

**The Pro Bono Project
New Orleans, LA**

Contractor Disputes Handbook

Introduction

The purpose of this manual is to serve as a guide for volunteers and volunteer attorneys handling construction and contractor dispute claims, and to provide volunteers working with the Pro Bono Project with a general overview of Louisiana construction law. Much of Louisiana law is governed by the Louisiana Civil Code, with case law serving as interpretations of the Civil Code articles. Included within this manual are brief summaries of a number of relevant statutes, intended to provide volunteers with a general background and introduction to the statutes governing these claims.

As residents of Louisiana continue to rebuild, a number of contractor disputes continue to arise from those rebuilding efforts. Many of the claims are for breaches of contract, negligence, and fraud. This manual was assembled by volunteers while working on cases of these kinds, in an effort to help streamline the process of handling contractor disputes. The forms and other materials included in this manual are intended to serve only as a guide to beginning the process of handling these cases.

Forms

Initial Pro Bono Project Intake Form Instructions

The initial Pro Bono Project intake form will be filled out for each new client wishing to submit a claim. The form should be filled out by the client as completely as possible, with the client's name, date of visit, address, any alternate address, contact phone numbers, and other information requested, if applicable. The address of the property out of which the dispute arises must be clearly noted and marked, as well as the address where the client prefers to receive mail.

The client should provide as completely as possible the adverse party's information, and complete all information regarding household members, financial information requested, and the type of legal issue for which they are seeking relief. The client should also answer as completely and accurately any additional questions on the form. Volunteers should assist clients to ensure that forms are filled out as completely and accurately as possible, to avoid any confusion or delays later in the process. Additionally, the client should provide a detailed description of the problem, including as much information as they can regarding when the problem first arose, any actions they have taken since then including any contact with the adverse party, monies dispensed and dates if known, as well as any other information relative to their legal issue.

The volunteer should assist the client with the contract page, ensuring that the client fully understands all of the information contained therein. The intake form will be signed and dated by the client, and the information pages on the front given directly to the client. Volunteers may provide clients with a copy of these forms as requested. Forms may vary or be amended, but will generally require the same information. Please carefully review the sample intake form provided.

Sample Pro Bono Project Initial Intake Form



615 Baronne Street Suite 201
New Orleans, LA 70113
Phone: (504) 581-4043 Fax: 566-0518
e-mail: probono@probono-no.org

Serving Jefferson, Orleans,
St. Bernard, St. Tammany,
Washington & Plaquemines
Parishes

Appointment Date:
Appointment Time:

Dear

Recently you requested legal services from, or were referred to, The Pro Bono Project. If you believe we can help you after you read this letter, please complete the enclosed form and return it to this office. When we have received your form and evaluated your legal problem, we will contact you. If we can help you, we will send you a letter indicating how you can schedule an appointment to meet with an attorney. If we cannot help you, we will try to refer you to other more appropriate assistance.

Because of the way our program is funded, we are not allowed to serve clients who make too much money. Too much money is determined by using the federal poverty income guidelines. You will be required to provide proof of income.

Also, please understand that The Pro Bono Project works through volunteer private attorneys. We cannot help clients in instances like the ones listed below.

- * *criminal problems*
- * *emergency legal problems*
- * *complex legal problems requiring extensive investigation and costs*
- * *discrimination or civil rights problems*
- * *employment discrimination or wrongful termination cases*
- * *fee generating cases (lawsuits in which the client seeks to win money in court)*

If your legal problem falls into one of these categories, you may find the help you need through other assistance. Some of the providers of other assistance are listed on the second page of this letter.

If you are financially eligible for our services and believe we can help you with your legal problem, we look forward to receiving the attached forms fully completed.

Sincerely,
The Pro Bono Project

Other sources of free or low-cost legal assistance

Emergency civil legal problems:

New Orleans Legal Assistance Corporation
504-529-1000

Criminal Legal Problems:

Orleans Indigent Defender Program
504-821-8101

Jefferson Indigent Defender Program
504-364-2820

Discrimination/Employment Discrimination:

Equal Employment Opportunity Commission (EEOC)
504-589-2329

Civil Rights violations/unlawful discrimination:

American Civil Liberties Union of Louisiana
504-522-0617

Fee generating cases/complex cases

New Orleans Bar Association

Lawyer Referral Service (call to get referrals to attorneys who can represent you on a contingency basis or on a sliding scale fee)
504-561-8828



CASE# _____

THE PRO BONO PROJECT INITIAL INTAKE FORM

DATE: _____ REFERRED BY: _____
LAST NAME: _____
FIRST NAME: _____
ADDRESS: _____
APT. #: _____ PARISH: _____
CITY: _____ STATE: _____ ZIP: _____
ALTERNATE ADDRESS: _____

PHONE: _____ WORK: _____ ALTERNATE: _____
S.S.#: _____ D.O.B.: ____/____/____ RACE: _____ SEX: _____
NATIONALITY: _____ ETHNICITY: _____ LANGUAGE: _____
☐ U.S. CITIZEN:
☐ QUALIFYING ALIEN
☐ NOT QUALIFIED
MARITAL STATUS: _____

ADVERSE PARTY

ADVERSE PARTY (FIRST): _____ ATTORNEY: _____
ADVERSE PARTY (LAST): _____ EMPLOYER: _____
ADVERSE PARTY ADDRESS: _____ HOME #: _____ WORK #: _____
S.S. #: _____
ADVERSE D.O.B.: ____/____/____ ETHNICITY: _____ SEX: _____

FAMILY

NUMBER OF INDIVIDUALS IN HOUSEHOLD: _____
PLEASE LIST NAMES, AGES, D.O.B AND RELATIONSHIP TO CLIENT

NAME & RELATIONSHIP	DOB	NAME & RELATIONSHIP	DOB
1. _____	____/____/____	4. _____	____/____/____
2. _____	____/____/____	5. _____	____/____/____
3. _____	____/____/____	6. _____	____/____/____

ADDITIONAL PLAINTIFF/PARTIES INVOLVED: LAST NAME: _____ FIRST: _____
S.S.#: _____ RELATIONSHIP: _____



FINANCIAL

CLIENT'S EMPLOYER: _____

WORK #: _____

MONTHLY INCOME BEFORE TAXES, PLEASE STATE THE AMOUNT FROM EACH SOURCE:

FROM WORK: \$ _____ FROM UNEMPLOYMENT: \$ _____ FROM S.S.: \$ _____
FROM CHILD SUPPORT: \$ _____ FROM SSI: \$ _____ FROM WELFARE: \$ _____
FROM FOOD STAMPS: \$ _____ FROM ALIMONY: \$ _____ FROM OTHER: \$ _____
FROM RENT (Receive): \$ _____

DO YOU HAVE HEALTH INSURANCE ON YOUR CHILDREN? ☐ YES ☐ NO

DO YOU HAVE A CHECKING OR SAVINGS ACCOUNT? ☐ YES ☐ NO

BALANCE: CHECKING: \$ _____ SAVING: \$ _____

SHELTER: ☐ HOMELESS ☐ OWN ☐ RENT: PRIVATE ☐ RENT: PUBLIC ☐ RENT: SECTION 8

MONTHLY COST: \$ _____ ☐ RENT ON VOUCHER ☐ GAS ON VOUCHER ☐ ELEC. ON VOUCHER ☐ UTIL. INCL. IN RENT

VALUE OF ASSETS: (Generally, one automobile and one home are exempt.)

ADDITIONAL AUTOMOBILES: \$ _____

SECOND HOME: \$ _____ USE (vacation, rental, investment?): _____ Amount you receive: \$ _____

OTHER ASSETS: \$ _____ WHAT IS THE ASSET?: _____

HOW ARE YOU CURRENTLY MAKING ENDS MEET? _____

DEBTS (Please list approximate dollar amounts):

Medical or Nursing Home Expenses: \$ _____

Child Support that you pay \$ _____

Do you have any special needs? _____

Do you have transportation? _____



LEGAL

PLEASE CHECK WHAT LEGAL NEEDS/ISSUES YOU ARE HERE FOR TODAY:

FAMILY LAW	ADMINISTRATIVE	CONSUMER LAW	GENERAL
<input type="checkbox"/> DIVORCE/SEPARATE/ANNUL	<input type="checkbox"/> MEDICARE	<input type="checkbox"/> BANKRUPT/DEBTOR RELIEF	<input type="checkbox"/> TORTS
<input type="checkbox"/> CHILD SUPPORT/ALIMONY	<input type="checkbox"/> IDENTIFICATION/BIRTH CERT	<input type="checkbox"/> COLLECTION/REPO	<input type="checkbox"/> POWER OF ATTORNEY
<input type="checkbox"/> PATERNITY	<input type="checkbox"/> VETERAN'S BENEFITS	<input type="checkbox"/> CONTRACTS/WARRANTIES	<input type="checkbox"/> LIVING WILLS/POA/HEALTH
<input type="checkbox"/> SPOUSE ABUSE	<input type="checkbox"/> SSI	<input type="checkbox"/> CONSTRUCTION CONTRACT	<input type="checkbox"/> CRIMINAL
<input type="checkbox"/> ADOPTION	<input type="checkbox"/> MEDICAID	<input type="checkbox"/> CREDIT ACCESS	<input type="checkbox"/> CRIMINAL REFERRAL
<input type="checkbox"/> GUARDIAN/CONSERVATOR	<input type="checkbox"/> FOOD STAMPS/COMMODITY	<input type="checkbox"/> ENERGY-NOT PUBLIC UTIL.	<input type="checkbox"/> INDIAN/TRIBAL LAW
<input type="checkbox"/> NAME CHANGE	<input type="checkbox"/> FEMA APPEALS	<input type="checkbox"/> LOANS/INSTALLMENTS	<input type="checkbox"/> LICENSE (AUTO/OTHER)
<input type="checkbox"/> MENTAL HEALTH	<input type="checkbox"/> AFDC/OTHER WELFARE	<input type="checkbox"/> OTHER CONSUMER	<input type="checkbox"/> INCORPORATE/DISSOLUT
<input type="checkbox"/> CUSTODY/VISITATION	<input type="checkbox"/> SOCIAL SECURITY	<input type="checkbox"/> PUBLIC UTILITIES	<input type="checkbox"/> IMMIGRATION/NATURALIZE
<input type="checkbox"/> DIVORCE/ CHILD CUSTODY	<input type="checkbox"/> PRISONER'S RIGHTS	<input type="checkbox"/> UNFAIR SALES PRACTICES	<input type="checkbox"/> PHYS. DISABLED RIGHTS
<input type="checkbox"/> REPRESENT A CHILD	<input type="checkbox"/> EDUCATION		
JUVENILE	HOUSING	EMPLOYMENT	OTHER
<input type="checkbox"/> NEGLECTED/ABUSED/DEP	<input type="checkbox"/> LANDLORD/TENANT	<input type="checkbox"/> UNEMPLOYMENT COMP	<input type="checkbox"/> OTHER INDIVIDUAL RIGHT
<input type="checkbox"/> JUVENILE DELINQUENT	<input type="checkbox"/> HOME OWNER/REAL PROP	<input type="checkbox"/> WORKER'S COMPENSATION	<input type="checkbox"/> OTHER MISCELLANEOUS
<input type="checkbox"/> PARENTAL RIGHTS TERMIN	<input type="checkbox"/> FEDERAL SUBSID HOUSING	<input type="checkbox"/> WAGE CLAIMS	<input type="checkbox"/> OTHER PROBLEMS
<input type="checkbox"/> OTHER JUVENILE	<input type="checkbox"/> OTHER HOUSING	<input type="checkbox"/> JOB DISCRIMINATION	<input type="checkbox"/> OTHER HELP
WILLS/SUCCESSIONS	<input type="checkbox"/> OTHER PUBLIC HOUSING	<input type="checkbox"/> OTHER EMPLOYMENT	<input type="checkbox"/> OTHER FAMILY
<input type="checkbox"/> WILLS		<input type="checkbox"/> BLACK LUNG	<input type="checkbox"/> OTHER HELP
<input type="checkbox"/> SUCCESSIONS			
<input type="checkbox"/> TRUSTS/SPECIAL NEEDS			

1. Have you or anyone else involved with this issue sought the assistance of another attorney or agency, and to what result? _____

Name of attorney _____ Date _____

Agency _____

2. Have any papers been served on YOU regarding this matter? ☐ Yes ☐ No

3. Are there any deadlines that require immediate action? _____

4. Do you understand that filing fees and court cost are your responsibility? ☐ Yes ☐ No

5. Do you have any other pending legal cases? ☐ Yes ☐ No

If the client is involved in other litigation please supply the attorney name and type of cases.

Attorney Name: _____ Type of case: _____

6. Have you reviewed and signed the Pro Bono Project's client retainer? ☐ Yes ☐ No

7. Please state your objectives _____





CONTRACT FOR LEGAL SERVICES & CERTIFICATION OF ELIGIBILITY INFORMATION

I hereby request The Pro Bono Project to refer my case to a private attorney for representation and I authorize the release of the information provided by me to The Pro Bono Project. I certify that all of the information given by me is correct. I understand that if my income changes, I might not remain eligible for assistance through The Pro Bono Project. If a change in my income occurs, I will immediately notify The Pro Bono Project.

I further understand that The Pro Bono Project will **not accept** my case until the volunteer attorney assigned to the case notifies The Project that he/she has met with me and agrees to take the case. Within fifteen days after I receive the name and phone number of the volunteer assigned to my case, I agree to contact that attorney and arrange to meet with that attorney.

I further understand that the resources of The Project and the number of attorneys available to render legal services are limited. Therefore, I realize that I must notify the attorney assigned to my case immediately if I decide not to pursue this legal action. I further agree to cooperate fully with the volunteer attorney and to provide the necessary information to him/her, to keep all scheduled appointments, to execute necessary documents, and to make all required court appearances. I understand that failure to keep in touch with my attorney may result in the closing of my file.

I understand that The Project may close my file if I do not contact my volunteer attorney within fifteen (15) days of receiving notification that an attorney has been assigned to my case. If my case has been closed due to lack of contact I understand that in order to pursue this legal action through The Project that I will have to complete the application process again.

Signed this _____ day of _____, _____

Client Signature: _____

For Office Use Only:

I have reviewed and explained the above agreement with the above named individual or group.

Staff/Volunteer Signature: _____

Date accepted: _____

Case Rejected by: _____ Date: _____

Reason Rejected: _____



PLEASE DESCRIBE THE FACTS SURROUNDING YOUR LEGAL ISSUES:

Contractor Dispute Questionnaire

This form was developed to obtain additional information from the client regarding their contractor dispute which captures changes in the client's information, and more detailed information about estimates, contracts, contractor information, insurance information, any construction or repair progress that has been made since the initial intake was completed, as well as the names and information of contractors who have since been hired to complete, fix, or redo any work on the property. It should also capture any new developments with regard to contact with the adverse contractor, and be accompanied by any documentation missing from the initial intake, including but not limited to contracts, cancelled checks, receipts, insurance company information, and later contractors' reports on defects of the original adverse contractor.

This form can be used either in conjunction with the initial intake form to provide a more thorough intake, or later as a follow up if information was missing after the intake, or the client needed time to gather the information. This form can also be used for periodic updates to assist in tracking the status of the client's claim. If the client has since sought legal assistance elsewhere, that information should be included here, along with the attorney's name and contact information. Please refer to sample questionnaire provided.

Sample Contractor Dispute Questionnaire

CONTRACTOR DISPUTE QUESTIONNAIRE

1. HOMEOWNER INFORMATION

FIRST NAME MIDDLE NAME LAST NAME

ADDRESS CITY/STATE/ZIP

PHONE ALT. PHONE (CELL) EMAIL

ADDRESS OF PROPERTY WHERE WORK WAS TO BE PERFORMED

2. CONTRACTOR INFORMATION

FIRST NAME LAST NAME

BUSINESS NAME (If applicable)

ADDRESS CITY/STATE/ZIP PHONE

ORIGINAL CONTACT DATE CONTRACTOR'S LICENSE # (AND
STATE ISSUING LICENSE)

3. DID YOU RECEIVE A WRITTEN ESTIMATE FROM THE CONTRACTOR? Y / N

4. DO YOU HAVE A WRITTEN CONTRACT? Y / N

5. DID YOU AND THE CONTRACTOR SIGN THE CONTRACT? Y / N

*****IF YOU HAVE A WRITTEN CONTRACT AND/OR ESTIMATE, PLEASE PROVIDE
A COPY OF THAT DOCUMENT. *****

6. HOW DID YOU FIND THE CONTRACTOR? LIST NAMES AND PHONE NUMBERS
OF ANY PEOPLE WHO RECOMMENDED OR REFERRED YOU TO THE CONTRACTOR

7. DO YOU HAVE A COPY OF THE CONTRACTOR'S LICENSE? Y / N IF SO,
PROVIDE A COPY.

8. WHAT WAS YOUR METHOD OF PAYMENT? _____

9. HOW MUCH MONEY DID YOU PAY THE CONTRACTOR? _____

10. DO YOU HAVE YOUR RECEIPTS FOR PAYMENT? Y / N IF YES, PROVIDE
COPIES OF RECEIPTS

11. DID THE CONTRACTOR COMPLETE MOST OF THE WORK ON YOUR HOME
THAT HE/SHE AGREED TO MAKE? Y / N

12. DID THE CONTRACTOR GIVE YOU ANY RECEIPTS SHOWING THAT THE
CONTRACTOR PAID FOR MATERIALS OR OTHER EXPENSES RELATED TO THE
WORK? Y / N

13. DID THE CONTRACTOR TAKE MONEY, START WORK ON THE JOB AND FAIL TO
RETURN TO COMPLETE THE WORK? Y / N

14. WHAT WAS THE AGREED UPON COMPLETION DATE FOR THE WORK?

15. WAS THE MONEY USED TO PAY THE CONTRACTOR PROVIDED BY AN AGENCY
OR INSURANCE COMPANY? Y/N

IF YES, WHAT AGENCY OR INSURANCE COMPANY?

IF YES, DO YOU HAVE A COPY OF THE REPORT MADE BY THE INSURANCE
COMPANY WHERE THEY ESTIMATED THE VALUE OF THE KATRINA RELATED
DAMAGE TO YOUR HOME? Y / N

16. DID YOU HAVE TO HIRE ANOTHER CONTRACTOR TO COMPLETE THE WORK?
Y/N

IF YES, FILL OUT THE FOLLOWING INFORMATION ABOUT THE CONTRACTOR
HIRED TO COMPLETE THE WORK.

FIRST NAME

LAST NAME

BUSINESS NAME (If applicable)

ADDRESS

CITY/STATE/ZIP

PHONE

ORIGINAL CONTACT DATE

CONTRACTOR'S LICENSE # (AND
STATE ISSUING LICENSE)

ATTACH COPY OF THE CONTRACT FROM THE CONTRACTOR HIRED TO COMPLETE
THE WORK.

DID THE CONTRACTOR FINISHING THE WORK GIVE YOU ANYTHING IN WRITING
CONCERNING THE QUALITY OF THE WORK PERFORMED BY THE ORIGINAL
CONTRACTOR? Y/N

IF YES, ATTACH COPY OF SUCH DOCUMENTATION.

17. PLEASE DESCRIBE WHY YOU ARE UNHAPPY WITH YOUR CONTRACTOR
AND/OR DESCRIBE THE DISPUTE. INCLUDE ANY PHOTOGRAPHS OF THE WORK
DONE BY THE CONTRACTOR AND ANY CORRESPONDENCE WITH THE
CONTRACTOR

DOCUMENT CHECK LIST

- THE AGREEMENT WITH THE CONTRACTOR (CONTRACT)

- CONTRACTOR'S ESTIMATE
- CONTRACTOR'S LICENSE
- RECEIPTS FOR MONEY PAID TO THE CONTRACTOR
- COPIES OF CANCELLED CHECKS MADE OUT TO CONTRACTOR
- CONTRACTOR'S RECEIPTS FOR EXPENSES
- INSURANCE COMPANY INFORMATION
- PICTURES
- CORRESPONDENCE WITH CONTRACTOR (EMAILS, LETTERS, HANDWRITTEN NOTES, ETC)
- SECOND CONTRACTOR'S REPORT ON DEFECTS OF FIRST CONTRACTOR'S WORK

Recommended Documentation

There are a number of documents that a client may need to provide before their claim can go forward. While these documents will vary from case to case, we have provided a general list of documents that are commonly requested in these types of cases. This is not an exhaustive list of all possible documents, but it should provide you with an idea of the types of documents the client may want to begin compiling to add to the file. It would be beneficial to develop a checklist with the client during the initial intake, and to provide them with the list so that they can begin compiling the documentation. Examples of such documentation include:

- Agreement(s) with the contractor(s) (Contract)
- Contractor's estimate
- Contractor's license (or license number if known)
- Receipts for money paid to the Contractor
- Copies of cancelled checks made out to Contractor
- Contractor's receipts for expenses
- Insurance Company information
- Pictures of damage, repairs, faulty work, incomplete work, etc.
- Correspondence with Contractor (Emails, letters, handwritten notes, etc).
- Second Contractor's report on defects of first contractor's work (if applicable)
- Name and contact numbers of any other attorneys or legal assistance sought
- Inspection reports

Summary Update Memorandum

It is recommended that after any interview or follow-up with the client or resident, a Summary Update Memo be completed and enclosed with the file, containing a short description of the facts of the case, any changes to the client's situation, and any updated information about the contractor.

Statutes

Statutes

Louisiana law is largely governed by the Louisiana Civil Code, with case law interpreting the codal articles. Included here are a number of statutes relevant to construction law issues, and a brief explanation of applicable cases.¹

Fraud

La. Civ. Code art. 1953. Fraud may result from misrepresentation or silence.

Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. It may also result from silence or inaction.

This article provides that fraud can result both from acts, such as actual assertions or suppressions of truth, as well as failures to act and silence which is calculated to produce a misleading effect. La. Civ. Code art. 1953(b).

There are three basic elements to any action for fraud: (1) a misrepresentation, suppression, or omission of true information, (2) the intent to obtain an unjust advantage or to cause damage or inconvenience to another; and (3) the error induced by a fraudulent act must relate to a circumstance substantially influencing the victim's consent to a cause of the contract. Morris v. Nanz Enterprises, Inc., 929 So. 2d 115, 119-20 (La. App. 1 Cir. 2006). (Copy of case attached).

In Bunge Corp. v. GATX Corp., the Louisiana Supreme Court held that a contractor may be guilty of fraud or misrepresentation where the contractor knew of a hazard which arose from his work but failed to disclose the hazard to the owner. 557 So. 2d 1376, 1385 (La. 1990).

¹ Statutes and cases assembled herein were suggested in and obtained from a listing of sources and information about contractor assembled by McCranie, Sistrunk, Anzelmo, Hardy, Maxwell & McDaniel P.C., and provided for research purposes to the Pro Bono Project.

FRAUD CASE

Westlaw.

929 So.2d 115

929 So.2d 115, 2005-0236 (La.App. 1 Cir. 3/1/06)

(Cite as: 929 So.2d 115, 2005-0236 (La.App. 1 Cir. 3/1/06))

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HCourt of Appeal of Louisiana,
First Circuit.Mary Kozolis Morris wife of/and Thomas E. MOR-
RIS

v.

NANZ ENTERPRISES, INC., Donald A. Nanz,
ABC Insurance Company, Harriet Haag a/k/a Har-
riet Osborne wife of/and Robert Edward Osborne,
Dorothy Calderone, Jan Heap, TEC Realtors, Inc.,
DEF Insurance Company, Curry, Inc., GHI Insur-
ance Company, the Home Team Inspection Service,
JKL Insurance Company, Curry, Inc. d/b/a the
Home Team Inspection Service, MNO Insurance
Company, Pella Windows & Doors, Inc., PQR In-
surance Company, Pella Corporation and STU In-
surance Company.

No. 2005 CA 0236.

March 1, 2006.

Rehearing Denied May 10, 2006.

Background: Homeowners brought action against construction company, company's president, and others, alleging that they discovered numerous latent defects in home. The Twenty-Second Judicial District Court, Parish of St. Tammany, No. 2000-10177, Donald M. Fendlason, J., granted motion by company's president for summary judgment and dismissed claim against him in his individual capacity. Homeowners appealed.

Holdings: The Court of Appeal, McClendon, J., held that:

- (1) homeowners did not raise a genuine issue of material fact as to whether president individually was builder of the home, and
- (2) homeowners could not maintain action for fraud against president because he did not make any representations to homeowners regarding home.

Affirmed.

Welch, J., dissented and assigned reasons.

West Headnotes

[1] Judgment 228 ⇨ 185.3(5)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in
Particular Cases228k185.3(5) k. Banks, Corporations
and Associations. Most Cited Cases

Purchase agreement signed by president of construction company in his individual capacity did not raise a genuine issue of material fact as to whether president individually was builder of the home, as would preclude summary judgment for president and dismissal of claim against him in his individual capacity, in homeowners' action against construction company, president, and others alleging latent defects in the house; original purchasers of home made down payment and interest checks payable to company, invoices for materials for the house were made to company, certificate of occupancy was issued to company, and sale of the house to original purchasers was by company represented by president. LSA-R.S. 9:3141, 9:3142 et seq.

[2] Fraud 184 ⇨ 30

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k30 k. Persons Liable. Most Cited Cases
President of construction company that built home could not have made any misrepresentations to homeowners regarding home, and, thus homeowners could not maintain fraud action against president; homeowners bought home from original purchasers of home, homeowners had no communication with president prior to their purchase of the home, and homeowners obtained a copy of plans and specifications for house from original pur-

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chasers, and, thus any possible misrepresentation to homeowners could only have been made by original homeowners.

[3] Fraud 184 ➡1

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k1 k. Nature of Fraud. Most Cited Cases
 Fraud is a misrepresentation or a suppression of the truth made with the intent to obtain an unjust advantage for one party or to cause loss or inconvenience for the other party.

[4] Fraud 184 ➡3

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k2 Elements of Actual Fraud

184k3 k. In General. Most Cited Cases

Fraud 184 ➡16

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k15 Fraudulent Concealment

184k16 k. In General. Most Cited Cases

There are three basic elements to an action for fraud against a party to a contract: (1) a misrepresentation, suppression, or omission of true information; (2) the intent to obtain an unjust advantage or to cause damage or inconvenience to another; and (3) the error induced by a fraudulent act must relate to a circumstance substantially influencing the victim's consent to a cause of the contract.

*116 Ambrose V. McCall, New Orleans, Counsel for Plaintiffs/Appellants Mary Kozolis Morris wife of/and Thomas E. Morris.

Andrew A. Braun, Michele Conigar, New Orleans, Mark R. Cambron, Pro Hac Vice, Louisville, KY, Counsel for Defendants/Appellees Nanz Enterprises, Inc., and Donald A. Nanz.

William C. Cruse, Metairie, Counsel for Defendant Ray Price.

*117 Michael P. Bienvenu, Baton Rouge, Counsel for Defendants Dorothy Calderone, Jan Heap, and TEC Realtors, Inc.

Gregory Currier, Metairie, Paul R. Dickinson, Pro Hac Vice, Charlotte, NC, Counsel for Defendant Pella Corporation.

Robert T. Lorio, Covington, Counsel for Defendant Bruce Cacioppo.

D. Rex English, Slidell, Counsel for Defendants Harriet Haag Osborne and Robert Edward Osborne.

Robert J. Young, III, Metairie, Counsel for Defendants Curry, Inc. and Curry, Inc. d/b/a The Home Team Inspection Service.

Marti Tessier, Mandeville, Counsel for Defendants Flint Plastering, Inc. and Alfred M. Flint, Jr.

John I. Hulse, IV, Wayne J. Jablonowski, New Orleans, Counsel for Defendant Pleko Southwest, Inc.

Glen E. Mercer, New Orleans, Counsel for Defendant Assurance Company of America.

John L. Duvieilh, Christopher S. Mann, New Orleans, Counsel for Defendant Gats Masonry, Inc.

John E. Unsworth, III, New Orleans, R. Bryan Barnes, Pro Hac Vice, Robert C. Kelly, Pro Hac Vice, Columbia, SC, Counsel for Pleko Southwest Corporation.

Before: WHIPPLE, McCLENDON, and WELCH, JJ.

McCLENDON, J.

**3 In this appeal, plaintiffs, Mary Kozolis Morris and Thomas E. Morris, challenge the trial court judgment granting summary judgment in favor of defendant, Donald A. Nanz, individually, and dis-

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missing their claim for damages against him in his individual capacity. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On January 22, 1999, Mary and Thomas Morris purchased a home in Beau Chene Subdivision in Mandeville, Louisiana, from Robert and Harriet Osborne. The Osbornes had purchased the home from Nanz Enterprises, Inc. following the completion of its construction in August of 1991. Said house had been built following the Osbornes' signing of a purchase agreement for the construction of the home, which agreement was signed by Mr. Nanz. On January 13, 2000, plaintiffs filed a petition for damages against several defendants, including Nanz Enterprises, Inc. and its president, Donald A. Nanz, in his individual capacity. In their petition, plaintiffs alleged that sometime after purchasing the residence, they discovered numerous latent defects in the home. Plaintiffs asserted that the manner in which the Nanz defendants constructed the home caused the defects rendering it structurally unsound.

Mr. Nanz answered the petition and thereafter, on April 15, 2004, filed a motion for summary judgment. In his motion, Mr. Nanz asserted that at all relevant times he acted only in his representative capacity on behalf of Nanz Enterprises, Inc. Therefore, Mr. Nanz argued, no genuine issue of material fact existed as to plaintiffs' claims against him, and he was entitled to judgment as a matter of law. Following a hearing, the trial court agreed with Mr. Nanz. Judgment was signed on September 2, 2004, granting the **4 summary judgment, and dismissing all claims against Mr. Nanz with prejudice.^{FN1} *118 Plaintiffs appealed asserting that the trial court erred in dismissing Mr. Nanz individually.^{FN2}

FN1. Other motions and exceptions had also been filed on behalf of Mr. Nanz. However, because all claims against Mr.

Nanz individually were dismissed by his motion for summary judgment, the other pending matters were not ruled upon.

FN2. Any claims against Nanz, Enterprises, Inc. are not before us in this appeal.

SUMMARY JUDGMENT

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. *Johnson v. Evan Hall Sugar Cooperative, Inc.*, 01-2956, p. 3 (La.App. 1 Cir. 12/30/02), 836 So.2d 484, 486. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B). Summary judgment is favored and is designed to secure the just, speedy, and inexpensive determination of every action. LSA-C.C.P. art. 966(A)(2); *Thomas v. Fina Oil and Chemical Co.*, 02-0338, pp. 4-5 (La.App. 1 Cir. 2/14/03), 845 So.2d 498, 501-02.

On a motion for summary judgment, the burden of proof is on the mover. If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the moving party must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of **5 proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. LSA-C.C.P. art. 966(C)(2); *Robles v. ExxonMobile*, 02-0854, p. 4 (La.App. 1 Cir. 3/28/03), 844 So.2d 339, 341.

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Summary judgments are reviewed on appeal *de novo*. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. *Ernest v. Petroleum Service Corp.*, 02-2482, p. 3 (La.App. 1 Cir. 11/19/03), 868 So.2d 96, 97, *writ denied*, 03-3439 (La.2/20/04), 866 So.2d 830.

DISCUSSION

The salient issue before us in this matter is whether, based on the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, Mr. Nanz proved that there were no unresolved issues of material fact as to whether a possible cause of action could be maintained against him. In support of his motion for summary judgment, Mr. Nanz attached excerpts from his deposition, excerpts from plaintiffs' depositions, a copy of the certificate of occupancy for the residence issued to Nanz Enterprises, Inc., copies of checks issued by the Osbornes to Nanz Enterprises, Inc., copies of invoices to Nanz Enterprises, Inc. by Pella Window Store for the residence, and a copy of the residential building contractor certificate for Nanz Enterprises, Inc. for the year 2000. Our *de novo* review of the facts in this case compels us to conclude that Mr. Nanz met his burden. The burden then shifted to plaintiffs to come forward with evidence, sufficient to establish their evidentiary burden at trial, that Mr. Nanz was personally **6 liable for his actions. We conclude *119 that plaintiffs failed to produce such evidence.

[1] Initially, plaintiffs contend that they have alleged a cause of action against Mr. Nanz individually as the builder of their home under the New Home Warranty Act (NHWA). The NHWA was enacted in 1986 and codified in LSA-R.S. 9:3142, *et seq.*, for the purpose of "providing clear, concise, and mandatory warranties for the purchasers and occupants of new homes in Louisiana and by providing for the use of homeowners' insurance as

additional protection for the public against defects in the construction of new homes." LSA-R.S. 9:3141. The NHWA provides a "warranty for a new home purchaser defining the responsibility of the builder to that purchaser and subsequent purchasers during the warranty provisions provided herein." LSA-R.S. 9:3141. *Ciliberti v. Mistretta*, 03-1559, p. 5 (La.App. 1 Cir. 5/14/04), 879 So.2d 789, 792. At the time plaintiffs' home was constructed, the definition of "builder" under the NHWA included "any person, corporation, partnership, or other entity which constructs a home, including a home occupied initially by its builder as his residence." LSA-R.S. 9:3143(1).^{FN3}

FN3. The NHWA currently defines "builder" as:

[A]ny person, corporation, partnership, limited liability company, joint venture, or other entity which constructs a home, or addition thereto, including a home occupied initially by its builder as his residence. A person, corporation, partnership, limited liability company, joint venture, or other entity which constructs a home, or any addition thereto, is a "builder", whether or not the consumer purchased the underlying real estate with the home.

LSA-R.S. 9:3143(1).

In an effort to establish that Mr. Nanz, and not Nanz Enterprises, Inc., was the builder of the home, plaintiffs asserted that Mr. Nanz signed the purchase agreement with the Osbornes in his individual capacity. Admittedly, Mr. Nanz signed the purchase agreement in January of 1991 **7 individually without any indication of representative capacity. The evidence, however, fails to establish that Mr. Nanz was the builder and seller of the home at issue. Mr. Nanz testified in his deposition that Nanz Enterprises, Inc. is the residential construction company he incorporated in 1984 that built plaintiffs' residence. The evidence also shows that in January

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of 1991, the Osbornes made their down payment and interest checks payable to Nanz Enterprises, Inc. for the construction of the home. Additionally, invoices for materials for the house were made to Nanz Enterprises, Inc. The certificate of occupancy for the home, dated August 6, 1991, was issued to Nanz Enterprises, Inc. Further, the sale of the house to the Osbornes was by Nanz Enterprises, Inc., represented by Donald Nanz, its president, by virtue of a recorded and referenced corporate resolution. We conclude that plaintiffs have failed to produce sufficient evidence to establish that Mr. Nanz individually was the builder of the home under the NHPA.

[2] Plaintiffs also claim, however, that Mr. Nanz's actions were fraudulent, subjecting him to personal liability in that the house was not built according to the plans and specifications as agreed to by Mr. Nanz in the purchase agreement between the Osbornes and Mr. Nanz.

[3][4] Fraud is a misrepresentation or a suppression of the truth made with the intent to obtain an unjust advantage for one party or to cause loss or inconvenience for the other party. Fraud may result from silence or inaction. LSA-C.C. art. 1953. Further, there are three basic elements to an action for fraud against a party to a contract: (1) a misrepresentation, suppression, or omission of true information;^{*120} (2) the intent to obtain an unjust advantage or to cause damage or inconvenience to another; and (3) the error induced by a fraudulent act must relate to a circumstance substantially influencing the ^{**8} victim's consent to (a cause of) the contract. *Shelton v. Standard/700 Associates*, 01-0587, pp. 4-5 (La.10/16/01), 798 So.2d 60, 64.

In the present matter, plaintiffs assert that the purchase agreement between the Osbornes and Mr. Nanz is evidence of his fraudulent misrepresentation, since he signed it agreeing to build the home according to the plans and specifications when, in fact, the home was not built in accordance with the plans and specifications. Plaintiffs argue that had they known the house was not built in accordance with the plans and specifications, they would not

have relied on same and would not have purchased the home.^{FN4}

FN4. Plaintiffs claim in part that the drawings and specifications did not call for synthetic stucco in the construction of the home, but synthetic stucco was used, including areas where brick was depicted. However, we note that the use of synthetic stucco in areas where the plans and specifications called for brick was openly apparent, thereby indicating that at least some deviations from the plans and specifications occurred.

Although plaintiffs allege that Mr. Nanz made negligent and fraudulent misrepresentations, the purchase agreement signed in 1991 was between Mr. Nanz and the Osbornes, not between Mr. Nanz and the plaintiffs. Further, Mr. Nanz was not a party to the sale of the home from the Osbornes to the plaintiffs. Plaintiffs admit that they had no communication with Mr. Nanz prior to their purchase of the home. No evidence was presented that, prior to the sale to the plaintiffs, they had any communication of any kind with Mr. Nanz. Plaintiffs did receive a copy of the plans and specifications prior to their purchase, but that was obtained from the Osbornes. Thus, any possible misrepresentations to the plaintiffs could only have been made by the Osbornes, and not by Mr. Nanz. It was impossible for Mr. Nanz to have the intent to obtain an unjust advantage or induce the plaintiffs into buying the home, as Mr. Nanz made no representations to plaintiffs of any kind prior to their purchase.

^{**9} Accordingly, we find no genuine issues of material fact, and that summary judgment was appropriate.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court granting summary judgment in favor of Donald A. Nanz, dismissing plaintiffs'

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claims against him individually with prejudice.
Costs of this appeal shall be borne by Mary Kozolis
Morris and Thomas E. Morris.

AFFIRMED.

WELCH, J., dissents and assigns reasons.

WELCH, J., dissenting.

**1 I respectfully dissent from the majority's affirmation of the summary judgment in this case.

Our summary judgment jurisprudence establishes that weighing evidence has no place in the summary judgment procedure. *Campbell v. Hospital Service District No. 1 Caldwell Parish*, 35,015 (La.App. 2nd Cir.8/22/01), 793 So.2d 521, 526. After reviewing the deposition testimony and documentary evidence submitted in this case, the majority notes that there is conflicting evidence regarding whether Mr. Nanz built and sold the house to the Osbornes in his individual capacity or in a representative capacity for Nanz Enterprises, Inc. After noting this discrepancy, the majority *121 concludes the evidence "overwhelmingly establishes that Nanz Enterprises, Inc. was the builder and seller of the home at issue."

In my opinion, the majority's analysis constitutes an impermissible weighing of the evidence in a summary judgment setting. The fact that the court might conclude that the evidence preponderates in favor of the opponent does not justify the denial of a full trial on the merits to resolve the disputed issue. *LeBlanc v. Landry*, 371 So.2d 1276, 1279 (La.App. 3rd Cir.1979). Therefore, I think the summary judgment should be reversed and this matter should be remanded for further proceedings.

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END OF DOCUMENT

Breach of Contract

To form a valid and enforceable contract under Louisiana law, there must be capacity of the parties to contract, consent of the parties to the contract, a lawful cause or consideration, and a certain object that forms the subject matter of the agreement. There are a number of claims that may fall into the breach of contract category, including but not limited to situations where:

- Contractor contracts and takes payment but does not perform
- Contractor starts job but doesn't finish
- Work was poorly done (could also be negligence)

La. Civ. Code art. 1931: Obligor liable for failure to perform

An obligor is liable for the damages caused by his failure to perform a conventional obligation. A failure to perform results from nonperformance, defective performance, or delay in performance.

La. Civ. Code art. 2769: Contractor's liability for non-compliance with contract.

If an undertaker fails to do the work he has contracted to do, or if he does not execute it in the manner and at the time he has agreed to do it, he shall be liable in damages for the losses that may ensue from his non-compliance with his contract.

In White v. Boutte, the court held that the defendant contractor was in breach of his valid oral contract with plaintiff when contractor failed to return to the plaintiff's home and complete the work he had contracted to perform. 392 So. 3d 124, 125 (La. App. 1st Cir. 1980). Failure or refusal to perform the contractual obligations constituted an active breach of contract. Id.

In Southeastern Const. Co. V. Housing Authority of Opelousas, the Supreme Court of Louisiana held that the plaintiff construction company breached its contract with the Housing Authority when it delayed performance by filing numerous untimely extensions. 197 So. 2d 628, 632 (La. 1967). Under Louisiana law, building contracts are contracts "to do," which may be violated actively when a party either does something inconsistent with the terms of the contract, or violated passively by not doing what the contract calls for the party to do, nor performing at the time or in the manner contracted for. Id.

Prescription

La. Civ. Code art. 3500. Action against contractors and architects

An action against a contractor or an architect on account of defects of construction, renovation, or repair of buildings and other works is subject to a liberative prescription of ten years.

Damages

La. Civ. Code art. 1986: Right of the obligee

Upon an obligor's failure to perform an obligation to deliver a thing, or not to do an act, or to execute an instrument, the court shall grant specific performance plus damages for delay if the obligee so demands. If specific performance is impracticable, the court may allow damages to the obligee. Upon a failure to perform an obligation that has another object, such as an obligation to do, the granting of specific performance is at the discretion of the court.

The obligee may perform the obligation himself or have the obligation performed by another party at the obligor's expense. See La. Civ. Code art. 2504.

La. Civ. Code art. 1994 Art. 1994. Obligor liable for failure to perform

An obligor is liable for the damages caused by his failure to perform a conventional obligation. A failure to perform results from nonperformance, defective performance, or delay in performance.

La. Civ. Code art. 1995. Measure of Damages

Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived.

For more on damages, see Rosbottom v. The Office Lounge, Inc., 654 So. 2d 377 (La.App. 3 Cir. 1995).

Negligence

La. Civ. Code art. 2769. Contractor's liability for non-compliance with contract

If an undertaker fails to do the work he has contracted to do, or if he does not execute it in the manner and at the time he has agreed to do it, he shall be liable in damages for the losses that may ensue from his non-compliance with his contract.

La. Rev. Stat. Ann. 9:2771. Non-liability of contractor for destruction or deterioration of work

No contractor, including but not limited to a residential building contractor as defined in R.S. 37:2150.1(9), shall be liable for destruction or deterioration of or defects in any work constructed, or under construction, by him if he constructed, or is constructing, the work according to plans or specifications furnished to him which he did not make or cause to be made and if the destruction, deterioration, or defect was due to any fault or insufficiency of the plans or specifications. This provision shall apply regardless of whether the destruction, deterioration, or defect occurs or becomes evident prior to or after delivery of the work to the owner or prior to or after acceptance of the work by the owner. The provisions of this Section shall not be subject to waiver by the contractor.

La. Civ. Code art. 2762. Liability of contractor for damages due to badness of workmanship

If a building, which an architect or other workman has undertaken to make by the job, should fall to ruin either in whole or in part, on account of the badness of the workmanship, the architect or undertaker shall bear the loss if the building falls to ruin in the course of ten years, if it be a stone or brick building, and of five years if it be built in wood or with frames filled with bricks.

In Cell-O-Mar, Inc. v. Gros, the court held that contractors or builders in construction contracts have "an implied duty to perform in a workmanlike manner free from defects attributable to either faulty materials or poor workmanship," and are liable for damages caused by lack of skill,

efficiency, or knowledge, or where the contractor failed to exercise ordinary care in the performance of the work. 479 So. 2d 386, 391 (La. App. 1st Cir. 1985).

For measure of damages, see *Morton Buildings, Inc. v. Redeeming Word of Life Church, Inc.*, 744 So. 2d 5 (La. App. 1st Cir. 1998).

Breach of Warranty (New Home Warranty Act)

La. Rev. Stat. '9:3141 through 3150 outline the New Home Warranty Act, and provides special warranties and remedies when a new home is defective. Under La. Rev. Stat. Ann. '9:1350, NHTA is the exclusive remedy when the cause of action arises from construction defects, violations of building codes, and poor workmanship. These statutes cover periods of time for which the contract for new construction warrants the home free of defects in workmanship, materials, plumbing, electrical, heating and cooling, noncompliance with regulations and building codes, and provides applicable remedies.

Delays

La. Civ. Code art. 2769: Contractor's liability for non-compliance with contract

If an undertaker fails to do the work he has contracted to do, or if he does not execute it in the manner and at the time he has agreed to do it, he shall be liable in damages for the losses that may ensue from his non-compliance with his contract.

There are some exceptions under which delays are not compensable and which are often expressly contracted for, such as Acts of God and bad weather delays.

Recoverable Damages (For Construction defect and breach of contract claims)

Out of pocket expenses:

In Salard v Jim Walters Homes, Inc., the court reversed the trial court's holding for the plaintiffs which rescinded a construction contract for a home and awarded damages to the plaintiffs, and

the Court of Appeal awarded defendant the amount of the contract, less necessary repairs and out-of-pocket expenses made by the plaintiffs. 563 So. 2d 1327, 1333 (La. App. 3d Cir 1990).

Loss of Rental Income:

In Guy T. Williams Realty, Inc. v. Shamrock Constr. Co., the Court of Appeal affirmed the trial court's award of damages, and increased awarded to plaintiffs by the amount of loss rental income resulting from roof leaks in an office building constructed by defendants where plaintiffs tenants were kept from leasing the building. 564 So. 2d 689 (La. App. 5th Cir. 1990)

Attorney's Fees: Recoverable where parties contract for payment of attorney's fees, but there is no statutory provision otherwise authorizing recovery.

Investigation Costs:

Like attorney's fees, investigation costs are typically contracted for.

Mitigation of Damages

La. Civ. Code art 2002: Reasonable efforts to mitigate damages

An obligee must make reasonable efforts to mitigate the damage caused by the obligor's failure to perform. When an obligee fails to make these efforts, the obligor may demand that the damages be accordingly reduced.

Liens

Residential Truth in Construction Act

The following statutes make up the Residential Truth in Construction Act, which deals with lien and notice of liens requirements.

La. Rev. Stat. Ann. 9:4851. Scope; definition

A. The provisions of this Subpart and the notice required to be given herein shall be nonwaivable and shall be applicable to all residential home improvements and shall be read and construed in

para materia with the other provisions of this Part.

B. For the purposes of this Subpart, residential home improvements shall include all improvements or construction which enhance the value or enjoyment of any real property occupied by the owner thereof principally as a single-family dwelling or residence if such works would entitle any person to lien rights against the property under the provisions of R.S. 9:4801 through 9:4842.

La. Rev. Stat. Ann. 9:4852. Notice

A. Prior to or at the time of entering into a contract for residential home improvements under the provision of this Subpart, the contractor shall deliver to the owner or his authorized agent, for such owner's or agent's signature, written notice in substantially the following form:

NOTICE OF LIEN RIGHTS

Delivered this day of , 19 , by , Contractor.

I, the undersigned owner of residential property located at (street address) in the city of _____, parish of _____, Louisiana, acknowledge that the above named contractor has delivered this notice to me, the receipt of which is accepted, signifying my understanding that said contractor is about to begin improving my residential property according to the terms and conditions of a contract, and that in accordance with the provisions of law in Part I of Chapter 2 of Code Title XXI of Title 9 of the Louisiana Revised Statutes of 1950, R.S. 9:4801, et seq.:

(1) A right to file a lien against my property and improvements is granted to every contractor, subcontractor, architect, engineer, surveyor, mechanic, cartman, truckman, workman, laborer, or furnisher of material, machinery or fixtures, who performs work or furnishes material for the improvement or repair of my property, for the payment in principal and interest of such work or labor performed, or the materials, machinery or fixtures furnished, and for the cost of recording such privilege.

(2) That when a contract is unwritten and/or unrecorded, or a bond is

not required or is insufficient or unrecorded, or the surety therefor is not proper or solvent, I, as owner, shall be liable to such subcontractors, materialmen, suppliers or laborers for any unpaid amounts due them pursuant to their timely filed claims to the same extent as is the hereinabove designated contractor.

(3) That the lien rights granted herein can be enforced against my property even though the contractor has been paid in full if said contractor has not paid the persons who furnished the labor or materials for the improvement.

(4) That I may require a written contract, to be recorded, and a bond with sufficient surety to be furnished and recorded by the contractor in an amount sufficient to cover the cost of such improvements, thereby relieving me, as owner, and my property, of liability for any unpaid sums remaining due and owing after completion to subcontractors, journeymen, cartmen, workmen, laborers, mechanics, furnishers of material or any other persons furnishing labor, skill, or material on the said work who record and serve their claims in accordance with the requirements of law.

I have read the above statement and fully understand its contents.

Owner or Agent

Date

B. The notice herein required shall not be considered a condition of the construction contract.

La. Rev. Stat. Ann. 9:4853. Copies of notice

A. A copy of the signed notice shall be given to the owner or agent who has affixed his signature thereto.

B. Every person who may be entitled to lien rights against the residential property for work to be done or material to be furnished pursuant to this Subpart shall be furnished a copy of the signed notice by the contractor upon request.

La. Rev. Stat. Ann. 9:4854. Lien rights unaffected

Nothing contained in this Subpart shall abrogate or interfere with the lien rights of any person otherwise entitled thereto pursuant to the provisions of this Part.

La. Rev. Stat. Ann. 9:4855. Penalty for violation

In the event any liens are perfected under the provisions of this Part against any immovable property for work or improvements covered under the provisions of this Subpart and the contractor has failed to comply with the provisions of this Subpart, or, if having technically complied with this Subpart, has willfully, knowingly, and unlawfully falsified any statements or fraudulently obtained the signature of the owner or his agent, such owner shall have a civil cause of action therefor, and shall be entitled to reasonable damages and attorney fees. The penalty provided for herein shall not apply if the contractor or subcontractor obtains a bond from a good and solvent surety in favor of the owner of the property on which the lien is placed pursuant to R.S. 9:4841, or reimburses the property owner in an amount sufficient to satisfy the lien, either in the form of a deduction from the original contract price or other refund and the owner so acknowledges receipt in writing.

Other Liens Statutes:

La. Rev. Stat. 9:4855 (Grant of damages and attorney's fees if contractor fails to comply with the Residential Truth in Construction Act).

See also attached article: "Mechanics' liens and construction bonds under Louisiana Law," Goliath Business News, June 1 2006; retrieved from <http://goliath.ecnext.com> 3/13/2009.

Intentional Interference of a Contract

La. Civ. Code art. 2315: Art. 2315. Liability for acts causing damages

A. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

B. Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person. Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease. Damages shall include any sales taxes paid by the owner on the repair or replacement of the property damaged.

In 9 to 5 Fashions v. Spurney, the Louisiana Supreme Court held that the following elements must be present for a cause of action for Intentional Interference with a Contract: (1) the existence of a contract or a legally protected interest between the plaintiff and the corporation; (2) the corporate officer's knowledge of the contract; (3) the officer's intentional inducement or causation of the corporation to breach the contract or his intentional rendition of its performance impossible or more burdensome; (4) absence of justification on the part of the officer; (5) causation of damages to the plaintiff by the breach of contract or difficulty of its performance brought about by the officer. 538 So. 2d 228, 234 (La. 1989).

Supplemental Materials:

Liens

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Louisiana is the only one of the 50 states which bases its legal system on civil, as opposed to common, law. These are the two prominent legal systems in the Western world. Common law is derived from the English legal system; civil law was originally administered in the Roman Empire and is in a...

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...still influential continental Europe, Latin America, Scotland, and, of course, Louisiana, by way of France. Louisiana's main body of statutes is known as the Civil Code, which was also the name of the collection of legislation that embodied the law of Rome. France's 19th century codification was called the Napoleonic Code and it is from this work that great part of the Louisiana Civil Code is derived. If your business happens to cross state lines, you need to be aware that there may be unique distinctions that will affect your status, rights, and liabilities because of the disparities between the civil and common law systems. To Louisianans, the differences and the manner of the civilian tradition, however, are a thing of beauty.

As if the civil law difference was not enough, Louisiana's lien law is its own unique maze of rules and requirements, many of which mirror each other as between public and private projects--and many of

which do not. We break out below the foundational statutes governing the rights of general contractors, and their subcontractors and suppliers, to file liens and privileges on construction projects.

To be sure, the lien laws in Louisiana are strong devices in the hands of unpaid claimants—so strong, that as this article is being written the Louisiana Legislature is contemplating a means to restrict some of that strength. Currently-pending House Bill Number 653 proposes a revision to Louisiana Revised Statute 9:4843 to eliminate the effect of a lien against property and the owner, in the event an owner can prove that the general contractor has been paid in full "the amount due under the (general) contract ...". Whether this proposed change in the law passes remains to be seen, although it runs clearly counter to a principal purpose of the lien law, which is to provide the "little guy" with the ability to get paid.

Subcontractor And Supplier Liens

Private Works Act, LA. REV. STAT. 9:4801, et seq.

Subcontractors and materialmen are given a privilege or security interest to secure the principal and interest on their claims, and the cost of recording their claim, on the land and improvements on which their work has been done, or which their materials, machinery or fixtures have been furnished. A "privilege" under Louisiana law gives the holder of the privilege the right to get paid first in preference to and priority over others who do not have a privilege, with the real—or "immovable" as it is called in Louisiana—property as security for the claim.

Public Works Act, LA. REV. STAT. 38:2241, et seq.

Since public property cannot be subject to lien claims, the Public Works Act is not, strictly speaking, "lien and privilege" statutes. Nevertheless, contractors frequently refer to the filing of a claim under the Public Works Act as "filing a lien" on a public project.

Under Article 12 of the Louisiana Constitution, Section 10(c), public property in Louisiana cannot be subjected to lien claims. Therefore, the claims of contractors, subcontractors, laborers and materialmen cannot be secured by a privilege on public property. However, these claimants may "freeze" the further distribution of general contract funds, as long as they properly file their claim. If the governing authority distributes the funds in violation of the freeze, then it may be liable for the claims out of its regular budget. (1)

The law requires the general contractor to furnish a statutory payment bond for sizable public projects. Therefore, the risk is shifted (at least partially) away from the governing authority and to the surety and the general contractor.

Statutory Payment Bonds

Statutes in Louisiana require construction bonds on public works.

Bond Required for Construction Contracts under Louisiana Public Works Act, LA. REV. STAT. 38:2241, et seq.

Louisiana law requires that whenever the state or any state entity, agency or political subdivision enters into a contract in excess of \$5,000.00 for the construction, alteration or repair of any public work, the contract must be in writing and a bond furnished in an amount not less than 50 percent of the contract price. The bond is given to ensure the faithful performance of the contract and for the payment of certain claims arising out of the work. Under a 1985 amendment to the Public Works Act, lessors of equipment used in the construction project are now protected by the Act. Although the statute only requires a bond in an amount equal to 50 percent of the contract price, nearly all public contract bonds are for the full amount of the contract.

On public contracts of \$100,000.00 or less, the required performance bond is waived for any contractor who (1) qualifies as a small business; (2) is a "responsible bidder"; (3) has been operating under the same name for over a year; and (4) has been denied a guaranteed bond by the Small Business Administration or an established surety firm, for any reason other than a previous performance default. (2) Under Louisiana law, a public works bond is considered a statutory bond. This means that regardless of the contents and provisions of the bond document itself, the bond is deemed to provide coverage under such terms as are specified in the Public Works Act. This entails that any provisions of the Act that were omitted from the bond would be read into the bond, and extra-statutory language in the bond would be read out of the bond. This is known as the "read-in, read-out" rule.

A public works bond ensures both performance and payment. It protects the public body in the event that the contractor fails to complete the project. It allows the public body to recover all excess completion costs in the event of default by the contractor. The bond also guarantees that subcontractors, materialmen, laborers, architects and consulting engineers will be paid. Materialmen must show that their materials were either incorporated or consumed on the project. (3) However, a supplier to a supplier has no claim against either the general contractor or the surety underwriting the bond. (4)

Bond Required for Construction Contracts under the Louisiana Private Works Act, LA. REV. STAT. 9:4801, et seq.

The general purpose of the Private Works Act is to protect the interests of those persons who perform labor on, supply material to, contract work for, or lease movable equipment used on a project, while also protecting the interests of the owner of the project or the person requesting the work.

Those whose efforts contributed to the construction of the project ("claimants") are granted a privilege on the land and improvements on which the work or labor has been done, or the materials, machinery, equipment or fixtures furnished. In addition to the privilege against the property, the owner is also personally liable to the claimants under certain conditions, even though the owner has no direct contractual relationship with the claimants.

Under the Louisiana Private Works Act scheme, an owner can avoid personal liability by requiring the contractor to furnish and maintain a bond from a solvent, legal surety for the project. To obtain the statutory protections, the bond and a notice of contract must be filed by the owner in the office of the Recorder of Mortgages or Clerk of Court before work on the project begins. The statute requires that the bond be 100 percent of the contract price, if the price is less than \$10,000.00; 50 percent, but not less than \$10,000.00, of the contract price if the contract is between \$10,000.00 and \$100,000.00; 33.3 percent of the contract amount, but not less than \$50,000.00, if the price of the contract is between \$100,000.00 and \$1,000,000.00; and 25 percent of the contract amount, but not less than \$333,333.00, if the contract price is in excess of \$1,000,000.00. (6)

A bond given under the Private Works Act is a "statutory bond" with respect to subcontractors, suppliers and laborers and is subject to the "read-in, read-out" rule. The bond will also be considered a statutory performance bond protecting the owner, unless such guaranty is expressly excluded by the terms of the bond. (7)

Private Payment Bonds

On private works projects, any payment bond given in connection with a construction contract that does not comply with the provisions of the Louisiana Private Works Act is a conventional bond (also known as a "private payment bond"), and will be enforced according to the terms of the bond, like any other contract. Only those parties named as obligees on that bond may sue the surety. (8)

A bond given by a subcontractor to a general contractor is a conventional, not a statutory bond. Claimants other than the general contractor will not have a direct right of action against the subcontractor or surety unless that right is specifically granted in the bond. Furthermore, since a performance bond furnished by a subcontractor is not covered by the Private Works Act, the time limitations on suit-governing lien claims do not apply.

Lien Bonds

If a statement of claim or privilege or a notice of lis pendens is filed regarding a private works project, any interested party may file a surety bond, cash, certified funds, or a federally insured certificate of deposit to guarantee payment of the secured obligation. The bond or funds must guarantee that portion of the principal amount of the claim ultimately found to be lawfully due, together with interest, costs and attorney's fees to which the claimant may be entitled up to a total amount of 125 percent of the principal amount of the claim. (9)

Any party who files a bond or other security to guarantee payment of the secured obligation must give notice via certified mail to the owner of the immovable, the holder of the lien and the general contractor. (10)

Subcontractors

A subcontractor contracts directly with the general contractor or with another subcontractor to do a specific portion of the construction project, but is not himself a laborer or a supplier. The factors that distinguish a subcontractor from a general contractor are: whether the performance was part or all another contract; whether the performance was an identified unit portion of a larger work; whether the party was responsible for undertaking and completing a specified unit of work and whether the party directly employed, supervised, and controlled his own men and equipment and their performance of his portion of the work through his own foreman or supervisory employees. (11) The status of "subcontractor" is not always easy to determine.

To be a "subcontractor" under Louisiana law, one must actually participate in the fabrication or erection work of the project. Mere off-site work, or the supplying of materials, is usually not enough to make a party a subcontractor. (12) This distinction is significant because under Louisiana law, a supplier to another supplier has no cause of action against either the general contractor or the surety on the statutory bond. (13) However, subcontractors at all levels have lien rights. Unlike some statutory schemes in other jurisdictions, liens are not limited to so-called "first-tier" and "second-tier" subcontractors.

Material Suppliers

Material suppliers or materialmen have a privilege for their claims upon the land and improvements on which the materials, machinery or fixtures are used. To establish his claim and privilege, the materialman must be able to prove that (1) the materials were delivered to the job site, and (2) they were actually

incorporated or consumed in the work. The material must have been furnished with the consent, or at the request, of the owner or his express or implied agent, (14) and furnished directly to the person or entity that physically incorporated (or consumed) the item in the work (to avoid the supplier-to-supplier problem).

What Improvements Are Covered

Erection, Construction, Addition, Alteration, Repair, Removal And Demolition

Obligations of the owner arising out of the work on an immovable are covered under the Private Works Act. Under that Act, a "work" is defined as a single continuous project for the improvement, construction, erection, reconstruction, modification, repair, demolition or other physical changes of an immovable or its component parts. (15)

The clearing, leveling, grading, test piling, cutting or removal of trees and debris, placing of fill dirt, leveling of the land surface or performance of other work on land for or by an owner in preparation for the construction project shall be deemed a separate work to the extent the preparatory work is not a part of the general contractor's work. (16)

Under the Public Works Act, the definition of "claimant" includes various individuals. It means any person to whom money is due pursuant to a contract with the owner or a contractor for doing work, performing labor, or furnishing material or supplies for the construction, alteration or repair of any public works. It includes persons who transport and deliver such materials or supplies to the site of the job by a for-hire carrier, and persons who furnish oil, gas, electricity, or other materials or supplies for use in machines used in the construction, alteration, or repair of any public works. It also includes persons to whom money is due for the lease or rental of movable property, use at the site of the immovable and leased to the owner by written contract, as well as registered or certified surveyors or engineers, or licensed architects, or their professional sub-consultants, employed by the owner, or by the contractor in connection with the building of any public work. (17)

Labor

Laborers and employees of the owner, contractors and subcontractors have a privilege on an immovable to secure the wages owed to them arising out of a work on the immovable for the price of the work. (18)

Materials

Sellers have a privilege on the immovable for the price of movables sold to the owner, contractor or subcontractor that are incorporated in the construction project, or are consumed during construction, or are consumed in machinery or equipment used during construction.

In order for off-site materials to be covered, the materialmen must be able to prove that (1) the materials were delivered to the job site, and (2) they were actually incorporated or consumed in the work. The Act does not provide protection to suppliers who supply other suppliers or laborers. (19) The mere fact that labor has been expended or materials gathered off the premises is...

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Additional Resources

Additional Resources

For inquiries into current licenses of contractors:

Louisiana State Licensing Board for Contractors

<http://www.lslbc.louisiana.gov/findcontractor.asp>

1-225-765-2301 (For inquiries into previously held licenses for currently unlicensed contractors)

For inquiries into construction companies and corporations

Secretary of State of Louisiana

<http://www.sos.louisiana.gov/tabid/433/Default.aspx>

For public records searches:

Lexis Searches: www.lexis.com

Asset locators, Civil and Criminal Court Filings, address and phone information with dates.

Other sources:

The Times Picayune: www.timespicayune.com

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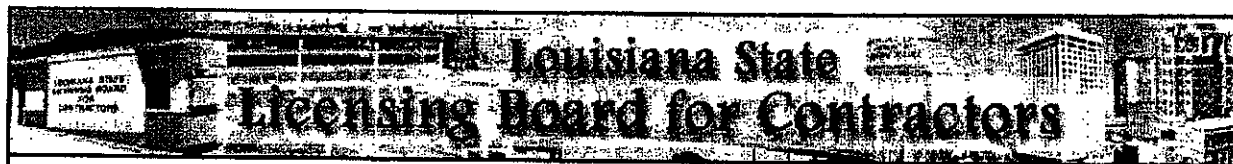
For public records searches:

Lexis Searches: www.lexis.com

Asset locators, Civil and Criminal Court Filings, address and phone information with dates.

Other sources:

The Times Picayune: www.timespicayune.com



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All licenses to practice contracting in the state of Louisiana R.S.37:2150-2192 expire December 31st of the year in which they were issued or renewed. This license becomes invalid on that date unless renewed. After the license has expired, the person or firm to whom such license was issued shall have until the second Tuesday in January, next, following the expiration date to file an application for the renewal of such license without payment of penalty and without further examination.

The classifications shown under the name of each contractor are the branches of contracting for which he has qualified before the State Licensing Board for Contractors, and no contractor should be permitted to bid on a project amounting to \$50,000 or more (\$1 or more for hazardous) unless his classifications show that he is qualified for that type

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