



# NORTH AMERICAN CONSTRUCTION SUMMIT

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## National Trends and Jurisdictional Overview



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# Recent Trends in Arizona



# Potential Expansion of the Implied Warranty of Workmanship For Common Areas



- *Pointe 16 Community Association v. GTIS-HOV Pointe 16, LLC, et al.* (CV-24-0182-PR)
  - Plaintiff/Appellant: Pointe 16 Community Association
  - Defendant/Appellees: GTIS-HOV Pointe 16, LLC, et. Al
  - Issue: Whether an anti-assignment clause in a purchase agreement precludes a homeowner from assigning a breach of implied warranty claim to a homeowners' association, an issue of statewide importance.
  - Outcome: An anti-assignment clause does not necessarily preclude a homeowner from assigning a breach of implied warranty claim to a homeowners' association, an issue of statewide importance.



# Did They Go Too Far or Not Far Enough?

Held implied warranty claims owned by Individual owners can be assigned to the association

Contracts can limit or prohibit the assignments if worded correctly

Leaves the question as to whether a builder can be sued for defects in common areas by an HOA under the implied warranty of habitability and workmanship absent contractual privity with the builder?



# Pending Arizona Supreme Court Case

- *Gallery Community Association v. K. Hovnanian at Gallery, LLC, et al.* (CV-24-0252-PR)
  - Petitioners: Hovnanian at Gallery, LLC, and K. Hovnanian Arizona Operations, LLC
  - Respondent: Gallery Community Association:
  - Issue: Whether Arizona Revised Statute § 33-2002 created for planned area community homeowners' associations allows a cause of action for the implied warranty of workmanship and habitability for both common areas they own and individual owners' properties they do not own.
  - Outcome: Oral argument was held on April 22, 2025. Still awaiting decision.



# Texas Business Courts

Tex. Gov't Code 25A

- Newly Established in Texas for Business Disputes
  - Excludes personal injury, insurance litigation
  - More streamlined, quicker to resolution, appointed judges
- \$5 million in controversy arising out of a "qualified transaction"
  - Aggregate value of claims or aggregate of all joined parties' claims
- Dispute arises from a \$5 million construction contract and the amount in controversy exceeds \$5 million
- Opt-in jurisdiction where parties agree in the contract or subsequent agreement.



# Contingent Payment Clauses

- Generally disfavored by all jurisdictions
- Pay-if-paid v. pay-when-paid
  - Pay-if-paid is strictly construed in jurisdictions that allow
    - Contractual language must be clear that risk is shifting to subcontractor
    - Most states do not allow statutory lien rights to be contractually waived
  - Pay-when-paid is typically seen as a timing mechanism
    - Allows payment to be delayed until payment received by owner for a "reasonable time"
    - Most jurisdictions do not interpret this as a pay-if-paid and require payment





# Texas Contingent Payment

- Contingent Payment Clauses cannot be "unconscionable"
  - Statute states contingent payment in Texas not "unconscionable". Tex. Bus. & Com. Code Ann. 56.054(d).
  - But *Solorzano v. Sage Commercial Group LLC*, 693 S.W.3d 689 (Tex. App. -- Houston [14th Dist.] 2024, pet. denied).
    - Payment clause was unenforceable because GC "did none of the things required by statute to avoid the conclusion of unconscionability"
      - Research viability of owner and owner's ability to pay
      - Collect amounts from owner or attempt to collect
      - Assign claim against the owner to subcontractor



# Arizona Contingent Payment

- Both pay-if-paid and pay-when-paid are enforceable
- Pay-when-paid clause is a "reasonable provision" designed to postpone payment for a "reasonable period of time."
  - Does not relieve GC from making payment or limit lien rights
  - *Thos. J. Dyer v. Bishop International Engineering Co.*, 303 F.2d 655 (6th Cir. 1962)
- Pay-if-paid must be carefully written and clear
  - Use "only if the general contractor is paid" type of language.
  - Be clear that "subcontractor assumes the risk of nonpayment by owner"



# New York Updates





# California Updates





## National Trends and Jurisdictional Overview

# Codes are considered legal documents

### Codes

- National / Worldwide Model – Predominantly adopted versions of I-Codes
  - Codes, state and local amendments, ordinances are typically updated every three years (versions). Jurisdictions have the latitude as to which versions they can elect to adopt. The adopted version needs to be confirmed every time.
  - Adopted versions of the model code typically include state amendments
  - Some states use the model code as a guide and generate their own state regulated family of codes
    - State and local codes/ordinances can be no less restrictive than the model code
  - Amendments and ordinances are usually a function of weather and geography



## Enforcement Trends

- Enforcement can range from loose to strict depending on the Jurisdiction, (generally rural vs metropolitan)
  - ✓ Enforcement is jurisdiction specific
- Enforcement specific to existing buildings started to change about 1997 and has been steadily evolving since. We went from chapter 34 (a very loosely defined set of rules), to a totally separate code for existing buildings
- The latitude originally provided for existing buildings has steadily decreased, however, definitions have become clearer and better defined.
- Over the last 2 to 3 adoption cycles provisions definitions for “substantial damage” have changed
  - “Substantial Damage used to be a term that applied specifically to structural damage. Now departments have added scope and cost percentage thresholds, typically requiring more restrictive levels of enforcement.
- Fire department authorities tend to have a lot more opportunity for enforcement of life safety elements
- Residential code enforcement has started to adopt and enforce restrictions that were formerly specific to commercial buildings.