

## Idaho Construction and Design Law

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**James L. Martin**

*Moffatt Thomas Barrett Rock & Fields, Chartered  
101 South Capitol Boulevard, Suite 1000  
Boise, Idaho 83701-0829  
(208) 345-2000  
jlm@moffatt.com*

**Tyler J. Anderson**

*Moffatt Thomas Barrett Rock & Fields, Chartered  
101 South Capitol Boulevard, Suite 1000  
Boise, Idaho 83701-0829  
(208) 345-2000  
tya@moffatt.com*



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### I. Considerations Relating to Project Delivery Systems

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Idaho has no unique statutory or case law considerations regarding design-build projects. Idaho does have statutes regarding design-build, construction management, and other delivery systems for public projects. *See generally* Idaho Code § 67-5711A (authorizing the use of design-build contracting for public works contracts and defining a design-build contract as “a contract between the state of Idaho and a nongovernmental party in which the nongovernmental party contracting with the state of Idaho agrees to both design and build the structure, roadway, or other items specified in the contract”); Public Works Construction Management Licensing Act, Idaho Code §§ 54-4501 – 54-4514 (describing licensure and other requirements for construction managers who provide construction management services); Idaho Code § 67-5711E (recognizing that alternative “project delivery methods” exist for public works construction and defining “construction management services” for purposes of restoration of Idaho’s capitol building); Idaho Code § 67-2320 (mandating that all Idaho public agencies and political subdivisions must make selections for construction management services, construction management and professional land surveying services “on the basis of qualifications and demonstrated competence and shall negotiate contracts or agreements for such services on the basis of demonstrated competence and qualifications for the type of services required at fair and reasonable prices”). A detailed discussion of public contracts is beyond the scope of this book.

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### II. Design and Construction Professionals

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#### A. Liability of Design and Construction Professionals Generally

The liability for design and construction professionals is derived from the common law tort and contract principles, as well as the Idaho Code. *See, e.g., Stephens v. Stearns*, 678 P.2d 41 (Idaho 1984) (professional malpractice claim against architect); *Blahd v. Richard B. Smith, Inc.*, 108 P.3d 996 (Idaho 2005) (negligence claims against land developer and engineer); *Tusch Enters. v. Coffin*, 740 P.2d 1022 (Idaho 1987) (negligence claim against residential builder). Moreover, in 2003, the Idaho legislature enacted the Notice and Opportunity to Repair Act, Idaho Code §§ 6-2501 – 6-2504, which prescribes contractor liability and sets forth limitations on damages for claims brought against construction professionals, which include “an architect, subdivision owner or developer, builder, contractor, subcontractor, engineer or inspector,” arising from residential construction within the meaning of the Act.

## B. Statutes of Limitations Applicable to Design or Construction Liability

### 1. Tort and Contract Claims

An action based on a written contract must be brought within five years from the date of completion. Idaho Code § 5-216. An action based on an oral contract must be brought within four years following the date of completion. *Id.* at § 5-217. Actions arising in tort, including those based on professional malpractice, must be brought within two years following accrual, or date of discovery, but not more than eight years following completion of the construction. *Id.* at § 5-219; *Twin Falls Clinic & Hospital Bldg. Corp. v. Hamill*, 644 P.2d 341, 346 (Idaho 1982). An exception exists when the defect is concealed from the injured party by the wrongdoer who at the time of the alleged act was in a professional relationship with the injured party. In cases of concealment, the action accrues when the injured party knows or is put on notice of the injury. *Id.*; see also *Sumpter v. Holland Realty, Inc.*, 93 P.3d 680 (Idaho 2004) (recognizing that claims against engineers and landscape architects may fall within scope of professional services for purposes of Idaho Code Section 5-219(4)); *Stephens v. Stearns*, 678 P.2d 41 (Idaho 1984) (professional malpractice claim against architect governed by two-year period under Idaho Code § 5-219(4)).

### 2. Statute of Repose

Idaho Code Section 5-241 provides a statute of repose for actions arising out of the design or construction of improvements to real property. For causes of action based in contract, accrual occurs at the completion of construction. However, a cause of action based in tort accrues six years after completion provided that the cause of action has not previously accrued. These limitations may not be asserted as a defense by an individual in actual possession or control at the time of any deficiency that caused injury. Idaho Code § 5-241. Moreover, claims for products liability are subject to the 10-year statute of repose set forth in the Idaho Product Liability Reform Act. See Idaho Code § 6-1403, *et seq.*

## C. Licensing and Regulation

### 1. Design Professionals

#### a. Architects

The licensing and regulation of architects is governed by Idaho Code Title 54, Chapter 3, Architects. The practice of architecture includes the rendering or offering of services in connection with the design, construction, enlargement, or alteration of a building or a group of buildings. Services may include architectural planning, advice, and consultation; providing preliminary studies, architectural designs, drawings, and specifications; technical submissions; and administration of construction contracts. Idaho Code § 54-309.

Any individual who wishes to practice architecture in the state of Idaho must submit evidence of his or her qualifications to practice and to be licensed. To be licensed, an applicant must pass an examination conducted by the Board of Architectural Examiners (the Board). *Id.* at § 54-301. The examination tests the applicant's qualifications in all areas of the profession with special reference to the structural stability of buildings and the protection of health and property. *Id.* at § 54-303. Idaho Code Section 54-302 describes the educational and practical qualifications necessary for an applicant to take the architecture examination and obtain a license. The qualifications include either (1) graduation from an accredited architecture curriculum in a school or college approved by the Board and three years' experience in architectural work deemed satisfactory by the Board, or (2) graduation from an accredited

architectural curriculum and a specific record of eight years' experience in architectural work of a character deemed satisfactory by the Board. Each applicant applying for examination must also pay a fee to the Bureau of Occupational Licenses. *Id.* at § 54-304.

The Board has the authority to create rules necessary to administer, conduct, examine, license, investigate, and impose penalties upon individuals in connection with the practice of architecture. *Id.* at §§ 54-301, 54-305, 54-312.

Every person practicing or offering to practice architecture shall have a separate license in his own name. A license cannot be issued to a firm or corporation. *Id.* at § 54-307. In addition, each architect must obtain and use a seal. *Id.* at § 54-308.

An individual may also practice architecture if licensed by endorsement. To be licensed by endorsement, the applicant must hold a valid license of another state, hold a National Council of Architectural Registration Boards Certificate, and pay a fee to the Idaho Bureau of Occupational Licenses. If an architect not licensed in the state seeks an architectural commission in Idaho, he or she shall be permitted to practice in the state for a maximum of six months if he or she meets certain qualifications as set forth in Idaho Code Section 54-302A(2)(a)-(d).

### b. *Landscape Architects*

The licensing and regulation of landscape architecture is covered by Idaho Code, Title 54, Chapter 30, Landscape Architect Registration and Licensing Act.

A person must be an Idaho registered landscape architect to use the designation or convey the impression that he or she is a Landscape Architect or practices Landscape Architecture. Idaho Code §§ 54-3003(9)(a).

Landscape architecture is defined as: "The performance of professional services such as consultations, investigation, reconnaissance, research, planning, design or responsible supervision in connection with the development of land and incidental water areas . . . involving the design and arrangement of land forms and the development of outdoor space including, but not limited to the design of public parks, play grounds, cemeteries, home and school grounds, and the development of industrial and recreational sites." Idaho Code § 543002.

Idaho Code Section 54-3003 sets forth the qualifications, examination, fees, and seal required by the Idaho State Board of Landscape Architects for registration as a landscape architect. Certificates of registration are issued only to natural persons and not to firms or corporations. Idaho Code § 54-3002(8)(a).

Before sitting for the examination, an applicant must have graduated from a college or school of landscape architecture approved by the Board. In lieu of graduation from an accredited college or school of landscape architecture, an applicant may present evidence of at least eight years of actual, practical experience in landscape architectural work. Idaho Code § 54-3003(2).

An applicant for a landscape architect's license must demonstrate in a written examination his or her competency to plan, design, specify, and supervise the installation of landscape projects. Each written examination may be supplemented by oral examinations as the Board may determine. Idaho Code § 54-3003.

The Board may also certify for registration with limited examination an applicant who is a registered landscape architect in another state with requirements substantially equivalent to Idaho's. Idaho Code § 54-3003(6)(b).

### c. *Engineers and Land Surveyors*

Engineers and land surveyors are licensed and regulated according to the provisions of Idaho Code Title 54, Chapter 12, Engineers and Surveyors.

Idaho Code Section 54-1201 makes it unlawful to practice or to offer to practice professional engineering or professional land surveying services in the state of Idaho unless the person is registered or authorized by the Board of Registration of Professional Engineers and Professional Land Surveyors or exempted from registration by the provisions set forth in Idaho Code Section 54-1223.

“Engineer” is defined as “a person who is qualified to practice engineering by reason of his special knowledge and use of mathematical, physical, and engineering sciences, and the principles and methods of engineering analysis and design acquired by professional education and engineering experience.” Idaho Code § 54-1202(4). Professional engineering and the “practice of professional engineering” are defined as “any service or creative work offered to or performed for the public, such as consultation, investigation, evaluation, planning, designing, teaching upper division engineering design subjects, and responsible charge of observation of construction in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works or projects wherein the public welfare or the safeguarding of life, health, or property is concerned or involved, when such service requires the application of engineering principles and data. . . .” Idaho Code § 54-1202(8).

“Professional land surveyor” is defined as “a person who is qualified by reason of his knowledge of the principles of land surveying acquired by education and practical experiences to engage in the practice of professional land surveying and who has been duly registered or licensed as a professional land surveyor” by the Board. Idaho Code § 54-1202(8). “Professional land surveying” and the “practice of professional land surveying” are defined as “responsible charge of surveying of land to determine the correct boundary, description, to convey, to establish or reestablish land boundaries, or to plat lands and subdivisions thereof . . .” Idaho Code § 54-1202(9).

The Board grants the privilege to practice engineering or land surveying based upon an individual’s qualifications as evidenced through that individual’s license. Idaho Code § 54-1201.

The minimum educational and practice standards that individuals must meet to be qualified for assignment to an examination for professional engineer, professional land surveyor, engineer intern, or land surveyor intern certification are set forth in Idaho Code Section 54-1212.

Professional engineer candidates must have graduated from an approved four-year engineering curriculum and obtained an additional four years of satisfactory engineering experience. Alternatively, a candidate may have graduated with a bachelor’s degree in a related science from a school or college approved by the board, provided that the candidate is able to show evidence satisfactory to the board that the applicant possesses knowledge and skill approximating that attained through graduation from an approved four-year engineering curriculum. Additionally, this candidate must have obtained four years or more of progressive experience in engineering work of a grade and character satisfactory to the board and indicating that the applicant is competent to practice professional engineering. Idaho Code § 54-1212(1). The standards for professional land surveyor candidates are similar. *See* Idaho Code § 54-1212(2). All candidates must pass an examination. *Id.* The Board directs, administers, and determines the acceptable grade and fees with regard to the examinations. Idaho Code § 54-1213 – 54-1214.

Once the Board has determined that an applicant has satisfactorily met all requirements with respect to education, practice, payment of fees, performance on examinations, etc., the Board may issue to the individual all applicable certificates and seals pursuant to Idaho Code Section 54-1215, which must be renewed from time to time in accordance with Idaho Code Section 54-1216.

The Board may issue a license as a professional engineer or land surveyor to any person who holds a license that was issued by another state, territory, or possession of the United States or a foreign country provided that the applicant possesses the education, experience, and examination credentials that were required for the state of Idaho at the time the certificate was issued. In addition, a professional land surveyor wishing to transfer his or her registration must also pass a land surveying examination administered by the Board. Idaho Code § 54-1219.

Exemption from the engineering and land surveyor requirements exists for employees or subordinates, individuals doing work for themselves, and emergency services. Idaho Code § 54-1223.

Agency 10, Title 1 of the Idaho Administrative Code provides Rules of Procedure, Rules of Professional Responsibility, and Rules of Comer Perpetuation and Filing for professional engineers and professional land surveyors.

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## 2. **Construction Professionals**

### a. *Plumbers*

Plumbers must be certified by the Plumbing Board of the Department of Labor and Industrial Services according to Idaho Code Section 54-2620.

No person, firm, copartnership, association, or corporation may construct, install, improve, extend, or alter any plumbing system in any building, residence, or structure, or service lines without a permit from the division of building safety authorizing the work to be done, except within the boundaries of incorporated cities and within five miles of the city where the city elects to exercise jurisdiction, where the work is regulated and enforced by an equivalent ordinance. Idaho Code § 54-2620.

### b. *Electrical Contractors*

Any person, partnership, company, firm, association, or corporation engaged in, conducting or carrying on the installation of wires or equipment with the purpose of carrying electrical currents must be licensed as an electrical contractor to engage in any electrical business or offer to perform electrical installations. Idaho Code §§ 54-1002, 54-1003A.

Any person who personally performs or supervises the physical work of installation must be licensed as a journeyman electrician. Idaho Code §§ 54-1002, 54-1003A.

To obtain a license, an individual must by examination show himself or herself to be fit, competent and qualified to engage in the trade of journeyman electrician or master journeyman electrician. A firm, partnership, association, or corporation that has shown itself to be fit, competent, and qualified to engage in the business of electrical contracting may also obtain a license. Idaho Code § 54-1007.

A person who has worked as a journeyman electrician or as an apprentice electrician for four years will be considered qualified to apply for a journeyman electrician's license, provided that for each year he or she worked as an apprentice electrician, the apprentice was registered with the division of building safety, paid an apprentice registration fee, and submitted with his or her annual application for apprentice registration verification of employment and hours worked. Before this experience may be used to qualify the apprentice to take the journeyman's examination, the required related instruction for electrical apprentices as approved by the Idaho State Board for Vocational Education must be completed. An individual who works in the state for two years as a journeyman electrician is qualified to apply for a master journeyman electrician's license. Idaho Code § 54-1007.

Licenses may be granted to electricians licensed by other states upon the payment by the applicant of the required fee and upon furnishing proof that the applicant has qualifications at least equal to those of the state of Idaho. Idaho Code § 54-1007.

## 3. **Other**

### a. *Contractors*

In 2005, the Idaho legislature enacted the Idaho Contractor Registration Act (ICRA) with an effective date of January 1, 2006. Idaho Code §§ 54-5201 – 54-5219. The ICRA requires all contractors to register as a contractor with the state of Idaho. Idaho Code § 54-5204. If a construction contractor or subcontractor is not registered, the contractor or subcontractor does not enjoy statutory lien rights, and any mechanics' lien filed by an unregistered contractor is void. Idaho Code § 54-5208. The ICRA exempts professionals who are otherwise licensed or regulated by the state, such as architects and engineers, from registration. *See* Idaho Code § 54-5205 (listing exemptions). A subcontractor's actual knowledge that a general contractor is not registered under the ICRA may also impair the lien rights of a properly registered subcontractor. A subcontractor may also be denied lien rights when it is not reasonable for the subcontractor to believe that the contractor is registered. Idaho Code § 54-5208.

*b. Public Works Contractors*

According to Idaho Code Section 54-1902, it is illegal for any person to engage in the business or act in the capacity of a public works contractor without first obtaining a license from the Public Works Contractors State License Board, unless exempt according to Idaho Code Section 54-1903.

The Board may adopt rules and regulations determining classification of licenses according to their responsibility and type and scope of operations as well as the applicable annual fees. There are seven classifications of licenses issued: “Unlimited,” “AAA,” “AA,” “A,” “ B,” “C,” and “D,” with “Unlimited” being the most broad. Idaho Code § 54-1904.

The Board has the authority to carry out the administration of the before-mentioned act, Idaho Code § 54-1907, and to investigate, classify, and qualify applicants for licenses as Public Work Contractors. Idaho Code § 54-1910.

Idaho Code Section 54-1910 lists the qualifications required of an applicant to receive a public works contractor license. In addition, the license must be renewed annually. Idaho Code § 54-1912.

If a contractor is awarded a public works contract, he or she must, within 30 days, file with the tax commission a signed statement showing the date on which the contract was made or awarded, the names and addresses of the home offices of the contracting parties (including all subcontractors), the contractor’s state of incorporation, the project number, and a general description of the type and location of the work to be performed, the amount of the prime contract (and all subcontracts), and all other necessary information that the tax commission may require. Idaho Code § 54-1904A.

The Board may investigate any complaint regarding a Public Works Contractor and reclassify, re-type, temporarily suspend, or permanently revoke any license for misconduct. Idaho Code § 54-1914. The Board may renew the license at its discretion or if the contractor complies with all provisions of the decision as to renewal. Idaho Code § 54-1917.

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### **III. Considerations Applicable to Payments to Contractors and to Subcontractors**

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Idaho Code Section 29-115 applies to any construction contract where proceeds are withheld from the contractor by the owner or from the subcontractor by the original contractor. The retained proceeds cannot exceed 5 percent of the payment or 5 percent of the contract price.

The 5 percent maximum is not applicable where the contractor or the subcontractor does not provide a performance bond or where the contract is for private work to residential real property consisting of 1-4 units to be occupied by the owner.

Within 35 days from substantial completion of the project, the retention withheld by the owner must be reduced to the lesser of 150 percent of the work yet to be completed or 5 percent of the contract price.

Within 35 days of final completion, the owner must release the retained proceeds unless a dispute exists, in which case the owner may retain no more than 150 percent of the amount in dispute.

Within 10 days of the contractor’s receipt of retained proceeds, the contractor must pay each subcontractor from which funds were retained unless a dispute exists between the original contractor and the subcontractor, in which case the amount withheld may not exceed 150 percent of the value of the amount in dispute.

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## IV. Warranties

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### A. Implied Warranty of Workmanlike Performance

Idaho law imposes an implied warranty of workmanlike performance where personal services are rendered. A contractor, engineer, architect, etc. may be responsible for faults or defects arising from his or her failure to perform in a workmanlike manner. *Hoffman v. Simplot Aviation, Inc.*, 539 P.2d 584, 588 (Idaho 1975) (person engaged in repair and inspection of small aircraft).

The standard for liability varies with the expertise of the party offering services, the nature of the services, and the degree of possible dangers to others from the party's failure to perform in a workmanlike manner. *Hoffman*, 539 P.2d at 588.

A contractor must follow all plans and specifications and when he or she properly does so, the contractor will not be held to guarantee that the work performed according to a contract will be free from defects or that the completed construction project will accomplish its intended purpose. A contractor is responsible only for improper workmanship or defects resulting from his failure to perform. *Gates*, 432 P.2d at 788.

### B. Implied Warranty of Fitness/Habitability

In every sale of a house by a builder-vendor, a warranty of fitness or habitability is implied. *Bethlahmy v. Bechtel*, 415 P.2d 698, 710 (Idaho 1966); *Hibbler v. Fischer*, 712 P.2d 708, 713 (Idaho Ct. App. 1985). The implied warranty of habitability is only imposed upon a person regularly engaged in the business of building; the sale must be commercial (selling of a new home to the public). *Hibbler*, 712 P.2d at 714 (quoting *Klos v. Gockel*, 554 P.2d 1349, 1352 (Wash. 1976)).

The implied warranty of fitness or habitability does not create an obligation to deliver a perfect house. The purchaser must show major defects that render the house unfit for habitation to be entitled to rescission and restitution. *Bethlahmy*, 415 P.2d at 711.

The implied warranty of fitness has also been applied in Idaho outside of the residential house arena to other construction projects. See *Mays v. Kast*, 531 P.2d 234, 235 (Idaho 1975) (implied warranty of fitness applied to construction of concrete pit).

A disclaimer of the implied warranty is permissible and enforceable within a contract, but it must be clear and unambiguous. Public policy is the basis for the implied warranty; therefore, it is difficult to waive. *Tusch Enters. v. Coffin*, 740 P.2d 1022, 1030 (Idaho 1987).

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## V. Principles Applicable to Indemnification Agreements

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### A. General Principles

Idaho law recognizes both express and implied indemnification agreements. *Chenery v. Agri-Lines Corp.*, 766 P.2d 751, 754-55 (Idaho 1988); *Farber v. State of Idaho*, 682 P.2d 630, 631 (Idaho 1984); *R.W. Beck & Assoc., Inc. v. Job Line Constr., Inc.*, 831 P.2d 560, 563 (Idaho Ct. App. 1992). Whether indemnity is based on express or implied agreement, the general rule is that the indemnitor is liable for any reasonable expenses, including attorney's fees and costs incurred by the indemnitee, whether or not the indemnitee is held liable. *Farber*, 682 P.2d at 631.

In the interpretation of a contract provision providing for indemnity, the indemnitor's obligation will be strictly construed, especially where the provision is prepared by the indemnitee, and the status of

the indemnitee is narrowly interpreted. *R. W. Beck*, 831 P.2d at 564 (citing *Tyee Construction Co. v. Pacific Northwest Bell Telephone Co.*, 472 P.2d 411, 414 (Wash. Ct. App. 1970); *Gulf Oil Corp. v. Mobile Drilling Barge or Vessel Margaret*, 411 F. Supp. 1 (E.D. La. 1975), *aff'd*, 565 F.2d 958 (5th Cir. 1978)).

## B. Anti-indemnity Statutes

Under Idaho Code Section 29-114, an indemnification agreement in connection with a contract “relative to the construction, alteration, repair or maintenance of a building structure, highway, appurtenance and appliance including moving, demolition and excavating connected therewith,” that indemnifies a party against liability for personal injury or property damage resulting from the sole negligence of the indemnitee is void. However, so long as the indemnification clause in the construction agreement does not require a party to be indemnified for injuries to a third party caused solely by that party, the clause does not violate Idaho Code Section 29-114. *Beitzel v. Orton*, 827 P.2d 1160, 1166 (Idaho 1992).

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## VI. Insurance

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Employers in the State of Idaho must maintain statutory workers’ compensation coverage. *See* Idaho Code §§ 72-101 – 72-1434.

“Employer” is defined by the statutes as “. . . any person who has expressly or impliedly hired or contracted the services of another. It includes contractors and subcontractors. It includes the lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workmen there employed. If the employer is secured, it means his surety so far as applicable.” Idaho Code § 72-102(13)(a).

An employee in Idaho may have more than one employer; the proprietor is the “employer” of the contractor’s and subcontractor’s employees and the contractor is also an “employer” of the subcontractor’s employees. Idaho Code § 72-216; *Runcorn v. Shearer Lumber Prods., Inc.*, 690 P.2d 324, 328 (Idaho 1984).

No statutory provisions impose further insurance requirements applicable to construction projects.

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## VII. Suretyship and Bonds

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The Public Contracts Bond Act applies to any contract for the construction, alteration, or repair of any public building or public work or improvement of a building belonging to the State of Idaho, or of any county, city, town, municipal corporation, township, school district, public educational institution, or other political subdivision, public authority, or public instrumentality, or of any officer, board, commission, institution, or agency of the foregoing. Idaho Code §§ 54-1925 – 54-1926.

The Public Contracts Bond Act is modeled after the Miller Act, 40 U.S.C. § 3131 – 3134. The act is intended to protect persons who furnish labor and materials to public works by obligating the prime contractor on its bond to satisfy their unpaid claims. *School District No. 91, Bonneville County v. Tayson*, 495 P.2d 5, 9 (Idaho 1972).

### A. Bid Bonds

There are no special considerations relating to this topic in the state of Idaho.

## B. Performance Bonds

In Idaho, the performance bond requirement applies only to public projects. Idaho Code Section 54-1926 applies to any contract for the construction, alteration, or repair of any public building or public work or improvement of any property belonging to a state or local government body. The contracting body sets the performance bond, which must be at least 50 percent of the contract amount. The bond penalty sum is conditioned upon the faithful performance of the contract in accordance with its plans, specifications, and conditions. Idaho Code § 54-1926.

The definition of a “public body” includes the state of Idaho, any county, city, town, municipal corporation, township, school district, public educational institution, or other policy subdivision, public authority, or public instrumentality, and any officer, board, institution, or agency thereof. The performance bond is made payable to the public body concerned and is solely for the protection of the public body awarding the contract. Idaho Code § 54-1926.

The public body may require a performance bond in addition to that prescribed by the Public Contracts Bond Act. If a public body requires a performance bond in excess of 50 percent of the total contract amount, the public body may not withhold from the contractor any amount exceeding 5 percent of the retainage. Further, the public body must release any retainage for those portions of the project accepted by the contracting body and the contractors as complete within 30 days after such acceptance. Idaho Code § 54-1926.

If a contractor is required to give a performance bond, the contractor may give a government obligation. Idaho Code §§ 54-1926, 54-1926A(a). A government obligation is defined as “a public debt obligation of the United States government or the State of Idaho and an obligation whose principal and interest is unconditionally guaranteed by the United States Government or the State of Idaho.” Idaho Code § 54-1901(h). If a government obligation is used, it is given to the official having the authority to approve the surety bond or its authorized custodian, and it must be in the amount equal to the fair market value of the required surety bond, and it must authorize the official receiving the obligation to collect or sell the obligation if the contractor defaults on the required condition. Idaho Code § 54-1926A(a).

The security, therefore, must be either a performance bond executed by a security company authorized to do business in Idaho meeting the requirements of Idaho Code Section 54-1926 or be a government obligation meeting the requirements of Idaho Code Section 54-1926A.

## C. Payment Bonds

Payment bond provisions of the Idaho Public Contracts Bond Act (IPCBA) are applicable to contracts for the construction, alteration, or repair of any public building or public work or public improvement of the State of Idaho, or any county, city, town, municipal corporation, township, school district, public educational institution, or other political subdivision, public authority, or public instrumentality, or of any officer, board, commission, institution, or agency of the foregoing. Idaho Code § 54-1926.

These payment bond provisions are also derived from the federal Miller Act (40 U.S.C. § 3131) and are nearly identical.

The scope of the protection afforded under the payment bond provisions of the Idaho Public Contracts Act is limited to those who have a direct contractual relationship with the prime contractor and those who have a direct contractual relationship with one of the prime contractor’s subcontractors. *LaGrand Steel Products, Co. v. A.S.C. Constructors, Inc.*, 702 P.2d 855, 856 (Idaho Ct. App. 1985), defined a subcontractor as “one who performs for and takes from the prime contractor a specified part of the labor or material requirements of the original contract.”

The payment bond must be in the amount fixed by the contracting body but in no event less than 50 percent of the contract amount. Idaho Code § 54-1926. If a public body requires a payment bond in excess of 50 percent of the total contract amount, the public body may only withhold 5 percent of the total amount payable as retainage, and this retainage must be released to the contractor for the portions of the project accepted by the public body and the contractor as complete within 30 days after such acceptance. Idaho Code § 54-1926.

The payment bond must be executed by a surety company duly authorized to do business in the state of Idaho and must be payable to the state or state agency. Idaho Code § 5-1926.

As in the case of performance bonds, a government obligation may be furnished rather than a payment bond. Idaho Code §§ 54-1926, 54-1926A, 54-1901(h). If the claim is made against the contractor, the public contracting body may not return the government obligation to the contractor unless the 90-day period for bringing a suit under Idaho Code Section 1927 has lapsed. Idaho Code § 54-1926A(d). If a civil action is brought in the 90-day period, the public contracting body is required to hold the government obligation or the proceeds thereof subject to the order of the court having jurisdiction of the action. *Id.*

The right to sue on the payment bond accrues when a claimant who has furnished labor or materials or rented, leased, or otherwise supplied equipment in the prosecution of the work has not been paid in full before the expiration of 90 days after the day on which the last labor was done or performed or material or equipment was furnished or supplied for which such claim is made. Idaho Code § 54-1927.

If a public body fails or neglects to obtain the delivery of a payment bond, as required by the IPCBA, the public body must promptly make payment to all persons who have supplied materials and performed labor in the prosecution of the work under the contract. Actions must be commenced within one year after the furnishing of the materials or labor. Idaho Code § 54-1928.

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## VIII. Damages

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### A. General Principles

A comprehensive discussion of tort and contract damages available under Idaho law is beyond the scope of this publication.

For actions for construction defects arising in the context of residential construction, a homeowner/claimant may recover the following damages proximately caused by the construction defect: (a) The reasonable cost of repairs necessary to cure any construction defect, including any reasonable and necessary engineering or consulting fees required to evaluate and cure the construction defect, that the contractor is responsible for repairing under this chapter; (b) the reasonable expenses of temporary housing reasonably necessary during the repair period; (c) the reduction in market value, if any, to the extent that the reduction is due to structural failure; and (d) reasonable and necessary attorney's fees. Idaho Code § 6-2504.

### B. Liquidated Damages

Idaho law follows the common law governing liquidated damages provisions. For a liquidated damages provision to be enforceable, the actual damages that may be incurred due to a breach must be difficult or impossible to calculate. *Margaret H. Wayne Trust v. Lipsky*, 846 P.2d 904, 909 (Idaho 1993). In addition, the liquidated damages must reasonably estimate the actual damages expected to be incurred. *Id.* at 909-10; *see also Thompson v. Fairchild*, 468 P.2d 316, 320 (Idaho 1970); *Nichols v. Knowles*, 394 P.2d 630, 633 (Idaho 1964).

If a liquidated damages term is not reasonably related to the anticipated actual damages, the provision will be found to be a penalty and unenforceable. *Margaret H. Wayne Trust*, 846 P.2d at 910; *Thompson*, 468 P.2d at 320; *Nichols*, 394 P.2d at 633-34.

A party also may not enforce the liquidated damages provision in a contract where the party contributed to the breach by failing to perform a contractual duty or through action taken in contravention of contractual terms. *City of Idaho Falls v. Beco Constr. Co., Inc.*, 850 P.2d 165, 170 (Idaho 1993).

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## C. Exculpatory Clauses

Although the Idaho appellate courts have not addressed the application of an exculpatory clause in the context of a construction contract, the Idaho appellate courts have enforced exculpatory clauses in other contexts. *See Lee v. Sun Valley Co.*, 695 P.2d 361, 363 (Idaho 1984) (upholding exculpatory clause and absolving outfitter from liability for injuries to plaintiff arising from horseback trail ride); *Anderson & Nafziger v. G.T. Newcomb, Inc.*, 595 P.2d 709, 712 (Idaho 1979) (upholding exculpatory clause and absolving seller of irrigation equipment from liability for any crop loss suffered by failure to make proper delivery of the equipment). However, in a recent case, the Idaho Supreme Court refused a landlord's attempt to enforce an exculpatory clause on the grounds that it violated public policy. *Jesse v. Lindsley*, — P.3d —, 2008 WL 2313406 at \*3 (Idaho June 6, 2008).

## D. Economic Loss Rule

Damages for pure economic losses are not recoverable in tort because these damages are barred by the economic loss rule under Idaho law. Generally, parties owe “no duty to exercise due care to avoid purely economic loss.” *Duffin v. Idaho Crop Improvement Ass’n*, 895 P.2d 1195, 1201 (Idaho 1995). Pure “[e]conomic loss includes costs of repair and replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use.” *Salmon River Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 544 P.2d 306, 309 (Idaho 1975). Also, compensable “[p]roperty damage encompasses damage to property other than that which is the subject of the transaction.” *Id.* Therefore, purely economic damages are not recoverable in negligence actions. *Clark v. Int’l Harvester Co.*, 581 P.2d 784, 791-94 (Idaho 1978); *see also Tusch Enters. v. Coffin*, 740 P.2d 1022, 1026 (Idaho 1987).

In a recent decision involving the construction of a residence, the Idaho Supreme Court held that “[i]t is the subject of the transaction that determines whether a loss is property damage or economic loss, not the status of the party being sued.” *Blahd v. Richard B. Smith, Inc.*, 108 P.3d 996, 1001 (Idaho 2005). Because the plaintiffs in *Blahd* “purchased the house and lot as an integrated whole,” the claimed damages to the house were held to be purely economic and barred by the economic loss rule. *Id.* at 1000-1001.

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## IX. Construction Liens

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### A. Direct Contracts with Owner

*See* Section IX.G, *infra*; *see also* Section IX.I, *infra*.

### B. Subcontractors and Suppliers

The Idaho mechanics’ and materialmen’s lien laws cover laborers, materialmen, professional engineers, and licensed surveyors. Laborers and materialmen are covered if they perform labor upon or furnish materials to be used in the construction, alteration, or repair of any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, or who grades, fills in, levels, surfaces, or otherwise improves any land, or who performs labor in any mine or mining claim. Idaho Code § 45-501.

Also covered are professional engineers and licensed surveyors if, under contract, they prepare or furnish designs, plans, plats, maps, specifications, drawings, surveys, estimates of cost, on-site observation or supervision, or render any professional service for which they are legally authorized to perform

regarding any land or building development or improvement; or if they establish boundaries. Idaho Code § 45-501.

Other than the lessees of any mining claim, every contractor, subcontractor, architect, builder, or person in charge of a mining claim is considered to be the agent of the owner. Idaho Code § 45-501.

Nothing in Idaho Code Title 45, Chapter 5, Liens of Mechanics and Materialmen, impairs the rights of a person to whom a debt is owed to maintain a personal action to recover such debt. Idaho Code § 54-515.

### C. Residential Liens by Subcontractors and Suppliers

See Section IX.B, *supra*.

### D. Assignment of Lien Rights

Idaho law does not expressly address the assignment of lien rights to a third party. However, Idaho case law contains instances that involved the assignment of lien rights to a third party in the context a materialmen's lien. See *Credit Bureau of Lewiston-Clarkston, Inc. v. Idaho First Nat'l Bank*, 784 P.2d 885 (Idaho 1989); *Brown v. Hawkins*, 158 P.2d 840 (Idaho 1945) *overruled in part by Mitchell v. Flandro*, 506 P.2d 455 (Idaho 1972); *Nohrnberg v. Boley*, 246 P. 12 (Idaho 1925). Therefore, the assignment of lien rights in the context of a construction lien appears to be permissible and most likely determined by the facts of each particular case.

### E. Notices

Idaho Code Section 45-507 sets forth the basic notice requirements. Any person claiming a lien pursuant to the provisions of this chapter must, within 90 days after the completion of the labor or services or furnishing of materials, or the cessation of the labor, services or furnishing of materials for any cause, record a notice of lien with the county recorder containing the following:

1. A statement of the claimant's demand, after deducting just credits and offsets. "Substantial compliance," rather than complete accuracy, is necessary for the creation of a valid lien. *Barber v. Honorof*, 780 P.2d 89, 91 (Idaho 1989); *Chief Indus., Inc. v. Schwendiman*, 587 P.2d 823, 826 (Idaho 1978).
2. The name of the owner or reputed owner of the property, if known; and the name of the person by whom he or she was employed or to whom he or she furnished the materials.
3. A description of the property to be charged with the lien sufficient for identification.

The claim of lien must be verified by the oath of the claimant or the claimant's agent or attorney, to the effect that the affiant believes the same to be just. A true and correct copy of the claim of lien must be served on the owner or reputed owner of the property no later than five days following the filing of the lien. Idaho Code § 45-507.

A timely filed mechanics' or materialmen's lien relates back to the time the building, improvement, or structure was commenced, the work was done, or the materials or professional services first were commenced to be furnished. Idaho Code § 45-506. "Commence to furnish materials" has been held to mean the first delivery of construction materials to the site. *Beall Pipe & Tank Corp. v. Tumas Intermountain, Inc.*, 700 P.2d 109, 114 (Idaho Ct. App. 1985) (citing *Walker v. Lytton Sav. & Loan Ass'n of N. Cal.*, 465 P.2d 497, 500 (1970)). The labor or materials must be incorporated into the building, structure, or improvement for a lien to attach; but, where materials are delivered to the worksite, a rebuttable presumption arises that the materials were actually incorporated into the building or improvement. *Chief Indus., Inc. v. Schwendiman*, 587 P.2d 823, 828 (Idaho 1978).

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## F. Foreclosure

Once a lien has been filed, the claimant must initiate a foreclosure action within six months of the filing. Idaho Code § 45-510.

## G. Lien Waivers and Releases

Any waiver of lien rights signed by a party protected by the Idaho mechanics' and materialman's lien statute is unenforceable unless supported by consideration. *Pierson v. Sewell*, 539 P.2d 590, 594 (Idaho 1975) (citing *McCorkle v. Lawson & Co., Inc.*, 259 S.W.2d 27 (Ky. Ct. App. 1953)).

## H. Liens or Other Payment Protection Applicable to Public Projects

Any person who at the request of the owner surveys, grades, fills in, or otherwise improves a lot or the street in front of or adjoining a lot in any incorporated city or town, or who rents, leases, or otherwise supplies equipment, materials or fixtures, "has a lien upon such lot for his work done or material furnished or equipment, materials or fixtures . . ." Idaho Code § 45-504.

## I. Bonding in Lieu of Lien Rights

Idaho law provides for the posting of a surety bond for the release of a lien against real property. Idaho Code § 45-519. The amount of the bond must be one and one-half times the amount of the lien claim. *Id.* To post a surety bond in place of a lien, petition must be made with the district court in the county in which the real property at issue is located. Idaho Code § 45-520. Following a hearing on the petition, the court may then issue an order, which must reference the real property at issue, releasing the lien against the property. Idaho Code § 45-521.

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## X. Arbitration, Mediation, and Other ADR

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### A. Uniform Arbitration Act

In 1975, Idaho adopted the Uniform Arbitration Act, Idaho Code §§ 7-901 through 7-922, aligning Idaho with the majority of states. *Loomis, Inc. v. Cudahy*, 656 P.2d 1359, 1361 (Idaho 1983).

Under the Act, agreements to arbitrate are encouraged due to their effective means of resolving disputed issues and an arbitration clause in a contract is generally enforceable and irrevocable. Idaho Code §§ 7-901, *et seq.*; *Loomis*, 656 P.2d at 1361.

In deciding issues under the Uniform Arbitration Act, Idaho courts also look to other uniform states and to the Federal Arbitration Act.

Further, the Idaho Supreme Court has held as valid awards from arbitration that follow the Construction Industry Arbitration Rules of the American Arbitration Association. *See Loomis*, 656 P.2d at 1367.

### B. Other ADR Issues

For claims for construction defects falling within the scope of the Notice and Opportunity to Repair Act, Idaho Code §§ 6-2501 – 6-2504, a claimant must serve written notice of claim on the construction professional prior to commencing an action. *Id.* at § 6-2503(1). The written notice must be delivered via certified mail or personally served, *id.* at § 6-2502(8), and must describe the claim for construction

defect “in reasonable detail sufficient to determine the general nature of the defect,” *id.* at § 6-2503(1). Within 21 days after service of the notice of claim, the construction professional must serve a written response on the claimant and such response must: (a) propose to inspect the residence within a specified time frame; (b) offer to compromise and settle the claim by monetary payment without inspection; or (c) state that the construction professional disputes the claim. *Id.* at § 6-2503(2). “Any action commenced by a claimant prior to compliance with the requirements of this section shall be dismissed by the court without prejudice and may not be recommenced until the claimant has complied with the requirements of this section.” *Id.* at § 6-2503(1).

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## XI. Other Special Considerations Applicable to Construction Contract Practices Generally

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Title 29, Chapter 1, Idaho Code provides general provisions relating to contracts. Idaho has no unique requirements.

Idaho Code Sections 29-101 through 29-116 contain provisions relating to who may contract (§ 29-101); enforcement by beneficiary (§ 29-102); written instrument as presumptive evidence of consideration (§ 29-103); placement of burden of proof on the party attempting to invalidate the contract (§ 29-104); enforceable oral contracts (§ 29-105); contracts not put in writing due to fraud (§ 29-106); affixing of corporate or official seals (§ 29-107); removal of distinction between sealed and unsealed documents (§ 29-108); conflicting provisions (§ 29-109); voidability of contracts limiting the right to sue (§ 29-110); debtor’s right to receipt from creditor (§ 29-111); objections to offer of performance and waiver of such objections (§ 29-112); agreements releasing individuals’ rights to be compensated for personal injury (§ 29-113); indemnification agreements for negligence (§ 29-114); retainage on construction contracts (§ 29-115); and computer information agreements (§ 29-116).

Idaho Code Section 29-115 (construction contracts) and Section 29-114 (indemnification of promise for negligence - effect on existing agreements) are discussed *supra* in sections III and V.B, respectively.

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## XII. Consumer Protection Laws Applicable to Design and Construction Contracts

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The Idaho Consumer Protection Act, Idaho Code §§ 48-601 through 48-619, protects consumers and businesses against unfair competition and deceptive acts and practices in the conduct of trade or commerce.

“Trade and commerce” is defined as “Advertising, offering for sale, selling, leasing, renting, collecting debts arising out of the sale or lease of goods or services or distributing goods or services, either to or from locations within the State of Idaho, or directly or indirectly affecting the people of this state.” Idaho Code § 48-602.

The statute instructs the courts to give due consideration and weight to the Federal Trade Commission Act and to Federal Trade Commission and federal court interpretations of that act. *Myers v. A.O. Smith Harvestore Prods., Inc.*, 757 P.2d 695, 704 (Idaho Ct. App. 1988); Idaho Code § 48-604.

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## XIII. Environmental Considerations

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### A. General Considerations

The Idaho Land Remediation Act, Idaho Code §§ 39-7201 through 39-7211, follows federal brownfields legislation. The purpose of the act is to create a voluntary remediation program to promote economic revitalization of property that was previously burdened with environmental liability and therefore underutilized. Idaho Code § 39-7202.

To participate in the program, a developer must submit an application containing general information and an environmental assessment to the Idaho Department of Health and Welfare. *Id.* at § 39-7204. If the department determines the applicant is eligible, that individual must submit a proposed voluntary remediation work plan to the department, including an estimation of costs to the department, a statement of work to be performed, and a schedule to accomplish the remediation. *Id.* at § 39-7205. The department will evaluate the work plan following the guidelines presented in Idaho Code Section 39-7206. If approved, the remediation work plan will be incorporated into the voluntary remediation agreement. *Id.* Once the department determines the remediation has been completed, the department shall issue a certificate of completion and provide a covenant not to sue. *Id.* at § 39-7207. In 2006, the Idaho legislature amended the Idaho Land Remediation Act to include an Idaho community reinvestment pilot initiative that creates a state treasury fund to allow for financial assistance to eligible property owners conducting voluntary cleanup. *Id.* at § 39-7211.

In 2008, the Idaho legislature enacted the Energy Efficient State Building Act to reduce “the consumption of and dollars spent” for energy consumed by state facilities. *See* Chapter and Session Laws 274 (2008). The Act took effect on July 1, 2008, and is codified at Idaho Code Sections 39-2901 – 39-2904. To the extent it is fiscally prudent, feasible, and practical, all major facility projects must be designed, constructed and certified to meet a target of at least 10 percent to 30 percent better efficiency than a comparable building on a similar site. Idaho Code § 39-2904. The Act defines a “major facility project” as those constructed by a state agency or for use by a state agency that are “larger than five thousand (5,000) gross square feet of occupied or conditioned space.” *Id.* at § 39-2903. Building renovation projects greater than 5,000 gross square feet with a project cost greater than 50 percent of the assessed value of the existing building are also considered a “major facility project.” *Id.*

### B. Green Building Programs and Sustainable Construction Initiatives

Idaho does not currently have any green building or sustainable construction legislation. However, some Idaho cities and counties have adopted green building initiatives. *See, e.g.*, City of Boise Resolution No. 18710, A Resolution Striving to Achieve and Implement Green Building Standards in All City Owned Buildings, and Providing an Effective Date (July 26, 2005), available at [http://www.cityofboise.org/Departments/Public\\_Works/PDF/BoardsAndCommissions/PWCommission2006/2006-09-14/AGENDA%20ITEMS/Item5.EnvironmentalIssues.pdf](http://www.cityofboise.org/Departments/Public_Works/PDF/BoardsAndCommissions/PWCommission2006/2006-09-14/AGENDA%20ITEMS/Item5.EnvironmentalIssues.pdf); Ada County Resolution No. 1180, Building Guidelines for Implementation (Feb. 25, 2003) (requiring, among other things, all new construction and major retrofit projects for all County facilities and buildings over 10,000 gross square feet of occupied space to meet or exceed minimum Leadership in Energy and Environmental Design (L.E.E.D.) certification requirements), available at [http://www2.adaweb.net/ComAgen.nsf/7d355ae74b7e99ae872567a60078c23c/d25f7471b400b3b187256cd400742a41/\\$FILE/Resolution%20No.%201180%20-%20Public%20Facilities.pdf](http://www2.adaweb.net/ComAgen.nsf/7d355ae74b7e99ae872567a60078c23c/d25f7471b400b3b187256cd400742a41/$FILE/Resolution%20No.%201180%20-%20Public%20Facilities.pdf).

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## XIV. Lender's Issues

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

The priority between construction mortgages or deeds of trust and construction liens is governed by Idaho Code Section 45-506, which provides that mechanic's and materialmen's liens are preferred to any mortgage which attached "subsequent to the time when the building, improvement or structure was commenced, work done, equipment, materials or fixtures were rented or leased, or materials or professional services were commenced to be furnished."

There has been some debate in Idaho case law regarding whether this language means that all liens of *all* materialmen attached at the time the *first* commenced work on the project; or whether the liens of *each* materialman attached at the time that particular materialman commenced work on the project. See generally *Ultrawall, Inc. v. Washington Mutual Bank, FSB*, 25 P.3d 855 (Idaho 2001) (discussing, but refusing to adopt, Justice Alshie's dissenting opinion in *Pacific States Sav. & Loan & Bldg. Co. v. Dubois*, 83 P. 513 (Idaho 1905)). The *Ultrawall* Court characterized Judge Alshie's interpretation of the statute as set forth in his dissenting opinion as follows:

*[E]ach of the statutory lien claimants has a priority date that relates back to the date the project was commenced* regardless of when the lien claimant's materials or services were provided. Then, if the value of the project is insufficient to pay all the lien claimants, those claimants are paid according to their rank under [Idaho Code] § 45-512. Thus, either all of the lien claimants are paid ahead of the construction lender, or none are, depending on whether the lender's mortgage was recorded before or after the project began.

*Id.* at 858 (emphasis added).

The *Ultrawall* Court characterized the majority interpretation to mean:

*[T]hat the particular lien claimant must either commence to furnish professional services such as engineering or surveying, commence the physical construction of building, improvement or structure, or, if that person or entity was not involved with either of the above activities, begin to work or furnish materials in order for that claimant's lien to attach.*

*Id.* at 859 (emphasis added).

Rejecting the dissenting interpretation as one that would unfairly allow "a lien claimant [to] bootstrap his claim to the earliest known work on the project," the *Ultrawall* Court adopted the *Pacific State* majority approach. *Id.* However, the *Ultrawall* Court also suggested that the legislature could, by amendment, indicate dissatisfaction with this judicial interpretation. *Id.*

Almost contemporaneously with the *Ultrawall* decision, Idaho Code Section 45-506 was amended as indicated by the following underlined language:

45-506. LIENS PREFERRED CLAIMS. The liens provided for in this chapter shall be on equal footing with those liens within the same class of liens, without reference to the date of the filing of the lien claim or claims and are preferred to any lien, mortgage or any other encumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced....

See Idaho Sess. Laws ch. 152, § 4 (2001). Whether this legislative amendment modified the *Ultrawall* decision, at least insofar as it would allow a lien claimant to "bootstrap" his claim to the first claim within his same class of liens, is uncertain as it has not been the subject of any reported judicial decision.

With respect to the time in which mortgage rights attach to property, Idaho law is in accord with the general rule in the United States:

[I]f a future advance is obligatory, it takes its priority from the original date of the mortgage, and the subsequent creditor is junior to it. However, if the advance is optional, and if the mortgagee has notice when the advance is made that a subsequent creditor has acquired an interest in the land, then the advance loses its priority to that creditor.

*Idaho First Nat. Bank v. Wells*, 596 P.2d 429, 433 (Idaho 1979).

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

Under Idaho law, a construction lender's responsibility to the borrower arising from disbursement of the loan proceeds will be governed by the parties' contractual agreement. *See Wooden v. First Security Bank of Idaho, N.A.*, 822 P.2d 995, 997-98 (Idaho 1991); *Laight v. Idaho First Nat. Bank*, 697 P.2d 1225, 1227-28 (Idaho Ct. App. 1985). Idaho courts have refused to recognize a common law duty of a mortgagee to protect a mortgagor, unless the lender exercised "complete control over disbursement of the funds." *Wooden*, 822 P.2d at 997-98 (citing *Prudential Insurance Co. of America v. Executive Estates, Inc.*, 369 N.E.2d 1117 (Ind. Ct. App. 1977)); *see also Laight*, 697 P.2d at 1228; *Falls Lumber Co. v. Heman*, 181 N.E.2d 713 (Ohio Ct. App. 1961)).

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

The Idaho appellate courts have rejected claims against a lender for breach of fiduciary duty, the tort of "bad faith," negligent failure to disclose information, and negligent infliction of emotional distress. *See Black Canyon Racquetball Club v. Idaho First Nat'l Bank*, 804 P.2d 900 (Idaho 1991).

Moreover, the Idaho appellate courts have recognized the remedy of an equitable lien, but have twice refused to authorize an equitable lien in cases involving a seller's attempt to recover property from a buyer. *See Ellis v. Butterfield*, 570 P.2d 1334 (Idaho 1977); *Kerr Land & Livestock, Inc. v. Glaus*, 692 P.2d 1199 (Idaho Ct. App. 1984). Specifically, in *Ellis* and *Kerr*, the Idaho Supreme Court and Idaho Court of Appeals refused to grant the buyers of real property an equitable lien to recover the down payment and other expenditures made to improve the property because at no time in the proceedings did the respective buyers argue that the amounts they expended were "disproportionate to the damages sustained by the [sellers] or that the [sellers] are unjustly enriched by the retention of payments and recovery of the property." *Ellis*, 570 P.2d at 1337. In light of *Ellis* and *Kerr*, a party seeking an equitable lien must show either that its damages are disproportionate as compared to the party against whom the lien is sought, or that the party against whom the lien is sought will be unjustly enriched as a result of the conduct of the party seeking the lien. Additionally, in *Pierson v. Jones*, 625 P.2d 1085 (Idaho 1981), the Idaho Supreme Court refused to impose an "equitable lien by agreement" because this kind of arrangement "presupposes a creditor-debtor relationship between the parties" and because there was "no showing of unjust enrichment, which could justify a judicially imposed equitable lien." *Id.* at 1088 (citing D. Dobbs, *Handbook on the Law of Remedies: Damages-Equity-Restitution* § 4.3 (1979)).

Additionally, the Idaho appellate courts have been reluctant to recognize claims for unjust enrichment against lenders. In *Cannon Builders, Inc. v. Rice*, 888 P.2d 790, 798 (Idaho Ct. App. 1995), the Idaho Court of Appeals rejected an unjust enrichment claim by a third-party supplier of rebar against a private money lender. Additionally, in *Hausam v. Schnabl*, 887 P.2d 1076 (Idaho Ct. App. 1984), the Idaho Court of Appeals rejected a claim for unjust enrichment against private money lender. In *Hausam*, the son of a sole proprietor who operated a logging business obtained a loan, and the proceeds of that loan were deposited in the business's bank account. The lender ultimately sued to enforce the promissory note, and the Court of Appeals concluded that the son did not have apparent authority to bind his father, the sole proprietor, to the transaction. The Court of Appeals also concluded that the father gained

a benefit from the transaction as soon as the funds were deposited in the business account. Accordingly, the Court of Appeals held that the father had been unjustly enriched, and it would be inequitable for the father to retain the benefit of the loan without compensating the lender for its value to the business.

In *Dale's Service Co., Inc. v. Jones*, 534 P.2d 1102 (Idaho 1975), *overruled on other grounds by Peavey v. Pellandini*, 551 P.2d 610 (Idaho 1976), the Idaho Supreme Court refused to allow a subcontractor to pursue an unjust enrichment claim against landowner for excavation and compacting services performed on behalf of the landowner in connection with the construction of a car wash. In rejecting the claim, the Idaho Supreme Court stated:

The general rule in this area is that a subcontractor who furnishes material or labor pursuant to an agreement with, or upon the order and credit of a general contractor cannot recover against the property owner upon the basis of an implied promise to pay arising from the owner's receipt and acceptance of the benefit of the material and labor furnished. Thus it is said that a landowner will not be held liable for work or material furnished by a subcontractor to a contractor, pursuant to a contractual arrangement between the contractor and subcontractor, where the landowner is not a party to this contractual arrangement.

*Id.* at 1106 (citations omitted). The Idaho Supreme Court noted that the Idaho materialmen's lien statutes constitute an exception to this general rule, but it refused to permit recovery against the landowner because the subcontractor did not avail itself of the remedies afforded by Idaho's materialmen's lien statutes. *Id.* at 1107.