

## MONTANA CONSTRUCTION LAW

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### I. MECHANIC'S LIEN BASICS

Montana Code Ann. § 71-3-521 *et. seq.* provides for and governs constructions liens on real estate. The statutes provide the exclusive means for the attachment and enforceability of a construction lien against real estate by persons furnishing labor or materials under a real estate improvement contract to secure payment of the person's contract price.

#### A. Requirements

Prior to filing a construction lien, the lien claimant generally must give to the contracting owner, by certified mail or personal delivery, written notice of the right to claim a lien no later than 20 days after the date on which the services or materials are first furnished to the contracting owner. MCA § 71-3-531. If notice is not given within 20 days of the date of commencement, the construction lien is enforceable only for the services or materials within the 20 day period before the date on which notice was given. *Id.* The notice must then be filed in the county clerk and recorder's office within five (5) days after the contracting owner receives notice. *Id.* A notice of right to claim a lien is effective for 1 year, upon which it expires if no notice of continuation is filed. *Id.* A sample form is provided in MCA § 71-3-532.

The following persons are not required to give notice of the right to claim a lien: (1) an original contractor who furnishes services or materials directly to the owner at the owner's request; (2) a wage earner or laborer who performs personal labor services for a person furnishing any service or material pursuant to a real estate improvement contract; (3) a person who furnishes services or materials pursuant to a real estate improvement contract that relates to a dwelling for five or more families; and (4) a person who furnishes services or materials pursuant to a real estate improvement contract that relates to an improvement that is partly or wholly commercial in character. *Id.*

In order for a construction lien to attach and be enforced, it must be filed not later than 90 days after the lien claimant's final furnishing of labor or materials, or the owner's filing a notice of completion. MCA § 71-3-535. The lien must be filed in the office of the County Clerk and Recorder of the county in which the improved real estate is located, and must certify that a copy has been served, either by certified mail return receipt requested or personal delivery, upon each owner of record of the subject property. MCA §§ 71-3-534 and 535. A sample form is provided in MCA § 71-3-536.

The Montana Supreme Court has consistently held that the procedural requirements of the construction lien statutes must be strictly construed. *Swain v. Battershell*, 294 Mont. 282, 983 P.2d 873 (1999). This includes not only the time and notice requirements, but also the language that must be contained in the lien itself. *Id.* Once that procedure has been fulfilled, the statutes will be liberally construed so as to give effect to their remedial purpose. *Id.*

#### B. Enforcement and Foreclosure

A construction lien claimant must file an action to foreclose the lien within two (2) years from the date the lien was filed. MCA § 71-3-562. Reasonable attorney fees and costs are allowed to the prevailing party in an action to enforce or foreclose a lien. MCA § 71-3-124. The priority of construction liens relative to other liens and encumbrances is governed by MCA §§ 71-3-541 and 542.

#### C. Ability to Waive and Limitations on Lien Rights

Contractors routinely execute lien waivers in exchange for payment. However, a construction contract may not contain provisions requiring the contractor, subcontractors or suppliers to waive the right to claim a construction lien (or the right to make a claim against a payment bond) before payment has been made. MCA § 28-2-723.

## II. PUBLIC PROJECT CLAIMS

#### A. State and Local Public Work

Mechanic's liens are not available against public property in Montana. Rather, Montana law requires performance, labor, and materials bonds on state government projects in an amount equal to the full contract price, and on municipal projects in an amount to be determined by the municipality, provided the amount required is not less than 25% of the contract price. MCA §18-2-201 through § 18-2-208. In lieu of a surety bond, a cash bond may be posted. *Id.* Bonds may be waived for state and local government costing less than \$50,000, and on school district projects costing less than \$7,500. *Id.*

##### i. Notices and Enforcement

In order to perfect a right of action on the bonds, written notice of a claim must be presented and filed with the public body, as well as the contractor, within the applicable time period and using the statutory prescribed form of notice. MCA §18-2-204 and §18-2-206. Attorneys' fees are available to a party prevailing against a surety under MCA §18-2-207.

#### B. Claims to Public Funds

The state of Montana is liable in respect to any contract entered into in the same manner and to the same extent as a private individual under like circumstances, except the state is not liable for punitive damages. MCA § 18-1-404. The state is generally liable for interest from the date on which the payment on the contract became due, and costs including attorney fees to the successful claimant. *Id.* Payment of a construction contractor or subcontractor for services

performed on public projects is governed by the Montana Prompt Payment Act, MCA § 28-2-2101, *et seq.* MCA § 18-2-123.

### **III. STATUTES OF LIMITATION AND REPOSE**

#### **A. Statutes of Limitation and Limitations on Application of Statutes**

There is no specific statute of limitations for construction-related claims in Montana. Therefore, the claim is subject to the statute of limitations applicable to the underlying cause of action. The statute of limitations for actions on written contracts is 8 years. MCA § 27-2-202(a). The statute of limitations for non-written contracts is 5 years. MCA § 27-2-202(b). The statute of limitations for actions based in unjust enrichment/quantum meruit is 3 years. MCA § 27-2-202(c). The statute of limitations for a tort claim is three years. MCA § 27-2-204. The statute of limitations for injuries involving property is 2 years. MCA § 27-2-207. Montana's statutes on residential construction defects allow for limited tolling of applicable statutes of limitations upon certain conditions related to notice and opportunity to repair. MCA § 70-19-427.

#### **B. Statutes of Repose and Limitations on Application of Statutes**

MCA § 27-2-208 provides a 10 year statute of repose for actions for damages arising out of work on improvements to real property or land surveying. See *Assoc. of Unit Owners of Deer Lodge Condominium v. Big Sky of Mont., Inc.*, 245 Mont, 64, 798 P.2d 1018 (1990)(confirming statute is one of repose rather than limitation). This includes actions for damages arising out of design, planning, supervision, inspection, construction, or observation of construction. MCA § 27-2-208.

### **IV. PRE-SUIT NOTICE OF CLAIM AND OPPORTUNITY TO CURE**

Montana has a series of statutes related to residential construction defect claims which require the claimant, prior to bringing an action against a construction professional, to provide the construction professional with written notice of the defect and an opportunity to cure. MCA § 70-19-426 *et seq.* The construction professional has twenty-one (21) days to respond to the claimant either proposing inspection of the property, offering to compromise/settle, or denying responsibility. MCA § 70-19-427. The statute outlines the procedures the parties must follow in each circumstance. *Id.* However, for a construction professional to avail himself of these procedures he must have provided the home owner with notice of the applicable statutes. *Id.*

The statutes also limit the damages in residential construction defect actions to the cost of repairs to cure the defect, the expenses of temporary housing during the repair period, the reduction in market value due to the defect, and costs and attorneys' fees. MCA § 70-19-428.

Aside from residential construction defect claims, and the requirements pertaining to notice of the right to claim a construction lien (discussed above), there are no statutes requiring pre-suit notice of claims and opportunity to cure in construction disputes in general.

## V. INSURANCE COVERAGE AND ALLOCATION ISSUES

### A. General Coverage Issues

Montana courts have issued a number of decisions in recent years addressing CGL liability coverage and the insurer's duty to defend construction-related claims. Generally speaking, coverage exclusions must be narrowly construed, while ambiguities are interpreted against the insurer and in favor of extending coverage. *Lukes v. Mid-Continent Cas. Co.*, 2013 WL 496203 (D.Mont. 2013).

### B. Trigger of Coverage

The duty to defend is independent from and broader than the duty to indemnify created by the same insurance contract. *United National Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 352 Mont. 105, 214 P.3d 1260 (2008). The duty to defend arises when a complaint against the insured alleges facts that, if proven, represent a risk covered by the terms of the policy. *Id.* Unless there is an unequivocal demonstration that the claim against the insured does not fall within the policy coverage, the insurer has a duty to defend. *Farmers Union Mut. Ins. Co. v. Staples*, 321 Mont. 99, 90 P.3d 381 (2004). If there is a duty to defend one claim alleged in a complaint, the insured must provide a defense for the whole case even if there is no possibility the remaining claims would be covered. *Haskins Const., Inc. v. Mid-Continent Cas. Co.*, 2011 WL 5325734 (D.Mont. 2011). While the duty to defend thus arises where the alleged facts even potentially fall within the scope of coverage, the duty to indemnify does not arise unless the policy actually covers the alleged harm. *Skinner v. Allstate Ins. Co.*, 329 Mont. 511, 127 P.3d 359 (2005)

In determining whether CGL coverage exists for a particular claim, Montana Courts have frequently interpreted the term "occurrence." In policies defining "occurrence" as an "accident," the Montana Supreme Court has held that term 'accident' reasonably refers to any unexpected happening that occurs without intention or design on the part of the insured." *Blair v. Mid-Continent Cas. Co.*, 339 Mont. 8, 167 P.3d 888 (2007). Under that rationale "occurrence" has been held to encompass claims of property damage or other injury arising out of faulty workmanship. *Thomas v. Nautilus Ins. Co.*, 2011 WL 4369519 (D.Mont. 2011).

Montana courts have upheld unambiguous policy provisions (i.e., "your work" exclusions, and products-completed operations hazard provisions) excluding coverage for property damage to the insured's own work product and materials. See *Lukes v. Mid-Continent Cas. Co.*, 2013 WL 496203 (D.Mont. 2013); *Taylor-McDonnell Construction Co. v. Commercial Union Ins.* 229 Mont. 34, 744 P.2d 892 (1997); and *Generali-U.S. Branch v. Alexander d/b/a Pioneer Plumbing and Heating*, 320 Mont. 450, 87 P.3d 1000 (2004).

### C. Allocation Among Insurers

There are no Montana cases directly addressing issues of allocation among CGL carriers in construction-related disputes. Generally speaking, when multiple insurance policies apply to the same loss, the "other insurance" policies are examined to determine the proper allocation of the loss. *Mountain West Ins. Co. v. Credit General Ins. Co.*, 247 Mont. 161, 805 P.2d 569

(1991). In situations where there is a conflict between two insurance policies covering the same interest (i.e., one specifying excess coverage and one specifying pro-rata coverage), Montana has adopted the majority rule that the terms of the excess clause prevail over the terms of the pro-rata clause. *Id.* Therefore, the policy containing the pro-rata clause is considered the primary insurance for the loss, and must be exhausted prior to any allocation to the excess policy. *Id.* Where two or more policies provide only excess coverage for a particular event, it is generally held that the excess clauses are mutually repugnant and must be disregarded, rendering such insurers liable pro rata. *Bill Atkin Volkswagen v. McClafferty*, 213 Mont. 99, 108, 689 P.2d 1237, 1241 (1984).

## **VI. CONTRACTUAL INDEMNIFICATION**

Construction contract provisions that require one party to the contract to indemnify, hold harmless, insure, or defend the other party to the contract (or the other party's officers, employees, or agents) for liability, damages, losses, or costs that are caused by the negligence, recklessness, or intentional misconduct of the other party (or the other party's officers, employees, or agents) generally are void as against Montana public policy. MCA § 28-2-2111. However, the statute does expressly allow for contractual provisions requiring a party to indemnify, hold harmless, or insure the other party for liability, damages, losses, or costs, including but not limited to reasonable attorney fees, caused by the negligence, recklessness, or intentional misconduct of a third party or of the indemnifying party (or the indemnifying party's officers, employees, or agents). *Id.* Moreover, construction contracts may require a party to the contract to purchase a project-specific insurance policy, such as a builder's risk policy. *Id.*

## **VII. CONTINGENT PAYMENT AGREEMENTS**

The Montana Code contains no provisions for contingent payment agreements, and Montana courts have not yet addressed the issue. However, other statutory language suggests "pay-if-paid" clauses may be unenforceable on grounds of public policy. For example, under Montana's prompt pay statutes, performance by a contractor of a construction contract in accordance with the provisions of the contract entitles a contractor to payment from the owner; and performance by a subcontractor of a subcontract entitles the subcontractor to payment from the contractor. MCA § 28-2-2102. Construction contract provisions which state that a party to the contract may not suspend performance or terminate the contract if another party to the contract fails to make prompt payments are against public policy and are void and unenforceable. MCA § 28-2-2116(2). Moreover, as previously discussed, a construction contract may not require a party to waive the right to file a construction lien or make a claim on a payment bond before the party has been paid. MCA § 28-2-723.

## **VIII. SCOPE OF DAMAGE RECOVERY**

### **A. Personal Injury Damages vs. Construction Defect Damages**

In personal injury actions, the statutory measure of damages is the amount which will compensate the injured party for all the detriment proximately caused thereby, whether it could

have been anticipated or not. MCA § 27-1-317. Each case must depend upon its own peculiar facts, and the award rests in the discretion of the trier of fact. *Sheehan v. DeWitt*, 150 Mont. 86, 430 P.2d 652 (1967). For breach of contract claims, recovery is prohibited for emotional or mental distress, except in those actions involving actual physical injury to the plaintiff. MCA § 27-1-310.

There are statutory limitations on the recovery of damages for residential construction defects. MCA § 70-19-428 limits such damages to the cost of repairs to cure the defect, the expenses of temporary housing during the repair period, the reduction in market value due to the defect, and reasonable costs and attorneys' fees.

#### B. Attorney's Fees Shifting and Limitations on Recovery

Attorney's fees are generally not awarded in Montana unless allowed by statute or agreement of the parties. However, in construction disputes there are various statutes allowing for the recovery of attorney fees by the prevailing party. Montana's prompt pay statutes provide for an award of attorney's fees to the prevailing party in actions brought by contractors or subcontractors to collect payment. MCA § 28-2-2105. Attorney's fees are also allowed in construction lien enforcement and foreclosure actions. MCA § 71-3-124. Another statutory basis for the recovery of attorney's fees is for residential construction disputes. MCA § 70-19-427. If attorneys' fees are provided for in a construction contract, the right to those fees is reciprocal. MCA § 28-3-704.

#### C. Consequential Damages

Damages for breach of contract are generally "the amount which will compensate the party aggrieved for all the detriment which was proximately caused [by the breach]..." MCA § 27-1-311. The measure of damages for breach of contract is expectancy; to put the party in the position he would have been had the contract been properly performed. *Bradley v. Crow Tribe of Indians*, 329 Mont. 448, 124 P.3d 1143 (2005). Any damages that cannot be clearly ascertained are not recoverable. *Id.* Plaintiffs in breach of contract cases are entitled to the "benefit of the bargain" that the defendants promised to deliver, and are therefore entitled to damages in the amount that will put them in that position. *Poulsen v. Treasure State Industries.*, 192 Mont. 69, 626 P.2d 822 (1981).

#### D. Delay and Disruption Damages

Montana law contains no specific limitations on the recovery of delay and disruption damages. Absent a contractual provision that limits or excludes them, actual damages from delay and disruption may be recovered provided that they are foreseeable and otherwise qualify as consequential damages. The Montana Supreme Court has held that a subcontractor cannot recover delay damages from the general contractor when the subcontractor works "as directed" by the general, according to the terms of the construction contract. *Keeney Const. v. James Talcott Const. Co., Inc.*, 309 Mont. 226, 45 P.3d 19 (2002).

#### E. Economic Loss Doctrine

The Montana Supreme Court addressed the economic loss doctrine in a case involving a third party professional negligence claim against a design professional. Noting that the majority of jurisdictions have rejected the economic loss doctrine, the Court held that a third party contractor may successfully recover for purely economic loss against a project engineer or architect when the design professional knew or should have foreseen that the plaintiff was at risk in relying on the information supplied. *Jim's Excavating Service, Inc. v. HKM Associates*, 265 Mont. 494, 878 P.2d 248 (1994). Generally speaking, in order for a party to recover on a tort claim arising out of the same set of facts underlying a breach of contract claim, there must exist an independent duty, separate and distinct from the contract obligation. *Boise Cascade Corp. v. First Sec. Bank of Anaconda*, 183 Mont. 378, 600 P.2d 173 (1979).

#### F. Interest

Montana law entitles parties to recover interest for damages capable of being made certain by calculation from the day the right to damages is vested in him. MCA § 27-1-211. That right is discretionary in non-breach of contract cases. MCA § 27-1-212. Any legal rate of interest stipulated by a contract remains chargeable after a breach until the contract is superseded by a verdict. MCA § 27-1-213.

#### G. Punitive Damages

Under Montana law punitive damages may not be recovered in an action arising from contract or breach of contract. MCA § 27-1-220. However, the Montana Supreme Court has held that an underlying contract will not defeat a claim for punitive damages where the defendant's conduct was fraudulent. *Lee v. Armstrong*, 244 Mont. 289, 798 P.2d 84 (1990). Further, the Court clarified that while MCA § 27-1-220 prohibits punitive damages in claims arising from contract, punitives are nevertheless allowed where the plaintiff can prove by clear and convincing evidence that the defendant is guilty of actual fraud or actual malice (as defined by MCA § 27-1-221) outside the contract context. *Weter v. Archambault*, 313 Mont. 284, 61 P.3d 771 (2002).

Residential construction disputes frequently involve claims under the Montana Consumer Protection Act, which allows for treble damages in certain circumstances. See MCA § 30-14-133(1).

#### H. Liquidated Damages

Liquidated damages provisions are generally void under Montana law, except that the parties to a contract may agree upon a liquidated amount which shall be presumed to be an amount of damage sustained by a breach thereof when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage. MCA § 28-2-721. In practice, Montana courts typically look beyond the language of the liquidated damages clause, and instead consider how the clause actually operates, in order to analyze reasonableness. *Arrowhead Sch. Dist. No. 75 v. Klyap*, 2003 MT 294, ¶ 24, 318 Mont. 103, 79 P.3d 250; see also *Morgen &*

*Oswood Constr. Co. v. Big Sky of Montana, Inc.*, 171 Mont. 268, 277, 557 P.2d 1017, 1022 (1976)(contract provision allowing for delay damages of \$500 per day was enforceable given that it was a reasonable estimate of damages which were impractical or extremely difficult to fix).

## **IX. CASE LAW AND LEGISLATION UPDATE**

The 2015 Session of the Montana Legislature did not result in any material changes to Montana construction law statutes. However, two recent Montana Supreme Court decisions are noteworthy.

In *dck Worldwide Holdings, Inc. v. CH SP Acquisition, LLC* the Montana Supreme Court held that construction liens are limited to services that are actually performed and materials actually provided. *dck Worldwide Holdings, Inc. v. CH SP Acquisition, LLC*, 2015 MT 225, 380 Mont. 215, 355 P.3d 724. In that case the contract was terminated early when the owner filed bankruptcy, and the contractor then filed a construction lien for the unpaid portion of the contractor's fee on the uncompleted work, to which the contractor was entitled under the contract. *Id.*, ¶¶ 5-7. The Court held that even though the contractor would have prevailed on a breach of contract claim for the unpaid contractor's fee, because the fee was for services not actually performed and materials not actually provided, there was no right to a construction lien. *Id.*, ¶ 26.

In *JEM Contracting, Inc. v. Morrison-Maierle, Inc.* the Montana Supreme Court considered the enforceability of a "continuing work" clause that required the contractor to carry on with the work during all disputes or disagreements with the owner. *JEM Contracting, Inc. v. Morrison-Maierle, Inc.*, 2014 MT 21, 373 Mont. 391, 318 P.3d 678. The contractor allegedly encountered site conditions that differed from the bid documents, and sought additional compensation through a change order, which the project owner refused to pay. *Id.*, ¶¶ 6-8. The contractor argued that the provision was so broad that it should be declared void under MCA § 28-2-2116, however, the Court noted that there was an exception to the provision that allowed for stoppage of work in the event of a failure to make progress payments. *Id.*, ¶ 13. The Court also rejected the contractor's argument that the failure to pay for work performed pursuant to a disputed change order equates to the failure to make a progress payment, reasoning that the prompt payment statutes only require prompt payment of the "approved amount" for "agreed upon work." *Id.*, ¶ 14.