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I. MECHANIC'S LIENS BASICS

Contractors' liens, which include Mechanics' and Material Suppliers' liens, are governed by 9 V.S.A. § 1921-28. In general, to secure payment, a person providing labor or materials pursuant to a contract for erecting, repairing, moving, or altering improvements to real property or for furnishing labor or material to a property, shall have a lien on the labor or materials to secure the payment for the work.[1] There are several requirements for perfection of the lien that could become "minefields" for the unwary practitioner. The necessity of strict compliance with the statute's procedures has been long recognized in Vermont.[2]

A. Requirements

1. Pre-lien Notice

Any person claiming a lien must give notice in writing to the owner of the property that he or she shall claim a lien for the labor or material. The notice shall include the date that payment is due, if known. The lien extends to the portions of the contract price remaining unpaid at the time the notice is received by the owner.[3]

The lien remains in force for only 180 days from the time when payment became due for the last labor performed or materials furnished unless a Notice of Lien is recorded in the land records maintained by the town clerk's office.[4] The pre-lien notice does not put the world on notice – only owners, who are liable in tort if they alienate the property so as to defeat the lien.[5] Note that the statute does not prescribe a "waiting period" between the contractor's giving

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[1] Vt. Stat. Ann. tit. 9.§ 1921 (a).
[2] *See, e.g., Piper v. Hoyt*, 61 Vt. 539, 17 A. 798, 798 (1889) (requiring strict adherence because "the [statute] provides a special remedy in favor of a particular person . . . .").
[3] Vt. Stat. Ann. tit. 9 . § 1921(b).
[4] Vt. Stat. Ann. tit. 9 § 1921(c).
[5] *Haigh Lumber Co. v. Drinkwine*, 130 Vt. 120, 287 A.2d 560 (1972); *see* Vt. Stat. Ann. tit. § 1922.

written notice and the filing of the lien in the land records. In many cases, the best practice may be to give notice to the owner at the same time that the lien is recorded.

2. Recording

To perfect a lien, a person must first file a notice of lien in the office of the town clerk within 180 days from the time when payment became due for the last of such labor performed or materials furnished on the property.[6] The notice is in the form of a written memorandum, signed by the person claiming the lien, asserting his claim, describing the real estate and/or building into which the labor and materials went and disclosing the amount claimed. The memorandum must also state the person to whom it is due and from whom it is due, and that the person from whom it is due is the owner of the property.[7] The real estate is then charged with the lien as of the visible commencement of work or delivery of material.[8] If there are several contractors' liens, and the sum due from the owner is not sufficient to pay them all in full, the liens shall be paid pro rata.[9]

B. Enforcement and Foreclosure

1. Enforcement

Within 180 days from the time of filing the memorandum or, if payment is not yet due at the time of filing within 180 days from the time such payment becomes due, the person asserting the lien may commence an action for the payment due and cause the real estate or other property to be attached. If judgment is obtained in the action, the record of such judgment shall contain a brief statement of the contract upon which the action is founded.[10]

2. Foreclosure

Within five months after the date of a judgment, a person may cause a certified copy of the judgment to be recorded in the office of the clerk of the town in which the real estate is situated.[11] The United States District Court for the District of Vermont, on appeal from the Bankruptcy Court, has held that the failure to strictly comply with the five month window to record the judgment causes the contractor's lien to expire.[12]

The effect of recording the judgment is to encumber the attached property for the amount due on such judgment as if it had been mortgaged for the payment thereof.[13] Then, and only

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[6] Vt. Stat. Ann. tit. 9 § 1921(c).
[7] Vt. Stat. Ann. tit. 9 § 1921(c); Vt. Stat. Ann. tit. 9 § 1923; *see Baldwin v. Spear Brothers*, 79 Vt. 43, 64 A. 235 (1906).
[8] Vt. Stat. Ann. tit. 9 § 1923.
[9] *Id.*
[10] Vt. Stat. Ann. tit. 9 § 1924.
[11] Vt. Stat. Ann. tit. 9 § 1925.
[12] *Naylor v. Cusson (In re Cusson)*, 412 B.R. 646 (D. Vt. 2009).
[13] *Id.;* Vt. Stat. Ann. tit. 9 § 1925.

then, shall a contractor have the right to foreclose the lien, obtaining possession and foreclosing the defendant's equity of redemption as if it were a mortgage.[14]

C. Ability to Waive and Limitations on Lien Rights

1. Waiver Not Possible

A contractor's lien may not be waived in advance of the time such labor is performed or materials are furnished, and any provision calling for such advance waiver shall not be enforceable.[15]

2. Other Limitations on Lien Rights

The lien extends to the improvements to real property and "the lot of land on which the same stand."[16] A "lot of land" is defined as the land owned or held by the owner for use in connection with such improvements, but does not extend to adjacent lands that are not connected with the improvements.[17] However, adjacent lands that are connected with the improvements may be considered part of the same "lot" for lien purposes, even if there is no active improvement on the adjacent lands.[18] The lien shall not take precedence over a deed or other conveyance to a good faith purchaser to the extent the purchase was made before the lien was recorded.[19] The lien does not take precedence over a mortgage given by the owner as security for the payment of money loaned and to be used by such owner in payment of the expenses of the property, if such mortgage is recorded before the contractor's lien is filed in the town clerk's office.[20] However, if the mortgagee receives written notice of any contractor' lien, the lien shall take precedence over the mortgage as to all advances made after the mortgagee has notice of the lien, except such advances as the mortgagee may show were actually expended in completing such improvements to real property.[21]

It important to note that filing a mechanic's lien can form the basis for a slander of title claim if the lien lacks a credible basis, even if the lien has not been perfected, when the filing is accompanied by malice.[22]

II. PUBLIC PROJECT CLAIMS

Vermont's public project scheme allocates the risk of non-payment and non-performance to bonding surety for public construction contracts when the contract is for work performed on a state highway.[23] For other public projects, there is a patchwork of funding arrangements

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[14] *Id.*
[15] Vt. Stat. Ann. tit. 9 § 1921(f).
[16] Vt. Stat. Ann. tit. 9 § 1921(a).
[17] Vt. Stat. Ann. tit. 9 § 1921(e); *See also Birchwood Land Co. v. Ormond Bushey & Sons, Inc.*, 2013 VT 60, ¶¶ 40-42, 194 Vt. 478, 497-498, 82 A.3d 539, 552 (2013).
[18] *Id*.
[19] Vt. Stat. Ann. tit. 9 § 1921(d).
[20] *Id.*
[21] *Id.*
[22] *Birchwood Land Co. v. Ormond Bushey & Sons, Inc.*, 2013 VT 60, ¶ 39, 194 Vt. 478, 497, 82 A.3d 539, 552 (2013); *Wharton v. Tri–State Drilling & Boring,* 2003 VT 19, ¶ 15, 175 Vt. 494, 824 A.2d 531 (mem.)
[23] Vt. Stat. Ann. tit. 19 § 10(8).

provided by statute. If the public project is not governed by one of these statutes, the terms of the bond, if any, or the contract will control.

A. State and Local Public Work

i. Notices and Enforcement

Any contractor employed in a project by the Agency of Transportation for construction of a transportation improvement must file in the office of the Secretary of the Agency of Transportation (the "Secretary") a good and sufficient surety performance bond.[24] In projects involving contracts for $100,000.00 or less, the Secretary may waive the requirement of a performance bond.[25]

Further, for highway projects, the State requires a contractor to file an additional surety bond (the "additional bond") to the Secretary for the benefit of all labor, materialman and others, in such sum as the Agency shall direct, for services and materials used or employed by contactor in carrying out the terms of the contract.[26] In order to make obtain the benefit of this additional bond, the claimant must file his or her claim with the Secretary within 90 days after final acceptance of the project by the State of Vermont or within 90 days from the time the taxes or contributions to the Vermont Commissioner of Labor are due and payable.[27] Within one year after filing the claim, the claimant must bring a petition in the Superior Court.[28] "The Secretary at his or her discretion, as to the best interest of the State, may accept other good and sufficient surety in lieu of a bond."[29]

In school construction projects involving "the construct or purchase of a new school, or [] extensive additions or alterations to an existing school," an "eligible"[30] district or independent school can apply for construction aid from the State. In order to receive the State aid, the district must vote funds or authorize a bond for the total estimated cost of the project.[31] If the total estimated cost of the proposed project in under $50,000.00, no performance bond or irrevocable letter of credit is required.[32]

B. Claims to Public Funds

There is no statutory or Vermont Supreme Court authority addressing whether a contractor or subcontractor may place a mechanic's or materialman's lien on property owned by the State. One trial court, after expressing sympathy for the contractor and the lack of a uniform bond requirement for most public projects, held that "sovereign immunity bars such liens,

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[24] *Id.*
[25] *Id.*
[26] Vt. Stat. Ann. tit. 19 § 10(9).
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *See* Vt. Stat. Ann. tit. 16 § 3447.
[31] Vt. Stat. Ann. tit. 16 § 3448 (a)(1), (5)(ii).
[32] *Id.*

because it is not acceptable to allow a private party such power over State property."[33] The subcontractor's complaint to enforce the lien against the State of Vermont was dismissed.

III. STATUTES OF LIMITATIONS AND REPOSE

A. Statutes of Limitations and Limitations on Application of Statutes

Vermont has no statute of limitations that specifically relates to the construction industry. Statutes of limitations limit only court proceedings; arbitration is not barred by the running of a statute of limitations.[34] Vermont law prohibits contractual waiver of the statute of limitations.[35]

Generally in Vermont, as discussed below, the nature of harm done rather than the nature of the cause of action governs which statute of limitations applies.[36]

1. General Statute of Limitations – Six Years

The general statute of limitations is six years.[37] This statute provides that, "A civil action, except one brought upon the judgment or decree of a court of record of the United States or of this or some other state, and except as otherwise provided, shall be commenced within six years after the cause of action accrues and not thereafter."[38]

Even though the general statute contains no explicit discovery rule, the court ruled in a case involving delayed discovery of asbestos fireproofing that a cause of action governed by the general statute "accrues" when plaintiff discovers the injury, or through reasonable diligence should have discovered the injury.[39]

This general statute of limitations applies to all civil actions that are not covered by another specific statute. Claims against builders and architects for physical harm to real property are governed by this six-year statute of limitations.[40] Indemnity claims by contractors against designers resulting from defective flooring in condominiums are governed by the six-year statute

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[33] *Kelley Bros. of New England, LLC v. Mobile Medical Intern. Corp. et. al.*, Docket No. 740-12-13 Wncv 2013 WL 7346939, (Toor, J. Dec. 26, 2013).
[34] *Clayton v. Unsworth*, 2010 VT 84, ¶ 26, 8 A.3d 1066.
[35] Vt. Stat. Ann. tit. 12, § 465 ("Except as otherwise provided by statute, any provision in a contract which limits the time in which an action may be brought under the contract or which waives the statute of limitations shall be null and void.")
[36] *E.g. Eaton v. Prior*, 2012 VT 54, 192 Vt. 249, 58 A.3d 200 (2012); *Kinney v. Goodyear Tire & Rubber Co*. 134 Vt. 571, 367 A.2d 677 (1976) (not necessary to categorize strict product liability action as either tort or contract).
[37] Vt. Stat. Ann. tit. 12, § 511.
[38] *Id.*
[39] *Univ. of Vermont v. W.R. Grace & Co.,* 152 Vt. 287, 290, 565 A.2d 1354, 1357 (1989).
[40] *Congdon v. Taggart Bros., Inc.,* 153 Vt. 324, 325, 571 A.2d 656, 657 (1989) (§ 511 governs action against builder for damages resulting from fire allegedly caused by negligent design and construction of building); *Union Sch. Dist. No. 20 v. Lench*, 134 Vt. 424, 425, 365 A.2d 508, 509 (1976) (§ 511 governs claim against architect for economic loss resulting from negligent repair of roof).

of limitations.[41] Claims against engineers for a defective survey resulting in lost opportunities and diminution in value of real estate are governed by the six-year statute of limitations.[42]

2. Statute of Limitations for Injuries to Persons or Personal Property – Three Years

The statute of limitations for injuries to the person, including emotional distress, and for damage to personal property runs three years from discovery of the injury.[43]

An injury is "discovered" when the plaintiff knows or should have known both the fact of injury and the fact that it *may* have been caused by a *particular* defendant's negligence or other breach of duty.[44] The case law requires no more than the discovery of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery.[45]

3. Death and Survival Claims – Two Years

Death and survival claims have a two-year statute of limitations, assuming the defendant is in the state, running from discovery of the death.[46] If the defendant is outside the state, the statute of limitations begins to run upon return to the state.[47]

4. UCC Breach of Warranty Claims – Four Years

One exception to the "nature of the harm" rule is that a UCC breach of warranty claim runs four years from the date of breach and when "tender of delivery" occurs, regardless of the aggrieved party's knowledge of the breach.[48] The parties may reduce this statute of limitations to one year by agreement but may not extend it.[49]

5. Burden of Proof

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[41] *Inv. Props., Inc. v. Lyttle*, 169 Vt. 487, 739 A.2d 1222, 1228 (1999) (same limitation period applies to an indemnity action as would apply to the underlying action).
[42] *Bull v. Pinkham Eng'g Assocs. Inc.,* 170 Vt. 450, 455, 752 A.2d 26, 30-31 (2000) (§ 511 governs where the harm is economic loss, including lost profit and diminution of value of real property).
[43] Vt. Stat. Ann. tit. 12, § 512(4)-(5); *Politi v. Tyler,* 170 Vt. 428, 751 A.2d 788 (2000) (suit barred under three-year statute as to emotional distress claim).
[44] *Rodrigue v. VALCO Enters.,* 169 Vt. 539, 726 A.2d 61, 63 (1999) (mem.); *Earle v. State*, 170 Vt. 183, 193, 743 A.2d 1101, 1108 (1999).
[45] *Soutiere v. Betzdearborn, Inc.,* 189 F. Supp. 2d 183, 191 (D. Vt. 2002).
[46] Vt. Stat. Ann., tit. 14, §§ 1492 & 1451.
[47] Vt. Stat. Ann., tit. 14, § 1492.
[48] Vt. Stat. Ann. tit. 9A, § 2-725 (1994); *Gus' Catering, Inc. v. Menusoft Sys.,* 171 Vt. 556, 762 A.2d 804 (2000) (software warranty claim was time-barred four years after tender of delivery, notwithstanding argument that additional warranties arose during time when seller unsuccessfully attempted to fix problem); *Paquette v. Deere & Co.,* 168 Vt. 258, 260, 719 A.2d 410, 411-12 (1998); *Aube v. O'Brien,* 140 Vt. 1, 433 A.2d 298 (1981).
[49] *Id*.

The burden of pleading and proving that claim is barred by the statute of limitations rests on the party asserting the defense.[50]

6. Which Statute of Limitations Applies?

A complaint may include claims for damage to both personal property and real estate, or may include UCC warranty claims among a number of legal theories. Which statute applies?

Sometimes the court dismisses claims for harm subject to a shorter period of limitations that has run, while permitting the suit to proceed on claims, such as claims for economic loss, that are within the longer general statute.[51] Other times the court looks to the "gravamen or essence" of the claim and decides whether the whole matter "predominantly or essentially relates" to the time-barred claim;[52] if so, the whole claim is dismissed. Otherwise, the claim may be divided and the portions of the claim that are not time-barred are permitted to move forward.[53]

B. Statutes of Repose and Limitations on Application of Statutes

Vermont's statutes of limitations can be indefinite because they generally run from discovery of the legal injury. In contrast, a "statute of repose" establishes a maximum length of time within which a plaintiff must commence suit, even if the cause of action is not discovered and not barred by any applicable statute of limitations.[54]

Vermont's only statute of repose relevant to the construction industry places an outside time limit of twenty years from the last occurrence to which the injury is attributed. This statute applies in cases involving "noxious agents medically recognized as having a prolonged latent development."[55] This might apply, for example, in a radon, formaldehyde or asbestos case.

Because of the long twenty-year period, the statute has been used or attempted to be used more by claimants than defendants.[56] Any usefulness of the statute to the defense is limited by

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[50] V.R.C.P. 8(c) (statute of limitations is affirmative defense); *Bull v. Pinkham Eng'g Assocs. Inc.,* 170 Vt. 450, 456, 752 A.2d 26, 31 (2000) (defendant has burden of establishing statute-of-limitations defense).

[51] *Egri v. U.S. Airways, Inc.* 174 Vt. 443, 804 A.2d 766 (2002) (mem.) (three-year statute of limitation governs claim for emotional distress and six-year statute governs a claim for lost income and benefits resulting from single wrongful act); *Fitzgerald v. Congleton,* 155 Vt. 283, 288, 583 A.2d 595, 598 (1990) (claim for damages resulting from emotional distress is an "injury to the person" and must be commenced within three years after the cause of action accrues; whereas claim for economic losses do not constitute personal injuries and fall under the six-year limitations).

[52] *Lamell Lumber Corp. v. Newstress Int'l, Inc.,* 2007 VT 83, ¶ 12, 182 Vt. 282, 938 A.2d 1215 (where transaction contains elements of both sales and service, applicability of UCC four-year statute of limitations depends on whether transaction predominantly or essentially relates to goods or to services); *Rennie v. State,* 171 Vt. 584, 762 A.2d 1272 (2000) (claim barred under the three-year statute of limitations even though economic losses alleged, where "gravamen or essence" of the claim was physical and emotional harm).

[53] *Id*.

[54] *Cavanaugh v. Abbott Labs.,* 145 Vt. 516, 528, 496 A.2d 154, 161-62 (1985).

[55] Vt. Stat. Ann. tit. 12, § 518(a).

[56] *Campbell v. Stafford* , 2011 VT 11 (mem.) (holding that cancer is not "noxious agent" that extends the statute of limitations to twenty years).

an interpretation that the "last occurrence" can refer, not to the defendant's last negligent act, but to a later triggering event.[57]

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

To the extent Article 2 of the UCC applies, Vermont requires that a buyer notify the seller of any alleged breach of warranty in order to provide the seller with an opportunity to cure. Once a buyer accepts tender, "The buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."[58] This notice requirement affords the seller the opportunity to cure the claimed defects or minimize the buyer's losses.[59] The right to cure has limits. The buyer is not bound to permit the seller to tinker with an item indefinitely and hope that it may ultimately be made to comply with the warranty. "At some point [though this point is not specified] a buyer may say 'enough is enough' and revoke acceptance."[60] The timeliness of notice of a breach of contract is a question for the trier of fact.[61] There is no specified time limit with regard to what constitutes "a reasonable time" as identified in the statute.

V. INSURANCE COVERAGE AND ALLOCATION ISSUES

A. General Coverage Issues

1. Coverage for Contractual Indemnity

Vermont law does not protect contractors from unfavorable terms in their contracts. Under Vermont law, indemnity contracts are valid and enforceable according to their terms, so long as the meaning is clear. A commercial party may obtain indemnity against its own negligent conduct, even if the contract does not expressly refer to negligence. Further, it is no defense to indemnification under an express agreement that the indemnitee has breached the contract. In one case, a worker on leased commercial premises brought a negligence action against the lessor for damages for severe injuries sustained in a fall from a loft storage area, through a suspended ceiling, and to the floor below. Under the lease, the lessor was entitled to indemnification from the tenant, notwithstanding the tenant's claim that the lessor breached the lease by failing to maintain the premises.[62]

2. Additional Insured Status and Scope of Coverage

Generally, the "anti-subrogation" rule prevents an insurer that is providing coverage to its policy holder from seeking a subrogation action against a co-insured or additional insured under

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[57] *Cavanaugh,* 145 Vt. at 528-30, 496 A.2d at 162-63 (statute of repose did not bar DES case brought by a daughter who developed cancer 22 years after her pregnant mother injected the drug because the last occurrence to which the injury was attributed was the onset of menarche at puberty).
[58] Vt. Stat. Ann. tit. 9A § 2-607 (2015)
[59] *Wilk Paving, Inc. v. Southworth-Milton, Inc.,* 162 Vt. 552, 649 A.2d 778 (1994).
[60] *Id*. at 555.
[61] *Agway, Inc. v. Teitscheib*, 144 Vt. 76, 472 A.2d 1250 (1984).
[62] *Hart v. Amour,* 172 Vt. 588, 590, 776 A.2d 420, 424 (2001),

the policy.[63] This rule applies even if the additional insured's coverage under the policy is secondary to other coverage it might have.[64]

The rule extends to both express and implied co-insureds.[65] Whether a party is a co-insured under a policy must be determined by looking at the agreement between the subrogor and the target.[66] However, there must be express or implied intent to have the party as a co-insured party. In one case, a town building suffered water damage after the negligent use of "flash powder" by a theater guild resulted in the building's fire suppressant system being activated. The town's fire insurer, after paying the town for the damages to the building, sought to subrogate against the theater guild. The guild had an oral lease with the town where the guild paid a nominal $1 a month rent and performed general maintenance and upgrades to their theater space, in exchange for the opportunity to use the space for performances. The guild argued that they were a co-insured under the lease and, therefore, the insurance company should not be allowed to subrogate against the guild. The court reasoned that the oral lease contained neither an implied nor express intent to have the guild be a co-insured party under the town's policy, therefore, subrogation was permissible.[67]

One exception to the anti-subrogation rule is the "no coverage" exception: the rule does not preclude a subrogation claim by the insurer to the extent that the occurrence would have been excluded from coverage for the co-insured. While there has been some suggestion that Vermont does not recognize the "no coverage" exception, the only court decision suggests otherwise, stating that there is no reason to believe that the Vermont Supreme Court "would not recognize the 'no coverage' exception to the anti-subrogation rule, since it is totally logical" and furthers the primary intent of the anti-subrogation rule: to prevent an insurer from being able to avoid ultimate payment of claims for the very risk it has undertaken in the policy.[68]

a. Effect of "Other Insurance" Clauses

Where "other insurance" clauses of insurance policies are mutually repugnant, each is deemed void and the rule is to prorate the loss between insurers.[69] Where "other insurance" clauses are not mutually repugnant but competing, Vermont courts will reconcile the clauses to give effect to the parties' intent as long as that reconciliation does not violate public policy or compromise coverage for the insured.[70] If policies provide for a consistent method of apportioning loss, the court will honor that method.[71]

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[63] *Union Mutual Fire Ins. Co. v. Joerg*, 2003 VT 27 ¶ 6; *Travelers Indem. Co. of America v. Deguise*, 2006 VT 87.
[64] *Treetop at Stratton Condo. Ass'n v. Treetop Dev. Co*., No. 147-3-09 Wmcv (Carroll, K., Aug. 19, 2013).
[65] *Travelers Indem. Co. of America v. Deguise*, 2006 VT 87.
[66] *Id*.; *Union Mutual Fire Ins. Co. v. Joerg*, 2003 VT 27; *Town of Stowe v. Stowe Theatre Guild*, 2006 VT 79.
[67] *Town of Stowe v. Stowe Theatre Guild*, 2006 VT 79.
[68] *Treetop at Stratton Condo. Ass'n v. Treetop Dev. Co*., No. 147-3-09 Wmcv (Carroll, K., Aug. 19, 2013).
[69] *Fireman's Fund Ins. Co. v. CNA Ins. Co*., 2004 VT 93 ¶ 22 (citing *State Farm Mut. Auto Ins. Co. v. Powers*, 169 Vt. 230, 237, 732 A .2d 730, 735 (1999); *Champlain Cas. Co. v. Agency Rent-A-Car, Inc.*, 168 Vt. 91, 97-98, 716 A.2d 810, 814 (1998)).
[70] *Id.* at ¶ 23 (citing *Powers*, 169 Vt. at 235).
[71] *Champlain CAS. Co.,* 168 Vt. 91, 98 n1., 716 A.2d 810, 814 (1998).

One Vermont court prorated the settlement amount and defense costs between concurrent insurers in proportion to limits, based both on the consistent terms of the "other insurance" clauses of the two policies and the settled common law precedent.[72] In another case, the court determined that one company's coverage was primary, and the other's was excess, based on language in one policy (omitted in the other) that said the policy was "excess over *any* other liability insurance available to any insured."[73]

3. Insurance Procurement Clauses

The Vermont Supreme Court has not addressed the issue of what damages may be recovered for the breach of an insurance procurement clause. Does the breaching party effectively become the insurer and provide a defense and indemnity to the non-breaching party? One Vermont trial court answered that question affirmatively and determined that the remedy for breach of an insurance procurement clause is not limited to out-of-pocket expenses. Instead, a breaching party is liable for damages that flow naturally from a breach of a promise. These damages include the amounts that would have been due under the insurance contract if it had been obtained. "A landlord who has no knowledge of a tenant's failure to acquire the requisite insurance and is left uninsured may recover the full amount of the underlying tort liability and defense costs from the tenant."[74]

4. Intersection of Indemnity and Insurance

There is likewise some support for the proposition that insurance procurement clauses are considered entirely independent of the indemnification provisions in contracts, and therefore a failure to procure insurance results in a separate cause of action from the breach of an indemnification clause. Further, a final determination of the liability for failure to procure need not await a factual determination as to whose negligence caused injury to the plaintiff.[75]

B. Trigger of Coverage

The Vermont Supreme Court has not considered the appropriate "trigger" of insurance coverage for construction defect claims. The court has, however, decided trigger issues in pollution and toxic tort cases.

Under the "continuous-trigger" theory, coverage is triggered under all polices on the risk from the time of first exposure to the time the damage first becomes apparent.[76]

The court adopted the "continuous-trigger" theory in a groundwater contamination case where a waste hauler had dumped waste over a period of fifteen years. Continuous exposure to contamination during the policy period was sufficient to trigger coverage under an old policy,

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[72] *Hathaway v. Tucker*, 2010 VT 114.
[73] *Fireman's Fund Ins. Co.*, 2004 VT 93 ¶ 21.
[74] *Green Mtn. Propane Gas v. Kimball*, 2005 WL 5895242 (Vt. Super.) (Trial Order).
[75] *Id*.
[76] *Morrisville Water & Light Dept. v. USF&G, CO.*, 775 F. Supp. 718, 730-731 (D. Vt. 1991) (outlining five different rules used by courts to determine if an "occurrence" was triggered during the policy period in cases involving exposure to toxic substances).

though the contamination was not discovered until after the policy had expired. Because in this case environmental injury in fact occurred during the policy period the court left open whether exposure alone, without any actual injury, was a sufficient initial triggering event.[77]

In an earlier case, the court implied that actual injury is necessary to support the "continuous-trigger" theory. Evidence that wastes had been spilled at the State prison during the 1940s and 1950s and that contamination was discovered in the 1990s was insufficient to trigger policies issued to the State in the 1960s and 1970s. The court said there must be evidence that the property damage was continuing or progressively deteriorating during the policy period.[78]

Exposure alone, however, was sufficient to trigger defense obligations in a toxic tort case where claimants alleged they suffered serious increased health risks from exposure to urea formaldehyde in a home sold by defendant and that the formaldehyde insulation diminished the fair market value of their house, the court held these allegations were sufficient "bodily injury" and "property damage" to trigger the defense obligation under the defendant's homeowner's policy.[79] Similarly, when the Court used "continuous-trigger" theory in a 2011 environmental case to apportion cleanup costs of a gasoline leak, the Court apportioned liability between an insurer and its insured who was uninsured for certain periods by the percentage of the exposure period spent on the risk, rather than by damages incurred during each period.[80]

C. Allocation among Insurers

The problem of allocation arises in different contexts with, perhaps, different solutions. Different rules may apply where two or more insurers cover different risks or successive risks, rather than where two or more insurers cover concurrent risks. Rules that govern allocation among insurers may not necessarily apply where part of the risk is uninsured. If a party presents evidence showing some logical and fair basis for apportionment, the court may follow it.

The Vermont case law is sparse generally and nonexistent in cases involving construction defects or specialized contractors' liability policies. The comments that follow are general in nature.

In the environmental area, where a continuous trigger rule applies and exposure tends to span multiple policy periods, the court has apportioned defense and indemnity costs between an insurer and its insured who was uninsured for certain periods, based on the percentage of time spent on the risk.[81] In another case, however, the court ruled it proper to allocate costs in proportion to the amount of gasoline that had leaked out of the insured's underground tanks in several separate spills during the insurers' respective policy periods.[82]

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[77] *Towns v. N. Sec. Ins. Co*., 2008 VT 98, 184 Vt. 322, 964 A.2d 1150.
[78] *State v. CNA Ins. Cos.,* 172 Vt. 318, 779 A.2d 662 (2001).
[79] *Am. Prot. Ins. Co. v. McMahan*, 151 Vt. 520, 522, 562 A.2d 462, 466 (1989).
[80] *Bradford Oil Co. v. Stonington Ins. Co.*, 2011 VT 108.
[81] *Towns v. N. Sec. Ins. Co.*, 2008 VT 98.
[82] *Agency of Natural Res. v. Glens Falls Ins. Co.,* 169 Vt. 426, 736 A.2d 768 (1999).

In a partial coverage situation, the court has required an insurer to bear full indemnity costs where the insurer cannot prove what part of the verdict was based on uncovered claims.[83] Similarly the insurer must bear full defense costs, even though only part of the claim was covered, where the insurer cannot clearly distinguish the specific defense costs for non-covered claims from those costs necessarily incurred for covered claims.[84]

VI. CONTRACTUAL INDEMNIFICATION

Contractual indemnity is a risk allocation device by which the parties to a contract apportion or shift responsibility for future third-party claims. Indemnity provisions in commercial transactions are routinely upheld by the Vermont Supreme Court. Vermont does not agree with those jurisdictions that say an indemnification clause cannot cover liability for the indemnitee's own negligence.[85]

In one leading case, the court enforced a broad indemnification clause against a contractor, despite the owner's negligence.[86] A security guard injured on a faulty stair while working as an employee of a contractor brought a negligence action against the owner of the facility where he was posted. The facility's owner brought a third-party action against the contractor, claiming that the contractor was required to indemnify it under their contract, even if the damaged stair was caused by the owner's own negligence. The contract at issue stated that the contractor, agreed to:

> assume all risk of injury to persons, including himself, his employees and agents, and or damage to property in any manner resulting from or arising out of or in any manner connected with [the indemnitor's] operations hereunder, and [the indemnitor] agrees to indemnify and save [the indemnitee] harmless from any and all loss caused by or resulting from any such injury or damage.[87]

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[83] *Pharmacists Mut. Ins. Co. v. Myer,* 2010 VT 10, 993 A.2d 413.

[84] *City of Burlington v. Associated Elec. & Gas Ins. Servs., Ltd.,* 170 Vt. 358, 363, 751 A.2d 284, 292 (2000) (citing B*urlington Drug Co. v. Royal Globe Ins. Co*., 616 F. Supp. 481, 483 (D. Vt. 1985) (where covered and non-covered claims cannot be so distinguished, the insurer will be liable for all fees expended) (affirming allocation of certain defense costs to the insured because they can "clearly be distinguished from the covered claims").

[85] *Hemond v. Frontier Commc'ns of Am., Inc*., 2015 VT 66, ¶ 29, 122 A.3d 1205, 1214; *Southwick v. City of Rutland,* 2011 VT 53; *Hamelin v. Simpson Paper (Vermont) Co*., 167 Vt. 17, 702 A.2d 86 (1997); *Furlon v. Haystack Mountain Ski Area, Inc*., 136 Vt. 266, 269-70, 388 A.2d 403, 405 (1978). The court has stated, "[t]he issue in Vermont is not whether commercial parties may allocate liability among themselves, including indemnification of one party for its own negligence, but under what circumstances the agreement has to expressly disclose that fact." *Stamp Tech, Inc. v. Lydall/Thermal Acoustical, Inc*., 2009 VT 91, ¶ 22, 186 Vt. 369, 987 A.2d 292.

[86] *Hamelin*, 167 Vt. 17, 702 A.2d 86 (1997).

[87] *Id.* at 19.

The Court enforced the indemnity clause as written in recognition that parties to arms-length business deals will divide certain risks and responsibilities, and that an indemnification clause does no more than allocate the cost of purchasing insurance.[88]

VII. CONTINGENT PAYMENT AGREEMENTS

Contingent payment agreement in construction contracts are used in contracts between a general contractor and a subcontractor, and typically state that payment to the subcontractor will not be made until the general contractor is paid by the owner. They are commonly referred to as "pay-if-paid" or "pay-when-paid" clauses. In the absence of case law on the topic, arguments are available to both the general contractor looking to enforce the agreement and the subcontractor seeking to be relieved of its provisions.

A. Enforceability

Vermont's construction prompt payments law[89] does not, on its face, rule out contingent payment agreements. Payments made by an owner to a contractor are held in a statutory "express trust" for payment of materials furnished or construction services rendered.[90] A subcontractor must be paid "the full or proportional amount received for [its] work and materials …" within the later of seven days after receipt of each progress or final payment or seven days after receipt of the subcontractor's invoice.[91] This appears to imply that if a general contractor receives less that the full amount from the owner, the general contractor may pay the subcontractor the proportional amount that it received from the owner.

While there is no reported case law in Vermont construing contingent payment provisions, there is an argument that, if tested, they will be found to violate public policy. Since a "pay-if-paid" clause makes the subcontractor's right to payment contingent upon the uncertain event of payment to the general contract by the owner; and, since a subcontractor cannot enforce its mechanic's lien until after the payments become due,[92] a "pay-if-paid" clause would operate as a waiver of the subcontractor's rights to enforce its mechanic's lien. That result would conflict with the Vermont's Contractor's Lien statute, which prohibits waiver of mechanics' and material suppliers' lien rights and makes "any provision calling for such advance waiver unenforceable."[93]

VIII. SCOPE OF DAMAGE RECOVERY

A. Personal Injury Damages vs. Construction Defect Damages

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[88] *Id. Cf. Colgan*, 150 Vt. at 377, 553 A.2d at 146 (the court held that a waiver in the parties' construction contract did not cover claims for the builder's negligence. The exculpatory clause disclaimed all warranties and "any other obligations or liability on the part of the contractor" but did not make any specific reference to negligence or tort liability and therefore did not waive the owner's ability to sue on a negligence theory when a wall of the storage facility collapsed).

[89] Vt. Stat. Ann. tit. 9 § 4001-4009.

[90] Vt. Stat. Ann. tit. 9 § 4005a.

[91] Vt. Stat. Ann. tit. 9 § 4003(c).

[92] Vt. Stat. Ann. tit. 9 § 1923.

[93] Vt. Stat. Ann. tit. 9 § 1921(f).

In a personal injury case recoverable damages include economic damages such as medical expenses and lost wages, as well as non-economic damages such as pain and suffering, that are not generally recoverable in a construction defect case. In construction defect cases, when loss in value to plaintiff cannot be calculated with sufficient certainty, the measure of damages is either the cost of repair or diminution in the market price of the property. If damages are to be measured by diminution in value of the property, and more than one contractor has committed a breach that affects that value, the diminution in value may be allocated to the contractors in relation to their impact on the diminution.[94] However, in the alternative a court may use the substantial factor test and decide that each wrongdoing is responsible for the entire loss.[95] Also, see sections on consequential damages and economic loss doctrine.

B. Attorney's Fees Shifting and Limitations on Recovery

Generally, Vermont applies the "American rule" on attorneys' fees, which means that the parties must bear their own attorney's fees absent a statutory or contractual provision authorizing fee shifting. However, where a party to the action behaves in bad faith or with vexatious intent, the court may award attorneys' fees.[96]

Vermont has enacted statutes that specifically apply to construction contracts. 9 V.S.A. §§ 4001 – 4009. 9 V.S.A. § 4007 creates an exception to the "American rule", providing that:

> Notwithstanding any contrary agreement, the substantially prevailing party in any proceeding to recover any payment within the scope of this Chapter [construction contracts] shall be awarded reasonable attorney's fees in an amount to be determined by the court or arbitrator, together with expenses.

The statute provides that reimbursement of attorneys' fees are mandatory to a substantially prevailing party, but the question of whether any party to a lawsuit substantially prevailed is left to the trial court's discretion and does not flow automatically from the calculation of the net victor (as where the owner and contractor prevail on counterclaims against each other).[97]

C. Consequential Damages

In a breach of contract case, there are two types of damages: direct damages and consequential damages.[98] Direct damages are damages that naturally and usually flow from the breach itself. Consequential damages must pass the test of causation, certainty, and foreseeability, and must have been in the contemplation of the parties at the time the parties entered into the contract.[99]

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[94] *Winey v. William E. Dailey, Inc.*, 161 Vt. 129, 636 A.2d 744 (1993).
[95] *Id*. at n6.
[96] *Agway, Inc. v. Brooks*, 173 Vt. 259, 790 A.2d 438 (2001).
[97] *Fletcher Hill, Inc. v. Crosbie*, 178 Vt. 77, 872 A.2d 292 (2005).
[98] *Waterbury Feed Company, LLC v. O'Neil*, 2006 VT 126, 181 Vt. 535, 915 A.2d 759.
[99] *Id*.

D. Delay and Disruption Damages

Unless the terms of a construction contract provide otherwise, when an owner's delay prevents a contractor from completing work called for by a construction contract, resulting in the contractor's termination of performance, a proper measure of the contractor's damages is contract price minus cost of completion and other costs avoided, plus damages incurred as a result of owner's delay.[100]

E. Economic Loss Doctrine

Vermont follows the Economic Loss Doctrine which generally allows claims for purely economic loses only in contract actions, and not in tort actions. Purely economic losses are not recoverable in tort actions. Purely economic losses are recoverable under contract law.[101] "The underlying premise of the economic loss rule is that negligence actions are best suited for resolving claims involving unanticipated physical injury, particularly those arising out of an accident. Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement."[102]

Vermont has not expressly recognized an exception to the Economic Loss Doctrine for claims related to the provision of "professional services." However, the Vermont Supreme Court has implied such an exception on several occasions. In one case, the Vermont Supreme Court acknowledged that other states recognize such an exception when the parties had a "special relationship" where one party undertakes a "special duty" distinct from contractual duties, but the Court found it unnecessary to decide in that case whether it would recognize the exception.[103] In another case, the Court stated that purely economic losses may be recoverable in a professional services case" because the special relationship between the parties itself creates an independent duty of care.[104] However, the Court ruled that a contractor was not liable for negligent design or negligent construction because it held itself out as a contractor, not as a provider of specialized professional services, nor did the owner rely on the contractor as such.[105] In so deciding, the Court appeared to lay out the following as potential factors for a professional services exception: (a) contractors holding themselves out as providing professional services, (b) charging increased prices for "professional" services, and (c) the consumer's reliance on the contractor's representations as to professional services. The Court also downplayed the role of licensure in determining whether a contractor is a professional service.[106]

F. Interest

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[100] *McGee Constr. Co. v. Neshobe Dev.*, 156 Vt. 550, 594 A.2d 415 (1991); RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981).
[101] *Murphy v. Patriot Ins. Co.,* 2014 VT 96, ¶ 15, 197 Vt. 438, 445, 106 A.3d 911, 916; *Hamill v. Pawtucket Mut. Ins. Co.*, 179 Vt. 250, 892 A.2d 226 (2005).
[102] *Springfield Hydroelectric Co. v. Copp*, 172 Vt. 311, 779 A.2d 67 (2001) (citations and quotations omitted); *Hunt Const. Grp., Inc. v. Brennan Beer Gorman/Architects, P.C.*, 607 F.3d 10 (2d Cir. 2010) (construing Vermont law).
[103] *Id.*
[104] *EBWS, LLC v. Britly Corp.*, 2007 VT 37, 181 Vt. 513, 928 A.2d 497.
[105] *Id*.
[106] *Id*.

Vermont's Prompt Pay Act[107] governs the interest recoverable for an overdue payment under a "construction contract," which the Act defines broadly as any agreement, whether written or oral, to perform work on any real property located within the state of Vermont."[108]

If any progress or final payment to a contractor is delayed beyond the due date, whether set by statute or by the parties' agreement,[109] the owner must pay the contractor interest, beginning on the 21st day, at an interest rate equal to that established by the judgment lien statute,[110] which is 12 percent per annum, on such unpaid balance as may be due.[111] The parties may agree to a different interest rate.[112]

If any progress or final payment to a subcontractor is delayed beyond the due date, the contractor or subcontractor must pay its subcontractor interest, beginning on the next day, at the judgment lien interest rate, 12 percent per annum, on such unpaid balance as may be due. The parties may not agree to a different interest rate.[113]

Improper withholding of retainage also subjects the withholder to 12 percent interest.[114]

On claims not governed by the Prompt Pay Act, such as tort liability, prejudgment interest accrues at a rate of 12 percent per annum.[115]

G. Punitive Damages

Punitive damages are compensable in Vermont only upon a showing of wrongful conduct that is outrageously reprehensible and malice.[116] Malice is defined variously as bad motive, ill will, personal spite or hatred, reckless disregard, and the like.[117] Punitive damages are generally not available in breach of contract actions. However, Vermont recognizes an exception to this general rule for cases in which the breach has the character of a willful and wanton or fraudulent tort, and when the evidence indicates that the breaching party acted with actual malice.[118] The purpose of punitive damages is to punish conduct that is "morally culpable" and "truly reprehensible", so the Vermont court has set a high bar for plaintiffs seeking such damages. Punitive damages are available only to punish and deter defendants who acted with actual malice.[119]

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[107] Vt. Stat. Ann. tit. 9 §§ 4001 – 4007.
[108] Vt. Stat. Ann. tit. 9 § 4001(5).
[109] Vt. Stat. Ann. tit. 9 § 4002(c).
[110] Vt. Stat. Ann. tit. 12 § 2903(c).
[111] Vt. Stat. Ann. tit. 9 § 4002(d).
[112] *Id*.
[113] Vt. Stat. Ann. tit. 9 § 4003(d).
[114] Vt. Stat. Ann. tit. 9 § 4005(d).
[115] Vt. Stat. Ann. tit. 9 § 41a.
[116] *Fly Fish Vt., Inc. v. Chapin Hill Estates, Inc.*, 2010 VT 33, ¶ 18, 187 Vt. 541, 996 A.2d 1167.
[117] *Id*.
[118] *Monahan v. GMAC Mortg. Corp.*, 2005 VT 110, 179 Vt. 167, 893 A.2d 298.
[119] *Id*.

H. Liquidated Damages

If a liquidated damages provision is reasonable, a party may keep the full amount specified therein regardless of the actual loss suffered.[120] Whether a liquidated damages provision is reasonable is a question of law for the Court.[121] There are three factors considered in the "reasonableness" determination: (1) because of the nature of the subject matter, damages from a breach would be difficult to calculate; (2) whether the sum fixed as liquidated damages reflects a reasonable estimate of likely damages; and (3) whether the provision is "intended solely to compensate the non-breaching party and not as a penalty for incentive to perform."[122] These criteria will be evaluated at the time of contract formation, and not after the contract has been breached.[123]

IX. CASE LAW AND LEGISLATION UPDATE

A. Case Law

When including "differing site conditions" clauses in contracts, a contractor need not show that its interpretation of site conditions used in its bid is the only reasonable one, but only that its interpretation is a reasonable reading.[124] Vermont uses the three-part *Stuyvesant* test to determine whether a differing site condition clause is triggered: (1) there were reasonably plain or positive indications in the bid information or contract documents that conditions would be otherwise than actually found in contract performance; (2) the conditions actually encountered were reasonably unforeseeable based on all the information available to the contractor at the time of bidding, and (3) the contractor reasonably relied upon its interpretation of the contract and contract-related documents.[125]

The Vermont Supreme Court reinforced the six year statute of limitations for civil actions, finding that the term began to run when a homeowner who sued a contractor for negligence was first aware that the roof was not performing consistent with his expectations and had begun to rust.[126]

Contractors should use care when designating workers as independent contractors, as a recent case demonstrated. The Vermont Supreme Court currently follows the ABC test for determining whether a worker is an employee or an independent contractor and applies a liberal construction to all three parts of the test: (A): the right of control a contractor has over the worker's performance, (B) whether the worker's services are provided outside the usual course of business, and (C) whether the worker is independently established providing the same or

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[120] *Heath Knolls Investments, Inc. v. Westlake Residential Partners, LLC*, No. 2:07-CV-049, 2008 WL 1902066, at *5 (D. Vt. Apr. 25, 2008).
[121] *Renaudette v. Barrett Trucking Co*., 167 Vt. 634, 635, 712 A.2d 387, 388 (1998) (citing *Highgate Assocs., Ltd. v. Merryfield,* 157 Vt. 313, 316, 597 A.2d 1280, 1282 (1991)).
[122] *Id.* (quoting *New England Educ. Training Serv., Inc. v. Silver St. P'ship*, 156 Vt. 604, 613, 595 A.2d 1341, 1346 (1991)).
[123] *Id.*
[124] *W.M. Schultz Construction, Inc. v. Vt. Agency of Transp.*, 2018 VT 130 at ¶ 35.
[125] *Id.* at ¶ 6
[126] *Abaijan v. Truexcullins, Inc.*, 2017 VT 74.

similar services as they provide for the contractor/employer.[127] Where a worker could be interpreted as failing one of these three elements, the worker is considered an employee, and not an independent contractor, for the purposes of unemployment insurance.[128]

B. Legislative Update- Biennial Session 2017-2018

The 2017-2018 Biennial Session led to no significant changes in construction law, though it did see several bills regarding employee classification and independent contractors fail to advance into law. This issue shows signs of continuing to be in contention during the 2019-2020 Biennial Session.

[127] *Great N. Constr., Inc. v. Dep't of Labor*, 2016 VT 126 at ¶ 2.
[128] *Id*. at ¶ 27.