CHAPTER 7

Connecticut Construction and Design Law

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CHAPTER 7

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I. Considerations Relating to Project Delivery Systems

Effective team-building at the outset of a project involves not only assembling technically competent professionals, but also defining the roles and relationships of the team players to each other and the owner.

In the most common of project delivery systems, design-bid-build, the owner hires a prime design professional to prepare construction documents suitable for lump-sum bidding. The owner then hires a general contractor to coordinate and perform all construction work. At the heart of this traditional system is the bifurcation of design/administration services from construction services along separate contractual lines, both of which run directly to the owner.

The increase in use of construction management in Connecticut and elsewhere in recent decades signals an evolution of traditional general contracting, focusing exclusively on administering the project and supervising trades, and eliminating the performance of actual construction work by the contractor’s own forces. Construction managers often provide pre-construction services such as constructability reviews, estimating and scheduling assistance. While owners may choose to hire trade contractors directly while employing construction managers as consultants during the construction phase, more often construction managers are expected to undertake the construction itself in an at-risk arrangement. In this scenario, usually before completion of the drawings, the construction manager submits a proposal to the owner to perform the construction work, generally on a cost-plus-fee basis with a guaranteed maximum price (GMP). If the drawings are complete at the time of the proposal, however, the owner will generally favor a lump sum over a GMP.

The more recent rise of design-build reflects a desire of owners to consolidate design and construction disciplines that have grown steadily apart under a single contract. With design-build, owners may find that the process favors cost and time factors, while sacrificing oversight during design. By agreeing on design and construction parameters early, the owner generally grants the design-builder leeway to develop the design within those parameters. Design-build also claims the advantage of streamlined communication and uniformity of purpose in addressing field conditions. Accordingly, design-build is popular in heavily engineered facilities.
II. Design and Construction Professionals

A. Liability of Design and Construction Professionals

Generally

Design professionals are bound to exercise that degree of care which a skilled professional of ordinary prudence engaged in the same line of business would have exercised in the same or similar circumstances. Goodrich Oil Burner Mfg. Co. v. Cooke, 126 Conn. 551, 553–54, 12 A.2d 833, 834 (1940); Ferrie v. Sperry, 85 Conn. 337, 343, 82 A. 577 (1912). In order to succeed on a professional malpractice action against a design professional, a plaintiff must prove by expert testimony the standard of care applicable and that the defendant’s failure to conform to the standard of care caused the plaintiff’s damages. Matyas v. Minck, 37 Conn. App. 321, 326–27, 655 A.2d 1155 (1995).

Contractors, in addition to their duties under contract, owe a duty of care to those to whom they are providing services and may be held liable in negligence. Coburn v. Lenox Homes, Inc., 186 Conn. 370, 375–76, 441 A.2d 620 (1982). A duty of care may arise from contract, statute, or from circumstances under which a reasonable person, knew or should have known, would anticipate that harm of the general nature suffered was likely to result from his act or failure to act. Id. When negligent construction is alleged, the plaintiff must also prove the defendant knew or should have known of the circumstances that would foreseeably result in the harm suffered. Id. Where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge. Id.

B. Statutes of Limitations Applicable to Design or Construction Liability

1. Tort and Contract Claims

An action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought within six years after the right of action accrues, and the cause of action is complete at the time the breach of contract occurs, i.e., when the work is completed. Conn. Gen. Stat. § 52-576 (2005); Beekenstein v. Potter & Carrier, Inc., 191 Conn. 150, 156, 470 A.2d 699 (1983).

The six-year statute of limitations applies to oral contracts which have been fully performed. Cacace v. Morcaldi, 37 Conn. Supp. 735, 741, 435 A.2d 1035 (1981).


No action based on a tort shall be brought after three years from the date of which the act or omission complained of occurs. Conn. Gen. Stat. § 52-577 (2005). Likewise for tort actions, no action to recover damages for injury to real or personal property, caused by
negligence, or by reckless or wanton misconduct shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of. Conn. Gen. Stat. § 52-584 (2005). However, no action or arbitration, whether in contract, in tort, or otherwise, to recover damages for any deficiency in the design, planning, contract administration, supervision, observation of construction or construction of an improvement to real property shall be brought against any architect, professional engineer or land surveyor more than seven years after substantial completion of such improvement, except that personal injuries and property damage occurring in the seventh year must be placed in suit within one year of such occurrence. Conn. Gen. Stat. § 52-584a (2005).

Conn. Gen. Stat. § 47-118(e) (2009) provides that the implied warranty on a newly constructed single family dwelling unit terminates one year after delivery or of taking possession by the purchaser, which ever occurs first. If the defect becomes reasonably discoverable within the one year, suit may be brought within the general contract period of six years. Cashman v. Calvo, 196 Conn. 509, 511, 493 A.2d 891 (1985).

Several Connecticut courts have recognized that arbitration proceedings are not subject to statutes which limit the time for bringing actions. Skidmore, Owings & Merrill v. Conn. Gen. Life Ins. Co., 25 Conn. Supp. 76, 197 A.2d 83 (1963). However, Conn. Gen. Stat. § 52-584a (2005) specifically limits demands for arbitration involving architects and engineers to seven years after substantial completion of an improvement to property. Furthermore, where the right to arbitration is established by statute or contract and that statute or contract in and of itself contains a period in which arbitration proceedings are to be held, then the established limitations period applies; otherwise, arbitration proceedings are not subject to statutes of limitation, because arbitration is not a common-law action, and the initiation of an arbitration proceeding is not the bringing of an action which would fall under any statute of limitations. Skidmore, 25 Conn. Supp. at 84 (Where the court found that arbitration is an arrangement for deferring to the judgment of selected persons in a disputed matter, instead of carrying it to the established tribunals of justice.); see also R.A. Civitello Co. v. New Haven, 6 Conn. App. 212, 226, 504 A.2d 542 (1986), overruled on other grounds by Grigerik v. Sharpe, 247 Conn. 293, 721 A.2d 526 (1998).

There is a long established common-law principle that, under certain circumstances, ordinary statutes of limitations will not apply to government claims. See State v. Goldfarb, 160 Conn. 320, 323–26, 278 A.2d 818 (1971). Where, however, the State commences an action well beyond a statute of limitations, such as the six-year limitation contained in Conn. Gen. Stat. § 52-576 (2005), the State may be prohibited from doing so. See State of Conn. v. Lombardo Bros. Mason Contractors, Inc. et al., 51 Conn. Supp. 265, 302, 980 A.2d 983 (2009) (where the Court determined it was a major public policy concern to allow the State to bring construction claims into perpetuity and granted defendants’ motion to strike the State’s claims brought six years after the statute of limitations expired).

2. Statute of Repose

The Connecticut Supreme Court has ruled that Conn. Gen. Stat. § 52-584 (2005) is both a statute of limitations and a statute of repose. The statute provides for a two-year
limitation on actions for negligence while the repose portion provides that no action for negligence may be brought more than three years from the date of the act or omission complained of, barring the bringing of suit more than three years after the alleged negligent conduct of a defendant regardless of when a plaintiff discovers the proximate cause of his harm or any other essential element of a negligence cause of action. *Barrett v. Montesano*, 269 Conn. 787, 793, 849 A.2d 839 (2004).


The State of Connecticut has also been found to be subject to the statutes of repose contained in Conn. Gen. Stat. §§ 52-577, 52-577a, 52-584, 52-584a (2005). *Lombardo Bros*, 51 Conn. Supp. at 294-95. In addition, the State may be prohibited from asserting claims beyond prescribed time limitations set forth in contracts it enters into with private entities, whether those contracts reference certain statutes of repose or statutes of limitations. *Id.* at 286.

C. Licensing and Regulation

1. **Design Professionals**

   a. **Architects.** No person shall practice architecture in Connecticut, or use the title “architect” in advertising without a license issued by the Architectural Licensing Board in the Connecticut Department of Consumer Protection. Conn. Gen. Stat. §§ 20-288 (2008) *et seq.* An architect may be exempt from examination if he or she has been licensed in another state with similar requirements and has been practicing in such state for at least ten years. The initial license fee is $72 for individuals and $50 for firms, and annual renewal fees are $150 for individuals and $175 for firms. Conn. Gen. Stat. § 20-292 (2008).

   b. **Engineers and Surveyors.** No person shall practice engineering, including land surveying, without a license issued by the Board of Examiners for Professional Engineers and Land Surveyors in the Connecticut Department of Consumer Protection. Conn. Gen. Stat. §§ 20-300 *et seq.* (2008). The written engineering examination may be waived for an applicant having 20 years of lawful practice in engineering. Written examination may be waived for an engineer with 20 years experience of a character satisfactory to the Board. Conn. Gen. Stat. §§ 20-302 (2008). The written exam may be waived for a surveyor with 16 or more years in surveying and 10 years in land surveying. The application fee is $40. The initial license fee is $110 and the annual renewal fee is $225. Corporations must pay an application fee of $450 and annual renewal fees of $300.

   c. **Landscape Architects.** No person shall use the title “landscape architect” without a license issued by the State Board of Landscape Architects of the Connecticut Department of Consumer Protection. Conn. Gen. Stat. §§ 20-367 *et seq.* (2008). Examination may be waived for out-of-state practitioners licensed by a state with standards similar to Connecticut’s. The exam application fee is $40. The fee for an initial license is $140 and the annual renewal fee is $80.
d. Interior Designer. No person shall use the title “interior designer” unless he or she has obtained a certificate of registration from the Connecticut Commissioner of Consumer Protection or is a CT licensed architect or used the title “interior designer” for one year prior to 1983. The fee for the certificate of registration is $150. Conn. Gen. Stat. §§ 20-377k, et seq. (2008). Reciprocity may be available for those from states having requirements equal to those of the National Council for Interior Design Qualifications.

2. Construction Professionals


e. Subsurface Sewage Disposal System Installers. Conn. Gen. Stat. §§ 20-341a et seq (2008). No person shall engage in, practice or offer to perform the work of a subsurface sewage disposal system installer without obtaining an apprentice’s permit or a

f. **Environmental Professionals.** An “environmental professional” is a person who is qualified by his or her knowledge to engage in activities associated with the investigation and remediation of pollution and sources of pollution including the rendering or offering to render to clients professional services in connection with the investigation and remediation of pollution and sources of pollution. The Commissioner of Environmental Protection may issue a license to qualified applicants who pass an examination. The application fee is $188. The annual licensing fee is $338. Conn. Gen. Stat. § 22a-133v (2006).

g. **Asbestos Abatement Contractors.** No person shall provide services as an asbestos contractor without a license pursuant to the requirements of Conn. Gen. Stat. §§ 20-435 et seq (1999). Applications for a license must be made to the Department of Public Health and require an application fee of $500. Prior to issuing a license, the Department will determine if the applicant has demonstrated that all employees have passed a training course approved by the Department and have been issued a certificate by the same. In addition, the Department shall approve the technical, equipment and personnel resources of each applicant. Reciprocity may be available to persons who hold a similar license issued by another state. Conn. Gen. Stat. § 20-435 (2008).

h. **Lead Abatement Contractors.** No person shall hold themselves out as a lead abatement contractor, lead consultant contractor or engage in such work without a license issued by the Commissioner of Public Health. Conn. Gen. Stat. §§ 20-474 et seq (2008). Applications for a license must be made to the Department of Public Health and require an application fee of $500. The Department shall review the technical, equipment and personnel resources of each applicant. Reciprocity may be available to persons who hold a similar license issued by another state. Conn. Gen. Stat. § 20-474 (2008).

i. **Crane Operators.** An applicant for a crane operator’s license must have at least two years of experience in the operation of a crane, be at least 18 years old, and must successfully complete the Examining Board for Crane Operators general examination as well as a crane operating examination. There is a $50 licensing fee for applicants who meet the requirements, and the license is valid for two years. Conn. Gen. Stat. §§ 29-221 et seq (2003).

j. **Well Drilling Contractors.** Contractors who engage in well drilling or pump installation must obtain a certificate of registration as a well drilling contractor from the Department of Consumer Protection. Conn. Gen. Stat. § 25-129 (2008). There is an initial registration fee of $44 and an annual $125 renewal fee.

3. **Other**

There are no licensing requirements in Connecticut for design-builders. An entity undertaking design-build projects must hold appropriate licenses for each design or construction profession involved.

However, firms offering both design and construction services under a single corporate structure must be aware of peculiar restrictions in the architectural licensing statutes. Pursuant to Conn. Gen. Stat. § 20-298b (2008), if a material part of a corporation’s business includes the practice of architecture, the corporation’s chief executive officer and two-thirds of its voting stock must be licensed architects. This may cause some design-builders to consider separating their practices into distinct corporate forms.

### III. Considerations Applicable to Payments to Contractors and to Subcontractors

On any public building or work of the state or a municipality, where the contract for construction exceeds $100,000, the contract must contain a requirement that the general contractor, within 30 days after payment to the contractor by the state or municipality, pay any amounts due any subcontractor for labor and materials which have been included in a requisition submitted by the contractor and paid by the state or municipality. Additionally, the general contractor must include in each of its subcontracts a requirement that each subcontractor pay any amount due any of its subcontractors within 30 days after the subcontractor receives payment from the general contractor, which encompasses labor or materials furnished by such subcontractor. Conn. Gen. Stat. § 49-41a(a) (2006).

If payment is not made by the general contractor or subcontractor, the subcontractor or sub-subcontractor shall set forth its claim against the debtor through notice by certified mail. Conn. Gen. Stat. § 49-41a(b) (2006). If payment is not made within 10 days of receipt of that notice, the general contractor or subcontractor shall be liable for interest on the amount due and owing at the rate of 1% per month. Additionally, the general contractor or subcontractor, upon proper written demand, can be required to place funds in the amount of the claim, plus interest of 1%, into an interest bearing escrow account in a bank in the State of Connecticut. Conn. Gen. Stat. § 49-41a(b) (2006).

Under Conn. Gen. Stat. § 49-41a(c) (2006) no payment may be withheld from a subcontractor on a public works project, for which a payment bond is required under Conn. Gen. Stat. § 49-41 (2006), for work performed because of a dispute between a general contractor and another contractor or subcontractor.

Each construction contract on a private project, where the contract exceeds $25,000 and does not involve a building intended for residential occupancy containing four or less units, must contain a requirement that (1) the owner pay any amount due any party in a direct contractual relationship with the owner not later than 30 days after the date of receipt of a written request for payment; (2) that the contractor pay any amounts due any subcontractor or supplier not later than 30 days after the contractor receives payment from the owner, which encompasses any labor or materials furnished by such subcontractor or
supplier; and (3) a requirement that the contractor include in each of its subcontracts a provision requiring each subcontractor to abide by the identical prompt payment requirements. Conn. Gen. Stat. § 42-158j(a) (2007).

If payment is not made within the time prescribed under Conn. Gen. Stat. § 42-158j(a) (2007), the contractor, subcontractor or supplier shall set forth its claim against the debtor through notice by certified mail. If payment is not made within 10 days after receipt of such notice, the debtor shall be liable for interest on the amount due and owing at a rate of 1% per month. In addition, the party who has failed to comply with the provisions of Conn. Gen. Stat. § 42-158j(a) (2007) may be required to place funds in the amount of the claim, plus interest of 1% per month, into an interest bearing escrow account in a bank in the State of Connecticut. Conn. Gen. Stat. § 42-158j(b) (2007).

Additionally, if an owner enters into a contract under this section and fails or neglects to make payment to a contractor as required by Conn. Gen. Stat. § 42-158j(a) (2007), the owner shall, upon demand of any subcontractor or supplier who supplied labor and materials under the contract and has not been paid by the contractor, promptly pay such subcontractor or supplier. If the owner fails to make such payment, the subcontractor or supplier shall have a direct right of action against the owner. The owner’s obligations for direct payments to the subcontractor or supplier pursuant to Conn. Gen. Stat. § 42-158j(d) (2007) shall be limited to the amount owed to the contractor by the owner for work performed under the contract at the date such notice is provided. Conn. Gen. Stat. § 42-158j(d) (2007).

### IV. Warranties

#### A. Implied Representations & Warranties in Construction Contracts

A contractor will necessarily rely on an owner’s cooperation in any construction contract, and courts have interpreted construction contracts to contain a number of implied terms. There are (1) the implied warranty of the adequacy of the plans and specifications; (2) the duty to reveal superior knowledge; and (3) the duty not to hinder performance. Southern New England Contracting Co. v. State, 165 Conn. 644, 656, 345 A.2d 550 (1974); Hartford Elec. Applicators of Themalux, Inc. v. Alden, 169 Conn. 177, 183, 363 A.2d 135 (1975). In turn, the duty not to hinder performance has been held to apply in a wide range of circumstances, including the duty to make the work-site available and the duty to schedule and coordinate work. Hartford Elec. Applicators, 169 Conn. at 182; see also Walter Kidde Constructors, Inc. v. State, 37 Conn. Supp 50, 60, 434 A.2d 962 (1981).

Courts impose upon contractors an implied warranty that the work will be done in a skillful manner and that the material and equipment will be free of defects and in accordance with the plans and specifications. Willow Springs Condominium Ass’n, Inc. v. Seventh BRT Dev. Corp., 245 Conn. 1, 717 A.2d 77 (1998). Uniform Commercial Code warranties generally do not apply to the construction process since it is often interpreted to involve the sale of services as opposed to the sale of goods for which the U.C.C. does not

**B. New Home Warranties**

Connecticut General Statutes Chapter 827 regulates new home warranties. It applies to newly constructed single family dwelling units or conversion condominium units being conveyed by the declarant. The New Home Warranties Act only applies where a builder constructs a new home on a lot and then sells both the home and the lot to a third party purchaser. Therefore, the Act does not apply where a landowner contracts with a builder to construct a new home on real estate already owned by the landowner. D’Angelo Dev. & Constr. Corp. v. Cordovano, No. X06CV000166704S, 2008 WL 2895949, at *12-13 (Conn.Super. July 03, 2008). Similarly, the Act does not apply where a builder constructed a modular home for delivery to and erection on real estate already owned by the purchaser of a modular home. Camelot Modular Homes, Inc. v. Freska, No. CV075001754S, 2008 WL 3916263, at *7 (Conn.Super. July 30, 2008).

1. **Express Warranties**

Express warranties are created when a vendor makes (1) any written affirmation of fact or promise which relates to an improvement and is relied on in the agreement between the vendor and the purchaser; (2) any written description of an improvement, including plans and specifications which is relied on in the agreement between the vendor and the purchaser; and (3) any sample or model which is relied on in the agreement between the vendor and the purchaser. Conn. Gen. Stat. § 47-117(a) (2009).

An express warranty terminates either one year after delivery of the deed to the purchaser if the improvement is completed at that time, or of taking possession by the purchaser, which ever occurs first; or, if the improvement is not completed at the time of delivery of the deed, then within one year after the completion of the improvement or of taking possession by the purchaser, which ever occurs first. Conn. Gen. Stat. § 47-117(d) (2009).

2. **General Implied Warranties in Construction Contracting**

Implied warranties arise under Conn. Gen. Stat. § 47-118 (2009), the New Home Warranty Act, which provides that for the sale of an improvement, warranties are implied that 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, at the time of 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 implied warranties do not apply to any condition that an inspection of the premises would reveal to a reasonably diligent purchaser at the time the consent is signed. Conn. Gen. Stat. § 47-118(b) (2009).
An implied warranty terminates either (1) one year after delivery of the deed to the purchaser if the improvement is completed at that time, or of taking possession by the purchaser, which ever occurs first; or (2) if the improvement is not completed at the time of delivery of the deed, then within one year after the completion of the improvement or of taking possession by the purchaser, which ever occurs first. Conn. Gen. Stat. § 47-118(e) (2009).

V. Principles Applicable to Indemnification Agreements

A. General Principles

Indemnification agreements have long been recognized as a valid method of allocating the risks inherent in construction projects. Leonard Concrete Pipe Co. v. C.W. Blakeslee & Sons, Inc., 178 Conn. 594, 597, 424 A.2d 277 (1979). However, indemnification may be barred where the party seeking indemnification was guilty of affirmative misconduct which was a proximate cause of the injury. Weintraub v. Richard Dahn, Inc., 188 Conn. 570, 572, 452 A.2d 117 (1982).

B. Anti-indemnity Statutes

Pursuant to Conn. Gen. Stat. § 52-572(k) (2005), “Any covenant, promise, agreement or understanding entered into in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of any building, structure or appurtenances thereto, including moving, demolition and excavation connected therewith, that purports to indemnify or hold harmless the promissee against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of such promissee, such promissee’s agents or employees, is against public policy and void....” This anti-indemnity statute does not affect insurance-related agreements issued by a licensed insurer.

VI. Insurance

A. Workers’ Compensation


In 2008, the Connecticut Supreme Court reaffirmed the scope of a general contractor’s liability for personal injury claims by employees of one of its subcontractors. As a general rule, a general contractor, as an employer of independent subcontractors, is not liable for the torts of its independent subcontractors; however, Connecticut courts have long held that there are exceptions to this general rule, among them the following: if the
work contracted for is unlawful, or such as may cause a nuisance, or is intrinsically dangerous, or in its nature is calculated to cause injury to others, or if the contractee negligently employs an incompetent or untrustworthy contractor, or if the contractee reserves in his contract general control over the contractor or his servants, or over the manner of doing the work, or if in the progress of the work, he assumes control or interferes with the work, or if he is under a legal duty to see that the work is properly performed, the contractee will be responsible for resultant injury. So, too, the contractee or proprietor will be liable for injury which results from his own negligence. Consistent with these exceptions, Connecticut courts have also held that in the absence of statutory immunity based on the principal employer doctrine, embodied in Conn. Gen. Stat. § 31-291 (2003), a general contractor may, depending on the circumstances, be held liable to an employee of its subcontractor for its own negligence. Pelletier v. Sordoni/Skanska Constr. Co., 286 Conn. 563, 2008 WL 1722013 at *10 (2008); Pelletier v. Sordoni/Skanska Constr. Co., 264 Conn. 509, 517-19 (2003) (Where the court explained that under the principal employer doctrine, if an employer, known as a “principal employer,” meets three requirements: (1) the relation of principal employer and contractor must exist in work wholly or in part for the former; (2) the work must be on or about premises controlled by the principal employer; and (3) the work must be a part or process in the trade or business of the principal employer, it becomes liable to pay workers’ compensation benefits to an employee of its independent subcontractor injured in the course of employment. The purpose of the principal employer doctrine is to afford full protection to workmen by preventing the possibility of defeating the Workers’ Compensation Act by hiring irresponsible contractors or subcontractors.).

B. Owner-Controlled Insurance Programs

Conn. Gen. Stat. § 49-41(e) (2006) provides for owner-controlled insurance programs. An owner-controlled insurance program is an insurance procurement program under which a principal provides and consolidates insurance coverage for one or more contractors on one or more construction projects. A principal or contractor must disclose that the project will be covered by an owner-controlled insurance program in the project plans or specifications at the time the bids are solicited for the construction project. Conn. Gen. Stat. § 49-41(e)(4) (2006).

Each contract or policy of insurance issued under an owner-controlled insurance program must provide that (1) coverage for work performed and materials furnished shall continue from the completion of the work until the date that all causes of action are barred under any applicable statute of limitations; (2) any notice of a change in coverage under the contract or policy, or of a cancellation or refusal to renew the coverage under the contract or policy shall be provided to the principal and all contractors covered under the program; and (3) the effective date of a change in coverage under the contract or policy shall be at least 30 days after the date the principal and contractors receive the notice of change in coverage, and cancellation or refusal to renew shall be at least 60 days after the principal and contractors receive the notice of change in coverage. Conn. Gen. Stat. § 49-41(e)(3) (2006).

No contract for a public works project may include a provision that allows or requires the state or municipality to maintain an owner-controlled insurance program, except for one or more municipal projects under the supervision of one construction manager totaling one
hundred million dollars or more, or, if under the supervision of more than one construction manager, are located within the boundaries of a municipality. Conn. Gen. Stat. § 49-41(e)(2) (2006).

VII. Suretyship and Bonds

On public buildings or works of the state or municipalities, where the contract exceeds $100,000 and the total estimated cost of the labor and materials under the contract is greater than $100,000, the prime contractor must post a bond to secure payment to subcontractors and suppliers. Conn. Gen. Stat. § 49-41 (2006) (so-called “Little Miller Act”). A performance bond may be required at the discretion of the contracting officer for any contracts of $25,000 or more for a general bid or for a sub-bid of $50,000 or more. Conn. Gen. Stat. § 49-41(b) (2006). If payment for work performed or materials supplied, covered by a requisition submitted to the awarding authority, is not made within 60 days after the applicable payment date provided in Conn. Gen. Stat. § 49-41a (2006), or, in the case of materials or work not included on a requisition, if payment is not made within 60 days after the date materials were supplied or the work was performed, the subcontractor may serve a notice of claim on the surety with a copy to the general contractor within 180 days after the work was performed or materials supplied. Notice must be by certified mail. Suit must be commenced within one year after the last date materials were supplied or any work was performed. Conn. Gen. Stat. § 49-42 (2006).

In Connecticut, the furnishing of a contract surety bond is becoming more common on private projects. Private bonds serve as added security to that provided by mechanics’ liens. Because these bonds are not supplied pursuant to statute, they are not directly governed by the federal Miller Act or Connecticut’s Little Miller Act, although these statutes are often referred to as a source of guidance by the courts. Private surety bonds are interpreted based upon the language of the bond itself and the underlying contract.

In Connecticut, despite the fact that bond forms frequently specify a shorter period, private bonds must allow for at least three years of time within which suits against the bond can be brought, Conn. Gen. Stat. § 38a-290 (2007). The three-year period commences on the last day on which labor and materials related to the claim are supplied to the project. The statute prescribes a minimum time bar. It does not establish a limitation of action. If the bond provides for a longer period of time within which claims can be brought, the longer time period controls.

No surety shall be obligated for any of the interest, costs, penalties or attorney’s fees imposed under: (1) the prompt payment provisions of Conn. Gen. Stat. § 42-158i to 42-158o (2007); (2) Conn. Gen. Stat. § 49-37 (2006), which governs the dissolution of a mechanic’s lien by the substitution of a bond; or (3) Conn. Gen. Stat. § 52-249(a) (2005), which pertains to actions for foreclosure and substitution of a bond for a mechanic’s lien, unless the terms of the bond precisely reference the statute and specify that the surety is, in fact, so obligated.

VIII. Damages
A. General Principles

The basic aim of contract damages is to place the injured party in the same position that it would have been in had the contract been fully performed. *Beckman v. Jalich Homes, Inc.*, 190 Conn. 299, 309-10, 460 A.2d 488 (1983). Thus, the losses incurred by the injured party as a result of the breach, as well as any gains prevented, are recoverable as damages for breach of contract. In the context of a construction contract dispute, recoverable damages fall into two basic categories: “(1) direct damages, composed of ‘the loss in value to him of the other party’s performance caused by its failure or deficiency’; 3 Restatement (Second), Contracts § 347(a) (1981); plus, (2) ‘any other loss, including incidental or consequential loss, caused by the breach….’ Id., § 347(b).” *Ambrogio v. Beaver Road Associates*, 267 Conn. 148, 155, 836 A.2d 1183 (2003).

General, direct or actual damages are considered to include those damages that flow naturally from a breach, that is, damages that would follow any breach of similar character in the usual course of events. Such damages are said to be the proximate result of a breach, and are sometimes called ‘loss of bargain’ damages, because they reflect a failure on the part of the defendant to live up to the bargain it made, or a failure of the promised performance itself. Alternatively, consequential damages include those damages that, although not an invariable result of every breach of this sort, were reasonably foreseeable or contemplated by the parties at the time the contract was entered into as a probable result of a breach. These, too, must be proximately caused by the breach, and the difference is that they do not always follow a breach of this particular character. *City of Milford v. Coppola Constr. Co., Inc.*, 93 Conn. App. 704, 715, 891 A.2d 31 (2006).

While a party need not prove his damages with mathematical certainty, damages cannot be based on speculation. *Southern New England Contracting*, 165 Conn. at 661. “It is incumbent upon a plaintiff in a contract action to prove his damages with all the certainty which is reasonably possible, but where exactness is not possible he is not therefore to be precluded from a recovery, and the best approximation to certainty is all that is required.” *Bartolotta v. Calvo*, 112 Conn. 385, 395, 152 A. 306, 310 (1930).

B. Liquidated Damages

It is quite common for general contracts to contain liquidated damages provisions. A liquidated damages provision fixes the amount a breaching party will be assessed as damages. In almost all circumstances, liquidated damages clauses are inserted by the owner to calculate the potential loss if the contractor does not complete the project on time. Liquidated damages are enforceable in Connecticut; however, in order for a liquidated damages clause to be enforceable under Connecticut law, the following three conditions must be satisfied: (1) the damage which was to be expected as a result of a breach of contract is uncertain in amount and difficult to prove; (2) there was an intent on the part of the parties to liquidate damages in advance; and (3) the amount stipulated was reasonable in the sense that it is not greatly disproportionate to the amount of damages which, as the parties look forward, seem to be the presumable loss which will be sustained by the contractee in the event of a breach of contract. *Hanson Development Co. v. East Great Plains Shopping Center, Inc.*, 195 Conn. 60, 64–65, 485 A.2d 1296 (1985).
Liquidated damages are an exclusive remedy. Whatever amount is agreed to within the contract is the amount that will be enforced if a breach is found. This is so because a liquidated damages clause is utilized when actual damages are too difficult to prove or calculate. In addition, a liquidated damages clause should not operate as a penalty to the breaching party. The non-breaching party will be required to show that the liquidated damages are not so greatly disproportionate to its actual damages suffered so as to be characterized as a penalty. If a court finds that a liquidated damages provision is in fact a penal clause, the court will refuse to enforce it. Lastly, the non-breaching party must prove it actually suffered damages. A court will not assess liquidated damages if it is found that the non-breaching party has not suffered damage in any way. *Vines v. Orchard Hills, Inc.*, 181 Conn. 501, 435 A.2d 1022 (1980).

C. Exculpatory Clauses

1. Pay-When-Paid Clauses


However, where the subcontract expressly makes payment by the owner a condition precedent to payment by the contractor (often referred to as a “pay-if-paid” clause), courts have generally enforced the provision. *See, e.g., Star Contracting Corp. v. Manway Construction Co.*, 32 Conn. Supp. 64, 337 A.2d 669 (1973), but see *R&L Acoustics v. Liberty Mut. Ins. Co.*, No. CV000380506S, 2001 WL 1249658, at *4-7 (Conn.Super. Sept. 27, 2001) (holding that even where payment by owner is set forth as condition precedent to payment by contractor, pay when paid clause is unenforceable, because “[t]he solvency of the owner is a credit risk necessarily incurred by the general contractor….”).

2. No Damages for Delay Clauses

It is a universally accepted proposition that contract provisions aimed at relieving a party from the consequences of his own fault are not viewed with favor by the courts. *See Hyson v. White Water Mountain Resorts of Conn., Inc.*, 265 Conn. 636, 643, 829 A.2d 827 (2003). Thus, while clauses in construction contracts which exculpate parties from damages resulting from delays in performance are generally valid and enforceable, such clauses may not be invoked to bar damages for: (1) delays caused by the protected party’s bad faith or its willful, malicious or grossly negligent conduct; (2) unanticipated delays;
(3) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee; and (4) delays resulting from the contractee’s breach of a fundamental obligation of the contract. See White Oak Corp. v. Dep’t of Transp., 217 Conn. 281, 289, 585 A.2d 1199 (1991), citing, Corinno Civetta Constr. Corp. v City of New York, 67 N.Y.2d 297, 309-312 (1986).

For a delay to be “uncontemplated,” it must be uncontemplated by both parties to the contract and must not be “reasonably foreseeable.” White Oak, supra, 217 Conn. at 291. “Having agreed to the exculpatory clause when he entered into the contract, it is presumed that the contractor intended to be bound by its terms. It can hardly be presumed, however, that the contractor bargained away his right to bring a claim for damages resulting from delays which the parties did not contemplate at the time.” Id.

3. Indemnification Clauses

Many construction contracts contain broad indemnification clauses which require the general contractor to indemnify and hold harmless the owner, and in standard form AIA contracts, the architect, from liability for damages arising from the contract. Subcontracts often contain such clauses running in favor of the general contractor. An indemnification clause drafted so broadly as to hold the indemnitee harmless for personal injuries caused by the sole negligence of the indemnitee will not be enforceable and is against public policy. See supra Conn. Gen. Stat. § 52-572(k) (2005).

In many cases, however, these clauses are so broad as to require the contractor to indemnify the owner (or the subcontractor to indemnify the general contractor) unless the damages alleged were caused solely by the negligence of the owner (or general contractor) or its representatives. Under such circumstances, the indemnitor is required to fully indemnify the indemnitee. See Cirrito v. Turner Construction Co., 189 Conn. 701, 706-09, 458 A.2d 678 (1983). However, the language of the indemnity provision will be strictly construed. See Hyson, 265 Conn. at 643 (agreement purporting to release or indemnify proprietor of recreational facility or service prospectively may not be applied to damages arising from that party’s negligence in absence of express language so indicating).

D. Economic Loss Rule

In the context of construction disputes, the economic loss rule is most often raised when a party brings a negligence claim for purely economic harm against another party with whom it is not in contractual privity, such as when a contractor brings a claim against a design professional for defective plans and specifications. Although neither the Connecticut Appellate or Supreme Courts have ruled on the applicability and scope of the economic loss rule in the context of construction disputes, the Connecticut Superior Court decisions have been split on the issue. Compare Darien Asphalt Paving, Inc. v. Town of Newtown, No. CV 9804878, 1998 WL 886507 (Conn.Super. Dec. 7, 1998) (the economic loss rule has not been adopted in Connecticut, and therefore, “the requirement of privity should only be applicable to actions growing out of contract theory and should be irrelevant to tort actions.”); Garguilo Construction, Inc. v. Consulting Engineers, P.C., No. CV 99427426S, 1999 WL 1244239 (Conn.Super. November 30,1999) (economic loss rule

IX. Construction Liens

A. Direct Contracts with Owner

The right to file a mechanic’s lien in Connecticut is established by statute. Conn. Gen. Stat. § 49-33 (2006) provides that if any person has a claim for more than $10 for materials furnished or services rendered in the construction, removal or repair of any building, or in the site development of any plot of land, by virtue of an agreement with or consent of the private owner, or of some person acting for the owner in procuring the labor or materials, the building, or with the land on which it stands, is subject to the payment of the claim. The mechanic’s lien statutes have been interpreted to prohibit liens on public property. National Fireproofing Co. v. Huntington, 81 Conn. 632, 633 71 A. 911 (1909); see also Herbert S. Newman & Partners v. CFC Constr. Ltd. P’ship, 236 Conn. 750, 757, 674 A.2d 1313 (1996); Blakeslee, 239 Conn. 708, 714–15, 687 A.2d 506 (1997); KMK Insulation v. A. Prete & Son Constr. Co., 49 Conn. App. 522, 527 (Conn. App. Ct. 1998).

The mechanic’s lien takes precedence over any other encumbrance originating after the commencement of the services or the furnishing of materials. Conn. Gen. Stat. § 49-43 (2006); see also Waterbury Lumber & Coal Co. v. Asterchinsky, 87 Conn. 316, 321, 87 A. 739 (1913). However, if the remaining amounts due from the owner is insufficient to pay all mechanic’s liens in full, all lienors share pro-rata. Conn. Gen. Stat. § 49-36(b) (2006). In addition, a mechanic’s lien does not attach for materials and labor provided before title is vested in the owner. Bridgeport People’s Savings Bank v. Palaia, 115 Conn. 357, 161 A. 526, 528 (1932).

A mechanic’s lien will not attach to a greater extent than the amount which the owner has agreed to pay to the general contractor. Conn. Gen. Stat. §§ 49-33(e), 36(a) (2006). In addition, the owner is entitled to credit for the reasonable cost of completion and damages, and the owner is further entitled to credit for payments made in good faith to the general contractor or prime contractors before receiving notice of the lien. Conn. Gen. Stat. § 49-33(f) (2006).

The person performing the services or furnishing the materials must, within 90 days after he or she has ceased to do so, record in the land records a certificate of lien
describing the premises, the amount claimed as a lien, the name of the owner, and the date of the commencement of the performance of services or furnishing of materials; stating that the amount claimed is justly due, as nearly as the same can be ascertained; and subscribed and sworn to by the claimant; and within the same 90 days serve a true and attested copy of the certificate upon the owner. Conn. Gen. Stat. § 49-34 (2006). Service of the certificate of lien must be made by a sheriff or indifferent person.

The time for filing the lien begins to run from substantial completion of the claimant’s work and is not extended by trivial work deferred. Peck v. Brush, 90 Conn. 651, 656, 98 A. 561 (1916).

Moreover, in order to sustain a mechanic’s lien, materials must not merely be furnished or delivered to the building site but they must actually be used in its construction. Thompson & Peck, Inc. v. Division Drywall. 241 Conn. 370, 371–72 696 A.2d 326 (1997).


The most recent significant change in Connecticut’s mechanic’s lien statutes is contained in Connecticut’s Act Concerning Fairness in Financing in the Construction Industry enacted in 2006. The Act modified Connecticut’s lien laws allowing liens to attach to either a leasehold interest or the underlying interest of lease property if: (1) the labor and materials were provided under the terms of a commercial contract; (2) they were provided with the owner’s prior knowledge and approval; and (3) the owner exercised a right of approval and control over the performance of labor and provision of material. Conn. Gen. Stat. § 49-33(h) (2006).

B. Subcontractors and Suppliers

Subcontractors, sub-subcontractors and suppliers are proper lien claimants under Conn. Gen. Stat. § 49-43 (2006). A subcontractor’s right to file a lien, however, is based on the doctrine of subrogation. Its right to recovery is limited to the amount of the unpaid contract debt owed by the owner to the general contractor. Seaman v. Climate Control Corp., 181 Conn. 592, 601–02, 436 A.2d 271 (1980). Thus, if the owner does not owe money to the general contractor, the subcontractor has no right to a mechanic’s lien. However, a second tier subcontractor can pursue a mechanic’s lien even though the general contractor has paid the first tier subcontractor in full. Id.

The owner is entitled to credit for payments made to the general contractor in good faith and prior to notice of lien, and to credit for payments for the reasonable cost of completion. The owner’s knowledge that the general contractor had been delinquent in making some payments to subcontractors and had requested that some checks be pre-endorsed to designated subcontractors, does not demonstrate a lack of good faith. Rene Dry Wall Co. v. Strawberry Hill Associates, 182 Conn. 568, 574, 438 A.2d 774 (1980). Where, after the general contractor’s default, the owner pays a premium to some subcontractors to complete their work, and the premium includes payment for unpaid work performed while the general contractor was still in charge of the project, the exigencies
confronting the owner upon the general contractor’s default may make such payments nonetheless reasonable. *Id.* at 575–76.

C. **Residential Liens by Subcontractors and Suppliers**

Home improvement contractors and new home construction contractors are entitled to file mechanic’s liens. Such contractors must comply with the statutory requirements of the Home Improvement Act, Conn. Gen. Stat. §§ 20-419 *et seq.* (2008), or they forfeit their right to assert a lien. *Macmillam v. Higgins*, 76 Conn. App. 261, 270, 822 A.2d 246 (2003). However, subcontractors to home improvement or new home construction contractors do not have to comply with the Home Improvement Act and their liens will not be discharged even when the general contractor is not in compliance with the Act. *Fink v. Olson*, No. CV 950148938, 1996 WL 689736, at *2-3 (Conn.Super. Nov. 22, 1996).

D. **Assignment of Lien Rights**

Connecticut statutes do not prohibit the assignment of mechanic’s lien rights. However, such rights are typically governed by contract. Connecticut courts will uphold clauses in contracts that bar the assignment of claims stemming from a party’s contractual rights thereunder. *Rumbin v. Utica Mutual Ins. Co.*, 254 Conn. 259, 267–69, 757 A.2d 526 (2000).

E. **Notices**

Within 90 days from the date the contractor or subcontractor ceases its work on the property, a copy of the mechanic’s lien must be served on all property owners. Conn. Gen. Stat. § 49-34 (2006). Additionally, a copy of the lien must be served on all owners within 30 days of the date the lien was filed. *Id.* A state marshal or other indifferent person must perform service of the lien. Conn. Gen. Stat. § 49-35 (2006). Subcontractors who do not have a contract with the property owner must provide additional notice to the owner of its intent to file a lien. Written notice on an intent to file a lien must be served on the owner not later than 90 days after ceasing to furnish materials or render services. Conn. Gen. Stat. § 49-35 (2006); *J.C. Penney Properties, Inc. v. Peter M. Santella Co.*, 210 Conn. 511, 516, 555 A.2d 990 (1989). The notice must state when the subcontractor commenced work on the property and that the subcontractor intends on filing a lien to recover payments therefore. Failure to serve this notice of intent will render a mechanic’s lien invalid. *Sallstrom v. Borowski*, No. CV020080291, 2003 WL 21213658, at *3 (Conn.Super. May 9, 2003). However, a subcontractor may satisfy the notice requirement by serving upon the owner a copy of the recorded lien certificate. *H&S Torrington & Assocs. v Lutz Eng’g Co. Inc.*, 185 Conn. 549, 555–56, 441 A.2d 171 (1981).

Finally, pursuant to Conn. Gen. Stat. § 42-158n (2007), an owner, at or before the commencement of any work under a construction contract, shall post and maintain in a conspicuous place at the construction site (1) the name and address of the owner and any agent authorized to accept service of a certificate of mechanic’s lien on behalf of the owner in any action, suit or proceeding for the enforcement of any obligation of the owner arising out of the construction contract; (2) the volume and page number of the land
records of the town in which such property is located; and (3) if a payment bond exists, the name and address of the surety that issued the payment bond.

F. Foreclosure

An action to foreclose a mechanic’s lien must be commenced within one year after the lien is filed with the town clerk in which the property is situated. Conn. Gen. Stat. § 49-39 (2006). Connecticut’s mechanic’s lien law also states that a lien expires unless the claimant records a notice of lis pendens on the land records within one year of the date the lien was perfected, or within 60 days of any final disposition of an appeal taken in accordance with Conn. Gen. Stat. § 49-35c (2006). The lis pendens provides notice to any third parties that the property is subject to an action against it. A lienor has no cause of action for foreclosure of the mechanic’s lien after the passage of the one-year time limitation. However, in the case of an owner in bankruptcy, the time to bring the foreclosure will be stayed under the Bankruptcy Code. If the owner’s bankruptcy petition is ultimately dismissed, the lienor will have an additional 30 days, from the time it receives notice of the dismissal, to bring its foreclosure. Incorporated Constr. Ltd. v. New England Sav. Bank, No. CV92 050 57 28, 1995 WL 16820, at *2-3 (Conn.Super. Jan. 10, 1995).

Just prior to instituting a foreclosure action, the lienor should conduct an up to date title search to determine any encumbrances on the subject property. Any encumbrances or other persons with interests in the property subsequent in right to the lienor must be named as defendants in the foreclosure action if the lienor is to take the property or the property is to be sold at a foreclosure sale free of those subsequent encumbrances or interests. If the property being foreclosed is being leased to any tenants, those tenants should also be named as defendants in the foreclosure action, so that the lienor has the option of ejecting those tenants upon obtaining a judgment of foreclosure. Those mechanic’s lienors with equal priority to the foreclosing lienor need not be named as defendants in the action, but should be identified in the complaint, as well as those encumbrances with interests prior in right to the foreclosing lienor.

The first named defendant should always be the owner of the subject property. In addition, all parties liable for the debt to the lienor should be joined as parties in the action. It is not necessary to join other mechanic’s lienors as defendants if there are no intervening encumbrances, since no mechanic’s lien would have priority over any other mechanic’s lien. D & G Plumbing & Heating Co., Inc. v. Malon, No. CV 93 54351 S, 1995 WL 23452, at *1 (Conn.Super. Jan. 13, 1995).

The foreclosure complaint itself, besides identifying all prior, concurrent, and subsequent encumbrances, along with the exact nature of their interests, should set forth all the information included in the certificate of lien as required by Conn. Gen. Stat. § 49-34 (2006), including a description of the premises, an identification of the owner or owners of the premises, and the amount that is justly due, which is secured by the lien. In addition, a complaint should contain a statement of facts sufficient to demonstrate that the lienor is entitled to the relief sought. This would include an identification of the contract pursuant to which the lienor rendered services or furnished materials, as well as a description of the exact nature of those materials or services, and the fact that the lienor has not been fully paid for those services or materials.
Furthermore, the complaint should include a recitation indicating that all procedural requirements under the mechanic’s lien statutes have been followed, including the dates that notices of intent, if necessary, were served upon the owner and general contractor, and the date, page and volume number the certificate of lien, properly signed and sworn to, was recorded on the land records.

If the lienor is a general contractor, and his only recourse is against the property, then the complaint need only be set forth in a single count seeking foreclosure of the property. However, if the lienor is a subcontractor, he may include a cause of action for breach of contract against the general contractor, as well as seek relief for unjust enrichment. The Connecticut mechanic’s lien statutes are not an exclusive remedy and do not bar the lienor from asserting other causes of action. See Charbonneau v. Samsel, No. CV93 0704028, 1994 WL 702695 (Conn.Super. December 5, 1994). A similar procedure would be used if the lienor is a second tier subcontractor or material supplier who is seeking additional recourse against the first tier subcontractor.

Upon proving its cause of action on its lien, the lienor shall seek a judgment of strict foreclosure, or foreclosure by sale. Whether or not the lienor is going forward on a motion for strict foreclosure or motion for foreclosure by sale, at the time of the hearing the court must determine whether there is equity in the property based on the finding of the lienor’s debt and the property value, and thus, whether the judgment should be one for foreclosure by sale, if there is equity, or strict foreclosure, if there is not sufficient equity. The lienor will generally prove the amount of the debt by putting on testimony and presenting evidence with regard to the contract and services rendered or materials furnished, as well as the lack of payment. The value of the property will be determined by the court, based on appraisals or the testimony of one or more appraisers. If the court orders a foreclosure by sale, the court will assign a sale date and appoint a committee for sale, usually a lawyer, to conduct the sale at auction. If the judgment is one for strict foreclosure, the court will set a first law day. Law days are the days on which the owner or subsequent encumbrancer may redeem, or pay off the lienor and take title to the property subject to prior encumbrances. The first law day is given by the court to the owner and is usually set at least 21 days after the judgment enters to allow the appeal period to lapse. The remaining law days are assigned to the encumbrances of record in inverse order of priority.

In a strict foreclosure, a subsequent encumbrancer has the option to pay the debt and the costs of the lienor and take title, foreclosing out all subsequent parties. If there is more than one defendant, the court will set separate law days for each defendant, and as each defendant’s law day passes, his or her interest is foreclosed, and the right to redeem is forever waived. After all the law days have passed without any party redeeming, title will vest in the lienor.

Within 30 days after the time limited for redemption expires, the lienor must file a certificate of foreclosure as provided in Conn. Gen. Stat. § 49-16 (2006). This serves as notice that title to the foreclosed property is now in the name of the lienor.

If the defendant/owner appears and raises defenses to the foreclosure action, the matter will not be amenable to disposition upon motion and hearing but must proceed to trial on the merits. Any action to foreclose a mechanic’s lien is privileged with respect to trial assignment, which means that an earlier trial date will be obtained as compared with an ordinary lawsuit for money damages. There is generally no right to a jury trial in a
mechanic’s lien foreclosure action, because a mechanic’s lien foreclosure is considered an “equitable proceeding.” However, if there are sufficient legal counts joined with the equitable foreclosure count, such as breach of contract, the court may find that the legal claims outweigh the equitable (foreclosure) claim and allow a jury trial. See Northeast Sav., F.A. v. Plymouth Commons Realty Corp., 229 Conn. 634, 642 A.2d 1194 (1994). The issue is whether the lawsuit is “essentially” legal or “essentially” equitable. Id.

Several of the more common defenses raised by the owner at a mechanic’s lien foreclosure trial include: (1) the reasonable cost of satisfactory completion of the contract exceeded the amount of the lien; (2) damages for which the general contractor is liable to the owner exceed the amount of the lien; (3) good faith payments were made by the owner to the general contractor before it received notice of the lien; (4) the lienor failed to comply with one or more of the statutory prerequisites for perfection or foreclosure of the lien. Based on the court’s findings, the court may either (1) enter judgment of strict foreclosure or foreclosure by sale in the full amount of the lien claimed; (2) enter judgment for the lienor, but reduce the amount of the debt; or (3) enter judgment for the defendant and discharge the lien.

G. Lien Waivers and Releases

Under Conn. Gen. Stat. § 42-158 (2007), a construction contract that requires the waiver or release of the right of a contractor, subcontractor or supplier to record a mechanic’s lien for services yet to be performed and not paid for is invalid. Lien waivers subject to Conn. Gen. Stat. § 42-158 (2007) are valid only if they apply retrospectively for work already performed and paid for. This law applies only to construction involving commercial or industrial buildings requiring a certificate of occupancy and does not affect construction of residential or public projects.

H. Liens or Other Payment Protection Applicable to Public Projects

In Connecticut, a contractor, subcontractor or any other party cannot lien a public work of the state or a municipality. Fenton v. Fenton Building Co., 90 Conn. 7, 96 A. 145, 147 (1915); National Fireproofing, 81 Conn. 632; see also O & G Indus., Inc. v. Town of New Milford, 229 Conn. 303, 307, 640 A.2d 110 (1997). An unpaid supplier of goods or services must look to other avenues of payment such as state bonding laws. See Conn. Gen. Stat. § 49-41. In making a determination of whether a project is “public work” within Conn. Gen. Stat. § 49-41 no one factor is determinative, and the decision is made on case-by-case basis turning on the degree of governmental connection and involvement with each particular project. L. Suzio Concrete Co., v. New Haven Tobacco, Inc., 28 Conn. App. 622, 629, 611 A.2d 921 (1992). Although the protection of a mechanic’s lien is not available as indicated, see supra p. 12, Connecticut has a prompt payment statute and a statute requiring that general contractors furnish payment bonds for the protection of subcontractors and employees. See Conn. Gen. Stat. §§ 49-41, 41a (2006).
I. Bonding in Lieu of Lien Rights

Pursuant to Conn. Gen. Stat. § 49-37 (2006), the property owner may file an application with the superior court to dissolve a mechanic’s lien and seek substitution of a surety bond. The bond must be sufficient to cover the amount of the lienor’s claim, including costs and interests. The lien claimant has one year from the date of perfecting its original lien to commence suit against the bond. Conn. Gen. Stat. § 49-37 (2006). Should a claimant obtain judgment on such a bond, the court is authorized to award costs, including reasonable attorney’s fees. Conn. Gen. Stat. § 52-249(a) (2005). However, under Conn. Gen. Stat. § 42-158o (2007), the recovery of costs and fees, as well as interest, by the claimant must be expressly provided for in the terms of the lien bond.

J. Architect Lien Rights

As previously discussed, to file a mechanic’s lien, the materials furnished or services rendered by a lienor must be directly associated with the physical construction or improvement of the land. Services provided by architects, engineers and surveyors are lienable so long as their plans are used in the construction and site development of the building or property. Marchetti v. Sleeper, 100 Conn. 339, 343, 123 A. 845 (1924). See also Design Professionals, Inc. v. Sammartino, 11 Conn.L.Rptr. 99 (1994).

K. Example

The following is a sample Certificate of Mechanic’s Lien and Notice of Intent:

CERTIFICATE OF MECHANIC’S LIEN

THIS IS TO CERTIFY THAT, _____, a corporation with a place of business at _____, Connecticut, its successors and assigns, by virtue of a certain agreement with or by consent of _____, a corporation with a place of business in the Town of _____, Connecticut, the Owner of land upon which buildings and appurtenances are located (hereinafter referred to as the “Owner”), has a lien under the Statutes in such cases made and provided, on the following described premises located in the Town of _____, County of _____ and State of Connecticut, and to the buildings standing thereon and appurtenances thereto, in the amount of _____ and 00/100 Dollars ($_____), as nearly as the same can be ascertained, and which amount is now justly due.

THE LIEN is filed against the Owner for services rendered and materials furnished in the construction, erection, raising and removal of the buildings on the land hereinafter described or any of the appurtenances thereto; and for repairs done thereon, commencing on the _____ day of _____ 200_ and last performed on the _____ day of _____ 200_.

THE LIENED PREMISES are situated in the Town of _____, County of _____ and State of Connecticut, known as _____, _____, Connecticut, and recorded in the name of _____, in the Land Records for the Town of _____, Connecticut, in Volume _____ at Page _____, and bounded and described as follows, viz:
SEE SCHEDULE A, ATTACHED HERETO

THIS CERTIFICATE is made and filed within 90 days from the time of ceasing to render services and furnish materials aforesaid.

IN WITNESS WHEREOF, _____, _____ of _____, signer of the foregoing Certificate of Mechanic’s Lien, have hereunto set my hand and made solemn oath to the truth of the foregoing Certificate of Mechanic’s Lien and that the amount above named is justly due to the said _____, as nearly as the same can be ascertained, this the _____ day of _____ 200__.

[____]  

____________________________________         By:_______________________________  
Witness        By: _____
Its: _____

____________________________________  
Witness

STATE OF CONNECTICUT  )
) ss. _____, Connecticut  _____, 200__
COUNTY OF __________  )

PERSONALLY APPEARED, _____, _____ of _____, signer of the foregoing Certificate of Mechanic’s Lien, and made solemn oath to the truth of the foregoing Certificate of Mechanic’s Lien and that the amount above named is justly due to the said _____, as nearly as the same can be ascertained, before me.

_______________________________________  
Notary Public
My Commission Expires:

Received _________ , 200_ at _______ a.m./p.m.

__________________________________________  Town Clerk
NOTICE OF MECHANIC’S LIEN

To Property Owner:  
Name ____________________
Adress ____________________

Agent for Service:  
Name ____________________
Name ____________________

To Contractor:  
Name ____________________
Address ____________________

Agent for Service:  
Name ____________________
Address ____________________

You are hereby notified that on the ____ day of ____ 200__, ________, of ____________, Connecticut, commenced to furnish materials for and render services in the construction, raising, removal or repairs of the buildings and appurtenances owned by the Owner, and located on land situated in the Town of ________, Connecticut, located at ____________, known as ____________, ________, Connecticut, more particularly bounded and described as follows:

SEE SCHEDULE A, ATTACHED HERETO

that said materials and services were completed by ____________ on the ____ day of ____ 200__, and that it intends to claim a lien on said buildings, appurtenances and land in the amount of ________________ and 00/100 Dollars ($_______), which is justly due, as nearly as the same can be ascertained.

You are further given notice of our intent to claim a lien in accordance with a certain Certificate of Mechanic’s Lien dated ____ __, 200__.

IN WITNESS WHEREOF, ________________, Officer of ________________, signer of the foregoing Notice of Mechanic’s Lien, have hereunto set my hand and made solemn oath to the truth of the foregoing Notice of Mechanic’s Lien and that the amount above named is justly due to the said ________________, as nearly as the same can be ascertained, this the _____ day of _____ 200__.

[______________]

____________________________________  By:______________________________
Witness        By: __________


X. Arbitration, Mediation, and Other ADR

A. Uniform Arbitration Act

Arbitration agreements are enforceable, and a court action brought by one party to an arbitration agreement may be stayed on motion by another party. Conn. Gen. Stat. §§ 52-408, 409 (2005). Any party to an arbitration agreement may apply to the court for an order directing the parties to proceed with arbitration. Conn. Gen. Stat. § 52-410 (2005). If the arbitration agreement fails to provide a method for appointment of an arbitrator, the court may appoint one. Conn. Gen. Stat. § 52-411(b) (2005). Subpoenas are returnable to the arbitrator, and compliance may be compelled by the court. Conn. Gen. Stat. § 52-412 (2005). The award shall be rendered within 30 days from completion of the hearings. Conn. Gen. Stat. § 52-416 (2005). Within one year after the award is rendered, any party may apply to the court for an order confirming the award. Conn. Gen. Stat. § 52-417 (2005). Upon application of any party, the court may vacate the award if it finds that the arbitrators have refused to hear evidence pertinent and material, or exceeded their powers, or evidenced partiality. Conn. Gen. Stat. § 52-418 (2005). The court may modify or correct the award if there has been an evident miscalculation of figures, or an evident material mistake in the description of any person, thing or property referred to in the award, or if an award is made on a matter not submitted to the arbitrators. Conn. Gen. Stat. § 52-419 (2005). No motion to vacate, modify or correct an award may be made after 30 days from the notice of the award to the moving party. Conn. Gen. Stat. § 52-420(b) (2005).
B. Other ADR Issues

The Connecticut Judicial Department actively encourages agreement of the parties to litigation to submit to various Alternative Dispute Resolution (ADR) programs.

Under Conn. Gen. Stat. § 52-434 (2005) an attorney trial referee (ATR) may be appointed for a one-year term. The court may refer any civil, non-jury case to an ATR for trial. The ATR files a report with the court, containing facts found and the conclusions drawn there from; and a memorandum of decision and recommended judgment. The court may enter judgment on the report.

Contract cases involving less than $15,000 may be referred by the court to a fact-finder or to an arbitrator. Conn. Gen. Stat. §§ 52-549n et seq (2005).

Court annexed mediation in Connecticut is a program under which the presiding judge may, with the consent of the parties, refer a case to a senior judge for extensive settlement negotiations.

C. Mediation

For actions against the state on public works contracts, claims brought pursuant to Conn. Gen. Stat. § 4-61 (2007) may be submitted for mediation under the mediation rules of such dispute resolution entity as the parties may agree upon. Conn. Gen. Stat. § 4-61(f) (2007).

XI. Other Special Considerations Applicable to Construction Contract Practices Generally


XII. Consumer Protection Laws Applicable to Design and Construction Contracts


CUTPA applies to construction claims. See Tessman v. Tiger Lee Construction Co., 228 Conn. 42, 634 A.2d 870 (1993). Punitive damages are available when there is evidence of a reckless indifference to the rights of others or an intentional and wanton
violation of those rights. *Id.* Punitive damages equal to actual damages is a common measure. *Tessman*, 228 Conn. at 43. Connecticut courts have considered the following criteria to determine whether certain practices violate CUTPA; (1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; or (3) whether it causes substantial injury to consumers or competitors. *Francoline v. Klatt*, 26 Conn. App. 203, 209, 600 A.2d 8 (1991). CUTPA also applies to banks. *Normand Josef Enter’s, Inc. v. Connecticut Nat’l Bank*, 230 Conn. 486, 509, 646 A.2d 1289 (1994).

Chapter 740 of the Connecticut General Statutes is the Home Solicitation Sales Act. It may apply to home improvement contractors. No agreement of the buyer shall be effective unless it is signed and dated, or if the seller shall fail to furnish the buyer with a fully completed copy. It must contain the name and address of the seller and a notice in bold face that the buyer may cancel within 3 business days. Conn. Gen. Stat. § 42-135a (2007); Conn. Gen. Stat. § 42-137 (2007). Violation of the Act constitutes a violation of CUTPA. Conn. Gen. Stat. § 42-141 (2007).

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**XIII. Environmental Considerations**

**A. General Considerations**

Under Title 22a of the Connecticut General Statutes there exists a multitude of Acts and corresponding statutes which have been enacted to safeguard Connecticut’s environmental resources. These include the Environmental Protection Act, the Inland Wetlands and Watercourses Act and the Soil Erosion and Sediment Control Act to name a few. Conn. Gen. Stat. §§ 22a-14 et seq (2006); Conn. Gen. Stat. §§ 22a-36 et seq (2006); Conn. Gen. Stat. §§ 22a-325 et seq (2006). Construction projects are inherently intertwined with the environment in which they occur; therefore, it is important to be cognizant of the existing laws and regulations concerning environmental protection standards and to conduct such projects within these parameters. It may be necessary for owners and/or contractors to employ various environmental consultants, experts and professionals who are capable of guiding them through the applicable environmental protection measures.

Environmental consultants are valuable experts on virtually any construction project. The type of environmental consultant necessary, is dependant upon the challenges associated with each individual construction project. Landscape architects who have training in the protection of natural contours and topography can be a helpful when the general environmental design of the project is at issue. A soil scientist or groundwater hydrologist may be required if the project occurs near, or may potentially effect, a wetland or waterway. If the owner and/or contractor are uncertain as to what potential environmental hazards may be awaiting them on a project site, a civil engineering firm and/or the Connecticut Department of Environmental Protection should be contacted. Project teams can also benefit from legal counsel experienced in the resolution of environmental concerns and the coordination required to manage these complex issues and tasks.
B. Green Building Programs and Sustainable Construction Initiatives

Under Conn. Gen. Stat. § 16a-38k (2009), new state buildings of $5,000,000 or more, and renovations of state facilities in excess of $2,000,000, must meet or exceed a LEED silver rating or a two-globe rating under Green Globes. In 2007, this was extended to municipal school construction projects.

In 2007, the Connecticut Legislature enacted Conn. Gen. Stat. § 29-256a (2007), requiring changes to the State Building Code mandating sustainable energy practices and meeting ASHRAE Standard 90.1 for all new construction. The Code revisions will also require that all buildings, including residences, be designed to provide optimum cost-effective energy efficiency over the useful life of the building. Moreover, except for residential buildings with no more than four units, all buildings in excess of $5,000,000 (this threshold drops to $2,000,000 in 2010) must be built or renovated using building construction standards consistent with or exceeding the LEED silver rating or a two-globe rating under Green Globes.

C. Acquisition of Contaminated Property

1. The Connecticut Transfer Act

Conn. Gen. Stat. §§ 22a-134 et seq. (2008) concerns any transfer of real property or a business operation at which more than 100 kilograms of hazardous waste was generated in any one month, hazardous waste generated at another site was disposed, treated, recycled, stored or otherwise handled or the process of dry cleaning, furniture stripping, or vehicle body repair or painting was conducted on the premises. Hazardous Waste is that which is identified under the Federal Resource Conservation and Recovery Act of 1976, or regulations adopted by the Connecticut Commissioner of Environmental Protection, or PCBs (polychlorinated biphenyls) in concentrations greater than fifty parts per million.

The transferor of an establishment must deliver to the transferee one of four forms. Form I is the written certification by the transferor of an establishment on a form prescribed by the Commissioner that no discharge, spillage or other release of hazardous waste or other hazardous substance has occurred at the parcel. Form II is a certification by the transferor that any release which has occurred has been properly investigated and remediated and that the remediation has been approved in writing by the Commissioner or has been verified in a writing attached to such form by a licensed environmental professional (LEP) to have been performed in accordance with the remediation standards adopted by the Commissioner, or that no remediation is necessary to achieve compliance with the remediation standards. Form III is a written certification stating that a release of hazardous waste has occurred at the parcel, or the environmental conditions are unknown and that the person signing the certification agrees to investigate and remediate the parcel in accordance with the remediation standards. Form IV is a written certification accompanied by documentation demonstrating that there has been a release and remediation has been effected except for post-remediation or natural attenuation monitoring, and the person signing the certification agrees to conduct post-remediation or
natural attenuation monitoring in accordance with the remediation standards, and to conduct further remediation if necessary.

Conn. Gen. Stat. § 22a-134a (2008) provides that prior to transferring of an establishment, the transferor must submit to the transferee the appropriate form no later than 10 days after the transfer the transferor must provide a copy of the form to the Commissioner. The certifying party to a Form I, III or IV filing must simultaneously submit an Environmental Condition Assessment Form, summarizing prior site investigation and remediation work. The transferor must make this certification and assume the investigation and remediation responsibilities if no other qualified party associated with the transfer agrees to serve as the certifying party. Within 45 days of receipt of a Form III or IV, the Commissioner shall notify the party assuming the task of remediation whether the form is complete. Unless the Commissioner elects to review and approve the remediation, the certifying party must use a LEP to verify that the remediation has been performed in accordance with the remediation standards.

Under Conn. Gen. Stat. § 22a-134b (2006), failure of the transferor to comply with any of the provisions of the Act entitles the transferee to recover damages from the transferor, and renders the transferor strictly liable for all remediation costs and damages. Violation of the Act may also lead to civil penalties, fines and other enforcement.

2. **Covenant Not to Sue**

Conn. Gen. Stat. § 22a-133aa and § 22a-133bb (2006) provide for Commissioner of Environmental Protection to enter into a covenant not to sue with a prospective purchaser or owner of contaminated real property when (1) the owner or purchaser certifies that there is a detailed written plan for remediation of the property, in accordance with standards adopted by the Commissioner, approved by the Commissioner of Environmental Protection, which plan shall be incorporated by reference in the covenant, (2) the Commissioner of Environmental Protection has approved a final remedial action report for such property and the person requesting a covenant certifies that there has been no discharge after the date of such approval. Upon payment of the fee set forth in Conn. Gen. Stat. § 22a-133aa (2006), the Commissioner must issue a covenant on a narrower set of conditions than those issued under Conn. Gen. Stat. § 22a-133b. The Commissioner has discretion whether or not to issue the latter type of covenant, on conditions that reserve rights to require further actions if contamination or increased risks are discovered in the future. These discretions, covenants under Conn. Gen. Stat. § 22a-133bb (2006) can also be issued based on remedial action plans, verifications and reports issued by a licensed environmental professional under the Connecticut Transfer Act or voluntary remediation programs established under Conn. Gen. Stat. §§ 22a-133x and 133y.

Any covenant not to sue shall also provide that the Commissioner will not take any action against the holder of the covenant to require remediation or any other action against such holder related to the discharge, unless the property is not remediated in accordance with plan, the plan does not achieve the applicable standards, or environmental land use restrictions supporting the remediation are not recorded or followed. The covenant does not, of course, bar claims of the U.S. Environmental Protection Agency, or private parties.
D. Disclosure Requirements

Conn. Gen. Stat. § 20-327b (2008) requires existing residential property sellers to provide written property condition disclosures to a prospective purchaser prior to the latter’s execution of a contract. The disclosure form is prescribed by the Department of Consumer Protection and may be obtained from the Division of Real Estate or any municipal town clerk.

XIV. Lender’s Issues

A mortgage to secure future advances for construction or repair of buildings, or site improvements, secures all advances with the same priority as if advanced at the time the mortgage was delivered, if the mortgage contains a description of the loan in substantially the following form: “Whereas buildings or improvements on said premises are in process of construction or repair, or to be erected or repaired; and whereas the said grantee has agreed to make the loan herein described to be paid over to said grantor in installments as the work progresses, the time and amount of each advancement to be at the sole discretion and upon the estimate of said grantee, so that when all of the work on said premises shall have been completed to the satisfaction of said grantee, said grantee shall then pay over to said grantor any balance necessary to complete the full loan of $....; and whereas the grantor agrees to complete the erection or repair of said buildings to the satisfaction of said grantee within a reasonable time from the date hereof or at the latest on or before .... months from this date”. Conn. Gen. Stat. § 49-3(a) (2006). This language is valid even if a separate construction loan agreement specifies sums to be advanced upon the happening of a certain event (e.g., $50,000 when house enclosed). The time for completion may be modified by a recorded agreement without affecting or limiting the priority of the mortgage. Conn. Gen. Stat. § 49-3(b) (2006). Upon default, the mortgagee may complete and the cost will be secured by the mortgage, provided that the total debt may not exceed the face amount of the note. Conn. Gen. Stat. § 49-3(c) (2006)/.


A. Priority between Construction Mortgage or Deed of Trust and Construction Liens

In Connecticut, a mechanic’s lien, asserted pursuant to Conn. Gen. Stat. § 49-33 (2006), will have priority over any other encumbrance, such as a mortgage, if said other encumbrance is recorded after the contractor provides materials or labor to a construction project. Conn. Gen. Stat. § 49-3 (2006). However, a mortgage, or other such encumbrance, filed prior to a contractor providing materials or labor will take precedence. See Waterbury Lumber & Coal Co. v. Asterchinsky, 87 Conn. 316, 321, 87 A. 739 (1913) (Where the court determined a mechanic’s lien takes priority over all conveyances subsequent to the time when labor and materials are first furnished.).
B. Construction Lender’s Responsibility to Borrower Arising from Disbursement of Loan Proceeds

In Connecticut Bank & Trust Co., v. Carriage Lane Associates, 219 Conn. 772, the Connecticut Supreme Court held that: (1) the language in the senior mortgage did not allow a junior lienor to infer that the senior mortgagee had made a contractual commitment to advance funds to the mortgagor only as construction progressed; (2) the only duty that senior construction mortgagee owed to the holder of the junior purchase money mortgage was one of good faith after the purchase money mortgagee had unsuccessfully bargained for subordination agreement; and (3) when the mortgage securing future advances complies with Conn. Gen. Stat. § 49-3 (2006), the mortgagee is permitted to make advances at its sole discretion, provided that the face amount of the note secured by the mortgage is not exceeded.

C. Potential Liability of Construction Lender to Contractors, Subcontractors, and Others Involved in Construction Process

A lender should request all copies of subcontractor notices to a borrower and not make advance disbursements to the borrower to limit its potential liability to subcontractors. Conn. Gen. Stat. § 49-36 (2006) provides for a limitation on the amount of the mechanic’s lien that can attach to property based on the price which the owner agreed to pay for the property and its improvements. Conn. Gen. Stat. § 49-36(a) (2006) provides for a “credit” against the amount of the lien for the amount in payments made by the owner, in good faith to the original contractor before receiving notice of a lien filed by a subcontractor. Conn. Gen. Stat. § 49-36 (2006) also provides that payments made before the time stipulated in the contract are not considered to be made in good faith unless advance notice of the intention to make such payment has been given (e.g., by the owner/mortgagor) to each person known to have furnished materials or rendered services at least five days before the payment is made. To avoid potential liability to the borrower for making payments to the general contractor which would not provide “credit” to the mortgagor, the lender should require that the mortgagee provide it with copies of all subcontractor notices and a consent to all payments made after receipt of any such notice. Otherwise, the lender may be subject to liability if the loan servicing results in the borrower’s failure to earn the “credit.”

To avoid liability in connection with advances subsequent to receiving notice of a mechanic’s lien, a lender should comply with requirement under Conn. Gen. Stat. § 49-3 (2006) that when a lender pays advances over to the mortgagor, the mortgagor must be a payee on the disbursement checks and may be either the sole payee or a joint payee with the general contractor. To avoid lender liability for improper payments under the mechanics lien law, in particular, under Conn. Gen. Stat. § 49-36 (2006), the lender should also make the mortgagor a payee on the loan disbursement checks. Accordingly, the lender could make the checks payable jointly to the mortgagor and to the general contractor before either the lender or the mortgagor has received a notice of a mechanic’s lien from a contractor. After the receipt of notice of a mechanics’ lien and prior to the
release of that lien, the lender should make the checks payable jointly to the mortgagor, general contractor, and subcontractor.