Maine

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Insurance

Insurance Contracts

In Maine, unambiguous contract language is interpreted according to its plain meaning. *Cookson v. Liberty Mut. Fire Ins. Co.*, 2012 ME 7, 34 A.3d 1156. "Any ambiguity in an insurance contract is construed strictly against the insurer and liberally in favor of the insured." *Pelkey v. General Elec. Capital Assur. Co.*, 2002 ME 142, 804 A.2d 385. A provision of an insurance contract is ambiguous if it is reasonably susceptible of different interpretations or if any ordinary person in the shoes of the insured would not understand that the policy did not cover claims such as those brought. *City of S. Portland v. Me. Mun. Ass'n*, 2008 ME 128, 953 A.2d 1128. Further, "Exclusions and exceptions in insurance policies are disfavored and are construed strictly against the insurer." *Foremost Ins. Co. v. Levesque*, 2005 ME 34, ¶7, 868 A.2d 244.

"Work Product" and "Your Work" Exclusions and Occurrences

The typical Commercial General Liability policy provides coverage for damages because of property damage caused by an occurrence. The most common definition of "property damage" in the CGL policies is (a) physical injury to tangible property, including resulting loss of use; or (b) loss of use of tangible property that is not physically injured. The typical CGL policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

In Maine, Comprehensive general liability insurance is intended to cover occurrence of harm risks, but not business risks. *Mass. Bay Ins. Co., v. Ferraiolo*, 584 A.2d 608 (Me. 1990). Business risks are excluded from the scope of coverage by detailed exclusions. *Id.*

Unlike many jurisdictions, the Law Court has yet to conclude that the replacement of faulty workmanship does not qualify as property damage, nor does faulty workmanship qualify as an occurrence. The Law Court has instead focused on the application of relevant policy based "business risk exclusions." *Peerless Insurance Company v. Brennon*, 564 A.2d 383 (Me. 1989). In *Brennon*, the Court addressed two exclusions barring coverage for "property damage to the named insured's products arising out of such products" and for "property damage to work performed by or on behalf of the named insured arising out of work or any portion thereof." The Court held that such exclusions:

> [C]learly and unequivocally preclude coverage for the business risk that the insured contractor's product or completed work prove to be unsatisfactory. If, as in the instant case, a contractor performs unsatisfactory work, repair or replacement of the faulty work is a business expense for which insurance coverage is not provided.

Id. at 386, quoting dissent in *Baybutt Const. Corp. v. Commercial Union Ins. Co.*, 455 A.2d 914 (Me. 1983). In finding that the exclusions negated Peerless's duty to defend, the Court explained the difference between "business risks" (which are not covered) and "occurrence of harm risks" (which are covered), noting:

> An "occurrence of harm risk" is a risk that a person or property other than the product itself will be damaged through the fault of the contractor. A "business risk" is a risk that the contractor will not do his job competently, and thus will be obligated to replace or repair his faulty work. The distinction between the two risks is critical to understanding a CGL policy. A CGL policy covers an occurrence of harm risk but specifically excludes a business risk.

Id., quoting with approval Note, "*Baybutt Construction Corp. v. Commercial Union Insurance Co.*: A Question of Ambiguity in Comprehensive General Liability Insurance Policies," 36 Me. L. Rev. 179, 182 (1984).

Similarly, in *Baywood Corp. v. Maine Bonding & Cas. Co.*, 628 A.2d 1029 (Me. 1993), the Court, considering coverage under a CGL policy for a Complaint seeking damages for replacement of defective workmanship and holding that no duty to defend existed, explained:

> The standard comprehensive general liability policy… specifically excludes coverage for business risks based on the contractor's warranty for its work…What is insured, therefore, under the standard comprehensive general liability policy is property damage *resulting from an occurrence of harm occasioned by negligent workmanship. What is not insured is the repair or replacement of the faulty work.* (emphasis added)

Insurer's Duty to Defend

The Law Court recently reiterated that the duty "is triggered if the complaint tendered contains any allegations that, if proved, could fall within the coverage afforded by the policy…. [I]f the complaint—read in conjunction with the policy—reveals a mere potential that the facts may come within the coverage, then the duty to defend exists." *Cox v. Commonwealth Land Title Ins. Co.*, 2013 ME 8, 59 A.3d 1280. In addition, "where the events giving rise to the complaint may be shown at trial to fall within the policy's coverage, an insurer must provide the policyholder with a defense. An insurer may have a duty to defend even against a complaint that could not survive a motion to dismiss." *Mitchell v. Allstate Ins. Co.*, 2011 ME 133, 36 A.3d 876.

To determine whether an insurer has a duty to defend, the trial court compares the allegations of the underlying complaint with the coverage provided in the insurance policy. *Commercial Union Ins. Co. v. Royal Ins. Co.*, 658 A.2d 1081, 1082 (Me. 1995); *see also State Mut. Ins. Co. v. Bragg*, 589 A.2d 35, 36 (Me. 1991). Only the Complaint and the policy are considered in determining whether the insurer has a duty to defend. *Elliot v. Hanover Ins. Co.*, 711 A.2d 1310 (Me. 1998).

The duty to defend is broader than the duty to indemnify. *York Ins. Group of Me. v. Lambert*, 740 A.2d 984 (Me. 1993). An insurer must provide a defense if there is any potential that facts ultimately proved could result in coverage. *Penney v. Capitol City Transfer Inc.*, 707 A.2d 387 (Me. 1998). The facts alleged in the Complaint need not make out a claim that specifically and unequivocally falls within the coverage. *Union Mut. Fire Ins. Co. v. Inhabitants of Topsham*, 441 A.2d 1012, 1015 (Me. 1982). Rather, "where the events giving rise to the complaint may be shown at trial to fall within the policy's coverage," an insurer must provide the policyholder with a defense. *Auto Europe, LLC v. Conn. Indem. Co.*, 321 F.3d 60, 68 (1st Cir. 2003) (applying Maine Law). An insurer may have a duty to defend even against a Complaint that could not survive a motion to dismiss. *Me. Bonding & Cas. Co. v. Douglas Dynamics, Inc.*, 594 A.2d 1079, 1080 (Me. 1991). Because the duty to defend is broad, any ambiguity in the policy regarding the insurer's duty to defend is resolved against the insurer. *Union Mut. Fire Ins. Co.*, 441 A.2d at 1015. Policy exclusions are construed strictly against the insurer. *Hall v. Patriot Mut. Ins. Co.*, 2007 ME 104, 942 A.2d 663.

Errors and Omissions

There are no relevant decisions in Maine involving errors and omissions policies.

Arising Out Of

The Law Court in *Acadia Ins. Co. v. Vermont Ins. Co.*, 2004 ME 121, 860 A.2d 390, noted with approval that the First Circuit had interpreted the term "arising out of" expansively, defining it to mean "originating from, growing out of, flowing from, incident to or having connection with." (citing *Murdock v. Dinsmoor*, 892 F.2d 7, 8 (1st Cir. 1989)). In *Acadia Ins. Co.*, the Court similarly noted that… the term "arising out of" was interpreted broadly (citing *Hawkes v. Commercial Union Ins. Co.*, 2001 ME 8, 764 A.2d 258).

Reservation of Rights

In *Travelers Indem. Co. v. Dingwell*, 414 A.2d 220 (Me. 1980), the Law Court recognized in dicta the insurer's obligation to provide independent counsel when a conflict arises between insurer and insured. The Court stated "of course, the insurers' obligation to defend can lead to a serious dilemma for the insurer. In some cases, the parties may agree that the insurer hire independent counsel for the insured…. The difficulties which these cases may pose will have to be addressed as they arise. For the case at bar, it is sufficient for us to hold that the complaint here

does generate a duty to defend, because it discloses a potential for liability within the coverage and contains no allegation of facts which would necessarily exclude coverage." *Dingwell*, 414 A.2d at 227 (citing *Magoun v. Liberty Mut. Ins. Co.*, 346 Mass. 677, 195 N.E.2d 514 (1964)). The Law Court next addressed the issue in *Patrons Oxford Ins. Co. v. Harris*, 2006 ME 72, 905 A.2d 819. There, in the context of reviewing a settlement entered by appointed counsel on behalf of an insured which was being defended under a reservation of rights, the Court commented that when an insurer defends subject to a reservation of rights—irrespective of the basis for the reservation and whether it creates an actual conflict of interest—it gives up its right to control the defense. *Id.* at ¶16.

Punitive Damages

Maine courts have held that punitive damages are not damages "because of bodily injury," and thus not recoverable under a policy of liability insurance. *Braley v. Berkshire Mut. Ins. Co.*, 440 A.2d 359 (1990). The Cout held that where the policy provided uninsured motorist coverage for "all sums which the insured shall be legally entitled to recover as damages… because of bodily injury," punitive damages were not recoverable. The court held that "punitive damages are not awarded as compensation 'for bodily injury,'… [but] 'for the protection of society and societal order,' and to deter similar misconduct by the defendant and others." (citations omitted) Under Maine law the justification for a punitive damage award was the deterrence of the tortfeasor. *Brayley*, 440 A.2d at 362. The Court found that "allowing punitive damages to be awarded against an insurance company can serve no deterrent function because the wrongdoer is not the person paying the damages." *Id.*

Additional insured endorsements

There has been no relevant litigation in Maine involving additional insured endorsements.

Causes of Action

Contract

In Maine, a contract may written or oral. However, the Maine's Home Construction Contract Act requires a written contract on a residential project between the owner and the contract. *See Runells v. Quinn*, 2006 ME 7, 890 A.2d 713. A party breaches the contract if they fail to substantially comply with the terms of the contract. *Paine v. Spottiswoode*, 612 A.2d 235 (Me. 1992). Typically, a contractor will not be found liable if the building is constructed in accordance with the plans and specifications, unless a contractor undertook design responsibilities on the project. *Associated Builders v. Oczkowski*, 2002 ME 115, 801 A.2d 1008. All construction contracts in Maine contain an implied warranty that the work will be completed in a workman like manner. *Paine*, 612 A.2d 235 (1992).

Where a contractor has substantially complied with a contract he may recover the full contract price less any damages for alleged defects. *Morin v. Atlantic Design & Construction*, 615 A.2d 239 (Me. 1992). However, material breaches of the contract, including failure to pay, permit the contractor to terminate the agreement and refuse performance. *Advanced Construction Corp. v. Pilecki*, 2006 ME 84, 901 A.2d 189. A party who prevents another party from performing pursuant to the contract is considered to be in material breach of that contract, justifying the termination of the contract. *See Morin*, 615 A.2d 239. According to the Law Court where through conduct or words, a party expresses its intention not to perform on a contract, than an anticipatory repudiation has occurred and the party receiving the information regarding the intentions not to perform is permitted to assume the other party will not perform and may therefore cancel the contract. *Wholesale Sand and Gravel v. Decker*, 630 A.2d 710 (Me. 1993). In *Decker*, the homeowner argued anticipatory breach occurred when the contractor removed equipment from the site and failed to return to the project.

In order to obtain relief for a breach of that contract, the plaintiff must also demonstrate that the defendant breached a material term of the contract, and that the breach caused the plaintiff to suffer damages. *Tobin v. Barter*, 2014 ME 51, ¶12, 89 A.3d 1088. "Similarly, the question of whether there has been a breach of contract is a question of fact," *VanVoorhees v. Dodge*, 679 A.2d 1077, 1080 (Me. 1996). "The assessment of damages is within the sole province of the factfinder." *Down E. Energy Corp. v. RMR, Inc.*, 697 A.2d 417 (Me. 1997).

Prompt Pay

The Maine Prompt Payment Act, Me. Rev. Stat. Ann. tit. 10, §1111 to 1120 (2008) has been construed as a payment paid clause that impacts the rights of parties to recover for performance of work. Pursuant to the act the owner is required to reimburse the contractor within 20 days of the end of the billing period or delivery of the invoice, whichever is later. Me. Rev. Stat. Ann. tit10, §1113(3) (2008). The act requires that the contractor or subcontractor or material suppliers within strict accordance with the terms of a subcontractor or material suppliers contract. Me. Rev. Stat. Ann. tit10, §1114(1) (2008). Section 1114(2) of the act requires the disclosure by a contractor or subcontractor to material suppliers of the due date of payments to be received from the owner. Where the contractor or subcontractor fails to disclose the due date to the subcontractor or material supplier, they are obligated to pay the subcontractor or material supplier no later than 20 days after receipt of the invoice from the subcontract or material supplier.

Section 1114(3) requires that absent an agreement, following permanence under a contract by a subcontractor or a material supplier the contract shall pay the subcontractor or material supplier the full or proportional amount received for the subcontractor's work or the materials received within 7 days after receipt of each progress or final payment from the owner or 7 days after receipt of subcontractor's or material supplier's invoice whichever is later. Pursuant to Section 1114(4) of the Act where final payment to a subcontractor or supplier is delayed beyond the due date as established by the act interest shall be applied to any unpaid balance beginning on the next day.

Quantum Meruit/Unjust Enrichment

Quantum Meruit involves recovery for services or materials provided under an implied contract. *Aladdin Elec. Assoc. v. Old Orchard Beach*, 645 A.2d 1142, 1145 (Me. 1994). "[Q]uantum meruit… rests on a contract implied in fact, that is, a contract inferred from the conduct of the parties."). *Id.* Unjust enrichment describes recovery for the value of the benefit retained when there is no contractual relationship, but when, on the grounds of fairness and justice, the law compels performance of a legal and moral duty to pay, and the "damages analysis is based on principles of equity, not contract." *Aladdin Elec. Assoc.*, 645 A.2d at 1145.

Damages in Unjust Enrichment are measured by the value of what was inequitably retained. *Id.* In Quantum Meruit, by contrast, the damages are not measured by the benefit realized and retained by the defendant, but rather are based on the value of the services provided by the plaintiff. *Siciliani v. Connolly*, 651 A.2d 386, 387 (Me. 1994) (plaintiff's labor rather than enhanced value of property is the proper measure in quantum meruit claim); *William Mushero, Inc. v. Hull*, 667 A.2d 853, 855 (Me. 1995) (quantum meruit damages are equal to the reasonable value of the services rendered).

A valid claim in Quantum Meruit requires: "that (1) services were rendered to the defendant by the plaintiff; (2) with the knowledge and consent of the defendant; and (3) under circumstances that make it reasonable for the plaintiff to expect payment." *Bowden v. Grindle*, 651 A.2d 347, 351 (Me. 1994). Unjust enrichment is an equitable claim on which there is no jury trial right. *Bowden*, 651 A.2d at 350.

Quasi Contract

A contract implied in fact, whether express or implied, requires "a meeting of the minds of the parties to the contract, *i.e.*, a mutual assent to be bound by the terms, and that mutual assent of the parties to the terms agreed upon must be reflected and manifested in the contract, either expressly or impliedly." *Zamore v. Whitten*, 395 A.2d 435, 440 (Me. 1978). When an agreement has not been expressly made but is instead implied and the circumstances surround the parties' relationship, the claimant must show that those surrounding circumstances "make it reasonable for him to believe that he will receive payment" for services he has rendered to the other party. *Bourisk v. Amalfitano*, 379 A.2d 149, 151 (Me. 1977).

To recover on a quasi-contract claim the party has the burden of proof (1) a benefit conferred upon the party; (2) an appreciation of knowledge by the recipient; and (3) the recipient accepted or retained the benefit under such circumstances to make it inequitable for him to retain the benefit without payment of its value. *Estate of Boothby*, 532 A.2d 1007 (Me. 1987).

Rescission

A contract can be rescinded by mutual agreement of the parties, by one of the parties declaring rescission of the contract without the consent of the other if a legal rescission ground for doing so exists or by either party applying to the court for a degree of rescission. The contract being rescinded must have been formed through the mutual assent of the parties on all materials terms. *Smile, Inc. v. Moosehead Sanitary District*, 649 A.2d 1103, 1105 (Me. 1994). If the parties have failed to agree on a material term, then they have entered into an unenforceable contract. *Id.* The law court has ruled that a mutual mistake in the creation of a contract may prevent enforcement of the contract allowing for a party, or the parties to rescind the contract. *DiBiase v. Universal Design & Builders, Inc.*, 473 A.2d 875, 878 (Me. 1984). A mutual mistake is material when it affects the subject matter of the contract causing the contract to not express the true contracting intentions of the parties. *Interstate Indus. Uniform Rental Service, Inc. v. Couri Pontiac, Inc.*, 355 A.2d 913, 918 (Me. 1976).

Tort

Negligence

Workmanlike Construction

In Maine, a contractor owes a duty to the owner to exercise reasonable care in the construction of a building. *Paine*, 612 A.2d, 235. However, where the negligent breach of the duty does not result in *personal injury or damage to property* other than the work itself, the economic loss doctrine may bar the negligence claim. *Id.* Under that scenario, the proper remedy is in contract. The comparative fault of the owner, if greater than the contractors will bar a negligence claim pursuant to Me. Rev. Stat. Ann. tit. 14 §156.

To prevail on a claim of negligent construction the claimant must prove negligence by establishing negligence by proving that the contractor owed a duty to the claimant, the contractor breached the duty, the claimant incurred damages as a result of the builders breach, and the contractor's breach was the proximate cause in fact of the claimants damages. *Ricci v. Alternative Energy, Inc.*, 211 F.3d 157, 162 (1st Cir. 2000).

Violations of codes or statutes are construed as evidence of negligence or evidence of the breach of a duty or reasonable care owed pursuant to a code or statute. *Russell v. Accurate Abatement, Inc.*, 694 A.2d 921, 923 (Me. 1997). *See also Grover v. Boise Cascade Corp.*, 2003 ME 45, 819 A.2d 322.

The Law Court refused to recognize the doctrine of negligence per se. *Binette v. Dyer Library Ass'n*, 688 A.2d 898, 904 (Me. 1996).

Joint and Several Liability

Maine's comparative negligence statue as well as the law court's decision *Paine* require that actors found to be negligent for a single injury should be jointly and severally liable. *Paine*, 612 A.2d at 240. Jointly and severally liable defendants are liable to the plaintiff for the full amount of the plaintiff's damages. Me. Rev. Stat. Ann. tit. 14, §156 (2007). However, defendants are permitted, if sufficient evidence exists, to establish the percentage of each defendant's individual share by requesting that the jury consider special interrogatories establishing a percentage of fault to each defendant. *Id.* The statute allows defendants remaining in a case to request that the jury apportion liability to a release joint tortfeasor. *Id.*

Contribution

The Maine Law Court held in *Cyr v. Michaud*, 454 A.2d 1376 (Me. 1983), that "claims for indemnification and contribution do not accrue for the purposes of the statute of limitations until a judgment has been paid by the third-party plaintiff." *Id.* at 1385 (citing 1 Field, McKusick & Wroth, Maine Civil Practice §14.2 at 291 (2d ed. 1970)). The commentary of the authors of Maine Civil Practice on this subject is noteworthy:

> It is important to note that since the third-party plaintiff's claim is based on some substantive right peculiar to him, such as contribution or indemnity, the statute of limitations that applies is that pertinent to that right, rather than that controlling the original plaintiff's claim. Thus, in impleader for contribution, the third-party plaintiff's claim does not even accrue for purposes of the statute of limitations until he has paid a judgment on the original claim. [The] impleader will be timely even if the statute has run on the original plaintiff.

Pursuant to M. R. Civ. P. 14(a) anytime after a suit is commenced, defendant as third-party plaintiff *may serve complaint on non-party when non-party may be liable to defendant for all or part of plaintiff's claim*. The reporter's notes for Rule 14 indicate "the use of this device is optional with the defendant, who may elect to wait and bring a separate action." The impleader or third-party claim will be considered timely even if the statute has run on the claims of the original plaintiff. *Saint Paul Ins. Co., v. Hayes*, 676 A.2d 510, 511 (Me. 1996). Where a party has paid a judgment or settled the case and seeks recovery for all or part of it from another, the statute of limitations does not begin to run until the settlement or time of judgment. *Id.*

Intentional Torts

Negligent Misrepresentation

In Maine, a claim of negligent misrepresentation must demonstrate that an individual in the course of his business profession or employment, or any other transaction in which he has pecuniary interest, supplies false information for the guides of others in their business transaction, is therefore subject to liability for pecuniary loss cause for them by their justified reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. *See Chapman v. Rideout*, 568 A.2d 829, 830 (Me. 1990), adopting Restatement (Second) of Torts §552(1) (1977). Negligent misrepresentation is a vehicle for asserting "claims for economic harm." *Jourdain v. Dineen*, 527 A.2d 1304, 1307 (Me. 1987).

Whether a party made a misrepresentation and whether the opposing party justifiably relied on a misrepresentation are questions of fact. *See McCarthy v. U.S.I. Corp.*, 678 A.2d 48, 53 (Me.1996); *Devine v. Roche Biomedical Labs., Inc.*, 637 A.2d 441, 446 (Me. 1994). Additionally, liability only attaches if, when communicating the information, the party making the alleged misrepresentation "fails to exercise the care or competence of a reasonable person under like circumstances," an inquiry that is likewise for the fact-finder. *Rand v. Bath Iron Works Corp.*, 832 A.2d 771 (Me. 2003). *See also St. Louis v. Wilkinson Law Office*, 2012 ME 116, 55 A.3d 443.

Fraud

In Maine, a claimant must prove that the defendant made a false representation of material fact, with knowledge of its falsity or in reckless disregard of whether it is true or false, for the purposes of inducing another to act or to refrain from acting in reliance upon it and the plaintiff justifiably relies upon the representation as true and acts upon it causing his damage. *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 776 (Me. 1989). To assert any fraud claim, one must specifically plead and describe the alleged fraudulent statements in the complaint, and the elements of fraud must be proven by "clear and convincing evidence." *Mariello v. Giguere*, 667 A.2d 588 (Me. 1995). In the *Mariello* case, a window distributor was held liable for fraud after the owner purchased double hung windows, but single pane windows were installed. A claimant has no duty to investigate fraudulent statements and comparative negligence is not a bar to claim fraud in Maine. *Letellier v. Small*, 400 A.2d 371, 376 (Me. 1979). However, a claim of fraud cannot be sustained where the truth was obvious on the face of a contract, and there was no evidence that changes to the contract were "hidden, inaccessible, or required any supplemental investigation." *Rared Manchester NH, LLC v. Rite Aid of NH, Inc.*, 693 F.3d 48 (1st Cir. 2012).

Warranties/Strict Liability

Implied warranty

In Maine every construction contract contains an implied warranty of workmanship. *Paine*, 612 A.2d at 235. The Law Court considers workmanlike to include a building "constructed in a reasonably skillful and workmanlike manner. The test is one of reasonableness, not perfection, the standard being, ordinarily, the quality of work that would be done by a worker of average skill and intelligence." *Wimmer v. Downey's Properties*, 406 A.2d 88, 93 (Me. 1997). Work performed in a workmanlike manner must be "in keeping with competent building practices." *Paine*, 612 A.2d 235. Construction work is "proper and workmanlike" where it meets the relevant code. *Parsons v. Beaulieu*, 429 A.2d 214 (Me. 1981). However, a contractor is not responsible for a code violation which is part of the design where the work was performed consistent with the design. *See Oczkowski*, 801 A.2d at 1008.

Where a party contracts to build a building for a specific purpose, the law reads into the contract a stipulation that the building shall be erected in a reasonably good and workmanlike manner and when completed shall be reasonably set for the intended purpose." *Gosselin v. Better Homes, Inc.*, 256 A.2d 629, 639 (Me. 1969). This standard is met by "having regard to the general nature and the situation of the projected object and the purpose for which it was manifestly designed." *Id.* The Law Court ruled that the warranty of workmanlike construction applies to the sale of a new house by a builder-vender. *Wimmer*, 406 A.2d at 92.

All homes sold by builder vendors in Maine come with an implied warranty of habitability. *Banville v. Huckins*, 407 A.2d 294 (Me. 1979).

Express Warranty

The Law Court has ruled that to establish and express warranty claim, the claimant must demonstrate (1) the existence of a promise amounting to an express warranty; (2) breach of that promise or warranty; and (3) damages. *Me. Energy Recovery Co. v. United Steel Structures, Inc.*, 1999 ME 31, ¶7, 724 A.2d 1248.

Maine's Home Construction Act requires contractors to include specific language in home construction contracts valued at greater than $3,000.00, including:

> In addition to any additional warranties agreed to by the parties, the contractor warrants that the work will be free from faulty materials; constructed according to the standards of the Building Code applicable for this location; constructed in a skillful manner and fit for habitation or appropriate use. The warranty rights and remedies set forth in the Maine Uniform Commercial Code apply to this contract.

Me. Rev. Stat. Ann. tit. 10, §1487(7)(2008).

Strict Liability

Me. Rev. Stat. Ann. tit. 14, §221(2007) requires "one who sells any goods or products in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods, or to his property, if the seller is engaged in the business of selling such a product and it is expected to and does reach the user or consumer without significant change in the condition in which it is sold. This section applies although the seller has exercised all possible care in the preparation and sale of his product and the user or consumer has not bought the product from or entered into any contractual relation with the seller."

The Law Court, held in *Dyer v. Maine Drilling and Blasting, Inc.*, that strict liability should be applied to abnormally dangerous activities in accordance with the Restatement (Second) of Torts §§519–20. *See* 2009 ME 126, 984 A.2d 210. The Court expressly overruled its prior decision in *Reynolds v. W.H. Hinman Co.*, 145 Me. 343, 75 A.2d 802 (1950) which had rejected a strict liability approach to blasting cases in favor of a negligence-based standard.

Worksite Accidents

The Maine Workers' Compensation Act provided exclusive remedy for workplace related construction injuries. *Gordan v. Cummings*, 2000 ME 68, ¶13, 756 A.2d 942. The employee's sole remedy for injury sustained on a construction site is to file a workers' compensation claim and may not bring any civil action against his or her current or former employer for an injury allegedly caused by his or her employer or employment. *Li D.C.N. Brown Co.*, 645 A.2d 606, 608 (Me. 1994); and *see Knox v. Combined Ins. Co. of America*, 542 A.2d 363 (Me. 1988).

Green Building Litigation

Me. Rev. Stat. Ann. tit. 5: §§1761 to 1770 (2013), Maine's Energy Conservation in Buildings Act, indicates that:

> No public improvement, as defined in this chapter, public school facility or other building or addition constructed or substantially renovated in whole or in part with public funds or using public loan guarantees, with an area in excess of 5,000 square feet, may be constructed without having secured from the designer a proper evaluation of life-cycle costs, as computed by a qualified architect or engineer. The requirements of this section with respect to substantial renovation shall pertain only to that portion of the building being renovated. Construction shall proceed only upon disclosing, for the design chosen, the life-cycle costs as determined in section 1764 and

> the capitalization of the initial construction costs of the facility or building. The life-cycle costs shall be a primary consideration in the selection of the design. As a minimum, the design shall meet the energy efficiency building performance standards promulgated by the Department of Economic and Community Development.

"Life cycle costs" are defined by the statute as (1) the reasonable and expected energy costs over the life of the building for illumination, power, temperature, humidity and ventilation; (2) the reasonable energy-related costs of maintaining the building; and (3) a comparison of energy-related and economic-related design alternatives. Me. Rev. Stat. Ann. tit. 5, §1764(2).

In addition to the life cycle costs analysis, "all planning and design for the construction of new or substantially renovated state-owned or state-leased buildings and buildings built with state funds, including buildings funded through state bonds or the Maine Municipal Bond Bank" shall (1) include consideration of architectural designs and energy systems that show the greatest net benefit over the life of the building by minimizing long-term energy and operating costs; (2) include an energy use target that exceeds by at least 20 percent the energy efficiency standards in effect for the commercial and institutional buildings under Maine law; and (3) include a life-cycle cost analysis that explicitly considers costs and benefits over a minimum of 30 years and that explicitly includes the public health and environmental benefits associated with energy-efficient building design and construction. Me. Rev. Stat. Ann. tit. 5, §1764A (2013).

Maine previously adopted an Energy-Efficiency Building Performance Standard Act. The Act has been largely repealed. The remaining section of the Act, Me. Rev. Stat. Ann. tit. 10, §1415-G, pertains to electric heating systems in subsidized housing, and prohibits the installation of "electric space heating equipment as the primary heating system" if that construction, remodeling or renovation is funded in whole or in part by public funds, guarantees or bond proceeds. *Id.* A builder or owner may apply for a waiver, but a building owner who violates this section or rules adopted under this section commits a civil violation for which a fine of not less than $100 nor more than 5 percent of the value of construction must be adjudged. Me. Rev. Stat. Ann. tit. 10, §1415-G(5).

Delay

Maine recognizes the concept of "time is of the essence." *Hill v. School Dist. No. 2 in Milburn*, 17 Me. 316 (1840). Whether time is of the essence is a factual question for the jury. *Raisin Mem'l Trust v. Casey*, 2008 ME 63, ¶21, 945 A.2d. 1211. However, a contract does not require that explicit language that "time is of the essence" where the contract may be read to mean that the parties are entitled to specific performance at such a time as to constitute "equivalent to recitation that time is of the essence." *Id.* at ¶20 (quoting *Frost v. Barrett*, 246 A.2d. 198, 201 (Me. 1968). The Law Court ruled in *Raisin Men'l Trust* that the circumstances and purpose of the contract shall be reviewed and considered when determining whether the time-is-of-the-essence standard exists. The court in *Telegraphone Corp.* ruled that where the terms of the contract make the time specified an essential element of the contract and that the consequences of a failure to perform have been contemplated by the parties at the time the contract is executed the express term will be determined to be validated by the court.

To be enforceable, a liquidated damages clause must meet a two-part test. *Raisin Mem'l Trust*, 945 A.2d at 1215. First, it must be "very difficult to estimate [the damages caused by the breach] accurately," and second, the amount fixed in the agreement must be a reasonable approximation of the loss caused by the breach. *Id.* (quotation marks omitted). We review the enforceability of a liquidated damages provision as a question of law. *Sisters of Charity Health System, Inc. v. Farrago*, 2011 ME 62, 21 A.3d 210.

The Law Court recognizes Act of God as an excuse to performance of a contract only where the act makes it impossible to reform the contract or prevents a competent person from performing the contract. *Knight v. Bean*, 22 Me. 531 (1843); *see also White v. Mann*, 26 Me. 361 (1846).

Maine Home Construction Contracts Act—Me. Rev. Stat. Ann. Tit.10, §§1486–1490 (1997)

Maine adopted a Home Construction Contracts Act Me. Rev. Stat. Ann. tit. 10, §§1486–1490 (1999) which applies to "home construction contracts" to build,

remodel or repair a residence, including not only structural work but also electrical, plumbing and heating work, carpeting, window replacements and other non-structural work." Me. Rev. Stat. Ann. Tit. 10, §1486(4). The Act defines "residence" as a dwelling with three or fewer living units and garages, if any. Residences of homeowners that include one or two rental units qualify as "residence" under the Act. *Runnells v. Quinn*, 2006 ME 7, ¶8, 890 A.2d 713.

The purpose of the Home Construction Contracts Act is to protect unsophisticated consumers from unscrupulous construction contractors.

The Act requires that any home construction contract for more than $3,000 in materials or labor must be in writing and must be signed by both the home construction contractor and the homeowner or lessee. Both the contractor and the homeowner or lessee must receive a copy of the executed contract prior to any work performance. Me. Rev. Stat. Ann. tit. 10, §1487 (1999 & Supp. 2007). The Act requires that the basic contract must contain the entire agreement between the homeowner or lessee and the home construction contractor and must contain at least the following:

1. **Names of parties.** The name, address and phone number of both the home construction contractor and the homeowner or lessee;
2. **Location.** The location of the property upon which the construction work is to be done;
3. **Work dates.** Both the estimated date of commencement of work and the estimated date when the work will be substantially completed.;
4. **Contract price.** The total contract price, including all costs to be incurred in the proper performance of the work, or, if the work is priced according to a "cost-plus" formula, the agreed-upon price and an estimate of the cost of labor and materials;
5. **Payment.** The method of payment, with the initial down payment being limited to no more than 1/3 of the total contract price;
6. **Description of the work.** A general description of the work and materials to be used;
7. **Warranty.** A warranty statement that reads:

   In addition to any additional warranties agreed to by the parties, the contractor warrants that the work will be free from faulty materials; constructed according to the standards of the building code applicable for this location; constructed in a skillful manner and fit for habitation or appropriate use. The warranty rights and remedies set forth in the Maine Uniform Commercial Code apply to this contract;
8. **Resolution of disputes.** A statement allowing the parties the option to adopt one of 3 methods of resolving contract disputes in addition to the option of a small claims action. At a minimum, this statement must provide the following information:

   If a dispute arises concerning the provisions of this contract or the performance by the parties that may not be resolved through a small claims action, then the parties agree to settle this dispute by jointly paying for one of the following (check only one):

   (1) Binding arbitration under the Maine Uniform Arbitration Act, in which the parties agree to accept as final the arbitrator's decision ( );

   (2) Nonbinding arbitration, with the parties free to reject the arbitrator's decision and to seek a solution through other means, including a lawsuit ( ); or

   (3) Mediation, in which the parties negotiate through a neutral mediator in an effort to resolve their differences in advance of filing a lawsuit ( );

   Me. Rev. Stat. Ann. tit. 10, §1487 (2009)
9. **Change orders.** A change order statement that reads:

   Any alteration or deviation from the above contractual specifications that results in a revision of the contract price will be executed only upon the parties entering into a written change order;
10. **Door-to-door sales.** If the contract is being used for sales regulated by the Maine's consumer solicitation sales law, a description of the consumer's rights to avoid the contract, as set forth in these laws;
11. **Residential insulation.** If the construction includes installation of insulation in an existing residence, any disclosures required by chapter 219, Insulation Contractors;
12. **Energy standards.** A statement by the contractor that chapter 214 establishes minimum energy efficiency building standards for new

residential construction, and whether the new building or an addition to an existing building will meet or exceed those standards;

13. **Consumer protection information.** As an addendum to the contract, a copy of the Attorney General's consumer protection information on home construction and repair, which includes information on contractors successfully sued by the State, as provided on the Attorney General's publicly accessible website; and
14. **Attorney General's publicly accessible website.** A clear and conspicuous notice that states that consumers are strongly advised to visit the Attorney General's publicly accessible website to gather current information on how to enforce their rights when constructing or repairing their homes, as well as the Attorney General's publicly accessible website address and telephone number.

Me. Rev. Stat. Ann. tit. 10, §1487.

Parties to a home construction contract may exempt themselves from the requirements of this chapter only if the contractor specifically informs the homeowner or lessee of his or her rights under the Act and the parties then mutually agree to a contract or change order that does not contain the information required by the Act. Me. Rev. Stat. Ann. tit. 10, §1489 (1999).

Failure to comply with the Act can result in the imposition of civil penalties and fines for each violation of the Act, as well as potential liability under the Maine Unfair Trade Practices Act. Me. Rev. Stat. Ann. tit. 10, §1490(1) (1999). It is unsettled whether damages are available for violations of the Home Construction Contracts Act. *See Advanced Constr. Corp. v. Pilecki*, 2006 ME 84, ¶1 n. 1, 901 A.2d 189, 192.

No action may be brought for a civil violation under Maine's Home Construction Contracts Act more than two years after the date of the occurrence of the violation. Me. Rev. Stat. Ann. tit. 10, §1490(2). Home construction contractors are not liable under the Act if the contractor can show by a preponderance of the evidence that the violation was unintentional and a bona fide error, notwithstanding the maintenance of procedures reasonably adopted to avoid any such error. Me. Rev. Stat. Ann. tit. 10, §1490(2).

Maine law suggests that even when an express contract violates the Home Construction Contracts Act, a contractor may still recover on the basis of an implied contract. *See Philbrook & Spinney Bldg. Contractors v. Hessert*, 2004 WL 1599220 at * 1 (Me. Super. June 29, 2004) (citing *William Mushero, Inc. v. Hull*, 667 A.2d 853, 855 (Me. 1995)).

Construction/Materialman's Lien

Maine has adopted a broad mechanic's lien statute to provide a remedy to those who work on construction projects. Maine's mechanic's lien law is extremely beneficial to contractors and others that provide labor and services for the improvement of real property. Maine courts "have long adhered to the principle that the mechanic's lien statutes [should] be construed and applied liberally to further their equity and efficacy, when it is clear that the lien has been honestly earned, and the lien claimant is within the statute." *Twin Island Dev. Corp. v. Winchester*, 512 A.2d 319, 323 (Me. 1986).

Under Maine law, if the labor and the materials are provided "by virtue of a contract with or by the consent of the owner," then the lien has priority over the interests of the owner. Under Maine law, the "owner" includes a mortgagee, since a mortgagee typically holds legal, but not equitable, title to the mortgaged property. *Carey v. Boulette*, 158 Me. 204, 182 A.2d 473 (1962).

Whoever performs or furnishes labor, material or whoever performs services, including a surveyor, an architect, or engineer used to erect, alter, move or repair a house, building, or public building, or its appurtenances has a lien on the land and/or the building including improvements. When the owner of the building has no legal interest in the land on which the building is erected or to which it is moved, the lien attaches to the building. Me. Rev. Stat. Ann. tit. 10, §3251 (1999 & Supp. 2007).

If the labor, materials or services were not furnished by a contract with the owner of the property affected, the owner may prevent such lien for labor, materials or services not then performed or furnished, by giving written notice to the person performing or furnishing the same that he or she will not be responsible therefore. Me. Rev. Stat. Ann. tit. 10, §3252 (1999).

Notice

The formal requirements for enforcing a lien are strictly followed. The exact requirements differ depending on whether the provider has a contract directly with the owner of the property or whether the provider is supplying his or her labor, materials or services indirectly to the project through another contractor or consultant. Regardless of the contractual relationship, all liens are eventually enforced by filing a lawsuit in court within one hundred and twenty days of the last date on which labor, materials or services were supplied by the lienor.

No Direct Contract with the Owner

If the lienor is not in direct contract with the owner, the lienor must file a lien certificate in the Registry of Deeds in the county in which the work was done within ninety days of the last date on which the lienor performed the work. Me. Rev. Stat. Ann. tit. 10, §3253 (Supp. 2007). The last day on which one performs work is not the last day on which punch items were completed, but the last day on which substantial work was done. *See*, *e.g.*, *Hahmel v. Warren*, 123 Me. 422, 123 A. 420 (1924).

If the lienor is not in direct contract with the owner, the lien certificate must state the amount due, give a reasonably sufficient description of the property, be signed by a person with personal knowledge of the amount due, must state the owner, if know, and must be made under oath. Me. Rev. Stat. Ann. tit. 10, §3253. In addition to this filing, the lienor must file a lawsuit against the owner and other within one hundred and twenty days of the work. Me. Rev. Stat. Ann. tit. 10, §3253(1).

Special rules apply to homeowner contracts. If the contractor is not in direct contract with the owner of the property and the owner resides on the property, the contractor must comply with the "homeowner's notice requirement." A special notice must be given that warns the owner that the contractor is asserting a lien. This written notice must contain a description of the property, the name of the owner, that the person giving notice is going to perform or furnish, is performing or furnishing or has performed or furnished labor, materials or services, and a statement that the owner's failure to assure that the contractor is paid before making further payments to others may result in the owner paying twice for the same work. Me. Rev. Stat. Ann. tit. 10, §3255(3) (1999 & Supp. 2007). In any event, under the mechanic's lien statutes, a subcontractor's recovery from the homeowner is limited to the lesser of the amount of money owned by the homeowner to the general contractor or the outstanding balance due the subcontractor. *McCormack Building Supply, Inc. v. Giroux Dev., Inc*., 2005 WL 2723634 at *3 (Me. Super. Aug. 16, 2005); *John W. Goodwin, Inc. v. Fox*, 1999 ME 33, ¶17, 725 A.2d 541, 544 ("After the homeowner receives notice of the mechanic's lien, the lien may be enforced against the property affected only to the extent of the 'balance due' to the person with whom the homeowner has directly contracted.").

This special notice for homeowners does not apply "where labor, materials, or services are performed or furnished to the premises for a business, commercial or industrial purpose unless the owner resides on the premises affected." Me. Rev. Stat. Ann. tit. 10, §3255(3).

Direct Contract with Owner

If the lienor is in direct contract with the owner of the property, the lienor need not file a lien certificate. The only requirement for lien perfection in such a case is that the lienor file an enforcement action to "perfect" his or her lien within one hundred and twenty days of the last date of work.

Enforcement of Lien

The Lien Complaint

Maine law also prescribes the content of the lien complaint. The complaint must state that a lien is claimed and must set forth a complete property description alleging that labor, materials, or services were furnished toward the construction, alteration, improvement, repair or moving of real property, and were incorporated into the improved real estate that the work was done by contract with the owner or with the knowledge and consent of the owner, and that the lienor complied with the applicable lien certificate recording requirements. The complaint shall pray that the property be sold and the proceeds applied to the discharge of such lien. Me. Rev. Stat. Ann. tit. 10, §3257 (1999).

Under Maine law, the lien complaint need only be filed within one hundred and twenty days of the last day of work, but may be served sometime thereafter provided that the service complies with Maine's

Rules of Civil Procedure. *Maguire Construction, Inc. v. Forster*, 2006 ME 112, ¶14, 905 A.2d 813, 817.

Lien Certificate to be Filed with Registry of Deeds

When a lien complaint on real estate is filed with the court in Maine, the clerk of that court, upon written request of the contractor's attorney, will file a certificate setting forth the names of the parties, the date of the complaint and of the filing of the complaint and a description of the real estate as described in the complaint in the registry of deeds for the county or district in which the land is situated. Me. Rev. Stat. Ann. tit. 10, §3261(1) (Supp. 2007).

Regardless, Me. Rev. Stat. Ann. tit. 10, §3261(2) (Supp. 2007), requires that within sixty days of the filing of the lien complaint, the contractor must have caused each of the following to be recorded with the registry of deeds for the county or district in which the complaint was filed:

(1) A certificate of the court clerk;

(2) An affidavit of the contractor or contractor's attorney setting forth the name of the court in which the complaint was filed, the names of the parties, the date of the complaint and of the filing of the complaint, a description of the real estate as described in the complaint and the name, address and telephone number of the claimant or the claimant's attorney; or

(3) An attested copy of the complaint.

The failure to file notice of a lien complaint does not invalidate a lien, but if notice of the filing of a lien complaint is not recorded in the registry of deeds in accordance with this section before a bona fide purchaser takes title to the premises, the bona fide purchaser for value takes title free of the lien. Me. Rev. Stat. Ann. tit. 10, §3261(3) (Supp. 2007).

Surety/Bond

Performance and Payment Bonds

Me. Rev. Stat. Ann. tit. 14, §871(1999) requires that before any contract exceeding $125,000 in amount for the construction, alteration or repair of any public building or other public improvement or public work, including highways, is awarded to any person by the State or by any political subdivision or quasi-municipal corporation or by any public authority, that person must furnish to the State or to the other contracting body, as the case may be, the following surety bonds:

A. A performance bond in an amount equal to the full contract amount, conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions thereof. Such a bond is solely for the protection of the State or the contracting body awarding the contract, as the case may be. A performance bond issued pursuant to this paragraph must include on its face the name of and contact information for the surety company that issued the bond; and

B. A payment bond in an amount equal to the full amount of the contract solely for the protection of claimants supplying labor or materials to the contractor or the contractor's subcontractor in the prosecution of the work provided for in the contract. The term "materials" includes rental of equipment. A payment bond issued pursuant to this paragraph must include on its face the name of and contact information for the surety company that issued the bond.

When required by the contracting authority, the contractor shall furnish bid security in an amount the contracting authority considers sufficient to guarantee that if the work is awarded the contractor will contract with the contracting agency. The bid security may be in the form of United States postal money order, official bank checks, cashiers' checks, certificates of deposit, certified checks, money in escrow, bonds from parties other than bonding companies subject to an adequate financial standing documented by a financial statement of the party giving the surety, bond or bonds from a surety company or companies duly authorized to do business in the State.

The bid security may be required at the discretion of the contracting authority to ensure that the contractor is bondable. The bid securities other than bid bonds must be returned to the respective unsuccessful bidders. The bid security of the successful bidder must be returned to the contractor upon the execution and delivery to the contracting agency of the contract and performance and payment bonds, in terms satisfactory to the contracting agency for the due execution of the work.

Notwithstanding the surety bond requirements of subsection 3, at the discretion of the State or other contracting authority, a person may provide an irrevocable letter of credit in lieu of the performance bond required by subsection 3, paragraph A or the payment bond required by subsection 3, paragraph B, or both, to the State or the contracting authority.

Any person who has furnished labor or material to the contractor or to a subcontractor of the contractor in the prosecution of the work provided for in a contract in respect to which a payment bond has been furnished under subsection 3, paragraph B, and who has not been paid in full before the expiration of 90 days after the day on which the last of the labor was performed by that person or material was furnished or supplied by that person for which a claim is made, may bring an action on the payment bond in that person's own name for the amount, or the balance thereof, unpaid at the time of the institution of the action.

Any such claimant having a direct contractual relationship with a subcontractor of the contractor furnishing such a payment bond but no contractual relationship, express or implied, with that contractor does not have the right of action upon that payment bond unless the claimant has given written notice to the contractor within 90 days from the date on which the claimant performed the last of the labor, or furnished or supplied the last of the material for which the claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such a notice must be served by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office or conducts business, or at the contractor's residence.

Any such action may not be commenced after the expiration of one year from the date on which the last of the labor was performed or material was supplied for the payment of which the action is brought, except that in the case of a material supplier, when the amount of the claim is not ascertainable due to the unavailability of final quantity estimates, the action may be commenced before the expiration of one year from the date on which the final quantity estimates are determined. The notice of claim from the material supplier to the contractor furnishing the payment bond must be filed before the expiration of 90 days following the determination by the contracting authority of the final quantity estimates.

Defenses

Statute of Limitations

In Maine, civil actions based on negligence and breach of contract must be commenced within *six* years after the cause of action has accrued. Me. Rev. Stat. Ann. tit. 14, §752 (2007). The statute of limitations for tort actions, will begin to run when the act causing injury accrues. *Bangor Water Dist.*, 34 A.2d at 1328. In a breach of contract, negligence or warranty claim, the statute of limitations begins to accrue when the breach occurs. *Dunelawn Owners' Ass'n v. Gendreau*, 2000 ME 94, ¶11, 750 A.2d 591.

However, the statute does not specify when the cause of action accrues. When the Legislature does not give explicit directions, "definition of the time of accrual… remains a judicial function." *Anderson v. Neal*, 428 A.2d 1189, 1191 (Me. 1981). Generally, the Law Court defines the time of accrual as "the time the plaintiff sustains a judicially cognizable injury." *Chiapetta v. Clark Assocs.*, 521 A.2d 697, 699 (Me. 1987). In some cases it has held that the cause of action does not accrue until the plaintiff discovers or reasonably should have discovered the cause of action. *See Myrick v. James*, 444 A.2d 987, 996 (Me. 1982) (foreign-object surgical malpractice). In *Anderson*, the Court held that application of the discovery rule is appropriate only when there exists a fiduciary relationship between the plaintiff and defendant, the plaintiff must rely on the defendant's advice as a fiduciary, and the cause of action was virtually undiscoverable absent an independent investigation that would be destructive of the fiduciary relationship. *See Anderson*, 428 A.2d at 1192. In the case of *Nevin v. Union Trust Co.*, 726 A.2d 694, 699 (Me. 1999), the Court limited the use of the discovery rule as a defense to situations where a fiduciary relationship exists between the parties, where the claimant relied on the advice of the fiduciary and absent an independent investigation the conditions leading to the potential cause of action were undiscoverable.

The Law Court has not adopted the continuing violations doctrine to toll of the six-year limitations period for filing private complaint. *McKinnon v. Honeywell Intern., Inc.*, 2009 ME 69, 977 A.2d 420. However, the United States District Court, District of

Maine, adopted the continuing violations doctrine, and ruled that Maine's six-year statute of limitations was tolled for negligence claims, in property owner's action against purported prior owners of the property, seeking costs incurred in connection with environmental cleanup at the property. *Frontier Communications Corp. v. Barrett Paving Materials, Inc.*, 631 F. Supp. 2d 110 (D. Me. 2009).

Claims for breach of warranty under Maine's UCC are subject to a 4-year statute of limitations which begins to run at the time of the injury. Me. Rev. Stat. Ann. Tit. 11, §2-725 (1)(2) (2007).

Any claim under Maine's Home Construction Act shall be filed within two years of the violation. Me. Rev. Stat. Ann. Tit 10, §1490(2) (2007).

Statute of Repose

Maine recognizes a *ten* year statute of repose following the substantial completion of construction contracts or the substantial completion of construction services, where a contract is not involved. Me. Rev. Stat. Ann. tit. 14, §752-A (2007). The statute exclusively protects professional architects or engineers from malpractice claims or professional negligence, and not contractors, within *four* years after the discovery of the alleged malpractice or negligence. *Id.*; *see also Bangor Water Dist. v. Malcolm Pirnie Engineers*, 534 A.2d 1326, 1329 (Me. 1988) The limitation periods provided by this section shall not apply if the parties have entered into a valid contract which by its terms provides for limitation periods other than those set forth in this section. *Id.*

Me. Rev. Stat. Ann. tit. 14, §752-B Me. Rev. Stat. Ann. tit. 14, §752-D protects licensed land surveyors from liability in civil actions raised *ten* years after the completion of a plan or professional services where no plan is prepared, or within *four* years after the discovery of the alleged negligence or malpractice. *Id.*; *see also Johnson v. Dow & Coulombe, Inc.*, 686 A.2d 1064 (Me. 1996).

Contributory and Comparative Negligence

In Maine, comparative negligence is statutory and applies when "Any person suffers… damages as a result partly of that person's own fault and partly of the fault of any other person or persons, a claim… may not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof must be reduced to such extent as the jury thinks just and equitable having regard to the claimant's share in the responsibility for damage." Me. Rev. Stat. Ann. Tit. 14, §156.

"When damages are recoverable by any person by virtue of this section, subject to such reduction as is mentioned, the court shall instruct the jury to find and record the total damages that would have been recoverable if the claimant had not been at fault, and further instruct the jury to reduce the total damages by dollars and cents, and not by percentage, to the extent considered just and equitable, having regard to the claimant's share in the responsibility for the damages, and instruct the jury to return both amounts with the knowledge that the lesser figure is the final verdict in the case." *Id.* The statute defines fault as "negligence, breach of statutory duty or other act or omission that gives rise to a liability in tort or would, apart from this section, give rise to the defense of contributory negligence." *Id.*

Where a "claimant is found by the jury to be equally at fault, the claimant may not recover." *Id.*

In cases involving multiparty defendants, "each defendant is jointly and severally liable to the plaintiff for the full amount of the plaintiff's damages. However, any defendant has the right through the use of special interrogatories to request of the jury the percentage of fault contributed by each defendant. If a defendant is released by the plaintiff under an agreement that precludes the plaintiff from collecting against remaining parties that portion of any damages attributable to the released defendant's share of responsibility. However, "the trial court must preserve for the remaining parties a fair opportunity to adjudicate the liability of the released and dismissed defendant. Remaining parties may conduct discovery against a released and dismissed defendant and invoke evidentiary rules at trial as if the released and dismissed defendant were still a party."

The focus and analysis in a comparative negligence claim is often conditioned on whether the plaintiff's negligence was a proximate cause of the underlying harm that gave rise to the plaintiff's damages. *See Searles v. Fleetwood Homes of Penn., Inc.*, 2005 ME 94, ¶38, 878 A.2d 509. However, the negligence of the plaintiff does not bar his or her recovery unless his fault is at least equal to that of the defendant, or defendants. *Herrick v. Theberg*, 474

A.2d 870, 874 (Me. 1984). Comparative negligence is not a defense to intentional torts including negligent misrepresentation and fraud. *See McLain v. Training & Dev. Corp.*, 572 A.2d 494, 497 (Me. 1990).

Waiver

In Maine, the Law Court has recognized that waiver exists where specifically included in the terms of an express contract or by the course of conduct of a party. A course of conduct waiver includes that the right in question has not been insisted upon by the waiving party based upon a reasonable inference. *Saga v. Voornes*, 2000 ME 156, ¶9, 756 A.2d 954.

When the facts upon which waiver is based are not in dispute, the determination of whether a party has waived its contractual right to arbitration is a question of law for the court. *Id.* In addition, Maine has adopted a strong policy favoring the enforcement of arbitration clauses. *J.M. Huber Corp. v. Main-Erabauer, Inc.*, 493 A.2d 1048, 1050 (Me. 1985). While courts that have addressed the issue of waiver have not reached an agreement over all the required elements to find a waiver, they do agree that the party seeking to compel arbitration must have undertaken a course of action. *Voornes*, 756 A.2d at 958.

Maine courts will consider whether or not the parties have undertaken a course of action inconsistent with their present demand for arbitration, as they have not litigated substantial issues going to the merits of the case. *Id.* "The relevant question is whether the parties have litigated 'substantial issues going to the merits' of the claims without any indication that, despite the dispute's presence in court, a party intends to exercise its contractual right to arbitration.") *Voornes*, 756 A. 2d at 961. "Prejudice… refers to the inherent unfairness—in terms of delay, expense, or damage to a party's legal position—that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." *Id.*

Estoppel

In Maine, an insurer may be estopped from denying coverage when the party claiming coverage has demonstrated (1) unreasonable conduct of the insurer that misleads the insured concerning the scope of his coverage and (2) justifiable and detrimental reliance by the insured upon the insurer's conduct. *Maine Mutual Fire Ins. Co. v. Grant*, 674 A.2d 503, 504 (Me. 1996). The conduct at issue must have justifiably misled the claimant into believing that coverage would exist. *Id.*

Contractual Limitations on Liability and Damages

Maine recognizes contract clauses that limit damages and liability, including indemnification provisions, limitation of damages provisions, limitations of liability clauses and waivers of subrogation. Generally, Maine has treated limitation of liability agreements similar to the treatment of indemnity agreements which are governed by the principals of contract law. Maine's trial courts have permitted limitation of liability agreements and indemnity agreements after considering the "plain, unambiguous language compensation of the agreements." *Devine v. Roache Biomedical Lab.*, 637 A.2d 441, 446 (Me. 1994).

Indemnity Agreements

The Law Court validated hold harmless agreements in *Emery Waterhouse Co. v. Lea*, 467 A.2d 986, 993 (Me. 1983). The court in *Emery Warehouse* concluded that indemnity clauses to save a party harmless from damages due to negligence may lawfully be inserted in contracts such as the lease entered into between Emery Associates and Emery Waterhouse, and such clauses are not against public policy. *Denaco v. Blanche*, 148 Me. 120, 124–25, 90 A.2d 707, 709 (1952); *E.L. Cleveland Co. v. Bangor & Aroostook Railroad Co.*, 133 Me. 62, 173 A. 813 (1934).

However, when requiring indemnification of a party for damage or injury caused by that party's own negligence, such contractual provisions, with virtual unanimity, are looked upon with disfavor by the courts, and are construed strictly against extending the indemnification to include recovery by the indemnitee for his own negligence. *Doyle v. Bowdoin College*, 403 A.2d 1206, 1208–09 (Me. 1979); *United States v. Seckinger*, 397 U.S. 203, 211–12, 90 S. Ct. 880, 885, 25 L. Ed. 2d 224 (1970). According to the Law Court, it is only where the contract on its face by its very terms clearly and unequivocally reflects a mutual intention on the part of the parties to provide indemnity for loss caused by negligence of the party to be indemnified that liability for such damages will be fastened on the indemnitor, and words of general

import will not be read as expressing such an intent and establishing by inference such liability. *Emery Waterhouse Co.*, 467 A.2d at 993.

Where a hold harmless provision is construed to be *ambiguous*, the court will find against the party seeking the indemnification. *Lloyd v. Sugarloaf Mountain Corp.*, 833 A.2d 1, 4 (Me. 2003), *see also McGraw v. S.D. Warren Co.*, 656 A.2d 1220 (Me. 1995). An indemnification claim based on a contract must rest on clear, express, specific and explicit contractual provision, under which the party against whom the claim is made has assumed the duty to indemnify in a contract. *See Devine*, 637 A.2d at 446. However, non contractual indemnification is not recognized in Maine. *Roberts v. American Chain and Cable Co.*, 259 A.2d 43, 50 (Me. 1969).

Waiver of Subrogation

The Law Court in Maine favors waiver of subrogation provisions as an alternative to litigation and as a contractual risk shifting mechanism. "Waivers of subrogation are encouraged by the law and serve important social goals: encouraging parties to anticipate risk and to procure insurance covering those risks, thereby avoiding future litigation, and facilitating and preserving economic relations and activity." *Reliance Nat'l Indemnity v. Knowles Industrial Services Corp.*, 2005 ME 29, 868 A.2d 220; *see also Acadia Ins. Co. v. Buck Construction, Co.*, 2000 ME 154, 756 A.2d 515. In *Acadia Ins. Co.*, the law court held that a contract with insurance procurement clauses, without explicit subrogation waiver provisions, acted as a subrogation waiver. *See Acadia Ins. Co.*, 2000 ME 154, ¶¶11–17. The Law Court in *Reliance Indemnity*, declined to carve out a public policy exception to a waiver of subrogation provision, for malicious or wanton misconduct, or its violation of a positive statutory duty, or because enforcement will be harmful to the interests of society. *Reliance Indemnity*, 2005 ME 29, ¶¶14–27.

The Law Court also interpreted the waiver of subrogation provision in *Reliance Indemnity*, which applied to "separate contractors" and "all other subcontractors," to include product manufacturers or suppliers, and those who furnish labor. *Id.* at ¶26.

Intervening and Superseding Causes

The law court has recognized that a person liable for original act of negligence and not liable for any injury related thereto if a third person's independent act intervened and was the proximate cause of the damage suffered. *See Petersen's Case*, 25 A.2d. 240, 241 (Me. 1942). In 2001 the Court again concluded that proximate cause is a cause that is unbroken by an efficient intervening cause. *Johnson v. Carleton*, 2001 ME 12, ¶12, 765 A.2d 571. Where the intervening act is foreseeable, the liability of the first wrong doer is not excused. *Petersen's Case*, 138 Me. 289. However, the mere occurrence of an intervening cause is not enough and does not automatically break the chain of causation. *Ames v. Dipietro-K Corp.*, 617 A.2d 559, 561 (Me. 1992). The Law Court further found that the intervening cause must be superseding and neither anticipated nor reasonable foreseeable. *Id.*

Failure to Mitigate

In Maine, where a party "has it in his power to take measures, by which his loss may be less aggravated this will be expected of him." *See Miller v. Mariner's Church*, 7 Me. 51, 55 (1830). "The touchstone of the duty to mitigate is reasonableness. The non-breach of party need only take reasonable steps to minimize his losses." *Schiavi Mobile Homes, Inc. v. Gironda*, 463 A.2d 722, 725 (Me. 1983).

Economic Loss Rule

In Maine, the Economic Loss Rule bars the purchaser of defective goods or services from recovery in tort when the duties of the parties are contractual in nature. *Oceanside at Pine Point Condo. Owners Ass'n. v. Peachtree Doors, Inc.*, 659 A.2d 267, 269–70 (Me. 1995). Economic losses do not include personal injury or damage to other property. *Id.* The *Oceanside* Court approved the doctrine and, quoting an the Illinois Supreme Court, defined economic losses to include "'damages for inadequate value, costs of repair and replacement of defective product, or consequent loss of profits—without any claim of personal injury or damage to other property." *Oceanside*, 659 A.2d at 270 n.4 (quoting *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443, 449 (III. 1992)).

In *Oceanside*, the law court barred a negligence claim against a window manufacturer after defective windows had caused damage to the plaintiff's new construction. *Id.* The law court considered the plaintiff's "product" to be the home which they purchased as opposed to merely the windows supplied

by the defendant and how that the economic loss doctrine barred the owners' negligence claims. The federal court in Maine has applied the economic loss doctrine to service contracts. *See Maine Rubber Int'l v. Env. Mgt. Group, Inc.*, 295 F. Supp. 2d 125, 128 (D. Me. 2003). The economic loss doctrine creates "the fundamental boundary between the law of contracts, which is designed to enforce expectations created by agreement and the law of torts which is designed to protect citizens and their property by imposing a duty of reasonable care." *Bank North, N.A. v. BJ's Wholesale Club, Inc.*, 394 F. Supp. 2d 283, 287 (D. Me. 2005) (quoting *Fireman's Fund Ins. Co. v. Childs*, 52 F. Supp. 2d 139, 141 (D. Me. 1999).

The Superior courts of Maine have applied the economic loss doctrine into the sale of goods and services. *Twin Town Homes, Inc. v. Moley*, CV-01-298, 2002 WL 32068353 (Me. Super. Nov. 14, 2002), and *see Bareuther v. Gardner*, CV-99-352., 2000 WL 33675355 (Me. Super. June 21, 2000).

Spearin *Doctrine*

The Law Court recognized the Spearin Doctrine in *Paine v. Spottiswoode*, 612 A.2d 235, 238 (Me. 1992). The court in *Spottiswoode* ruled that the contractor need build in accordance with the plan and specifications, but also in a workmanlike manner. *Spottiswoode*, 612 A.2d at 238. Although an owner may warrant a sufficiency of plan the contractor is not relieved of his duty to perform his work in a workmanlike manner. *Gosselin v. Better Homes, Inc.*, 256 A.2d 629, 640 (Me. 1969). "Whether the contractor has skillfully complied with the owner's specifications… is a question for the fact finder." *Id.*

Exclusive Remedy

Under Maine law, recovery under the Workers' Compensation Act provides the exclusive remedy for workplace injuries. *Gordan v. Cummings*, 2000 ME 68, ¶12, 756 A.2d 942, 945. An employee or former employee cannot bring a civil action against his or her current or former employer for an injury allegedly caused by his or her employer or employment. Rather, the employee's remedy is to file a workers' compensation claim. This plain rule of law was established in the cases of *Li v. C.N. Brown Co.*, 645 A.2d 606, 608 (Me. 1994) and *Knox v. Combined Ins. Co. of America*, 542 A.2d 363 (Me. 1988).

Notice and Opportunity to Cure

Although there is a dearth of case law on the subject, there does not seem to be support for a common law right of notice and opportunity to cure under Maine law. It is likely, however, that a Maine court would enforce a contractual provision providing for notice and opportunity to cure.

Arbitration/ADR

Me. Rev. Stat. Ann. tit. 14, §§5927–5949 (1999) is Maine's version of the Uniform Arbitration Act. Under the Act or an agreement to submit an existing controversy to arbitration or provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exists at law or in equity for revocation or rescission of any contract. Me. Rev. Stat. Ann. tit. 14, §5927.

Maine courts are required to order the parties to proceed with arbitration upon application of party seeking to confirm the arbitration agreement contained in a contract. Me. Rev. Stat. Ann. tit. 14, §5928(1) where the arbitration agreement is disputed, the court must proceed to a legal determination of the issue of the existence of the arbitration agreement. *Id.* The court may stay an arbitration proceeding commenced or threatened on a showing with foundation that there is no agreement to arbitrate. Me. Rev. Stat. Ann. tit. 14, §5928(2).

The Law Court has specifically held that arbitration clause does not constitute a waiver of a right to perfect a mechanics' lien by filing of a civil action as required by the mechanics' lien statute. *Buckminster v. Acardia Village Resort*, 565 A.2d. 313 (Me. 1980).

Maine Rule of Civil Procedure 16B requires that parties who file suit at the Superior Court, or are removed from the Maine District Court to the Superior Court must submit to alternative dispute resolution, with limited exceptions. Pursuant to Rule 16B within 60 days of a Rule 16A scheduling order the parties shall schedule an alternative dispute resolution conference, which shall be held within 120 days of the scheduling conference.

Measure and Types of Damages

The Law Court requires special damages to be proved to a reasonable certainty. *Wendward Corp.*

v. Group Design, Inc., 428 A.2d 57, 61 (Me. 1981), *see also Michaud v. Steckino, Me.*, 390 A.2d 524 (1978); *McDougal v. Hunt*, 76 A.2d 857 (Me. 1950). The burden of proving such damages rests on the plaintiff. *Dairy Farm Leasing Co., Inc. v. Hartley*, 395 A.2d 1135 (Me. 1978). That measure which most precisely compensates a plaintiff for its loss and which may be used without conjecture or speculation should be applied. *Wendward*, 428 A.2d at 61.

Consequential Damages

Consequential damages are damages which do not flow from the ordinary course of an event but rather emerges as a result of the consequence of the event. *Forbes v. Wells Beach Casino, Inc.*, 409 A.2d 646, 654–655 (Me. 1979). Consequential damages however are only recoverable where they are foreseeable or where contemplated by the parties by both of the contracting parties as a possible or as a probable result of the breach. *See Me. Rubber Int'l v. Envtl. Mgmt. Group*, 324 F. Supp. 2d, 32, 34 (D. Me. 2004). In Maine, where parties are reasonable aware of the circumstances relating to the unique needs and characteristics of the parties at the time the contract was created consequential damages may be awarded. *Williams v. Ubaldo*, 670 A.2d 913, 918 (Me. 1996).

Delay and Disruption Damages

Generally, the Maine trial courts permit the recovery of delay damages, if based in contract. *Foster v. Holley*, RE-02-39, 2003 WL 21386703 (Me. Super. May 14, 2003). Delay damages must have been reasonably foreseeable under the contract. *Id.* The amount of the delay damages must be proven to a reasonable degree of certainty and not rest on speculation or conjecture. *Wendward Corp.*, 428 A.2d at 61.

Measure of Damages to Real Property

A plaintiff's measure of damages to real property is the diminution in value of the property. *Borneman v. Milliken*, 124a. 200, 203 (Me. 1924). *See also Lerman v. The City of Portland*, 695 F. Supp. 11 (D. Me. 1987).

Where a property can be restored to its original condition for less than the diminution value, the court may consider the cost of restoration to be submitted as a measure of damages. *Com. of Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652, 672–73 (1st Cir. 1980).

Attorney's fees

A court's authority to award attorney fees may be determined by statute, by the 'American Rule' at common law which generally prohibits taxing the losing party in litigation with a successful opponent's attorney fees, or by certain recognized common law authorizations of attorney fees. *Baker v. Manter*, 2001 ME 26, ¶17, 765 A.2d 583. Although the prevailing party is not ordinarily entitled to an award of attorney fees, courts may award fees as damages for certain egregious conduct, *id.* (citation omitted), and for some kinds of tortious conduct, *Murphy v. Murphy*, 694 A.2d 932, 935 (Me. 1997). *See also Chiappetta v. LeBlond*, 544 A.2d 759, 760 (Me. 1988) (holding that trial court possess inherent authority to sanction parties and attorneys for abuse of the litigation process). Absent a contract or statute, each party to litigation is responsible for paying its attorneys' fees. This is consistent with the American rule. *Soley v. Karll*, 2004 ME 89, ¶15, 853 A.2d 755.

Because of the "American Rule," trial "courts should exercise their inherent authority to award attorney fees as a sanction only in the most extraordinary circumstances." *Linscott v. Foy*, 1998 ME 206, ¶17, 716 A.2d 1017. The trial court's authority to sanction parties and attorneys for abuse of the litigation process "should be sparingly used and sanctions imposed only when the abuse of process by parties or counsel is clear." *Chiappetta v. LeBlond*, 544 A.2d 759, 761 (Me. 1988).

Violation of the Unfair Trade Practices Act or Maine's Home Construction Act may permit a homeowner to recover attorney fees. Further, the prompt payment statute permits the "prevailing party" to recover fees when a contractor or subcontractor brings suit for non-payment. Me. Rev. Stat. Ann. tit. 10 §1118. The attorneys' fees provision of §1118 allows the "substantial prevailing party" to recover attorneys' fees. Id §1118 (4). Attorney's fees are recoverable pursuant to the Unfair Trade Practices Act only to the extent that the fees were earned pursuing the Unfair Trade Practices Act claim. *William Mushero, Inc.*, 667 at 855.

Interest

In Maine, the statutory pre-judgment interest rate is one-year United States Treasury bill rate plus 3 percent. Me. Rev. Stat. Ann. tit. 14, §1602-B(3) (Supp. 2008). In the event that a civil suit involves a contract

or note that contains a provision relating to interest, prejudgment interest is allowed at the rate set forth in the contract or note. Me. Rev. Stat. Ann. tit. 14, §1602-B(2) (Supp. 2008).

Prejudgment interest accrues from the time of notice of claim setting forth under oath the cause of action, served personally or by registered or certified mail upon the defendant, until the date on which an order of judgment is entered. If a notice of claim has not been given to the defendant, prejudgment interest accrues from the date on which the complaint is filed. In actions involving a contract or note that contains a provision relating to interest, the rate of interest is fixed as of the time the notice of claim is given or, if a notice of claim has not been given, as of the date on which the complaint is filed. Me. Rev. Stat. Ann. tit. 14, §1602-B(5) (Supp. 2008).

If the prevailing party at any time requests and obtains a continuance for a period in excess of 30 days, interest is suspended for the duration of the continuance. On petition of the nonprevailing party and on a showing of good cause, the Maine courts may order that interest awarded by this section be fully or partially waived. Me. Rev. Stat. Ann. tit. 14, §1602-B(5) (Supp. 2008).

In Maine, the statutory post-judgment interest rate is one-year United States Treasury bill rate plus 6 percent. Me. Rev. Stat. Ann. tit. 14, §1602-C(1)(B)(1) (Supp. 2008). In the event that a civil suit involves a contract or note that contains a provision relating to interest, post-judgment interest is allowed at the rate set forth in the contract or note. Me. Rev. Stat. Ann. tit. 14, §1602-C(1)(A) (Supp. 2008). The applicable post-judgment interest rate must be stated in the judgment. Me. Rev. Stat. Ann. tit. 14, §1602-C(1) (Supp. 2008).

Post-judgment interest accrues from and after the date of entry of judgment and includes the period of any appeal. Me. Rev. Stat. Ann. tit. 14, §1602-C(2) (Supp. 2008). In actions involving a contract or note that contains a provision relating to interest, the rate of interest is fixed as of the date of judgment. *Id.* If the prevailing party at any time requests and obtains a continuance for a period in excess of 30 days, interest is suspended for the duration of the continuance. *Id.* On petition of the nonprevailing party and on a showing of good cause, the trial court may order that interest awarded by this section be fully or partially waived. *Id.*

Punitive damages

In Maine a plaintiff must prove "malice" which is defined as deliberate ill will towards the plaintiff or conduct so outrageous that ill will may be implied. *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985). It is not enough to prove deliberate, gross want on a reckless conduct *Boivin v. Jones and Fining*, 578 A.2d 187 (Me. 1990). As a practical matter punitive damage is difficult to recover in Maine, and though have been alleged in a construction context, rarely become a factor of consideration for the fact finder, absence severe malice or ill will.

To obtain an award of punitive damages in Maine, the plaintiff must prove by clear and convincing evidence that the defendant acted with malice *Morgan v. Koositra*, 2008 ME 26, 941 A.2d 447. However, punitive damages are not permitted in breach of contract cases, no matter how egregious the breach. *See Drinkwater*, 563 A.2d at 776. In addition, pursuant to Me. Rev. State. Ann. Tit. 5 §213(1), punitive damages are not available under the Unfair Trade Practices claim. *Mainely Marine Sales & Service, Inc. v. Worrey*, 2006 WL 1668039 at *4 (Me. Super. April 10, 2006).

Stigma damages

There are no reported opinions in Maine regarding "stigma damages."

Maine Unfair Trade Practices Act

The Maine Unfair Trade Practices Act, Me. Rev. State. Ann. Tit. 5 §205-A to 214 (2007), provides consumers with a private remedy for unfair methods of competition. The Act provides protection for consumers against unfair and deceptive trade practices. *Id.* It declares unlawful "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Me. Rev. State. Ann. Tit. 5 §207. In enacting the UTPA in 1969, the Legislature intended "to bring into Maine law the federal interpretations of 'unfair methods of competition and unfair or deceptive acts or practices[,]' " as set forth in the Federal Trade Commission Act. *Bartner v. Carter*, 405 A.2d 194, 199–201 (Me. 1979).

The Act does not contain a definition of either the term "unfair" or "deceptive." *State of Maine v. Shattuck*, 2000 ME 38, ¶13, 747 A.2d. 174. Determination of whether an act or practice is "unfair or deceptive"

in violation of the UTPA must be made by the fact-finder on a case-by-case basis. *Binette v. Dyer Library Ass'n*, 688 A.2d 898, 906 (Me. 1996). To justify a finding of unfairness, the act or practice: (1) must cause, or be likely to cause, substantial injury to consumers; (2) that is not reasonably avoidable by consumers; and (3) that is not outweighed by any countervailing benefits to consumers or competition. *Tungate v. MacLean-Stevens Studios, Inc.*, 1998 ME 162, ¶9, 714 A.2d 792.

The Law Court adopted the "clear and understandable standard" articulated by the FTC and the federal courts. *State of Maine v. Weinschenk*, 2005 ME 28, ¶11, 868 A.2d 200 (quoting *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164 (1984)). An act or practice is deceptive if it is a material representation, omission, act or practice that is likely to mislead consumers acting reasonably under the circumstances. *Id.* A material representation, omission, act or practice "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *Id.*, quoting *Cliffdale Assocs., Inc.*, 103 F.T.C. at 165. An act or practice may be deceptive, within the meaning of Maine's UTPA, regardless of a defendant's good faith or lack of intent to deceive. *Binette*, 688 A.2d at 906.

"At least 30 days prior to the filing of an action for damages, a written demand for relief, identifying the claimant and reasonably describing the unfair and deceptive act or practice relied upon and the injuries suffered, must be mailed or delivered to any prospective respondent at the respondent's last known address. A person receiving a demand for relief, or otherwise a party to any litigation arising from the claim that is the subject of the court action, may make a written tender of settlement or, if a court action has been filed, an offer of judgment. If the judgment obtained in court by a claimant is not more favorable than any rejected tender of settlement or offer of judgment, the claimant may not recover attorney's fees or costs incurred after the more favorable tender of settlement or offer of judgment." Me. Rev. State. Ann. tit. 5, §213 (1-A). "The demand requirement of this subsection does not apply if the claim is asserted by way of counterclaim or cross claim." *Id.*

"If the court finds, in any action commenced under this section that there has been a violation of section 207, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorney's fees and costs incurred in connection with said action." A failure to send or deliver such a demand may result in the prevailing plaintiff be unable to recover fees and costs. *Kilroy v. Northeast Sunspaces, Inc.*, 2007 ME 119, ¶15, 930 A.2d 1060.

The Unfair Trade Practices Act defines trade or commerce as the advertising, for sale, sale or distribution of any services and any property tangible or intangible, real, personal or mixed, or any other article, commodity or thing of value wherever situated, and shall include any trade, commerce directly or indirectly affecting the people of the State of Maine. Me. Rev. State. Ann. Tit. 5, §206 (3). The law court has indicated that the Acts applies to contractors. *Advanced Constr. Corp. v. Pilecki*, 2006 ME 84, 901 A.2d 189. The Act permits a claimant damaged by a deceptive trade practice to obtain an injunction and under limited circumstances potentially recover attorney fees. Me. Rev. State. Ann. Tit. 10, §1213. Parties may not waive or avoid the provisions of the Act by contractor or otherwise. Me. Rev. State. Ann. Tit. 5, §214.

"A violation of the Home Construction Contract Act is prima facie evidence of a violation of the main Unfair Trade Practices Act, 5 M.R.S.A. §205-A to §214…" *William Mushero, Inc. v. Hull*, 667 A.2d 853, 855 (Me. 1995). To be entitled to remedial measures authorized by the Act, the homeowner must show a loss of money or property as a result of the violation. *Parker v. Rayre*, 612 A.2d 1283, 1284–1285 (Me. 1992). To avail themselves of the remedies available pursuant to the Act "claimants must demonstrate not only a violation of the UTPA but also that a portion of their damages are attributable to the UTPA violation." *Van Voorhees*, 69, 679 A.2d at 1077. The amounts expended by a homeowner to correct a defect in performance pursuant to an oral contract "could constitute damages resulting from a contractor's violation of the UTPA." *William Mushero, Inc.*, 667 A.2d at 855.

Contract damages

The measure of recovery for defect or incomplete performance of a construction contract is the difference in value between the value of the performance contracted for and the value of the performance actually rendered. *Paine*, 612 A.2d at 240. The differ-

ence may be proved either by diminution in market value or by the amount reasonably required to remedy the defect. *Id.*, *see also Kleinschmidt v. Morow*, 642 A.2d 161, 165 (Me. 1994). In *Morow*, the court approved calculation of compensatory damages as a difference between the contract price and the actual total cost to the homeowner of completing the home.

The assessment of damages in Maine is within the sole provenance of the fact finder, and an award of damages will not be disturbed unless there is no basis in evidence for the award. *McGrath v. Hills*, 662 A.2d 215, 219 (Me. 1995), *see also Banvile v. Huckins*, 407 A.2d 294, 296 (Me. 1979).

The Law Court has also determined that "although damages need not to be proved to a mathematical certainly, and award must be supported by some evidence of the value of the property damaged and/or expenses incurred." *Currier v. Cyr.*, 570 A.2d 1205, 1210 (Me. 1990).

When separate and independent acts of negligence of two or more persons are the direct cause of a single injury and it is impossible to determine apportionment of liability, the liable parties are jointly and severely liable. *Atherton v. Crandlemier*, 33 A.2d 303 (Me. 1943). This form of negligence has been discussed in terms of resulting single injury. *Paine*, 612 A.2d. at 241. Under the "single injury" rule, damages are not apportioned unless the negligent defendants are able to sustain their burden of proof as to apportionment. *Id.*; *see also Northern Petro Chemical Co. v. Thorscen and Thorschov, Inc.*, 211 N.W. 2d 159, 167 (1973).

Economic Waste/Betterment

The Law Court does not specifically address the issue of whether or not an owner can recover the cost of a repair when the repair constitutes an economic waste or betterment. The measure of reasonable damage is however is the difference in the value between the product promise and the value of the product delivered. The owner is not obligated to accept a repair that is less than what he bargained for. *Bandville*, 407 A.2d at 298. In *Bandville*, the owner was not required to accept a sump pump as a repair to fix a leaking basement. In addition, in *Parson v. Beaulieu*, 429 A.2d 214 (Me. 1981), the replacement of a septic system was the least expensive way to provide the homeowner with a working septic system as promised even though it was a significant upgrade of what was originally installed.

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