UNDERSTANDING THE CONSTRUCTION CONTRACT BEFORE YOU SIGN IT

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Contracts can take many forms—they can even be oral contracts. In the construction context, small jobs may be commenced after an estimate and handshake, while larger jobs inevitably rely upon one of the many standard form contracts published by various industries. Occasionally, a larger contractor or owner will have their own version of a contract which they will require you to sign. Contracts govern the terms of the agreement, and the Courts in general follow them very closely. *Cater v. Barker*, __ NC App __, 617 S.E.2d 113 (2005). Therefore, it is crucial that you read and understand the contracts you sign. Anything that you want changed or modified can be done relatively easily on the front-end; once the contract is executed you are legally obligated to follow its terms.

A. Standard Form Contract

There are several standard form contracts which are produced by various industries involved in the construction process. Examples of form contracts are those produced by the following groups:

- American Institute of Architects (AIA)
- Engineering Joint Contracts Document Committee (EJCDC)
- Construction Owners' Association of America (COAA)
- Associated General Contractors of America (AGC)
- Design-Build Institute of America (DBIA)

The benefits of utilizing a standard form contract are that the terms are well defined, the Courts have already issued decisions based on many form contracts, and there is a familiarity of all parties with their expected roles. On the other hand, the form agreements are often biased depending upon the organization which drafted them, and the form agreements are not customized to allow for unique situations.

Of all the standard forms, the AIA Forms dominate the industry, probably because the architect typically drafts the contracts for the owner and contractor. Among the AIA forms, the A Series provides the documents for the owner and contractor agreements, including:

- A101 Owner-Contractor Agreement- Stipulated (Lump) Sum
- A111 Owner-Contractor Agreement- Cost Plus Fee with GMP
- A114 Owner-Contractor Agreement- Cost Plus Fee without GMP
- A191 Owner-Design/Builder Agreement
- A201 General Conditions of the Contract for Construction

The B Series AIA documents are for design professionals. The most commonly used B series form is the B141 Owner-Architect Agreement. The B141 is a two part document, with part 1 the Standard Form of Agreement between Owner and Architect, and part 2 the Standard Form of Architect's Services—Design and Contract Administration.

Despite the significant benefits in utilizing the standard form contracts, especially the AIA documents, these documents are not required, nor are the terms within them fully defined by the case law. A court will still look for the intent and understanding of the parties. "While these documents are widely used in the construction industry, both for convenience and because they provide for many of the problems which practical experience has shown to be expected to arise in the course of a construction project, there is nevertheless no magic in the printed word. The problem remains here, as in other

contract cases, of ascertaining the true intent and understanding of the parties." *T.A. Loving Co. v. Latham*, 20 N.C. App. 318, 201 S.E.2d 516 (1974).

Therefore, where the parties through custom or practice routinely waive certain requirements of one another, those requirements may be deemed by the courts to have been taken out of the contract. For example, a breach of the contract requirement concerning written notice for extensions of time can be waived by the owner, if, for example, the contractor asks for an extension of time and the owner never responds. Courts have held that in such cases, the contractor is not required to continue to fruitlessly submit further requests for extensions of time. *See, e.g., J.R. Graham & Son, Inc. v. Randolph County Bd. Of Ed*, 25 N.C. App. 163, 212 S.E.2d 542 (1975).

Practice Tips:

- *If you decide to waive a portion of the contract requirements, you should make it clear that you are not waiving any other requirements. One way to accomplish this to have a phrase within the contract itself which states: "Any waiver of a breach shall not constitute waiver of any later breach."*

- *Even though case law indicates that as a contractor you do not need to make a written request for each time extension if those requests are being ignored, it is better practice to always do so.*

B. Implied Contracts

Most people can recognize a written contract. However, there are times when a contract is "implied" by law based on the conduct between two parties.

If an enforceable express contract addressing the same subject matter exists, there can be no additional implied contract. *Propst Construction Co. v. North Carolina Dept. of Transportation*, 56 N.C. App. 759, 290 S.E.2d 387 (1982). If, however, an express

contract does exist, but all of the terms concerning extra labor or materials are not specified, recovery can still be made on an implied contract theory for those items not addressed in the express contract. *Hood v. Faulkner*, 47 N.C. App. 611, 267 S.E.2d 704 (1980). This is a contract "implied in fact."

For example, where extra work is ordered by the owner, and no provision regarding such work exists in the contract, courts have found an implied contract with regard to that extra work. *Ellis Jones, Inc. v. Western Waterproofing Co., Inc.*, 66 N.C. App. 641, 312 S.E.2d 215 (1984). The implied contract theory is often encountered in "differing site condition" situations. The measure of damages are based on the reasonable value of the services provided. *Id.*

A second implied contract is one "implied in law," where one man has been enriched by another's expenses that, in equity, call for an accounting. The measure of recovery is that of *quantum meruit*, the reasonable value of materials and services rendered by one party that are accepted and appropriated by another party. *Ellis Jones, Inc. v. Western Waterproofing Co., Inc.*, 66 N.C. App. 641, 312 S.E.2d 215 (1984).

Practice Tip: The failure to include provisions for contingencies will result in bidders submitting higher bids to cover unknowns. Therefore, it may be advantageous to all parties to indicate a method for dealing with differing site conditions within the contract.

In addition to implied contracts, there are also implied duties upon all parties in a construction contracts, including the following:

- Merchantability or Fitness for a Particular Purpose

Under the Uniform Commercial Code, a merchant or supplier owes a duty to provide materials or goods that conform to the specifications and are able to be used as intended. *See* N.C. Gen. Stat. §25-2-314; 25-2-315.

- Habitability

This is a warranty for residential homes only, which requires that the dwelling, together with all its fixtures, be sufficiently free from major structural defects, and be constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction. *Lincoln v. Bueche*, 166 N.C. App. 150, 601 S.E.2d 237 (2004); *Allen v. Roberts Construction Co., Inc.*, 138 N.C. App. 557, 532 S.E.2d 534 (2000).

- Accurate and complete plans and specifications

An owner also impliedly warrants the adequacy of the plans and specifications. This is sometimes known as the "Spearin Doctrine, " after the seminal Supreme Court case, *U.S. v. Spearin*, 248 U.S. 132 (1918). In *Spearin*, a contractor sought to recover from the government for the government's failure to provide accurate plans reflecting the overflow issues which preexisted at the Brooklyn Navy Yard. The Court held:

> [I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. (Citations omitted). This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work . . . . The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view.

Id. at 136-137. The Spearin Doctrine has been faithfully followed in the North Carolina courts. *See, e.g., City of Charlotte v. Skidmore, Owings and* Merrill, 103 N.C. App. 667, 407 S.E.2d 571 (1991); *Burke Co. Public School Bd. of Education v. Juno Construction Corp.*, 50 N.C. App. 238, 273 S.E.2d 504 (1981).

One state court held, "[i]t is simply unfair to bar recovery to contractors who are mislead by inaccurate plans and submit bids lower than they might otherwise have submitted." *Battle Ridge Companies v. North Carolina Dept. of Transportation*, 161 N.C. App. 156, 160, 587 S.E.2d 426 (2003), *quoting Lowder v. Highway Comm.*, 26

N.C. App. 622, 638, 217 S.E.2d 682, 692, *cert. denied*, 288 N.C. 393, 218 S.E.2d 467 (1975).

- Workmanship

Every contractor impliedly warrants that the structures he builds will be built in a workmanlike manner free from defects, and appropriate for their intended purpose. In AIA form A201, the workmanship warranty is express. (3.5.1). The express warranties in A201 include:

  - Materials and equipment furnished will be of good quality and new
  - Work will be free from defects not inherent in the quality
  - Work will conform to the required Contract documents

- Not to Delay or Hinder

An owner impliedly warrants that he will not interfere with a contractor's work, or hinder or delay the contractor's performance. To the extent an owner prevents the contractor from working, the owner cannot thereafter take advantage of the contractor's nonperformance. *Cater v. Barker*, __ N.C. App. __, 617 S.E.2d 113 (2005). Further, the duty not to hinder also applies to a contractor and his subcontractor. *Raleigh Paint & Wallpaper v. Rogers Builders*, 73 N.C. App. 648, 327 S.E.2d 36 (1985). Moreover, a party who fails to complete performance because of interference by another party may recover the full cost of his work. *D.W. Ward Construction Co., Inc. v. Adams*, 90 N.C. App. 241, 368 S.E.2d 31 (1988).

C. Key Contract Clauses

Although your contract may or may not incorporate one of the form contracts cited above, most construction contracts have similar language regarding certain key clauses. Since the AIA General Conditions of the Contract (A201) dominate the

industry, particular mention will be made to provisions within the A201 (1997 edition) in the following discussion of contract clauses.

Important terms or phrases with which every contractor should be aware, if incorporated into his contract for construction, are listed and discussed below.

Arbitration

Arbitration clauses are enforceable in North Carolina, where the Uniform Arbitration Act has been adopted. N.C. Gen. Stat. §1-567.1. *Ellis-Don Construction, Inc. v. HNTB Corp.*, ___ N.C. App. ___, 610 S.E.2d 293 (2005). The A201 has a specific provision providing for arbitration of disputes. (4.6.1). Arbitration has the advantage of generally being quicker and cheaper, although some contractors may do just as well, if not better, having a jury trial. Therefore, the arbitration provision should be carefully considered with legal counsel before you agree to arbitration or decide to strike this provision from the contract.

Claims

A claim is not only for time or money but can also include any dispute between the owner and contractor, and any assertion for adjustment or interpretation of the contract terms. Claims procedures are set out in paragraph 4.3 of A201, and include the following:

- Claims must be initiated within 21 days after occurrence of the event (4.3.2)
- Claims for a concealed or unknown condition must be reported within 21 days and investigated by the architect; claims in opposition to the architect's determination must be made within 21 days of the architect's decision (4.3.4)
- Claims for Additional Cost must be made by prior written notice unless emergency situation (4.3.5)
- Claims for Additional Time must be made by written notice, along with an estimate of the cost and effect of delay on the progress of the work. (4.3.7.1). If the claim

for time involves a weather condition, documentation must be presented substantiating the abnormal weather condition. (4.3.7.2)

In order to bring a claim, the Architect must first issue a decision as a condition precedent to litigation or arbitration. (4.3.2). The Architect must make an impartial decision in good faith. (4.2.12). Pending final resolution of a Claim, the contractor is required to proceed diligently with performance of the Work and the owner is required to continue to make timely payments. (4.3.2).

The Architect's decision on a claim is final and binding on the parties (4.4.4), unless the decision is made in bad faith. *Spector Industries, Inc. v. Mitchell*, 63 N.C. App. 391, 305 S.E.2d 738 (1983). The architect's final decision, however, is subject to arbitration, if a timely demand for arbitration is made after the Architect's final decision. (4.4.6).

Consequential Damages

Consequential damages include damages for rental expenses, loss of use, lost income, lost profit, lost productivity, extended overhead, lost business opportunity, and other less concrete losses. Under AIA A201, claims for consequential damages are expressly waived unless a party terminates the contract. (4.3.10). If a party terminates the contract, consequential damages may be recoverable. (See "Handling Threats of Contract Termination" section of this manuscript). The courts generally enforce such mutual waivers of consequential damages. This provision, therefore, should be carefully considered with your legal counsel prior to acceptance.

Design Errors

Although the contractor is not responsible for ascertaining whether the contract documents are in conformance with all applicable laws and codes, he does have a duty to report any design errors or omissions which he discovers during his required review of the documents and the field conditions. AIA A201 3.2.2.

Indemnity Agreements

Construction indemnity agreements, in which a party attempts to escape liability from its own acts of negligence, are void as against public policy and unenforceable in North Carolina. N.C. Gen. Stat. §22B-1 (1993). However, indemnity provisions can be enforced so long as they do not allow a party to escape its own negligence. AIA A201 provides for indemnity at para 3.18.1:

> To the fullest extent permitted by law. . . the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expenses is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. . . .

Therefore, to the extent this indemnity provision attempts to avoid the owner's liability for its own acts, this section is unenforceable. *See Bridgestone/Firestone, Inc. v. Ogden Plant Maintenance Co. of N.C.*, 144 N.C. App. 503, 548 S.E.2d 807 (2001); *International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 385 S.E.2d 553 (1989). However, this provision would protect the owner against the negligence of a contractor or its subcontractor where the owner is not also negligent.

Means and Methods

A contractor has complete control over the means and methods of performing his work. If, however, he is directed in the means or methods, liability may be vested in the owner. For example, A201, para 3.3.1 reads:

> The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely

> responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the job site safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If the contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely written notice to the Owner and the Architect and shall not proceed with that portion of the work without further written instructions from the Architect. If the Contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any resulting loss or damage.

Thus, with the exception of jobsite safety, the standard form documents give the architect the ability to contractually control the contractor's work.

Merger Clause

A merger clause acts to prevent any previous or concurrent oral agreements from taking effect, as all the key terms have been "merged" into the written document. This is consistent with case law on the "parol evidence rule," which essentially states that any parts of a transaction prior to the execution of a finalized written contract are superseded and made legally ineffective by the written contract.

A201 contains a merger clause at para. 1.1.2. However, courts have held that generic merger clauses, such as those found in the A201, are not necessarily applicable if the parties never intended one particular document to be the complete agreement. *T.A. Loving Co. v. Latham*, 20 N.C. App. 318, 201 S.E.2d 516 (1974). "When several written contracts are separately and simultaneously executed, the fact that in one of them it is expressly stated that there are no such other contracts does not prevent their being proved and enforced, even though they contain promises and representations that would

otherwise be excluded." *Id.* at 330, 201 S.E.2d at 524, *quoting* 3 Corbin on Contracts, s 578, p. 407.

No Damage for Delay Clause

A "no damage for delay" clause is generally enforceable in state courts in North Carolina. In one case, severe weather delays were held to be foreseeable, and thus precluded by the no-damages-for-delay clause. *APAC-Carolina, Inc. v. Greensboro-High Point Airport Authority*, 110 N.C. App. 664, 431 S.E.2d 508 (1993).

These clauses are strictly construed due to the typically harsh result if such a clause is enforced. Therefore, if the contract is not specific regarding types of delays which would entitle the contractor to an extension of time, or if an owner unreasonably delays or denies a time extension request, the clause may be deemed ambiguous and unenforceable. *Watson Electrical Construction Co. v. City of Winston-Salem*, 109 N.C. App. 194, 426 S.E.2d 420 (1993).

Where a delay is caused by the owner on a public construction project, statutory law prohibits the enforcement of any no damage for delay clause. "No contractual language forbidding or limiting compensable damages for delay caused solely by the owner or its agent may be enforced in any construction contract . . . ". N.C. Gen. Stat. §143-134.3 (2004).

Pay when paid clauses

Pay when paid clauses are barred as against public policy in North Carolina. Under the statute, payment by the owner to a contractor is not a condition precedent for payment to a subcontractor and payment by a contractor to a subcontractor is not a condition precedent for payment to any other subcontractor, and an agreement to the contrary is unenforceable. N.C. Gen. Stat. § 22C-2 (2003); *American National Electric Corp v. Poythress Commercial Contractors, Inc.*, 167 N.C. App. 97, 604 S.E.2d 315 (2004).

Schedule

Under A201 (3.10.1), the contractor is to submit a construction schedule. Under the owner-contractor agreement itself, the contractor is the responsible party for control over means, methods, techniques, sequences and procedures, and for coordinating all portions of the work. (A107, para 8.2.1). These two provisions together make the construction schedule part of the contractor's responsibility.

Standard of Care

Standard of care is a term of art used to represent the reasonable care in performance of professional services, and level of skill and diligence those engaged in the same profession would ordinarily exercise under similar circumstances. *RCDI Const., Inc. v. Spaceplan/Architecture, Planning, & Interiors, P.A.*, 148 F. Supp. 2d 607 (W.D.N.C. 2001). The professional will be presumed to:

- posses the required degree of learning, skills, and experience that is ordinarily possessed by similarly-situated professionals in the community;
- use reasonable and ordinary care and diligence in the exercise of his skill to accomplish his professional tasks; and
- use his best judgment in performing his professional tasks.

Substantial completion

Substantial completion is that degree of completion of a project, on attainment of which allows the owner to use the same for the purpose it was intended. (9.8.1). For a residence, substantial completion occurs when a final certificate of compliance is issued. N.C. Gen. Stat. §1-50(a)(5)(c); *Nolan v. Paramount Homes, Inc.*, 135 N.C. App. 73, 518 S.E.2d 789 (1999).

In many construction contracts, the architect or designer is deemed the decision-maker concerning issues such as completion, sufficiency, and classification in cases where the owner and contractor disagree. In such cases, the architect's certificate is a

condition precedent to the contractor's recovery, absent a showing of bad faith. *Elec-trol, Inc. v. C.J. Kern Contractors, Inc.*, 54 N.C. App. 626, 284 S.E.2d 119 (1981). Therefore, where the contract provides that work shall be done to the satisfaction, approval, or acceptance of a designer, the designer is the sole arbitrator between the parties, and the parties are bound by his decision in the absence of fraud or gross mistake. *Id.*

Subcontractor Relations

Subcontractor relations are addressed in section 5.3.1 of A201, which require the contractor-subcontractor contract to incorporate all of the other contract terms and conditions. This is sometimes called a "flowdown provision." Therefore, be sure that you understand and have a copy of all conditions or contracts to which your contract binds you or incorporates by reference.

Time is of the Essence

Unless specified, time is not considered a material term of the contract. A set date for completion, by itself, does not make time a material term. Therefore, the "time is of the essence" clause in A201 (at para 8.2.1) is not necessarily enforceable. "It is common knowledge that projected completion dates in the construction industry are often missed for a variety of reasons and may be impossible or impractical to fulfill." *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 369, 533 S.E.2d 827, 833 (2000), *quoting Opsahl v. Pinehurst Inc.*, 81 N.C. App. 56, 344 S.E.2d 68 (1986), *review dismissed*, 319 N.C. 222, 353 S.E.2d 400 (1987). Further, a bare assertion that "time is of the essence", standing alone, does not make time a material term of the contract. *Gaskill v. Jeanette Enterprises, Inc.*, 147 N.C. App. 138, 554 S.E.2d 10 (2001). To incorporate an enforceable "time is of the essence" clause, the language must be clear, precise, and very specific.

Violation of building codes

The AIA A201 makes the Contractor liable for knowingly performing work contrary to the Building Codes. (3.7.4). North Carolina case law, however, extends that liability to all work not in compliance with Building Codes. *Sullivan v. Smith*, 56 N.C. App. 525, 289 S.E.2d 870 (1982).

D. Rules of Contract Interpretation

Contracts are construed as a whole, giving reasonable meaning to all provisions of a contract if at all possible. *International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App 312, 385 S.E.2d 553 (1989). The interpretation of some key contract rules is discussed below.

Mutual Mistake

Contracts can be rescinded on the grounds of Mutual Mistake if both parties misunderstand the meaning or terms of the contract, so that it does not reflect the intent of either. However, a unilateral mistake is no basis for rescission or reformation in the absence of fraud. *Spector Industries, Inc. v. Mitchell*, 63 N.C. App. 391, 305 S.E.2d 738 (1983).

Ambiguous Language

If the contract terms are clearly defined, the courts will presume that the parties intended what the language clearly expresses. *Cater v. Barker*, __ N.C. App __, 617 S.E.2d 113 (2005). If, however, contract documents as well as the intention of the parties are unclear, the contract must be interpreted by the jury. *Handex of the Carolinas, Inc. v. County of Haywood*, 168 N.C. App. 1, 607 S.E.2d 25 (2005); *Barrett Kays & Associates, P.A. v. Colonial Building Co., Inc.*, 129 N.C. App. 525, 500 S.E.2d 108 (1998). A corollary rule is that any ambiguities are construed against the drafter of the contract. To

the extent that specific and general terms in a contract conflict, the specific terms govern. *Development Enterprises of Raleigh v. Ortiz*, 86 N.C. App. 191, 356 S.E.2d 922 (1987).

Statute of Limitations

The Statute of Limitations is a time-barring statute which gives you a set time within which to bring an action (i.e., lawsuit) against another party. In North Carolina, for construction defects, plan defects, delay claims, and similar construction claims, the statute generally gives three (3) years from the time when you first knew or should have known about the issue to bring the claim. N.C. Gen. Stat. §1-52.[1] *ABL Plumbing and Heating Corp. v. Bladen Co. Board of Education*, __ N.C. App. __, 623 S.E.2d 57 (2005). *See also* AIA A201 para. 13.7. Different jurisdictions may have different time limitations, so consult your attorney for specific advise on timing.

If the contract involves merchandise and falls under the Uniform Commercial Code, the statute of limitations is 4 years. N.C. Gen. Stat. §25-2-725. However, where a defect in merchandise results in bodily injury or damage to real property, the shorter three year statute still applies. *Hanover Ins. Co. v. Amana Refrigeration, Inc.*, 106 N.C. App. 79, 415 S.E.2d 99 (1992). In *Hanover*, a defective HVAC unit caused a fire which destroyed a building. The court held that the shorter 3 year statute of limitations applied because the defective merchandise caused damage to the real property.

Therefore, it is best practice to assume that the Courts will find that the statute starts running at the first inkling of a problem, and bring your action accordingly. Also, regardless of the length of any warranty period, contractors can still be liable until the statute of limitations period expires.

Once a project has been accepted by an owner, the owner waives his right to claim damages for all but latent defects. Acceptance by the owner with knowledge of a defective performance may be deemed a waiver of the defective performance. Where, however, the defect is unknown, or latent, the owner's acceptance does not waive the

[1] If, however, a contract is "under seal," then the statue of limitations is extended to 10 years. See N.C. Gen. Stat. §1-47.

defective performance. *Perlmuter Printing Co. v. Elite Force, Inc.*, 151 N.C. App. 598, 2002 WL 1544102 (2002)(unpublished disposition); *Tisdale v. Elliott*, 13 N.C. App. 598, 186 S.E.2d 685 (1972). If a defect is a "latent" defect, hidden or not readily discoverable, the statute of limitations starts running from the date of discovery.

Under A201 para 13.7, any statute of limitations is deemed to have accrued in any and all events not later than the date of Substantial Completion. This section shortens the statute of limitations in some cases of latent defects.

Statute of Repose

The Statute of Repose is another time-barring statute within which your claim must fit. The Statute of Repose in North Carolina for improvements to real property is currently six (6) years from substantial completion or the last specific act or omission of the defendant, whichever is later. N.C. Gen. Stat. §1-50(a)(5)(a); *Nolan v. Paramount Homes, Inc.*, 135 N.C. App 73, 518 S.E.2d 789 (1999).

Unlike the Statute of Limitations, the Statute of Repose starts running whether or not you are aware of any defect. *Bryant v. Don Galloway Homes, Inc.*, 147 N.C. App. 655, 556 S.E.2d 597 (2001). This is a double-edged sword—if you are the one whose work is being questioned, you can rest easy that after you have been off of a project for 6 years, no claim can thereafter be (successfully) brought against you.

On the other hand, you are also bound by the repose statute, regardless of any equitable considerations. For example, in *Monson v. Paramount Homes, Inc.*, homeowners sued a general contractor for defective construction, and the contractor brought a third-party action against his subcontractor. The claims against the subcontractor were deemed time-barred under the statute of repose. 133 N.C. App. 235, 515 S.E.2d 445 (1999). In *Monson*, the contractor had to defend the action but had no ability to recover from the subcontractor who actually performed the poor construction.

In the recent case of *Mitchell v. Mitchell's Formal Wear, Inc.*, 168 N.C. App. 212, 606 S.E.2d 704 (2005), the Court of Appeals clarified the issue of what constitutes a last act or omission for the purposes of triggering the statute of repose. In that case, although

the contractor had performed some punchlist work after substantial completion, and although the architect failed to issue a certificate of substantial completion, the statute began to run at the date of substantial completion of the contractor's work.

This is also true if you return to the job for minor warranty type issues during the 6 year period. The statute of limitations is tolled during the repair time, but in general, the statute of repose is not tolled once it begins running. *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 515 S.E.2d 445 (1999). The policy behind this interpretation is that the Statute of Repose is a substantive right designed to limit the potential liability for a set period of time. *Id.*

No Privity Needed for Suit

Parties do not necessarily need contractual privity to sue another party that causes them injury in a construction context. Contractors can generally sue the designer despite the absence of a contractual relationship for a breach of the architect's standard of care. *RPR & Associates v. O'Brien/Atkins Associates, P.A.*, 921 F. Supp. 1457 (M.D.N.C. 1995). An action for delay damages can be brought against a contract administrator by a subcontractor for economic losses based on the administrator's violation of its duty of care. *Pompano Masonry Corp. v. HDR Architecture, Inc.*, 165 N.C. App. 401, 589 S.E.2d 608 (2004) Further, on a multi-prime contracting job, there is statutory authority to sue any other prime contractor. N.C. Gen. Stat. §143-128.

Summary Tip: Before you sign any contract, you should understand exactly what rights you are preserving, what rights you may be foregoing, and what responsibilities you have. It is especially important to consider the claims resolution terms and whether you would have better success in arbitration or litigation if a dispute were to arise on the project. That is often a project-specific question which you should address with your legal counsel before entering into the contract itself.