NEW HAMPSHIRE

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I. MECHANIC'S LIEN BASICS

New Hampshire Revised Statutes Annotated ("RSA") 447 provides for and governs mechanics' liens on private projects. The purpose of the mechanics' lien is to provide effective security to those individuals who furnished labor or materials that were used to enhance the value of the property of another. *Innie v. W & R, Inc.,* 116 N.H. 315, 317, 359 A.2d 616 (1976).

A. Requirements

RSA 447:2 states that any person who, by himself or others, performs labor, furnishes professional design services or furnishes materials in the amount of $15 or more for erecting or repairing a home or other building, or for building a dam, canal, sluiceway, well or bridge, or for consumption or use in the prosecution of such work, by virtue of a contract with the owner thereof, shall have a lien on said structure, and on any right of the owner to the lot of land on which it stands.

The property owner must receive notice of the right to assert a lien. RSA 447:6. This notice may be given in the first instance after the provision of labor, services or supplies by a general contractor. Subcontractors providing labor or furnishing materials in the amount of $15 or more by virtue of a contract with an agent, contractor, or subcontractor of the owner have separate notice requirements. *See* RSA 447:5.

Subcontractors giving notice "shall, as often as once in 30 days, furnish to the owner, or person having charge of the property on which the lien is claimed," a written account of the labor performed or materials furnished during successive 30 day periods. RSA 447:8. These accountings may be given at the same time as the first notice given in the case of general contractors, though subcontractors must provide such accountings while the project is ongoing. RSA 447:6.

B. Enforcement and Foreclosure

Liens created under RSA 447:2 continue for 120 days after the services are performed, or the materials, services, supplies or other things are furnished, unless payment is made in full. Such liens take precedence over all prior claims except tax liens. RSA 447:9.

Mechanics' liens may be "secured by attachment of the property on which the lien exists at any time while the lien continues, the writ and return thereon distinctly expressing that purpose." RSA 447:10. A person possessing a mechanic's lien must bring suit and seek pre-judgment attachment of the secured property. *Id.* As long as "the writ and return taken together distinctly express that the attachment is made to secure a mechanic's lien, the purpose of the attachment is sufficiently stated." *Holden Eng'g & Surveying, Inc. v. Law Offices of Raymond P. D'Amante, P.A.*, 142 N.H. 213, 216, 698 A.2d 3 (1997). The attachment generally has priority over all lien claims for labor, materials or other things done or furnished after the attachment was made. RSA 447:11. Exceptions to this rule are set forth in RSA 447:12-a.

A bond is required for public projects involving expenditures of $75,000 or more. RSA 447:16. Other requirements for public projects are set forth in RSA 447:15-18.

C. Ability to Waive and Limitations on Lien Rights

The New Hampshire Supreme Court has discussed the waiver of mechanics' liens extensively and, although it has never expressly approved or disapproved of the practice, such waivers appear to be effective. *See Guyotte v. O'Neill*, 157 N.H. 616, 618-22, 958 A.2d 939, 943-46 (2008). A waiver of the right to assert a mechanic's lien under the statute, however, does not act as a general release of all claims to payment for work performed. *Id.* at 620-21, 958 A.2d 944-45. The New Hampshire Supreme Court has stated that a mechanics' lien waiver "requires an actual intention to forego a known right. Such a waiver should not be presumed; a clear expression of intent to waive the right must exists." *Pine Gravel, Inc. v. Cianchette*, 128 N.H. 460, 465, 514 A.2d 1282, 1285, (1986). (citation omitted). Under the mechanics' lien statute, it is clear that a contractor does not waive its lien rights by taking a note on the attached property. RSA 447:14. Such a note will not defeat a lien unless the note was expressly given in satisfaction of the lien and covers the amount due thereon.

II. PUBLIC PROJECT CLAIMS

A. State and Local Public Work

A party may bring a claim against a governmental unit within New Hampshire based in negligence for, among other culpable conduct, "maintenance or operation of…all premises" that are owned, occupied, or maintained by the local municipality. RSA 507-B:2. Governmental unit "means any political subdivision within the state." RSA 507-B:1, I. RSA 507-B:5 provides that "[n]o governmental unit shall be held liable in any action to recover for bodily injury, personal injury, or property damage except as provided by [RSA 507-B:1, et seq.]." Liability against a local government unit is capped at $325,000 per person, per incident, and $1,000,000 aggregate

per incident. RSA 507-B:4, I. Towns are generally subject to contract and other claims. RSA 31:1.

The State of New Hampshire may be sued on "express or implied contract[s]." RSA 491:8. However, with respect to torts, "[s]overeign immunity protects the State itself from suit in its own courts without its consent, and shields it from liability for torts committed by its officers and employees." *Everitt v. Gen. Elec. Co.*, 156 N.H. 202, 209, 932 A.2d 831, 838 (2007) (quotations omitted).

i. Notices and Enforcement

Under RSA 507-B, potential plaintiffs are required to give notice of a potential claim within sixty days of the injury. RSA 507-B:7. However, if written notice is not given, the burden of proof is on the town to show it is "substantially prejudiced" by the lack of written notice in order to avoid the suit. *Id.*

B. Claims to Public Funds

i. Notices and Enforcement

When contract claims are made against the state, the attorney general is obligated to submit the claim to the department/agency that entered into the contract and that department/ agency is obligated to try and satisfy the claim pursuant to the appropriation under which the contract was executed; however, if that appropriation cannot satisfy the claim, then the attorney general is obligated to submit the claim to the general court. RSA 491:8.

When a claim needs to be satisfied by a local government unit, that government unit is obligated to appropriate money, through insurance or otherwise, to satisfy the judgment. RSA 507-B:8; RSA 507-B:7-a.

III. STATUTES OF LIMITATION AND REPOSE

A. Statutes of Limitation and Limitations on Application of Statutes

New Hampshire's statute of limitations for personal actions applies in construction cases. *Big League Entertainment Inc. v. Brox Indus. Inc.*, 149 N.H. 480, 484, 821 A.2d 1054, 1057-58 (2003) (*citing* RSA 508:4). As expressly noted in the statute, the "discovery rule" applies in New Hampshire. RSA 508:4. Additionally, an infant or mentally incompetent person has two years after the disability of age or incompetence is removed in which to file suit. RSA 508:8. At least one trial judge has held that mental incompetence or disability does not toll the statute of limitations in RSA 508:4. *D'Amico v. Kindred Healthcare, Inc.*, No. 2262014CV00201, 2014 WL 12802982, at *3-4 (N.H. Super. Ct. Nov. 20, 2014) (interpreting the discovery rule of RSA 508:4 to require an objective standard).

B. Statutes of Repose and Limitations on Application of Statutes

RSA 508:4-b, I states that "all actions to recover damages for injury to property, injury to the person, wrongful death or economic loss arising out of any deficiency in the creation of an improvement to real property, including without limitation the design, labor, materials, engineering, planning, surveying, construction, observation, supervision or inspection of that improvement, shall be brought within 8 years from the date of substantial completion of the improvement, and not thereafter." This has been expressly held to be a statute of repose, rather than a statute of limitations, by the New Hampshire Supreme Court. *Big League Entertainment*, 149 N.H. at 484, 821 A.2d at 1057-58. A project is "substantially complete" when "construction is sufficiently complete so that an improvement may be utilized by its owner or lawful possessor for the purposes intended." RSA 508:4-b, II.

The statute of repose is extended in cases involving "fraudulent misrepresentations, or actions involving fraudulent concealment of material facts." RSA 508:4-b, V(a). In such cases, the statute of repose does not begin to run until "all relevant facts are, or with due care ought to be, discovered by the person bringing the action." *Id.* Although this may seem to create a new statute of limitations, rather than extending the statute of repose, the Supreme Court's decision in *Big League Entertainment* strongly suggests otherwise. *See Big League Entertainment,* 149 N.H. at 484, 821 A.2d at 1057-58. The statute of repose is inapplicable to cases involving design or construction defects in nuclear energy facilities. RSA 508:4-b, V(b). The repose period may be extended by written agreement of the parties. RSA 508:4-b, III.

IV. PRE-SUIT NOTICE OF CLAIM AND OPPORTUNITY TO CURE

Pursuant to RSA 359-G:4, in all actions by homeowners against contractors where the contract was entered into after January 1, 2006, the homeowner must, at least 60 days before initiating an action against a contractor, provide service of written notice of the claim on the contractor.

The notice must state that "the homeowner asserts a construction defect claim and is providing notice of the claim pursuant to" RSA 359-G:4, I. The notice must "describe the claim in detail sufficient to explain the nature of the alleged construction defect and the result of the defect," and the homeowner must provide the contractor with "any evidence in possession of the homeowner that depicts the nature and cause of the construction defect." RSA 359-G:4, I.

Within 30 days after service of the notice of claim, the contractor is required to "serve on the homeowner, and on any other contractor that has received the notice of claim, a written response to the claim or claims, which discloses any evidence in the possession of the contractor that depicts the nature and cause of the construction defect" and which:

a. offers to settle the claim by monetary payment, the making of repairs, or a combination of both, without inspection;

b. proposes to inspect the residence that is the subject of the claim; or

c. wholly rejects the claim.

RSA 359-G:4, II.

If the contractor proposes to inspect, the homeowner may, "within 15 days of receiving a contractor's proposal, provide the contractor and its subcontractors, agents, experts, and consultants prompt and complete access to the residence to inspect the residence, document any alleged construction defect, and, if authorized in writing by the homeowner, perform any destructive or non-destructive testing required to fully and completely evaluate the nature, extent, and cause of the claimed defect and the nature and extent of any repairs or replacements that may be necessary to remedy the alleged defect." RSA 359-G:4, IV. Within 15 days of the completion of the inspection and testing, the contractor must serve the homeowner with a response "disclosing any inspection or testing records in the possession of the contractor that depict the nature and cause of the construction defect," and:

a. A written offer to fully or partially remedy the construction defect at no cost to the homeowner;

b. A written offer to settle the claim by monetary payment;

c. A written offer including a combination of repairs and monetary payment; or

d. A written statement that the contractor will not proceed further to remedy the defect.

RSA 359-G:4, V. No later than 30 days after receipt of the contractor's offer, the homeowner must serve the contractor with written notice of acceptance; otherwise, the offer is deemed rejected. RSA 359-G:4, X.

Service of a written notice of claim tolls the expiration of the statute of limitations for sixty (60) days. RSA 359-G:4, XII. Service does not toll the statute of repose. *Id.* Actions filed by homeowners that have not complied with RSA 359-G shall be stayed for a maximum of sixty (60) days, without prejudice, until the homeowner has complied with the requirements of RSA 359-G. RSA 359-G:3.

If, after providing the contractor with the notice required by RSA 359-G:4, the homeowner discovers additional defects that are "substantially related to the factual circumstances, acts, or omissions giving rise to the construction defects alleged in the initial notice," those additional defects may be "alleged in an action involving the claims alleged in the initial notice without following the notice of claim procedure provided in RSA 359-G:4." RSA 359-G:5. If a homeowner accepts an offer, and the contractor complies with the terms of the offer, the homeowner is thereafter barred from bringing an action for the claim. RSA 359-G:6.

V. INSURANCE COVERAGE AND ALLOCATION ISSUES

A. General Coverage Issues

When disputes over coverage arise, the insurer bears the burden of establishing that the insured is not covered. *Weeks v. St. Paul Fire & Marine Ins. Co*., 140 N.H. 641, 643, 673 A.2d

772 (1996). Any ambiguities in policy language will be resolved in favor of the insured. *Id.* Within six months after the filing of the writ, complaint, or other pleading initiating the action giving rise to the coverage question, the insured or insurer may file a petition for declaratory judgment to determine whether an insurance policy provides coverage for the allegations contained in the writ. RSA 491:22, III. This provision also applies to indemnification actions. *See The Craftsbury Co., Inc. v. Assurance Co. of Am.*, 149 N.H. 717, 719-20, 834 A.2d 267 (2003). The six month limitations period does not apply when "the facts giving rise to such coverage dispute are not known to, or reasonably discoverable by, the insurer until after expiration of such 6-month period" or if the failure to file within six months resulted from "accident, mistake or misfortune" and not neglect. RSA 491:22, III.

B. Trigger of Coverage

New Hampshire has not specifically adopted one of the four approaches generally used to determine how coverage is triggered; instead, New Hampshire courts determine whether coverage has been triggered by looking at the language of the relevant insurance policy (or policies). *EnergyNorth Natural Gas, Inc. v. Underwriters at Lloyd's*, 150 N.H. 828, 832, 848 A.2d 715 (2004); *see also Pro Con Constr., Inc. v. Acadia Ins. Co*., 147 N.H. 470, 472-73, 794 A.2d 108 (2002) (holding that coverage was not triggered because the policy only extended coverage to an additional insured when liability "aros[e] out of . . . ongoing operations performed for that insured," and no causal nexus linked the ongoing operations and the injuries). New Hampshire courts have utilized both the "injury-in-fact" or "actual damage" and the exposure rules. *EnergyNorth Natural Gas, Inc*., 150 N.H. 828. Under the "injury-in-fact" rule, "all of the policy periods during which the insured proves some injury or damage" are implicated. *Id*. at 831. In contrast, under the "exposure" rule, "all insurance contracts in effect when property was exposed . . . would be triggered." *Id*.

The New Hampshire Supreme Court applied the injury-in-fact rule to occurrence-based policies. It held that if the alleged event and resulting damage are continuing, the injury-in-fact triggering coverage is also continuing. *Id.* at 835-36.

The exposure rule was applied to accident-based policies, which covered "accidents occurring during the policy period." *Id.* at 837-38. While the accident triggering the coverage must occur during the policy period, the accident does not need to be limited to a single, discrete event; if the accident "is continuing, multiple exposures triggering coverage are also continuing." *Id.* at 838.

The exposure rule was also applied to an occurrence-based policy, which provided that coverage was "triggered by occurrences happening during the currency hereof." *Id.* at 840. Under the policy in question, the occurrence which caused the property damage was required to occur during the policy period; however, the policy did not require that the resulting property damage occur during the policy period. *Id.*

C. Allocation Among Insurers

The New Hampshire Supreme Court has addressed allocation of damages among multiple triggered insurance policies in a long-term environmental pollution case. *EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's*, 156 N.H. 333, 934 A.2d 517 (2007). The Court adopted a pro rata approach to allocating liability among multiple insurers, and without selecting a method of pro-ration, suggested that courts should apply the pro-ration by years and limits, if possible. *Id.* at 345. Under that method, "loss is allocated among policies based on both the number of years a policy is on the risk as well as that policy's limits of liability. The basis of an individual insurer's liability is the aggregate coverage it underwrote during the period in which the loss occurred." *Id*. at 341 (internal quotation and citation omitted).

D. Issues With Additional Insurance

The predominant issue that arises in construction cases in New Hampshire concerning additional insurance involves the determination of which insurance policy is "primary" and which is "excess." *See, e.g.*, *Peerless Ins. v. Vermont Mut. Ins. Co.*, 151 N.H. 71, 849 A.2d 100 (2004). These disputes are resolved by interpreting the relevant policy language, though where each policy has "mutually repugnant" excess-insurance provisions, the Court will order each insurance company to pay its pro rata share of settlements, judgments, and defense costs. *Id.* at 74, 849 A.2d at 103. The Court also recently issued a decision that a carrier's excess duty to defend is implicated only when the primary insurer's coverage is exhausted. *See Old Republic Ins. Co. v. Stratford Ins. Co.*, 148 N.H. 568, 552, 132 A.3d 1198 (2016).

VI. CONTRACTUAL INDEMNIFICATION

Indemnification agreements that require a party to indemnify any person or entity for personal injury or property damage that was not caused by that party or its employees, agents, or subcontractors are prohibited. RSA 338-A:2.

Other indemnification agreements are permitted, and implied agreements to indemnify may exist where an individual "performs a service under contract negligently and, as a result, causes harm to a third party in breach of a nondelegable duty of the indemnitee." *Jaswell Drill Corp. v. Gen. Motors Corp*., 129 N.H. 341, 346, 529 A.2d 875 (1987); *see also* RSA 359-G:8, II.

VII. CONTINGENT PAYMENT AGREEMENTS

A. Enforceability

New Hampshire's courts view contingent payment agreements with disfavor, and so will not enforce such agreements unless they are expressed clearly in the agreement between the parties. *Holden Engineering and Surveying, Inc. v. Pembroke Road Realty Trust*, 137 N.H. 393, 396, 628 A.2d 260, 262 (1993).

B. Requirements

As noted above, any contingent payment agreement must, to be enforceable, be expressed in the clearest possible terms. *Id.* New Hampshire's courts have not weighed in on any specific

requirements for either "pay-if-paid" or "pay-when-paid" contingent payment agreements beyond requiring such agreements to be clearly expressed.

VIII. SCOPE OF DAMAGE RECOVERY

A. Personal Injury Damages Versus Construction Defect Damages

The Economic Loss Doctrine generally operates in New Hampshire to limit the damages available to plaintiffs in construction defect cases. The doctrine is a "judicially-created remed[y] principle that operates generally to preclude contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship." *Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 241 (Wis. 2004); *see also Wyle v. Lees*, 162 N.H. 406, 410, 33 A.3d 1187 (2011).

Of course, tort damages may be available if a construction defect amounts to a breach of New Hampshire's Consumer Protection Act. *See* RSA 358-A:2, RSA 358-A:10. The same is true if the homeowner properly pleads and proves claims for negligent or intentional misrepresentation, which constitute exceptions to the Economic Loss Doctrine. *See Plourde Sand & Gravel v. JGI Eastern, Inc.*, 154 N.H. 791, 795-96, 917 A.2d 1250 (2007).

B. Attorney's Fees Shifting and Limitations on Recovery

New Hampshire follows the "American Rule," and parties generally bear their own attorneys' fees in construction defect litigation. *See, e.g., Taber v. Town of Westmoreland*, 140 N.H. 613, 615, 670 A.2d 1034 (1998). The exceptions to this rule are where the parties agree to an allocation of attorney's fees, where a statute creates a right to recovery of attorney's fees, or where a judicially-created exception to the American Rule applies. *Id.* The common-law exceptions include situations where a party must sue to secure "a clearly defined right which should have been freely enjoyed without such intervention." *Id.* (citation omitted).

Attorney's fee awards are generally supervised by the courts, and will only be awarded to the extent they are reasonable. *See George v. Al Hoyt & Sons*, 162 N.H. 123, 139, 27 A.3d 697, 712 (2011).

C. Consequential Damages

Consequential damages are the "losses that flow from a breach of contract." *Bell v. Liberty Mut. Ins. Co*., 146 N.H. 190, 194, 776 A.2d 1260, 1263-64 (2001). The party seeking damages must prove, by a preponderance of evidence, the extent and amount of the damages sought. Consequential damages are only available "if the harm was a reasonably foreseeable result at the time the parties entered into the contract." *Independent Mech. Contractors v. Gordon T. Burke & Sons*, 138 N.H. 110, 114, 635 A.2d 487, 489 (1993).

Consequential damages for breach of a construction contract include: lost profits, *Id*. at 115, the difference between the value of the building as constructed and the value the building would have had if constructed as promised, *Bailey v. Sommovigo*, 137 N.H. 526, 530, 631 A.2d

913 (1993) (citation omitted), "the difference between the cost of finishing the work and the balance due the plaintiff on the contract," *McMullin v. Downing*, 135 N.H. 675, 677, 609 A.2d 1226 (1992), and recovery of the cost of completion from the subcontractor if the cost of completion exceeds the value of the subcontract. *Parem Contracting Corp. v. Welch Constr. Co., Inc.,* 128 N.H. 254, 258, 512 A.2d 1104 (1986).

D. Delay and Disruption Damages

A plaintiff is entitled to reasonable damages caused by a contractor's disruption or delay of a construction project. *See Tardiff v. Twin Oaks Realty Trust*, 130 N.H. 673, 677-78, 546 A.2d 1062 (1988). This is especially so where a contract states that "time is of the essence." *See id*. In such cases, the damages allowed may include such items as carrying costs and increased costs to the plaintiff, and may cover claims for lost profits if pled and proved properly. See *id.*

E. Economic Loss Doctrine

For a discussion of the Economic Loss Doctrine, see Section VII, A, *supra*.

F. Interest

As a general rule, claims collect interest at an established rate from the date the lawsuit is commenced. *See* RSA 524:1-a; RSA 524:1-b; *see also* RSA 336:1-2.

G. Punitive Damages

Punitive damages are not available in New Hampshire except when expressly authorized by statute. *Stewart v. Bader,* 154 N.H. 75, 88, 907 A.2d 931 (2006); RSA 507:16. New Hampshire courts may award enhanced compensatory damages, or "liberal compensatory damages," when damages result from "wanton, malicious, or oppressive" conduct. *Id*. at 87. Such damages must be *compensatory* in nature, i.e., they must compensate a plaintiff for an aggravated injury caused by the nature of defendant's conduct. *Vratsenes v. N.H. Auto., Inc.*, 112 NH 71, 73, 289 A.2d 66 (1972). Such awards cannot be given to punish a defendant or to make an example of it. *Id*. at 72.

H. Liquidated Damages

In New Hampshire three criteria distinguish a valid liquidated damages clause from an unenforceable penalty. "In a valid clause: (1) the damages anticipated as a result of the breach are uncertain in amount or difficult to prove; (2) the parties intended to liquidate damages in advance; and (3) the amount agreed upon is reasonable and not greatly disproportionate to the presumable loss or injury." *Holloway Automotive Group v. Lucic*, 163 N.H. 6, 9-10, 35 A.3d 577 (2011).

The New Hampshire Supreme Court has adopted a two-part test to determine whether a liquidated sum is reasonable. First, the court will assess whether the amount "was a reasonable estimate of difficult-to-ascertain damages at the time the parties agreed to it." *Id.* at 10 (citing

Shallow Brook Assoc's v. Dube, 135 N.H. 40, 48, 599 A.2d 132 (1991)). Next, the Court will ask whether actual damages are "easily ascertainable" after a breach. *Id.* (citation and brackets omitted). "If the actual damages turn out to be easily ascertainable, [the court] must then consider whether the stipulated sum is unreasonable and grossly disproportionate to the actual damages from a breach." *Id.* "If the stipulated sum is grossly disproportionate to easily ascertainable, actual damages, the provision is an unenforceable penalty, and the aggrieved party will be awarded no more than the actual damages." *Id.*

IX. CASE LAW AND LEGISLATION UPDATE

The most notable recent development for construction law litigants has been the establishment of the Business and Commercial Dispute Docket. In 2008, the New Hampshire General Court enacted RSA 491:7-a, authorizing the establishment of the Business and Commercial Dispute docket. The BCDD is simply a separate docket in the Superior Court. It sits in Merrimack County, and is presided over by a judge with substantial experience handling business disputes, including construction disputes. *See* N.H. Super. Ct. R. 207.

To qualify for the BCDD, all parties to an action must consent to its jurisdiction; one party must be a "business entity" as defined by the statute; the case cannot involve an individual who has purchased or leased merchandise for personal, family or household use; and the amount in controversy must be $50,000 or greater. RSA 491:7-a, I-II. The BCDD is granted jurisdiction under the above circumstances, over several categories of cases that arise in the construction context: "Claims arising from breach of contract[,]" "Claims relating to surety bonds," and "other complex disputes of a business or commercial nature." RSA 491:7-a, VI (a), (d) & (m).

In recent years, construction disputes have commanded a significant portion of the BCDD's attention. *See, e.g.*, *E.D. Swett, Inc. v. Town of Hooksett*, No. 217-2018-CV-00381 (Dec. 31, 2018); *Penta Corp. v. Town of Newport*, No. 212-2015-CV-00011 (Apr. 23, 2018); *Hooksett Sewer Comm'n v. Penta Corp.*, No. 217-2013-CV-540 (Aug. 22, 2016); *Berlin Station, LLC v. Babcok & Wilcox Cons. Co., Inc.*, No. 214-2014-CV-00014 (June 1, 2015); *Dartmouth College v. North Branch Construction, Inc.*, No. 2009-CV-152 (Mar. 24, 2014); *Town of Bow v. Provan & Lorber, Inc. and Gordon Construction, Inc.*, No. 2009-CV-190 (Feb 14, 2014). In addition to offering litigants a chance to submit their case to a judge who specializes in commercial litigation, the BCDD also maintains a roster of mediators who have a high degree of expertise and experience resolving commercial disputes, including construction claims. *See* https://www.courts.state.nh.us/adrp/business/bios/index.htm. The *Berlin Station* case is particularly noteworthy because the trial judge noted that the New Hampshire implied covenant of good faith and fair dealing is not an independent cause of action. *Berlin Station, LLC*, No. 214-2014-CV-00014, at 21, n.4.

On March 30, 2018, the New Hampshire Supreme Court issued its decision in *XTL-NH, Inc. v. N.H. State Liquor Commission*, clarifying that sovereign immunity does in fact bar a promissory estoppel claim against the State, and that such a finding of immunity strips a trial court of subject matter jurisdiction. *XTL-NH, Inc. v. N.H. State Liquor Comm'n*, 170 N.H. 653, 656-59, 183 A.3d 897 (2018). In August 2018, the New Hampshire Supreme Court addressed the liability of a general contractor to a subcontractor's injured employee in the common scenario in which a

general contractor promises the owner of the premises that it will maintain site safety, in addition to a subcontractor's promise to provide for the safety of their employees. *See Grady v. Jones Lang LaSalle Construction Co., Inc.*, 171 N.H. 203, 193 A.3d 283 (2018). The court concluded that, under such circumstances, neither the general contractor's general duty to monitor the site for site safety nor its promise to the owner regarding site safety were implicated and thus, the general contractor was not liable to the subcontractor's employee. *Id*. at 208, 212.

Finally, two recent New Hampshire cases have clarified the applicability of the construction statute of repose to claims for indemnification and contribution. In March 2019, the Federal District Court for the District of New Hampshire concluded that the statute of repose does apply to indemnification and contribution claims, even when, as in that case, the underlying action by the subrogee is not itself barred by the statute. *Continental Western Insurance Co. v. Superior Fire Protection, Inc.*, 2019 WL 1318274, No. 18-CV-117-JL, at *2, *5-7 (D.N.H. Mar. 22, 2019). In a subsequent case, the New Hampshire Supreme Court reached the same conclusion. *Rankin v. South Street Downtown Holdings, Inc.*, 2019 WL 3562167, No. 2018-0604, at *1 (N.H. Aug. 6, 2019).