Case Law Update in the South: Race Against the Clock

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Case Law Update: Race Against the Clock

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A. Introduction

This past year saw an escalation in materials' prices, a resurgence in construction through publicly funded and private ventures, and a growing demand for housing with the continuation of work-from-home models. Further, pandemic-related restrictions on construction sites have affected timelines, schedules, and delivery dates, with experts anticipating increased materials cost, supply chain issues, and COVID-related concerns to continue into the upcoming year. Such issues are fodder for future litigation, yet because construction litigation is incredibly fact intensive, each case is bound to set forth narrowly applicable rules. Nevertheless, each decision provides guidance for how to approach a future, related matter. Below provides a brief summary of new developments in case law and legislation in states across the South and analyzes the potential implications and suggested course of action for contractors, insurers, public adjustors, and the like.

B. Florida Case Law Developments

i. Florida Supreme Court Clarifies Application of the Underground Facility Damage Prevention and Safety Act

In its 2021 decision *Peoples Gas System v. Posen Construction*, the Florida Supreme Court accepted certification from the Eleventh Circuit Court of Appeals of a question regarding application of the Underground Facility Damage Prevention and Safety Act and related legal issues in an action arising from a job-site injury to an employee from a fire caused by the rupture of a natural gas line near Fort Myers. 322 So. 3d 604 (Fla. 2021).

As background, the Underground Facility Damage Prevention and Safety Act (the "Act") was passed with the legislative intent to both provide a single toll-free telephone number for excavating contractors and the general public to call for notification of their intent to engage in excavation or demolition and to provide member operators an opportunity to identify and locate their underground facilities. *Id.* Pertinent to the case, in addition to creating a notification system, the Act imposed notice-related and performance-related duties on member operators and excavators.

The action arose from a 2010 strike-incident, in which an employee for Posen Construction ruptured a PGS pipeline during excavation work creating an explosion that severely injured him. Subsequent to the explosion, the parties disputed whether notice of the excavation work was deficient. The injured employee sued both entities, eventually settling. Thereafter, PGS sued Posen in federal court in an attempt to subrogate its losses in the settlement to the employee. The trial court dismissed the suit, concluding that Posen had no duty to indemnify PGS under the Act. On appeal, given the substantial doubt surrounding whether the Act authorized recovery of the settlement payment as damages or

statutory indemnity, the Eleventh Circuit certified the question for the Florida Supreme Court. Specifically, the Eleventh Circuit asked the following:

> Whether a member-operator has a cause of action under Fla. Stat. § 556.106(2)(a)-(c) [of the Underground Facility Damage Prevention and Safety Act] to recover damages (or obtain indemnification) from an excavator for payments to a third party for personal injuries related to the excavator's alleged violation of the statute?

Id. at 606.

Preliminarily, the Court held that the Act creates a standalone cause of action sounding in negligence and subject to proof of proximate causation and the defense of comparative fault. Further, in determining the losses recoverable, the Court held that recovery under the Act included pure economic loss, independent of personal injury or damage, and concluded that that the Act did not create statutory indemnity. Importantly, PGS did not dispute that the employee sued it for its own alleged negligence, and absent any reference to indemnity, the Court determined that the Act cannot be read as having created a new substantive duty to indemnify a joint tortfeasor, as PGS was suggesting.

As to the duties owed by member operators and excavators, the Court explained that failure to follow the provisions of the Act could likely result in liability for damages incurred. Further, even in the event of perfect compliance, the Act still requires work to be performed "in a careful and prudent manner, based on accepted engineering and construction practices." *Id.* at 607 (citing § 556.106(2)(c), Fla. Stat. (2019)).

In short, the Act reflects a negligence-based cause of action creating a rebuttable presumption of negligence for violation of the Act and subsequent damage-causing excavation. As such, strict compliance with the Act does not in itself shield excavators from liability; neither does the utility member's failure to comply with his or her own obligations. As interpreted, the Act strongly favors utility members and third-party injured persons over the excavating contractor. *See* Michael J. Cox, *People Gas System v. Posen (Fla. 2021) and Florida's Underground Facility Damage Prevention and Safety Act: The Supreme Court of Florida Has Weighed in on Several Complex Issues that Often Arise in Underground Utility Cases*, TAYLOR DAY LAW (Sept. 28, 2021), https://www.taylordaylaw.com/2021/09/underground-utility-contractors/.

As more utilities are increasingly installed underground—*e.g.*, sewer and water lines, cable, internet, and electrical lines—utility strikes are becoming more commonplace. The result is high expense and high liability exposure. Though the Florida Supreme Court made headway in clarifying the Act as it related to excavator liability, case law in this area remains underdeveloped, meaning it is ripe for future litigation to address the vaguer sections of the Act, such as an excavator's

obligation "to use increased caution." *Id.* (citing § 556.105(5)(c), Fla. Stat.)). Moving forward, counsel for excavators should take solace in noting that, as a cause of action sounding in negligence, the burden is on the plaintiff, the presumption of negligence is rebuttable, and affirmative defenses such as comparative fault remain available.

ii. Clerks' Duty to Record Liens Triggered by Receipt of Document and Fees

In its recent decision *Phillips v. Pritchett Trucking, Inc.*, the First District determined that Florida's clerks of court have a duty to mark the date of recording as the date the lien and recording fees are received, and *not* the date when the clerk actually records the document. 2021 Fla. App. LEXIS 13668, at *1 (Fla. 1st DCA Oct. 6, 2021). The case arose when a trucking company supplying limerock materials and trucking services to a construction project owned by Costco was not timely paid the $118,288.83 owed to it. In response, the trucking company mailed a lien for the outstanding amount owed as well as a check for the recording costs. Notwithstanding the clerk's receipt of the lien three days prior to the expiration of the recording deadline, the clerk only recorded the lien two days after the deadline.

The trucking company relied on Section 28.222(3), Florida Statutes, which provides that a "clerk of the circuit court shall record . . . instruments presented to him or her for recording, upon payment of the service charges prescribed by law."§ 28.222(3), Fla. Stat. (emphasis added). In contrast, the clerk relied on another Florida statute indicating that a document is recorded when the clerk affixes a register number. § 695.11, Fla. Stat. The court was unpersuaded. Instead, the First District determined that Section 28.222, Florida Statutes, detailed when a document must be recorded by the clerk while Section 695.11, Florida Statutes, solely provided when a document could be deemed recorded. In light of the seven-day window between payment and recording, the court held that the clerk was derelict in its duty to record upon payment and affirmed the trial court's ruling in favor of the trucking company.

Importantly, this decision is likely to affect the clerks' processing and recording of liens and reveals the significance of recording dates for construction liens. *See* Jason Lambert, *New Court Decision Requires Clerks to Record Liens When Document and Fees Received, Not When They Get to it Later*, HAMMER & GAVEL (Oct. 7, 2021), https://hammerngavel.com/blog/new-court-decision-requires-clerks-to-record-liens-when-document-and-fees-received-not-when-they-get-to-it-later. Moving forward, contractors would be advised to adhere to the deadline for recording liens, but to also recognize the leniency granted by the court's recognition that the date of recording is set by the date of payment, and not the date when the clerk actually records the lien.

iii. Court Establishes Limits of Construction Liens in Connection with Public Land

Further, in its recent decision *James B. Pirtle Construction Co. v. Warren Henry Automobiles, Inc.*, the Third District determined that the trial court misapplied Chapter 713 of the Florida Statutes—Florida's construction lien law. 2021 Fla. App. LEXIS 14103, at *1 (Fla. 3d DCA Oct. 20, 2021). The action involved a dispute between sublessor Warren Henry Automobiles—which operated a dealership on public property owned by the City of North Miami and leased to developer Oleta Partners LLC—and general contractor James B. Pirtle Construction Co., which had been retained to build Warren Henry's new store. Consequent to the dispute, Pirtle recorded a construction lien against Warren Henry's leasehold interest. According to Warren Henry, the lien was invalid because the land was owned by the city, which is specifically excluded from the definition of "real property" under Chapter 713. Agreeing with the tenant, the trial court discharged the contractor's claim of lien against the leasehold interest of the sublessee.

However, on appeal, the Third District overturned the trial court's ruling and determined that the language of Florida's lien law exempted the *city's* interest in the property from the lien claim. The law reads, in pertinent part, that "[p]ersons in privity with an owner and who perform labor or services or furnish materials constituting an improvement . . . shall have rights to a lien on real property as provided in § 713.05." § 713.02(3), Fla. Stat. (emphasis added) Further, real property is defined as "the land that is improved and the improvements thereon, including fixtures, except any such property owned by the state or any county, municipality, school board, or governmental agency, commission, or political subdivision." § 713.01(26), Fla. Stat. (emphasis added).

Upon consideration of the plain meaning of the statutory provisions, the Third District determined that Pirtle's claim of lien "can only be against Warren Henry Automobile's leasehold interest, not the physical property . . . because Warren Henry Automobiles has no ownership interest in the property." *Pirtle*, 2021 Fla. App. LEXIS 14103, at *5. The result was to distinguish between property interests, recognizing physical property to be exempt from a construction lien, while permitting an interest in that property to be subject to lien.

This ruling is significant as construction projects with public-private joint ventures are likely to increase after the passage of the Infrastructure Investment and Jobs Act on November 15, 2021, providing funding for improving basic infrastructure on public property such as highways, roads, bridges, airports, and railways. *See* Karen C. Bennett & Jane C. Luxton, *New Infrastructure Law Promises $1.2 Trillion in Transportation and Infrastructure Spending, And More Funds Are on the Way*, LEWIS BRISBOIS (Dec. 6, 2021), https://lewisbrisbois.com/newsroom/legal-alerts/new-infrastructure-law-promises-

1.2-trillion-in-transportation-and-infrastructure-spending. For any contractors, subcontractors, or design professionals hired by private entities leasing public land, as is common in airports, cruise ports, and rail stations, the *Pirtle* decision recognizes construction liens for tenant improvements on publicly owned property, thereby providing security in guaranteeing payment for such services. *See* Jason Lambert, *Florida Court Reinstates $4.8M Lien for Tenant Improvements on Public Property*, HAMMER & GAVEL (Oct. 23, 2021), https://hammerngavel.com/blog/florida-court-reinstates-48m-lien-for-tenant-improvements-on-public-property.

iv. Ruling Reveals Alternative Method for Appealing Penalties from Department of Business and Professional Regulation

In *Rodriguez v. Dept. of Business & Professional Regulation*, the Third District considered whether a contractor was afforded notice of the complaint against him for abandoning a construction project such that the imposition of probation and fines by the Department of Business and Professional Regulation for failure to respond was proper. 326 So. 3d 796 (Fla. 3d DCA 2021). Specifically, a dispute arose between the contractor and homeowner, resulting in the homeowner filing a complaint with the Department.

In accordance with Section 455.275, Florida Statutes, the Department sent notice of the complaint to the contractor via certified mail, regular mail, and email, and after the certified mail was returned unclaimed, the Department left a message at his last known telephone number, posted a notice on the front page of its website, and emailed local newspapers and broadcast affiliates. *See* § 455.275, Fla. Stat. (providing that if mail efforts fail to yield "proof of service," a term undefined under the statute, then notice must be given by "call[ing] the last known telephone number of record and caus[ing] a short, plain notice to the licensee to be posted on the front page of the department's website and shall send notice via e-mail to all newspapers of general circulation and all news departments of broadcast network affiliates in the county of the licensee's last known address of record."). When the contractor failed to respond, the Department determined that he waived his right to respond to the complaint and imposed probation, fines, and restitution upon the contractor.

The contractor appealed, contesting the sufficiency of the notice. Therein, the Third District reviewed the Department's actions to effect service and noted that its efforts were sufficient to afford the contractor due process. Notably, however, in response to the contractor's defense of equitable tolling, the court reversed and remanded in part for an evidentiary hearing on the limited issue of whether equitable tolling applied to excuse his failure to request a hearing to dispute the material facts alleged in the complaint against him. In the alternative, the court also stated that the Department could accept the contractor's claims of equitable tolling, remove the penalties, and allow a hearing on the abandonment claims set forth by the homeowners.

Notwithstanding the sufficiency of notice after the Department's extensive efforts to put the contractor on notice before imposing penalties, this decision signifies that where a defense of equitable tolling applies, contractors could appeal and seek removal of penalties despite failing to respond to the complaint. *See* Jason Lambert, *Recent Court Decision Describes Additional Way Contractors Can Appeal Penalties from DBPR*, HAMMER & GAVEL (Oct. 4, 2021), https://hammerngavel.com/blog/recent-court-decision-describes-additional-way-contractors-can-appeal-penalties-from-dbpr. In short, contractors are afforded an out even where there was no due process violation in service of the administrative complaint.

v. Ambiguities in Scope of Work Provision Entitled Subcontractor to Payment for Additional Work Performed

In the context of disputes over contractual provisions, the Fourth District read the ambiguities in the scope of work provision in the subcontractor's favor and required payment for extra work performed. *Paschen v. B&B Site Dev., Inc.*, 311 So. 3d 39 (Fla. 4th DCA 2021). In *Paschen*, an agreement was arranged between a general contractor and a site development developer for the demolition and paving work of a parking lot at a post office in Okeechobee, Florida. Problematically, despite portions of the parking lot being comprised of asphalt, the general contractor interchangeably used the terms "pavement," "cement concrete pavement," "existing Portland cement concrete pavement," and "existing PCC pavement" when describing the demolition and paving work of the parking lot. As a result, the subcontractor excluded the eastern driveway from its bid and instead, submitted a proposal for concrete work on the remaining 9,000 square yards of the property, which was later included in the general contractor's contract with the post office.

A dispute arose between the general contractor and subcontractor when it was revealed that the subcontractor had not included replacement of the eastern driveway in its bid. The additional cost was estimated to be $33,000. After the project architect determined that the eastern driveway was included in the bidding documents, the subcontractor completed the work despite protestations that it was outside its scope of work to avoid any delays.

Thereafter, upon conclusion of the project, the subcontractor filed suit against the general contractor for claims of breach of contract, unjust enrichment, and quantum meruit. The trial court entered summary judgment in favor of the subcontractor, and the general contractor appealed.

On appeal, the Fourth District affirmed the summary judgment as to liability under the quantum meruit and unjust enrichment counts, but reversed the summary judgment on the breach of contract count and remanded for further proceedings on the issue of damages under the implied contract theories of recovery. Specifically,

the court found that the subcontract agreement was limited to concrete removal alone, determining that "the specific provisions governing the subcontract's scope of work [such as references to replace 'the existing concrete pavement' or 'the existing Portland cement pavement'] control over the headings and other general language in the subcontract [such as 'Replace Pavement' and 'Replace Parking Area.'] *Id.* at 45. The subcontract further specified the thickness of the concrete to be removed, but contained no such similar specifications for the existing asphalt, and required the subcontractor to rely on its own site examination, *not* on the opinions or representations of the GC or the Postal Service. Cumulatively, these provisions indicated that the asphalt removal was outside the scope of work.

Importantly, the architect's determination that the scope of work included the eastern driveway was not conclusive or binding; in fact, the architect's determination merely indicated that the asphalt removal was included in the general contractor's bid, not the subcontractor's bid. In other words, the architect's determination could not be used to rewrite the subcontract. Further, the court determined there was no breach of contract absent a written change order or an award of additional compensation from the post office. However, the subcontractor was still entitled to compensation under a theory of unjust enrichment and quantum meruit because though an express contract existed, the subcontractor performed additional work without compensation, and Florida has long recognized that an implied contract may arise out of an express contract where a contractor or subcontractor performs "extras" not covered by the original contract.

The case is an important reminder that specific provisions in a subcontract are likely to control the scope of work over general provisions and that compensation may be recovered for additional work even where an express contract exists. To avoid litigation, contractors and subcontractors are advised to read through the provisions to remove any ambiguities and walk through the site together to discuss details of the scope of work, bid documents, and site conditions.

vi. Court Determines General Contractor's Liability May Extend to Subcontractor's Employee for On-Site Injury

Shifting gears to job site injury, in *Pratus v. Marzucco's Construction & Coatings, Inc.*, the Second District placed liability on the general contractor for injuries incurred by an electrical subcontractor who fell into an uncovered drain on a second-floor landing on the construction site. 310 So. 3d 146 (Fla. 2d DCA 2021). The subject drain was one of hundreds of drains on the construction site and was outside a door that opened onto an exterior landing on the second floor of the garage being built by the general contractor. Though the drain had been marked with caution tape, on the day in question, the tape had been removed. The subcontractor, using the door as the most direct path to his job site, fell through the drain, which was both unmarked and uncovered. A suit in negligence there followed, and summary judgment was granted in favor of the general contractor.

On appeal, the Second District determined that the general contractor owed a duty to use reasonable care in maintaining the property in a reasonably safe condition and a duty to warn of dangers of which the owner has or should have knowledge and which are unknown to the invitee. Specifically, although the trial court concluded that the drain was open and obvious—an exception to the duty—the general contractor did not conclusively establish that the *dangerous condition* of the drain was obvious. Rather, the only evidence presented was that the drain was sometimes covered and sometimes uncovered, but there was no evidence that the subcontractor knew that the drain was uncovered the day of the incident.

Additionally, the general contractor was still required to maintain the premises in a reasonably safe condition if it could have anticipated the harm to the employee. Relatedly, to the extent the subcontractor knew and failed to avoid the condition, such a consideration is a question of fact for the jury as part of its comparative negligence determination.

Illustrating the importance of job site safety on the part of the general contractor, the case demonstrates how general contractors may be liable for injuries sustained by employees of its subcontractors based upon duties of care owed. To avoid disputes and injury, general contractors are best advised to notify their employees, subcontractors, and the subcontractors' employees of all dangerous conditions on job sites, including warnings, markings, and safe pathways. *See* Jason Lambert, *General Contractor May Be Held Liable for Job Site Injury to Subcontractor's Employee*, HAMMER & GAVEL (Jan. 19, 2021), https://hammerngavel.com/blog/general-contractor-may-be-held-liable-for-job-site-injury-to-subcontractors-employee.

vii. Court Determines Public Adjustors Cannot Appraise Claims to Which They Are Contractually Entitled to a Portion of the Insurance Appraisal Award

In *State Farm Florida Ins. Co. v. Parrish*, the Second District considered whether a public adjusting company could receive a percentage of insurance funds received by the homeowner for its efforts in assisting with the homeowner's insurance claim. 312 So. 3d 145 (Fla. 2d DCA 2021). Specifically, the adjustor executed a contract with the homeowner entitling it to ten percent of the insurance funds and thereafter submitted a sworn statement evaluating the loss to be $495,079.25. Along with the sworn statement, the adjustor requested that any dispute over the amount of loss be submitted to appraisal pursuant to the policy.

In correspondence with the insurer, the adjustor named the president of the public adjusting company to serve as the homeowner's disinterested appraiser. The insurer objected and in turn proposed its own disinterested appraiser. A dispute arose, resulting in the trial court allowing the president to serve as the disinterested appraiser.

Upon appeal, the Fourth District debated whether a petition to compel appraisal with a disinterested appraiser is a cause of action and chose to consider it as a final order. The insurer argued that the adjustor could not be a "disinterested" appraiser where it had a 10% interest in any insurance proceeds received by the homeowner. In reviewing the policy language to define disinterested, the court stated as follows:

> As is clear from the policy provision, the conclusion of the appraisal process results in a recommended monetary award of some amount. Indeed, that is the point of the endeavor. And a contingency stake in a potential monetary award—such as this one—constitutes a pecuniary "interest" . . . . An interest in the appraisal award, then, is part and parcel of an interest in the process' outcome.

Id. at 149.

Thus, "disinterested" was defined as a person "who does not hold an interest in the outcome of the policy's appraisal process." *Id.* Because the president's compensation would be a percentage of it, the court declared that he had a vested interest in obtaining the highest possible recovery. The court there concluded that any public adjustor that has a contingency interest in an insured's appraisal award or represents an insured in an appraisal process cannot be a disinterested appraiser under the appraisal provision.

Importantly, this case reveals the that for contractors who rely on payment from insurance proceeds, potential delays may arise where an interested public adjustor is chosen in the appraisal process, especially if the insurance policy requires the use of a truly disinterested adjustor. *See* Jason Lambert, *Public Adjustors Who Receive a Portion of an Insured's Appraisal Cannot Serve as an Appraiser for that Award*, HAMMER & GAVEL (Jan. 8, 2021), https://hammerngavel.com/blog/public-adjusters-who-receive-a-portion-of-an-insureds-appraisal-award-cannot-serve-as-an-appraiser-for-that-award.

viii. Arbitration Provision Is Not Binding on Disputes Lacking a "Significant Relationship" to the Contractual Provision

In *Dewees v. Johnson*, the Fourth District considered whether an arbitration provision between a buyer and the developer in the purchase contract for her home extended to claims arising out of an injury in the developer's community. 2021 Fla. App. LEXIS 14460, at *1 (Fla. 4th DCA Nov. 3, 2021). Specifically, the buyer purchased a home in a private residential community from the developer pursuant to a purchase contract. In pertinent part, the contract provided that "all post-closing claims, disputes, and controversies . . . between purchaser and seller will be resolved by binding arbitration except those arising under sections G.5 and G.6 above." *Id.* at 2. Sections G.5 and G.6 required that the purchaser not interfere in the sales process with other purchasers and not interfere with workmen during the construction process. The contract also included a Dwelling Warranty providing a

one-year workmanship and two-year systems defect warranty and a structural defect warranty.

Eighteen months after purchasing the home, the buyer sustained injuries while riding her bicycle in the community due to the unevenness of the roads—which at the time were under construction by the developer and missing the asphalt and concrete necessary to level the pavement and gutters. The buyer filed suit against the developer for three counts of negligence, and in response, the developer moved for arbitration based on the terms of the purchase contract and dwelling warranty. According to the developer, the buyer was en route to the warranty office to report a claim under the warranty, and as a result, her subsequent fall arose from the purchase contract and warranty. After granting the developer's motion to compel arbitration, the buyer appealed.

On appeal, the Fourth District reversed, stating that a significant relationship between the claim and the contract was required to apply a broad arbitration clause such as the one therein. Namely, the developer had to establish that a contractual nexus existed wherein resolution of the dispute required reference to the contract. Because the buyer's claims did not arise from the purchase contract, there was no significant relationship under which the arbitration provision could apply. Rather, the court explained that the claims "do not refer to or implicate contractual duties created or governed by the Purchase Contract or Dwelling Warranty but concern duties generally owed to the public, including all invitees using the roadways in [the community]." *Id.* at 15-16. The developer owed a duty to all pedestrians and cyclists using its roads, and thus, the buyer's fall could not be one which was contemplated under the arbitration provision.

In practice, broad arbitration provisions are utilized as an assurance that any disputes will be resolved without prolonged litigation. However, as demonstrated here, a possibility remains that even a broadly worded arbitration provision may not apply absent a significant relationship between the claim and contract. As such, parties seeking to avoid (or enforce) arbitration provisions should consider whether there is a contractual nexus between the claim and the contract.

ix. Subsequent Purchaser Not Bound to Arbitration Provision in Contract Between Original Purchaser and Contractor

In its 2021 decision *Oakmont Custom Homes, LLC v. Billings*, the Fourth District held that a subsequent purchaser was not bound to the arbitration provision within the building agreement between the purchaser and contractor of a new construction home, despite having been assigned the homebuilder's limited warranty from the original purchaser. 310 So. 3d 59 (Fla. 4th DCA 2021). Upon discovery of water damage and mold, the subsequent purchaser filed suit setting forth claims for negligence and building code violations.

In response, the contractor sought to enforce an arbitration provision in the building agreement it entered with the original owner, arguing that the subsequent purchaser was required to arbitrate because she accepted assignment of the limited warranty and her claims are sufficiently related to the building agreement. Notably, however, the subsequent purchaser did not seek relief pursuant to the limited warranty and neither received a copy of the agreement nor agreed to be bound by the building agreement at the time of purchase. The trial court ruled in favor of the subsequent purchaser, and an appeal there followed.

On appeal, the District Court concluded that the subsequent purchaser was not required to arbitrate because nothing in the second purchaser's contract indicated that by accepting transfer of all warranties, she agreed to be bound by the building agreement and to arbitrate any non-warranty claim against the builder. Further, she was not seeking to enforce the third-party contract. As a result, the court determined that there was no agreement between the contractor and the second purchaser to arbitrate claims between them.

Importantly, this case represents that arbitration agreements or provisions in contractor's construction contracts may not extend to subsequent owners. Best practice dictates that contractors should include separate arbitration provisions and the like to any warranty granted separately from the contract. *See* Jason Lambert, *Subsequent Purchaser Not Required to Arbitrate Claims over Construction Defects*, HAMMER & GAVEL (Jan. 7, 2021), https://hammerngavel.com/blog/subsequent-purchaser-not-required-to-arbitrate-claims-over-construction-defects. Though the subsequent owner in this case did not rely on the limited warranty in her claims, such a provision in the warranty would serve as a basis for enforcing arbitration to any claims arising between the contractor and subsequent purchaser. Another consideration is for contractors to include reference to the arbitration provision in the deed to place subsequent purchasers on notice. In short, contractors would need to provide other means for applying arbitration provisions to subsequent purchasers and cannot merely rely on the initial purchase agreement to which subsequent purchasers are not a party.

C. Florida Legislative Developments

i. New Statute Eliminates Local Contractor Licenses by 2023

Pursuant to Section 163.211, Florida Statutes, "[t]he licensing of occupations is expressly preempted to the state and this section supersedes any local government licensing requirement of occupations with the exception of . . . (a) Any local government that imposed licenses on occupations before January 1, 2021 [and] (b) Any local government licensing of occupations authorized by general law." § 163.211, Fla. Stat. (emphasis added). Effective July 1, 2021, the statute essentially reserves the licensing of occupations to the state with two exceptions.

First, the law carves out an exception for local government licenses effective as of January 1, 2021; however, it provides that those licenses expire on July 1, 2023. The second exception extends to local government licenses authorized by general law. Importantly, though the local licenses may continue until 2023, they may not impose additional licensing requirements on that occupation or modify existing licensing requirements. Further, local governments may not enforce local licensing requirements that are not authorized by the law.

Relatedly, the Florida legislature amended Section 489.117, Florida Statutes, to further limit or ban local licensing by governments in relation to specialty contractors' licensing. Namely, the law prohibits a local government from requiring a person "to obtain a license for a job scope which does not substantially correspond to the job scope of one of the contractor categories" as defined in other sections. § 489.117, Fla. Stat. Such categories include painting; flooring; cabinetry; interior remodeling; driveway or tennis court installation; handyman services; decorative stone, tile, marble, granite, or terrazzo installation; plastering; stuccoing; caulking; and canvas awning and ornamental iron installation. *Id.*

In tandem, the effect of these two statutes appears to remove local licensing requirements for various specialty contractors without requiring a state license in its stead. Thus, unless a specific state license is required under Chapter 489, a contractor may be able to work without a license. Additionally, it should be noted that localities may continue to issue licenses to contractors working in electrical, alarm systems, plumbing, pipe fitting, mechanical, and/or HVAC services. *See* Jason Lambert, *New Statute Phases Out Local Licenses by 2023*, HAMMER & GAVEL (July 14, 2021), https://hammerngavel.com/blog/new-statute-phases-out-local-licenses-by-2023.

ii. New Statute Affecting the Handling and Litigation of Florida Property Insurance Claims Temporarily Halted

On July 1, 2021, Senate Bill 76 went into effect, purporting to address the unsustainable losses recently experienced by the insurance market in the state. Specifically, the statute added new requirements and contract disclosures for roofing contractors and added expansive restrictions to market efforts by contractors working with homeowner insurance companies. The law further impacted public adjustors, contractors, and other entities that encourage consumers to bring insurance claims by limiting or prohibiting such advertisement, and reduced the time limit to file insurance claims, added a pre-suit notice requirement, limited attorney's fees, and permitted the consolidation of related lawsuits.

The law was proposed in response to rising insurance premiums and encourages private carriers to issue new policies on Florida homes. *See* Samantha Epstein, et al., *SB76: Florida's Attempt to Reduce Insurance Litigation*

and Attract Insurance Carriers, JDSUPRA (July 23, 2021), https://www.jdsupra.com/legalnews/sb76-florida-s-attempt-to-reduce-6770635/. Notably, "while Florida homeowners insurance claims accounted for just over 8% of all homeowners claims opened by U.S. insurers in 2019, homeowners insurance lawsuits in Florida accounted for more than 76% of all litigation against insurers nationwide." Amy O'Connor, *NAIC Data: Florida Property Lawsuits Total 76% of Insurer Litigation in U.S.*, INS. J. (Apr. 14, 2021), https://www.insurancejournal.com/news/southeast/2021/04/14/609721.htm. As a result, insurers are reticent to issue policies on Florida homes.

In relation to roofing contractors, SB 76 creates Section 489.147, Florida Statutes, to disincentivize and limit certain questionable marketing practices by contractors. *See* Christopher Cooper, et al., *Florida Senate Bill 76 Signed into Law*, JDSUPRA (July 6, 2021), https://www.jdsupra.com/legalnews/florida-senate-bill-76-signed-into-law-5661244/. Specifically, this provision bans contractors from encouraging a consumer with written marketing material to contact a contractor or public adjuster for the purpose of making an insurance claim for residential roof damage. In practice, this would eliminate contractors' ability to make solicitations through door hangers, business cards, magnets, flyers, pamphlets, and emails. Neither may contractors offer homeowners anything of value for allowing the contractor to inspect the roof or for making an insurance claim; offer or accept compensation for referring service for which insurance proceeds are payable; interpret policy provisions of the homeowner's policy; or provide an insured with an agreement for services to be rendered without providing a good faith and detailed estimate and a notice that the contractor cannot engage in the solicitation restrictions imposed by the statute. The penalty is $10,000 per violation, regulating contractors and public adjustors alike.

Additionally, Section 626.854, Florida Statutes, has been amended to similarly prevent contractors or their subcontractors from advertising, soliciting, handling, or performing public adjustor services unless they are licensed as public adjustors. Notably, insurers cannot deny claims merely because of any violation of the statute; however, any such violations have the effect of potentially undermining the merits of such claims.

Concerning the time limit to file insurance claims, the statute expands Section 627.70132, Florida Statutes, which provides a three-year period to report a hurricane claim, to include all property insurance claims; namely, an insured has two years within the date of loss to provide notice of a claim or reopened claim. In contrast, notice of a supplemental claim must be brought within three years, or else it is barred. The result is that claims adjustors must ensure that untimely claims are denied before incurring otherwise avoidable expenses.

Insurers are further advised to deny an untimely claim before adjusting, or else the time limit defense may be considered waived.

Importantly, since its passage, a federal judge in Tampa issued an injunction stopping enforcement of certain portions of Senate Bill 76 relating to solicitation and advertising under a claim of First Amendment infringement of free speech. *See* Jason Lambert, *Federal Judge Stops Enforcement of Certain Part of New Senate Bill 76 Temporarily*, HAMMER & GAVEL (July 14, 2021), https://hammerngavel.com/blog/federal-judge-stops-enforcement-of-certain-part-of-new-senate-bill-76-temporarily. With the issuance of the temporary injunction, the full impact of the new legislation remains unknown. Nevertheless, insurance carriers should prepare to update claims handling protocols pursuant to the new law.

iii. Florida's Prompt Payment Law Has Been Amended to Increase Penalties for Failure to Make Timely Undisputed Payments

Under newly amended Section 713.346, Florida Statutes, homeowners and contractors who withhold undisputed payments face heightened penalties. § 713.346(1), Fla. Stat. Previously, the statute provided relief where payment was not made for more than thirty days, requiring payment be made downstream in accordance with contract obligations. If no payment was made within the given period, the party awaiting payment could file suit and obtain an evidentiary hearing to determine the undisputed amount owed. If payment still remained outstanding, the recourse was garnishment or attachment of pre-judgment assets as well as attorney's fees.

Since its amendment, the statute now makes the knowing and intentional failure to pay undisputed bills a "misapplication of construction funds" and subjects the individual or entity to civil and criminal penalties. Specifically, such misapplication of funds may result in a felony in the first, second, or third degree and/or the suspension of any licenses issued to them for at least one year. Further penalties may be given by the Department of Business and Professional Regulation. An additional consideration is that interest owed on late payments may be set at the statutory rate in Florida, plus an additional twelve percent, resulting in steep repercussions for bad-faith late payments.

Given the severely increased penalties faced by contractors who withhold undisputed payment, it is recommended that any decision to forgo payment is done for a valid reason. Importantly, however, the statute applies to contractors and homeowners alike. Thus, the same penalties may be enforced against homeowners who improperly withhold undisputed funds from contractors.

iv. Liability for Engineers and Architects Restricted under New Law

Under Section 768.382, Florida Statutes, licensed engineers and architects have been shielded under a full limitation of liability if their services are given in response to an emergency and pursuant to the orders of a government emergency management agency. Entitled "Limitation of liability for certain voluntary engineering or architectural services," the statute protects structures specialists and engineers—defined therein— from liability "for any personal injury, wrongful death, property damage, or other economic loss related to his or her acts or omissions in the performance of his or her services, unless the act or omission constituted gross negligence or willful misconduct." § 768.382(2).

The protection afforded to engineers and architects extends to individuals licensed in other jurisdictions, but only applies to services provided within the first ninety days of the first declaration of a particular federal, state, or local emergency. Importantly, the statute broadly expands limitation of liability and reflects a priority of protecting those voluntarily offering services in response to emergencies. Newly passed, the effect of this statute remains to be seen.

v. Bill Proposes Remove 10-Year Bar on Construction Defect Claims and Apply New Pre-Suit Requirements for Defect Claims

On the horizon is the potential passage of Senate Bill 736, proposing to eliminate the ten-year statute of repose for latent construction defects and opening the door for latent defect claims to be filed after the ten-year period for fraudulent concealment or for the tolling of the four-year statute of limitations applying to such claims. *See* Ralf Rodriguez, *Florida Legislature Proposes Significant Revisions to Construction Defect Statute*, JDSUPRA (Dec. 7, 2021), https://www.jdsupra.com/legalnews/florida-legislature-proposes-6674754/. The effect is to create additional exposure to contractors and insurers alike.

Additional provisions would change Chapter 558, Florida Statutes, to grant attorney's fees for rejecting settlement offers and mandating that courts appoint construction experts to inspect defects. In pertinent part, the bill reads as follows:

> Requiring a claimant who rejects a timely settlement offer to provide a written notice rejecting the offer including the reasons for rejecting the offer within the notice serving to reject the offer. If the claimant believes the settlement offer omitted reference to any portion of the claim or was unreasonable in any manner, the claimant must identify the items that the claimant believes were omitted and state in detail all known reasons why the claimant believes the settlement offer is unreasonable.

Construction Defect Claims, (SB 2022-736).

As a consequence, if the supplemental offer is rejected by the claimant, the claimant is at risk of losing the right to recover attorney's fees unless he or she can prove by a preponderance of evidence that further repairs was needed beyond what was offered.

The final change concerns a new mandate for courts to appoint an expert to inspect and report the alleged defects, to be paid by each party and with the costs of such expert services recoverable by the prevailing party. The purpose of this amendment is to facilitate settlement and resolution of construction defect claims without prolonging litigation.

Though this law has yet to be deliberated, its proposal stands to create additional exposure through the elimination of the ten-year bar on construction defect claims. As a result, this bill warrants monitoring.

D. Rapid Fire: Other Southern Developments

i. New Texas Law Grants Limited Protection to Contractors for Defective Plans and Designs

Under Chapter 59 of Texas Business and Commercial Code, entitled "Responsibility for Defects in Plans and Specifications," the Texas Legislature disposed of century-long case law set forth in *Lonergan* to adopt protections from liability for defective plans and designs provided to the contractor by another individual. Justin T. Scott, *Out with* Lonergan, *In with* Spearin: *Texas Legislature Provides Contractors with Limited Protection for Defective Plans and Designs*, XI NAT'L L.R. 316 (Nov. 12, 2021), https://www.natlawreview.com/article/out-lonergan-spearin-texas-legislature-provides-contractors-limited-protection. In *Lonergan v. San Antonio Loan & Trust*, the Texas Supreme Court held that the contractor was responsible for failing to comply with the design plan despite the fact that the house fell due to weaknesses arising out of defects in the specifications and without any fault on the part of the contractor. 104 S.W. 1061 (Tex. 1907).

Now, under the newly adopted Chapter 59, a contractor is not liable for the consequence of design defects resulting from the design plans and specifications, but upon discovery, the contractor is required to disclose in writing such defects to the individual with whom it entered the contract. These provisions bring Texas law in line with thirty-six other states and the District of Columbia, which have adopted the U.S. Supreme Court's decision in *U.S. v. Spearin*, 248 U.S. 132 (1918), declining to hold a contractor responsible for determining the sufficiency of the design plans and specifications given by the project owner.

ii. Texas Supreme Court Gives New Guidance on Commercial Property Owners' Protection against Liability for Job-Site Injuries

In its 2021 decision *Los Compadres Pescadores, L.L.C. v. Valdez*, 622 S.W.3d 771 (Tex. 2021), the Texas Supreme Court elucidated on the application of Chapter 95 of the Texas Civil Practice and Remedies Code, which limits commercial property owner liability for injuries sustained by a contractor's or subcontractor's employees. The action arose from injuries sustained by employees of the property owner's contactor while working on the property; specifically, crew members were electrocuted when, during the installation of concrete pilings, the rebar crew members were lifting contacted a high-voltage power line that hung above and along the back property line and leaning eight or nine degrees toward the owner's property. The employees filed suit against the power line company and the property owner for claims in negligence, noting that the contractor had previously notified the project manager that the powerline was too close to the worksite.

To recover under Chapter 95, a plaintiff must demonstrate that the owner had actual knowledge of the condition—a heightened evidentiary standard; however, the court focused on the fourth requirement providing that the injury "arise[ ] from the condition or use of an improvement to real property where the contract or subcontractor constructs, repairs, renovates or modifies the improvement." *See* TEX. CIV. PRAC. & REM. CODE §§ 95.001-.002. To that end, the Court considered what qualifies as an improvement and when a condition exists in relation to an improvement.

In a prior decision, the Texas Supreme Court clarified that the employee's injuries must result "from a condition or use of the *same improvement* on which the contractor (or its employee) is working when the injury occurs." *Compadres*, 622 S.W.2d at 782 (citing *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 567 (Tex. 2016)). Under the facts before it, the Court determined that the drilling pilings, foundation, and condominium building constituted improvements—defining improvements broadly as "any addition to real property, other than fixtures, that can be removed without causing injury to the real property." *Id.* at 784.

Then, defining 'condition' as "an intentional or inadvertent state of being," *id.* at 785, the Court decided that for a condition on the property to be a condition of the improvement, the condition must affect the "state of being" of the improvement—in this case, the pilings. Further, in identifying whether the condition is one of the property or of the improvement, the Court determined that proximity was the decisive factor—namely, "if a dangerous condition, by reason of its proximity to an improvement, creates a probability of harm to one who 'constructs, repairs, renovates or modifies' the improvement in an ordinary manner,

it constitutes a condition of the improvement itself." *Id.* (quoting TEX. CIV. PRAC. & REM. CODE § 95.002).

Ultimately, the court held that to recover under Chapter 95, the injury must arise from a dangerous condition of the specific improvement the employee was working on, rather than from a hazard commonly present on the jobsite. Thus, the employees were covered under Chapter 95 because the powerline's proximity to the pilings created a probability of harm to the employees tasked with installing those pilings. Notably, the Court rejected the property owner's argument that the workplace was the improvement as it was not "an addition to real property" and because doing so would permit an overbroad reading of 'improvement,' thereby improperly bringing all workplace hazards within the scope of Chapter 95.

By defining "condition . . . of an improvement," the Court created significant limits on the statute's scope and served to remove claims based on generalized workplace or premises injuries through the requirement of a proximal tie between the hazard and the improvement on which the work was performed. As a result, fewer cases fall within the scope of Chapter 95's protections, putting commercial property owners on notice of available defenses for negligence claims against them. Importantly, notwithstanding the applicability of Chapter 95 to an employee's claim, the employee's failure to obtain a jury finding on the owner's actual knowledge of the dangerous condition does not bar a finding of liability.

iii. North Carolina Supreme Court Redefines the Economic Loss Rule

In its recent 2020 decision *Crescent Univ. City Venture, LLC v. Trussway Manu, Inc. et al.*, 852 S.E.2d 98 (N.C. 2020), the North Carolina Supreme Court reconceived the application of the economic loss rule in the context of a dispute between a commercial developer and a subcontractor over the installation of defective floor trusses. *See* Evan M. Musselwhite & Amy H. Wooten, *The Economic Loss Rule – Recently Refined or Redefined by the North Carolina Supreme Court*, XI NAT'L L.R. 22 (Jan. 22, 2021), https://www.natlawreview.com/article/economic-loss-rule-recently-refined-or-redefined-north-carolina-supreme-court.

In its defense, the subcontractor argued that the duties it allegedly breached stemmed from a contractual relationship rather than by operation of law, and thus, the economic loss rule barred the negligence claim. The Business Court agreed, and on appeal, the North Carolina Supreme Court affirmed, stating that the economic loss rule "requires negligence claims to be based upon the violation of an extra-contractual duty imposed by operation of law." *Crescent*, 852 S.E.2d at 99.

Importantly, the court rejected that a contract between the opposing parties is required to apply the economic loss rule, meaning that in the context of commercial construction litigation, property owners with a bargained-for contract

with a general contractor are prohibited from recovering pure economic losses against the general contractor's subcontractors in tort if such claims arise out of the general contractor's contract. An exception remains if the claim arises out of an independent legal duty. The key takeaway is that parties should determine whether protections are in place for economic losses in connection with commercial construction projects. Notably, this decision does not apply to cases involving residential construction.

iv. Georgia Court of Appeals Recognizes the Supremacy of a Contract's Arbitration Provision Notwithstanding Attacks on Contract's Validity

In its recent 2021 decision *Jhun v. Imagine Castle, LLC*, 856 S.E.2d 24 (Ga. Ct. App. 2021), the Georgia Court of Appeals affirmed the trial court's order compelling arbitration in the homeowner's contract action against a contractor and its principals despite the fact that the contractor was unlicensed. Like under many states' laws, pursuant to O.C.G.A. § 43-41-17(b), unlicensed contractors cannot enforce a contract. However, despite doubt as to the enforceability of the contract, the court deferred to arbitration as the proper forum to determine whether the contract was valid and enforceable.

The case arose when the Jhuns contracted with Imagine Castle to remodel their home with a broad arbitration agreement providing that "[a]ny questions regarding the interpretation of this arbitration provision or about the arbitrability of a dispute . . . shall be decided by the arbitrator." *Id.* at 628. Imagine Castle had misrepresented that it was properly licensed when the contract was executed, and after its work was deemed incomplete and deficient, the Jhuns filed suit. In response, Imagine Castle moved to compel arbitration and stay the proceedings, which the trial court granted.

On appeal, the Jhuns claimed that the arbitration provision was unenforceable because Imagine Castle lacked proper licensure and could not rely on the provision pursuant to Georgia law. Siding with the lower court, the court stated as follows:

> Under the FAA, "[w]here there is a specific challenge attaching the validity of an arbitration agreement, the court and not the arbitrator should decide whether the arbitration provision is enforceable' . . . . However, 'a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.'"

Id. at 628-29 (quoting *Crawford v. Great Am. Cash Advance*, 644 S.E.2d 522, 524 (Ga. Ct. App. 2007)).

Further, the court determined that the Jhuns failed to "raise any challenge that is specific to the arbitration provision in the contract" and that "their challenge to the arbitration agreement [wa]s part and parcel of their argument that the entire

contract [wa]s unenforceable due to the defendants' unlicensed status." *Id.* at 630-31. Relying in part on the U.S. Supreme Court decision in *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006), the court likewise rejected the argument that the severability of the arbitration provision from the remainder of the contract could turn on an individual state's law or public policy. Additionally, the court also stayed proceedings against the other defendants—Imagine Castle's principals—as the claims against all defendants were intimately related and within the discretion of the trial court.

The key takeaway is the court's continuation of enforcing arbitration provisions over state law that would otherwise bar unlicensed contractors to enforce the contract. Parties to a contract should note that arbitration provisions are severable from the contract and will remain in effect even if the contract would be otherwise unenforceable. As such, any attempt to overcome the arbitration provision should include a meritorious attack on the validity of the provision itself, rather than on the contract as a whole. *See* Alexander G. Thrasher, *Attacks on Contract's Validity are Likely Insufficient to Overcome the Binding Effect of the Contract's Arbitration Provision*, XI NAT'L L. REV. 355 (2021), https://www.natlawreview.com/article/attacks-contract-s-validity-are-likely-insufficient-to-overcome-binding-effect.

v. Louisiana Circuit Courts Recognize Businesses May Recover Damages for Loss of Use of Property

In its recent 2020 decision *Levy v. Hard Rock Construction of La., LLC*, the Fourth Circuit Court of Appeal determined that business entities are entitled to seek damages for inconvenience, even if recovery for mental anguish from property damage is barred. 312 So. 3d 641 (La. App. 4th Cir. 2020). There, the court considered a suit filed against a realtor for damages resulting from the alleged severing of the telephone cable that provided telephone and fax services to the individual plaintiff's home and to the offices of the business entities plaintiffs and stated as follows:

> While we recognize and agree that the Louisiana jurisprudence cited by Relator holds that corporate/business entities are not entitled to recover damages for mental anguish, we find a distinction in the jurisprudence between damages awarded for mental anguish and damages awarded for loss of use and inconvenience. In Louisiana, an award for mental anguish resulting from property damage requires a finding of "real mental injury" or "psychic trauma in the nature of or similar to a physical injury." . . . . However, Louisiana jurisprudence also recognizes a damage award for inconvenience that is not based on mental injury or trauma associated with property damage, but due to the loss of use of property.

Id. at 645 (internal citations omitted).

As such, litigants are advised to plead damages for severe inconvenience rather than for mental anguish in order to succeed on property damage claims where loss of use is evident.

E. Conclusion

As set forth above, many new developments emerged in the past year by way of judicial action and legislation. From changes in the scope of contractor liability to the expansion of penalties and limitation in the application of arbitration provisions, courts and state legislatures have created the need for new strategies to both avoid and address potential litigation and insurance claims. Given construction trends of price fluctuation, variable timelines, investments in infrastructure, and COVID-related delays, the coming year is likely to bring its share of construction-related litigation. Whether representing contractors, subcontractors, public adjustors, or property owners, attorneys are best advised to review any updates from the past year and to keep an eye to proposed legislation up for a vote in the coming year.