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CONSTRUCTION LAW UPDATE
- July 2023

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 A. Stewart, Jr.** at *jstewart@pugh-law.com* or (504) 799-4529. Licensed in Louisiana and Texas (inactive in Texas).

RECENT LEGISLATIVE DEVELOPMENTS

During its 2023 Regular Session, the Louisiana legislature passed a number of Acts of interest to the construction industry. They include:

1) Act No. 8 – The contract limit for the Department of Transportation and Development projects was increased from $500,000 to $1,000,000.

2) Act No. 230 – Authorizes the City of New Orleans and its boards, agencies, and commissions for each fiscal year to designate and set aside, for awarding to socially and economically disadvantaged businesses, an amount not less than 10%, and not exceeding 25%, of the value of anticipated local procurement of goods and services, including construction or doing any public work, including alteration or repair. The governing authority shall adopt a requirement that the prime contractor award a certain percentage, not to exceed 35%, of the total dollar bid to socially and economically disadvantaged subcontractors. This requirement may be waived if the prime contractor after a good faith effort is unable to comply with the requirement. If the governing authority of the City, or any board, agency or commission, is unable to award all of its procurements set-aside to socially and economically businesses, the balance of the procurement set-asides may be awarded to other businesses in accordance with existing solicitation, bid evaluations and contract award provisions otherwise provided by law.

3) Act No. 344 – Amends the Louisiana Underground Utilities and Facilities Damage Prevention Law to provide that the marking of an operator's facility or utility shall be provided for excavation or

demolition purposes only. The Act also provides any excavation or demolition activities shall commence not more than 120 hours past the marked-by-time. Still further, the act provides in addition to the notification requirements and emergency notification requirements, each person responsible for an excavation or demolition operation, shall, among other things, perform potholing to determine the actual location of facilities or utilities if an excavation or demolition operation could result in damage to underground utilities or facilities handling electricity, gas, natural gas, oil, petroleum products, or other flammable, toxic or corrosive fluids or gases. Forestry excavation operations are treated somewhat differently.

4) Act No. 329 – Provides where unit prices are contained in initial contracts for public works, no deviations shall be allowed in computing negotiated change order costs unless specified in the contract documents. Further, when a unit price change order is required, it shall be submitted to the designer of record, or in the absence of the designer, the public entity, within 30 days from the date of discovery of the work to be performed by the change order. Still further, any change order requiring new pricing by the contractor shall be submitted to the to the designer of record, or in the absence of the designer, the public entity, within 30 days from the date of discovery of the work to be performed by the change order. For a change order requiring redesign, the redesign shall not take more than 90 days from the date of notification by the contractor to the designer of record, or in the absence of the designer, the public entity, of discovery of the work to be performed by the change order. Extensions of time may be granted. Once the redesign is complete, the contractor shall submit the cost estimate to the designer of record, or in the absence of the designer, the public entity, for the change order within 30 days for the redesigned work under the change order. Still further, for any change order, the public entity shall have 45 days from the submittal of the change order to the public entity to negotiate and approve or reject the contractor's proposed cost estimate of the work to be performed by the change order. Extensions of time may be granted. The contractor shall not be required to provide to the public entity any schedule updates incorporating the change order until that change order is executed unless the schedule is needed for evaluation of the proposed change order.

5) Act 246 – Provides with respect to design-build for progressive design-build contracts by the Department of Transportation and Development.

CONTRACTOR LICENSING REQUIREMENTS

The Ernest N. Morial Exhibition Hall Authority issued a request for qualifications ("RFQ") to select a contractor to act as the construction manager pursuant to the Louisiana construction management at risk statute for improvements and renovations to the exhibition hall. The budget was estimated at $300,000,000.00. The RFQ provided the construction manager at risk would be responsible for the pre-construction phase of the project, and required respondents be licensed in building construction in accordance with the rules of the Louisiana State Licensing board for Contractors.

Proposals were received from three entities, each of which submitted a proposal as a joint venture. One of the proposals was received from AECOM which purported to be a joint venture, but had registered as a partnership with the Louisiana Secretary of State in January, 2021. The selection review committee recommended AECOM be awarded the contract. Another entity, Lemoine, which submitted a proposal, filed a formal protest requesting that AECOM be disqualified because it did not meet the licensing requirements set forth in the RFQ. Lemoine contended AECOM was a partnership, and, while the individual members of the partnership possessed contractors licenses at the time of the RFQ, the partnership did not have a separate license. The Louisiana State Licensing Board for Contractors required that a partnership possess its own license. The Authority voted to award the contract to AECOM. Lemoine sued the Authority seeking to enjoin it from awarding the contract to

AECOM. The trial court granted a preliminary injunction enjoining the Authority from entering into the contract with AECOM, but later denied Lemoine's request for a permanent injunction. Lemoine appealed.

After the denial by the trial court of Lemoine's request for a permanent injunction, the Authority executed a contract with AECOM. The question addressed first by the court of appeal was whether a justiciable controversy existed. It held one did since Lemoine could be awarded the construction phase of the project.

The court of appeal found the difference between a joint venture and a partnership is a joint venture generally is formed only for a particular project or venture, whereas a partnership is formed as an ongoing entity for multiple purposes. There is no joint venture where an actual partnership exists or where the business or enterprise is organized and operated in corporate form. The state licensing statute provided it would be unlawful for any person to act as a contractor as defined therein unless he holds an active license as a contractor under the provisions of the law. Lemoine claimed because AECOM was registered as a partnership and because a partnership is a distinct juridical person, it was required to possess a proper license to qualify for the contract. Although a joint venture is akin to a partnership, because AECOM actually registered as a partnership, it was not a joint venture and could not take advantage of that rule when two or more persons bid as a joint venture in the amount for which a license is required, all parties to the joint venture are required to be licensed. The fact the members of AECOM were individually licensed was irrelevant. When the entity registered as a partnership, it could not avoid the licensing requirements of the law, and was required to possess its own license.

The court of appeal found the Authority was arbitrary and capricious in disregarding the licensing requirements of its own RFQ and the Louisiana licensing law. AECOM was an unlicensed partnership, and should not have been considered responsive to the RFQ. The trial court abused its discretion in denying Lemoine's request for a permanent injunction and reversed the trial court's judgment. *The Lemoine Company, LLC v. The Ernest N. Morial Exhibition Hall Authority*, 2022-0217 (La.App. 4 Cir. 4/12/23), _____ So.3d _____, 2023 WL 2910736.

DESPITE THE CONTENTION A CONSTRUCTION CONTRACT WAS INVALID, THE ARBITRATION CLAUSE WAS ENFORCEABLE

Plaintiff, an unlicensed contractor, was made a defendant in an arbitration proceeding by the owner. During the course of the arbitration proceeding, plaintiff sought a finding the construction contract as a whole, including the arbitration provision contained in it, was invalid because the contractor was not licensed. The arbitration panel denied plaintiff's request and found the construction contract was enforceable. Plaintiff then sought an injunction in federal district court to prevent the arbitration proceeding from continuing on the basis the arbitration provision was invalid and under the Federal Arbitration Act, the court, not the arbitrator, must decide the validity of the construction contract.

The court found an arbitration clause is severable from the underlying contract. Under that rule, a party cannot avoid arbitration by attacking the underlying contract containing an arbitration clause but must challenge the arbitration clause itself. The contractor contended because the construction contract was illegal, the entire contract, including the arbitration provision, was never formed under Louisiana law. The court disagreed for two reasons. First, the contractor could not avoid the severability doctrine by merely re-framing a legality challenge to the construction contract as a formation question under Louisiana law. The contractor did not argue the arbitration provision standing alone was an illegal contract or that the parties did not agree to arbitrate their disputes.

State law or public policy cannot overcome the severability doctrine with respect to the enforceability of an arbitration agreement nor can it overcome the doctrine merely by characterizing an illegality defense as a question of contract formation. Second, plaintiff had not placed the formation of the arbitration provision at issue. The Federal Arbitration Act does not require the court to determine the validity of the construction contract; that is a question for the arbitrator to decide.

The court held the contractor had not established the first requirement for injunctive relief, i.e., there is a substantial likelihood of success on the merits of its claim. Accordingly, the court held it did not need to address the remaining requirements for injunctive relief. The motion for a preliminary injunction was denied. *Ferrandino & Son Inc. v. WMG Development, LLC*, 23-00679 (W.D. La 6/13/23), 2023 WL 3985520.

MOTION OF AN UNLICENSED CONTRACTOR TO STAY COURT PROCEEDINGS PENDING ARBITRATION

A homeowner sued its contractor whom it alleged performed substandard work. The contractor did not become licensed until approximately two months after the contract between it and the homeowner was signed. The contractor contended the dispute was subject to the arbitration clause in its contract. The homeowner contended the contract, since the contractor was not licensed, was null and void. The contractor argued the arbitration provision was binding.

The United States District Court for the Western District of Louisiana held a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause within it, must be decided by the arbitrator, not the court. Further, the United States Supreme Court adopted the separability doctrine based on a legal fiction that an arbitration provision is an independent contract from the main contract in which it is contained. The arbitration provision is treated as severable from the main agreement in which it appears, and challenges to a contract containing a broad arbitration agreement go directly to arbitration unless it is clearly shown the parties intended to withhold the issue from the arbitrator. The court held under the Federal Arbitration Act and the separability doctrine, the claims were subject to arbitration. The motion to stay pending arbitration was granted. *Hackett v. VIP REI, LLC*, 23-00522 (W.D. La 6/5/23), 2023 WL 3874472.

WAIVER OF LIABILITY PROHIBITED RECOVERY

The Louisiana First Circuit Court of Appeal held a claim by a relative of a decedent for emotional injuries she allegedly received after viewing the remains of her father at a funeral home were subject to the exclusion and limitation of liability provisions of CC. Art. 2004. Article 2004 provides any clause that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party or that, in advance, excludes or limits liability of one party for causing physical injury to the other party is null.

In this particular case, the plaintiff filed a lawsuit against a funeral home alleging negligence in the preparation of her father's remains. The funeral home recommended against viewing the body at the time since it had not been finally prepared. The plaintiff objected. The funeral home finally consented after it obtained a release of liability from the plaintiff. The release provided the funeral home and its owners and employees were released from liability incurred while viewing the remains of the decedent. The plaintiff, nevertheless, sued the funeral home for emotional distress.

The court of appeal held under Article 2004, contractual provisions that eliminate or limit liability for injury due to negligence, but not for injury caused by intentional or gross negligence or personal injuries, are valid. An act is intentional when the actor either 1) consciously desires the result of his or her action, regardless of the likelihood of success, or 2) has knowledge to a substantial certainty the harm will occur, regardless of his or her desire to achieve that result. Gross negligence is characterized as the entire absence of care with complete disregard to the rights of others. The injuries contemplated by the parties in the release were psychological or emotional injuries or distress that may arise from viewing the remains. They were not physical injuries. The court of appeal held the contractual waiver of liability was enforceable as written.

The court of appeal considered whether the waiver of liability was a claim of adhesion. A contract of adhesion is a standard contract, usually printed and often in small print, prepared by one party with superior bargaining power for the adherence or rejection of a weaker party. The issue presented by a contract of adhesion is whether the party truly consented to all of the printed terms. The court held the Plaintiff signed the release of liability and knew the contents of the document. The burden shifted to her to show a genuine issue of material fact regarding her consent to the waiver, which she failed to do. Further, it could not be said there was a large discrepancy in bargaining power between the plaintiff and the funeral home. The judgment of the trial court granting the motion for summary judgment was affirmed. *White v. DT Williams, LLC*, 2022-1145, (La.App. 1 Cir. 6/2/23), _____ So.3d. _____, 2023 WL 3862470.

CLAIM FOR UNJUST ENRICHMENT DENIED

A general contractor failed to pay a subcontractor. The subcontractor sued the general contractor and attempted to amend its petition to assert a claim for unjust enrichment against the owner. The general contractor opposed the motion to amend. To state a claim for unjust enrichment, the subcontractor was required to establish five (5) elements: 1) an enrichment, 2) an impoverishment, 3) a connection between the enrichment and the impoverishment, 4) an absence of justification or cause for the enrichment or impoverishment, and 5) no other remedy at law.

The subcontractor did not allege the owner failed to pay the general contractor for the work performed. It also did not allege the owner implied it would pay the subcontractor. There was no factual basis to find the owner received the benefit of the goods and services without cause or justification. Further, the subcontractor had a remedy against the contractor for the same damages it sought from the owner (i.e. payment for the goods and services provided). The court declined to allow the amendment finding the unjust enrichment claim of the subcontractor would be futile. *Ackel Construction Company, LLC v. Mastec North America, Inc.*, 22-4408 (E.D. La 3/14/23), 2023 WL 2731707.

LOUISIANA ANTI-INDEMNITY ACT NOT APPLICABLE

The United States General Services Administration ("GSA") hired Wright Bros. to renovate a floor of the Hale Boggs Federal Building in New Orleans. Wright subcontracted the HVAC, mechanical and plumbing work to Bremermann Mechanical, Inc. Bremermann hired Siemens Industry, Inc. to perform certain of its work. Wright acquired a liability insurance policy from Charter Oak Insurance and an umbrella policy from Travelers Property Casualty Company. Wright required Bremermann and Siemens to indemnify it and name it as an additional insured on their policies.

A leak occurred in a drain line damaging the building. Charter Oak and Travelers, the Wright insurers, paid the GSA for the damages. They then, as subrogees of Wright, brought a lawsuit against Bremermann, Siemens and their insurers to recover the losses. Bremermann moved to dismiss contending the indemnity and additional insured provisions in its contract were expressly prohibited under the Louisiana Anti-Indemnity Act ("LAIA") and, therefore, invalid.

The LAIA renders null, void and unenforceable any provision in a construction contract which purports to indemnify, defend or hold harmless the indemnitee from or against any liability for loss or damage resulting from the negligence or intentional acts or omissions of the indemnitee. Additionally, any provision that purports to require an indemnitor to procure liability insurance covering the acts or omissions or both of the indemnitee or the acts or omissions of a third party over whom the indemnitor has no control is null, void and unenforceable, unless there is evidence the indemnitor recovered the cost of the required insurance in the contract price.

The court found the LAIA applies only to provisions that demand the indemnitor hold harmless the indemnitee for the actions of the indemnitee. The indemnitee here was Wright. To run afoul of the LAIA, the subcontract would have to require Bremermann to defend Wright from the consequences of Wright's actions. That was not the case presented. Instead, the plaintiff insurers contended the indemnitor, Bremermann, was required to hold harmless the indemnitee, Wright, for the actions of Bremermann, the indemnitor. The claims did not present the situation contemplated or covered by the LAIA. The indemnity clause in the contract in question, insofar as it applies to the indemnitor's actions or omissions, were valid under the LAIA. *Charter Oak Fire Insurance Company v. Bremermann Mechanical, Inc.*, 21-1486 (E.D. La 4/25/22), 2022 WL 19517408.

SURETY'S REQUEST FOR INDEMNITORS TO POST COLLATERAL SECURITY

A surety requested the indemnitors on the performance and payment bonds it issued post collateral security pursuant to a General Agreement of Indemnity entered into by the indemnitors. The indemnitors failed to post the security. The surety sued to enforce the collateral security requirements of the Agreement of Indemnity and for preliminary and permanent injunctions ordering the indemnitors to immediately deposit the collateral security. The United States District Court for the Eastern District of Louisiana considered the request for a preliminary injunction.

The court first addressed the requirement the surety show a likelihood of success. The court held the surety must present a prima faciae case, but need not prove it is entitled to summary judgment. In evaluating this requirement, the court may rely on otherwise inadmissible evidence, including hearsay evidence, at the preliminary injunction stage. The indemnitors contended the surety could not demonstrate a substantial likelihood of success on the demand for collateral security because senior liens existed on the property the indemnitors said they would have to sell in order to satisfy their duty to furnish the security. The court found the argument was without merit. The indemnitors ability to post collateral security in an amount and of a kind acceptable to the surety has no bearing on the indemnitors obligation to furnish the security. The indemnitors could not claim the surety has failed to demonstrate a substantial likelihood of success on its demand simply because the assets that could be used in satisfaction of their obligation to furnish collateral security are encumbered by other security interests. Because the indemnitors did not dispute the Agreement of Indemnity gave the surety the right to demand the collateral security, and the indemnitors had not posted such security, the court concluded the surety demonstrated a substantial likelihood of success on its demand.

Next, the court considered the requirement the surety must demonstrate the threat of injury to it is likely and irreparable in order to prevail on a motion for a preliminary injunction. An injury is irreparable if it cannot be adequately compensated by money damages. Only those injuries that cannot

be addressed by the application of a judicial remedy after a hearing on the merits can properly justify a preliminary injunction. Equitable relief is warranted when the injury constitutes either continuing harm or a real and immediate threat of repeated injury in the future. The courts have recognized an indemnitor's failure to collateralize a surety constitutes an injury that cannot be remedied with damages because it amounts to loss of the bargained-for right to be collateralized. The surety was required to show its inability to collect amounts that may become owed by an indemnitor is imminent, including, for example, showing the indemnitor faces dire financial straits or bankruptcy thereby increasing the likelihood that damages may not be recovered upon a later judgment awarding specific performance. A claimants inability to collect a judgment due to the judgement-debtor's insolvency or initiation of bankruptcy proceedings can constitute irreparable harm. The court found the record evidence clearly demonstrated the indemnitors were insolvent and incapable of paying a future judgment. Accordingly, the surety satisfied its burden of showing it would suffer irreparable injury if a preliminary injunction did not issue ordering the indemnitor to deposit collateral security.

The court then considered the requirement for purposes of a preliminary injunction that courts must balance the competing claims of injury and must consider the effect on each party of the granting or the withholding of the requested relief. The court found in the absence of an injunction, and without the benefit of its bargained-for right to collateralization under the Agreement of Indemnity, the surety would face liability for the full sum of the bonds on claims asserted by the project owners and unpaid contractors, subcontractors and suppliers. A preliminary injunction would simply compel the indemnitors to perform an obligation to which they agreed in the Agreement of Indemnity. The balance of these hardships favored the surety. The surety had demonstrated the hardship it would face if an injunction did not issue which outweighed the threat and harm to the indemnitors posed by the injunction.

Finally, the court considered the requirement a party seeking a preliminary injunction must establish that granting the injunction will not disserve the public interest. The court held it was not constrained to the immediate interests of the parties to the contract but considers the situation of the public as it would be affected by injunctive relief. The public has an interest in the enforcement of valid contracts and the ongoing solvency of sureties. The indemnitors conceded the public has an interest in the enforcement of valid contracts and the solvency of sureties, but argued those interests are outweighed by the public's competing interests in honoring and preserving lending relationships and in protecting security interests and their ranking with banks and other financial entities. The court found the issuance of a preliminary injunction would only order the indemnitors to post collateral security. This would require the indemnitors, in collaboration with the surety, to identify assets, including any portion of assets unencumbered by senior ranking security interests, that the surety believes will satisfy their obligation. Third-party lien holders are more than capable of protecting their security interests in the principal's assets. The court held the publics interest is not impeded by a preliminary injunction and, in any event, is eclipsed in these circumstances by the public's competing interests in the enforcement of valid contracts, the solvency of sureties, and the completion of vital public works projects. The surety had shown the issuance of a preliminary injunction ordering the indemnitors to comply with the collateral security provisions of the Agreement of Indemnity did not disserve the public interest. *Western Surety Company v. Magee Excavation & Development, LLC*, 23-1097 (E.D. La 5/11/23), 2023 WL 3377163.

RESPONSIBILITY OF AN ARCHITECT AND ENGINEER FOR INJURIES

An employee of a subcontractor was injured when the ceiling of a vault on which he was standing collapsed during demolition. The injured employee sued the architect and the structural engineer. The architect was granted summary judgment by the trial court. The injured employee appealed.

The court of appeal found the architect acknowledged it had a contractual duty to make site visits to make sure the contractor was operating in accordance with the design plans. The architect also had a contractual duty to report any deviations from the contract. The court of appeal found, particularly considering the photographs taken by a representative of the architect on the date of the accident, there were clear indications violations or deviations from the contract were occurring that the representative should have observed and reported. Although the general contractor was responsible for safety on the project, the representative of the architect acknowledged in his deposition if he saw anything unsafe at the site he would notify the contractor's superintendent. The representative, however, did not speak with the general contractor or with the injured employee's supervisor on the day of the accident.

The court of appeal held there were genuine issues of material fact as to whether the architect was aware of the general contractor's deviations from the contract requirements involving demolition, and whether the architect failed to identify and report an unsafe condition. The summary judgment of the architect was reversed. *Bonilla v. Verges Rome Architects – A Professional Architectural Corporation*, 2022-0625 (La.App. 4 Cir. 5/11/23), _____ So.3d _____, 2023 WL 3371559.

In the same matter, the engineer moved for and was granted summary judgment. The injured employee appealed.

The court of appeal held the pertinent issue was whether the express provisions of the relevant contract imposed a duty on the engineer. The court found the general contractor, not the engineer, had the stated contractual duty for the means and methods of construction and for safety. There was no evidence introduced to demonstrate the engineer was aware of any unsafe condition on the jobsite.

The engineer's role in the project was limited to its specified scope of work as a consultant for the architect. That role did not include any demolition drawings or specifications for the vault. Additionally, it was not responsible for the means and methods of construction and for site safety. Further, the observations of the architect's representative could not be imputed to the engineer. The representative worked for the architect, not the engineer.

There was no evidence to show the engineer was aware of how the vault was being demolished. Its site visits did not begin until more than a month after the accident. Summary judgment in favor of the engineer was affirmed. *Bonilla v. Verges Rome Architects – A Professional Architectural Corporation*, 2022-0802 (La.App. 4 Cir. 5/11/23), _____ So.3d _____, 2023 WL 3371562.

MOTION TO COMPEL MEDIATION DENIED

Blue Cliff College was the owner for a project in Metairie, LA. Highland Commercial Construction, Inc. was the general contractor. Highland claimed Blue Cliff failed to pay part of the fourth installment payment and none of the fifth. The total amount due was $623,474.00. Highland contended the parties agreed to use a standard form of agreement of the American Institute of Architects (the "AIA Agreement") for the project which incorporated by reference AIA Document A201-2017 which provided general conditions for the contract. Document A201 contained a provision requiring that all claims, disputes and other matters in controversy arising out of or relating to the contract would be subject to mediation as a condition precedent to binding dispute resolution. According to Highland, it provided the AIA Agreement to Blue Cliff and asked it to sign and return it so it could be executed but Blue Cliff never did. Highland sued Blue Cliff for the payments. Blue Cliff filed an answer and counter claims for breach of contract and negligence and a motion to compel mediation.

Blue Cliff contended the parties had a valid and enforceable agreement to mediate the dispute. Highland argued there was no agreement to mediate since Blue Cliff never executed the AIA Agreement and did not comply with its payment provisions or its dispute resolution provisions. Further, Blue Cliff, in its answer to Highland's amended complaint, stated the AIA Agreement was not executed. Highland asserted, accordingly, since the defendant had not indicated an intent to be bound by the terms of the AIA Agreement, it could not seek to enforce the Agreement's provisions to compel mediation.

The United States District Court for the Eastern District of Louisiana held Blue Cliff had not carried its burden of proving that, prior to its motion to compel mediation, it agreed to be bound by the terms of the AIA Agreement. It offered no evidence it ultimately signed the Agreement, and, crucially, by arguing the AIA Agreement was unexecuted in its answer to Highland's amended complaint, it demonstrated its understanding the Agreement would not be binding until it was signed by all parties. There was no evidence clearly indicating Blue Cliff's consent to be bound by the AIA Agreement sufficient for the court to find the Agreement was valid and enforceable despite being unsigned by Blue Cliff.

The court further found the AIA Agreement provided the architect was the initial decision maker and an initial decision was required as a condition precedent to mediation of any claim. There was no evidence showing Blue Cliff had referred the claims or its own counter claims to the initial decision maker. Blue Cliff, instead, sought an order from the court directing the parties to mediate, bypassing the Agreement's procedural requirements. Highland also argued the failure of Blue Cliff to timely make the fourth and fifth installment payments violated the terms of the AIA Agreement and was further evidence Blue Cliff did not intend to be bound by the Agreement's terms. The motion to compel mediation was denied. *Highland Commercial Construction, Inc. v. Education Management, Inc.*, 23-543 (E.D. La 5/23/23), 2023 WL 3601568.

MOTION TO STAY PROCEEDINGS PENDING ARBITRATION

The United States District Court for the Western District of Louisiana considered a motion by a defendant insurer to stay the proceedings in court pending arbitration in accordance with the contract. The plaintiff, the owner of damaged property, opposed the motion arguing the clause did not conform to the strict standard established by the Louisiana binding arbitration law and arbitration would unconstitutionally deprive it of its right to a trial by jury.

The court granted the motion, stating arbitration clauses potentially governing all claims arising from the relationship of the parties are left to the arbitrators to decide whether a dispute falls within the clause. Further, it is well settled that compelling arbitration is not *unconstitutional even when the plaintiff would otherwise have a right to a jury trial* on its claims. *First Baptist Church of Westlake Louisiana v. Cotton Commercial USA, Inc.*, 22-05309 (W.D. La 3/10/23), 2023 WL 3881493.

CONTRACT NOT WITHIN THE PURVIEW OF THE LOUISIANA CONTRACTORS LICENSING LAW

St. Bernard Trucking entered into a contract with the St. Bernard Parish Government for emergency drainage and sewerage removal following Hurricane Ida to prevent flooding. The work was completed. St. Bernard Trucking submitted invoices totaling $1,802,669.16, and subsequently revised the invoices to reflect a reconciled amount of $1,665,661.48 in order to avoid delay or dispute regarding the charges submitted. The St. Bernard Parish Government refused to pay St. Bernard Trucking on the basis it was not licensed as a contractor as required by Louisiana law, and, as a result, the contract was

an absolute nullity. St. Bernard Trucking sued to enforce the contract, or alternatively, for unjust enrichment.

The court found the contract to remove drainage and sewerage from one location in St. Bernard Parish and transport it to another location did not require a license under the Louisiana Contractors Licensing Law. St. Bernard Trucking was not a "contractor" under the terms of the law and the work performed did not involve construction or a construction undertaking.

The decision was reached by the court despite the declaration of a representative of the Louisiana State Licensing Board for Contractors to the contrary. The declaration relied upon two bulletins issued by the Licensing Board which the St. Bernard Parish Government contended constituted law as administrative regulations. The court found the St. Bernard Parish Government failed to provide any legal authority suggesting the bulletins constitute law or legal authority. The licensing law and rules and regulations make no reference to the word "bulletin" and specifically provide that words and phrases shall be as defined in the licensing law and rules and regulations.

St. Bernard Trucking was not required to have a commercial contractors license at the time it performed its work. The court, pursuant to a Motion for Summary Judgment, awarded St. Bernard Trucking $1,665,661.48 plus pre-judgment and post-judgment interest. *Sewell v. St. Bernard Parish Government*, 21-2376 (E.D. La. 2/3/23), 2023 WL 1765923.

LAWSUIT FOR DAMAGES BY OWNERS OF PROPERTY ADJACENT TO A ROAD PROJECT

The Louisiana Department of Transportation and Development let a design/build contract for the upgrade of a section of U.S. Highway 90 in Lafayette Parish to James Construction Group, LLC. The plans were prepared by C.H. Fenstermaker & Associates, LLC and approved by the DOTD. Construction was performed by James and its subcontractors. Owners of property adjacent to the project sued the DOTD seeking damages for losses they incurred due to the project and just compensation for DOTD's inverse condemnation of their property. DOTD moved for summary judgment arguing it was entitled to judgment due to plaintiffs' inability to prove at trial that access to their property was substantially impaired by the construction work; that a landowner is entitled to compensation for merely inconvenient or mere circuitous access; or that any such impairment was not common to all landowners.

The Louisiana Third Circuit Court of Appeal first considered plaintiff's argument the trial court erred in granting summary judgment in favor of DOTD on their inverse condemnation claim. The court held a landowner may bring an action for inverse condemnation when his property has been taken or damaged by a public entity. The liability of a public body in such a case is limited to those instances where there is physical taking or damage to property or a special damage peculiar to the particular property and not general damage sustained by other property similarly located. It must be determined whether that damage is not suffered by those in the general neighborhood, i.e., whether the damage is peculiar to the individual who complains.

In determining whether private property has been taken or damaged by a public entity, courts consider a three-pronged analysis: 1) whether a person's legal right with respect to a thing or an object has been affected; 2) whether the property, either a right or a thing, has been taken or damaged, in a constitutional sense; and 3) whether the taking or damaging is for a public purpose under the state constitution. C.C. arts. 667 and 668 impose reciprocal obligations on the landowner and his neighbor. Art. 667 restricts the landowner from exercising his right in a manner damaging to his neighbor, while art. 668 requires the neighbor to tolerate certain inconveniences arising from the landowner's lawful use of his property. A finding of liability turns on whether the State's construction activities resulted in

inconveniences that must be tolerated by the claimant or resulted in more serious inconveniences or interference that may be suppressed under art. 667. A plaintiff must present proof of some type of excessive or abusive conduct. Damage that is not peculiar to the property at issue but is the type of general damage sustained by other similarly situated property owners is not compensable.

The court of appeal found DOTD had satisfactorily pointed out an absence of factual support for plaintiffs' claim the inconvenience caused by the construction was special or peculiar to them and not suffered by other similarly situated property owners along the roadway. Plaintiffs failed to produce factual support sufficient to establish the existence of a genuine issue of material fact on the issue of whether the damage suffered by them as a result of the project was peculiar to their property, rather than the type of damage suffered by other businesses.

Next, plaintiffs argued the trial court erred in dismissing their general negligence claims against DOTD based on the grounds of negligent delay. James filed a motion for summary judgment as to all theories of recovery and causes of action asserted by plaintiffs. The trial court granted summary judgment in favor of James with the exception of the cause of action for damages relating to its negligence in reducing traffic lanes for an unnecessary and unreasonable period of time. The court of appeal held, based on the evidence pertaining to DOTD's monitoring of James' activities and the trial court's denial, in part, of James' motion for summary judgment, genuine issues of material fact existed with respect to DOTD's liability claims arising from James' allegedly negligent actions. *Southland Engine Company, Inc. v. State of Louisiana, Through the Department of Transportation and Development*, 2022-205 (La.App. 3 Cir. 12/21/22), 353 So.3d 1081.

AN INSURER'S DUTY TO DEFEND

Boh Bros. Construction Co., LLC, the general contractor, subcontracted with L&M Trucking, Inc. to haul materials to and from a project. L&M was required to carry insurance and name Boh as an additional insured. L&M subsequently entered into an agreement with Rodney's Trucking, LLC to perform certain hauling and trucking duties. A driver for Rodney's Trucking was involved in an automobile accident. The other party to the accident sued Boh, L&M, L&M's liability insurer, Rodney's and the driver of Rodney's vehicle.

Boh argued that under the terms of its contract with L&M, L&M was obligated to defend and indemnify it from claims arising out of the negligence of L&M or any of its subcontractors. The court of appeal held a liability insurer's duty to defend and the scope of its coverage are separate and distinct items. With respect to the duty to defend, the court held the test is not whether the allegations unambiguously assert coverage, but whether they do not unambiguously exclude coverage. Even though a Plaintiff's petition may allege numerous claims for coverage excluded under an insurer's policy, a duty to defend may nonetheless exist if there is at least a single allegation in the petition under which coverage is not unambiguously excluded.

The additional insured endorsement of the policy under which Boh was named as an additional insured provided coverage applied to the insured only as a person liable for the conduct of another insured and then only to the extent of that liability. The plaintiff alleged Boh was liable for negligence imputed to it under the doctrine of respondeat superior for the negligent acts and omissions of its employees and/or those acting on its behalf. The court held the allegation implicated Boh for the alleged acts of L&M. The insurer was found responsible to defend Boh to the extent Boh was liable for the actions of L&M. The court noted the liability insurer sought a summary judgment ruling its policy did not provide coverage for the accident. The trial court denied the motion. Considering the foregoing, coverage was not unambiguously excluded. *Silva v. Boh Bros. Construction Co., LLC*, 2023-0154 (La.App 4 Cir. 4/10/23), 360 So.3d 140.

USE OF A PRESCRIBED OBLIGATION AS A DEFENSE AND A PEREMPTION OF A CLAIM AGAINST A SURETY

The Louisiana Fifth Circuit Court of Appeal held an owner's prescribed claim via a reconventional demand could, according to C.C.P. art. 424, be used as a defense to a contractor's claim since it was incidental to, or connected with the, obligation sought to be enforced by the contractor. *Lamar Contractors, LLC v. SRF Group Consulting, LLC*, 22-212 (La.App. 5 Cir. 2/1/23) 328 So. 3d 885, writ denied, 2023-00298 (La. 5/23/23), _____ So.3d _____, 2023 WL 3595207.

In the same matter, the contractor stopped work over a dispute concerning the design and specifications of roof decking for the project. The project was a public work. The contractor then filed a Notice of Termination and a lawsuit against the owner. The owner filed a reconventional demand against the contractor representing its work was defective and the contractor breached the contract in unilaterally deciding to stop work. The owner also sued the surety. The surety filed an exception alleging the claim against it was perempted under La. R.S. 38:2189.

The statute provides that any action against a contractor on the contract or on the bond, or against the contractor or the surety or both on the bond furnished by the contractor, shall prescribe five (5) years from substantial completion or acceptance of the work, whichever occurs first, or notice of default of the contractor. The surety argued the owner gave notice of the contractor's default when it filed its reconventional demand on January 9, 2016. The owner's claim against the surety was not brought until June 18, 2021.

The Court found after the contractor filed suit the parties were working towards a resolution of claims which included resuming work on the project. There was no evidence which demonstrated the owner considered the contractor to be in default of the contract prior to its reconventional demand, or that it formally declared the contractor to be in default. The owner's reconventional demand against the contractor did not allege default, but pleaded causes of action pursuant to a breach of contract. The court of appeal found it could not say the contractor was put into default sufficient to trigger the five (5) year peremptive period.

Lamar Contractors, LLC v. SRF Group Consulting, LLC, 22-213 (La.App. 5 Cir. 2/1/23) 358 So.3d 907, writ denied, 2023-00305 (La. 5/23/23) _____ So.3d _____, 2023 WL 3595237.

FORUM SELECTION CLAUSE AND A MILLER ACT ACTION

The Overton Brooks VA Medical Center in Shreveport contracted with Blue Cord Design & Construction, LLC to serve as the prime contractor for a project. Blue Cord hired Avallone Architectural Specialty, LLC to provide and install doors and related items. Avallone commenced a Miller Act action against Blue Cord in the United States District Court for the Western District of Louisiana representing it performed its work but Blue Cord did not pay for labor and materials. Blue Cord moved to transfer the matter to the Middle District of Florida pursuant to a forum selection clause in a subcontract between Blue Cord and Avallone.

The magistrate judge found the initial question was whether the subcontract at issue which contained the clause was consented to by the parties, particularly Avallone. The magistrate held the parties contemplated the contract containing the forum selection clause would be in writing. There was no evidence it was customary in the construction industry for a subcontract worth more than

$300,000.00 to be accepted by commencement of performance rather than execution of a written agreement.

Blue Cord proposed a contract with a forum selection clause setting venue in Florida. When Avallone returned a signed version of the signed subcontract agreement, the forum selection clause had been omitted, and its acceptance was specifically stated to be subject to an attached amendment page. There was some performance consistent with there being a contract between the parties, but there was no solid evidence of offer and acceptance of the particular subcontract that included the Florida forum selection clause. The magistrate judge found the motion to transfer should be denied. *Avallone Architectural Specialties, LLC v. Blue Cord Design & Construction, LLC*, 22-6153 (W.D. La. 4/3/23), 2023 WL 2995924. The district judge concurred with the findings of the magistrate and denied the motion to transfer. *Avallone Architectural Specialties, LLC v. Blue Cord Design & Construction, LLC*, 22-6153 (W.D. La., 4/18/23), 2023 WL 2994119.

UNLICENSED RESIDENTIAL CONTRACTOR AND THE NHWA

The Louisiana First Circuit Court of Appeal held under the New Home Warranty Act (NHWA) it is unlawful for a contractor or builder who is required to be licensed by the Louisiana State Licensing Board to enter into a construction contract or work as a residential building contractor without the proper license. In this instance, the contractor did not possess a residential building contractors license, although the sole member of the contracting LLC did. The contract was an absolute nullity. The NHWA does not apply to a construction contract and is absolutely null due to the builder's failure to obtain the proper residential building contractor's license.

The contractor did not have a breach of contract claim or NHWA claim against the owner. CC art. 2033 requires parties, in such an instance, be restored to the situation that existed before the contract was made, if possible. The court held the record supported the trial court's finding it was the owner, not the individual who held the license, who terminated the parties' dealings and refused to let the licensed individual complete or repair work at the house. The court held the owner was not entitled to damages under art. 2033. *Robinson v. Papania*, 2022-1010 (La. App. 1 Cir. 3/6/23) _____ So.3d _____, 2023 WL 2361125, writ denied, 2023-0048 (La. 5/23/23) _____ So3d _____, 2023 WL 3595283.

ACTION FOR ALLEGED PROMISES TO HIRE LOCAL BUSINESSES

A group of local dump truck operators alleged a chemical company promised and they relied upon the company's representations they would be awarded work for the project in preference to non-area companies, but they were not. The local truckers sued for alleged violations of the Louisiana Unfair Trade Practices Act (LUTPA) and damages or detrimental reliance.

The Louisiana Third Circuit Court of Appeal held in order to establish a valid LUTPA claim, plaintiffs must either be consumers of the chemical company's products or its direct competitors. A trade practice is unfair when it offends established public policy and when the practice is unethical, oppressive, unscrupulous, or substantially injurious. A trade practice is deceptive under LUTPA if it amounts to fraud, deceit or misrepresentation. Only egregious actions involving elements of fraud, misrepresentation, deception or other unethical conduct will be sanctioned based on LUTPA. The alleged behavior did not, according to the court, rise to the level of deceit, fraud or misrepresentation as contemplated by LUTPA. The court found, at best, the alleged representations by the chemical company were gratuitous representations to the community at large which included the plaintiffs, and

it was not reasonable for the plaintiffs to act upon such vague and generalized gratuitous representations.

Detrimental reliance is generally based upon an oral promise that imposes a burden upon the other party; such a promise is onerous because of the burden imposed. If the promisee performs the burden at a cost to himself, and the promisor does not keep his part of the bargain, then the oral promise is enforceable if it was reasonable for the promisee to rely on the promise in the first place. A gratuitous promise is one given freely without imposing a burden. A requirement for recovery under a theory of detrimental reliance is the party seeking recovery must have had a justifiable reliance in the representation. The court held it was not reasonable for the plaintiffs to rely on a gratuitous promise without a written agreement.

The doctrine of detrimental reliance is designed to prevent injustice by barring a party from taking a position contrary to his prior acts, admissions, representations or silence. To establish such an action, three elements must be proved: 1) a representation by conduct or word; 2) justifiable reliance; 3) a change in position to one's detriment because of the reliance. The court held the alleged representations by the chemical company did not constitute definite and certain offers to plaintiffs, were not clear and unambiguous, but instead were mere expressions of an intention to favor local vendors. Interestingly, the plaintiffs represented in their petition their trucks were placed in rotation and all worked their trucks every day when hauling was available. The court held the claims for detrimental reliance failed to state a cause of action. *Mayehaul Trucking, LLC v. Sasol Chemicals, LLC*, 2021-797 (La.App. 3 Cir. 11/9/22), 353 So.3d 243.

PRESCRIPTION

Defendants, a general contractor and subcontractors, performed work on the construction of a building next to plaintiff's property. Plaintiff contended the work damaged its property. The defendants filed an exception of prescription which was sustained by the trial court. Plaintiff appealed. Defendants argued prescription began to run as early as February 1, 2016, more than one year before the petition was filed on October 5, 2017. Plaintiff represented it did not discover damages to the property until late fall of 2016 and January 2017, and there was continued shaking of the building from construction activities through November 2016.

The court of appeal found Civil Code Art. 3492 was applicable. It provides a prescriptive period for delictual actions of one year which commences to run from the date injury or damage occurs. The jurisprudence provides that damage is considered to have been sustained when it has manifested itself with enough certainty to support a cause of action. Actual knowledge of facts that would entitle a party to bring suit is not necessary to begin the running of prescription. Prescription will commence as long as there is constructive knowledge sufficient to excite attention and put the injured party on guard and call for inquiry. The court of appeal held the dispute hinged on resolving the question of manifestation of damages, i.e., when did the damages manifest and whether there was a delay between the manifestation of the damages and the cessation of the defendants' alleged tortious conduct. It found the answer to these manifestation issues not only goes to whether or not plaintiff timely filed suit, but also as to its ability to prove the merits of its claim.

The court concluded the evidence required to resolve the issue of prescription was substantially interrelated with the evidence required to prove the merits of plaintiff's general negligence claim. It held the trial court should not have granted defendants' exception of prescription, but rather, the exceptions should have been referred to the merits. *Canal Street Land Company, LLC v. MAPP Construction, LLC*, 2022-0445 (La.App. 4 Cir. 12/14/22), 353 So.3d 1055, writ denied, 2023-00049 (La. 3/28/23), 358 So.3d 506.

VALIDITY OF OPEN ACCOUNT AND UNJUST ENRICHMENT CLAIMS

24/7 Restoration Specialists, LLC contracted with Zachary Young to perform water damage mitigation services for Young's property in Luling, Louisiana following Hurricane Ida. The contract between the parties provided that the total cost of 24/7's services would be payable upon completion of the work. 24/7 performed the work. Young signed a Certificate of Completion confirming that the work was completed to his satisfaction. 24/7 sent Young an invoice for $62,108.00. Young disputed the invoice. 24/7 agreed to reduce the amount to $59,105.00. Young did not pay the invoice. 24/7 sued Young alleging breach of contract, suit on open account and unjust enrichment. Young moved to dismiss the open account and unjust enrichment claims.

Louisiana law, LRS 9:2781, defines an open account as any account for which a part or all of the balance is past due, whether or not the account reflects one or more transactions and whether or not at the time of contracting the parties expected future transactions. It provides for the recovery of attorney's fees for a party who prevails on a claim on an open account. The court held to distinguish between an open account and an ordinary contract, several factors are considered such as: 1) whether there were other business transactions between the parties; 2) whether a line of credit was extended by one party to the other; 3) whether there are running or current dealings; and 4) whether there are expectations of other dealings. There is, however, no requirement that there must be multiple transactions between the parties, nor is there any requirement that the parties must anticipate future transactions in order for a relationship to constitute an open account. An open account generally leaves undetermined key aspects of the obligation such as the time period during which the services will be rendered or the total cost of the services for which a party may be liable. It is open to future modification, and is left open for ongoing debit and credit entries and has a fluctuating balance until either party finds it convenient to settle and close, at which time there is a single liability. The court found it was not convinced that 24/7 adequately alleged a cause of action pursuant to the open account statute, and granted it leave to amend its complaint.

C.C. art. 2298 provides that a person who has been enriched without cause at the expense of another is bound to compensate that person and specifies that an unjust enrichment remedy shall not be available if the law provides another remedy for the required impoverishment. To maintain a claim for unjust enrichment, a plaintiff must show: 1) an enrichment, 2) an impoverishment, 3) a connection between the enrichment and impoverishment, 4) an absence of justification for the enrichment and impoverishment, and 5) the unavailability of any other remedy of law available to the plaintiff.

Young contended the unjust enrichment claim should be dismissed because 24/7 had another remedy at law, i.e., its breach of contract claim. 24/7 asserted that dismissal of its unjust enrichment claim would be premature because the mere fact it has pleaded a breach of contract does not conclusively establish that an available contractual or legal remedy existed. The court held a plaintiff may not plead unjust enrichment in the alternative when the law provides an alternative remedy, even when the plaintiff has not succeeded on an alternative remedy. The point in question is whether another remedy is available, not whether the party seeking a remedy will be successful. Until the validity of an alleged contract can be determined, an unjust enrichment claim should not be dismissed on the ground that the claimant has another available remedy.

Here, Young indicated he planned to contest the validity of the contract. Although he did not explicitly assert that the contract was unenforceable, he did not concede the validity of any of the plaintiff's allegations and causes of action and expressly reserved all defenses, counter claims and further responsive pleadings. In his motion to dismiss, Young referenced an anticipated affirmative defense that there was no valid agreement or contract. He could not convincingly assert that 24/7 had an adequate remedy at law in the form of a breach of contract claim and also that there is no contract

between the parties. The court could not, at this stage, determine the validity of the alleged contract, and the motion to dismiss the unjust enrichment claim was denied. *24/7 Restoration Specialists, LLC v. Young*, 22-1948 (E.D. La. 10/5/22), 2022 WL 5241934.

CLAIMS OF AN UNLICENSED CONTRACTOR DENIED IN PART

24/7 Restoration contracted with Young to perform water damage mitigation services, also referred to as remediation and cleaning and repairs, for Young's home following Hurricane Ida. 24/7 contended Young failed to pay for the work it performed and sued Young to recover the amount owed. Young moved for summary judgment contending the claims of 24/7 failed as a matter of law because the agreement was an absolute nullity since 24/7 did not hold a Louisiana contractors license.

The principal argument of 24/7 in opposition to Young's motion for summary judgment was dewatering and water mitigation services are excepted from the licensure requirement and do not require a contractor's license under Louisiana law. 24/7 relied on the website of Louisiana State Licensing Board for Contractors which stated that "water extraction, carpet removal, damaged drywall removal do not require a license." The court held the website offered no statutory basis for this statement and it was not bound by the frequently asked questions portion of the website. 24/7 also relied upon an amendment passed in August, 2022 to the licensing law which provided dewatering or water mitigation is excluded from the type of work that requires a contractor's license. The court found, however, the amendment was passed after the execution of the agreement between 24/7 and Young and did not have any effect on the law at the time 24/7 performed the work in question. The court found under Louisiana law, the work performed was that of a contractor. Since 24/7 did not have a contractors license, the agreement between it and Young was in direct violation of Louisiana law and was an absolute nullity. Without a valid contract, the claim of 24/7 for breach of contract failed.

The court considered the claim of 24/7 under the Louisiana Open Account Statute. The court held because it found the agreement between 24/7 and Young was an absolute nullity under Louisiana law, 24/7 could not bring a claim for an open account for payment due under the Louisiana Open Account law. The claims of 24/7 for breach of contract and recovery under the Louisiana Open Account Statute were dismissed.

Finally, the court considered the claim of 24/7 for unjust enrichment. It held an unlicensed contractor may recover the actual cost of materials, services and labor with no allowance for profit or overhead with respect to an absolutely null contract. The court found, however, there were genuine issues of material fact with respect to Young's motion for summary judgment prohibiting summary judgment on the sole remaining issue. *24/7 Restoration Specialists, LLC v. Young*, 22-1948 (E.D. La 6/5/23), 2023 WL 3816973.

DAMAGES FOR FAILURE TO PERFORM A CONTRACT VERSUS THOSE FOR DELAYED PERFORMANCE

A dispute arose between a general contractor and a subcontractor as to damages related to a subcontractor's obligation to timely provide drainage pumps and start-up services for a project. The general contractor sued the subcontractor for damages for delay in the delivery and set up of the pumps. The subcontractor filed a reconventional demand against the general contractor for the amount it claimed was due pursuant to the subcontract of $35,000, plus service charges of $525.00 per month from the date the account became overdue. The subcontractor moved for a summary judgment which was granted by the trial court. The general contractor appealed.

The court of appeal found the late delivery of the pumps was not a breach of contract because the subcontractor ultimately, though untimely, fulfilled its obligation to deliver the pumps. At that point, the general contractor was obliged to pay the balance of the contract. It could separately seek damages it sustained as a result of late delivery. The general contractor's failure to pay the terms of the contract constituted non-performance of the contract. The subcontractor did not breach the contract by ceasing service when the general contractor failed to pay the balance of the account.

The general contractor contended the parties orally agreed to modify the subcontract to delay payment of the $35,000.00. The court of appeal found there was a lack of corroborating evidence of the oral agreement and, as a result, the trial court did not err in finding the lack of a genuine issue of material fact that would preclude the granting of the subcontractor's motion for summary judgment. It affirmed the grant of the motion for summary judgment of the subcontractor. *Circle, LLC v. M&L Engine, L.L.C.,* 2022-0381 (La.App. 4 Cir. 12/19/22), 356 So.3d 62.

The Louisiana Supreme Court in a *per curiam* opinion reversed the grant of summary judgment. It found there were genuine issues of material fact and the trial court improperly weighed evidence and made credibility determinations regarding the alleged modification to the original contract. The matter was remanded for further proceedings. *Circle, LLC v. M&L Engine, L.L.C.*, 2023-00063 (La. 3/28/23), 358 So.3d 40.

LOUSIANA DIRECT ACTION STATUTE

Design Management Group, LLC ("DMG") contracted to renovate a home. It subcontracted the roofing and framing work to Southern Hammer & Nail Builders, LLC ("Southern Hammer"). Colony Insurance Company issued a general liability policy to DMG. Evanston Insurance Company issued a general liability policy to Southern Hammer. Colony claimed Southern Hammer's acts and omissions caused damages to the home and sued Evanston under the Louisiana Direct Action Statute. It sued Evanston as the subrogee of DMG for the damages it paid claiming Southern Hammer breached an express or implied warranty of workmanship by failing to ensure its employees and subcontractors were qualified to perform the services rendered and failed to ensure the project was executed in accordance with the subcontract which required the roof be water tight. These were breach of contract claims.

Evanston moved to dismiss the claims. The United States District Court for the Eastern District of Louisiana held the Louisiana Direct Action did not authorize a direct action based solely on a breach of contract claim and neither DMG nor Colony were tort victims. The tort victims were the homeowners who did not sue Evanston. Since neither Colony nor DMG could avail themselves of the Direct Action Statute, the claims pursuant to the statute were dismissed.

Further, the Evanston Insurance policy provided no person or organization had a right under the policy to sue it except to recover on an agreed settlement or on a final judgment against the insured. An agreed settlement was defined to mean a settlement and release of liability signed by Evanston, the insured and the claimant or the claimant's legal representative. Here, there had been no agreed settlement or final judgment against the insured. Still further, the court held even if Colony could assert a proper tort claim under the Louisiana Direct Action Statute, it would be prescribed since it did not initiate the suit against Evanston until more than one year after the damage to the residence occurred. *Colony Insurance Company v. Evanston Insurance Company*, 22-4573 (E.D. La 4/25/23), 2023 WL3072810.

IMMUNITY OF A PUBLIC ENTITY

Rosehill Construction, LLC contracted with the City of Baton Rouge/East Baton Rouge Parish ("City/Parish") as the general contractor for a project. Rosehill subcontracted the sewer-related work to Ted Hebert, LLC. Rosehill sued Hebert for damages maintaining its work on the project failed to pass the City/Parish inspections on three occasions. After notice and opportunity to cure the defects, Hebert failed to do so, and its contract was terminated. Rosehill hired Hendrick Construction, Inc. to complete Hebert's work.

Hebert filed a third party demand against the City/Parish and Nathan Cobb, the City/Parish engineer who oversaw the CCTV inspections. The City/Parish moved for summary judgment contending they were entitled to qualified immunity in performing their official duties as public works employees. The district court found the City/Parish had the authority to implement its sewer sag standard and CCTV sewer inspection policy and it and Cobb were entitled to immunity. Summary judgment was granted to the City/Parish and Cobb, dismissing the claims against them with prejudice.

Hebert contended the City/Parish did not have the authority to implement the sewer sag standard and the CCTV sewer inspection policy without formal adoption of the standard and inspection policy by the Metro Council and the trial court erred in finding the City/Parish and Cobb were immune from civil liability under L.R.S. 9:2798.1. The statute provides liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties.

The court of appeal first held the City/Parish had the authority to choose the methods of inspection, which included the authority to implement the sewer sag standard and the CCTV inspection policy. It then held when discretion is involved, the court must determine whether the discretion is the kind that is shielded by the statutory immunity, that is, discretion grounded in social, economic or political policy. The statute protects the government from liability only at the policymaking or ministerial level, not at the operational level. There was no genuine issue of material fact the City/Parish and Cobb were immune from civil liability for their discretionary or policymaking act in determining how the City/Parish would inspect public sewer pipelines. The judgment of district court was affirmed. *Rosehill Construction, LLC v. Ted Hebert, LLC*, 2022-0486 (La.App 1 Cir. 11/28/22), 356 So.3d 1115.

STAY OF LAWSUIT PENDING ARBITRATION

A property owner sued several insurers for damage to its property during Hurricane Ida. The insurers were foreign corporations with their principal places of business in the United Kingdom. The lawsuit was filed in state court, and removed by the insurers to federal court. The insurers contended the dispute was subject to arbitration under the provisions of the policy to which they all subscribed in accordance with the Federal Arbitration Act and moved to compel arbitration. The plaintiff moved to dismiss the motion.

In addition to being subject to the FAA, the issues were subject to the Convention Act of 1970 which was promulgated by the Congress of the United States to implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention Act is an international treaty which seeks to encourage the recognition and enforcement of commercial contracts and to unify the standard by which agreements to arbitrate are observed and arbitral awards are enforced in signatory countries. The United Kingdom is a signatory to the Convention Act. Agreements under the Convention Act are subject to provisions of the FAA unless the FAA is in conflict with the Act.

The court held, as a matter of federal law, arbitration agreements and clauses under the FAA are to be enforced unless they are invalid under principles of state law that governs all contracts. The plaintiff did not question its claims were within the scope of the policy's arbitration provision. The main dispute was whether the arbitration provision was null and void. According to the Convention Act, under a breach-of-contract claim, defenses are limited to those such as fraud, mistake and duress.

Plaintiff contended its insurance broker failed to remove the arbitration provision from the policy as instructed by it. The alleged mistake did not, however, void the arbitration clause under Louisiana law. The court found the Louisiana Supreme Court has explained both parties can individually be mistaken vitiating the consent of both parties, or one party can be mistaken and that mistake will vitiate consent if the other parties know, or should have known, the error was the reason for consent. The plaintiff stated no facts to suggest the defendant insurers should have known plaintiff would not have agreed to purchase the policy containing an arbitration clause. It, therefore, failed to overcome the substantial burden of establishing the invalidity of the policy arbitration clause.

The court then considered the question of whether the lawsuit should be dismissed or, in the alternative, stayed. The FAA provides when the claims are properly referrable to arbitration, the courts shall stay the trial of the action until the arbitration is complete upon application of one of the parties. A court may not, under the FAA, deny a stay when a valid arbitration agreement falls under the Convention Act. Where all of the plaintiffs' claims are subject to arbitration, however, the United States Fifth Circuit Court of Appeals has clarified that although dismissal is not an abuse of discretion, it is not mandatory. The court held it would exercise its discretion to stay the litigation pending arbitration rather than dismiss the claims since the defendant insurers had not explained why dismissal would be warranted. *Kronlage Family Limited Partnership v. Independent Specialty Insurance Co.*, 22-1013 (E.D.La. 1/17/23), 2023 WL 246847.

PEREMPTION UNDER L.R.S. 9:2772

Stupp Bros., Inc., as the owner, contracted with Fairfield Machine Company, Inc., as the general contractor, for the modernization of its Baton Rouge facility. The project included the manufacture, design and installation of a conveyor and cutting machine which was alleged to be unreasonably dangerous due to design and manufacturing defects and inadequate warnings and the legal cause of the injury and death of a worker. Fives Bronx, Inc. contracted with Fairfield and was alleged to be the manufacturer, designer and distributor of the equipment. Fairfield did not perform any work with respect to the equipment. Fives brought a third-party demand against Fairfield and Stupp.

Stuff accepted and took possession of the equipment no later than December 1997. The lawsuit was filed on March 27, 2019. The third-party demand of Fives was not brought until June 9, 2020. Fairfield moved for summary judgment arguing the claims against it were perempted under the five-year peremptive period established by L.R.S. 9:2772. The statute provides that no action shall be brought against, among others, any person performing or furnishing the design, planning, supervision, inspection or observation of construction or the construction of immovables or improvements to immovable property.

Fairfield argued the claims against it were perempted because the equipment was an improvement to an immovable. The court agreed finding the undisputed facts showed the equipment was bolted to the concrete floor of the facility and was hardwired into the facility's electrical system. A lot of work and effort would be required to take the equipment apart and perhaps removing a wall so that it could be removed. Further, the court found Fairfield was a person performing or furnishing a design, planning, supervision, inspection or observation of construction or the construction of immovables or improvement to immovable property. The five-year period begins to run after either: 1)

the date of registry in the mortgage office of acceptance of the work by the owner, or 2) if no such acceptance is recorded within six months from the date the owner has occupied or taken possession of the improvement, more than five years after the improvement has been occupied by the owner. The claims were perempted. More than five years passed since Stupp accepted the equipment. *Deggs v. Aptim Maintenance*, 19-00406 (M.D. La. 6/29/22), 2022 WL 2351922.

STATUTORY EMPLOYER STATUS FOUND

A federal district court recently reviewed the requirements for finding whether a statutory employer-employee relationship exist. A statutory employer is immune from a suit by an injured employee. The Workers Compensation Statue provides a statutory employer-employee relationship can be achieved via contract. It requires there be a written contract between the principal and a contractor which recognizes the principal as the statutory employer. When the contract recognizes a statutory employer relationship, there is a rebuttable presumption of the relationship between the principal and the contractor's employees, whether direct or statutory employees.

The presumption may be overcome only by showing the work is not an integral part of or essential to the ability of the principal to generate its goods, products or services. The "principal" is any person who undertakes to execute any work which is a part of his trade, business or occupation in which he was engaged at the time of the injury, or which he had contracted to perform and contracts with any person for the execution thereof. When a principal contracts to execute any work, which is a part of his trade, business, or occupation, the person with which the principal contracts is considered the "contractor." The Court cited with approval a decision of the United States Fifth Circuit Court of Appeals which held that a purchase order was a written contract as envisioned by the statute, and an unsigned purchase order and its terms and conditions satisfies the statute's requirement.

The Court held, pursuant to the contract, the principal was a statutory employer and immune from suit concerning injuries arising out of and occurring during the scope of employment. It also found the injured employee's work was an integral part of the principal's ability to generate its goods, products, or services. *Charlie v. Mobile Modular Management Corp., et al*, 2:21-00715 (W.D. La., 1/6/23), 2023 WL 122978.

GENERAL LIABILITY COVERAGE FOR A CONTRACTOR DENIED AND INSURER FOUND LIABLE FOR DUTY TO DEFEND

The Opelousas Hotel Group, LLC contracted with DDG Construction, Inc. to build a Hampton Inn in Opelousas, Louisiana. DDG did not employ or provide any workers for the project. Rather, it hired and managed subcontractors who performed the work. DDG's contract was ultimately terminated. Opelousas Hotel Group sued DDG and its CGL carrier, First Mercury, for damages. First Mercury moved for summary judgment contending its policies did not provide coverage.

A number of policy exclusions, together with other issues, were the subject of the motion. The court found indemnity was precluded under the exclusions for Damaged Property Exclusion, Damage to Your Product Exclusion, Damage to Impaired Property or Property Not Physically Injured Exclusion, Exterior Insulation and Finished Systems Exclusion (EIFS Exclusion), Professional Liability Exclusion and Contractual Liability Exclusion. First Mercury also contended coverage under its policies was not triggered. The policies are triggered once the damages first "manifest." First Mercury argued damages did not manifest until after the last policy terminated. The court agreed. The manifestation theory of trigger of damages applied. Damage did not manifest until after the policy terminated. Coverage was

denied. The motion for summary judgment was granted. *Opelousas Hotel Group, LLC v. DDG Construction, Inc.*, 6:18-01311 (W.D. La. 12/29/22), 2022 WL 17991355.

In the same matter, First Mercury accepted the contractors defense of the lawsuit subject to a reservation of rights. It sued Admiral Insurance Company which also issued CGL policies to DDG to recover a share of its defense costs. The court concluded the Admiral policy conditions and exclusions did not unambiguously exclude coverage as applied to the allegations of the complaint and Admiral violated its duty to defend DDG. First Mercury was entitled to reimbursement from Admiral for its pro rata share of attorneys' fees and costs that First Mercury paid to defend DDG. *Opelousas Hotel Group, LLC v. DDG Construction, Inc.,* 6:18-01311 (W.D.La. 2/2/23), 2023 WL 1478625.

COURT UNABLE TO DETERMINE IF WORK REQUIRED A CONTRACTOR TO BE LICENSED

In considering a Federal Rules of Civil Procedure, Rule 12(b)(6) motion to dismiss, the issue before the court was whether a contractor who was not licensed by the Louisiana State Licensing Board for Contractors was required to be licensed. The contractor contended the work was for dewatering which did not require it to be licensed. In considering a Rule 12(b)(6) motion, the court accepts well-pleaded facts as true and views those facts in the light most favorable to the plaintiff.

The magistrate judge who considered the motion found the allegations of the petition could go beyond dewatering which is excepted from the licensing board's requirements. She could not recommend dismissal of the contract claim at this stage of the proceeding. If the work did require that the contractor be licensed, the contract would be an absolute nullity, and the contractor would be limited to the recovery of actual costs for labor, materials and services, with no allowance for overhead or profit. *Messiah Missionary Baptist Church v. ServiceMaster Residential/Commercial Services, LP*, 2:21-00910 (W.D. La. 9/8/22), 2022 WL 18671510.

A CONTRACTOR'S CLAIM IT WAS NOT REQUIRED TO BE LICENSED AS A CONTRACTOR REJECTED

The agreement between an owner and a contractor provided the contractor would perform emergency cleaning and/or mitigation services. The contractor claimed it was not paid. The owner filed a declaratory judgment action contending the contractor was not licensed and, therefore, the contract was an absolute nullity. The owner then filed a motion to dismiss the claims under Federal Rules of Civil Procedure, Rule 12(b)(6). Among other things, in considering dismissal under the Rule, the court accepts all pleaded facts as true and use those facts in the light most favorable to the non-moving party.

At one point the contractor stated its remediation services were limited to removing ceiling tiles, flooring, carpet, baseboards, cabinets, and walls, cleaning and sanitizing the floors and studs, and installing drying equipment and air scrubbers. At another point, it stated the work included removal of the buildings component parts, including its walls, flooring, carpet, baseboards, ceiling tiles, and cabinets, the cleaning and sanitizing of the flooring and studs, and the installation of drying equipment and air scrubbers. The contractor argued it was not required to be licensed to perform water removal/extraction/mitigation or dewatering services. Nowhere in the agreement for the work were the words "dewatering" or "water extraction" to be found.

The court found the water remediation services involving, inter alia, the removal of ceiling tiles, flooring, carpeting, baseboards, cabinets and walls constituted an "alteration" of the property because

the buildings were made different without changing into something else. Prior to the work, the buildings were hurricane and water damaged commercial buildings. After the work, the buildings remained commercial office buildings, less water damaged carpets, flooring, walls, baseboards, etc. The changes made to the property modified it without transforming the property into something new in kind. The court found this constituted an "alteration" as that term is used in the licensing law. Additionally, the court found the contractor's work of "tearing down" suggested the removal or elimination of certain aspects of a structure as was the case presented. Because the contractor's remediation work involved "taking apart" certain water damaged components of the owner's property, the court found the services performed by the contractor fit the definition of "tearing down" as used in the licensing law. The court found it sufficient the contractor performed "alteration" and the "tearing down" of structures.

In arguing the Louisiana State Licensing Board for Contractors does not require a license for dewatering services, the contractor cited, as authority for the proposition, Frequently Ask Questions found on the licensing board's webpage which stated "water extraction, carpet removal [and] damage to drywall removal do not require a license from the LSLBC." The website did not cite any statutory authority for this proposition. The court held the Frequently Asked Questions were not binding on the court and reliance on them was misplaced and without merit. There was no evidence the LSLBC had the authority to suspend licensing requirements.

The court also found, at the time the agreement between the owner and contractor was entered into in September, 2021, the types of services performed by the contractor fell within the definition of "contractor" such that a license was required to perform the services. On August 1, 2022, the licensing statute was amended to explicitly exempt "dewatering or water mitigation." The effect of the amendment was to remove the prohibition against contracting without a license for the work. The amendment supported the proposition "dewatering" services and the types of services performed by the contractor were, at the time of the agreement, covered under the definition of "contractor" and, thus, a license was needed for the work.

In reaching its conclusion, the court distinguished the decision of another court. To the extent the decision held the type of services rendered by the contractor here were synonymous with dewatering, and thus, did not require a contractor's license to perform, the court disagreed. The court held the contractor could not adequately plead a breach of contract under Louisiana law since the contract was an absolute nullity.

The court, further found the contractor's open account claim lacked merit. An open account claim necessarily depends on the validity of the agreement between the parties. If the agreement is invalid, a defendant cannot owe money under the agreement. Here, the agreement was an absolute nullity, and it followed the contractor could not state a claim for open account. Additionally, a party can only prevail on an open account claim where judgment on the claim is rendered in favor of the claimant. The claim here pertained to funds owed under the agreement which was dismissed. The open account claim failed because judgment was not rendered in favor of the contractor.

In considering the contractor's claim for unjust enrichment, the court held it would not reward a party with unclean hands. The owner argued the contractor either knew, or should have known, the agreement entered into between the parties was absolutely null because the contractor did not possess a required contractor's license. The court held the contractor adequately pleaded a claim for unjust enrichment, but the issue of whether it either knew or should have known of the defect causing the nullification of the agreement was a factual dispute not appropriate for consideration on the motion to dismiss. That issue would have to be decided later.

The contractor also claimed a lien under the Private Works Act. The court held, under the Private Works Act, a contractor is one who contracts with an owner to perform all or part of a work. Absent a

valid contractual relationship, no claim may lie for the enforcement of a lien under the Act. The claim was dismissed. *CCAPS, LLC v. HD and Associates, LLC*, 21-2195 (E.D. La. 2/13/23), 2023 WL 1965087.

CLAIM FOR AN INTENTIONAL TORT DENIED

The United States District Court for the Eastern District of Louisiana held to prove an intentional tort for contracting an asbestos related disease a plaintiff must show the defendant either consciously desired that plaintiff contract a disease, or knew the result was substantially certain to follow from its conduct. It is not sufficient to show the defendant had knowledge its practices were dangerous and created a high probability someone would eventually be injured. A defendant's belief someone may, or even probably will, eventually get hurt if a workplace practice is continued does not rise to the level of an intentional tort, but instead falls withing the range of negligent acts. Plaintiff submitted no evidence the defendant intended he would contract an asbestos related disease and, therefore, could not meet his burden of proof for an intentional tort claim. *Ragusa v. Louisiana Guarantee Insurance Association*, 21-1971 (E.D.La 3/22/23), 2023 WL 2601438.

DUTY TO DEFEND NOT RETROACTIVE

The United States District Court for the Eastern District of Louisiana held an insurers duty to defend did not arise until an amended pleading was filed. As a result, the duty to defend was not retroactive to the dates of earlier pleadings. It is the filing of pleadings which could lead to liability under a policy that triggers an insurers duty to defend. *The Burlington Insurance Company, v. Houston Casualty Company*, 22-981 (E.D. La. 3/6/23), 2023 WL 2375361.