 20-385 (W.D. La. 9/22/21), 2021 WL 4343949.

ENFORCEABILITY OF AN UNSIGNED CONTRACT

The United States District Court for the Middle District of Louisiana considered whether an unsigned rental agreement which modified an original signed agreement was enforceable. The court found the original agreement should be considered with the second agreement as part of one contract. In doing so, the court held a written contract can be orally modified at any time regardless of whether the written contract provides that it can only be amended in writing. Parol (oral) evidence is admissible to prove the modification. *Urda v. Valmont Industries, Inc.*, 18-1044 (M.D. La. 9/21/21), 2021 WL 4295752.

PEREMPTION AND REMEDIAL WORK AND SALES VERSUS A CONSTRUCTION CONTRACT

Lamar Contractors, LLC subcontracted the installation of a wall panel system to AR-Clad, Inc. It purchased the system from GMHorne Architectural Systems, LLC. The system was manufactured by Centria, Inc. Lamar sued AR-Clad, GMHorne and Centria for damages related to leaks in the system. The lawsuit was filed more than five years after substantial completion was filed in the mortgage office. AR-Clad and GMHorne argued the claims against them were preempted under L.R.S. 9:2772.

Lamar argued AR-Clad performed remedial work after substantial completion which should be construed as part of the original work so that neither was preempted. The court found there was no evidence to support the claim AR-Clad performed any work less than five years before the lawsuit was filed. Even if AR-Clad had performed work after the preemptive period, that would not revive Lamar's preempted claims related to AR-Clad's original work. The claims against AR-Clad were preempted.

Lamar contended the claims against GMHorne were based on breach of a sales contract, and were not subject to L.R.S. 9:2772 for construction work. The court found the contract with GMHorne was a construction contract, having a primary obligation to do rather than a sales contract having a primary obligation to give. The contract required GMHorne to create shop drawings to design metal

wall components unique to the project. The shop drawings were submitted to Lamar for review and approval of the architect, and then, upon approval, sent to Centria to fabricate the components. A significant portion of GMHorne's work included design skills and the products were not prefabricated, but rather built according to GMHorne's design. Thus, Lamar's claims against GMHorne arose out of a construction contract that was subject to L.R.S. 9:2772. The claims against GMHorne were perempted. *Lamar Contractors, LLC v. AR-Clad, Inc.*, 20-588 (E.D. La. 8/10/21), 2021 WL 3509665.

LEASE OF CONSTRUCTION EQUIPMENT HELD NOT TO BE THE BASIS FOR AN OPEN ACCOUNT

L.R.S. 9:2781, the Louisiana Open Account Law, provides that a person who fails to pay an open account within thirty days after the claimant sends written demand therefor correctly stating the amount owed shall be liable to the claimant for reasonable attorneys fees. The Louisiana First Circuit Court of Appeal held that rental agreements for construction equipment did not become the basis for an open account simply because there is a balance due under those agreements. Accordingly, the lessor was not entitled to an award of attorneys fees under the statute. *Louisiana Machinery Company, LLC v. BIHM Equipment Co.*, 2019-1081 (La.App. 1 Cir. 8/10/21), 329 So.3d 317.

ASSESSMENT OF ATTORNEYS FEES

A subcontractor sued a general contractor for damages related to the construction of retaining walls, including, but not limited to, delays, increased costs of labor, equipment, overhead and lost profits and attorney's fees. The Louisiana First Circuit Court of Appeal reversed an award of attorney's fees in favor of the subcontractor and against the general contractor which were assessed under L.R.S. 9:2784. Paragraph A of the statute provides that when a contractor receives payment from the owner, it shall promptly pay such monies received to each subcontractor and supplier in proportion to the percentage of work completed. Paragraph C provides that if the contractor, without reasonable cause, fails to make any payment to his subcontractors and suppliers within fourteen days of the receipt of payment from the owner, it shall pay to the subcontractors and suppliers a penalty. In addition, the contractor shall be liable for reasonable attorney's fees for the "collection of the payments due." The subcontractor based its claim for attorney's fees only on the statute.

The subcontractor sought attorney's fees based on the total amount of the damages, arguing the statute gave it the right to fees for the collection of "payments due." The court found the attorney's fee provision of L.R.S. 9:2784 was clear and unmistakable. A subcontractor is entitled to recover attorney's fees under Paragraph C for the collection of payments due the subcontractor under Paragraph A. Paragraph A requires the contractor who receives payment from the owner to pay such monies received to subcontractors. In order to be entitled to attorney's fees under Paragraph C, the subcontractor had to demonstrate that the general contractor failed to promptly pay it monies received from the owner for the subcontractor's work. It was undisputed the subcontractor was paid all amounts which it invoiced under the subcontract, with the exception of one invoice for work in the amount of \$39,000.00 which became due after the subcontractor left the project. Attorney's fees were allowed only with respect to that invoice. The court of appeal declined to award fees in the amount of \$2,394,940.00 as sought by

the subcontractor. Attorney's fees allowed were \$15,600.00. *A.B.S. Services, Inc. v. James Construction Group, L.L.C.*, 2020-0841 (La.App. 1 Cir. 7/22/21), 2021 WL 3087879.

INTENTIONAL ACT EXCEPTION TO STATUTORY EMPLOYER IMMUNITY

Plaintiffs in a workplace injury lawsuit contended none of the defendants were entitled to statutory employer immunity under the Workers' Compensation law because of the intentional act exception to immunity. The exception provides that an employee may sue in tort to recover beyond workers' compensation benefits when the injury is proximately caused by the employer's intentional act. The exception requires that the person acting and causing injury must either (1) consciously desire the physical result of his act, whatever the likelihood of that result happening from his conduct, or (2) know that the result is substantially certain to follow from his conduct whatever his desire may be as to that result. The focus is on the consequences of the act rather than the act itself. An act is characterized as intentional only when the actor entertains a desire to bring about the consequences that followed or where the actor believed that the result was substantially certain to follow.

The court found the plaintiffs fell short of introducing summary judgment evidence sufficient for a rational fact-finder to find that the requirements of the exclusion had been met. Plaintiffs presented evidence that the defendants knew that the ingredients of the explosion which caused the injuries were present, not that they would interact. Plaintiffs did not produce evidence that the defendants were substantially certain that gases would be released at the time of the welding which took place and ignited the gases, or that the tank which contained the gases would intake oxygen and a spark at the time of welding. Plaintiffs only showed the defendants knew there was the potential for the release of gas or intake of oxygen, not that they were substantially certain either of those things would inevitably occur at the exact time there was an ignition source produced by the welding. The court declined to accept the intentional act defense to statutory immunity. *Johnson v. Packaging Corp. of America, Inc.*, 18-613 (M.D. La. 7/28/21), 2021 WL 3201370.