

Construction Law

by **Henry L. Balkcom IV***
Dana R. Grantham**
and **Devin H. Gordon*****

This Article surveys construction law decisions handed down by Georgia courts and construction-related legislation enacted by the Georgia General Assembly between June 1, 2004 and May 31, 2005. As in prior years, the selected cases primarily fall within five categories: (1) contracts, (2) torts, (3) mechanics' and materialmen's liens, (4) arbitration, and (5) miscellaneous. Recent legislation is highlighted in Section VI.

I. CONTRACTS

The Georgia Court of Appeals decided several cases concerning claims arising out of or relating to breach of contract claims.

A. *Constructive Trust*

In *Tabar, Inc. v. D & D Services, Inc.*,¹ the court of appeals held that a subcontractor is not entitled to summary judgment against a property owner on a claim for constructive trust when the owner's retention of equipment supplied by the subcontractor violates no principle of equity,

* Associate in the firm of Smith, Gambrell & Russell, LLP (Construction Law and Litigation Section), Atlanta, Georgia. Georgia Institute of Technology (B. Civ. Eng., 1994); Walter F. George School of Law, Mercer University (J.D., 2000); Member, Mercer Moot Court Board (1998-2000). Member, State Bar of Georgia.

** Associate in the firm of Smith, Gambrell & Russell, LLP (Construction Law and Litigation Section), Atlanta, Georgia. Hollins University (B.A. with honors); The University of Georgia School of Law (J.D. cum laude, 2001). Executive Articles Editor, Georgia Law Review (1999-2001). Member, State Bar of Georgia.

*** Associate in the firm of Smith, Gambrell & Russell, LLP (Construction Law and Litigation Section), Atlanta, Georgia. University of Georgia (B. Mus. Ed., 2001); Vanderbilt University Law School (J.D., 2004). Notes Editor, Vanderbilt Journal of Entertainment Law and Practice (2003-2004). Member, State Bar of Georgia.

1. 267 Ga. App. 659, 601 S.E.2d 143 (2004).

even though the subcontractor has not been paid by the general contractor.² Tabar, Inc. (“Tabar”) entered into a contract with Good Guys, Inc. (“Good Guys”) for certain construction work on Tabar’s building. Good Guys, in turn, contracted with D & D Services to replace air conditioning units in the building. When D & D Services failed to receive payment for its air conditioning work from Good Guys, D & D Services filed suit against Tabar, Good Guys, and others, alleging breach of contract and constructive trust. The trial court granted D & D Services’s motion for summary judgment after Tabar filed a late reply.³

The court of appeals reversed the grant of summary judgment against Tabar, stating that “[a] constructive trust is a trust implied whenever the circumstances are such that the person holding legal title to the property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity.”⁴ The court of appeals noted that when Tabar paid the general contractor for the heat pumps, it did not know or have any way of knowing that Good Guys did not intend to pay D & D Services.⁵ Therefore, there was no equitable principle that would allow Tabar to be subjected to a constructive trust.⁶

B. Damages, Consequential Damages, and Attorney Fees

During the survey period, the court of appeals also addressed the subject of damages for breach of a construction contract. In the first two cases we have selected to discuss, in addition to contract damages, the court of appeals affirmed the award of attorney fees against the subcontractors.⁷

In *Charter Drywall Atlanta, Inc. v. Discovery Technology, Inc.*,⁸ the court of appeals affirmed an award of consequential damages to a builder against a subcontractor when the subcontractor knew at the time of contracting that its work needed to be completed before a homebuilders show in which the contractor planned to enter the home.⁹ In addition, the court held that the trial court’s award of attorney fees in favor of the contractor was appropriate where the subcontractor “vowed

2. *Id.* at 660, 601 S.E.2d at 145.

3. *Id.* at 659, 601 S.E.2d at 144.

4. *Id.* at 660, 601 S.E.2d at 144 (quoting O.C.G.A. § 53-12-93(a) (1997)).

5. *Id.*

6. *Id.*

7. *Charter Drywall Atlanta, Inc. v. Discovery Tech., Inc.*, 271 Ga. App. 514, 610 S.E.2d 147 (2005); *Robert E. Canty Bldg. Contractors, Inc. v. Garrett Mach. & Constr., Inc.*, 270 Ga. App. 871, 608 S.E.2d 280 (2004).

8. 271 Ga. App. 514, 610 S.E.2d 147 (2005).

9. *Id.* at 516, 610 S.E.2d at 149.

to engage in protracted litigation,” and when there was no bona fide controversy as to the substandard quality of the subcontractor’s work.¹⁰

Discovery Technology, Inc. (“Discovery”) entered into a subcontract with Charter Drywall Atlanta, Inc. (“Charter”) to install drywall in a new home. At the time Discovery and Charter entered into the contract, they both understood that Discovery intended to enter the completed home in the upcoming International Homebuilders Show and that Charter’s work had to be completed before the show. Charter failed to complete the work on time and in accordance with the parties’ agreement. Discovery ultimately had to show the house in an unfinished condition, which embarrassed Discovery in front of its sponsors. Discovery attempted to salvage its relationship with its sponsors by entering the house in a different home show, which cost Discovery an additional \$10,000 for the entry fee.¹¹

After writing Charter many letters regarding Charter’s poor performance and substandard and incomplete work, Discovery eventually terminated Charter. In spite of Discovery’s offer to pay Charter the difference between its subcontract price and the costs Discovery incurred in hiring a new subcontractor to complete the work, Charter wrote threatening e-mails to Discovery stating that the homeowner was “going to be mad at [Discovery]” and that litigation could “get quite expensive.”¹² Charter also threatened to pursue the recovery of its full subcontract price, attorney fees, and punitive damages, stating that it took its dispute with Discovery personally, and that it intended to pursue the matter with “an open check book.”¹³ Charter later sued Discovery and the homeowner to recover the amount owed on its subcontract. Discovery counterclaimed for breach of contract and damages.¹⁴

In upholding the trial court’s award in favor of Discovery, the court of appeals held that Discovery’s payment of \$10,000 to enter the home into another home show was a proper damage that flowed as a consequence from Charter’s breach of the subcontract.¹⁵ Furthermore, the court of appeals agreed with the trial court’s award of attorney fees because the evidence supported a finding that there was no bona fide dispute with regard to Charter’s substandard work, and Charter insisted on

10. *Id.* at 517, 610 S.E.2d at 150.

11. *Id.* at 514-15, 610 S.E.2d at 148-49.

12. *Id.* at 515, 610 S.E.2d at 149.

13. *Id.* at 514-15, 610 S.E.2d at 148-49.

14. *Id.* at 514, 610 S.E.2d at 148.

15. *Id.* at 516-17, 610 S.E.2d at 149-50.

protracted litigation rather than honoring its promises or settling the matter reasonably.¹⁶

In *Robert E. Canty Building Contractors, Inc. v. Garrett Machine & Construction, Inc.*,¹⁷ the court of appeals affirmed the trial court's denial of the subcontractor's motion for directed verdict on the general contractor's claim for breach of contract and attorney fees under Official Code of Georgia Annotated ("O.C.G.A.") section 13-6-11.¹⁸ The general contractor, Garrett Machine & Construction, Inc. ("Garrett"), entered into a subcontract with Robert E. Canty Building Contractors, Inc. ("CBC") for the masonry work on a new restaurant. After CBC failed to make corrections to its defective masonry work, ignored Garrett's telephone calls, and failed to return to the project site, Garrett sued CBC for damages, including the cost to complete CBC's work.¹⁹ The trial court awarded Garrett \$45,568 in special damages, which included the cost of a replacement mason, new cinder blocks, removal of a damaged wall, and costs for overhead, equipment, and labor.²⁰ On appeal, CBC argued that generally "the measure of damages [for] real property is the diminution of the fair market value of the property and/or the cost of repair or restoration, but limited by the fair market value at the time of the breach or tort."²¹ The court of appeals disagreed, stating that damages for the breach of a construction contract could also be properly measured by the plaintiff's costs to correct defects in workmanship.²²

With respect to Garrett's claim for attorney fees, the court of appeals determined that evidence of poor work, missed commitments to complete work, and failure to return Garrett's telephone calls, when construed in support of the verdict, was sufficient to support the award of attorney fees against CBC.²³

C. Completion of Residential Project and Doctrine of Merger

The case of *Wallace v. Bock*²⁴ presented an interesting question regarding the effect of a subsequently executed escrow agreement on a prior agreement to construct and sell a home. The homebuyers, Mr. and

16. *Id.* at 517, 610 S.E.2d at 150 (citing O.C.G.A. § 13-6-11 (1982 & Supp. 2005)).

17. 270 Ga. App. 871, 608 S.E.2d 280 (2004).

18. O.C.G.A. § 13-6-11 (1982 & Supp. 2005); *Robert E. Canty Bldg. Contractors*, 270 Ga. App. at 874, 608 S.E.2d at 283.

19. *Robert E. Canty Bldg. Contractors*, 270 Ga. App. at 871, 608 S.E.2d at 281.

20. *Id.* at 872, 608 S.E.2d at 282.

21. *Id.* at 873, 608 S.E.2d at 282 (quoting *Ryland Group v. Dailey*, 245 Ga. App. 496, 502, 537 S.E.2d 732, 738 (2000)).

22. *Id.*

23. *Id.* at 873-74, 608 S.E.2d at 282-83.

24. 271 Ga. App. 833, 611 S.E.2d 62 (2005).

Mrs. Wallace (the "Wallaces"), entered into a construction contract with Bock Homes on July 29, 1994. Although the closing was postponed twice, the house still was not complete by the time the parties closed on October 3. Accordingly, the parties entered into an escrow agreement "providing that \$10,000 would be held in escrow until October 14, 1994, by which time the escrow agent 'must be tendered' a 'clear final inspection.'"²⁵ Bock Homes did not complete the construction of the home by October 14, but in November the escrow agent erroneously released the escrowed funds to Bock Homes anyway. Although the homeowners demanded completion of the work, the home was never finished. The Wallaces brought actions for breach of the purchase agreement and the escrow agreement six years and one day after the October 3, 1994 closing of the sale of the house.²⁶

The trial court granted summary judgment in favor of Bock Homes and the other defendants.²⁷ The court of appeals affirmed, concluding with regard to the escrow agreement that "Bock Homes had nothing left to perform *as to that agreement* after it placed into escrow the initial funds that were the subject of the agreement, and thus could not breach it as a matter of law."²⁸ The court opined that even though Bock Homes's retention of the funds mistakenly paid to it by the escrow agent may have given rise to some other claim, such as tortious conversion, the Wallaces did not have a valid claim for breach of the escrow agreement.²⁹

With regard to the homeowners' claim for breach of the original purchase agreement, the court of appeals held that because the parties had executed "two successive agreements embodying completed negotiations 'on the same subject,'"³⁰ the doctrine of merger applied, which resulted in the homeowners' purchase agreement being merged into and extinguished by the subsequent escrow agreement.³¹ Although the purchase agreement specified that "Bock Homes's obligation to complete the house would survive the closing," the court of appeals stated that the escrow agreement dealt with precisely the same subject matter.³² Because the Wallaces' claim of breach of the escrow agree-

25. *Id.* at 834, 611 S.E.2d at 63.

26. *Id.*

27. *Id.*

28. *Id.* at 835, 611 S.E.2d at 64.

29. *Id.* at 835-36, 611 S.E.2d at 64.

30. *Id.* at 836, 611 S.E.2d at 64.

31. *Id.*

32. *Id.*

ment failed as a matter of law, the court of appeals concluded that their merged action under the purchase agreement failed as well.³³

The Georgia Supreme Court granted the homeowners' petition for a writ of certiorari³⁴ in order to address the court of appeals' reliance on the doctrine of contractual merger.³⁵ As to the claim for breach of the original purchase agreement, the supreme court reversed, noting that the merger doctrine should not extinguish the homeowners' right to enforce Bock Homes's contractual obligations under the initial purchase agreement unless the subsequent escrow agreement was both inconsistent with that earlier contract and completely covered the same subject matter.³⁶ Here, the court determined that the subject matter of the two agreements was not identical: whereas the escrow agreement dealt solely with the construction of the house, the purchase agreement included not only Bock Homes's obligation to complete the construction, but also its obligation to convey title to the real property.³⁷ Nor was the escrow agreement inconsistent with the prior agreement because it merely established an alternative procedure by which the builder would be paid the balance of its payment once it completed the construction of the home.³⁸ Therefore, the escrow agreement did not constitute a substituted contract under the merger doctrine.³⁹

The supreme court also reversed the trial court's holding that the Wallaces' claim for breach of the purchase agreement was time-barred for being filed outside the six year statute of limitations period based on the October 3 closing date.⁴⁰ Instead, the court found that Bock Homes's contractual obligation to complete the home was extended by the escrow agreement to October 14.⁴¹ Thus, rather than commencing on the date of substantial completion, here, the six-year breach of contract statute of limitations did not begin to run until the purchase contract was breached.⁴² Bock Homes's breach of the purchase contract did not occur until Bock Homes received final payment without providing the Wallaces the consideration for which they had bargained.⁴³ Because the escrow agent released the escrow funds less than

33. *Id.*

34. Wallace v. Bock, No. S05G1101, 2005 WL 2493272 (Ga. Oct. 11, 2005).

35. *Id.* at *1.

36. *Id.* at *2.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at *3.

41. *Id.*

42. *Id.*

43. *Id.*

six years before the Wallaces brought suit against Bock Homes on the purchase agreement, the court held that their action was timely commenced within the statute of limitations period prescribed by O.C.G.A. section 9-3-24.⁴⁴

D. Sales and Use Taxes on Public Projects

The case of *ESI Companies, Inc. v. Fulton County*⁴⁵ should serve as an important reminder that contractors on public projects need to be careful to understand the extent to which they are responsible for the payment of sales and use taxes. Here, the court of appeals affirmed the trial court's holding that a contractor cannot recover from the government the contractor's cost for sales and use taxes where the contract clearly and unambiguously provides that the government is not responsible for the payment of those taxes.⁴⁶

In *ESI Companies, Inc.*, Fulton County solicited bids to replace security and life-safety systems at the Fulton County Jail. The bid documents required bidders to submit a price that excluded sales and use taxes from the bid. When ESI Companies, Inc. ("ESI") submitted its bid, it excluded sales and use taxes. ESI was awarded the contract, and the parties then executed a lump-sum contract which incorporated the bid documents into the contract. ESI later sued Fulton County, arguing that the parties intended that ESI be exempt from the payment of sales and use taxes. Fulton County moved for summary judgment, which was granted.⁴⁷

On appeal, the court noted that neither the contract nor the bid documents promised ESI exemption from its responsibility to pay sales and use taxes.⁴⁸ Moreover, O.C.G.A. section 48-8-63⁴⁹ treats a contractor like a consumer that is liable for sales and use taxes even though the public body is the actual consumer.⁵⁰

In affirming the grant of summary judgment to Fulton County, the court of appeals noted that "ESI submitted its bid under a mistake of law and did nothing to protect itself prior to entering into the contract."⁵¹ Furthermore, because the bidding documents were incorporat-

44. *Id.*; O.C.G.A. § 9-3-24 (1982 & Supp. 2005).

45. 271 Ga. App. 181, 609 S.E.2d 126 (2004).

46. *Id.* at 181-82, 609 S.E.2d at 126-27.

47. *Id.*

48. *Id.*

49. O.C.G.A. § 48-8-63 (2005).

50. *ESI Companies, Inc.*, 271 Ga. App. at 182, 609 S.E.2d at 127 (citing O.C.G.A. § 48-8-63).

51. *Id.*

ed into the contract between the parties, the court of appeals held that “[f]rom the plain and unambiguous language of the contract documents, it was plain that Fulton County would not pay sales and use taxes; therefore, ESI would be liable for such sales and use taxes.”⁵²

E. Change Orders, Oral Modification of Written Contract, and Mutual Departure

In *Handex of Florida, Inc. v. Chatham County*,⁵³ the court of appeals held that parties to a written contract that requires modifications to be made in writing may waive their rights to enforce such a provision.⁵⁴ Handex of Florida, Inc. (“Handex”) entered into a contract with Chatham County to excavate and dispose of waste from portions of a landfill. Handex subcontracted the excavation and disposal to Waste Management. The contract between Handex and Chatham County provided that Handex would be paid based on the volume of the waste excavated, which was to be determined by comparing the topographic surveys of the landfill before and after excavation. Handex was responsible for hiring the surveyor to perform the before and after surveys.⁵⁵

During the project, Handex notified Chatham County that the survey conducted by Handex’s surveyor may have been inaccurate.⁵⁶ Subsequently, the parties met and agreed that interim payments would be made to Handex based upon the “truck count method.”⁵⁷ In addition, the minutes from that meeting stated that “final payment ‘may be adjusted to reflect actual volumes as determined by land survey.’”⁵⁸

Waste Management later sued Handex to recover amounts owed for its work on the project. Handex answered, asserting that the subcontract contained a “pay-when-paid” clause that conditioned payment to Waste Management upon Handex’s receipt of payment from Chatham County. In addition, Handex filed a third party complaint against Chatham County, alleging that payment should be made to Handex in accordance with the parties’ revised method for computing the payment based upon truck counts. Handex and Chatham County both filed cross-motions for summary judgment. The trial court denied Handex’s motion, but granted Chatham County’s motion for summary judgment.⁵⁹

52. *Id.* at 183, 609 S.E.2d at 128.

53. 268 Ga. App. 285, 602 S.E.2d 660 (2004).

54. *Id.* at 288, 602 S.E.2d at 663.

55. *Id.* at 285, 602 S.E.2d at 610.

56. *Id.* at 288, 602 S.E.2d at 663.

57. *Id.*

58. *Id.* at 286, 602 S.E.2d at 662.

59. *Id.*

On appeal, Handex argued that there were numerous examples showing that the parties had waived the requirement that contract modifications be memorialized in writing.⁶⁰ The court of appeals agreed.⁶¹ However, the court determined that

[a]lthough Handex . . . has cited numerous instances in which the County did not strictly adhere [to] the requirement that all modifications be in writing, Handex . . . points to no evidence that the parties agreed to abandon the contract provision requiring that the final quantification of waste removed be based upon topographic surveys.⁶²

In the absence of evidence that the parties agreed to modify the contract's requirement that the final quantification of the waste be determined based upon topographic surveys, summary judgment in favor of Chatham County was proper.⁶³

F. Personal Guaranty of Performance of Construction Contract

In *Marett v. Brice Building Co.*,⁶⁴ the court of appeals held that a party's guaranty to pay "any obligations" of a party to a construction contract is enforceable with respect to quantum meruit claims made by a contractor.⁶⁵ Jean and William Marett were principals in Marett Properties, LLC, ("Marett Properties") which owned certain real property. Jean Marett individually owned a second parcel. In their efforts to develop the two pieces of property, the Maretts entered into negotiations with Brice Building Company, Inc. ("Brice") to construct improvements on each of the properties.⁶⁶ "After the work began, both Jean and William Marett signed guaranties agreeing to be personally liable for Marett Properties' debt to Brice, but did not sign the contracts Brice submitted."⁶⁷ The personal guaranties stated that the Maretts unconditionally guaranteed payment to Brice and that "the Guaranty Agreement shall remain fully enforceable against the Undersigned for the full amount of *any obligations* of the Owner to the Contractor less only payments thereon actually received and retained by Contractor"⁶⁸

60. *Id.* at 286-87, 602 S.E.2d at 662-63.

61. *Id.* at 288, 602 S.E.2d at 663.

62. *Id.* at 289, 602 S.E.2d at 664.

63. *Id.*

64. 268 Ga. App. 778, 603 S.E.2d 40 (2004).

65. *Id.* at 781, 603 S.E.2d at 43.

66. *Id.* at 778, 603 S.E.2d at 41.

67. *Id.*

68. *Id.* at 780, 603 S.E.2d at 42.

When the Maretts and Maret Properties failed to pay, Brice filed this action against them for quantum meruit, breach of contract, and on account.⁶⁹ As to Brice's action, "[t]he trial court granted summary judgment against all three defendants for \$337,800 plus pre-judgment interest on the quantum meruit counts, and denied summary judgment on the claims for breach of contract and on account."⁷⁰

On appeal, the Maretts argued that "the guaranties only covered contractual obligations by Maret Properties to Brice, and because Maret Properties never signed a contract, Jean and William Maret are not personally liable."⁷¹ However, the court of appeals disagreed with the Maretts, holding that even though the Maretts had not signed the contracts for the respective projects, Maret Properties had assented to the terms of the contracts through the conduct and performance of the Maretts.⁷²

II. TORTS

During the survey period, Georgia appellate courts decided a number of tort-related construction cases dealing with such issues as accrual of claims, professional negligence, liability for tortious interference with contract, the borrowed servant doctrine, and others.

A. *Accrual of Claims and Statutes of Limitation*

In *Stamschror v. Allstate Insurance Co.*,⁷³ a homeowner entered into a contract for the purchase of a newly built home in Valdosta, Georgia. Stamschror was the electrical subcontractor who had installed electrical wiring for the air conditioning and heating system in the home during construction. Four years and four months after closing, the home was nearly destroyed by a fire.⁷⁴

After paying more than \$126,000 to the homeowner to cover the costs of repairs, the homeowner's insurance company, Allstate Insurance Company ("Allstate"), filed a subrogation action against the electrical subcontractor alleging negligent installation of the electrical wiring. The electrical subcontractor moved for summary judgment on the grounds that the subrogation action was barred by the applicable statute of

69. *Id.* at 778, 603 S.E.2d at 41.

70. *Id.*

71. *Id.* at 780, 603 S.E.2d at 42.

72. *Id.* at 784, 603 S.E.2d at 45.

73. 267 Ga. App. 692, 600 S.E.2d 751 (2004).

74. *Id.* at 692, 600 S.E.2d at 752.

limitations.⁷⁵ The trial court denied the motion, and Stamschror filed this interlocutory appeal.⁷⁶

On appeal, the court determined that two separate causes of action existed against the electrical subcontractor: (1) a cause of action for negligent installation of the electrical system and (2) a cause of action for damage to personal property.⁷⁷ The court stated that “[t]he true test to determine when a cause of action accrues is to ascertain the time when the plaintiff could first have maintained her action to a successful result.”⁷⁸ The court stated that, with regard to negligent construction, design, or installation claims, the statute of limitations begins to accrue at the point of substantial completion, not upon discovery of the negligence or the date of the damage.⁷⁹ Under Georgia law, “[t]he ‘discovery rule’ is confined to cases of bodily injury and does not apply to actions seeking recovery for property damages only.”⁸⁰ Because the construction of the house, including the electrical wiring, was completed more than four years before Allstate filed its action, the claim for negligent installation was barred by the applicable four year statute of limitations.⁸¹

The court reached the opposite result on Allstate’s claim for damage to personal property, holding that Allstate’s cause of action against the electrical subcontractor for damage to personal property did not accrue until the date of the fire, which was less than three years prior to the filing of its subrogation action.⁸² Because the four-year statute of limitations had not yet run on that claim, the court of appeals held that the trial court’s denial of summary judgment for the electrical subcontractor on Allstate’s claim for damages to the insured’s personal property was proper.⁸³

B. Expert Affidavit Requirement in Professional Negligence Actions

In *Sembler Atlanta Development I, LLC v. URS/Dames & Moore, Inc.*,⁸⁴ the court of appeals reversed the trial court’s dismissal of a third-party complaint, finding that the trial court had erred in determin-

75. *Id.*

76. *Id.*, 600 S.E.2d at 751.

77. *Id.* at 693-94, 600 S.E.2d at 752-53.

78. *Id.* at 693, 600 S.E.2d at 752 (quoting *Travis Pruitt & Assoc. v. Bowling*, 238 Ga. App. 225, 226, 518 S.E.2d 453, 454 (1999)).

79. *Id.*

80. *Id.*

81. *Id.* at 693-94, 600 S.E.2d at 752-53.

82. *Id.* at 694, 600 S.E.2d at 753.

83. *Id.*

84. 268 Ga. App. 7, 601 S.E.2d 397 (2004).

ing that a professional negligence claim against a civil engineering contractor required the filing of an expert affidavit with the complaint.⁸⁵ In *Sembler* a tenant sued its landlord (“Sembler”) for damages suffered as a result of flooding.⁸⁶ Sembler then filed a third-party complaint against the civil engineering contractor (“URS”) for the Midtown Place project, seeking indemnification and contribution based on URS’s alleged professional negligence.⁸⁷ In response, URS filed a motion to dismiss the third-party complaint on the grounds that Sembler was required by statute to file an expert affidavit with its complaint. The trial court agreed and dismissed the third-party complaint with prejudice.⁸⁸

On appeal, the court held that O.C.G.A. section 9-11-9.1(a)⁸⁹ “by its specific terms limits the expert affidavit requirement to professional malpractice suits against [individual] *members* of one of the 24 enumerated professions, and to [only] *one* category of employer [of such professionals]—a licensed health care facility”⁹⁰ Following the Georgia Supreme Court’s “plain holding” in *Minnix v. Department of Transportation*,⁹¹ which narrowly construed the expert affidavit statute, the court of appeals concluded that because the civil engineering firm was neither a “member” of one of the enumerated professions, nor an employer operating a licensed health care facility, the statute did not require the filing of an expert affidavit.⁹² Accordingly, the trial court’s judgment was reversed.⁹³

C. *The Borrowed Servant Doctrine*

In *Tim’s Crane & Rigging, Inc. v. Gibson*,⁹⁴ the Georgia Supreme Court held a general contractor liable for the negligence of a crane operator under the borrowed servant doctrine.⁹⁵ Pinkerton & Laws, Inc. (“Pinkerton”), the general contractor on a construction project, leased a crane from Tim’s Crane & Rigging, Inc. (“Tim’s Crane”) which

85. *Id.* at 8, 601 S.E.2d at 398.

86. *Id.* at 7, 601 S.E.2d at 397.

87. *Id.* at 7-8, 601 S.E.2d at 398.

88. *Id.* at 8, 601 S.E.2d at 398.

89. O.C.G.A. § 9-11-9.1(a) (1993 & Supp. 2005).

90. *Sembler*, 268 Ga. App. at 9, 601 S.E.2d at 399 (quoting *Minnix v. Dep’t of Transp.*, 272 Ga. 566, 570-71, 533 S.E.2d 75, 79 (2000) (emphasis added) (citing O.C.G.A. § 9-11-9.1(a))).

91. 272 Ga. 566, 533 S.E.2d 75 (2000).

92. *Sembler*, 268 Ga. App. at 9, 601 S.E.2d at 399.

93. *Id.* at 10, 601 S.E.2d at 400.

94. 278 Ga. 796, 604 S.E.2d 763 (2004).

95. *Id.* at 798, 604 S.E.2d at 765.

sent a certified crane operator to deliver and operate the crane on the project site. A Pinkerton employee was injured when the crane operator passed too close to a power line and the electrical current arced to the rebar that was being unloaded.⁹⁶

The employee sued Tim's Crane, under the theory of respondeat superior, alleging that the crane operator's negligence caused his injuries. The trial court granted summary judgment to Tim's Crane, who argued that under the express terms of the crane lease, the crane operator was not its employee, but rather a "borrowed servant" of Pinkerton.⁹⁷ Under Georgia law, an employee is considered a borrowed servant if the borrowing entity exercises complete control and direction over the employee for the occasion, the lending entity has no such control, and the borrowing entity has exclusive right to discharge the employee.⁹⁸ The lending entity is not liable if the injury was the consequence of the borrower's direction.⁹⁹ The court of appeals reversed the grant of summary judgment in favor of Tim's Crane, stating that the scope of the contractor's control over the crane operator was insufficient to establish, as a matter of law, that the crane operator was a borrowed servant.¹⁰⁰ The Georgia Supreme Court granted certiorari to consider the extent to which Pinkerton exercised complete control.¹⁰¹

After reviewing the record, the supreme court reversed, stating that "where the hirer, by express contract, accepts the owner's agent as his employee for the duration of the contract," the agent is clearly a borrowed servant under Georgia law.¹⁰² Under the terms of the lease, Pinkerton had accepted the status of an employer by assuming the right to control or supervise the crane operator.¹⁰³ As a result, the court held that the crane operator was a borrowed servant, and Pinkerton, not Tim's Crane, was liable for the crane operator's negligence.¹⁰⁴

96. *Id.* at 796, 604 S.E.2d at 764.

97. *Id.*

98. *Id.* at 797, 604 S.E.2d at 765 (citing *Six Flags Over Ga. v. Hill*, 247 Ga. 375, 377, 276 S.E.2d 572, 574 (1981)).

99. *Id.*

100. *Id.*, 604 S.E.2d at 764.

101. *Id.*, 604 S.E.2d at 765.

102. *Id.* at 798, 604 S.E.2d at 765 (quoting *Bowman v. Fuller*, 84 Ga. App. 421, 421-22, 66 S.E.2d 249, 251 (1951)).

103. *Id.*

104. *Id.*

D. Tortious Interference with Contract

In *Carey Station Village Homeowners Ass'n v. Carey Station Village, Inc.*,¹⁰⁵ the court of appeals held that a homeowners association was not liable to a developer for tortious interference with contractual relations between the developer and certain purchasers of subdivision lots where the homeowners association had a legitimate interest in and relationship to the developer's contracts.¹⁰⁶

Carey Station Village, Inc. (the "Developer") purchased real estate near Lake Oconee in 1987 for the purpose of developing a residential subdivision. After selling a number of the lots, the Developer relinquished control of the subdivision to the homeowners association in 1994, but resumed the sale and financing of some of its remaining lots in 1999. The Developer later foreclosed on sixteen of the twenty-one homes it had sold.¹⁰⁷

When the Developer failed to pay certain dues and assessments to the homeowners association on the Developer's remaining lots, the homeowners association filed suit against the Developer. The Developer counterclaimed, alleging that actions taken by the homeowners association had caused a number of purchasers to default on their promissory notes and had impaired the Developer's ability to sell its remaining lots. A jury awarded the homeowners association all dues and assessments owed by the Developer and awarded the Developer damages on its tortious interference counterclaim.¹⁰⁸ The homeowners association appealed, asserting that unless it was a stranger to the relationship between the Developer and the purchasers, which it was not, the homeowners association could not be liable on the Developer's tortious interference claim.¹⁰⁹

The court of appeals agreed, stating that where a third party to a contract has a legitimate interest in, or a relationship to a contract, the third party cannot tortiously interfere with that contract.¹¹⁰ Here, the homeowners association was not a stranger to the relationship between the Developer and the purchasers because each of the warranty deeds executed in connection with the Developer's sale of its lots were subject to protective covenants granting the homeowners association the power

105. 268 Ga. App. 461, 602 S.E.2d 233 (2004).

106. *Id.* at 463, 602 S.E.2d at 235.

107. *Id.* at 461, 602 S.E.2d at 234.

108. *Id.* at 462, 602 S.E.2d at 234.

109. *Id.*

110. *Id.* at 463, 602 S.E.2d at 235.

to enforce the covenants and collect dues and assessments.¹¹¹ Under those circumstances, the homeowners association could not be liable for tortious interference with the contracts or the business relationship between the lot purchasers and the Developer.¹¹²

E. No Trespass Liability for Subcontractor's Actions

In *Sorrow v. Hadaway*,¹¹³ the court of appeals ruled that a developer and contractor could not be held vicariously liable for a subcontractor's trespass and damage to property when the subcontractor was not subject to the immediate direction and control of the developer or the contractor at the time of performing the work.¹¹⁴

A property owner purchased land next to her existing home from a developer with an intent to maintain the property in its natural, undeveloped state. Some time later, the developer decided to clear undergrowth from several of the lots he owned in order to make them more appealing to potential buyers. The developer hired a contractor to perform this work, and the contractor, in turn, hired a subcontractor to clear the undergrowth. The contractor met with the subcontractor and identified the separate lots to be cleared. One lot the contractor wished to clear sat adjacent to the property owner's undeveloped lot. The contractor did not remain on the property to supervise the subcontractor's work, and the subcontractor determined the method by which he would clear the undergrowth.¹¹⁵

While clearing the developer's property, the subcontractor accidentally began to clear undergrowth from the property owner's undeveloped lot, and the property owner demanded that he stop immediately. The property owner then sued the contractor and the developer, alleging that they caused their agent to trespass on and damage her property.¹¹⁶

The trial court granted summary judgment to both defendants, and the court of appeals affirmed, stating that "[a]n employer generally is not responsible for torts committed by his employee when the employee exercises an independent business and . . . is not subject to the immediate direction and control of the employer."¹¹⁷ In determining whether an independent contractor is to be held liable, courts examine "whether the injury resulted from the improper plans or directions by

111. *Id.*

112. *Id.*

113. 269 Ga. App. 446, 604 S.E.2d 197 (2004).

114. *Id.* at 446, 604 S.E.2d at 197.

115. *Id.* at 447, 604 S.E.2d at 197-98.

116. *Id.*, 604 S.E.2d at 197.

117. *Id.*, 604 S.E.2d at 197-98 (quoting O.C.G.A. § 51-2-4 (2000)).

which [the independent contractor's] employment was defined, or from the improper execution of work properly planned."¹¹⁸ The court held that, in the instant case, the property owner failed to demonstrate that the developer's or the contractor's plans or directions led to the damage that occurred to her property, or that the subcontractor was under the immediate direction or control of the developer or contractor while performing the work.¹¹⁹ Accordingly, the court of appeals concluded that the defendants could not be held vicariously liable and that summary judgment was proper.¹²⁰

F. Geogrid Safety Net Was a "Product" in Products Liability Claim

In *Tensar Earth Technologies, Inc. v. City of Atlanta*,¹²¹ the court of appeals ruled that a reinforcing safety net designed by a geotechnical engineering firm and installed above a sewer line during the construction of a Midtown Atlanta hotel was a "product" for purposes of a plaintiff's products liability claim.¹²² In 1988, a civil engineering firm was hired to provide site designs for a hotel to be constructed in Midtown Atlanta.¹²³ During its site investigation, the engineering firm discovered a combined storm and sanitary sewer crossing underneath a section of the proposed hotel site. Due to concerns regarding the structural integrity of the sewer, the engineering firm agreed to design and install a reinforcing safety net in the ground above the sewer and below the hotel's parking lot.¹²⁴ The geogrid safety net was intended "to support the parking lot for a period of time should some void . . . below the parking lot open up, creating a lack of soil support beneath the parking lot"¹²⁵

To achieve this end, a geotechnical engineering firm was hired to design the safety net.¹²⁶ The purpose of the geogrid safety net was to "bridge or span some void for some amount of . . . time to allow the authorities . . . to have adequate notice to barricade off the area and then go in and repair it," and also "to hold up the parking lot if the sewer collapsed."¹²⁷ After several revisions, a final design of the

118. *Id.* at 448, 604 S.E.2d at 198 (quoting *Jasper Constr. Co. v. Echols*, 198 Ga. App. 127, 127-28, 400 S.E.2d 660, 661 (1990)).

119. *Id.*

120. *Id.* at 450-51, 604 S.E.2d at 199-200.

121. 267 Ga. App. 45, 598 S.E.2d 815 (2004).

122. *Id.* at 53, 598 S.E.2d at 822-23.

123. *Id.* at 45, 598 S.E.2d at 817.

124. *Id.*

125. *Id.* at 45-46, 598 S.E.2d at 818.

126. *Id.* at 46, 598 S.E.2d at 818.

127. *Id.*

geogrid safety net was approved, and it was manufactured and installed on the project.¹²⁸

In May 1993 one of the hotel's managers noticed that cracks were developing in the hotel parking lot, but he was unaware of the underground sewer or the geogrid system that had been installed during construction. The condition of the parking lot continued to deteriorate, and the City of Atlanta (the "City") was notified. On Friday, June 11, 1993, the City inspected the sewer and determined that the sewer required emergency repairs. The City scheduled repairs for the following Monday.¹²⁹

Monday morning, before the repair work had commenced, the hotel parking lot collapsed into a 100-foot by 100-foot hole, drowning an employee who was parking her car. The estate of the hotel employee brought a wrongful death action against the geotechnical engineering firm, the City, and several other defendants. The City filed a cross-claim against the geotechnical engineering firm for contribution, relying on theories of negligent design and products liability. The parties eventually settled all claims with the exception of the City's cross-claim for contribution.¹³⁰

During the trial, the geotechnical engineering firm moved for a directed verdict on the City's products liability claim, arguing that it could not be found liable on a products liability claim because the geogrid safety net could not be considered a "product," as it was installed in the ground as merely one component of a specially designed system. The trial court denied the geotechnical engineering firm's motion, and the firm appealed.¹³¹

The court of appeals affirmed the trial court's decision, based on Georgia's products liability statute which provides that "the manufacturer of any personal property sold as new property" can be held liable in tort.¹³² Here, the court of appeals held that the geogrid safety net was personal property manufactured by the geotechnical engineering firm and sold to the hotel for installation at the project site.¹³³ Although there was conflicting evidence as to whether the "product" was defective, the court determined there was sufficient evidence to authorize a jury to find that the geogrid net "was not reasonably suited for its intended

128. *Id.*

129. *Id.* at 47, 598 S.E.2d at 818-19.

130. *Id.* at 45, 598 S.E.2d at 817.

131. *Id.* at 53, 598 S.E.2d at 822.

132. *Id.*

133. *Id.*, 598 S.E.2d at 823.

purposes.”¹³⁴ The judgment was later reversed and remanded, however, on other grounds.¹³⁵

III. MECHANICS’ AND MATERIALMEN’S LIENS

During the survey period, there were several developments with regard to the preparation, statutory requirements, validity, and enforceability of Georgia mechanics’ and materialmen’s liens.

A. *Preparation of Liens by Nonlawyers*

On August 6, 2004, the State Bar of Georgia’s Standing Committee on the Unlicensed Practice of Law (the “Committee”) issued Advisory Opinion 2004-1,¹³⁶ concluding that the preparation of a lien for another by a nonlawyer in exchange for a fee constitutes the unlicensed practice of law.¹³⁷ While the opinion is only persuasive authority for Georgia courts, it nevertheless spells the end for business entities that, in the past, have prepared mechanics’ and materialmen’s liens for others, but did not employ lawyers.

During the public hearing regarding this matter, the Committee heard presentations contending that preparing and filing liens was similar to performing title searches and preparing title abstracts—activities which are permitted by Georgia law.¹³⁸ With regard to the preparation of a lien, the Committee rejected that contention, based in large part on O.C.G.A. section 15-19-50(3),¹³⁹ which states that the practice of law includes “[t]he preparation of legal instruments of all kinds whereby a legal right is secured.”¹⁴⁰ The Committee concluded that, unlike a title abstract, which at its core is a neutral, informational document, a lien asserts a legal claim.¹⁴¹ Accordingly, preparing the lien document after performing the title search necessarily involves the practice of law as set out in O.C.G.A. section 15-19-50(3) and involves the furnishing of legal services within the meaning of O.C.G.A. section 15-19-51(a)(4).¹⁴² The opinion concludes that the physical filing of a lien, however, does

134. *Id.* at 54, 598 S.E.2d at 823.

135. *Id.* at 54-55, 598 S.E.2d at 823.

136. UPL Advisory Op. 2004-1 (Aug. 6, 2004), available at https://www.gabar.org/handbook/handbook_upl_advisory_opinions/#2004-1.

137. *Id.*

138. *Id.*

139. O.C.G.A. § 15-19-50(3) (2005).

140. *Id.*

141. UPL Advisory Op. 2004-1.

142. O.C.G.A. § 15-19-50(3) (2005); O.C.G.A. § 15-19-51(a)(4) (2005); UPL Advisory Op. 2004-1.

not constitute the practice of law since it is essentially a ministerial transaction.¹⁴³

B. Statutory Notice Requirements

In *Carey v. Maynard*,¹⁴⁴ the plaintiff lienholder filed suit to foreclose on a lien on property in Barrow County owned by Paul and Linda Maynard.¹⁴⁵ The lienholder also filed what he described as his notice of commencement of suit with the clerk of the superior court.¹⁴⁶ Under Georgia law, once a lienholder files suit to enforce his lien within twelve months of filing his claim of lien, he must also file a statutory notice of the commencement of suit with the clerk of the superior court where the lien is recorded within fourteen days of filing suit.¹⁴⁷ Because statutory lien rights are in derogation of the common law and can work serious hardship upon otherwise innocent owners, lien claimants must strictly comply with each and every provision of the state's lien laws for the lien to be enforceable.¹⁴⁸ Here, the plaintiff's notice was deficient in several respects: (1) the notice was incorrectly titled "Lis Pendens Notice;" (2) the notice did not list the property owners in the caption as required by the statute; and (3) only one of the owners was listed as property owner in the body of the notice, even though two parties were listed as property owners on the lien.¹⁴⁹

The defendants filed a motion for summary judgment on the basis that the plaintiff's notice did not comply with Georgia's Mechanics' and Materialmen's Lien Statute, O.C.G.A. section 44-14-361.1(a)(3).¹⁵⁰ The trial court granted their motion, finding that because the notice had been titled incorrectly, it had not been filed in the deed docket as required by statute. On appeal, the plaintiff contended that the notice he filed contained all the necessary information, and that any failure by the court clerk to correctly file the notice should not be held against him.¹⁵¹

The court of appeals agreed that any filing errors by the court clerk should not be held against a lienholder who has strictly complied with the mechanics' lien statute, but determined that this case was not that

143. *Id.*

144. 269 Ga. App. 110, 603 S.E.2d 515 (2004).

145. *Id.* at 110, 603 S.E.2d at 515.

146. *Id.* at 111, 603 S.E.2d at 516.

147. *Id.* at 110, 603 S.E.2d at 515 (citing O.C.G.A. §§ 44-14-361, 361.1(a)(3) (2002)).

148. *See id.*

149. *Id.* at 111, 603 S.E.2d at 516.

150. O.C.G.A. § 44-14-361.1(3) (2002).

151. *Carey*, 269 Ga. App. at 110-11, 603 S.E.2d at 515-16.

type of situation.¹⁵² First, as noted above, the notice as filed was wrongly captioned as a *lis pendens* notice, which is governed by an entirely different statute.¹⁵³ Second, the caption failed to list the property owners as required by the lien statute.¹⁵⁴ Third, whereas the lien listed both of the defendants as the property owners, only one was cited as an owner of the property in the body of the notice.¹⁵⁵ Accordingly, the court held that the lienholder's failure to comply with the statute extinguished his right to a lien against the defendants' real estate, rendering his lien unenforceable.¹⁵⁶

In *Washington International Insurance Co. v. Hughes Supply, Inc.*,¹⁵⁷ the court of appeals was again faced with the question of what constitutes compliance with the statutory requirements for perfecting a lien. Hughes Supply, Inc. ("Hughes") furnished material and equipment to an electrical subcontractor for a construction project in Georgia. When the electrical subcontractor failed to pay Hughes, Hughes filed suit against the subcontractor and also filed a materialman's claim of lien against the improved realty. The general contractor discharged the lien by filing a bond. After Hughes obtained a judgment against the electrical subcontractor, it filed suit against the general contractor and its surety to recover on the lien release bond and was granted summary judgment.¹⁵⁸ "[T]he trial court rejected [the defendants'] argument that Hughes's purported failure to fully comply with the notice requirement of the lien statute barred Hughes from recovering on the bond."¹⁵⁹

The court of appeals affirmed the trial court's decision based on an exception recognized by the Georgia Supreme Court that lien claimants who sue to recover on a bond do not have to comply with the notice provision in subparagraph (a)(3) of the lien statute to perfect the lien.¹⁶⁰ The rationale for the exception is as follows: In enacting the lien statute, the legislature created a detailed statutory scheme for filing and perfecting liens.¹⁶¹ The notice provisions "are designed to protect prospective purchasers from unknowingly buying property encumbered by liens . . ."¹⁶² When a property owner or contractor "obtains a lien

152. *Id.* at 111, 603 S.E.2d at 516.

153. *Id.* at 110-11, 603 S.E.2d at 515-16.

154. *Id.*

155. *Id.*

156. *Id.*

157. 271 Ga. App. 50, 609 S.E.2d 99 (2004).

158. *Id.* at 50, 609 S.E.2d at 99-100.

159. *Id.*, 609 S.E.2d at 100.

160. *Id.* at 52-53, 609 S.E.2d at 101-02.

161. *Id.* at 51-52, 609 S.E.2d at 101-02.

162. *Id.* at 53, 609 S.E.2d at 102.

release bond, ‘the bond stands in the place of the real property as security for the lien claimant.’”¹⁶³ In a suit concerning a bond, the lien has already been discharged, and there is no need to protect prospective purchasers from unknowingly buying property encumbered by a lien. Under those circumstances, “a materialman’s failure to file a notice of the action is immaterial.”¹⁶⁴

C. No Liens on Public Property

In *Vakilzadeh Enterprises, Inc. v. Housing Authority of the County of DeKalb*,¹⁶⁵ Affordable Housing Development Corporation of DeKalb (“Affordable Housing”) entered into a contract with Vakilzadeh Enterprises d/b/a Allstates Construction Company (“Allstates”) that required Allstates to provide the labor, materials, and equipment for development work in a subdivision located in DeKalb County (the “Project”). The Project was located on land owned by the DeKalb County Housing Authority (“Authority”) and was “intended to be an affordable housing development for low-to-moderate-income families.”¹⁶⁶

Affordable Housing, per its agreement, assigned its contract to the Authority, who soon thereafter terminated Allstates due to various defaults. Allstates then sued the Authority for breach of contract and also filed a materialman’s claim of lien on the property despite being notified by the Authority that Allstates did not have lien rights because the property was public.¹⁶⁷

At the emergency hearing requested by the Authority, the trial court granted the Authority’s petition to remove the lien from the property, finding that the property at issue was public property because it was owned by the Authority—an entity designated by statute as a public institution—and that nothing in Georgia law authorizes the placing of a lien against public property.¹⁶⁸

On appeal, Allstates urged the court to reconsider Georgia’s well-established rule that claims of lien against public property are not enforceable. Allstates argued that once construction was completed, the homes at issue were to be sold to individuals and, accordingly, would no longer be used for a public purpose.¹⁶⁹ The court of appeals declined

163. *Id.* at 52, 609 S.E.2d at 101 (quoting *Few v. Capitol Materials*, 274 Ga. 784, 786, 559 S.E.2d 429, 430 (2002)).

164. *Id.* at 53, 609 S.E.2d at 102.

165. 271 Ga. App. 130, 608 S.E.2d 724 (2004).

166. *Id.* at 130, 608 S.E.2d at 725.

167. *Id.* at 130-31, 608 S.E.2d at 725.

168. *Id.* at 131, 608 S.E.2d at 725.

169. *Id.* at 132, 608 S.E.2d at 725-26.

Allstates's invitation, holding that by legislative mandate, property owned by the Authority is "public property used for essential public and governmental purposes;"¹⁷⁰ therefore, Allstates had no right under Georgia law to place a lien on the Authority's property.¹⁷¹ The court found nothing in Georgia law that either authorizes the placing of a lien against public property or that limits how the Authority can develop housing projects or accomplish its mission to provide low-income individuals and families with affordable housing.¹⁷²

IV. ARBITRATION

During the survey period, the court of appeals decided several cases concerning arbitration of construction-related disputes, including an issue of first impression with regard to the Georgia Arbitration Code.

A. *Validity and Enforceability of Agreement to Arbitrate*

In *D. S. Ameri Construction Corp. v. Simpson*,¹⁷³ homeowners William and Janey Simpson ("Homeowners") entered into an agreement with D. S. Ameri Construction Corporation ("Ameri") for the construction and sale of a new home (the "Agreement"). After moving in and discovering that their home did not fully comply with applicable building codes or industry standards, Homeowners filed suit seeking damages for breach of contract, negligent construction, breach of warranties, and fraud in the inducement. Alternatively, Homeowners sought rescission of the Agreement.¹⁷⁴

Ameri moved to stay the litigation and compel arbitration based on the arbitration clause in the parties' Agreement.¹⁷⁵ Homeowners did not dispute the validity of the arbitration clause, but argued that the clause would be rendered void by a rescission of the Agreement; therefore, the threshold issue for the court to determine was whether the Agreement should be rescinded. Agreeing with Homeowners, the trial court denied Ameri's motion to stay, finding that if the Homeowners ultimately prevailed on their claim of rescission, the Agreement would be considered void and the arbitration clause would necessarily fail.¹⁷⁶ Ameri filed a motion for interlocutory appeal, which the court of appeals

170. *Id.* at 131, 608 S.E.2d at 725.

171. *Id.* at 131-32, 608 S.E.2d at 725.

172. *Id.* at 132, 608 S.E.2d at 726.

173. 271 Ga. App. 825, 611 S.E.2d 103 (2005).

174. *Id.* at 825, 611 S.E.2d at 104.

175. *Id.* at 826, 611 S.E.2d at 104.

176. *Id.*

granted in order to consider whether the trial court erred by denying the contractor's motion to stay litigation and compel arbitration.¹⁷⁷

On de novo review, the court of appeals concluded that both the Homeowners and trial court "overlook[ed] the unambiguous language [in this] arbitration clause [relied upon by Ameri] that expresse[d] the parties' intent to arbitrate even claims or disputes seeking the remedy of rescission."¹⁷⁸ As the court pointed out, the arbitration clause expressly provided that any unresolved claim or dispute between the seller and the buyer "arising out of or relating in any manner to this Agreement or this transaction shall be decided by binding arbitration" and that the "provisions of this paragraph . . . shall apply to any claim for rescission of the Agreement."¹⁷⁹ Accordingly, the court of appeals reversed the trial court's judgment, stating that an agreement to arbitrate is enforceable "without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on [the] award."¹⁸⁰

In *Krut v. Whitecap Housing Group, LLC*,¹⁸¹ the court of appeals took the opportunity to highlight several general rules with regard to arbitration clauses in contracts for residential construction: (1) the Federal Arbitration Act ("FAA"),¹⁸² rather than Georgia law, usually governs the interpretation and application of a disputed arbitration clause, because building materials used in home construction generally pass in interstate commerce;¹⁸³ (2) "[t]he question of arbitrability, i.e., whether an agreement creates a duty for the parties to arbitrate the particular grievance, is undeniably an issue for judicial determination";¹⁸⁴ and (3) following the lead of the federal courts in applying the FAA, where a court action contains both arbitrable and nonarbitrable issues, the court should (and must) "compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result [is the] inefficient maintenance of separate [and duplicative] proceedings in different forums."¹⁸⁵

177. *Id.* at 825, 611 S.E.2d at 104.

178. *Id.* at 827, 611 S.E.2d at 105.

179. *Id.* at 826, 611 S.E.2d at 104.

180. *Id.* at 827, 611 S.E.2d at 105.

181. 268 Ga. App. 436, 602 S.E.2d 201 (2004).

182. 9 U.S.C. §§ 1-16 (2000).

183. *Krut*, 268 Ga. App. at 439, 602 S.E.2d at 205.

184. *Id.* at 441, 602 S.E.2d at 206 (quoting *Bell South Corp. v. Forsee*, 265 Ga. App. 589, 590, 595 S.E.2d 99, 101 (2004)).

185. *Id.* at 443, 602 S.E.2d at 208 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985)).

The specific facts of the case are as follows: October Farm, Inc. (“October Farm”), as seller, and Whitecap Housing Group, LLC (“Whitecap”), as buyer (hereinafter collectively the “parties”), entered into two contracts for the sale of lots in a Fulton County subdivision. The parties entered into a third, separate agreement several months later in which the parties agreed that \$50,000 would be held in escrow until the seller completed construction of a private drive on one of the lots.¹⁸⁶ Among other provisions, the escrow agreement provided that “[i]n the event of a dispute, both parties agree to choose a mutually acceptable arbiter within 10 days of receipt of written notice by either party to said agent. The agent will hold the funds until the arbiter renders a decision.”¹⁸⁷

After a dispute arose over the quality and timeliness of the construction work on the private drive, October Farm filed a demand for arbitration and also a claim of lien on the lots, which October Farm represented it would release upon payment of the escrowed funds. Whitecap then filed suit against October Farm and others, including October Farm’s president, Eric Krut (“Krut”), for breach of the sales and escrow agreements, slander of title, declaratory judgment, and attorney fees.¹⁸⁸ Whitecap filed a motion for summary judgment on the claim of lien, which the trial court granted because October Farm had failed to record an affidavit for the commencement of the action to establish the lien as required by O.C.G.A. section 44-14-361.1(a)(3).¹⁸⁹ In response to Whitecap’s summary judgment motion, October Farm and Krut filed a motion to dismiss or to compel arbitration, which the trial court denied.¹⁹⁰ October Farm and Krut appealed, contending that the trial court erred in ruling that the language of the parties’ agreement to arbitrate was “unclear [as to] whether the parties intended to have binding arbitration and if so, what rules and procedures would apply to such proceedings.”¹⁹¹

The court of appeals saw no grounds to reverse the trial court’s order as to the claim of lien, but determined that under the FAA, the trial court should have enforced the parties’ agreement to arbitrate with respect to the escrow dispute.¹⁹² Citing the FAA’s policy favoring “a liberal reading of arbitration agreements,” the court of appeals stated

186. *Id.* at 437, 602 S.E.2d at 204.

187. *Id.* at 437-38, 602 S.E.2d at 204.

188. *Id.* at 438, 602 S.E.2d at 204-05.

189. *Id.* at 444, 602 S.E.2d at 208.

190. *Id.* at 438, 602 S.E.2d at 205.

191. *Id.* at 441, 602 S.E.2d at 207.

192. *Id.*, 602 S.E.2d at 207-08.

that pursuant to the FAA's mandatory stay provision, 9 U.S.C. § 3,¹⁹³ the trial court had no discretion and was required to stay the action as to the escrow dispute.¹⁹⁴ The court determined, however, that the other claims asserted by Whitecap for breach of contract, slander of title, and declaratory judgment fell outside the substantive scope of the parties' agreement to arbitrate, and thus, were not subject to arbitration.¹⁹⁵ The court, "[f]ollowing the lead of the federal courts in applying the FAA" when faced with an action containing both arbitrable and nonarbitrable issues, remanded the nonarbitrable claims to the trial court, allowing both to continue in bifurcated proceedings despite the risk of inefficient or duplicative proceedings.¹⁹⁶

In *Holt & Holt, Inc. v. Choate Construction Co.*,¹⁹⁷ the court of appeals affirmed the grant of partial summary judgment to the general contractor, Choate Construction Co. ("Choate"), which had filed a complaint to stay the arbitration demanded by Holt & Holt, Inc. ("Holt"), Choate's drywall subcontractor on a high-rise construction project.¹⁹⁸ In 2002 Holt entered into a subcontract to perform drywall work in accordance with an attached construction schedule.¹⁹⁹ The subcontract provided that in the event Holt failed to meet its obligations, Choate was entitled to "issue written decisions terminating Holt's employment or supplementing its work with labor and materials," and to deduct the cost of such termination or supplemental work from any remaining payment due to Holt.²⁰⁰ The subcontract also required that "'any claim, dispute, or controversy' between Choate and Holt . . . 'be conclusively resolved and settled' pursuant to the provisions of its claims and disputes article," which provided that unless Holt commenced arbitration proceedings within thirty days following Holt's receipt of notice of Choate's decision, Choate's decision would become final and binding.²⁰¹

In late spring 2002, Choate notified Holt that it was in default, and unless it immediately remedied its defective performance, Choate intended to hire additional or replacement contractors at Holt's expense. Choate followed that notice with a certified letter (the "certified letter") informing Holt of its decision to supplement Holt's work forces and its intention to hold Holt fully responsible for all costs incurred by Choate

193. 9 U.S.C. § 3 (2000).

194. *Krut*, 268 Ga. App. at 441, 442-43, 602 S.E.2d at 207-08.

195. *Id.* at 442, 602 S.E.2d at 207.

196. *Id.* at 443-44, 602 S.E.2d at 208.

197. 271 Ga. App. 292, 609 S.E.2d 103 (2004).

198. *Id.* at 294, 609 S.E.2d at 105.

199. *Id.* at 293, 609 S.E.2d at 104.

200. *Id.*

201. *Id.*

due to the delays caused by the subcontractor. Choate then added workers and sent Holt change orders totaling \$67,345 for the cost of the supplemental work.²⁰²

Months later, well after its thirty-day period had expired and Choate's prime contract with the owner had been closed out, Holt filed a demand for arbitration. In response, Choate filed a motion to stay arbitration in the Superior Court of Cobb County on the basis that Holt's arbitration demand was untimely.²⁰³ Choate's motion was granted, and Holt appealed, arguing that: (1) Choate's certified letter was ineffective as a formal contractor's decision; (2) Choate's conduct post-supplementation showed that Choate did not intend the decision to be final and binding; (3) a contractual thirty-day period in which to file a claim for arbitration is an impermissibly short limitations period; and (4) the contract's thirty-day period provision contravenes O.C.G.A. section 4-14-366,²⁰⁴ which provides that the "right to claim a lien or to claim upon a bond may not be waived in advance of furnishing of labor, services, or materials."²⁰⁵

The court of appeals affirmed the lower court's ruling that Holt's arbitration demand was untimely.²⁰⁶ The court held that Holt's failure to pursue its contract remedies in accordance with the contract provisions resulted in Holt being bound by Choate's decision, and it was Holt's conduct, not its contract, that "impaired its claim and any lien rights it would have had with respect to that claim had it timely arbitrated the contractor's decision to a favorable result."²⁰⁷

B. Confirmation, Vacation, and Modification of an Arbitration Award

In *Cipriani v. Porter*,²⁰⁸ an arbitrator granted an award to the plaintiff, Porter, "jointly and severally" against the defendants, Cipriani Custom Homes, Inc. ("Custom Homes") and its president, Edward Cipriani, Jr., ("Cipriani") on the plaintiff's claim that the defendants' negligent construction caused multiple incidents of flooding in the plaintiff's basement.²⁰⁹ A superior court confirmed the award, but

202. *Id.* at 293-94, 609 S.E.2d at 104-05.

203. *Id.* at 294, 609 S.E.2d at 105.

204. O.C.G.A. § 4-14-366 (2003).

205. *Holt*, 271 Ga. App. at 294-96, 608 S.E.2d at 105-06 (quoting O.C.G.A. § 44-14-366(a)).

206. *Id.* at 296, 609 S.E.2d at 106.

207. *Id.*

208. 269 Ga. App. 695, 605 S.E.2d 106 (2004).

209. *Id.* at 695, 605 S.E.2d at 107.

remanded to the arbitrator the question whether Cipriani was a proper party.²¹⁰ The defendants appealed, contending that the court's order was defective because the court confirmed only a part of the arbitrator's findings and combined its judgment and order in a single document.²¹¹ The defendants argued that a trial court "may vacate [an] arbitration award only in its entirety."²¹² The defendants, however, did not file a motion to vacate or modify the award, nor did they cite any statutory ground for vacating the award or provide any evidence as to whether Cipriani was in fact a proper party to the arbitration.²¹³

Without the benefit of the original contract or a transcript of the arbitration proceedings, and given the deference with which courts are to treat arbitration results, the court of appeals had no basis upon which to state that the arbitrator incorrectly imposed joint and several liability on Cipriani and Custom Homes.²¹⁴ The trial court, therefore, was ordered to confirm the arbitrator's award in full against both defendants.²¹⁵

In *Dream Maker Construction, Inc. v. Murrell*,²¹⁶ the court of appeals was presented with an issue of first impression under the Georgia Arbitration Code.²¹⁷ Dream Maker Construction, Inc. ("Dream Maker") sold land and a newly constructed house to April and Troy Murrell ("Homeowners"). The sales contract contained a broad arbitration agreement falling under the Georgia Arbitration Code. After allegedly suffering carbon monoxide injuries due to Dream Maker's negligent construction, installation, and inspection, Homeowners sued Dream Maker, who raised the defense of arbitration and moved to compel arbitration. Dream Maker's motion was denied.²¹⁸

On appeal, the court of appeals affirmed, holding that even though the parties had entered into a valid and binding agreement to arbitrate all disputes, the Georgia General Assembly never intended for the Georgia Arbitration Code to encompass personal injury or wrongful death actions, and expressly excluded such subject matter from the Act's coverage.²¹⁹ The court emphasized that although the arbitration

210. *Id.*

211. *Id.* at 696, 605 S.E.2d at 107.

212. *Id.* (quoting *Amerispec Franchise v. Cross*, 215 Ga. App. 669, 670, 452 S.E.2d 188 (1994)).

213. *Id.* at 696-97, 605 S.E.2d at 107-08.

214. *Id.* at 697, 605 S.E.2d at 108.

215. *Id.*

216. 268 Ga. App. 721, 603 S.E.2d 72 (2004).

217. O.C.G.A. § 9-1-1 to -133 (1982 & Supp. 2005).

218. *Dream Maker Constr.*, 268 Ga. App. at 721, 603 S.E.2d at 72.

219. *Id.* at 721-22, 603 S.E.2d at 72-73.

clause at issue had language broad enough to include such disputes, the clear and unambiguous language of the Georgia Arbitration Code, particularly O.C.G.A. sections 9-9-2(c)(1) and (10),²²⁰ expressly excludes all future medical malpractice, wrongful death, or personal injury actions.²²¹ Even though agreements to arbitrate other disputes, such as construction defects or warranty issues, are enforceable under the Act, the court held that it is against Georgia public policy for the Act to cover future personal injuries or wrongful death.²²²

V. MISCELLANEOUS

A. *Fair Business Practices Act*

In *Tiismann v. Linda Martin Homes Corp.*,²²³ the court was again presented with the question of when a claim accrues.²²⁴ Here, the Georgia Supreme Court expressly overruled a prior case, *Greene v. Team Properties*,²²⁵ by holding that a cause of action pleaded by a homeowner, under the Fair Business Practices Act (“FBPA”),²²⁶ did not accrue for statute of limitations purposes until the property was conveyed to the homeowner at closing.²²⁷

Linda Martin Homes Corporation (“Builder”) entered into an agreement with Tiismann (“Homeowner”) for the construction and sale of a new home. After moving in and discovering multiple building code violations, Homeowner filed a demand for arbitration, asserting claims for breach of contract, negligent construction, and conversion. A hearing was held, which resulted in an award in favor of the Homeowner.²²⁸ The Homeowner then filed a separate civil action against Builder, asserting violations of the FBPA based on conflicting language contained within the contract that required the Builder “to complete construction ‘in accordance with all applicable governmental regulations, ordinances, and codes,’ but also contain[ed] a limited warranty [to the Homeowner]

220. O.C.G.A. §§ 9-9-2(c)(1) and (10) (Supp. 2005).

221. *Dream Maker Constr.*, 268 Ga. App. at 722, 603 S.E.2d at 73 (citing O.C.G.A. § 9-9-2(c)(1) and (10)).

222. *Id.*

223. 279 Ga. 137, 610 S.E.2d 68 (2005).

224. *Id.*

225. 247 Ga. App. 544, 544 S.E.2d 726 (2001).

226. O.C.G.A. § 10-1-390 to -407 (2004 & Supp. 2005).

227. *Tiismann*, 279 Ga. at 139-40, 610 S.E.2d at 70 (overruling *Greene v. Team Properties, Inc.*, 247 Ga. App. 544, 544 S.E.2d 726 (2001)).

228. *Id.* at 137, 610 S.E.2d at 69.

. . . in lieu of various rights and remedies, including those based on code violations.²²⁹

Builder moved for summary judgment, claiming that the statute of limitations had expired on the Homeowner's claim because it began to accrue at the time the sales contract was signed rather than, as Homeowner argued, at the time of closing. The trial court granted the Builder's motion and the Homeowner appealed.²³⁰

The court of appeals affirmed the trial court's grant of summary judgment for the Builder, stating that the customer should have known about the conflicting contract language when he signed the contract.²³¹ Therefore, the FBPA's two-year statute of limitations barred the Homeowner's claim.²³²

The Georgia Supreme Court reversed and remanded for reconsideration.²³³ Because the limitations period for an FBPA claim does not commence until accrual of the action, and because actual, rather than nominal, damages are an essential element of a private FBPA claim, the court concluded that Homeowner could not have suffered any actual damages until either the house was conveyed to him without being in compliance with code requirements, or the builder sought to use the conflicting contract language to deny liability.²³⁴ Therefore, Homeowner's FBPA cause of action accrued, for purposes of starting the two-year statute of limitations, when the house was conveyed to the Homeowner rather than at the time the sales contract with the alleged conflicting language was executed.²³⁵ Because Homeowner brought his cause of action less than two years after conveyance of the property, the statute of limitations did not act to bar his FBPA claim.²³⁶

B. Bankruptcy and Criminal Proceedings for Contractor Theft

A Chapter 13 debtor-contractor filed a series of adversary proceedings in United States Bankruptcy Court seeking to enjoin a state criminal prosecution that had been brought against him for his alleged theft by conversion, which he had been accused of for failing to use funds that he received from property owners to pay a subcontractor on a residential

229. *Id.*

230. *Id.* at 137-38, 610 S.E.2d at 69.

231. *Id.*

232. *Id.*

233. *Id.* at 138, 610 S.E.2d at 69.

234. *Id.* at 139-40, 610 S.E.2d at 69-70.

235. *Id.* at 140, 610 S.E.2d at 70.

236. *Id.*

construction project.²³⁷ Randy and Becky Jones (the “Homeowners”) hired Terry Perry (“Perry”), a builder, to construct an addition to their home. Perry then subcontracted with Puckett Foundations (“Puckett”) to provide labor and materials for the project. Perry received certain payments from the Homeowners, but failed to pay Puckett.²³⁸

Perry and his wife then filed a joint petition for relief under Chapter 13 of the United States Bankruptcy Code.²³⁹ In response, Homeowners filed with the Magistrate Court of Madison County, Georgia, an application for a criminal warrant against Perry for contractor theft based on Perry’s failure to pay Puckett, and Puckett filed a materialman’s lien against Homeowners’ property for the purpose of collecting the debt owed by Perry. Perry was later indicted for theft by conversion, arrested, and released on bond.²⁴⁰

Under the Georgia criminal code, O.C.G.A. section 16-8-15,²⁴¹ a contractor commits a felony if he, with intent to defraud, fails to use the proceeds of any payment made to him to pay subcontractors for improvements made to real property.²⁴² The failure to pay subcontractors is prima facie evidence of intent to defraud.²⁴³

Perry filed a series of adversary proceedings against the magistrate judge, district attorney, Homeowners, and Puckett in the United States Bankruptcy Court seeking to enjoin the state criminal case from moving forward and to invalidate the lien Puckett had filed.²⁴⁴ The contractor contended that the defendants were using the criminal proceedings to collect a civil debt and were conspiring to violate the automatic stay of the Bankruptcy Code.²⁴⁵ The bankruptcy court was not persuaded. With respect to Homeowners, the court held that the automatic stay is not violated when state criminal actions are either commenced or continued against a debtor in bankruptcy.²⁴⁶ With regard to the materialman’s lien, the court ruled that because Georgia lien law

237. There are four related cases: *In re Perry v. Puckett Founds.*, 312 B.R. 717 (M.D. Ga. 2004); *In re Perry v. Puckett Founds.*, 312 B.R. 720 (M.D. Ga. 2004); *In re Perry v. Puckett Founds.*, 312 B.R. 723 (M.D. Ga. 2004); *In re Perry v. Jones*, 314 B.R. 873 (M.D. Ga. 2004).

238. *In re Perry v. Puckett Founds.*, 312 B.R. 717, 718 (M.D. Ga. 2004).

239. 11 U.S.C. §§ 1301 to 1330 (2000).

240. *Perry*, 312 B.R. at 718-19.

241. O.C.G.A. § 16-8-15 (2003).

242. *Id.* § 16-8-15(a).

243. *Id.* § 16-8-15(b).

244. *Perry*, 312 B.R. 717 (M.D. Ga. 2004); *Perry*, 312 B.R. 720 (M.D. Ga. 2004); *Perry*, 312 B.R. 723 (M.D. Ga. 2004); *Jones*, 314 B.R. 873 (M.D. Ga. 2004).

245. *Perry*, 312 B.R. at 719.

246. *Id.*

provides that an unpaid subcontractor may proceed directly against the property owner when the contractor is in bankruptcy, Puckett could enforce its lien against the property without first obtaining a judgment against Perry.²⁴⁷

VI. LEGISLATION

During this survey period, the General Assembly amended several statutes affecting construction law in Georgia.

A. Georgia's "Right to Repair" Act

The Georgia General Assembly amended Chapter 40 of its 2004 mandatory alternative dispute resolution ("ADR") process for residential construction defect claims (the "Act"), effective July 1, 2005.²⁴⁸ Chapter 40, as amended, provides that a contractor's performance of repairs or payment of money to a claimant pursuant to an accepted offer for settlement in relation to a construction defect claim does not create insurance coverage or affect the parties' rights and obligations under a contractor's liability insurance policy.²⁴⁹ No other provisions were changed.

Overall, the impact, the meaning, and the merits of this recent Act and statutory framework continue to be hot topics of debate among construction lawyers. Under the mandatory statutory scheme, a homeowner is required to provide written notice of a claim ninety days prior to initiating an action against a contractor for a construction defect claim.²⁵⁰ Purportedly, the Legislature created this "alternative method to resolve legitimate construction disputes [so as to] reduce the need for litigation while adequately protecting the rights of homeowners."²⁵¹ As a practical matter, however, there are so many required notices, offers, responses, rejections, supplemental offers, and supplemental responses—and such potentially negative consequences for failing to comply with the ADR procedures—that the parties often find themselves in need of lawyers early on to assist and monitor compliance with the statute. With established periods for service of notices, inspections, and the inevitable attorneys' requests for extensions, the process can drag on for months beyond the ninety days, resulting in significantly increased legal expenses for all concerned, and—far too often—no real resolution of the

247. *Id.* at 726.

248. O.C.G.A. § 8-2-40 (2004 & Supp. 2005).

249. *Id.* § 8-2-40(a)(2).

250. O.C.G.A. § 8-2-38(a) (2004).

251. O.C.G.A. § 8-2-35 (2005).

dispute. Litigation or arbitration is merely postponed, not avoided, and the extra costs and delays incurred in order to comply with the statute can end up significantly adding to, rather than reducing, the homeowner's financial burden.

Finally, it is still too early to tell how the courts will interpret some of the key provisions left unexplained by the Act or other Georgia statutory law.²⁵² In the meantime, there are many questions that remain unanswered by the Act, including, but not limited to, whether the term "claimant" covers anyone other than homeowners, home buyers, condominium and neighborhood associations; how this Act and the new contractor licensing law are supposed to interface; the interplay between the defined terms "construction defect" and "express written warranty"; and perhaps most significantly, what the consequences are if a contractor fails to provide the statutory written notice to the buyer or owner of the dwelling regarding the contractor's right to resolve alleged construction defects before the buyer or owner may commence an action against the contractor pursuant to O.C.G.A. section 8-2-41.²⁵³

B. Licensing of Residential and General Contractors

Georgia's 2004 contractor licensing statute was amended to provide that the Governor shall appoint all members of the State Licensing Board for Residential and General Contractors, and initial members shall be appointed no later than July 1, 2005.²⁵⁴ The Act also changed the starting dates for submission of licensure applications from residential and general contractors, and provided that Chapter 43-41 relating to such licensure becomes effective for all purposes on July 1, 2007.²⁵⁵ Contractors now have two years from the effective date of the amended statute before the licensing requirements imposed by this chapter, and the sanctions and consequences relating thereto, become effective and enforceable.²⁵⁶ Under the Act, as amended, persons seeking to be licensed or exempted from examination may submit an application starting July 1, 2006.²⁵⁷

252. Frank O. Brown, Jr., Georgia's Statutory ADR for Residential Construction Disputes (2005) (on file with author at Weissman, Nowack, Curry & Wilco, P.C.).

253. *Id.*; O.C.G.A. § 8-2-41 (2004).

254. O.C.G.A. §§ 43-41-3, -4 (effective July 1, 2005).

255. O.C.G.A. § 43-41-17(a) (2005).

256. *Id.*

257. *Id.*

C. Licensure for Plumbers

Under O.C.G.A. section 43-14-2,²⁵⁸ as amended, a plumbing license is no longer required for a contractor certified by the Department of Human Resources to make the connection from the stub exiting the structure to any on-site waste-water management system.²⁵⁹

D. Payment of Sales and Use Taxes

The legislature amended Chapter 8 of Title 48 of the Georgia Code to add a subsection that provides that “[a]ny governmental entity [furnishing] tangible personal property to a contractor for incorporation into a construction, renovation, or repair project conducted pursuant to a contract with [that] governmental entity shall issue advance written notice to [the] contractor of the amount of tax owed for such tangible personal property,” or the governmental entity will be liable for such tax.²⁶⁰

E. Excavation or Blasting at Utility Facilities

In order to better protect the public from physical harm and prevent interruptions of utility service resulting from damage to utility facilities and sewer laterals caused by blasting or excavating operations, the Georgia General Assembly overhauled the Georgia Utility Facility Protection Act²⁶¹ and changed, among other provisions, notice requirements prior to excavation or blasting and for emergency situations.²⁶² The General Assembly also established rules and regulations relating to the location of large projects and established a standard of care for conducting trenchless excavations.²⁶³

F. Department of Transportation Contracting Powers and Criteria

During the survey period, the Georgia legislature also amended certain code sections relating to the general contracting powers of the Department of Transportation so as to permit the acceptance of both solicited and unsolicited proposals for public-private initiatives, to allow for the disclosure of nonproprietary matters from those proposals in order to encourage competition, to provide for a payment and perfor-

258. O.C.G.A. § 43-14-2 (2005).

259. *Id.* § 43-14-2(12).

260. O.C.G.A. § 48-8-63(g) (2005).

261. O.C.G.A. §§ 25-9-1 to -13 (2003 & Supp. 2005).

262. O.C.G.A. §§ 25-9-2 to -6(a)-(g) (2003 & Supp. 2005).

263. *Id.* §§ 25-9-2 to -9, 25-9-12, and 25-9-13.

mance bond sufficient to protect the public's interest, and to extend the time for submission of competing proposals.²⁶⁴

In addition, the legislature revised the criteria for design-build contracts entered into by the Department of Transportation for the construction of buildings, bridges and approaches, rail corridors, limited or controlled access projects, or clearly defined projects to be constructed within existing rights of way.²⁶⁵

G. Property Insurance

Last, but not least, the General Assembly amended O.C.G.A. section 33-7-6²⁶⁶ to provide an exception to the category of property insurance covering warranty service agreements for major appliances, utility systems, and roofing of certain one- and two-family residential structures if such an agreement is guaranteed by a surety bond of at least \$100,000.²⁶⁷

264. O.C.G.A. §§ 32-2-78 to -80, 32-10-1, 32-10-4 (2001 & Supp. 2005).

265. O.C.G.A. § 32-2-81 (2001 & Supp. 2005).

266. O.C.G.A. § 33-7-6 (2000 & Supp. 2005).

267. *Id.* § 33-7-6(b)(3)(E).