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FEATURES

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The President's Page

By Edward L. Dowd, Jr.

Part I - America's Sentencing Policy – Lock Them Up

America's war on drugs has become a war on the American people.

One thing is clear about the sentencing taking place in the United States - we are mindlessly incarcerating an incredible number of non-violent offenders. The *New York Times* found it startling that the United States has less than five percent of the world's population, but an absolutely astounding 25 percent of the world's prisoners. We have over 2.3 million prisoners behind bars. If we need to imprison that many to protect people from violent criminals, so be it, but that is not the case.

Nearly one-half of the people incarcerated in our state prisons in 2015 were convicted of non-violent crimes. Not only do American prosecutors and courts send hundreds of thousands of non-violent offenders to prison, our system frequently mandates that the court impose very long sentences on non-violent people.

The U.S. stands alone in the world in its willingness to sentence people to life in prison. The ACLU reported that there were 3,281 prisoners in America serving life sentences for non-violent crimes. The *Washington Post* reported that a woman named Sharanda Jones received a life sentence for her first cocaine offense. She was convicted of a drug conspiracy and her sentence was enhanced due to the actions of other conspirators. This is a grotesque injustice. Timothy Jackson was given a life sentence for shoplifting a jacket worth $159.00.

Leslie Chew stole blankets to keep warm. He spent six months in jail because he could not afford his bail of $3,500.00. The Government had to pay $7,000.00 for clothing, housing, food and guards. Does this make sense to anyone? Does it sound like Victorian England to hold someone in jail for six months because they needed to be warm?

China, a totalitarian dictatorship, has about 1.7 million prisoners, many less than the U.S. and also has four times our population. If you are an African American male, you have a one in three chance of being jailed or imprisoned. The land of the free? You must be kidding.

David L. Hyatt was a Vietnam veteran who was non-violent but was convicted of a cocaine conspiracy when he was 43 years old. He died after serving more than 20 years in prison. He claimed innocence. He was sentenced to a mandatory life sentence by U.S. District Court Judge David D. Dowd. Judge Dowd said, "Once again I question whether the life sentence that I was required to pronounce makes good policy in the long run." "The Court notes that the petitioner did not kill anyone even though he is serving a life sentence."

The Judge said, "I think like almost every other District Court judge in the United States, at times we have expressed frustration with the straightjacket the guidelines represent . . . ." Although the guidelines are no longer strictly mandatory, they inaugurated extremely harsh sentencing, as well as punishing defendants who exercised their constitutional right to a trial by jury. There are still many mandatory sentencing statutes that are absurdly harsh.

According to the Department of Justice, over 60 percent of people who are in jail are there for small-time, non-violent offenses because they cannot afford bail. The land of the free has actually become the land of the jailed and imprisoned. How did we get to this absurd position where we lock up more people than China, Russia, or any other country in the world?

I am a true believer that defendants who have murdered, committed violent sexual assaults, robbed and shot other people should be given very heavy sentences. Murderers should receive life in prison, or, in the most extreme cases, the death penalty. When I was the U.S. Attorney, I prosecuted death penalty cases and have had defendants sentenced to death. I personally prosecuted rapists, carjackers and other murderers and none of those criminals will ever leave prison. Those ultra-violent offenders had to be removed from society due to the viciousness of their crimes and to protect our citizens. However, one has to look at the facts of each case to determine how harsh or how lenient a sentence should be, or if a potential defendant should even be charged.

Since the 1980s, politicians have successfully passed draconian sentencing laws, including the United States Sentencing Guidelines, in an effort to prove that they are tough on crime. Some judges that have to run for office wanted to avoid any opportunity for their opponent to claim that they were soft on crime so no mercy was shown.

Mandatory minimum sentencing laws sound good if you are running for office as a tough on crime U.S. Representative or a state senator, but it takes the sentencing decision away from a judge who actually knows the facts of a case and has all of the information available about each defendant and their record and life. We are wasting lives and an astounding amount of money on incarcerating non-violent American citizens. The federal prison system costs more than $8.8 billion annually.

The next chapter will be what we can do about this intolerable situation.

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The Most Popular Construction Contract Document Gets a Makeover: A Summary of Key Revisions to the AIA A201

By Jeremy P. Brummond and Patrick J. Thornton

The American Institute of Architecture (AIA) published its first integrated set of standardized contract documents for construction projects in 1911.[1] The General Conditions of the Contract for Construction (AIA Document A201) is now the most commonly used general conditions on building projects in the United States.[2] AIA Document A201 is an integral part of a design-bid-build construction project utilizing the AIA forms because it is often incorporated by reference into the signed agreement between the owner and contractor and sets forth the responsibilities of the owner, contractor, and architect during the project.

The AIA has revised AIA Document A201 on many occasions, typically every 10 years in the modern era. This year, the AIA released its seventeenth version of the General Conditions: A201-2017. The revision was part of a larger effort by the AIA to revise various forms involved in the design-bid-build project delivery model. Although the AIA has not published a commentary corresponding to A201-2017 (which it has published for prior versions), like its predecessors, A201-2017 is the product of extenuated discussions between representative groups in the construction industry, including owners, contractors, subcontractors, architects, engineers, insurers, and even attorneys.[3]

As would be expected, some revisions made to AIA Document A201 are substantive and others are minor. Some changes reflect rulings and decisions issued over the past decade involving prior versions of the General Conditions. Other changes are simply practical attempts to conform to modern trends and concerns in construction. According to the AIA, each of the substantive changes endeavors to further the AIA's stated objective of achieving fairness by reasonably apportioning risks and responsibilities among those participants in a construction project.[4] This article discusses some of the more important substantive changes.

Owner's Financial Information

In the 2007 version of the AIA Document A201, the contractor has a right to make a written request that the owner provide "reasonable evidence"[5] of its ability to pay for the work. Prior to commencement of the construction, the contractor's right to request this information is unfettered, as it can make this request for any reason.[6] After the commencement of construction, the contractor can request this information only if one of the following occurs: (1) the owner fails to make payments to the contractor, (2) the contractor identifies in writing a reasonable concern regarding the owner's ability to pay, or (3) a change in scope materially alters the contract sum.[7]

In A201-2017, while the general parameters of the contractor's right to request reasonable evidence of the owner's financial situation has not changed, its right to stop the work (after construction has commenced) while it awaits this information has changed. Previously, if the contractor made this request, the owner's furnishing such evidence was a condition precedent to the continuation

1. *History*, The American Institute of Architects, <*https://www.aia.org/history*> (last visited July 17, 2017).
2. The American Institute of Architects, AIA Document Commentary: A201™ -2007 General Conditions of the Contract for Construction 1, <*http://aiad8.prod.acquiasites.com/sites/default/files/2017-02/a201-2007%20commentary.pdf*>.
3. American Institute of Architects, *supra* note 1.
4. *Id.* As is readily apparent, however, many of the changes made to the document are "owner-friendly" changes. It is very possible (if not likely) that the new form changes will be criticized by contractor groups and their attorneys.
5. AIA Document A201 is silent as to what constitutes "reasonable evidence" of the owner's ability to pay.
6. AIA Document A201-2007, §2.2.1.
7. *Id.*, §2.2.1; AIA Document A201-2017, §2.2.2.

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of the work.[8] Now, the contractor must wait at least 14 days from the date of its request before it can suspend work.[9] Further, if the contractor requests written evidence of the owner's ability to pay under the third prong (a change in scope of work), the contractor's right to stop work is limited to only that portion of the work affected by the change.[10]

If, during the course of construction, the owner has lost its ability to pay for the work, requiring the contractor to expend an additional two weeks' worth of labor and materials on the project (while it awaits financial assurances) can be harsh. The AIA A201-2017 now expressly gives the contractor the right to have the contract time extended and contract sum increased if the work is delayed because the owner did not timely provide financial assurance. This change, however, may provide little comfort to contractors who are required under the form to continue work on a potentially unstable project without the immediate right to suspend work.[11]

Building Information Modeling

Building Information Modeling ("BIM") has advanced dramatically over the past 10 years. BIM is a tool that uses model-based technology to "create a digital representation of the building process to facility the exchange and interoperability of project information."[12] In practice, "BIM is an amalgamation" from "different project participants that together provide the entirety of the information contained in the BIM."[13]

While BIM has been around for many years, pre-dating the last version of the General Conditions in 2007, the protocols for the parties working with and transmitting BIM data are not always clear and can be confusing. Take, for example, *North American Mechanical, Inc. v. Walsh Construction Company II, LLC*. In that case, which concerned a hospital remodel and expansion, after the general contractor created the initial BIM based on the architect's two-dimensional plans, certain subcontractors were supposed to participate in the BIM process.[14] Many subcontractors did not participate in the BIM process, however, which, combined with some architectural error, caused conflicts pertaining to equipment location.[15] As a result, one subcontractor (North American Mechanical, Inc.) had to perform a significant amount of change order work that it did not anticipate, and later brought a breach of contract claim to try to recover for the change order work.[16]

Revisions in A201-2017 address responsibility for transmitting BIM data (and liability for failing to accurately transmit data) in two ways. First, the General Conditions now require the parties to agree at the time of contracting upon the protocols governing the transmission and use of BIM information.[17] As a default, A201-2017 states the parties will use another AIA Document (E203-2013) to establish these protocols.[18]

Second, the General Conditions provide that if the parties do not agree on the protocols governing the use of and reliance on BIM, then any use or reliance on BIM by either party shall be at that party's "sole risk and without liability to the other party and its contractors or consultants," as well as without liability to the authors and contributors to the BIM.[19]

Communications Among the Parties

Perhaps nothing in society has changed more over the past 10 years than the manner in which people can communicate (think generally of text messaging, social media, smart phones, etc.). So too have parties to a construction contract changed the way in which they communicate. The AIA A201-2017 has made two notable revisions that reflect changes in communication practices.

The first concerns the degree to which the Architect must be privy to communications between the owner and contractor. Whereas prior versions of AIA Document A201 provided the "Owner and Contractor shall endeavor to communicate through the Architect about matters arising out of or relating to the Project,"[20] now the owner and contractor are free to communicate directly with one another but only must include the architect on communications that relate to or affect its services or professional responsibilities.[21] This change reflects the practical reality that including the architect in all discussions was unnecessary and a waste of its time and resources.

A second noteworthy change is that the parties are now permitted to give written notice to one another (when written notice is required under the contract documents) via e-mail. Under prior versions, written notice had to be issued by either courier or registered or certified

8. AIA Document A201-2017, §2.2.1.
9. AIA Document A201-2017, §2.2.2.
10. *Id.*
11. AIA Document A201-2017, §2.2.2 ("If the work is stopped under this Section 2.2.2, the contract time shall be extended appropriately and the contract sum shall be increased by the amount of the contractor's reasonable costs of shutdown, delay and start-up, plus interest as provided in the contract documents.").
12. The Annotated Construction Law Glossary 31 (A. Elizabeth Patrick et al. eds. 2010).
13. *Id.*
14. 132 F. Supp. 3d 1064, 1070, 1073 (E.D. Wisc. 2015).
15. *Id.* at 1073.
16. *Id.*
17. AIA Document A201-2017, §1.7.
18. *Id.*
19. *Id.* at §1.8.
20. AIA Document A201-2007, §4.2.4.
21. *AIA Document A201-2017, §4.2.4.*
22. AIA Document A201-2007, §13.3.

mail.[22] Now, written notice can be "delivered in person, by mail, by courier, or by electronic submission if a method for electronic transmission is set forth in the agreement."[23]

Notwithstanding these changes, written notice of any "claim" (additional provisions pertaining to which are discussed later in this article) cannot be made through email but must still be provided by certified or registered mail, or by courier providing proof of delivery.[24] That the AIA did not change the notice required for claims underscores the significance of making and evaluating claims under the contract documents.

Indemnification for Liens

The AIA Document A201 has also been revised so now the standard form provides that the contractor must indemnify the owner from any loss caused by any lien claim or claim by a subcontractor, provided the owner has fully complied with its payment obligations to the contractor.[25] Notably, this was an alteration that many parties would make to the prior versions of the AIA Document A201. Presumably, the drafters of the AIA A201-2017 were altering the form to comport with this trend.

In many jurisdictions, including Missouri, an owner that has fully complied with its payment obligations to the contractor already has a claim for indemnification for amounts paid to extinguish subcontractor liens as a matter of law.[26] This revision to the AIA Document A201, however, remains important for projects in states like Missouri because it gives the owner an express right to claim attorney's fees and litigation expenses associated with costs to remove downstream liens (again, presuming payment obligations have been fulfilled).

Termination for Convenience

One of the most significant revisions to the AIA Document A201 relates to the owner's right to terminate the contract for convenience. In the prior version of AIA Document A201, the owner had a right to terminate the contract but the contractor had the right to collect reasonable overhead and profit on the portion of the work not executed.[27] This provision, though consistent with the common law pertaining to termination of a contract for convenience, was "frequently revised or negotiated out of the final contract documents" because it was perceived as being too generous to the contractor.[28]

The revisions to the General Conditions dispenses with the contractor's right to profit and overhead and, instead, provides the contractor shall receive a termination fee in the event of such termination among other expenses. The pertinent provision, now states:

> In case of such termination for the Owner's convenience, the Owner shall pay the Contractor for Work properly executed; costs incurred by reason of the termination, including costs attributable to termination of Subcontracts; and the termination fee, if any, set forth in the Agreement.[29]

As a result of this change, the owner and contractor are required to negotiate at the time of contracting the amount, if anything, of the termination fee. A termination fee (as opposed to a general promise to pay lost profit) helps the owner control the risks of termination because the owner can avoid a fight after termination about the expected quantum of the contractor's profit and overhead.

Notably, this change also brings the AIA form contract in line with other form contracts in the construction industry.[30]

Liquidated Damages

AIA Document A201 imposes certain obligations pertaining to the assertion of a "claim" by either owner or contractor. These obligations include a 21-day window from the "occurrence" giving rise to a claim to provide written notice of that claim to the other party.[31] The case law is inconsistent as to whether written notice within the 21-day window is a condition precedent to litigation or arbitration (and whether failure to give the written notice waives the claim).[32] The revisions to the AIA Document A201 did not address this inconsistency. The revisions did alter the claim provisions, however, in two very material respects.

A claim, under the AIA Document A201, is defined broadly as "a demand or assertion by one of the parties seeking, as a matter of right, payment of money or other relief with respect to the terms of the Contract . . . and includes other disputes and matters in question between the owner and contractor arising out of or relating to the contract."[33]

23. AIA Document A201-2017, §1.6.1.

24. *Id.* at §1.6.2.

25. *Id.* at §9.6.8.

26. *See* Mo. Rev. Stat. § 429.140.

27. AIA Document A201-2007, §14.4.3.

28. *SAK & Associates v. Ferguson Construction, Inc.*, 357 P.3d 671, 675 (Wash. Ct. App. 2015) (citing Stephen M. Seeger & Ben Patrick, *Terminations for Convenience—"You Want Me to Pay You What?"*, Address at the American Bar Association Forum on the Construction Industry 2013 Midwinter Meeting 24 (Jan. 31 & Feb. 1, 2013), <http://www.imagserve.com/naples2013/papers/WorkshopB.pdf.>)).

29. AIA Document A201-2017, §14.4.3.

30. *SAK & Associates*, 357 P.3d at 675 (noting that the Design-Build Institute of America document 530 (2d ed. 2010) contemplates one fee to be paid for termination before commencement of work and a different fee after commencement of work) (citing Ryan P. Adair, *Limitations Imposed by the Covenant of Good Faith and Fair Dealing upon Termination for Convenience Rights in Private Construction Contracts*, 7 *J. Am. C. Construction Law.* 127, 163 (2013)).

31. AIA Document A201-2017, §15.1.2.

32. *See American Manuf. Mut. Ins. Co. v. Payton Lane Nursing Home, Inc.*, No. CV 05-5155, 2010 WL 144426, *15 (E.D. N.Y. Jan. 11, 2010) (denying summary judgment for owner claiming lack of adequate claim notice under AIA Document A201 document where contract did "not contain a statement setting forth the consequences of a party's failure to provide 21 days' notice of a claim.").

33. AIA Document A201-2007, §15.1.1; AIA Document A201-2017, §15.1.1.

Due to the breadth of this definition, courts addressing the issue have determined that, under prior versions of the AIA Document A201, an owner's assertion of liquidated damages constitutes a "claim," subject to the claim provisions of the AIA Document A201. Some courts have even held, under those claim provisions, an owner is required to give written notice of its intent to seek liquidated damages or the owner's claim is effectively waived.[34]

Revisions to AIA Document A201 change this dynamic. The AIA added language to narrow the definition of a claim and remove liquidated damages from otherwise applicable "claim" requirements.[35] Now, as a result of this change, liquidated damages are closer to automatic under the contract (albeit subject to certain defenses) and there is much more pressure on the contractor to obtain an extension of the contract time to avoid a liquidated damages penalty.

In addition to this change, the drafters also removed from the AIA Document A201 any 21-day written notice requirement for any claims first discovered after the warranty period (e.g. latent defect claims).[36]

The Initial Decision Maker

The AIA has also added language imposing additional duties on the Initial Decision Maker of the claim. Under the General Conditions, an Initial Decision Maker (typically the architect) is tasked with issuing a decision about any claim submitted by either the owner or contractor.

The AIA, in this release, has now imposed a duty upon that Initial Decision Maker to make its decisions without favoritism to either the owner or contractor.

> The Initial Decision Maker is the person identified in the Agreement to render initial decisions on Claims in accordance with Section 15.2. *The Initial Decision Maker shall not show partiality to the Owner and shall not be liable for results of interpretations rendered in good faith.*[37]

The second sentence, which the AIA added to A201-2017 and is, thus, emphasized, is not necessarily a new concept to the extent the architect has been designated as the Initial Decision Maker. In prior iterations, and in the AIA Document A201-2017, the architect, generally, has a duty of impartiality. Section 4.2.12, to which the AIA did not make any substantive changes, provides that the architect, when making interpretations and decisions under the contract documents, "will not show partiality to either [the owner or contractor], and will not be liable for results of interpretations or decisions rendered in good faith."[38]

This revision, in imposing a duty of impartiality on the Initial Decision Maker is consistent with standards imposed on any decision maker, including arbitrators. Federal statute, for example, codifies an arbitrator's duty of impartiality.[39] Of course, whether an Initial Decision Maker has acted with partiality may ultimately need to be addressed by another fact finder.[40]

Dispute Resolution

As mentioned, under the General Conditions, an Initial Decision Maker (usually the architect) is obliged to evaluate and make decisions on certain claims submitted by the parties. Decisions by the Initial Decision Maker have been subject to appeal through mediation and binding dispute resolution.

The AIA has made two significant revisions with respect to appeals of initial decisions. The first relates to the timing of mediation following the initial decision. Whereas previously, AIA Document A201 provided that either party may, within 30 days from the date of the initial decision, demand that the other party file for mediation within 60 days of the initial decision, the General Conditions now have shortened that time for a party receiving a demand of mediation to file for mediation to 30 days.

The section states in full:

> Either party may, within 30 days from the date of receipt of an initial decision, demand in writing that the other party file for mediation. If such demand is made and the other party receiving the demand fails to file for mediation within 30 days after receipt thereof, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.[41]

If mediation of an initial decision was unsuccessful in fully resolving the parties' dispute, then AIA Document A201 has allowed the parties' to escalate the claims to binding dispute resolution (often arbitration) at any time following mediation (sub-

34. *See, e.g.*, *A. Hedenberg and Company, Inc. v. St. Luke's Hospital of Duluth*, No. C7-95-1683, 1996 WL 146732 (Minn. Ct. App. Apr. 2, 1996) (holding that *owner's claim for liquidated damages arose the moment the scheduled completion deadline was not met and owner's claim was barred because it waited six months after the "claim" arose to provide written notice to the contractor)*; *RCR Building Corporation v. Pinnacle Hospitality Partners*, No. M2012–00286–COA–R3–CV, 2012 WL 5830587 (Tenn. Ct. App. Nov. 15, 2012) (holding that the assertion of liquidated damages is a "claim," which required timely written notice like any other claim; owner's claim for liquidated damages was barred because the owner waited "nearly a year after the May 2008 substantial completion deadline" to provide written notice).

35. AIA Document A201-2017, §15.1.1.

36. *See id.* at § 15.1.3.2.

37. *Id.* at §1.1.8.

38. *Id.* at §4.2.12.

39. 9 U.S.C. § 10(a)(2) (providing that the United States court in and for the district wherein an arbitration award was made may make an order vacating the award upon the application of any party to the arbitration where there was "evident partiality or corruption in the arbitrators").

40. *See, e.g.*, *Beacon4, LLC v. I & L Investments, LLC*, 514 S.W.3d 153 (Tenn. Ct. App. 2016) (trial court found that architect showed "complete and unequivocal" partiality to the owner in reviewing *the contractor's pay applications, only approving 13% of the a change order without reason, and later revoking its partial approval of the change order entirely, among other actions).*

41. *AIA Document A201-2017, §15.2.6.1. Importantly, the parties can agree to waive this section. If so, either party may file for mediation of an initial decision at any time. AIA Document A201-2017, §15.2.6.*

ject to the statute of limitations).[42] AIA Document A201-2017, however, now includes a mechanism by which one party can shorten the time the other is required to start binding dispute resolution proceedings. New paragraph 15.3.3 now states:

> Either party may, within 30 days from the date that mediation has been concluded without resolution of the dispute or 60 days after mediation has been demanded without resolution of the dispute, demand in writing that the other party file binding dispute resolution. If such demand is made and the party receiving the demand fails to file for binding dispute resolution within 60 days after receipt thereof, then both parties waive their rights to binding dispute resolution proceedings with respect to the initial decision.[43]

This could potentially be a harsh provision in that it could result in litigation and arbitrations occurring during the work, distracting the parties at a time when the parties should be focused on completing the project.

Insurance

For its most significant revision to AIA Document A201, the AIA drafters have dramatically scaled down Article 11 (concerning insurance and bonds) and relocated the majority of its provisions to a newly created Exhibit: AIA Document A101-2017 Exhibit A.

The AIA had previously required an owner and contractor to obtain fairly rigid but traditional forms of coverage described in the General Conditions. The insurance exhibit represents a significant change in that the parties are able to use checklists of various coverages in Exhibit A to negotiate at the time of contracting and to craft the risk-management strategy that makes most sense for the project.

The insurance exhibit sets out both required and optional coverages for each of the owner and contractor. An owner is required to procure general liability insurance and property insurance written on a "builder's risks" completed value or equivalent policy form, which should be in an amount sufficient to cover the total value of the project on a replacement cost basis.[44] The insurance exhibit also sets out the specific items that the owner's builder's risk policy must cover, which includes for example false work, temporary structures, debris removal, and demolition.[45] Finally, the exhibit lists several types of optional coverage an owner can obtain.[46]

The contractor is required to obtain commercial general liability coverage, auto liability coverage, workers' compensation and employer's liability coverage, and other coverages based upon the type of project.[47]

The drafters made this revision because Article 11 in its prior form was often heavily modified or eliminated entirely in favor of the insurance requirements of one of the parties.[48]

Beyond making the risk-management element of the General Conditions, more user-friendly and substantive provisions pertaining to insurance coverage have also changed. For example, under the old AIA Document A201, the insurer (not the contractor) was required to notify the owner 30 days prior to a cancellation of the contractor's policies.[49] That obligation imposed on the insurer is now removed from A201-2017.[50] Both the contractor and owner now have individual responsibilities to maintain coverage for through the period designated under the contract.[51]

Some commentators have remarked that it is odd to have split the insurance requirements between the General Conditions Document and the insurance exhibit.[52] However, the drafters did this as a precaution in the event the parties failed to make the insurance exhibit part of their agreement.[53] In such event, Article 11, containing a general obligation on the part of the contractor and owner to procure insurance, and containing the familiar waivers of subrogation, would govern the parties' insurance obligations.[54]

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42. AIA Document A201-2007, §15.4.1.

43. AIA Document A201-2017, §15.3.3.

44. AIA Document A101-2017, Exhibit A, §A.2.3.1. The insurance exhibit also provides spaces for the parties to insert specific sublimits for various elements of coverage under the policy.

45. *Id.* at §A.2.3.1.2.

46. The optional coverage available to the owner and listed in AIA Document A101-2017, Exhibit A, §A.2.4 is (a) loss of use, business interruption, delay in completion insurance; (b) ordinance or law insurance; (c) expedited cost insurance; (d) extra expense insurance; (e) civil authority insurance; (f) ingress/egress insurance; and (g) soft costs insurance.

47. AIA Document A101-2017, Ex. A, §A.3.2. Optional coverage for the contractor includes railroad protective liability insurance, asbestos abatement liability insurance, and property insurance covering loss to the contractor's property as well as property located in off-site storage or in transit to the construction site. *Id.* at §A.3.3.

48. Kim Slowey, *The Dotted Line: What Contractors Need to Know about the AIA's 2017 Contracts Revamp*, Construction Dive (May 16, 2017), <http://www.constructiondive.com/news/the-dotted-line-what-contractors-need-to-know-about-the-aias-2017-contrac/442737/>.

49. *AIA Document A201-2007, §11.1.3 (providing that certificates of insurance were required to contain provisions stating that coverage afforded under the policies would not be canceled or allowed to expire until at least 30 days' prior written notice was given to the owner).*

50. *See* AIA Document A101-2017, Exhibit A, §A.3.1.

51. *See* AIA Document A201-2017, §11.2; AIA Document A101-2017, Exhibit A, §A.3.1. The owner has the additional obligation of notifying the contractor of an impending or actual cancellation of any property insurance required by the contract documents within three (3) business days of becoming aware of the pending cancellation or expiration. AIA Document A201-2017, §11.2.3.

52. Patrick J. O'Connor, Jr., *In New Contract Documents, AIA Bolsters Insurance Requirements: An In-Depth Look*, FAEGRE BAKER DANIELS (Apr. 24, 2017) <*https://www.faegrebd.com/in-new-contract-documents-aia-bolsters-insurance-requirements-an-in*>.

53. *Id.*

54. *Id.*

Shop Drawings and Submittals: Purposes, Process, and Problems

By Kenneth A. Slavens

Submittals are a formalized means of communication in construction and a building block to a successful project. They can also have unwelcome consequences.

I. The Role of Shop Drawings and Submittals

AIA Document A201-2017, General Conditions of the Contract for Construction (General Conditions) defines the role of shop drawings as the means to demonstrate "how the Contractor proposed to conform to the information given and the design concept expressed in the Contractor Documents for those portions of the Work . . . require[ing] submittals . . . ."[1]

Submittals, which include shop drawings, fill various functions in construction administration. Some are purely administrative, such documenting that operating or training manuals have been provided. Other submittals are the contractor's means of communicating what it intends to construct or what the general contractor or its subcontractors may have to design.

Delegation of aspects of the design by the lead design professional is common. No architect or engineer can design every detail of a project. Owners cannot afford the cost of a design professional trying to design the minute details. Some design responsibilities are routinely delegated to contractors. The shop drawing process formalizes the method for a contractor to demonstrate how it will accomplish these design obligations.

The American Institute of Architects (AIA) family of contract documents is reportedly the most widely used standard form contracts in the construction industry. This article will reference the AIA Contract Documents' requirements as typical.

Sometimes, the design professional may only tell the contractors the performance requirements the completed work must meet. The specific design of how to achieve that performance is left to the general contractor and those under its contractual umbrella. This allows those with more knowledge and greater expertise to design and install certain components. Common examples are curtain walls, steel connections, or HVAC systems. The submittal process forces the contractor to show how it intends to execute the work and allows the design professional to review those intentions for compliance with the design intent.

Of equal importance is understanding that submittals are not part of the "Work."[2] The contract for construction and the General Conditions incorporate into the owner-contractor agreement obligates the contractor to "fully execute the Work described in the Contract Documents . . . . "[3] You need to determine what is defined as the "Contract Documents."[4] The items constituting contract documents are drawings, specifications, the agreement, general conditions, etc., which is a definition that has remained consistent for decades. The notable absence from the list is submittals and shop drawings. The General Conditions state specifically "submittals are not Contract Documents."[5]

II. Contractor and Architect's Contractual Obligations

The contract documents assign primary responsibilities for shop drawings to the contractor and secondarily to the design professional.

A. Contractor's Contractual Obligations

The AIA's General Conditions de-

1. AIA Document A201-2017, General Conditions of the Contract for Construction §3.12.4.
2. AIA Document A201-2017, General Conditions of the Contract for Construction, §1.1.3. (The 2017 version of AIA Family of documents was recently released; however, the language related to the submittal process has remained unchanged in the decennial revisions of these documents.)
3. Article 2, AIA Document A101-2017, Standard Form Agreement between Owner and Contractor.
4. Article 1, AIA Document, A101-2017, Standard Form of Agreement between Owner and Contractor; AIA Document A201-2017, General Conditions of the Contract for Construction, §1.1.1.
5. AIA Document A201-2017, General Conditions of the Contract for Construction, § 3.12.4.

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fine shop drawings as "drawings, diagrams, schedules, and other data specifically prepared for the Work by the Contractor or a Subcontractor, manufacturer, supplier, or distributor to illustrate some portion of the work."[6]

The contractor is obligated to review the submittal for compliance with the contract documents and approve it prior to submission to the design professional.[7] Contractor must provide submittals with "reasonable promptness" absent a submittal schedule.[8] If a there is an approved schedule, the contractor must comply to "cause no delay" to the work, the activities of the owner, or other separate contractors.[9]

By sending the submittal to the design professional for review, the contractor represents to the owner and the architect it (1) reviewed and approves of the submittal, (2) determined and verified materials, field measurements, and field construction criteria, or will do so, and (3) checked and coordinated the information in the submittal with the contract requirements.[10]

Until the submittal is approved by the architect or engineer, the contractor is prohibited by contract from performing any work covered by the submittal.[11] However, once the submittal is approved, contractors must perform the work in accord with the approved submittal.[12] Contractors should take caution. Even if the architect's approves a shop drawing that includes a deviation from the contract documents, the contractor still must comply with the contract documents.[13]

There is a means to address an intentional deviation. The contractor can proposed something other than as called out in the contract documents. The contractor must notify the architect of the deviation when submitting the shop drawing.[14] If the proposed change is accepted during the review process, the architect must give written approval of the deviation as a minor change in the work or process a change order or change directive.[15] Contractors must proceed carefully. If the architect approves the shop drawing but does not provide the required documentation, the contractor remains at risk for the deviation in the submittals.[16]

When the design professional delegates full or partial design responsibility to the contractor, responsibility becomes a bit more enigmatic. As a general proposition, the General Conditions acknowledge contractors do not provide professional design services.[17] The common exceptions may involve the contractor's means, methods, sequences, and procedures to accomplish the work.[18]

However, when the contractor is delegated part of the design obligations, the contract documents sort out responsibility. Contractors may rely on the adequacy and accuracy of the design provided in the contract document.[19] The owner and architect, however, may rely on the design from the contractor if the work contains the appropriate required written certification.[20] The architect's review of the delegated design is limited to conformance with the design concept.[21]

B. Design Professional's Obligations

The architect must review submittals and take the appropriate action. The architect's obligations are in the General Conditions and in AIA Document B101-2017, Standard Form Agreement between Owner and Architect.

The architect's obligations are limited by comparison to the contractor's. Review is limited to checking for conformance with information in the contract documents and the design concept.[22]

The architect's review must meet the approved schedule or, absent a schedule, it must be reasonably prompt.[23] The review responsibility explicitly excludes obligations for the accuracy and completeness of details such as dimension and quantities, or installation instructions, or equipment performance.[24] These remain the contractor's obligations.

Strangers to the project agreements may try to impose liability on the design professional based on the review and approval of shop drawings. Careful attention must be paid to the contracts. The General Conditions are clear that the architect's review does not constitute approval

6. AIA Document A201-2017, General Conditions of the Contract for Construction, §3.12.1.
7. AIA Document A201-2017, General Conditions of the Contract for Construction, §3.12.5.
8. *Id.*
9. *Id.*
10. AIA Document A201-2017, General Conditions of the Contract for Construction, § 3.12.6.
11. AIA Document A201-2017, General Conditions of the Contract for Construction, § 3.12.7.
12. AIA Document A201-2017, General Conditions of the Contract for Construction, § 3.12.8.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. AIA Document A201-2017, General Conditions for Construction, § 3.12.10.
18. *Id.*
19. AIA Document A201-2017, General Conditions for Construction, § 3.12.10.1.
20. *Id.*
21. *Id.*
22. AIA Document B101-2017, Standard Form of Agreement between Owner and Architect, §3.6.4.2, AIA Document A201-2017, General Conditions for Construction, §4.2.7.
23. AIA Document B101-2017, Standard Form of Agreement between Owner and Architect, §3.6.4.1, AIA Document A201-2017, General Conditions for Construction, §4.2.7, .
24. AIA Document B101-2017, Standard Form of Agreement between Owner and Architect, §3.6.4.2, AIA Document A201-2017, General Conditions for Construction, §4.2.7.

of safety precautions or construction means or methods, techniques, sequences, or procedures.[25]

III. Failure to Review, Nondelegable Duties, and Gross Negligence

No discussion of shop drawing review and liability can be had without discussing the 1981 Hyatt Regency skywalk collapse in Kansas City, Missouri. The collapse of a set of skywalks during a social event resulted in 114 deaths and 186 other injuries. The structural engineer's licensing hearing gave rise to an appeal reported in *Duncan v. Missouri Board for Architects, Professional Engineers and Land Surveyors*.[26] This Missouri Court of Appeals opinion is discussed in almost every commentary on this topic. It is a valuable, though somewhat nuanced, lesson.

The landmark *Duncan* opinion arose, in part, from the licensing board's discipline of the structural engineer, Daniel Duncan. At the hearing level, Mr. Duncan was disciplined due to his gross negligence in failing to review shop drawings and other professional misconduct.

During the shop drawing process, changes were made to the steel connections used to suspend the skywalks, which differed from the engineer's design. The connections at issue were special connections, meaning they were "non-redundant."[27] If a non-redundant connection fails, the structure will collapse.[28]

The change in the connections was due to fabrication issues. The steel supplier proposed to the structural engineer to use a two-rod system, as opposed to one continuous rod as shown in the engineer's design to suspend the second and fourth floor skywalks. The supplier submitted shop drawings to the structural engineer for review and approval showing this change.

The licensing board concluded Daniel Duncan did not review the shop drawings for compliance with the Kansas City Building Code, for conformance with the design concept as required by the structural engineer's contract, or for the information in the contract documents. Regardless, he approved the shop drawings.[29]

The Missouri Court of Appeals found review and approval of these shop drawings is an engineering function.[30] The court noted the structural engineer's in-house policy called for a detailed check of all special connections during shop drawing review.[31] The structural engineer knew of the change to a two-rod system, but he did not review the connection.[32] In addition, the shop drawings did not show necessary elements to bring the connection into compliance with the building code.[33]

The court concluded that shop drawing review by the engineer was contractually required and universally accepted as part of the design engineer's responsibility.[34] The engineers conduct from initial review through shop drawing review showed a conscious indifference to his professional duty.[35] The court concluded Duncan breached a nondelegable duty.[36]

IV. Good Faith and Fair Dealing in the Review of Shop Drawings

The parties must deal with each other in good faith during the shop drawing review process. An example is the appeal that arose from a contractor's suit following termination in *Nova Contracting, Inc. v. City of Olympia*.[37]

Nova contracted with the City of Olympia to replace a culvert. Under the contract, Nova had to provide various submittals to the city's engineer for approval before construction could begin. The contract made two things clear: the city's engineer's approval was a prerequisite to starting work covered by a submittal, and the city's decision to accept or reject a submittal was final.

The city rejected many of Nova's submittals and re-submittals, which Nova argued was done improperly and motivated by an effort to prevent its performance. The termination of Nova was initiated in part due to Nova's failure to provide appropriate submittals.

The trial court agreed with the owner and Nova appealed. The Washington State Court of Appeals found sufficient questions of fact to send the dispute back to the trial court.[38]

The State of Washington imposes an implied duty of good faith and fair dealing in every contract as does most states.[39] This requires the parties to cooperate so each may benefit from full performance of the contract.[40]

The court looked to the Restatement (Second) of Contracts for guidance on the good faith and fair dealing question, quoting from the

25. *Id.*

26. 744 S.W.2d 524 (Mo. Ct. App. 1988).

27. The court discussed the difference between simple, complex, and special connections. *Id.* at 528-29.

28. *Id.* at 529.

29. *Id.* at 530.

30. *Id.*

31. *Id.* at 540.

32. *Id.* at 540-41.

33. *Id.* at 541.

34. *Id.*

35. *Id.*

36. *Id.*

37. 2017 Wash. App. LEXIS 913; 2017 WL 1382883.

38. *Id.* at 14.

39. *Id.* at 6.

40. *Id.*

comments to section 205.[41]

The city argued there was no duty of good faith because the city had unconditional authority, i.e.: the city engineer's decisions were final on the relevant issues.

The court rejected the city's position and held the contract did not provide the city with the absolute right to reject all submittals for any reason.[42] The city's judgments were to be guided by whether the submittal indicated Nova's work would comply with the contract.[43] The city had to exercise discretion consistent with the contract's requirements.[44]

The city's actions, among others, showing a lack of good faith included demanding all submittals be approved before Nova could begin any work contrary to industry practice and the contract and the city's rejection of the initial submittal for one reason and then rejecting the resubmittal for new and different reasons.[45]

V. Impacts on the Scope of Work

Arguments can arise over whether shop drawings can alter or impact the scope of work. An unsuccessful effort to rely on shop drawings to change the scope of work can be found in *United States v. Henke Const. Co.*[46] A contractor sought recovery for the cost of additional labor and material as the result of the government-owner's refusal to "consider, approve or act upon" certain shop drawings.

In *Henke*, shop drawings were prepared with input from the tile installer. The general contractor submitted the shop drawings to the government-owner, but the shop drawings were returned without action and with the notation that no shop drawings were required for "this work."

The tile installer, plaintiff in the lawsuit, argued failing to approve or disapprove the shop drawings caused it damage because its installation reflected the work shown in the shop drawings and included work over and above what was called for by the contract.

The court found against plaintiff. The court held the fallacy in plaintiff's argument was the assumption that shop drawings were required for the work.[47] The shop drawings were returned without approval or disapproval and the only comment was to warn the installer to follow the contract requirements.[48]

However, if shop drawing review is required, the approval may affect the scope of work. In *Ozark Mountain Granite & Tile, Co. v. Dewitt Associates, Inc.*,[49] the general contractor contracted with Missouri State University for a scope and, in turn, subcontracted with Ozark Mountain for the fabrication and installation of granite. Ozark Mountain prepared shop drawings. Ozark Mountain highlighted the architectural drawing to indicate where it intended to install granite and submitted those as its shop drawings. Ozark Mountain cut, fabricated, and installed the granite in accord with the highlighting on the shop drawings.

A dispute arose between the general contractor and Ozark Mountain over Ozark Mountain's scope of work. The general contractor argued there was work within the scope of Ozark Mountain's contract not shown on the shop drawings. The court of appeals found in favor of Ozark Mountain.[50]

The appellate court noted that the shop drawings were submitted on more than one occasion and they highlighted the areas to receive granite. The submissions were required by contract. Ozark Mountain fabricated and installed every piece of granite highlighted on its shop drawings. The court of appeals found a reasonable inference that the disputed areas were within the contract, in part, because the definition of the scope of work referenced the "details of the shop drawings."[51]

VI. Timeliness of Review and the Creation of Liability

A delay in the review process can impact claims for extended costs or the assessment of liquidated damages.

In *Gillioz v. Missouri State Highway Commission*,[52] a contractor was assessed liquidated damages. The contractor claimed it was delayed due to the conduct of Missouri State Highway Commission. The contractor claimed the state's failure to approve shop drawings within a reasonable time after submission delayed its completion.

A misunderstanding between the owner's engineer and the contractor regarding the review process resulted in at least a three week delay before shop drawings were processed when normally, the court noted, the time frame was four or five days.

The Missouri Supreme Court concluded there was sufficient evidence to show that a substantial part of the completion delay was caused by state's untimely review of shop drawings, which supported allowing the issue to go to the jury.[53]

VII. Liability to Third Parties and the Scope of Review

Third parties, who believe they

41. *Id*. at 8.
42. *Id.* at 9.
43. *Id.*
44. *Id.* at 10.
45. *Id.* at 11-12.
46. 157 F.2d 13 (8th Cir. 1946).
47. *Id.* at 22.
48. *Id.*
49. 372 S.W.3d 556 (Mo. Ct. App. 2012).
50. *Id.* at 562.
51. *Id*.
52. 169 S.W.2d 901 (Mo. 1943).
53. *Id.* at 905.

have been damaged, may try to base liability on the review of the shop drawings. This commonly relates to job site safety measures.

Approval of shop drawings that did not include temporary bracing or temporary connections was argued to be negligence by the design professional in W*aggoner v. W & W Steel Company,*[54] when two workers died after a gust of wind caused an unsecured and unbraced piece of steel to collapse. The event resulted from a failed connection, which lacked a temporary device to keep the connection from failing during construction. By the time of trial the sole remaining defendant was the architect for whom the trial court directed a verdict.[55]

The suit reached the Oklahoma Supreme Court, which looked to the contract documents to determine the review process and purpose of shop drawings. The court noted the contract documents provided shop drawings were to be first submitted to the contractor for review and verification of "all field measurements, field construction criteria, materials, catalog numbers, and similar data." The contractor's approval is a representation it checked each shop drawing against the requirements of the contact. The documents were clear that the contractor is "solely responsible for all construction means, methods, techniques, sequences, and procedures."[56] On the other hand, the architect was obligated to review "for conformance with the design concept . . . and with the information given in the Contract Documents."[57]

The court concluded it was the duty of the contractor - not the architect - to see that the shop drawings included temporary connections, which is encompassed in the field construction criteria and construction means, methods, techniques, sequences, and procedures.[58] The architect could not be held liable for the injuries sustained because of an unsafe construction procedure.[59]

The holding in *Waggoner* is in line with other opinions. For example, the Illinois Court of Appeals adopted the same essential positon in *Block v. Lohan Associates, Inc.,*[60] when a worker sustained severe head injuries in a fall while erecting the precast panels during construction of a new building. The injured worker's representative argued the design professional who agreed to review shop drawings and submissions approved the submissions without requiring an erection procedures be included.

The court found that the contract documents uniformly and clearly limit the architect –lead designer's responsibility regarding shop drawings to a determination of design conformance and not worker safety.[61] The design professional did not have control or charge of the construction means, methods, techniques, sequences, procedures or for safety precautions in the construction.[62] The court made essentially the same finding for the structural engineering subconsultant to the architect.[63]

Similar arguments were addressed in a suit by an injured plaintiffs related to the absence of temporary barriers or handrails during construction with the same essential outcome in National *Foundation Company v. Post, Buckley, Schuh, & Jernigan.*[64] The design and placement of the handrails and barricades were found to be temporary in work site area and a safety measure, not an inherent design requirement. The duty for worker safety was placed on the contractor who exercises control and supervisory responsibly on the job site.[65]

If the approved shop drawings do not conform to the design, the courts may reach a different conclusion. In *Jaeger v. Henningson, Durham, & Richardson, Inc.,*[66] the design professional, Henningson, Durham, & Richardson, Inc. (HDR) contracted to provide architectural services for a South Dakota office building. Two workers were injured during steel erection.

A shop drawing had erroneously called for 14 gauge steel for a landing pan contrary to the specifications which required 10-gauge steel. HDR failed to notice the discrepancy in gauge and approved the shop drawing. The steel was fabricated in accord with the approved shop drawing and later found to the cause of the injuries.

The court concluded that HDR had negligently failed to "supervise the shop drawings" under the contract and the proximate cause of the accident.[67] The contract in this suit does not seem to have the AIA language requiring a written notice and approval for deviations.

VIII. Delegation of Design

The design process can delegate design for certain aspects of the project. The contract documents will delegate the design to a supplier, vendor, or contractor with more specialized knowledge. However, the delegation and shared responsibility can cause complications in the submittal review process and the assessment of responsibility.

The court in *Great American Insur-*

54. 657 P.2 147 (Ok. Ct. App. 1983).
55. Id. at 149.
56. Id. at 151.
57. Id.
58. Id.
59. Id.
60. 645 N.E.2d 207 (Ill. Ct. App. 1993).
61. Id. at 222.
62. Id.
63. Id. at 224.
64. 465 S.E.2d 726 (Ga. Ct. App. 1995).
65. Id. at 730.
66. 714 F.2d 773 (8th Cir. 1983).
67. Id. at 776.

ance Company v. North Austin Municipal Utility District No. 1[68] had to sort through responsibility for a construction defect in part of a project involving a design delegated to a contractor. The dispute involved the design of a dry well, which was part of a waste water system. Almost a year after completion of the wastewater system, the utility-owner discovered a structural deformity in the shell of the dry well as one side was collapsing. The collapse occurred because the sides of the underground dry well were not sufficiently thick given the depth underground at which it placed.

The utility owner first demanded the general contractor correct the defect, but the general contractor refused. The utility-owner then turned to Great American Insurance, who had issued the maintenance bond. Great American argued the failure was a structural defect due to design and it was not liable under the bond.[69]

A subcontractor who worked on the dry well had prepared and submitted shop drawings to the engineer. They showed how it proposed to refurbish the lift station. However, the shop drawings did not indicate thickness the sides of the dry well. Regardless, the engineer approved the subcontractor's shop drawings.

Great American argued it could not be liable because the engineer's negligence relieved the general contractor of liability. The engineer's design required the "thickness of the sides [of the dry well] shall be determined by the structural requirements for the depth of burial." The contract documents did not specify a thickness for the wall; however, the documents did identify the standard for determining the thickness of the sides of the dry well. The court found such a design sufficient.[70]

Though Great American argued it was relieved from liability because the engineer approved the shop drawings, but the court disagreed.[71] The contract said, "ENGINEER's review and approval of the Shop Drawings or samples shall not relieve CONTRACTOR from responsibility for any variation from the requirements of the Contract Documents" unless a particular procedure is followed, which did not occur.[72] The engineer's stamp disclaimed responsibility saying, "This review is for determining general conformity with the contract plans and specifications and shall not relieve the contractor of responsibility for deviations from the drawings and specifications, or for errors of any sort in the shop drawings or schedules."[73]

IX. Conclusion

To have a successful project of any complexity, the submittal process must be followed and managed. Though not part of the "Work" as defined by the contract documents, the shop drawings assure the owner is delivered what it wants, the designer's design is brought to fruition, and contractor complied with the contract's obligations. When the process runs off of the tracks, it can create issues for all involved.

Careful attention to the contractual obligations related to the process and attention to details in the submission and review process will provide smooth project delivery without surprises, finger-pointing, or additional expenses.

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68. *902 S.W.2d 488 (Tex. Ct. App. 1995).*

69. *Id. at 495.*

70. *Id. at 496.*

71. *Id.*

72. *Id.*

73. *Id.*

Construction Contracts and Third Party Beneficiary Claims

By Joseph C. Blanner

In every construction project, there are a variety of parties that benefit in some way by the relationships of others involved. For instance, an owner may contract with design professionals for design services. The design documents prepared for the owner are used by the contractor and subcontractors to execute the work. The owner contracts with the general contractor for the performance of the work. The general contractor may contract with subcontractors. The owner benefits from these subcontractors' work. The subcontractors benefit from the owner's payments to the general contractor. There are even instances where developers contract with contractors to build a structure that will later be sold to another. The end user ultimately benefits from the construction services despite not being a party to the original contract.

The various contracts involved in a construction project create obligations and benefits to each of the direct parties to the contracts, but others also benefit. Since these parties derive some benefit from the performance of the contract, they are often referred to as "third party beneficiaries." Does their status as third party beneficiaries give them the right to pursue a claim against one of the actual parties to the contract? To answer this question, we will first examine the law in Missouri on third party beneficiaries. We will then explore how this law has been applied in Missouri and elsewhere to the various relationships on construction projects.

Missouri Courts have defined a "third party beneficiary" as, "one who is not privy to a contract or its consideration but one to whom the law gives the right to maintain a cause of action for breach of contract."[1] "Privity of contract" refers to the relationship between two or more contracting parties. Thus, in some instances the law will give those individuals who were not a party to the contract a cause of action for a breach of the contract despite the fact that they furnished no consideration and that they had no obligations.[2]

In attempting to explain which third party beneficiaries had a right to assert a cause of action under a contract, the Restatement of Contracts (First) classified them as: donee, creditor and incidental.[3] The Restatement of Contracts (Second) attempted to clarify the confusion created by the classification approach and offered an "intent to benefit" test..[4] Missouri ourts have adopted both approaches.

A. "Intent to Benefit" Test

The right of third party beneficiaries to assert a claim under a contract is not unlimited. Not every party that may derive some benefit from the contract of another is entitled to assert a claim based on its terms. Rather, "[o]nly third parties *for whose primary benefit* the contracting parties *intended* to make the contract may maintain an action."[5] Thus, the actual parties to the contract had to intend to benefit the third party.

To determine intent, the courts may look to the situation of the parties, the facts and circumstances attending the execution of the contract and the apparent purpose the parties intend to accomplish with the contract.[6] While these factors are important, the court looks primarily to the contract itself to determine the intent of the parties. "In determining whether plaintiff was a third-party beneficiary to the contract, the question of intent is paramount . . . [and] is to be gleaned from the four corners

1. *Dave Kolb Grading, Inc. v. Lieberman Corporation,* 837 S.W.2d 924, 939 (Mo. Ct. App. E.D. 1992); *see also Ernst v. Ford Motor Co.,* 813 S.W.2d 910, 922 (Mo. Ct. App. W.D. 1991); *Halamicek Bros. v. R & E Asphalt Service,* 737 S.W.2d 193, 195 (Mo. Ct. App. E.D. 1987); *L.A.C. v. Ward Parkway Shopping Center Co.,* 75 S.W.3d 247, 260 (Mo. *en banc* 2002).

2. *Black & White Cabs of St. Louis, Inc. v. Smith,* 370 S.W.2d 669, 975 (Mo. Ct. App. E.D. 1963).

3. *Restatement (First) of Contracts, § 133 (1932).*

4. Restatement (Second) of Contracts, § 302 (1979); David M. Summers, *Third Party Beneficiaries and the Restatement (Second) of Contracts,* 67 Cornell L. Rev. 880 (1982).

5. *Kansas City N.O. Nelson Co. v. Mid-Western Construction Co. of Missouri, Inc.,* 782 S.W. 672, 677 (Mo. Ct. App. W.D. 1989); *Kolb Grading, supra* note 1 at 940.

6. *J. Crum Corporation v. Alfred Lindgren, Inc.*, 564 S.W.2d 544, 547 (Mo. Ct. App. W.D. 1978).

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of the contract."[7]

"Although it is not necessary that the third party beneficiary be named in the contract, the terms of the contract *must* express *directly* and *clearly* an intent to benefit an identifiable person or class."[8] Thus, the intention of the parties to a construction contract to benefit a specific party or a group to which that party belongs must be *clearly* and *unambiguously* stated in the contract. And, "it must be shown that the benefit to the third party was the cause of the creation of the contract."[9] It is not enough that the parties desired to confer a benefit on the plaintiff.[10]

"In the absence of such an express declaration [of an intent to benefit certain third-parties], *there is a strong presumption that the parties contracted only for themselves and not for the benefit of others*."[11] Additionally, "[t]he court may not speculate from the language in the contract as to whether the contracting parties intended to make the plaintiff a third-party beneficiary."[12] Thus, the court may not go outside of the clear intent set forth in the construction contract to speculate as to whether a party is an intended third-party beneficiary. This is the case even when the parties anticipated that a party would benefit from the contract's performance.

B. Three types of Third Party Beneficiaries

Missouri courts, following the Restatement of Contracts (First), recognize three types of third party beneficiaries to a contract: donee, creditor and incidental. The first two classes have enforceable rights under a contract. The third does not.[13]

"A donee beneficiary is one upon whom the promisee intends to confer the benefit of performance although such performance will not discharge a preexisting duty or obligation to the beneficiary."[14] In other words, a party to the contract seeks to make a gift to the donee beneficiary by a party's performance of the contract. For example, suppose A and B enter into a contract where A will give B a car in exchange for B paying C $1,000. In that instance, C would be a donee beneficiary to the contract between A and B.

A creditor beneficiary is "one upon whom the promisee intends to confer the benefit of performance of the contract and thereby discharge a preexisting duty or obligation to the beneficiary."[15] In other words, a party to the contract owes the third party a duty which is discharged by performance of the contract. For example, suppose A owes C $1,000. A enters into a contract whereby A lends B $1,000 in exchange for his agreement to repay the $1,000 to C. C would be a creditor beneficiary and could enforce the terms of the contract.

An incidental beneficiary is one, "who will be benefited by performance of a promise but who is neither a promisee nor an intended beneficiary."[16] The courts indicate that *only* donee or creditor beneficiaries and *only* those that were intended to be beneficiaries are entitled to enforce the contract's terms.

I. Application of Third Party Beneficiary Law to Construction Contracts

A. Clauses that express an intent not to benefit third parties

Many construction contracts specifically state that they are intended only for the benefit of the parties and not for the benefit of third parties. A good example is Section 1.1.2 of AIA Document A201-1997, which states,

> *The Contract Documents shall not be construed to create a contractual relationship of any kind* (1) between the Architect and Contractor; (2) between the Owner and a Subcontractor or Sub-subcontractor; (3) between the Owner and Architect; or (4) *between any persons or entities other than the Owner and Contractor.*[17] (Emphasis added.)

While no Missouri court has interpreted this language, these types of provisions have been enforced in Missouri.[18] Several other jurisdictions have examined this specific provision and found it to bar third parties from attempting to enforce

7. *OFW Corporation v. City of Columbia*, 893 S.W.2d 876, 878 (Mo. Ct. App. 1995) quoting from *Wilson v. General Mortgage Co.*, 638 S.W.2d 821, 823 (Mo. Ct. App. 1982).

8. *Kansas City N.O. Nelson Co. v. Mid-Western Construction Company of Mo.*, 782 S.W.2d 672, 677 (Mo. Ct. App. W.D. 1989).

9. *OFW Corporation, supra note 7 at 879, quoting from Chmieleski v. City Products Corp.*, 660 S.W.2d 275, 289 (Mo.Ct. App. W.D. 1983).

10. *Wilson, supra* note 7 at 824.

11. *OFW Corporation, supra* note 7 at 879, citing *State ex rel. William Ranni Associates, Inc. v. Hartenbach,* 742 S.W.2d 124, 141 (Mo. *en banc* 1987); *See also JTL Consulting, LLC v. Shanahan,* 190 S.W.3d 389, 399 (Mo. Ct. App. E.D. 2006); *Nitro Distributing, Inc. v. Dunn,* 194 S.W.3d 339, 345 (Mo. *en banc* 2006).

12. *Wilson, supra* note 7 at 824; OFW Corporation, *supra* note 7 at 879.

13. *Stephens v. Great Southern Savings and Loan Association*, 421 S.W.2d 332, 335 (Mo. Ct. App. S.D. 1967).

14. *Wilson, supra* note 7 at 823.

15. *OFW Corporation, supra* note 7 at 879.

16. *Id.*

17. Section 1.1.2 of AIA A201-2007 is nearly identical to A201-1997. The only difference is that §§ (1) and (3) were expanded from "Architect" to "Architect or the Architect's consultants" and § (2) notes an exception contained in §§ 5.3 and 5.4.

18. *JTL Consulting, supra* note 11 at 400.

19. *155 Harbor Drive Condominium Association v. Harbor Point Incorporated,* 568 N.E.2d 365, 374 (Ill. Ct. App. 1991); *Simon v. Buckley Construction, LLC,* 2015 WL 9464681 (La. Ct. App. 2015); *Town Center Office Plaza Association, Inc. v. Carlson Real Estate Ventures, LLC,* 2017 WL 1375304 (Minn. Ct. App. 2017); The Board of Managers of the A Building Condominium v. 13th and 14th Street Realty, LLC, 2013 NY Slip Op. 32058 (N.Y. Sup. Ct. 2013). *See also Wasserstein v. Kovatch,* 618 A.2d 886 (N.J. Super. A.D. 1993).

the terms of the contract.[19]

According to one court, the language is unambiguous and, "clearly precludes anyone . . . from claiming third-party beneficiary status under the contract".[20]

In certain instances, however, courts have found a third party beneficiary to have enforceable contractual rights despite clauses like this one. In *Construction Services, Inc. v. Eco Tech Construction, LLC*, the construction manager, who had contracted with the owner, sought indemnity from a contractor who had also contracted with the owner to perform work.[21] The contractor's contract indicated that it had a duty to indemnify, among others, the construction manager. The contractor took the position that the construction manager could not enforce this obligation because of the aforementioned clause. However, this clause also indicated that, "the Construction Manger . . . shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of [its] duties."

According to the court, "Paragraph 1.1.2 [of AIA A-201] provides that the contract shall not be construed to create a contractual relationship of any kind between [the construction manager] and [the contractor], except that [the construction manager] is entitled to performance and enforcement of obligations by [the contractor] intended to facilitate performance of its duties." Based on the foregoing, the court concluded that, "Paragraph 3.18.1 carves out another exception to the general limitation on third-party rights, providing specified parties the right to indemnification under the contract." Thus, despite a general provision indicating that the contract was not intended to grant rights to third parties, the contract may be interpreted to create those rights if specific provisions suggest an intent to confer a benefit on third parties.[22]

B. Owner vs. Subcontractor

As noted, any inquiry into whether a third party has a claim pursuant to a contract is going to be based on the terms of the contract itself. With that being said, Missouri courts have examined the relationship between owners and subcontractors and have determined that owners are generally *not* third-party beneficiaries of subcontracts. In *East v. Galebridge Custom Builders, Inc.*, the court found that home purchasers could not sue a subcontractor or supplier for breach of the subcontract as a third party beneficiary.[23] According to the court, the sole remedy of the owner was to sue the builder. Similarly, in *Grgic v. Cochrane,* the court concluded that a home purchaser could not sue the builder's subcontractor as a third-party beneficiary.[24] According to the court, "there is no duty owed to owners by [the] subcontractor in the absence of privity of contract."[25]

Other jurisdictions have reached the same conclusion. In *Pierce Associates, Inc. v. Nemours Foundation*, a hospital owner contracted with a general contractor to construct certain improvements.[26] The contractor subcontracted with a mechanical subcontractor. The owner/general contractor contract included AIA A-201 (1976), which contained the same clause referenced above.[27] Thus, the contract specifically indicated that nothing contained in it was to be construed to create a contractual relationship between the owner and a subcontractor. The subcontract incorporated the general contract. The owner filed a lawsuit against the subcontractor claiming to be a third party beneficiary of the subcontract.

After relaying the principals previously referred to in Section (A) above, the court stated,

> Typically when major construction is involved an owner has neither the desire nor the ability to negotiate with and supervise the multitude of trades and skills required to complete a project. Consequently an owner will engage a general contractor. The general contractor will retain, coordinate and supervise subcontractors. The owner looks to the general contractor, not the subcontractors, both for performance of the total construction project and for any damages or other relief if there is a default in performance.[28]

The court added that the general contractor, in turn, can look to the subcontractor for any default or defects in performance. Given the relationships, the court reasoned that, "the typical owner is insulated from the subcontractors both during the course of construction and during the pursuit of remedies in the event of a default. Conversely, the subcontractors are insulated from the owner. The owner deals with and, if necessary, sues the general contractor, and the general contractor deals with and, if necessary, sues the subcontractors."[29]

Based on the foregoing, the court indicated that ordinarily the owner is merely an incidental beneficiary of the subcontractor's work, stating, "the owner has no right against the subcontractor, in the absence of clear words to the contrary."[30] And, given that the contract included AIA A-201 Section 1.1.2, which indicated the parties' intent not to create third party beneficiaries, the court concluded

20. *Dick Anderson Construction, Inc. v. Monroe Construction Company, LLC*, 221 P.3d 675, 686 (Mont. 2009).

21. 784 N.W.2d 202 (Iowa Ct. App. 2010).

22. This comports with the rule of contract construction which requires general provisions to yield to specific provisions when the two are in conflict with one another. *Smith v. City of Springfield,* 375 S.W.2d 84, 91[2] (Mo. *en banc* 1964).

23. 839 S.W.2d 720 (Mo. Ct. App. E.D. 1992).

24. 689 S.W.2d 687 (Mo. Ct. App. E.D. 1985).

25. *Id*. at 690.

26. 865 F.2d 530 (3rd Cir. 1989).

27. *Id*. at 533.

28. *Id*. at 535.

29. *Id*. at 535-536.

30. *Id*. at 536.

that the owner had no right of action against the subcontractor.[31] As one case relied upon by the *Nemours* court indicated, "the language of the instant documents expressly preempts the creation of third party contract rights in [the owner]."[32]

In *Cahill v. Lazarski*, the court ruled that the purchaser of home could *not* sue the subcontractor as a third party beneficiary of the contract between the builder and subcontractor.[33] In reaching this conclusion, the court noted that,

> [g]enerally it has been held that the ordinary construction contract – i.e., one which does not expressly state that the intention of the contracting parties is to benefit a third party – does not give third parties who contract with the promisee the right to enforce the latter's contract with another. Such third parties are generally considered mere incidental beneficiaries.[34]

Based on this reasoning, the court concluded that the owner was not a third party beneficiary entitled to sue.

Similarly, in *Ball Corporation v. Bohlin Building Corp*., the court found that the owner of a commercial property was not a third-party beneficiary of the contract between the general contractor and a subcontractor where express provisions indicated that the contract was not entered into for its benefit.[35] The contract specifically provided that, "nothing contained in the contract documents shall create any contractual relationship between any subcontractor and the owner."[36]

The owner claimed that it was a third party beneficiary of the contract between the contractor and subcontractor because the work performed by the subcontractor was ultimately performed for the benefit of the owner. However, the court found that both, "[the contractor] and [the subcontractor] acted entirely in their own self-interest and [the owner] was merely an incidental beneficiary." The court added, "to hold otherwise under these facts would allow [the owner] to have a contractual relationship with [the subcontractor] when it would be economically beneficial to [the owner] and to disavow a contractual relationship in the event [the subcontractor] is not paid by [the general contractor]."[37]

The court added that it could not disregard the clear and unambiguous language indicating that the contract was not intended to have third party beneficiaries. According to the court, "[i]n addition, if [the owner] were granted third-party beneficiary status in a situation where an express contract provision indicates a contrary intent of the parties, it is difficult to imagine a situation where the owner of property would not be the third-party beneficiary of a contract between the general contractor and the subcontractor."[38]

Also instructive is *Thomson v. Espey Hutson & Associates*, where a Texas court found that, "the present case is governed by the generally prevailing rule that, in the construction context, a property owner is ordinarily not a third-party beneficiary of a contract between the general contractor and a subcontractor." In stating this proposition, the court referenced *Corbin on Contracts*, which provided that,

> [Subcontracts] are made to enable the principal contractor to perform; and their performance by the subcontractor does not in itself discharge the principal contractor's duty to the owner with whom he has contracted. The installation of plumbing fixtures or the construction of cement floors by a subcontractor is not a discharge of the principal contractor's duty to the owner to deliver a finished building containing those items; and if after their installation the undelivered building is destroyed by fire, the principal contractor must replace them for the owner, even though he must pay the subcontractor in full and has no right that the latter shall replace them. It seems, therefore, that the owner has no right against the subcontractor, in the absence of clear words to the contrary. The owner is neither a creditor beneficiary nor a donee beneficiary; the benefit that he receives from performance must be regarded as merely incidental.[39]

The court also relied on an example set forth in Restatement of Contracts (Second), which states, "A contract to erect a building for C. B then contracts with A to supply lumber needed for the building. C is an incidental beneficiary of B 's promise, and B is an incidental beneficiary of C's promise to pay A for the building."[40] Thereafter, the court concluded that, "absent clear evidence to the contrary, a property owner is not a third-party beneficiary of [the subcontract]."[41] Numerous other courts reached the same conclusion.[42]

However, as was previously noted, whether an owner is a third party beneficiary of a subcontract is going to be determined based on the terms

31. *Id.* at 539.

32. *Federal Mogul Corporation v. Universal Construction Company,* 376 So.2d 716, 724 (Ala. Civ. App. 1979).

33. 641 N.Y.S.2d 124 (N.Y. Sup. Ct. 1996).

34. *Id*. at 125.

35. 543 N.E.2d 106, 108 (Ill. Ct. App. 1989).

36. *Id*. at 108.

37. *Id.*

38. *Id.*

39. *Id. citing* 4 Arthur L. Corbin, Corbin on Contracts § 779D, at 46-47 (1951).

40. Restatement (Second) of Contracts § 302, illus. 19 (1979).

41. *Thomson, supra* note 39 at 419-420; *see also B&C Construction Co. v. Grain Handling Corp.,* 521 S.W.2d 98, 101 (Tex. Civ. App. 1975).

42. *Shroyer v. County of Mecklenburg*, 571 S.W.2d 849, 851 (N.C. Ct. App. 2002), ; *See also Kisiel v. Holz*, 725 N.W.2d 67, 70 (Mich. Ct. App. 2006) ("In general, although work performed by a subcontractor on a given parcel of property ultimately benefits the property owner, the property owner is not an intended third-party beneficiary of the contract between the general contractor and the subcontractor. Absent clear contractual language to the contrary, a property owner does not attain intended third-party beneficiary status merely because the parties to the subcontract knew, or even intended, that the construction would ultimately benefit the property owner"); *Vogel Brothers Building Co. v. Scarborough Constructors, Inc.*, 513 So.2d 260, 261 (Fla. Ct. App. 1987); *Warner v. Design and Build Homes, Inc.,* 114 P.3d 664, 670 (Wash. Ct. App. 2005); *New Jersey-American Water Co., Inc. v. Watchung Square Associates, LLC,* 2016 WL 3766248 (N.J. Ct. App. 2016); *Association of Apartment Owners v. Venture*, 167 P.3d 225, 264 (Hawaii 2007).

of the subcontract. In *Tarin's, Inc. v. Tinley*, the court noted that the presumption that owners are not third party beneficiaries of subcontracts is subject to challenge.[43] Thus, while the presumption is that an owner is not a third party beneficiary of the subcontract, this presumption can be overcome if the clear language of the subcontract expresses a direct intent to benefit the owner.[44]

C. Subcontractor vs. Owner

Just as the courts have generally determined that an owner has no claim against a subcontractor on the subcontract, courts have also found that subcontractors are *not* third-party beneficiaries of contracts between the owner and general contractor absent clear language expressing an intent to benefit the subcontractors.

In *Port Chester Electrical Construction Corp. v. Atlas*, the owner contracted with a general contractor for the construction of a commercial development.[45] The general contractor subcontracted out the electrical work. After work concluded, the subcontractor filed a lawsuit claiming to be a third party creditor beneficiary of the owner/general contractor contract.[46] In reviewing the subcontractor's claim, the court set used the "intent to benefit" test adopted by Missouri courts. It noted, "difficulty may be encountered, however, in applying the intent to benefit test in construction contracts because of the multiple contractual relationships involved and because performance ultimately, if indirectly, runs to each party of the several contracts."[47] According to the court,

> [g]enerally it has been held that the ordinary construction contract--i.e., one which does not expressly state that the intention of the contracting parties is to benefit a third party--does not give third parties who contract with the promisee the right to enforce the latter's contract with another. Such third parties are generally considered mere incidental beneficiaries.

After noting that treatises frequently refer to subcontracts as incidental beneficiaries, the court concluded that the subcontractor had no claim against the owner under to the general contract.

A similar conclusion was reached in *State v. Osborne*[48], where an employee of the homebuilder who provided labor filed a lawsuit against the owner claiming to be a third party beneficiary of the contract. The court concluded that the homebuilder did not enter into the contract to confer a benefit on his laborer. As such, the laborer could not assert a claim under the contract.[49]

A couple of Missouri courts have found subcontractors to be third-party beneficiaries where language of the general contract clearly expressed an intention to benefit them. However, these cases involved specific waiver of subrogation clauses that indicated that the owner waived subrogation against the subcontractor.[50]

D. Condominium Unit Owner vs. Contractor

While no Missouri court has analyzed the relationship between a condominium unit owner and a contractor, courts in other states have analyzed this relationship. These courts have generally found that unit owners are *not* third-party beneficiaries of construction contracts between the developer and the contractor or subcontractors.[51] In the *Board of Managers v. Schorr Brothers Development Corp*., a New York court found that unit purchasers were *not* third party beneficiaries of the contract between the developer and the contractor.[52]

Illinois courts reached the same conclusion in *Waterford Condominium Association v. Dunbar Corporation*.[53] The unit owners contended that they were intended third party beneficiaries of the construction contract because the parties to that contract knew that the condominium was being built for their use and not for the developer's use. In analyzing the unit owners' claims, the court reasoned that, "it is not enough that the parties to the contract know, expect or even intend that others will benefit from the construction of the building in that they will be users of it. The contract must be undertaken for the plaintiff's direct benefit and the contract itself must affirmatively make this intention clear."[54] Since the contract contained no language providing that the contractor was acting for the direct benefit of the unit owners, either individually or as a class, the court determined that they were not third party beneficiaries entitled to sue.[55]

The finding was followed in *155*

43. 3 P.3d 680 (N.M. Ct. App. 1999).

44. *See Kisiel, supra* note 42 at 70; *State ex rel. Guste v. Simoni, Heck & Associates*, 331 So.2d 478, (La. 1976)(an owner may sue a subcontractor directly as a third-party beneficiary when the subcontract was expressly intended to benefit him).

45. 389 N.Y.S.2d 327 (N.Y. Ct. App. 1976).

46. *Id.* at 330.

47. *Id.*

48. 607 P.2d 369 (Alaska 1980).

49. *Id.* at 371.

50. *Haren & Laughlin Construction Company, Inc. v. Jayhawk Fire Sprinkler Co., Inc*., 330 S.W.3d 596, 600 (Mo. Ct. App. W.D. 2011); *Knob Noster R-VIII School District v. Dankenbring,* 220 S.W.3d 809, 818-819 (Mo. Ct. App. W.D. 2007). It should be pointed out that in certain instances, subcontractors may have a cause of action for quantum meruit or unjust enrichment if they have furnished work that was received by the owner and the owner has not paid the general contractor for that work. *Lee Deering Electric Co. v. Pernikoff Construction Company,* 247 S.W.3d 577, 582 (Mo. Ct. App. E.D. 2008).

51. *F.O. Bailery Co., Inc. v. Ledgewood, Inc*. 603 A.2d 466 (Me. 1992).

52. 182 N.Y.S.2d 258, 259 (N.Y. Sup. Ct. 1992).

53. 432 N.E.2d 1009, 1011 (Ill. Ct. App. 1982).

54. *Id.* at 1011.

55. *Id.*

Harbor Drive Condo. Assn v. Harbor Point Inc., where unit owners (via the owners' association) filed a lawsuit against the contractor claiming to be third party beneficiaries of the contractor's contract with the developer.[56] The contract contained Section 1.1.2 of AIA A-201 referenced above. In determining whether the unit owners were third party beneficiaries, the court indicated that it had to determine the intent of the parties by looking at the terms of the contract.

According to the court, "liability to a third party must affirmatively appear from the contract's language and from the circumstances surrounding the parties at the time of its execution, and cannot be expanded or enlarged simply because the situation and circumstances justify or demand further or other liability."[57] The court did not find, under the circumstances or the contract's language, that the contract was undertaken for the direct benefit of the condominium unit owners. Rather, any benefit to them was found to be incidental.

E. Subsequent Owner v. Contractor

Courts have also concluded that owners are *not* third-party beneficiaries of construction contracts between the prior owner and contractor. In *Altevogt v. Brinkoetter*, the purchaser of home was found by the court not to be a third-party beneficiary of the construction contract between the prior homeowner and the builder.[58]

A similar result was reached in *Elsander v. Thomas Sebold & Assoc., Inc.*[59] After noting that the construction contract indicated that nothing in the contract documents was to be construed to "create a contractual relationship of any kind between any persons or entities other than the Owner and Contractor," the court concluded that, "because the construction contract nowhere provides or suggest that either plaintiff or a class of subsequent homeowners should receive the benefit of [contractor's] promises, we conclude that 'at best, plaintiff is an incidental beneficiary to the contract,' who has no rights thereunder."[60] While many of these cases deal with a subsequent purchaser of a residence, the same principle would apply in the commercial context.

F. Contractor vs. Architect/ Engineer

Generally, contractors have been held *not* to be third-party beneficiaries of the contract between the owner and architect. Illustrative of this is *Valley Landscape Company, Inc. v. Rolland*, where the court indicated that,

> the purpose of [retaining the design professional to oversee work] is to assure that the owner will get a finished product in accordance with the plans which he approved. The duty of the architect is to protect the owner to the end that the quality of the workmanship that goes into the project and the kind and quality of the materials that are used, will be in accordance with the plans and specifications upon which the owner and architect have agreed.[61]

Quoting *A.R. Moyer, Inc. v. Graham*[62], the court concluded, "a contractor is an incidental beneficiary absent clear intent manifested in the owner-architect contract to the contrary." The same has been found to be true regarding the preparation of plans and specifications.[63] Several other courts have reached the same conclusion.[64]

II. Conclusion

In each of the different relationships on a construction project, courts have been hesitant to find that a third party beneficiary entitled to assert a claim under a contract has been established. The determination in any specific case must be determined primarily by the language set forth in the contract using the "intent to benefit" test and based on the circumstances and relationships of the parties (i.e. whether the party is a creditor or donee beneficiary).

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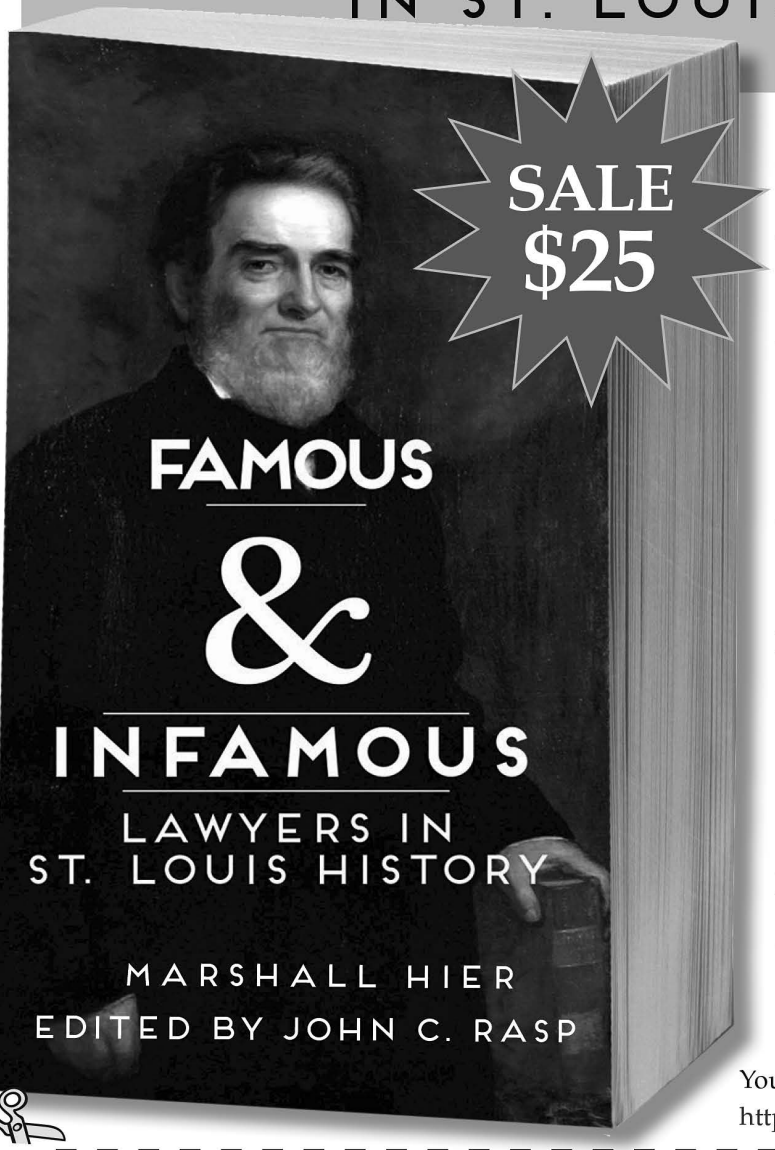
56. 568 N.E.2d 365 (Ill. Ct. App. 1991).
57. *Id*. at 374-375.
58. 421 N.E.2d 182 (Ill. 1981); *see also Foxcroft Townhome Owner's Association v. Hoffman Rosner Corporation*, 435 N.E.2d 210 (Ill. Ct. App. 1982).
59. 2008 WL 5077011 (Mi. Ct. App. 2008).
60. *Id.; see also Cahill v. Lazarski*, 226 A.D.2d 572 (N.Y.A.D. 1996).
61. 237 S.E.2d 120, 122 (Va. 1977).
62. 285 So.2d 397 (Fla. 1973).
63. *Dynamic Construction Company v. Barton Malow Company,* 543 N.W.2d 31 (Mich. Ct/ App. 1996).
64. *See Collins Co. v. City of Decator,* 533 So.2d 1127, 1132-1134 (Ala. 1988) (owner-architect contract did not create third-party beneficiary rights in contractor); *Richardson Associates v. Lincoln-Devore, Inc.*, 806 P.2d 750 (Wy. 1991) (Architect and mechanical engineer not third-party beneficiary of contract between owner and soil testing lab relating to construction); *Northgate Electric Corp. v. Barr & Barr, Inc.*, 61 A.D.3d 467 (N.Y. Sup. Ct. 2009) (Subcontractor could not assert a claim as third-party beneficiary to contract between owner and architect even though architect new plans would be relied upon by subcontractor); *Detweiler Bros. v. John Graham & Co.*, 412 F. Supp. 416, 419 (E.D. Wash. 1976); *SME Industries, Inc. v. Thompson, Ventulett, Stainback and Associates, Inc.*, 28 P.3d 669 (Utah 2001) (Contractors not third-party beneficiaries of contract between design professionals and owner); Linde Enterprises, Inc. v. Hazelton City Authority, 602 A.2d 897 (Penn. 1992).

FAMOUS AND INFAMOUS LAWYERS IN ST. LOUIS HISTORY



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Construction Damages under Missouri Law

By James R. Keller

A construction lawsuit, with few exceptions, involves damages. This article[1] discusses what damages are recoverable under Missouri law for breach of contract.[2] Mechanics' lien claims are not included.[3]

Level of Proof

Missouri courts require that an "award of [construction] damages must be supported by competent and substantial evidence." *Best Buy Builders, Inc. v. Siegel*, 409 S.W.3d 562, 565 (Mo. Ct. App. 2013). This requires proof of "reasonable certainty" but not "absolute certainty." *Id.* at 565; *Penzel Constr. Co., Inc. v. Jackson R-2 School Dist.*, 2017 WL 582663 at 10 (Mo. Ct. App. Feb. 14, 2017); *Harvey v. Timber Resources, Inc.*, 37 S.W.3d 814, 819-20 (Mo. Ct. App. 2001).

"The proper measure of damages is a question of law for determination by the trial court." *Business Men's Assurance Co. of America v. Graham*, 891 S.W.2d 438, 449 (Mo. Ct. App. 1994). The plaintiff's evidentiary burden is easier to satisfy when the losses are directly traceable to the alleged breach or defect giving rise to the construction claim. *Penzel*, *supra* at 10. In a bench tried case, the trial court "has the prerogative to make a finding of value within the range of values testified to at trial on the issue of damages." *Jerry Bennett Masonry, Inc. v. Crossland Constr. Co., Inc.*, 171 S.W.3d 81, 95 (Mo. Ct. App. 2005), quoting *Francis v. Richardson*, 978 S.W.2d 70, 74 (Mo. Ct. App. 1998).

Once damages are established, the amount of damage is a matter for the fact finder to decide, be it a jury, judge or arbitrator. Missouri courts require a lesser degree of certainty as to the amount of damages. *Penzel*, *supra* at 10. This allows juries a greater degree of discretion in assessing what the damages are. *BMK Corp. v. Clayton Corp.*, 226 S.W.3d 179, 196 (Mo. Ct. App. 2007); *Gasser v. John Knox Village*, 761 S.W.2d 728, 731 (Mo. Ct. App. 1988).

Direct Costs and Jury Instructions

The primary Missouri jury instruction for breach of a construction contract is M.A.I. 4.01 (2012). It provides recovery for damages that will fairly and justly compensate plaintiff as a direct result of the wrongful action. *Boten v. Brecklein*, 452 S.W.2d 86, 93 (Mo. 1970) (M.A.I. 4.01 is the proper instruction subject to defendants' right to offer a more specific instruction). M.A.I. 4.01 is a direct cost damage instruction.

To recover construction damages for breach of contract based on a claimed unpaid balance, MAI 4.08 (2012) provides that a jury must award plaintiff such sum as the jury believes is the balance due plaintiff under the contract less any sum necessary to correct any variations. This damage recovery is available once "substantial performance" has been achieved. A plaintiff has "substantially performed" when all important parts of the contract have been fulfilled with only slight variations. MAI 16.04 (2012).

The typical example is a contractor or subcontractor seeking recovery for a balance due pursuant to a fixed price contract. In *American Builders & Contractors Supply Co., Inc. v. G.S.R. Contracting, Inc.*, 429 S.W.3d 485 (Mo. Ct. App. 2014), the Missouri Court of Appeals, Eastern District affirmed on appeal a judgment for breach of

1. Several hundred cases, although reviewed and considered, are not cited in this article due to page limitations and other factors. Each case cited is either the best, most relevant or most recent authority for the topic discussed.

2. Quantum Meruit is a common alternative claim under Missouri law, especially applicable when there clearly is no formal contract. Quantum meruit requires proof that the materials or services provided had reasonable value. *City of Cape Girardeau v. Jokerst, Inc.*, 402 S.W.3d 115, 122 (Mo. Ct. App. 2013). "The principal function of this type of implied contract is the prevention of unjust enrichment." *County Asphalt Paving, Co. v. Mosley Constr., Inc.*, 239 S.W.3d 704, 710 (Mo. Ct. App. 2007), quoting *Bellon Wrecking & Salvage Co. v. Rohlfing*, 81 S.W.3d 703, 711 (Mo. Ct. App. 2002).

3. Mechanics' lien claims under Mo. Rev. Stat. Chapter 429 largely involve labor, equipment and material costs.

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contract based on a contract balance due of $147,424.18 in a three-paragraph opinion.

In *Kansas City Bridge Co. v. Kansas City Structural Steel Co.*, 317 S.W.2d 370, 376 (Mo. 1958), the Missouri Supreme Court noted: "[b]y agreement the jury was instructed to deduct from any amount it awarded plaintiff, the sum of $64,347.98 which plaintiff admittedly owed defendant as the balance of the total contract price of the steel." Such claims are essentially akin to an account stated per MAI 26.04 (2012), which merely requires proof that plaintiff and defendant agreed to an amount being owed and that defendant failed or refused to make payment.

Claims for the balance due are claims for a direct cost. While extremely common, they generally are one part of a larger construction dispute; thus playing a small role in appellate decisions, given the ease with which such damages can be assessed and generally the lack of dispute between the parties about the amount left unpaid.

Total Cost Method (TCM) and Modified TCM

In a case of first impression, the Missouri Court of Appeals for the Eastern District in February, 2017 discussed an alternative theory to recover damages known in the construction industry primarily through federal litigation as the total cost method ("TCM") and the modified total cost method ("modified TCM"). The case is *Penzel Constr. Co., Inc. v. Jackson R-2 School Dist.*, 2017 WL 582663 (Mo. Ct. App. Feb. 14, 2017). This approach pertains to claims based on the *Spearin* doctrine.

The *Spearin* doctrine is that when a government entity includes detailed specifications in its contract, the governmental entity impliedly warrants that if the contractor follows those specifications, the finished product will not be defective or unsafe. If the end product proves to be defective or unsafe, the contractor is not liable for its consequences and also may be able to recover for damages. *See Caddell Constr. Co. v. United States*, 78 Fed. Cl. 406, 410 (2007); *Hercules Inc. v. United States*, 24 F.3d 188, 197 (Fed. Cir. 1994), *aff'd*, 516 U.S. 417, 116 S. Ct. 981, 134 L.Ed.2d 47 (1996).

In *Penzel*, the general contractor brought a breach of contract action against a school district (a governmental entity) based on a breach of implied warranty for furnishing deficient and inadequate plans and specifications. The Missouri Court of Appeals, Eastern District recognized that this put the *Spearin* doctrine—a doctrine not previously officially adopted in Missouri—into play. The *Spearin* doctrine is akin to established Missouri precedent articulated in *Ideker, Inc. v. Missouri State Highway Comm'n*, 654 S.W.2d 617 (Mo. Ct. App. 1983).

In general, the TCM allows the contractor to calculate damages by subtracting the construction bid (or in some instances, the "contract price") from the total cost incurred to perform the contractual obligations. *Penzel*, *supra* at 11. This approach is premised upon the breaching party being the sole and exclusive cause for any additional damages incurred by the plaintiff. The potential weakness to this approach is that it dismisses other potential factors which may have caused or contributed to cause part or all of the damage.

The TCM requires proof of each of the following elements: (1) the nature of the particular losses make it impossible or highly impractical to determine them with a reasonable degree of accuracy; (2) the plaintiff's bid or estimate was realistic; (3) its actual costs are reasonable; and (4) it was not responsible for the added expenses. *Id*. at 13. The *Penzel* court concluded that the "TCM is incompatible with Missouri contract law and should be avoided." *Id*. at 13.

Instead, the *Penzel* court embraced as legally viable a modified TCM. A modified TCM considers the elements of the TCM but also accommodates adjustments to (1) the original contract price (the amount of the contractor's accepted bid); (2) the total cost of performance; or (3) both. *Id*. at 13. This allows for calculations to be tailored to more accurately reflect the amount of damages caused by the breaching party's errors and thus more accurately reflect what actual damages occurred. "Regarding the modified TCM, we merely conclude its framework—or a similar framework—should not be avoided as a matter of law." *Id*. According to the *Penzel* court, this "is precisely our State's goal when awarding damages in breach of contract actions." *Id.; See Dubinsky v. United States Elevator Corp.*, 22 S.W.3d 747, 752 (Mo. Ct. App 2000).

Prior to *Penzel*, numerous federal courts and construction arbitration panels around the country had recognized and applied the TCM and modified TCM. The *Penzel* decision promises to open the door to additional appellate decisions in Missouri on the scope and application of these two methods. New case law likely will expand to include private contract disputes as well.

Indirect Costs—Consequential Damages

In a breach of contract lawsuit, in addition to recovering direct costs relating to the benefit of the bargain, "a plaintiff may also recover for damages naturally and proximately caused by the commission of the breach and for those that could have been reasonably contemplated by the defendant at the time of the agreement." *Crank v. Firestone Tire & Rubber Co.*, 692 S.W.2d 397, 402 (Mo. Ct. App. 1985).[4] To recover, such damages must have been reasonably foreseeable at the time the parties entered into the contract. *Birdsong v. Bydalek*, 953 S.W.2d 103, 116 (Mo. Ct. App. 1997), citing Restatement (Second) of Contracts §351 (1981).

In *Gill Const., Inc. v. 18th & Vine Auth.*, 157 S.W.3d 699 (Mo. Ct. App. W.D. 2005), the court found that there was sufficient evidence to support a jury finding in favor of a contractor and against the City of Kansas City and its development authority for consequential damages. *Id*. at 718. Consequential damages were "reasonably

4. The court noted that M.A.I. 4.01 needs to be modified to cover consequential or "special" damages.

foreseeable" at contract inception.

Examples of recoverable consequential damages include:

Bond Costs

Many construction projects including virtually all government-related construction projects involve payment and performance bonds. The contractors and subcontractors must obtain appropriate bonds and pay a premium for coverage. Increased bond costs due to a defendant's breach of contract can be recoverable under Missouri law. For example, in *Gill*, *supra*, the Western District held that a general contractor could recover damages for increased bond premiums of three percent. *Id*. at 718. Recovery also may be possible when bonding companies have denied a contractor's request for additional bonding because the financial documents provided in support of the request "showed an account receivable that was unpaid for a long period of time." *Id*.

Lost Profits

The *Gill* court recognized that consequential damages can include lost profits. *Id*. at 717. "The proper measure of damages in a case where an owner breaches a construction contract by preventing the contractor from performing the work is the contract price less the amount it would have cost the contractor to perform the contract." *Forney v. Missouri Bridge and Concrete, Inc.*, 112 S.W.3d 471, 474 (Mo. Ct. App. 2003). "This amount, which constitutes lost profits, must be shown with reasonable certainty by proof of facts from which anticipated profits can rationally be estimated." *Juengel Constr. Co., Inc. v. Mt. Etna, Inc.*, 622 S.W.2d 510, 514 (Mo. Ct. App. 1981). It is incumbent upon the plaintiff contractor to demonstrate what actual costs would have gone into completion of the work and then to subtract that amount from the total original contract balance, netting the difference as a lost profit. Failure to do so will preclude the recovery of lost profits.

Contractors need to be careful to present evidence on the cost to complete given a breach of contract. Lost profits do not automatically equal the remaining contract balance. A judgment based solely on the unpaid contract price assumes that plaintiff would have spent no additional money to complete the contract. There almost always are additional costs that would have been incurred for contract completion. *See Fort Zumwalt Sch. Dist. v. Recklein*, 708 S.W.2d 754, 756 (Mo. Ct. App. 1986).

An alternative way to recover lost profits is shown in *Statler Mfg., Inc. v. Brown*, 691 S.W.2d 445, 451 (Mo. Ct. App. S.D. 1985). The court recognized that when an owner breaches a construction contract by preventing the contractor from doing its work, the contractor's measure of damages is usually stated to be the contract price minus the amount it would have cost the contractor to complete the performance of the contract. The court found that if unusual circumstances exist—in this case, the property could not be properly delivered to complete construction due to an easement dispute—the contractor was entitled to its lost profit plus various expenses incurred up to the time of termination minus the contract down payment. There was no evidence at the trial court level as to what it would have cost the contractor to complete the contract because "under the peculiar circumstances, such completion would not have been possible." *Id*. at 451.

Many construction projects are not based on a fixed price or lump sum, but rather on a cost of work plus a specified percentage for profit and overhead (sometimes referred to as a cost-plus percentage fee contract). Missouri courts enforce damage claims based on a cost-plus percentage fee contract. *J.E. Hartman, Inc. v. Sigma Alpha Epsilon Club of Columbia, Mo.*, 491 S.W.2d 261, 266 (Mo. 1973). Cost plus fixed fee contracts also are enforceable. *Id.*; *Kalen v. Steele*, 341 S.W.2d 343, 346, (Mo. Ct. App. 1960).

In *Juengel Constr., supra,* the Eastern District held that when an owner breaches a cost-plus construction contract, the contractor may be entitled to profit of 6% of the cost of work and that such profit may include overhead. *Id*. at 515. A contractor's "inability to differentiate between overhead and profit, however, does not automatically preclude it from recovering the total amount . . . ." *Id*. "The rationale supporting this conclusion is that if the contract had not been breached, fixed business expenses would have been paid from profits remaining after payment of costs directly related to performance of the contract." *Id*.

Overhead

In *Groppel Co., Inc. v. United States Gypsum Co.*, 616 S.W.2d 49, 65 (Mo. Ct. App. 1981) the contractor could recover a 10% estimate for overhead but not another 10% for lost profits. The evidence showed the contractor actually would have lost money if allowed to complete. As noted above, a contractor's damages for overhead and profit are sometimes intertwined or so linked that it is not possible to separate them through evidence. This is not an automatic barrier to recovery. *See Juengel*, *supra*.

Requests for recovery of overhead often occur when a contractor claims a delay in completion. Even though a percentage of a fixed overhead could be properly allocated to a specific job during the period of delay, any amount so allocated does not represent a loss or damage unless plaintiff would have, "but for the delay, obtained other work (which it did not have or which it did not in fact obtain) sufficient in amount to have absorbed the allocated portion of general overhead." *Kansas City Bridge Co. v. Kansas City Structural Steel Co.*, 317 S.W.2d 370, 377 (Mo. 1958).

The court held there was "no evidence supporting a reasonable inference that plaintiff did in fact forego bidding on a job or jobs during the delay period, or, if so, the probability of plaintiff obtaining such job or jobs, or whether they would have been of sufficient stature to have absorbed the overhead allocated to [this particular project] during the period of delay, or that their reason for not so bidding was because of their lack of ability (resources) to accomplish such due to the tie-up of the equip-

ment and personnel on the [project in question]." *Id*. at 378.

Contractor Delay Damages

Missouri recognizes damages to owners and contractors for delay caused by the other.

The Missouri Supreme Court in *Spitcaufsky v. State Highway Comm'n. of Mo.*, 349 Mo. 117, 127 (1941), held, consistent with references to various federal cases at the time, "that if the delay here was caused wholly by unwarranted action of the Commission (a government body), Sec. 48, Art. IV of the State Constitution and Sec. 8764, *supra*, of our statutes do not bar recovery of compensatory damages by [contractor]." A subcontractor generally has the same opportunity to recover delay damages against a contractor as a contractor has against the owner.

In *Missouri Dep't. of Transp. ex rel. PR Developers, Inc. v. Safeco Ins. Co. of America*, 97 S.W.3d 21, 35 (Mo. Ct. App. E.D. 2002), the court noted it

> is the general rule that when a party in a contract charges itself with a duty possible to [be] performed, it must perform it, unless the performance is made impossible by the act of God, by the law, or the other party . . . . If a party wishes to be excused from performance in the case of various contingencies arising, it is the party's duty to provide this excuse in the contract.

Id., citing *County Asphalt Paving Co., Inc. v. 1861 Group, Ltd*., 851 S.W.2d 577, 580 (Mo. Ct. App. 1993). If an owner or contractor has a duty to perform an obligation that is not performed and it results in damage to a contractor or subcontractor, that contractor or subcontractor has a viable claim for delay damages. *Id*.

No Damage for Delay Clauses

Many construction contracts include a "no damage for delay" clause designed to preclude the contractor from recovering for damages, even if the delay was the fault of the owner. The court in *Roy A. Elam Masonry, Inc. v. Fru-Con Constr. Corp.*, 922 S.W. 2d 783, 789 (Mo. Ct. App. 1996) noted that cases from other jurisdictions generally have enforced "no damage for delay" clauses. These opinions are split, however, on enforceability if the delay was not contemplated by the parties when they entered into the contract.

The *Roy A. Elam Masonry* court did not reach a definitive conclusion on enforceability. The clause in question was not an absolute bar to a subcontractor's claim for delay damages against a contractor. Instead, it premised such damages upon the contractor recovering delay damages against the owner. "Missouri courts have not squarely ruled on the validity of no-damages-for-delay clauses like this one, but a state appellate court has suggested that Missouri—like other jurisdictions—would enforce them as written. *Roy A. Elam Masonry, Inc. v Fru-Con Constr. Corp.*, 922 S.W.2d 783, 788-89 (Mo. Ct. App. 1996)." *St. Louis Housing Auth. ex rel. Jamison Elec., LLC v. Hawkins Constr. Co.*, 2014 WL 7408944 at 10 (E.D. Mo. Dec. 31, 2014).

In *State ex rel. MWE Services, Inc. v. Sircal-Cozeny-Wagner*, 2009 WL 482378 at 5-6 (W.D. Mo. Feb. 23, 2009), the court cited *Roy A. Elam Masonry* with approval. The court upheld a clause restricting delay damages that provided that a contractor is only liable for a subcontractor's delay damages to the extent the owner was obligated to pay the contractor for such damages. While Mo. Rev. Stat. §34.058 (2017) makes unenforceable in public works contracts no damage for delay clauses, this section does not apply to private contracts between a contractor and a subcontractor. *St. Louis Housing Auth. ex rel. Jamison Elec., LLC v. Hawkins Constr. Co.*, 2013 WL 6592754 at 4 (E.D. Mo. 2013).

Owner Delay Claims – Liquidated Damages

Owners frequently have delay claims against contractors and contractors frequently have delay claims against subcontractors. The large preponderance of such claims for delays are covered by a liquidated damage provision contained within the contract. A liquidated damage clause sets a specific amount to be paid (for example, a specified dollar amount for each day of delay) or some formula to calculate an amount as the payment for delay damages in lieu of proof of actual damages. Five hundred dollars per day for delay, per one Missouri Supreme Court case, was enforceable. *Intertherm, Inc. v. Structural Systems, Inc.*, 504 S.W.2d 64 (Mo. 1974).

Liquidated damages clauses cannot be a penalty. *Gillioz v. State Highway Comm'n*., 348 Mo. 211, 224 (Mo. 1941). "Missouri has adopted the Restatement of Contracts rules to aid in determining whether a damages clause is an enforceable liquidated damages clause or an unenforceable penalty provision." *Star Dev. Corp. v. Urgent Care Assoc., Inc.*, 429 S.W.3d 487, 491-92 (Mo. Ct. App. 2014). To be enforceable, the amount fixed as damages must be a reasonable forecast for the harm caused by the breach and the harm must be of a kind difficult to accurately estimate. *Id*.; *Paragon Group, Inc. v. Ampleman*, 878 S.W.2d 878, 881 (Mo. Ct. App. 1994), citing Restatement (Second) of Contracts §356 (1979). If these two elements cannot be shown, the courts generally construe a liquidated damage clause to be an unenforceable penalty.

In determining whether a clause is a penalty or an enforceable provision, the courts look to the intention of the parties as ascertained from the contract as a whole. *Wilt v. Waterfield*, 273 S.W.2d 290, 295 (Mo. 1954). "By its nature, a liquidated damages clause may operate to provide the non-breaching party more or less than his actual damages." *Burst v. R.W. Beal & Co.*, 771 S.W.2d 87, 91-92 (Mo. Ct. App. 1989). Thus, the clause "must not be unreasonably disproportionate to the amount of harm anticipated when the contract was made." *Paragon, supra* at 881, quoting *Burst*, *supra*.

The Missouri Supreme Court noted in *Gill*, *supra*, that absent unusual circumstances or precise contract language, liquidated damages generally are not apportioned between the parties even when they are mutually responsible for delays. *Id*. This decision comports with the present-day practice that if there are multiple de-

lays that can be defined and ascribed to particular parties, one party may be assessed liquidated damages for its share of the delay while another party may be entitled to recover under a different theory for delay—such as extended general conditions and other related costs. This leads to a mathematical calculation to net out offsets between different party delays.

To enforce a liquidated damage cause, the non-breaching party must show "some actual harm." *Goldberg v. Charlie's Chevrolet, Inc.*, 672 S.W.2d 177, 179 (Mo. Ct. App. 1984). "While this need not be a precise dollar amount, it nevertheless must be shown that some harm or damage, in fact, occurred." *Id*.

Liquidated damages clauses tend to be strictly construed. For example, in *J.H. Berra Constr. Co., Inc. v. City of Washington*, 510 S.W.3d 871, 873 (Mo. Ct. App. E.D. 2017), the court held that a contract provision assessing liquidated damages for each "working day" was to be construed against the drafter—the owner—and thus liquidated damages could not be assessed for days when work was not possible due to weather. However, in *Obermiller Constr. Services, Inc. v. Public Water Supply Dist. No. 5 of Cass County*, 319 S.W.3d 545, 546 (Mo. Ct. App. W.D. 2010), the court affirmed a court award of $125,000.00 in liquidated damages against the contractor hired to construct water lines for a county water supply district relating to removal of rock.

In a contractor's claim against a homeowner (who is generally considered under Missouri law to be a "consumer"), a liquidated damage clause will not be enforced where it is unduly harsh and unconscionable. *Repair Masters Constr., Inc. v. Gray*, 277 S.W.3d 854, 858 (Mo. Ct. App. 2009). Ambiguity also precludes enforcement. Fifteen percent of an unknown contract price is not sufficiently definite to provide enforceability. *Id*. at 859.

Missouri's Prompt Payment Acts—Public and Private

Missouri has two prompt payment acts—one public and one private; namely, Mo. Rev. Stat. §34.057 (2017) (Public Prompt Payment Act) and Mo. Rev. Stat. §431.180 (2017) (Private Prompt Payment Act). Both have big teeth. Essentially, they both provide as follows: if a scheduled payment is not made on time, the finder of fact may award in addition to any other damages, interest from the date payment was due at a rate of up to 18%—at the fact finder's discretion—and reasonable attorney fees—also at the fact finder's discretion. The provisions have exceptions, but generally speaking are a sword to prod those responsible for payments to make them timely. If a scheduled contractual payment is not made, it cannot be overstated how much leverage and ultimately potential damage recovery this provides to the contractor.

Public Prompt Payment Act

This Act applies to public projects. "Efforts to legislatively address the problem of abusive practices led to the adoption in 1990 of Section 34.057." *Mays-Maune & Assoc., Inc. v. Werner Brothers, Inc.*, 139 S.W.3d 201, 209 (Mo. Ct. App. 2004). "The drafters of this legislation intended to allow courts to impose the interest penalty whenever bad faith is found." *Id*.

In *Systemaire, Inc. v. St. Charles County*, 432 S.W.3d 783 (Mo. Ct. App. E.D. 2014), the court noted that a public owner under the public Missouri Prompt Payment Act must make final payment of all monies owed to the contractor within 30 days of the due date. *Id*. at 786. "However, the final payment due date does not arrive until the project is complete or when the proper authority certifies that the project is complete and upon filing with the public owner of all documentation and certifications required by the contract in complete and acceptable form." *Id*.

For untimely payments, interest can accrue unless payment was withheld in good faith for reasonable cause. If a contractor lacks sufficient manpower and this delays project completion in a timely manner, the trial court may decide not to award the 18% otherwise provided in Section 34.057. *Jerry Bennett Masonry, Inc. v. Crossland Constr. Co., Inc.*, 171 S.W.3d 81, 90 (Mo. Ct. App. 2005).

Private Prompt Payment Act

This Act applies to private projects. The Missouri Supreme Court has held that a contractor can put Missouri's Private Prompt Payment Act into play by expressly pleading a violation of the Act and stating: (1) the parties entered into a private construction contract; and (2) one or more payments were not made pursuant to the contract. *Lucas Stucco & Eifs Design, LLC v. Landau*, 324 S.W.3d 444, 446 (Mo. 2010). Unlike the Public Prompt Payment Act, payment under the Private Prompt Payment Act cannot be withheld in good faith for reasonable cause. *Vance Brothers, Inc. v. Obermiller Constr. Services, Inc.*, 181 S.W.3d 562, 565 at fn. 5 (Mo. 2006).

The parties may submit the issue of recovery under the Private Prompt Payment Act to the court rather than the jury. *Walton Constr. Co. v. MGM Masonry, Inc.*, 199 S.W.3d 799, 807 (Mo. Ct. App. 2006). Section 431.180 does not mandate application of an interest rate up to 18% but rather provides that the fact finder "may" award such interest within the fact finder's discretion. *Fru-Con/Fluor Daniel Joint Venture v. Corrigan Brothers, Inc.*, 154 S.W.3d 330, 339 (Mo. Ct. App. 2004).

Attorney Fees

Missouri follows the "American rule" which provides that each party pays for its own attorney fees. The exceptions are where a statute specifically authorizes recovery or when the contract provides that attorney fees can be awarded to the prevailing party. *Scheck Indus. Corp. v. Tarlton Corp.*, 435 S.W.3d 705, 732 (Mo. Ct. App. 2014). Attorney fees are special damages that must be pled specifically. *Id*.; *Bailey v. Hawthorne Bank*, 382 S.W.3d 84, 107 (Mo. Ct. App. 2012). If the contract provides for attorney fees, they clearly may be recoverable. A contractor may not be entitled to an award of attorney fees, however, if the contractor materially breached the contract, even though the contractor may otherwise recov-

er on its mechanic's lien action. *Matt Miller Co., Inc. v. Taylor-Martin Holdings, LLC*, 393 S.W.3d 68, 88 (Mo. Ct. App. 2012).

Owner Recovery for Defective Work

If a contractor's work is defective, the measure of damages available to an owner is "cost to repair" or "diminution in value." *Business Men's Assurance,* 891 S.W.2d 438, at 449. The general rule in Missouri for damages to real property is the diminution in value test. This test calculates the difference between the fair market value of real property before and after the action that caused damage. *Id.*; *Tull v. Housing Auth. of the City of Columbia*, 691 S.W.2d 940, 942 (Mo. Ct. App. 1985).

In defective construction cases, the "cost to repair" test is favored by the courts. This approach requires proof as to the cost of correcting the defects. *Kelley v. Widener Concrete Constr. LLC*, 401 S.W.3d 531, 540 (Mo. Ct. App. 2013). If the cost to repair and complete the construction contract involves unreasonable economic waste, the diminution in value approach should be used. *White River Dev. Co. v. Meco Systems, Inc.*, 806 S.W.2d 735, 741 (Mo. Ct. App. 1991). The diminution in value test also should be used when the cost to repair method would result in destruction of usable property or would be grossly disproportionate to the results attained. *Kelley*, *supra* at 540.

Once the owner presents evidence of the cost of reconstruction or repair, the burden then shifts to the contractor to present evidence that the cost of reconstruction is unfair economic waste such that the diminished value rule should apply. If the contractor presents no evidence of the value of the building as actually constructed, the trial court does not err in applying the cost to repair measure of damages. *Rogers v. Superior Metal, Inc.*, 480 S.W.3d 480, 483 (Mo. Ct. App. 2016). Under either method of proof, MAI 4.01 (2012) is the proper damage jury instruction. *Ince v. Money's Bldg. & Dev., Inc.*, 135 S.W.3d 475, 479 (Mo. Ct. App. 2004).

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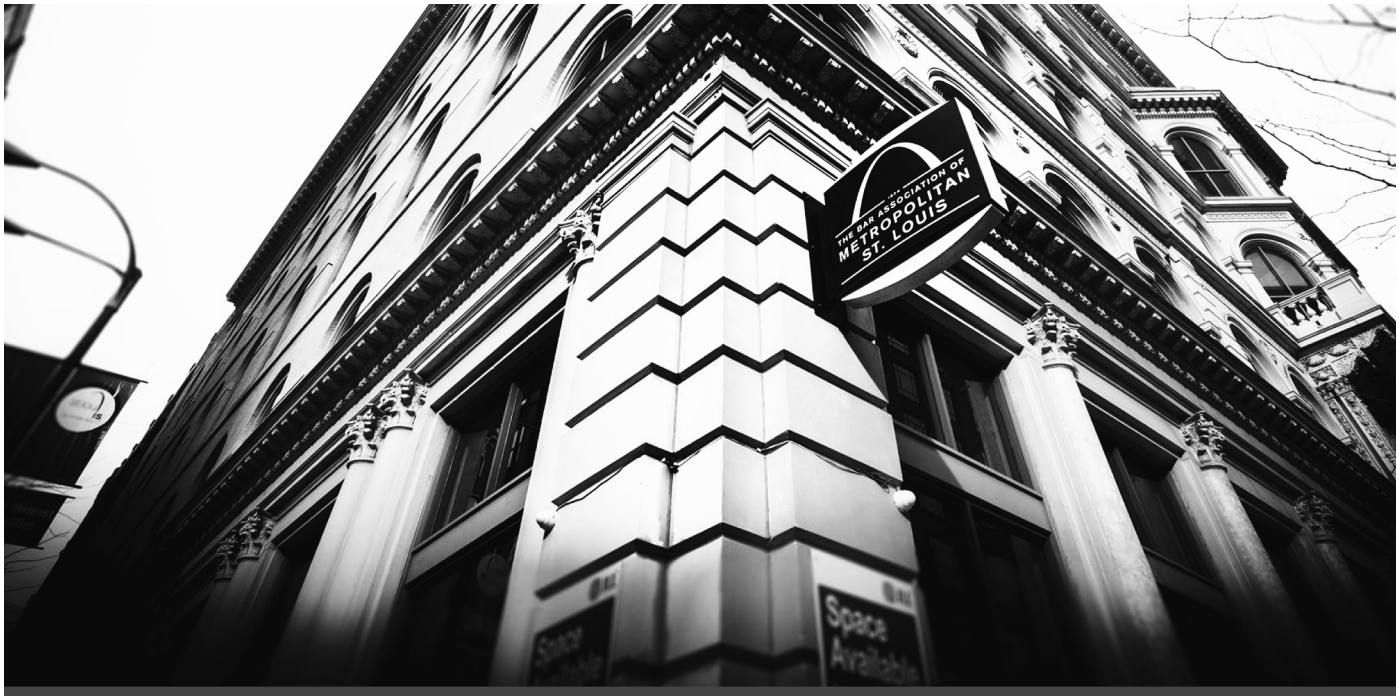

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Mechanic's Lien Waivers – A Seemingly Simple Concept With Significant Implications

By Jackson D. Glisson, III

If you have represented contractors, subcontractors, or other entities offering construction goods and services, you probably know that the ability to place a lien on property for the unpaid value of labor and materials provided is a great piece of leverage. Conversely, those of you with clients that are property owners have likely had to take steps to avoid the title of their property becoming clouded by liens. This is typically required by most loan agreements.

One of the ways both parties ensure payment and avoid risk on a project is by utilizing lien waivers. A lien waiver is a written instrument by which a contractor, subcontractor, material supplier or other potential lien claimant fully or partially relinquishes its right to assert a lien against another's property.

While lien waivers are a routine aspect of most construction projects, they should not be taken lightly. It is very important for both construction entities and property owners to thoroughly review and understand the lien waiver process on each project and even more important to give them proper attention during their execution.

Many owners mistakenly believe that a subcontractor or supplier's lien can be defeated by showing evidence of payment to the prime contractor. This is simply not the case. In fact, Missouri courts have repeatedly held that an owner's payment to a general contractor will not serve as a defense to a lien enforcement action brought by a subcontractor or supplier.

In the case of *Bolivar Insulation Company v. Bella Pointe Development, L.L.C.*, 166 S.W.3d 610 (Mo. Ct. App. 2005), Trendwest Resorts, Inc. claimed that it did not owe the obligation for which the insulation subcontractor, Bolivar Insulation Company, sought relief because Trendwest had paid its general contractor, Bella Pointe. However, the court held that that this did not entitle Trendwest to summary judgment in that a property owner who has fully paid a contractor is still subject to a claim for mechanic's lien against its property by a subcontractor against which the contractor has defaulted. See *Northeast Painting Co. v. AOC Intern. (U.S.A.), Ltd., 831 S.W.2d 711, 712 (Mo. Ct. App.1992)*; *Frank Powell Lumber Co. v. Federal Ins. Co., 817 S.W.2d 648, 652 (Mo. Ct. App.1991)*.

There are four typical types of lien waivers. They are pre-contract, conditional, partial and final. Each type of lien waiver is addressed herein.

I. Enforcement

A mechanic's lien claim may be waived; however, the waiving party's intention to do so must be clearly manifested. *Landvatter Ready Mix, Inc. v. Buckey*, 963 S.W.2d 298, 301 (Mo. Ct. App. 1997). A lien waiver may be one manner by which a party may demonstrate its intent to waive its lien rights.

A lien waiver is only valid if it a) is supported by consideration; *or* b) has induced the receiving party to detrimentally change its position in reliance upon the waiver. *P&K Heating and Air Conditioning, Inc v. Tusten Townhomes Redevelopment Corp.,* 877 S.W.2d 121, 123 (Mo. Ct. App. 1994).

The enforceability of a lien waiver can be summarized as follows:

(1) The waiver will be enforced as written if the language is plain and unambiguous;

(2) Lawful consideration must be given for the waiver; and

(3) The courts will not determine whether the consideration is fair or adequate.

It is also important for practitioners to confirm that lien waivers accurately describe the project/property against which lien rights are being relinquished. In *Bolivar Insulation Company*, 166 S.W.3d 610, 614, Trendwest, the resort owner, contended it was entitled to summary judgment because the insulation subcontractor provided seven lien waivers that acknowledged payments and a final lien waiver. None of the lien waivers, however, related to work done to Building C of the condominium complex. The insulation subcontractor's mechanic's lien claim pertained to Building C. Trendwest's contention that it had lien waivers for the claim for which the subcontract sought a lien was not supported by the record before the trial court and, as a result, summary judgment was denied.

II. Pre-Contract Lien Waivers

A party may waive its future lien rights if its intention to do so is clearly manifested. *Landvatter,* at 302. However, the Missouri Mechanic's Lien Act does not allow agreements to waive lien rights, *when such agreements are made in anticipation and consideration of the award of a contract*. Mo. Rev. Stat. § 429.005(1) (2017) states:

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> An agreement by an original contractor, subcontractor, supplier or laborer to waive any right to enforce or claim any lien authorized under this chapter, where the agreement is in anticipation of and in consideration for the awarding of a contract or subcontract to perform work or supply materials for an improvement upon real property, whether expressly stated or implied, is against public policy and shall be unenforceable under this chapter.

Mo. Rev. Stat. § 429.005 (1) (2017). This restriction, however, does not apply to contractual provisions which require lien waivers as a condition for payment. Mo. Rev. Stat. § 429.005 (2) (2017).

III. Conditional Lien Waivers

A conditional lien waiver is not effective and cannot be relied upon by *anyone* until the condition stated in the lien waiver has been satisfied. A situation might arise where a subcontractor or material supplier provides a lien waiver with its pay application to the contractor, but then does not receive payment from the contractor after the owner makes payment to the contractor. In this instance, the owner might argue that it relied upon the lien waiver to its detriment by making payment to the contractor; and, therefore, the waiver should be given full effect despite the fact that the subcontractor or supplier did not receive full consideration for its lien waiver. In order to prevent this scenario from occurring, practitioners representing subcontractor or material suppliers should add language to lien waivers expressly conditioning the waiver upon actual receipt of funds from the contractor's payment. Conditional language prevents the owner from reasonably relying upon a lien waiver without further investigation as to whether actual payment has occurred. *E.A. Polack Plumbing & Heating v. A.S.A. Builders, Inc.*, 534 S.W.2d 505 (Mo. Ct. App. 1976) (subcontractors were held not to have waived their lien rights where they expressly conditioned lien waivers upon collection of funds represented by general contractor's check).

IV. Partial Lien Waivers

A partial lien waiver only waives a claimant's lien rights to the stated extent of the waiver. Partial lien waivers are usually submitted with payment applications during the course of a project. Typically, a partial, or qualified, lien waiver will waive lien rights for 1) work performed to date; 2) work performed to a stated dollar amount; or 3) a combination of the two.

A.To Date Lien Waivers

A partial lien waiver that waives a claimant's lien rights for all work performed "to date" may waive that claimant's lien rights for pending, unapproved claims for extra work and the amount of retention withheld through the particular date. If you are representing a potential lien claimant, you should exercise extreme caution when reviewing "to date" lien waivers, as the waiver might be construed against the client in a manner you hadn't envisioned. In many cases, a contracting entity may have been paid for progress payments through a certain date, but it still could be owed money for held retention, disputed extra work or other potential claims. By agreeing to a lien waiver through a date certain, the lien claimant is essentially acknowledging payment for all of the work it performed through the effective date. As a result, it could potentially be waiving its right to a lien for these types of issues.

B. Stated Dollar Amount

Preferably, a partial lien waiver will recite a specific dollar amount being waived by the claimant. A lien waiver which states a specific dollar amount does not contain the same pitfalls as a "to date" lien waiver, as the exact amount being waived is clear on its face, and not open to multiple interpretations. Again, counsel representing construction entities should add conditional language to the face of the lien waiver requiring actual receipt of funds.

V. Final Lien Waivers

Final lien waivers are typically required by owners before final payment will be issued. A final lien waiver constitutes a waiver of all lien rights that may have accrued during the course of a project up to the date of the waiver. Owners will typically demand much stricter language in a final lien waiver. As such, usually an owner will not accept "conditional" language in a final lien waiver. However, a prudent lien claimant will refrain from executing an unconditional final lien waiver where it has claims for additional compensation. In such a situation, the prudent lien claimant will either refuse to execute a final lien waiver, carve out the disputed claims or condition it upon a reservation of rights to assert a future claim for the additional money.

VI. Fraudulent Lien Waivers

Construction entities that submit fraudulent lien waivers can be subject to criminal and personal liability. Under the Missouri Mechanic's Lien Act, any contractor who knowingly issues a fraudulent lien waiver or a false affidavit shall be guilty of a class D felony. Mo. Rev. Stat. § 429.100(3) (2017).

Title companies and escrow agents can also be criminally liable for knowingly accepting fraudulent lien waivers for financial gain. The Act states that:

> Any settlement agent, including but not limited to any title insurance company, title insurance agency, title insurance agent or escrow agent who knowingly accepts, with intent to defraud, a fraudulent lien waiver or a false affidavit shall be guilty of a class D felony if the acceptance of the fraudulent lien waiver or false affidavit results in a matter of financial gain to:
>
> (1) The settlement agent or to its officer, director or employee other than a financial gain from the charges regularly made in the course of its business;
>
> (2) A person related as closely as the fourth degree of consanguinity to the settlement agent or to an officer, director or employee of the settlement agent;
>
> (3) A spouse of the settlement agent, officer, director or employee of the settlement agent; or
>
> (4) A person related as closely as the fourth degree of consanguinity to the spouse of the settlement agent, officer, director or employee of the settlement agent.

Mo. Rev. Stat. § 429.100(5) (2017).

In *John Knox Village v. Fortis Construction Co.*, 449 S.W.3d 68 (Mo. Ct. App. 2014), the individual owners of a construction entity were found personally liable due to fraud associated with lien waivers. John Knox Village ("Knox Village") was the owner of a project known as the Hospice Project. Knox Village contracted with Triad Construction Company, Inc. ("Triad")

as the general contractor. In each application for payment, Triad represented and warranted that all work to that point would be free and clear of all liens and claims and all subcontractors would be paid. Knox village paid Triad and its prime subcontractor, Fortis Construction Co., pursuant to a joint check agreement a total of $124,299.23 for the Hospice Project. Of particular importance to the court's ultimate holding was the fact that three of the four individual owners of Fortis also were owners of Triad.

Knox Village received lien waivers per applications for payment and a final waiver of lien. Triad had certified that all subcontractors had been paid or would be paid. Eventually, through the project architect, Knox Village learned that none of the subcontractors on the Hospice Project had been paid and that $127,121.14 was owed to them. Some of the subcontractors gave notice of intent to file liens, and Knox Village had to negotiate payments to them. Ultimately, Knox Village paid an additional $70,373.78 directly to the subcontractors that had threatened liens.

Triad, who had been in dire financial shape throughout the project, filed for Chapter 7 bankruptcy. Knox Village filed suit against the individual owners of Triad. On appeal, the issue was whether Knox Village could pierce the corporate veil on its claims for fraudulent representation, fraudulent conveyance, and civil conspiracy.

The appellate court agreed that there was sufficient evidence that Triad falsely represented that it would timely pay any subcontractors for work performed on the Hospice Project after receiving Knox Village's payments. In addition, it ruled that the individuals had entered into a civil conspiracy to unlawfully benefit themselves by "absconding with the money [Knox Village] paid."

The appellate court found there was adequate evidence to pierce the corporate veil from Triad to the individuals so that the owners were personally liable. In particular, the appellate court noted that it was the knowingly false representations by defendants that elevated this case and caused it to be treated differently than a "garden-variety breach of contract action involving the non-payment of subcontractors."

Interestingly, in an earlier decision, the Missouri Court of Appeals, Southern District, found that allegations in a petition were insufficient to state a claim of fraudulent misrepresentation against the president of an electrical contractor. In *Crossland Construction Co. Inc. v. Alpine Electrical Construction, Inc.,* 232 S.W.3d 590 (Mo. Ct. App. 2009, the court found that a lien waiver submitted made no representations that the subcontractor had obtained lien waivers from its suppliers or that the subcontractor had paid its suppliers. Rather, the lien waiver stated only that the subcontractor was releasing its own mechanic's lien rights on the property for the "labor or services, material, fixtures or apparatus," which it itself had furnished up to the amount of money it received from the general contractor.

The court noted that even if, as the petition alleged, appellant executed the lien waivers knowing that its suppliers had not been paid and the general contractor relied on the lien waivers, nothing in the lien waivers was a fraudulent misrepresentation because the lien waivers did not represent that the subcontractor's suppliers had been paid. The lien waivers only stated that the subcontractor was releasing its mechanic's lien and nothing in the petition alleged that the subcontractor did not release it mechanic's lien. Therefore, the court held that the execution of the lien waiver and the general contractor's reliance on it did not establish a claim of fraudulent misrepresentation against the president of the subcontractor individually.

VII. Joint Check Rule

In addition to requiring lien waivers, another way to minimize exposure to payment claims and mechanic's liens is the use of joint checks. The joint check rule provides that, in the absence of an agreement to the contrary, if a material supplier receives and enforces a joint check without collecting the amount then due from the maker, the supplier is not entitled to assert a mechanic's lien or payment bond claim. In *Southwest Hardware & Lumber Co. V. Borgerson*, 77 S.W.2d 195 (Mo. Ct. App. 1934), the owners argued that they had already paid the supplier in full through checks payable jointly to the supplier and the contractor and that supplier had, by endorsing the checks, waived his right to further payment from them. *Id.* at 196. The court of appeals reversed the trial court, holding that the supplier had received the money due him as a matter of law. *Id*. at 197. The court reasoned that because the supplier had turned its portion of the joint checks over to the contractor by choice, it could only look to the contractor for repayment. See also *Board of Education of City of St Louis ex rel. Bertolino v. Vince Kelly Construction Company, Inc.*, 963 S.W.2d 331 (Mo. App. Ct. 1997). The dual purpose of the rule, as explained by courts in states that have adopted it, is to protect suppliers and laborers by ensuring payment and also to protect owners and general contractors by eliminating potential lien claims.

VIII. Release of Mechanic's Lien

If a mechanic's lien claimant is paid or the claim is otherwise resolved, the owner should require the claimant to remove the lien from the records of the Circuit Clerk. In fact, Mo. Rev. Stat. § 429.120 (2017) requires a party that has filed a lien and whose debt has been satisfied to acknowledge such satisfaction in the margin of the record of the mechanic's lien on file in the Circuit Clerk's office. The common practice is to file a separate release of mechanic's lien document with the Circuit Clerk's office.

If a lien claimant refuses to enter satisfaction on the record within ten days from the property owner's request, the lien claimant shall be liable to any person injured to the amount of such injury and the cost of any suit necessary. Mo. Rev. Stat. § 429.130 (2017).

Lien waivers are an important tool for the payment process on construction projects. Unfortunately, they are often executed without much thought regarding their implications. For practitioners routinely representing parties on construction projects, it is important to make sure that your clients are aware of these nuances and the corresponding risks they present.

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Judge Luke Lawless's Transcendent Charge to the Grand Jury

By Marshall D. Hier

St. Louis Riverfront (ca. 1836)

At the edge of the American frontier in the spring of 1836, St. Louis was jolted by events that threatened its striving for respectability. The death of one of the city's leading citizens followed immediately by the mob lynching of his killer would severely test the community's commitment to the "rule of law', even that of its judiciary.

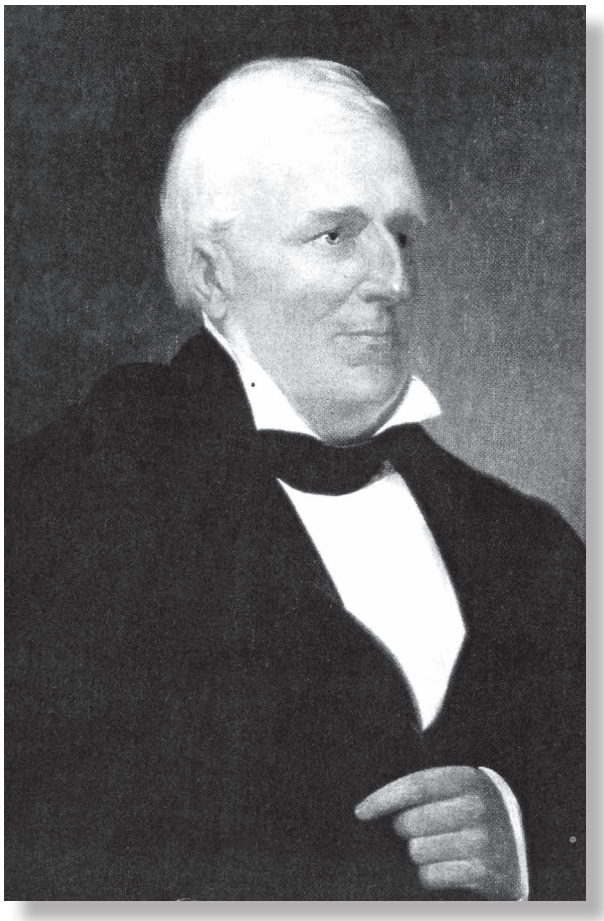
Murder and Savage Brutality

St. Louis in the mid-1830's was experiencing an ever-accelerating growth, not only in population but in commerce as well. By 1830, St. Louis had attained a population of 5,852, an increase of little more than 27 percent over its population in 1820, whereas the population of the State of Missouri had more than doubled to 140,455 in that same period. The city's population over the next decade, however, grew at a faster pace and by 1835 had reached 8,316.[1] St. Louis's population was very mixed and, as one visitor noted, included not only French Creoles and settlers from other parts of the United States but also "a sprinkling of people from all quarters of the world."[2] An 1839 census of St. Louis County, which then included the City of St. Louis, showed a total of 16,207 individuals, including 843 white males, 255 "colored" males and 54 "colored" females on board the steamboats at the St. Louis levee.[3]

That more than seven percent of the total population of St. Louis County in the 1839 was made up of the crews and passengers of steamboats moored along the St. Louis riverfront is indicative of the importance of river commerce to the city. In 1836, there were 144 steamboats that made 1,355 landings in St. Louis, up from 99 steamboats that made 573 landings three years earlier.[4] During this period, thanks largely to the increased steamboat traffic, St. Louis's share of the western wholesale market grew rapidly with decreased price differentials vis-a-vis other trade centers like New Orleans and Cincinnati. Furthermore, there were the advantages of reduced delivery times and insurance risks for western retailers that traded with St. Louis wholesalers.[5]

One of the steamboats moored along the St. Louis levee Thursday, April 28, 1836, was the Flora whose cook was "a free mulatto man named Francis L. McIntosh of Pittsburg[h], Pa."[6] That afternoon, McIntosh, described as "a tall, athletic and powerful" young man, forcibly prevented St. Louis Deputy Constable William Mull from arresting two

1. James Neal Primm, Lion of the Valley, St. Louis, Missouri, 1764-1980, 3rd Ed. at 133-134 (Missouri Historical Society Press, 1998).
2. *Id.*
3. Missouri Republican, April 24, 1839.
4. Primm, *supra* note 1 at 134-135.
5. *Id.*
6. Missouri Republican, April 30, 1836.



Luke E. Lawless
(Missouri History Museum)

black Flora deckhands for disturbing the peace.[7] McIntosh was then seized and brought before a justice of the peace who committed him to jail. As he was being escorted to the jail at Chestnut and Sixth Streets by Mull and Deputy-Sheriff George Hammond, McIntosh asked what would happen to him. When Hammond replied in jest that he might be hanged, McIntosh panicked, pulled a butcher knife from his pocket and attacked both officers.

Forty-four years later, John Darby (1803-1882), a distinguished attorney who was mayor of St. Louis in 1836, left a graphic and sensational account of the cascade of horrible events that quickly followed: "Mull fell, and the murderous desperado plunged his sharp butcher-knife into Hammond's throat . . . and ran south toward Market Street. Though the blood gushed out of Hammond's throat in a large stream, he attempted to pursue . . . when he fell on the pavement directly in front of the court-house . . . Hammond died where he fell, in less than five minutes." Darby described next the heart-rending scene when Hammond's wife and children, who had been quickly summoned, reached the spot which was only three hundred feet distant from their home on Walnut Street.[8]

McIntosh was pursued by about fifty citizens through the streets of St, Louis, and soon cornered and captured in a "backhouse" [e.g., outhouse]. The prisoner was taken to the jail where he was turned over to St. Louis County Sheriff James Brotherton and locked in a cell. Shortly thereafter, a mob of between five hundred and a thousand surrounded the jail and demanded that McIntosh be turned over to them. When Sheriff Brotherton refused, he was seized and the key to McIntosh's cell taken from him. The prisoner was then taken out and marched west on Chestnut Street as the mob grew.

According to Mayor Darby, "They took him to two honey-locust trees, about where the Polytechnic building is now situated [the southwest corner of Seventh and Chestnut Streets], got some trace-chains and bound his body to one of the locust trees." Darby described how the mob piled shavings and pine boards from a nearby carpenter's shop around their victim and lit them.[9] Darby, however, failed to record that McIntosh suffered in extreme pain while singing hymns throughout his fiery ordeal. One eye witness stated, "Not one single scream escaped him – his chest heaved with the most intense agony, yet all he said was 'God take my soul! – God take my life.'"[10] Darby noted that the entire incident occurred within "less than one hour's time and, consequently, three-fourths of his fellow St. Louisans did not know anything about it until it was over.[11]

Reactions

The Missouri Republican, a leading St. Louis newspaper of the day, under the heading "Horrible Tragedy" described the events of April 28th in terse detail. As in Mayor Darby's account, much more attention was given to McIntosh's attack on Hammond and Mull than the lynching of McIntosh and his suffering. The newspaper's concern over the burning of McIntosh was primarily for its effect on "the fair fame of our town". It wished that the "veil of oblivion be drawn over the fatal affair".[12] The St. Louis Bulletin, on the other hand, did note that the lynching constituted an "atrocious violation of law, (and

7. John F. Darby, Personal Reflections at 150-152 (G.I. Jones and Co., 1880). Darby refers of McIntosh as the "second steward on the *Flora* and that he freed only one fellow sailor.

8. *Id.*

9. *Id.*

10. Boston Liberator, May 21, 1836.

11. Darby, *supra* note 7.

12. Missouri Republican, April 30, 1836.

perhaps we may say humanity)"; and the German-language newspaper, *Anzeiger des Westens*, questioned why the militia had not been called out to deal with the mob.[13]

The *Missouri Republican*, a week after its initial reporting of the McIntosh affair, felt compelled to defend its honor against a call by the editors of the *Alton Telegraph* for the "conductors of the press in St. Louis . . . to disavow all participation in, and apology for, such a tragedy". The *Republican* retorted, "[W]e do not imagine that any such necessity devolves upon us, or any portion of our citizenry . . . the murderer deserved the death which he suffered."[14]

Judge Lawless's Charge

On May 16, 1836, St. Louis Circuit Court Judge Luke E. Lawless (1781-1846) convened a grand jury in connection with the events of April 28. Of the many colorful characters who have served the bar and bench of St. Louis throughout its history, Luke Lawless stands out for his combination of brilliance, irascibility, eccentricity and wit. Born into a prominent Catholic family in Dublin, Ireland, Lawless first served in the British navy until 1802 and then was admitted to the Irish bar in 1805. He fled to the Continent in 1810 to join the French army only to emigrate to the United States after Napoleon's defeat in 1815 at Waterloo. He soon settled in St. Louis where he opened a law office and, with his fluency in French, acquired a significant clientele with regard to land titles granted during the colonial era of St. Louis. His growing affluence can be seen by his buying the first brick house ever built in St. Louis.

In 1830, Lawless managed to persuade the United States House of Representatives to impeach United States District Judge for Missouri, James Peck, after a four-year feud with Peck for having sentenced him in 1826 to jail for contempt for twenty-four hours and suspending him from federal practice for a year and a half. The United States Senate found Peck not guilty by a vote of twenty-two to twenty-one (two-thirds having been necessary for conviction). In 1834, Governor Daniel Dunklin appointed Lawless a judge of the St. Louis Circuit Court.[15]

Although Lawless had many endearing personal qualities, such as a fierce loyalty to friends (having acted as a second to Thomas Hart Benton in Benton's fatal 1817 duel with lawyer Charles Lucas) and a penchant for potatoes which he ate in great quantities at every meal, these virtues were offset by his quick temper, his frequent tardiness and his habit of missing important engagements entirely. The March 24, 1836 issue of the *Missouri Republican* carried a letter from a reader who identified himself only as "St. Charles' in which the author roundly condemned Judge Lawless for his failure to handle cases on his St. Charles docket (St. Charles being then in the St. Louis Circuit) in a timely and orderly basis. The writer accused Lawless of using the winter weather as an excuse for not holding court at the appointed times in St. Charles when in fact, "the river was constantly crossed . . . all the time" by others from St. Louis. "We complain of a system which, by leaving the Judges irresponsible, has in fact, left us without law."[16]

The importance that St. Louisans gave to the events of April 28, 1836 can be seen in the apparently verbatim transcript carried by at least one newspaper of Judge Lawless's lengthy charge to the grand jury. Incidentally, Lawless's nemesis Judge James Peck had died of pneumonia just a day after the events of April 28. The McIntosh grand jury was headed by "Coronel" John O'Fallon, a wealthy St. Louis merchant who would leave a portion of his vast fortune on his death in 1865 to fund the O'Fallon Polytechnic Institute that ironically would be built on the site of McIntosh's lynching.[17]

Judge Lawless asked that the jurors determine whether the lynching of McIntosh was the act of the "few" or of the "many". If it was the act of a small number "compared to the population of St. Louis", the jurors should "indict them all without a single exception." If it was rather the act of "congregated thousands, seized upon and impelled by that mysterious, metaphysical, and almost electric phrenzy, . . . the case then transcends [the grand jury's] jurisdiction – it is beyond the reach of human law." To attempt to punish such a multitude might, in Lawless's opinion, shake the "foundations of decency" and throw "the social elements in this City and County . . . into most disastrous collision." It "would be impossible to punish and absurd to attempt it."[18]

Although Lawless expressed his horror at the violation of law and public order that the lynching of McIntosh represented, he pointed out the extreme provocation under which the mob had acted, i.e., "the pavement streaming with the blood of [Hammond and Mull], . . . the shrieks of the widow and her desolate orphans . . . ."

Lawless concluded his charge by laying the blame for McIntosh's actions of abolitionists, singling out for special condemnation, Presbyterian minister Elijah P. Lovejoy (1802-1837) and his newspaper *The St. Louis Observer*. "The danger in Missouri is particularly great from this species of incendiary excitement." Missouri's slaves, "their minds and passions prepared by the publication in ques-

13. Louis S. Gerteis, Civil War in St. Louis at 11 (University Press of Kansas, 2001).

14. Missouri Republican, May 7, 1836.

15. Lawrence H. Larsen, *Lawless, Luke* (1781-1846), Dictionary of Missouri Biography at 474-475 (University of Missouri Press 1999).

16. Missouri Republican, March 24, 1836. (This author shares Lawless's seemingly insatiable appetite for potatoes and thus deems it a virtue.)

17. Darby, *supra* note 7 at 152.

18. Missouri Republican, May 26, 1836.

tion", might ally themselves with the Indians on Missouri's frontiers "to assail the white population."[19]

The grand jury, following Judge Lawless's charge, naturally chose not to issue any indictments in the lynching of McIntosh. The *Bulletin*, a St. Louis Whig newspaper, and the *Shepard of the Valley*, a Catholic weekly publication, both praised Lawless's remarks. Elijah Lovejoy, on the other hand, found in the Irish Catholic Lawless's charge to the jury "the cloven feet of jesuitism, peeping out from under the veil of almost every paragraph."[20]

The Aftermath

Although his wounds had been thought mortal, William Mull recovered and the city raised $1,200 to assist Mrs. Hammond and her children.[21] On December 22, 1836, leading members of the St. Louis bar met and passed a resolution objecting to the governor's reappointing Lawless as Circuit Court Judge. Among the many reasons cited were Lawless's "imperious. overbearing and disrespectful" manner in dealing with members of the bar, his lack of punctuality relating to his office, his invading the province of the jury by assuming questions of fact and his impatience and arbitrariness with counsel. No mention was made, however, of his handling of the grand jury charge in the McIntosh lynching eight months earlier.[22] Despite the bar's objections, Lawless was reappointed to the Circuit Court from which he soon retired to resume the private practice of law. He died in September 1846 at age 65. The St. Louis bar met and passed a glowing tribute to their departed colleague, praising him for being "gifted in intellect, of the highest culture, of kindly disposition."[23] One of those who praised Lawless at that meeting was John Darby. Two months after Lawless died, a meeting was held in the St. Louis Courthouse to organize "an association to counteract the evil influence in our midst of the abolitionists of the North." Colonel John O'Fallon, the foreman of the McIntosh jury, was appointed President.[24]

Reverend Elijah P. Lovejoy, having made numerous enemies with his twin attacks on Catholicism and slavery, fled with his press to Alton, Illinois in late July, 1836, after his newspaper offices in St. Louis had been broken into and vandalized. Certainly, Lovejoy's feud with Lawless had helped to fuel the public's anger over his outspoken positions, but Lawless was just one of many St. Louisans denouncing the abolitionist press. In January of 1836, Lawless's friend, Senator Thomas Hart Benton, on the floor of the United States Senate, had warned abolitionists that "agitators and incendiaries" within their ranks would cause state legislatures, including Missouri's, to enact repressive statutes to preclude slave revolts.[25] Elijah Lovejoy was shot and killed on November 7, 1837 while trying to protect his printing press (his fourth) from yet another mob. He died a martyr to both freedom of the press and the antislavery movement.

According to John Darby, the locust tree to which Francis McIntosh was tied and burned became a source of souvenirs for three years afterwards for visitors to St. Louis who would cut off pieces and take them with them until "the tree was greatly cut to pieces."[26] The O'Fallon Polytechnic Institute built on the lynching site became, in October, 1867, the first home of the St. Louis Law School, today's Washington University School of Law.

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19. *Id.*

20. Primm, *supra* note 1 at 177.

21. Missouri Republican, May 12, 1836.

22. Walter B. Stevens, History of St. Louis, The Fourth City at 520 (S. J. Clarke Publishing Co. 1909).

23. Larsen, *supra* note 15.

24. Weekly Reveille, November 13, 1846.

25. Missouri Republican, January 30, 1836.

26. Darby, *supra* note 7 at 152.

Books in Brief

By Judge Arthur Litz

Pillars of Justice

By Owen Fiss (Harvard University Press - $27.95 - 209 pages)

Professor Owen Fiss is an Emeritus Professor at Yale Law School. He is an exceptional teacher, author, and expert on constitutional law. He is a graduate of Dartmouth, Harvard Law School, and Oxford, who clerked for Thurgood Marshall when he was on the Second Circuit, and later for Justice William Brennan. He worked for the Department of Justice before beginning his teaching career first at Chicago Law School and then at Yale.

In this book he presents reflections on the men and women he knew and who shaped his life in the law. He provides vignettes of thirteen judges (including some from South America, and Justice Aharon Barak, Chief Justice of Israel), lawyers, and law professors who he befriended and inspired him. The thread that binds the various chapters in the lives he mentions is the liberalism grounded mainly in *Brown v. Board of Education* and Yale Law School. By writing of his relations with his subjects he continuously blends his liberal thoughts on civil rights with his personal experiences with them.

Towards the end of the book he unfortunately veers into parochial law school politics which detracts from the more interesting parts of the book.

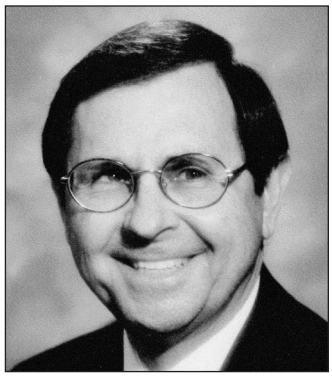
As a high school student Fiss was at the Supreme Court to observe his first oral argument when he witnessed Thurgood Marshall at the lectern to argue *Brown*. In one of the outstanding chapters Fiss relates an inspirational incident about John Doar, who had an Atticus Finch moment when he was age 42 in June 1963 while an Assistant Attorney General in Jackson, Mississippi just after the murder of Medgar Evers. A large angry group of blacks were confronted by a phalanx of armed police. Doar in shirtsleeves stepped out from behind the police lines and walked between the two factions, raised his arms and with open hands gestured to the crowd and urged them to stop advancing, saying "My name is John Doar- D-O-A-R. I am from the Department of Justice, and as anybody around here knows, I stand for what is right. Medgar Evers would not want it this way". The angry crowd melted and began to disperse. Thus what could have bloody encounter was avoided. The book's front cover has a picture of Doar during this display of courage. Later on Doar was appointed to head the investigation during the Watergate affair and the impeachment of President Nixon. He died in 2014 at 92. In 2012 he was awarded the Medal of Freedom by President Obama, who said "Without him I would not be here." A legal hero indeed.

This is an enjoyable read. Fiss is an entertaining writer who is devoted to his liberal ideals and who relates his tradition through the lawyers presented.

Reviewed by Judge Arthur Litz

The Brief Case

By Charles A. Weiss



BASED ON A U.S. SUPREME COURT DECISION, MISSOURI SUPREME COURT HOLDS FEDERAL EMPLOYEE HEALTH BENEFITS ACT PREEMPTS MISSOURI'S ANTI-SUBROGATION LAW.

***Nevils v. Group Health Plan, Inc. and ACS Recovery Services Inc.*, No. SC93134 (Mo. *en banc* 7-11-17).**

After addressing the issue for the third time, the Missouri Supreme Court held that Missouri's anti-subrogation law is preempted by 5 U.S.C. § 8902(m)(1) of the Federal Employee Health Benefits Act.

Nevils was a federal employee insured through a health insurance plan governed by the Federal Employee Health Benefits Act (FEHBA) when she was injured in an auto accident. The health insurer, Coventry, paid her medical expenses and asserted a subrogation lien against the proceeds of a settlement that Nevils received from the party responsible for the accident. Nevils satisfied the subrogation lien and then filed a class action petition arguing Missouri law does not permit subrogation or reimbursement of personal injury claims.

The insurer moved for summary judgment asserting that the FEHBA preempts Missouri subrogation law. The FEHBA preemption clause provides: "The terms of any contract under this Chapter which relate to the nature, provision or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance plans."

The trial court entered judgment for the insurer and Nevils appealed. On Nevils initial appeal to the Missouri Supreme Court, the court reversed and held that the FEHBA preemption clause does not preempt Missouri's anti-subrogation law because an insurer's subrogation rights do not relate to the nature, provision or extent of coverage or benefits.

After the Missouri Supreme Court's decision, the federal office of personal management promulgated a new rule providing that an insurer's rights to subrogation and reimbursement under federal employee health benefits contracts "relate to the nature, provision and extent of coverage or benefits" within the meaning of FEHBA's preemption clause. The Supreme Court then granted certiorari, vacated the Missouri Supreme Court's opinion, and remanded the case to the court to consider whether the FEHBA preempts Missouri's anti-subrogation law in light of the new rule. On remand, the Missouri Supreme Court held that the new rule did not alter "the fact that FEHBA preemption clause does not express Congress' clear and manifest intent to preempt Missouri's anti-subrogation law. The Missouri court again reversed the trial court's judgment in favor of the insurer.

The United States Supreme Court again granted certiorari and held that an insurer's subrogation and reimbursement rights "relate to payments with respect to benefits" because it is the insurance carrier's provision of benefits that triggers its right to payment from either the beneficiary or a third party after a judgment against the tort feasor is entered or settlement is reached. The United States Supreme Court vacated the Missouri Supreme Court's decision in *Nevils* II and remanded the case for further proceedings. On remand, the Missouri Supreme Court held that consistent with the United States Supreme Court's decision, the FEHBA preemption clause applies in this case to preempt Missouri's anti-subrogation law. The Missouri court held that the trial court properly entered summary judgment in favor of the insurer with regard to the federal employee health benefits contract at issue.

MISSOURI SUPREME COURT HOLDS THAT THE COMBINED EFFECT OF CONSECUTIVE SENTENCES IMPOSED ON A JUVENILE WITHOUT THE POSSIBILITY OF PAROLE DURING HIS LIFE EXPECTANCY DOES NOT VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

***State of Missouri v. Nathan*, No. SC95473 (Mo. *en banc* 7-11-17).**

In a case involving the sentencing of juveniles decided the same day as the *Willbanks* case, the court in a 4-3 decision upholds the sentencing of a juvenile to consecutive prison terms amounting to life without possibility of parole.

Nathan was convicted of several crimes as a juvenile in connection with a home-invasion robbery and murder. He initially was sentenced to life in prison without the possibility of parole for the first-degree murder conviction and also to five life sentences and five 15-year sentences for the non-homicide convictions, all of which were to be served consecutively to each other and to the sentence for first-degree murder and eleven life sentences for the armed criminal action convictions. As a result of an appeal and resentencing, the first degree murder charge was reduced to a second degree murder conviction and he was sentenced to life in prison on the second-degree murder conviction, in addition to a 30-year sentence for the first degree robbery conviction and a 15-year sentence for kidnapping and three life sentences for the related

armed criminal action convictions, which sentences were to run consecutively.

Nathan argued that the combined effect of his consecutive sentences, which include a homicide offense and several non-homicide offenses, amount to the functional equivalent of life in prison without the possibility of parole and therefore violate the constitutional prohibition against cruel and unusual punishment and has constitutional right to due process under *Graham v. Florida*, 560 U.S. 48, 82 (2010).

The U.S. Supreme Court in *Graham* had held that the constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. In the scenario where, like here, a juvenile offender is convicted of both homicide and non-homicide offenses, the Supreme Court in *Graham* explained:

> Juvenile offenders who committed both homicide and non-homicide crimes present a different situation for a sentencing judge then juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a non-homicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination. The instant case concerns only those juvenile offenders sentenced to life without parole solely for a non-homicide offense.

The Missouri Supreme Court pointed out that the U.S. Supreme Court did not have before it in *Graham,* as this court currently does, the issue of whether the Eighth amendment is violated when a juvenile offender like Nathan is sentenced to consecutive lengthy sentences for committing multiple non-homicide offenses along with a homicide offense. The Missouri Supreme Court further noted that the U.S. Supreme Court has not yet decided the question of whether consecutive sentences are, for constitutional purposes, the function equivalent of life in prison without the possibility of parole.

This issue has appeared in state and federal courts across the country, with differing conclusions. The Missouri Supreme Court noted that the U.S. Supreme Court expressly limited its holding in *Graham* to "juvenile offenders sentenced to life without parole solely for non-homicide offenses," not those juvenile offenders serving consecutive sentences. The Missouri court pointed out if the Supreme Court intended for its holding in *Graham* to apply to consecutive lengthy sentences, the number of inmates incorporated for such sentences would likely be in the thousands and certainly exceed the 123 individuals the U.S. Supreme Court calculated were serving life in prison without the possibility of parole for committing a non-homicide offense. The Missouri Supreme Court rejected Nathan's argument.

Judge Laura Stith dissented in a long opinion, joined by Judges Draper and Breckenridge, and would have held that "this court should join the many well-reasoned decisions holding the Supreme Court did not intend to place form – the label of LWOP – over substance. A sentence that results in no meaningful opportunity for release during a juvenile's lifetime is the functional equivalent of LWOP."

MISSOURI SUPREME COURT AFFIRMS SENTENCE OF JUVENILE TO AGGREGATE PRISON TERMS UNDER WHICH HE WILL NOT BE ELIGIBLE FOR PAROLE UNTIL PAST HIS LIFE EXPECTANCY.

***Willbanks v. Missouri Department of Corrections*, No. SC95395 (Mo. *en banc* 7-11-17).**

In another 4-3 decision the Missouri Supreme Court has held that Missouri's mandatory minimum parole statutes and regulations do not violate the holding in *Graham v. Florida*, 560 US 48 (2010).

In this case, Wilbanks was 17 years old when he devised a plan with two other individuals to steal a car. Carrying a sawed-off shotgun, he approached a woman in the parking lot of her apartment building and ordered her to get in the driver's seat of her car. He climbed in the back seat and directed her to drive to an ATM where he took all the money from her account. When the victim failed to follow Willbank's driving instructions, he became angry, ordered her to stop the car, and forced her into the trunk. At Willbanks' directions she began to walk away, and as she did, Willbanks shot her four times. The victim survived the ordeal, but she was left with permanent disfigurement and irreparable injuries.

A jury convicted Willbanks of one count of kidnapping, one count of first-degree assault, two counts of first-degree robbery, and three counts of armed criminal action. The trial court imposed prison sentences of 15 years for kidnapping, life imprisonment for first-degree assault, 20 years for year robbery count, and 100 years for each armed criminal action count, and set those terms to run consecutively.

Willbanks' convictions and sentences were affirmed on appeal. Willbanks then filed a petition for writ of habeas corpus in the Cole County Circuit Court, asserting that his aggregated sentences amounted to the functional equivalent of a life without parole sentence and violated his Eighth Amendment rights under *Graham*. The trial court denied the petition, indicating that the proper venue for the relief Willbanks sought was through a declaratory judgment action.

Willbanks then filed another petition, in which he requested a judgment declaring that Mo. Rev. Stats. §558.019.3 and 14 CSR 80-2.010, which require offenders to serve specific percentages of their sentences before they become parole-eligible, are unconstitutional as applied to him. He alleged under the current Missouri parole statutes and regulations, he would not have a meaningful opportunity to obtain release because he does not become parole eligible until he is approximately 85 years old. The trial court rejected his claim and found that his case was distinguishable from *Graham* because *Graham* involved a single sentence of life without parole for an offense and Willbanks was convicted of seven separate felonies and received seven consecutive sentences as a result.

The Missouri Supreme Court rejected Willbanks' claims, holding that Missouri's mandatory minimum parole statutes and regulations are constitutionally valid under *Graham*. The

Missouri court distinguished *Graham* as barring sentencing a juvenile to a *single* sentence of life without parole for a non-homicide offense, while Willbanks had been convicted of multiple non-homicide offenses and received multiple fixed-term sentences. Consequently, the Missouri court found *Graham* not controlling.

The court noted that in *Graham* the U.S. Supreme Court held that the Eighth Amendment barred courts from sentencing juvenile non-homicide offenders to life without parole and that *Graham* was expanded to prohibit homicide juvenile offenders from being subject to mandatory life sentence without parole in *Miller v. Alabama*, 132 S. Ct. 2455 (2012). More recently, the U.S. Supreme Court ruled in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), that *Miller's* new substantive rule must be applied retroactively on collateral review for juvenile offenders sentenced to mandatory life without parole.

The Missouri Supreme Court explained that whether multiple fixed-term sentences, which total beyond a juvenile offender's life expectancy, should be considered the function equivalent of life without parole is a question of first impression for this court. The court explained that requiring inmates to serve a mandatory minimum percent of their sentences is not inherently unconstitutional. The Missouri Supreme Court found that Missouri's mandatory minimum parole statutes and regulations are constitutionally valid, even under *Graham*.

Judge Laura Stith again wrote a long detailed dissenting opinion joined by Judges Draper and Breckenridge. Judge Stith explained that the U.S. Supreme Court in *Graham v. Florida* held that sentencing non-homicide juvenile offenders to life without the possibility of parole categorically violates the Eighth Amendment because it offers juvenile offenders no meaningful opportunity for relief. Sentencing juvenile offenders to an aggregate term of years that is so long they are likely to die in prison identically gives these juveniles no meaningful opportunity for relief. Judge Stith pointed out for this reason, the Seventh, Ninth and Tenth Circuits have held that *Graham* must be applied to *de facto* life without the possibility of parole aggregate sentences if they do not give the juvenile a meaningful opportunity for release. Twelve of the seventeen state supreme courts to decide the issue, including just in the last few months, the supreme courts of Illinois, New Jersey, Ohio and Washington – agree that the imposition of lengthy aggregate sentences that are the functionally equivalent of life without parole violates the juvenile's Eighth Amendment rights because the sentences do not allow a meaningful opportunity for release under the principal set out in *Graham* and *Miller v. Alabama*.

MISSOURI ORDERS THAT A SENTENCE OF MANDATORY LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE FOR 50 YEARS FOR CRIMES COMMITTED BY A PERSON WHEN HE WAS A JUVENILE SHOULD BE VACATED AND THE PERSON SHOULD BE RESENTENCED.

***State ex rel. Carr v. Wallace,* No. SC93487 (Mo. *en banc* 7-11-17).**

In yet another opinion handed down by the Missouri Supreme Court involving the sentencing of juveniles, the Missouri Supreme Court has ordered resentencing in the case of Jason Carr who was a juvenile when he killed three members of his family, and was sentenced to three concurrent terms of life imprisonment without the possibility of parole for 50 years where he was not afforded an opportunity for the sentences to consider his age, maturity, limited control over his environment, and the transient characteristics attended to youth or his capacity of rehabilitation before sentencing.

After the U.S. Supreme Court handed down its decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), in which it held that juveniles could not be sentenced to a mandatory sentence of life without the possibility of parole in a homicide case without first considering whether this punishment was just and appropriate given the juvenile offender's age, development, and the circumstances of the offense, *Miller* applied for habeas corpus arguing that his mandatory sentences of life without the possibility of parole for 50 years violate the Eighth Amendment because they were imposed on him for offenses he committed as a juvenile without consideration of any of the factors in *Miller*.

While his habeas corpus was pending, the U.S. Supreme Court in *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016), held that *Miller's* substantive rule must be applied retroactively on collateral review of a juvenile offender's mandatory sentence of life without parole. *Miller* explained that mandatory sentencing schemes that require juveniles convicted of homicide to receive lifetime incarceration without the possibility of parole, regardless of their age, age-related characteristics, and the nature of their crimes, violate the Eighth Amendment principle of proportionality. The U.S. Supreme Court further explained that "children are constitutionally different from adults for purposes of sentencing." Because juveniles are constitutionally different for purposes of sentencing, an "offender's juvenile status can play a central role in considering a sentence's proportionality." Therefore, "criminal procedure laws that fail to take defendants' youthfulness into account at all [are] flawed."

Carr was born in 1968 and his parents divorced several years later. He ultimately began to live with his biological father who was an alcoholic but had stopped drinking when Carr was about 5 years old and became a devout member of the Jehovah Witnesses congregation. His father's religious beliefs began to cause conflicts between the two. Carr was not allowed to play high school basketball because practice conflicted with the family's home bible study. He was not allowed to play video games or watch certain television shows or date a girl who did not attend his father's place of worship. He lived with his father until he was around 14 years old, when he moved back in with his mother following her second divorce. He was then allowed to join the high school basketball team and was generally a good student, but when he was around 16 years old he received a phone call from his father and then became withdrawn. He quit the basketball team and would not see his friends. He stayed in his room most of the time, would not talk or eat much, and began reading

the Jehovah's Witnesses materials he had kept. At his request, his mother took him back to live with his father, his stepmother and stepsister.

Sometime in 1983, he called his mother and said he was upset and repeatedly told his mother he was "bad" because he wanted to do things that were against church rules such as play basketball, date a girl outside the faith, and drive. At a worship service one day, his father rebuked and ridiculed him for failing to recite a biblical passage. Later that day when his brother and stepsister returned home from school, he shot his brother and sister at close range, and when his stepmother returned home, he also shot her.

Because the state did not seek the death penalty, the defense was not required to and did not present any mitigating evidence prior to sentencing so neither the jury nor the court heard any information concerning his background.

Consequently, based upon *Miller v. Alabama*, the Missouri Supreme Court in a 5-1 decision found that his sentences were imposed in direct contravention of the foundational principle that imposition of a state's most severe penalties on juvenile offenders cannot proceed as though they were not children, and that the transient characteristics attended to youth or its capacity to rehabilitation in connection with the sentencing. The court ordered that he be resentenced so his youth and the other attending circumstances surrounding his offense can be taken into consideration to assure that he will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.

MISSOURI SUPREME COURT AGAIN UPHOLDS THE SEXUAL VIOLENT PREDATOR ACT.

***In the Matter of the Care and Treatment of Carl Kirk v. State of Missouri*, No. SC95752 (Mo. *en banc*, 6-27-17); *In the Matter of the Care and Treatment of Jay Nelson v. State of Missouri*, No. SC95975 (Mo. *en banc* 6-27-17).**

The Missouri Supreme Court in companion cases has again upheld the constitutionality of Missouri's sexually violent predator act, Mo. Rev. Stats. §632.480-632.525.

In the case involving Carl Kirk, he had pleaded guilty to having inserted his penis between the legs of a young boy. After he was released from the Department of Corrections in 1987, in less than three months after his release he sodomized his 10 or 11-year-old nephew. A licensed psychologist diagnosed Kirk as suffering from pedophilia as described in the Diagnostic and Statistical Manual of Mental Disorders. The psychologist opined that Kirk's pedophilia caused him serious difficulty in controlling his behavior and that he was a sexually violent predator and that it was more likely than not that Kirk would commit a future act of sexual predatory violence if not securely confined. He was given the Static-99R and Stable-2007 tests and scored very high on both tests placing him in the high risk category. Another psychiatrist similarly concluded that Kirk was a sexually violent predator and was more likely than not that Kirk would commit a future act of sexual predatory violence if not securely confined.

In the case of *J. Nelson*, in 1988 Nelson broke into a woman's home, threatened to kill her and brutally raped her on top of broken glass. While serving a sentence for that crime, he received 55 conduct violations for sexual misconduct and failed to complete Missouri Sex Offender Program in prison. He would shout violent sexual threats at the female staff, threatening to kidnap them and sexually assault them and kill them and on other occasions he went beyond threats and sexually assaulted female correction staff. A licensed psychologist reviewed his history of sexual violence, his responses during interview she had with him and his medical mental health and probation and parole records. She diagnosed Nelson with anti-social personality disorder and exhibitionism. She opined these conditions, rose to the level of a mental abnormality and concluded his mental abnormality caused Nelson serious difficulty in controlling his behavior. She finally concluded it is more likely than not that Nelson would commit a future act or predatory sexual violence unless placed in a secure facility. She relied on the Static-99 R and the Stable-2007 test. On the Static-99 R test he had a moderate to high risk of reoffending. The Stable-2007 test indicated he had a high risk of reoffending. She opined that Nelson had a high risk of reoffending if not securely confined and therefore satisfy the statutory definition of a sexually violent predator. Another licensed psychologist also concluded that he was a sexually violent predator and was more likely than not that he would commit a future act of predatory sexual violence if not securely confined.

Both Kirk and Nelson challenged the constitutionality of the Act. The Missouri Supreme Court rejected the challenges in both cases, noting that the court has upheld the Act's constitutionality in prior cases. The court rejected the arguments that the Act is a criminal statute because its purpose is to punish offenders for past conduct. The Missouri court noted that the U.S. Supreme Court has rejected that argument in *Kansas v. Hendricks*, 521 U.S. 346 (1997), when considering a similar statute from another state. The Missouri court previously in *In Re Care & Treatment of Van Orden*, 271 S.W.3d 579, 585 (Mo. *en banc* 2008), had held that "even though the Act's proceedings involve a liberty interest, they are civil proceedings." The Missouri Supreme Court also previously had rejected the argument that the Act amounted to an *ex post facto* law. The court explained that the phrase "ex post facto law" applies exclusive to criminal laws and the Act is civil in nature and that initiation of its commitment proceedings did not constitute a second prosecution and therefore also does not violate the double jeopardy clause even though that confinement may follow a prison term. The court also rejected the argument that the Act is unconstitutional because it does not require that the person be held in the least restrictive environment.

The court in *Nelson* rejected Nelson's arguments that the use of the phrase "sexually violent predator" at trial violated his right to due process in a fair trial.

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Sometimes Form Matters

By Richard M. Wise

As an attorney, you are a licensed professional, earning fees by providing services to clients that only a licensee is authorized by law to provide.

If you are operating as a sole proprietor, these fees are taxable to you as ordinary income, and subject to self-employment tax, in addition to individual income tax, at 15.3%, to cover Social Security and Medicare contributions that would have been withheld from your paycheck if you were working for an employer.

What would the tax consequences be if you were to set up a corporation to employ you, have your clients pay the corporation instead of you directly, and then have the corporation pay you a salary considerably less than the gross fee income, and contribute some part of your salary to a section 401(k) retirement plan? That portion of the gross fee income not paid to you in salary would not be subject to self-employment tax or withholding, right?

As it turns out, as with so many concepts in taxation, it depends.

Fleischer v. Commissioner[1]

Consider for a moment the case of Ryan Fleischer, a stockbroker in Omaha, Nebraska. Ryan held a string of licenses from federal securities regulatory agencies, enabling him to sell a variety of investment products, and he had contracts with two broker-dealers to sell their products on commission. He formed a subchapter S corporation, intending to achieve what we described above, and he paid himself a salary.

What he did *not* do – and this is what drew the attention of the Internal Revenue Service ("IRS") – is obtain securities licenses *for his corporation,* nor did he arrange for the broker-dealers to *pay his corporation directly rather than paying him*. The broker-dealers issued Form 1099s in his name and social security number, but Ryan reported this as income to the corporation, and deducted operating expenses on the Form 1120S—United States Income Tax Return for a Small Business Corporation, and reported distributions to himself as wages.

He filed this way for almost seven years before attracting the attention of the IRS, which assessed deficiencies for the most recent three tax returns. Ryan timely petitioned the United States Tax Court in order to challenge the deficiency assessments.

The Tax Court sided with IRS, citing caselaw dating back to at least 1982, holding that the determination who is taxable on client fees as between the individual service provider and the corporate employer depends on which of them "controls" the activity that generates the income. The two-prong test, as articulated in *Johnson v. Commissioner*,[2] is (1) whether the individual service provider is an employee whom the corporation can "direct and control" in any meaningful sense, and (2) whether there is anything -- preferably in writing -- by which the third-party purchaser of the personal services recognizes the corporation's controlling position. This test has been formalized in section 31.3121(d)-1(c)(2) of the employment tax regulations.

The Second Prong

The Tax Court noted the two broker-dealers here had contracted with *Ryan directly,* not through his corporation. Ryan argued that this was because the corporation itself could not hold the necessary licenses, however the court suggested this was not actually true – it would have been possible for Ryan to obtain securities licenses *for his corporation* – but in any event what Ryan was trying to accomplish was an *assignment of income* properly taxable to him. The court cited *Jones v. Commissioner*[3] on this point, which held that a court reporter could not assign his income to a personal service corporation, which by law was not permitted to perform reporting services.

Ryan then argued that the case was controlled by *Sargent v. Commissioner*.[4] Some among this readership may be die-hard Minnesota Northstars hockey fans who remember Gary Sargent. Back in 1978, he and another hockey player each formed a personal service corporation that,

1. T. C. Memo 2016-238.
2. 78 T.C. 882 (1982), aff'd without published opinion, 734 F.2d 20 (9th Cir. 1984).
3. 64 T.C. 1066 (1975).
4. 929 F.2d 1252 (8th Cir. 1991).

in turn, contracted with the hockey team. The Northstars paid the corporations, and the corporations, in turn, paid the players, setting aside some money for retirement funds. The Tax Court sustained the assessed deficiencies, but the appeals court reversed, holding that the players had met both prongs of the *Johnson* test, as embodied in the regulation. The appeals court rejected the Tax Court's analysis that the hockey team ultimately "controlled" the activities of the individual players.

This is as good a place as any to note the taxpayer in *Johnson* was a basketball player for the San Francisco Warriors of the National Basketball Association. He actually lost his case, *not because the court did not recognize him as an employee of his personal service corporation,* but because *the Warriors had not entered into a contract with the corporation.*

And this, finally, was the factor that determined Ryan's case.

Neither of the broker-dealers had any contractual relationship with his personal service corporation. Almost gratuitously, the Tax Court also mentioned that the corporation had entered into no other contractual relationships at all, apart from the purported employment agreement.

Because Ryan had failed to meet the second prong of the *Johnson* test – that is, there was nothing indicating that the broker-dealers understood they were dealing not with Ryan directly, but with a corporation that directed and controlled his activities – the court ruled that he should have reported his fees as self-employment income on his individual income tax returns.

What This Suggests

So how, then, does all of this apply to your law practice? Only a licensee can practice law, but the ethics rules do allow for fees to be paid to a law firm, which can direct and control the activities of its lawyer employees. So you are not left in the same position as the court reporter in *Jones,* however, you must still satisfy the two-prong test of *Johnson* in order to obtain the desired tax consequences.

Accordingly, you need to form the corporation – or partnership, or limited liability company – as a separate and distinct legal entity, and enter into an employment agreement with that entity, ***and*** you need to ensure that clients remit their fees directly to that entity and not to you individually. Taking the extra steps initially may save many steps down the road if the IRS should come calling.

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