



# **STATE OF LOUISIANA CONSTRUCTION LAW COMPENDIUM**

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This outline is intended to provide a general overview of Louisiana Construction Law. The volume of discussion on any particular topic is not necessarily an indication of the amount of litigation related to that area of Louisiana construction law. Much of Louisiana law is governed by the Louisiana's Civil Code and Revised Statutes, with case law serving as interpretations of the codal/statutory articles.

## **BREACH OF CONTRACT**

To form a valid and enforceable contract under Louisiana law, there must be capacity of the parties to contract, consent of the parties to the contract, a lawful cause or consideration, and a certain object that forms the subject matter of the agreement. A breach of contract is performing some act inconsistent with the terms of the contract. For example, if a contractor refuses to perform obligations and leaves the job site, then those actions are considered an active breach of contract. White v. Boutte, 392 So. 2d 124 (La. App. 1<sup>st</sup> Cir. 1980). There can also be a passive breach of contract, which is the failure to do what was agreed to be done, the failure to perform timely, or the failure to perform in the manner stipulated. Southern Const. Co. v. Housing Authority of Opelousas, 197 So. 2d 628 (La. 1967).

A contractor, subcontractor, owner, supplier, or any party to a construction contract is liable for the damages caused by the failure to perform a contractual obligation. Failure to perform may result from non-performance, defective performance, or a delay in performance. La. Civ. Code art. 1994. The remedies for a breach of contract include either specific performance or damages, or a combination of both if applicable. La. Civ. Code art. 1986.

The purpose of contract damages is to place the non-breaching party in the position he would have been in had there been no breach of contract. Therefore, contract damages consist of the actual loss sustained by the non-breaching party, and the lost profits of which the breaching party has been deprived. La. Civ. Code art. 1995. Loss of profits must be proved with reasonable certainty and cannot be based on speculation or conjecture. Simpson v. Restructure Petroleum Marketing Services, Inc., 36,508 (La. App. 2d Cir. 10/23/02), 830 So. 2d 480.

In a construction context, lost profits are usually calculated by taking the gross revenues that would have been received if there were no breach and deducting from that the variable expenses that would have been incurred. Fixed costs such as overhead and depreciation are not deducted from gross revenues when determining a damage award. Rosbottom v. The Office Lounge, Inc., 94-894 (La. App. 3d Cir. 4/5/95), 654 So. 2d 377.

Specific performance is rarely a remedy in construction cases. If a contractor fails to perform or renders defective performance, it is unlikely than the owner will want the court to order the same contractor to continue the work. Instead, contract damages are the primary remedy in construction cases. La. Civ. Code art. 2769. A detailed discussion of delay damages is provided below.

## **NEGLIGENCE**

Generally, a contractor must complete the work in a good and workmanlike manner, so that it will be suitable for its intended purpose and free from defects in workmanship or materials. A contractor may be liable for damages if the evidence shows he/she did not possess the necessary skill, efficiency or knowledge, or did not exercise ordinary care in performing the work. Louisiana courts have held that a contractor is liable for negligence which, during the course of construction, proximately causes damage or injury to persons who are rightly on the construction site, persons legally on adjacent premises and other persons lawfully using streets or highways adjacent to the construction site.

However, a contractor is not responsible for defects caused by faulty or insufficient specifications furnished to the contractor, provided that the specifications were not his own. La. R.S. 9:2771. This provision shall apply regardless of whether the defect occurs or becomes evident prior to or after acceptance of the work by the owner. This is statutory protection cannot be waived in a contract. La. R.S. 9:2771.

Nevertheless, the contractor may still be subject to liability under third-party tort claims. To avoid third-party liability, the contractor must show that either the situation created was not hazardous or that the contractor had no reason to know that it created a hazardous situation. Bernard v. La. DOTD, 640 So. 2d 694 (La. App. 3d Cir. 1994).

The Louisiana Civil Code make a “undertaker,” e.g. contractor/architect “bear the loss: if a building he or she undertakes to make falls into ruin within a specified period, either in whole or in part, on account of “badness of the workmanship.” The period for liability differs between stone/brick buildings and wood/wood-framed buildings with brick facades. Stone/brick buildings have a 10-year preemptive period; wood/wood-framed buildings have a 5-year period. La. C.C. art. 2762. It is well-established Louisiana law that implied in every building contract is an obligation on the part of the contractor to perform the work in a good, workmanlike manner, free from defects in either materials or workmanship. Cell-O-Mar, Inc. v. Gros, 479 So. 2d 386 (La. App. 1st Cir. 1985).

The general measure of damages for breach of the implied warranty of good workmanship is the cost of repairs if the work can be repaired. If the work is so defective as to render it useless, the measure of damages is the sum of the return of all contract payments, the cost to remove the defective structure, and the cost of returning the property on which the construction occurred to its pre-construction state. Morton Buildings, Inc. v. Redeeming Word of Life Church, Inc., 1997-2251 (La. App. 1 Cir. 11/6/98), 744 So. 2d 5.

## **BREACH OF WARRANTY**

The New Home Warranty Act, provides special warranties and remedies when a new home is defective. La. R.S. 9:3141 et seq. The purpose of the act is to promote commerce in

Louisiana by providing clear, concise, and mandatory warranties for the purchasers and occupants of new homes in Louisiana. La. R.S. 9:3141. Section 3144 of the Act sets forth the applicable warranties and time periods wherein the contract warrants that the various elements of the home will remain free of defects caused by noncompliance with building standards. For example, under the New Home Warranty Act, the contractor warrants the house will be free of any defect in materials or workmanship not regulated by the building standards, or warrants that it will be free from any defect due to noncompliance with the applicable building standards, for a period of one year. La. R.S. 9:3144(A)(1). The contractor warrants that the new home will be free of any defects in plumbing, electrical, heating, cooling and ventilating for two years. La. R.S. 9:3144(A)(2). The contractor warrants that the new home will be free from major structural defects for five years. La.R.S. 9:3144(A)(3). Pursuant to section 3150 the NHTWA is the exclusive remedy when the cause of action arises from construction defects, violations of the building code, or poor workmanship. The NHTWA does not cover the cost of completion of a home where the builder fails to complete the job. Such damages are usually addressed in a breach of contract claim. Thorn v. Caskey, 745 So. 2d 653, (La. App. 2d Cir. 9/22/99).

To avail himself of the recovery under the NHTWA, the owner must provide the contractor written notice, by registered or certified mail, within one year of acquiring knowledge of the defect and give the contractor the opportunity to repair the defect before attempting the repair himself or filing suit. La. R.S. 9:3145. Additionally, any action to enforce any warranty provided in the Act shall be subject to a peremptive period of thirty days after the expiration of the appropriate warranty time period. La. R.S. 9:3146. Peremption is a concept very similar to liberative prescription (discussed below) in that both provide a certain time period within which a right must be exercised to avoid forfeiture of that right. Assuming statutory entitlement and compliance with all procedural requirements, the owner will also be able to recover actual damages, including attorneys fees and court costs, arising out of the violation. La. R.S. 9:3149. The damages with respect to a single defect shall not exceed the reasonable cost of repair or replacement necessary to cure the defect, and damages with respect to all defects in the home shall not exceed the original purchase price of the home. La. R.S. 9:3149.

## **LOUISIANA'S PUBLIC WORKS ACT**

Louisiana Revised Statute 38:2212 provides that public construction work valued above \$100,000 (with a few exceptions) must be advertised and awarded to the lowest bidder who bid according to the contract, plans, and specifications as advertised. The Public Works Act provides protection to claimants who have been hired by a general contractor for the construction or repair of public works. Potential claimants include any person to whom money is due pursuant to a contract with a contractor or subcontractor for doing work, performing labor, or furnishing materials or supplies. The Public Works Act requires the general contractor to obtain a bond which secures its obligation to pay claimants. It should be noted that this statute is not technically a lien or privilege because public property cannot be subject to lien claims.

Subcontractors and laborers generally have contractual privity with the general contractor. In other words, should there be any breach of contract between the general contractor

and various subcontractors, the subcontractors can pursue a claim against the general contractor to enforce the rights under the contract. However, subcontractors rarely have any such claim against the governing authority of a public works contract. The Public Works Act provides a method by which subcontractors and laborers can obtain payment from the primary source of funds, the governing authority, rather than the secondary source of funds, the general contractor. Basically, the Act provides a measure of protection to those who have no contractual relationship with the governing authority and no control over the funds advanced by the authority to the general contractor during construction of the project.

If any legal contest arises from a Public Works contract, they all must take place in a Louisiana Court applying Louisiana law. Louisiana Revised Statute 38:2196 declares null and void and unenforceable as against public policy any provision in a Public Works contract that declares a suit or arbitration proceeding must be brought in a forum or jurisdiction outside of Louisiana and/or requires the agreement to be interpreted according to the laws of another jurisdiction. The State or a political subdivision can waive this prohibition of enforceability if to do so would be in the best interests of the State or political subdivision.

## **LOUISIANA PRIVATE WORKS ACT**

Similar to the Public Works Act, the Louisiana Private Works Act provides general contractors and subcontractor with a remedy against the owner if not compensated for work. As to general contractors, for projects reasonably estimated to exceed \$25,000 in costs, an absolute prerequisite to the privileges afforded under the Act is that a notice of contract must be filed with the recorder of mortgages prior to the commencement of work. La. R.S. 9:4811 & 4831. For subcontractors, this act allows a lien in their favor despite the lack of formal contract with the owner.

A person granted a privilege under R.S. 9:4801 or a claim and privilege under R.S. 9:4802 shall file a statement of his claim or privilege no later than sixty days after the filing of a notice of termination of the work or the substantial completion or abandonment of the work, if a notice of termination is not filed. La. R.S. 9:4822(A). If not, subcontractors must file a lien within 60 days of the filing of a notice of termination or the substantial completion of the job. La. R.S. 9:4822(C). A general contractor must also file within this time period. La. R.S. 9:4822(B). The time period for filing is mandatory and the claimant bears the burden of providing the claim was filed timely. If the Private Words Act lien was not filed within the requisite time period, then the claimant cannot avail itself of the right provided in the Act.

Substantial completion implies that the job is totally completed with no more work to be done or supplies delivered, or when there is only punch-list work remaining. Substantial completion also includes the situation when an owner terminates the work done on a specific portion or area, or the work of a particular contractor.

Suppliers of materials for residential purposes must satisfy the additional burden of providing timely notice of non-payment to the owner at least ten days prior to filing a claim.

Additionally, a supplier to another supplier does not have these rights under the Private Works Act. That is, to have rights under this Act, a supplier must sell directly to a subcontractor or a contractor. Cable & Connector Warehouse, Inc. v. Omnimark, Inc., 700 So. 2d 1273 (La. App. 4 Cir. 9/12/97).

Despite the protection provided to subcontractors and suppliers who qualify under the Private Works Act, the owner can relieve itself of personal liability and protect the property from potential liens by assuring alternate security is available. La. R.S. 9:4802(C). This requires the timely filing of written notice and the use of a payment bond. If the price of the work stipulated or reasonably estimated in the general contractor's contract exceeds one hundred thousand dollars, the bond shall be issued by a surety company licensed to do business in this state. La. R.S. 9:4812(B).

### **LIBERATIVE PRESCRIPTION**

Liberative prescription is the functional equivalent in Louisiana to the statute of limitations in other states. A prescriptive period is the period of time within which an aggrieved party must file suit to protect his/her rights. The Louisiana Civil Code provides that an action against a contractor or an architect on account of defects of construction, renovation, or repair of buildings and other works is subject to a liberative prescription of ten years. La. C.C art. 3500. Parties may contract to shorten the codal prescriptive period.

### **MISREPRESENTATION AND FRAUD**

An owner may make a claim against a builder based on fraud. Under Louisiana law, fraud is defined as a misrepresentation or suppression of the truth made with the intention of advantaging oneself or disadvantaging another. La. C.C. art. 1953. It is important to note that fraud can, and often does result from silence or inaction. However, La. R.S. 9:2772 creates a 5-year preemptive period within which an owner must bring an action against a contractor/architect/designer for any deficiencies in a subject immovable (La. Civil Code term for an improvement on a property) including deficiencies known to a contractor, etc., but never revealed to the owner. This period begins accruing after the owner registers his acceptance of the work of the immovable or the date the owner has occupied or taken possession of the improvement, in whole or in part, if no such acceptance is recorded.

### **DELAY DAMAGES**

Delay claims are damages over and above the direct costs expended to remedy the cause of the delay, whether it be change orders, defective specifications, or differing site conditions. To prove entitlement to delay damages, a contractor will generally try to show that the delay impacted the "critical path." Any delay of an item of work on the "critical path" will cause the project to be completed later than if the item was completed on time.

Some delays are not compensable at all. For example, most contracts exclude delay

damages occasioned by Acts of God or bad weather. Rather than actual delay damages, the contractor is given an extension of time to complete the project. Aside from these excusable delays, Louisiana Civil Code article 2769 provides generally that if a contractor or subcontractor fails to do the work he has contracted to do, or if he does not execute it in the manner and at the time he has agreed to do it, he should be liable in damages for the losses that may result from his non-compliance with the contract.

A common provision in construction contracts is the “no damages for delay” clause which purports to prevent the contractor from recovering monetary damages for delays caused by the owner or the owner’s representatives such as architects. These provisions are common in form subcontracts utilized by many general contractors. Generally, Louisiana courts uphold these clauses but some have refused to enforce a “no damages for delay” clause where the delay was not of a kind anticipated by the parties, or was caused by bad faith or active interference. The Louisiana Public Works Act prohibits “no damages for delay” clauses on contracts governed by the Louisiana Public Works Act.

## **RECOVERABLE DAMAGES**

In construction defect and breach of contract claims, certain items of damages are recoverable under Louisiana law assuming the damages can be proven with reasonable certainty. For example, Louisiana courts have awarded out of pocket expenses, Salard v. Jim Walter Homes, Inc., 563 So. 2d 1327 (La. App. 3d Cir. 1990), and loss of rental income, Guy T. Williams Realty, Inc. v. Shamrock Constr. Co., 564 So. 2d 689 (La. App. 5th Cir. 1990).

### *Attorney’s Fees*

Attorney’s fees are not recoverable damages in the absence of a statute or contract provision authorizing the recovery of such expenses as damages. Parties are allowed to contract with respect to attorney fees. Such a contract does not violate public policy.

### *Investigation Costs*

Recovery of investigation costs is usually determined by the terms of the contract itself. Louisiana courts have upheld the reimbursement of costs associated with the investigation into accidents involving subcontractors as long as the costs were material to determining the cause of the workplace accident.

### *Emotional Distress*

Louisiana law does not generally recognize an independent cause of action for negligent infliction of emotional distress. Moresi v. Dept. of Wildlife, 567 So. 2d 1081 (La. 1990). In Sanders v. Zeagler, the Louisiana Supreme Court overturned a trial court’s award of emotional distress damages holding that the intellectual gratification of the homeowner did not rise to the level of being the principal object of contract. Sanders v. Zeagler, 686So.2d 819 (La. 1/14/97).

Nevertheless, there is some indication that Louisiana courts are willing to award emotional distress damages where there is a significant non-pecuniary interest involved. See Young v. Ford Motor Co., 595 So. 2d 1123 (La. 1992). For example, one court found that the culmination of a lifelong dream to improve the quality life by constructing a new home after rising from the housing projects to homeownership justified an award of noneconomic damages. Thomas v. Desire Community Housing Corp., 98–2097 (La. App. 4 Cir. 8/10/00); 773 So. 2d 755.

### *Mitigation of Damages*

A party to a contract must make a reasonable effort to mitigate its damages caused by the other party's breach of contract. La. Civ. Code art. 2002. When an owner or contractor allows unnecessary or unreasonable damages to result from a compensable delay, breach of contract, or defect claim, the unnecessary or unreasonable damages can be challenged and will not be included in a damage award.

### **LIENS**

If a construction project is residential, then the Residential Truth in Construction Act requires the general contractor to give the owner written notice of lien rights that may be asserted against them and of actions the owners may take to protect themselves against liens. La. R.S. 9:4851 et seq Louisiana Revised Statute 9:4855 grants the owner a claim for damages and attorney=s fees if the contractor fails to comply with the Act.

Under the Private Works Act, if the general contractor fails to file a notice of contract prior to starting work on the project, then the general contractor loses its lien rights. If the general contractor does file a notice of contract prior to starting work, then the general contractor must file its lien within 60 days of the filing of substantial completion on the project. La.R.S. 9:4822(B). Subcontractors and suppliers have 30 days from substantial completion to file a lien if the general contractor filed a notice of contract. La.R.S. 9:4822(A). However, if the general contractor failed to file a notice of contract, then subcontractors and suppliers have 60 days from substantial completion to file their liens. La. R.S. 9:4822(C).

Because public property cannot be subject to a lien, the Public Works Act requires a general contractor to post bond. Subcontractors and suppliers can file a “statement of claim” on these projects (and their attached bonds) and the resultant financial protection is similar to when subcontractors or suppliers file liens on private jobs where the owner has posted a bond.

### **INSURANCE COVERAGE**

In Louisiana, insurance law is sui juris or subject to its own set of rules and regulations. Insurance principles are not necessarily applicable to other contractual relationships. La. R.S. 22:2(A)(1). Generally, an insurance company's duty to defend suits against its insured is broader than its duty to indemnify. In other words, assuming all of the allegations of the petition to be true, if there would be coverage under the policy and also liability to the plaintiff, the insurer

must defend the insured, regardless of the possible outcome of the suit. Steptore v. Masco Const. Co. Inc., 643 So. 2d 1213 (La. 8/18/94). This duty to defend arises whenever the pleadings against the insured disclose even a possibility of liability under the policy.

An indemnity agreement is a specialized form of contract which is distinguishable from a liability insurance policy. A cause of action under a liability insurance policy accrues when the liability attaches. While the insurer's duty to defend arises whenever the pleadings against the insured disclose even a possibility of liability under the policy, an indemnity agreement does not render the indemnitor liable until the indemnitee actually makes payment or sustains loss.

## **ANTI-INDEMNITY STATUTE**

Louisiana Revised Statute § 9:2780.1(B), Louisiana's so-called anti-indemnity statute places certain restrictions on what extent one party may indemnify another. For example, a subcontractor cannot be required to indemnify the general contractor for the general contractor's negligence or intentional misconduct. Similarly, the statute does not permit indemnification for the negligence or intentional acts of a third party over whom the indemnitor has no control. For an indemnity clause to be deemed enforceable, any obligation by an indemnitor should be solely limited to the loss resulting from the acts or negligence of the indemnitor.

## **INTENTIONAL INTERFERENCE OF CONTRACT**

In 9 to 5 Fashions v. Spurney, 538 So. 2d 228 (La. 1989), the Louisiana Supreme Court recognized intentional interference of contract as a viable cause of action in tort. 9 to 5 Fashions v. Spurney, 538 So. 2d 228 (La. 1989). The elements of this cause of action are: (1) the existence of a contract of a legally protected interest between, for example, a contractor, subcontractor or supplier, and a third person such as the owner or general contractor; (2) the defendant, usually the design professional, knows of the contract; (3) intentional inducement to break the contract; (4) lack of justification; and (5) damages to the plaintiff. Id. at 234.

The consequence of this cause of action in a construction context is that design professionals and government employees should be careful about recommending to owners that general contractors or subcontractors should be terminated unless there is a firm justification for the recommendation of termination.

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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/o seeking legal advice.

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