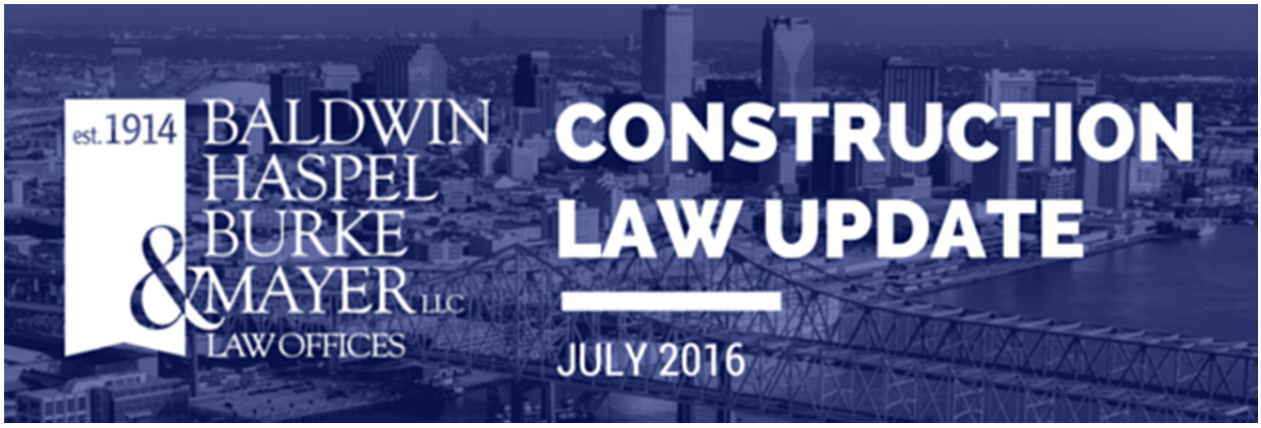

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For information about the firm, please visit our website at www.bhbmlaw.com.

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ADDITIONAL LOUISIANA SALES TAX

During this year's First Extraordinary Session, the Louisiana Legislature adopted a new statute, L.R.S. 47:321.1, imposing an additional 1% sales and use tax and tax on the lease or rental of tangible personal property. Act No. 26, 2016 First Extraordinary Session, No. 26. The new tax is effective April 1, 2016. L.R.S. 47:305.11 provides relief from tax for lump sum or unit price construction contracts entered into and reduced to writing prior to the effective date of the statute, or contracts entered into and reduced to writing within 90 days thereafter, if such contracts involve contractual obligations undertaken prior to the effective date. The statute states:

> A. No new or additional sales or use tax shall be applicable to sales of materials or services involved in lump sum or unit price construction contracts entered into and reduced to writing prior to the effective date of the statute or ordinance levying same or to sales or services involved in such contracts entered into and reduced to writing within ninety days thereafter, if such contracts involve contractual obligations undertaken prior

to such effective date and were computed and bid on the basis of sales taxes at the rates effective and existing prior to such effective date.

The Louisiana Department of Revenue has provided guidance with respect to the application of the statute to the new taxes. Revenue Information Bulletin 16-016, Sales Tax, April 19, 2016. The Bulletin states in part:

> This provision applies only to the sale of materials or services involved in a lump sum or unit price contract, after the contractor has become liable for performance and completion of a contract, which did not provide for new or additional taxes. This provision does not apply to contracts entered into on a cost plus or fixed fee basis. It also requires that the contract be entered into prior to the effective date of the statute or ordinance levying the new tax.
>
> This provision also applies to sales and services involved in a lump sum or unit price construction contract reduced to writing within ninety days after the effective date of a statute levying a new tax, but only if the contractor had a contractual obligation entered into prior to the effective date. This ninety day period is intended to cover a situation where a contractor has computed and bid a contract on the basis of existing taxes prior to the effective date of the new tax, but where awarding of the contract and formal signing thereof do not take place prior to the effective date of the new tax, but does take place within ninety days after the effective date of the new tax.
>
> Contracts meeting all of the requirements set forth in La. R.S. 47:305.11 will not be subject to the new 1% tax increase pursuant to La. R.S. 47:321.1. This state sales tax increase is effective April 1, 2016 as provided by Act 26 of the 2016 First Extraordinary Session of the Louisiana Legislature.
>
> Those contractors who have entered lump sum or unit price construction contracts meeting the requirements of La. R.S. 47:305.11 should complete Form R-1075 and attach a copy of the contract containing the signatures of all parties.
>
> Form R-1075 and the attached contract should be mailed to:
>
> Louisiana Department of Revenue
> Taxpayer Compliance – SSEW
> P.O. Box 66362
> Baton Rouge, LA 70821

Questions concerning Revenue Information Bulletin 16-016 can be directed to sales.inquiries@la.gov.

It is suggested that anyone who wishes to seek the benefit of the statute consult with their professional tax consultant. The tax may have to be paid and reimbursement sought from the Department of Revenue.

FIFTH CIRCUIT DENIES INJUNCTION TO PROHIBIT NLRB RULE ON ELECTIONS

The Associated Builders and Contractors of Texas, Inc. sued the National Labor Relations Board to enjoin enforcement of a rule modifying procedures relating to union representation elections. The rule allows employees to take a vote on union representation as soon as eleven days after the petition for representation is filed. Among other things, the rule defers employer challenges to voter eligibility issues until after an election is held; removes the standard 25-day delay that normally occurs between the time a regional director directs an election and the actual election; and requires expanded disclosure of employee contact information.

The district court granted a combined partial motion to dismiss and cross-motion for summary judgment of the NLRB. On appeal, the U.S. Fifth Circuit held that the challenged provisions of the rule neither exceeded the scope of the NLRB's authority under the National Labor Relations Act, nor violated the arbitrary and capricious standard of the Administrative Procedure Act. *Associated Builders and Contractors of Texas, Incorporated v. National Labor Relations Board*, 15-50497 (5th Cir. 6/10/16), 2016 WL 3228174.

ARBITRATION AWARD CONFIRMED AND NOT VACATED

Brice Building Company, LLC moved to confirm an arbitration award against Southland Steel Fabricators, Inc. Southland moved to vacate the award. The district court granted Brice's motion to confirm the award and found the motion to vacate was moot. Southland appealed.

The court of appeal held the district court is required to confirm an arbitration award unless any of the grounds specified in L.R.S. 9:4210 or 9:4211 exist. L.R.S. 9:4211 provides the grounds for modifying or correcting an award, and L.R.S. 9:4210 the grounds for vacating an award. Since Southland sought to vacate the award, L.R.S. 9:4210 was applicable. It states an award can be vacated: a) where it was procured by corruption, fraud or undue means; b) where there was evidence of partiality or corruption on the part of the arbitrators or any of them; c) where the

arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or any other misbehavior by which the rights of any party have been prejudiced; and d) where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. None of these conditions were present.

Southland contended the award should be vacated on the basis of a violation of public policy since Brice contracted with an allegedly unlicensed replacement subcontractor to complete the work. The argument was rejected. The court of appeal held Southland's public policy argument was not encompassed by the statute. It found, under the facts presented, it would defy public policy and defeat arbitration's purpose of promptly resolving disputes to vacate an arbitration award, and, thereby, permit a breaching subcontractor to avoid paying its contractual damages. Southland provided no case law where a Louisiana court has held that the public policy of enforcing contractor licensing laws is so strong as to invalidate an arbitration award against an entity that was not a party to the allegedly null contract, and, indeed, breached its own contract. The issue before the arbitration panel was Southland's breach and the ensuing contractual damages due as a result, not Brice's dealings with replacement subcontractors. It was public policy favoring the integrity and preservation of arbitration awards that controlled the matter.

The court of appeal mentioned briefly the judicially created ground for vacating an arbitration award of a manifest disregard of the law. A manifest disregard of the law refers to error which is obvious and capable of being readily and instantly perceived by an average person qualified to serve as an arbitrator. The doctrine implies that the arbitrator appreciated the existence of a clearly governing legal principle, but decided to ignore it. The doctrine was not discussed by the court of appeal further in reaching its decision finding the district court properly denied Southland's motion to vacate the arbitration award. *Brice Building Company, L.L.C. v. Southland Steel Fabricators, Inc.,* 2015-1110 (La.App. 4 Cir. 6/17/16), 2016 WL 3354059.

CLAIMS AGAINST A PUBLIC ENTITY

A subcontractor on a public works project, after its recorded claim and privilege and lawsuit against the general contractor and payment bond surety were dismissed, which dismissals were not appealed, sought to enforce its claim directly against the public entity under L.R.S. 38:2242D and L.R.S. 38:2243. L.R.S. 38:2242D allows for judgment against a public entity if the awarding authority makes final payment to the contractor without deducting the total amount of all outstanding claims served on it, or without obtaining a bond from the contractor to cover the total amount of the outstanding claims. Neither of these conditions were applicable. The awarding authority did not make a final payment to the contractor, but issued payment to the

payment bond surety. Additionally, recovery under the statute is premised upon the existence of a recorded privilege which no longer existed.

L.R.S. 38:2243 provides that a public entity, if at the expiration of the 45-day period for filing, claims any recorded claims are unpaid, shall file a petition in the proper court of the parish where the work was done citing all claimants and the contractor and subcontractor, and surety, requiring claimants to assert their claims. This is referred to as a concursus proceeding. If the governing authority fails to file the proceeding, any claimant may do so. The court of appeal found the statute does not subject a public authority to liability, and does not afford a claimant a cause of action against a public entity for failing to initiate a concursus proceeding. Further, any right of recovery sought by a claimant is contingent upon a recorded privilege. Here, there was no such recorded privilege; it had been dismissed previously. *Apex Building Technologies Group, Inc. v. Catco General Contractors, LLC*, 15-729 (La.App. 5 Cir. 3/30/16), 189 So.3d 1209.

FAILURE TO PAY SUBCONTRACTOR DID NOT RESULT IN A FINDING OF NEGLIGENCE REDUCING DAMAGES

The Louisiana Fourth Circuit Court of Appeal held the failure of a general contractor to pay a subcontractor played a substantial role in causing the subcontractor's breach of contract, and was negligence. Damages sought by Lamar Contractors, Inc., the general contractor, against Kacco, Inc., a subcontractor, for breach of contract were reduced in proportion to its negligence. *Lamar Contractors, Inc. v. Kacco, Inc.*, 2014-1360 (La. App. 4 Cir. 7/1/15), 174 So.3d 82. See the report on the decision in the February 2016 issue of the *Louisiana Construction Law Update*. Lamar sought a writ of certiorari from the Louisiana Supreme Court. The Supreme Court granted the application for a writ.

Kacco contended Lamar negligently withheld payments for completed work which contributed to Kacco's failure to perform remaining work. The Supreme Court found, in order to recover, Kacco must demonstrate that Lamar failed to perform its obligations under the contract, which in turn contributed to Kacco's breach of contract. The subcontract between Lamar and Kacco required that payments be made within ten days after Lamar received payment for the work from the owner. Within that ten-day period, Lamar terminated Kacco's contract. Termination occurred before Lamar's obligation to make payment to Kacco became due. As a result, Lamar did not violate any obligation owed under the contract to make payment to Kacco. The judgment of the court of appeal was vacated insofar as it affirmed the district court's judgment reducing the

award of damages in favor of Lamar. *Lamar Contractors, Inc. v. Kacco*, 2015-1430 (La. 5/3/16), 189 So.3d 394.

ARBITRATION

The United States District Court for the Middle District of Louisiana recently considered a motion by a third party defendant to compel arbitration. The personal injury plaintiff sued Louis Dreyfus Commodities, LLC for personal injuries. Dreyfus filed a third party demand against T.E. Ibberson Company. The agreement between Dreyfus and Ibberson required arbitration of disputes between them. Dreyfus opposed the motion on the basis the plaintiff moved to add Ibberson as a main defendant, and the lawsuit included parties who are not subject to arbitration. The motion of plaintiff to amend the petition to include Ibberson as a main defendant was pending.

The court granted the motion of Ibberson to stay the claims of Dreyfus pending arbitration. It also held if Ibberson is ultimately added as a defendant on the main demand, it must proceed accordingly.

In reaching its decision, the court recognized Supreme Court precedent that the Federal Arbitration Act governs all contracts that are within the reach of the commerce clause which includes contracts affecting commerce. The Act has very broad application. *Thomas v. Louis Dreyfus Commodities, LLC*, 15-394 (M.D. La. 6/8/16), 2016 WL 3197562.

CONTRIBUTION, INDEMNITY AND WAIVER OF WARRANTY

The United States District Court for the Eastern District of Louisiana held a general contractor was not liable to a window manufacturer, nor its distributor, for contribution or indemnity in tort with respect to a lawsuit filed by the owner. Contribution, in the past, was available among tortfeasors who are solidarily liable, but the 1966 amendments to Civil Code art. 2324 abolished solidarity except in instances where the parties conspire to commit an intentional or willful act. Otherwise, a party is liable only for damages caused by his fault. Since solidary liability in tort did not exist in this instance, there could be no requirement for contribution. The court also found the general contractor was not liable for tort indemnity since it is applicable only when a party discharges a liability which another rightfully should have assumed, and the fault of the party seeking indemnification is solely constructive or derivative, and is not active. Here, the fault of the parties seeking indemnity was not technical or constructive; their liability was based on negligence.

The court next considered whether the parties were solidarily liable by contract or law. Contribution and indemnity are only available among solidary obligors when multiple obligors or obligees agree to render one inseparable performance. There was no contract requiring solidary liability between the general contractor and the manufacturer and distributor.

The court then addressed the issue of whether they could be solidarily liable by law under principles of redhibition or warranty of fitness. A seller warrants a buyer against redhibitory defects or vices in the thing sold. A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that the buyer would not have bought the thing had he known of the defect. Sellers as well as manufacturers are liable for redhibitory defects. Solidary liability exists between manufacturers and sellers when the thing sold contains a redhibitory defect. They are also liable for a warranty of fitness. The two warranties are closely related. The issue turned on whether the general contractor could be liable for redhibition or breach of warranty of fitness as a seller. If it was not a seller, it could not be solidarily liable and subject to either warranty.

In order to decide the issue, the court considered whether the general contractor entered into a contract of sale with the owner or a contract to build. The court identified several tests to distinguish a contract of sale from a contract to build. One test was identified as the fundamental obligation test, which provides that a contract to build involves primarily the furnishing of labor and the contractor's skill in the performance of the job rather than the mere sale of materials. Another test was identified as the three-factor test. According to it, in a contract to build: (1) the buyer has some control over specifications for the project; (2) the negotiations take place before the object is constructed; and (3) the contract contemplates not only that one party will supply materials, but also that party will furnish his skill and labor to build the desired object. Yet another test was whether a party agrees to construct a building for another on land owned by the other party.

The court determined it was clear the general contractor and the owner intended the contract to be a contract to build, not a contract of sale. The general contractor's fundamental obligation was to furnish labor and skill in building and restoring the specified structure, not just to sell materials, and the owner already owned the property on which the building was to be constructed. Accordingly, the general contractor was not a seller, and could not be held solidarily liable with the others.

Finally, it was alleged the general contractor was liable in redhibition as the manufacturer of a component part since it modified the windows by vertically-mulling or fastening them together in the field. The court held if the owner were to sue the general contractor for its role in installing

the windows, its claims would rise under the building contract, not under a purchase order. Because they did not enter into a contract of sale, the general contractor could not be solidarily liable in redhibition with the manufacturer and distributor. The court held the general contractor was entitled to summary judgment dismissing the claims of the manufacturer and seller against it. *425 Notre Dame, LLC v. Kolbe & Kolbe Mill Work Co., Inc.*, 15-454, (E.D. La. 12/16/15), 2015 WL 9001918.

The window manufacturer subsequently moved for partial summary judgment to dismiss the claims of the owner against it in warranty for redhibition and fitness arguing they were waived by virtue of the manufacturer's express limited warranty contained in the purchase order. The court held warranty limitations are generally construed against manufacturers, and for that reason limitation attempts have often been ineffective. Commercially sophisticated parties, however, are held to a higher standard than unknowledgeable consumers, and Louisiana courts are more willing to find that a waiver was clear and unambiguous, and a buyer's signature is evidence its terms and conditions were brought to its attention, and the waiver enforceable.

Here, the general contractor signed the purchase order with the distributor which contained the manufacturer's express limited warranty. The limited warranty stated that it was in lieu of all other warranties, express or implied, and there were no implied warranties of mercantability or fitness for a particular purpose, or any other warranties that extended beyond the express limited warranty. Further, the remedies provided in the express limited warranty were exclusive, and in lieu of all other remedies at law or equity.

A buyer's rights in redhibition are based on subrogation, and because commercially sophisticated entities are held to a higher standard, a subsequent purchaser is bound by its seller's waiver of redhibition. The owner was subrogated to the general contractor's rights against the distributor and manufacturer. Because the general contractor acted for the owner in the transaction with the distributor, it would be patently absurd for the owner to claim that it had no notice of the terms of the purchase order.

The court found the limitation of warranty was sufficiently clear and unambiguous, and the waivers were valid. The general contractor, thus, waived all warranties with respect to the manufacturer, but its claims and warranty against the distributor were valid. The owner could maintain its claims against the distributor, but not against the manufacturer. Its sole remedy against the manufacturer was based in tort and violations of the Louisiana Products Liability Act. *425 Notre Dame, LLC v. Kolbe & Kolbe Mill Work Co., Inc.*, 15-454 (E.D. La. 5/27/16), 2016 WL 3033621.

FORUM SELECTION

The contract between a general contractor and a subcontractor provided that if the parties were not able to resolve a dispute, either party "may" seek to have the dispute resolved in any court having jurisdiction over the general contractor's office address. The parties were unable to resolve the dispute among themselves, and the subcontractor sued the general contractor in the United States District Court for the Western District of Louisiana. The general contractor moved to transfer the matter to the United States District Court for the Western District of Texas, which had jurisdiction over the general contractor's office address. The general contractor argued the forum selection clause mandated that the litigation take place in the Texas court. The court found the forum selection clause must contain clear and unequivocal language demonstrating the parties' intent to establish an exclusive forum, and the provision in the subcontract failed to contain such language. *R P Construction LLC v. S M C Builders, Inc.*, 15-2600, (W.D. La. 5/12/16), 2016 WL 2858961.

CLAIMS OF A MATERIAL SUPPLIER TO A SUB-SUBCONTRACTOR ON A PUBLIC WORKS PROJECT

The City of Youngsville contracted with Trahan Construction, LLC for a public works project. Trahan subcontracted part of the work to IDIM Construction, LLC. IDIM subcontracted its obligation to provide goods and materials and services to Rage Logistics. Rage purchased dirt, sand and other materials from Patriot Construction & Equipment, LLC. Patriot was not fully paid and sued the City, Trahan, IDIM and Rage. The City, Trahan and IDIM filed exceptions of no right of action and no cause of action, which were granted by the trial court. Patriot appealed.

A significant part of the opinion of the court of appeal dealt with the claims of Patriot against the City and Trahan. The Public Works Act requires not only that a claimant file a sworn statement of the amount due with the governing authority and record it in the Office of the Recorder of Mortgages within 45 days after recordation of acceptance, L.R.S. 38:2242B, but also that a materialman who has not been paid by a subcontractor must send a notice of nonpayment to the general contractor and the owner on or before 75 days from the last day of the month in which material was delivered, L.R.S. 38:2242F. Further, L.R.S. 38:2247 requires that before any claimant having a direct contractual relationship with a subcontractor, but no contractual relationship with the contractor, shall have a right of action against the contractor or the surety on the bond, he shall give written notice to the contractor within 45 days of the recordation of notice of acceptance by the owner of the work of the amount claimed. The court of appeal found Patriot failed to timely file a sworn statement of the amount of its claim, and failed to provide

timely notice. Patriot's only remedy against the City and Trahan was under the Public Works Act, which was barred since it did not comply with the requirements of the Act. Patriot, according to the court, was not entitled to relief under alternate theories of recovery such as quantum meruit and unjust enrichment. *Patriot Construction & Equipment, LLC v. Rage Logistics, LLC,* 15-1136 (La.App. 3 Cir. 4/6/16), 2016 WL 1358526.

DISMISSAL OF CLAIMS FOR FAILURE TO PURSUE ARBITRATION

Upon finding an agreement required arbitration, the district court on July 24, 2013, stayed proceedings in the lawsuit which had been filed in federal court and compelled the parties to arbitrate. The claimant, a year after the order compelling arbitration was entered, sent an arbitration demand to the American Arbitration Association, but failed to pay the required filing fee, and sought a fee waiver or deferral under the applicable arbitration rules which was denied by the AAA. The claimant neither cured the filing deficiency nor made any additional attempts to arbitrate its claims. The court, in reviewing the history of the matter, found there was a clear record of delay and contumacious conduct intentionally caused by the claimant, and lesser sanctions would not prompt diligent prosecution. For nearly three years, the parties were precluded from litigating their claims and defenses because the case had been stayed pending arbitration proceedings that the claimant never initiated. As time passes, memories fade, evidence becomes harder to locate and the litigation process becomes more difficult for all parties involved. On motion of the respondents, the claims were dismissed with prejudice. *84 Lumber Company v. F.H. Paschen, S.N. Nielsen & Associates, LLC,* 12-1748 (E.D. La. 5/5/16), 2016 WL 2594798.

PRESCRIPTION OF A CLAIM BY AN OWNER AGAINST A SUBCONTRACTOR

The Louisiana Fifth Circuit Court of Appeal considered whether a claim by an owner against a subcontractor was subject to the one-year prescriptive period for torts for damages to immovable property under C.C. art. 3493 or C.C. art. 3500, allowing a ten-year prescriptive period for actions against a contractor or an architect on account of defects of construction, renovation or repair of buildings or other works. The court found there was no contract between the owners of the property which was allegedly damaged, and the one-year prescriptive period of art. 3493 applied. The claims were found to be prescribed. *Caballero v. Keystone Customs, L.L.C.*, 15-722 (La.App. 5 Cir. 3/16/16), 188 So.3d 385.

LIABILITY OF A DESIGNER

Glenn and Sandra Wilson sued Acadiana Home Design, LLC and Murry Daniels, d/b/a Acadiana Design, alleging Acadiana and Daniels were liable to them for defective plans and Acadiana failed to properly supervise construction of their house. Acadiana is a limited liability company, and Daniels and his wife are the only members. The Wilsons selected a stock plan from Acadiana that was modified by one of its employees pursuant to instructions from the Wilsons. The parties did not sign a written contract.

The Wilsons contended they had a claim against Daniels individually because he was the owner of the plans, citing language on the face of the plans stating the plans were the property of the designer, Daniels. Daniels, although he prepared the plans, was not an architect or engineer. On each sheet, there was a statement that if an error or omission occurred, it was the sole responsibility of the contractor and/or the owner to correct the error and/or omission at their own expense, and not the responsibility of the drafting service. There was no evidence the Wilsons orally agreed to the limitation of liability.

The court of appeal held the jurisprudence requires that attempts to enforce disclaimers of liability under similar circumstances are unsuccessful where the evidence fails to establish that the customer was made aware of the limitation of liability provision at the time of the transaction. Daniels did not introduce any evidence that the disclaimer of liability was discussed with, or otherwise brought to the attention of, the Wilsons prior to their purchase of the plans, and the Wilsons denied noticing the disclaimer when they reviewed the plans. The text of the disclaimer was not emphasized to distinguish it from other information that also appeared at the bottom of each page, and the text was smaller than the text of other information. The court held it could not, as a matter of law, find the Wilsons consented to the disclaimer of liability. The evidence of actual knowledge by the Wilsons was conflicting. With respect to constructive knowledge, the court of appeal held it could not conclude, as a matter of law, that the disclaimer was sufficiently displayed as to impose knowledge of the provision on the Wilsons. The final determination on the issue must, according to the court, be reserved for the fact finder, and was not subject to summary judgment.

The Wilsons alleged Acadiana negligently failed to supervise the construction of the house. There was no evidence Acadiana or Daniels agreed to supervise the construction. They could not be held responsible for that claim.

The Wilsons argued that Daniels was personally liable for defects in the plans and specifications as a member of Acadiana Home Design, LLC and owner of the plans. L.R.S. 12:1320D provides

exceptions to the general rule that a member of a limited liability company is not personally liable. The rule does not apply if the member: 1) engages in fraud; 2) commits a negligent or wrongful act; or 3) breaches a professional duty. Four factors are considered in determining whether there is liability for a negligent or wrongful act: 1) whether the member's conduct could be fairly characterized as a traditionally recognized tort; 2) whether the member's conduct could be fairly characterized as a crime, for which a natural person, not a juridical person, could be held culpable; 3) whether the conduct at issue was required by, or was in furtherance of, a contract between the claimant and the limited liability company; and 4) whether the conduct at issue was done outside the member's capacity as a member.

As to the first consideration, whether a tort was committed, it must be shown that the member owed a duty to the plaintiff that does not arise under the contract between the plaintiff and the limited liability company. A showing of poor workmanship arising out of a contract entered into by the limited liability company, in and of itself, is insufficient to establish a negligent or wrongful act. Evidence of Daniels' ownership of the plans, alone, is insufficient to establish a separate tort duty sufficient to engage his personal liability where the obligation to provide adequate plans arose from the agreement between the Wilsons and Acadiana. There was no showing that Daniels owed a duty to the Wilsons that arose outside of the obligations of the agreement between the Wilsons and Acadiana.

As to the second consideration, the Wilsons did not contend that Daniels committed a crime.

With respect to the third consideration, to the extent Daniels was involved in the preparation of the plans, his actions were in furtherance of the agreement between Acadiana and the Wilsons.

As to the fourth consideration, Daniels testified the plans drafted by him were prepared in his capacity as a member or employee of Acadiana. There was no contrary evidence that he acted outside of his capacity as a member of the LLC.

Finally, there was no breach of a professional duty. The term "professional" means one who is engaged in a profession identified under Louisiana Revised Statutes. Daniels was not an architect; he provided residential plan design services. A person providing those services is not considered as engaged in a profession under the statute. Accordingly, Daniels was not liable as a member of the LLC.

Acadiana contended the claims against it were prescribed. The remaining claims against it were that it failed to properly design certain aspects of the house and specify certain building materials. When a party has been damaged by the conduct of another arising out of a contractual

relationship, he may have two remedies, a suit in contract, or a suit in tort, and may elect to recover his damages in either of the two actions. The applicable prescriptive period is determined by the character of the pleadings and the form of action. An action in tort is prescribed by one year, and an action in contract ten years. An action in contract results from the breach of a special obligation created by the contract, and an action in tort from the violation of a general duty owed to all persons. The court concluded the claims against Acadiana were based in contract. Any damages flowed from the breach of a contractual obligation as opposed to a general duty owed to all persons. The ten-year prescriptive period was applicable, and the claims were not prescribed. *Wilson v. Two SD, LLC,* 2015-0959 (La.App. 1 Cir. 12/23/15), 186 So.3d 103.

SUBCONTRACTOR'S FAILURE TO FILE A SWORN STATEMENT OF CLAIM UNDER THE PUBLIC WORKS ACT DID NOT AFFECT ITS RIGHT TO PROCEED DIRECTLY AGAINST THE GENERAL CONTRACTOR AND ITS SURETY

JaRoy Construction, Inc. subcontracted the piling work for a public works project to Pierce Foundations, Inc. Ohio Casualty Insurance Company provided payment and performance bonds for JaRoy. Pierce contended JaRoy failed to make payments due under the subcontract, and sued Jaroy and Ohio Casualty. JaRoy declared bankruptcy and Pierce proceeded solely against Ohio Casualty. The Louisiana Fifth Circuit Court of Appeal held since Pierce did not file a sworn statement of its claim, as requested by the Public Works Act, it was not entitled to pursue an action against the surety. *Pierce Foundations, Inc. v. JaRoy Construction, Inc.*, 14-669 (La.App. 5 Cir. 3/25/15), 169 So.3d 580. The decision was reported in the February 2016 issue of the *Louisiana Construction Law Update*. Pierce applied to the Louisiana Supreme Court for a writ of certiorari. The Louisiana Supreme Court granted the application and reversed the court of appeal.

The Supreme Court found that where a subcontractor fails to comply with the notice and recordation requirements of the Public Works Act, the subcontractor loses his privilege against funds in the hands of the public authority, but the failure to comply does not affect the right of the subcontractor, in contractual privity with the general contractor, to proceed directly against the contractor and its surety. The court held, despite confusing and perhaps conflicting language in the statute, the purpose of the Public Works Act was to protect those performing labor and furnishing materials for public works, rather than protecting sureties on the bond. The Public Works Act is not intended to, and does not affect rights between parties proceeding directly in contract, and is silent on the question of the rights of parties who file suit well before notice of

acceptance or default is filed. In this case, the subcontractor filed suit against the surety long before the event, which triggered the 45-day period during which a claimant may file and record a sworn statement.

Finding the statutory language ambiguous, and because the purpose of the Public Works Act is to assist laborers in recovery - not to immunize sureties where parties may proceed in contract - the court held the purpose of the Act is effectuated by allowing the subcontractor to proceed against the surety. The failure of the subcontractor to perfect its privilege against the public authority did not affect its right of action against the surety. The judgment of the court of appeal was reversed. *Pierce Foundations, Inc. v. JaRoy Construction, Inc.*, 2015-0785 (La. 5/3/16), 190 So.3d 298.

ATTORNEY FEES NOT ALLOWED TO A CLAIMANT UNDER THE LOUISIANA PROMPT PAY STATUTE, BUT WERE AWARDED TO THE DEFENDANT

The Louisiana Prompt Pay Statute, L.R.S. 9:2784, provides that when a contractor receives any payment from the owner for improvements to an immovable, it shall promptly pay such monies received to each subcontractor and supplier in proportion to the percentage of work completed. If the contractor or subcontractor - without reasonable cause - fails to make any payment to its subcontractors and suppliers within fourteen consecutive days of the receipt of the payment from the owner, the contractor or subcontractor shall pay to the subcontractors and suppliers, in addition to the payment, a penalty in the amount of one-half of one percent of the amount due, per day, from the expiration of the period allowed for payment after the receipt of payment from the owner. The total penalty shall not exceed 15% of the outstanding balance due. In addition, the contractor or subcontractor shall be liable for reasonable attorney fees for the collection of payments due. Any claim which the court finds to be without merit shall subject the claimant to all reasonable costs and attorney fees for the defense of such claim.

In this instance, the district court fashioned formulas to determine the amounts due to a subcontractor, and ordered the general contractor to pay the statutory penalty, granting the subcontractor's motion for summary judgment, and later entered judgment awarding $55,920.00 in attorney fees to the subcontractor. The general contractor contended it had reasonable cause not to pay the subcontractor, and it was entitled to attorney fees under the statute. Its motion for summary judgment was denied. The general contractor appealed.

The court of appeals agreed with the general contractor. The court found that the subcontractor's sworn statement of claim asserted the general contractor owed over two times the amount

remaining on the subcontract, and was even more disproportionate because the district court found the general contractor need not pay almost $90,000.00 of the subcontract. This "out of proportion" demand alone might be enough under the statute to constitute reasonable cause for the general contractor not to make payment, but, additionally, the court found the general contractor could withhold the value of a sub-subcontractor's lien which was not fully resolved until a few weeks before payment was made to the sub-subcontractor. The award of attorney fees in favor of the subcontractor was vacated; the denial of the general contractor's motion for summary judgment was reversed; and summary judgment entered in its favor. Attorney fees in favor of the general contractor were awarded. The matter was remanded to the district court for further proceedings. *Fisk Electric Company v. Woodrow Wilson Construction Company, Incorporated*, 816 F.3d 311 (5th Cir. 2016).

ATTORNEY FEES UNDER THE OPEN ACCOUNT STATUTE AND PRIVATE WORKS ACT

Dr. Margeaux Walker contracted with Tracy Jordan, LLC to build a home in Baton Rouge. Jordan contracted with Accusess Environmental, Inc. to provide environmental permitting services. Jordan failed to pay Accusess. Accusess filed a lien under the Private Works Act to collect the principal amount of the debt, and sued Walker and Jordan to enforce the lien and for attorney fees. Accusess moved for summary judgment against Walker and Jordan. The trial court granted the motion and awarded the principal amount of the debt, interest and attorney fees. Walker appealed.

The issue on appeal was whether Accusess was entitled to attorney fees. It claimed they were due under the open account statute, L.R.S. 9:2781. The statute provides for the award of fees for the successful prosecution and collection of a claim on an open account. The court of appeal held a claim on an open account necessarily requires an underlying agreement between the parties. There was no contractual relationship between Accusess and Walker, nor was there an agency relationship between them. Attorney fees under the statute were denied.

The court of appeal also held that Accusess was not entitled to attorney fees pursuant to Section 4822(K) of the Private Works Act. L.R.S. 9:4822(K) provides that any person to whom a privilege is granted by L.R.S. 9:4802, which includes subcontractors and others, may give notice to the owner of an obligation to that person arising out of the performance of work under the contract. The notice must be given prior to the filing of a notice of termination of the work, or the substantial completion or abandonment of the work, if a notice of termination is not filed. L.R.S. 9:4822(L) states that when notice is given under Subsection K, the owner shall notify that

person within three days of filing a notice of termination of the work, or the substantial completion or abandonment of the work, if a notice of termination is not filed. An owner who fails to give such notice shall be liable for all costs and attorney fees for the establishment and enforcement of the claim or privilege.

Here, the record did not provide evidence that Accusess provided notice under Subsection K, or that Walker violated Subsection L. Accordingly, attorney fees provided for under L.R.S. 9:4822(L) were not allowed. The judgment of the trial court awarding attorney fees was reversed. *Accusess Environmental, Inc. v. Walker*, 2015-0008 (La.App. 1 Cir. 12/17/15), 185 So.3d 69.

PUBLIC BID LAW AND PROHIBITION AGAINST WAIVER OF BID REQUIREMENTS

The City of New Orleans issued an Invitation to Bid for a street paving project in New Orleans. The Invitation required that the project proposal number should be stated on the sealed bid envelopes. TKTMJ, Inc. and Roubion Roads & Streets, LLC submitted the first and second lowest numerical bids, but their bid envelopes did not state the proposal number. Durr Heavy Construction, LLC submitted the third lowest numerical bid, and included the proposal number on its envelope. Durr protested the bids of TKTMJ and Roubion. The City denied Durr's protest. Durr sought injunctive and other relief in district court. The district court denied Durr's applications for relief. Durr appealed.

The court of appeal found while L.R.S. 38:2212(B)(2) states that the bidding documents shall require only certain specified information and documentation be submitted by a bidder at the time designated in the advertisement for bids, which does not include the identification of the proposal number on the bid envelope, L.R.S. 38:2212(B)(1) does not limit the mandatory non-waiver provisions to those set forth in L.R.S. 38:2212(B)(2). It states: "The provisions and requirements of this Section and those stated in the bidding documents shall not be waived by any entity." Applying that provision, the court of appeal held, since the Invitation to Bid required the identification of the proposal number on the envelope, the bids of TKTMJ and Roubion were non-responsive. The judgment of the district court denying Durr's application for injunctive relief enjoining and restraining the City of New Orleans from awarding the contract to TKTMJ or Roubion was reversed, and the City was enjoined from awarding the contract to TKTMJ or Roubion. *Durr Heavy Construction, LLC v. City of New Orleans*, 2015-0915 (La.App. 4 Cir. 3/16/16), 2016 WL 1061384.

The Supreme Court, on an application for a writ of certiorari, and without assigning reasons, granted the writ application and reinstated the district court's order denying the request for an injunction. *Durr Heavy Construction, LLC v. City of New Orleans,* 2016-609 (La. 4/15/16), 189 So.3d 384.

SCOPE OF A CONTRACTOR'S DUTY

D L Star, LLC contracted with Royal Seal Construction, Inc. to build a building. Star sued Royal for failing to construct the building within the time specified and for negligent construction. Star amended the complaint joining as plaintiffs the operators of two restaurants located in the building. The two restaurant operators alleged, although they were not signatories to the construction contract with Royal, they were third party beneficiaries of Royal's obligation under its contract with Star to timely construct the building, and were entitled to damages in tort. Royal moved for summary judgment to dismiss the claims of the two restaurant operators.

The court found the restaurant operators were not third party beneficiaries of Star's contract. The Louisiana Civil Code recognizes the creation of a contractual benefit for a third party, referred to as a stipulation *pour autrui*. Stipulations for the benefit of another are favored in Louisiana, but are not presumed. There are three criteria to consider when determining whether contracting parties have provided a benefit for a third party: 1) the stipulation for a third party is manifestly clear; 2) there is certainty as to the benefit provided to the third party; and 3) the benefit is not a mere incident of the contract between the promisor and the promisee. The court determined, after reviewing the criteria, that the contract at issue did not provide a stipulation for the benefit of the two restaurant operators.

The issue of whether the two operators were entitled to damages in tort presented questions of the duty of the contractor and to whom the duty was owed. The scope of the duty is determined by the duty/risk standard. This standard asks whether the defendant's duty is intended to protect each of the plaintiff's interests affected against the type of damage that occurred. The court found the interests of the two operators, i.e., their expectation under the contract that the building would be completed timely, were not within the scope of the contractor's duty to build the restaurants free from defects attributable to either faulty material or poor workmanship. The motion for summary judgment of the contractor to dismiss the claims of the two restaurant operators was granted. *D L Star, LLC v. Royal Seal Construction, Inc.*, 14-952 (E.D. La. 3/31/16), 2016 WL 1270265.

STIPULATION POUR AUTRUI NOT FOUND

Nottingham Construction Company, LLC contracted with the City of Hammond for the construction of a lift station. Nottingham rented sheet piles from J.D. Fields & Company, Inc. for a cofferdam, and contracted with Professional Construction Services, Inc. to drive the sheet piles. Fields claimed the sheet piles, as returned after the work, were heavily damaged and not in redrivable condition. It sued Nottingham and Professional for damages to the sheet piles. Professional moved for summary judgment. The motion was granted by the trial court. Fields appealed.

Fields contended the contract between Nottingham and PCS established a stipulation *pour autrui* in its favor, i.e., it was a third party beneficiary to the contract. The contract provided that PCS would take reasonable precautions for the safety of, among other things, the materials, and promptly remedy all damage or loss to any property. The court of appeal held Fields could only avail itself of the benefit of the contract if it was, indeed, a third party beneficiary. It found the most basic requirement of a stipulation *pour autrui* - that the contract manifest the clear intention to benefit the third party - was absent. The trial court was correct in granting Professional's motion for summary judgment. The judgment was affirmed. *J.D. Fields & Company, Inc. v. Nottingham Construction Co., LLC,* 2015-0697 (La.App. 1 Cir. 11/9/15), 184 So.3d 713.

LOUISIANA PROMPT PAY ACT

The United States District Court for the Eastern District of Louisiana held that the Louisiana Prompt Pay Act, L.R.S. 9:2784, distinguishes payments owed by a contractor to its subcontractors from payments owed by a subcontractor to its sub-subcontractors. Here, the general contractor was sued by two third-tier subcontractors alleging it was liable to them for payments due under their contract with the second-tier subcontractor.

The statute provides that when a contractor receives any payment from the owner, the contractor shall promptly pay such monies received to each subcontractor and supplier in proportion to the percentage of work completed, and, further, whenever a subcontractor receives payment from the contractor, the subcontractor shall promptly pay such monies received to each sub-subcontractor and supplier in proportion to the work completed. The court, in distinguishing payments owed by a contractor to its subcontractors from payments owed by a subcontractor to its sub-subcontractors, found the general contractor was not liable to the third-tier sub-subcontractors for the payments allegedly due. *Masonry Solutions International, Inc. v. DWG & Associates, Inc.*, No. 15-2450 (E.D. La. 3/25/16), 2016 WL 1170149.

SUBCONTRACTORS DENIED THE RIGHT TO PAYMENT BY AN OWNER SINCE THEIR CLAIMS WERE NOT TIMELY FILED

Despite knowledge by the owner of a public works project of the claims of two subcontractors before it made final payment to the general contractor, the claims against the owner were dismissed as untimely. *Red Dot Buildings, Inc. v. GM&R Construction Company, Inc.*, 14-2803 (E.D. La. 3/28/16), 2016 WL 1182578.

FILING OF A STATEMENT OF SUBSTANTIAL COMPLETION IN THE MORTGAGE RECORDS NOT NECESSARY TO START THE TIME FOR A LIEN OF A GENERAL CONTRACTOR

The United States District Court for the Western District of Louisiana held it is not necessary under the Private Works Act that a certificate of substantial completion be filed in the mortgage records to start the time period in which a general contractor's lien must be filed. In this instance, a certificate of substantial completion was signed, but not filed in the mortgage records. The general contractor's lien was filed in the mortgage records more than 60 days after the certificate was signed. The lien was untimely. *Golden Nugget Lake Charles, LLC v. W.G. Yates & Sons Constr. Co.*, (W.D. La. 3/8/16), 2016 WL 1030029.

PRESCRIPTION APPLIED TO A CONTRACTOR'S CLAIMS AGAINST DESIGN PROFESSIONALS

MR Pittman Group, LLC contracted with the Plaquemines Parish Government for the demolition and reconstruction of a pumping station. Stuart Consulting Group, Inc., Evans-Graves Engineers, Inc. and Professional Engineering Consultants Corporation furnished the plans for the project. Plaquemines Parish entered into a contract with one of the engineers to design and furnish the plans for the work and administration of the project. That engineer subcontracted with one of the other engineers, which in turn, subcontracted with the third. The three engineering firms comprised the design team for the project. Pittman did not have a contract with the engineers.

Pittman sued the engineering firms alleging damages as a result of delays occasioned by the absence of a letter of no objection from the United States Army Corps of Engineers, the necessity for which it was not initially advised, and design deficiencies. The engineers filed exceptions of prescription representing the claims were subject to the one-year prescriptive period for torts, C.C. art. 3492, arguing the prescriptive limitation was not displaced by the five-

year peremptive period of L.R.S. 9:5607, which is applicable to claims against designers. The trial court sustained the exceptions of prescription. Pittman appealed.

The court of appeal agreed with the trial court. In spite of the five-year peremptive period of L.R.S. 9:5607, the shorter one-year prescriptive period for torts of C.C. art. 3492 was applicable, and the claims were found to be prescribed by the one-year rule. The five-year peremptive period did not displace the one-year prescriptive period for torts.

Pittman argued that a change order signed by one of the engineers was an acknowledgment by it of Pittman's rights against it and interrupted prescription. Acknowledgment which interrupts prescription results from any act or fact which contains or implies the admission of the existence of a right. A tacit acknowledgment occurs when a debtor performs acts of reparation or indemnity, makes an unconditional offer or payment, or lulls the creditor into believing he will not contest liability. The court of appeal found the change order only affected a modification of the contract between Pittman and Plaquemines Parish. The engineer signed the change order in its capacity or role as an administrator of the project, and in no way obligated the engineer to make any sort of payment to Pittman. The change order did not constitute an express or tacit acknowledgment by the engineer that it was obligated in any way to Pittman. The argument was rejected.

The trial court's judgment sustaining the exception of prescription was affirmed. *MR Pittman Group, LLC v. Plaquemines Parish Government*, 2015-0396 (La.App. 4 Cir. 12/2/15), 182 So.3d 291.

COURT OF APPEAL AFFIRMS LOWER COURT JUDGMENT SUSTAINING A CONTRACTOR'S EXCEPTION OF PRESCRIPTION

Lamar Contractors, LLC contracted with the Plaquemines Parish Government to rebuild the Buras Fire Station after it was damaged by Hurricane Katrina. Lamar filed an exception of prescription under L.R.S. 38:2189, which establishes a five-year period for owners to file claims against a contractor arising out of a public construction project. The statute provides that the prescriptive period begins to run from substantial completion or acceptance of the work, whichever occurs first. Lamar contended the five-year period began to run on April 6, 2010, the date the engineer issued a certificate of substantial completion, rather than a later date on which the project manager recommended acceptance or an even later date when the notice of acceptance was filed in the mortgage records, and the claims were, therefore, prescribed.

The court of appeal agreed with the trial court that April 6, 2010 was the correct date from which the time period began to run. The engineer was contractually designated the owner's representative, and had the authority to select the date for substantial completion. Acceptance of the work does not necessarily establish the date of substantial completion. The judgment of the trial court sustaining the exception of prescription was affirmed. *Plaquemines Parish Government v. Burk-Kleinpeter, Inc.*, 2015-1152 (La.App. 4 Cir. 3/9/16), 2016 WL 915393.

LOUISIANA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW (LUTPA)

The Second Circuit Court of Appeal held that the LUTPA does not provide an alternative remedy for simple breaches of contract. The LUTPA allows for treble damages and the award of attorney fees. Citing a recent decision of the Louisiana Supreme Court, the court of appeal stated in establishing a LUTPA claim, a plaintiff must show that the alleged conduct offends established public policy and is immoral, unethical, oppressive, unscrupulous or substantially injurious. The statute prohibits only fraud, misrepresentation, and similar conduct, and not mere negligence. Conduct that offends established public policy and is unethical is not necessarily a violation under LUTPA. Only egregious actions involving elements of fraud, misrepresentation, deception or other unethical conduct will be sanctioned under the statute.

Carroll Insulation & Window Co., Inc. alleged that Biomax Spray Foam Insulation lied about the products it applied and installed at the project, and it was entitled to damages under the LUTPA. Biomax claimed the Carroll Insulation allegations were groundless and brought in bad faith and it was entitled to attorney fees and costs under the LUTPA. Finding the claims were only for breach of contract, relief under the LUTPA was rejected. *Carroll Insulation & Window Co., Inc. v. Biomax Spray Foam Insulation, LLC,* 50,112 (La.App. 2 Cir. 11/18/15), 180 So.3d 518.

REQUIREMENT OF THE PUBLIC BID LAW FOR WRITTEN AUTHORITY OF THE PERSON SIGNING A BID

The public bid law requires that a bidder submit written evidence of the authority of the person signing a bid at the time of bidding. Although the individual who signed a bid on the part of an LLC was apparently authorized to do so, as reflected in the records of the Secretary of State, evidence of that authority was not submitted with the bid. The Fifth Circuit Court of Appeal held, as a result, the district court did not abuse its discretion in granting a preliminary injunction enjoining the offending bidder from executing the public works contract in question or in

proceeding with the work. *Ryan Gootee General Contractors, LLC v. Plaquemines Parish School Board*, 15-325 (La.App. 5 Cir. 11/19/15), 180 So.3d 588.

CLAIMS UNDER THE PUBLIC WORKS ACT

A sub-subcontractor filed a statement of claim under the Public Works Act against its prime contractor. The claim was recorded with the recorder of mortgages before acceptance, and not within forty-five days thereafter as required by the statute. Recordation of substantial completion is sufficient for purposes of acceptance. The court of appeal found the claim was premature.

The sub-subcontractor also argued it was asserting rights under the payment bond. The court of appeal held that even if it would otherwise have a claim under the payment bond, its statement of claim against the surety was premature. First, before asserting a claim under the bond, it was required to comply with the statute and file its claim only within forty-five days after recordation of acceptance, which it did not do. Second, an action against the bond must be filed within one year from registry of acceptance of the work or notice of default of the contractor, which had not occurred. Third, because it did not have a contractual relationship with the general contractor, it must have first given written notice to the general contractor within forty-five days from recordation of notice of acceptance, which also did not occur.

The judgment of the trial court dismissing the claim was affirmed. *Gootee Construction, Inc. v. Atkins*, 2015-0376 (La. App. 4 Cir. 11/4/15), 178 So.3d 629.

OWNER ENTITLED TO SUE A MANUFACTURER OF A PRODUCT INSTALLED PURSUANT TO A CONSTRUCTION CONTRACT UNDER THEORIES OF SUBROGATION AND MANDATE

Landis Construction Co., LLC entered into a purchase agreement with Grand Openings, Inc., a distributor for Kolbe & Kolbe Mill Work Co., Inc., the manufacturer, to provide windows for a project. Grand Openings and Kolbe signed a purchase order. The windows leaked. The owner, Notre Dame, LLC, sued Kolbe and Grand Openings for damages for negligence, breach of warranty against redhibitory defects, and breach of warranty of fitness for ordinary use, and for damages under the Louisiana Products Liability Act. Kolbe moved for summary judgment to dismiss Notre Dame's redhibition and warranty of fitness claims.

The district court found the purchase order between Grand Openings and Landis warranted the windows against defects, and that they would be fit for their ordinary use. It stated the warranties

were in addition to any warranty implied by law. The warranties of fitness and against redhibitory defects are implied by law in every sales contract. The general conditions of the contract between Landis and Notre Dame assigned all manufacturers warranties relating to materials used in the work to Notre Dame. Thus, Landis specifically assigned the warranties to Notre Dame. Further, the court found subrogation occurred by operation of law. Notre Dame was both conventionally and legally subrogated to Landis's rights.

The agreement between Landis and Notre Dame established that Landis acted on Notre Dame's behalf. With Landis acting as Notre Dame's agent in purchasing the windows from Grand Openings, Notre Dame became a party to the sales contract. Notre Dame was considered a buyer by operation of the law of mandate, and could sue the sellers and manufacturers of the windows for redhibition. The motion for summary judgment of Kolbe was denied. *425 Notre Dame, LLC v. Kolbe & Kolbe Mill Work Co., Inc.*, (E.D. La. 3/22/16), 2016 WL 1110232.

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