Construction Law

Brian J. Morrissey
Matthew W. Wallace

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Transactions within the construction industry are becoming increasingly complex as lawyers are required to consider intricate questions concerning such diverse areas as lender liability, insurance, and environmental law, along with the more traditional tort and contract principles. The recent economic downturn in the construction industry has changed the nature of the relationships between contractor, subcontractor, and developer, complicating the lawyer's task. This economic downturn has also sharpened the conflict in the Georgia Court of Appeals between age-old principles of contract and banking law and newer principles that may better reflect the increasingly complex legal environment. For example, Georgia courts have traditionally been willing to protect banks from lender liability claims, but this traditional immunity is at odds with the banks' willingness to become an active participant in the supervision of a construction project. Also, the courts are continuing to wrestle with exactly what role arbitration should play in the construction industry. The courts must decide whether to allow parties to choose binding arbitration and avoid the expenses and delays associated with litigation, or to so hamstring arbitral awards that they become nothing more than a precursor to a full-blown trial on the merits.

* Senior Associate in the firm of Brock & Clay, P.C., Marietta, Georgia. Davidson College (B.A., 1978); University of North Carolina, Chapel Hill (J.D., with honors, 1981). Member, State Bars of Georgia and Florida.

I. LENDER LIABILITY

A. Disbursement of Loan Proceeds

An area of increasing interest is the role played by financial institutions that make construction loans. Typically, a lender has no liability beyond its contractual responsibilities to the parties with which it contracted. This approach prevailed during the survey period. In *Equitable Mortgage Resources, Inc. v. Carter,* defendant, Equitable Mortgage Resources, Inc., ("Equitable") made a loan to a developer for the construction of two houses. The developer hired a general contractor who, in turn, subcontracted some of the work to plaintiff, Lawrence J. Carter, d/b/a Lawrence J. Carter Construction Company ("Carter"). The loan was evidenced by a promissory note and a construction loan agreement. The loan was secured by a deed to secure debt and a security agreement. Under these agreements, Equitable disbursed loan proceeds to the developer, who in turn disbursed proceeds to the general contractor. However, the general contractor never paid Carter for the work it performed.

Carter failed to perfect a materialmen’s lien against the property and did not inform Equitable that it had not been paid. The developer subsequently defaulted on the loan and Equitable foreclosed on the property. Carter filed suit against the developer and the general contractor for fraud and breach of contract. Carter later added Equitable as a defendant, alleging unjust enrichment, negligent disbursement of loan proceeds, and seeking equitable enforcement of its "lien" and equitable remedies to set aside the foreclosure sale.

The trial court entered summary judgment in favor of Equitable on all of Carter’s lien and contract claims. The court declined, however, to grant summary judgment on the fraud and tort claims against Equitable. After a renewed motion for summary judgment, the court of appeals granted Equitable permission to appeal.

2. Id. at 866, 406 S.E.2d at 495.
3. Id. Even if Carter's lien had been perfected, this lien would have been subordinate to Equitable's security interest in the property.
4. Id.
Light v. Equitable Mortgage Resources,7 reversed the denial of Equitable’s motion for summary judgment on the fraud and tort claims, holding:

“A construction lender has no duty to protect the subcontractors from the risks of doing business with its borrower or to supervise the borrower’s disbursement of the advances and control the funds for the benefit of the subcontractors. Similarly, where [Equitable] undertook no duties for the benefit of the appellants here, [Equitable] owed . . . no duty with regard to the disbursements of the construction loan proceeds. The contractual provision giving [Equitable] the right to inspect and withhold advances if it was not satisfied with the progress of construction inured to the benefit of [Equitable], and any failure of [Equitable] to exercise that contractual right provided the appellants no basis for complaint. Accordingly, the appellants have no claim against [Equitable] for negligent disbursement of the loan funds.”

This area may be subject to considerable change over the next several years as Georgia appellate courts are confronted with lenders who, in a weak construction market, step in and take a more active role in project supervision. The results of cases involving lender liability claims spawned during the current recession may indicate how courts will treat lenders who actively supervise construction projects.

B. Fraud

Similarly, in Metmor Financial, Inc. v. Jenkins,8 the court did not find a duty extending from the lender to the borrower on a purchase money mortgage. Metmor Financial, Inc. provided mortgage financing to Julius R. Jenkins, Jr. for the purchase of a home. After the closing, Jenkins inspected the property and noted that construction had not been completed, whereupon Jenkins defaulted on the loan. Metmor instituted foreclosure proceedings. Jenkins sued, alleging that before the closing Metmor’s employees had fraudulently misrepresented that construction of the house had been completed.9  

The trial court denied Metmor’s motion to dismiss for failure to state a claim, but did certify the question whether the complaint established as a matter of law that Jenkins failed to exercise due diligence in ascertaining

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8. 199 Ga. App. at 867, 406 S.E.2d at 496 (quoting Light v. Equitable Mortgage Resources, 191 Ga. App. at 817, 383 S.E.2d at 143-44) (brackets in original). In essence, the court found that Equitable’s contract with the developer did not create any rights in third parties in either contract or tort. The court rejected the conspiracy and fraud claim as well, noting that Equitable was authorized under the note and deed to secure debt to make advances and to foreclose on the property. Id.
10. Id. at 885-86, 406 S.E.2d at 288.
the condition of the home prior to closing. The court of appeals granted Metmor’s application for an interlocutory appeal. The court held that the purchaser of real property has a duty to discover obvious defects in the property and concluded that a cursory visual inspection of this property would have revealed the construction deficiencies of which Jenkins complained. In other words, the reliance element of fraud is governed by what is reasonably discoverable.

II. Contract Formation, Construction, and Breach

A. Contract Formation

Oral Contracts. In Joe N. Guy Co. v. Valiant Steel & Equipment, Inc., M & M Specialties, Inc., (“M&M”) a steel fabricator, no longer had sufficient credit available to purchase steel from Valiant Steel & Equipment (“Valiant Steel”) for use in its construction projects on which Joe N. Guy was the general contractor. Valiant Steel’s treasurer allegedly came to an agreement with Joe N. Guy’s vice president, whereby M & M would place purchase orders identified to the specific projects involved with Valiant Steel on Joe N. Guy’s behalf and Valiant Steel would invoice Joe N. Guy for the shipments. There was no written contract memorializing this arrangement. Valiant Steel made thirty shipments of steel and mailed invoices for the shipments directly to Joe N. Guy during the three month period following the first shipment. Joe N. Guy paid more than $297,000 without objection, then ceased paying. Valiant Steel sued. Valiant Steel obtained a verdict and judgment against Joe N. Guy. Joe N. Guy claimed, in part, that Valiant Steel did not make out a prima facie case that a contract existed. The court of appeals disagreed, finding that the written confirmations in the form of letterhead invoices sent by Valiant Steel to Joe N. Guy constituted evidence of the oral agreement.

Contradictory Terms. A different set of issues arises when a contract is contradictory in its terms. In Crook v. West, builders W. Tony

11. Id. at 886, 406 S.E.2d at 288.
14. Id. at 20, 395 S.E.2d at 311.
15. Id. at 21, 395 S.E.2d at 311.
16. Id.
17. Id. at 21-22, 395 S.E.2d at 311-12.
Crook and TAC Builders, Inc. sued the purchaser of a residential building for breach of a contract to purchase. The purchasers counterclaimed to recover their earnest money deposit. At trial, the jury found the existence of a valid contract between the parties but a breach of that contract on the part of the builders. The dispute centered on the purchase price of the property; the builder's contention was that the evidence at trial did not support the jury's verdict in favor of the purchasers concerning the price.\textsuperscript{19}

The contract provided: "The purchase price of said property shall be . . . $125,900.00 . . .," but immediately preceding this language in the contract was a provision that the purchase price was subject to modification prior to closing.\textsuperscript{20} The contract further provided that "[t]he final purchase price will be determined by the actual construction costs of the building, including land and all documented related construction costs, . . . plus 20\% of this total cost figure."\textsuperscript{21} The builder alleged that the actual construction costs were $160,000, and so, according to the contract, the purchase price on a cost-plus basis would be approximately $192,000. The purchasers admitted the price was subject to some fluctuation based upon the price of materials but contended that the size of the disparity claimed by the builders was beyond what was contemplated by the parties. The purchasers were only willing to close for $125,900 and not the higher price sought by the builders.\textsuperscript{22}

The court of appeals held that, even though the price was subject to fluctuation, the jury was authorized to find that the purchase price provisions were not consistent, given the more than fifty percent discrepancy between the fixed price amount and the cost-plus amount ultimately sought by the builders.\textsuperscript{23} In essence, the court decided that the size of the discrepancy was beyond the meeting of the minds as evidenced by the contract. The contract contemplated minor deviations that would allow for cost increases or decreases in materials and labor, however, the contract provisions would not allow a material change to the contract. Accordingly, the contractor's change in price was beyond the scope of the agreement made by the purchasers and, therefore, unenforceable.

\textbf{Waiver of Written Terms.} The parties to a construction contract may waive any of the written provisions by their conduct. For example, in

\begin{itemize}
\item \textsuperscript{19} Id. at 4, 395 S.E.2d at 261.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id. The court rested its decision on the principle of contract construction that the first of two contradictory contract clauses will prevail. Joseph Camacho Ass'n v. Millard, 169 Ga. App. 937, 315 S.E.2d 478 (1984).
\end{itemize}
Consolidated Federal Corp. v. Cain, plaintiff Consolidated Federal Corp. and defendants Frank and Eudene Cain entered into a written construction agreement for the construction of a house. Plaintiff brought suit, alleging that defendants failed to deliver the house for the price agreed upon in the contract and sought specific performance or, alternatively, damages for breach of contract. Defendants counterclaimed, contending plaintiff owed them additional sums for labor, material, and services performed.

The jury returned a verdict in favor of the defendants in the full amount of additional compensation sought, conditioned upon defendants' conveyance of the property to the plaintiff. The trial court denied plaintiff's motion for judgment notwithstanding verdict or alternatively for new trial, and plaintiff appealed.

The construction agreement required all change orders to be in writing and signed by both parties to the contract. At trial, however, the court permitted the defendants to present evidence of oral instructions from plaintiff to make changes and modifications to the house while it was under construction, which resulted in additional construction costs. The court reiterated the prevailing standard:

"that the provisions of a building contract requiring a written change order before beginning work for which recovery is sought are valid and binding provisions. However, where the parties by a course of conduct have departed from the terms of the contract and operated without prior written change orders, there may be a waiver, or oral variation of the provisions of the contract."

To establish such a deviation, then, a party must show no prior use of written change orders on the job and a deviation from the specific terms of the contract by the course of conduct of the parties.

It is unclear what result would obtain if a single written change order had been used, but all subsequent changes were done orally. The language of the court of appeals decision suggests that such an instance would not engender a waiver of a party's right to insist that written change orders be employed, even if that party orally instructed another to perform changes.

25. Id. at 671-72, 394 S.E.2d at 605.
26. Id. at 672, 394 S.E.2d at 606.
27. Id.
B. Contract Construction

**Statutes of Limitation and Repose.** In *Fort Oglethorpe Associates II v. Hails Construction Co.*, 29 a shopping center owner brought an action for breach of contract and breach of warranty against a general contractor and for negligent construction against the general contractor and its roofing subcontractor. The trial court granted summary judgment to defendants on all claims. The shopping center owner appealed. 30 The construction project was substantially completed on December 12, 1979. Plaintiff’s complaint was filed on June 27, 1986, more than six years after the limitations period commenced. 31 Accordingly, the statute of limitations barred the contract claims. 32 The court of appeals further determined that the statute of limitations barred the warranty claims because of the six-year statutory limitation and the one-year limitation found within the agreement itself. 33

The court clarified the law as to when the limitations period begins to run. The department store over which the roof was constructed was a separate and identifiable portion of the shopping center project as a whole and was constructed under a separate set of specifications. As a result, the date on which the department store was occupied, which was prior to the date of substantial completion of the entire shopping center project, controlled the warranty provisions of the contract. Since the department store was completely separate from the entire project, the court rejected the shopping center owner’s argument that occupancy of the entire shopping center was the important date for limitations purposes. 34

With respect to the negligence claims, the shopping center owner argued that even though he brought the action more than four years after substantial completion, Georgia’s statute of repose 35 saved the action be-

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30. Id. at 663, 396 S.E.2d at 586.
31. Id. at 664, 396 S.E.2d at 586. A claim on a written contract must be brought within six years after the contract becomes due and payable. O.C.G.A. § 9-3-24 (1982). A construction contract is considered “due and payable” at the time of substantial completion. 196 Ga. App. at 663, 396 S.E.2d at 586.
32. 196 Ga. App. at 664, 396 S.E.2d at 586.
33. Id.
34. Id.
35. The statute of repose provides:

   **No action to recover damages:**

   (1) For any deficiency in the survey or plat, planning, design, specifications, supervision or observation of construction, or construction of an improvement to real property . . .

   shall be brought against any person performing or furnishing the survey or plat, design, planning, supervision or observation of construction, or construction of
cause it was brought within eight years of substantial completion. The court rejected the argument, claiming that the statute of repose applies only to personal injury, not property damage. Accordingly, in Georgia, actions for property damage must be brought within four years of the substantial completion date. Moreover, the court found that the statute of repose was not intended to extend the otherwise applicable periods of limitation, whether they be two, four, or six years.

Apparent Authority. In Hunter v. Roberts, plaintiff Isaiah Hunter, d/b/a Hunter Grading Contractors ("Hunter"), sued Terry Roberts, d/b/a T.S. Roberts and Son, Inc. ("Roberts"), over a construction contract for blasting work. Hunter alleged that Roberts ceased work on the project well before completion. The trial court granted defendant's motion for summary judgment on the basis that one of Hunter's employees executed a release in favor of defendant Roberts. The release was a handwritten, undated document which read: "As of 1/16/87 Drilling Services div [sic] of T.S. Roberts & Sons, Inc., is released from contract dated Nov ___ to do drilling & blasting on Gwinnett Co Airport box culvert." The release was signed by the employee as Vice President of Hunter Grading.

Hunter produced evidence showing that the employee was not a vice president and had no authority to enter into contracts or release others from contracts on behalf of the plaintiff. Hunter further testified that during the entire project he never introduced his employee as a vice president of the company.

Roberts introduced evidence that he relied upon the release signed by the employee as vice president. The president of Controlled Blasting, the company hired by the employee of Hunter to complete the work defendant had contracted to do, testified that the employee led him to believe that he was the vice president of Hunter Grading and, therefore, authorized to enter into contracts on behalf of the company. Indeed, this employee signed the contract between plaintiff and Controlled Blasting as

such an improvement more than eight years after substantial completion of such an improvement.

37. Id.
38. Id. at 665, 396 S.E.2d at 587.
40. Id. at 318, 404 S.E.2d at 646.
41. Id., 404 S.E.2d at 647.
42. Id.
43. Id.
44. Id.
the Vice President of Hunter Grading. Defendant further testified that Hunter introduced the employee as vice president and told Roberts to deal with this employee on the project and that the employee had full authority to administer the project. Based upon this testimony, the court of appeals correctly concluded that a question of fact remained concerning the authority of the employee to bind plaintiff Hunter and reversed the summary judgment granted in favor of defendant.

The formalities surrounding authority to act on behalf of corporations or to act as an agent for a principal often become relaxed on construction projects. This leads to numerous problems, such as the one outlined above in which an employee of a contractor may have waived his employer's rights to enforce a contract against a defaulting subcontractor. It is best to clearly spell out the authority of administrators on a project site so that no confusion results from an employee who oversteps his authority.

C. Breach and Remedies

Unjust Enrichment and Implied Contract. In construction law claims, contractors or purchasers are not limited to simple breach of contract claims; they can also pursue recovery ex contractu or by implied contract. Such was the case in Smith Development, Inc. v. Flood, where Smith Development, Inc. ("Smith Development") sued Flood for quantum meruit and unjust enrichment. Dyer contacted plaintiff to construct a house on land then being offered for sale by Flood and Boling, a third party. The landowner and Dyer never arranged a purchase price, nor did they execute a written contract. Furthermore, Boling informed plaintiff that he was not the sole owner of the lot and could not sell it.

In October 1988, Boling visited the lot with a prospective buyer and discovered that someone was building a house on it. At that time, the foundation, subflooring, and septic tank were in place. Boling contacted Flood, who was also unaware that any building was being constructed on the property. Boling conveyed his interest to Flood and Flood contacted Smith Development, notifying Smith Development that there was no agreement to purchase the land and that there should be no construction

45. Id.
46. Id.
47. Id.
48. As an example of some of the complications that may arise from ambiguity created by the parties to a construction contract, see generally Clover Cable, Inc. v. Haywood, 260 Ga. 341, 392 S.E.2d 855 (1990).
50. Id. at 817, 403 S.E.2d at 250.
51. Neither joint owner had given anyone permission to build.
on the property until they settled the matter of purchase. Despite numerous warnings, plaintiff continued construction and the house was substantially completed on November 17, 1989. Smith Development filed suit.\textsuperscript{52} The trial court concluded that the house was approximately fifty percent completed before Boling discovered it and that Flood notified plaintiff to cease construction until the purchase of the property was worked out. The court found that the fair market value of the land itself was $16,000 and that the house built upon it had a reasonable value to the plaintiff of $40,400.\textsuperscript{53}

The court concluded that Flood could not be compelled to accept any services from a contractor the existence of whom she was unaware.\textsuperscript{54} An acceptance, therefore, would have to be found by virtue of the parties' conduct after defendant became aware of construction on the property. In this case, conduct showed that defendant was explicit in demanding that construction cease.\textsuperscript{55} At best, plaintiff voluntarily commenced construction and did not provide any benefit to defendant. Defendant did not voluntarily accept the benefit of the construction, and, as a result, no promise to pay can be presumed or implied.\textsuperscript{56} The court also rejected the argument that the subsequent use of the house by the defendant created an obligation to pay, stating,

"[w]henever a structure is permanently affixed to real property belonging to an individual, without his consent or request, he cannot be held responsible because of its subsequent use. It becomes his by being annexed to the soil; and he is not obliged to remove it to escape liability. He is not deemed to have accepted it so as to incur an obligation to pay for it, merely because he has not chosen to tear it down, but has seen fit to use it."\textsuperscript{57}

While seemingly harsh in effect, this principle places the risk squarely on the party best situated to prevent its occurrence, even at the price of a windfall to another.

**Conditions Precedent.** Although breach of contract by one party may excuse performance by the other, such a breach need not excuse performance of an independent, albeit related, obligation. In *S & W Masonry Contractor, Inc. v. Jamison Co.*,\textsuperscript{58} the court of appeals reversed the trial court's denial of plaintiff's motion for summary judgment on a

\textsuperscript{52} 198 Ga. App. at 817-18, 403 S.E.2d at 250-51.
\textsuperscript{53} Id. at 818, 403 S.E.2d at 251.
\textsuperscript{54} Id. at 819, 403 S.E.2d at 252.
\textsuperscript{55} Id. at 819-21, 403 S.E.2d at 251-52.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 821, 403 S.E.2d at 253 (quoting Sutton v. United States, 256 U.S. 575 (1921)).
$10,000 promissory note. Plaintiff, S & W Masonry Contractor, Inc. ("S & W Masonry"), instituted the action against defendant, Jamison Company, for the collection of the $10,000 promissory note. Defendant denied liability because plaintiff failed to perform its construction services satisfactorily. The court rejected as irrelevant to defendant's obligation to make payment under the note defendant's contention that a genuine issue of material fact existed concerning whether there was failure of consideration resulting from substandard performance on the part of plaintiff.

Measure of Damages for Defective Workmanship. In Sanders v. Robertson, purchasers of a home sued the general contractor and architect for negligent design and construction. Plaintiff contended that defendants' negligence necessitated structural repairs to the home and payment of additional engineering consulting fees, interest and closing costs on loans made to pay for the structural repairs, and additional interest paid as a result of delays. The court stated that the measure of damages for the correction of substandard work is the amount necessary to repair the defective workmanship. The court also held that for delay in the performance of a contract, the damages are usually for the loss of the use of the property involved.

Damages for Delays. In Empire Shoe Co. v. Niko Industries, Inc., a corporate commercial tenant brought an action against his landlord for damages resulting from delays in renovation of a building. The tenant allegedly lost profits as a result of the landlord's renovation. The court held that although anticipated profits were too speculative to be recoverable, when a business has been established, such damages may be recoverable. These damages for lost profits are recoverable, however, only if the business has a proven track record of profitability and not when there is a track record of loss. The court of appeals determined that since the

59. Id. at 628, 405 S.E.2d at 520.
60. Id. at 629, 405 S.E.2d at 520. An example of a case in which the obligations arose in the same contract is Dixie Roof Decks, Inc. v. Borggren/Dickson Constr., Inc., 195 Ga. App. 881, 395 S.E.2d 19 (1990), in which a roofing subcontractor brought suit to recover retainage held under the construction contract in payment for certain extra work performed. The construction contract contained an express condition precedent to payment that the roofing subcontractor deliver a roof warranty to the general contractor. Id.
62. Id. at 739, 397 S.E.2d at 27.
63. Id.
64. Id.
66. Id. at 411, 398 S.E.2d at 441.
67. Id. at 413-14, 398 S.E.2d at 442-43.
68. Id. at 414, 398 S.E.2d at 443.
tenant had no track record of profitability, the trial court correctly denied its right to recover such damages.\footnote{Id.}

\textbf{Damages for Successful Bid Protest.} In \textit{City of Atlanta v. J.A. Jones Construction Co.},\footnote{260 Ga. 658, 398 S.E.2d 369 (1990).} the Georgia Supreme Court held that the unsuccessful or frustrated bidder for a public construction contract could only recover the reasonable costs of bid preparation and was not entitled to lost profits.\footnote{Id. at 659, 398 S.E.2d at 370-71.} In \textit{Jones} the City of Atlanta advertised for bids on the construction of a parking deck at Hartsfield International Airport. The City established a deadline for the submission of bids at 2:00 p.m., April 10, 1985. While Jones' bid was the lowest one submitted on time, the contract was awarded to Interstate Construction, which had submitted a lower bid three minutes after the deadline. Jones sued the city on two counts, seeking lost profits in a state law contract claim, and further damages under 42 United States Code section 1983 ("section 1983")\footnote{42 U.S.C. § 1983 (1988).} for an alleged denial of due process.\footnote{260 Ga. at 658, 398 S.E.2d at 370. Jones alleged that its due process rights were denied because of the city's failure to conduct a hearing to consider Jones' complaint regarding the consideration of the late bid. \textit{Id.}} A jury in Fulton County Superior Court awarded Jones $522,125.05 on the state law claim and $375,000 on the section 1983 claim.\footnote{Id.} The court of appeals affirmed the trial court's verdict.\footnote{Id.}

The City of Atlanta appealed, claiming that in the event of a wrongful award of the bid, the amount of damages should be merely the reasonable costs of bid preparation, and that any recovery allowed under section 1983 constituted an impermissible double recovery for the plaintiff.\footnote{260 Ga. at 658, 398 S.E.2d at 370-71.} The Georgia Supreme Court agreed, reversing the court of appeals.\footnote{Id. at 659, 398 S.E.2d at 370-71.} The court stated, "In order to determine whether the damages awarded were correct, we must first look at the purpose of the bid requirement."\footnote{Id. at 658, 398 S.E.2d at 370.} Justice Benham went on to state that "the bid process for public projects was designed to protect the public coffers from waste and to assure that taxpayers receive quality work and goods for the lowest possible price."\footnote{Id. at 658, 398 S.E.2d at 370.} Moreover, if "a governmental entity has frustrated the bid process and awarded the contract to an unqualified bidder, the injured low bidder
may bring an action for appropriate relief." The damages are limited, however, to the "reasonable cost of bid preparations." The court also noted that to allow

the recovery of lost profits would unduly punish the tax-paying public while compensating the plaintiffs for effort they did not make and risks they did not take. Limiting recovery to reasonable bid preparation costs is in keeping with the legitimate governmental objective of rewarding the lowest qualified bidder and guarding against public officials shirking their duties while, at the same time, preventing unwarranted waste of tax-payers' money.

The Georgia Supreme Court also rejected Jones' section 1983 claim as an "impermissible double recovery." The court noted that the basis of the section 1983 claim was the City of Atlanta's failure to afford Jones Construction a hearing at which they could contest the award of the contract to another bidder. The court also held that there could be no additional recovery beyond that of the bid preparation costs because the "abstract value of a constitutional right may not for the basis of section 1983 damages . . . [S]uch damages must always be designed 'to compensate injuries caused by the constitutional deprivation.'" Accordingly, the court concluded that Jones could not recover any damages resulting from a wrongful bid award under section 1983.

III. TORT LIABILITY

Tort liability is one of the fastest growing areas in the construction law field as parties increasingly seek alternative means of securing payment for services performed or recovery for damages incurred by breaches of contract. Thus, prudence dictates that when considering a claim involving a construction site, one should carefully investigate tort remedies as a supplement to rights existing under construction contracts.

80. Id. at 659, 398 S.E.2d at 370 (citing Hilton Constr. Co. v. Rockdale County Bd., 245 Ga. 533, 266 S.E.2d 157 (1980)).
81. Id., 398 S.E.2d at 371.
82. Id.
83. Id.
84. Id.
85. Id. (quoting Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 308-09 (1986)).
86. Id.
A. Privity in Professional Negligence

In Southeast Consultants, Inc. v. O'Pry, O'Pry sued Brunner and Southeast Consultants, Inc., engineering and land surveyors who were subcontractors on the construction of O'Pry's new house. The basis of the action was negligence in the performance of certain percolation tests prior to installation of a septic tank. At trial, the jury rendered a verdict in favor of plaintiff, from which defendants appealed.

Defendants argued that since they were subcontractors, plaintiff had no standing to sue because he did not have direct contractual privity with them. In rejecting that argument, the court of appeals held that privity was not necessary as the basis of a suit founded in negligence. The court stated:

One who in the course of his business, profession or employment supplies false information is subject to liability for damages caused by others' justifiable reliance upon the information, where he fails to exercise reasonable care or competence in providing the information, and where the loss is suffered by one for whose benefit he supplies the information or knows that the recipient intends to supply it, and whom he intends the information to influence or knows that the recipient so intends.

Because the engineers knew that prospective purchasers would rely on their report concerning percolation, lack of privity could not shield them from liability to foreseeable prospective purchasers. Prospective purchasers of the house were exactly the type of persons whom the defendants could foresee would be directly injured as a result of their negligence; thus, defendants owed a duty to the plaintiff.

Interestingly, the decision in Southeast Consultants is at odds with last year's decision in Wood Brothers Construction Co. v. Simons-Eastern Co., in which the court of appeals reiterated that privity between a design professional and a third party was necessary in order for the third party to sue on its legal duty to exercise reasonable care in the performance of a contract. The distinguishing feature between Wood Brothers Construction and Southeast Consultants is the difference between a vertical relationship and a horizontal relationship. In other words, in South-

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88. Id. at 125, 404 S.E.2d at 300.
89. Id.
90. Id.
91. Id. (citing Robert & Co. v. Rhodes-Haverty Partnership, 250 Ga. 680, 300 S.E.2d 503 (1983)).
92. Id.
94. Id. at 875-76, 389 S.E.2d at 383-84.
east Consultants the design professionals were subcontractors of one in direct privity with the prospective purchaser, while in Wood Brothers Construction, the design professional was in a separate contractual chain to the owner than the complaining third party general contractor.

B. Contractual Duties and Tort

In Bowdish v. Johns Creek Associates, Bowdish, a home builder, purchased five building lots in a subdivision from Johns Creek Associates ("Johns Creek") for the purpose of constructing homes. A condition of the purchase agreement was that the sale of the finished homes would be handled through Hyde Park Realtors. After construction, plaintiff sold none of the homes it constructed in the subdivision. Foreclosure and money judgments against Bowdish followed. Bowdish asserted claims against both Johns Creek and Hyde Park Realtors based on breach of contract, negligence, and fraud. At trial, Bowdish argued that defendants were negligent in failing to maintain the subdivision properly, to construct certain amenities, and to market the subdivision properly. The fraud claim was based upon misrepresentations that the amenities and entrance wall would be constructed. The jury returned a verdict in favor of plaintiff. However, the trial court granted defendant's motion for a directed verdict, and plaintiff appealed.

In affirming that portion of the judgment directing a verdict against plaintiff on the negligence claim, the court held:

"It is well settled that misfeasance in the performance of a contractual duty may give rise to a tort action. But in such cases the injury to the plaintiff has been 'an independent injury over and above the mere disappointment of plaintiff's hope to receive (the) contracted-for benefit.' "The duty, for a breach of which an action ex delicto lies, must be a duty imposed by law as to some relationship, general or special, as applied to that class of cases where the alleged duty arises out of a contract. For instance, if one promises to pay another a given sum of money by a named day, the contract creates a duty to pay; but a breach of that duty is not a tort." 96

The court found that while one might construe the contract between the parties to contain implied duties on the part of defendants to extend and devote resources for the purposes outlined by plaintiff, the evidence sim-

96. Id. at 93, 406 S.E.2d at 503. The contract claim was resolved by the grant of summary judgment in favor of defendants.
97. Id. at 93-94, 406 S.E.2d at 503-04.
98. Id. at 94, 406 S.E.2d at 504 (quoting Tate v. Aetna Casualty & Sur. Co., 149 Ga. App. 123,124-25, 253 S.E.2d 775, 777 (1979)).
ply showed a failure to provide sufficient assets for these purposes, which, standing alone, was a breach of a promise to allocate these sources to the business project but was not a tort.\textsuperscript{99}

The court reversed the trial court's grant of directed verdict on the fraud claim based upon representations by defendants as to when the amenities would be constructed.\textsuperscript{100} As it turned out, the amenities were not constructed until after plaintiff's houses had been foreclosed and defendant Johns Creek transferred ownership of the subdivision to a third party. Additionally, the financing required by Johns Creek did not include a provision for funds for construction of the amenities at the subdivision. Thus, there was sufficient evidence that, at the time defendant made representations to plaintiff, defendant did not intend to perform the promise.\textsuperscript{101}

IV. ARBITRATION

During the survey period, the Georgia Court of Appeals, with limited success, wrestled again with the scope, validity, and function of arbitrators in the construction industry. The courts alternate between a well-reasoned policy of insuring the success of arbitration through granting broad scope to the arbitrators and an openly hostile attack on any arbitral award that possesses minor technical faults.

A. Awards of Interest and Attorney Fees

The hostility that courts sometimes demonstrate is apparent in \textit{Walton Acoustics, Inc. v. Currahee Construction Co.}\textsuperscript{102} In \textit{Currahee} the court of appeals affirmed a trial court's order vacating an arbitral award merely because the arbitrator awarded attorney fees in his arbitral decision. In a five to four decision, the court of appeals found that Official Code of Georgia Annotated ("O.C.G.A.") section 9-9-97(a) controlled the arbitral awards of attorney fees.\textsuperscript{103} Section 9-9-97(a) provides: "[U]nless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the

\begin{itemize}
\item \textsuperscript{99} \textit{Id.} at 95, 406 S.E.2d at 504.
\item \textsuperscript{100} \textit{Id.} at 95-96, 406 S.E.2d at 505-06.
\item \textsuperscript{102} 197 Ga. App. 659, 399 S.E.2d 265 (1990).
\item \textsuperscript{103} \textit{Id.} at 659-60, 399 S.E.2d at 266.
\end{itemize}
conduct of the arbitration, shall be paid as provided in the award.” 104 The judges discounted appellant’s notion that O.C.G.A. section 13-6-11 105 provided for the recovery of properly pled and proved attorney fees in an arbitral action. 106 The court chose to favor section 9-9-97 because the Georgia legislature enacted it subsequent to passage of section 13-6-11. 107 The court found further support for its holding in the plain language of section 9-9-97(a), which allows for the “recovery of ‘other expenses’ incurred in the conduct of the arbitration.” 108

The majority then applied a strict construction argument to O.C.G.A. section 9-9-93(b)(3) 109 and vacated the entire arbitral award because of the grant of $700 in attorney fees. 110 The court apparently felt bound by the strict language of the statute, noting that the trial court does not have “the power simply to set aside the award of attorney’s fees and confirm the remaining award. As logical as this would be, the statutory scheme does not permit it.” 111 Section 9-9-93(b) states in pertinent part “[t]he award shall be vacated . . . by: (3) an overstepping by the arbitrator of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made.” 112 Evidently, the judges felt that the arbitrator’s award of the minimum attorney fees had overstepped the boundaries allowed in the statute and thereby invalidated the entire arbitration process.

Judge Beasley entered a stinging dissent. 113 Beasley agreed that attorney fees are not properly awardable in arbitration actions but found it nonsensical, by virtue of this improper award of attorney fees, to require repetition of the entire process. 114 Judge Beasley noted: “It is wasteful and serves neither justice nor any useful purpose to send a whole matter back, for re-arbitration with a new arbitrator and new potential applications to the trial court and a new appeal, when the law is clear.” 115

Results such as this hamstring the usefulness of arbitration. The primary benefit of any arbitration process is that it is faster and cheaper

106. 197 Ga. App. at 660, 399 S.E.2d at 266.
107. Id.
108. Id.
110. 197 Ga. App. at 660, 399 S.E.2d at 266.
111. Id.
113. 197 Ga. App. at 660, 399 S.E.2d at 266. Judge Beasley was joined by Judges Birdsong and Sognier. Chief Judge Carley entered a separate dissent without opinion. Id. at 660-61, 399 S.E.2d at 266-67.
114. Id. at 660-61, 399 S.E.2d at 266-67 (Beasley, Birdsong & Sognier, JJ., dissenting).
115. Id. at 661, 399 S.E.2d at 267 (Beasley, Birdsong & Sognier, JJ., dissenting).
than resorting to the state or federal court system. The value of the arbitral process is contingent upon the simple requirement that at the end of the arbitral day, a valid binding award can be issued. If each and every award is subject to appeal and vacation on minor procedural grounds, as in Currahee, the value of arbitration is at best de minimis and at most it represents a precursor to a full trial on the merits.

B. Scope of Arbitrator's Authority

A common method of attacking an arbitral award in the courts is to allege the arbitrator acted beyond the scope of his authority. Unlike the stringent scrutiny it has given to the form of arbitral awards, the Georgia Court of Appeals has taken a more liberal stance in the definition of the scope of an arbitrator's authority. In City of College Park v. Batson-Cook Co., the city appealed the refusal of the Superior Court of Fulton County to vacate an arbitral award on the grounds that the arbitral panel overstepped its authority in making the award. In 1984 the City of College Park and the Batson-Cook Company entered into a guaranteed maximum cost contract for the construction of a convention center to be completed in mid-1985. The contract provided further that any costs above that amount would not be reimbursed unless an order signed by the owner and architect authorized the additional cost. The parties used a standard form agreement from The American Institute of Architects that included a standard arbitration clause requiring "all claims and disputes between the contractor and owner . . . be decided by arbitration."

After the project was substantially completed, Batson-Cook submitted a claim of $1.4 million over the guaranteed maximum cost. The architect denied the claim and Batson-Cook filed a declaratory judgment action in the Superior Court of Troup County claiming that the dispute was not subject to arbitration. At arbitration, Batson-Cook presented evidence that the changes made were presented to the architect and the owner and that the owner indicated that he would like to wait until the project was completed before discussing the additional amounts. The arbitration panel awarded Batson-Cook slightly less than the full amount claimed in the increase, and the city appealed the award to the Superior Court of Fulton County.

117. Id. at 138-39, 395 S.E.2d at 386.
118. Id. at 139, 395 S.E.2d at 386.
119. Id. (The trial court denied appellant's request for declaratory relief, concluding that the claim was subject to arbitration. The Supreme Court of Georgia affirmed without opinion.)
120. Id.
After examination of the record, the trial court confirmed the award. The court found the award within the range of evidence and that there was no evidence that the arbitrator ignored the terms of the contract or the applicable law. The City of College Park appealed. The city claimed that in failing to vacate the award the trial court erred because the award was "manifestly against applicable law and the arbitrators overstepped their authority in making the award." The court of appeals affirmed. The court noted that O.C.G.A. section 9-9-93(b)(3) provides that an arbitration award shall be vacated if the court finds that the rights of the party making the application were prejudiced by "an overstepping by the arbitrators of their authority or such imperfect execution of it that a final and definitive award upon the subject matter submitted was not made."

The court ruled strongly in favor of the authority of the arbitrator noting that "[t]he function of the trial court in proceedings to confirm or vacate an arbitration award should be severely limited in order not to frustrate the purpose of avoiding litigation by resorting to arbitration." In discussing the proper function of the court in reviewing an arbitral award, the Georgia Court of Appeals cited United Steel Workers v. American Manufacturing Co. American Manufacturing is one of the three most durable cases in American labor history. Written in 1960 and commonly called the Steelworkers Trilogy these cases form the basis of all significant decisions concerning the arbitrability of labor questions. These decisions are the cornerstone of the effectiveness of labor arbitration, because the constant resort to appeal threatens the vitality of any award and undermines the value of arbitration. These cases provide fertile ground for anyone defending an arbitral award. As the Supreme Court stated, "The courts . . . have no business weighing the merits" of

121. Id.
122. Id., 395 S.E.2d at 386-87.
123. Id. at 140, 395 S.E.2d at 387.
124. Id. (quoting O.C.G.A. § 9-9-93(b)(3) (1982)).
an arbitration claim. The Court further noted in *United States v. Enterprise Wheel & Car Corp.* that an award is "legitimate only so long as it draws its essence" from the agreement from which the arbitrator draws his authority. While these principles only apply by analogy to construction arbitration, the underlying purposes of speed and practical efficiency remain the same.

Sometimes, the Georgia Court of Appeals will agree to a practical and realistic interpretation of the scope of an arbitrator's authority. For example, in *Mitchem v. Joe N. Guy Co.*, the court held that a subsequent oral agreement was subject to an arbitration clause found in the contract that defined the relationship between the contractor and subcontractor. *Mitchem*, a subcontractor, operated pursuant to several written agreements with Joe N. Guy Company ("Guy"). Mitchem was unable to lease certain hydraulic excavation equipment needed to perform the subcontract with Guy. Accordingly, Guy leased the equipment, and thereafter loaned the equipment to Mitchem under an oral agreement pursuant to which Guy recovered the rental costs through payment from Mitchem or by withholding a sum from periodic payments due Mitchem under the subcontracts.

When underpaid, Mitchem filed a demand for arbitration with the American Arbitration Association. Guy counterclaimed, alleging that Mitchem had wrongfully converted the equipment and withheld it from Guy and that the lessor of the equipment had filed suit against Guy to recover rental payments and cost of repairs. Mitchem thereafter filed a motion for stay of arbitration in the superior court. Mitchem asserted that the equipment lease claim was not properly the subject of arbitration because it was not within the contemplation of the original agreement. The court of appeals properly noted that

> [e]ven though Mitchem prayed for injunctive relief, his petition was in the nature of a complaint for declaratory judgment requesting the trial court to decide as a matter of law whether written contracts between the parties, which were clearly subject to arbitration, permitted Guy to seek reimbursement for the equipment leased as part of the arbitration proceedings.

128. 363 U.S. at 568.
130. Id. at 597.
132. Id. at 111, 395 S.E.2d at 333.
133. Id. at 110, 395 S.E.2d at 332.
134. Id. at 110-11, 395 S.E.2d at 332.
135. Id. at 111 n.1, 395 S.E.2d at 332 n.1.
Mitchem appealed the trial court's denial of the motion for stay of arbitration.\textsuperscript{136} Mitchem argued that the agreement concerning the equivalent lease was not subject to arbitration because it was oral and did not otherwise comply with the statutory requirement of subjecting an agreement to arbitration.\textsuperscript{137}

The court quickly dispensed with this notion, observing that "each of the written subcontracts contained a provision whereby the contractor may pay for expenses of labor, materials or supplies used by the subcontractor in the work and charge the cost to the subcontractor if the subcontractor fails to pay for such expenses."\textsuperscript{138} The court considered the rental charges a debt for supplies or equipment owed to the general contractor, and therefore subject to the arbitration clause.\textsuperscript{139} This led the court to conclude that "the trial court did not err in denying Mitchem's prayer for relief because, as a matter law, the amount owed under the rental agreement was arbitrable because it relates to the amount of money owed by one party to the other under the written agreements."\textsuperscript{140}

V. Mechanics' and Materialmen's Liens

In Georgia, a mechanics' lien is a statutory lien on real property that represents security for payment of labor or materials provided in the construction or rehabilitation of the property.\textsuperscript{141} The lien establishes an interest in land and, ultimately, a right to sell the property to which the lien attaches if the debt is not paid.\textsuperscript{142} The procedure for establishing a binding materialmen's or mechanics' lien can be found at O.C.G.A. sec-

\begin{enumerate}
\item[136.] Id. at 111, 395 S.E.2d at 332.
\item[137.] Id. (citing O.C.G.A. §§ 9-9-82, -83 (1982)).
\item[138.] Id., 395 S.E.2d at 333.
\item[139.] Id.
\item[140.] Id.; see also Bartlett v. Dimension Designs, Ltd., 195 Ga. App. 845, 395 S.E.2d 64 (1990). Bartlett, while decided under the old Georgia Arbitration Code for Construction Contracts, states that any arbitral award should be "upheld unless it is completely irrational or it constitutes a manifest disregard of the law." Id. at 848, 395 S.E.2d at 67. The court also noted that
\begin{quote}
"[a]rbitrators are not obliged to apply strict rules of law in the matter at hand, when they act within the scope of their authority, unless the parties require to adhere to such rules. In fact, it is stated that they may disregard the traditional rules of law. Accordingly, as a general rule, arbitrators are free to apply broad principles of justice and good conscience, and decide according to their concept or notion of justice. They are still obliged, however, to be guided by the basic agreement of the parties."
\end{quote}
\item[141.] Id., 395 S.E.2d at 66 (quoting 6 C.J.S. Arbitration § 70 (1975)).
\item[142.] Id., 395 S.E.2d at 66 (Supp. 1991).
\item[142.] Not all states employ this procedure. Mechanics' or materialmen's liens in Texas operate as a writ of garnishment and appropriate money from the hands of the owner. See Lonergan v. San Antonio Loan & Trust Co., 104 S.W. 1061 (Tex. 1907).
\end{enumerate}
As noted in last year's survey, because these statutory liens are in derogation of the common law and often require innocent parties to pay the debt secured by the lien, the Georgia Court of Appeals strictly construes the provisions of the Georgia Code against lien claimants. Accordingly, Georgia courts tend to place materialmen's and mechanics' lien claims under a magnifying glass in an attempt to avoid the lien. The areas that appear to cause the greatest trouble for contractors seeking to file liens are the requirements that a claim of lien be filed within three months of completion of the work, and that notice of the claim be provided within twelve months of completion of the work.

A. Timely Filing Difficulties

As noted above, the two critical filing periods are the three month statutory period for filing notice of the lien and the twelve month deadline for filing of claim and notice of claim. During the survey period, the Georgia courts had an opportunity to address both these periods. In *L & W Supply Corp. v. Whaley Construction Co.*, defendant, a general contractor, subcontracted with defendant Southeastern Custom Services ("Southeastern") to install sheet rock for two separate construction projects. Southeastern purchased sheet rock materials on an open account from *L & W Supply* ("L & W"). When Southeastern failed to pay L & W, the supplier filed a claim of lien against the property of both projects. Whaley filed discharge bonds, thus releasing the real property from the liens.

L & W filed suit to recover on the bonds. Whaley answered, contending that the liens were insufficient as a matter of law because they failed to

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145. O.C.G.A. § 44-14-361.1(a)(2),(3) (Supp. 1991). This code section states in pertinent part that

[t]he commencement of an action for recovery of the amount of [the lien claimant's] claim [shall be initiated] within 12 months from the time the same shall become due. In addition, within 14 days after filing such action, the party claiming the lien shall file a notice with the clerk of the superior court of the county wherein the subject lien was filed.

*Id.* § 44-14-361.1(a)(3). This is entirely separate from the requirement that a record of a claim of lien be filed within three months after the completion of the work as stated in O.C.G.A. § 44-14-361.1(a)(2).
146. *197 Ga. App. 680, 399 S.E.2d 272 (1990).* The Georgia Court of Appeals clearly established when the clock begins to run on both the three and twelve month statutory periods. *Id.* at 681, 399 S.E.2d at 273 (citing Chamlee Lumber Co. v. Crichton, 136 Ga. 391, 71 S.E. 673 (1911)).
147. *Id.* at 680, 399 S.E.2d at 272.
specify the date the claims became due. The trial court granted summary judgment in favor of Whaley, and L & W appealed. L & W’s difficulty arose when it claimed that the last date on which it delivered material to each project was August 16, 1988 and September 21, 1988 respectively. These dates were at odds with the technical requirement that the claim state when it was due. The court of appeals found L & W’s allegations sufficient, stating that “the supplier did specify the date the claim was due; it was by its statement [of] the last date material was delivered. The date specified was, for legal purposes, the equivalent of the due date.” This is in accord with the Georgia Supreme Court’s earlier holding that as long as a lien is filed and suit is commenced on time, the lien is effective against the property owner regardless of technical omissions by the lienholder. In conclusion, the court noted that

[s]upplier L & W Supply Corporation’s stating the specific rather than the generic did not deviate from the requirements of the Code so as to render its lien claim defective and unenforceable. The supplier complied with the requirements for valid liens when it stated the date materials were last delivered to each project.

The Georgia Court of Appeals, in a recent case, contemplated the timely nature of the three month filing period. In Womack Industries, Inc. v. B & A Equipment Co., the court of appeals held against a lienholder because of the lienholder’s failure to file notice of claim within three months of the supply of labor or materials as opposed to the end of the contract. B & A Equipment (“B & A”), a subcontractor for installation of a water system, storm drains, and sewers on a Womack Industries (“Womack”) project, declared the work substantially complete on Decem-

148. Id. at 680-81, 399 S.E.2d at 272. Default judgment was also entered against defendants Swain and Drury. Id. at 681 n.1, 399 S.E.2d at 272 n.1.
149. Id. at 683, 399 S.E.2d at 274.
150. Id. at 681-82, 399 S.E.2d at 273. This conclusion makes sense because of Georgia’s use of notice pleading.
151. Id. at 682, 399 S.E.2d at 274 (citing J.H. Morris Bldg. Supplies v. Brown, 245 Ga. 178, 264 S.E.2d 9 (1980)).
152. Id. at 683, 399 S.E.2d at 274. Judges Pope and Bank dissented, stating that the summary judgment should be upheld because of L & W’s failure to comply strictly with the materialmen’s lien statute. Id. at 683-84, 399 S.E.2d at 274-75 (Pope & Bank, JJ., dissenting). This result seems a trifle harsh in light of the notice pleading concept that predominates in Georgia and the minor difference in the language utilized for the filing of the claim which otherwise would have been proper.
154. Id. at 662, 405 S.E.2d at 882.

Normally, this would make the filing of the lien untimely and void because of the three month deadline period. B & A contended, however, that it returned to the Womack project area to remove trash from storm drains and to turn on several valves that had apparently been left sealed. B & A contended that this constituted work under the contract so that completion of the work did not take place before April 21, 1988. Accordingly, the filing of the lien was timely and valid.¹⁵⁶

The court of appeals firmly rejected this notion observing that ‘[a]ccording to B & A’s position, no contract would be ‘complete’ until the contractor ran out of items to wonder about and check.’¹⁵⁷ The court also noted:

The evidence in this case demands a conclusion that the work was completed and the water was in fact turned on by February 27, well before B & A’s employees went back to the site on April 21 to see if they had turned on the water. The trial court erred in failing to direct a verdict for Womack Industries.¹⁵⁸

Courts continue to enforce rigorously the twelve month filing of claim and notice requirement set out in O.C.G.A. section 44-14-361.1(3).¹⁵⁹ For example, in Eurostyle, Inc. v. Jones,¹⁶⁰ the Georgia Court of Appeals affirmed summary judgment against a lienholder because of failure to file within twelve months.¹⁶¹ Eurostyle, Inc. (“Eurostyle”) contracted with Jones to install cabinets in the Jones’ home. When the Jones refused to pay in full because of alleged defects in the cabinets, Eurostyle filed a lien against the property. On August 14, 1989, Eurostyle commenced an action to enforce the lien. However, Eurostyle did not file notice of commencement of suit. The Jones’ counterclaim sought damages for slander of title.¹⁶²

Eurostyle’s failure to file a notice of claim within the statutory twelve month period was a fatal flaw in the claim and, therefore, their lien was

¹⁵⁵. Id. at 660, 405 S.E. 2d at 881.
¹⁵⁶. Id. at 660-61, 405 S.E.2d at 881.
¹⁵⁷. Id. at 661, 405 S.E.2d at 882.
¹⁵⁸. Id. at 662, 405 S.E.2d at 882; see also Troup Enters. v. Mitchell, Carrington & Rayfield Co., 199 Ga. App. 173, 404 S.E.2d 337 (1991) (jury question as to whether a mechanics’ or materialmen’s lien, which was filed before the absolute completion of all work, was filed within the three month statutory period).
¹⁶¹. Id. at 188, 397 S.E.2d at 621.
¹⁶². Id.
void and unenforceable. The court of appeals affirmed summary judgment against the Jones for their claim of slander of title because "the filing of the lien and action to enforce the lien were considered privileged under O.C.G.A. § 51-5-8." An intervening bankruptcy that disrupts the claim process provides an exception to the rule that requires filing within twelve months. In Galbreath v. Vondenkamp, the owners of real property contracted for the construction of a residence. The contractor engaged Galbreath, a materialman, to furnish labor and materials for heating, air conditioning, and electrical wiring of the residence. Galbreath completed his work on November 15, 1986. When the contractor failed to pay him, Galbreath filed his claim of lien on December 29, 1986. He filed suit on September 9, 1987. On June 8, 1988, appellant received notice that the contractor had filed bankruptcy. Galbreath then filed a proof of claim in the bankruptcy proceeding for the amount of the debt. He filed against Vondenkamp on January 6, 1989 to enforce the lien against the property. The trial court granted summary judgment in favor of Vondenkamp because Galbreath failed to file notice within the twelve month period. The court of appeals reversed the order granting summary judgment, and remanded the case for determination of whether the notice requirement had been satisfied. The court relied on O.C.G.A. section 44-14-361.1(a)(4) in stating:

[If, after a subcontractor files an action against a contractor, no judgment can be obtained against the contractor because of his adjudication in bankruptcy, the subcontractor does not have to obtain a judgment against the contractor as a prerequisite to enforcing his lien but may enforce the lien directly against the property in an action against the owner of the property, if filed within twelve months from the time the lien becomes due.]

The court endorsed its previous holdings, stating that "'[a]n action to enforce the lien against the owner need not be instituted within the twelve-month statutory period if a claim has been filed by the materialmen in the contractor's bankruptcy proceedings during that time.'"

The court of appeals further endorsed this exception by holding that failure to file notice of prior suit against a bankrupt contractor did not

163. Id.
164. Id. (citing O.C.G.A. § 51-5-8 (1982)).
167. Id. at 284, 398 S.E.2d at 278-79.
168. Id. at 285, 398 S.E.2d at 280.
169. Id. at 284-85, 398 S.E.2d at 279 (citing O.C.G.A. § 44-14-361.1(a)(4) (Supp. 1991)).
170. Id. at 285, 398 S.E.2d at 279 (quoting Newton Lumber v. Crumbley, 161 Ga. App. 741, 742, 290 S.E.2d 114, 115 (1982)).
extinguish the lien against the homeowners because no final judgment could be obtained against the contractor.\textsuperscript{171} In \textit{Duncan Wholesale, Inc. v. Palmer},\textsuperscript{172} Duncan Wholesale, Inc. ("Duncan Wholesale") supplied materials to the contractor Ernest and Gail Palmer engaged to construct a house on their property. On May 3, 1988, Duncan Wholesale filed a materialmen's lien on the Palmer property. Duncan Wholesale alleged that it last delivered materials to the contractor on March 11, 1988, and that it had not been paid during the intervening period.\textsuperscript{178}

Duncan Wholesale filed suit on open account against the contractor on January 16, 1989, but the contractor did not file notice as required by statute.\textsuperscript{174} This suit never reached fruition because the contractor filed for bankruptcy before trial. On March 9, 1989, Duncan Wholesale filed the instant lien foreclosure proceedings. The Palmers moved to dismiss the suit because appellant failed to file the required notice of its action against the contractor. The trial court granted the motion to dismiss because of Duncan Wholesale's failure to file within the statutory period.\textsuperscript{176}

The court of appeals reversed, relying on section 44-14-361.1(a)(4).\textsuperscript{176}

\section*{B. Evidence}

In \textit{Electrical Distributors, Inc. v. Turner Construction Co.},\textsuperscript{177} the Georgia Court of Appeals held that a supplier who does not maintain a separate account number for each subcontracted project by a particular individual, but can nonetheless prove the exact amount due against a particular property, can maintain a cause of action under the materialmen's and mechanics' lien statutes.\textsuperscript{178} In \textit{Turner} the owner contracted with Trans-Con Construction Company ("Trans-Con") to construct a building to be known as Buckhead Plaza. Trans-Con subcontracted the electrical portion of the project to Electrical Management, Inc. ("EMI"). EMI then contracted with Electrical Distributors, Inc. ("EDI") for certain electrical and lighting supplies necessary to complete the project. On May 19, 1987, EDI filed a claim of lien against EMI for materials delivered but not yet paid. Less than a month later, EMI filed a petition for bankruptcy, and EDI filed suit against the project's owner. Turner, as

\begin{itemize}
  \item \textsuperscript{172} Id. at 255, 401 S.E.2d at 291 (1990).
  \item \textsuperscript{173} Id. at 255, 401 S.E.2d at 292.
  \item \textsuperscript{174} O.C.G.A. § 44-14-361.1(a)(3) (Supp. 1991).
  \item \textsuperscript{175} 198 Ga. App. at 255, 401 S.E.2d at 292.
  \item \textsuperscript{176} Id. at 257, 401 S.E.2d at 293.
  \item \textsuperscript{177} 196 Ga. App. 359, 395 S.E.2d 879 (1990).
  \item \textsuperscript{178} Id. at 360, 395 S.E.2d at 881.
\end{itemize}
successor in interest to Trans-Con, filed a bond discharging EDI’s lien against the owner.\footnote{179}

Six months later EDI instituted an action to foreclose on the lien. EDI claimed $117,538.58 with interest accruing according to the terms of its subcontract with EMI. Turner erected three defenses, the execution of a lien waiver, the “contract price defense,”\footnote{180} and that EDI had intermingled its accounts.\footnote{181} The trial court, ruling on cross-motion for summary judgment, struck the first two defenses, but granted summary judgment on “the ground that by failing to maintain separate accounts for each construction project for which it had supplied materials to EMI, EDI has waived its lien rights.”\footnote{182}

On appeal, EDI admitted that it had assigned only one customer number to EMI for all EMI’s jobs in Georgia but contended that “it maintained segregated billings by issuing one invoice for each EMI order, by describing the project of delivery on each invoice, by requiring EMI to designate payments to specific invoices and by issuing monthly statements showing which EMI invoices remained unpaid.”\footnote{183}

It is well settled that a lienholder who so commingles one potential lien claim with other potential lien claims “to necessitate a process of separation by the courts’” may well have waived his claim to any and all liens involved.\footnote{184} However, that was not the case here, since EDI introduced specific copies of unpaid invoices for materials and lighting supplies furnished for construction on the Buckhead Plaza project. Further,

EDI’s accountant explained that when a payment check was received from EMI the amount paid was entered against the invoice number designated on the check stub and that, if no invoice number was so designated, then EMI was contacted for direction as to application of the amount paid. The accountant also explained that invoices were removed from EMI’s account as they were paid and that at the end of each month a statement was prepared showing the job number, name and balance owed.\footnote{185}

\begin{itemize}
\item \footnote{179}{Id. at 359, 395 S.E.2d at 880.}
\item \footnote{180}{Id. The “contract price” defense can be found at O.C.G.A. § 44-14-361.1(a)(4) and (e) (Supp. 1991). The court found the defense inapplicable in this case. 196 Ga. App. at 364-65, 395 S.E.2d at 883.}
\item \footnote{181}{196 Ga. App. at 359, 395 S.E.2d at 880.}
\item \footnote{182}{Id. (citing Artistic Ornamental Iron Co. v. Long, 113 Ga. App. 464, 148 S.E.2d 478 (1966)).}
\item \footnote{183}{Id. at 360, 395 S.E.2d at 880.}
\item \footnote{184}{Id., 395 S.E.2d at 880-81 (quoting Rickman Bros. Lumber Co. v. Martin, 144 Ga. App. 39, 40, 240 S.E.2d 308, 308 (1977)).}
\item \footnote{185}{Id., 395 S.E.2d at 881.}
\end{itemize}
These facts provided sufficient evidence for the court to hold in favor of EDI. In an interesting case, the court of appeals established a rebuttable presumption that materials delivered to the job site were received and used by the contractor to the benefit of the defendant. In *Williamscraft Development, Inc. v. Vulcan Materials Co.*, a materialman brought suit to foreclose on a lien filed against property owned by defendant, Williamscraft Development, Inc. The lien covered materials delivered to the contractor defendant hired to make improvements on defendant’s property. At trial, defendant presented evidence that the materials were “never delivered to the job site owned by defendant, or, at least, were delivered on or before August 1, 1985.” This allegation, if proved, made the filing of the claim untimely and entitled the defendant to set aside the trial court verdict.

Plaintiff presented ample evidence, including the testimony of the owner of an independent trucking company, which corroborated plaintiff’s claim that the materials had been picked up at his place of business and delivered to defendant’s job site. To support this claim, the owner of the trucking company produced invoices with his employee’s initials on them that indicated that his employees had delivered the materials. Additionally, at least one of the invoices contained the signature of defendant’s job site supervisor indicating receipt of the materials. Defendant presented testimony that after August 1, 1985 “the contractor was not involved in any work on the job site that would have required the materials in question.” While this represented conflicting evidence, the court, presented with a jury verdict, was bound to “construe the evidence in the light most favorable to the verdict.” Accordingly, the verdict stood.

To aid in questions of this sort, the court stated that “invoices showing the materials were shipped to the contractor for use at the defendant’s job site created a rebuttable presumption that materials were received and used by the contractor for the benefit of the defendant.”

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186. *Id.*
189. *Id.* at 703, 397 S.E.2d at 123.
190. *Id.*
191. *Id.*
192. *Id.* at 704, 397 S.E.2d at 124.
193. *Id.*
194. *Id.* at 705, 397 S.E.2d at 124.
195. *Id.*, 397 S.E.2d at 125.
196. *Id.* at 704, 397 S.E.2d at 124 (citing *Bankstone v. Smith*, 236 Ga. 92, 222 S.E.2d 375 (1976)).
sumption highlights the need for accurate record keeping and procedures to insure written verification that the contractor or project director received the materials.

C. Limitations on Damages

Generally, a materialman is allowed to recover from the property owner the value of the labor and materials he has furnished in the event that the contractor does not pay him for services. The Georgia Court of Appeals limited a lienholder's recovery in *F.S. Associates v. McMichael's Construction Co.* In *F.S. Associates*, McMichael's Construction Company ("McMichael's") brought an action against the landlord of a tenant who failed to pay the contractor for its labors. Jerry Willard, a restauranteur, entered into a lease with F.S. Associates to operate a restaurant in the second-largest space in the Hunting Creek Plaza shopping center. As part of the terms of the contract, the landlord granted the tenant $59,400 in construction and rebuilding allowance to make the space suitable for his needs. Subsequently, Willard entered into a contract with McMichael's to make the improvements needed for the restaurant in Hunting Creek Plaza. Pursuant to the lease agreement, the landlord paid the tenant his entire construction allowance, and the tenant passed on this amount to McMichael's. This left an outstanding balance of over $125,000 on the construction contract. McMichael's brought suit against the landlord for the remainder of the contract price when he was unable to obtain the monies from Willard. McMichael's alleged that he was due the monies under the lienholder statutes, or on the basis of the equitable theories of *quantum meruit* or unjust enrichment.197

The court of appeals disagreed on both counts. First, Judge Pope noted that "although the landlord consented to improvements made in excess of the allowance, it cannot be said that the landlord became a party to the contract for any improvements exceeding that amount."198 The court discussed the fact that consent to improvements were common in these lease situations, as were building allowances, "but mere consent to improvements does not mean that the landlord approves the contract between tenant and the contractor in such a manner as to make the property subject to the contractor's lien."199 The court also noted that while a contrary rule may apply in other jurisdictions, these other jurisdictions "unlike Georgia, have construed their respective materialmen's lien laws liberally

198. Id. at 705-06, 399 S.E.2d at 480.
199. Id. at 706, 399 S.E.2d at 480.
200. Id. (citing Nunley Contracting Co. v. Four Taylors, 192 Ga. App. 253, 384 S.E.2d 216 (1989)).
to protect the interest of the materialmen." Accordingly, the materialmen's claim for relief from the landlord was denied.

The Georgia Court of Appeals also limited materialmen to the statutory basis of recovery and denied their claim for recovery on the quantum meruit theory. The court stated, "Under Georgia law, a materialman or subcontractor may not recover against an owner or general contractor with whom it has no contractual relationship, based on the theory of unjust enrichment or implied contract; rather, it is limited to the statutory remedies provided by Georgia's lien statute."

The court's holding in F.S. Associates makes clear that a lienholder is limited in claims against a landlord, at least in a commercial setting, to the amount of leasehold improvements granted in the lease agreement between the tenant and the landlord. This rule will make a crucial difference in the way contractors and suppliers structure transactions in order to maximize the protection of their interests in commercial leasing situations.

VI. SURETY AND GUARANTOR ISSUES

A. Duty to Defend

In Batson-Cook Co. v. Aetna Insurance Co., plaintiff, Batson-Cook Company ("Batson-Cook"), sued defendants, Aetna Insurance Company and Fireman's Fund Insurance Company, for failing to provide a defense in two lawsuits. A Florida developer retained Batson-Cook to provide construction management services on a project. The comprehensive general liability insurance policy from Aetna listed Batson-Cook as an additional insured, and a similar policy issued by Fireman's Fund listed it as a named insured.

One of the contractors on the project sued Batson-Cook in a Florida federal district court, and later, another contractor brought suit in a Florida state court. Both Aetna and Fireman's Fund denied that the allegations in the two lawsuits came within the scope of the policies' respective coverages. The trial court entered summary judgments in favor of Aetna and Fireman's Fund on the coverage questions, and Batson-Cook appealed.

201. Id. at 707, 399 S.E.2d at 481 (citation omitted).
202. Id.
205. Id. at 571-72, 409 S.E.2d at 42.
206. Id.
The federal action contained three counts alleging negligent performance of Batson-Cook's duties as supervisor of the project. The breach of duties resulted in lost profits, increased overhead, cost of labor, materials and tools, increased insurance expenses, loss of use of the equipment, and other job costs.\textsuperscript{207} The court found that the federal suit did not allege any occurrence of property damage as contemplated by the terms of the policies and that there was not a loss as to any tangible property.\textsuperscript{208}

The Florida state action alleged that Batson-Cook directed others to use and move certain equipment and materials of a contractor and that such use damaged the equipment. The court found that, while such allegations were sufficient to show property damage covered by the policy, there was no duty to defend because the damage alleged was specifically excluded by the terms of both policies under a professional services exclusion, specifically, in the provision pertaining to supervisory, inspection, or engineering services.\textsuperscript{209}

B. Public Works Bonds

In Sunderland v. Vertex Associates,\textsuperscript{210} the trial court dismissed plaintiff's claim against a payment bond issued by American Insurance Company on behalf of Vertex Associates ("Vertex"). Vertex was the general contractor on an elementary school project. Vertex' subcontractors on the project contracted with Sunderland for certain work. When the subcontractor with whom Sunderland had direct privity defaulted, Sunderland filed a claim against Vertex for its own services and claims of its subcontractors. The trial court found that Sunderland had no standing to assert the claims of its subcontractors, but awarded it a judgment on its own claims.\textsuperscript{211}

Since the project was a public work, the bond statute required the general contractor to place a bond for payment of the use of laborers, materialmen, and subcontractors. The court noted that while lien statutes and bond statutes served the similar purposes of providing protection for those doing work when payment is not passed on to them, there are also differences.\textsuperscript{212} Generally, the courts construe lien statutes strictly, while bond statutes are liberally construed in order to protect those who furnish work on public projects.\textsuperscript{213} Furthermore, a lien is a statutory crea-

\textsuperscript{207} Id. at 572-73, 409 S.E.2d at 574.
\textsuperscript{208} Id. at 573, 409 S.E.2d at 575.
\textsuperscript{209} Id. at 573-74, 409 S.E.2d at 575.
\textsuperscript{211} Id. at 279, 404 S.E.2d at 575.
\textsuperscript{212} Id. at 279-80, 404 S.E.2d at 575.
\textsuperscript{213} Id. at 280, 404 S.E.2d at 575 (citing Ingalls Iron Works Co. v. Standard Accident Ins. Co., 104 Ga. App. 454, 130 S.E.2d 606 (1963)).
ture, while a bond is based in contract, even though the contract is required by law. Formerly, under the lien statute, a supplier of materials or labor to a subcontractor could not acquire a lien against the owner of the property, even though the supplier could always assert a claim under the bond statute. The court of appeals further found that, under Georgia's bond statute, the definition of "subcontractor" was not limited only to those having privity of contract with the prime contractor. Accordingly, Sunderland had a right to sue upon the bond, and the court extended this right to include all suppliers of materials and labor, the provision of which allowed Sunderland to fulfill its subcontract obligations.

C. Joint and Several Obligations of Guarantors

In *Floyd Davis Sales, Inc. v. Central Mortgage Corp.*, plaintiff operated a door and trim company. Plaintiff delivered goods to Walter Lewis and Associates for use in improvement of real property, payment for which defendant guaranteed. Plaintiff sued defendant on the guaranty, whereupon defendant moved to dismiss plaintiff's complaint for failure to join indispensable parties, i.e. Walter Lewis and Associates, the principal, and Walter Lewis, individually, an additional guarantor. Plaintiff appealed the trial court's grant of defendant's motion to dismiss. Defendant argued that the indispensable parties were joint obligors who must necessarily be joined in the lawsuit. Plaintiff argued that sureties, including guarantors, are jointly and severally liable with their principal unless the contract provides otherwise. The court concluded that, absent any contractual language to the contrary, the alleged indispensable parties were severally liable with the defendant.

Defendants further argued that defendant and Walter Lewis, individually, were jointly obligated, but not severally obligated, so that the language of O.C.G.A. section 10-7-1 would not apply because it did not
specifically include the relationship between cosureties. The court rejected this argument, holding that these cosureties made separate promises to pay in separate instruments; thus, the reciprocal rights and liabilities between the cosureties arose from their status as such, and not from any agreement between them. As a result, any right to contribution and indemnity or to the benefit of any security in the hands of the other would be founded not upon contract, but upon general considerations of justice and equity.

225. 197 Ga. App. at 533, 398 S.E.2d at 821.
226. Id., 398 S.E.2d at 822.
227. Id.