



# STATE OF OKLAHOMA COMPENDIUM OF CONSTRUCTION LAW

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## 1. BREACH OF CONTRACT

If a contract has been formed and one party fails to perform on the contract which results in damages, the damaged party may sue for breach. "Accompanying every contract is a common law duty to perform the contract with care, skill, reasonable experience and faithfulness the thing agreed to be done. A negligent failure to perform these duties is a tort and a breach of contract." *Leak-Gilbert v. Fahle*, 2002 OK 66, ¶ 20, 55 P.3d 1054.

"An action for breach of contract and an action in tort may arise from the same set of facts." *Id.* "A breach of contract is a material failure of performance of a duty arising under or imposed by agreement. Although torts may be committed by parties to a contract, a tort is a violation of a duty imposed by law independent of contract. If the contract is merely the inducement which creates the occasion for the tort, the tort, not the contract, is the basis of the action." *Lewis v. Farmers Ins. Co., Inc.*, 1983 OK 100, ¶ 5, 681 P.2d 67, 69. In some cases, "tort may then be the basis for recovery even though it is the contract that creates the relationship between the parties." *Woods Petroleum Corp. v. Delhi Gas Pipeline Corp.*, 1983 OK CIV APP 26, ¶ 16, 700 P.2d 1023, 1027.

"The law is settled in Oklahoma that when a contractor and builder has in good faith endeavored to comply with the terms of a contract, literal compliance in all details is not essential to recovery, especially where the owner has taken possession of the building." *Collins v. Baldwin*, 1965 OK 55, ¶ 24, 405 P.2d 74, 81 (quoting *Kizziar v. Dollar*, 268 F.2d 914, 916 (10th Cir. 1959)).

## 2. NEGLIGENCE

There are three essential elements of a negligence case. These elements are: (1) a duty of care owed by the defendant to protect the plaintiff from injury, (2) a failure to properly perform that duty, and (3) the plaintiff's injury being caused by the defendant's breach of that duty. *Graham v. Keuchel*, 1993 OK 6, ¶ 58, 847 P.2d 342, 348.

### 2.1 Several Liability

Okla. Stat. tit. 23, § 15 states only several liability exists in Oklahoma for actions based on fault and not arising out of contract. Tortfeasors are responsible solely for the amount of damages allocated to their conduct. The language of the statute is as follows:

- A. In any civil action based on fault and not arising out of contract, the liability for damages caused by two or more persons shall be several only and a joint tortfeasor shall be liable only for the amount of damages allocated to that tortfeasor.
- B. This section shall not apply to actions brought by or on behalf of the state.

## 2.2 The Duty of the Design Professional

Architects and engineers are required to exercise ordinary professional skill and diligence in rendering their professional services. See *Waggoner v. W & W Steel Co.*, 1982 OK 141, ¶ 6, 657 P.2d 147, 149. However, an architect or engineer's understanding does not guarantee a perfect plan or a satisfactory result. "Whenever the circumstances attending a situation are such that an ordinarily prudent person could reasonably see that, as the natural and probable consequences of the act, another person will be in danger of receiving an injury, a duty to exercise ordinary care to prevent such injury arises." *Boren v. Thompson & Associates*, 2000 OK 3, ¶ 23, 999 P.2d 438, 446-47.

The court has stated:

At common law, privity of contract was required before an action in tort could arise from a breach of duty created by a contract. However, in *Truitt v. Diggs*, 611 P.2d 633 (Okla. 1980), we indicated that in cases involving physical injury to third parties [like the general public], that restriction has in many cases been eliminated or modified. Therefore, it is possible for an architect to be liable for injuries received by a person with whom he has no privity, but there can be no standard rule. The determination must be made by considering the nature of the architect's undertaking and his conduct pursuant thereto.

*Waggoner*, 1982 OK 141, ¶ 7, 657 P.2d at 149. A design professional can limit his or her duties, and hence potential liabilities, by contract. See *id.* ¶ 7, 657 P.2d at 150. Because it is the duty of the contractor "to supervise the job and employ all reasonable safety precautions, the [design professional] cannot be held liable for injuries sustained as a result of unsafe construction procedure." *Id.* ¶ 17, 657 P.2d at 151.

## 2.3 The Duty of the Contractor

"Generally, as matter of public policy, builder's liability to third persons for negligent construction is terminated upon acceptance of property by [builder's] grantee, but where the builder has willfully created a condition which he knows to be immediately and certainly dangerous to persons other than his grantee, who will necessarily be exposed to such danger, considerations of public policy do not require the application of the general rule." *Lowe v. Francis Const. Co.*, 1962 OK 165, ¶ 13, 373 P.2d 51, 54. However, in Oklahoma, a contractor is not liable for negligently creating a defect that causes injury where the condition or defect alleged is patent, open, and discoverable on reasonable inspection. *Pickens v. Tulsa Metro. Ministry*, 1997 OK 152, ¶ 20, 951 P.2d 1079, 1089.

## 2.4 The Accepted Work Doctrine

In Oklahoma, the Accepted Work Doctrine, no longer subscribed to in many jurisdictions, still relieves an independent contractor of liability for injuries to third parties after the contractor has completed the work and the owner or employer has accepted the work, regardless of the

contractor's negligence in completing the project. *See Pickens*, 1997 OK 152, 951 P.2d 1079. However, *see The Duty of the Contractor, supra* 2.3. Oklahoma has adopted a modified version of the Accepted Work Doctrine, and thus recognizes several exceptions to the general rule of no liability. *Pickens*, 1997 OK 152, ¶ 18, 951 P.2d at 1088. Therefore, a contractor may be subject to liability where a "defect is latent or hidden, in cases of fraud or deceit, where the contractor deliberately conceals a defect, where a nuisance has been created, or where the product of the contractor's work is inherently or imminently dangerous." *Id.*

### **3. BREACH OF WARRANTY**

"A warranty is an express or implied statement of something undertaken as a part of a contract of sale, but collateral to its express object." *Pauls Valley Milling Co. v. Gabbert*, 1938 OK 244, ¶ 6, 78 P.2d 685, 686. With regards to construction law, a warranty can be based upon either an express provision stated in the contract between the owner and the contractor, or implied by law. *See Bridges v. Ferrell*, 1984 OK CIV APP 19, ¶ 5, 685 P.2d 409. Further, the existence of an express warranty will not automatically invalidate an implied warranty. *See Id.*

#### **3.1 Breach of Implied Warranty**

Implied warranties are provided for in Oklahoma by Okla. Stat. tit. 15, § 171, which provides that "[s]tipulations which are necessary to make a contract reasonable or conformable to usage, are implied in respect to matters concerning which the contract manifests no contrary intention."

Furthermore, "where [a] general contractor contracts to perform work for another requiring exercise of care, skill and knowledge, there is an implied warranty that work which he undertakes shall be of proper workmanship and reasonable fitness for its intended use." *McCool v. Hoover Equip. Co.*, 1966 OK 95, ¶ 13, 415 P.2d 954, 958. In *Miller v. Guy H. James Const. Co.*, the court held that, "[a]bsent open and obvious design defects which should be apparent to a prudent contractor and called to prime contractor's attention, the party who furnishes plans and specifications impliedly warrants them to be fit for their intended use." 1982 OK CIV APP 34, ¶ 17, 653 P.2d 221, 224.

The Oklahoma Supreme Court has held that where a contractual provision requires a contractor to perform in a good and workmanlike manner, a contractor will not escape liability on the basis that the architect had accepted the building where there was no contractual provision calling for either acceptance by the architect or a requirement that the work be done to the architect's satisfaction. *Smith v. Goff*, 1958 OK 100, ¶ 4, 325 P.2d 1061, 1063. The court has also held that an architect will only be required to "exercise reasonable care and professional skill in performing their services" where the contract states that the architect will guard against problems but will not guarantee a perfect plan. *Wills v. Black & West*, 1959 OK 162, ¶ 12, 344 P.2d 581, 584.

Oklahoma allows parties to contractually waive the implied warranty of habitability. *See Bridges*, 1984 OK CIV APP 19, ¶ 4, 685 P.2d at 410. Specifically, "to relieve a builder-vendor of its obligation under an implied warranty of habitability, there must be clear and conspicuous

language evidencing builder's disclaimer of its obligations arising under an implied warranty of habitability." *Id.* ¶ 2, 685 P.2d at 410.

### 3.2 Breach of Express Warranty

When a contract contains an express warranty within the terms of the contract, the warranty will determine the extent and duration of the builder's responsibility, unless that responsibility is provided for by an implied warranty at law. *See Woods v. Amulco Products*, 1951 OK 190, ¶ 9, 235 P.2d 273, 276: "[a] construction contractor who has followed plans and-or specifications furnished by [the owner], his architect or engineer, and which have proved to be defective or insufficient, will not be responsible to [the owner] for loss or damage which results – at least after the work is completed – solely from the defective or insufficient plans or specifications, in the absence of any negligence on the contractor's part, or any express warranty by him as to their being sufficient or free from defects." (quoting A.L.R. annotation for *State v. Commercial Ins. Co.*, 125 Neb. 43, 248 N.W. 807, 88 A.L.R. 790, 797).

## 4. STATUTE OF LIMITATIONS

A statute of limitations is a law that bars claims after a specified period. Specifically, a statute of limitations establishes a time limit for filing suit in a civil case, based on the date when the claim accrued. *See Okla. Stat. tit. 12, § 92.* The statute of limitations for actions arising in either contract or tort law are provided in Okla. Stat. tit. 12, § 95. With respect to contracts, that section states in relevant part:

A. Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards: 1. Within five (5) years: An action upon any contract, agreement, or promise in writing; 2. Within three (3) years: An action upon a contract express or implied not in writing; an action upon a liability created by statute other than a forfeiture or penalty; and an action on a foreign judgment.

"When applied to construction contracts, the *general rule* is that the limitations period does not begin until the work is completed. The completion of the construction is the accrual date for a plaintiff's claim for breach of contract against a general contractor. The rationale behind this rule is that there is no breach for defective performance if the defects can be remedied by the date of completion." *Samuel Roberts Noble Found., Inc. v. Vick*, 1992 OK 140, ¶ 8, 840 P.2d 619, 622 (emphasis in original) (internal citations omitted).

Okla. Stat. tit. 12, § 95(A)(3) also defines the statute of limitations for an action arising in tort as two (2) years, subject only to the discovery rule. In *Smith v. Johnston*, the court applied the discovery rule to the claimant's tort action against the defendant contractor. 1978 OK 142, ¶ 13, 591 P.2d 1260, 1263. In *Smith*, the claimant did not discover the contractor's negligence until more than two years from the date of completion of the contract; however, the Court held that the statute of limitation did not begin running from the date of completion of the construction contract, but rather (pursuant to the discovery rule) from the date of discovery of the contractor's

negligence. *Id.* ¶ 15, 591 P.2d at 1264. In Oklahoma, the two-year statute of limitations for tort actions does not begin to run until the property owner “learn[ed] of or, in the exercise of reasonable care and diligence, should have learned of the harm through discovery of the hazardous condition caused by the hidden defect.” *Id.*

## 5. THE DISCOVERY RULE

In construction and maintenance cases, Oklahoma courts apply the discovery rule to determine when a cause of action accrues and the statute of limitations begins to run. *Lee v. Phillips & Lomax Agency, Inc.*, 2000 OK 65, ¶¶ 8-9, 11 P.3d 632, 634-35. Under the discovery rule, the statute of limitations begins to run once the property owner has learned of the damage or in the exercise of reasonable care and diligence should have learned of the act complained of. *Id.* ¶ 9, 11 P.3d at 635. However, the statute of limitations is triggered when the property owner is generally aware that a defect exists. The property owner need not know the exact nature or source of the defect for the limitations period to commence. *Samuel Roberts Noble v. Vick*, 1992 OK 140 at ¶¶ 28-31.

## 6. STATUTE OF REPOSE

A statute of limitations and a statute of repose “are significantly different since a statute of limitation merely extinguishes the plaintiff's remedy while a statute of repose bars a cause of action before it arises.” *Reynolds v. Porter*, 1988 OK 88, ¶ 6, 760 P.2d 816, 820. Practically, “a statute of repose marks the boundary of a substantive right whereas a statute of limitation interposes itself only procedurally to bar the remedy after a substantive right has vested.” *Id.*

An action in tort arising from design, planning, or construction of improvement to real property, for injury or damage arising from the design or construction of such improvement, must be brought within 10 years from the date of substantial completion of the improvement. Okla. Stat. tit. 12, § 109 (1978). This statute covers designers, builders, owners, lessors and persons in possession.

It is important to note that work performed by a contractor as “maintenance” is not the same thing as “improvement” and is therefore *not* subject to the statute of repose, but rather governed by the two (2) year tort statute of limitations and subject to the discovery rule. *Lee*, 2000 OK 65, ¶ 8, 11 P.3d at 634.

The Oklahoma Court of Civil Appeals has held that a third party claim for contribution arising out of “improvements to real property” is subject to the statute of repose, and cannot be brought more than ten years after the substantial completion of the improvements. *Lay v. ConocoPhillips Co.*, 2019 OK CIV APP 73, ¶ 20.

## **7. MISREPRESENTATION AND FRAUD**

### **7.1 Actionable Fraud**

If a contractor makes a false assertion that damages the owner, the contractor can be sued under the theory of fraud. The elements of actionable fraud in Oklahoma are: (1) that defendant made a material representation; (2) that it was false; (3) that he made it when he knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that the plaintiff thereby suffered injury. *State ex rel. Southwestern Bell Tel. Co. v. Brown*, 1974 OK 19, ¶ 19, 519 P.2d 491, 495; *see also* Okla. Stat. tit. 76, §§ 2, 4. All facts must be proven with a reasonable degree of certainty, and all of them must be found to exist; the absence of any of them is fatal to a recovery. *Ramsey v. Fowler*, 1957 OK 61, ¶ 6, 308 P.2d 654, 656. Further, the reliance by the plaintiff must be justifiable. *Brown*, 1974 OK 19, ¶ 19, 519 P.2d at 495.

### **7.2 Fraud as Defense**

Whenever fraud is asserted as a defense, it “is never presumed, but it must be affirmatively alleged and proven by the party who relies on it, and cannot be inferred from facts which may be consistent with honesty of purpose.” *Stafford v. McDougal*, 1935 OK 251, ¶ 5, 42 P.2d 520, 523.

## **8. DELAY DAMAGES**

### **8.1 Delay in Performance**

The duty to perform a contract within a certain amount of time may be established through essentially two different means. First, pursuant to well-established general contract law, parties to a contract may agree to a specified date by which a builder must perform. It is important to note, certain delays are anticipated and included in the time allotted for performance of the contract, and not; therefore, considered excuses for delay. Second, where no time is specified for the completion of the project, a reasonable time is allowed by operation of law. Okla. Stat. tit. 15, § 173.

When calculating damages, an owner is entitled to compensation for “all the detriment proximately caused” by a Builder’s breach, or detriment which would likely result in the ordinary course of things from the Builder’s breach. Okla. Stat. tit. 23, § 21. Damages which are not ascertainable in nature and origin cannot be recovered. *Id.*

### **8.2 Excuses for Delay**

As stated above, certain delays are anticipated and included in the time allotted for performance of the contract, and are not considered excuses for delay. The anticipated delays are unique to

each contract, but are included in the time allotted for completion of the project; a typical example would be days accounting for inclement weather.

An implicit waiver of a contracted-for time limit has been found where an owner continues to make the progress payments and otherwise assents to a delay. *E.V. Cox Const. Co. v. Brookline Assocs.*, 1979 OK CIV APP 66, ¶ 14, 604 P.2d 867, 871. Once the specified time limit became inoperative as a result of this implicit waiver by the owner, the contractor became subject to an implied duty to perform within a reasonable time pursuant to Okla. Stat. tit. 15, § 173. *Id.* ¶ 15, 604 P.2d at 871.

An owner may not recover for damages resulting from any delay he caused. *Scroggins v. Gaddis*, 1999 OK CIV APP 98, ¶ 6, 990 P.2d 302, 305. Under such circumstances, the trial court should determine the period of delay, the relative responsibility of each party for that delay, and attribute to each party the commensurate amount of damages. *Id.*

### **8.3 No Damages for Delay Clauses**

The Tenth Circuit has recognized “no damages for delay clauses” in a case appealed from the district court of Colorado. *W. C. James, Inc. v. Phillips Petrol. Co.*, 485 F.2d 22, 25 (10th Cir. 1973). Such clauses are commonly used in the construction industry and are generally recognized as valid and enforceable. *Wells Bros. v. U.S.*, 254 U.S. 83 (1920).

## **9. RECOVERABLE DAMAGES**

### **9.1 Attorney’s fees**

Prevailing parties in Oklahoma are generally not entitled to recover attorney’s fees, absent an authorizing statute or valid contract. *Moses v. Hoebel*, 1982 OK 26, ¶ 5, 646 P.2d 601, 603. One such authorizing statute, Okla. Stat. tit. 12, § 936, governs the viability of claims for attorney’s fees where cases arise directly from the rendition of labor or services. Section 936(A) states:

In any civil action to recover for labor or services rendered, or on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, unless otherwise provided by law or the contract which is the subject of the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs.

The controlling case regarding the applicability of Okla. Stat. tit. 12, § 936 is *Cook v. Okla. Bd. of Pub. Affairs*, 1987 OK 22, 736 P.2d 140. In *Cook*, the court stated that “before counsel fees may be awarded the case must be one that falls clearly within the express language of the authorizing statute.” *Id.* ¶ 43, 736 P.2d at 154. “The underlying nature of the action determines the applicability of the § 936 labor-and-services provision.” *Id.* “If the damage arises directly from the rendition of labor or services, rather than from an aspect that relates collaterally to labor and services, then the provisions § 936 are applicable.” *Id.*

Oklahoma law also provides for an attorney's fees award to the prevailing party "[i]n any civil action to recover damages for the negligent or willful injury to property and any other incidental costs related to such action." Okla. Stat. tit. 12 § 940(A). This provision applies in actions for physical injury to property, regardless of whether the plaintiff's claims sound in tort or contract. *Finnell v. Seismic*, 2003 OK 35, ¶ 15, 67 P.3d 339, 345.

## 9.2 Direct Damages

Okla. Stat. tit. 23, § 21 governs the identification and measure of direct damages. It provides in relevant part:

For the breach of an obligation arising from contract, the measure of damages...is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. No damages can be recovered for a breach of contract, which are not clearly ascertainable in both their nature and origin.

Additionally, when a contractor or builder has breached the contract by defective construction and the defects may be remedied by repair to comply with the contract, the measure of damages is limited to the cost of the repairs. *Smith v. Torr*, 1957 OK 73, ¶ 12, 310 P.2d 378, 380.

## 9.3 Expert Fees and Costs

As a general rule, expert fees are not part of recoverable costs to the prevailing party. Okla. Stat. tit. 12, §3226(B)(4)(d) governs claims for expert's fees and costs. That provision provides:

Unless manifest injustice would result: (1) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under division (2) of subparagraph a of this paragraph and subparagraph c of this paragraph; and (2) The court shall require that the party seeking discovery with respect to discovery obtained under subparagraph c of this section, pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

Okla Stat. tit. 12, § 942 does mandate the allowance of statutory witness fees. *Atchley v. Hewes*, 1998 OK CIV APP 143, ¶ 10, 965 P.2d 1012, 1015. Because fees paid to the expert witnesses under Okla. Stat. tit. 12, § 3226(B)(4)(c)(1) are fees required to be paid by statute, they should be awarded as costs to the prevailing party. *See generally Atchley*, 1998 OK CIV APP 143, 965 P.2d 1012.

## 9.4 Lost Profits

The damaged party in a contract breach may recover for lost profits. "Loss of anticipated profits, if within the contemplation of the parties at the time contract was entered into, is recoverable in

an action for breach of contract. These damages must flow proximately from the breach and be capable of accurate measurement." *Cook*, 1987 OK 22, ¶ 41, 736 P.2d at 153.

## 9.5 Mitigation of Damages

The law governing mitigation of damages is succinctly stated in *Bailey v. J.L. Roebuck Co.*, 1929 OK 96, 275 P. 329: "The duty imposed upon one to reduce or minimize his damage goes only to the amount of recovery, and cannot be an absolute defense to an injury already sustained. As to whether defendant performed such duty, and, if not, how much his damage was enhanced by his failure to do so are questions of fact to be determined by a jury, or by the court in a trial without a jury." *Id.* ¶ 3, 275 P. at 330.

## 10. STRICT LIABILITY CLAIMS

Oklahoma recognizes a strict liability theory of recovery for ultrahazardous activities, including the use of explosives. *See, e.g., Smith v. Yoho*, 1958 OK 80, ¶ 6; 324 P.2d 531, 533 (1958).

The strict liability theory of recovery for allegedly dangerous products was originally adopted in Oklahoma in 1974. *See Kirkland v. General Motors*, 1974 OK 52. 521 P.2d 1353; *Northrip v. Montgomery Ward & Co.*, 1974 OK 142, 529 P.2d 489. "Although . . . strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law . . . , and the refusal to permit a manufacturer to define the scope of its own responsibility for defective products [] make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort." *Marathon Battery Co. v. Kilpatrick*, 1965 OK 212, ¶ 59, 418 P.2d 900, 915 (*quoting Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1962)).

Additionally, "though strict liability does eliminate negligence as a basis for recovery, it does not dispense with the requirement of proximate cause." *Minor v. Zidell Trust*, 1980 OK 144, ¶ 14, 618 P.2d 392, 396. In *Garner v. Halliburton Co.*, the Court noted: "Regardless of whether the action is thought of in terms of liability for negligence or implied warranty . . . or as a strict liability case, it is essential that there be evidence to establish that the defendant acted or failed to act in relationship to the plaintiffs in such a manner as to create an unreasonable risk of harm . . . or the defendant must have created a defective condition unreasonably dangerous to the user or consumer." 474 F.2d 290, 295 (10th Cir. 1973) (*quoted in Jones v. Stemco Mfg. Co., Inc.*, 1981 OK 10, ¶ 20, 624 P.2d 1044, 1048).

## 11. INDEMNITY CLAIMS

### 11.1 Express Indemnity

In Oklahoma, agreements to indemnify a party against its own negligence or liability are strictly construed. *Transpower Constructors v. Grand River Dam Auth.*, 905 F.2d 1413, 1420 (10th Cir.

1990) (citing *Fretwell v. Protective Alarm Co.*, 1988 OK 84, ¶ 12, 764 P.2d 149, 152) (applying Oklahoma law). “To be enforceable, the agreement must meet the following three conditions: (1) the parties must express their intent to exculpate in unequivocally clear language; (2) the agreement must result from an arm's-length transaction between parties of equal bargaining power; and (3) the exculpation must not violate public policy.” *Id.* (citing *Fretwell*, 1988 OK 84, 764 P.2d at 152-53).

Under Oklahoma law, a manufacturer is required to indemnify and hold harmless a seller “against a loss arising out of a product liability action, except for any loss caused by the seller’s negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable.” Okla. Stat. tit. 12 § 832.1. The Oklahoma Court of Civil Appeals has held that this duty to defend and indemnify extended to a builder and plumber who installed allegedly defective corrugated stainless steel tubing in a home, resulting in a fire. *Honeywell v. GADA Builders, Inc.*, 2012 OK CIV APP 11, 271 P.3d 88.

## 11.2 Implied Indemnity

Generally, “one without fault, who is forced to pay on behalf of another, is entitled to indemnification.” *Nat’l Union Fire Ins. Co. v. Western Skyways, Inc.*, 1989 OK 157, ¶ 7, 784 P.2d 52, 54. If a party is held vicariously liable for the acts of another, an implied indemnity right is created against the responsible party – but only if the party seeking indemnification is blame free.

“Noncontractual indemnity is sometimes referred to as implied indemnity and may arise out of a contractual or special relationship between parties and from equitable considerations.” *Noble Steel, Inc. v. Williams Bros. Concrete Const. Co.*, 2002 OK CIV APP 66, ¶ 12, 49 P.3d 766, 770 (citations and internal quotations omitted). “[I]mplied indemnity rests upon fault of another which has been imputed or constructively fastened upon him who seeks indemnity.” *Id.* Implied indemnity is similar to common-law contribution; “one who is only constructively or vicariously obligated to pay damages because of another's tortious conduct may recover the sum paid from the tortfeasor.” *Id.*

The right to indemnification may arise out of “an independent legal relationship [such as a joint venture], under which the indemnitor owes a duty either in contract or tort to the indemnitee apart from the joint duty they owe to the injured party.” *Safway Rental & Sales Co. v. Albina Engine & Mach. Works, Inc.*, 343 F.2d 129, 132 (10th Cir. 1965) (applying Oklahoma law) (internal quotations omitted).

## 12. CONTRIBUTION CLAIMS

**Contribution.** Under Okla Stat. tit. 12, § 832(A) the right of contribution arises when “two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death.” Contribution functions like reimbursement from non-paying parties. “This right of contribution exists only in favor of a tort-feasor who has paid more than the pro-rata share of the common liability, and the total recovery is limited to the amount paid

by the tort-feasor in excess of their pro-rata share.” 12 Okla. St. § 832(B). Furthermore, “[t]here is no right of contribution in favor of any tort-feasor who intentionally contributed to the injury or the wrongful death.” OKLA. STAT. tit. 12, § 832(C). Moreover, joint liability means that two or more parties may share the accountability, or liability, for a tort. Several liability means one person’s liability for a tort is separate and distinct from another person’s liability, so the Plaintiff can sue one person without suing the others.

**Contribution and indemnity.** Contribution does not impair the right of indemnity. OKLA. STAT. tit. 12, § 832(F). As a result, indemnity arises when there is a legal relationship between the parties, whereas contribution involves concurrent or joint tortfeasors, who owe the same duty of care to the injured party and have no legal relationship to one another. *National Union Fire Ins. Co. v. A.A.R. Western Skyways, Inc.*, 1989 OK 157, 784 P.2d 52, 55. The Supreme Court of Oklahoma has noted, that 12 OKLA. STAT. § 832 “...does not create a right of indemnity where none had previously existed.” *Id.* Further the Court stated, “Oklahoma case law has always premised this right of indemnity on the understanding that a legal relationship exists between the parties.” *Id.* at 54.

**Contribution and several liability.** Oklahoma adopted several liability (Okla. Stat. tit. 23, § 15) subsequent to the passage of the contribution statute (Okla. Stat., tit. 12, § 832). Thus, even though codified, there is an argument that contribution claims no longer exist in negligence actions because liability is several only, and a tortfeasor will never be required to pay more than their pro-rata share of the common liability under several liability.

### 13. ECONOMIC LOSS DOCTRINE

The “economic loss rule” is defined as “the principle that a plaintiff cannot sue in tort to recover for purely monetary loss -- as opposed to physical injury or property damage -- caused by the defendant.” *Black’s Law Dictionary* (9th ed. 2009). The term “economic loss” is defined as “monetary loss such as lost wages or lost profits.” *Black’s Law Dictionary* (9th ed. 2009).

Oklahoma law has applied this doctrine to manufacturer product’s liability actions, *see Waggoner v. Town & Country Mobile Homes, Inc.*, 1990 OK 139, 808 P.2d 649, but it is unclear whether it would apply to negligent construction claims as well. However, the Northern District of Oklahoma has refused to apply the economic loss rule in the context of a construction defect claim. *Lexington Ins. Company; Gavilon Fertilizer, LLC v. Newbern Fabricating, Inc.*, 14-CV-0610-CVE-TLW, 2016 WL 4059251, at \*6 (N.D. Okla. July 28, 2016) (“Oklahoma courts have given no indication . . . that Oklahoma courts would extend the reach of this economic loss doctrine to negligent construction claims.”).

### 14. ECONOMIC WASTE

Oklahoma law limits recovery of restoration costs so that the recovery cannot exceed the diminished value of the land, in order to prevent economic waste. *See Peevyhouse v. Garland*

*Coal & Min. Co.*, 1962 OK 267, 382 P.2d 109. Also, damages are measured by the diminution in the value of the property, rather than by the cost of remediation when the cost to restore the land is grossly disproportionate to the loss in the value of the property. See *Schneberger v. Apache Corp.*, 1994 OK 117, ¶ 18, 890 P.2d 847, 852.

Most of the cases in this area are in the context of environmental problems, such as water pollution or land deformation. However, in the construction context the rule would probably also be applied. It is likely that if the cost of repairing the defect is grossly disproportionate to the loss in value of the property, the damages awarded would be the diminution in value, in order to prevent economic waste. For example, the court, in *State ex rel. Burk v. Oklahoma City*, stated that, “equity will not insist on an absolute and literal restoration of the parties to status quo where it would be purposeless, useless, and foolish.” 1976 OK 109, ¶ 7, 556 P.2d 591, 595 (quoting *State ex rel. Burk v. Oklahoma City*, 1973 OK 134, ¶ 39, 522 P.2d 612, 621).

## 15. PAY IF PAID CLAUSES

There are no true “pay-if-paid” Oklahoma cases, but one federal court decision suggests that Oklahoma would follow the general rule of courts looking with disfavor upon contractual provisions conditioning payment upon some future event such as payment by the project owner or general contractor. The court will likely not find that a condition precedent to payment exists “unless required to do so by the plain and unambiguous language of the contract.” *Byler v. Great Am. Ins. Co.*, 395 F.2d 273, 276 (10th Cir. 1968) (applying Oklahoma law).

Pay-when-paid clauses are generally enforceable for a reasonable length of time after the date upon which payment should have been made to the party relying on the clause. These clauses are designed to allow delay of payment for a reasonable time to allow for a fair opportunity for the party to collect the earnings from the owner or general contractor. These provisions do not shift the credit risk or affect one’s obligation to pay. See *Byler*, 395 F.2d 273 and *Moore v. Cont’l Cas. Co.*, 366 F.Supp. 954 (W.D. Okla. 1973).

For public projects, Okla. Stat. tit. 61, § 224 is a statutory pay-when-paid clause providing a time limit for payment to subcontractors, sub-subcontractors, and material suppliers. Under that provision, if they have performed in accordance with their contract, they are entitled to receive payment no later than ten calendar days after the prime contractor receives its corresponding payment.

## 16. FLOW DOWN/FLOW THROUGH CLAUSE

Flow-down clauses provide that all duties and obligations the contractor owes the owner are owed by the subcontractor as well. Flow-down provisions are generally accorded validity, but courts vary on whether they will be enforced fully according to their terms. These clauses generally incorporate the technical provisions and specifications without a problem, but courts are often reluctant to enforce general flow-down provisions when it is not entirely clear what the parties actually intended or when the prime contract provision doesn’t fit the circumstances of

the subcontract. Exculpatory, or liability relieving, provisions are generally construed narrowly or denied validity at all where there are inconsistencies between the prime and the sub contract. If you want a flow-down clause to be enforceable, it must be clearly stated within the contract.

Oklahoma has not directly addressed the issue, but the United States District Court in Kansas has found that flow-down clauses are upheld when they are plain and unambiguous. If there is any ambiguity, the contract or clause therein is construed against the drafter. *See United Tunneling Enters., Inc. v. Havens Constr. Co., Inc.*, 35 F. Supp. 2d 789 (D. Kan. 1998).

## **17. WAIVER OF SUBROGATION**

A waiver of subrogation occurs when an insurance carrier gives up its right, pre-loss, to recover from others. This usually occurs because the insured does business with a third party (like the government or a general contractor) and the third party requires the insured's carrier to waive its right to subrogate against the third party. Waivers of subrogation are generally upheld as they are written and are limited by the terms of the contract or waiver. Courts will usually preclude claims when there is a valid waiver of subrogation provision.

Oklahoma has found that an insurer's waiver of subrogation as to the insured does not apply to a contractor hired by the insured. Therefore, a contractor is not considered a co-insured so as to be immune from liability per the waiver of subrogation. *See Travelers Ins. Cos. v. Dickey*, 799 P.2d 625, 628 (Okla. 1990). However, a tenant is considered a co-insured under a lessee/landlord insurance policy, even without being named on the policy, and is thus immune from liability on an insurer's subrogation claims. *See Sutton v. Jondahl*, 532 P.2d 478, 481 (Okla. Civ. App. 1975) and *Kansas City Fire and Marine Insurance Co. v. Rogers*, 871 P.2d 443 (Okla. Civ. App. 1994). These cases essentially illustrate that a party must have an insurable interest in the property in order to be considered a co-insured for purposes of waiving rights to subrogation.

## **18. MECHANICS AND MATERIALMEN'S LIENS**

Okla. Stat. tit. 42, § 141 grants any person working under an oral or written contract with the owner of real property the right to file a lien against the property and its improvements to secure payment, provided certain requirements are met. A person with an express oral or written or implied contract with the owner of the property is an original contractor and eligible to file a lien under section 141. *Rogers v. Crane Co.*, 68 P.2d 520, 521 (Okla. 1937). Liens filed under section 141 attach only to real property and not to personal property. *Abel v. Bachmann*, 400 P.2d 151, 155-56 (Okla. 1965). Oklahoma law prohibits liens from attaching against public projects and public utilities. *Hydro Conduit Corp. v. American-First Title & Trust Co.*, 808 F.2d 712, 715 (10th Cir. 1986) (applying Oklahoma law) (collecting cases).

An original contractor claiming a lien under section 141 must file a statement in the office of the county clerk where the property is situated within four (4) months after the last date labor or materials were furnished. Okla. Stat. tit. 42, § 142. This statement must contain: the amount due; the items provided as nearly as practicable; the name of the owner, the name of the

contractor, the name of the claimant (the person seeking the lien and here the contractor), and the legal description of the property upon which a lien is claimed. *Id.* Five (5) business days after the filing of such a lien, a notice of the lien must be mailed, certified mail, return receipt requested, to the owner of the property on which the lien is imposed. Okla. Stat. tit. 42, § 143.1. This notice must include the date of filing for the lien, the name and address of the lien claimant (i.e. the contractor) and the owner of the property, a legal description of the property, and the amount claimed. *Id.* Any original contractor falsifying a statement regarding any liens is guilty of a felony upon conviction. Okla. Stat. tit. 42, § 142.4.

### **18.1 Subcontractor's Liens – Pre-Lien Notice Requirement**

A subcontractor who provides materials, equipment, or labor may obtain a lien against real property and improvements thereon to the same extent as an original contractor for the amount owed to him. Okla. Stat. tit. 42, § 143. To claim such a lien, a subcontractor must file a statement with the county clerk where the property is situated within ninety (90) days after the last date which material or labor was furnished. *Id.* This statement must be verified by affidavit, set forth the amount due to the lien claimant, the items provided by claimant as nearly as practicable, the name of the property owner, the name of the contractor, the name of the claimant (i.e. the subcontractor), and a legal description of the property over which the lien is claimed. *Id.* The owner of land affected by any subcontractor lien is not liable to the claimant for any amount greater than the amount of the original contract. *Id.* Five (5) business days after the filing of such a lien, a notice of the lien must be mailed, certified mail, return receipt requested, to the owner of the property on which the lien is imposed. Okla. Stat. tit. 42, § 143.1. This notice must include the date of filing for the lien, the name and address of the lien claimant (i.e. the subcontractor) and the owner of the property, a legal description of the property, and the amount claimed. *Id.*

Prior to filing the lien statement required under section 143, Oklahoma law also requires a claimant to send a pre-lien notice to the last known address of the original contractor and the owner of the property to which the lien will attach within seventy-five (75) days after the last date which material or labor was furnished. Okla. Stat. tit. 42, § 142.6(B)(1). The pre-lien notice must be written and include: a statement that it is a pre-lien notice; the complete name, address, and telephone number of the claimant or his representative; the date of the supply of the materials or labor; the description of the materials or labor; the name and last-known address of the person who requested that the claimant provide the material or labor (which would generally be the original contractor); the address and legal description of the property; a statement of the dollar amount of the material, services, labor, or equipment furnished or to be furnished; and the signature of the claimant or his representative. Okla. Stat. tit. 42, § 142.6(B)(4). This notice may be hand delivered, sent via an automated transaction in accordance with Oklahoma law (found at Okla. Stat. tit. 12A, §§ 15-115), or sent via certified mail, return receipt requested. Okla. Stat. tit. 42, § 142.6(B)(5).

The practical effect of this pre-lien notice requirement is that a subcontractor must notify both the original contractor and the property owner of his intent to pursue a lien within seventy-five (75) days after last supplying materials or labor in order to preserve his lien rights. After proper

pre-lien notice has been given, a subcontractor must still actually file the lien, as discussed above, within ninety (90) days after the last material or work is supplied. Failure to comply with the pre-lien requirements imposed by Oklahoma law will render that portion of the lien, for which there was no notice, invalid and unenforceable. Okla. Stat. tit. 42, § 142.6(D). Additionally, a subcontractor's lien requires the filing of an affidavit, stating compliance with the pre-lien notice. Okla. Stat. tit. 42, § 142.6(C). Falsification of this affidavit is a misdemeanor, with a penalty upon conviction of a fine of up to \$5,000 or thirty (30) days imprisonment in the county jail, or both. *Id.*

The pre-lien notice requirement is not applicable against residential property (single family dwelling up to four dwelling units – but see the following section for residential liens) or where the aggregate claim is less than \$10,000. Okla. Stat. tit. 42, § 142.6(B)(3).

The Oklahoma Court of Civil Appeals recently found that a temporary staffing company which supplies skilled workers to a subcontractor is not within the class of claimants who may file a claim under Okla. Stat. tit. 12 § 143. *Advanced Resource Solutions, LLC v. Stava Building Corporation*, 2019 OK CIV APP 28, ¶ 18. The contract between the staffing company and the subcontractor did not refer to a particular project, and showed only that the staffing company was to provide the subcontractor with temporary laborers for use on various commercial construction project. *Id.* at ¶ 25. Because the staffing company had not entered into a contract to perform any “act” with regard to the project at issue, the staffing company was not a “subcontractor” under § 143. *Id.*

**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.**