

QUATTLEBAUM, GROOMS, TULL & BURROW PLLC

A PROFESSIONAL LIMITED LIABILITY COMPANY

ARKANSAS CONSTRUCTION & DESIGN LAW

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The following pages are excerpted from:

*A State-By-State Guide to Construction & Design Law
Current Statutes and Practices
Second Edition*

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CHAPTER 4

Arkansas Construction and Design Law

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CHAPTER 4

Arkansas Construction and Design Law

I. Considerations Relating to Project Delivery Systems

Arkansas law does not heavily regulate private construction project negotiation and bidding with regard to project delivery systems. Arkansas requires that general contractors only perform construction management services in those fields in which they hold the proper classification. 033-00-001 Ark. Code R. § 224-25-5(c). While a detailed discussion of public contracts is beyond the scope of this book, it should be noted that political subdivisions and agencies may enter into construction management contracts. A.C.A. § 19-11-801 to 805. Furthermore, competitive bidding is prohibited in the procurement of construction management services. A.C.A. § 19-11-802(c)(1). With regard to design-build contracts, A.C.A. § 19-11-807 only allows school districts to use design-build construction as a project delivery method. A.C.A. § 22-9-203(j) does allow municipalities and sanitation authorities to enter into contracts to provide for the design, building, operation and maintenance of water, storm water, and wastewater treatment projects. Absent other statutory authority, all public construction contracts are to be awarded by competitive sealed bidding. A.C.A. § 19-11-228.

II. Design and Construction Professionals

A. Liability of Design and Construction Professionals Generally

With regard to general tort liability, Arkansas courts have held that the foreseeability and negligence rules applicable in products liability cases should be controlling in an owner-contractor situation, with considerations such as owner inspection and acceptance, the time between construction and injury and other intervening factors considered in evaluating the question of negligence. *Suneson v. Holloway Constr. Co.*, 992 S.W.2d 79, 85 (1999). Professional malpractice liability for design and construction professionals is not addressed directly in the Arkansas Statutes, but rather arises under general negligence and intentional tort theories.

B. Statutes of Limitations Applicable to Design or Construction Liability

1. Tort and Contract Claims

Arkansas has a five year statute of limitation for any cause of action based on a written contract, duty or right. A.C.A. § 16-56-111. Actions based on oral contracts or torts must be commenced within three years after the cause of action accrues. A.C.A. § 16-56-105. All other actions not specifically addressed in other statutes are subject to a five year statute of limitation. A.C.A. § 16-56-115. Under these statutes, the limitation period begins to run when the cause of action accrues. A cause of action accrues when it becomes obvious that a permanent injury has been suffered. *City of Springdale v. Weathers*, 410 S.W.2d 754, 756 (Ark. 1967). This is a question of fact for a jury to decide. *Id.*

2. Statute of Repose

A.C.A. § 16-56-112 concerns the limitation period for bringing an action arising from the deficiency in the design, planning, supervision, or observation of construction or the construction and repair of any improvement to real property or for injury to real or personal property caused by a deficiency. The statute provides that the limitation period shall commence upon substantial completion of an improvement. Accordingly, actions based on a contract to recover damages must be brought within five years after the date of substantial completion and actions in tort or contract to recover damages for personal injury or wrongful death must be brought no later than four years after that date. In personal injury or wrongful death cases, if the injury occurred during the fourth year following substantial completion of an improvement, an action in tort or contract to recover damages for the injury may be brought within one year after the date the injury occurred, but in no event more than five years after the date of substantial completion of construction of an improvement. However, the statute specifically states that "[n]othing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any cause of action, nor shall the parties to any contract for construction extend the above prescribed limitations by agreement or otherwise." A.C.A. § 16-56-112(f). The courts have construed this statute as a statute of repose. *Curry v. Thornsberry*, 128 S.W.2d 438, 441 (Ark. 2003). Therefore, under § 16-56-112(a), there is a maximum five-year period within which an injured party can bring suit against a person who deficiently constructs or repairs an improvement to real property, which period commences after substantial completion of the improvement; but, in bringing such a suit, the injured party must still bring the action within the statute of limitations for that type of cause of action. *East Poinsett County School Dist. No. 14 v. Union Std. Ins. Co.*, 800 S.W.2d 415, 417 (Ark. 1990).

The limitations prescribed by A.C.A. § 16-56-112 also apply in any action for damages caused by any deficiency in surveying, establishing, or making the boundaries of real property, the preparation of maps, or the performance of any other engineering or architectural work on real property or improvements to real property. However, the limitations do not apply in the event of fraudulent concealment. A.C.A. § 16-56-112(d).

3. ***Promise by Joint Contractor or Executor (A.C.A. § 16-56-124)***

Arkansas statute A.C.A. § 16-56-124 applies when two or more joint contractors or executors are involved and it provides that no joint contractor shall lose the benefit of the statute of limitations by virtue of any written acknowledgement or promise made by the other joint contractor. In other words, if one joint contractor assumes responsibility for liability after the statute of limitations has run for that liability, then the joint contractor not assuming the liability is still protected by the applicable statute of limitations from the liability assumed by the first joint contractor.

C. **Licensing and Regulation**

1. ***Design Professionals***

The activities of technical professionals are governed by separate chapters of Arkansas Code Annotated. The technical professions regulated are: architects, engineers, interior designers, landscape architects and surveyors. Each chapter defines what constitutes practicing one of these technical professions, creates and prescribes the duties of a governing body for that profession, imposes requirements for registration and licensing for the profession, and prescribes activities of persons practicing that profession.

a. ***Architects (A.C.A. § 17-15-101 et. seq.)***

An architect is one whose occupation is to form and devise plans, and who designs and draws up specifications for buildings or structures and superintends the construction of the building or structure. *Arkansas State Bd. of Architects v. Bank Bldg & Equip. Corp.*, 286 S.W.2d 323, 326-27 (Ark. 1956). The activities of architects are governed by A.C.A. § 17-15-101 to -312 (1987), the Arkansas Architectural Act.

A.C.A. § 17-15-103 declares it unlawful for any person to practice or offer to practice¹ the profession of architecture without being registered or exempted from the registration requirements prescribed in A.C.A. § 17-15-301 through 17-15-311. A person is guilty of a misdemeanor, and upon conviction, shall be sentenced to a fine of not less than \$50 nor more than \$500 or be imprisoned for a period not exceeding three months if he or she 1) practices the profession of architecture without first registering or qualifying for an exemption, or 2) gives false or forged evidence in order to obtain a certificate of registration, or 3) falsely impersonates another registrant, or 4) attempts to use an expired or revoked certificate, or 5) violates or aids or abets a violation of any provision of the Arkansas Architectural Act.

The Arkansas Architectural Act is administered by the Arkansas State Board of Architects which consists of seven members appointed by the Governor for terms of five years. A.C.A. § 17-15-201. The Board is empowered to enforce the Arkansas Architectural Act and to make such rules and regulations as may be desirable or necessary to carry out the purposes of the Arkansas Architectural Act. A.C.A. § 17-15-203. In addition, the

¹ A.C.A. § 17-15-301 (1987) requires an architect's license in order to "use the title 'architect,' or to display or use any title, sign, card, advertisement, or other device to indicate that the person practices or offers to practice architecture, or is an architect."

Board is empowered to adopt regulations setting minimum standards of continuing education for architects. A.C.A. § 17-15-205.

A.C.A. § 17-15-302 provides a variety of exemptions from the Arkansas Architectural Act, including an exemption for 1) professional engineers who engage in the practice of architecture provided they do not use the designation "architect,"² 2) employees of those lawfully practicing architecture, 3) government employees engaged in the practice of architecture for the government, 4) residents who design buildings for personal use, and 5) millworkers, woodworkers, and sash and door manufacturers. A person or entity that qualifies for an exemption may obtain a certificate of registration by exemption from the Arkansas State Board of Architects by paying the prescribed fee which is not to exceed \$250. A.C.A. § 17-15-311.

To be registered and licensed, an applicant must be at least twenty-one years of age and of good moral character. He or she must have all the qualifications required for admission to either the written examination or the senior examination of the National Council of Architectural Registration Boards, and he or she must pass an examination for licensure offered by the Arkansas State Board of Architects. A.C.A. § 17-15-304. An applicant for examination and registration must pay a fee not to exceed two hundred fifty dollars. A.C.A. § 17-15-311.

The Arkansas State Board of Architects is empowered to license a partnership or corporation in the business of architecture provided two-thirds of the partners or directors are registered under the laws of any state to practice architecture or engineering. A partner or director who is registered to practice architecture in Arkansas must manage the partnership's or corporation's practice of architecture in Arkansas. A.C.A. § 17-15-303.

A person or entity that possesses an unexpired license to practice architecture in any state or territory of the United States may obtain a temporary license to practice architecture in Arkansas provided the requirements for registration in the applicant's state or territory do not contravene the provisions of the Arkansas Architectural Act and are the equivalent of the requirements for practicing architecture in Arkansas. In addition, the applicant must enter into a contract of association with a licensed architect in Arkansas which must be filed with the Arkansas Board of Architects, along with a temporary license application. A.C.A. § 17-15-306.

The Arkansas Board of Architects may revoke the registration and license of any architect if the architect violates the Arkansas Architectural Act or the rules promulgated under the Act, or is found guilty of any of nine additional grounds for revocation, including gross incompetence or recklessness in construction or designing a building, conviction of a felony, or allowing another to affix his or her seal or name to any plans specifications, drawings, or related documents that were not prepared by him or her or under his or her supervisory control. A.C.A. § 17-15-308. Revocation procedures are set forth in A.C.A. § 17-15-309, which provides that all charges deemed worthy of consideration by the Arkansas Board of Architects shall be heard within three months after the date a complaint is received by the Secretary of the Board.

b. Engineers. (A.C.A. § 17-30-101 *et. seq.*)

² See also *Holloway v. State Bd. of Architects*, 86 S.W.3d 391 (Ark. Ct. App. 2002), *aff'd in part, rev'd in part*, 101 S.W.3d 805 (Ark. 2003) (holding that the mere fact that an engineer engaged in the planning and design of a building was not enough to prove that the engineer engaged in the unauthorized practice of architecture).

The practice of engineering is defined as "any service or creative work, the adequate performance of which requires engineering education, training, and experience, in the application of special knowledge in the mathematical, physical, and engineering sciences to services or creative work such as consultation, investigation, evaluation, planning, and design of engineering works and systems relating to the use of air, land, water, municipal and regional planning, forensic services, engineering teaching of advanced engineering subjects or courses related thereto, engineering surveys, and the inspection of construction for the purpose of assuring compliance with drawings and specifications, any of which embraces service or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, or projects including architectural work as is incidental to the practice of engineering." A.C.A. § 17-30-101(4)(A). The activities of engineers are governed by A.C.A. § 17-30-101 to -306 (1987) (the "Arkansas Engineering Act").

A.C.A. § 17-30-102 declares it unlawful for any person to practice or offer to practice³ the profession of engineering without being registered or exempted from the registration requirements prescribed in A.C.A. § 17-30-301 to -306. A person is guilty of a misdemeanor, and upon conviction, shall be sentenced to a fine of not less than \$100 nor more than \$1,000 or be imprisoned for a period not exceeding three months if he or she 1) practices or offers to practice engineering without a license, or 2) uses a certificate of registration of another, or 3) gives false evidence in obtaining a license, or 4) falsely impersonates any other practitioner, or 5) implies that he or she is a licensed engineer when he or she is not, or 6) uses the name "engineer" or "engineering" in his or her title or form of business activity without first being registered as an engineer. On the second or any subsequent offense a person, upon conviction, is guilty of a Class D felony. *Id.*

The Arkansas Engineering Act is administered by the State Board of Registration for Professional Engineers and Land Surveyors which consists of nine members appointed by the Governor for terms of four years. A.C.A. § 17-30-201. The Board is empowered to enforce the Arkansas Engineering Act and to make such rules and regulations as may be desirable or necessary to carry out the purposes of the Arkansas Engineering Act. A.C.A. § 17-30-203.

A.C.A. § 17-30-105 provides an exemption from the Arkansas Engineering Act for non-resident engineers qualified to do business in another state provided he or she obtains a temporary permit to practice engineering in the State of Arkansas, and for engineer-interns and employees of those lawfully practicing engineering. A person who is registered to practice engineering in another state may engage in the practice of engineering in Arkansas provided the requirements for registration in his or her state are comparable to the requirements in Arkansas. A.C.A. § 17-30-301(2). Any person who conducts engineering business in Arkansas apply to the Board of Registration for Professional Engineers and Land Surveyors and obtain a written permit to do a specific job for a definite period of time not to exceed sixty calendar days. *Id.*

Each applicant for registration must take an examination, and if found to be qualified, will be registered, depending on his or her education and experience, either as a professional engineer or an engineer-intern. Applicants must be graduates of an educational institution approved by the Accreditation Board for Engineering and

³ A.C.A. § 17-30-102 (1987) requires an engineering license in order to use the title "engineering" or "engineer" in any name or form of business activity.

Technology, Inc. and which has an approved engineering curriculum, or its equivalent, as approved by the Board of Registration for Professional Engineers and Land Surveyors. The Board may waive the examination requirement of an applicant provided he or she is registered either as an engineer, an engineer-in-training or an engineer-intern by the registering authority of any state or territory of the United States, provided his or her qualifications at the time he or she was registered are not less than those required by the Arkansas Engineering Act. A.C.A. § 17-30-302.

A firm, association, partnership, or corporation may not engage in the practice of engineering except through its officers, agents, or employees and only if one of the owners or incorporators is a professional engineer and the practice of engineering by the entity is done under the supervision and direction of the professional engineer. A.C.A. § 17-30-301(4).

The Board of Registration for Professional Engineers and Land Surveyors may suspend, revoke, refuse to issue, restore, or renew a certificate of registration or place on probation, fine, reprimand, or any combination thereof, a professional engineer who is found to have violated any of the thirteen proscriptions contained in A.C.A. § 17-30-305. The proscriptions include violations of the Arkansas Engineering Act or the rules promulgated under the Act, and include negligence, incompetency, misconduct in the practice of engineering, conviction of a felony, engaging in dishonorable, unethical or unprofessional conduct, habitual intoxication, addiction to the use of drugs or alcohol or providing false testimony to the Board. *Id.* Disciplinary action procedures are set forth in A.C.A. § 17-30-306 and provide that all charges deemed worthy of consideration by the Board of Registration for Professional Engineers and Land Surveyors shall be heard within six months after the date a complaint is received by the Board.

c. Interior Designers. (A.C.A. § 17-35-101 *et. seq.*)

In Arkansas, the practice of interior design is regulated by restricting the use of the title "registered interior designer" or "registered residential interior designer." A.C.A. §§ 17-35-102, -601. The activities of registered interior designers and registered residential interior designers are regulated by A.C.A. § 17-35-101 to -304, the "Arkansas Interior Designers Title Registration Act" and A.C.A. §§ 17-35-601 to -804, the "Arkansas Residential Interior Designers Title Registration Act."

A.C.A. § 17-35-301 declares it unlawful for any person, company, partnership, association, corporation or other similar organization, unless properly registered, to advertise or imply that it is in a position to provide the services of a registered interior designer or to use the title "registered interior designer" or any other words, letters, figures, or other devices for the purpose of implying, directly or indirectly, that the person is a registered interior designer. A.C.A. § 17-35-605 also declares it unlawful if a person or entity uses the title of "registered residential interior designer."

A person is guilty of a Class A misdemeanor if he or she 1) uses the title of "registered interior designer" or "registered residential interior designer" unless he or she is registered under the applicable registration act, 2) uses the registration of another, 3) gives false information in order to obtain registration 4) falsely impersonates a registered interior designer, 5) uses or attempts to use a registration that has been revoked, or 6) otherwise violates the applicable registration act. A.C.A. §§ 17-35-105, -605.

The Arkansas Interior Designers Title Registration Act is administered by the State Board of Registered Interior Designers, while the Arkansas Residential Interior Designers Act is administered by the State Board of Residential Interior Designers. Each board consists of seven members appointed by the Governor for terms of five years. A.C.A. §§ 17-35-201, -701. The respective Boards are empowered to enforce the respective Acts and to make such rules and regulations as may be desirable or necessary to carry out the purposes of the respective Acts. A.C.A. §§ 17-35-202, -702.

A.C.A. §§ 17-35-104 and 17-35-604 provide an exemption from the respective Acts for persons or entities that designate themselves as an "interior decorator" and for those offering "interior decorating services." There is also an exemption for architects and other persons who render interior design services provided those persons do not use the title "registered interior designer" or "registered residential interior designer." A.C.A. §§ 17-35-104, -604.

Under both Acts, an applicant must register by demonstrating he or she 1) has taken and passed the National Council for Interior Design Qualification examination or its predecessor exams, 2) is a graduate of a four or five-year interior design program from an accredited institution, and in the case of a four year program, he or she has two years of interior design experience, and in the case of a five-year program, he or she has one year of experience. Architects qualify for registration by presentation of their certification to practice architecture in the State of Arkansas. A.C.A. §§ 17-35-302, -802.

A person who is registered, licensed or certified as an interior designer in another state and provides proof of passage of the examination of the Council for Qualification of Interior Designers or Residential Interior Designers, as the case may be, may use the appropriate title, "registered interior designer" or "registered residential interior designer," in the state of Arkansas. *Id.*

The Boards established by the Acts administer, coordinate, and enforce the provisions of the respective Acts and may investigate allegations of misconduct and suspend registrations of registered interior designers and registered residential interior designers. A.C.A. §§ 17-35-202, -702.

d. Landscape Architects. (A.C.A. § 17-36-101 et. seq.)

The practice of landscape architecture is defined as any service or creative work, the adequate performance of which requires landscape architectural education, training, and experience and includes performance of services in connection with the development of land areas in order to preserve, enhance or determine proper land uses. A.C.A. § 17-36-102. The activities of landscape architects are governed by A.C.A. §§ 17-36-101 to -310, the Landscape Architectural Practice Act.

A.C.A. § 17-36-103 declares it a misdemeanor for any person to practice the profession of landscape architecture without being licensed and registered or exempted from the registration requirements prescribed in A.C.A. §§ 17-36-301 to -309.

The Landscape Architectural Practice Act is administered by the Advisory Committee for Registration of Landscape Architects which consists of five members appointed by the Governor for terms of six years. A.C.A. § 17-36-201. The Board is empowered to enforce the Landscape Architectural Practice Act and to make such rules and regulations as may be desirable or necessary to carry out the purposes of the Landscape Architectural Practice Act. A.C.A. § 17-36-204.

A.C.A. § 17-36-309 provides an exemption from the Landscape Architectural Practice Act for 1) persons acting under the supervision of a registered landscape architect, 2) government employees engaged in the practice of landscape architecture on behalf of the government for the governmental entity by whom they are employed, 3) regional and urban planners, 4) architects and engineers, and 5) other miscellaneous persons whose work involves plants and irrigation.

Each applicant for registration must take an examination, hold a degree in landscape architecture or a field related to landscape architecture, and have sufficient experience in landscape architecture as set forth in A.C.A. § 17-36-303.

A person who has successfully completed a written examination prepared or approved by the Council of Landscape Architectural Registration Board and is legally registered as a landscape architect in any other state may apply to the Advisory Committee for Registration of Landscape Architects to qualify for certification and become licensed in Arkansas, provided the qualifications for licensure are generally equivalent to that of Arkansas. A.C.A. § 17-36-304.

The Advisory Committee for Registration of Landscape Architects may revoke the registration and license of any landscape architect on any one of eight grounds, including 1) violation of the Landscape Architectural Practice Act, 2) failure to pay license or renewal fees, 3) conviction of a felony, and 4) affixing the architect's seal to plans not prepared by him or her. A.C.A. § 17-36-306. Revocation procedures are set forth in A.C.A. § 17-36-307 and provide that all charges deemed worthy of consideration by the Advisory Committee for Registration of Landscape Architects shall be heard by the board.

e. Surveyors. (A.C.A. § 17-48-101 *et. seq.*)

In Arkansas, the practice of land surveying is defined as any service comprising the determination of the location of land boundaries and land boundary corners and the preparation of plats showing the shape and areas of tracts of land, streets, roads and rights-of-way. A.C.A. § 17-48-101(2). A land surveyor is any person who engages in the practice of land surveying. *Id.* The activities of land surveyors are governed by A.C.A. § 17-48-101 to -304 (1987), the "Arkansas Land Surveyors Act."

A.C.A. § 17-48-201 declares it unlawful for any person to practice or offer to practice land surveying in Arkansas or to use with his or her name or to use in connection with his or her name or otherwise assume or advertise any title or description tending to convey the impression that he or she is a land surveyor, unless the person has been registered under the Arkansas Land Surveyors Act. A person is guilty of a misdemeanor, and upon conviction, shall be sentenced to a fine of not less than \$100 nor more than \$500 or be imprisoned for a period not less than thirty days and not exceeding six months if he or she violates the Arkansas Land Surveyors Act. A.C.A. § 17-48-102. In addition, the State Board of Registration for Professional Engineers and Land Surveyors is authorized to levy a civil penalty of not less than twenty dollars and not more than two thousand dollars for violating this chapter. A.C.A. § 17-48-201.

The Arkansas Land Surveyors Act is administered by the State Board of Registration for Professional Engineers and Land Surveyors which consists of nine members appointed by the Governor for terms of four years. A.C.A. § 17-30-201. The Board is empowered to enforce the Arkansas Land Surveyors Act and to make such rules

and regulations as may be desirable or necessary to carry out the purposes of the Arkansas Land Surveyors Act. A.C.A. § 17-48-104.

Each applicant for registration must qualify according to his or her experience, education and satisfactory completion of a written examination designed to show that he or she is qualified to practice land surveying. The Board may waive the examination requirement of an applicant if he or she is registered either as a registered land surveyor or a land surveyor-in-training in any state or territory of the United States, provided his or her qualifications at the time he or she was registered are not less than those required by the Arkansas Land Surveyors Act. A.C.A. § 17-48-203.

All licensed engineers and surveyors must file a plat of all surveys of property boundary lines made by them in the office of the circuit clerk in the county where the survey was made within thirty days after payment for performing the survey or the plat is completed, whichever event occurs last. Failure or refusal to file a survey is a misdemeanor, and upon conviction, a surveyor is subject to a fine of not less \$50 nor more than \$100 and/or imprisonment for not less than thirty days nor more than six months. A.C.A. § 17-48-106.

A land surveyor may practice his or her profession through a firm, association, partnership, or corporation provided that all surveys are signed and stamped with the signature and seal of a registered land surveyor who shall be personally and professionally responsible for them. A.C.A. § 17-48-201.

The Board of Registration for Professional Engineers and Land Surveyors must revoke a land surveyor's registration if it finds that any registered land surveyor 1) secured his or her registration through fraud, deceit or false statements, 2) is guilty of gross negligence, incompetence or misconduct in the practice of land surveying or 3) has been convicted of a felony or crime involving moral turpitude. A.C.A. § 17-48-205.

2. Construction Professionals

Like technical professionals, the activities of construction professionals are governed by separate chapters of the Arkansas Code Annotated. The construction professions regulated are: contractors, electricians, HVAC workers, homebuilders, plumbers, and water-well constructors. Each chapter defines what constitutes practicing one of these construction professions, creates and prescribes the duties of a governing body for that profession, imposes requirements for registration and licensing for the profession, and prescribes activities of persons practicing that profession.

a. Contractors. (A.C.A. § 17-25-101 *et. seq.*)

A contractor is any person, firm, partnership, co-partnership, association, corporation, or other organization, or any combination thereof, that, for a fixed price, commission, fee, or wage, attempts to or submits a bid to construct or demolish, or contracts or undertakes to construct or demolish, or assumes charge, in a supervisory capacity or otherwise, or manages the construction, erection, alteration, demolition, or repair, or has or have constructed, erected, altered, demolished, or repaired, under his or her, their, or its direction, any building, apartment, condominium, highway, sewer, utility, grading, or any other improvement or structure on public or private property for lease, rent, resale, public access, or similar purpose, except single-family residences, when the cost of the work to be done, or done, in the State of Arkansas by the contractor, including, but not limited to,

labor and materials, is twenty thousand dollars (\$20,000) or more. A.C.A. § 17-25-101. The activities of contractors are governed by A.C.A. § 17-25-101 to -409, the "Arkansas Contractors' Act."

A.C.A. § 17-15-103 declares it a misdemeanor for any person or entity to engage in the business of contracting unless he or she is licensed or exempt from the licensing requirement of the Arkansas Contractors' Act. Upon conviction, an unlicensed contractor shall be sentenced to a fine of not less than \$100 nor more than \$200 for each offense, with each day to constitute a separate offense. No proceedings may be commenced by the Contractors Licensing Board after three years from the date of a violation. The Contractors Licensing Board has the power to file suit in the court of appropriate jurisdiction to enjoin a person or entity from violating the provisions of the Arkansas Contractors' Act which prohibits the business of contracting without a license. A.C.A. § 17-25-103.

The Arkansas Contractors' Act is administered by the Contractors Licensing Board which consists of seven members appointed by the Governor for terms of five years. A.C.A. § 17-25-201. The Board is empowered to enforce the Arkansas Contractors' Act and to make such rules and regulations as may be desirable or necessary to carry out the purposes of the Arkansas Contractors' Act. A.C.A. § 17-25-203.

A.C.A. § 17-25-102 exempts authorized representatives of governmental entities, and architects and engineers in certain situations, from the contractor licensing requirements.

To be registered and licensed, an applicant must complete and file a written application on the form prescribed by the Board, submit an audited financial statement, and satisfactorily complete an examination to determine the applicant's qualifications. An applicant for examination and registration must pay a fee not to exceed one hundred dollars. A.C.A. § 17-25-301 to -306.

The Contractors Licensing Board may revoke the license of any contractor who is found guilty of any fraud or deceit in obtaining a license, for aiding or abetting any contractor or person violating the provisions of the Arkansas Contractors' Act, or for gross negligence, incompetence, or misconduct in the conduct of the contractor's business. A.C.A. § 17-25-308. Revocation procedures are set forth in A.C.A. § 17-25-309 and provide that all charges deemed worthy of consideration by the Contractors Licensing Board shall be heard by the Board.

b. Electricians. (A.C.A. § 17-28-101 *et. seq.*)

An electrical contractor is defined in A.C.A. § 17-28-101 as any person, member, or employee of a firm, partnership, or corporation engaged in the business of installing, erecting, repairing, or contracting to install, erect, or repair electrical wires or conductors to be used for the transmission of electric light, heat, power, or signalling purposes, or to install or repair moulding, ducts, raceways, or conduits, for the reception or protection of such wires or conduits, or any electrical machinery, apparatus, or systems to be used for electrical light, heat, power, or signalling purposes. The activities of electrical contractors are governed by A.C.A. § 17-28-101 to -307, the "Electrical Contractors' Act."

A.C.A. § 17-28-302 provides that an electrical contractor may apply for and be issued a license upon satisfying the Board of Electrical Examiners of the State of Arkansas that he or she has satisfied the requirements to become a master electrician or has employed a master electrician as his or her superintendent or manager. A.C.A. § 17-28-

302. The state license is optional and entitles an electrical contractor to practice his or her profession throughout Arkansas without first complying with the licensing requirement of any municipality. A.C.A. § 17-28-305.

The Electrical Contractors' Act is administered by the Board of Electrical Examiners of the State of Arkansas, which consists of the Director of the Department of Labor or his or her authorized representative and eight members appointed by the Governor for terms of four years. A.C.A. § 17-28-201. The Board is empowered to formulate rules and regulations necessary for the implementation of the Electrical Contractors' Act. A.C.A. § 17-28-202.

To become licensed, an applicant must satisfactorily complete the master, journeyman, industrial maintenance, residential master, air conditioning, or residential journeyman electrician's examination as specified in A.C.A. § 17-28-203. An applicant must pay a licensing fee which shall not exceed one hundred dollars, or fifty dollars in the case of the industrial maintenance electrician license. *Id.* The Board is authorized to issue an electrical license to those applicants holding equivalent licenses in other states, provided an agreement has been reached with that state to recognize the electrical licenses held by Arkansas residents.. A.C.A. § 17-28-306.

The Board may suspend or revoke the license of any electrical contractor for cause. It is the duty of the Department of Labor of the State of Arkansas to administer and enforce the provision of the Electrical Contractors' Act. A.C.A. § 17-28-202.

c. Heating, Ventilation, Air Conditioning, and Refrigeration Workers.
(A.C.A. § 17-33-101 *et. seq.*)

Heating, ventilation, air conditioning, and refrigeration, or "HVACR," means the design, installation, construction, maintenance, service, repair, alteration, or modification of a product or equipment in heating and air conditioning, refrigeration, ventilation, process cooling or heating systems. A.C.A. § 17-33-101(6). The activities of HVACR workers are governed by A.C.A. § 17-33-101 to -308, the "HVACR Workers' Act."

A.C.A. § 17-33-104 declares it unlawful for any person to engage in HVACR work without the appropriate license or registration or allow an unlicensed person to use an HVACR license for any purpose. Any person who violates any provision of the HVACR Workers' Act is subject to a penalty not to exceed \$250 for each violation, and each day of a continuing violation may be deemed a separate violation for purposes of penalty assessments. A.C.A. § 17-33-105.

The HVACR Workers' Act is administered by the HVACR Licensing Board which consists of nine members appointed by the Governor. The secretary of the board, who shall be an employee of the Department of Health, shall serve at the pleasure of the Governor, and all other members shall serve four-year terms. A.C.A. § 17-33-201. The Board is empowered to enforce the HVACR Workers' Act and to make such rules and regulations as may be desirable or necessary to carry out the purposes of the HVACR Workers' Act. A.C.A. § 17-33-202.

Under A.C.A. § 17-33-106, persons licensed by the Liquefied Petroleum Gas Board are exempt from the requirements of the HVACR Workers' Act for certain types of work. Under A.C.A. § 17-33-102, a variety of appliances and other products and services are exempt from application of the HVACR Workers' Act. Any person who possesses a HVACR license shall not be required to obtain an additional license in order to perform gas fitting and electrical work incident to HVACR work. However such exemption does

not permit an HVACR licensee to perform electrical work without complying with any applicable local code, city code, state code, or national code pertaining to electrical work. A.C.A. § 17-33-103.

To become registered and licensed as an HVACR worker, an applicant must complete and file a written application on the form prescribed by the HVACR Licensing Board, meet all requirements specified by the Board, pay appropriate examination and license fees and pass the appropriate examinations. A.C.A. § 17-33-302. The applicant may obtain one of three classes of licenses depending on the type of work to be performed. A.C.A. § 17-33-303.

The HVACR Licensing Board may revoke the license of any worker who makes a material misstatement on his or her license application, who demonstrates incompetency or who has violated any provision of the HVACR Workers' Act. A.C.A. § 17-33-307. A license may be suspended or revoked by the HVACR Licensing Board pursuant to the procedures of the Arkansas Administrative Procedure Act, A.C.A. § 25-15-201 *et seq.* A.C.A. § 17-33-308.

d. Homebuilders – Residential Building Contractors. (A.C.A. § 17-25-101 *et seq.*)

A residential building contractor is any person, firm, partnership, co-partnership, association, corporation, or other organization or any combination thereof, which for a fixed price, commission, fee, or wage attempts to or submits a bid to construct or contract or undertakes to construct or assumes charge in a supervisory capacity or otherwise manages the construction of single family residences. A.C.A. § 17-25-502. The activities of residential building contractors are governed by A.C.A. § 17-25-501 to -514, the "Residential Building Contractors Act."

A.C.A. § 17-25-505 states that no person shall act as a residential building contractor unless licensed by the Residential Building Contractors Committee or exempted from licensure under the Residential Building Contractors Act.

The Residential Building Contractors Act is administered by the Residential Building Contractors Committee, which consists of seven members appointed by the Governor for terms of three years. A.C.A. § 17-25-503. The Committee is empowered to enforce the Residential Building Contractors Act and to issue regulations necessary to carry out the purposes of the Arkansas Contractors' Act. A.C.A. § 17-25-504.

A.C.A. § 17-25-513 exempts a person who acts as a residential building contractor in the construction of his or her own residence from the licensing requirements for residential building contractors unless the person builds more than one (1) residence during any year.

To be registered and licensed, an applicant must complete and file a written application on the form prescribed by the Committee, submit an audited financial statement, and satisfactorily complete an examination to determine the applicant's qualifications. A.C.A. § 17-25-506 to -509.

The Residential Building Contractors Committee may conduct hearings regarding alleged violations of the Residential Building Contractors Act or regulations promulgated under the Act, and the hearings shall be conducted in accordance with the Arkansas Administrative Procedure Act, A.C.A. § 25-15-201 *et seq.* A.C.A. § 17-25-510.

e. Plumbers. (A.C.A. § 17-38-101 *et seq.*)

"Plumbing" is defined in A.C.A. § 17-38-101. The activities of plumbers are governed by A.C.A. § 17-38-101 to -408, the "Plumbers' Act."

A.C.A. § 17-38-301 declares that no person shall engage in work as a master plumber, journeyman plumber, apprentice plumber, or restricted license holder called for under this chapter or adopted regulations unless first licensed or registered to do so by the Department of Health. Any person who engages in work as a plumber without first obtaining a plumbing license, or who violates any provision of the Plumbers' Act, is subject to a penalty not to exceed \$500 for each violation and/or imprisonment for not more than thirty days. A.C.A. § 17-38-102.

The Plumbers' Act is administered by the State Board of Health. The Board is empowered to enforce the Plumbers' Act and to make such rules and regulations as may be desirable or necessary to carry out the purposes of the Arkansas Plumbers' Act. A.C.A. § 17-38-201.

Under A.C.A. § 17-38-302, the following are exempt from the Plumbers' Act: plumbing work done by a property owner in a building owned and occupied by him or her as his or her home except when the license is required by local ordinance; work done on buildings whose primary use is agricultural and located outside the incorporated limits of any city or town unless the buildings are connected to a public water system, sewerage system, or natural gas utility system; or minor repairs consisting of repairing minor working parts of plumbing, fixtures, or the removal of stoppages.

To become registered and licensed as a plumber, an applicant must complete and file a written application, meet all requirements specified by the Board, pay appropriate examination and license fees and pass the appropriate examinations. The applicant may obtain either a master or journeyman license depending on the applicant's experience. A.C.A. § 17-38-304.

The Committee of Plumbing Examiners is appointed by the Board of Health and may revoke or suspend the license of any worker who makes a material misstatement on his or her license application, who demonstrates incompetency or who has violated any provision of the Plumbers' Act. A.C.A. § 17-38-309. Revocation procedures are set forth in A.C.A. § 17-38-310 and provide that all proceedings shall be conducted in accordance with the Administrative Procedures Act, A.C.A. § 25-15-201 *et. seq.*

Plumbing work is governed by the state plumbing code. A.C.A. § 17-38-103. County and municipal ordinances shall prescribe additional regulations governing the regulation of plumbing, provided such ordinances require equal or greater regulation than the Arkansas Plumbers' Act. A.C.A. § 17-38-204.

f. Water Well Constructors. (A.C.A. § 17-50-101 *et. seq.*)

The activities of water well constructors are governed by A.C.A. § 17-50-101 to -311, the "Arkansas Water Well Construction Act."

A.C.A. § 17-50-104 declares it unlawful for any person to engage in construction, alteration, repair, or installation of a pump or water well, unless the work is performed under the supervision of an individual properly licensed to perform such work. Any person who violates any provision of the Arkansas Water Well Construction Act is guilty of a Class A or Class B misdemeanor, or in the alternative may be subject to a penalty not to exceed \$2500 per offense, each day constituting a separate offense. A.C.A. § 17-50-105 to -106.

The Arkansas Water Well Construction Act is administered by the Commission on Water Well Construction, which consists of seven members appointed by the Governor for terms of five years. A.C.A. § 17-50-201. The Board is empowered to enforce the Arkansas Water Well Construction Act and to make such rules and regulations as may be desirable or necessary to carry out the purposes of the Arkansas Water Well Construction Act. A.C.A. § 17-50-204.

Every person who wishes to engage in business as a water well contractor must obtain from the commission a license to conduct this business. A.C.A. § 17-50-304. To become registered and licensed as a water well constructor, an applicant must complete and file a written application, meet all requirements specified by the Board, pay appropriate examination and license fees and pass the appropriate examinations. A.C.A. § 17-50-301, -311.

The Commission on Water Well Construction may revoke or suspended the license of any worker who violates any provision of the Arkansas Water Well Construction Act. A.C.A. § 17-50-308. Any and all proceedings of the Commission on Water Well Construction must be conducted in accordance with the Arkansas Administrative Procedures Act. A.C.A. § 17-50-110

3. Other

There is no statutory or case law regarding the licensure of "design-build" projects; however, a design-build contractor will be required to register or obtain a license for each technical or design profession required to complete a project (i.e. landscape architect, electrician, plumbing, and etc.).

III. Considerations Applicable to Payments to Contractors and to Subcontractors

A. Private Construction Projects

Arkansas law has one statutory provision applicable to private construction projects. It provides that "a person commits the offense of defrauding a materialman if, being the principal contractor or subcontractor, he or she knowingly or willfully with the purpose to defraud fails to pay any supplier or subcontractor for materials or goods furnished to the project within thirty (30) days of final receipt of payment under the contract." A.C.A. § 5-37-525. This law, however, does not apply to principal contractors or subcontractors covered by A.C.A. § 22-9-101 *et seq.*, which deals with public works. It is an affirmative defense to prosecution under this law that "the contractor or subcontractor has given notice of a dispute in the terms, conditions, payment, or quality of goods to the contracting consumer or to the supplier or subcontractor, or the contractor has in good faith sought relief in federal court under the bankruptcy laws of the United States, prior to the expiration of the thirty days after receipt of payment under the contract." A.C.A. § 5-37-525.

B. Public Construction Projects

Arkansas law contains several statutory provisions applicable to public construction projects. A.C.A. § 22-9-604(a)(1) permits a public agency to retain ten percent of any earned progress payments from a contractor who is required to furnish a performance bond to assure performance of the contract. However, upon certification by the project architect or engineer that fifty percent of the project is complete, no further retainage is to be withheld. A.C.A. § 22-9-604(a)(2). Within thirty days of completion, the public agency must pay the contractor all sums retained. A.C.A. § 22-9-604(b). A contractor may withdraw any amounts retained prior to completion of the project by depositing with the Treasurer of the State direct obligations or fully guaranteed obligations of the federal government, State of Arkansas, public housing authority, or certificates of deposit from federal or state banks or savings and loan associations. However, no amounts are to be withdrawn in excess of the market value of the securities at the time of deposit or withdrawal. A.C.A. § 22-9-501.

Arkansas law also establishes a maximum time allowed for processing a payment request submitted by a contractor for work completed on a State construction project, which conforms to the provisions of the contract award and the laws of the State. A.C.A. § 19-4-1411. Should the parties fail to promptly process the uncontested requests for payments within the proper time limits, a penalty of eight percent (8%) shall be assessed against the parties responsible and paid to the contractors. *Id.*

Furthermore, Arkansas statutory law establishes a time constraint on payment to a contractor, upon completion and approval of a project covered by A.C.A. §§ 22-9-202 to -204, which deal with public works. If, upon completion and approval of the project, the contractor "presents a claim for payment. . .in accordance with the terms of the contract, and the claim is not paid by the public authority [contracted with] within ninety (90) days from the date of presentment of the claim, then the public authority shall pay to the contractor interest at the rate of ten percent (10%) per annum on the unpaid amount due..." A.C.A. § 22-9-205.

IV. Warranties

A. Implied Warranty of Fitness

Arkansas has adopted the rule that an implied warranty exists in the "sale of a new house by a seller who was also the builder." *Wawak v. Stewart*, 449 S.W.2d 922, 926 (Ark. 1970). Arkansas law also states that the "builder-vendor's implied warranty of fitness for habitation runs not only in favor of the first owner, but extends to subsequent purchasers for a reasonable length of time where there is no substantial change or alteration in the condition of the building from the original sale." *Blagg v. Fred Hunt Co.*, 612 S.W.2d 321, 322 (Ark. 1981). However, the law limits this implied warranty "to latent defects which are not discoverable by subsequent purchasers upon reasonable inspection and which become manifest only after the purchase." *Id.* Further, Arkansas courts have held that the implied warranty of fitness applies when a contractor uses plans furnished by the

purchaser to construct a dwelling and when the contractor uses his or her own plans to construct a dwelling then offered for sale to the general public. *Daniel v. Quick*, 606 S.W.2d 81, 83 (Ark. Ct. App. 1980).

B. Express Warranties

In *Carter v. Quick*, 563 S.W.2d 461 (Ark. 1978), the Arkansas Supreme Court stated that "[a]lthough we have no cases involving the effect of an express warranty upon an implied warranty in building contracts, we conclude that implied warranties are not applicable when there is an express warranty . . . [on the subject of an asserted implied warranty]." *Id.* at 463. However, the Arkansas Supreme Court later revisited *Carter v. Quick* in its opinion in *Wingfield v. Page*, 644 S.W.2d 940 (Ark. 1983). In *Wingfield* the court, noting the above-stated rule of *Carter*, stated that "[a]ssuming the implied warranty of habitability could be properly disclaimed, issues of the disclaimer's conspicuousness, detail, and reasonableness would merit our consideration. This area of our common law troubles us and we will welcome the opportunity to reexamine it. However, the issue is not now before us." *Id.* at 944. Given the language in *Wingfield v. Page*, there may be risk involved in relying on the rule of *Carter v. Quick*.

C. Other Warranties

Arkansas law also recognizes a warranty by the owner of property that plans and specifications supplied by the owner to the contractor are suitable and adequate for the purpose for which they were tendered. *Texarkana Housing Auth. v. E.W. Johnson Constr. Co., Inc.*, 573 S.W.2d 316, 322 (Ark. 1978). Arkansas law states that this warranty is implied and "is not nullified by any stipulation requiring the contractor to make an on-site inspection where the repairs are to be made and a requirement that the contractor examine and check the plans and specifications." *Id.* at 322. However, this implied warranty does not relieve the contractor of all responsibility under the contract. "[A] competent and experienced contractor cannot rely upon submitted specifications and plans where he [or she] is fully aware, or should have been aware, that the plans and specifications cannot produce the proposed results." *Id.* Finally, a breach of this implied warranty by the owner cannot be cured by "simply extending the time of the performance of a contractor's assignment." *Id.*

V. Principles Applicable to Indemnification Agreements

A. General Principles

In Arkansas, the rules governing requisites, validity and construction of contracts are generally applied to indemnity contracts. *Anthony v. Louisiana & Arkansas Ry. Co.*, 316 F.2d 858, 863-64 (8th Cir. 1963); *Chevron U.S.A., Inc. v. Murphy Exploration & Production Co.*, 151 S.W.3d 306, 310 (Ark. 2004). The agreement must contain a clear expression of the parties' intent to indemnify against a certain loss or liability. *Anthony*,

316 F.2d at 863-64. The intention of the parties must be gathered from an instrument as a whole. *Id.* at 864. A cause of action for indemnity under a contract accrues when the obligee suffers actual damage, including financial loss occasioned by payment of money. *C & L Rural Elec. Co-op. Corp. v. American Cas. Co.*, 199 F.Supp. 220, 222 (E.D. Ark. 1961).

If the language is clear, unequivocal and certain, then an indemnity agreement can be used to indemnify even against one's own negligence. *Arkansas Power & Light Co. v. Home Ins. Co.*, 602 F.Supp. 740, 746 (E.D. Ark. 1985). Accordingly, an indemnity agreement was enforceable in Arkansas where a subcontractor was required to indemnify and hold the general contractor harmless and reimburse the general contractor for any loss resulting from claims by a subcontractor's employee for injuries on the job site whether or not injuries were caused by negligence of the general contractor. *Ross v. Smith*, 315 F.Supp. 1064, 1070 (E.D. Ark. 1970). The court in *Ross* indicated the parties were bound by the agreement because the language was unambiguous, the intent of the parties was clear, and there was consideration. *Id.* at 1068. The court rejected the notion that the agreement was void due to public policy. *Id.* A subcontract obligating the subcontractor to indemnify the contractor for any loss, injury or damage arising out of or resulting from the subcontractor's performance of the work covered by subcontract or occasioned by acts or neglect of the subcontractor or its agents, servants or employees was upheld. *See Harmon v. Robberson Steel Co.*, 157 F.Supp. 627 (W.D. Ark. 1958).

B. Anti-indemnity Statutes

During the 2007 legislative session, the Arkansas General Assembly enacted Act 874 (ACA § 4-56-104). This act makes certain hold harmless clauses in construction contracts unenforceable. ACA § 4-56-104 states, "A clause in a construction agreement or construction contract entered into after July 31, 2007 is unenforceable as against public policy to the extent that a party to the construction contract or construction agreement is required to indemnify, defend, or hold harmless another party against 1) damage from death or bodily injury to a person arising out of the sole negligence or fault of the indemnitee, its agent, representative, subcontractor, or supplier; or 2) damage to property arising out of the sole negligence or fault of the indemnitee, its agent, representative, subcontractor or supplier." An indemnity provision made unenforceable by this section is deemed to be severable from the rest of the construction contract and does not invalidate the rest of the agreement. *Id.*

This section does not prohibit the parties from providing insurance to cover the negligence of the parties. This section specifically does not apply to construction contracts in which:

1. The first party indemnifies, defends, or holds harmless the second party from the first party's negligence or fault or from the negligence or fault of the first party's agent, representative, subcontractor, or supplier;
2. The first party requires the second party to provide liability insurance coverage for the first party's negligence or fault if the construction contract or construction agreement requires the second party to obtain insurance and the construction contract or construction agreement limits the second party's obligation to the cost of the required insurance;

3. The first party requires the second party to provide liability insurance coverage for the first party's negligence or fault under a separate insurance contract with an insurance provider; or
4. The first party requires the second party to name the first party as an additional insured as a part of the construction agreement or construction contract.

Id.

VI. Insurance

All employers must maintain statutory workers compensation insurance. *See* A.C.A. §§11-9-101 to -1001. The primary goals of workers compensation include, but are not limited to, paying temporary and permanent disability benefits to all legitimately injured workers who are injured during the course of employment, improving workplace safety, and paying reasonable medical expenses. A.C.A. § 11-9-101.

A.C.A. § 17-34-105 previously mandated insurance minimums for homebuilders, but that statute was subsequently repealed. It appears that no other statutory provisions impose special insurance requirements or specifications applicable to private construction projects. However, most construction contracts require commercial general liability coverage. Either the contractor or the owner may secure the property insurance covering the project itself.

VII. Suretyship and Bonds

A.C.A. § 17-25-404 requires that a contractor, prior to commencing work in Arkansas, file a surety bond of a surety authorized to do business in Arkansas or a cash bond, with the Contractors' Licensing Board. This bond is a condition of licensure within the state. The bond must be in the amount of \$10,000, payable to the State of Arkansas, and be conditioned on the contractor complying with the tax laws of the State and ordinances, rules and regulations of other political subdivisions of the state, the Arkansas Employment Security Law, and the Workers' Compensation Law. *Id.* Sixty days notice must be given to the Contractors' Licensing Board prior to cancellation of a bond. A.C.A. § 17-25-406. Failure to comply with A.C.A. §§ 17-25-401 *et. seq.* may result in a penalty not to exceed five percent of the value of the contract performed for the first violation, or ten percent of the value of the contract performed for a second or subsequent violation. Furthermore, a second or subsequent violation of this subchapter may result in loss of contractor's license for a period of one year. A.C.A. § 17-25-408

If a contractor does not honor its financial obligations to the State of Arkansas or any city, county, school district, or state agency, the customer for whom the work is being performed is responsible for all obligations with respect to the customer's project, if that customer receives written notice that the contractor has not complied with surety requirements prior to final payment to the contractor. *See* A.C.A. § 17-25-403.

A surety insurer may become a surety upon any bond or other contract of any person. A.C.A. §§ 23-63-1001. As to sureties on bonds, see generally A.C.A. §§ 23-63-1001 *et seq.*

VIII. Damages

A. General Principles

Should a contractor commit a material breach, the owner is entitled to rescission or restitution of payments. However, the contractor may be entitled to full restitution from the owner for the value of the work the contractor performed. *Cox v. Bishop*, 772 S.W.2d 358, 359-60 (Ark. Ct. App. 1989). If a contractor has substantially performed, the contractor is entitled to recover the contract price, less the difference between the value of the work done and as contracted to be done, or less the cost of correcting defective work where this can be done. *Prudential Insurance Company of America v. Stratton*, 685 S.W.2d 818, 821 (Ark. Ct. App. 1985). There are five factors which should be considered in determining whether performance has been substantial: (1) the extent to which the injured party will be deprived of the benefit reasonably expected; (2) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (3) the extent to which the party failing to perform will suffer forfeiture; (4) the likelihood that the party failing to perform will cure the failure; and (5) the extent to which the failure comports to standards of good faith and fair dealing. *Id.* at 822.

B. Liquidated Damages

The general rule under Arkansas law governing liquidated damages is that "an agreement in advance of breach will be enforced if the sum named is a reasonable forecast of just compensation for the injury, if the harm is difficult or incapable of accurate estimation." *Hall v. Weeks*, 217 S.W.2d 828, 830 (Ark. 1949). However, a liquidated damages clause will be "regarded as a penalty if the sum agreed to exceeds the measure of just compensation and the actual damages sustained are capable of proof." *Phillips v. Ben M. Hogan Co., Inc.*, 594 S.W.2d 39, 41 (Ark. Ct. App. 1980). Determination of whether damages are capable of proof should be made by examining "the status of the parties at the time the contract is executed and not at the time of the breach." *Id.* at 41.

The Arkansas Supreme Court has upheld valid clauses for liquidated damages in construction contracts. However, the Court refused to enforce a provision for liquidated damages for a delay in contract performance where the construction work was substantially performed and there was delay in completion only of minor details. *Roseburr v. McDaniel*, 227 S.W. 397 (Ark. 1921). The issue of whether a construction project is substantially complete is a question of fact. *See Osborne v. Sutter*, 220 S.W. 481, 483 (Ark. 1920). Furthermore, the Arkansas Supreme Court affirmed the trial court's finding in *Oxborne* that the contractor should not be charged with the owner's damages for delay due to causes which were beyond the control of the contractor and not within the parties' contemplation. *Id.*

C. Exculpatory Clauses

Exculpatory contracts that exempt a party from liability for negligence are not favored by the law. *Jordan v. Diamond Equip. & Supply Co.*, 207 S.W.3d 525, 529-30 (Ark. 2005). Nevertheless, such contracts are not invalid per se. *Id.* at 530. Because exculpatory contracts are disfavored, two rules of construction apply to them: they are to be strictly construed against the party relying on them and the contract must clearly set out what negligent liability is to be avoided. *Id.* In order for an exculpatory contract to be enforced, three factors must be present: (1) the party must be knowledgeable of the potential liability that is being released; the party must benefit from the activity which may lead to the potential liability that is released; and (3) the contract that contains the clause have been fairly entered into. *Id.* at 530-31. Exculpatory clauses limiting liability for breach of contract may also be enforced. *W. William Graham, Inc. v. City of Cave City*, 709 S.W.2d 94, 96 (Ark. 1986).

D. Economic Loss Rule

Arkansas law allows for recovery of purely economic losses under the Arkansas strict liability statute. A.C.A. § 4-86-102. This statute states that a supplier of a product is subject to liability in damages for harm to a person or property if the product supplied in a defective condition rendered it unreasonably dangerous. *Id.* The Supreme Court of Arkansas held, while citing *Schipper v. Levitt and Sons, Inc.*, 207 A.2d 314 (N.J. 1965), that "the warranty [of] strict liability principles. . . should be carried over into the realty field." *Blagg v. Fred Hunt Company, Inc.*, 612 S.W.2d 321 (Ark. 1981). As such, the obligation of a manufacturer should be found in enterprise liability and not dependent on the law of sales. *Id.*

IX. Construction Liens

A. Direct Contracts with Owner

A.C.A. §§ 18-44-101 to -135 set forth the Arkansas statutory scheme concerning mechanics' and materialmen's liens. In addition to the typical lien protections afforded contractors, subcontractors and material suppliers, Arkansas law also specifically creates liens for engineers, surveyors, architects, appraisers, abstractors, title insurance agents and landscapers. A.C.A. §§ 18-44-105, -133, -134.

Every contractor, subcontractor or material supplier (as defined at A.C.A. § 18-44-107) who supplies labor, services, material, fixtures, engines, boilers or machinery in the construction or repair of an improvement to real estate or any boat or vessel of any kind, by virtue of a contract with the owner, proprietor, contractor, or subcontractor, or agent thereof, has a lien to secure payment upon the improvement and on the land upon which the improvement is situated or upon the boat or vessel. A.C.A. § 18-44-101. As clearly indicated in the statute, a materialman's lien against property cannot exist without a valid contract with the property owner or agent. *Katterjohn Concrete Products, Inc. v. Coffman*,

573 S.W.2d 306, 307 (Ark. 1978). The contract can be an express agreement or implied from circumstances or conduct of the parties. *Gillison Discount Bldg. Materials, Inc. v. Talbot*, 488 S.W.2d 317, 319 (Ark. 1972).

The liens for labor performed or material or fixtures furnished have equal priority as against each other without regard to the date of filing the account or lien or the date when the particular labor or material was performed or furnished. All of these liens date from the time that the construction or repair first commenced. A.C.A. § 18-44-110. Section 18-44-110(a)(2) states that construction or repair "commences" when there is a visible manifestation of activity on real estate that would lead a reasonable person to believe that construction or repair of an improvement to the real estate has begun or will soon begin, including, but not limited, to the following:

- Delivery of a significant amount of lumber, bricks, pipe, tile, or other building material to the site;
- Grading or excavating the site;
- Laying out lines or grade stakes; or
- Demolition of an existing structure.

The statute further provides that the proceeds arising from the sale of the property shall be paid pro rata on the respective liens when the proceeds are not sufficient to discharge all the liens in full. A.C.A. § 18-44-110(a)(3). These liens attach in preference to any encumbrance existing on the real estate prior to the commencement of the construction or repair except where the prior encumbrance was given for the purpose of funding the construction or repair. A.C.A. § 18-44-110(b)(1).

Pursuant to A.C.A. § 18-44-104, manufacturers or contractors who furnish to any landowner any soil or drain pipe or tile for drainage, or who shall put in soil or drain tile for any land, shall have a lien for each tract of forty acres or less of the real estate upon which the tile is placed for payment of the lien. This lien extends for a period of two years. The lien attaches in preference to any subsequent liens, encumbrances or mortgages executed on the land after the purchase of the tile.

Every architect, engineer, surveyor, appraiser, abstractor, title insurance agent, or landscaper who performs any architectural, engineering, surveying, appraisal, abstracting, or landscaping work on, or who shall issue any title insurance policy on any land, building, erection, or improvement on land by virtue of any written agreement shall have a lien upon the building, erection or improvement to the extent of the agreed contract price or reasonable price for those services. A.C.A. § 18-44-105, -133, -134. However, the lien does not attach to the land, building, erection or improvement unless and until the lien is duly filed of record with the circuit clerk and recorder in the county where the land, building, erection or improvement is located. *Id.*

B. Subcontractors and Suppliers

Arkansas law does not distinguish between categories of potential lien claimants except for the distinctions concerning required notices, which are discussed below in Section E. The statutes and principles discussed in section IX.A. *supra* apply to subcontractors and suppliers as well.

C. Residential Liens by Subcontractors and Suppliers

Arkansas law does not distinguish between categories of potential lien claimants except for the distinctions concerning required notices, which are discussed below in Section E. The statutes and principles discussed in section IX.A. *supra* apply to residential liens by subcontractors and suppliers as well.

D. Assignment of Lien Rights

Pursuant to A.C.A. § 18-44-113, the lien shall be transferable and assignable, but it is not enforceable against the owner or proprietor until the owner or proprietor has actual notice of the assignment so as to protect himself or herself. Courts in Arkansas have held that a lien is purely a creature of the statute and, while it is assignable under the statute, the right to perfect a mechanic's lien is not assignable. Therefore liens must be perfected before they can be transferred or assigned. *Superior Lumber Co. v. National Bank of Commerce*, 2 S.W.2d 1093, 1094 (Ark. 1928). It is also important to note that while the statute does not provide a specific time limit on providing actual notice, the court has held that the requirement of "actual notice" contemplates notice reasonably contemporaneous with assignment. *Carter-Fleming v. Kirby Bldg. Systems, Inc.*, 603 S.W.2d 421, 422 (Ark. 1980).

E. Notices

A.C.A. § 18-44-115(a) establishes the requirements for providing notice to the owner from the contractor and states that no lien may be acquired unless the owner of the property (or his authorized agent) has received, by personal delivery or by certified mail, a copy of the notice language set forth at A.C.A. § 18-44-115(c). The courts in Arkansas have held that strict compliance, not substantial compliance, is necessary to comply with the notice provisions of this statute. *Books-A-Million, Inc. v. Arkansas Painting & Specialties Co.*, 10 S.W.3d 857, 859 (Ark. 2000). The notice requirements are for the benefit and protection of the owners. *Id.* at 860. This notice language may be incorporated into the contract or affixed to the contract and shall be conspicuous and ordered exactly as stated, in all capital letters, as follows:

"IMPORTANT NOTICE TO OWNER

I UNDERSTAND THAT EACH PERSON SUPPLYING MATERIAL OR FIXTURES IS ENTITLED TO A LIEN AGAINST PROPERTY IF NOT PAID IN FULL FOR MATERIALS USED TO IMPROVE THE PROPERTY EVEN THOUGH THE FULL CONTRACT PRICE MAY HAVE BEEN PAID TO THE CONTRACTOR. I REALIZE THAT THIS LIEN CAN BE ENFORCED BY THE SALE OF THE PROPERTY IF NECESSARY. I AM ALSO AWARE THAT PAYMENT MAY BE WITHHELD TO THE CONTRACTOR IN THE AMOUNT OF THE COST OF ANY MATERIALS OR LABOR NOT PAID FOR. I KNOW THAT IT IS ADVISABLE TO, AND I MAY, REQUIRE THE CONTRACTOR TO FURNISH TO ME A TRUE AND CORRECT FULL LIST OF ALL SUPPLIERS UNDER THE

CONTRACT, AND I MAY CHECK WITH THEM TO DETERMINE IF ALL MATERIALS FURNISHED FOR THE PROPERTY HAVE BEEN PAID FOR. I MAY ALSO REQUIRE THE CONTRACTOR TO PRESENT LIEN WAIVERS BY ALL SUPPLIERS, STATING THAT THEY HAVE BEEN PAID IN FULL FOR SUPPLIES PROVIDED UNDER THE CONTRACT, BEFORE I PAY THE CONTRACTOR IN FULL. IF A SUPPLIER HAS NOT BEEN PAID, I MAY PAY THE SUPPLIER AND CONTRACTOR WITH A CHECK MADE PAYABLE TO THEM JOINTLY.

SIGNED: _____

ADDRESS OF PROPERTY

DATE: _____

I HEREBY CERTIFY THAT THE SIGNATURE ABOVE IS THAT OF THE OWNER OR AGENT OF THE OWNER OF THE PROPERTY AT THE ADDRESS SET OUT ABOVE.

CONTRACTOR"

A.C.A. § 18-44-115(c).

It is the duty of the contractor to give this notice on behalf of all potential lien claimants under his or her contract prior to supplying any materials or fixtures, but any potential lien claimant may also give notice. A.C.A. §18-44-115(b). However, Sections 18-44-115(e)(1)(A)-(C) state that the "notice requirement mandated under subsection (b) of this section as a condition precedent to the imposition of a material supplier's lien shall only apply to construction of or improvement to residential real estate containing four (4) or fewer units."

No material supplier or laborer is entitled to a lien on commercial real estate unless that material supplier or laborer notifies the owner of the commercial real estate, in writing, that such supplier or laborer is currently entitled to payment, but has not been paid. This notice shall be sent to the owner and to the contractor by registered mail, return receipt requested, before seventy-five days have elapsed from the time that the labor was supplied or the materials furnished. The notice must contain the following information:

1. A general description of the labor, service, or material furnished, and the amount due and unpaid;
2. The name and address of the person furnishing the labor, service or material;
3. The name of the person who contracted for purchase of the labor, service, or material;
4. A description of the job site sufficient for identification; and
5. The following statement set out in bold face type:
"NOTICE TO PROPERTY OWNER

IF BILLS FOR LABOR, SERVICES, OR MATERIALS USED TO CONSTRUCT AN IMPROVEMENT TO REAL ESTATE ARE NOT PAID IN FULL, A CONSTRUCTION LIEN MAY BE PLACED AGAINST THE PROPERTY. THIS COULD RESULT IN THE LOSS, THROUGH FORECLOSURE PROCEEDINGS, OF ALL OR PART OF YOUR REAL ESTATE BEING IMPROVED. THIS MAY OCCUR EVEN THOUGH YOU HAVE PAID YOUR CONTRACTOR IN FULL. YOU MAY WISH TO PROTECT YOURSELF AGAINST THIS CONSEQUENCE BY PAYING THE ABOVE-NAMED PROVIDER OF LABOR, SERVICES, OR MATERIALS DIRECTLY, OR MAKING YOUR CHECK PAYABLE TO THE ABOVE-NAMED PROVIDER AND CONTRACTOR JOINTLY."

A.C.A. § 18-44-115(e)(2)(C).

Every person who wishes to avail himself or herself of the provisions of the above-referenced lien provisions must file a lien account with the clerk of the circuit court of the county in which the building, erection, or other improvement to be charged with the lien is situated, within one hundred twenty days after the last materials were furnished or the last work or labor was performed. A.C.A. § 18-44-117.

However, such a lien claimant must first give ten days notice before the filing of the lien with the clerk. This notice must be given to the owner, the owner's agent, or either of them, and must 1) state that the claimant holds a claim against the building or improvement, and 2) set forth the amount of the claim and from whom the amount is due. A.C.A. § 18-44-114. This notice may be served by an officer authorized by law to serve process in a civil action, by a person who would be a competent witness, or by mail with return receipt requested and delivery restricted to the addressee or the addressee's agent. *Id.*

Once this ten day notice requirement has been met, the lien account filed with the clerk of the circuit court must be verified, and must contain a just and true account of the demand due and owing, after allowing all credits, and must contain a correct description of the property to be charged with the lien. A.C.A. § 18-44-117.

A.C.A. § 18-44-118 provides that any person having an interest in the property charged with a lien may contest the lien by filing a bond with the circuit clerk, to be approved by the clerk, in double the amount of the lien claimed. If the clerk approves the surety, the clerk will give the lien claimant three days' notice of the filing of the bond, within which time that claimant may appear and question the sufficiency of the surety or the form of the bond. If at the expiration of three days, the sufficiency of the bond has not been questioned, or the clerk finds it sufficient, the lien shall be discharged and the claimant's only recourse shall be against the principal and surety on the bond. A.C.A. § 18-44-118.

All actions to enforce the lien must be commenced within fifteen months after filing the lien with the circuit clerk. A.C.A. § 18-44-119. In any action brought by any person other than a contractor, the contractor has the duty to defend the action at his own expense. A.C.A. § 18-44-124.

Upon satisfaction of any lien, it is the duty of the lien creditor to enter satisfaction of the lien in the office of the clerk of the circuit court within ten days after satisfaction. A.C.A. § 18-44-131.

F. Foreclosure

Liens, filed and perfected as provided in A.C.A. §§ 18-44-101 to -135, shall be enforced by foreclosure, and the real property ordered sold subject to the lien of the prior encumbrance on the real estate. A.C.A. § 18-44-110. The procedure for obtaining a lien judgment and foreclosure is set out in A.C.A. §§ 18-44-122 to -127. With regard to the distribution of the proceeds from the sale of the property, a lien for labor performed and material furnished shall, except for purchase money security interests in the real estate or improvements on the property, have priority over all other encumbrances that attach to the real estate or improvements subsequent to commencement of construction or repair. Liens for labor performed or material furnished shall have equal priority toward each other without regard to the date of filing the account or lien or the date the labor or material was furnished. In cases in which a sale shall be ordered and the property sold, and the proceeds are insufficient to discharge in full all liens against the property without reference to the date of filing, the proceeds shall be paid pro rata on the respective liens. A.C.A. § 18-44-110.

G. Lien Waivers and Releases

In Arkansas, owners commonly require signed lien waivers from contractors and subcontractors prior to payment for services or material furnished. These lien waivers are contemplated in the form Notice to Owner by Contractor, provided in A.C.A. §§ 18-44-115, wherein the owner is informed of his or her right to require the contractor to present lien waivers from all suppliers, acknowledging their payment for services or materials furnished under the contract, before the owner pays the contractor in full. These lien waivers operate to release the lien rights of the contractor or subcontractor for the materials or services furnished for the time period and project stated in the waiver. Because a subcontractor, materialman, or laborer is estopped to assert a mechanic's lien where the owner has settled with the contractor, or made payments to the contractor or subcontractors, in reliance on a representation, statement, or direction by the subcontractor, materialman, or laborer, that he has been paid, any and all communications with an owner regarding lien waivers should be conducted in writing, and contain details as to what lien rights are being waived. *Kennemore v. Robins*, 266 S.W.2d 64, 65 (Ark. 1954).

H. Liens or Other Payment Protection Applicable to Public Projects

A.C.A. §§ 18-44-501 to -508 provide a uniform bonding procedure in conjunction contracts for the repair, alteration, or erection of any building, structure, or improvement, public or private. Contractors are required to furnish a bond in the full amount of the contract if: (1) the contract is with the State of Arkansas or any subdivision thereof, any county, municipality, school district or other local taxing unit, or by any agency of any of the forgoing, (2) the contract exceeds \$20,000, and (3) the contract provides for the repair, alteration, or erection of any public building, public structure, or public improvement. A.C.A. § 18-44-503(a). All claims must be brought against the bond in the State of Arkansas and within 12 months from the date on which the "Arkansas Building Authority

or institutions exempt from construction review and approval by the authority approve final payment on the state contract." A.C.A. § 18-44-503(b). Notwithstanding the above, Section 18-44-508 clearly establishes a 6 month statute of limitations period that begins to run upon the date of final payment under the contract.

I. Bonding in Lieu of Lien Rights

"Any person, firm, corporation, or association entering into a contract for the repair, alteration, or erection of any building, structure, or improvement may, at his or her or its option, require the contractor to furnish a bond in the sum equal to the amount of the contract." A.C.A. § 18-44-505. The bond is required to be filed with the clerk of the circuit court of the county where the work is to take place before any work is performed under the contract. A.C.A. § 18-44-507. Actions must be brought in Arkansas within 6 months after final payment is made on the contract. A.C.A. § 18-44-508.

X. Arbitration, Mediation, and Other ADR

A. Uniform Arbitration Act

Arkansas adopted the Uniform Arbitration Act in 1969, A.C.A. §§ 16-108-201 to -224 (the "UAA"), without significant deviation from the Uniform Act. The UAA governs controversies between parties when there is a written agreement to submit any existing controversy to arbitration. A.C.A. § 16-108-201(a). However, Arkansas' version of the UAA does not govern disputes concerning personal injury, torts, insurance contracts and annuities or employer-employee disputes. A.C.A. § 16-108-201(b)(2). Courts look to the parties' intent in determining the question of arbitrability. *Pest Management, Inc. v. Langer*, 240 S.W.3d 149, 153 (Ark. Ct. App. 2006). Arbitration is favored in Arkansas and the courts have recognized the strong public policy in favor of arbitration as a cheaper and faster dispute resolution process. *Hart v. McChristian*, 42 S.W.3d 552, 557 (Ark. 2001). However, it is important to note that the UAA contains five grounds upon which the vacation of an arbitration award is appropriate: (1) award is procured by corruption, fraud, or other undue means; (2) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) the arbitrators exceeded their powers; (4) the arbitrators refused to postpone the hearing upon sufficient cause being shown or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 16-108-205, as to prejudice substantially the rights of a party; or (5) there was no arbitration agreement and the issue was not adversely determined in proceedings under § 16-108-202 and the party did not participate in the arbitration hearing without raising the objection. A.C.A. § 16-108-212.

Arkansas also provides for arbitration under A.C.A. §§ 16-108-101 to -107. The statute indicates that "[a]ll controversies which might be the subject of a suit or action may be submitted to the decision of one (1) or more arbitrator, or to two (2) and their umpire." A.C.A. § 16-108-102. The court in *Alexander v. Fletcher*, 175 S.W.2d 196 (Ark. 1943),

stated that "it is well settled in this State that our statutes on arbitration and awards. . .do not repeal the common law on this subject, nor are parties thereby prohibited from submitting their controversies to arbitration without the intervention of the court." *Id.* at 197-98. The court went on to hold that when parties agree to submit their dispute to arbitration there is a presumption in favor of upholding the award and an implied agreement to be bound by the decision. *Id.*

B. Other ADR Issues

In 1993, Arkansas adopted the Alternative Dispute Resolution Act to encourage, promote and develop voluntary alternative processes to resolve disputes. *See* A.C.A. §§ 16-7-101 to -207. The Arkansas Alternative Dispute Resolution Commission was created in 1995 to promote the appropriate use of alternative dispute resolution. A.C.A. § 16-7-104. The processes include, but are not limited to, negotiation, mediation, conciliation, arbitration, private judging, moderated settlement conferences, med-arb, fact finding, mini-trials, and summary jury trials.

XI. Other Special Considerations Applicable to Construction Contract Practices Generally

There are two important areas of the law in which Arkansas varies from the general rule or follows the minority rule.

A. Recovery of Consequential Damages

First, Arkansas has adopted the tacit agreement test for the recovery of consequential damages for breach of contract, which is the minority rule. In Arkansas, "the plaintiff must prove more than the defendant's mere knowledge that a breach of contract will entail special damages to the plaintiff. It must also appear that the defendant at least tacitly agreed to assume responsibility." *Morrow v. First National Bank of Hot Springs*, 550 S.W.2d 429, 430 (Ark. 1977).

B. Reformation of Contract upon Unilateral Mistake

Arkansas contract law also varies slightly from general contract law in that "[a]n order reforming a written instrument cannot be used upon a unilateral mistake unless there is a mistake on one side and *fraud or inequitable conduct on the other.*" *Delone v. U.S. Fid. & Guar. Co.*, 707 S.W.2d 329, 331 (Ark. Ct. App. 1986) (emphasis added). This Arkansas rule is more restrictive than the general rule.

XII. Consumer Protection Laws Applicable to Design and Construction Contracts

A. Deceptive Trade Practices Act (A.C.A. § 4-88-101 *et seq.*)

The Arkansas Deceptive Trade Practices Act, codified at A.C.A. §§ 4-88-101 *et seq.*, governs deceptive trade practices in Arkansas. A.C.A. § 4-88-107 provides a list of unconscionable trade practices that are made unlawful and are prohibited by the statute, including, but not limited to, false representations, disparaging goods or services of another and taking advantage of a consumer who is unable to protect his or her interest because of physical infirmity, ignorance or illiteracy. The Deceptive Trade Practices Act is enforced by the Consumer Protection Division of the Office of the Attorney General of Arkansas. A.C.A. §§ 4-88-104, -105. However, it is important to note that this statute (and other state statutes like it) has been preempted by federal law, including the Federal Insecticide, Fungicide, and Rodenticide Act, in certain circumstances. *Hardin v. BASF Corporation*, 290 F.Supp.2d 964, 973 (E.D. Ark. 2003).

B. Manufactured Homes Recovery Act (A.C.A. § 20-29-101 *et seq.*)

A.C.A. §§ 20-29-101 to -112 govern manufacturers of manufactured homes ("The Arkansas Manufactured Home Recovery Act"). The Act is administered by the Arkansas Manufactured Home Commission which is authorized by A.C.A. § 20-25-101 *et seq.* The Commission collects assessment fees from manufacturers of manufactured homes and maintains a Manufactured Housing Recovery Fund in the minimum amount of \$250,000. A.C.A. § 20-29-104. The Fund is used to pay the claims of persons aggrieved by a home manufacturer's violation of the standards established by the Commission. The amount of damages is limited to the actual cost of repairs to the manufactured home and does not include attorney's fees. A.C.A. § 20-29-105. The amount cannot be in excess of \$10,000 for any one violation and the fund balance must be sufficient to pay the award. A.C.A. § 20-29-106.

XIII. Environmental Considerations

A. General Considerations

The Arkansas Water and Air Pollution Control Act, found at A.C.A. §§ 8-4-101 *et seq.*, §§ 8-4-201 *et seq.*, and §§ 8-4-301 *et seq.*, may be relevant to certain construction projects in Arkansas. Generally speaking, it is unlawful to knowingly cause air pollution (as defined by the Act) or to cause pollution (as defined by the Act), of any of the waters of this State. *See* A.C.A. §§ 8-4-310, -217. *See also* A.C.A. § 8-4-103. Portions of the Solid Waste Management Act, found at A.C.A. §§ 8-6-201 *et seq.*, may also be relevant to certain construction projects in the State. This Act states that it is illegal to 1) construct a solid waste processing or disposal facility without a permit from the Arkansas Pollution Control and Ecology Commission, and 2) dispose of solid waste at any disposal site or facility other than one for which a permit has been issued by the Commission. A.C.A. § 8-6-204, -205. Anyone engaging in construction in Arkansas should also generally be aware of the Hazardous Waste Management Act found at A.C.A. § 8-7-201 *et seq.* The

Hazardous Waste Management Act makes it unlawful for any person to dispose of hazardous wastes at any disposal site or facility other than one for which a permit has been issued by the Arkansas Department of Pollution Control and Ecology pursuant to this subchapter; or to store, collect, transport, treat, or dispose of any hazardous waste contrary to the rules, regulations, permits, or orders issued under this subchapter or in such a manner or place as to create or as is likely to create a public nuisance or a public health hazard or to cause, or is likely to cause, water or air pollution within the meaning of the Arkansas Water and Air Pollution Control Act. A.C.A. § 8-7-205.

Directly relevant to construction within the State is A.C.A. § 8-6-1401 *et seq.*, which deals with the use of closed solid waste landfills and adjacent areas for residential purposes. The law states that it is “unlawful for any person, partnership, company, corporation, or other entity to build, erect, or construct any house, home, or building to be used for residential purposes upon any land used as or which has been used as a solid waste landfill permitted under the Arkansas Solid Waste Management Act, § 8-6-201 *et seq.*” A.C.A. § 8-6-1404. However, these prohibitions do not apply to “landfills or the land which was specifically used as a landfill more than twenty-five years before August 13, 1993.” *Id.* Violation of this subchapter may result in civil penalties. A.C.A. § 8-6-1405. Construction is also prohibited on or at a hazardous site as defined by A.C.A. § 8-7-702, unless and until an order is issued by the Arkansas Department of Pollution Control and Ecology terminating such prohibition. A.C.A. § 8-7-705.

B. Green Building Programs and Sustainable Construction Initiatives

There are currently no Green Building Programs or Sustainable Construction Initiatives created by statute or regulation in the State of Arkansas.

XIV. Lender’s Issues

A. Priority between Construction Mortgage or Deed of Trust and Construction Liens

A.C.A. § 18-44-110(b)(1) provides that an encumbrance given for the purpose of funding construction or repair will have priority over mechanics' and materialmen's liens. The requirements for establishing the construction money mortgagee's priority over the liens of materialmen are: (1) the mortgage must be executed and recorded before the commencement of construction or repair of the improvement; (2) the mortgagee must be unequivocally bound to advance money for construction; and (3) the recorded mortgage must show that the mortgagee is unequivocally bound. *Spickes Bros. Painting Contractors, Inc. v. Worthen Bank & Trust Co.*, 771 S.W.2d 258, 259 (Ark. 1989). The test of priority is the purpose of the loan, not the use actually made of it. *Id.* at 260.

However, when a construction lender has permitted or known that funds were not to be used for improvements, the lender cannot claim priority as to the amount not spent for improvements. *Id.* Also, where a construction mortgage secures future advances, it is

superior to the intervening materialmen's liens where making the future advances is obligatory but not where the advances are optional. *Ashdown Hardware Co. v. Hughes*, 223 Ark. 541, 267 S.W. 2d 294, 297-98 (Ark. 1954).

Commencement of construction or repair of the improvement, as the terms are used in A.C.A. § 18-44-110, occurs when the work completed is such that it is obvious the improvements on the property were commenced or underway. *Ozark Acoustical Contractors, Inc. v. National Bank of Commerce*, 1991 WL 3964, at *2 (Ark. Ct. App. Jan. 16, 1991), (citing *Clark v. General Electric Co.*, 420 S.W.2d 830 (Ark. 1967)). Under this standard, work that is simply preparatory to future building operations does not constitute the commencement of construction. *Id.* (citing *Jim Walter Homes, Inc. v. Bowling Building Supply*, 521 S.W.2d 828 (Ark. 1975)). Consequently, it has been held that removing the foundations of old buildings, commencement of leveling operations and the establishment of cut and fill elevations are not sufficient evidence of "commencement" so as to establish priority of the materialman over a subsequently recorded construction money mortgage. *See Clark v. General Electric Co.*, 420 S.W.2d at 834. It has also been held that the installation of a power pole and wall box is only a preparatory measure, not qualifying as the commencement of construction so as to establish priority of the materialman over a subsequently recorded construction money mortgage. *See Jim Walter Homes, Inc. v. Bowling Building Supply*, 521 S.W.2d at 829.

B. Construction Lender's Responsibility to Borrower Arising from Disbursement of Loan Proceeds

A construction lender may be liable to homeowners if it directly or through its agents controlled the distribution of the money borrowed by homeowners, even if they never handled or saw the money, and through such control failed to use reasonable due diligence or care to protect the interests of the homeowners. *Speights v. Arkansas Savings & Loan Association*, 393 S.W. 2d 228, 230 (Ark. 1965). In *Speights*, the homeowners borrowed money from Arkansas Savings and Loan Association ("Arkansas") secured by a first mortgage on the property. Arkansas disbursed the funds to an escrow agent to be disbursed pursuant to the terms of the construction contract. The escrow agent failed to properly disburse the funds, resulting in subcontractors filing liens on the property. The Court found that Arkansas effectively controlled the funds disbursed through its agent and thus took charge of the building operation. As such, Arkansas breached its contract and was liable to the homeowners for damages.

C. Potential Liability of Construction Lender to Contractors, Subcontractors, and Others Involved in Construction Process

A construction lender may also be liable to a contractor if the construction lender misrepresented its capacity to make the loan to the contractor and induced the contractor to rely on the false representations. *See Fidelity Mortgage Co. of Texas v. Cook*, 821 S.W.2d 39 (Ark. 1991). In *Cook*, a partner in a hunting club contracted with a contractor to construct a hunting lodge. The partner contacted Fidelity Mortgage Company to secure

financing. The contractor only agreed to perform the services on the basis of frequent assurances by the construction lender that they would be paid from the proceeds of the loan. After the partners failed to make payments to the contractor, the contractor foreclosed and sued the construction lender for damages. The Court found that the construction lender intentionally deceived the borrowers and the contractor and was liable to the contractor.