



STATE OF INDIANA CONSTRUCTION LAW COMPENDIUM

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Indiana is a modified comparative fault state. Indiana's modified comparative fault system differs from the pure comparative fault system in place in California, for example, and as modified "serves as an important safeguard against what most Hoosiers consider "frivolous" lawsuits, by persons whose own conduct was the predominant, proximate cause of an accident which resulted in injuries to themselves and others." Davis v. LeCuyer, 849 N.E.2d 750, 755-756 (Ind.Ct.App. 2006); see also Ind. Code § 34-51 et seq. Under the modified comparative fault system in Indiana, if a person is found to be greater than 50 % at fault for his or her own injuries then that person may not recover damages. *Id.* at 755. If a plaintiff is 50% or less at fault for his own injuries, the damages are decreased by the plaintiff's assigned percentage of fault. Hanson v. St. Luke's United Methodist Church, 704 N.E.2d 1020, 1026 (Ind. 1998). "Under the Comparative Fault Act, liability is to be apportioned among persons whose fault caused or contributed to causing the loss in proportion to their percentages of "fault" as found by the jury." Control Techniques, Inc. v. Johnson, 762 N.E.2d 104, 109 (Ind. 2002) (citing Cahoon v. Cummings, 734 N.E.2d 535, 541 (Ind. 2000); see also Ind. Code § 34-51-2-8.

I. Breach of Contract

Generally, a claim for breach of a written contract is subject to a ten-year statute of limitations claim in Indiana. See Ind. Code § 34-11-2-11. In Meisenhelder v. Zipp Express, 788 N.E.2d 924, 930 (Ind.Ct.App. 2003), the court concluded that "the discovery rule is applicable to actions for breach of a written contract under I.C. §34-11-2-11, and that [plaintiff's] cause of action accrued when he knew, or in the exercise of ordinary diligence, could have discovered, that his employment contract had been breached." *Id.* at 930.

Similarly, in Habig v. Bruning, 613 N.E.2d 61 (Ind.Ct.App. 1993), the court held that under the discovery rule, a homeowner's claims against a contractor for breach of contract, breach of implied warranties of habitability and workmanship regarding a home addition began to accrue when the homeowner knew or in the exercise of ordinary diligence could have discovered that his property had been damaged. *Id.* at 65.

II. Negligence

Generally, an injury resulting from faulty or negligent construction may give rise to an action for breach of a contractor's common law duty of care, or negligence. An action for negligence in construction may be based upon the contractor's poor workmanship, supervision, inspection or design.

A negligence claim against a party may be limited by the economic loss doctrine. The economic loss doctrine in Indiana bars a plaintiff from recovering economic damages under a claim in tort. Indianapolis – Marion County Public Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722 (Ind. 2010). Therefore, the recovery of pure economic loss resulting from damages to the building itself falls within the area of contract law, not tort law. *Id.* However, where there is

damage to other property or personal injury, a cause of action for negligence may exist, and it would be subject to Indiana's two-year statute of limitations. Ind. Code § 34-11-2-4.

III. Breach of Warranty

In construction cases, a plaintiff may assert a cause of action for breach of warranty. The breach of warranty can be based on either express warranty provisions contained in the contract between the plaintiff and the general contractor, and/or warranties implied by law.

Indiana recognizes a warranty of habitability, which is an implied warranty that a home "will be free from defects that would substantially impair the use and enjoyment of the home." Russo v. Southern Developers, Inc., 868 N.E.2d 46, 48 (Ind.Ct.App. 2003). Claims for breach of the implied warranty typically involve disputes with a "builder-vendor"; however, Indiana has extended the reach of this type of claim to include "landlord-tenant" disputes. Johnson v. Scandia Associates, 717 N.E.2d 24, 31 (Ind. 1999). The implied warranty of habitability extends to subsequent purchases if the claim is for latent defects. Russo, 868 N.E.2d. at 48. A claim under a breach of implied warranty of habitability is subject to the six (6) year statute of limitations under Ind. Code § 34-11-2-7, which is a discovery-based statute. Id. This claim for breach of the implied warranty of habitability commences when a person knows or in the exercise of ordinary diligence, could have known, that an injury had been sustained. Id.

There is a strong argument that a breach of warranty claim, brought under the Uniform Commercial Code, set out in Ind. Code § 26-1-2-725, should not be allowed in construction cases if the building component used in the construction of the building does not meet the definition of a good. Under Ind. Code § 26-1-2-314, a warranty of merchantability is implied in a contract for the sale of goods. Further, Ind. Code § 26-1-2-105(1) defines goods as "all things...which are moveable at the time of identification to the contract for sale."

In Indiana, transactions involving both goods and services are classified as "mixed" transactions. Insul-Mark Midwest, Inc. v. Modern Materials Inc., 612 N.E.2d 550, 553-554 (Ind. 1993). In Insul-Mark, the Indiana Supreme Court accepted the "predominant thrust test" for the determination of whether a "mixed" contract falls under the provisions of Indiana's UCC or contract law. "Under the predominant thrust test, courts look to the agreement between the parties to determine their understanding about the predominant purpose of the contract." Id. at 554. Similarly, in Ogden Morton Sys., Inc. v. Whiting Corp., 179 F.3d 523 (7th Cir. 1999), the court applied Indiana law and utilized the "predominant thrust test" to determine that a "mixed" contract for the procurement and installation of two 13.5-ton cranes was a contract for goods and therefore the four-year statute of limitations under Ind. Code § 26-1-2-725 was applicable. Ogden at 530-31.

IV. Misrepresentation and Fraud

In Indiana, fraud claims are subject to a six-year statute of limitations. Ind. Code § 34-11-2-7(4); See also McKibben Construction v. Longshore, 788 N.E.2d 452, 459 (Ind.Ct.App. 2003). Indiana law recognizes two forms of fraud, actual fraud and constructive fraud. The elements of actual fraud are:

- (1) a material misrepresentation of past or existing fact by the party to be charged which,
- (2) was false,
- (3) was made with knowledge or in reckless ignorance of the falsity,
- (4) was relied upon by the complaining party, and
- (5) proximately caused the complaining party injury.

Darst v. Illinois Farmers Ins. Co., 716 N.E.2d 579, 581 (Ind.Ct.App. 1999), trans. denied (2000). The elements of constructive fraud are:

- (1) a duty owing by the party to be charged to the complaining party due to their relationship,
- (2) violation of that duty by the making of deceptive material misrepresentations of past or existing facts or remaining silent when a duty to speak exists,
- (3) reliance thereon by the complaining party,
- (4) injury to the complaining party as a proximate result thereof, and
- (5) the gaining of an advantage by the party to be charged at the expense of the complaining party.

Id. In order to establish either actual or constructive fraud, the complaining party must have had a reasonable right to rely upon the statements made or omitted. *Id.* at 582; Westfield Ins. Co. v. Yaste, Zent & Rye Agency, 806 N.E.2d 25, 31, (Ind.Ct.App. 2004). In summary, there are three common elements among actual fraud and constructive fraud that must be proven: (1) a material misrepresentation of past or existing fact by the party to be charged; (2) reliance on the misrepresentation; (3) and that such reliance was the proximate cause of the complaining party's injury. *See*, e.g., Westfield Ins. Co., 806 N.E.2d at 30.

Generally, Indiana's rules of procedure only require notice pleading. However, Indiana Rule of Trial Procedure, 9(B) is an exception. Allegations of fraud must be pled with specificity, meaning the pleading must show the time, place and the contents or substance of the false representations, the fact misrepresented, and an identification of what has been obtained. Dutton v. International Hamilton Co., 504 N.E.2d 313, 318 (Ind.Ct.App. 1987).

V. Strict Liability Claims

Strict liability claims in construction cases have not been accepted in Indiana. Indiana recognizes strict liability claims against sellers of defective products. Ind. Code § 34-20-2-1. Nevertheless, strict liability claims may only be made against manufacturers of products. Ind. Code § 34-20-2-3. Indiana courts have further differentiated the sale of products and the sale of services, stating that the sale of services does not fall under the products liability statutes. Sapp v. Morton Bldgs., Inc., 973 F.2d 539, 541 (Ind. 1992). The court in Sapp dealt with a contractor's remodeling of a barn and the owner's complaints about defects. While the owner attempted to claim that the contractor's work should fall under the products liability statute, the court ruled that the remodeling of the barn was a transaction involving the sale of a service and therefore the statute was inapplicable. *Id.* Indiana courts have also found that the replacing of guardrails along the highway constitutes that sale of a service and does not fall under the products liability act. Hill v. Rieth-Riley Const. Co., Inc., 670 N.E.2d 940, 943 (Ind.Ct.App. 1996).

VI. Indemnity Claims

A. Express Indemnity

Express indemnity agreements are contract provisions in which one party to the contract agrees to pay costs incurred by the other party to the contract as a result of the other party being held liable to a third party. Generally, indemnity provisions in construction contracts are valid in Indiana. Hagerman Construction Corp. v. Long Electric Company, 741 N.E.2d 390, 392 (Ind.Ct.App. 2000). In Indiana, parties may contract as they desire, unless prohibited by legislation. *Id.* For example, a party may contract to indemnify another party for the other's own negligence, but only if the party knowingly and willingly accepts such liability. *Id.* Some Indiana courts have followed a two-step analysis to determine whether a party has knowingly accepted this risk of indemnification: (1) the indemnifying clause must expressly state in clear and unequivocal terms that indemnitor has agreed to indemnify indemnitee for negligence, and (2) the provision must clearly and unequivocally state that it applies to indemnification of indemnitee's own negligence. *Id.*

However, some indemnification provisions in Indiana may be held invalid under Ind. Code § 26-2-5-1. That statute generally provides that indemnity provisions or clauses in construction or design contracts are void and unenforceable if they purport to indemnify the promisee against liability for death or bodily injury to persons, injury to property, and design defects from the sole negligence of the promisee. Moore Heating & Plumbing, Inc. v. Huber, Hunt & Nichols, 583 N.E.2d 142, 147 (Ind.Ct.App. 1991).

B. Implied Indemnity

“The right to indemnity may be implied at common law only in favor of one whose liability to a third person is solely derivative or constructive, and only as against one who has by his wrongful act caused such derivative or constructive liability to be imposed upon the indemnitee. Absent an adequate express contract, a party seeking indemnification from another must be free of fault.” Indianapolis Power & Light Company v. Brad Snodgrass, 578 N.E.2d 669, 671 (Ind. 1991)(citations omitted).

C. Comparative Indemnity

The Indiana Supreme Court has discussed comparative indemnity schemes and concluded “that the law of indemnification is unchanged by the enactment of the Comparative Fault Act. Parties may continue to provide for lawful indemnification by express contract. However, the fault apportionment process under the Act does not give rise to vicarious liability and resulting indemnification rights.” Indianapolis Power & Light Co. v. Brad Snodgrass, Inc., 578 N.E.2d 669, 673 (Ind. 1991).

D. Third Party Beneficiary

The controlling principles concerning third-party beneficiary claims are well established in Indiana. A third-party beneficiary may directly enforce an agreement in Indiana if (1) the contracting parties intended to benefit a third party, (2) the agreement places a duty on one of the parties in favor of a third-party, and (3) the performance of the provision of the agreement provides the third party with a direct benefit that was intended by the parties under the contract. Mogensen v. Martz, 441 N.E.2d 34, 35 (Ind.Ct.App. 1982); see also St. Paul Fire & Marine Insurance Company v. Pearson Construction Company, 547 N.E.2d 853, 856 (Ind.Ct.App. 1989).

In St. Paul, the owner of a project was found to be a third-party beneficiary to the contract between a contractor and subcontractor. The owner’s insurer filed a subrogation action against the contractor and subcontractor to recover the amount it paid to owner for damages. The court concluded that the warranty provision contained in the contract between the contractor and subcontractor imposed a duty and provided the proof necessary that the subcontractor intended to provide a benefit to the owner of the project. Further, the court in St. Paul held that “[a]lthough the cases cited concern third-party beneficiary rights to enforce a contract, a party may also use such status as the basis of a duty in a negligent context. In a contract for work, there is an implied duty to do the work skillfully, careful, and in a workmanlike manner. Negligent failure to do so is a tort, as well as a breach of contract.” *Id.* at 857.

VII. Statute of Repose/Statute of Limitations

Indiana Code § 32-30-1 provides for a 10-year statute of repose for which an architect and/or contractor remain residually liable for deficiency of design and/or construction of improvements to real property. Any action to recover damages based upon contract, tort,

negligence or other legal theory for a deficiency in design or construction, injury to real or personal property or injury or wrongful death must be brought within 10 years of the date of substantial completion of improvement or within 12 years after the completion of drawings (if related to design deficiency). Ind. Code § 32-30-1-5; see also, J.M. Foster, Inc. v. Spriggs, 789 N.E.2d 526, 533 (Ind.Ct.App. 2003)(“The purpose of the construction statute of repose is to protect engineers, architects and contractors from stale claims and to eliminate open-ended liability for defects in workmanship.”)

VIII. Economic Loss Doctrine

The economic loss doctrine in Indiana bars a plaintiff from recovering under tort law when the product caused property damage only to itself. Indianapolis – Marion County Public Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722 (Ind. 2010). Moreover, Indiana courts have held that application of the doctrine in the construction context has resulted in barring tort recovery of economic loss damages from a party involved in a construction project. See Choung v. Iemma, 708 N.E.2d 7, 14 (Ind.Ct.App. 1999)(holding that a homeowner could not recover under a negligence theory when property damage to a residence that arose from a poorly constructed foundation resulted in only economic losses such as the loss of value to the house and the costs to repair and replace).

IX. Recovery of Investigative Costs

At this time, Indiana courts have not addressed the specific issue of recovery for investigative costs.

X. Emotional Distress Claims

In Indiana, it is unlikely that a homeowner or homebuyer can recover compensatory damages for emotional distress because of construction defects to their home. See Plummer v. Hollis, 213 Ind. 43, 44 (Ind. 1937) (An action cannot be maintained for damages for mental anguish alone, resulting from a breach of contract claim); Western Union Telegraph Co. v. Ferguson, 157 Ind. 64 (Ind. 1901). Indiana courts have further ruled that economic loss is not “sufficiently serious in nature and the emotional trauma is not of a kind and extent normally expected to create emotional distress in a reasonable person, warranting the imposition of liability.” Comfax Corp. v. North American Van Lines, 587 N.E.2d 118, 127 (Ind.Ct.App. 1992).

XI. Stigma Damages

Stigma damages are comparable to diminution in value because of a perceived problem with the property. Indiana case law does provide for the claim of stigma damages. These cases have dealt specifically with environmental claims where the property has been stigmatized. Stigma damages are recoverable for “losses in the fair market value of property after remediation of environmental contamination.” Pflanz v. Foster, 888 N.E.2d 756, 759 (Ind. 2008); see also Terra-

Products, Inc. v. Kraft Gen. Foods, Inc., 653 N.E.2d 89 (Ind.Ct.App. 1995). Additionally, a stigma claim or diminution in value claim may be part of contractual damages allowed in a case.

Diminution in value has been held to be a proper measure of damages for a building contractor's breach of contract resulting in a number of construction defects including septic field problems, drainage issues, and many other defective or unsightly aspects of the construction. Indiana courts have stated that where damages sought are based on diminution in value, the builder-vendor must be given notice of the defect and afforded an opportunity to remedy the defect. The builder-vendor must be given a reasonable opportunity to cure or repair. Deckard v. Ratcliff, 553 N.E.2d 523, 523-24 (Ind.Ct.App. 1990); Wagner Const. Co., Inc. v. Noonan, 403 N.E.2d 1144, 1150 (Ind.Ct.App. 1980). In diminution in value cases, the amount of damages awarded will be "the difference between the fair market value of the work as performed and the fair market value of the work if it had been performed in accordance with contract specifications." Gough Const. Co., Inc. v. Tri-State Supply Co., Inc., 493 N.E.2d 1283, 1285 (Ind.Ct.App. 1986).

XII. Economic Waste

Generally, the measure of damages for a breach of contract by a general contractor is the cost to remedy the defect. 24 Williston on Contracts § 66:17 (4th Ed. 2003). However, unreasonable economic waste is a factor which must be considered when assessing damages in a breach of construction contract case. "The builder must demonstrate that the measure of damages proposed by the owner would result in economic waste." Gough Const. Co., Inc. v. Tri-State Supply Co., Inc., 493 N.E.2d 1283, 1285 (Ind.Ct.App. 1986). See also, Sanborn Elec. v. Bloomington Athletic Club, 433 N.E.2d 81, 90 (Ind.Ct.App. 1982). Economic waste only exists if there would be an unreasonable duplication of effort if repairs were made to remedy the situation. Willie's Const. Co., Inc. v. Baker, 596 N.E.2d 958, 962 (Ind.Ct.App. 1992); see also Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc., 603 P.2d 513, 524-25 (Ariz.App. 1979). Furthermore, if the building would be substantially destroyed by remedying the defects, the difference in value measure cannot be used and economic waste does not exist. Willie's at 962.

XIII. Delay Damages

Delay damages are generally recoverable in Indiana. Delay damages are extra costs that arise solely as a result of delay by the owner, contractor, or subcontractor. Party-caused delays are not contemplated by the parties and are breaches of implied or express contractual provisions. Osolo School Buildings, Inc. v. Thorleif Larsen & Son of Indiana, Inc., 473 N.E.2d 643, 645 (Ind.Ct.App. 1985). For owners seeking delay damages against contractors, the proper measure of damages for failure to complete a project on time is the rental value or value of use of the property for the time of the delay. Jay Clutter Custom Digging v. English, 393 N.E.2d 230, 233 (Ind.Ct.App. 1979).

XIV. Recoverable Damages

A. Direct Damages

In Indiana, damages for injuries to real property are measured by either: “1) the difference between the value of the building as constructed and what its value would have been had it been constructed in accordance with the contract, or 2) the reasonable cost of curing the defects to make the building conform to the contract.” Willie’s Const. Co., Inc. v. Baker, 596 N.E.2d 958, 961 (Ind.Ct.App. 1992) (quoting Clark’s Pork Farms v. Sand Livestock Sys., 563 N.E.2d 1292, 1297 (Ind.Ct.App. 1990)). However, Indiana courts have refused to assess damages on the theory of repair, “if repairs would entail costs in excess of the economic benefit such repairs would confer.” City of Anderson v. Salling Concrete Corp., 411 N.E.2d 728, 734 (Ind.Ct.App. 1980).

B. Stigma

There are currently no Indiana cases directly on point as to whether stigma damages are recoverable in construction cases. However, Indiana courts generally allow damages for diminution in value (see above section on stigma damages and diminution in value damages).

C. Loss of Use

In the case of loss of use of land in Indiana, the proper measure of damages is rental value. Wallace v. Rogier, 395 N.E.2d 297, 300 (Ind.Ct.App. 1979). See also, Wolff v. Slusher, 314 N.E.2d 758, 763 (Ind.Ct.App. 1974). Although rental value is the normal method for measuring value of loss of use of property, lost profits may be used as a measure where such profits are ascertainable with a reasonable degree of certainty. Wolf at 763. However, if it is impossible to ascertain loss of profits to any reasonable degree of certainty, they are generally excluded in determining the value of the loss of use of property. Indianapolis Rys. v. Terminal Motor Inn, 112 N.E.2d 596, 599 (Ind.Ct.App. 1953).

D. Punitive Damages

In Indiana, punitive damages are only proper when there is “clear and convincing evidence that the defendant acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing.” Wohlwend v. Edwards, 796 N.E.2d 781, 784 (Ind.Ct.App. 2003). “Punitive damages also may be awarded upon a showing of willful and wanton misconduct.” Davidson v. Bailey, 826 N.E.2d 80, 85 (Ind.Ct.App. 2005). In Indiana, a plaintiff may only recover punitive damages in a breach of contract claim if the plaintiff pleads and proves “the existence of an independent tort of the kind for which Indiana law recognizes that punitive damages may be awarded.” Firstmark Standard Life Ins. Co. v. Goss, 699 N.E.2d 689, 696 (Ind.Ct.App. 1998). Additionally, Indiana has a punitive damage cap: “A punitive damage award may not be more

than the greater of: (1) three (3) times the amount of compensatory damages awarded in the action; or (2) fifty thousand dollars (\$50,000).” Ind. Code § 34-51-3-6.

E. Emotional Distress

In Indiana, emotional distress damages are not recoverable under a pure breach of contract theory. Holloway v. Bob Evans Farms, Inc., 695 N.E.2d 991, 995 (Ind.Ct.App. 1998) (citing Plummer v. Hollis, 11 N.E.2d 140 (Ind. 1937)). “The general rule in Indiana, known as the impact rule, is that damages for mental anguish are recoverable only when accompanied by and resulting from a physical injury.” Charlie Stuart Oldsmobile, Inc. v. Smith, 357 N.E.2d 247, 253 (Ind.Ct.App. 1976). Indiana does, however, recognize a few exceptions to that general rule. Emotional distress damages may be awarded when a tort involves “the invasion of a legal right which by its very nature is likely to provoke an emotional disturbance.” Naughle v. Feeney-Hornak Shadeland Mortuary, 498 N.E.2d 1298, 1300 (Ind.Ct.App. 1986); see also Cullison v. Medley, 570 N.E.2d 27, 30 (Ind. 1991) (recognizing that the impact rule does not prohibit recovery for emotional distress when sustained in the course of a tortious trespass); Shuamber v. Henderson, 579 N.E.2d 452, 455 (Ind. 1991) (holding that plaintiff is entitled to maintain an action to recover for emotional trauma that plaintiff sustains as a direct impact of defendant’s negligence without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff) Emotional distress damages may also be awarded when the conduct causing the injury was inspired by fraud, malice, or like motives and the conduct was intentional. Atlantic Coast Airlines v. Cook, 857 N.E.2d 989, 997-998 (Ind. 2006); Groves v. Taylor, 729 N.E.2d 569, 572 (Ind. 2000); Conder v. Wood, 716 N.E.2d 432, 435 (Ind. 1999); Ross v. Cheema, 716 N.E.2d 435, 437 (Ind. 1999); First National Bank of New Castle v. Acra, 462 N.E.2d 1345, 1350 (Ind.Ct.App. 1984).

F. Attorney’s Fees

In deciding whether to award attorney’s fees as damages, “Indiana follows the American Rule which ordinarily requires each party to pay their own attorney’s fees.” Swartz v. Swartz, 720 N.E.2d 1219, 1223 (Ind.Ct.App. 1999). “Generally, attorney’s fees are not recoverable from the opposing party as costs, damages, or otherwise, in the absence of an agreement between the parties, statutory authority, or rule to the contrary.” *Id.*

G. Expert Fees and Costs

Expert fees and costs are considered expenses of litigation. Generally in Indiana, “expenses of litigation may not be included in damages.” Cooper v. High, 317 N.E.2d 177, 179 (Ind. 1974). Exceptions to this general rule may include cases where the parties have made an agreement regarding expert fees and costs and may include cases where a statute explicitly provides for an award of expert fees and costs.

XV. Insurance Coverage for Construction Claims

In Indiana, insurers must carefully weigh their options whenever they are tendered a suit by an insured. Under Indiana law, the insurer's duty to defend is broader than its duty to indemnify. Walton v. First American Title Ins. Co., 844 N.E.2d 143, 146 (Ind.Ct.App. 2006); Liberty Mut. Ins. Co. v. OSI Industries, Inc., 831 N.E.2d 192, 198 (Ind.Ct.App. 2005), trans. denied. However, if an insurer's independent investigation of the facts underlying a complaint against its insured reveals a claim patently outside of the risks covered by the policy, the insurer may properly refuse to defend. Walton, 844 N.E.2d at 146. The insurer's duty to defend is therefore determined by the allegations contained within the complaint and those facts known or ascertainable by the insurer after reasonable investigation. *Id.* at 147; OSI, 831 N.E.2d at 198. If an insurer refuses to defend, it "must protect its interest by either filing a declaratory judgment action for a judicial determination of its obligations under the policy or hire independent counsel and defend its insured under a reservation of rights." Walton, 844 N.E.2d at 146; Liberty Mutual Ins. Co. v. Metzler, 585 N.E.2d 897, 902 (Ind.Ct.App. 1992)

A. Occurrences that Trigger Coverage

In 2010, the Indiana Supreme Court issued a landmark decision in the case of Sheehan Construction Company, Inc. v. Continental Casualty Company, 935 N.E.2d 160 (Ind. 2010). In the Sheehan Construction case, an insurer brought a declaratory judgment action seeking a declaration that its commercial general liability (CGL) policy didn't provide insurance coverage for the costs to repair damage caused by the faulty workmanship of the insured's subcontractors. After both the trial court and the Indiana Court of Appeals found in favor of the insurer, the Indiana Supreme Court reversed, holding that the CGL policy could provide coverage for the subcontractor's faulty workmanship. The Indiana Supreme Court reasoned that to the extent that the faulty workmanship was the product of unintentional conduct, the resulting damage would be "unforeseeable" and constitute an "accident" that is an "occurrence" for purposes of triggering insurance coverage. *Id.* at 170-72. The Sheehan Construction decision abrogated the prior law set forth in cases such as Amerisure, Inc. v. Wurster Construction Co., 818 N.E.2d 998 (Ind.Ct.App. 2004), and R.N. Thompson & Associates v. Monroe Guaranty Insurance Co., 686 N.E.2d 160 (Ind.Ct.App. 1997).

B. Bodily Injury

Typical CGL policies define bodily injury as physical injury, sickness, or disease sustained by a person, including death resulting from any of these at any time. Allegations in a complaint of physical injury generally will constitute a covered injury. In addition, "Indiana law recognizes that emotional injury that does not arise from bodily contact is not bodily injury as contemplated in CGL policies. We agree with the majority of jurisdictions holding that the term "bodily injury" does not include emotional damage that does not arise from a bodily touching." Wayne Township Bd. of Sch. Comm'rs v. Indiana Ins. Co., 650 N.E.2d 1205, 1210 (Ind.Ct.App. 1995)(citations omitted). Thus, if a complaint alleges emotional distress, mental anguish or any

other wording which could be considered a bodily injury, it may be a covered claim. However, some CGL policies specifically exclude coverage for mental anguish and emotional distress.

C. Property Damage

In the Sheehan Construction decision, *supra*, the CGL policy at issue defined “property damage” to include “[p]hysical injury to tangible property, including all resulting loss of use at that property.” Sheehan Construction, 935 N.E.2d at 164. Previously, “property damage” had been found by Indiana Courts to not include the work itself. However, in Sheehan Construction, the Court found that the damage to the work itself could be construed as “property damage,” provided that the faulty workmanship was performed by subcontractors. *Id.* at 171-72. The Indiana Supreme Court cited the subcontractor’s work exception to the “your work” exclusion found in standard CGL policies as the basis for holding that damages to the work itself that are caused by subcontractors can constitute property damage.

D. Defective Workmanship

As discussed above, the Indiana Supreme Court held in Sheehan Construction Company, Inc. v. Continental Casualty Company, 935 N.E.2d 160 (Ind. 2010) that faulty or defective workmanship is typically unintentional, and therefore can constitute an “occurrence” that triggers CGL coverage. The Indiana Supreme Court cited a litany of cases from across the country on both sides of this issue, ultimately deciding to align with decisions holding that “improper or faulty workmanship does constitute an accident so long as the resulting damage is an event that occurs without expectation or foresight.” *Id.* at 169. Moreover, the Sheehan Construction Court held that if the defective work is performed by a subcontractor, then there is “property damage” that is covered by the standard CGL policy. The Court discussed that a CGL policy has a broad grant of coverage, that is then limited by the “your work” exclusion. However, there is an exception to the “your work” exclusion for work performed by subcontractors, which results in coverage for defective work performed by subcontractors.

XVI. Mechanic’s Liens

Indiana’s Mechanics’ Lien Statute can be found at Ind. Code § 32-28-3 et seq. (the “Statute”). The key aspect of filing a claim for a Mechanic’s lien is the recording of lien notice conforming to the requirements of Ind. Code § 32-28-3-3. If the notice requirements are not met, the lien is invalid. The party asserting the lien must strictly comply with the filing requirements set forth in the Statute. Specifically, the sworn lien notice must: (a) identify the claimant; (b) identify the owner of the property; (c) identify the amount of the claim; (d) include the legal description and common street address of the property; and (e) be recorded in duplicate in the recorder’s office of the county in which the real estate is located. Ind. Code § 32-28-3-3. The lien notice must be verified and may be filed by either the claimant or its attorney. *Id.* In McCartin McAuliffe Mech. Contr., Inc. v. Midwest Gas Storage, Inc., 685 N.E.2d 165 (Ind.Ct.App. 1997), the court discussed the substantial compliance standard in the context of the requirements of a

lien notice. "A mechanic's lien notice is sufficient if it states the amount due, to whom, from whom, and for what and sufficiently describes the premises. A lien will not be defeated by a trivial error or omission in the notice where the defect is not misleading." *Id.* at 173 (citations omitted). The lien notice for a Class 1 project (generally all projects other than Class 2 projects) must be recorded within 90 days from the last date on which labor was performed or materials were furnished to the project by the claimant. Ind. Code § 32-28-3-3(a). For a Class 2 project (primarily residential single and double family dwellings) the lien notice must be recorded within 60 days from the last date on which labor was performed or material were furnished to the project by the claimant. The lien notices are to be recorded with the recorder of the county in which the real estate is located. Failure to adhere to any of the time periods set forth above will result in loss of the lien rights.

A suit to foreclose on the mechanic's lien must be brought within one year of the date the lien was recorded. Ind. Code § 32-28-3-6. The owner can shorten the one-year period by sending a letter to the lien holder, demanding that the foreclosure action be commenced, in which case the lien holder must file its foreclosure action within 30 days of receiving such letter, otherwise the lien is extinguished. Ind. Code § 32-28-3-10.

A claimant that successfully pursues a mechanics' lien action is entitled to recover, in addition to the underlying claim, reasonable attorneys' fees as part of the judgment. Ind. Code 32-28-3-14.

An example of a lien notice is as follows:

SWORN STATEMENT AND NOTICE OF INTENTION TO HOLD MECHANIC'S LIEN

Date_____

You are hereby notified that _____(hereinafter called "Claimant") whose address is _____, intends to hold a Mechanic's Lien on the following described real estate:

Legal Description: See Exhibit A, which is attached hereto and is incorporated herein by reference;

commonly known as the_____, and improvements thereon in the amount of \$_____ for services rendered and furnished by Claimant for improvements of said real estate within the last _____ (__) days, which improvements are more specifically described as follows:

(Description)

The undersigned individual executing this instrument, having been duly sworn upon his oath, under the penalties of perjury, hereby states that Claimant intends to hold a mechanic's lien upon the above-described real estate and the described improvements, and that the facts and matters set forth in the foregoing statement are true and correct.

(Signature)

STATE OF INDIANA)

) SS:

COUNTY OF)

Before me, a Notary Public in and for said County and State, personally appeared _____, who subscribed and sworn to before me the foregoing Sworn Statement and Notice of Intention to Hold Mechanic's Lien, and who, having been duly sworn,

under the penalties of perjury, stated that the facts and matters therein set forth are true and correct.

Witness my hand and Notarial Seal this ____ day of ____ 2009.

My Commission Expires: _____ Signature: _____

_____ Printed: _____, Notary Public

Residing in _____ County, Indiana

I affirm under the penalties for perjury that I have taken reasonable care to redact each Social Security Number in this document unless otherwise required by law. _____

*** This instrument was prepared by _____.

CERTIFICATE OF MAILING

The undersigned, as duly elected and acting Recorder of _____ County, Indiana, certifies that a duplicate copy of this Notice of Mechanic's Lien was mailed by first class United States mail, postage prepaid, to the following entities, owners or interest holders:

(Owner(s) Names)

DATED: _____

Recorder of _____ County, Indiana

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.