BRADLEY ARANT ROSE & WHITE LLP **First Quarter 2008**

CONSTRUCTION AND PROCUREMENT LAW NEWS

Recent federal, state, and local developments of interest, prepared by the firm's Construction and Procurement Group:

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In Order to Get Paid, Contractors Working on Federal Projects Need Express Authorization from the Contracting Officer (No One Else) for All Extra Work

In August 2007, the United States Court of Appeals for the Federal Circuit in *Winter v. Cath-dr/Balti Joint Venture* held that in order for a contractor to get paid for change orders, all changes for extra work must be expressly authorized from the Contracting Officer only. The Federal Circuit went on to note that this rule holds regardless of whether the contractor is told otherwise verbally by the government or a different arrangement is set out in the contract documents.

In *Winter v. Cath-dr/Balti Joint Venture*, the contractor ("Cath") and the Navy entered into a contract for external renovations of a historic dental research facility at the Great Lakes Naval Training Center in Illinois. The contract incorporated by reference many standard government clauses giving the Contracting Officer authority to grant change orders, modifications and equitable adjustments. Once the project started, the Navy informed Cath that a Project Manager had been assigned, and to direct all correspondence and Requests for Information to the Project Manager. Upon substantial completion, Cath submitted several adjustments to the Project Manager in accordance with the standard equitable adjustments provision in the contract. The requests were sent for review up to the Contracting Officer who determined that many of the submitted adjustments were inappropriate and denied them. Cath appealed the Contracting Officer's decision to the Armed Services Board of Contract Appeals ("ASBCA"), arguing that all adjustments were appropriate because they were authorized by the Project Manager, an agent of the Navy. The ASBCA agreed and held that the Project Manager had delegation of authority to resolve minor problems under the contract and, thus, his authorization of changes bound the government to provide an equitable adjustment. The Navy appealed the ASBCA decision to the Court of Appeals for the Federal Circuit.

Under general agency principles, an agent is authorized to bind a principal if apparent or actual authority exists. Actual authority is that which a principal expressly confers on an agent, while apparent authority is authority that a third party reasonably believes an agent has based on the party's dealings with the principal. Arguably, the Project Manager in this case had apparent authority to grant

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change orders and modifications. Cath was told to direct all correspondence to the Project Manager who held himself out as the head of the project. The Federal Circuit, however, confirmed that apparent authority is not enough to bind the government. The fact that the Project Manager held himself out as the Navy's agent, including Cath's reasonable reliance on this fact, was not enough. Express or implied actual authority must exist to bind the government. Express authority generally comes from the contract itself. With respect to contracts for supplies and services, the government only gives express authority to Contracting Officers. When clear express actual authority exists in the contract, like in this case, implied authority is irrelevant. The Federal Circuit held that although the Contracting Officer had made a limited delegation of authority to the Project Manager, this delegation of authority did not include contract modifications.

The Federal Circuit's decision confirms that a contractor must deal with the person having express authority. When in doubt, contractors operating under federal government contracts should always take the side of strict interpretation of the contract terms and seek advice from counsel before relying on the authority of a government agent who is not expressly authorized under the contract to take the action in question.

by Nick Voelker

Spearin Claims Requires Proof of Substantial Defects

In *Caddell Construction Co., Inc. v. U.S.*, the Court of Federal Claims considered a defective specification claim under the *Spearin* doctrine. Under the *Spearin* doctrine, the Government impliedly warrants that, if the contractor follows detailed specifications provided with the contract, the resulting project will not be defective or unsafe and that the contractor will achieve satisfactory contract performance. Where a design specification is defective, a Government contractor may recover costs incurred to overcome the specification, including damages suffered from delays attributable to the defective specification. To prevail on a defective specification claim, the contractor must show that that the Government's specification was a design specification and that the specification was "substantially deficient or unworkable." *Spearin* may not apply to purely performance specifications.

Caddell, the general contractor, sponsored a claim by its structural steel erector, Steel Service Corporation ("SSC"), arising from the construction of a VA hospital in Memphis, Tennessee. SSC claimed that the structural steel drawings provided by the VA were incomplete and contained conflicting information. As a result, SSC submitted over 300 requests for information ("RFIs") aimed at clarifying and correcting the allegedly defective structural steel design documents.

In response to SSC's claim, the Government first argued that the structural steel design was a performance specification to which *Spearin* did not apply. According to the Government, the specification allowed the contractor to utilize its own schedule and sequence for completing the structural steel work; therefore, it was not a detailed design specification. The Court rejected the Government's argument, however, reasoning that the nine-page specification for structural steel contained detailed instructions about how to erect the structural steel, including instructions about what types of bolts, washers, nuts, welds, finishes, and connections to be used. While sequencing and scheduling were left to the contractor, the Court concluded that the structural steel specifications were a detailed "road map" that the contractor was obligated to follow.

After finding that the structural steel specification was a design specification, the Court concluded that the specification was not defective. According to the Court, the contractor failed to meet its burden of proving that the specifications were "substantially deficient or unworkable." The Court rejected the notion that a substantial number of RFIs proves that a specification is defective. Unless the responses to the RFIs generate changes to the design or otherwise reveal that the design was fundamentally flawed, the mere fact that many RFIs were issued is not enough to support a defective specification claim under *Spearin.*

The Court noted that the general contractor did not immediately submit RFIs received from its subcontractor to the Government, instead waiting to "bundle" numerous RFIs into one large submission. According to the Court, this practice of bundling the RFIs resulted in signification delays to resolving the RFIs that were not attributable to the Government.

The *Caddell* case confirms that a contractor pursuing a design defect claim under *Spearin* must show that the design contained a fundamental flaw, or a collection of flaws, that required a major revision to the design and delays to the project. Conclusory allegations will not be sufficient to prevail.

by Jim Archibald

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Be Specific in Preparing Releases and Settlement Agreements

A recent decision from Florida provides a useful reminder to all in the construction industry to draft and review carefully settlement agreements and releases. Be wary of "boiler-plate" clauses, and ensure that the language describing the claims released is precise.

On March 14, 2000, the University of Central Florida contracted with Centex Rooney/Construct Two to construct student housing. Traveler's Casualty and Surety Company issued a payment bond for the use and benefit of claimants on the project. Centex entered into a subcontract with Progressive Plumbing, Inc. for Progressive to perform the plumbing work on the project. Progressive then hired The Plumbing Service Company to perform some of the plumbing work.

Plumbing Service stopped working on the project on or about February 1, 2001, because of a dispute between it and Progressive. Plumbing Service and Progressive met on February 14, 2001, and agreed upon the amount of money due Plumbing Service for the work it had performed. When Progressive failed to make the payment, Plumbing Service sued Traveler's on the payment bond. While the suit was pending, Plumbing Service filed a "Civil Remedy Notice of Insurer Violation" against Traveler's with the Department of Insurance, pursuant to section 624.155(2) of the Florida Statutes alleging, among other things, that Traveler's violated the statute by: (1) failing to acknowledge claims and act promptly; (2) denying claims without conducting a reasonable investigation; (3) not attempting in good faith to settle claims; and (4) failing to promptly settle claims.

On March 5, 2003, Plumbing Service, Traveler's and Progressive entered into a Settlement Agreement under which the parties agreed that Plumbing Service had a valid claim under the bond and was entitled to recover. Traveler's agreed to pay Plumbing Service a total of $76,566.40, representing principal, interest, court costs and attorney's fees. Plumbing Service, in turn, agreed to dismiss its lawsuit upon payment of all specified sums. The Settlement Agreement contained a mutual release. The two release clauses, however, differed in one significant aspect. Traveler's released Plumbing Service from "all causes of action whether known or unknown, . . . from the beginning of the world through the date hereof." Plumbing Service released Traveler's from "all causes of action whether known or unknown, . . . from the beginning of the world through February 14, 2001 . . . ."

Shortly after executing the Settlement Agreement, Plumbing Service filed a separate action alleging bad faith and asserting those claims contained in the "Civil Remedy Notice of Insurer Violation." Traveler's filed a motion to dismiss the complaint, affirmative defenses, and a motion for summary judgment relying in part on the release contained in the Settlement Agreement. The trial court granted the motion based on the language in the Settlement Agreement. Plumbing Service appealed the decision.

In *Plumbing Service Co. v. Traveler's Cas. & Sur. Co.*, the Florida Court of Appeals reviewed the Settlement Agreement language related to the scope of the release. As an initial matter, the court noted that the release failed to specifically mention which of Plumbing Service's claims Traveler's released because the release used general language, *e.g.* "all" claims. The court also noted that unlike the release language used in Traveler's release of Plumbing Service, the release as to Traveler's was limited by time to a date certain, February 14, 2001. As such, the court stated that Plumbing Service claims accruing after February 14, 2001 were unaffected by the release. The court then determined that based on the language of the statute governing Plumbing Service's bad faith claim, the claim did not accrue until after February 14, 2001. The court held that the release did not extinguish that claim. As a result, the Court reversed the trial court.

Parties to a written agreement have an affirmative duty to read and understand the written agreement before signing it. Moreover, courts interpreting a written agreement after the fact presume that the express language in the agreement is what the parties intended, and construe the agreement to mean what on its face it purports to mean. When drafting an agreement, ensure that you are precise. More importantly, it is imperative that you review any written agreement prior to execution.

by Mike Griffin

Florida Condo Law: Owner Awarded Damages for Defective Central Air Conditioning Unit, Despite Exclusion in Condominium Act

In a recent Florida case, a unit owner sued the developer of a residential condominium complex over problems with the air conditioning system. In *Turnberry Court Corp. v. Bellini*, the owner claimed several deficiencies in the system, and sued the developer for breach of implied warranty of fitness and merchantability under Fla. Stat. Section 718.203. After a jury verdict in favor of the owner, the developer appealed on the basis that

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the Florida Condominium Act specifically excluded warranty claims for "mechanical elements serving only one unit."

The appeals court analyzed Florida's Condominium Act. The court found that the condominium is a unique hybrid in property law. For example, a condo owner obtains title to a unit, as well as an undivided share in common elements. For this reason, the court found that condominiums are exclusively subject to the Florida Legislature's control and regulation.

Specifically, under Florida's Condominium Act, a developer grants to each unit owner an implied warranty of fitness and merchantability. Per the statute, the warranty includes six (6) classifications, including: (1) the unit; (2) the personal property transferred with each unit; (3) all other improvements for the use of unit owners; (4) all other personal property for the use of the unit owners; (5) the roof and structural components, and mechanical, electrical and plumbing elements serving a building (rather than a single unit); and (6) all other property conveyed with a unit. Each classification has a different warranty period. While subsections (1), (2) and (6) concern the unit itself, subsections (3), (4) and (5) relate to the common elements of the condo complex.

The Florida appeals court found that the clear objective of the statute is to cover the complete unit and all common elements. The court reasoned that the warranty already extended to such personal property transferred with the unit, such as refrigerators, stoves and ceiling fans. The court found that it was illogical to find that the Legislature purposely intended to exclude from the warranty such an important part of a condo as the central air conditioning system because it was a material mechanical element serving only one unit. For this reason, the court affirmed the verdict in favor of the condo unit owner against the developer. The result is not surprising considering the purpose of the Florida Condominium Act is to provide buyers with a warranty that the unit they are purchasing meets reasonable expectations, including an adequate air conditioning system.

by Mitch Mudano

Contractor Awarded Lost Future Profits as Damages

When a contractor or subcontractor is terminated from performance on a bonded job, it is likely that the termination will result in a loss of, or reduction in, bonding capacity, where the bonding company is notified of the termination and takes action following the termination. In such a case, contractors and subcontractors have long contended that a damage flowing from the termination is a loss of future profits on jobs that "would have been bid." There are numerous legal and common sense hurdles which must be cleared before a claim for lost profits on future work will be actually awarded (or negotiated), but Mehr Beglari, owner of BEGL Construction Co., Inc., was awarded such damages by a jury in California following BEGL's termination by the Los Angeles Unified School District. In August, 2007, the California intermediate appellate court in *BEGL Construction Co., Inc. v. Los Angeles Unified School Dist.*, sustained the award of lost future profits, as a component of what lawyers call "special" damages. The damages arose when BEGL was terminated from its right to proceed with a contract for work on a School District project. Following termination, the District called on the bonding company, F&D Company of Maryland, to complete the work. F&D did so, and sued BEGL. BEGL had obtained replacement bonding capacity, for a brief period, until its new bonding company learned of the dispute with F&D. As a result, BEGL's bonding capacity was reduced to 10% of what it had been prior to the termination. The trial and appellate court allowed evidence of the lost profits caused by the inability to bid the number of jobs BEGL had bid prior to the termination, and the jury awarded $506,000 to BEGL for its lost profits (on jobs it never bid), after the jury found, of course, that the District had wrongfully terminated BEGL's proceeding under its contract with the District.

In the appropriate case, where the loss of bonding capacity can be tied to a wrongful termination, BEGL is instructive as to some of the elements that may support, or defeat, such a claim arising out of a breach of a contract with a state or other related entity. For breaches of contract by the Federal government, lost profits on future contracts are difficult to recover, although there is no *per se* prohibition.

by Mabry Rogers

Indemnity for Your Own Negligence: Be Clear and Conspicuous or You'll Fail

In *Gilbane Bldg. Co. v. Keystone Structural Concrete, Ltd*., the Texas Court of Appeals reiterated the requirement that indemnity provisions aimed at indemnifying one from its own negligence must be clear and conspicuous. In *Gilbane*, the contractor, Gilbane, contracted with Keystone for Keystone to act as subcontractor. During construction, an employee of Keystone suffered an injury and, due to a Texas law that limited his rights against Keystone to

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workers' compensation benefits, he brought suit alleging negligence against Gilbane only. Gilbane settled the suit for $2,000,000.

After the settlement, Gilbane filed suit against Keystone and Royal Insurance, Keystone's excess carrier, seeking to recover the funds it paid to settle the claim. Gilbane asserted, among other things, that Keystone was liable to Gilbane for breaching an indemnity agreement in the Gilbane-Keystone contract. The provision on which Gilbane relied stated as follows: "Keystone agrees to indemnify . . . Gilbane . . . from and against claims . . . arising out of or resulting from the performance . . . of Keystone's work under this Agreement provided that any such claim . . . is caused, in whole or in part, by any negligent act or omission of Keystone or anyone directly or indirectly employed by Keystone, or anyone for whose acts Keystone may be liable, regardless of whether caused in part by a party indemnified hereunder." Gilbane argued that it could establish that the employee's injuries were caused by the negligence of Keystone and not the negligence of Gilbane. Thus, in accordance with the contract, Keystone should have been required to indemnify Gilbane. Keystone responded that the provision was not enforceable because Gilbane was sued for its own negligence and, since the provision did not expressly indemnify Gilbane for its own negligence, the provision did not comply with Texas law.

In agreeing with Keystone, the court noted that because indemnity provisions seek to shift the risk of one party's negligence to the other, Texas applies an express negligence doctrine and the conspicuousness requirement to such provisions. Under the express negligence doctrine, the intent to indemnify a party from its own negligence must be specifically stated in the four corners of the document. The conspicuous requirement mandates that something on the face of the contract, such as larger type or contrasting colors, must attract the attention of a reasonable person. Since Gilbane was the only one sued for negligence and the Gilbane-Keystone contract did not expressly and conspicuously provide that Keystone would indemnify Gilbane for Gilbane's own negligence, the provision was deemed unenforceable. While Gilbane argued that it sought indemnity for Keystone's negligence and not its own, the court refused to allow Gilbane to recover because the allegations of negligence were made solely against Gilbane and Gilbane did not litigate the issue.

If a party intends to be indemnified for its own negligence, it must make sure that its contract with the indemnitor expressly and conspicuously indicates this requirement. Anything less than clear, concise, and noticeable language may not be enforced in many states.

by Mike Huff

Miller Act's Definition Of "Subcontractor" Expanded To Include Bankrupt First-Tier Supplier

The Third Circuit Court of Appeals recently ruled that a third-tier subcontractor on a construction project, whose only contractual relationship was with a steel fabricator used by the prime, was entitled to recover under the contractor's Miller Act payment bond. According to the court, the steel fabricator was a "subcontractor" for purposes of the Miller Act because it was tasked "to supply a specific and crucial part of the materials required by the original contract" and also had a "substantial and important" relationship with the prime contractor. *United States ex rel. E & H Steel Corp. v. C. Pyramid Enterprises*.

The dispute arose out of a contract awarded by the Army Corps of Engineers to Pyramid Enterprises for the design and construction of an airplane hangar. Pyramid issued a $2.23 million purchase order to Havens Design Build to provide the structural steel. Havens, in turn, hired E & H Steel Company to manufacture the steel as well as deliver it to the job site. Following delivery to the job site, Havens filed for bankruptcy. Although Pyramid had already paid Havens for the delivered steel, Havens had failed to pay approximately $500,000 of what was owed E & H. E & H brought a Miller Act suit against Pyramid and its payment bond surety, citing a United States Supreme Court decision, which held that recovery under a Miller Act payment bond is available to "subcontractors without an express or implied contract with the prime contractor, but with a direct contract with a subcontractor."

The District Court for New Jersey denied the claim, asserting that E & H did not have a "direct contract with a subcontractor" because Havens' role in the project was merely that of a material supplier, not a subcontractor. The Third Circuit reversed the district court's decision, finding that Havens qualified as a "subcontractor" under the Miller Act. In arriving at this conclusion, the Third Circuit explained its view that other, contrary court decisions had lost sight of "the purpose of the Act, the relationship between the parties, and the middleman's role in the project.'" The court then determined, in accordance with the Miller Act's intent to "protect persons who supply labor or materials for government construction projects," that Havens was indeed a subcontractor, and making E & H a second-tier subcontractor under the Act. If you are a

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supplier for a federal project, make sure you consult with counsel about all of your options to secure payment, including the possibility of pursuing a claim under the Miller Act.

by Steve Pozefsky

Colorado Passes New Anti-Indemnity Legislation

Construction contracts almost always include indemnity provisions, whereby parties agree to contractually transfer the risk of potential losses and damages that may arise out of a construction project. However, almost every state has passed legislation that aims to constrict the scope of indemnity provisions in the construction context. Colorado is the most recent state to pass such legislation which applies to virtually all construction contracts involving real property in the State that are executed after July 1, 2007.

Under Colorado's new statute, all broad and intermediate indemnity provisions are declared void and unenforceable. The statute provides:

> any provision in a construction agreement that requires a person to indemnify, insure, or defend another . . . for [damages or injuries] . . . caused by the negligence or fault of [that party or any other person] under the control or supervision of [that party] is void as against public policy and unenforceable.

The statute also voids contractual provisions which require the purchase of additional insured coverage for damages from acts or omissions that are not caused by the negligence or fault of the party providing such insurance.

In support of the statute, the Colorado General Assembly made several findings, including (1) it is in the best interests of the state its citizens and consumers to ensure that every construction business will be financially responsible for damages and/or losses that it causes; (2) the statute will promote competition and safety in the construction industry; (3) contract provisions that shift the financial responsibility for one's own negligence to another are in conflict with the intent of the law; and (4) if all businesses are responsible for their own actions, then construction companies will be able to obtain adequate insurance, the quality of construction will be improved, and workplace safety will be enhanced.

Colorado has joined the trend to eliminate indemnity and additional insured provisions that shift the responsibility for damages arising out of one's own negligence. Many form contracts and subcontracts will need to be compared to a particular jurisdiction's law to see if "broad" indemnity is enforceable.

by Ed Everitt

Bradley Arant Lawyer Activities:

Mabry Rogers presented on the topic of "Defective Specifications" on November 8, 2007 at The Thirty-Fifth Annual Symposium on Government Acquisition.

Rhonda Caviedes spoke on November 13, 2007 at a Policy Roundtable concerning "Alabama Environmental Law and Policy Affecting Green Building," sponsored by the Alabama Chapter of the U.S. Green Building Council.

Keith Covington spoke at a National Business Institute seminar on November 30, 2007 on "Guarding Against Ethical Issues" and "10 Tips for Using Depositions to Win Your Case."

Michael Knapp, **Arlan Lewis**, **Mitch Mudano**, **Jeff Peters**, and **David Pugh** presented a seminar entitled "The Fundamentals of Construction Contracts: Understanding the Issues" on December 5, 2007.

David Hume conducted a seminar on green building and its effects on the mechanical contracting industry in Atlanta, Georgia in December 2007.

Keith Covington, **Rob Dodson**, **Eric Frechtel**, and **David Owen** attended the 23rd Construction SuperConference held on December 12-14, 2007 in San Francisco, California.

Keith Covington recently published an article in *Alabama Construction News* entitled "Complying with Immigration Laws."

David Owen presented a seminar to the Alabama Society of Professional Engineers entitled "Professional Services Contracts and Risk Allocation" on January 15, 2008.

David Bashford and **Michael Knapp** attended the Carolinas AGC 87th Annual Convention on January 16, 2008 in Aventura, Florida.

David Pugh conducted a seminar on Building Codes on January 16, 2008.

The Construction Practice Group members attended a "Learning Day" on January 28, 2008 covering an in-depth review of "Defective Specifications."

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Michael Knapp and **Stanley Bynum** attended the ABA Forum on the Construction Industry's presentation covering "The 2007 AIA Documents: New Forms, New Issues, New Strategies" on January 31, 2008 in New York City.

David Pugh has been elected to serve as a member of the ABC Board of Directors for 2008.

Stanley Bynum will attend the American Bar Association Tort Trial and Insurance Practice Section's presentation entitled "The Butterfly Effect: How Surety and Fidelity Claims Handlers' Responses Shape Perceptions" on January 31, 2008 in New York.

Arlan Lewis will attend the ABA Forum on the Construction Industry's presentation covering "The 2007 AIA Documents: New Forms, New Issues, New Strategies," on February 7, 2008 in San Antonio, Texas.

Mabry Rogers will attend the annual meeting of the American College of Construction Lawyers on February 21-24, 2008 in San Antonio, Texas. Mabry will present a review of important insurance law decisions affecting the construction industry.

Wally Sears will be inducted as a new fellow in the American College of Construction Lawyers at the annual meeting on February 21-24, 2008 in San Antonio, Texas.

John Mark Goodman, **Jonathan Head**, **David Hume**, and **David Pugh** will participate in the 1st Annual Chili Cook-Off for the Alabama Chapter of the Associated Builders and Contractors at Sloss Furnaces on February 22, 2008.

Mabry Rogers will present a client seminar concerning "Common Sense Contract Negotiation and Administration" on February 28, 2008 in Palm Springs, California.

Rob Dodson, **Arlan Lewis**, **David Owen**, and **David Pugh** will present a seminar entitled "AIA Contracts" in Mobile, Alabama on March 25, 2008.

Michael Knapp, **David Bashford**, **Michael Griffin**, and **Nicholas J. Voelker** will be conducting a CLE seminar entitled "Condominium Construction Law Issues in The Carolinas" in Charlotte, North Carolina, on March 25, 2008, with **John Bond** as Moderator.

Joel Brown, **Patrick Darby**, **Arlan Lewis**, and **David Pugh** will present a seminar entitled "Construction Insurance, Bonding, and Liens in Alabama" on April 1, 2008 in Birmingham, Alabama. **Ed Everitt** will act as a moderator for the seminar.

Rhonda Caviedes, Michael Knapp and **Arlan Lewis** will attend the ABA Forum on the Construction Industry's Annual Meeting on April 24-25, 2008 in Palm Springs, California.

Rhonda Caviedes will co-present a workshop titled "Debate, Mitigate, or Wait: Addressing Unexpected Environmental Issues or Archaeological Features on the Construction Site" at the ABA Forum on the Construction Industry's Annual Meeting in Palm Springs, California, April 24-25, 2008. Ms. Caviedes will speak on the topic of unexpected environmental issues encountered on construction projects.

Sabra Barnett, **Joel Brown**, **Jonathan Head**, **Michael Knapp**, and **David Pugh** will present a seminar entitled "The Fundamentals of Construction Contracts in Alabama" scheduled for May 13, 2008. **Luke Martin** will act as a moderator for the seminar.

Rhonda Caviedes will speak at a seminar entitled "Current Issues in Stormwater Regulation" on May 30, 2008.

Sabra Barnett, **Keith Covington**, **Arlan Lewis**, **David Pugh**, and **Mabry Rogers** will present a seminar entitled "Construction Claims and Litigation/Arbitration" on June 13, 2008.

Jonathan Head and **David Bashford** are co-authoring a chapter on "Remedies" in the Second Edition of the *Construction Law Handbook* with Nick Gaede. The publication date is currently unknown.

For more information on any of these activities or speaking engagements, please contact Rebecca Harris at 205-521-8504.

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The lawyers at Bradley Arant Rose & White LLP, including those who practice in the construction and procurement fields of law, monitor the law and regulations and note new developments as part of their practice. This newsletter is part of their attempt to inform their readers about significant current events, recent developments in the law and their implications. *Receipt of this newsletter is not intended to, and does not, create an attorney-client, or any other, relationship, duty or obligation.*

This newsletter is a periodic publication of Bradley Arant Rose & White LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult your own lawyer concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact your lawyer or any of the lawyers in our group whose names, telephone numbers and E-mail addresses are listed below; or visit our web site at www.bradleyarant.com.

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BRADLEY ARANT ROSE & WHITE LLP **Second Quarter 2008**

CONSTRUCTION AND PROCUREMENT LAW NEWS

Recent federal, state, and local developments of interest, prepared by the firm's Construction and Procurement Group:

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Condominium Developers Beware: With Bad Real Estate Market Conditions Buyers Are Using Crafty Legal Arguments to Rescind Purchase Agreements

As recently as just two years ago, the condominium market was so hot and profitable that buyers rarely, if ever, attempted to rescind purchase agreements. Why would they? Many were making money immediately following the closing of the deal. As all of us are well aware, the real estate market has changed drastically in the last few years and now buyers are looking to crafty legal arguments to rescind purchase agreements they find themselves in under depressed market conditions.

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Lawsuits have started to pop up, especially in Florida, involving two main legal arguments: namely, (a) the use of the federal Interstate Land Sales Disclosure Act, and (b) an argument that changes made by developers during construction were "material and adverse" to what the parties agreed to at the time of purchase

The federal Interstate Land Sales Disclosure Act says that, within two years of executing purchase agreements, a developer must file property reports with the U.S. Department of Housing and Urban Development ("HUD") or agree to deliver units to owners within those two years. On projects where developers have failed to file with HUD and the project is two or more years late, buyers have attempted to use the federal statute to rescind purchase agreements because they claim they are in violation of federal law. Therefore, condominium developers should be cognizant of the exposure under this statute.

In addition, buyers are using the argument that changes made by the developer from the time of pre-construction purchase until substantial completion of the units are material and adverse. Rescission of contract is the appropriate remedy for buyers where they allegedly did not get what they bargained for. This approach raises the question of whether oral representations can be relied upon, or on the other hand, is the buyer strictly forced to rely only on the contract documents? In January 2008, a Miami developer promised to provide an "Olympic-style pool." The developer delivered a

pool that was 2,500 sq. ft. An International Swimming Pool is defined as 13,500 sq. ft. Even though the condominium documents specifically stated that the pool would be 2,500 sq. ft., the buyers claim they relied upon the oral representation of an "Olympic-style pool" during pre-construction purchase. Although final judgment in this case has yet to be rendered, in a not so good sign to developers, the court has recently denied summary judgment for the Miami developer.

The lack of case law in these attempts by buyers to rescind purchase agreements should alarm developers, because there is little way of knowing which way various courts will go in these cases. Therefore, in order to avoid exposure in the current real estate market conditions, developers should always consult with counsel before they orally represent anything to a potential buyer. In addition, developers should file with HUD as soon as possible or at the very least, make sure their projects do not carry over the two year threshold set forth in the Interstate Sales Disclosure Act.

by Nick Voelker

Courts Continue to Find CGL Coverage for Construction Defects

Defective work is a fact of life on most construction projects and can often be absorbed by contingencies or bid allowances. However, when curing defective work places a contractor or subcontractor at a significant loss on a project, disputes often arise that cause parties to seek additional funds to finance the work. Although coverage for a contractor's self-performed work is very often excluded by a general liability policy, coverage is often and, based on the trends of state court cases, increasingly available for defective work performed by subcontractors. A recent case from the Supreme Court of South Carolina demonstrates that an upper-tier contractor may have potential insurance recoveries when a subcontractor performs defective work.

In *Auto Owners Insurance Company, Inc. v. Newman*, a homeowner sued its general contractor for moisture problems arising out of stucco installation. The homeowner alleged that the stucco was improperly applied and caused moisture damage to the substrate underlying the stucco. The insurer argued that it had no liability or, at the very least, liability only for the repair to the substrate that did not include the costs of removing and reapplying the stucco. The court disagreed.

To fall within the general liability policy's insuring agreement, the insured first has to prove an "occurrence," *i.e.*, that an unexpected event caused "property damage" or "bodily injury." The court found property damage to the substrate materials and that the removal of the stucco to get to them would further constitute property damage. The insurer raised a common exclusion, called the "Your Work" exclusion, which disallows coverage for a contractor's self-performed defective work. This type of liability is generally covered by a warranty and not by a general liability policy. However, the "Your Work" exclusion contains an exception for property damage caused by a subcontractor. Since the general contractor did not self-perform either the stucco or substrate work, the court found that the subcontractor exception applied and coverage was available. In reaching its coverage conclusion, the court stated in the following very broad language—probably broader than justified by the general liability policy language itself—that "a CGL policy in the home construction industry is designed to cover the risks faced by homebuilders when a homeowner asserts a post-construction claim against the builder for damage to the home caused by alleged construction defects." Though technically inaccurate because it does not draw the distinction between self-performed and subcontracted work, the court's quote is becoming more a reality as many general contractors self-perform little, if any, work themselves and courts are finding coverage within the subcontractor exception to the Your Work exclusion.

Our advice to those who subcontract work is to look for any subcontractor contribution to defective work when it arises. Quite often, general liability coverage is available to help offset a loss in these circumstances.

by Jonathan Head

Immigration Compliance: The DHS Issues Supplemental Proposed Rule on Social Security "No-Match" Responses, Increases Penalties for Immigration Violations

There are two recent developments regarding work-place immigration compliance about which all construction industry employers should be aware. First,

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on March 21, 2008, the Department of Homeland Security ("DHS") issued a Supplemental Proposed Rule on Social Security "no-match" responses which is intended to validate DHS's previously implemented employer "safe harbor" protocol and clear the way for the Social Security Administration ("SSA") to resume sending out "no-match" notices. Then, on March 28, 2008, DHS implemented a regulation which substantially increases the monetary penalties assessed against employers found to have committed immigration compliance violations.

<u>The Supplemental Proposed "No-Match" Rule</u>. For years employers have received no-match notices for employees whose W-2 information does not match the information in the SSA database. The stated purpose of the no-match notice is not immigration enforcement but to help ensure that employee social security allocations are correct. Nevertheless, employers justifiably are concerned that the notice could give rise to a finding that the employer had knowledge of an employee's unauthorized status and lead to liability under the federal immigration laws. This concern is heightened when the no-match notices identify, in large or disproportionate numbers, employees in ethnic groups associated with undocumented workers. Until last year, it was unclear how employers should respond to these no-match notices.

DHS provided some guidance in an August 10, 2007 Final Rule which expressly stated that a no-match notice could lead to a finding that the employer had "constructive knowledge" of an employee's unauthorized status. This August 2007 Final Rule also outlined a protocol (the "safe harbor") for employers to follow that would prevent the employer from being attributed constructive knowledge based on the no-match notice. The Final Rule also made clear that an employer who did not follow the safe harbor procedure faced an increased risk of liability under the immigration laws.

The safe harbor procedures require that an employer give a "mismatched" employee 90 days to clear up the discrepancy with SSA. If the employee cannot, the employer must then re-verify the employee's work authorization using documents other than those bearing the questionable social security number. If the employee cannot resolve the discrepancy with SSA and cannot produce alternative documents, the employer must terminate the employee or risk liability if the employee turns out to be unauthorized.

Although the Final Rule was to go into effect on September 14, 2007, a lawsuit in a federal court in California stopped it. *AFL-CIO, et al. v. Chertoff, et al.*, No. 07-4472-CRB, D.E. 135 (N.D. Cal. 2007). The plaintiffs argued that the August 2007 Final Rule was inconsistent with the federal immigration laws, gave DHS and SSA impermissible authority, and would lead to discrimination and result in the firing of lawful workers. On October 10, 2007, Judge Charles R. Breyer entered a preliminary injunction barring implementation of the August 2007 Final Rule. Judge Breyer found that the rule would cause immediate harm to both employees and employers and held that the plaintiffs had raised serious concerns about its legality. Judge Breyer concluded that a rule which used the SSA database (which contained numerous errors according to an SSA report) for firings would discriminate against tens of thousands of legal workers and place an unfair burden on employers. The judge also held that DHS had not provided a "reasoned analysis" for its change in position that an employer who receives a no-match notice now can be held liable, without any other evidence of illegality, under the immigration laws. DHS appealed Judge Breyer's ruling and indicated that it planned to issue a supplemental proposed rule to address the matters raised in the judge's preliminary injunction.

DHS issued the planned Supplemental Proposed Rule on March 21, 2008. The new Proposed Rule seeks to provide the "reasoned analysis" Judge Breyer found lacking and respond to several other concerns. Significantly, this Proposed Rule *does not* make any changes to the text of the August 2007 Final Rule. Thus, if the Supplemental Rule becomes final -- and survives further legal challenge -- the safe harbor procedures for responding to Social Security no-match notices would finally become operable.

The Proposed Rule rescinds language in the preamble to the Final Rule which had stated that an employer who follows the safe harbor procedures will not be found to have engaged in discrimination. This was in response to one of Judge Breyer's articulated concerns -- that the Final Rule encroached on the authority of the Department of Justice ("DOJ"), and it is DOJ, not DHS, which is charged with enforcing the federal immigration law's anti-discrimination provisions. However, DOJ has issued additional guidance stating that an employer will not be held liable for discrimination if it follows the safe harbor procedures

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and then terminates an employee in accordance with DHS's no-match rule, so long as the employer applies those same procedures uniformly to all employees and does not act with a purpose or intent to discriminate.

The Increased Penalties for Immigration Violations. On March 28, 2008, DHS issued a final regulation which increased by approximately 30% the civil penalties imposed on employers for worksite immigration violations. Now, an employer found to have knowingly hired or employed an unauthorized alien is subject to civil penalties, for a first offense, of not less than $375 but not more than $3,200 for each unauthorized alien. These civil penalties increase to a range of not less than $3,200 but not more than $6,500 per unauthorized alien for a second offense and to a range of not less than $4,300 but not more than $16,000 per unauthorized alien for a third offense and any subsequent offenses. Additionally, federal contractors remain subject to debarment if they are found guilty of knowingly employing unauthorized aliens. The initial period of debarment is one year and may be extended if the employer continues to be in violation of the immigration laws. Even if knowledge of unauthorized status is not established, an employer is subject to civil penalties of between $110 and $1,100 per individual if it fails to satisfy the Form I-9 verification and record-keeping requirements. Additionally, if an employer is found to have engaged in a "pattern and practice" of worksite immigration violations, it is subject to criminal penalties, including fines of up to $3,000 per unauthorized alien and imprisonment of up to six months.

by Keith Covington

License Reminder: Forecast When You Will Need It, Get It, Keep It Current

The lack of a professional license (engineer, architect, some specialty subcontractors), or of a contractor's (or subcontractor's) license in the appropriate amount (or specialty) can be costly. In some states, one cannot enforce one's contract if unlicensed, and in a subset of those states, the lack of a license cannot be "cured" or made retroactive. And the blade has but one edge: your contracting party has the right to enforce the contract against you or your company and, notwithstanding that lawsuit by the other party, you cannot assert your contract defenses (because, of course, you cannot enforce the contract). In a recent case from an intermediate appellate court in California, *Vestra Resources, Inc. v. Thompson*, the court ruled that the unlicensed professional could not enforce its contracts for professional fees. The appellate court thus overturned an arbitration award in favor of the designer--and overturned the arbitrator's finding that the failure to obtain a license defense had been waived by the owner. This case could be reversed on further appeal, but it is a reminder: get your license; keep it in effect. If you are expanding (and we hope you are and are doing so profitably), you should forecast the need for a license. In some states, it is a misdemeanor to bid on a project when you or your company is not properly licensed in the state in which you tender your bid or proposal, and it is a misdemeanor for the owner to consider your bid or proposal. To make it more complicated, the licensing exams are sometimes administered at set times only, so that forecasting work in a state--and thus the need for a license--must be done very early.

by Mabry Rogers

Expanded Review of Arbitration Awards Rejected by Supreme Court

In *Hall Street Associates, LLC v. Mattel, Inc.*, the U.S. Supreme Court ruled that the Federal Arbitration Act ("FAA") supplied the exclusive grounds for judicial review of an arbitration award, and that any attempt to provide for increased judicial review of an arbitration award by contract would not be enforced. The decision means that parties seeking to challenge an unfavorable arbitration award are limited to the narrow grounds set forth by the FAA even if they contracted for broader review. Attempts to provide for expanded review in future contracts likely will not be enforced.

Section 10 of the FAA provides that a court must confirm an arbitration award unless the award resulted from fraud, evident partiality by the arbitrators, arbitrator misconduct, or the arbitrators exceeding their powers. 9 U.S.C. § 10(a) (2000). These grounds for attacking an arbitration award rarely exist and are difficult to prove. As a result, arbitration awards are difficult to overturn, even where arbitrators mistakenly interpret disputed facts or misapply applicable law.

Some parties to arbitration agreements view finality as an advantage to arbitration. Once the arbitrators make their decision, such parties can avoid the

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protracted and expensive battle through the appellate courts that often follows a bench trial or jury trial. Not everyone favors this finality, however, and some parties have bargained for increased judicial review of an adverse arbitration award in their arbitration agreements.

In *Hall Street*, for example, the arbitration clause between Hall Street and Mattel provided that a court could vacate an award by the arbitrators if the arbitrator's findings of fact were "not supported by substantial evidence" or if the arbitrator's conclusions of law were "erroneous." As a result of this provision, Hall Street successfully vacated an arbitration award in favor of Mattel by convincing a federal district judge in Oregon that the arbitrator had reached an erroneous conclusion of law.

The Ninth Circuit Court of Appeals reversed the district judge, however, reasoning that parties could not provide for expanded judicial review in their arbitration agreement. Other federal circuit courts, including the First, Third, Fifth and Sixth Circuits, had reached the opposite result and had enforced arbitration clauses that provided for heightened review. The U.S. Supreme Court granted review to resolve the split among the circuits. The Court concluded that language used by Congress in the FAA precluded expanded judicial review of arbitration awards.

Parties seeking expanded judicial review of their arbitration awards have few options in the wake of this decision. One option may be to attempt to arbitrate under state law, instead of federal law, in a state that allows expanded judicial review of arbitration awards. If the transaction from which the arbitration arises involves interstate commerce, however, this option likely is not available because federal law will preempt state law.

A second option, discussed by the dissent, involves conducting the arbitration pursuant to an order entered by a federal district judge so that the judge retains jurisdiction to review the outcome of the arbitration. It is not clear whether other justices support the dissent's views concerning judicial review of a court-ordered arbitration.

by Jim Archibald

Another Statutory Victory for Subcontractors in North Carolina Will Challenge Prime Contractors to Make Up for Lost Leverage

Adding to a growing body of subcontractor-friendly construction law (including extensive mechanic's lien and public construction bond recovery rights), the North Carolina legislature recently approved revisions to Section 143-134.1 of the North Carolina General Statutes that greatly limits retainage rights down the contractual chain on non-Department of Transportation ("DOT") public projects.

The revisions to Section 143-134.1, which took effect January 1, 2008, initially act to limit retainage rights on *public* projects to five (5%) percent on payments otherwise due prime contractors and sub-contractors. In addition, when the project is fifty (50%) percent complete, retainage from monthly payment applications will cease without some assertion of unsat-isfactory performance by the applicant. While it can be argued that these provisions benefit both prime contractors and subcontractors, in practice it is the subcontracting community that will benefit the most from these new requirements.

Historically, it has been common for local governmental owners to hold ten percent (10%) retainage on prime contractors. However, many state public entities (including the State Construction Office and University of North Carolina System) have in recent years more commonly utilized five percent (5%) as the prime contractual rate. At least in part, this trend reflects North Carolina's statutory requirement that prime contractors furnish payment and performance bonds on large public projects. Through bonding of prime contractors, public owners have an alternative protection against costs associated with defective or incomplete performance by prime contractors, which makes reduced retainage less of a risk.

Unlike with prime contractors, bonding of sub-contractors on North Carolina public projects is not statutorily required and most often is left to the dis-cretion of the prime contractor. While prime contractors often require performance bonds from their major subcontracts, many prime contractors rely solely on withheld funds to ensure complete and compliant performance by mid to lower level subcontractors. With the recent revisions to Section 143-134.1, the amount of retainage held on subcontractors can be as low as two

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and a half percent (2.5%) for the subcontractor's final payment application. This represents a significant limitation on the financial pressure a prime contractor can assert against its subcontractors to complete their work.

In understanding the "real world" impact of this revision, it is critical to note that the final ten percent (10%) of a subcontractor's payment on a project is often what the subcontractor realizes in profit. Removing a prime contractor's ability to withhold such a large portion of its subcontractors' profit lessens the leverage that prime contractor has at the end of the project to get work corrected and completed. Conversely, this retainage limitation will benefit subcontractors by allowing them earlier access to more of their project profit as the job progresses.

A special group of subcontractors will see an even more beneficial impact from this recent amendment. For trades that have reached final completion on or before the time that the project as a whole is fifty (50%) percent complete, the prime contractor generally is now required to make full payment of all amounts due (including retainage) within sixty (60) days of that subcontractor's request. For those involved early in a project, e.g., structural steel, piling, caisson and demolition subcontractors, this new provision ensures that they will no long have to wait until completion of the project as a whole to recover withheld retainage.

As stated above, while these revisions to Section 143-134.1 allow for earlier recovery of withheld retainage for both prime contractors and subcontractors, the new law will predominantly benefit subcontractors. However, it will be prime contractors that are left with deciding the most economical way to compensate for the corresponding loss of leverage against their subcontractors. One likely result will be that prime contractors will find it necessary to obtain performance bonds for more of their subcontractors, as merely being able to hold five (5%) retainage or less will not provide the security prime contractors need to ensure lower tier trades correct and complete their work. Additional bonding necessarily means additional cost, which will be reflected in bidding on public projects going forward.

In summary, while the revisions to Section 143-134.1 appear positive for prime contractors and subcontractors on public projects, it is the subcontracting community that really will reap the benefits. Prime contractors, on the other hand, will be faced with the corresponding question of how to make up for minimizing of their retained leverage and ensure adequate and complete performance by their subcontractors.

by David Bashford

Bradley Arant Lawyer Activities:

David Pugh was installed as a 2008 Board member for the Alabama Chapter of the Associated Builders and Contractors.

David Hume and **Arlan Lewis** attended the ABA Forum on the Construction Industry's presentation covering "The 2007 AIA Documents: New Forms, New Issues, New Strategies," on February 7, 2008 in San Antonio, Texas.

Mabry Rogers attended the annual meeting of the American College of Construction Lawyers on February 21-24, 2008 in San Antonio, Texas. Mabry presented a review of important insurance law decisions affecting the construction industry.

Wally Sears was inducted as a new fellow in the American College of Construction Lawyers at the annual meeting on February 21-24, 2008 in San Antonio, Texas.

Mabry Rogers presented a client seminar concerning "Common Sense Contract Negotiation and Administration" on February 28, 2008 in Palm Springs, California.

Rob Dodson, **Arlan Lewis**, **David Owen**, and **David Pugh** presented a seminar entitled "AIA Contracts" in Mobile, Alabama on March 25, 2008.

David Hume's comments regarding possible legal issues surrounding green building were recently featured in the Spring 2008 edition of Alabama Construction News Magazine in an article entitled *Green Building Finally Comes of Age*.

Michael Knapp, **David Bashford**, **Michael Griffin**, and **Nicholas J. Voelker** conducted a CLE seminar entitled "Condominium Construction Law Issues in The Carolinas" in Charlotte, North Carolina, on March 25, 2008, with **John Bond** as Moderator.

Joel Brown, **Patrick Darby**, **Arlan Lewis**, and **David Pugh** presented a seminar entitled "Construction Insurance, Bonding, and Liens in Alabama" on April 1,

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2008 in Birmingham, Alabama. **Ed Everitt** was the moderator for the seminar.

Sabra Barnett and **Keith Covington** attended the Alabama Associated Builders and Contractors annual Day on the Hill in Montgomery, Alabama on April 2, 2008.

Jim Archibald, **Jonathan Head**, **David Hume**, **Luke Martin** and **David Pugh** competed in the 1st Annual Chili Cook-Off for the Alabama Chapter of the Associated Builders and Contractors at Sloss Furnace on April 4, 2008.

Mabry Rogers presented a client seminar in Las Vegas, Nevada on April 22, 2008. The seminar focused on practical job administration and schedule methodology.

Rhonda Caviedes, Michael Knapp and **Arlan Lewis** attended the ABA Forum on the Construction Industry's Annual Meeting on April 24-25, 2008 in Palm Springs, California.

Rhonda Caviedes co-presented a workshop entitled "Debate, Mitigate, or Wait: Addressing Unexpected Environmental Issues or Archaeological Features on the Construction Site" at the ABA Forum on the Construction Industry's Annual Meeting in Palm Springs, California. Ms. Caviedes spoke to over 150 members of the Forum on the topic of unexpected environmental issues encountered on construction projects.

Rob Dodson, **David Hume**, **Will Manuel**, **David Owen**, and **David Pugh** presented a Construction Law seminar to the Mississippi Associated Builders and Contractors on May 1, 2008 in Jackson Mississippi. The seminar included topics on insurance, bonding, green building, project management and hot topics surrounding the construction industry.

Sabra Barnett, **Joel Brown**, **Jonathan Head**, **Michael Knapp**, and **David Pugh** will present a seminar entitled "The Fundamentals of Construction Contracts in Alabama" scheduled for May 13, 2008 in Montgomery, Alabama. **Luke Martin** will act as a moderator for the seminar.

Wally Sears will speak at the Mealy's Construction Litigation Conference in Philadelphia, Pennsylvania on May 20-21, 2008. Wally will present on two topics: (1) proof of damages for delay and disruption, and (2) termination, default, and material breach.

Joel Brown will join three Bradley Arant partners in speaking to the Huntsville, Alabama Chamber of Commerce on May 29, 2008, regarding issues which impact government and private sector contractors.

Rhonda Caviedes will speak at a seminar entitled "Current Issues in Stormwater Regulation" on May 30, 2008 in Birmingham, Alabama.

Sabra Barnett, **Keith Covington**, **Arlan Lewis**, **David Pugh**, and **Mabry Rogers** will present a seminar entitled "Construction Claims and Litigation/ Arbitration" on June 13, 2008 in Birmingham, Alabama.

Rob Dodson will attend the Mississippi Associated Builders and Contractors annual convention on July 10-12, 2008 at the Grand Sandestin, in Sandestin, Florida.

Jonathan Head and **David Bashford** are co-authoring a chapter on "Remedies" in the Second Edition of the *Construction Law Handbook* with Nick Gaede. The publication date is currently unknown.

Mabry Rogers will speak on the topic of "International Dispute Resolution" at the Society of Construction Law's 2008 International Construction Law Conference in London, England on October 5-7, 2008.

The Governing Committee of the American Bar Association Form on the Construction Industry appointed **Rhonda Caviedes** as a member of the Steering Committee for Division 10 – Legislation & Environment at the Forum's annual meeting in LaQuinta, California.

For more information on any of these activities or speaking engagements, please contact **Rebecca Harris** at 205-521-8504.

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CONSTRUCTION AND PROCUREMENT LAW NEWS

Recent federal, state, and local developments of interest, prepared by the firm's Construction and Procurement Group:

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Immigration Compliance: E-Verify

On June 6, 2008, President Bush amended Executive Order 12989 mandating that all federal contractors use E-Verify, an employment verification system, to check immigration status. On June 12, 2008, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council issued a proposed rule to the Federal Acquisition Regulation (FAR) implementing the Executive Order. Comments on the proposed rule are due by August 11, 2008. The government will consider all comments before issuing the final rule. Accordingly, it will likely take several months before this requirement is actually "the law" for federal contracts.

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Highlights of the proposed rule:

1. Once you are awarded a federal contract, you have 30 days to enroll in the E-Verify program. Once you are enrolled, you must use E-Verify within 30 days to verify the employment eligibility of all of your employees assigned to the contract at that time.

2. If you were already enrolled in E-Verify at the time of the contract award, you have 30 days to use E-Verify for your employees assigned to the contract.

3. You must use E-Verify for all employees you subsequently assign to or hire for the contract. You only have three days for each employee who is new to the contract, so you need to make sure you have procedures in place to verify quickly and accurately.

4. You must require all your subcontractors performing work exceeding $3000 for services or for construction to comply as well.

Effective Date. The Final Rule will apply to all contracts awarded after the effective date. It will not apply to federal contracts existing on the effective date. The proposed rule, however, directs contracting officers who have indefinite-delivery/indefinite-quantity contracts to seek amendments that would have E-Verify requirements for future orders if there is (1) at least six months still

remaining on the contract and (2) a substantial amount of work expected to be performed.

Enrolling, Waivers, and Consequences of Non-Compliance. To participate in the E-Verify program, you must enter into a Memorandum of Understanding (MOU) with the Department of Homeland Security and the Social Security Administration. Under the MOU, you will agree to abide by legal hiring procedures and ensure that no employee will be unfairly discriminated against as a result of the E-Verify program. Participation in the E-Verify program does not exempt you from the responsibility to complete, retain, and make available Forms I-9, but participation in E-Verify will provide you with some deference of compliance upon inspection, such as a "good faith" exception to any civil or criminal liability.

The proposed rule provides for waivers of the E-Verify requirements only under "exceptional circumstances." You seek a waiver from the head of a contracting agency.

Compliance with the E-Verify rule will be a performance requirement for a federal contract. You will be required to release information relating to compliance to contracting officers or other officials. Failure to comply could result in the termination of the contract.

by Sabra Barnett and Keith Anderson

Immigration Compliance: State Immigration Rules

Recently, there has been much activity among state legislatures to pass their own versions of immigration reform, resulting in a hodgepodge of rules that have to be followed in addition to those prescribed by the federal government. Although a majority of this legislation regulates social programs provided to illegal immigrants, some states have gone so far as to create their own employment enforcement laws.

For those contractors doing business in various states, it is important to know the immigration compliance rules for those states. Below is a survey of employment-related legislation that has been implemented in the past several years. However, it is important that if contracting in these states, you check with your attorney about compliance. These laws are changing rapidly.

Arizona

- Prohibits employers from knowingly or intentionally hiring undocumented workers, and requires all employers to use the Basic Pilot program to determine employees' eligibility status. Penalties include the loss of a business license.

Arkansas

- Prohibits state agencies from contracting with businesses that employ undocumented immigrants. Contractors must certify that they do not employ or contract with undocumented workers. Contractors must obtain certification from all subcontractors. Penalties include the termination of the contract and actual damages.

Colorado

- Requires prospective state contractors to use E-Verify to confirm the employment eligibility of new hires. Penalties include the termination of the contract, actual, and consequential damages.
- Creates hiring requirements in addition to those required under the Federal Immigration Reform and Control Act. The Director of that department is authorized to conduct random audits of employers to obtain the documentation.

Georgia

- Requires state contractors to use E-Verify.

Iowa

- Businesses that receive state economic development grants must certify that all employees are authorized to work in the United States.

Louisiana

- Prohibits businesses from employing unauthorized workers. Establishes civil penalties for violations up to $1,000 for each unauthorized worker. Allows any state agency or department to conduct an investigation into an employer's hiring policies, provides for cease and desist orders, and subjects an employer to penalties up to $10,000 for violations.

Massachusetts

- Prohibits the use of undocumented workers on state contracts. Contractors are required to certify that they shall not knowingly use undocumented workers and shall verify the immigration status of all workers assigned to the state contract. Violation of the terms is a breach of contract, subjecting the

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contractor to monetary penalties, suspension, and/or termination of the contract.

Michigan

- Directs state agencies to consider a variety of factors when awarding or canceling contracts with private businesses including the immigration and residency status of persons employed by the contractor, and whether the use of non-citizen workers would be detrimental to state residents or the state economy.

Mississippi

- Requires all employers to use E-Verify. Creates cause of action against employers for terminating an authorized worker while employing an unauthorized worker. Penalties include loss of business license.

Missouri

- Prohibits employers from employing unauthorized workers. Requires E-Verify for state contractors. E-Verify is optional for private employers but is an affirmative defense to a charge that the employer knowingly hired an unauthorized worker. Provides for the revocation of business licenses and the termination of state contracts.

Minnesota

- Requires state contractors to use E-Verify.

Nevada

- Upon a finding by the U.S. Government that an employer has violated IRCA, the Nevada Tax Commission shall hold a hearing and fine the employer if found to have willfully, flagrantly or otherwise egregiously violated the law.

New Hampshire

- Prohibits the employment of unauthorized workers. Provides for penalties up to $2,500 for terminating an authorized worker while employing an unauthorized worker.

Oklahoma

- Requires public employers to use E-Verify. Creates cause of action against employers for terminating an authorized worker while employing an unauthorized worker.

Pennsylvania

- Prohibits employers from using illegal immigrants on projects financed by grants or loans from state government. Penalties include repayment of loan with interest.

Rhode Island

- Requires state contractors to use E-Verify.

South Carolina

- Employers must enroll in E-Verify or verify that the employee has a valid driver's license. Provides for a cause of action by fired workers if they are replaced with unauthorized workers. Felony offense for harboring an illegal immigrant. Employer in violation may lose business license.

Tennessee

- Prohibits employers from knowingly hiring illegal immigrants. Penalties include loss of business license. There is a safe harbor provision for employers using E-Verify.

Texas

- Requires employers receiving public subsidies to certify the legal status of its workers. Employers found in violation of this Act must repay the subsidy with interest.

Utah

- Requires public employers to use E-Verify. Creates a cause of action for the termination of a lawful employee while retaining an unauthorized alien in the same job category.

Virginia

- Suspends the business license of a company whose officers or directors are convicted under federal law for having a pattern or practice of employing unauthorized aliens in Virginia. Requires employers signing state contracts to state that they will not knowingly hire unauthorized aliens.

West Virginia

- Prohibits employers from employing unauthorized workers. Penalties include revocation of business licenses.

by Sabra Barnett

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Lien Preferences in Alabama

In *Ex parte Theresa Lawson d/b/a The Design Company*, the Alabama Supreme Court recently addressed the priority of mechanics liens and mortgages. It overturned a decision of the Court of Civil Appeals unfavorable to mechanics lien claimants.

Brian Homes built several homes on properties it owned in Madison County. Theresa Lawson was a subcontractor to Brian Homes. To finance construction, Brian Homes obtained a construction loan secured by a mortgage on the properties. After the homes were completed, but before Lawson filed her liens, the homes were sold to initial homeowners and the construction loan was paid in full. To obtain the money to purchase the homes, the homeowners mortgaged the properties to residential lenders. The residential lenders had no notice of Lawson's potential liens. Lawson recorded her mechanics liens after the residential mortgages were recorded.

The Court of Civil Appeals held that, even though Lawson commenced work before the residential mortgages were recorded, the residential mortgages had priority over her mechanics liens. It reasoned that the lenders had satisfied the construction mortgage without notice of Lawson's liens. Because they had no knowledge of Lawson's liens, they should be equitably subrogated to the rights of the construction lender, who filed its construction mortgage before Lawson commenced work. This would leave Lawson in the same position she occupied at the time she decided to perform the work. By subrogating the residential lenders to the rights of the construction lender, Lawson's priority would not change. She started in a subordinate position. The Alabama Mechanics Lien statute does not promise that mechanics liens will not be subject to equitable subrogation when equity requires it. Because the residential lenders had no notice of Lawson's potential liens and because the construction industry relies on lenders to finance construction and home ownership, the residential lenders were entitled to priority over Lawson, as subrogees to the priority position of the construction lender.

The Alabama Supreme Court reversed the Court of Civil Appeals. In doing so, it examined the Alabama Mechanics Lien statute and Alabama court decisions on the doctrine of equitable subrogation. Someone who claims equitable subrogation must meet five requirements: (1) the money was lent at the instance of the debtor to extinguish a prior encumbrance, (2) the new lender reasonably expected that it would enjoy the position of the old lender, (3) the whole debt was paid in full, (4) the new lender was ignorant of the lien, and (5) the lien claimant would not be "burdened or embarrassed." The court held that the residential lenders could not satisfy the first and fourth requirements. As to the first requirement, the loans were made at the request of the homeowners, not Brian Homes. As to the fourth requirement, the lenders could not claim they did not have notice of Lawson's potential mechanics liens. Section 35-11-211 of the Alabama Mechanics Lien statute provides that mechanics liens "shall have priority over all other liens, mortgages or encumbrances created subsequent to the commencement of work. . . ." Thus, by statute, the residential lenders were given constructive notice that a lien could be filed that would have priority over their interests. The plain words of the statute require that mechanics liens have priority over all other liens, mortgages or encumbrances created subsequent to the commencement of the work. Therefore, the constructive notice given by the mechanics lien statute defeated the lenders' claims of equitable subrogation.

The Court of Civil Appeals decision created uncertainty over the priority status of mechanics liens. Although a lien claimant could wait the statutory period to file its lien, it would be at risk of losing priority to subsequent claimants. Had the Alabama Supreme Court not overturned the lower court decision, mechanics lien claimants would have had difficulty determining exactly when to file a mechanics lien to avoid losing rights to persons coming after them claiming interests in the property.

by Axel Bolvig

"No Damage For Delay" Clause Is Enforceable Under California Law and Bars Subcontractor Pass-Through Claim for Delay Damages brought under the *Severin* Doctrine

The Court of Federal Claims has recently held that under California law, a contract with a clear "no damage for delay" clause is enforceable by a prime contractor in its subcontracts, and because this clause is an iron-bound bar to the subcontractor's claim, the United States was entitled to dismissal of the pass-through, delay claim brought under the *Severin* doctrine.

In *Harper/Nielsen-Dillingham v. U.S.*, the prime contractor, Harper, asserted claims against the U.S. on behalf of a subcontractor, KCI, for delay damages, as well as other claims. The contract between Harper and KCI contained a clear "no damage for delay" clause. Pursuant to the contract, if KCI experienced delays caused by Harper or the U.S., it was only entitled to additional time to

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complete the contract, not damages. The project experienced significant delays, and upon completion of its subcontract, KCI sued Harper under the Miller Act for the unpaid balance of its contract as well as $770,565.00 for delay damages. KCI and Harper later settled this lawsuit and executed a settlement agreement settling all claims between the parties except for KCI's claim for equitable adjustment from the U.S. with which Harper agreed to cooperate.

After the government's contracting officer denied KCI's equitable adjustment claim, Harper and KCI entered a second agreement titled "Claims Presentation and Prosecution Agreement" ("Claims Agreement"). In the Claims Agreement the parties acknowledged that Harper continued to be liable to KCI for any recovery which Harper might obtain from the U.S. as a result of KCI's claim. Harper was only liable to KCI if Harper recovered from the U.S.

Pursuant to the *Severin* doctrine, Harper brought suit against the United States on behalf of KCI asserting its claim for delay damages. The *Severin* doctrine allows a prime contract to assert claims of subcontractors as "pass through" claims, but only when the prime contractor remains potentially liable to the subcontractor for the claims. The subcontractor cannot sue the United States directly because, under the Tucker Act, the United States has only agreed to allow suits against it by parties who have a direct contractual relationship with the United States.

The government requested that the court dismiss the delay claims asserting that Harper had no potential liability to KCI because the subcontract in question contained a "no damage for delay" clause. Harper countered that under California law, which was applicable to the contract, a "no damage for delay" clause was not enforceable, and Harper was potentially liable to KCI for these damages.

The court examined California law as it applies to a "no damage for delay" clause and found that California enforces such contract provisions when they are clear and unambiguous. The court specifically considered whether the California statute governing contracts with state and local government agencies would apply to Harper's claims, and the court found no basis for applying this statute primarily because the United States did not meet the definition of a state or local government agency. The court also considered the plaintiff's argument for exceptions to the enforcement of "no damage for delay" clauses, and found that if such exceptions existed, the Plaintiff failed to present any evidence to support the application of any of the potential exceptions. Furthermore, the court specifically noted that California had not embraced any of the traditional exceptions to enforcement of a "no damages for delay" clause.

Because the court found that the "no damage for delay" clause was enforceable, KCI had no claim for delay damages against Harper from the inception of its subcontract. Understandably, the court held that because KCI never had a delay claim, the Claim Agreement entered by Harper and KCI could not be used to revive, or in this case, create a viable claim for purposes of the pass-through claim against the government.

Because the KCI subcontract contained an enforceable "no damage for delay" clause, the court found that Harper had an iron-bound bar to KCI's pass through claim, and consequently the delay claim was dismissed.

by Rob Dodson

North Carolina Lien Law: Subcontractors Win Crucial Subrogated Claim of Lien on Real Property Lien Law Hierarchy Issue

Recently, in *Carolina Building Services' Windows & Doors, Inc. v. Boardwalk, LLC*, the North Carolina Supreme Court took up issues pertaining to the lien law hierarchy for "Subrogated Liens on Real Property" created by the North Carolina General Statutes. The North Carolina Supreme Court held that a default judgment in favor of an owner of real property against its general contractor cannot extinguish a subcontractor's lien on real property.

Boardwalk, LLC ("Owner") entered into a contract with Miller Building Corporation ("Contractor") for the construction of a condominium project. Before completion, Contractor removed its personnel and equipment from the project site and failed to pay its subcontractors, including the plaintiff Carolina Building Services' Windows and Doors, Inc. ("Subcontractor").

In North Carolina, a subcontractor or supplier can acquire no better lien rights by subrogation than those of the general contractor and is bound by any defenses available to the owner against the general contractor. In this case, Subcontractor properly gave notice of its claim of lien upon funds, filed a subrogated lien, and filed suit against Owner and Contractor to perfect its lien rights. However, the Contractor failed to answer or appear, and the trial court entered a default judgment against Con-

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tractor. Subsequently, Owner filed a cross-claim against Contractor and also obtained a default judgment against Contractor. The trial court granted summary judgment to Owner on Subcontractor's lien claims based on the entry of the default judgment. The trial court held that because Owner established it owed no money to Contractor through default, Subcontractor could not have a claim of lien against the property.

The North Carolina Supreme Court reversed and found the default judgment could not limit Subcontractor's lien rights. In support of its decision, the North Carolina Supreme Court noted that, pursuant to N.C.G.S. 44A-23, "upon filing of a notice and claim of lien and the commencement of an action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent." The Contractor's failure to answer or appear constituted an "action" by defining it broadly as "a thing done." Therefore, the Contractor's action had the effect of prejudicing Subcontractor in contravention of the North Carolina lien law statute, and, therefore, Subcontractor should have a right to present evidence concerning the merits of its claim of lien.

In many instances, subcontractor liens are the result of a "disappearing" general contractor, resulting in unpaid bills on a project. Prior to this decision, in North Carolina, owners could obtain a default judgment against the general contractor and use that default judgment as a quick and inexpensive way for refusing to pay the subcontractors subrogated lien claims. Now, that argument is no longer available to owners in North Carolina, who will now additionally be required to argue the merits of the subcontractor's lien claims.

by David Bashford and Nick Voelker

Alabama Supreme Court Rules on Relationship Between Letters of Credit and Arbitration

In today's economic environment, we are seeing more and more real estate deals and the construction projects affiliated with those deals go bad or run into financial problems. All parties involved -- developers, contractors, subcontractors, lenders and buyers -- need to remain vigilant in their knowledge of the terms of their deal before signing on the dotted line.

In *Holiday Isle, LLC v. Beth Adkins, et al.*, the Alabama Supreme Court reversed the decision of the trial court, but in so doing affirmed the Court's precedent in dealing with letters of credit issues and arbitration issues that often arise in a development project.

Holiday Isle, LLC was the developer of a condominium project. Beth Adkins was one of several purchasers ("the purchasers") who agreed to pre-purchase a condominium unit from Holiday Isle prior to construction. The purchasers all signed preconstruction purchase agreements and escrow agreements with Holiday Isle. The purchase agreements required an earnest money deposit, but allowed the purchasers to satisfy that obligation with cash or with a letter of credit issued in favor of Holiday Isle. All of the purchasers in this instance obtained letters of credit for their escrow. The purchase agreements said that if purchasers were to default, Holiday Isle "shall draw on the existing Letter of Credit . . . with said funds to be delivered to [Holiday Isle] as liquidated damages."

Holiday Isle had contracted with the purchasers to complete the condominiums within two years. Toward the end of the two years, a dispute arose over completion. On the one hand, the Town of Dauphin Island issued a certificate of occupancy on March 28, 2007, and the purchasers conducted a pre-closing inspection on April 2, 2007. On the other hand there were parts of the condominium units that the purchasers claimed were not complete within two years as they had been promised. As a result, the purchasers told Holiday Isle they were not closing and wanted their letters of credit back. Holiday Isle in response set a closing date, stating it had met its obligations.

The purchasers filed suit seeking a declaration of their rights under the purchase agreements with Holiday Isle and also seeking a Temporary Restraining Order ("TRO") preventing Holiday Isle from collecting on the Letters of Credit. Holiday Isle in response moved to compel arbitration pursuant to a clause in the purchase agreement.

On July 30, 2007, the trial court ordered the case to arbitration. On October 11, 2007, Holiday Isle filed an objection to the TRO arguing, among other things, that the trial court lacked jurisdiction to enter a TRO because the case had been ordered to arbitration. On October 18, 2007, the trial court appointed an arbitrator and issued a preliminary injunction preventing Holiday Isle from negotiating the letters of credit. The trial court entered the injunction stating that the letters of credit were inextricably intertwined with the arbitration issues and that nothing should happen to the letters of credit until the arbitration resolved the matter.

The Alabama Supreme Court first ruled that the trial Court had jurisdiction to enter a TRO after ordering the

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matter to arbitration. The Alabama Supreme Court then turned to the merits of whether the TRO should have been granted.

The Court first noted the purpose of letters of credit and stated that they exist independent of the underlying contract – in this instance the purchase agreement. The Court then analyzed the parties opposing views on how the independent letters of credit should be handled. To prevent an underlying dispute to preclude the drawing of a letter of credit, the Court reversed the trial court's injunction and allowed Holiday Isle to move forward with negotiating the letters of credit.

The Alabama Supreme Court's decision gives trial courts the option of ruling on certain matters outside the arbitration setting, if the contractual language of an agreement or the rules called for by the arbitration agreement provide for such leeway to the trial court or if they are needed to preserve the status quo. The Court also upholds the rights of beneficiaries to letters of credit to draw on those letters as the terms provide, regardless of any disputes in the underlying transaction (absent, of course, a showing of fraud by the beneficiary). Because the ruling focuses so heavily on the contractual agreements between the parties, developers, contractors and all persons involved in real estate development or construction contracts should pay close attention to the specifics of their agreements.

by Mike Brown

To Get or Not to Get: An Important Limitation on Qui Tam Lawsuits

To help enforce various prohibitions against false claims to the Federal government, Congress authorized private actions against anyone who knowingly "makes, use, or causes to be made or used, a false record or statement **to get** a false or fraudulent claim paid or approved by the Government." This has helped spawn a growing number of *qui tam* lawsuits where individuals, acting they say on behalf of the Federal government, sue contractors for submitting false claims. Sometimes the "relator" (the name for the person suing as a *qui tam* plaintiff) had a hand in creating the false claim.

In a recent case decided by the US Supreme Court, *Allison Engine Co., Inc. v. U.S.*, the "false claim" was a number of certifications that the second tier vendor had complied with the technical specifications in manufacturing the equipment and that various quality control procedures had been followed during manufacturing. These certifications had been given to the contractors up the chain and, so the plaintiffs alleged, the Government made progress payments based upon these documents. Because the plaintiffs said the manufacturing procedure was not so perfect as the certifications declared, a "false claim" had been made and the Government had paid based upon that claim. A jury agreed, but the trial court reversed the jury because the plaintiffs failed to show that a false or fraudulent claim was actually presented to the Government. They had shown that the Government paid the prime contractors, and that money was used to pay the allegedly fraudulent invoices coming from the second tier manufacturer.

The Supreme Court agreed with the trial court, stating that a *qui tam* plaintiff must show that the target defendant itself had an intent to present a false claim to the Government and that it intend that the Government pay for that false claim. This is a key reading of the statute, requiring "intent" by the alleged bad actor. The Supreme Court found this requirement of intent in the words "to get" above: "'To get' denotes purpose, and thus a person must have the purpose of getting a false or fraudulent claim" paid in order to be liable.

As the Supreme Court itself noted, this reading of "to get" is its natural reading, and it prevents the False Claims Act from having an almost boundless reach into everyday acts. A "false claim" would attach to a foreman's certifying the rebar was at 1 inch elevation, when it in fact was at 1 and 1/4 inches, so long as the General Contractor received some federal funds – maybe even on a different job.

by Mabry Rogers

Door-Closing Statutes

A recent decision from the Alabama Supreme Court, *TradeWinds Env. Rest., Inc. v. Brown Bros. Constr.,* demonstrates the importance of complying with state statutes and regulations regarding the certification to conduct business in foreign states. Be sure to qualify your business with the foreign state's Secretary of State, and any other required agencies, prior to executing an agreement and commencing performance.

TradeWinds Environmental Restoration, Inc. ("TradeWinds"), a New York-based company which performs post-disaster response, environmental remediation, and restorations services, filed suit against Brown Brothers Construction, LLC, ("BBC") an Alabama-based general con-

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tractor, Shoalwater Condominium Association ("Shoalwater"), and the Windward Condominium Association ("Windward") alleging that Windward owed it $210,024.75 and that Shoalwater owed it $188,814.25 for monies due under a contract. TradeWinds entered into the contract with BBC following Hurricane Ivan. The contract provided that TradeWinds would perform structural-drying services and restoration at a number of condominiums along the Gulf Coast, including the Shoalwater and Windward properties. TradeWinds alleged that it completed the work contemplated by the contract, but that BBC failed to pay it the amounts due under the contract.

BBC, Shoalwater and Windward moved for summary judgment on grounds that TradeWinds' claims were barred by Alabama Code § 10-2B-15.02, the Alabama "door closing" statute, because TradeWinds is a foreign corporation that had not qualified to do business in Alabama. The trial court granted the motion for summary judgment noting that in prior decisions, the Alabama Supreme Court interpreted the door-closing statute to bar lawsuits brought by an out-of-state, corporation who failed to obtain a certificate of authority to transact business from the secretary of state.

On appeal, TradeWinds argued the trial court erred when it entered summary judgment in favor of BBC, Shoalwater, and Windward because the contract at issue involved interstate commerce, and therefore, the door-closing statute was inapplicable to the action.

The Alabama Supreme Court affirmed the trial court decision. Although the Court agreed with TradeWinds' assertion that the Commerce Clause protects foreign corporations from the penal effects of the door-closing statute where the contract involves interstate commerce, the Court noted that TradeWinds failed to allege that its labor, materials, and service were incident to an interstate sale. Accordingly, the Court held that the contract at issue was intrastate, not interstate, in nature. The Court also rejected TradeWinds' equitable estoppel claim. The Court stated that even if the result were harsh, the door-closing statute prevents a non-qualified corporation from maintaining a proceeding in this state under any theory sounding in contract. The Court concluded that a foreign corporation cannot circumvent the door-closing statute by merely labeling the claim as something other than a contract claim.

Many states require foreign corporations to register with a state's Secretary of State in order to transact business in that state. Failure to comply with the relevant statutes and regulations may result in your contract being void and unenforceable. In certain states, the violation of these statutes may also involve criminal charges. Ensure that you qualify your business prior to executing an agreement or performing work to protect your rights to recover for your effort.

by Michael C. Griffin

Earth to General Contractors [or Contractors Beware]: Follow Bond Terms When Terminating Subcontractors

A Florida State appellate court recently ruled that multiple letters declaring a subcontractor in default were not enough to trigger the liability of a subcontractor's performance bond surety because these letters failed to follow the precise terms of the bond in notifying the surety of a default termination.

Even though the general contractor incurred over $600,000 in cost overruns to complete the defaulted subcontractor's work, and even though a jury found the original subcontractor breached its subcontract and was liable for these damages, the court in *Current Builders of Florida, Inc. v. First Sealord Surety, Inc.*, affirmed the lower court ruling that the performance bond surety could not be held liable.

The court's ruling was based on a strict reading of the terms of the performance bond default provisions. The performance bond at issue required that, in order to trigger the surety's obligations under the bond in the event of a default termination, the general contactor was required to: (1) "formally terminate the subcontractor's right to complete the contract"; and (2) "agree to pay the balance of the contract price, if any, to the surety."

The general contractor, during the course of the project, wrote numerous letters declaring the subcontractor in default, each of which was copied to the surety. However, none of these "notice of default" letters ever formally terminated the subcontractor. Several days after the last "notice of default" letter was sent, the general contractor informed the subcontractor and surety that it had removed the subcontractor from the job and hired a replacement subcontractor. At no time prior to announcing the termination of the subcontractor and hiring of a new subcontractor, did the general contractor formally invoke the terms of the bond, demand performance from the surety or offer to tender the remaining contract balance to the surety.

In affirming the lower court's ruling that the general contractor did not comply with the terms of the bond, the

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appellate court seized on the general contractor's failure to agree to pay the remainder of the contract price to the surety, or to a subcontractor selected by the surety, as the key factor in its holding. By failing to take this step, the court held that the general contractor "did not permit the surety to perform under the bond" which was "part of [the general contractor's] obligation."

With respect to the notice provided by the general contractor, the court also found persuasive the testimony of the surety's expert who opined that, to be effective, the default letter "would have had to have a declaration of default, a termination, and probably an agreement that they're going to release the remaining project funds to the surety." Because the letters by the general contractor merely declared the subcontractor in default, the court held that the notice given was insufficient to trigger the surety's obligations under the bond.

As the decision in *Current Builders of Florida* demonstrates, the safest practice in terminating a subcontractor is to precisely follow the terms of the performance bond and subcontract in both notifying the surety and arranging for replacement subcontractor.

by Thomas Lynch

Contractor Awarded Over $6.2 Million on Cumulative Impact Claim

The Court of Federal Claims recently awarded a general contractor approximately $6.2 Million for a cumulative impact and delay claim against the federal government. The case, *Bell BCI Co. v. United States*, arose out of the construction of a laboratory building at the National Institutes of Health (NIH) in Bethesda, Maryland. The building's original design called for five stories and a basement with a total price tag of $63.6 million. During construction, NIH issued over 200 contract modifications, including the decision to add a new floor. These changes caused the contract price to increase by 34% to a total cost of $85 million.

In its defense, the government mainly argued that Bell's cumulative impact claims were barred by the doctrine of accord and satisfaction. However, the court found the government's defense to be without merit. None of the contract modifications on the project included payments to Bell for the cumulative impact of NIH's changes nor did Bell ever expressly release its cumulative impact and labor inefficiency claims. The court also rejected the government's claim for liquidated damages.

In calculating the cumulative impact claim, Bell's expert found that approximately 25% of its total labor hours were due to lost productivity caused by NIH's changes on the project. The court adopted the expert's recommendation and found Bell was due approximately $2 million for its cumulative impact (or labor inefficiency) claim. In addition, the court awarded Bell $1.6 million in delay damages for its extended general conditions costs, 10% profit on the labor inefficiency and extended general conditions costs, $1.6 million for disputed extra work orders that had not been resolved, and Bell's unpaid balance for a total amount of approximately $6.2 million.

Bell also attempted to "pass through" claims of five subcontractors. The record incorporated all five subcontractors' underlying claims, but the court only granted the claim of the one subcontractor who actually testified at trial. While noting the other four subcontractors may have had viable claims, the court found that Bell failed to submit any specific evidence on their behalf and they did not present any witnesses at trial.

This case is a prime example of how numerous design changes can cause a construction project to get completely out of hand. The fact that Bell never expressly released its cumulative impact claims proved to be a key factor. The practical lesson of course is that you should try to avoid releasing a cumulative impact or labor inefficiency claim, especially where the owner has issued numerous design changes on a project. While contract modifications or change orders may compensate for the direct costs of an owner's changes, they usually do not reimburse for indirect costs that are difficult to ascertain at the time.

by Ed Everitt

Bradley Arant Lawyer Activities:

Rob Dodson, **David Hume**, **Will Manuel**, **David Owen**, and **David Pugh** presented a Construction Law seminar to the Mississippi Associated Builders and Contractors on May 1, 2008 in Jackson Mississippi. The seminar included topics on insurance, bonding, green building, project management and hot topics surrounding the construction industry.

Wally Sears spoke at the Mealy's Construction Litigation Conference in Philadelphia, Pennsylvania on May 20-21, 2008. Wally presented on two topics: (1) proof of damages for delay and disruption, and (2) termination, default, and material breach.

Sabra Barnett, **Joel Brown**, **Jonathan Head**, **Michael Knapp**, and **David Pugh** presented a seminar entitled "The

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Fundamentals of Construction Contracts in Alabama" scheduled for May 13, 2008 in Montgomery, Alabama. **Luke Martin** acted as a moderator for the seminar.

Sabra Barnett and **John Hargrove** spoke at a recent meeting of human resource professionals and risk managers regarding recent changes in the federal and state immigration laws on May 14 and 30, 2008.

Joel Brown joined three Bradley Arant partners in speaking to the Huntsville, Alabama Chamber of Commerce on May 29, 2008, regarding issues which impact government and private sector contractors.

Rhonda Caviedes presented a seminar entitled "Current Issues in Stormwater Regulation and Control" on May 30, 2008, in Birmingham, Alabama.

Rhonda Caviedes participated in a "LEED for New Construction and Major Renovations Workshop" presented by the U.S. Green Building Council on June 11, 2008, in Birmingham, Alabama.

Sabra Barnett, **Keith Covington**, **Arlan Lewis**, **David Pugh**, and **Mabry Rogers** presented a seminar entitled "Construction Claims and Litigation/Arbitration" on June 13, 2008 in Birmingham, Alabama.

Darrell Tucker attended the Alabama Associated General Contractors State Convention in Destin, Florida on June 19-22, 2008.

Rhonda Caviedes organized and chaired the Greater Birmingham Chapter of the National Association of Women in Construction's Annual Industry Appreciation Fundraiser and Banquet honoring construction industry businesses, partners, and members that support NAWIC's core purpose of enhancing the success of women in construction. The event was held in Birmingham, Alabama, on June 26, 2008.

Rob Dodson attended the Annual Meeting of the Associated General Contractors of Mississippi on June 26-28, 2008 in Gulf Shores, Alabama.

On June 27, **Jim Archibald** taught an in-house training seminar about key subcontract terms and project documentation for B.L. Harbert International project managers at the Associated General Contractors offices in Birmingham, Alabama.

Harold Stephens, a partner in the firm's Huntsville office, was elected as Vice President/President Elect at the recent annual meeting of the Alabama Defense Lawyers Association held in June at Sandestin, Florida. With almost 1200 members, ADLA is the fifth largest state lawyer defense organization in the nation.

Rob Dodson attended the Mississippi Associated Builders and Contractors annual convention on July 10-12, 2008 at the Grand Sandestin, in Sandestin, Florida.

Rhonda Caviedes was a panelist discussing recruiting, training, and retaining minorities and women in the construction workforce at the Southeast Manpower Tripartite Initiative ("SEMPTA") Meeting on "Tapping a Rich Resource: Recruiting Minority and Women Workers" held July 15-16, 2008, in Birmingham, Alabama.

Arlan Lewis attended the 2008 ALFA International Construction Practice Group meeting held in Chicago, Illinois on July 15-18, 2008.

Sabra Barnett spoke at a meeting of Huntsville human resource professionals on July 24, 2008 concerning recent changes to federal and state immigration laws.

Arlan Lewis served as a faculty member for the Hoar Construction, LLC's Mentoring Program "Contracting with Owners and Vendors" held on July 25, 2008.

Sabra Barnett will teach a segment of UAB's Construction Engineering Management Certificate Program being held in Cairo, Egypt from August 1-7, 2008. The Program focuses on providing graduate students with education that will enhance their ability to adapt to a rapidly changing global environment.

Rhonda Caviedes, Michael Knapp and **Arlan Lewis** will attend the ABA Forum on the Construction Industry's Fall Meeting "Winds of Change? The Consensus DOCS" on September 11-12, 2008 in Chicago, Illinois.

Mabry Rogers will speak on the topic of "International Dispute Resolution" at the Society of Construction Law's 2008 International Construction Law Conference in London, England on October 5-7, 2008.

Rhonda Caviedes, **Donna Crowe**, **Ed Everitt**, and **David Hume** will present a seminar on "Green or Sustainable Construction" in Birmingham, Alabama on November 13, 2008.

For more information on any of these activities or speaking engagements, please contact Rebecca Harris at
205-521-8504.

NOTE: YOU CAN FIND THIS NEWSLETTER AND PAST NEWSLETTERS ON OUR WEBSITE. IF YOU ACCESS THIS NEWSLETTER ON OUR WEBSITE, CASE-LINKS WILL BE AVAILABLE UNTIL THE NEXT NEWSLETTER IS PUBLISHED. WE DO NOT VIEW THIS NEWSLETTER AS WRITTEN FOR ATTORNEYS BUT RATHER FOR PRACTICING MEMBERS OF THE CONSTRUCTION INDUSTRY. IF YOU OR YOUR LAWYER WOULD LIKE TO KNOW MORE INFORMATION ABOUT A PARTICULAR ARTICLE OR WOULD LIKE THE CASE CITES, YOU MAY GO TO WWW.BRADLEYARANT.COM/PG_CONSTRUCT.CFM OR CONTACT ANY ATTORNEY LISTED ON PAGE 12 OF THIS NEWSLETTER.

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The lawyers at Bradley Arant Rose & White LLP, including those who practice in the construction and procurement fields of law, monitor the law and regulations and note new developments as part of their practice. This newsletter is part of their attempt to inform their readers about significant current events, recent developments in the law and their implications. *Receipt of this newsletter is not intended to, and does not, create an attorney-client, or any other, relationship, duty or obligation.*

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BRADLEY ARANT ROSE & WHITE LLP **Fourth Quarter 2008**

CONSTRUCTION AND PROCUREMENT LAW NEWS

Recent federal, state, and local developments of interest, prepared by the firm's Construction and Procurement Group:

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Final FAR Rule Published on Contractor Code of Business Ethics and Conduct and Self-Disclosure Requirements for Criminal Violations

The final FAR Rule on Federal contractors' Code of Business Ethics and Conduct and self-disclosure requirements for criminal violations was published on November 12, 2008, and becomes effective December 12, 2008.

There are significant implications to this FAR Rule which require immediate and serious review by all contractors or subcontractors performing any Federal contract or subcontract, particularly those in excess of $5 million and lasting more than 120 days. Given the complexities of the new Rule, this Alert is intended only to provide you with a basic overview of the major issues presented by the changes. We strongly urge you to contact your lawyer to familiarize you with the many aspects of the new Rule.

The changes become effective on December 12, 2008, and apply to any contract awarded on or after that date. One portion of the changes also has a substantial impact on any federal contract that is presently in existence or that has been closed out within the three year period immediately preceding December 12, 2008.

Effective December 12, 2008, the FAR will be amended to require Government contractors to:

1. Establish and maintain specific internal controls to detect and prevent improper conduct in connection with the award or performance of *any* Government contract or subcontract.

These internal controls require the establishment of an ongoing business ethics and compliance program to be implemented within 90 days after contract award. The requirement affects all contractors (and subcontractors) awarded contracts valued at more than $5 million and expected to last more than 120 days, with the exception of small businesses and contracts for commercial items (who are only required

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to have a written code of business ethics and conduct, and make a copy of that written code available to each employee engaged in performance of the contract). The ongoing business ethics and compliance program will require training at both the prime and subcontractor level and implementation of an internal control system. The internal control system is required to "establish standards and procedures to facilitate timely discovery of improper conduct in connection with Government contracts; and ensure corrective measures are promptly instituted and carried out." Additionally, the new Rule lists far-ranging and comprehensive measures that must be included in the internal control system as a minimum requirement.

2. Timely disclose to the agency Office of the Inspector General, with a copy to the contracting officer, whenever, in connection with the award, performance, or closeout of a Government contract performed by the contractor or a subcontract awarded thereunder, the contractor has credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity prohibitions found in Title 18 of the United States Code; or a violation of the civil False Claims Act (31 U.S.C. 3729–3733).

This self disclosure requirement applies to any contract awarded to any contractor (or subcontractor) valued at more than $5 million and expected to last more than 120 days. There are no exceptions. The reporting requirement is limited to each contract (and awarded subcontracts, at all tiers) in which the amended clause (FAR 52.203-13) is included and is limited to the types of violations listed. The reporting requirement remains in effect throughout the performance period and until three years after the contract has been closed out. If the contract in question is a Government-wide acquisition contract, multi-agency contract, or a multiple award schedule contract, then disclosure must be made to the OIG of the ordering agency and the OIG of the agency responsible for the basic contract. A knowing failure to disclose can result in suspension or debarment.

3. The Rule also provides as cause for suspension or debarment, knowing failure by a principal, until three years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of (a) violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity prohibitions found in Title 18 of the United States Code; (b) violation of the civil False Claims Act; or (c) significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in FAR 32.001, Definitions.

This provision for suspension or debarment applies to **all contracts and subcontracts of any size and duration**. There are no exceptions. While a contractor awarded a contract for less than $5 million or with a performance period of less than 120 days is not required to self-disclose criminal violations under the new FAR 52.203-13, under these new provisions that contractor still runs the risk of suspension or debarment if it knowingly fails to disclose. Thus, as a practical matter, all federal contractors, even if exempted from self-disclosure regulations elsewhere or not required to have ongoing ethics compliance programs, are required to disclose criminal violations or risk suspension or debarment. Additionally, this provision applies to any federal contract that is presently in existence or that has been closed out within the three year period immediately preceding December 12, 2008. The cause for suspension or debarment is not the underlying violation of law, but is the failure to disclose the violation.

The new FAR Rule contains a great number of inter-related definitions, policy guidelines, and requirements too numerous to list in this Alert. Again, given the many complexities of the new Rule, this Alert is intended only to provide you with a basic overview of the major issues presented by the changes. We strongly urge you to contact a lawyer to familiarize you with the many aspects of the new Rule.

by Jeremy Becker-Welts

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Subcontract Form Lien Waiver Unenforceable In Nevada

Most general contractors (and owners) use standard form contracts which contain a prospective waiver of lien rights. Such provisions should always be carefully reviewed with your lawyer before undue reliance is placed on them. *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, a recent case from Nevada, illustrates the point. Lehrer McGovern Bovis, as CM, entered into a subcontract with the fire-stopping sub; that subcontract incorporated by reference the CM's general conditions in its contract with the owner (Venetian Sands). Those general conditions had the effect of a promise, before any payment was made to the sub, by the sub "not [to] suffer or permit any lien or other encumbrance to be filed" against the project. The Nevada Supreme Court agreed with the trial court that the provision was against public policy and could not be enforced. The Court also agreed with the trial court that the "pay if paid" clause, too, was unenforceable because it violated the sub's statutory right to a mechanic's lien.

In some jurisdictions, if an Owner files an action to have a job declared a "no lien" job, and then spreads that finding on the public record, an advance lien waiver is enforceable. However, many states reach the conclusion stated above by the Nevada Supreme Court as to a prospective lien waiver, before any payments have been made.

This case does *not* involve the enforceability of a lien waiver signed with a monthly pay application, where presumably there is a payment to the sub or the GC. The analysis of the effect of the lien waiver in that circumstance is different because there is a payment.

In the case of each kind of waiver, some states have enacted statutes addressing the enforceability of lien waivers. When there is a statute addressing the point in a given state, the statute sometimes prescribes a form for a lien waiver to be enforceable. Hence, it may be advisable to have your lawyer advise you about this issue before entering a project in a state where you are not familiar with the particular laws applicable to construction contracts.

by Mabry Rogers

Contractual Provisions Matter: Insurer "Stuck Holding the ($6.2 million) Bag" Pursuant to Its Insured's Waiver of Subrogation Clause

In the recent case of *Lexington Insurance Company v. Entrex Communications Services, Inc.*, the Supreme Court of Nebraska affirmed the dismissal of an insurer's claims against a contractor pursuant to a contractual waiver of subrogation clause in the contract between the owner and the contractor. In *Lexington*, a television broadcast tower constructed by the contractor collapsed, causing approximately $6.2 million in damage to the tower and the owner's transmission building. Pursuant to the contractual provision requiring the owner to obtain property insurance, the owner had relied upon its existing, "all risk" property insurance policies rather than obtaining a specific insurance policy to cover the project. One of the owner's "all risk" insurers compensated the owner for the damage. The owner and the insurer then attempted to recover the money paid from the contractor, alleging that the contractor was grossly negligent in constructing the tower. The trial court dismissed both the owner's and the insurer's claims against the contractor. The insurer appealed the trial court's decision.

On appeal, the insurer argued 1) that enforcing a waiver of subrogation clause to bar a claim of gross negligence was against public policy and 2) that, even if not against public policy, the waiver applied only to "Work" property (as defined in the contract between the owner and the contractor). The Supreme Court of Nebraska disagreed. First, it held that it was not against public policy to bar a gross negligence claim, pursuant to a waiver of subrogation clause, because there was no risk that an injured party would be left uncompensated, a reason which has provided the basis for other courts to decline to enforce other contractual provisions (e.g., exculpatory and limitation of damage clauses). Moreover, the court found that enforcing the waiver clause served the important social goals of encouraging parties to anticipate risks and to procure insurance, thereby avoiding litigation (regarding

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whether a party was grossly negligent) and the disruption of projects.

Second, the court, adopting the approach taken by a majority of courts, held that the waiver applied to both "Work" and "non-Work" property. The court found that this approach was more consistent with the parties' agreement and that it furthered the purpose of the waiver clause (i.e., preventing litigation and the disruption of the project). Additionally, the court found that the approach taken by the minority of courts, which distinguishes between "Work" and "non-Work" property in construing a scope of the waiver of subrogation clause, was not reasonable because it was inconsistent with the waiver's purpose (i.e., it encourages, rather than discourages, litigation regarding whether "non-Work" or "Work" property was damaged) and it could produce different results depending on whether the owner purchased two policies or relied on one policy that covered both "Work" and "non-Work" property.

Aside from the result (the insurer was stuck paying the $6.2 million notwithstanding any actual negligence of the contractor), this case illustrates the importance of the provisions in a construction contract and how they affect the rights of not only the parties to the contract, but also related third parties, including insurance companies. Moreover, it reinforces the importance of carefully reviewing contractual provisions, including waiver of subrogation clauses, during contract negotiations.

by Darrell Tucker

South Carolina: Missing One Payment under a Construction Installment Contract Constitutes a Substantial Breach

Recently, the South Carolina Court of Appeals in *Silver v. Aabstract Pools & Spas* held that regardless of homeowners' frustrations with a contractor, refusal to pay one installment under the terms of a construction contract constituted homeowners' substantial breach of the contract.

Homeowners and contractor entered into a contract for the construction and installation of an in-ground swimming pool and spa. The construction contract specifically required five installment payments by homeowners to contractor at certain stages of construction. Homeowners paid the first three installments (one of which was the initial deposit) without objection. At the time the fourth installment payment became due, homeowners refused to pay the contractor because it had only completed 20% of the work. Homeowners argued that the installment payment schedule did not account for the percentage completed on the job and was an ambiguous term. The lower court found: (1) the contract installment terms were ambiguous and ambiguities are read against the contractor as drafter of the contract; and (2) accordingly, the contractor breached the contract when it stopped work and removed its equipment from the project.

On appeal, the South Carolina Court of Appeals reversed and found in the contractor's favor. The Court of Appeals held that it was improper for the trial court to look beyond the four corners of the document in evaluating the terms of the contract, and that on its face, the contract was not ambiguous. In addition, the Court of Appeals stated that homeowners could not change the terms of the contract because homeowners became unhappy with the terms, or progress of the work. The homeowners are subject to the terms bargained for in the contract. Therefore, homeowners' refusal to pay the installment payment was a substantial breach of the contract and as such, the contractor had the right to cease work and recover the value of the work already performed. The Court of Appeals also held that the first party to breach bears the liability of non-performance. The Court of Appeals awarded the contractor damages, court costs and attorneys' fees.

Many times contractors and owners become frustrated with each other during the progress of a job. The initial response by a frustrated party is to withhold payment or to lay down its tools. However, as this case demonstrates, failure to abide by the terms of the contract could result in a substantial breach and costly litigation.

by Nicholas Voelker

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Pay Your Company's Subs . . . or, Be Forced To Pay Them Out of Your Own Wallet

In *Walter v. Atlantic Builders Group Inc.*, a general contractor ("ABG") entered into a contract with a subcontractor ("United"), whereby United agreed to supply wall panels and curtainwalls for a library project. United entered into two purchase order agreements with two different suppliers, Alply and X-Clad, for the provision of supplies for the work.

United allegedly breached its agreement with ABG, and ABG filed suit against both United and the individual who served as United's managing agent ("Agent") in his individual capacity, for breach of contract, and an action under Maryland's Construction Trust Statute. The Maryland Construction Trust Statute is a law under which money paid by a commercial contractor to a subcontractor is considered to be held in trust. The Statute also provides in pertinent part:

> "Any officer, director, or managing agent of any contractor or subcontractor, who knowingly retains or uses moneys held in trust under [The Maryland Construction Trust Statute] for any purpose other than to pay those subcontractors for whom the moneys are held in trust, shall be personally liable to any person damaged by the action."

Therefore, under Maryland law, any individual officer of a contractor at any tier may be personally liable as a trustee if money earmarked for a subcontractor is misused.

The trial court entered summary judgment against United, but conducted a trial on the case against Agent in his individual capacity. The trial court found that Agent had violated the Maryland Construction Trust Statute by misappropriating funds that had been paid by ABG to United that were due to be paid to Suppliers. The trial court entered judgment against Agent in the amount of $146,533.

Agent appealed, but the Court of Special Appeals of Maryland affirmed the judgment. The appellate court noted that Agent was vice president of United and had control of United's disbursements. The appellate court further noted that Agent testified that he paid "$140,000 and change" to Alply out of the $250,950 that ABG had paid to United for Alply's materials, and that he paid $16,394 to X-Clad out of slightly over $77,000 that ABG had paid to United for X-Clad's materials. Accordingly, the appellate court held that "[t]o the extent that monies were received by [United] for subcontractors, and not paid to them, the evidence permitted a finding that appellant had actual knowledge of the money flow." Thus, the appellate court determined that the trial court properly found Agent personally liable under the terms of the Maryland Construction Trust Statute.

This case serves as a cautionary tale for individual officers of contractors who think they have individual immunity for their actions as officers. In Maryland, and in any states with statutes similar to Maryland, if an agent of the company does not make payments to subcontractors in accordance with the terms of the payment, not only does that agent put the assets of the company on the line, but he or she may also be putting his or her personal assets on the line.

by Jeff Peters

Turnover of Condominium Association Tolls Limitation for Florida Construction Defects

An intermediate appellate court in Florida recently addressed the analysis of when condominium owners may bring actions for construction defects in Florida. In *Saltponds Condominium Ass'n, Inc. v. Walbridge Aldinger Co.,* the court provided a contractor with what appeared to be a clear statute of limitations argument. On August 1, 2002, the developer turned over control of the condominium association to its owners. Subsequently, on or shortly after August 17, 2005, the owners served a notice of claim on the contractor, the developer, and the architect. After unsuccessful attempts at informal resolution, the owners filed suit on August 21, 2006. Citing the statutory three-year warranty "from the date of completion of construction of a building or improvement" for major building elements, the contractor argued that the claim fell outside the three-year period because the date of completion (which the court implied, but did not state, preceded the date of the condominium association turnover) was more than three years before the notice of claim.

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The court noted that there was a difference between the warranty period and the limitations period, a distinction it had made in previous cases. It further noted that the latter existed in Florida's general statute of limitations and repose for actions involving real property. While Florida has an overall fifteen-year statute of repose that bars all actions, it has a two-part statute of limitations that may bar actions before the statute of repose runs. The first part of the statute of limitations is a simple four-year period calculated from the latest of four discrete project events (actual possession, issuance of a CO, abandonment of construction, or completion/termination of the engineering or building contract). In this case, the first part of the limitation period was undisputedly up on August 1, 2006. However, the second part of the statute of limitation contains a discovery period running from the date "the defect is discovered or should have been discovered with the exercise of due diligence." Because the complaint pleaded facts regarding latent construction defects, the court held that it was error for the trial court to dismiss the complaint using only the first part of the statute of limitations.

Due to the intersection of warranty periods, limitations periods, and repose periods, it is often confusing when causes of action accrue exactly and when they are no longer valid. Of course, in all cases, it is best to bring an action as early as possible to avoid prejudicing one's rights. However, especially when working in Florida, pleading facts about latent defects when they are available and well-founded may serve to avoid a time bar on legitimate actions for construction defects.

by Jonathan Head

Contractor Not Always Responsible for Subcontractor's Work

Many states have implied warranties associated with the sale of new homes and other construction. In South Carolina, the implied warranty of habitability and workmanship extends from a home builder to the original purchasers and subsequent purchasers for a reasonable period of time after construction of the home. However, the contractor may not be responsible for its subcontractor's breach of that warranty.

In *Fields v. J. Haynes Waters Builders, Inc.*, the court ruled that a contractor is not automatically responsible for its subcontractor's failure to satisfy the implied warranty of workmanlike service. This case dealt with subsequent purchasers of a residence who discovered problems associated with the exterior insulation and finish system (EIFS). The purchasers sued the original builder on multiple counts, including breach of the implied warranty of workmanship. The homeowner could not sue on a breach of contract theory because it had no contract with the original contractor.

The court found that a contractor may perform its duties in a workmanlike manner and not necessarily be responsible for its subcontractor's failure to perform its services in a workmanlike manner.

Though usually associated with home construction, the law of implied warranties and its applicability varies among the states.

by David Owen

Bradley Arant Lawyer Activities:

James F. Archibald III, Axel Bolvig III, Douglas L. Patin, J. David Pugh, E. Mabry Rogers, and **Walter J. Sears III** were listed in *Best Lawyers in America 2009*. Overall, eighty-four Bradley Arant attorneys are listed in this highly selective and regarded publication.

Sabra Barnett taught a segment of UAB's Construction Engineering Management Certificate Program held in Cairo, Egypt from August 1-7, 2008. The Program focused on providing graduate students with education that enhances their ability to adapt to a rapidly changing global environment.

Rhonda Caviedes, Michael Knapp and **Arlan Lewis** attended the ABA Forum on the Construction Industry's Fall Meeting "Winds of Change? The Consensus DOCS" on September 11-12, 2008 in Chicago, Illinois.

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Mabry Rogers spoke to the Construction Law Society (of the Commonwealth countries) regarding International Arbitration from a U.S. practitioner's perspective in London on October 5, 2008, and attended the meetings on October 6-7.

Rhonda Caviedes, **Donna Crowe**, **Bryan Thomas**, and **David Hume** presented a seminar on "Green or Sustainable Construction" on November 13, 2008. This seminar focused on the various aspects of green building and the policies, legal processes, and regulations that shape them.

William R. Purdy and **Ralph B. Germany, Jr.** recently joined Bradley Arant's Construction and Procurement Practice Group. Ralph and Bill are located in the Jackson, Mississippi office.

David W. Owen was recently named to the Associated Builders and Contractors of Alabama Advisory Board.

DeShanna Greenhill serves on the Board of Directors of the Alabama Association of Paralegals, Inc. as the Student School Liaison Chairperson. DeShanna's leadership role involves the education, communication, and coordination of paralegals and paralegal students throughout Alabama, as well as with the numerous institutions providing paralegal education.

Jonathan Head attended the two-week Jonah Program at the Avraham Y. Goldratt Institute during the weeks of October 6th and October 20th.

Arlan Lewis taught a seminar entitled "Construction Law Overview" on October 16, 2008 to the Birmingham Construction Industry Authority (BCIA).

Keith Covington and **Abdul Kallon**, of Bradley Arant's labor group, recently spoke at in-house Lunch and Learn on E-Verify: Federal Developments and State Requirements.

Michael Griffin completed the Marine Corps Marathon on October 26, 2008. He raised $7,500 for the injured Marine Semper Fund. Bradley Arant employees and friends accounted for approximately 65-75% of the donations.

Robert J. Symon and Eric A. Frechtel presented a Federal Government Contracts Seminar on October 28, 2008 at The Pacific Club in Honolulu, Hawaii. The seminar topics included "Critical FAR Contract Clauses" and "Ethics in Federal Contracting."

Michael W. Knapp attended the Comprehensive Construction Defect Claims and Coverage Super-Conference in Las Vegas, Nevada on November 5-7, 2008.

Rob Dodson spoke on "Making Changes and Resolving Disputes During the Construction Process" at a seminar in Jackson, MS entitled Construction Law for Architects, Engineers and Contractors on November 20, 2008.

Keith Covington will attend the Associated Builders and Contractors Attorneys Conference in Washington on December 4-5, 2008.

Mabry Rogers will give a client seminar on Federal Government Administration in December, 2008 in Las Vegas, Nevada.

Michael Knapp, **Arlan Lewis**, **Mitch Mudano**, **Jeff Peters**, and **David Pugh** will present "The Fundamentals of Construction Contracts: Understanding the Issues" in Birmingham, Alabama on December 5, 2008. This seminar will cover contract principles, dispute resolution, project delivery systems, and subcontracting issues.

For more information on any of these activities or speaking engagements, please contact Rebecca Harris at 205-521-8504.

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