BRADLEY ARANT BOULT CUMMINGS LLP **First Quarter 2012**

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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Pennsylvania "No Damages for Delay" Doctrine Held Not to Foreclose Contractor's Delay Claim

In a recent case, the federal trial court for the Western District of Pennsylvania disposed of a number of the Pittsburgh Airport Authority's (Owner) arguments against G&T Conveyor's (Contractor) delay claim arising from testing of a newly installed baggage handling and bomb detection system. The case presented the judge—unfamiliar with key construction principles—with a difficult and common array of arguments to place the risk of delay on the contractor, and it is a well-researched, though densely written, opinion.

The court held that the contractor was not liable for testing delays because the testing criteria were actually changed during the test by the Owner's testing agency. The contract contained a "no damages for delay" clause, but the court found that the Owner's active interference rendered the clause inapplicable. Specifically, the court found the Owner's change of the testing specification and supply of defective PLC's for the Contractor to install constituted active interference.

The Owner argued that the duty of the Contractor to "cooperate" with the Owner's testing agency placed the risk of delay on the Contractor. The court found that "cooperate" does not mean "take the risk of." The Owner argued that the prime contract's "turnkey" requirement placed all risk of delay on the Contractor. The court found that "turnkey" does not mean "take the risk of" delay caused by the Owner or those for whom the Owner was responsible.

Inside:

The case is not a landmark, as there are cases like it in many jurisdictions and in the Court of Federal Claims. Instead, it is a reminder to contractors, owners, and subcontractors to examine closely so-called "risk shifting" clauses to determine if they apply. In particular, clauses which purport to shift the risk of delay completely to the contractor (or subcontractor) must be examined in light of the applicable law and in light of the facts causing the delay.

By Mabry Rogers

Subcontractor Required to Pay "Expectation" Damages after Refusing to Honor Bid

In *Dynalectric Co. of Nevada, Inc. v. Clark & Sullivan Constructors, Inc.*, the Supreme Court of Nevada recently affirmed a trial court's judgment granting a general contractor, Clark and Sullivan Constructors, Inc. (C&S), "expectation" damages after its prospective subcontractor, Dynalectric Company of Nevada, Inc., refused to honor its bid.

The case arose from a dispute between C & S and Dynalectric on the expansion of the University Medical Center (UMC) in Las Vegas. In 2004, UMC solicited bids for the project. C&S, interested in serving as general contractor for the project, sought bids from subcontractors. Dynalectric submitted a bid to C&S to perform the electrical work for the project and "repeatedly assured" C&S of the accuracy of its bid. C&S relied on Dynalectric's bid in developing its bid for the general contract. C&S was the low bidder, and UMC awarded it the general contract. Thereafter, Dynalectric repudiated its bid and refused to negotiate with C&S. C&S contracted with three other subcontractors to perform the electrical work for the project.

C&S sued Dynalectric in district court under various theories of liability, including the legal doctrine of promissory estoppel. The doctrine of promissory estoppel provides that if a party changes its position substantially in reliance on a promise, then that party can enforce the promise although the essential elements of a contract are not present.

Following a trial, the district court entered judgment for C&S on its promissory estoppel claim and rejected each of Dynalectric's counterclaims. The district court awarded C&S the difference between Dynalectric's bid and the amount C&S paid the three replacement contractors to complete the work. This measure of damages placed C&S in the same position that it would have occupied if Dynalectric had performed as promised, and thus, it constituted "expectation" damages.

Dynalectric appealed to the Supreme Court of Nevada, where it argued that the lower court applied the incorrect measure of damages in awarding C&S "expectation" damages. The Supreme Court disagreed, finding that the modern trend is to tailor the damages to the requirements of justice, and to ensure that the damages are reasonably certain and foreseeable. According to the Supreme Court of Nevada, it was plain that justice required that C&S be awarded "expectation" damages and that the damages the district court awarded were reasonably certain and foreseeable.

Contractors and subcontractors should continue to use care when submitting bids on projects. While a bid may not be a formal contract, it carries with it an expectation of reliance that could subject the submitting party to liability if the contractor or subcontractor later decides not to honor the bid.

By Aron Beezley

Bad-Faith Mechanic's Liens: How to Make a Bad Situation Worse

Indiana, in a ruling by the Indiana Court of Appeals in *Walsh & Kelly, Inc. v. International Contractors, Inc.*, joined a list of jurisdictions which hold that owners may seek damages, including attorney fees, against contractors who refuse to remove an invalid mechanic's lien after being made aware that it is legally invalid.

The lien claimant in *Walsh-Kelly*, working as subcontractor, performed paving and road work on a residential subdivision owned by a developer. Following a payment default by the general contractor, the claimant, without consulting legal counsel, filed a lien

against several unsold lots on which it performed no work. The owner notified the subcontractor in writing that the lien was invalid because the subcontractor performed no work on the lots in question and because the owner had paid the general contractor, a complete defense under Indiana law. The subcontractor refused to remove the lien and instead filed suit to enforce the lien. The owner responded by asserting a counterclaim for slander of title and requested as damages its attorney's fees incurred in defending the frivolous lien. The Indiana Court of Appeals held that the trial court was correct in dismissing the mechanic's lien and awarding attorney's fees to the owner.

The Indiana Court of Appeals ruled in favor of the owner despite a high standard required by Indiana law. The law required the owner to prove that the lien contained a "false" or "malicious" statement which was "made knowingly or with reckless disregard" to its falsity. While the subcontractor was unaware of the legal reasons that the mechanic's lien was invalid, the court reasoned that once it was made aware of its possible invalidity, it had a duty to investigate the legality of the lien and remove it. The subcontractor's failure to do so constituted a "reckless disregard" for the falsity of the lien, regardless of whether the sub-contractor had any legal understanding of the reason the lien was invalid.

Walsh & Kelly reminds us how seriously the courts take the effects of an invalid mechanic's lien on a property owner. It is extremely important that an owner give notice of and reasons for the invalidity of a lien; once notified, the contractor (or subcontractor) must investigate the validity of a lien. Furthermore, as illustrated in this case, the contractor must take steps to have the lien removed once it has been determined to be invalid.

By Thomas Lynch

Changes To The Rules Governing SBA's 8(a) Program

Within the last year, comprehensive changes to the Small Business Administration ("SBA") regulations went into effect. These new rules are wide-ranging and will significantly impact SBA's 8(a) Business Development ("BD") program, SBA's mentor-protégé program, and SBA's joint venture regulations. The final rule can be found at: http://edocket.access.gpo.gov/2011/pdf/2011-2581.pdf.

Especially noteworthy are the new rules as they relate to SBA's joint venture regulations. Firms seeking to joint venture with 8(a) contractors for set-aside work under any of the designated regulations should now be aware that the 8(a) partner to the joint venture agreement is no longer required to receive 51% of the profits. Instead, under the new rules, "the 8(a) Participant(s) must receive profits from the joint venture commensurate with the work performed by the 8(a) Participant(s)." 13 CFR § 124.513(c)(4). Under 13 CFR § 124(d), "[f]or an unpopulated joint venture or a joint venture populated only with one or more administrative personnel, the 8(a) partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture." Therefore, the 8(a) contractor can now be limited to 40% of the profits under the joint venture agreement if it performs only 40% of the work. In its comments to the final rule, SBA clarified this change and the reasons for it:

> [T]he majority of commenters supported the proposal that 8(a) Participant(s) to an 8(a) joint venture must receive profits from the joint venture commensurate with the work they performed. Those in support believed that this provision makes sense in light of the change specifying that the 8(a) partner(s) to a joint venture must perform at least 40% of the work performed by the joint venture. In a situation where the joint venture performs 100% of the contract, 40% by an 8(a) Participant and 60% by a non 8(a) firm, these commenters believed that it was not reasonable for the 8(a) firm to receive 51% of the profits when it performed only 40% of the work. SBA continues to agree. SBA believes that requiring an 8(a) firm to receive 51% of the profits in all instances could discourage legitimate non-8(a) firms from participating as joint venture partners in the 8(a) BD program, or encourage creative accounting practices in which a significant amount of revenues

> flowing to a non-8(a) joint venture partner would be counted as costs to the contract instead of profits in order to meet the SBA requirement. SBA does not believe that either of those outcomes is positive. As such, this provision is retained in this final rule.

Federal Register, Vol. 76 No. 29, at p. 8243 (February 11, 2011)

It is important to be mindful, however, that this change applies only to a joint venture that has not been formed as a separate legal entity. In the case of a joint venture between an 8(a) contractor and its non-8(a) partner that is formed as a separate legal entity, the 8(a) contractor is still required to own at least 51% of the joint venture entity. 13 CFR § 124.513(c)(3). In this case, the profits received by the 8(a) contractor need not be commensurate with the percentage of work performed by that 8(a) contractor but, rather, must be "commensurate with [the 8(a) contractor's] ownership interests in the joint venture" – *i.e.*, the 8(a) contractor will receive at least 51% of the profits regardless of the percentage of work it performs for the separate legal entity joint venture. 13 CFR § 124.513(c)(4). Therefore, a firm seeking to joint venture with an 8(a) contractor for set-aside work needs to be aware that if it elects to construct the joint venture as a separate legal entity, then it can only receive up to 49% of the profits of the joint venture – regardless of whether the 8(a) contractor only performs 40% of the work.

Firms seeking to joint venture with an 8(a) contractor also need to familiarize themselves with the self-performance requirements under the new rules. In order to seek a full or partial small business set-aside construction contract or an 8(a) construction contract under a joint venture agreement, the 8(a) contractor or the 8(a) concern must "perform at least 15 percent of the cost of the contract with its own employees (not including the costs of materials)." 13 CFR § 125.6(a)(3). The phrase "cost of the contract" means "[a]ll allowable direct and indirect costs allocable to the contract, excluding profit or fees." 13 CFR § 125.6(e)(1).

To illustrate this self-performance requirement, consider the example of a large business and its small 8(a) partner who have an SBA-approved written mentor-protégé agreement and are seeking to joint venture together to perform an 8(a) contract. Assuming their joint venture agreement for the particular contract is approved by SBA, then the joint venture taken as a whole will be considered an 8(a) concern for that contract (provided that the 8(a) protégé "qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement and has not reached the dollar limit set forth in [13 CFR] § 124.519."). 13 CFR § 124.513(b)(ii)(B)(3). This means that the protégé firm and its approved mentor firm *together* must perform at least 15% of the cost of the contract with their own employees. Keep in mind, however, that the 8(a) protégé firm still must perform 40% of the total work being performed by the joint venture.

It should be remembered that joint venture eligibility and self-performance requirements for construction contracts are different with respect to other SBA programs. For example, with respect to SBA's Service-Disabled Veteran-Owned Small Business ("SDVO SBC") Program, an SDVO SBC seeking a service-disabled veteran-owned small business set-aside construction contract must agree that "at least 15 percent of the cost of the contract performance incurred for personnel will be spent on the [SDVO SBC's] employees or the employees of other service-disabled veteran-owned small business concerns." This standard – *i.e.*, "15% of the cost of the contract performance incurred for personnel" – is the same standard for HUBZone small business concerns in SBA's HUBZone Program.

The rules are complex, and this is an area of great interest to non-qualifying firms. You must be cautious in approaching these joint ventures.

By Eric Frechtel, Steven Pozefsky & Aron Beezley

OSHA's Multi-Employer Liability Policy Enforced by the D.C. Circuit Court

On December 14, 2011, the United States Court of Appeals for the District of Columbia (D.C. Circuit) affirmed an OSHA citation issued against a general contractor under OSHA's multi-employer liability policy, joining several other federal appellate courts

that have recently given the controversial policy their stamp of approval. This multi-employer liability policy provides that a general contractor may be cited by OSHA for a worksite safety hazard that the general contractor either created or had control over, even though none of the general contractor's own employees were exposed to the hazard. Pursuant to the policy, a general contractor may be held liable, as a "controlling" employer, for a safety hazard to which only the employees of one of its subcontractors were exposed, if the general contractor could reasonably have been expected to prevent, or to detect and abate, the unsafe hazard.

The D.C. Circuit's decision, in *Summit Contractors, Inc. v. Secretary of Labor and Occupational Safety and Health Review Commission,* ("*Summit Contractors*"), arose out of a citation that OSHA had issued to Summit Contractors, Inc. ("Summit"), the general contractor on an apartment complex project in Pennsylvania. Summit had only two employees at the project site. Those employees were responsible for the overall supervision and coordination of the project work. Summit sub-contracted the framing work on the project to another contractor which, in turn, subcontracted that work to another company, Mendoza Framing. Summit's direct subcontractor had only one employee on the project, a superintendant, but Mendoza Framing had several employees at the worksite.

OSHA conducted an inspection of the worksite and cited Summit for failing to ensure that the employees of Mendoza Framing were protected from a safety hazard resulting from two faulty pieces of equipment that Summit had rented to supply temporary electrical power to the project. OSHA issued the citation against Summit under its multi-employer liability policy. There was no evidence that either of Summit's own employees (or anyone other than Mendoza's employees) were exposed to the hazard.

Summit contested the citation, challenging the validity of the multi-employer liability policy. After an Administration Law Judge affirmed the citation, Summit sought review from the Occupational Health and Safety Review Commission ("OSHRC"). The OSHRC rejected Summit's challenge and issued a decision finding that Summit could be held liable either as a "creating" employer because it had ordered and not properly inspected the faulty equipment or as a "controlling" employer because it had maintained significant control over the worksite generally and the hazardous equipment in particular. In holding that Summit was a "controlling" employer, the OSHRC found it significant that Summit's superintendent routinely walked the jobsite and observed the project work and, at Summit's direction, pointed out safety hazards to its subcontractors.

Summit appealed to the D.C. Circuit, making three specific challenges to the OSHRC's decision. First, Summit argued that the imposition of liability on Summit under the multi-employer liability policy was improper because that policy had never been subjected to proper notice and comment rule-making under the procedures of the Administrative Procedures Act (APA), thereby rendering the policy invalid. The D.C. Circuit rejected this argument for two reasons. One, it held that the multi-employer liability policy was exempt from the APA's procedures because the policy was merely a general statement of OSHA's enforcement policy. And two, it found that the OSHRC's imposition of liability on Summit was not predicated *per se* on the multi-employer liability policy, but rather on OSHRC precedent holding general contractors liable in similar circumstances.

Second, Summit argued that the multi-employer liability policy violated a provision of the OSH Act stating that the Act shall not be "construed to . . . affect . . . the common law . . . duties, or liabilities of employers." Summit argued that OSHA's policy gave rise to a new duty of care by a general contractor to its subcontractor's employees, a duty that would increase the general contractor's liability. The D.C. Circuit noted simply that the argument provided no defense to the citation because "such liability would arise only from a court's (hypothetical) later action under state law – not for the OSH Act itself, which is all that [the OSH Act provision cited by Summit] addresses."

Third, Summit challenged the OSHRC's decision on the ground that OSHA had not proved that Summit had knowledge of the offending hazard and that,

without such proof, Summit could not be held liable for a subcontractor's employees' exposure to the hazard. The D.C. Circuit also rejected this argument, holding that there was substantial evidence to support the OSHRC's finding that "Summit could have known of the violative condition with the exercise of reasonable diligence" and that such "constructive" knowledge was sufficient for purposes of the OSH Act." On this issue, the Court pointed to the subcontract between Summit and its subcontractor, which contemplated Summit's provision of temporary electrical services to the project site and the use of those services by others.

Summit Contractors confirms that OSHA may use the multi-employer liability policy as a safety enforcement tool against general contractors and others who oversee construction jobs. More and more frequently, general contractors are cited for safety hazards simply because they have general supervisory capacity and control over the worksite. *Summit Contractors* and other recent cases suggest that general contractors cannot insulate themselves from liability simply by attempting to contract away, to their subcontractors, the responsibility for employee safety. Under these cases, general contractors and others who manage construction jobs face an increased risk of liability if they do not proactively take measures to prevent, detect, and abate jobsite safety hazards.

By Keith Covington

Contractors Must Recognize Risks from the Implied Duty to Complete Construction in a Workmanlike Manner

A recent Tennessee Supreme Court case is a reminder that a contractor's legal responsibility does not end when it subcontracts work. Specifically, it reminds us that a contractor has an implied duty to complete any work it agrees to perform in a good and workmanlike manner, even if it subcontracts the work and even it the subcontract includes provisions purporting to shift all the risk to the subcontractor.

In *Federal Insurance Company v. Winters Roofing Company*, the contractor (Winters Roofing) agreed to install a new roof for a homeowner. The contractor had a subcontractor complete the roofing work. When the homeowners contacted the contractor about problems with the roof installation, the contractor subcontracted with Bruce Jacobs to perform remediation work. The subcontract with Bruce Jacobs included a provision stating: "[a]ny and all work will be the responsibility of Bruce Jacobs" and" [a]ny and all leaks/damages caused by the work performed . . . will be [Bruce Jacob's] responsibility."

The remediation work performed by Bruce Jacobs ultimately caused a fire and almost $900,000 in damages to the home. Neither the contractor nor Bruce Jacobs were insured at the time of the remediation work and resulting fire. The homeowners (via their insurers) demanded that the contractor pay for the damages. The contractor refused, arguing that it was not responsible because it did not perform any of the work and because Bruce Jacobs had contractually assumed all responsibility for the remediation work that caused the fire.

The Tennessee Supreme Court disagreed. The Court held that 1) "the general contract placed upon the [contractor] the implied duty to skillfully, carefully, and diligently install and repair the [homeowner's] roof in a workmanlike manner" and 2) "because the delegation of the responsibility to perform the services did not operate to release the contractor from liability [to the homeowners], the contractor, based on his contract with the [homeowners], may be held liable for the damages caused by the acts of [Bruce] Jacobs, the subcontractor."

Contractors must remember that they are obligated to perform all work in a workmanlike manner regardless of whether they actually perform the work or what a subcontract may state. Contractors can manage this risk by including risk shifting provisions in its subcontracts similar to those in the subcontract between Winters Roofing and Bruce Jacobs and other indemnification provisions. However, managing risks through subcontract provisions is only useful if the subcontractor has the ability to pay. Contractors can monitor a subcontractor's ability to pay in a number of ways including reports on a subcontractor's financial status and checking the status of a subcontractor's insurance (such insurance would generally include coverage for resulting damages, not

the costs to repair the subcontractor's work itself). Contractors can also manage the risk associated with their subcontractor's work by keeping a current insurance policy covering the risks associated with subcontractor's work, being named as an additional insured on a builder's risk policy, or simply pricing the risk and including it in the price of the work.

By Bryan Thomas

General Contractor's Failure to Comply With Payment and Performance Bond Terms and Conditions Relieves Surety's Obligation to Perform

A recent federal district court decision in Michigan reminds us of the importance of understanding and adhering to the terms and conditions of a payment or performance bond. In *LaSalle Group, Inc. v. JST Properties, L.L.C.*, the contractor's failure to do so relieved the surety of its obligations under the performance bond and provided it with a meritorious defense of overpayment to the contractor's claims.

LaSalle Group, Inc. ("LaSalle") served as general contractor for the construction of a school in Gulfport, Mississippi. LaSalle subcontracted a portion of the concrete work on the project to Gulf Coast Construction, L.L.C. ("Gulf Coast"). LaSalle required that Gulf Coast provide a payment and performance bond for the full subcontract price. Gulf Coast obtained such bonds from American Contractors Indemnity Company ("ACIC").

During construction, LaSalle became aware that Gulf Coast was not paying its vendors and subcontractors. LaSalle sent a notice of default in accordance with the subcontract, requiring payment of all outstanding invoices within seventy-two hours. When this requirement was not met, LaSalle sent a letter terminating Gulf Coast's subcontract. Upon terminating Gulf Coast, LaSalle submitted to ACIC a formal claim against the subcontractor's payment and performance bonds.

ACIC denied LaSalle's claim on the performance bond for failure to comply with several conditions precedent. The bond clearly provided that, in order for the surety's obligation to arise, LaSalle had to (1) notify ACIC and Gulf Coast that it was considering declaring a default; (2) wait twenty days after such notice before declaring a default; and (3) pay ACIC any remaining contract balance as of the time of default. ACIC's denial of this claim prompted LaSalle to file suit alleging the surety's failure to perform under either bond.

The district court agreed with ACIC that LaSalle had not complied with the conditions requiring notice of impending default or the twenty-day waiting period. It found that LaSalle had not contacted ACIC at all regarding this issue until the point at which it informed the surety of Gulf Coast's termination and its claims on the bonds. The court did note, however, that while LaSalle clearly did not comply with these conditions, Michigan law states that failure to give notice as required in a bond will not in and of itself release the surety.

ACIC further claimed its obligations in the performance bond had not arisen because LaSalle had not paid over to it the remaining balance on Gulf Coast's subcontract. LaSalle contested by arguing that no balance remained on the subcontract because it had paid the balance to replacement contractors to complete or repair Gulf Coast's work. The court sided with the surety, finding that LaSalle had deprived ACIC of the opportunity to exercise its rights, which included contractor selection. The court concluded that none of the three conditions of the performance bond had been met and therefore ACIC's obligation to perform never arose.

The court also addressed ACIC's affirmative defense of overpayment against LaSalle's claims and its counterclaim for damages caused by such overpayment. The surety argued that LaSalle had overpaid Gulf Coast, resulting in a reduction of the contract balance which served as ACIC's collateral with respect to its indemnity and subrogation rights. LaSalle sought dismissal of these claims, but the court disagreed. It found that a contractor's overpayment can serve to discharge the surety's obligations where it results in "some injury, loss or prejudice" to the surety. Therefore, both the defense and counterclaim survived summary judgment.

LaSalle provides several important lessons for contractors working with subcontractors covered by a payment or performance bond. First, it is essential that the contractor know and understand all provisions within the bonds. Second, the contractor must maintain communications with the surety regarding the subcontractor's performance, especially if it starts to decline. Finally, the contractor must take special care to ensure payments made to the subcontractor accurately reflect the amount of work performed to that point. As seen from this case, the failure to do so may release the surety from its obligations to perform.

By Charlie Baxley

Golfers Beware: The IBC May Not Apply to the Features on Golf Courses

With the approach of spring and the Masters, one's head naturally turns to striking that little white ball with a variety of well-designed sticks. A recent case from the federal trial court for the Eastern District of New York involves a hazard that was neither a trap nor a waterway. James, the plaintiff in the case, having downed 3-4 beers, decided to continue play at the 14th hole, though it had begun to rain steadily. As he approached the 15th green, he walked down a set of railroad tie and brick steps (pictured in the written decision), head down, talking, putter in hand. He slipped on the steps and broke his ankle.

James' expert opined that the root cause of the injury was the failure of the resort to follow the International Building Code by installing non-slip surfaces on the stairs. The judge made short shrift of the construction argument: "There is no indication that the IBC was intended to be applied to outdoor golf courses." Instead, just as James assumed the risk of extra strokes due to misplaced shots into sand traps, the rough, and the water hazards, he assumed the risk of the obvious and necessary dangers inherent in golf, particularly when playing in the rain.

The lesson for all golfers: mud, slippery grass, errant golf shots that become head shots, and playing and walking surfaces are open and obvious dangers in the sport of golf. Be warned. Be careful. One day you'll get that par. Hopefully, you won't break your leg doing it.

By Mabry Rogers

Two Key States, California And Texas, Enact Sweeping Construction Law Changes

Is it a revolutionary change in construction, prompted by conservative legislative wins in much of the U.S. in 2011? Even a leading construction and procurement practice group like BABC's does not have that good a political commentator! Regardless of its source, California and Texas have recently enacted significant changes in construction law in the two states.

In June, 2011, Texas Governor Rick Perry signed legislation which prohibits indemnity and insurance provisions in construction contracts which have the effect of indemnifying a party for its own negligence. The law prevents waiver of its protections. The bill is effective as to construction contracts or CIP programs established on or after January 1, 2012.

Texas also enacted in 2011 (also effective January 1, 2012) changes to its lien laws, including adoption of statutory forms for partial and final lien waivers. The law provides for statutory forms for waiver and release of mechanic's liens and payment bond claims, both conditional (upon receipt of payment) and unconditional (full and final). In order for a waiver and release to be effective, the form of lien waiver and release must be in substantial compliance with the statutory forms.

Four statutory forms have been created: (a) Conditional Waiver and Release on Progress Payment; (b) Unconditional Waiver and Release on Progress Payment; (c) Conditional Waiver and Release on Final Payment; and (d) Unconditional Waiver and Release on Final Payment. The difference between "conditional" and "unconditional" is that a "conditional" waiver and release may be given prior to actual receipt of payment (i.e., it is conditioned upon a payment to be made). When using a "conditional" waiver and release, the form must specifically reference the specific payment to be made. It cannot be used to require a claimant to

provide a blanket waiver of its lien rights prior to a specific, promised payment. The statute expressly prohibits contractual waivers of lien rights except for contracts for labor or for labor and materials (but not materials-only contracts) for construction or "land development" of residential (single-family, townhouse or duplex) projects.

Questions remain about the use of the statutory forms in terms of the effectiveness of adding to them, such as true "bills paid" language and other issues associated with payment, such as a reaffirmation of warranties or representations about known claims. It is unclear whether those provisions can be combined into a single form or whether the separate statutorily prescribed waivers/releases have to be furnished.

California adopted legislation in 2011 that caps retainage on public projects (5% as of January 1, 2012) and shortens the time (from 10 days to 7) for a contractor to pay a downstream sub after receiving payment. The legislature also consolidated the lien and stop notice provisions, changing the statutory lien release forms (conditional and unconditional). The general contractor must now provide a preliminary work notice to lenders (which the owner must identify). "Completion" no longer includes "acceptance by an owner," which may affect the time for filing a lien or a stop notice.

The goal of both legislatures was to simplify the maze of construction law in each state, but the effect will likely be some confusion in the short run until contractors, owners, and subcontractors learn to change their forms to follow the new requirements. We suggest you contact your lawyer (or one of the lawyers below) to obtain a review of your practices, contracts, and forms in each state.

By Mabry Rogers

Bradley Arant Lawyer Activities:

Arlan Lewis was a featured panelist at the "Bonding & Insurance Workshop" for construction industry participants and government contractors on January 17th sponsored by the University of Alabama at Birmingham and the Alabama Department of Transportation.

Mabry Rogers, along with an outside business school professor, presented a client seminar for two days on fundamentals of negotiations, and will repeat the seminar in March, 2012.

David Taylor moderated and spoke on January 27th at a Tennessee Bar Association seminar in Nashville on "Remedies in Construction Law."

Wally Sears and **Mabry Rogers** attended the ACCL annual meeting in Laguna Beach, CA, from February 23rd thru 26th.

David Pugh attended ABC's BizCon Business Development Conference in Phoenix February 21st thru 22nd.

David Taylor spoke at a Construction Specification Institute national "webinar" on February 2 on "Using ADR to Resolve Construction Disputes."

David Bashford and **Mabry Rogers** will present client risk management seminars in California, Nevada, and Arizona in February, March, and April.

Eric Frechtel, **Steven Pozefsky** and **Aron Beezley** will be co-authoring for a federal construction publication a semi-monthly column on legal issues affecting small, disadvantaged and veteran-owned businesses.

David Taylor will be speaking at International Council of Shopping Centers Conference in Philadelphia on March 6 on "Using

Mediation/Arbitration to Resolve Real Estate Disputes."

David Bashford was recently honored by *Super Lawyers* as a Rising Star in North Carolina for 2012 and recognized as a "Top Young Attorney in North Carolina."

David Taylor will be speaking at ABA ADR Section Annual Meeting in Washington, D.C. on April 20th on "Marketing an ADR Practice."

Doug Patin, **Bill Purdy**, and **Mabry Rogers** were honored in the "International Who's Who of Construction Lawyers 2011."

David Bashford presented client risk management seminars in California and in Australia in January and February.

Eric Frechtel attended The Moles Award Dinner in New York City on January 25th. The Moles is a prestigious group of leaders in the heavy construction industry, including tunnel, subway, sewer, and marine.

Ralph Germany was named a *Mid-South Super Lawyer* in the area of Construction Litigation for 2011.

David Pugh was recently named as a member of the Board of Directors for Design-Build Institute of America's South Central Region.

Frederic Smith recently authored an article in *Construction Executive* magazine's "Executive Insights" section.

Jim Archibald, Axel Bolvig, Ralph Germany, Frederick Humbracht, Doug Patin, David Pugh, Bill Purdy, Mabry Rogers, Wally Sears, and **David Taylor** were recognized in *The Best Lawyers in America* for 2012.

Jim Archibald, Axel Bolvig, Mabry Rogers, and **Wally Sears** were named Alabama Super Lawyers for 2011 in the area of Construction Litigation.

Mabry Rogers and **Bill Purdy** were recognized in *Chambers 2011* edition in the area of Construction Litigation while **Doug Patin** and **Bob Symon** were recognized in the area of Construction.

Charlie Baxley recently assumed the duties of Assistant to the Editor-in-Chief of the BABC CPG's newsletter, taking the helm from **Bryan Thomas**.

Chambers 2011 recognized Bradley Arant Boult Cummings' **District of Columbia Construction Practice Group** as a Leading Firm (Band One).

For more information on any of these activities or speaking engagements, please contact Terri Lawson at 205-521-8210.

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.BABC.COM/PG_CONSTRUCT.CFM OR CONTACT ANY ATTORNEY LISTED ON PAGE 10 OF THIS NEWSLETTER.

NOTES

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The lawyers at Bradley Arant Boult Cummings 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 Boult Cummings 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.babc.com.

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Note: The following language is required pursuant to Rule 7.2 Alabama Rules of Professional Conduct: *No representation is made that the quality of the legal services to be performed is greater than the quality of the legal services performed by other lawyers.*

READER RESPONSES

If you have any comments or suggestions, please complete the appropriate part of this section of the *Construction & Procurement Law News* and return it to us by folding and stapling this page which is preaddressed.

Your Name:

☐ I would like to see articles on the following topics covered in future issues of the BABC *Construction & Procurement Law News*:

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We are in the process of developing new seminar topics and would like to get input from you. What seminar topics would you be interested in?

_____

If the seminars were available on-line, would you be interested in participating? ☐ Yes ☐ No

If you did not participate on-line would you want to receive the seminar in another format? ☐ Video Tape ☐ CD ROM

Comments:

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BRADLEY ARANT BOULT CUMMINGS LLP **Second Quarter 2012**

CONSTRUCTION AND PROCUREMENT LAW NEWS

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

James F. Archibald, III	Jonathan Cobb	Rick Humbracht (n)	Steven A. Pozefsky (d.c.)	Frederic L. Smith, Jr.
Sabra Barnett	F. Keith Covington	Aman Kahlon	J. David Pugh	H. Harold Stephens (h)
David H. Bashford (c)	Joel Eckert (n)	Michael W. Knapp (c)	Bill Purdy (j)	Robert J. Symon (d.c.)
Charlie Baxley	Eric A. Frechtel (d.c.)	Michael S. Koplan (d.c.)	Alex Purvis (j)	David K. Taylor (n)
Ryan Beaver (c)	Ralph Germany (j)	Arlan D. Lewis	Jerry Regan (d.c.)	C. Samuel Todd
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Stanley D. Bynum	Jonathan B. Head	Douglas L. Patin (d.c.)	Walter J. Sears III	James Warmoth (c)
Robert J. Campbell	Michael P. Huff (h)	Vesco Petrov	Eric W. Smith (n)	Monica Wilson (c)

Proceed! Or You Lose

Many construction contracts include clauses imposing a duty to proceed under protest. These clauses are found at every level – prime contracts, subcontracts, purchase orders, etc. There are solid reasons behind imposing that duty. Having a duty to proceed can keep a dispute over a change order involving one part of the work from shutting down the entire job.

In *Dave's Excavating, Inc. v. City of New Castle*, the Indiana Court of Appeals held that the prime contractor had defaulted by failing to proceed under protest. In that lawsuit the prime contractor discovered what it contended was a differing site condition. The prime contract stated that upon discovery of such a condition the prime contractor was to stop work, notify the owner and the engineer, and do no more work in that area until the prime contractor received a written order to resume work in that area. The prime contract also contained the following additional language imposing a duty to proceed:

> CONTRACTOR shall carry on the Work and adhere to the progress schedule during all disputes or disagreements with OWNER. No Work shall be delayed or postponed pending resolution of any disputes or disagreements. . . .

Upon discovery of what it contended was a differing site condition, the prime contractor stopped work, notified the owner and engineer, and did no more work in the area. After a couple of weeks the engineer responded in writing that the differing site condition claim was being reviewed. In that same letter the engineer directed the prime contractor to proceed with the work in that area, and cited the duty-to-proceed language set out above. The engineer's letter expressly stated it was being issued per the directive of the owner.

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Despite the engineer's letter the prime contractor never restarted work in the area of the disputed differing site condition. The prime contractor contended that it did not have to restart work because it was entitled to a change order. The prime contractor completed all of its other work. Eventually the owner terminated the contractor's right to proceed under the prime contract on the basis of default and re-let the job for completion. Then the owner sued the prime contractor and its bonding company for the excess completion costs from the re-letting.

As part of their defense of the lawsuit the prime contractor and its bonding company argued that the prime contractor had no duty to proceed because the owner and engineer had breached their obligations to properly investigate and respond to the differing site condition claim. The prime contractor and its bonding company argued that those breaches by the owner and engineer excused the prime contractor from having an obligation to proceed under protest.

The Court rejected those arguments. The Court ruled that the prime contractor's refusal to proceed under protest had been the first breach, and that this first breach would have excused the owner and engineer from responsibility for any deficiencies with their investigation and response to the claim if there had been any such deficiencies. The Court went on to find that the owner and the engineer had in any event complied with their investigation and response obligations. The prime contractor and its bonding company were held liable for the excess completion costs.

The lesson here is clear: One acts at his peril when he fails to proceed under protest after receiving a proper directive to proceed.

By Ralph Germany

Agencies Beware: Flawed Environmental Analysis Stalls Highway Development

In an opinion that may impact major construction projects throughout the Southeast, on May 3, 2012 the Fourth Circuit Court of Appeals blocked plans for an $800 million highway bypass project in metropolitan Charlotte, ruling that the government failed to accurately disclose the environmental impact of the bypass as required by federal law.

In fall 2010, the Federal Highway Administration and the North Carolina Department of Transportation announced plans to build a highway bypass project connecting Union and Mecklenburg Counties in North Carolina. The project, known as the Monroe Connector, would relieve an overcrowded highway and shorten commutes between the two counties. Environmental groups challenged the plans, claiming that the FHA and NCDOT failed to abide by the requirements of the National Environmental Policy Act (NEPA). After a federal district court granted judgment in the government's favor, the environmental groups appealed. The Fourth Circuit agreed with the environmental groups and overturned the district court's judgment.

NEPA requires federal agencies to prepare environmental assessments and environmental impact statements evaluating the effects of their proposed actions. In this case, the FHA and NCDOT seemed to follow proper procedure: they issued a draft environmental impact statement analyzing a variety of alternative proposals, received and responded to public commentary, and eventually issued a final environmental impact statement for the winning proposal (the Monroe Connector).

During the period for public comment, however, the agencies and their consultant misrepresented the composition of data used to compare alternative proposals. The United States Fish and Wildlife Service, along with other environmental groups, questioned the agencies' assessment of the minimal environmental impact of the Monroe Connector when compared with their "no-build" alternative projection (the baseline comparison of no action against which all proposed actions were evaluated). In response, the agencies defended their calculations and incorrectly stated that the no-build alternative did not incorporate "build" assumptions. In fact, as the agencies admitted in litigation, the no-build alternative assumed construction of the Monroe Connector, skewing the comparisons to demonstrate less environmental impact.

The Fourth Circuit unanimously ruled that the agencies' inaccurate analysis violated NEPA by fail-

ing to meet the procedural requirements of clarity and transparency of process. The agencies argued that their thorough analysis of the environmental impacts and procedure of accepting public commentary met NEPA standards. The court, although noting that NEPA does not require any particular outcome, disagreed. It held that the agencies' "mischaracterization related to a critical aspect of the NEPA process" and frustrated the purpose of the law by failing to accurately analyze the environmental impact of proposed action. The court noted that allowing agencies to admit their mischaracterization in litigation but continue with the proposed action would improperly allow them to contravene the NEPA process.

In so ruling, the Fourth Circuit set a strong precedent for judicial review of major construction projects within its jurisdiction, which includes Maryland, Virginia, West Virginia, North Carolina, and South Carolina. The decision may affect environmental challenges to major construction projects around the nation as lower courts follow the Fourth Circuit's interpretation of NEPA. Construction on the Monroe Connector, which was planned to begin in early fall, is at best significantly delayed until the agencies undertake a new, and accurate, environmental analysis of their proposed actions.

By Monica Wilson

Pay Close Attention to the Differences Between Statutes of Repose and Statutes of Limitation — Courts Do

Colorado has enacted a construction defect reform statute that requires certain procedural steps to make a defect claim, including time limitations (in the form of statutes of limitation and repose) within which to make those claims. A simplified distinction between statutes of limitation and statutes of repose is that statutes of limitation may be extended for various reasons (fraud, incapacity, statutory exception) while statutes of repose generally represent a drop-dead date for claims that can only very rarely be extended. In a recent case, the Colorado Court of Appeals rejected a claim as untimely that fell into an admittedly ambiguous portion of the statute. The issue involved whether the statute's tolling provision, which essentially calls 'time out' on the statute of *limitation* during claim review, also tolls the statute of *repose*. In this case, it did not.

The job in issue was a condominium complex built in multiple phases. Importantly for the outcome of this case, the local building authority issued certificates of occupancy at different times (during 2003 and up to January 2004) for the various phases. In 2007, the homeowners' association (HOA) made a claim for defects that remained under review for roughly a year and a half. Because the HOA did not originally sue the general contractor, the general contractor did not sue its subcontractors until March 2010, sixty days after being added to the lawsuit in January 2010. Unfortunately, the statute of repose for each phase ran six years from the dates of substantial completion and these dates, argued the subs, ran during the sixty-day intervening period.

The court had to decide two issues to rule on the case. First, it had to determine whether any unusual meaning should be given to the phrase "substantial completion," which wasn't defined in the statute. The general contractor argued that it should mean the substantial completion of the *entire improvement*, as certified by the architect. The court rejected the argument, opting instead for a more practical (and industry standard) view of substantial completion that was based on the actual habitability of the units, as attested by the local building official. The second issue was whether the statute of repose for the indemnity claims against subcontractors could be tolled by the defect statute's provision reading, "if a notice of claim [is filed timely], then the statute of limitations or repose is tolled until sixty days after the completion of the notice of claim process…."

The problem for the general contractor was that the subcontractors didn't receive a notice of claim from the HOA, though the court openly acknowledged that the statute "could reasonably be interpreted to mean" that such claims were also tolled. Cast into such doubt, the court looked at the policies of the defect statute — providing a cap on 'long-tail' liability, preventing "shotgun" subcontractor litigation by suing everyone potentially liable, and bringing

parties with potential liability into the pre-suit screening process — and determined that disallowing the 'late' claim would best serve those purposes. The court also decided that an amendment to the law expressly deferring the statute of *limitation* for contractors 90 days to bring claims against subcontractors, but not mentioning the statute of *repose*, meant that the legislature did not mean to toll the statute of repose.

One can't help but have sympathy for the general contractor here. It followed all of the rules under the statute, presumably in reliance on the tolling language and belief that the "notice of claim" included those portions of the claim that really lay against subcontractors. It filed suit within sixty days after receiving the owner's claims. Ironically, the court's ruling here makes it much more likely, and prudent, that general contractors will fire off a shotgun complaint against all potentially liable subcontractors the day after they receive an HOA lawsuit. This is particularly likely to be the case if there is any doubt about when the statute of repose runs.

Our suggestion in similar situations is for the general contractor to engage the owner entity ahead of time to determine its intentions, and to consider otherwise unusual procedural maneuvers like filing a declaratory judgment action against the owner and subs, or having the owner (in cases where suit is inevitable) sue sooner rather than later. One might also attempt to negotiate a covenant not to assert the statute of repose with certain subcontractors who are likely 'targets' of the HOA or Owner (if such a covenant will be recognized by the courts as actually tolling the repose statute).

By Jonathan Head

Default Termination Improper where Government caused Performance Delays

The U.S. Court of Federal Claims recently held in the case of *Martin Construction, Inc. v. United States,* that the U.S. Army Corps of Engineers' ("USACE") termination of a contractor's contract was improper because the performance delays at issue were caused by the USACE's defective design specifications. As a result, the termination for default was converted to a termination for convenience. Martin Construction (the "Contractor") entered into a contract with the USACE in 2007 to construct a marina in North Dakota. After more than thirteen months of attempted performance, the USACE terminated the Contractor's contract for default on January 13, 2009. The contractor then brought an action in the Court of Federal Claims seeking to convert the default termination into a termination for the Government's convenience, thereby entitling the contractor to reimbursement of the costs incurred in performing the project, plus reasonable profit and overhead. The Contractor claimed that the USACE's default termination was improper for two main reasons: (1) the USACE's defective cofferdam design and subsequent modifications caused most of the delays, making it impossible to finish the project by the October 2011 contract completion date; and (2) the USACE waived the contract completion date.

Following trial, the Court found that the USACE's decision to terminate the contractor for default on January 13, 2009 was improper. According to the Court, the "overwhelming" evidence at trial established that the USACE's cofferdam design "suffered from a critical defect, which significantly impeded the construction of the project." In short, the Court found that the USACE "mistakenly specified a porous gravel material for the first zone of the cofferdam, making it practically impossible to dewater the marina area." The contractor's inability to dewater created successive construction failures and safety concerns that prevented timely performance.

In its decision, the Court opined that:

> The most troubling aspect of this case is the [USACE's] adamant refusal to accept any responsibility for its defective design, even while [the contractor] made every effort to comply with it. This relatively routine construction project did not need to end in contentious litigation. Competent procurement officials would have acknowledged the agency's obvious design mistake, made the necessary corrections, and afforded the contractor the additional time and money to complete performance.

The Court's ruling in this case is significant because it sends a strong message to Government procurement officials that procuring agencies must take responsibility for their defective design specifications which result in project delays. In the event such defects occur, the Court has shown that it will not tolerate the Government's attempts to blame contractors for the Government's own delays.

By Aron C. Beezley

First Known Court Challenge to VA Denial of Service-Disabled Veteran-Owned Small Business Status

Recently, in what apparently is the first known court challenge of a U.S. Department of Veterans Affairs ("VA") denial of an application for inclusion in the VA's VetBiz Vendor Information Pages ("VIP") Verification Program, the U.S. District Court for the District of Columbia granted plaintiff CS-360, LLC's ("CS-360") Motion for Summary Judgment by remanding the denial back to the VA based on the VA's failure to provide a satisfactory contemporaneous explanation for its decision to deny CS-360's application. Being approved by the VA and included in the VIP database would have made CS-360 eligible to compete for VA service-disabled veteran-owned small business ("SDVOSB") set-aside contracts. Among other things, CS-360 had requested that the Court find that the VA's denial of CS-360's application was "arbitrary and capricious" under the Administrative Procedures Act.

After considering CS-360's claims, Judge Kollar-Kotelly ruled that, "in this case, the defects in the VA's written decisions are so many and so significant that they affect the whole, and preclude the Court from effectively exercising its review function." The Court went on to state:

> Given the ambiguous relationship between the Initial Determination and Final Decision, the vague and generalized explanations provided by the CVE [Center for Veterans Enterprise] on the administrative level, and the new explanations proffered by the VA before this Court, the Court cannot say with any level of confidence that it knows the precise grounds for the VA's decision to deny CS360's application for inclusion in the VetBiz VIP database and whether those grounds would hold up under review. Simply put, on this sparse and disjointed record, the Court cannot find that the VA has "provided a 'rational connection between the facts found and the choice made.'"

Meanwhile, the Court dismissed CS-360's claims that the VA acted beyond its statutory authority in establishing its regulatory process for verification and that the VA's decision was without due process.

This case is significant not only because it appears to be the first of its kind, but because the Court's ruling sends a strong message to the VA that its denials of such applications must be adequately supported by the record. We will continue to monitor this noteworthy case.

By Eric A. Frechtel, Steven A. Pozefsky and Aron C. Beezley

Bradley Arant Lawyer Activities:

David Taylor spoke at the International Council of Shopping Centers "College" in Philadelphia on March 2nd on the topic of "Managing Construction Disputes".

Eric Frechtel, **Steven Pozefsky** and **Aron Beezley** co-authored an article on the Small Business Contracting Fraud Prevention Act of 2011 which was published in the February/March 2012 issue of *Federal Construction Magazine*.

Ralph Germany was named a *Mid-South Super Lawyer* in the area of Construction Litigation for 2011.

David Taylor spoke at the American Bar Association's ADR National Meeting in Washington, DC on April 19th on the topic of "Selecting Neutrals".

Mabry Rogers, along with an outside business school professor, presented a client seminar for two days on fundamentals of negotiations in March 2012.

David Bashford was recently honored by *Super Lawyers* as a Rising Star in North Carolina for 2012 and recognized as a "Top Young Attorney in North Carolina."

Doug Patin, **Bill Purdy** and **Mabry Rogers** were included in the "International Who's Who of Construction Lawyers 2011."

David Pugh was recently named as a member of the Board of Directors for Design-Build Institute of America's South Central Region.

David Taylor spoke on May 4th at the Tennessee Chapter of American Society of Professional Engineers in Nashville on "Contract Clauses that Can Bite Back"

Ryan Beaver, **Ralph Germany**, **Michael Knapp**, **David Pugh**, **David Taylor** and **Bryan Thomas** will be speaking at the Bradley Arant Boult Cummings LLP 2012 Construction Contract Claims Legal 101 seminars in Birmingham on May 11th, Nashville on May 18th, Charlotte on June 15th and Jackson on June 22nd. Please see the enclosed invitation for more information.

Keith Covington spoke recently on the latest developments at the National Labor Relations Board and the Department of Labor at two recent membership meetings sponsored by the Associated Builders and Contractors. Keith's presentation included discussion of the new NLRB posting rule, the NLRB's new rules on union election procedures, and the proposed changes to the DOL's labor persuader reporting rules.

Arlan Lewis was a featured panelist at the "Bonding & Insurance Workshop" for construction industry participants and government contractors on January 17th sponsored by the University of Alabama at Birmingham and the Alabama Department of Transportation.

David Taylor moderated and spoke on January 27th at a Tennessee Bar Association seminar in Nashville on "Remedies in Construction Law."

Bill Purdy, **Wally Sears** and **Mabry Rogers** attended the ACCL annual meeting in Laguna Beach, CA, from February 23rd thru 26th.

David Pugh attended ABC's BizCon Business Development Conference in Phoenix February 21st thru 22nd.

David Bashford and **Mabry Rogers** recently presented client risk management seminars in California, Nevada, and Arizona in February, March, and April.

Jim Archibald, Axel Bolvig, Ralph Germany, Frederick Humbracht, Doug Patin, David Pugh, Bill Purdy, Mabry Rogers, Wally Sears and **David Taylor** were recognized in *The Best Lawyers in America* for 2012.

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Brian Rowlson recently joined BABC's Construction Practice Group in the Charlotte office. Brian received his J.D. from Stetson University, M.B.A. from the University of South Florida, and his B.S. from Florida State.

Mabry Rogers and **Bill Purdy** were recognized in *Chambers 2011* edition in the area of Construction Litigation while **Doug Patin** and **Bob Symon** were recognized in the area of Construction.

Chambers 2011 recognized BABC's **District of Columbia Construction Practice Group** and **Birmingham, AL General Litigation Group** as Leading Firm (Band One) practice groups.

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2012 CONSTRUCTION CONTRACT CLAIMS
LEGAL 101

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June 15th
Charlotte, NC
Charlotte City Club
121 West Trade St.
Charlotte, NC 28202

June 22nd
Jackson, MS
188 East Capitol St.
Suite 400
Jackson, MS 39201

Summary

A complimentary seminar hosted by the Construction Lawyers of Bradley Arant Boult Cummings LLP on critical information everyone in the construction industry needs to know about construction contract claims:

- What Are the Typical Construction Contract Claims
- How to Recognize the Potential Claim
- How to Preserve, Develop, and Price Construction Contract Claims
- How to Evaluate Construction Contract Claims

Schedule

7:30 a.m. to 8:00 a.m.	Registration & Continental Breakfast
8:00 a.m. to 9:45 a.m.	Program: Part I
9:45 a.m. to 10:00 a.m.	Break
10:00 a.m. to 11:45 a.m.	Program: Part II

Who Should Attend?

- Project Managers
- Project Engineers
- Superintendents
- Contract Administrators
- Owners
- Architects
- Engineers
- Subcontractors
- Suppliers

RSVP

Seating is limited. Please RSVP no later than one week prior to the event by registering at the following link:

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If you have any questions, please contact Sarah Heaton at sheaton@babc.com *or* 205.521.8563

BRADLEY ARANT BOULT CUMMINGS LLP

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The lawyers at Bradley Arant Boult Cummings 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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READER RESPONSES

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BRADLEY ARANT BOULT CUMMINGS LLP **Third Quarter 2012**

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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CBCA Imposes Damages for Prime Contractor's Failure to Self-Perform at Least 50% of Contract Work

Recently, in what apparently is a case of first impression, the U.S. Civilian Board of Contract Appeals (the Board) in *Singleton Enterprises v. Department of Transportation* awarded contract damages to the Federal Highway Administration (the Government) for a prime contractor's failure to self-perform at least 50% of the contract work. While this decision does not have precedential effect (which means it is not binding on the Board in subsequent cases), it is nonetheless noteworthy because this case likely will be looked to for guidance in future cases involving the imposition of damages for breach of self-performance requirements. These requirements are common in Federal procurements, and the agencies administering Federal contracts are increasingly insistent on enforcement of the requirement. The stated rationale is to assure the general contractor's "adequate interest and supervision of the work."

The contract, which was a firm fixed price contract awarded to the prime contractor for a base price of $634,241.40, contained a provision requiring the prime contractor to self-perform work equivalent to at least 50% of the project work. The Board concluded that the prime contractor breached the contract by failing to meet this self-performance requirement and then turned its attention to the Government's proposed calculation of damages, which the Government calculated to be $22,538.17. The Government essentially calculated its damages by removing from the prime contract amount the premium (*i.e.*, the difference between the total price of the subcontractor's work and the total contract price) that the Government was paying to have the prime contractor perform the subject work.

At the outset of its examination of the Government's proposed damages calculation, the Board stated:

> The imposition of damages for failure to meet the 50% threshold is a matter of first impression for this Board. No cases that have been brought to our attention are directly on point, either as to the propriety of assessing damages for this particular breach or how to calculate

Inside:

> those damages. That said, after consideration, we find that the Government, as any contracting party, has a right to the benefit of its bargain and, thus, the right to recover damages due to a breach. There is no provision in this contract which prohibits the Government from seeking damages for the breach in issue or which provides a specific remedy for this type of breach.

The Board found that under these circumstances an assessment of damages was warranted and that the method of calculation used by the Government was reasonable and appropriate.

In this particular case, the damages were relatively inconsequential given the size of the contract. However, the damages calculation for breach of the self-performance requirement could be quite substantial, depending on the size of the contract, the nature of the dispute, and the actual percentage of work completed by the contractor. For example, the VA clause on this issue imposes a penalty of 15% on the amount of the work which was not properly self-performed. Where the self-performance shortfall is, say, $40,000,000 (as it may be on a large hospital job), the penalty is obviously substantial.

It should also be noted that failure to satisfy self-performance requirements can potentially open a contractor up to liability under the False Claims Act if the contractor falsely certifies the percentage of work that it is self-performing. Keep in mind that each and every time a contractor submits a payment application to the Federal Government directly, it is certifying compliance with the terms and conditions of the contract. Moreover, it is likely that the Government will latch on to the Board's decision in investigating whether self-performance requirements have been met and then use breaches of self-performance provisions as an offset against legitimate claims by contractors.

By Robert J. Symon and Aron C. Beezley

Construction Defect Complaint Alleging Negligent Misrepresentation May Trigger Insurance Coverage

Insurance companies routinely – and incorrectly in many states – deny coverage for construction defects cases by arguing that construction defect claims do not allege covered occurrences and, even if they do, various exclusions eliminate coverage. Before engaging in extended disputes over these coverage denials, business insureds should carefully scrutinize the complaint for alternative grounds for coverage. A recent insurance coverage case arising out of a lawsuit between a residential buyer and seller, *USAA Casualty Insurance Co. v. McInerney*, demonstrates the favorable impact of an alternative claim on coverage. The court in *McInerney* required the insurance company to defend a home seller from the home buyer's lawsuit because the complaint alleged negligent misrepresentation, even though the complaint also alleged admittedly non-covered claims.

This case arose out of problems with a leaking basement in Illinois. The sellers' home disclosure informed the buyer of flooding or reoccurring leakage problems in the basement that had been corrected by new drains and landscaping. The sellers also disclosed that "[o]n rare occasions, we have experienced slight seepage." Less than a year after the sale closed, the basement sustained water infiltration, flooding, and mold growth that rendered the basement uninhabitable and allegedly constituted far more than "slight seepage." The buyers sued the sellers, claiming that the sellers negligently misrepresented the potential for basement flooding. The buyers also alleged breach of contract, violation of the Residential Real Property Disclosure Act, and fraudulent misrepresentation. The buyers claimed that the flooding damaged their house and personal belongings, and also caused mold-related illnesses.

The sellers submitted the buyers' lawsuit to their liability insurer, but the insurer denied coverage and instead sued the sellers to obtain a ruling on coverage. The insurer argued that the complaint did not allege an occurrence, and, even if it did allege an occurrence, the occurrence was excluded from coverage because it resulted from intentional acts or arose from the sales contract. The sellers did not dispute the insurer's intentional acts and contract exclusion defenses, but argued that the buyers' claim for negligent misrepresentation was a covered occurrence not excluded under the policy.

The Illinois appellate court held that a negligent misrepresentation claim is not excluded from coverage as long as the insured did not expect or intend the injury. The court held that the complaint alleged an occurrence by alleging negligent misrepresentation and that the relevant exclusions did not eliminate that coverage. The complaint alleged an occurrence because the damage arguably was not expected or intended. The contract

exclusion did not bar coverage because the disclosure report was not a contract and the buyers' lawsuit sought compensatory damages rather than contract-based relief.

Thus, the court seized on a single count – negligent misrepresentation – as the grounds for requiring the insurer to defend the entire case against the home seller. As the court explained, "if the underlying complaint against the insured contains several theories of recovery and only one of the theories is potentially covered, the insurer must still defend the insured [and] may become obligated to defend against causes of action and theories of recovery that the policy does not actually cover."

Construction defect complaints allege many alternative theories of recovery and one of those may be an "occurrence" (although many insurers may contest the point). Although insureds and insurers typically battle over exclusions to coverage, such as the "your work" and "faulty workmanship," exclusions, alternative bases for coverage may be available that avoid these disputes. Business insureds facing construction defect claims should search for alternative bases for coverage in complaints asserted against them. A single allegation, such as one for negligent misrepresentation, can be sufficient to trigger coverage for a claim that, from the insurer's perspective, is otherwise uninsured.

By Katherine Henry

Know Your State Law to Better Assess Risk

The recent Illinois case *1324 W. Pratt Condominium Association v. Platt Construction Group, Inc.* reminds contractors to be mindful of state policy considerations which may affect their risk assessments when constructing condominiums or high profile projects.

The case involved the construction and sale of an eight unit residential building in Chicago, Illinois. The project developer contracted with a general contractor for construction of the building, who then hired a number of trade subcontractors to perform the majority of the work.

After completion of the building in March 2005, the developer sold the eight units in the building as condominium units, entering into real estate contracts with each of the individual condominium unit owners. The general contractor and trade subcontractors had no direct contracts with the individual unit owners and were not involved in the sale of the units.

After sale of the condominium units, the developer became insolvent and entered bankruptcy. Shortly thereafter, leaks developed in the condominium building. The condominium association alleged that these leaks caused structural damages to the building and also caused mold to grow throughout the building with resultant medical problems for some of the owners. Because the developer had gone out of business, the condo association notified the general contractor of the leaks and requested that it repair the problems. The general contractor ignored these requests; so, the condo association sued the general contractor and some of its subcontractors asserting various causes of action, including breach of the implied warranty of habitability.

The general contractor first asked the Illinois trial court to dismiss the case because it had no contract with the unit owners or the condo association. While the trial court accepted this argument, on appeal the Illinois appeals court held that the implied warranty of habitability is meant to protect homeowners from improper construction and therefore, the implied warranty applied against the general contractor even when there was no contract between the general contractor and the unit owner.

On its second visit to the trial court, the general contractor attempted to rely on a provision in the real estate sales contract between the developer and the individual unit owners whereby the unit owners "disclaimed" the implied warranty of habitability. Again, the lower court accepted the general contractor's argument and ruled in favor of the general contractor. The unit owners again appealed.

Upon review, the appellate court noted that the real estate purchase contracts were between the individual unit owners and the developer; the general contractor was not a party to the contract. The court then noted that disclaimers of the implied warranty of habitability are strictly construed under Illinois law, as a matter of public policy. Here, the disclaimer of the implied warranty of habitability was only between the "Purchaser" and the "Seller" – between the unit owners and the developer. The court held that by its plain terms, this disclaimer could not apply to the general contractor. Therefore, the general contractor could still be held liable for breach of the implied warranty of habitability.

This case reminds contractors to be careful when constructing multi-unit residential buildings and other properties that may be subject to important "policy considerations" under a given state's law. To remain profitable, it is important that contractors put in place effective contractual mechanisms for assigning and disclaiming risks that will be effective under the applicable law. To do so, contractors must have a solid understanding of the legal structures under which they operate. While there is no "sure" answer here, the contractor might have been successful in having its contractual partner agree to place a disclaimer favorable to the contractor and its subcontractors in the condominium sales contracts.

By Luke Martin

If Your Warranty Fails, Will You Be Liable For Consequential Losses?

Two important elements of any commercial contract are the warranty and the exclusion of consequential losses. In the context of the sale of goods, warranty provisions will typically cover defective products and the seller's liability will be limited to the replacement or repair of the goods and may not cover so-called "consequential" damages. However, when a warranty fails of its essential purpose, contractual limitations on recovery of consequential losses can be compromised.

"Failure of essential purpose" of a warranty is a legal term that describes the situation where a warranty provides insufficient remedies to a purchaser. In a construction setting, the most typical example of this is the purchase of a piece of commercial equipment that is in some way defective. When the defect is discovered, the purchaser contacts the seller and requests that the seller fulfill its warranty obligations by fixing the equipment. Courts have held that a "limited repair or replace" warranty fails of its essential purpose when the seller is not able to fix the equipment in a reasonable amount of time, even if numerous attempts at repair are undertaken.

A warranty can also fail of its essential purpose when a volume purchaser discovers a "serial defect"- *i.e.*, a defect present within a large number of similar units. Even if the seller replaces the products under warranty, the warranty may still fail of its essential purpose if the purchaser is required to absorb the cost of uninstalling the products and shipping them back to the seller (as well as absorbing the resulting loss in production or cooling or other output). The theory behind this doctrine is that mere replacement of the defective products does not sufficiently compensate the purchaser – in legalese, the purchaser is deprived of the "benefit of the bargain."

When a warranty has failed of its essential purpose, the purchaser may be allowed to recover consequential losses despite a contractual exclusion of the same. The Uniform Commercial Code ("UCC"), which governs the sale of goods and is adopted in some form by every state, specifically addresses failure of a warranty and consequential losses. Section 719 of the UCC expresses the following rules: first, if a warranty fails of its essential purpose, all "normal" remedies (including recovery of consequential losses) become available to the purchaser; second, if a consequential loss exclusion is unconscionable, it is not valid. The interplay between these provisions begs the question: if a warranty fails of its essential purpose, thereby allowing the purchaser the full range of remedies available for breach of contract, does a consequential loss exclusion remain valid if it is not unconscionable? In other words, is a contractual consequential loss exclusion automatically extinguished when a warranty fails of its purpose?

The majority of states hold that the two UCC provisions are dependent – that a consequential loss limitation is automatically extinguished when a warranty fails of its purpose and the purchaser is allowed to recover consequential losses despite the contrary limitation in the parties' contract. The logic of this position is that the balance of risk inherent in a contract between two parties is materially altered when a warranty fails to serve its purpose. The majority states include Alabama, Delaware, Idaho, Illinois, Massachusetts, Michigan, Ohio, South Dakota, and Wisconsin. The minority of states hold that the two UCC provisions are independent – that a contractual limitation on recovery of consequential losses remains valid even when a warranty fails of its purpose. The logic of this position is that the balance of risks was negotiated between the parties and it should not be disturbed. Minority states include some behemoths in commercial contracting: California, New Jersey, New York, North Carolina and Tennessee. Some states, such as Mississippi, have not explicitly addressed this issue.

In order to better protect against liability for consequential losses, manufacturers and sellers of equipment and materials should consider including a contractual provision explicitly stating that the consequential loss

exclusion functions independently from the terms of the limited warranty. The provisions should state that the parties agree the consequential loss exclusion will remain in place even if the warranty fails of its essential purpose. Even in the majority rule states, this type of contractual clause has a good chance of holding up in a court of law because the UCC can be modified or overwritten by a contractual agreement. The following are two sample clauses, which can be added to consequential loss exclusions:

> *"This disclaimer and exclusion shall apply even if the express warranty set forth above fails of its essential purpose."*

> *"Customer acknowledges and agrees that Seller has set its prices and entered into the Agreement in reliance upon the disclaimers of warranty and the limitations of liability set forth herein, that the same reflect an allocation of risk between the parties (including the risk that a contract remedy may fail of its essential purpose and cause consequential loss), and that the same form an essential basis of the bargain between the parties."*

Of course, the purchaser, whether contractor or owner, faced with this effort by the equipment supplier, should be diligent in attempting to negotiate more favorable terms.

By Vesco Petrov

Owner's Approval of Means and Methods may not Relieve Contractor of Liability

When faced with a risky means and methods issue—excavating near an existing structure, for example—contractors frequently seek or otherwise receive input (whether they want it or not) from the owner or its on-site representative. In other cases, the contractor may simply take comfort in the fact that the owner is observing the means and methods in progress and is not objecting to them. In either case, the contractor may assume that so long as the owner somehow "buys in" to the contractor's plan and the contractor properly executes it, the owner will bear some or all of the risk if something goes wrong. This is not a sure assumption.

Generally, a contractor is solely responsible to implement the owner's design concept through means and methods of its choosing, so long as the owner or owner's designer does not dictate in the design that the contractor employ specific means and methods. Moreover, inspection provided by or for the owner generally does not guarantee the contractor's performance or relieve its obligation to perform work in accordance with the drawings and specifications. It is common for contracts to spell out these principles. The AIA A201 (2007), for example, provides that the "Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters."

While these are generally well understood principles, the analysis is less obvious when the owner has somehow indicated its approval of the means and methods. An older but frequently cited case out of Iowa, *Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates, Inc.*, illustrates why a contractor should not assume that it is off the hook in these cases. *Shepherd* involved sewer system improvements that required excavation near an existing structure. Although the contracts for the project clearly assigned sole liability for means and methods to the contractor, the owner's engineer, upon request for consultation from the contractor, provided its approval of the contractor's proposed method for protecting the adjacent property during excavation. The contractor installed sheet piling designed to retain the soil supporting the existing structure but—thinking it would solve a separate vibrations problem—deviated from the plan by excavating some material from the existing structure-side of the sheet piling. Signs of a potential failure quickly appeared. The contractor consulted the engineer and proposed a new plan to him. Although the engineer apparently did not formally approve this second plan, he was intimately aware of the plan and discussed it with the contractor in several meetings. The contractor followed the new plan without objection from the engineer. Nevertheless, a significant failure occurred and the owner of the existing structure sued the contractor and engineer.

Despite these "bad facts" for the engineer, which made it appear that he at least tacitly approved the plan, the court focused primarily on the terms of the contracts at issue and the customary lines of responsibility discussed above. Under its contract with the owner, the contractor had sole authority over means and methods. In contrast, while the engineer's contract with the owner

contained a duty to inspect the construction site, he had no authority to control means and methods. At trial, the property owner and contractor argued that the engineer should be primarily liable for the failure based on his negligence in failing to object to the plan or propose a plan of his own, especially given his involvement in the situation. Nevertheless, the court found that the engineer's on-site involvement did "not change the fact that [he] had no legal duty to interfere with [the contractor's] judgment on which construction procedures to utilize." In the end, the contractor was left holding the bag.

Understandably, contractors may view the owner's engineer as a good source of input, and there is nothing inherently wrong with seeking such input. However, the lesson of *Shepherd* is that contractors should not assume that the owner or owner's engineer has taken responsibility for a means and methods issue just because the engineer has observed, participated in, or even approved the method.

By James Warmoth

Magic Words Make For Bad Law

Homebuilders in Ohio, and those litigants who might be influenced by the Supreme Court of Ohio, should take note of the recent decision in *Jones v. Centex Homes* that the duty to build in a workmanlike manner is non-waivable as a matter of law. This decision flies in the face of the industry practice of disclaiming common law implied warranties and substituting limited express warranties in their place. The court achieved this result by claiming that building in a workmanlike manner was a "duty" rather than an "implied warranty." It appears that this has been in the law in Ohio for close to thirty years, yet the Ohio Legislature hasn't acted to fix this problem.

One of the first things lawyers learn is that the civil law draws its duties largely from contract and tort. While most people in our industry are quite familiar with contracts, many have heard of torts but aren't quite sure what the term means. Tort duties are duties that do not arise under contract, but arise because of the nature of society. They are those that a "reasonable person" would undertake in exercise of ordinary care to those around her. In the non-construction context, this means driving one's car at a reasonable rate of speed to protect other drivers or not driving while intoxicated. For our industry, it might mean not building weak scaffolds near public walking areas or leaving open excavations where the public would be likely to walk into them. Generally, it has not meant taking on duties to specific homeowners with whom the builder has a contract because the contract is the best way for those two parties, dealing at arm's length, to define their responsibilities to one another. If a homeowner wants a warranty, he or she can ask for one in the contract. For this reason, the law recognizes that promises regarding the quality of construction and directed at the homeowner, *i.e.*, warranties, spring from the contractual relationship and would not exist without it. Several states recognize that a party who promises to do something in a contract also has a duty to do that act reasonably — that is, contract duties can give rise to tort duties. Other states reject this view and adopt the economic loss rule, holding that purely economic damages arising from a contract may not also have a remedy in tort.

Why on earth should one care about this discourse on contracts vs. torts? In the Ohio case, the court focused on the builder's characterization of the duty to build in a workmanlike manner as an "implied warranty," in keeping with the general rules of the construction industry. Indeed, the court appears to have no problem with the notion that implied warranties can be waived and replaced by contract, but it claimed "that issue is not squarely before us." In Ohio, the obligation of a builder to provide a habitable home is a duty that arises from the contract, but is not an "implied warranty." Therefore, the duty cannot be waived in the way a warranty can. One supposes that a mere deviation from plans and specifications might not support this tort duty if the deviation were not "unreasonable" or was not alleged to make the home uninhabitable.

However, in practice, this is a harmful rule for construction businesses. First, by placing the duty in tort (specifically, negligence), the court takes away builders' ability to avoid a lengthy trial, as almost every negligence suit inherently turns on jury-decided questions. Second, the Ohio court changes the legal risks by not allowing parties, contracting at arms' length, to alter this particular tort duty in their contracts. Our advice to those building homes or condominiums in Ohio is to review your risk allocation clause, attempt to insure this particular risk, and, where possible, place strict notice limitations on a homeowner asserting a habitability claim. Finally, talk to your lawyer about other potential ways to limit this risk.

By Jonathan Head

Bradley Arant Lawyer Activities:

David Taylor spoke at the International Council of Shopping Centers "College" in Philadelphia on March 2nd on the topic of "Managing Construction Disputes."

Eric Frechtel, **Steven Pozefsky** and **Aron Beezley** co-authored an article on the first known court challenge of a U.S. Department of Veterans Affairs ("VA") denial of an application for inclusion in the VA's VetBiz Vendor Information Pages Verification program which was published in the April/May 2012 issue of *Federal Construction Magazine.*

Michael Knapp, **Ryan Beaver**, **Brian Rowlson**, **James Warmoth** and **Monica Wilson** recently attended the ABC Carolinas Construction Conference in Wilmington, NC, where the Charlotte office was recognized as the ABC Carolinas Associate Member of the Year for 2012.

Ralph Germany was named a *Mid-South Super Lawyer* in the area of Construction Litigation for 2011. **Alex Purvis** was also named a "Rising Star" in the area of Insurance Coverage.

Brian Rowlson recently authored an article that was selected for publication in the Florida Bar Journal and will also be published in the next Division 7 newsletter for the ABA Forum on the Construction Industry.

Arlan Lewis spoke at the ABA Forum on the Construction Industry's 2012 Annual Meeting in Las Vegas, NV in April on "Federal Contracting for Small, Minority and Women-Owned Businesses."

David Taylor spoke at the American Bar Association's ADR National Meeting in Washington, DC on April 19th on the topic of "Selecting Neutrals."

Doug Patin, **Bill Purdy** and **Mabry Rogers** were honored in the "International Who's Who of Construction Lawyers 2011."

David Pugh was recently named as a member of the Board of Directors for Design-Build Institute of America's South Central Region.

David Taylor spoke on May 4th at the Tennessee Chapter of American Society of Professional Engineers in Nashville on "Contract Clauses that Can Bite Back."

Ryan Beaver, **Ralph Germany**, **Michael Knapp**, **David Pugh**, **David Taylor** and **Bryan Thomas** recently spoke at the Bradley Arant Boult Cummings LLP 2012 Construction Contract Claims Legal 101 seminars in Birmingham on May 11th, Nashville on May 18th, Charlotte on June 15th and Jackson on June 22nd.

Stanley Bynum attended the ABA Section of International Law's Spring Meeting from April 17th to 24th in New York City.

Keith Covington spoke on the latest developments at the National Labor Relations Board and the Department of Labor at two recent membership meetings sponsored by the Associated Builders and Contractors. Keith's presentation included discussion of the new NLRB posting rule, the NLRB's new rules on union election procedures, and the proposed changes to the DOL's labor persuader reporting rules.

Jim Archibald, **Axel Bolvig**, **Ralph Germany**, **John Hargrove**, **Rick Humbracht**, **Russ Morgan**, **David Owen**, **Doug Patin**, **David Pugh**, **Bill Purdy**, **Mabry Rogers**, **Wally Sears**, **Frederic Smith**, **Harold Stephens** and **David Taylor** were recognized in *The Best Lawyers in America* for 2013.

Jim Archibald, **Axel Bolvig**, **John Hargrove**, **Doug Patin**, **Mabry Rogers**, **Harold Stephens, Wally Sears** and **Robert Symon** were recognized as Super Lawyers for 2012. **David Bashford** and **John Mark Goodman** were recognized as Rising Stars.

Mabry Rogers and **Bill Purdy** were recognized in *Chambers 2012* edition in the area of Construction Litigation. **Doug Patin** and **Bob Symon** were recognized in the area of Construction. **John Hargrove** was recognized in the area of Labor & Employment.

For more information on any of these activities or speaking engagements, please contact Terri Lawson at 205-521-8210.

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The lawyers at Bradley Arant Boult Cummings 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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If you have any comments or suggestions, please complete the appropriate part of this section of the *Construction & Procurement Law News* and return it to us by folding and stapling this page which is preaddressed.

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BRADLEY ARANT BOULT CUMMINGS LLP **Fourth Quarter 2012**

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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Ninth Circuit: Underbids Can Constitute False Claims

Recently, in the case of *Nyle J. Hooper v. Lockheed Martin Corp.*, the U.S. Court of Appeals for the Ninth Circuit ruled for the first time that underbidding or making false estimates in bids or proposals submitted in response to federal government solicitations may constitute violations of the False Claims Act. The agencies administering Federal contracts are increasingly insistent on enforcement of the requirement. The stated rationale is to assure the general contractor's "adequate interest and supervision of the work."

Inside:

In the *Hooper* case – a *qui tam* action filed by a former Lockheed Martin senior project engineer – Lockheed Martin allegedly defrauded the U.S. Air Force by intentionally underbidding on a cost reimbursement plus award fee contract that required it to install hardware and software to support space launch operations at Cape Kennedy in Florida and Vandenberg Air Force Base in California. Specifically, Hooper claimed that Lockheed Martin instructed its employees to lower Lockheed Martin's bids by almost half to improve its chances of winning the contract. Lockheed Martin was awarded the contract based on a bid of $432.7 million. By the time the court case was instituted, it had requested and been reimbursed over $900 million for its work on the contract, according to the Ninth Circuit's opinion.

Lockheed Martin argued that "[e]stimates of what costs might be in the future are based on inherently judgmental information, and a piece of purely judgmental information is not actionable as a false statement." The Ninth Circuit disagreed, stating that "[a]s a matter of first impression, we conclude that false

estimates, defined to include fraudulent underbidding in which the bid is not what the defendant actually intends to charge, can be a source of liability under the [False Claims Act], assuming that the other elements of a [False Claims Act] claim are met."

Having determined that False Claims Act liability may be premised on false estimates, the Ninth Circuit held that "there is a genuine issue of material fact whether Lockheed acted either knowingly, in deliberate ignorance of the truth or in reckless disregard of the truth when it submitted its bid." The Ninth Circuit's holding was based on testimony of Lockheed Martin employees who said that they were instructed to lower their estimate of costs, without regard to actual estimated costs, and that Lockheed Martin was "dishonest" in the productivity rates used to estimate costs for the contract. In addition, the Ninth Circuit cited the Air Force's own analysis of Lockheed Martin's bid which stated that the bid was "optimistic about some of its inputs . . . , resulting in an overstated potential for cost savings."

Contractors should heed the warning of the *Hooper* case: false statements and representations made in connection with bids or proposals may – in the right circumstances, such as the extreme allegations by the Hooper *qui tam* plaintiff – form the basis for liability under the False Claims Act, despite the lack of a formal contract with the governmental entity at the time such statements or representations are made.

By Aron C. Beezley

State Courts Limit CGL Coverage for Property Damage Arising From Defective Construction

Courts have generally recognized that property damage arising from faulty or defective work performed on a construction project constitutes an "occurrence" under commercial general liability (CGL) policies. In turn, contractors have frequently relied on these policies to provide insurance coverage for property damage claims arising from negligent work performed by their subcontractors. However, recent court decisions in a number of states have eroded the definition of an "occurrence," limited coverage under CGL policies, and altered the construction industry's widespread reliance on these policies as a risk-management mechanism.

The South Carolina Supreme Court issued one of the most publicized opinions on this issue in *Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Company* ("*Crossman I*"). In *Crossman I,* a developer was sued by several homeowners in a condominium development located in South Carolina for defective construction. Specifically, the exterior components of the projects were negligently constructed, leading to water intrusion issues and subsequent damage to non-defective components of the projects. The developer settled with the homeowners and later sought coverage under its CGL policies for the damages incurred. The trial court found that the homeowners' property damage claims were an "occurrence" covered by the CGL policies. On appeal, the South Carolina Supreme Court overruled prior state precedent on the issue, and held that the water damage was a direct result of the faulty construction and therefore could not have been an unintended consequence of the negligent work. Coverage under the CGL policy was denied. The January 7, 2011 opinion received immediate and widespread criticism from the construction industry.

The South Carolina legislature quickly enacted Senate Bill 431 in the spring of 2011 in an attempt to counter the *Crossman I* decision. The new law provides that South Carolina CGL policies "shall contain or be deemed to contain a definition of 'occurrence' that includes: (1) an accident, including continuous or repeated exposure to substantially the same general harmful conditions; and (2) property damage or bodily injury resulting from faulty workmanship, exclusive of the faulty workmanship." Section 3 of § 38-61-70 also states that the Act applies to "any pending or future dispute" as to "commercial general liability policies issued in the past, currently in existence, or issued in the future." The statute's aim was apparently to remove all CGL policies from the grasp of the *Crossman I* decision.

On May 23, 2011, the South Carolina Supreme Court reheard the arguments from *Crossman I*, reversed course on its prior decision, and issued a new opinion in August 2011 ("*Crossman II*") finding coverage under the CGL policies. Without making reference to the new law, but essentially restating the statutory language, the *Crossman II* court stated its intent to clarify that negligent construction resulting in damage to non-defective components "may" constitute property damage subject to coverage as an occurrence under the policy. As provided by the newly-enacted statute, damage arising from the faulty workmanship itself would not be covered by the policy.

Legislatures in states such as Colorado, Hawaii, and Arkansas have passed similar legislation in response to court decisions limiting CGL coverage for property damage arising from defective construction. However, despite the apparent widespread opposition to these limitations on CGL policies, some state courts continue to rule in favor of limiting coverage. Recently the Supreme Court of Ohio in *Westfield Insurance Company v. Custom Agri Sys., Inc.* ruled that claims for defective construction did not constitute "property damage" caused by an "occurrence" under a CGL policy. While it remains to be seen whether the Ohio legislature will step in and counter the *Westfield* decision, the ruling is a reminder that construction industry participants must remain cognizant of the governing law on this issue in their respective jurisdictions. The failure to do so may be costly to contractors, who may be liable for property damage claims that have been covered by CGL policies in many states.

By Brian M. Rowlson

Construction Contractor Prevails in Court of Federal Claims Bid Protest Action

Recently, the U.S. Court of Federal Claims held in favor of a construction contractor in a bid protest action that was brought against the U.S. Postal Service ("USPS") in connection with the award of a firm, fixed-price contract for replacement of the heating, ventilation, and air conditioning system in the principal post office in Portland, Maine. The Court's decision in *J.C.N. Construction, Inc. v. United States* reaffirms that the Court has jurisdiction over claims for breach of the government's implied duty to fairly and honestly consider offerors' proposals and highlights little-known risks that exist when contracting with the USPS.

In *J.C.N. Construction, Inc*., the contractor argued that the USPS improperly evaluated offerors' proposals and acted arbitrarily and capriciously throughout the procurement. Specifically, after the contractor had successfully protested under the USPS's bid protest process, the contractor contended that the USPS treated it unfairly by allowing the awardee to have inside information about the true scope of work and relaxed scheduling requirements. Indeed, when the awardee's prior contract was not terminated for convenience after the contractor's initial success at the agency-level protest, the awardee was able to significantly reduce its price under the revised solicitation because its bid and insurance costs had already been purchased under the original contract award and because the public statement of work overstated the work, as the awardee knew privately. In short, the USPS's mishandling of the procurement provided an improper advantage to the awardee and constituted a breach of the government's implied duty to consider proposals fairly and honestly in the earlier solicitation for the same work.

In response to these claims, the USPS argued that the contractor waived its claim associated with inaccuracies in the second solicitation issued by the USPS by failing to raise these inaccuracies with the USPS before the close of bidding. In addition, the USPS argued that the Court did not have jurisdiction over the contractor's claim that the government breached its implied duty to fairly and honestly consider the contractor's proposal. The Court rejected these arguments, finding that the inaccuracies in the second solicitation were latent and, as a result, the contractor was not required to raise this issue before the close of bidding under the second solicitation. In addition, the Court held that it had jurisdiction over the contractor's claims for breach of the implied covenant of fair and honest consideration.

Despite the Court's finding in favor of the contractor on the merits of its claims, the Court declined to grant the contractor's request that the Court terminate performance of the awarded contract because the majority of the work required by the contract had already been performed by the time the Court issued its decision. The reason that the contract had neared completion was because the contractor was required by regulation to exhaust the USPS's unique protest process before filing suit in the U.S. Court of Federal Claims and the USPS's protest process, unlike some other US agencies, does not provide for an automatic stay of contract performance. However, the Court did order the USPS to pay the contractor's bid preparation and proposal costs, and there is still the possibility that the contractor will recover a portion of its attorneys' fees under the Equal Access to Justice Act.

This case is significant because it reaffirms that the U.S. Court of Federal Claims has jurisdiction over contractors' claims for breach of the implied duty to fairly and honestly consider offerors' proposals and highlights little known risks of contracting with the USPS.

[The editors note that this article's authors, Mr. Symon and Mr. Beezley, served as bid protestor's counsel in this successful bid protest.]

By Robert J. Symon and Aron C. Beezley

Save Your Own Bacon: Verify Davis-Bacon Act Certifications or False Claims Liability Could Follow

The Sixth Circuit Court of Appeals in *U.S. ex. rel. Wall v. Circle C Construction, L.L.C.*, recently found a general contractor liable under the False Claims Act ("FCA") for submitting certified payrolls which falsely declared that a subcontractor had paid its employees the wage rate required by the Davis-Bacon Act. The court imposed liability on Circle C Construction, L.L.C., the general contractor, even though Circle C had no first-hand knowledge regarding whether its subcontractor actually paid the required Davis-Bacon wages. This case makes clear that a contractor can be held liable under the False Claims Act if it wrongly certifies that a lower-tier contractor paid required Davis-Bacon Act wages when the subcontractor failed to do so, especially where the contractor takes *no action* to verify the accuracy of the certification.

The Circle C case involved a construction contract with the Army to perform work at Fort Campbell. As required by federal regulations, the contract required Circle C to submit complete and accurate certified payroll and to ensure that subcontractors paid employees according to the Davis-Bacon wage determinations in the contract. Although Phase Tech was Circle C's electrical subcontractor on the project, it performed this work without executing a subcontract. Circle C provided Phase Tech with the wage determination excerpts from its prime contract, but did not (1) discuss the Davis-Bacon requirements with Phase Tech; (2) provide a blank certified payroll form to Phase Tech; or (3) verify whether Phase Tech submitted certified payroll during project performance. According to the court, Circle C "lacked a protocol or procedure to monitor Phase Tech's employees' work on the Fort Campbell project and did not take measures to ensure payment of proper wages under the Davis-Bacon Act."

During the project (from 2004 to 2005), Circle C submitted certified payroll for every subcontractor except Phase Tech. In 2008, after the False Claims Act case was commenced, Circle C asked Phase Tech to submit new certified payrolls for 2004 and 2005. Circle C ultimately submitted the certified payrolls to the government without verifying the accuracy of the documents.

Each of the certified payrolls contained a certification that the court decided was false under the FCA. Based on this certification by Circle C, the government identified 62 false payroll certifications among the certified payrolls submitted by Circle C. The government alleged the certified payroll was false in two respects: (1) the payroll was not "complete" as certified because Circle C failed to submit payroll for Phase Tech employees; and (2) the 2008 payroll wrongly represented that Phase Tech employees were paid the required Davis-Bacon wage rate.

The Sixth Circuit agreed with the government that these payroll certifications constituted false certifications under the FCA and that Circle C was liable for damages. In making its ruling, the Sixth Circuit recognized an important legal distinction regarding contractor liability for false Davis-Bacon Act certifications; namely, the court held that a contractor can only be held liable under the FCA based on false Davis-Bacon certifications when the allegedly false statement is made about the *amount* of wages paid. Cases cannot be brought under the FCA where the false statement concerns the *classification* of employees under the Davis-Bacon Act, a determination that requires analysis of complicated federal regulations regarding how certain laborers are classified for the purpose of determining the applicable wage rate. This particular legal ruling is consistent with prior court cases on that issue.

The facts of the Circle C case show that Circle C could have avoided FCA liability by taking two precautions with respect to submitting certified payrolls to the government. First, the 2008 certified payroll submitted by Circle C clearly showed that the wages being paid by Phase Tech were below the amount required by the Davis-Bacon Act. A quick comparison of Phase Tech's payroll with the wage requirements of the statute would have made this fact apparent. Second, Circle C was held liable for falsely certifying that the certified payroll it submitted was "complete." Circle C could have avoided liability by ensuring that complete certified payrolls were submitted for all subcontractors.

BABC's lawyers are aware that the U.S. government is focusing on Davis-Bacon compliance throughout the

country. While the general contractor is not required to audit each weekly payroll by each subcontractor, it is prudent to adopt a protocol for checking for missing certifications, for spot-checking certifications for obvious errors (classifications of mechanics as laborers, for example), and, where a problem appears, arranging for interviews of randomly selected employees of one or more subcontractors. Subcontractors must also ensure compliance. While the general contractor may face generally only financial penalties, the subcontractor will often face the death-knell of debarment.

By Thomas Lynch

Is a Developer's Arbitration Clause Effective Against a Third Party Owners' Association?

The construction of large condominium and multi-home development projects presents a number of challenges for courts in interpreting the applicability of the various necessary agreements, declarations, restrictions, etc. among the competing interests on a project. In *Pinnacle Museum Tower Assoc. v. Pinnacle Market Development (US), LLC,* the California Supreme Court addressed just such a situation when a condominium developer sought to enforce an arbitration clause contained in its recorded declaration against the third party owners' association for the condominium.

In that case, the developer constructed a mixed-use residential and commercial common interest community in San Diego, California. Pursuant to the requirements of California law, the developer drafted and recorded a "Declaration of Restrictions" to govern its use and operation of the project. The declaration contained a number of easements, restrictions, and covenants, and established an owners' association which was responsible for managing and maintaining the project property. The declaration also included an arbitration clause which provided that, by accepting a deed for any portion of the property, the owners' association and each condominium owner agreed to waive their right to a jury trial and instead agreed to have any construction dispute resolved exclusively through binding arbitration. Further, the individual owners entered into purchase agreements that were signed subject to the terms and conditions of the declaration.

Following completion of the development, the owners' association filed a construction defect suit against the developer. In response, the developer filed a motion to compel arbitration, citing the arbitration clause in the declaration. Finding against the developer, the lower appellate court held that the arbitration clause could not be binding against the owners' association. The court reasoned that the agreement to arbitrate did not provide the owners' association sufficient notice, time to consider the agreement, or an opportunity to consent, because the association was not a party to the declaration and did not even exist when the developer first filed the declaration.

The California Supreme Court overruled and held in favor of the developer on the motion to compel arbitration. The Court reasoned that the authority of the owners' association to consent to the arbitration agreement was effectively delegated to the individual owners of the condominiums. Via the terms of the purchase agreements, the owners and the developer had an expectation that the terms of the declaration would govern their interactions, and the owners' association, which represented the interests of the owners, could not frustrate those expectations by claiming an exemption from the provisions of the declaration as a non-party. The Court was further influenced by the judicial and legislative interests that favor arbitration as an efficient and cost-effective alternative means to resolve disputes.

The Court's application of the arbitration clause to the third party owners' association demonstrates the lengths to which courts will often go to funnel parties into the use of agreed alternative dispute resolution methods. Planned community developers and owners should pay particular attention to this decision as they draft future declarations and other development-related instruments, but owners and contractors in other complex projects should also take heed when drafting or entering into complex agreements with multiple parties.

By Aman Kahlon

Contractor Recovers Delay Costs Despite No-Damage-for-Delay Provision

Despite a no-damages-for-delay provision in the construction contract, a North Carolina appellate court decided in *Southern Seeding Service, Inc. v. W.C. English, Inc.*, to allow a contractor's delay claim for additional labor and material costs under the contract's equitable adjustment provision.

Southern Seeding Service, Inc., a subcontractor, provided grassing work on a transportation project in

Greensboro, North Carolina, pursuant to a subcontract with W.C. English, Inc. The subcontract, which paid Southern Seeding a unit price for seeding and mulching services, contained two provisions relevant to payment for project delays: an equitable adjustment provision and a no-damages-for-delay provision.

The project was delayed 256 days beyond its originally scheduled completion date. Southern Seeding invoiced W.C. English for its additional unit costs for labor and materials arising from the delay. The trial court ruled Southern Seeding was barred by the no-damages-for-delay provision from any additional compensation due to the delay. Southern Seeding appealed.

The appellate court distinguished the no-damages-for-delay provision and the equitable adjustment provision, finding that each provision allocated distinct risks which should be treated separately. The no-damages-for-delay provision barred only damages resulting from delay to the extent such damages were not compensated to W.C. English by the project owner or another third party. The equitable adjustment provision, on the other hand, stated that the unit prices in Southern Seeding's subcontract were "based on the assumption that the contract will be completed within time as specified in the specifications at time of bidding. Should [Southern Seeding's] work be delayed beyond said time without fault on [Southern Seeding's] part, unit prices herein quoted shall be equitably adjusted to compensate" Southern Seeding for its increased cost.

The court ruled that the equitable adjustment provision allowed Southern Seeding to recover its "market driven cost increases associated with material and labor costs" incurred after the originally scheduled completion date. Such costs, it found, were the result of conditions which significantly differed from those indicated in the subcontract and contemplated by the parties, and as such, recovery of these costs was not prohibited by the no-damages-for-delay provision. The court also allowed Southern Seeding to seek recovery of such costs, to the extent not collected from W.C. English, under the payment bond for the project.

Contractors may note several important contracting pointers from the *Southern Seeding* opinion. First, a contractor should identify each contractual provision providing a basis for recovery in addition to the contract price. When a changed condition arises, or a project suffers delays, the contractor should ask whether the change implicates any entitlement provision to form the basis for recovery of its increased costs (noting that the condition may implicate more than one contractual provision). Second, as demonstrated by Southern Seeding's repeated letters to W.C. English in the above-described project, a contractor facing increased costs for a changed condition should follow all contractual notice requirements, citing every potential contractual basis for its claim (or, alternatively, citing no specific clause, but instead relying on "the contract and applicable law"), to prevent any allegation that the contractor waived its contractual right of recovery. Recovery seemingly barred under a no-damages-for-delay provision may in fact be permitted by an equitable adjustment clause or other similar provision in a construction contract.

Finally, for owners, contractors, and subcontractors, Southern Seeding "won" this argument when it successfully negotiated a contract adder that expressed the basic assumption for its unit prices. Absent that important provision to the changes clause, it is likely the general contractor would have prevailed, even if such a result might be deemed unfair.

By Monica L. Wilson

Are You Sure? Strict Construction of Conditions of the Performance Bond

A recent case from the Federal court that supervises the trial courts in New York, Connecticut, and Vermont, *Stonington Water Street Associates v. National Fire Insurance Company of Hartford*, is a caution to be mindful of the suretyship conditions contained in the AIA A-312 performance bond.

The case involved the construction of a $20 million condominium complex in Connecticut. Stonington, the owner, contracted with a local general contractor to build the complex. In return, the general contractor secured National Fire Insurance Company of Hartford to act as surety, and National Fire executed an AIA A-312 performance bond in favor of the general contractor. As is customary, the terms of the AIA A-312 performance bond provided that National Fire would assume the responsibilities of the general contractor for defective work and, if necessary, complete the project upon the occurrence of certain circumstances enumerated in the bond form.

The construction of the condominiums proved difficult. The project experienced three costly delays due

to a fire, installation of defective materials, and a burst sprinkler hose. As a result, the financial condition of the general contractor deteriorated to the point that Stonington considered declaring the general contractor in default. Ultimately, the general contractor ceased working, and the owner hired replacement contractors to complete the project.

Two months after the general contractor stopped working, Stonington notified National Fire that it was terminating the general contractor and asserted that National Fire was responsible for fulfilling the contract's obligations. National Fire denied coverage on the grounds that Stonington had failed to strictly comply with the terms of the performance bond. Stonington then filed suit in federal court.

The trial court agreed with National Fire. Construing the terms of the construction contract and the performance bond together, the trial court reasoned that the owner had to fulfill several conditions necessary to invoke the surety's performance. First, under Section 3.2 of AIA A-312, the owner must declare a contractor default and formally terminate the general contractor, a process that requires written certification from the architect and seven days notice to the surety. Additionally, under Section 3.3 of AIA A-312, the owner must agree to pay the surety the balance of the contract price.

Stonington had not fulfilled either of these conditions, which prejudiced the ability of National Fire to protect its interests. Specifically, the unilateral hiring of replacement contractors deprived the surety of the opportunity to mitigate its damages. National Fire did not have the chance to participate in the selection of the replacement contractors, which may have been more expensive than the contractors National Fire would have selected. Moreover, because the owner had paid the replacement contractors the balance of the contract price, the surety had no further protection against the owner. In other words, because the owner depleted the contract balance, the surety was exposed in the event it had to complete construction. As a result, the trial court held that the terms of the performance bond were materially breached.

Upon review, the appeals court affirmed without requiring a showing of prejudice. The court agreed that the surety's interests were compromised because the owner did not properly abide by the terms of the performance bond. They concluded that the requirements to give notice and pay the contract balance to the surety were conditions precedent to the surety's performance. Without satisfying the conditions precedent, the surety's obligations did not come into existence. Additionally, they concluded that prejudice in fact was shown, even though that showing was not required.

While there is some split among courts applying the AIA form language, this decision, from an important commercial area of the country, stands for the proposition that an owner must be faithful in adhering to the exact terms of the performance bond if there is any likelihood that it will need to be invoked. Moreover, many courts hold the claimant to strict compliance with the notice requirements of the bond, whether or not the surety is prejudiced by the lack of compliance.

By J. Wilson Nash

Economic Development Group Joins Bradley Arant Boult Cummings

Well-known economic development attorney Alex B. Leath has joined the firm as a partner, and he brings with him three associates: David H. Cooper, Jr.; Charles B. "Trey" Hill III; and Matthew A. Hinshaw. Mr. Leath and his colleagues join the Economic Development and Incentives Group and State and Local Tax Practice Group. These additions continue Bradley Arant Boult Cummings' strong strategic growth over the past year, during which more than 60 attorneys have joined.

Mr. Leath has played a significant role in numerous economic development projects in 23 states over the last two decades. Recently, he advised Volkswagen Group of America on the site selection process for the company's U.S. manufacturing headquarters. Mr. Leath has a history of partnering with construction firms in all stages of the economic development process to assist them in understanding the opportunities available when large construction projects are initiated by owners/ developers.

The addition of Mr. Leath's group helps expand the firm's footprint in the national and international markets enjoyed by the Construction and Procurement Practice Group.

Bradley Arant Lawyer Activities:

U.S. News recently released its "Best Law Firms" rankings for 2013: **BABC's Construction Practice Group** is ranked as Tier One nationally. The Birmingham, Nashville, Jackson, and Washington, D.C. offices received similar recognition in the metropolitan rankings.

Jim Archibald, Aron Beezley, Rick Humbracht, Russ Morgan, David Pugh, and Mabry Rogers are recognized by *Best Lawyers in America* in the category of Litigation - Construction for 2013.

Aron Beezley, **Ralph Germany**, **David Owen**, **Doug Patin**, **David Pugh**, **Bill Purdy**, **Mabry Rogers, Wally Sears,** and **David Taylor** are recognized by *Best Lawyers in America* in the area of Construction Law for 2013.

Mabry Rogers and **David Taylor** are also recognized by *Best Lawyers* in the areas of Arbitration and Mediation for 2013.

David Owen is declared by *Best Lawyers in America* as the "Lawyer of the Year" in Birmingham in Construction Law for 2013.

Jim Archibald recently published an article in the August edition of *Construction Executive* entitled "Executive Insights: How Can Contractors Minimize the Potential for Disputes?"

David Taylor became the Chair of the Tennessee Association of Construction Counsel in December.

Eric Frechtel, **Steven Pozefsky** and **Aron Beezley** will publish an article for the upcoming edition of *Federal Construction Magazine* on the U.S. Small Business Administration's ("SBA") Office of Inspector General's recent report on the SBA's Mentor-Protégé Program.

Michael Knapp, **Ryan Beaver**, **Brian Rowlson**, **James Warmoth** and **Monica Wilson** recently attended the ABC Carolinas Construction Conference in Wilmington, NC, where BABC's Charlotte office was recognized as the ABC Carolinas Associate Member of the Year for 2012.

BABC's Nashville Office hosted the Pulte Summit for national homebuilder PulteGroup November 13th through 15th.

Brian Rowlson recently authored an article summarizing North Carolina's latest lien law revisions that was selected for publication in the Florida Bar Journal and will also be published in the Division 7 newsletter for the ABA Forum on the Construction Industry.

Russ Morgan attended the Associated General Contractors of America luncheon on November 6.

David Taylor recently spoke in Phoenix, Arizona to the National Meeting of the Construction Specifications Institute (CSI) on "Allowances and Owner Contingencies".

Jerry Regan, **Steve Pozefsky**, **Tom Lynch** and **Aron Beezley** conducted a seminar on October 24th on The Fundamentals of Joint Venturing in Construction for the Associated Builders and Contractors, Inc.'s Metro Washington Chapter.

David Taylor spoke to the construction/production team on October 23rd at the Hemlock Semiconductor plant in Clarksville, Tennessee on "Tennessee Lien and Licensing Laws"

David Pugh was recently named as a member of the Board of Directors for Design-Build Institute of America's South Central Region.

Jim Archibald, Axel Bolvig, Ralph Germany, **Doug Patin**, **Bill Purdy**, **Mabry Rogers**, **Wally Sears**, **Bob Symon** and **David Taylor** were named to *Super Lawyers* for 2013 in the area of Construction, Real Estate, and Environmental Law.

Chambers annually ranks lawyers in bands from 1-6, with 1 being best, in specific areas of law, based on in-depth client interviews. **Bill Purdy** and **Mabry Rogers** are in Band One in *Litigation: Construction*. **Doug Patin** was ranked in Band Two and **Bob Symon** in Band Three, both in the area of *Construction*.

For more information on any of these activities or speaking engagements, please contact Terri Lawson at 205-521-8210.

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.BABC.COM/PG_CONSTRUCT.CFM OR CONTACT ANY ATTORNEY LISTED ON PAGE 10 OF THIS NEWSLETTER.

READER RESPONSES

If you have any comments or suggestions, please complete the appropriate part of this section of the *Construction & Procurement Law News* and return it to us by folding and stapling this page which is preaddressed.

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We are in the process of developing new seminar topics and would like to get input from you. What seminar topics would you be interested in?

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If the seminars were available on-line, would you be interested in participating? ☐ Yes ☐ No

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