The ***Construction Law Update*** is published by Baldwin Haspel Burke & Mayer, LLC for the benefit of its clients and others having an interest in the construction industry. It includes discussions of Louisiana state and federal court decisions, legislative developments and tax issues concerning construction-related matters. For further information on the decisions and legislative developments covered in this newsletter, please contact **John Stewart, Jr.** at jstewart@bhbmlaw.com or (504) 585-7846.

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CIVIL JUSTICE REFORM ACT OF 2020

The Louisiana legislature adopted the Civil Justice Reform Act of 2020 during its 1st Extraordinary Session of 2020. The Act was promoted by business interests in an effort to reduce automobile insurance rates. The Act, however, has broad application and is not limited to automobile cases, except where a specific provision by its terms could only apply to those cases.

Among other things, a jury trial is now available if a cause of action exceeds $10,000.00, exclusive of interest and costs. Previously, the monetary limit was $50,000.00. Additionally, jury trials are available in parish and city courts wherein the cause of action satisfies the new monetary limitation for purposes of delictual or quasi delictual actions. Presumably, any judgment rendered in a parish or city court is limited to the monetary jurisdictional limitation of that court.

Although a policy of insurance may be admissible, the amount of coverage shall not be communicated to the jury unless the amount of coverage is a disputed issue which the jury will decide. The Act prohibits the communication to a jury of the existence of insurance coverage

unless a factual dispute related to an issue of coverage is an issue which the jury will decide, the existence of insurance coverage would be admissible to attack the credibility of a witness, or a cause of action is brought against an insurer for bad faith or pursuant to the Louisiana Direct Action Statute. The identity of an insurer is not to be communicated to the jury unless the identity of the insurer would be admissible to attack the credibility of a witness. When an action is brought against an insurer pursuant to the Direct Action Statute or for bad faith, the court shall instruct the jury there is insurance coverage for the damages claimed by the plaintiff.

In cases where a claimant's medical expenses have been paid in whole or in part by a health insurer or Medicare, to a contracted medical provider, the claimant's recovery of medical expenses is limited to the amount actually paid to the contracted medical provider by the health insurer or Medicare, and any applicable cost sharing amounts paid or owed by the claimant, and not the amount billed. The court shall award to the claimant 40% of the difference between the amount billed and the amount actually paid to the contracted medical provider by a health insurer or Medicare in consideration of the claimant's cost procurement, provided that this amount shall be reduced if the defendant proves the recovery of the cost procurement would make the award unreasonable.

In cases where a claimant's medical expenses have been paid, in whole or in part, by Medicaid, the claimant's recovery of medical expenses actually paid by Medicaid is limited to the amount actually paid to the medical provider by Medicaid, and any applicable cost sharing amounts paid or owed by the claimant, and not the amount billed. In cases where medical expenses are paid pursuant to the Louisiana Workers' Compensation Law, a claimant's recovery of medical expenses is limited to the amount paid under the medical payment fee schedule of the Louisiana Workers' Compensation Law.

The Act repealed in its entirety the statute which prohibited the failure of an injured party to wear a seat belt as evidence of the comparative negligence of the injured party, and could not be admitted to mitigate damages. Evidence for those purposes is now allowed.

The Act becomes effective on January 1, 2021, and has prospective application only, and shall not apply to a cause of action arising or action pending prior to that date. Acts 2020, 1st Ex.Sess., No. 37.

PROTECTION FROM CLAIMS RELATED TO COVID-19

The Louisiana legislature passed and the governor signed legislation protecting persons (both natural and juridical), state and local governments, and political subdivisions, from claims related to exposure to COVID-19. Such persons are immune from claims which arise in the course of or through the performance or provision of their business operations unless they fail to substantially comply with applicable COVID-19 procedures established by the federal, state or local agency which governs the business operations and the alleged injury was caused by the person's gross negligence or wanton or reckless misconduct.

Protection is afforded to those hosting, promoting, producing or organizing events unless damages are caused by gross negligence or willful or wanton misconduct. For claims in tort by employees against employers in instances when they are compensable under the Workers' Compensation Law, employees have no remedy unless the exposure is intentional as provided for by the Workers' Compensation Law. Employees who are not covered by the Workers' Compensation Law have no remedy in tort against their employers unless the exposure was caused by an intentional act of the employer.

Persons who design, manufacture, label or distribute personal protective equipment are not liable for damages related to such equipment unless they are caused by their gross negligence or willful or wanton misconduct. Those who use, employ, dispense or administer personal protective equipment are not liable for claims resulting from or related to the equipment unless they fail to substantially comply with the applicable procedures established by federal, state or local agencies which govern such personal protective equipment and the injury was caused by such person's gross negligence or wanton or reckless misconduct.

The legislation is effective June 13, 2020. It is retroactive to March 11, 2020, the date Governor Edwards declared a public health emergency as a result of the threat of COVID-19. Acts 2020, No. 336.

As to the immunity discussed in the first paragraph of this article, see also Acts 2020, No. 362 which is effective as of June 12, 2020 and is also retroactive to March 11, 2020. That Act, additionally, excludes immunity with respect to exposure as a result of intentional criminal misconduct.

SUSPENSION OF PRESCRIPTIVE AND PEREMPTIVE PERIODS DURING THE COVID-19 PANDEMIC

Governor John Bel Edwards issued several proclamations suspending liberative prescription and peremptive periods during the COVID-19 pandemic. The first was Proclamation Number JBE 2020-30 of March 16, 2020, which suspended liberative, prescriptive and peremptive periods from March 17, 2020 to April 13, 2020. Subsequent proclamations extended the suspensions until July 5, 2020. To date, there are no further extensions. This issue is subject to change and we suggest you check with us for new developments.

The Louisiana legislature approved, ratified and confirmed the foregoing actions taken by the governor. It also provided for a limited suspension or extension of liberative, acquisitive and prescriptive periods and peremptive periods from March 17, 2020 through July 5, 2020. The suspension or extension of these periods applies only if the periods would have otherwise expired during the time period of March 17, 2020 through July 5, 2020. The right to file a pleading or motion to enforce any right, claim or action which would have expired during that time period expires on July 6, 2020. The new law is to be applied retroactively as well as prospectively. It is effective June 9, 2020. Acts 2020, No. 162.

As it stands now, suspension of the prescriptive and peremptive periods ends July 5, 2020.

SUSPENSION OF THE LOUISIANA PUBLIC BID LAW DURING THE COVID-19 PANDEMIC

Governor John Bel Edwards in Proclamation Number 25 JBE 2020 of March 11, 2020 suspended the Louisiana Public Bid Law, L.R.S. 38:2211, et seq., and the Louisiana Procurement Code, L.R.S. 39:1551, et seq., from March 11, 2020 to April 9, 2020. The suspension included the corresponding rules and regulations issued under those statutes. Subsequent proclamations extended the suspension until August 7, 2020 with certain provisions. To date, there are no further extensions. This issue is subject to change and we suggest you check with us for new developments.

CONTRACT LIMIT FOR PUBLIC WORKS PROJECTS WHICH MUST BE ADVERTISED INCREASED

The Louisiana legislature during its 2020 regular session increased the value of public works projects that must be advertised and let by contract to the lowest responsible and responsive bidder. The amount, known as the "contract limit," was raised from $150,000.00 per project to $250,000.00 per project. The law previously required that beginning February 1, 2015 and annually thereafter the Office of Facility Planning and Control would adjust the "contract limit" by an amount not to exceed the annual percentage increase in the consumer price index in the preceding year. That date was changed to February 1, 2025. As a result, the "contract limit" will remain $250,000.00 per project until February 1, 2025. The new law is effective July 1, 2020. Acts 2020, No. 111.

PAYMENTS UNDER A PUBLIC WORKS CONTRACT AND CLAIM FOR LIQUIDATED DAMAGES

L.R.S. 38:2191 provides for the payment of attorneys fees and interest to a contractor when a public entity fails to make progressive stage and final payments under a contract within a certain period of time. The statute also provides that the public entity failing to make such payments when due is subject to a writ of mandamus to compel payment. A writ of mandamus is a summary proceeding. Here, the general contractor sought a writ of mandamus, and the issue was whether the court should deduct the amount of liquidated damages provided for in the contract from the total amount of the payments otherwise due.

The court of appeal held in order to determine the amount owed or due under the contract in a mandamus proceeding, the amount of liquidated damages, if any, must be determined. The trial court had not made that determination, but recognized the requirement for liquidated damages, and dismissed the contractor's petition for a writ of mandamus. The court of appeal held that if a contractor elects to use a mandamus proceeding, the trial court must determine in a summary proceeding what sum is owed under the contract, including the amount of liquidated damages. The matter was remanded to the trial court to determine the sum owed under the contract. In reaching its decision, the court of appeal refused to follow a Fourth Circuit opinion. *Law Industries, LLC v. Board of Supervisors of Louisiana State University*, 2018-1756 (La.App. 1 Cir. 3/2/20), _____

So.3d _____, 2020 WL 1024901. See also *Coast 2 Coast Construction, LLC v. Parish of St. Tammany*, 2019-1311 (La.App. 1 Cir. 6/16/20), ____ So.3d _____, 2020 WL 3249307.

The Louisiana legislature in its 2020 regular session addressed the situation to some extent. It amended the Public Works Act to define "liquidated damages" as a fixed sum of damages stipulated in a public works construction contract that are intended to compensate a public entity as a result of a delay in performance by the contractor and may be assessed for a project not being substantially complete within the time period provided for by the public works contract. Further, it provided that notwithstanding any provision of law to the contrary, a public entity letting a public works construction contract for a flood protection project or for an integrated coastal protection project as defined in R.S. 49:214.2, as per the terms of the contract, may withhold liquidated damages from any payments or monies otherwise due to the contractor, taking into consideration all granted time extensions, after the expiration of the 45-day period set forth in R.S. 38:2242(B). Acts 2020, No. 92. The Act is effective August 1, 2020. R.S. 38:2242(B) establishes a 45-day period for filing sworn statements of amounts due, sometimes referred to as the lien period for public contracts.

Questions to ponder…Does the new law mean public agencies are able to withhold liquidated damages from payments under flood protection and integrated coastal protection projects due after the expiration of the 45-day period for filing liens, R.S. 38:2242(B), but cannot withhold such damages from payments due after that date for other projects, and must sue to collect them? Does the new law have any effect on payments due for other projects?

STIPULATED DAMAGES DENIED

An agreement between borrowers and a lender for a construction project contained a stipulated damages provision. The lender sued to collect stipulated damages provided for in the loan agreement. The borrowers moved for summary judgment claiming the stipulated damages agreement was unenforceable as a matter of Louisiana law.

Louisiana Civil Code article 2005 establishes a general rule that parties may stipulate to damages to be recoverable in case of nonperformance, defective performance or delay in performance. C.C. art. 2012 provides an exception allowing a court to modify a stipulated damages provision if it is so manifestly unreasonable as to be contrary to public policy. The court noted a line of cases which

requires consideration of stipulated damages provisions asking whether such provisions reasonably approximate the obligee's loss in the event of a breach. It also noted another line of cases, which cautions courts against comparing the stipulated amount with the obligee's expected damages.

The lender urged the court to apply the all-deference or hands-off approach of the second line of cases. The court, instead, applied the first line of cases and three principles which emerged therefrom. First, the aim of a stipulated damages provision is to fix the measure of damages in advance and to constrain the timely performance of the principle obligation. Stipulated damages cannot serve as a vehicle to recover punitive as opposed to compensatory damages. Second, stipulated damages should reasonably approximate the obligee's loss in the event of a breach. Third, the stipulated amount is presumed reasonable, and the party that says otherwise must rebut the presumption. The party must show that the provision is so manifestly unreasonable as to be contrary to public policy.

The court found the parties did not even attempt to approximate the damages in confecting the stipulated damages provision. The stipulated amounts did not bear any reasonable relation to damages. The court held the stipulated damages provision was unenforceable. *Bellwether Enterprise Real Estate v. Jaye*, 19-10351 (E.D. La. 6/10/20), 2020 WL 3076661.

PEREMPTION AND A CONSTRUCTION CONTRACT VERSUS A SALES CONTRACT

The Law Enforcement District of Jefferson Parish, as owner, entered into a contract with MAPP Construction, LLC for the construction of the Jefferson Parish Sheriff's Office Forensic Crime Laboratory building. MAPP subcontracted with G. M. Horne Commercial and Industrial, LLC, a dealer in products manufactured by Centria Services Group, LLC, for the exterior walls of the building. Horne contracted with Centria to furnish materials, product application drawings, and delivery of an insulated metal panel system to be manufactured by Centria and installed on the project by a separate contractor. The building experienced substantial external water intrusion. The District sued MAPP. MAPP filed a third party demand against Horne and Horne filed a third party demand against Centria.

Centria filed an exception arguing that Horne's claims were filed more than five years after the filing of the certificate of completion in the mortgage office, and were perempted pursuant to L.R.S. 9:2772. Horne opposed the exception arguing that the contract between it and Centria was one of sale, rather than one of construction, and the contract was not, therefore, subject to the five-year peremptive period of the statute. The trial court granted Centria's exception. Horne appealed.

The court of appeal held there were three major factors in determining whether a contract is a contract for sale or a contract to build or to work by the job. First, in a contract to build, the purchaser has some control over the specifications of the object. Second, the negotiation in a contract to build must take place before the object is constructed. Third, and most importantly, a building contract contemplates not only that the builder will furnish the materials, but that he will also furnish his skill and labor in order to build the desired object.

The court of appeal found there was no error in the trial court's legal conclusion that the contract between Horne and Centria was a construction contract, i.e., a contract to build, rather than a contract of sale. First, the ultimate purchaser, the owner, through its architect, rather than Centria, maintained overall control over the general specifications and construction of the project. Second, the negotiations for the subject contract between Horne and Centria took place well before the component parts for the subject building called for in the contract were designed, built and delivered by Centria. Last, the contract contemplated not only that Centria would furnish the component parts for the building, but would also furnish its skill and labor in order to manufacture and build the component parts to the detailed specifications developed by Centria.

The court held Horne took a narrow view of the main object of the contract: for Centria to design, build and deliver the component parts for the subject building called for in the contract. The contract, despite not including a provision for Centria to perform the installation, was no mere sale of stock building materials to be incorporated into a building by a third party. Rather, the evidence clearly showed that the main object of the contract was for Centria to design, build and deliver the wall panel system, the window system, and the structural support steel framing system that composed much of the building's structure, to the particular plans and detailed specifications developed by Centria for this particular building. The fact Centria did not install the items it custom manufactured for the project did not render the contract merely one of sale. The finished items

manufactured by Centria were not stock items, but rather were ordered by Horne to be manufactured to the particular detailed specifications developed by Centria.

The court of appeal concluded there was no error in the trial court's decision that the contract between Horne and Centria was a construction contract, i.e., a contract to build, rather than a contract of sale. The five-year peremptive period of L.R.S. 9:2772 was applicable. *Law Enforcement District of Jefferson Parish v. MAPP Construction, LLC*, 19-543 (La.App. 5 Cir. 5/29/20), ___ So.3d ___, 2020 WL 2786910.

AWARD OF ATTORNEYS FEES

In the January 2020 issue of the *Louisiana Construction Law Update*, we reported the decision of the Third Circuit Court of Appeal in *Fontenot v. Gilchrist Construction Company, LLC*, 19-21 (La.App. 3 Cir. 10/9/19), 281 So.3d 761. The court there, applying La.C.C.P. art. 1472, allowed the assessment of attorneys fees in the amount of $1,000,000.00 for the failure of the defendant to admit in response to requests for admissions the existence of buried debris, a fact it could not reasonably deny.

The Louisiana Supreme Court granted a writ of certiorari. The court found the district court did not err in awarding attorneys fees as a sanction for discovery violations, but "committed legal error by awarding attorneys fees on a percentage basis without making a factual finding as to which portion of the fee related to activities directly resulting from the discovery violation." The judgment of the court of appeal was vacated and set aside, and the case remanded to the district court for a specific factual finding, after an appropriate evidentiary hearing, as to the reasonable amount of attorneys fees which can be attributed solely to the discovery violation. *Fontenot v. Gilchrist Construction Company, LLC,* 2019-1964 (La. 3/16/20), _____ So.3d _____, 2020 WL 1320709.

ECONOMIC-LOSS RULE, THIRD PARTY BENEFICIARY AND REDHIBITION

Professional Network Consulting Services, LLC leased property owned by 425 Notre Dame, LLC to operate a restaurant. The lease required that the sole member of 425 Notre Dame would build out the space to suit Professional's needs. The buildout was completed using HVAC equipment

manufactured by Trane U.S., Inc. and installed by a subcontractor. The HVAC system failed to operate properly. Professional sued Trane claiming the restaurant lost customers, and, thus, revenue, due to the faulty equipment. Professional alleged Trane breached a duty of care owed to it in the design, manufacturing and installation of the HVAC system.

Trane contended the claim was not allowed under the economic-loss rule. The rule bars recovery in tort when a party suffers economic loss unaccompanied by harm to its own person or property. The court found Professional's tort claim seeking to recover lost profits fell squarely under the economic-loss rule, and was barred. The claim was not for remediation to the structure, but rather simply for lost profits, which are prohibited by the rule.

Professional claimed it was a third party beneficiary to the contract between Trane and the HVAC contractor, and Trane was liable to it for breach of contract. The court found there was nothing in the contract that manifested an intent that Professional benefit from the contract. Rather, as a lessee of the property that did not itself pay for the renovations, Professional received only an incidental benefit of the contract. Moreover, even if Professional was a third party beneficiary, it had no greater rights than the contracting party, and the contract specifically excluded recovery for incidental, indirect and consequential damages, including lost profits, which constituted Professional's sole claim for damages. The third party beneficiary claim was rejected.

Professional next claimed Trane was liable in redhibition as the seller of a defective product. Professional was not the buyer of the Trane system, and could not bring an action in redhibition against Trane. That claim was rejected as well. *Professional Network Consulting Services, LLC v. Trane U.S., Inc.*, 19-10774 (E.D. La. 1/30/20), 2020 WL 491229.

DUTY OF AN ENGINEER

A personal injury plaintiff sued an engineer alleging the engineer owed a duty to him to prevent the incident causing his injuries. The court stated that in determining any duty owed, it must consider the express provisions of the engineer's contract. In reviewing the contracts of the contractor and engineer, the court found the responsibility for means and methods of construction and the responsibility for safety of the workers was placed under the control of the contractor.

The plaintiff claimed the engineer owed him a moral duty to stop the work if it observed a dangerous working condition. The court found the plaintiff did not argue nor establish that

Louisiana law recognizes a moral duty in a construction case when the parties' contracts explicitly state otherwise. Nor did the plaintiff establish the engineer assumed a duty to him. Neither a defendant's concern with safety conditions and its general communications regarding safety matters, nor its superior knowledge and expertise regarding safety issues, will create a duty to guarantee safety. Likewise, inspections and mere safety recommendations, which recommendations are not mandatory and are not within the authority of the defendant to remediate, cannot create such a duty. *Young v. Hard Rock Construction, LLC*, 19-484 (La.App. 5 Cir. 3/17/20), 292 So.3d 178.

THIRD PARTY DEMAND, PROPERTY DAMAGE AND INTERPRETATION OF INDEMNITY AGREEMENT

A contractor sued an owner for delay damages resulting from the stoppage of work by the owner to address design issues related to the elevation of a tank. The engineer did not design the elevation of the tank, and was wholly uninvolved in this portion of the project. An indemnity provision in the contract between the engineer and the owner required that the engineer indemnify the owner for damages to property.

In considering a third party claim by the owner against the engineer for the delay damages, which were economic-only losses, and reversing the decision of the Louisiana Fourth Circuit Court of Appeal in *Couvillion Group, LLC v. Plaquemines Parish Government*, 2019-0564 (La.App. 4 Cir. 12/11/19), 286 So.3d 1129 (reported in the January 2020 edition of the *Update*), the Louisiana Supreme Court observed that Louisiana Code of Civil Procedure art. 1111 providing for third party claims by a defendant in a principal action against another requires that the third party defendant be the third party claimant's warrantor, or someone who may be liable to him for all or part of the principal demand. Here, the engineer played no part in the facts with respect to which it was alleged to be negligent, and was not liable to the owner for any part of the contractor's principal demand. There was no assertion by either the contractor or the owner that the engineer caused any part of the delay damages claimed by the contractor under its contract. The contractor's claims against the owner were too "attenuated" from the owner's claims against the engineer to support the third party demand under art. 1111.

The Court, further, found damages to property has a plain, ordinary and generally prevailing meaning, which is physical damage to tangible property. The indemnity provision could not be expanded to include economic-only losses without any relation to physical damage.

The Supreme Court also concluded that damages for any and all claims as provided for in the indemnity provision did not cover losses allegedly caused by the sole negligence of the owner. The phrase "any and all claims" does not expressly provide indemnity to the owner for its sole negligence, nor does it reflect the required specificity to trigger the indemnity. There was no discussion of L.R.S. 9:2780.1, the statute prohibiting agreements in construction and design contracts requiring that the indemnitor indemnify another for the other's own negligence. *Couvillion Group, LLC v. Plaquemines Parish Government,* 2020-0074 (La. 4/27/20), ____ So.3d ____, 2020 WL 2299649.

PRESCRIPTION

An engineering company sued individuals in Louisiana state court for payment for engineering and project management services. The lawsuit was filed on August 18, 2017. Previously, on January 15, 2015, the engineering company filed suit in Pennsylvania for a breach of contract against entities related to the individuals. The entities filed for bankruptcy. The engineering company failed to perfect its claims in the bankruptcy case, leaving it unable to enforce its claims against the entities.

The lawsuit filed by the engineering company in Louisiana on August 18, 2017 alleged that the individual defendants conspired to make negligent, or alternatively, intentional misrepresentations that induced the engineering company to perform hundreds of thousands of dollars worth of engineering and project management services for which it was never paid. The individual defendants filed an exception alleging the Louisiana action was subject to the liberative prescription period of one year, and the claims against them were prescribed. The individual defendants argued, based on the engineering company's initial complaint in the Pennsylvania litigation, the engineering company possessed information sufficient to incite curiosity, excite attention or put a reasonable person on guard to call for inquiry no later than March 15, 2015. The district court sustained the exception of prescription.

The court of appeal held delictual actions are subject to a prescriptive period of one year. The prescriptive period begins to run even if the injured party does not have actual knowledge of facts that would incite him to bring a suit as long as there is constructive knowledge of the same. Constructive knowledge is whatever notice is enough to excite attention and put the injured party on guard and call for inquiry. Such notice is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead. Such information or knowledge as ought to reasonably put the alleged victim on inquiry is sufficient to start running of prescription.

The Louisiana Supreme Court adopted the jurisprudential doctrine of *contra non valentem* as an exception to prescription. The fourth category of the doctrine provides that *contra non valentem* is applied when a cause of action is not known or reasonably knowable by the plaintiff even though his ignorance was not induced by the defendant. This category is commonly known as a discovery rule, and provides that prescription commences on the date the injured party discovers or should have discovered the facts upon which his cause of action is based. The rule does not exempt a plaintiff's claim from the running of prescription if his ignorance is attributable to his own willfulness or neglect; that is, a plaintiff will be deemed to know what he could have learned by reasonable diligence.

The court of appeal found the engineering company's claim was prescribed on its face, and bore the burden of proving that its claim was not prescribed. To do so, it relied on the doctrine of *contra non valentem*. The court of appeal found based on the record, and specifically the Pennsylvania lawsuit, the district court was correct in finding the engineering company had sufficient facts to inquire further no later than March of 2015. The judgment sustaining the exception of prescription was affirmed. *Hunt Guillot and Associates, LLC v. Clark*, 53-434 (La.App. 2 Cir. 4/22/20), 293 So.3d 1278.

VALIDITY OF A THIRD PARTY CLAIM

In considering a claim by a general contractor against a manufacturer for providing replacement engines and upgrading gear reducers that drove four back-up storm water drainage pumps, the United States District Court for the Eastern District of Louisiana held the Federal Rules of Civil Procedure with respect to third party claims does not permit a third party plaintiff to implead a third party defendant merely because the third party defendant may be liable to the plaintiff. A

third party claim must be secondary or derivative of the main claim and the original defendant must be able to demonstrate a basis for the third party defendant's liability to the defendant, the third party plaintiff. A third party plaintiff must base its third party claim on indemnity, subrogation, contribution, express or implied warranty, or some other theory of secondary or derivative liability.

The general contractor's third party claim of negligent misrepresentation in this instance did not serve as a basis for a valid third party claim against the manufacturer. The third party plaintiff's claim for detrimental reliance fell as well. The contractor, the third party plaintiff, had the means readily and conveniently available to it to determine that the existing gear reducers' rotation was incompatible with the rotational direction of the engines. The fact that the manufacturer's proposal for the gear-reducer overhaul did not guarantee compatibility with the engine does not mean that it was not in compliance with the contract documents. More to the point, the general contractor failed to allege how it wasn't, and hence how the manufacturer breached any alleged obligation it owed to the contractor. *Fucich Contracting, Inc. v. Shread-Kuyrkendall and Associates, Inc.*, 18-2885 (E.D. La. 4/24/20), 2020 WL 1974248.

CONTRACTOR NOT RESPONSIBLE FOR LATENT OR HIDDEN DEFECTS

The court stated a contractor is not responsible for latent or hidden defects in soil, i.e., a defect that was neither apparent nor reasonably discoverable. The court considered whether that rule was relevant for purposes of applying soil cement where there was a significant rain event just prior to the application of the cement that rendered the road beds saturated with water to the point that the soil cement would not cure properly. The court found there was ample support for the trial court's finding that the failure of the soil cement was caused by the contractor's faulty workmanship. The contractor should have known that as a result of the subsoil conditions at the time of the application of the soil cement, its application would not be successful. *Kelly McHugh and Associates, Inc. v. RPDE Development, LLC*, 2019-0709 (La.App. 1 Cir. 3/5/20), 2020 WL 1082441.

"PAY-WHEN-PAID" CLAUSE VERSUS "PAY-IF-PAID" CLAUSE

A subcontractor sued a general contractor to recover payments under its subcontract. The subcontract stated the subcontractor acknowledged and agreed that the contractor's receipt of

payment from the owner was an express condition precedent to the contractor's obligation to pay the subcontractor. The court held the parties acknowledged in the payment provision the possibility the owner may fail to pay the general contractor, and payment to the general contractor was a condition precedent to payment to the subcontractor. The provision was a "pay-if-paid" clause and was a suspensive condition which transferred the risk of an owner's nonpayment wholly to the subcontractor. If the clause had been held to be a "pay-when-paid" clause, it would have been interpreted as a term of payment rather than a suspensive condition which would require that the obligation be paid within a reasonable time. Such a clause would not suspend payment.

In considering who had the burden to prove whether or not the general contractor had, in fact, been paid, the party relying upon a suspensive condition, i.e., the general contractor, had that burden. The subcontractor argued that the owner did not pay the general contractor since it was at fault in breaching its contract. The court held at the very least there was an issue of fact as to whether the general contractor was at fault for nonpayment. *Material Handling Technologies, Inc. v. Southland Process Group, LLC*, 16-1297 (W.D. La. 3/3/20), 2020 WL 1042236.

PEREMPTION UNDER L.R.S. 9:2772

The Louisiana First Circuit Court of Appeal held that in seeking a zoning change, an owner exercised dominion over the property and, thus, occupied or possessed the property. The five-year peremptive period of L.R.S. 9:2772(A)(1)(b) for claims against contractors accrued five years after a letter was sent requesting the zoning change. In this case, there was no acceptance of the work which, when recorded, would start the peremptive period under L.R.S. 9:2772(A)(1)(a). The claims of the owner against the contractor were perempted. *Beverly Construction, LLC v. Wadsworth Estates, L.L.C.*, 2019-0911 (La.App. 1 Cir. 2/26/20), ____ So.3d ____, 2020 WL 913607.

CLAIM FOR NEGLIGENT PROFESSIONAL UNDERTAKING

A contractor sued an entity which contracted with the owner to serve as the owner's representative for a project. The contractor claimed the owner's representative advised the owner not to certify substantial completion by a specific date so that the owner could avoid having to pay a bonus fee, and pressured the architect to delay certifying substantial completion. The owner's representative

moved for a dismissal for failure to state a cause of action arguing the contractor lacked contractual privity with it.

In analyzing the issue of whether the contractor stated a claim for negligent professional undertaking, a tort, the court relied to large extent on the decision in *Colbert v. B.F. Carvin Construction Co.*, 600 So.2d 719 (La.App. 5 Cir. 1991), *writ denied,* 604 So.2d 1309 (La. 1992), which involved a claim by a contractor against an architect. The *Colbert* decision established a balancing test to determine whether such a claim was viable. There, the court sustained the contractor's claim for the following reasons: (1) the general contractor's allegations indicated the person to be injured by the architect's negligence, i.e., the contractor, was known; (2) it was foreseeable that the contractor would be injured by the architect's negligence; (3) the allegations demonstrated the general contractor would be injured by the architect's negligent actions and failure to act; and (4) the allegations indicated a closeness between the injuries suffered and the architect's conduct so that the contractor was in a class of persons whose connection with the transaction was so close as to approach that of privy. The court in *Colbert* held that the rationale for imposing liability upon the architect entailed the degree of control exerted by the architect over the general contractor. The court also noted the decision in *Lathan Company, Inc. v. The State of Louisiana, Department of Education, Recovery School District*, 2016-0913 (La.App. 1 Cir. 12/6/17), 237 So.3d 1, *writ denied*, 2018-0026 (La. 3/9/18), 237 So.3d 1191, which held a project management company, not an architect, engineer or consultant, could be liable for a negligent professional undertaking under the *Colbert* balancing test.

In the present matter, the court found the allegations were sufficient to state a claim for negligent professional undertaking under the balancing test for the following reasons. First, the owner's representative's purported advice, instructions and pressure involved actions that it should have known would directly and economically affect the contractor. Second, it was foreseeable and certain that the contractor would suffer economic harm if the owner's representative proceeded with such advice, instructions and pressure. Third, the owner's representative's advice, instructions and pressure were closely connected to the contractor's injuries.

The court held, however, the contractor became aware of some but not all of the damages more than one year before the tort action. The claim was prescribed under the one-year rule for prescription. The contractor was granted leave to amend its complaint to show that prescription

was interrupted and was not barred by the one-year prescriptive period for tort actions. *McDonnel Group, LLC v. DFC Group, Inc.*, 19-9391 (E.D. La. 2/21/20), 2020 WL 871210.

CONTRACTOR IMMUNITY UNDER L.R.S. 9:2771

Contractors are immune from liability under L.R.S. 9:2771 in instances where they build projects according to plans and specifications provided to them, which they do not make or cause to be made, and the alleged destruction, deterioration, or defect was due to any fault or insufficiency of the plans or specifications. The immunity does not extend to a contractor who has reason to believe compliance with the plans or specifications will create a hazardous condition. Here, there was no factual dispute that the contractor had knowledge of the hazardous condition created by the proximity of a fan to a new mezzanine because, previously while installing the new mezzanine, one of the contractor's employees was injured by the unguarded fan blades at issue, much in the same manner as the present personal injury plaintiff, an employee of another contractor, was injured. Immunity provided by the statute was not allowed.

The court, in examining the negligence claims against the contractor, found this was not a case of whether a duty owed by the contractor was so obvious that expert opinions articulating duties are unnecessary. Plaintiff's experts failed to articulate any actionable duty that the contractor did not discharge, and the court not find one in law. If anything, the evidence spoke to how the contractor effectively discharged its duty: his warnings and repeated admonitions resulted in the fan remaining off from the day after the first injury to the day of the personal injury at issue. The court found the contractor did not breach a duty owed to the plaintiff. *Donahue v. Republic National Distributing Company, LLC*, 16-13948 (E.D. La. 1/27/20), 2020 WL 419298.

MOTION TO DISMISS CLAIMS AGAINST AN ENGINEER DENIED

Teche-Vermilion Fresh Water District entered into a contract with Cecil D. Gassiott, LLC to construct a canal siphon project. Teche also contracted with Shaw Coastal, Inc. to serve as the engineer and Teche's agent on the project. Shaw entered into a contract with Sellers & Associates, Inc. under which Sellers served as the resident engineer. Hartford Casualty Insurance Company issued a performance bond for Gassiott. Gassiott defaulted, and Hartford took over the project.

Hartford sued several parties, including Sellers, in federal district court in Lafayette. Sellers moved to dismiss the claims against it under Federal Rules of Civil Procedure, Rule 12(b)(6).

Hartford alleged Sellers was negligent in performing its responsibilities, and as a professional engineer owed a duty to Hartford to use the degree of care and skill customarily employed by others of the same profession in the same general area, but breached that duty to it. Sellers argued any duty it owed was to Shaw and/or Teche, and not Hartford with whom it had no privity of contract.

The Magistrate Judge for the federal district court for the Western District of Louisiana, in following prior Louisiana jurisprudence, found there was a duty imposed on professionals to perform in accordance with the generally accepted standards of their respective industry, and a third party who is not in privity may have an action in tort against an architect or engineer because the professional must be deemed and held to know that his services are for the protection, not only of the interests of the owner, but also as to third parties who must rely on him to produce a completed project conformable with the contract plans and specifications. Whether a particular professional owes a duty, absent of privity of contract, is a fact-intensive inquiry with a particular focus on the foreseeability of injury to the entity claiming damages. The details are matters for discovery.

The court found Hartford's petition stated a cause of action against Sellers which it may or may not be able to prove, and may or may not survive a motion for summary judgment. At this juncture, however, Hartford had, on the face of the complaint, alleged sufficient factual matter to raise a reasonable expectation that discovery will reveal evidence of each element of its claim. The motion to dismiss was denied. *Hartford Casualty Ins. Co. v. Teche-Vermilion Fresh Water District*, 19-0127, (W.D. La. 12/16/19), 2019 WL 7476712; *report of the Magistrate Judge adopted,* 19-0127 (W.D. La. 1/3/20), 2020 WL 54102.

NOTICE OF ALLEGED DEFECTS UNDER THE NEW HOME WARRANTY ACT

The Louisiana Fourth Circuit Court of Appeal held that a petition in redhibition filed within one year of the purchase of a home listing the alleged defects gave timely notice of the defects for purposes of a subsequent breach of warranty claim under the New Home Warranty Act. The

NHWA claim was filed more than one year after the purchase. L.R.S. 9:3145 of the law requires that before undertaking any repair or instituting any action for breach of warranty, the owner shall give the builder written notice, by registered or certified mail, within one year after knowledge of the defect advising him of all defects and giving the builder a reasonable opportunity to comply with the provisions of the Act. *Williams v. Wood,* 2019-0894 (La.App. 4 Cir. 3/25/20), 294 So.3d 581.

NONSIGNATORIES TO AN AGREEMENT BOUND TO ARBITRATE DISPUTES AND SCOPE OF AN ARBITRATION PROVISION

The Louisiana Fourth Circuit Court of Appeal considered the question of whether a nonsignatory to an agreement containing an arbitration provision could be bound to arbitrate disputes arising under it. The court found there were six theories binding a nonsignatory to an arbitration agreement which have been recognized: a) incorporation by reference; b) assumption; c) agency; d) veil-piercing/alter ego; e) estoppel; and f) third-party beneficiary. "Direct benefit" estoppel applies when a non-signatory plaintiff sues to enforce a contract containing an arbitration agreement, yet seeks to avoid the arbitration provision in that same agreement. The theory involves nonsignatories who, during the life of the contract, have embraced the contract despite their nonsignatory status, but then, during litigation, attempt to repudiate the arbitration clause in the contract. A nonsignatory can "embrace" a contract containing an arbitration clause in two ways; 1) by knowingly seeking and obtaining direct benefits from the contract; or 2) by seeking to enforce the terms of the contract or asserting claims that must be determined by reference to the contract. In the matter at hand, the arbitration respondents filed suit to enforce and benefit from the agreement containing the arbitration provision, but sought to avoid the binding arbitration provision. The court found they were bound by the arbitration clause.

The court also examined the issue of whether the dispute was within the scope of the arbitration provision. It found that it was. Even if some claims fell outside of the scope of the arbitration provision, they were intertwined such that they should be sent to arbitration. The courts resolve any resolution of doubt in favor of arbitration. *ERG Enterprises, LLC v. Green Coast Enterprises, LLC,* 2019-1104 (La.App. 4 Cir. 5/13/20), _____ So.3d _____, 2020 WL 2478466.

APPLICATION OF A FORUM SELECTION CLAUSE IN FEDERAL COURT

A general contractor contracted with the Louisiana Department of Transportation and Development for certain work. It subcontracted part of the work. The subcontractor provided a bond. The contract documents referred to in the contract between the general contractor and the DOTD included a forum selection clause which provided that when the DOTD is the contracting agency, any litigation arising under or related to the contract or the bidding or award thereof shall be instituted in the 19th Judicial District Court for the Parish of East Baton Rouge, State of Louisiana. The subcontract incorporated the prime contract along with all of the documents listed or referenced to therein. The bond incorporated the subcontract by reference.

The general contractor sued the surety in federal court seeking performance of obligations allegedly owed to it under the bond. The surety filed a motion to dismiss based on the forum selection clause.

The court held that a forum selection clause is *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances. This showing can be made if: (1) the incorporation of the forum selection clause into the agreement is a product of fraud of overreaching; (2) the party seeking to escape enforcement will for all practical purposes be deprived of his day in court because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or (4) the enforcement of the forum selection clause would contravene a strong public policy of the forum state. The general contractor did not present any argument that supported the finding the forum selection clause at issue was unreasonable under the circumstances, and made no showing that the clause was incorporated into the contract through fraud or overreaching, or that any of the aforementioned factors were present. The court held the forum selection clause was enforceable.

The court stated only mandatory and enforceable forum selection clauses justify transfer or dismissal. A permissible forum selection clause authorizes jurisdiction or venue in the selected forum, but does not prohibit litigation elsewhere. In contrast, a mandatory forum selection clause has express language limiting the action to the courts of a specific locale. Here, the court found the clause was unambiguously clear and mandatory. The court also held the broad language of the clause applied to the instant lawsuit.

The court next considered whether public-interest factors affected its analysis. Those factors include: (1) administrative difficulties flowing from court congestion; (2) local interest in having localized controversies decided at home; (3) the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; (4) the avoidance of unnecessary problems in conflict of laws; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty. The court found the general contractor failed to demonstrate how any of these factors weighed against application of the forum selection clause. It considered said factors and found none weighed against its enforcement. The forum selection clause was enforced. The matter was dismissed without prejudice. *PCL Civil Constructors, Inc. v. Arch Insurance Co.*, 19-0491 (W.D. La. 3/5/20), 2020 WL 1068160.

LOUISIANA UNFAIR TRADE PRACTICES ACT

The Louisiana Fourth Circuit Court of Appeal held a claim under the Louisiana Unfair Trade Practices Act is subject to a one-year prescriptive period which is peremptive. There was no discussion of decisions interpreting a recent amendment to the Act holding that the period is prescriptive and not peremptive. *Bottinelli Real Estate, L.L.C. v. Johns Manville, Inc.*, 2019-0619 (La.App. 4 Cir. 12/27/19), 288 So.3d 179.

APPLICATIONS TO CONFIRM, VACATE OR MODIFY ARBITRATION AWARDS IN FEDERAL COURT

The Federal Arbitration Act does not bestow federal court jurisdiction over controversies; rather, an independent jurisdictional basis is required. Federal courts examine the underlying disputes to determine whether they are subject to their jurisdiction. The United States Fifth Circuit Court of Appeals held with respect to applications to confirm, vacate or modify an arbitration award that jurisdiction over such applications is subject to the same analysis. The matter before the court concerned claims arising under the Federal Americans with Disabilities Act, which would be subject to federal question jurisdiction. The federal district court had authority to consider applications to confirm, vacate or modify arbitration awards issued as to the disputes.

In considering a motion to vacate the arbitration award in the matter before the court, the Fifth Circuit held the provision of the Federal Arbitration Act which allows a court to vacate an

arbitration award where an arbitrator exceeds his contractual authority, did not apply to the allegation that the arbitrator's award violated Fifth Circuit law. The court held the arbitrator was well within the scope of his authority because the dispute resolution procedure (arbitration) would be the exclusive means of resolving workplace disputes. The claim amounted to nothing more than a claim of manifest disregard for the law, a ground for which vacatur has been squarely rejected. *Quezada v. Bechtel OG & C Construction Services, Incorporated*, 946 F.3d 837 (5th Cir. 2020).

CONTRACTUAL FORUM-SELECTION CLAUSE ENFORCED

A Master Service Agreement (MSA) related to repair and maintenance in connection with the drilling, completion, reworking or operation of oil or gas wells located on the outer continental shelf contained a forum selection clause which provided that the state and federal courts located in Harris County, Texas would be the sole venue for the resolution of any disputes arising under the agreement. A lawsuit concerning a dispute as to payments owed was filed in the United States District Court for the Western District of Louisiana. One of the parties moved to transfer the lawsuit to the federal district court in Harris County, Texas.

The party opposing transfer argued that it would be deprived of remedies available under the Louisiana Oil Well Lien Act if the forum-selection clause was enforced and the matter transferred to Texas. The court held that unavailability of some particular remedy in the transferee court did not require enforcement of the forum-selection clause. It is only when transferring the case to a forum that would effectively afford no remedy whatsoever that this factor should control. The fact that certain types of remedies are unavailable in the foreign forum does not change the calculus if there exists a basically fair court system in that forum that would allow the plaintiff to seek some relief. Transferring the case to Texas would not result in the opposing party having no remedy at all.

The Louisiana federal district court found the public policy favoring freedom to contract, which encompassed the freedom to select a venue for future litigation, prevailed over the public policy articulated in L.R.S. 9:2779. The statute provides with respect to construction contracts, subcontracts and purchase orders for public and private works projects, that when one of the parties is domiciled in Louisiana, and the work to be done and the equipment and materials to be supplied involve construction projects in this state, that provisions in such agreements requiring disputes

arising thereunder to be resolved in a forum outside of the state of Louisiana or requiring their interpretation to be governed by the laws of another jurisdiction are inequitable and against the public policy of Louisiana. The court concluded that it would not be unreasonable to enforce the forum-selection clause set forth in the MSA.

There was some question as to whether the MSA would be considered a construction contract and subject to L.R.S. 9:2779. The statute does not define the term "construction contract." There was no prior jurisprudence on the issue. In analyzing the issue, the court reviewed the definition of the term in L.R.S. 9:2780.1, the Louisiana statute which prohibits indemnification of another for damages resulting from the negligence or intentional acts or omissions of the indemnitee relating to construction contracts. The court found that the work undertaken pursuant to the MSA, the refurbishing and installation of compressors, pumps and tanks, did not appear to be the type of work contemplated by the statute, but even if the MSA was a construction contract, the public policy interest prevailed and it would not be unreasonable to enforce the forum selection clause set forth in the agreement.

The motion to transfer the matter to the United States District Court for the Southern District of Texas was granted. *360 International, Inc. v. Gomex Offshore, Ltd.*, 6:19-cv-00325 (W.D. La. 7/1/19), 2019 WL 2852947.

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