



# STATE OF MARYLAND CONSTRUCTION LAW COMPENDIUM

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This outline is intended to provide a general overview of Maryland's construction law. The discussion on any particular topic is not necessarily an indication of the totality of the law related to any particular area of Maryland's construction law.

## I. BREACH OF CONTRACT

There is a general three year statute of limitations when bringing a breach of contract claim in Maryland. *Md. Code Ann., Cts. & Jud. Proc.* § 5-101 (West 2015). The running of the statute is triggered by the "discovery rule" which states that the statute begins running when the plaintiff knows or reasonably should know of the wrong. *DeGroft v. Lancaster Silo Co., Inc.*, 527 A.2d 1316, 1320 (Md. Ct. Spec. App. 1987). In breach of contract cases the statute therefore generally begins running at the time the alleged breach occurred. *Shailendra Kumar, P.A. v. Dhandra*, 43 A.3d 1029, 1034 (Md. 2012). The statute continues to run even during arbitration mandated by the contract unless a party files for a judicial stay. *Id.* at 1035-1038. The exception to the general three year statute of limitations for breach of contract is found in § 5-102(a)(5), which provides a twelve year statute of limitations for promissory notes or contracts made under seal. *Md. Code Ann., Cts. & Jud. Proc.* § 5-102 (West 2018). A seal should be referenced in the body of the contract and attached to the signature of each party; otherwise the 12 year statute of limitation may not apply. *Mayor & Council of Federalsburg v. Allied Contractors, Inc.*, 338 A.2d 275, 279-80 (Md. 1975).

The amount of damages recoverable for breach of contract is that which will put the injured party in the monetary position he would have been in had the contract been performed. *Hall v. Lovell Regency Homes Ltd. Partnership*, 708 A.2d 344, 349-350 (Md. Ct. Spec. App. 1998). In a breach of contract action for defective performance of a real estate construction contract, the primary measure of damages is the cost of repairing or remedying the defect. *Id.* However, if this proves impractical, the acceptable secondary measure of damages is the loss in value of the property caused by the breach, *i.e.*, the difference between the fair market value of the property without the defect and the fair market value of the property with the defect. *Id.* Compensatory damages for breach of contract may be recovered subject to "limitations of remoteness and speculativeness." *Id.*

Note that a contractual obligation, by itself, does not create a tort duty. *Wilmington Trust Co. v. Clark*, 424 A.2d 744, 754 (Md. 1981). While a tort action can be founded upon a duty arising out of the contractual relationship, the duty giving rise to the tort cause of action must be independent of the contractual obligation. Mere failure to perform a contractual duty, without more, is not an actionable tort. *Id.* See, discussion regarding the Economic Loss Doctrine at IX.

Contractual exculpatory clauses (a provision relieving a party from liability resulting from a wrongful or negligent act) are generally deemed to be valid and enforceable. However, there are three situations in which public interest will render such a clause unenforceable: (1) when the party protected by the clause intentionally causes harm or engages in acts of reckless, wanton, or gross negligence; (2) when the bargaining power of one party to the contract is so

grossly unequal so as to put that party at the mercy of the other's negligence; or (3) when the transaction involves the public interest. *Seigneur v. National Fitness Inst., Inc.*, 752 A.2d 631, 638 (Md. Ct. Spec. App. 2000) (citing *Wolf v. Ford*, 644 A.2d 522, 526-27 (Md. 1994)).

In addition to the above limitations, Maryland has a statute which prohibits indemnification of another for one's sole negligence. Please refer to the section on Indemnity, VII, below.

## II. NEGLIGENCE

### A. General

Recovery in an action for negligence requires (1) proof of a duty, (2) a breach of that duty, (3) proximate causation, and (4) damages. *Wells v. Polland*, 708 A.2d 34, 39 (Md. Ct. Spec. App. 1998). Recovery for negligence may be limited by the Economic Loss Rule, which generally holds that absent privity of contract, plaintiffs cannot recover in tort for purely economic losses. Purely economic losses are often the result of a breach of contract and ordinarily should be recovered in contract actions. *Pulte Home Corp. v. Parex, Inc.*, 923 A.2d 971, 1002 (Md. Ct. Spec. App. 2007) *aff'd*, 942 A.2d 722 (Md. 2008).

Homeowners who are subsequent purchasers (and who are therefore not in privity of contract with the builder) can assert a common law negligence action against the original builder of a home. Subsequent purchasers have a cause of action for negligent construction and design. *Milton Co. v. Council of Unit Owners of Bentley Place Condominium*, 708 A.2d 1047, 1056 (Md. Ct. Spec. App. 1998). Where an unreasonably dangerous condition is discovered in a building, an action in negligence will lie against the architect or builder for the recovery of the reasonable cost of correcting the condition. *St. James Const. Co. v. Morlock*, 597 A.2d 1042, 1046 (Md. Ct. Spec. App. 1991). Such a claim will not be barred by the Economic Loss Doctrine where there is a substantial risk of serious personal injury or death. See discussion of the Economic Loss Doctrine, IX, below.

Maryland follows the general rule that the employer of an independent contractor is not liable for the negligence of the independent contractor or his employees. *Restatement (Second) of Torts*, § 409 (1965). Exceptions to this rule, found in Comment b of section 409, fall into three broad categories:

1. Negligence of the employer in selecting, instructing or supervising the contractor.
2. Non-delegable duties of the employer arising out of some relation toward the public or the particular plaintiff.
3. Work which is specially, peculiarly, or inherently dangerous.

*Parker v. Neighborhood Theatres, Inc.*, 547 A.2d 1080, 1082-1083 (Md. Ct. Spec. App. 1988).

The owner of land owes a nondelegable duty to those who may come upon the land. The nature and extent of that duty is fixed by the status of the person claiming it. *Council of Co-Owners v. Whiting-Turner*, 517 A.2d 336 (Md. 1986). As the agents of a landowner, contractors owe the same duty to those who come upon the land as does the landowner. *Casper v. Chas. F. Smith & Son, Inc.*, 526 A.2d 87, 92 (Md. Ct. Spec. App. 1987) *aff'd*, 560 A.2d 1130 (Md. 1989). With respect to the duty of builders and designers, they are obligated to use due care in the design, inspection, and construction of a project and this duty extends to those persons foreseeably subjected to the risk of personal injury because of a latent and unreasonably dangerous condition resulting from that negligence. *Council of Co-Owners v. Whiting-Turner, supra*.

In Maryland, liability of an owner for the negligence of an independent contractor can also be based under the *Restatement (Second) of Torts*, § 414, which states: “One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.” Although the premise owner must exercise reasonable care to ensure that his or her property is safe for the employees of an independent contractor at the onset of the work, the owner will not be liable during the progress of work unless it is demonstrated that he or she has control of the details and the manner in which the work is to be accomplished. *Wajer v. Baltimore Gas and Elec. Co.*, 850 A.2d 394, 405 (Md. Ct. Spec. App. 2004). This requires the retention of a right of supervision by the owner such that the contractor is not entirely free to do his work in his own way. *Parker v. Neighborhood Theatres, Inc., supra*, at 1085. See also, *Appiah v. Hall*, 7 A.3d 536, 555 (Md. 2010) (“We have characterized these principles as requiring plaintiffs to demonstrate that the employer not only has retained control over the operative detail and methods of the work but also that this control extends to the very thing from which the injury arose.” See *Gallagher's Estate v. Battle*, 122 A.2d 93, 98 (Md. 1956) (internal quotation marks and citation omitted)).

## **B. Comparative Fault**

Maryland is a contributory negligence state and not a comparative negligence state. The contributory negligence doctrine holds that “a plaintiff who fails to observe ordinary care for his [or her] own safety is contributorily negligent and is barred from all recovery, regardless of the quantum of a defendant’s primary negligence.” *Harrison v. Mont. Co. Bd. of Educ.*, 456 A.2d 894, 898 (Md. 1983). In Maryland, where a defendant's negligence consists of the violation of a statute, ordinance, or an administrative regulation, and the action for negligence is based upon such a violation, the contributory negligence of a plaintiff will ordinarily bar his recovery. *Brady v. Ralph M. Parsons Co.*, 609 A.2d 297, 305 (Md. Ct. Spec. App. 1992).

Under Maryland law the defenses of contributory negligence and assumption of risk are closely related. The difference between the two is “contributory negligence defeats recovery because it is a proximate cause of the accident which happens, but assumption of risk defeats recovery because it is a previous abandonment of the right to complain if an accident occurs”.

*Baltimore Gas & Elec. Co. v. Flippo*, 705 A.2d 1144, 1157 (Md. 1998) (quoting *Warner v. Markoe*, 189 A. 260, 264 (Md. 1937)). The defendant must prove the plaintiff:

- (1) had knowledge of the risk of the danger;
- (2) appreciated that risk; and
- (3) voluntarily confronted the risk of danger.

*ADM P'ship v. Martin*, 702 A.2d 730, 734 (Md. 1997). Therefore proving assumption of the risk proves contributory negligence, but proving contributory negligence does not prove assumption of the risk. *Baltimore Gas & Elec. Co. v. Flippo*, *supra*, at 1157. Proving either defense negates recovery on the part of the plaintiff. *Id.*

### **C. Violation of a Statute**

In Maryland, evidence of a violation of a statute does not constitute negligence *per se*. *Wilber v. Suter*, 730 A.2d 693 (Md. Ct. Spec. App. 1999). However, evidence of a violation may be admissible to assist in proof of negligence. *Id.*

### **D. Joint and Several Liability**

In light of Maryland's contributory negligence law, the extent to which the claimant can recover against multiple defendants and the extent to which the defendants may recover from each other is controlled by the Maryland Uniform Contribution Among Joint Tortfeasors Act (*Md. Code Ann., Cts. & Jud. Proc.* §§ 3-1401 et seq. (West 2018)). Under that statute, as judicially construed:

1. Persons who are liable in tort for the same injury to the claimant are deemed to be joint tortfeasors and, as such, are jointly and severally liable to the claimant. The claimant may collect on the judgment from any or all of the tortfeasors, without regard to their respective shares of the fault (which are rarely determined, because it is not relevant under Maryland law). See §§ 3-1401 and 3-1403. The claimant's aggregate recovery is limited to the amount of the judgment.
2. To the extent that a joint tortfeasor discharges in whole the common liability or pays to the claimant more than a *pro rata* share of the common liability, that tortfeasor may recover a judgment for contribution against the other joint tortfeasors. A joint tortfeasor who settles with the claimant, however, is not entitled to contribution.
3. A release given by the claimant to one joint tortfeasor does not discharge other tortfeasors unless the release so provides, but it does reduce the claim against the other tortfeasors by the consideration paid for the release or, if greater, by any amount or proportion stated in the release. See § 3-1404. A release given to one joint tortfeasor does not relieve that tortfeasor from liability to make contribution to another joint tortfeasor unless (i) the release is given before the other tortfeasor acquires a right of contribution, and (ii) the release provides for a reduction to the extent of the released tortfeasor's *pro rata* share of the of the claimant's damages recoverable from all other joint tortfeasors. See § 3-1405.

### **III. BREACH OF WARRANTY**

A claim for breach of warranty can be based either on express warranty provisions found in the contract between the plaintiff and the contractor or based on warranties implied by law.

In Maryland there is a general two year statute of limitations on breach of warranty claims. *Md. Code Ann., Real Prop.* § 10-204 (West 2018). The statute of limitations begins running when the injury and its general cause are discovered or should have been discovered or within two years of the expiration of the warranty, whichever occurs first. *Lumsden v. Design Tech Builders, Inc.*, 749 A.2d 796, 804 (Md. 2000).

#### **A. Breach of Express Warranty**

##### **1. General**

Under Maryland Real Property Article § 10-202(a) the means by which an express warranty may be created include:

- Any written affirmation of fact or promise which relates to the improvement and is made a part of the basis of the bargain between the vendor and the purchaser creates an express warranty that the improvement conforms to the affirmation or promise.
- Any written description of the improvement, including plans and specifications of it, which is made a part of the basis of the bargain between the vendor and the purchaser creates an express warranty that the improvement conforms to the description.

*Md. Code Ann., Real Prop.* § 10-202 (West 2018).

##### **2. New Home Warranty Security Plan**

In contracts for the construction of new homes in Maryland, builders are required to register with the Consumer Protection Division of the Office of the Attorney General pursuant to § 10-603 of the Real Property Article. The builder must disclose in writing whether the builder participates in a new home warranty security plan. *Md. Code Ann., Real Prop.* §10-602. The new home warranty security plan shall warrant at a minimum:

- (a) For one year, the new home is free from any defects in materials or Workmanship.
- (b) For two years, the new home is free from any defect in the electrical, plumbing, heating, cooling, and ventilating systems; and
- (c) For five years, the new home is free from any structural defect.

*Md. Code Ann., Real Prop.* §10-604 (West 2018). A builder that does not participate in a new home warranty security plan is required to make statutory disclosures to the owner. When the disclosures are properly made and acknowledged, the owner may rescind the contract within five working days from the date of the contract. If the disclosures are not made and/or not acknowledged by the owner, the contract is voidable by the owner. §10-603.

### **3. Damages**

The measure of damages for the breach of an express warranty in the sale of real property is the same as the measure of damages for breach of contract. *Hall v. Lovell Regency Homes Ltd. Partnership*, 708 A.2d 344, 349-350 (Md. Ct. Spec. App. 1998).

#### **B. Breach of Implied Warranty**

In the construction context, the obligation to use ordinary skill and care in constructing a house or performing other work is implied by law independent of any contract. *Worthington Const. Corp. v. Moore*, 291 A.2d 466, 467 (Md. 1972).

Except in unusual circumstances, there is no implied warranty in the sale of a completed residence under Maryland's common law. *Andrulis v. Levin Const. Corp.*, 628 A.2d 197, 199-200 (Md. 1993). However, Maryland Real Property Article § 10-203 provides a cause of action for the breach of implied warranties in the sales of newly constructed homes. § 10-203(a) provides that "in every sale, warranties are implied that, at the time of the delivery of the deed to a completed improvement or at the time of completion of an improvement not completed when the deed is delivered, the improvement is:

- (1) Free from faulty materials;
- (2) Constructed according to sound engineering standards;
- (3) Constructed in a workmanlike manner; and
- (4) Fit for habitation.

*Md. Code Ann., Real Prop.* § 10-203 (West 2015).

Note that breach of warranty claims brought under § 10-203 apply only to new home sales by developers and real estate brokers; they do not apply to claims brought against manufacturers of construction materials. *Morris v. Osmose Wood Preserving*, 667 A.2d 624, 638 (Md. 1995).

As regarding condominium units, warranties statutorily implied under § 10-203 apply where condominium units are sold by a vendor to a purchaser. *Milton Co. v. Council of Unit Owners of Bentley Place Condo.*, 729 A.2d 981, 990-991 (Md. 1999). In addition to § 10-203, implied warranty claims covering condominiums are found in the Maryland Condominium Act. *Id.* Maryland Real Property Article § 11-131 provides for a one year warranty for transfers of

individual units from developers to owners that requires the developer to correct any “defects in materials or workmanship in the construction of walls, ceilings, floors, and heating and air conditioning systems in the unit.” *Md. Code Ann., Real Prop.*, § 11-131(c) (West 2018).

Real Property Article § 11-131(d) provides that there is a three year implied warranty on common elements in transfers from a developer to a council of unit owners, but only a council of unit owners (not individual unit owners) can bring suit under this provision. *Milton Co. v. Council of Unit Owners of Bentley Place Condominium*, 729 A.2d 981, 990 (1999). Breach of warranty actions brought under § 11-131 require that notice be provided during the three year statutory period and that any suits be filed within one year of the expiration of the warranty period. *Md. Code Ann., Real Prop.*, § 11-131(e) (West 2018).

The Court of Appeals has held that breach of warranty suits involving condominiums can be brought both under § 10-203 and under § 11-131. *Milton Co. v. Council of Unit Owners of Bentley Place Condo.*, *supra*, at 991.

#### **IV. BREACH OF CONTRACT/WARRANTY UNDER THE UCC**

Under Maryland’s adaptation of the Uniform Commercial Code (UCC) there is a general four year statute of limitations for breach of contract claims in contracts for transactions in goods. Commercial Law Article § 2-725 states:

- (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
- (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

*Md. Code Ann., Com. Law*, § 2-725.

Section 2-102 of Maryland’s adaptation of the UCC provides that the UCC applies to contracts for “transactions in goods,” a term which has been said to be broader than the sale of goods. *Burton v. Artery Co.*, 367 A.2d 935, 945 (Md. 1977). The UCC does not apply to service contracts or to materials used or supplied in connection with the performance of service contracts. *DeGroft v. Lancaster Silo Co.*, *supra*, at 1321.



However, there is a third category of contracts that are “hybrid” or mixed sales and service contract. This is the category that is most likely to arise in a construction context. The test to determine whether the UCC applies to mixed sales and service contracts is not whether they are mixed, but, granting that they are mixed, whether their *predominant factor*, their purpose, reasonably stated, is the rendition of a service, with goods incidentally involved (*e.g.*, a contract with an artist for a painting) or is a transaction of sale, with labor incidentally involved (*e.g.*, the installation of a water heater in a bathroom). *DeGroft v. Lancaster Silo Co.*, *supra*, at 1321. The former example would not be subject to the UCC, while the latter example would be a transaction for a good under the UCC. Courts have generally looked principally to the language of the parties' agreement and the circumstances surrounding its making in determining the predominant purpose of the transaction. *Id.* at 1322.

## V. FRAUD AND MISREPRESENTATION

The Maryland Consumer Protection Act covers cases of fraud and misrepresentation in construction disputes. Maryland Commercial Law Article § 13-303(1) prohibits “unfair or deceptive trade practices” in the sale of consumer goods, consumer realty, or consumer services. § 13-408(a) creates a civil cause of action for damages resulting from practices prohibited by the Act. *Md. Code Ann., Com. Law*, § 13-408(a).

A misrepresentation is within the purview of § 13-301(1) if it is “false” or “misleading” and “has the capacity, tendency, or effect of deceiving or misleading consumers.” *Hartford Acc. & Indem. Co. v. Scarlett Harbor Assocs. Ltd. P'ship*, 674 A.2d 106, 118 (Md. Ct. Spec. App. 1996) *aff'd*, 695 A.2d 153 (Md. 1997).

Liability for negligent misrepresentation is more restricted than that for fraudulent misrepresentation, and liability for negligent misrepresentation resulting only in pecuniary loss is more restricted than that for negligent misrepresentation resulting in physical harm. *Vill. of Cross Keys, Inc. v. U.S. Gypsum Co.*, 556 A.2d 1126, 1133 (Md. 1989).

In a claim for the tort of negligent representation the plaintiff must prove:

- (1) the defendant, owing a duty of care to the plaintiff, negligently asserts a false statement;
- (2) the defendant intended that his statement will be acted upon by the plaintiff;
- (3) the defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury;
- (4) the plaintiff, justifiably, takes action in reliance on the statement; and
- (5) the plaintiff suffers damage proximately caused by the defendant's negligence.

*Id.*

Negligent misrepresentation is an actionable tort when the negligent misrepresentation is used to induce the party to sign a contract. However, a claim of negligent misrepresentation is difficult to sustain in a construction claim if there is already a signed contract between the parties. Maryland law holds that a claim for negligent misrepresentation is improper when the only relationship between the parties is contractual, both parties are equally sophisticated, and the contract does not create an express duty of due care in making representations. *Martin Marietta Corp. v. International Telecommunications Satellite Org.*, 978 F.2d 140, 144 (4th Cir. 1992), republished as amended at 991 F.2d 94, 98 (4th Cir. 1992).

To prevail on a claim for fraudulent misrepresentation the plaintiff must prove:

- (1) the defendant made a false representation to the plaintiff;
- (2) its falsity was either known to the defendant or the representation was made with reckless indifference as to its truth;
- (3) the misrepresentation was made for the purpose of defrauding the plaintiff;
- (4) the plaintiff relied on the misrepresentation and had the right to rely on it; and
- (5) the plaintiff suffered compensable injury resulting from the misrepresentation.

*Goldstein v. Miles*, 859 A.2d 313, 331-332 (Md. Ct. Spec. App. 2004).

Plaintiffs often seek punitive damages when alleging fraudulent misrepresentation. However, in order for punitive damages to be awarded for fraud the plaintiff must show by clear and convincing evidence that the defendant had actual knowledge that his misrepresentation was false. *Bowden v. Caldor, Inc.*, 710 A.2d 267, 276 (Md. 1998). When there is fraud concealing a cause of action, § 5-203 of the Courts and Judicial Proceedings Article of the Maryland Code provides that the cause of action will accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered, the fraud. *Bragunier Masonry Contractors, Inc. v. The Catholic Univ. of Am.*, 796 A.2d 744, 755 (Md. 2002).

In tort actions based on misrepresentation, the aim of compensation is to put the buyer in the position he would have been had he not been defrauded. *Beardmore v. T.D. Burgess Co.*, 226 A.2d 329, 331 (Md. 1967). In fraudulent or negligent misrepresentation actions in which a plaintiff has purchased real property that was not as it was represented to be, Maryland law applies a “flexible” measure of damages that allows the plaintiff to choose between two tests for damages. *Ward Dev. Co. v. Ingrao*, 493 A.2d 421, 428-29 (Md. Ct. Spec. App. 1985).

The preferred test is the “out of pocket” rule which is “the difference between the amount of the purchase price the buyer has paid and the actual value of the property on the date it was sold.” *Hall v. Lovell Regency Homes Ltd. P’ship*, 708 A.2d 344, 349 (Md. Ct. Spec. App. 1998). Out of pocket damages are determined from the time at which the transaction was made. The other

measure of damages for misrepresentation is the “benefit of the bargain” test, in which damages are “the difference between the actual value of the property at the time of making the contract and the value that it would have possessed if the representations had been true.” *Id.* When determining the loss in fair market value under the “benefit of the bargain” test, to obtain an accurate determination of damages one needs a comparison of the separate valuation figures from one point in time. *Id.* at 354.

## VI. STRICT LIABILITY

To recover for injury under strict liability, a plaintiff must establish that: (1) the product was in a defective condition at the time that it left the possession or control of the seller; (2) that it was unreasonably dangerous to the user or consumer; (3) that the defect was a cause of the injuries, and (4) that the product was expected to and did reach the consumer without substantial change in its condition. *Lloyd v. General Motors Corp.*, 916 A.2d 257, 272 (Md. 2007).

Maryland has adopted the theory of strict liability found in the Restatement (Second) of Torts § 402A (1965): Special Liability of Seller of Product for Physical Harm to User or Consumer:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer or his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

*Lloyd v. General Motors Corp.*, *supra*, at 271.

The Court of Appeals has held § 402A to be applicable in situations in which it is alleged that property damage resulted from a defect in the product which rendered the product unreasonably dangerous. *A.J. Decoster Co. v. Westinghouse Elec. Corp.*, 634 A.2d 1330, 1337 (Md. 1994).

While contributory negligence may not be used as a defense to strict liability, assumption of the risk will bar a plaintiff's recovery if:

- (1) the plaintiff actually knew and appreciated the particular risk or danger created by the defect;
- (2) the plaintiff voluntarily encountered the risk while realizing the danger; and
- (3) the plaintiff's decision to encounter the known risk was unreasonable.

*Ellsworth v. Sherne Lingerie, Inc.*, 495 A.2d 348, 356 (Md. 1985).

## VII. INDEMNITY

### A. Express Indemnity

When there is an express indemnity clause in a contract, it cannot be read as indemnifying someone against their sole negligence. *Heat & Power Corp v. Air Products & Chemicals, Inc.*, 578 A.2d 1202, 1206 (Md. 1990). This would be void against both Maryland public policy and a violation of Maryland Courts & Judicial Proceedings § 5-401, which reads:

A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relating to architectural, engineering, inspecting, or surveying services, or the construction, alteration, repair, or maintenance of a building, structure, appurtenance or appliance, including moving, demolition and excavating connected with those services or that work, *purporting to indemnify the promisee against liability for damages arising out of bodily injury to any person or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, or the agents or employees of the promisee or indemnitee, is against public policy and is void and unenforceable.*

This section does not affect the validity of any insurance contract, worker's compensation, or any other agreement issued by an insurer.

*Md. Code Ann., Cts. & Jud. Proc. § 5-401 (2018)* (emphasis added). Moreover, an agreement to defend the promisee against liability for damages arising out of bodily injury or property damages caused by the sole negligence of the promisee is against public policy and is void and unenforceable.

However, if a contract provision or sentence can properly be construed as reflecting two agreements, one providing for indemnity if the promisee is solely negligent and one providing for indemnity if the promisee and promisor are concurrently negligent, only the former agreement is voided by the statute. *Heat & Power Corp v. Air Products & Chemicals, Inc.*, *supra*, at 1206.

## **B. Implied Indemnity**

When a construction contract does not contain an express indemnity provision, there may be a right to implied indemnity. Indemnity requires that, where one of the wrongdoers is primarily liable, that wrongdoer must bear the whole loss. Indemnity implies a shifting of the entire loss from the party who paid the judgment to the tortfeasor who should in fairness bear it. *Bd. of Trustees of Baltimore Cnty. Cmty. Colleges v. RTKL Assocs., Inc.*, 559 A.2d 805, 810 (Md. Ct. Spec. App. 1989).

Frequently occurring situations in which a right to implied indemnity between tortfeasors has been recognized include when a tortfeasor is liable: (1) vicariously for the conduct of another, (2) for failing to discover a defect in a chattel supplied by another, (3) for failing to discover a defect in work performed by another, and (4) for failing to discover a dangerous condition on land created by another. *Max's Of Camden Yards v. A.C. Beverage*, 913 A.2d 654, 659 (Md. Ct. Spec. App. 2006).

Maryland relies on a passive/active negligence analysis to determine if there is a right to implied indemnity. Under this analysis, a party is only entitled to indemnification when the party's actions, although negligent, are considered to be passive or secondary to those of the primary tortfeasor. *Id.* at 660). However, it is well established under Maryland law that someone who is guilty of active negligence cannot obtain tort indemnification, regardless of whether the alleged tortfeasor from whom indemnity is being sought was also actively negligent. *Franklin v. Morrison*, 711 A.2d 177 (Md. 1998).

## **C. Comparative Indemnity**

Although some jurisdictions may adopt comparative indemnity schemes based upon comparative negligence concepts, Maryland is a contributory negligence state. *Coleman v. Soccer Ass'n of Columbia*, 69 A.3d 1149 (Md. 2013). As such, it does not have comparative indemnity in construction (or any other) cases.

## **D. Third-Party Beneficiary**

In determining whether a party is a third party beneficiary to a contract, the controlling issue is whether the contract's terms, in light of the surrounding circumstances, reveal an intent to make the promise to the third party in fact if not in form. *Flaherty v. Weinberg*, 492 A.2d 618 (Md. 1985). A third party who is only an incidental beneficiary acquires no rights in the contract. *Bolick v. Board of Educ. of Charles County*, 260 A.2d 31, 33 (Md. 1969). Both the promisee and the beneficiary may enforce the contract with the third party beneficiary bound by the contract provisions. *Coll. of Notre Dame of Maryland, Inc. v. Morabito Consultants, Inc.*, 752 A.2d 265, 276-277 (Md. Ct. Spec. App. 2000).

The Court of Appeals has explained that “a third party beneficiary takes subject to the same defenses against the enforcement of the contract, as such, as exist between the original promisor and promisee.” This means that in a situation where a third party beneficiary sues a promisor, the promisor may utilize precisely the same defenses available against the promisee. *Dist. Moving & Storage Co., Inc. v. Gardiner & Gardiner, Inc.*, 492 A.2d 319, 323 (Md. Ct. Spec. App. 1985) (quoting *Shillman v. Hobstetter*, 241 A.2d 570 (Md. 1968)).

Those involved in a contract that is forbidden by a regulatory statute will not be able to recover for either materials or work, and cannot enforce such an illegal contract either directly (through the contract itself) or indirectly (e. g. mechanic's lien or third-party beneficiary). *United Elec. Supply Co. v. Greencastle Gardens Section III Ltd. P'ship*, 373 A.2d 42, 46 (Md. Ct. Spec. App. 1977).

### VIII. STATUTE OF REPOSE

Maryland's Statute of Repose is found in the Courts and Judicial Proceedings Article of the Maryland Code in § 5-108. The relevant language of § 5-108 states:

- (a) Except as provided by this section, no cause of action for damages accrues and a person may not seek contribution or indemnity for damages incurred when wrongful death, personal injury, or injury to real or personal property resulting from the *defective and unsafe condition of an improvement to real property occurs **more than 20 years** after the date* the entire improvement first becomes available for its intended use.
- (b) Except as provided by this section, a cause of action for damages does not accrue and *a person may not seek contribution or indemnity from any architect, professional engineer, or contractor for damages incurred* when wrongful death, personal injury, or injury to real or personal property, resulting from the defective and unsafe condition of an improvement to real property, occurs ***more than 10 years** after the date* the entire improvement first became available for its intended use.
- (c) Upon accrual of a cause of action referred to in subsections (a) and (b) of this section, **an action shall be filed within 3 years.**

*Md. Code Ann., Cts. & Jud. Proc.*, § 5-108 (emphasis added).

The purpose of § 5-108 was to protect builders, contractors, realtors, and landlords from suits for latent defects in design, construction, or maintenance of an improvement to real property that are brought more than twenty years after the improvement is first put to use. *Carven v. Hickman*, 763 A.2d 1207, 1212 (Md. Ct. Spec. App. 2000).

The Maryland statute of repose for actions resulting from improvement to real property applies to both contractors and subcontractors. *Hartford Ins. Co. of Midwest v. American Automatic Sprinkler Sys., Inc.*, 23 F.Supp.2d 623, 629 (D.Md. 1998) *aff'd*, 201 F.3d 538 (4th Cir. 2000). However, a purely financial injury does not fall within the purview of the Maryland statute of repose, but rather, is subject to general statutes of limitation applicable to the cause of action. *Carven v. Hickman*, 763 A.2d 1207, 1216 (Md. Ct. Spec. App. 2000).

## **IX. ECONOMIC LOSS RULE**

Losses related to product liability claims may be categorized generally as (1) personal injuries, (2) physical harm to tangible things, and (3) intangible economic loss resulting from the inferior quality or unfitness of the product to serve adequately the purpose for which it was purchased. Generally, absent privity of contract, plaintiffs cannot recover in tort for this third category of purely economic losses. This is known as the Economic Loss Rule. These losses are often the result of a breach of contract and ordinarily should be recovered in contract actions. *Pulte Home Corp. v. Parex, Inc.*, 923 A.2d 971, 1002 (Md. Ct. Spec. App. 2007).

There is, however, an exception to the Economic Loss Doctrine. In *Council of Co-Owners v. Whiting-Turner*, the Court of Appeals held that the determination of whether a duty in tort will be imposed in an economic loss case should depend upon the risk generated by the negligent conduct, rather than upon “the fortuitous circumstance of the nature of the resultant damage.” 517 A.2d 336 (Md. 1986). To be able to bring a tort action for purely economic loss there must be a risk of death or personal injury, in which case the recovery of the reasonable cost of correcting the dangerous condition can be sought in tort. *Morris v. Osmose Wood Preserving*, 667 A.2d 624, 631 (Md. 1995).

The Court of Appeals has devised a two part approach to determine the degree of risk required to circumvent the economic loss rule. First, one must examine both the nature of the damage threatened and the probability of damage occurring to determine whether the two, viewed together, present a clear, serious, and unreasonable risk of death or personal injury. If the possible injury is extraordinarily severe, the probability of the injury occurring does not have to be as high as it would if the possible injury threatened was less severe. Likewise, if the probability of the injury occurring is extraordinarily high, the injury does not have to be as severe as it would if the probability of injury were lower. *Morris v. Osmose Wood Preserving, supra*, at 632.

There is another exception to the Economic Loss Rule. When the failure to exercise due care creates a risk of economic loss only, courts have generally required an *intimate nexus* between the parties, satisfied by “privity of contract or its equivalent,” as a condition to the imposition of tort liability despite the absence of any risk that personal injury will result. In contrast, where the risk created is one of personal injury, such a direct relationship does not need to be shown. *Milton Co. v. Council of Unit Owners of Bentley Place Condo.*, 708 A.2d 1047, 1054 (Md. Ct. Spec. App. 1998).

## **X. RECOVERY FOR INVESTIGATIVE COSTS**

The Maryland Court of Appeals has not specifically ruled on the issue of recovery of investigative costs alone. Parties are, however, free to contract as to who will be responsible for the payment of investigative costs should litigation arise. This also appears somewhat frequently in insurance contracts. Under certain circumstances, an insured may be liable for the costs of investigation and, if so, the insurer may be required to indemnify its insured for such expenses. The general rule is that if an insured must resort to litigation to force its insurer to perform its duty to defend the insured and provide liability coverage, then the insured may recover the fees, costs and expenses of the litigation. *Aetna Ins. Co. v. Aaron*, 685 A.2d 858, 873 (Md. Ct. Spec. App. 1996).

## **XI. EMOTIONAL DISTRESS**

The general law of Maryland is that a plaintiff cannot recover for emotional injuries sustained solely as a result of negligently inflicted damage to the plaintiff's property. However, this rule does not apply to emotional injuries caused by a plaintiff's reasonable fear for personal safety. *Dobbins v. Washington Suburban Sanitary Com'n*, 658 A.2d 675, 679-680 (Md. 1995). There is currently no Maryland law directly on point as to whether a homeowner can recover emotional distress damages for a construction defect in their homes. At least one Maryland case has upheld the dismissal of plaintiffs' emotional distress claims in a case involving newly constructed homes. *See Hall v. Lovell Regency Homes Ltd. P'ship*, 708 A.2d 344, 356 (Md. Ct. Spec. App. 1998) (where the trial court's dismissal of plaintiffs' emotional distress claims based on the fact that the basements of the newly constructed homes were improperly waterproofed and had persistent water problems was affirmed by the Court of Special Appeals).

## **XII. ECONOMIC WASTE**

The ordinary measure of damages in a defective performance breach of contract action is "cost of repair" damages. However, this is limited by the Economic Waste Doctrine. The Economic Waste Doctrine provides that if the cost to repair the defect will result in unreasonable economic waste, the proper measure of damages becomes the difference between the fair market value of the property as contracted for (without the defect) and as performed (with the defect). *Hall v. Lovell Regency Homes Ltd. P'ship*, *supra*, at 351. In an action involving improvements to real estate, whether repair will produce economic waste is a question of "disproportionality" that must be determined by comparing the cost to cure to "any difference between the value of the property after the corrective work is done with the value of the property absent the corrective work." *Id.*

The burden of proving economic waste is on the party that breached the contract and that invokes the doctrine in an effort to limit expectation interest damages. *Andrulis v. Levin Const. Corp.*, *supra*, at 208.

## **XIII. STIGMA DAMAGES**



Stigma damages, often measured as diminution in value, arise because of a perceived problem with the property. There is no Maryland case law exactly on point that provides for the recovery of stigma damages; however, there is case law on diminution in value in both breach of contract and breach of express warranty claims.

In a breach of contract action for defective performance of a real estate construction contract, the recovery of ordinary cost of repair damages is limited by the economic waste doctrine. *Hall v. Lovell Regency Homes Ltd. P'ship, supra*, at 349-350. When the economic waste doctrine applies in such a situation the acceptable secondary measure of damages is the diminution in value of the property caused by the breach, *i.e.*, the difference between the fair market value of the property without the defect and the fair market value of the property with the defect. *Id.* This same measure of damages is applied in a claim for breach of express warranty. *Id.*

#### **XIV. DELAY DAMAGES**

Maryland case law allows for the recovery of delay damages. The Court of Appeals has recognized that a contractor is entitled to be compensated for delays in work occasioned by faulty plans and specifications. *Gladwynne Const. Co. v. Mayor and City Council of Baltimore*, 807 A.2d 1141, 1156 (Md. Ct. Spec. App. 2002).

The *Eichleay Formula* can be used to determine delay damages in construction contracts with the government. In order for a contractor to recover under the *Eichleay Formula*, three elements must be satisfied:

- (1) The plaintiff must prove that the contract was suspended, delayed, or disrupted by the other party;
- (2) The plaintiff must prove that he/it was forced to “stand by” during the delay;
- (3) The plaintiff must prove that, while “standing by” during the suspension, delay, or disruption, he/it was unable to take on other work.

*Id.* at 1158.

The *Eichleay Formula* compensates contractors who are unable to take on replacement work because their standby status prevents the contractor from doing so. *Id.* Although the standby status must be attributable to the wrongdoer, the standby test does not require that the contractor's work force be idle. Nor must the work be entirely suspended. *Id.* A contractor may be unable to take on additional work if the owner causes delay of uncertain duration or the contractor's bonding capacity is limited. *Id.*

Delay damages have not been recoverable where the contract contained no clause forbidding delay and where the increased costs were found to be the result of a unilateral contract modification. *General Federal Const., Inc. v. D.R. Thomas, Inc.*, 451 A.2d 1250, 1257 (Md. Ct. Spec. App. 1982).

## **XV. RECOVERABLE DAMAGES**

### **A. Direct Damages**

In Maryland, damages to real property are generally measured by the cost of repairing or remedying the defect, so long as that cost is reasonable. *Hall v. Lovell Regency Homes Ltd. P'ship, supra*, at 349-350. If the cost of repair is impractical, the difference between the fair market value of the property without the defect and the fair market value of the property with the defect will be used to determine the damages owed. *Id.*

### **B. Stigma Damages**

There are currently no Maryland cases that deal directly with the question of whether stigma damages are recoverable in construction cases. However, Maryland courts generally allow recovery for diminution of value (*See above*).

### **C. Loss of Use**

Maryland allows for recovery of 'loss of use' compensation. When personal or real property has been damaged, recovery is not limited to the cost of repair but may include the value of the use of the property during the time that it would take to repair it. *Superior Const. Co. v. Elmo*, 102 A.2d 739, 743-44 (Md. 1954). The Court of Appeals in *Elmo* awarded damages in tort to compensate homeowners who were living in and enjoying the use of their homes until the defendants' building operations disrupted their use and enjoyment of their land.

However, The Court of Appeals declined to extend the holding of *Elmo* to a construction case in which plaintiffs sought loss of use damages when the construction of their new homes was delayed for months. *Bernardini v. Stefanowicz Corp.*, 349 A.2d 287, 293 (Md. Ct. Spec. App. 1975). Here the Court found that the trial judge did not abuse his discretion in refusing to allow for loss of use damages when the plaintiffs' homes were not constructed on time. *Id.*

### **D. Punitive Damages**

Under Maryland law, punitive damages are allowable only in a tort action and only when there is an award of compensatory damages based on that tort. *VF Corp. v. Wrexham Aviation Corp.*, 715 A.2d 188, 192 (Md. 1998). With respect to both intentional and non-intentional torts "... an award of punitive damages generally must be based upon actual malice, in the sense of conscious and deliberate wrongdoing, evil or wrongful motive, intent to injure, ill will, or fraud."

*Montgomery Ward v. Wilson*, 664 A.2d 916, 932 (Md. 1995). While cases of fraud may arise in the construction context, in order for punitive damages to be awarded for fraud the plaintiff must show by clear and convincing evidence that the defendant had actual knowledge that his misrepresentation was false. *Bowden v. Caldor, Inc., supra*, at 276.

#### **E. Emotional Distress**

The general law of Maryland is that a plaintiff cannot ordinarily recover for emotional injuries sustained solely as a result of negligently inflicted damage to the plaintiff's property. However, this rule does not apply to emotional injuries caused by a plaintiff's reasonable fear for personal safety. *Dobbins v. Washington Suburban Sanitary Com'n, supra*, at 679-680. In such a situation, it appears that emotional distress damages can be awarded.

#### **F. Attorney's Fees**

In Maryland the general rule is that costs and expenses of litigation, other than the usual and ordinary court costs (*not* attorney's fees), are not recoverable in an action for compensatory damages. *Bresnahan v. Bresnahan*, 693 A.2d 1, 10 (Md. Ct. Spec. App. 1997). Attorney's fees may be awarded where a statute allows for the imposition of such fees, or where parties to a contract have an agreement regarding attorney's fees. *Id.* Where the wrongful conduct of a defendant forces a plaintiff into litigation with a third party, the plaintiff may recover from the defendant, as damages, reasonable counsel fees incurred in the action with the third party. *Id.* The principal exception to this general rule is recovery of counsel fees incurred by an insured in successful litigation with a liability insurer which denied coverage or a duty to defend. *Id.*

#### **G. Expert Fees and Costs**

Expert fees and costs ordinarily are not recoverable from the unsuccessful party. *Burdette v. Lascola*, 395 A.2d 169, 178 (Md. Ct. Spec. App. 1978); *Freedman v. Seidler*, 194 A.2d 778, 783 (Md. 1963). Fees may be awarded when expressly provided for in a contract.

### **XVI. INSURANCE COVERAGE**

Under a typical commercial general liability policy, an insurer has a duty to both provide the insured with a defense and to indemnify the insured for a judgment up to policy limits. The sole source of these duties is the insurance contract. The damages for breach of these contractual promises are the insured's defense expenses, including attorney fees, and the amount of an underlying tort judgment against the insured up to policy limits. *Mesmer v. Maryland Auto. Ins. Fund*, 725 A.2d 1053, 1065 (Md. 1999). Since the source of the duties to defend and to indemnify are entirely contractual, a liability insurer breaches no tort duty when, upon learning of a claim, it erroneously denies coverage and refuses to undertake any defense against the claim. *Id.*

However, a tort duty arises when an insurer acknowledges a claim but then refuses to settle within policy limits. Since the insurer “makes no promise that it will settle [a] claim within policy limits,” breach of contract damages are not available for violation of any duty to settle a claim within policy limits. *Allstate Ins. v. Campbell*, 639 A.2d 652, 658 (Md. 1994). Instead, any duty to settle within policy limits is strictly a tort duty which only arises when the insurer undertakes to provide a defense. *Mesmer v. Maryland Auto. Ins. Fund*, *supra*, at 1065. The damages for breach of that duty may be recovered only in a tort action. *Id.* The amount of damages ordinarily recoverable in a bad faith failure to settle case is the amount by which the judgment rendered exceeds the amount of insurance coverage. *Kremen v. Maryland Auto. Ins. Fund*, 770 A.2d 170 (Md. 2001).

Consequently, when a liability insurer erroneously takes the position that it has no contractual obligation with respect to a particular claim, and refuses to undertake any defense against the claim, it is liable only for breach of contract. A tort action based upon a liability insurer's bad faith failure to settle a claim within policy limits can arise only if the insurer undertakes to provide a defense against the claim. *Mesmer v. Maryland Auto. Ins. Fund*, *supra*, at 1064. Moreover, in Maryland the rule is clear that if an insured must resort to litigation to force its insurer to perform its duty to defend the insured and provide liability coverage, then the insured may recover the fees, costs and expenses of the litigation. *Aetna Ins. Co. v. Aaron*, 685 A.2d 858, 873 (1996).

## **XVII. MECHANIC’S LIENS**

A mechanic's lien is a claim against real property for work done or materials supplied for the property. Maryland's mechanics' lien law can be found in the *Md. Code Ann., Real Prop.* §9-101 *et. seq.* (West 2015). The most important aspect of filing a claim for a mechanic’s lien is notice. If the notice requirements are not met, there will be no recovery. The notice must also meet certain substantive criteria pursuant to *Md. Code Ann., Real Prop.* § 9-104(b) (West 2018). A contractor or subcontractor wishing to file a claim for a mechanic’s lien must, **within 120** days after doing the work or furnishing the materials, provide notice to the property owner. *See id.* § 9-104(a). The form of the notice is contained in the statute.

Notice can be served via certified mail or personal delivery. Once the property owner has been provided notice and there is still non-payment, the filing party may then commence the process of obtaining a lien on the subject property. It is important to know in which county the property is located to be compliant with the law. The claim must be filed in the circuit court for the county where the land or any part of the land is located **within 180 days** after the work has been finished or the materials furnished. *See id.* § 9-105(a).

The filing itself should be a Petition to Establish Mechanic’s Lien, which must include similar information provided in the Notice to the Owner (i.e.: the name and address of the petitioning contractor, name and address of the owner, nature of the work done, the time when the work was done, the name of the person for whom the work was done and the amount or sum claimed to be due, less any credit recognized by the petitioner, description of the land and facts showing

that the notice required under *Md. Code Ann., Real Prop. Art. § 9-104* (West 2018) of the Mechanic's Lien code was properly served). Service of notice by certified mail will make satisfying this part of the code easier as the return receipt will establish the date of notice.

The Petition should also include an affidavit by the subcontractor explaining the facts that are the basis for the petition as well as original or certified documents that support the claim. The petitioner should make an exhaustive effort to include all documents that support the claim because once filed; the court will review the filings and make its initial determination on the petition and accompanying documents. *See id.* § 9-106(a)(1). The Court will then issue a show cause order that requires the owner of the property to establish why a lien upon the land or building should not be ordered. The property owner may then appear at the show cause hearing and present evidence or file a counter-affidavit establishing the supporting facts against a lien.

Once a court has been provided materials from both petitioner and property owner, it will make a determination as to whether or not the lien should attach. If a lien is attached, the petitioner has one year from the day the petition to establish the lien was first filed to exercise its right to enforce a lien. *See id.* § 9-109.

**This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics as they existed at the time of drafting. 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.**