



# **STATE OF ILLINOIS CONSTRUCTION LAW COMPENDIUM**

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## **BREACH OF CONTRACT**

The essential elements of a breach of contract claim in Illinois are (1) the existence of a valid and enforceable contract, (2) performance by the plaintiff, (3) breach of the contract by the defendant, and (4) resulting injury to the plaintiff. *Nielsen v. United Servs. Auto. Ass'n*, 244 Ill. App. 3d 658, 612 N.E.2d 526 (2d Dist. 1993).

A subcontractor's liability for breach of contract is derivative, or dependent upon, the general contractor's liability to the owner. Therefore, a general contractor may properly pursue a third-party complaint against a subcontractor where the general contractor (1) asserts a breach of the terms of its agreement with a subcontractor and (2) seeks recovery for any loss incurred by the plaintiff. *Vicorp Restaurants v. Corinco Insulating Co.*, 222 Ill. App. 3d 518, 584 N.E.2d 229 (1st Dist. 1991).

## **NEGLIGENCE**

### ***Tort Claims – Negligence***

Since the repeal of the Illinois Structural Work Act, 740 Ill. Comp. Stat. 150/0.01 *et seq.*, in 1995, most construction negligence claims have been based on Restatement (Second) of Torts § 414 (1965), imposing a duty of care on contractors, or § 343, imposing a duty of care on owners or possessors of land.<sup>1</sup> *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill. App. 3d 1051, 728 N.E.2d 726 (1st Dist. 2000) (discussing § 414); *Deibert v. Bauer Bros. Const. Co.*, 141 Ill. 2d 430, 566 N.E.2d 239 (1990) (applying § 343 to the defendant general contractor, where the plaintiff subcontractor was injured on a construction site). Restatement (Second) of Torts §§ 414 and 343 are not mutually exclusive; rather, each offers an independent basis for recovery. *Clifford v. Wharton Bus. Grp., LLC*, 353 Ill. App. 3d 34, 817 N.E.2d 1207 (1st Dist. 2004).

### **Restatement (Second) § 414**

Illinois has adopted the Restatement (Second) of Torts § 414, which provides:

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

In order to state a cause of action for common law negligence under § 414, a plaintiff must allege (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached that duty, and (3) that the plaintiff suffered a compensable injury proximately caused by the defendant's breach. *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill. App. 3d 1051, 728 N.E.2d 756 (1st Dist. 2000).

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<sup>1</sup> Although §§ 414 and 343 have been adopted in Illinois for some time, they were rarely pleaded prior to repeal of the Structural Work Act because the Act provided an easier standard of proof for plaintiffs to meet and did not take into account a plaintiff's comparative negligence, thereby reducing the risk of a diminished judgment.

Section 414 is an exception to the general rule that one who employs an independent contractor is not liable for the acts or omissions of the independent contractor. *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill. App. 3d 1051, 728 N.E.2d 756 (1st Dist. 2000)(citing *Gomien v. Wear-Ever Aluminum, Inc.*, 50 Ill. 2d 19, 276 N.E.2d 336 (1971)). Under § 414, an employer who retains control of any part of the work will be liable for injuries resulting from his failure to exercise control with reasonable care. *Moiseyev v. Rot's Bldg. & Dev., Inc.*, 369 Ill. App. 3d 338, 860 N.E.2d 1128 (1st Dist. 2006) (finding control when the defendant supervises the entire job and effects the methods of the contractor's work, , or supervises the entire safety program, and fails to prevent the contractors from doing the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the contractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself.) *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill. App. 3d 1051, 728 N.E.2d 756 (1st Dist. 2000) (holding that defendant-general contractor retained control over roofing and siding work where the defendant held weekly meetings to discuss upcoming construction hazards, defendants' employees walked the construction site to ensure its safety guidelines were followed, and defendant's employees had power to stop construction at any time if they witnessed a safety hazard); *see also Larson v. Commonwealth Edison Co.*, 33 Ill. 2d 316, 211 N.E.2d 247 (1965); *Claudy v. City of Sycamore*, 170 Ill. App. 3d 990, 524 N.E.2d 994 (1988), *rev'd on other grounds*, *Claudy v. Commonwealth Edison Co.*, 169 Ill. 2d 39, 660 N.E.2d 895 (1995). The question of control is one of law to be decided by a court. *Aguirre v. Turner Constr. Co.*, 501 F.3d 825 (7th Cir. 2007).

The theory underlying the “retained control” exception to the general rule of non-liability is twofold: first, by retaining control over the operative details of a contractor or subcontractor’s work, an owner or general contractor may become derivatively, or vicariously, liable for the contractor or subcontractor’s negligence; alternatively, even in the absence of control over operative details, an owner or general contractor may be directly liable for failing to exercise actual control with reasonable care. *Cochran v. George Sollitt Constr. Co.*, 358 Ill. App. 3d. 865, 832 N.E.2d 355 (1st Dist. 2005) (*disagreed with by Stanley v. Ameren Illinois Co.*, N. D. Ill., October 22, 2013) (different interpretation of (Second) of Torts § 414).

Although early cases blurred the distinction between vicarious and direct liability, *see*, for example, *Pasko v. Commonwealth Edison Co.*, 14 Ill. App. 3d 481, 302 N.E.2d 642 (1st Dist. 1974); *Weber v. N. Ill. Gas Co.*, 10 Ill. App. 3d 625, 295 N.E.2d 41 (1st Dist. 1973), contemporary cases have clearly delineated the level of control sufficient to impose derivative liability. *Reico v. GR-MHA Corp.*, 366 Ill. App 3d 48, 851 N.E.2d 106 (1st Dist. 2006) (finding that general contractor did not exercise sufficient control over acts of subcontractor to be held liable for wrongful death of subcontractor's employee who fell from a ladder; contractor did not retain enough control over project to subject itself to vicarious liability, did not undertake to supervise workers so as to subject itself to direct liability, and had no actual or constructive knowledge that husband would carry bundle of shingles up a ladder, causing his fall); *Cochran v. George Sollitt Constr. Co.*, 358 Ill. App. 3d. 865, 832 N.E.2d 355 (1st Dist. 2005) (citing *Shaughnessy v. Skender Constr. Co.*, 342 Ill. App. 3d 730, 794 N.E.2d 937, (2003) (noting that the general contractor's contractual undertaking required it to supervise and direct the work; be responsible for and control the construction

means, methods, techniques, sequences and procedures for coordinating all portions of the work; be responsible for initiating, maintaining and supervising all safety precautions and programs; and to employ a superintendent whose duties included prevention of accidents-did not indicate control over the manner in which the employee of the subcontractor performed his work); *Kotecki v. Walsh Constr. Co.*, 333 Ill. App. 3d 583, 776 N.E.2d 774, (1st Dist. 2002) (finding that a general contractor's general right to start, stop and inspect progress was insufficient to impose derivative liability where subcontractor controlled manner of work by furnishing supplies, giving assignments, coordinating work, and inspecting work); *Rangel v. Brookhaven Constructors Inc.*, 307 Ill. App. 3d 835, 719 N.E.2d 174, (1st Dist. 1999) (finding that the general contractor's retention of the right to inspect the work done, order changes to the specifications and plans, and ensure that safety precautions were observed and that the work was done in a safe manner did not show that the general contractor retained control over the means of the independent contractor's work).

Evidence that a defendant (1) retained the right to control or supervise work, (2) had actual knowledge of an unsafe condition, and (3) took no steps to stop the work or otherwise remedy the situation will still subject the defendant to direct, though not derivative, liability under § 414. *Cochran v. George Sollitt Constr. Co.*, 358 Ill. App. 3d 865, 832 N.E.2d 355 (1st Dist. 2005); see also *Calderon v. Residential Homes of Am.*, 381 Ill. App. 3d 333, 885 N.E.2d 1138 (1st Dist. 2008) ("The general contractor's knowledge, actual or constructive, of the unsafe work methods or a dangerous condition is a precondition to direct liability. When a general contractor has an insufficient opportunity to observe unsafe working conditions, then knowledge will not be inferred and direct liability will not ensue.") (citation omitted); *Pestka v. Town of Fort Sheridan Co.*, 371 Ill. App. 3d 286, 862 N.E.2d 1044 (1st Dist. 2007) (explaining that employer who does not control the operative details of a contractor's work may still be subject to direct liability when it contractually assumes supervisory duties on a construction project and fails to exercise those responsibilities with reasonable care).

In *Martens v. MCL Construction Corp.*, 347 Ill. App. 3d 303, 807 N.E.2d 480 (1st Dist. 2004), the First District identified three distinct types of control: operational, supervisory, and contractual. The presence or absence of operational control turns on whether the contractor or subcontractor was "free to perform its work in its own way." *Id.* Similarly, in order to establish negligence based on a failure to exercise supervisory control—i.e., power to direct the order in which work is done or to forbid its being done in a dangerous manner—a plaintiff must prove that the defendant (1) maintained an extensive work site presence and (2) failed to exercise supervisory control with reasonable care. *Id.* Finally, in order to prove contractual control, a plaintiff must establish that the defendant contractually reserved the right to control the specific means, methods, techniques, procedures and coordination of work. Conversely, a general reservation of right to supervise work or require adherence to a safety manual is not per se retained control. *Id.*

In light of *Martens* and other Illinois decisions explaining the elements and factors used to prove control under § 414, some commentators argue that Illinois Pattern Instructions for Construction Negligence, I.P.I. (Civil) 55.00-55.04—in particular IPI (Civil) 55.03—are inconsistent with the law.

Specifically, the jury instructions do not clearly explain that under § 414, the central issue to finding common law negligence is whether the defendant(s) controlled the means and methods or operative details of the plaintiff or the plaintiff's employer. Indeed, the current construction negligence instructions refer to "control" without any mention of means, methods or operative details.

The most notable Illinois construction negligence cases are *Fris v. Pers. Prods. Co.*, 255 Ill. App. 3d 916, 627 N.E.2d 1265 (3d Dist. 1994), *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill. App. 3d 835, 719 N.E.2d 174 (1st Dist. 1999), and *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill. App. 3d 1051, 728 N.E.2d 726 (1st Dist. 2000).

### **Restatement (Second) § 343**

Illinois has adopted § 343 of the Restatement (Second) of Torts. In addition to the retained control exception in § 414, plaintiffs may bring a construction negligence claim under § 343, which provides:

#### **§ 343. Dangerous Conditions Known to or Discoverable by Possessor**

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

It is a prerequisite to liability under § 343 that the defendant be a possessor of the land. Restatement (Second) of Torts § 328E provides that the term "possessor" with respect to possession of land means "a person who is in occupation of the land with intent to control it." See *Esser v. McIntyre*, 169 Ill. 2d 292, 661 N.E.2d 1138 (1996) (explaining that the defendant is not subject to premises liability where he did not "occupy land with the intent to control it"); see also *Simpson v. Byron Dragway, Inc.*, 210 Ill. App. 3d 639, 569 N.E.2d 579 (2d Dist. 1991) (finding that the defendant race car association was not subject to premises liability for race car driver's death when it did not own or control the race track in question); *Madden v. F.H. Paschen*, 395 Ill. App. 3d 362, 916 N.E.2d 1203 (1st Dist. 2009) (reasoning that the construction manager and design consultant are not considered "possessors" of the land where they had no contractual power to direct events on the jobsite and no power to exclude others from that site).

In *Diebert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 566 N.E.2d 239 (1990), the Illinois Supreme Court held that a general contractor qualifies as a "possessor" within the Restatement's definition of the term. As such, a general contractor has a duty to keep the construction site reasonably safe for the benefit of construction workers on the job. *Id.*

Illinois has also adopted § 343A of the Restatement (Second) of Torts, a pro-defendant exception to §343. *See id.* Section 343A provides that an owner or possessor of land cannot be held liable for an invitee's injury when the condition which caused the injury was known or obvious to the invitee. *Id.*; *see also Gregory v. Beazer E.*, 384 Ill. App. 3d 178, 892 N.E.2d 563 (1st Dist. 2008) (noting that an owner or possessor of land owes its invitees a common law duty of reasonable care to maintain its premises in a reasonably safe condition, but no legal duty arises unless the harm is reasonably foreseeable). The term “obvious” means that a reasonable person would recognize both the condition and the risk involved. *Green v. Jewel Food Stores, Inc.*, 343 Ill. App. 3d 830, 799 N.E.2d 740 (1st Dist. 2003). The rationale behind the limitation in § 343A is that a possessor of land has no reason to anticipate harm from a hazard that is self-evident. *Bucheleres v. Chi. Park Dist.*, 171 Ill. 2d 435, 665 N.E.2d 826 (1996). Illinois courts, however, have carved out two exceptions to the open and obvious defense: the deliberate encounter exception and the distraction exception.

The deliberate encounter exception provides that a landowner has a duty to warn business invitees of open and obvious dangers where the landowner has reason to believe that a reasonable person in the position of the invitee will deliberately encounter the danger because the advantages of doing so would outweigh the apparent risk. *Lafever v. Kemlite Co.*, 185 Ill. 2d 380, 706 N.E.2d 441 (1998) (finding that owner of fiberglass plant knew that fiberglass byproducts in its waste facility posed a hazard to driver of waste truck who had to traverse refuse-covered ground to do his job, and, thus, owed duty to driver who slipped and fell on refuse while servicing waste facility under “deliberate encounter” exception to open and obvious doctrine). This exception is most often applied in cases involving some form of economic compulsion—e.g., where employees are compelled to encounter a dangerous condition as part of their employment obligations. *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 811 N.E.2d 364 (1st Dist. 2004) (citing *Sollami v. Eaton*, 201 Ill. 2d 1, 772 N.E.2d 215 (2002)).

The distraction exception provides that a landowner has a duty to warn business invitees of open and obvious dangers where the landowner can reasonably foresee that the invitee will either be distracted from discovering the danger or, after discovering the danger, will be distracted from avoiding it. *See Bieruta v. Klein Creek Corp.*, 331 Ill. App. 3d 269, 770 N.E.2d 1175 (1st Dist. 2002) (finding the distraction of a coworker calling the plaintiff’s name—causing plaintiff to fall into trench—was not reasonably foreseeable to the owner); *see also Ward v. K Mart Corp.*, 136 Ill. 2d 132, 554 N.E.2d 223 (1990) (explaining that it was reasonably foreseeable that customers would become distracted while exiting store with large purchases and collide with a post); *Rivas v. Westfield Homes*, 295 Ill. App. 3d 304, 692 N.E.2d 1359 (2d Dist. 1998) (citing *Deibert v. Bauer Bros. Constr. Co., Inc.*, 141 Ill. 2d 430, 566 N.E.2d 239 (1990)). The distraction exception only applies if the distractions occur at the time and place of injury. *Hope v. Hope*, 398 Ill. App. 3d 216, 924 N.E.2d 581 (4th Dist. 2010) (finding that the common, everyday activities of eating, studying, watching television, and sleeping, all of which were undertaken at a different location and time than the injury, were insufficient to invoke the distraction exception). Similarly, the distraction exception is inapplicable where a plaintiff is distracted solely by his or her own independent acts for which the defendant has no direct responsibility. *See Wilfong v. L.J. Dodd Constr.*, 401 Ill.

App. 3d 1044, 930 N.E.2d 511 (2d Dist. 2010) (finding that the plaintiff created the distraction to crossing the ruts by answering his cell phone and continuing to walk across the construction site).

The deliberate encounter and distraction exceptions have had the effect of narrowing the duty of possessors of land created under § 343. *Joyce v. Mastri*, 371 Ill. App. 3d 64, 861 N.E.2d 1102 (1st Dist. 2008) (clarifying that the duty a possessors of land owes to their invitees does not extend to risks created by open and obvious conditions); *see also Sparrow v. Talman Home Fed. Sav. & Loan Ass'n*, 227 Ill. App. 3d 848, 592 N.E.2d 363 (1st Dist. 1992) (citing *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 554 N.E.2d 223 (1990)) (holding that possessors of land are not liable for physical injuries to invitees caused by known or obvious dangers, unless the possessor should have anticipated the harm despite such knowledge or obviousness); *Deibert v. Bauer Bros. Constr. Co., Inc.*, 141 Ill. 2d 430, 566 N.E.2d 239 (1990) (discussing open and obvious dangers).

## **BREACH OF WARRANTY**

There are generally two types of warranties recognized in Illinois: express and implied. An express warranty is an assurance by one party to a contract of the existence of a fact on which the other party may rely. Express warranties typically appear as specific clauses in the contract. Implied warranties, by contrast, are obligations imposed by law regardless of the parties' intent. Illinois courts recognize several types of implied warranties, as well as certain warranties contained in the Uniform Commercial Code ("U.C.C.").

### ***Express Warranty***

A general contractor may be liable for damages for breach of an express warranty. *Intaglio Serv. Corp. v. J.L. Williams & Co.*, 95 Ill. App. 3d 708, 420 N.E.2d 634 (1st Dist. 1981) (stating that a contractor is responsible for work he guarantees, whether the defect is due to the contractor's work or that of a third person—e.g. subcontractor); *Wash. Ct. Condo. Ass'n-Four v. Washington-Golf Corp.*, 267 Ill. App. 3d 790, 643 N.E.2d 199 (1st Dist. 1994).

### ***Implied Warranty***

A contract to construct a building is a contract to render services. *Altevogt v. Brinkoetter*, 85 Ill. 2d 44, 421 N.E.2d 182 (1981). As such, Illinois courts have recognized that such a contract may carry an implied warranty that the various job components will be performed in a reasonably workmanlike manner. *Meyers v. Woods*, 374 Ill. App. 3d 440, 871 N.E.2d 160 (3d Dist. 2008) (holding that a proper and workmanlike job was not done when the contractor failed to use antifreeze when installing in-floor heating systems in an "out-building"); *see also Altevogt v. Brinkoetter*, 85 Ill. 2d 44, 421 N.E.2d 182 (1981); *Bd. of Dirs. of Bloomfield Club Recreation Ass'n v. Hoffman Grp., Inc.*, 186 Ill. 2d 419, 712 N.E.2d 330 (1999).

There has been considerable litigation when implied warranties extend to persons or entities not in privity with the general contractor. *Dean v. Rutherford*, 49 Ill. App. 3d 768, 364 N.E.2d 625 (4th Dist. 1977) (indicating that a direct relationship must exist between the injured party and a construction contractor); *see also Kramp v. Showcase Builders*, 97 Ill. App. 3d 17, 422 N.E.2d 958 (2d Dist. 1981) ("[T]he warranty only exists, if at all, between builder-vendors and their vendees.

We know of no case, and none has been cited, that extends the warranty beyond the builder-vendor to vendee relationship.”) (citations omitted); *cf. Harmon v. Dawson*, 175 Ill. App. 3d 846, 530 N.E.2d 564 (4th Dist. 1988) (permitting plaintiff homeowner to maintain an action for breach of implied warranty against a third-party defendant subcontractor).

Illinois recognizes several common law implied warranties, including an implied warranty of habitability for residential structures. *Bd. of Dirs. of Bloomfield Club Recreation Ass’n v. Hoffman Grp., Inc.*, 186 Ill. 2d 419, 712 N.E.2d 330 (1999) (discussing warranty of habitability). In addition, the Seventh Circuit adopted implied warranties arising out of the U.C.C. in limited circumstances. *See, e.g., id.*; *see also Republic Steel Corp. v. Pa. Eng’g Corp.*, 785 F.2d 174 (7th Cir. 1986). Illinois also recognizes a cause of action for breach of an implied warranty of merchantability under § 2-314 of the U.C.C., codified in Illinois as 810 Ill. Comp. Stat. 5/2-314 (2014).

Under Illinois law, there is no implied warranty that a general contractor or subcontractor will construct a structure fit for its ordinary and particular purpose. *Nitrin, Inc. v. Bethlehem Steel Corp.*, 35 Ill. App. 3d 577, 342 N.E.2d 65 (1st Dist. 1976) (noting that no Illinois decision has extended the U.C.C.’s implied warranty of fitness for a particular purpose with respect to goods to construction contracts).

A party may plead implied indemnity in Illinois; however, a party has never been permitted to recover on implied and express indemnity simultaneously. *Prater v. Luhr Bros. Inc.*, 51 Ill. App. 3d 685, 366 N.E.2d 399 (5th Dist. 1977). Thus, where a party pleads implied indemnity and, in the alternative, express contractual indemnity, recovery may be allowed under either theory but not both. *Id.*

### ***Warranty of Habitability***

The doctrine of implied warranty of habitability has been recognized by Illinois courts to protect residential dwellers from latent defects that interfere with the habitability of their residences. *Petersen v. Hubschman Constr. Co.*, 76 Ill. 2d 31, 389 N.E.2d 1154 (1979); *see also Bd. of Dirs. of Bloomfield Club Recreation Ass’n v. Hoffman Grp., Inc.*, 186 Ill. 2d 419, 712 N.E.2d 330 (1999) (refusing to apply the warranty to a commonly held clubhouse that contained defects in a residential development because it did not affect the habitability of the individual parties’ residences). However, the implied warranty of habitability has never been expanded to cover commercial structures. *Hopkins v. Hartman*, 101 Ill. App. 3d 260, 427 N.E.2d 1337 (4th Dist. 1981).

The Illinois Supreme Court expanded this doctrine to include: lessees of residential units and multi-unit dwellings, lessees of single family residences, *Pole Realty Co. v. Sorrells*, 84 Ill. 2d 178, 417 N.E.2d 1297 (1981), and sales by builder-vendors, *Park v. Sohn*, 89 Ill. 2d 453, 433 N.E.2d 651 (1982), even where the builder-vendors had lived in the homes for some time prior to selling to the original purchases. *Cotter v. Parrish*, 166 Ill. App. 3d 836, 520 N.E.2d 1172 (5th Dist. 1988) (noting that the implied warranty of habitability still applied when builder-vendor lived in the house for four years prior to selling to the house). Further, the implied warranty of habitability extends even to subsequent purchasers where there is a short intervening ownership by the first

purchaser. *Hirsch v. Optima, Inc.*, 397 Ill. App. 3d 102, 920 N.E.2d 547 (1st Dist. 2009); *but cf. Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 441 N.E.2d 324 (1982) (applying the doctrine to subsequent purchasers, but limiting it to latent defects that manifest themselves within a reasonable time after the subsequent purchaser's purchase of the house). The warranty also applies to builders who make significant additions to previously built residences. *Von Holdt v. Barba & Barba Constr., Inc.*, 175 Ill. 2d 426, 677 N.E. 2d 836 (1997); *see also McClure v. Sennstrom*, 267 Ill. App. 3d 277, 642 N.E.2d 885 (2d Dist. 1994) (holding that the implied warranty of habitability applied to sale of house that the vendor recently constructed on existing foundation).

The courts have not expanded the doctrine to include defects in commonly held areas, such as clubhouses, in a residential development that do not affect the habitability of individual residences. *Bd. of Dirs. of Bloomfield Club Recreation Ass'n. v. Hoffman Grp., Inc.*, 186 Ill. 2d 419, 712 N.E.2d 330 (1999). The implied warranty of habitability extends to subcontractors only if the homeowners do not have a cause of action against general contractor/builder. *Von Holdt v. Barba & Barba Constr. Inc.*, 175 Ill. 2d 426, 677 N.E.2d 836 (1997) (citing *Minton v. Richards Grp. of Chi.*, 116 Ill. App. 3d 852, 452 N.E.2d 835 (1st Dist. 1983)). However, the implied warranty of habitability does not extend to a subcontractor when the seller/developer is insolvent, but the plaintiff still has recourse against general contractor/builder. *1324 W. Pratt Condo. Ass'n v. Platt Const. Grp., Inc.*, 2012 IL App (1st) 111474, 974 N.E.2d 279 appeal denied, 979 N.E.2d 890 (1st Dist. 2012). The implied warranty of habitability also extends to non-vendor home builders. *1324 W. Pratt Condo. Ass'n v. Platt Const. Grp., Inc.*, 404 Ill. App. 3d 611 (1st Dist. 2010). The implied warranty of habitability does not extend to subsequent purchasers of older homes with previous owners. *Minton v. Richards Grp. of Chi.*, 116 Ill. App. 3d 852, 452 N.E.2d 835 (1st Dist. 1983). Because the warranty arises with the execution of a contract and has "roots in the execution of the contract," courts characterize the implied warranty of habitability as contractual. *Stonebridge Dev. Co, Inc. v. Essex Ins. Co.*, 382 Ill. App. 3d 731, 888 N.E.2d 633 (2d Dist. 2008).

Contractual disclaimers of the implied warranty of habitability in a sales contract are enforceable under certain circumstances, however this contractual disclaimer does not extend to non-parties of the sales contract. *1324 W. Pratt Condo. Ass'n v. Platt Const. Grp., Inc.*, 2012 IL App (1st) 111474, 974 N.E.2d 279 appeal denied, 979 N.E.2d 890 (1st Dist. 2012).

The statute of limitations for asserting an implied warranty of habitability claim begins to run against contractors when knowledge of the construction defect is acquired, as opposed to knowledge of a developer's insolvency. *Bd. of Directors of Prairie Dist. Homes Tower Residences Condo. Ass'n v. Leopardo Companies, Inc.*, 2012 IL App (1st) 111823-U (1st Dist. 2012).

### ***Warranty of Workmanship***

The Illinois Supreme Court recognized an implied warranty of workmanship in construction contracts in *Altevogt v. Brinkoetter*, 85 Ill. 2d 44, 421 N.E.2d 182 (1981). *See also Zielinski v. Miller*, 277 Ill. App. 3d 735, 660 N.E.2d 1289 (3d Dist. 1995); *Vicorp Restaurants v. Corinco Insulating Co.*, 222 Ill. App. 3d 518, 584 N.E.2d 229 (1st Dist. 1991).

## ECONOMIC LOSS

### *The Moorman Doctrine*

In Illinois, a party cannot recover in tort for purely economic losses; rather, such losses may only be recovered in contract. *Moorman Mfg. Co. v. Nat'l Tank Co.*, 91 Ill. 2d 69, 435 N.E.2d 443 (1982) (defining economic loss as “damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property,” as well as “the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold”) (citations omitted). The so-called *Moorman* doctrine can apply in the absence of a clear contractual relationship between the parties. *Anderson Elec., Inc. v. Ledbetter Erection Corp.*, 115 Ill. 2d 146, 503 N.E.2d 246 (1986) (applying the *Moorman* doctrine to bar plaintiff’s attempt to recover in tort for purely economic losses, despite plaintiff’s inability to recover in contract). In affirming *Anderson Electric, Fireman’s Fund Insurance Co. v. SEC Donohue, Inc.*, 281 Ill.App.3d 789 (1st Dist. 1996), *aff’d*, 176 Ill. 2d 160 (1997), stated that the economic loss rule is an available defense if the contractor is sued in both tort and contract, but the circumstances do not justify a tort claim.

A handful of decisions have criticized the *Moorman* doctrine because of the difficulty in distinguishing pure economic damages from noneconomic damages. See, e.g., *Trans Sts. Airlines v. Pratt & Whitney Can., Inc.*, 86 F.3d 725 (7th Cir. 1996). However, *Moorman* and subsequent cases have clarified the distinction. *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 112 Ill. 2d 378, 493 N.E.2d 1022 (1986)) (“We recognized in *Moorman* that the dividing line between property damage and economic loss depends on the nature of the defect and the manner in which the damage occurred. We held in that case that ‘[w]hen the defect is of a qualitative nature and the harm relates to the consumer’s expectation that a product is of a particular quality so that it is fit for ordinary use, contract law provides the appropriate set of rules for recovery.’ We also stated that ‘[t]ort theory is appropriately suited for personal injury or property damage resulting from a sudden or dangerous occurrence.’” (quoting *Moorman Mfg. Co. v. Nat’l Tank Co.*, 91 Ill. 2d 69, 435 N.E.2d 443 (1982))). Thus, a tort claim can be brought if there is a “sudden or dangerous” event, or if the failure or defect causes a clear and present danger for personal injury to inhabitants. *Id.*; see also *Elecs. Grp., Inc. v. Cent. Roofing Co.*, 164 Ill. App. 3d 915, 518 N.E.2d 369 (1st Dist. 1987) (allowing tort recovery for sudden water leakage in roof); *Wheeling Trust & Sav. Bank v. Tremco, Inc.*, 153 Ill. App. 3d 136, 505 N.E.2d 1045 (1987) (holding claimed defects in windows, streaking and etching, did not cause “sudden and calamitous” damage). This exception only applies if the damaged property is property other than the allegedly defective product itself; recovery is barred where a defective product caused the type of damage one would reasonably expect as a direct consequence of the failure of the defective product. *Trans Sts. Airlines v. Pratt & Whitney Can. Inc.*, 177 Ill. 2d 21, 682 N.E.2d 45 (1997) (prohibiting tort recovery since the failed aircraft engine and damaged airframe comprised a single product—the plaintiff had bargained for a fully integrated aircraft, rather than having bargained separately for an engine and an airframe). Thus, a defective product that damages only itself cannot be the subject of a suit for damages in tort. *Mars. Inc. v. Heritage Builders of Effingham, Inc.*, 327 Ill. App. 3d 346, 763 N.E.2d 428 (4th Dist. 2002).

The doctrine also applies to claims against design professionals. The Illinois Supreme Court refused to allow an exception to the *Moorman* doctrine for claims against architects in *2314 Lincoln Park W. Condo. Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*, 136 Ill. 2d 302, 555 N.E.2d 346 (1990) (disallowing a tort claim against the defendant architect, where the plaintiff had suffered solely economic damages, reasoning that even though architects provide information to builders, the information is transformed into the building itself).

### ***Exceptions to the Moorman Doctrine***

While the general rule is that parties cannot recover economic losses for claims sounding in tort, Illinois courts have carved out exceptions for cases involving intentional fraud, negligent misrepresentation, and intentional interference with contractual relationships. *Moorman Mfg. Co. v. Nat'l Tank Co.*, 91 Ill. 2d 69, 435 N.E.2d 443 (1982) (citing *Soules v. General Motors Corp.*, 79 Ill. 2d 282, 402 N.E. 2d 599 (1980) (economic loss is recoverable where one intentionally makes false representations). Under *Soules*, the elements necessary to prove common law fraudulent misrepresentation include (at times referred to as “fraud and deceit” or “deceit”): (1) false statement of material fact (2) known or believed to be false by the party making it; (3) intent to induce the other party to act; (4) action by the other party in reliance on the truth of the statement; and (5) damage to the other party resulting from such reliance. *Soules v. Gen. Motors Corp.*, 79 Ill. 2d 282 (1980).

Another exception to the economic loss doctrine includes negligent misrepresentation. *Moorman Mfg. Co. v. Nat'l Tank Co.*, 91 Ill. 2d 69, 435 N.E.2d 443 (1982) (citing *Rozny v. Marnul*, 43 Ill. 2d 54, 250 N.E.2d 656 (1969)) (economic loss is recoverable where one who is in the business of supplying information for the guidance of others in their business transactions makes negligent representations). The courts in *Knox Coll. v. Celotex Corp.*, 117 Ill. App. 3d 304, 453 N.E.2d 8 (3d Dist. 1983), and *Black, Jackson & Simmons Insurance Brokerage, Inc. v. IBM Corp.*, 109 Ill. App. 3d 132, 440 N.E.2d 282 (1st Dist. 1982), *overruled in part on other grounds by Fireman's Fund Insurance Co. v. SEC Donohue, Inc.*, 176 Ill. 2d 160, 679 N.E.2d 1197 (1997), held that to satisfy the negligent misrepresentation exception to the economic loss doctrine, the plaintiff must allege that (1) the defendant was in the business of supplying information to persons such as the plaintiff, and the information was not merely ancillary to the sale; (2) the defendant supplied the information for the guidance of the plaintiff in the plaintiff's business transaction; (3) the defendant had a duty to use reasonable care in supplying the information; (4) the defendant supplied defective information; and (5) as a proximate result of the defective information, the plaintiff sustained actual damages. When negligent misrepresentation is contained within information which is *incidental* to a tangible product, this particular exception does not apply. See *First Midwest Bank v. Stewart Title Guar. Co.*, 218 Ill. 2d 326, 843 N.E.2d 327 (2006) (finding that the negligent misrepresentation exception did not apply since a title insurer is not in the business of supplying information when it issues a title commitment or policy of title insurance); see also *Fireman's Fund Ins. Co. v. SEC Donohue, Inc.*, 176 Ill. 2d 160, 679 N.E.2d 1197 (1997) (explaining that the exception is inapplicable when the negligent misrepresentation is contained within plans for a water supply system as opposed to the actual tangible water supply system).

Additionally, intentional interference with contractual relationships is another exception to the economic loss doctrine. *Waldinger Corp. v. Ashbrook-Simon-Hartley, Inc.*, 564 F. Supp. 970 (N.D. Ill. 1983), *aff'd sub nom. Waldinger Corp. v. CRS Grp. Eng'rs, Inc., Clark Dietz Div.*, 775 F.2d 781 (7th Cir. 1985). To maintain the intentional interference exception, the plaintiff must satisfy the following requirements: (1) knowledge of the relationship or expectancy on the part of the interferer; (2) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (3) resultant damage to the party whose relationship or expectancy has been disrupted. *Id.* The interest protected is the reasonable expectation of economic advantage. *Id.* The court continued that it is unnecessary to assert the existence of malice in the sense of ill will because intentional conduct that brings about the breach with knowledge of the relationship is sufficient. *Id.*

Fraud cases typically invoke the Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/2 (2014). In order to recover under the Act, a plaintiff must prove (1) that the defendant committed a deceptive act or practice, (2) that the defendant intended the plaintiff to rely on the deception, and (3) that the deception occurred in the course of conduct that constituted or involved trade or commerce. *Siegel v. Levy Organizational Dev. Co.*, 153 Ill. 2d 534, 607 N.E.2d 194 (1992). The requirements under the Act are distinguishable from common law fraud requirements because unlike common law fraud the statute does not require proof of reliance. *Id.*; *see also Peter J. Hartmann Co. v. Cap. Bank and Trust Co.*, 296 Ill. App. 3d 593, 694 N.E.2d 1108 (1st Dist.1998) (holding that the legislature's purpose in enacting the Consumer Fraud and Deceptive Business Practices Act was, *inter alia*, to give consumers greater protection from business fraud than a common law fraud action). However, proof of actual deception—either direct or indirect—is required. *Shannon v. Boise Cascade Corp.*, 208 Ill. 2d 517, 805 N.E.2d 213 (2004) (finding no violation under the Act where the plaintiffs admitted that they were not personally deceived by the advertising). In addition, for a private person to sue under the Act, the plaintiff will need proof of “actual damage” that occurred as a result of the deceptive act or practice. 815 Ill. Comp. Stat. 505/10a(a). The Act does not apply to construction contracts between a general contractor and subcontractor, as neither is a “consumer.” *Lake Cnty. Grading Co. of Libertyville, Inc. v. Advance Mech. Contractors, Inc.*, 275 Ill. App. 3d 452, 654 N.E.2d 1109 (2d Dist. 1995) (“Where a dispute involves two businesses that are not consumers, the proper test is whether the alleged conduct involves trade practices addressed to the market generally or otherwise implicates consumer protection concerns.”) (citation omitted); *see also Sys. Am., Inc. v. Providential Bancorp, Ltd.*, No. 05 C 2161, 2006 U.S. Dist. LEXIS 6996 (N.D. Ill. 2006).

## **STRICT LIABILITY**

Generally, the doctrine of strict liability in tort does not apply to construction actions in Illinois, because construction activities do not meet the definition of a “product” set forth in § 402A of the Restatement (Second) of Torts. *Lowrie v. City of Evanston*, 50 Ill. App. 3d 376, 365 N.E.2d 923 (1st Dist. 1977); *see also Immergluck v. Ridgeview House, Inc.*, 53 Ill. App. 3d 472, 368 N.E.2d 803 (1st Dist. 1977) (“Professional services do not ordinarily lend themselves to the doctrine of tort liability without fault because they lack the elements which gave rise to the doctrine. There is no mass production of goods or a large body of distant consumers whom it would be unfair to

require to trace the article they used along the channels of trade to the original manufacturer and there to pinpoint an act of negligence remote from their knowledge and even from their ability to inquire.”); *Heller v. Cadral Corp.*, 84 Ill. App. 3d 677, 406 N.E.2d 88 (1st Dist. 1980) (noting that jurisdictions that have applied strict liability principles to a builder have done so only in the context of mass-produced homes); *Walker v. Shell Chem., Inc.*, 101 Ill. App. 3d 880, 428 N.E.2d 943 (1st Dist. 1981). Although a building is not a product as defined by § 402A, defective components that make up the building can give rise to a strict liability tort action, provided that the item has not become an indivisible component part of the building or structure. *Boddie v. Litton Unit Handling Sys.*, 118 Ill. App. 3d 520, 455, N.E.2d 148 (1st Dist. 1983).

## INDEMNITY

The Construction Contract Indemnification for Negligence Act restricts an entity’s ability to obtain indemnification for its own negligence. The Act provides:

With respect to contracts or agreements, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway bridge, viaducts or other work dealing with construction, or for any moving, demolition or excavation connected therewith, *every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.*

740 Ill. Comp. Stat. 35/1 (2014) *et seq.*, (emphasis added). The Act creates an insurance exception providing that the statute “does not apply to construction bonds or insurance contracts or agreements.” 740 Ill. Comp. Stat. 35/3 (2014). However, “indemnification contracts will not be construed as indemnifying against a party's own negligence unless such construction is required by clear and explicit language of the contract, or such an intention is expressed in unequivocal terms.” *McNiff v. Millard Maint. Serv. Co.*, 303 Ill. App. 3d 1074, 715 N.E.2d 247 (1st Dist. 1999); *see also Buenz v. Frontline Transp. Co.*, 227 Ill. 2d 302, 882 N.E.2d 525 (2008) (“It is not simply the use of the phrase ‘any and all’ that determines whether a particular contract provides indemnification for an indemnitee’s own negligence. The phrase must be read in the context of the entire contract.”); *Blackshare v. Banfield*, 367 Ill. App. 3d 1077, 857 N.E.2d 743 (5th Dist. 2006) (“[B]ecause an agreement to indemnify a party for its own negligence is so unusual and extraordinary, the intent to indemnify to that extent must be beyond doubt by express stipulation.”). Courts do not automatically apply the Act to void all indemnity agreements in construction-related contracts; rather, courts examine whether applying the Act will serve its ends. *Ill. Power Co. v. Duke Eng’g Servs.*, No. 99 C 5384, 2002 U.S. Dist. LEXIS 5497 (N.D. Ill. 2002) (citing *Lovellette v. S. Ry. Co.*, 898 F.2d 1286 (7th Cir. 1990)).

Much of the litigation involving the Act has focused on what is a construction contract. Whether a particular agreement is a “construction” contract within the meaning of the Act is a question of contract interpretation; as such, it is a question of law to be decided by a court. *Modern Steel Treating Co. v. Liquid Carbonic Indus./Med. Corp.*, 298 Ill. App. 3d 349, 698 N.E.2d 710 (1st Dist. 1998) (holding that a contract to install, repair and maintain an electrical control panel for an industrial furnace was a construction contract within the meaning of the Act; thus, it was a

provision); *see also*, *Chi. Steel Rule and Die Fabricators Co. v. ADT Sec. Sys., Inc.*, 327 Ill. App. 3d 642, 763 N.E.2d 839 (1st Dist. 2002); *cf.* *N. River Ins. Co. v. Jones*, 275 Ill. App. 3d 175, 655 N.E.2d 987 (1st Dist. 1995) (holding that the Act did not bar enforcement of a contractual provision limiting damages, where the damages occurred after the fire alarm system had been installed)

Further, the contract must be for “construction, alteration, repair, or maintenance”; merely having “some connection” with construction is not sufficient. *Winston Network Inc. v. Ind. Harbor Belt R. Co.*, 944 F.2d 1351 (7th Cir. 1991) (agreement providing that a party could issue a license to a third party who, in turn, might decide to paint an advertisement on a bridge was too attenuated from construction to fall within the Act’s anti-indemnity provision). Similarly, a contract to provide janitorial services (“general cleaning work”) is not “maintenance of a building,” and the Act does not apply. *McNiff v. Millard Maint. Serv. Co.*, 303 Ill. App. 3d 1074, 715 N.E.2d 247 (1st Dist. 1999). If the indemnitee is not responsible for construction activities or is not in a position to prevent accidents from occurring, the Act will not apply to the contract. *Lovellette v. S. Ry. Co.*, 898 F.2d 1286 (7th Cir. 1990) (holding that a contract granting a right-of-way for the installation of a sewer system fell outside the Act).

### ***“Improvement to Real Property”***

There has been substantial litigation over what activities constitute design, planning, supervision and improvements to real property. Whether an item constitutes an “improvement to real property” is a question of law; its answer, however, is grounded in fact. *St. Louis v. Rockwell Graphics Sys.*, 153 Ill. 2d 1, 605 N.E.2d 555 (1992). In *St. Louis v. Rockwell Graphic Systems*, for example, the Illinois Supreme Court held that the terms “fixture” and “improvement to real property” are not synonymous. *Id.* A fixture is typically a form of chattel that, while retaining its separate existence, is so connected with the real property that an observer would consider it a part of such real property. *Id.* Alternatively, an improvement may not have a separate identity after being installed in the system or building in which it is located. *Id.* Relevant factors for determining what constitutes an “improvement to real property” include: whether the addition was meant to be permanent or temporary; whether it became an integral component of the overall system; whether the value of the property was increased; and whether the use of the property was enhanced. *Id.* (citations omitted); *see also* *Bailey v. Allstate Dev.*, 316 Ill. App. 3d 949, 738 N.E.2d 189 (1st Dist. 2000) (finding that window washing services did not qualify as “construction of an improvement to real property” under § 214(a)); *Merrit v. Randall Painting Co.*, 314 Ill. App. 3d 556, 732 N.E.2d 116 (1st Dist. 2000) (reasoning that scraping, plastering, cleaning and painting while installing a window were ordinary maintenance activities that did not constitute an improvement to real property); *Adcock v. Montgomery Elevator Co.*, 274 Ill. App. 3d 519, 654 N.E.2d 631 (1995) (explaining that installation of an escalator constituted improvement to real property that fell under § 214, as opposed to the product liability statute of limitations and repose); *Morietta v. Reese Constr. Co.*, 347 Ill. App. 3d 1077, 808 N.E.2d 1046 (5th Dist. 2004) (stating that removing and replacing an existing road where it did not improve the value of the road or enhance the use of the property was not an “improvement to real property” under § 214(a)).

## STATUTES OF LIMITATION AND REPOSE

The statute of limitations and repose applicable to all actions based in tort or contract for construction activities is found in 735 Ill. Comp. Stat. 5/13-214 (2014). The statute contains a four-year statute of limitations and a ten-year statute of repose. The statute applies to almost all construction defect claims, as well as injury claims that arise from one of the statute's enumerated construction-related activities. *Hernon v. E.W Corrigan Const. Co.*, 149 Ill. 2d 190, 595 N.E.2d 561 (1992) (holding that the four-year statute of limitations of § 13-214(a) applied to a lawsuit by a construction worker injured on the job site, and the plaintiff worker's suit was not barred by the general two-year statute of limitations for personal injury suits); *Lombard Co. v. Chi. Housing Auth.*, 221 Ill. App. 3d 730, 587 N.E.2d 485 (1st Dist. 1991) (applying § 13-214(a) to a landowner's nonpayment for extra work due to its failure to timely approve or reject shop drawings); *Blinderman Constr. Co. v. Metro. Water Reclamation Dist. of Greater Chi.*, 325 Ill. App. 3d 362, 757 N.E.2d 931 (1st Dist. 2001) (applying § 13-214(a) to a water reclamation district's failure to pay for work generated by the district in its capacity as a construction supervisor).

Third-party express indemnity claims for construction defects, however, are subject to the 10-year statute of limitations for breach of written contract claims. *15th Place Condo. Assoc. v. South Campus Development Team LLC*, 2014 IL App (1<sup>st</sup>) 122292. Where two statutes of limitations might apply, Illinois courts apply the one which bears the closest relationship to the nature of the liability. *Hernon v. E.W Corrigan Constr. Co.*, 149 Ill. 2d 190, 595 N.E.2d 561 (1992) ("Section 13-214(a) . . . applies specifically to construction-related activities. Thus, we find that it takes precedence over the general statute of limitations for personal injuries set out in section 13-202."); *see also Fed, Ins. Co. v. Konstant Architecture Planning, Inc.*, 388 Ill. App. 3d 122, 902 N.E.2d 1213 (1st Dist. 2009) (applying § 13-214(a) over § 13-206 since the complaint was based upon a contract which dealt with the design and construction of a home); *Traveler's Cas. & Sur. Co. v. Bowman*, 229 Ill. 2d 461, 893 N.E.2d 585 (2008) (applying § 13-206 over § 13-214 since the liability at issue stems from the breach of a contractual obligation to indemnify and not from any construction-related activity). Parties to a contract may agree upon a shortened contractual limitations period to replace a statute of limitations as long as it is reasonable. *Medrano v. Prod. Eng'g Co.*, 332 Ill. App. 3d 562, 774 N.E.2d 371 (1st Dist. 2002).

Additionally, the language of the statute contains a discovery rule allowing for the commencement of an action following the discovery of the alleged injury. *Knox Coll. v. Celotex Corp.*, 88 Ill. 2d 407, 430 N.E. 2d 976 (1981) ("The effect of the discovery rule is to postpone the starting of the period of limitations until the injured party knows or should have known of his injury."); *see also Penn v. Gerig*, 334 Ill. App. 3d 345, 778 N.E.2d 325 (4th Dist. 2002); *LaSalle Nat'l Bank v. Skidmore, Owings & Merrill*, 262 Ill. App. 3d 899, 635 N.E.2d 564 (1st Dist. 1994).

### **"Knew or reasonably should have known"**

All actions against any person alleging liability from the construction or an improvement to real property "shall be commenced within 4 years from the time the person bringing the action . . . knew or should reasonably have known of such act or omission." 735 ILCS 5/12-214(a) (2014); *DuPage County v. Graham, Anderson, Probst & White, Inc.*, 109 Ill. 2d 143, 485 N.E.2d 1076 (1985). A party knows or should know of a wrongfully caused injury when he or she has

information that would alert a reasonable person to inquire as to whether the cause of injury was actionable. *LaSalle Nat'l Bank v. Skidmore, Owings & Merrill*, 262 Ill. App. 3d 899, 635 N.E.2d 564 (1st Dist. 1994) ("Persons have knowledge that an injury is wrongfully caused when they possess enough information about the injury to alert a reasonable person to the need for further inquiries to determine if the cause of the injury is actionable at law."); *see also Soc'y of Mt. Carmel v. Fox*, 90 Ill. App. 3d 537, 413 N.E.2d 480 (2d Dist. 1980) (holding plaintiffs had sufficient knowledge of design defects for purposes of the statute when they received a contractor's report that identified such defects); *Schleyhahn v. Cole*, 178 Ill. App. 3d 111, 532 N.E.2d 1136 (4th Dist. 1989) (holding that when the act or omission is discovered prior to the ten-year period, plaintiff has four years from the date of discovery to bring an action); *Swann & Weiskopf, Ltd. v. Meed Assocs., Inc.*, 304 Ill. App. 3d 970, 711 N.E.2d 395 (1st Dist. 1999) (holding design firm had knowledge under § 13-214 when it sent its project manager to investigate flooding); *Freeport Mem'l Hosp. v. Lankton, Ziegele, Terry & Assocs., Inc.*, 170 Ill. App. 3d 531, 525 N.E.2d 194 (2d Dist. 1988) (holding that the plaintiff had sufficient information when the project architect issued a letter outlining his findings).

### ***Equitable estoppel***

In construction cases, equitable estoppel can apply when a plaintiff reasonably relies on the defendant's representations—through words or conduct—in delaying legal action, and thereafter suffers an injury (e.g., the running of the statute of limitations) based upon that reliance. *Swann & Weiskopf, Ltd. v. Meed Assocs., Inc.*, 304 Ill. App. 3d 970, 711 N.E.2d 395 (1st Dist. 1999) ("Although there is ordinarily no duty to apprise an adversary of his rights, one cannot justly or equitably lull his adversary into a false sense of security, causing him to subject his claim to the bar of the statute, and then plead the very delay caused by his course of conduct."); *see also Senior Housing, Inc. v. Nakwatase, Rutkowski, Wyns & Yi, Inc.*, 192 Ill. App. 3d 766, 549 N.E.2d 604 (1st Dist. 1990) ("[T]o invoke the doctrine of equitable estoppel, it is not necessary to establish that the defendant intentionally misled or deceived the plaintiff, or even that the defendant intended to induce delay. The only requirements are that plaintiff reasonably relied on the defendant's conduct in forbearing suit and that plaintiff suffered a detriment as a result of his reliance upon the words or conduct of the defendant.") (citing *AXIA, Inc., v. I.C. Harbour Constr. Co.*, 150 Ill. App. 3d 645, 501 N.E.2d 1339 (2d Dist. 1986)). In *Axia, Inc.*, a breach-of-contract action against the builder and architect, the court held that defendant-builder was equitably estopped from asserting the statute of limitations, where its ongoing efforts to repair the building had the predictable effect of delaying legal action; however, defendant-architect was not estopped from raising the defense, where he had no contact with plaintiffs prior to the expiration of the statute of limitations. *AXIA, Inc. v. I.C. Harbour Constr. Co.*, 150 Ill. App. 3d, 501 N.E.2d 1339 (2d Dist. 1986).

### ***Contribution and Indemnity Actions***

Notwithstanding the four-year statute of limitations for filing construction-related actions, whether sounding in tort or contract *see* 735 Ill. Comp. Stat. 5/13-214(a) (2014), or the ten-year statute of limitations for third-party express indemnity claims for construction defects *see 15th Place Condo. Assoc. v. South Campus Development Team LLC*, 2014 IL App (1<sup>st</sup>) 122292, third-

party actions for contribution and indemnity must be filed within two years of the filing of the underlying complaint. *Guzman v. C.R. Epperson Constr., Inc.*, 196 Ill. 2d 391, 256 N.E.2d 1069 (2001) (holding that a defendant-general contractor's third-party action against a subcontractor was not time-barred when the third-party action was filed within one year of the underlying complaint, even though the general contractor knew for several years prior that the homeowners were unhappy with the home and might sue the general contractor); *see also Medrano v. Prod. Eng'g Co.*, 332 Ill. App. 3d 562, 774 N.E.2d 371 (1st Dist. 2002).

Prior to *Guzman*, some Illinois courts held that (1) the four-year statute of limitations in § 214 applied to construction claims as well as third-party claims arising out of construction claims; and (2) the time for filing third-party claims began to run when the third-party plaintiff knew or reasonably should have known of the injury. *Guzman v. C.R. Epperson Constr., Inc.*, 196 Ill. 2d 391, 256 N.E.2d 1069 (2001). The Illinois Supreme Court reasoned, however, that the General Assembly's amendment to 735 Ill. Comp. Stat. 5/13-204, specifically including indemnity claims, strongly suggested that the legislature intended the two-year statute of limitations in § 204 to apply to all indemnity claims, including those arising out of construction accidents. *Id.* Moreover, the court rejected the "knew or reasonably should have known . . . of the construction defect" standard, holding that such a rule would in some cases require third-party indemnity claims to be filed before they had accrued. *Id.*

There has also been litigation over whether the ten-year repose period in the statute or an equitable standard of "reasonableness" applies to causes of action based on the implied warranty of habitability. *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 441 N.E.2d 324 (1982) (holding that the implied warranty of habitability extends to subsequent purchasers, provided the latent defects manifest themselves to the subsequent purchaser within a reasonable time of the purchase); *see also Von Holdt v. Barba & Barba Constr., Inc.*, 175 Ill. 2d 426, 677 N.E.2d 836 (1997) (holding that an eleven-year delay between completion of a home addition and filing of a lawsuit was untimely under either statutory or equitable standards and concluding that "the reasonable time for bringing a cause of action under the 'reasonable time' standard of *Redarowicz* begins with the act or omission causing the defect rather than the date on which the subsequent purchaser takes title to the property"); *Andreoli v. John Henry Homes, Inc.*, 297 Ill. App. 3d 151, 696 N.E.2d 1193 (2d Dist. 1998) (holding that the ten-year statutory repose period of § 214(b) applies to actions based on the implied warranty of habitability and, in the case of a home, begins to run on the date the property is conveyed to the plaintiff-buyer).

## **MECHANICS LIEN ACT**

The Illinois Mechanics Lien Act is a statute adopted by the Illinois legislature to provide security for materialmen, subcontractors, and contractors who furnish their labor and/or materials to a construction project, which in turn increases the value or improves the condition of the property. *Weather-Tite, Inc. v. Univ. of St. Francis*, 233 Ill. 2d 385, 909 N.E.2d 830 (2009) (citing *R.W. Duntelman Co. v. C/G Enters., Inc.*, 181 Ill. 2d 153, 692 N.E.2d 306 (1998)). The Mechanics Lien Act can be found at 770 Ill. Comp. Stat. 60/0.01 (2014) *et seq.*

In order for a general contractor to secure a lien, four prerequisites must be satisfied. 770 Ill.

Comp. Stat. 60/1. First, there must be a valid contract. *Candice Co. v. Ricketts*, 281 Ill. App. 3d 359, 666 N.E.2d 722 (1st Dist. 1996); *see also S.N. Nielsen Co. v. Nat'l Heat & Power Co.*, 32 Ill. App. 3d 941, 337 N.E.2d 387 (1st Dist. 1975). Second, the contract must be made with the owner, the owner's authorized agent, or one "knowingly permitted" by the owner to improve the property. 770 Ill. Comp. Stat. 60/1; *see also Delaney Elec. Co., Inc. v. Schiessle*, 235 Ill. App. 3d 258, 601 N.E.2d 978 (1st Dist. 1992). Third, the contract must involve the improvement of property and the provision of lienable services or material. *See L.J. Keefe Co. v. Chi. & Nw. Transp. Co.*, 287 Ill. App. 3d 119, 678 N.E.2d 41 (1st Dist. 1997) (finding that a lien disallowed as work benefited the licensee and not the property); *Mostardi-Platt Assocs., Inc. v. Czerniejewski*, 399 Ill. App. 3d 1205, 929 N.E.2d 94 (5th Dist. 2010) (explaining that consulting services were not the kind of improvements to land that were subject to mechanics lien since the services did not enhance the land's value). Under the Mechanics Lien Act, lienable services include "labor, services, material, fixtures, apparatus or machinery, forms or form work." Fourth, the contractor must perform the contracted work or have a valid excuse for nonperformance. *Folk v. Cent. Nat'l Bank & Trust Co. of Rockford*, 210 Ill. App. 3d 43, 567 N.E.2d 1 (2d Dist. 1991); *see also Wilmette Partners v. Hamel*, 230 Ill. App. 3d 248, 594 N.E.2d 1177 (1st Dist. 1992) (finding that the contractor's performance was excused due to the developer ejecting the contractor from the property); *J.E. Milligan Steel Erectors, Inc. v. Garbe Iron Works, Inc.*, 139 Ill. App. 3d 303, 486 N.E.2d 945 (3d Dist. 1985) (clarifying that the subcontractor's performance was excused after the general contractor refused to pay despite the subcontractor's good-faith effort to cooperate).

Even with all four requirements satisfied, the Mechanics Lien Act contains additional requirements that the general contractor must comply with to enforce the mechanics lien. 770 Ill. Comp. Stat. 60/7. First, the claim must be filed in the office of the recorder for the county in which the improvement is located. *Id.* Second, the claim must be a recordable verified affidavit claiming a lien on the property and setting forth the name of the owner or its agent or employee, a description of the contract, the balance due after credits, a description of the property, and the date of completion of the work. *Id.* Third, and most importantly, are the timing requirements. The lien must be filed with the county recorder within four calendar months after completion of the work as to the owner and third parties and within two years after completion as to the original owner holding title to the property on the date of contract. *M. Ecker & Co. v. LaSalle Nat'l Bank*, 268 Ill. App. 3d 874, 645 N.E.2d 335 (1st Dist. 1994). Thus, determining the date of completion becomes very important. "Work that is trivial and insubstantial, and not 'essential to the completion of the contract' does not extend the time to file a lien under the Mechanics Lien Act." *Braun-Skiba, Ltd. v. LaSalle Nat'l Bank*, 279 Ill. App. 3d 912, 665 N.E.2d 485 (1st Dist. 1996). Finally, there are four ways to institute the lien: (1) filing a petition to intervene and filing a counterclaim in the mechanics lien suit of another claimant; (2) filing an answer and a counterclaim in the mechanics lien suit of another claimant who has made the plaintiff a party; (3) filing an answer and counterclaim in a mortgage foreclosure suit; or (4) filing an original complaint to foreclose the lien in the circuit court of the county where the improvement is located. 770 Ill. Comp. Stat. 60/9.

Even if § 7 is satisfied, the contractor must comply with § 5 of the Mechanics Lien Act to ensure enforceability of the lien. It should be noted, however, that courts are split on whether the failure

to comply with § 5 prevents the contractor from prevailing on a mechanics lien. *See Ambrose v. Biggs*, 156 Ill. App. 3d 515, 509 N.E.2d 614 (2d Dist. 1987) (finding that failure to comply with § 5 barred contractor's lien); *but see Nat'l Wrecking Co. v. Midwest Terminal Corp.*, 234 Ill. App. 3d 750, 601 N.E.2d 999 (1st Dist. 1992) (finding that failure to comply with § 5 did not bar mechanics lien). Section 5 requires that the contractor must provide the owner with a statement in writing, under oath or verified by affidavit, for the names and addresses of all parties furnishing labor, services, material, fixtures, apparatus or machinery, forms or form work, and of the amount due or to become due to each. Such a writing must be furnished before the owner or his agent, architect, or superintendent shall pay or cause to be paid to the contractor any moneys or other consideration due or to become due to the contractor, or make or cause to be made to the contractor any advancement of any moneys or any other consideration. 770 Ill. Comp. Stat. 60/5.

The Mechanics Lien Act is not only for general contractors, but also for subcontractors. 770 Ill. Comp. Stat. 60/21. The subcontractor's lien, unlike the general contractor's, is not only on the land but also on the money that is due or that will become due to the general contractor, as well as the fixtures incorporated into the real estate by the subcontractor. *Brady Brick & Supply Co. v. Lotito*, 43 Ill. App. 3d 69, 356 N.E.2d 1126 (2d Dist. 1976). The prerequisites to the subcontractor's mechanics lien are similar to that of the general contractor and include: (1) a valid contract between the owner and general contractor; (2) a valid contract between the general contractor and the subcontractor; (3) provision of lienable services or materials; and (4) performance of the contract or a valid excuse for nonperformance.

Enforcement of the subcontractor's lien is governed by §§ 21 and 24 of the Mechanics Lien Act. There are four important points under §§ 21 and 24. First, a subcontractor who performs services or delivers material to a single-family, owner-occupied residence must notify the occupant, personally or by certified mail, return receipt requested, that it is supplying labor or materials within sixty days from the first furnishing of labor or material. 770 Ill. Comp. Stat. 60/21(c). Second, within ninety days after the date of completion of the work, the subcontractor must serve a written notice of its claim and the amount thereof on the owner, the owner's agent, architect, or superintendent, and the mortgagee, if known. 770 Ill. Comp. Stat. 60/24(a); *see also Caruso v. Kafka*, 265 Ill. App. 3d 310, 638 N.E.2d 663 (1st Dist. 1994); *Hill Behan Lumber Co. v. Irving Fed. Sav. & Loan Ass'n*, 121 Ill. App. 3d 511, 459 N.E.2d 1066 (1st Dist. 1984). Under § 24(a), the written notice must be served personally or by certified or registered mail, return receipt requested and may be displayed as follows:

To (name of owner):

You are hereby notified that I have been employed by (the name of contractor) to (state here what was the contract or what was done, or to be done, or what the claim is for) under his or her contract with you, on your property at (here give substantial description of the property) and that there was due to me, or it to become due (as the case may be), therefore the sum of \$.....

Dated at ..... this ..... day of ....., .....

(Signature).....

With one exception, a subcontractor loses their rights under the Mechanics Lien Act by failing to properly serve a ninety-day notice. If the general contractor included the subcontractor on their § 5 sworn statement, the subcontractor's lien is enforceable to the extent of the amount listed on the sworn statement as being due to the subcontractor. *Hill Behan Lumber Co. v. Irving Fed. Sav. & Loan Ass'n*, 121 Ill. App. 3d 511, 459 N.E.2d 1066 (1st Dist. 1984). Third, the subcontractor's lien must be filed with the county recorder within four months after completion of the work in the same manner as the general contractor's lien. Finally, a lawsuit to foreclose the subcontractor's lien must be brought within two years after the date of completion of the work and may be instituted by: (1) an action at law against the general contractor; (2) an action at law against the general contractor and the owner jointly; (3) an action at law on the general contractor's completion bond; (4) an action in equity to enforce the mechanics lien; (5) a petition to intervene and counterclaim in a pending action by the general contractor against the owner; or (6) a petition to intervene in a pending action by the mortgagee foreclosing its mortgage lien.

Under § 17, parties can recover reasonable attorney's fees provided § 17(b) and § 17(c) are met. Section 17(b) states:

If the court specifically finds that the owner who contracted to have the improvements made failed to pay any lien claimant the full contract price, including extras, without just cause or right, the court may tax that owner, but not any other party, the reasonable attorney's fees of the lien claimant who had perfected and proven his or her claim. 770 Ill. Comp. Stat. 60/17(b).

Section 17(c) provides:

If the court specifically finds that a lien claimant has brought an action under this Act without just cause or right, the court may tax the claimant the reasonable attorney's fees of the owner who contracted to have the improvements made and defended the action, but not those of any other party. 770 Ill. Comp. Stat. 60/17(c).

Additionally, parties may be entitled to recover extra work performed if the party can prove that the work was outside the scope of the contract; the extra work was ordered by the owner; the owner agreed to pay, either expressly or by his or her conduct; the extras were not furnished by the contractor as his or her voluntary act; and the extra items were not rendered necessary by any fault of the contractor. *Kern v. Rafferty*, 131 Ill. App. 3d 728, 476 N.E.2d 52 (5th Dist. 1985).

There are a number of defenses available to a mechanics lien. Some defenses include: failure of the subcontractor to serve § 24 notice within ninety days of completion, improper service, or service on wrong parties; failure of general contractor and subcontractor to record a claim for the lien within four months after completion; failure of general contractor and subcontractor to file a lawsuit to foreclose a claim within two years from date of completion; failure to maintain

adequate records to determine date of completion or allocate a lien amount on multi-parcel or multiunit development; failure to accurately state the nature of the contract in the claim for the lien; incorrect names of contractors or owners; inaccurate or incorrect legal descriptions; failure to file *lis pendens* notices upon filing suit and failure to name each party defendant on the *lis pendens* notices; filing a claim for work completed more than three years after commencement when contract fails to state completion date; failure to serve § 21 notice within sixty days after the date of commencement of work by a subcontractor on a owner-occupied residence; and claiming a lien for non-lienable services or materials.

Finally, § 35 of the Mechanics Lien Act levies significant penalties for a lien claimant's failure to provide a release when one is warranted. Failure of a lien claimant to provide a written release within ten days of a demand subjects the lien claimant to liability of \$2500 plus costs and reasonable attorney's fees in bringing the action to enforce § 35. 770 Ill. Comp. Stat. 60/35(a).

## **DAMAGES**

### ***RECOVERY OF INVESTIGATIVE COSTS***

There is no published Illinois decision on the recovery of investigative costs as an element of recoverable damages.

### ***EMOTIONAL DISTRESS***

#### ***Negligent Infliction of Emotional Distress***

At early common law, a plaintiff alleging negligent infliction of emotional distress had to plead and prove not only the elements of negligence—i.e., duty, breach, causation and damages—but also a contemporaneous physical injury to the plaintiff. *See, e.g., Rickey v. Chi. Transit Auth.*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983) (charting the history of Illinois courts' adjudication of negligently caused emotional distress). More recent cases have eliminated the contemporaneous physical injury requirement and extended recovery to bystanders within the "zone of danger." *Corgan v. Muehling*, 143 Ill. 2d 296, 574 N.E.2d 602 (1991) (explaining that a plaintiff is within the "zone of danger"—and thus able to seek recovery—"when he is sufficiently close to that accident such that he is subjected to a high risk of physical impact emanating from the accident itself") (citations omitted); *Campbell v. A.C. Equip. Servs. Corp., Inc.*, 242 Ill. App. 3d 707, 610 N.E.2d 745 (4th Dist. 1993). In practice, this allows a bystander who is in close enough proximity to the person injured to fear for his own safety, to recover for any resulting emotional distress from the defendant's negligence. Both *Corgan* and *Campbell* made clear, however, that the zone-of-danger test only applies to bystanders.

For direct victims, Illinois follows the general negligence approach in analyzing claims for negligent infliction of emotional distress. *See Corgan v. Muehling*, 143 Ill. 2d 296, 574 N.E.2d 602 (1991). Under this approach, a direct victim must establish the existence of a duty by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by the defendant's breach. *Parks v. Kownacki*, 193 Ill. 2d 164, 737 N.E.2d 287 (2000) (citing *Corgan v. Muehling*, 143 Ill. 2d 296, 574 N.E.2d 602 (1991)). Though expert testimony may assist a victim

in proving his or her case, it is not required to support a claim of negligent infliction of emotional distress. *Thornton v. Garcini*, 237 Ill. 2d 100, 928 N.E.2d 804 (2009).

### ***Intentional Infliction of Emotional Distress***

The intentional form of this tort requires the plaintiff to establish that (1) the defendant's conduct was extreme and outrageous; (2) the defendant either intended that his conduct should inflict severe emotional distress or knew that there was a high probability that his conduct would cause severe emotional distress; and (3) the defendant's conduct in fact caused severe emotional distress. *Rekosh v. Parks*, 316 Ill. App. 3d 58, 735 N.E.2d 765 (2d Dist. 2000).

The key distinctions between intentional infliction of emotional distress and negligent infliction of emotional distress are (1) the level of conduct required: extreme and outrageous, as opposed to a breach of duty; and (2) an intent to inflict the harm, as opposed to mere negligence resulting in severe emotional distress.

To date, Illinois courts have not ruled on the propriety of pleading these causes of action in the classic construction lawsuit setting. In a personal injury claim, it is certainly conceivable that the elements of either negligent or intentional infliction of emotional distress could be met, but no opinion has either authorized or disallowed this form of recovery. However, consistent with the seminal Illinois Supreme Court decision, *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69, 435 N.E.2d 443 (1982), prohibiting recovery in tort for economic losses, appellate courts have not awarded damages without a separate claim of personal injury or damage to other property. *Anderson Elec., Inc., v. Ledbetter Erection Corp.*, 115 Ill. 2d 146, 503 N.E.2d 246 (1986).

### ***STIGMA DAMAGES***

Illinois has not recognized separate recovery for stigma damages, but has allowed stigma to be considered in terms of diminution of property value in the context of environmental cases. *Hawthorne Partners v. AT&T Techs., Inc.*, 831 F. Supp. 1398 (N.D. Ill. 1993) (denying a motion to exclude expert's opinion on diminution of property value based on the stigma of environmental contamination).

### ***ECONOMIC WASTE***

Where there has been less than full performance, the usual measure of damages is the cost of repairing the defects and/or completing the project. *Castricone v. Michaud*, 223 Ill. App. 3d 138, 583 N.E.2d 1184 (3d Dist. 1991). However, where the repairs would entail substantial destruction of the contractor's work, or the costs are disproportionate to the contract price, the measure of damages is determined by the diminution in the value of the property resulting from the defects. *Id.*; see also *Witty v. C. Casey Homes, Inc.*, 102 Ill. App. 3d 619, 430 N.E.2d 191 (1st Dist. 1981).

### ***LIQUIDATED DAMAGES***

In Illinois, an agreement to set the amount of liquidated damages prior to a breach is unenforceable unless: (1) the amount is a reasonable forecast of just compensation for the harm caused by the breach; and (2) the amount of harm is difficult or even impossible to determine or estimate. *People ex rel. Dep't of Pub. Health v. Wiley*, 218 Ill. 2d 207, 843 N.E.2d 259 (2006); *Hidden*

*Grove Condo. Ass'n v. Crooks*, 318 Ill. App. 3d 945, 744 N.E.2d 305 (3d Dist. 2001). Whether a contractual provision for damages is a valid liquidated-damages provision or a penalty clause is a question of law. *Penske Truck Leasing Co., L.P. v. Chemetco, Inc.*, 311 Ill. App. 3d 447, 725 N.E.2d 13 (5th Dist. 2000). However, there is no fixed rule applicable to all liquidated-damages agreements, and each one must be evaluated on its own facts and circumstances. *Id.* In order to validate such a clause, three elements must be met:

(1) the parties intended to agree in advance to the settlement of damages that might arise from the breach; (2) the amount of liquidated damages was reasonable *at the time of contracting*, bearing some relation to the damages which might be sustained; and (3) actual damages would be uncertain in amount and difficult to prove.

*Jameson Realty Grp. v. Kostiner*, 351 Ill. App. 3d 416, 813 N.E.2d 1124 (1st Dist. 2004) (emphasis added) (citations omitted). “A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.” *Penske Truck Leasing Co., L.P. v. Chemetco, Inc.*, 311 Ill. App. 3d 447, 725 N.E.2d 13 (2000) (quoting Restatement (Second) of Contracts § 356 at 157 (1981)). Illinois courts, however, have upheld liquidated damage clauses over a fairly wide range of values. *Inland Bank & Trust v. Knight*, 399 Ill. App. 3d 378, 927 N.E.2d 777 (1st Dist. 2010) (holding that a default interest rate of eleven percent in a promissory note, which was negotiated to and agreed upon by both parties, was not unreasonable in light of the loss that plaintiff suffered by defendant’s default); *see also Casaccio v. Habel*, 14 Ill. App. 3d 822, 303 N.E.2d 548 (1st Dist. 1973) (holding that a promissory note’s default interest rate of twenty-four percent was reasonable).

## **ABANDONMENT AND TERMINATION**

Abandonment occurs when a contractor ceases to perform on the contract. However, abandonment alone does not terminate the contract; rather, termination occurs only when one of the parties to the contract decides to end the contractual relationship. The distinction turns on the contractor’s intent: If the contractor intends to resume performance, he is deemed to have abandoned the contract; if the contractor has no intention of resuming performance, he is deemed to have terminated the contract.

### ***Abandonment***

Among the few cases decided in Illinois on the issue of abandonment, the courts have taken a decidedly pro-owner stance in their rulings. *See, e.g., City of East Peoria v. Colianni & Dire Co.*, 334 Ill. App. 108, 78 N.E.2d 806 (3d Dist. 1948) (holding for the plaintiff city against the defendant contractor, where the defendant stopped work on its contract with the plaintiff due to alleged insufficiency in plans and specifications provided by the plaintiff). While the courts do not take the extreme position that a contractor's abandonment is “in all circumstances *per se* bad faith,” more often than not, they side with the non-abandoning party. *Brink v. Hayes Branch Drainage Dist. of Douglas Cnty.*, 59 Ill. App. 3d 828, 376 N.E.2d 78 (4th Dist. 1978). Note, however, that even an abandoning contractor is entitled to payment for work already performed, generally on a *quantum meruit* theory. *Watson Lumber Co. v. Mouser*, 30 Ill. App. 3d 100, 333 N.E.2d 19 (5th

Dist. 1975). Moreover, an owner or contractor who receives substantially what he bargained for must pay the contract price, but the owner or contractor may deduct from the contract price the difference between what he actually received and what strict performance would have given him. *Brink v. Hayes Branch Drainage Dist. of Douglas Cnty.*, 59 Ill. App. 3d 828, 376 N.E.2d 78 (4th Dist. 1978) (citing *Watson Lumber Co. v. Mouser*, 30 Ill. App. 3d 100, 333 N.E.2d 19 (5th Dist. 1975)).

### **Termination**

Termination, rather than abandonment, is the more commonly litigated course of action taken by disgruntled parties to a contract. Termination clauses typically are included in construction contracts, and the damages for termination will be governed by these clauses. If the court determines termination was improper, it will not award damages to the terminating party; but if termination was proper, the court will award what is stipulated to in the contract. *Robinhorne Constr. Corp. v. Snyder*, 113 Ill. App. 2d 288, 251 N.E.2d 641 (4th Dist. 1969). This amount is usually the difference between the unpaid balance of the contract price and the expenses of completing the construction. *J.F. Edwards Constr. Co. v. Ill. St. Toll Highway Auth.*, 34 Ill. App. 3d 929, 340 N.E.2d 572 (3d Dist. 1975). A party who materially breaches a contract cannot take advantage of the terms of the contract that benefit that party. *McBride v. Pennant Supply Corp.*, 253 Ill. App. 3d 363, 623 N.E.2d 1047 (5th Dist. 1993) (citing *Robinhorne Constr. Corp. v. Snyder*, 113 Ill. App. 2d 288, 251 N.E.2d 641 (4th Dist. 1969)).

### **LOST PROFITS**

Illinois courts allow for recovery of lost profits when information is available by which the probable lost profits can be reasonably estimated. *See, e.g., TRI-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 856 N.E.2d 389 (2006) (holding that a plaintiff may satisfy the reasonable certainty requirement by presenting evidence of past profits in an established business). The amount of loss need not be proven with absolute certainty; indeed, prospective profits will always be somewhat uncertain. The law merely requires that the plaintiff approximate the claimed lost profits with competent evidence—i.e., evidence that, with a fair degree of probability, establishes a basis for the assessment of damages. *Id.* However, recovery of lost profits cannot be based on sheer speculation or conjecture; the evidence must afford some reasonable basis for the computation of damages. *Id.*; *see also Apa v. Nat'l Bank of Com.*, 374 Ill. App. 3d 1082, 872 N.E.2d 490 (1st Dist. 2007). Prospective profits recoverable are limited to those which might have been made pursuant to the performance of the particular contract sued on and during the period for which it was to run. *Rivenbark v. Finis P. Ernest, Inc.*, 37 Ill. App. 3d 536, 346 N.E.2d 494 (5th Dist. 1976). The “net profits” recoverable in a breach of contract action are calculated by deducting from the contract price the costs of full compliance on the part of the plaintiff. *Wilmette Partners v. Hamel*, 230 Ill. App. 3d 248, 594 N.E.2d 1177 (1st Dist. 1992). Indirect costs may also be deducted from a contract price to determine “net profits.” The determination will largely depend upon whether they constitute variable or fixed indirect costs. The issue of indirect costs was addressed by the Illinois Appellate Court in *Rivenbark v. Finis P. Ernest, Inc.*, 37 Ill. App. 3d 536, 346 N.E.2d 494 (5th Dist. 1976). *See also, F.E. Holmes & Son Constr. Co., Inc. v. Gualdoni Elec. Serv., Inc.*, 105 Ill. App. 3d 1135, 435 N.E.2d 724 (5th Dist. 1982).

## **FAILURE TO COMPLY WITH PLANS AND SPECIFICATIONS**

In Illinois, a contractor is not liable for damages if he (1) performs his work in accordance with the plans and specifications furnished by the owner, and (2) does so in a workmanlike manner. *Bednar v. Venture Stores, Inc.*, 106 Ill. App. 3d 454, 436 N.E.2d 46 (1st Dist. 1982) (citing *Georgetown Twp. High Sch. Dist. No. 218 v. Hardy*, 38 Ill. App. 3d 722, 349 N.E.2d 88 (4th Dist. 1976)); see also *Regan Co. v. Fiocchi*, 44 Ill. App. 2d 336, 194 N.E.2d 665 (2d Dist. 1963); *R.F. Conway Co. v. City of Chicago*, 274 Ill. 369, 113 N.E. 703 (1916).

### **“No Damages for Delay” Clauses**

Where there is no agreement otherwise, the general rule is that a contractor may recover damages for acts or omissions of the owner or general contractor that burden performance of the contractor’s work and increase the costs of completion. *Bates & Rogers Constr. Corp. v. Greeley & Hansen*, 109 Ill. 2d 225, 486 N.E.2d 902 (1985). As a result, sophisticated owners and general contractors will frequently insist on a “no damages for delay” clause in the construction contract. These provisions generally provide that a contractor waives any claim for compensation or damages arising out of any delay caused by the owner or its agents. The damages covered by the contracts typically include lost income or profit; rental expenses for tools and equipment; loss of use of tools, equipment, and personnel; loss of business reputation; and loss of management or employee productivity.

“No damages for delay” clauses are generally enforceable, though they are strictly construed against the parties seeking to invoke them, and they are subject to several specific exceptions. *J&B Steel Contractors, Inc. v. C. Iber & Sons, Inc.*, 162 Ill. 2d 265, 642 N.E.2d 1215 (1994). Where the owner is not acting in good faith, the delay is unreasonable in duration, the cause of the delay was not within the contemplation of the parties, or the delay is attributable to inexcusable ignorance or incompetence on the part of the owner or general contractor, such clauses have been held unenforceable. *Bates & Rogers Constr. Corp. v. Greeley & Hansen*, 109 Ill. 2d 225, 486 N.E.2d 902 (1985); see also *Gust K. Newberg, Inc. v. Ill. St. Toll Highway Auth.*, 153 Ill. App. 3d 918, 506 N.E.2d 658 (2d Dist. 1987) (holding that the only recognized exceptions to the enforceability of no damages for delay clauses are bad faith and gross negligence).

## **PREJUDGMENT INTEREST**

Illinois law provides that prejudgment interest can be awarded to the contractor if the owner is late in making payment under the contract. *Gen. Dynamics Corp. v. Zion St. Bank & Trust Co.*, 86 Ill. 2d 135, 427 N.E.2d 131 (1981). Pursuant to § 2 of the Illinois Interest Act, the owner is entitled to a five percent prejudgment interest award for the balance of the account outstanding. 815 Ill. Comp. Stat. 205/2 (2014); see also *Gen. Dynamics Corp. v. Zion St. Bank & Trust Co.*, 86 Ill. 2d 135, 427 N.E.2d 131 (1981) (holding that interest shall not be awarded where the person withholding payment did so in good faith, because of a genuine and reasonable dispute, but that interest was proper where an owner in bad faith unreasonably withholds money due to a contractor). Prejudgment interest will not be issued where the person withholding payment did so in good faith, because of a genuine and reasonable dispute. *Veath v. Specialty Grains, Inc.*, 190 Ill. App.

3d 787, 546 N.E.2d 1005 (5th Dist. 1989). However, interest is in fact proper where an owner in bad faith unreasonably withholds money. *Id.*

### **CONSEQUENTIAL DAMAGES**

An owner may recover consequential damages from a contractor who breaches the contract. Such damages may include lost profits, compensation for hardships resulting from the breach, costs of repair and damage to reputation in the industry. *See DP Serv., Inc. v. AM Int'l*, 508 F. Supp. 162 (N.D. Ill. 1981) (“Consequential damages are such as are not produced without the concurrence of some other event attributable to some origin or cause; such damage, loss, or injury as does not flow directly and immediately from the act of the party, but only from the consequence or results of such act.”). Stated more broadly:

[A] person breaching a contract can be held liable for such damages as may fairly and reasonably be considered as naturally arising from the breach thereof, in light of the facts known or which should have been known, or such as may reasonably be supposed to have been within the contemplation of the parties as a probable result of a breach thereof. Speculative damages or damages not the proximate result of a breach of contract will not be allowed.

*Jones v. Melrose Park Nat'l Bank*, 228 Ill. App. 3d 249, 592 N.E.2d 562 (1st Dist. 1992) (citations omitted); *see also Edward E. Gillen Co. v. City of Lake Forest*, 221 Ill. App. 3d 5, 581 N.E.2d 739 (2d Dist. 1991) (“Where a contract has been breached, recoverable damages are those which (1) naturally result from the breach, or (2) are the consequence of special or unusual circumstances which were within the reasonable contemplation of the parties when making the contract.”).

### **DUTY TO MITIGATE**

A party to a construction contract has a duty to mitigate damages arising from the other party's breach. A plaintiff may not “stand idly by and allow his property to be destroyed,” thereby increasing the damages owed to him by the defendant. *Montefusco v. Cecon Constr. Co.*, 74 Ill. App. 3d 319, 392 N.E.2d 1103 (3d Dist. 1979); *Cedar Rapids & Iowa City Ry. & Light Co. v. Sprague Elec. Co.*, 280 Ill. 386, 117 N.E. 461 (1917) (“[I]t is the duty of a party injured by a breach of contract to do all that is reasonably in his power to prevent the damage or reduce it to the smallest amount.”).

Damages that a plaintiff is required to avoid include those that may have been “avoided with reasonable effort without undue risk, expense, or humiliation.” *Pioneer Bank & Trust Co. v. Seiko Sporting Goods, U.S.A. Co.*, 184 Ill. App. 3d 783, 540 N.E.2d 808 (1st Dist. 1989) (“The burden of proof that the injured party has failed to mitigate damages is on the party who has breached the contract. However, the duty to mitigate may not be invoked by one who has breached a contract as grounds for a hypercritical examination of the injured party's conduct, or as evidence that the injured party might have taken steps which seemed wiser or would have been more advantageous to the breaching party.”)

### **INSURANCE COVERAGE**

### ***Failure to Procure Insurance***

A common dispute among contractors is the failure to name the contractor as an additional insured on another contractor's insurance policy. This can flow from the general contractor or property owner to the subcontractor or sub-subcontractor, or vice versa. This is a common risk-shifting analysis undertaken in almost all construction projects. These disputes are often litigated as third-party claims or counterclaims ancillary to the underlying injury suit. Commonly, the party that seeks relief brings a breach of contract action for failure to provide insurance pursuant to the underlying construction contract. There are several issues that Illinois courts have examined pertaining to this issue.

A promise by a contractor to obtain insurance for itself and/or an owner or general contractor is enforceable and does not violate public policy. *Jokich v. Union Oil Co. of Cal*, 214 Ill. App. 3d 906, 574 N.E.2d 214 (1st Dist. 1991); *see also Zettel v. Paschen Contractors, Inc.*, 100 Ill. App. 3d 614, 427 N.E.2d 189 (1st Dist. 1981). Indeed, one who breaches an agreement to obtain liability insurance is liable for all resulting damages, including the amount of any judgments against the promisee and the costs of the promisee's defense. *Id.* However, an agreement to obtain insurance is not the same as a promise to indemnify: an indemnity agreement is an agreement to assume all liability for injuries or damages; an insurance agreement, by contrast, is merely an agreement to procure insurance and pay the premiums on it. *Id.*

A subcontractor may argue that the general contractor waived the contractual provision requiring the subcontractor to procure insurance where the general contractor allowed performance under the contract (and paid for performance), notwithstanding the subcontractor's failure to provide proof of insurance, as required by the contract. *Whalen v. K-Mart Corp.*, 166 Ill. App. 3d 339, 519 N.E.2d 991 (1st Dist. 1988); *see also Lehman v. IBP, Inc.*, 265 Ill. App. 3d 117, 639 N.E.2d 152 (3d Dist. 1994) (holding that an owner who repeatedly requested proof of insurance from contractor had not waived its contractual right).

### **RELEVANT STATUTES AND FORMS**

#### **Building and Construction Contract Act**

815 Ill. Comp. Stat. 665/1 (2014) *et seq.*

The Building and Construction Contract Act voids construction contract provisions that require that building contracts be interpreted under the laws of another state. The Act broadly defines "building and construction contract" to include any contract for "design, construction, alteration, improvement, repair or maintenance of the real property, highways, roads or bridges." 815 Ill. Comp. Stat. 665/5. The Act provides that any provisions that require a construction contract to be litigated, arbitrated, or resolved using another form of dispute resolution outside of Illinois are void and unenforceable as against public policy 815 Ill. Comp. Stat. 665/10. There are two key exceptions. The first exception states that the Act does not apply to contracts awarded by the United States or by any other state. 815 Ill. Comp. Stat. 665/15. The second states that the Act does not apply to any person primarily engaged in the business of selling tangible personal

property. 815 Ill. Comp. Stat. 665/20.

### **Construction – Design Management and Supervision**

735 Ill. Comp. Stat. 5/13-214 (2014). Construction--Design management and supervision

Section 13-214. Construction – Design management and supervision. As used in this Section "person" means any individual, any business or legal entity, or any body politic.

- (a) Actions based upon tort, contract or otherwise against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property shall be commenced within 4 years from the time the person bringing an action, or his or her privity, knew or should reasonably have known of such act or omission. Notwithstanding any other provision of law, contract actions against a surety on a payment or performance bond shall be commenced, if at all, within the same time limitation applicable to the bond principal.
- (b) No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission. However, any person who discovers such act or omission prior to expiration of 10 years from the time of such act or omission shall in no event have less than 4 years to bring an action as provided in subsection (a) of this Section. Notwithstanding any other provision of law, contract actions against a surety on a payment or performance bond shall be commenced, if at all, within the same time limitation applicable to the bond principal.
- (c) If a person otherwise entitled to bring an action could not have brought such action within the limitation periods herein solely because such person was under the age of 18 years, or a person with a developmental disability or a person with mental illness, then the limitation periods herein shall not begin to run until the person attains the age of 18 years, or the disability is removed.
- (d) Subsection (b) shall not prohibit any action against a defendant who has expressly warranted or promised the improvement to real property for a longer period from being brought within that period.
- (e) The limitations of this Section shall not apply to causes of action arising out of fraudulent misrepresentations or to fraudulent concealment of causes of action.

### **Construction Contract Indemnification for Negligence Act**

740 Ill. Comp. Stat. 35/1 (2014). Indemnification of person from person's own negligence; effect; enforcement

Section 1. With respect to contracts or agreements, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway bridge, viaducts or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.

#### **Adjacent Landowner Excavation Protection Act**

765 Ill. Comp. Stat. 140/1 (2009). Evacuation; notice; liability; sustention adjoining land; standard depth, defined

Section 1. Each adjacent owner is entitled to the continuous lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction or improvements, under the following conditions:

1. Any owner or possessor of land intending to make or to permit an excavation to be made on his land shall give due and reasonable notice in writing to the owner or owners of adjoining lands and of adjoining buildings and other structures stating the depth to which the excavation is intended to be made and when the excavation will begin. If the excavation is to be of a depth of not more than the standard depth of foundations, as herein defined, and if it appears that the excavation is to be of a greater depth than the walls or foundations of any adjoining building or other structure and is to be so close as to endanger the building or other structure in any way, then the owner of the building or other structure on the adjoining land shall be allowed a reasonable time, but in no event less than thirty (30) days, in which to take measures to protect the same from any damage or in which to extend the foundations thereof, and he must be given, for the said purpose, a license to enter on the land on which the excavation is to be or is being made.
2. Any owner or possessor of land upon which an excavation is made, who does not comply with the provisions of subparagraph 1, when so required, is liable to the owner of adjacent property for any damage to the land or to any buildings or other structure thereon arising from such excavation, and is also liable to occupants and tenants of the adjoining land or structures for any damage to their property or business, proximately resulting from injury to such land or structures, caused by the failure of such owner or possessor to so comply.

3. In making any excavation, reasonable care and precautions shall be taken to sustain the adjoining land as such, without regard to any building or other structure which may be thereon, and there is no liability for damage done to any building or other structure by reason of the excavation except as herein provided or otherwise provided or allowed by law.
4. Standard depth of foundations, as used herein, is a depth of eight (8) feet below the established grade of a street, highway or other public way upon which such land abuts, or if there is no established grade, below the surface of the adjoining land.
5. If the excavation is intended to be or is deeper than the standard depth of foundations as herein defined, then the owner of the land on which the excavation is being made, if given the necessary license to enter on adjoining land, and not otherwise, shall protect the said adjoining land and any building or other structure thereon, without cost to the owner thereof, by furnishing lateral and subjacent support to said adjoining land and all buildings and structures thereon, in such a manner as to protect the same from any damage by reason of the excavation and shall be liable to the owner of such property for any damage to the land or to any buildings or other structures thereon.
6. The owner or possessor of the land upon which the excavation is being made shall also be liable to occupants and tenants of such adjoining lands or structures thereon for any damage to their property or business, proximately resulting from injury to such land or structures, caused by the failure of such owners or possessor, making such excavation, to fulfill the duty set forth in subparagraph 5.

### **Mechanics Lien Act**

770 Ill. Comp. Stat. 60/1 (2014). Contractor defined; amount of lien; waiver of lien; attachment of lien; agreement to waive; when not enforceable

Section 1. Contractor defined; amount of lien; waiver of lien; attachment of lien; agreement to waive; when not enforceable.

- (a) Any person who shall by any contract or contracts, express or implied, or partly expressed or implied, with the owner of a lot or tract of land, or with one whom the owner has authorized or knowingly permitted to contract, to improve the lot or tract of land or for the purpose of improving the tract of land, or to manage a structure under construction thereon, is known under this Act as a contractor and has a lien upon the whole of such lot or tract of land and upon adjoining or adjacent lots or tracts of land of such owner constituting the same premises and occupied or used in connection with such lot or tract of land as a place of residence

or business; and in case the contract relates to 2 or more buildings, on 2 or more lots or tracts of land, upon all such lots and tracts of land and improvements thereon for the amount due to him or her for the material, fixtures, apparatus, machinery, services or labor, and interest at the rate of 10% per annum from the date the same is due. This lien extends to an estate in fee, for life, for years, or any other estate or any right of redemption or other interest that the owner may have in the lot or tract of land at the time of making such contract or may subsequently acquire and this lien attaches as of the date of the contract.

- (b) As used in subsection (a) of this Section, "improve" means to furnish labor, services, material, fixtures, apparatus or machinery, forms or form work in the process of construction where cement, concrete or like material is used for the purpose of or in the building, altering, repairing or ornamenting any house or other building, walk or sidewalk, whether the walk or sidewalk is on the land or bordering thereon, driveway, fence or improvement or appurtenances to the lot or tract of land or connected therewith, and upon, over or under a sidewalk, street or alley adjoining; or fill, sod or excavate such lot or tract of land, or do landscape work thereon or therefore; or raise or lower any house thereon or remove any house thereto, or remove any house or other structure therefrom, or perform any services or incur any expense as an architect, structural engineer, professional engineer, land surveyor or property manager in, for or on a lot or tract of land for any such purpose; or drill any water well thereon; or furnish or perform labor or services as superintendent, time keeper, mechanic, laborer or otherwise, in the building, altering, repairing or ornamenting of the same; or furnish material, fixtures, apparatus, machinery, labor or services, forms or form work used in the process of construction where concrete, cement or like material is used, or drill any water well on the order of his agent, architect, structural engineer or superintendent having charge of the improvements, building, altering, repairing or ornamenting the same.
- (c) The taking of additional security by the contractor or sub-contractor is not a waiver of any right of lien which he may have by virtue of this Act, unless made a waiver by express agreement of the parties and the waiver is not prohibited by this Act.
- (d) An agreement to waive any right to enforce or claim any lien under this Act where the agreement is in anticipation of and in consideration for the awarding of a contract or subcontract, either express or implied, to perform work or supply materials for an improvement upon real property is against public policy and unenforceable. This Section does not prohibit release of lien under subsection (b) of Section 35 of this Act or prohibit subordination of the lien, except as provided in Section 21.

815 Ill. Comp. Stat. 505/2 (2014). Unlawful practices; construction with Federal Trade Commission Act

Section 2. Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965 [815 ILCS 510/2], in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5 (a) of the Federal Trade Commission Act [15 U.S.C. § 45].

### **Home Repair Fraud Act**

815 Ill. Comp. Stat. 515/2 (2014). Definitions

Section 2. Definitions. As used in this Act, unless the context otherwise requires:

- (a) "Home Repair" means the fixing, replacing, altering, converting, modernizing, improving of or the making of an addition to any real property primarily designed or used as a residence.
- (1) Home repair shall include the construction, installation, replacement or improvement of driveways, swimming pools, porches, kitchens, chimneys, chimney liners, garages, fences, fallout shelters, central air conditioning, central heating, boilers, furnaces, hot water heaters, electrical wiring, sewers, plumbing fixtures, storm doors, storm windows, awnings and other improvements to structures within the residence or upon the land adjacent thereto.
- (2) Home repair shall not include the sale, installation, cleaning or repair of carpets; the sale of goods or materials by a merchant who does not directly or through a subsidiary perform any work or labor in connection with the installation or application of the goods or materials; the repair, installation, replacement or connection of any home appliance including but not limited to disposals, refrigerators, ranges, garage door openers, television antennas, washing machines, telephones or other home appliances when the person replacing, installing, repairing or connecting such home appliance are employees or agents of the merchant that sold the home appliance; or landscaping.

(b) "Person" means any individual, partnership, corporation, business, trust or other legal entity.

(c) "Residence" means a single or multiple family dwelling, including but not limited to a single family home, apartment building, condominium, duplex or townhouse which is used or intended to be used by its occupants as their dwelling place.

Nothing in this Act shall be construed to apply to original construction of single or multiple family residence.

## **Illinois Pattern Jury Instructions (Civil) 55.01-55.04**

### **55.01 Construction Negligence—Work Entrusted to Another**

A[n] [owner] [contractor] [other] who entrusts work to a [subcontractor] [contractor] [other] can be liable for injuries resulting from the work if the [owner] [contractor] [other] retained some control over the safety of the work and the injuries were proximately caused by the [owner's] [contractor's] [other's] failure to exercise that control with ordinary care.

### **55.02 Construction Negligence—Duty**

A party who retained some control over the safety of the work has a duty to exercise that control with ordinary care.

### **55.03 Construction Negligence—Issues Made by the Pleadings/Burden of Proof**

Plaintiff \_\_\_\_\_ seeks to recover damages from defendant[s] \_\_\_\_\_. In order to recover damages, the plaintiff has the burden of proving:

1. [The defendant] [Defendants \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_] retained some control over the safety of the work;
2. Defendant[s] [acted] [or] [failed to act] in one or more of the following ways:
  - a. \_\_\_\_\_; or
  - b. \_\_\_\_\_; or
  - c. \_\_\_\_\_;

and in so [acting] [or] [failing to act], was [were] negligent in the manner in which it [exercised] [or] [failed to exercise] its control.

3. Plaintiff [name] was injured; and
4. [The defendant's] [Defendants' \_\_\_\_\_, \_\_\_\_\_, or \_\_\_\_\_]

negligence was a proximate cause of plaintiff's injuries.

[You are to consider these propositions as to each defendant separately.] If you find that any of these propositions has not been proven as to [the defendant] [any one] [or more] [or all] [of the defendants], then your verdict should be for [the] [that] [those] defendant[s]. On the other hand, if you find that all of these propositions have been proven as to [the defendant][any one] [or more] [or all] [of the defendants], then you must consider defendant['s] [s'] claim[s] that the plaintiff was contributorily negligent.

As to [that] [those] claim[s], defendant[s] has the burden of proving:

A. Plaintiff [name] acted or failed to act in one or more of the following ways:

- 1 \_\_\_\_\_; or
- 2 \_\_\_\_\_; or
- 3 \_\_\_\_\_;

and in so [acting] [or] [failing to act] was negligent, and

B. Plaintiff's negligence was a proximate cause of [his injury] [and] [damage to his property].

If you find that plaintiff has proven all the propositions required of [him] [her], and the defendant[s] ha[s][ve] not proven all of the propositions required of the defendant[s], then your verdict should be for the plaintiff as to [that] [those] defendant[s] and you will not reduce plaintiff's damages.

If you find that defendant[s] [has] [have] proven all of the propositions required of [the] [those] defendant[s], and if you find that the plaintiff's contributory negligence was greater than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict should be for [that] [those] defendant[s].

If you find that defendant[s] [has] [have] proven all of the propositions required of [the] [those] defendant[s], and if you find that the plaintiff's contributory negligence was less than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict should be for the plaintiff as to [that] [those] defendant[s] and you will reduce the plaintiff's damages in the manner stated to you in these instructions.

#### **55.04 Construction Negligence—More Than One Person Having Control**

One or more persons may have some control over the safety of the work. Which

person or persons had some control over the safety of the work under the particular facts of this case is for you to decide.

### **About the Authors**

Dennis J. Cotter is a founding partner of SmithAmundsen, serves as Chairperson of the firm's Construction Practice Group, and is also a member of the firm's Executive Committee. Dennis is an experienced trial attorney and represents steel erectors, HVAC contractors, roofing contractors, general contractors, owners, architects, masons, excavators, and others, all in pending lawsuits involving catastrophic injuries, commercial disputes, and construction defects, frequently with potential values in excess of one million dollars. He consults to general and subcontractors including litigation management, contract review, insurance and safety issues.

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