

Engagements, Deficiencies and Fraud: Examining the Scope of La. R.S. 9:2772

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Basic Concept Behind La. R.S. 9:2772

- Bars contract, tort and failure to warn actions arising out of an engagement for the planning, construction, design or building of an immovable or movable property against any person performing land surveying services including those services preparatory to construction or against any person for the design, planning, supervision, inspection or observation of construction
- Bars claims for any deficiency in land or surveying services such as defined in La R.S. 37:682 including those preparatory to construction or in the design, planning, inspection, or observation of construction, or in the construction of any improvement to immovable property
- More than five years after the date of registry in the mortgage office of acceptance of the work by owner
- If no such acceptance is recorded within six months, more than five years after the improvement has been occupied by the owner
- The statute includes exceptions, most notably an exception for fraud

Peremption vs. Prescription

- Peremption is a fixed time provided by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the period
- Prescription is a mode of barring of actions as a result of inaction for a period of time
- General rule for peremption and in the application of La. R.S. 9:2772 is that because it forever extinguishes causes of action, the statute must be strictly interpreted
- Key distinction is that prescription can be interrupted while nothing interrupts peremption

Original Legislative Purpose

- The Louisiana legislature enacted La. R.S. 9:2772 in 1964 to protect residential building contractors from liability for past construction projects that could extend for an indefinite period of time
- *Lasseigne v. Schouest & Sons, Builders*, 563 So.2d 371, 373 (La. App. 1st Cir. 1990)

Meant to be a true “catch all” or is it too often and too broadly applied?

- Statute covers claims arising out of an engagement for the planning, construction or design of an immovable
- If the 5 year period has elapsed, an exception of peremption pursuant to La. R.S. 9:2772 is typically the initial response to any suit involving defective construction and/or design of an immovable
- Not a lot of legislative commentary or judicial guidance, and courts sometimes appear to struggle with statute’s application

What is an Engagement?



Judicial Guidance on What Constitutes an Engagement

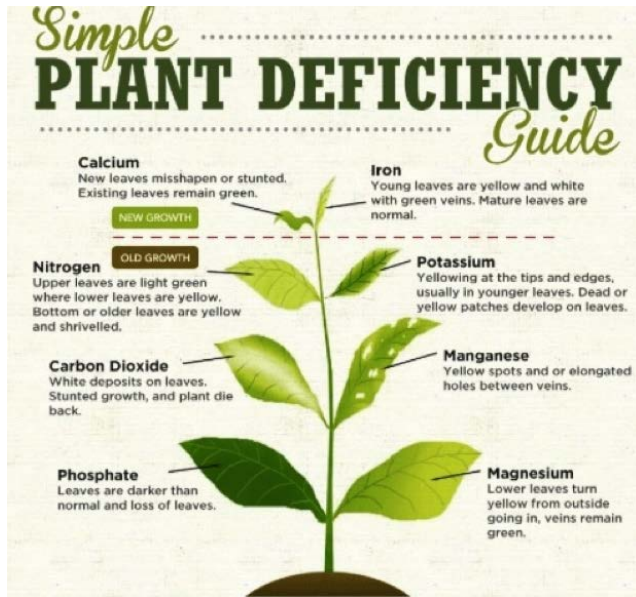
- The services involved must relate directly to the action. **Third party intervention or remoteness may shield a party from coverage by the statute**
- In a case involving a designer's role in the drawing of plans, where he did not prepare specifications for a contractor to follow, where he did not stamp the drawings or supervise construction, and where his designs were altered, the court found his role to be too remote to be classified as the architect
- Only possible liability was for negligence - one year prescriptive period

Elnaggar v. Fred H. Moran Const. Corp., 468 So.2d 803 (La. Ct. App. 1st Cir. 1985).

Litigating For or Against Peremption Based on the Concept of an Engagement

- Role and Position – general contractor or high level sub-contractor vs. supplier or consultant
- Intervention and Remoteness – timing and distance from the event that triggers the cause of action
- Component of the Project – could be a large universe of people and materials that impact the construction of an immovable and become part of the immovable

What is a Deficiency?



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Warning Signs You May Have A Magnesium Deficiency



Constitutional Challenge Sheds Some Light on What May Constitute a Deficiency

- *Burmester v. Gravity Drainage Dist. No. 2 of the Parish of St. Charles*, 366 So.2d 1381 (La. 1978)
- Wrongful death action in which plaintiff filed suit as a result of the death of her husband
- Trial court found La. R.S. 9:2772 unconstitutional; however, the Louisiana Supreme Court found that the statute was not prohibited by the constitution and did not offend equal protection or due process
- Court drew a clear distinction between persons performing the design, planning, supervision, inspection or observation of construction and persons in possession or control as owner, lessor, tenant or otherwise as well as a distinction between suppliers and manufacturers and architects and contractors

Judicial Guidance - What Constitutes a Deficiency (or what does not)

- In *Academy Park Imp. Ass'n v. City of New Orleans*, 469 So.2d 2 (La. Ct. App. 4th Cir. 1985), the Fourth Circuit ruled that causes of action based on allegations of fraud were outside the scope of La. R.S. 9:2772. The court concluded that “the statute does not purport to limit every action against someone who once built a building”
- Statute limits only actions that arise from deficiencies in design or construction, and a “deficiency” could not be fairly interpreted to include allegedly fraudulent planning and building
- Fraudulent and deceptive planning was not a deficiency in the design and construction of immovable, and it was no more a deficiency in design or construction than “Socrates hemlock was a deficiency in diet”
- Shortly after *Academy Park*, the legislature amended La. R.S. 9:2772 to provide an exception for fraud

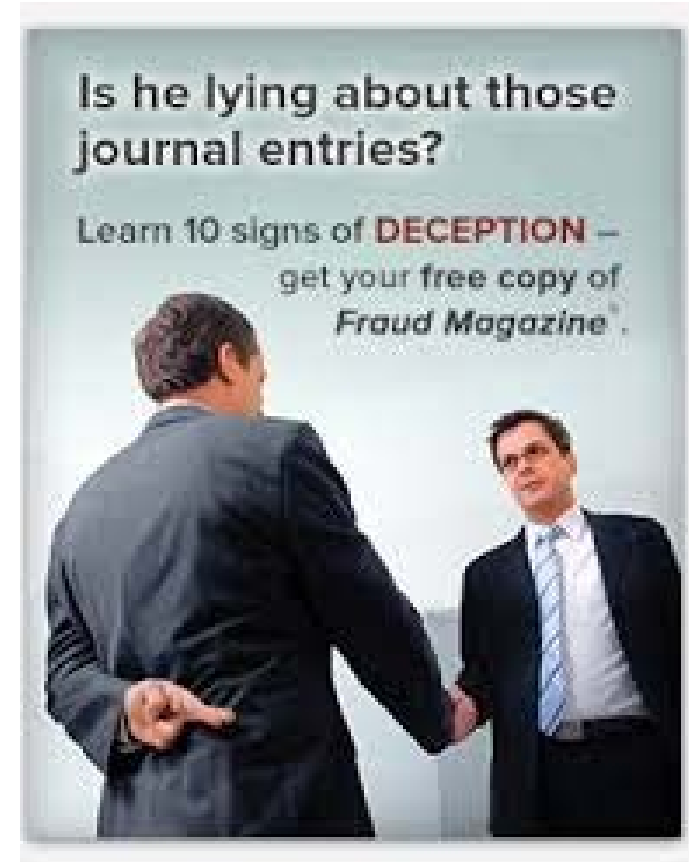
Judicial Guidance – What Constitutes a Deficiency (or what does not)

- In *Tenneco Oil Co. v. Chicago Bridge & Iron Co.*, 495 So.2d 1317 (La. App. 4 Cir. 1986), the Court held that a contractor who acquires knowledge of a danger inherent in the ordinary use of what he has constructed has a duty to warn, at the very least, the owner
- Relying on *Academy Park*, the Court found that the legislature could not have intended to allow a contractor to escape liability where he had knowledge of dangers in the use of a building he had built and failed to warn the owners with whom he had contracted
- On rehearing, the Court held that the plaintiff's cause of action based on a failure to warn was not barred by La. R.S. 9:2772

Litigating For or Against Peremption Based on Deficiency

- **What type of “engagement” presumably a contract exists?**
- **What is the essence of the claim?**
- **What is the classification of the litigant?**

What is Fraud?



What is Fraud?

C.C. Art. 1953 – Vices of Consent

- Misrepresentation or suppression of the truth;
- Intent to obtain an unjust advantage or to cause a loss or inconvenience; and
- Can result from silence or inaction

What is Fraud?

Delictual Fraud:

- Misrepresentation of a material fact;
- Made with the intent to deceive; and
- Causing justifiable reliance with resultant injury

Hahn v. Hunt, No 15-2867, 2016 WL 2625885 at *5 (E.D.L.A. May 6, 2016).

Legislative Guidance: What Does Not Constitute Fraud?

- In *Bunge Corp. v. GATX*, 557 So.2d 1376 (La. 1990), the Louisiana Supreme Court held that peremption did not apply where a contractor acquired knowledge of a dangerous defect and failed to warn the owner
- The court reasoned that a claim “which charges defendant with knowledge and failure to warn plaintiff of a hazardous condition in the construction asserts a claim based in fraud”
- However, following the decision, the legislature quickly amended the statute to exclude an action for failure to warn from the fraud exception in La. R.S. 9:2772
- “...Including, but not limited to, an action for failure to warn...”

Judicial Guidance: What Constitutes Fraud?

- After the 1990 amendment, the Third Circuit in *Curtis v. Brannon*, 944 So.2d 716 (La. App. 3d Cir. 2006) held that claims brought by employees of a paper mill against a contractor were not barred by preemption insofar as they alleged failure to warn of the dangers of asbestos
- The Court reasoned that because the statutory amendment was substantive, it could only be given prospective effect
- Therefore, the Court found that “failure to warn” claims which arose from an injury sustained *prior to the change in the law* could in fact satisfy the fraud exception of La. R.S. 9:2772

Judicial Guidance: What Does Not Constitute Fraud?

- More than five years after completion, plaintiff alleged the contractor knowingly concealed a leak in the plumbing system which caused her to inhale toxic fumes. Judgment was entered against the contractor
- On appeal, the record showed that: the plans for the building required that the plans required a certain pipe section that was missing per a post incident inspection
- The First Circuit found the evidence insufficient to establish a prima facie case of fraud. The court noted that while the circumstances were suspicious in looking at the totality of the circumstances, mere silence or inaction without fraudulent intent is not fraud
- Because there was no evidence that the contractor misrepresented or suppressed the truth to gain an advantage or cause loss to the State, the plaintiff's claims did not fit within the fraud exception
- *Schilling v. Bernhard Bros. Mechanical Contractors LLC*, 186 So. 3d 658 (La. App. 1 Cir. 6/29/16)

Litigating for the Fraud Exception

- Different standards – Is there a contract or tort claim or both – *Bunge* discussion
- Plead with particularity – Pre-suit fact development and investigation is critical
- Timing of the Injury or Loss – If pre-1990 can use a failure to warn claim to fall within the fraud exception

Litigating Against the Fraud Exception

- Essence of the claim – Is it really a failure to warn claim?
- Face of the pleadings – Has fraud and/or fraudulent intent been pled sufficiently?
- Bad faith remedy – If alleged and determined to be in bad faith, party that alleged fraud is liable for costs and attorney's fees

Recent Developments

Hefren v. McDermott, Inc., 820 F.3d 767 (5th Cir. 2016)



***Hefren* – Taking the Scope of Application a Step Further**

- The plaintiff brought suit against a company that had designed and constructed an offshore drilling and production platform
- The Court granted the company's motion for summary judgment on the basis that the claim was time-barred under Louisiana law
- The Fifth Circuit affirmed the district court's ruling and held that, pursuant to the Outer Continental Shelf Lands Act, the platform permanently affixed to the seabed constituted immovable property, and the claim was barred under La R.S. 9:2772

CONCLUSIONS

- Despite the general rule regarding preemption, Courts and the legislature appear ready and willing to expand the scope of application
- Determination of whether the statute applies requires a “down the line” or “chain of command” type analysis
- Unsettled issues and curious language could lead to future confusion and need for amendment – other statutes at play

QUESTIONS?

THANK YOU!