2007-2008 Construction Law Update:

Case Law & Legislation
Affecting the Construction Industry

Presented by

Division 10 – Legislation and Environment

Compiled and Edited by:

Matthew J. DeVries
Smith, Cashion & Orr PLC
231 Third Avenue North
Nashville, TN 37201-1603
(615) 742-8577
mdevries@smithcashion.com

Melissa A. Orien
Holland & Hart LLP
60 East South Temple, Ste. 2000
Salt Lake City, Utah 84111
(801) 799-5863
morien@hollandhart.com

***Contributing Editors**:*

Cathy Altman
Carrington Coleman
901 Main Street, Ste 5500
Dallas, TX 75202
(214) 855-3000
caltman@ccsb.com

Jeremy Vermilyea
P.O. Box 23338
Portland, Oregon 97281
(503) 726-1080
Jeremy@vermilyealaw.com

Christopher Montez
Thomas, Feldman & Wilshusen, LLP
9400 North Central Expy., Suite 900
Dallas, TX 75231
(214) 369-3008
cmontez@tfandw.com
Division Chair 2008-2009

TABLE OF CONTENTS

State	Author
Alabama	Arlan D. Lewis, Bradley Arant Rose & White LLP; Birmingham, AL 35203, alewis@bradleyarant.com
Arizona	Joshua Grabel and Jim Sienicki, Snell & Wilmer, L.L.P., One Arizona Center, Phoenix, AR 85004, (602) 382-6000, jgrabel@swlaw.com, jsienicki@swlaw.com
Arkansas	Stephen Lancaster and Patrick Wilson, Wright, Lindsey & Jennings LLP, 200 West Capitol Ave., Suite 2300, Little Rock, Arkansas 72201, (501) 371-0808, slancaster@wlj.com, pwilson@wlj.com
California	Ben Patrick, Watt, Tieder, Hoffar & Fitzgerald, L.L.P., Citigroup Center, One Sansome Street Suite 1050, San Francisco, CA 94104, (415) 623-7000, bpatrick@wthf.com
Colorado	Matthew J. Ninneman, The Holt Group, LLC, 1675 Broadway, Suite 1130, Denver, CO 80202, (303) 225-4223, matt.ninneman@holtllc.com, www.holtllc.com
Connecticut	Wendy Venoit, Pepe & Hazard LLP, Goodwin Square, Hartford, CT 06103, (860) 241-2647, wvenoit@pepehazard.com
Delaware	Paul Cottrell and Patrick McGrory, Tighe & Cottrell, P.A., 704 King St., Suite 500, Wilmington, DE 19899, (302) 658-6400, p.cottrell@tighecottrell.com; p.mcgrory@tighecottrell.com
Florida	Scott Pence, Carlton Fields, 4221 West Boy Scout Blvd., Suite 1000, Tampa, FL 33607, (813) 229-4322, Spence@carltonfields.com
Georgia	J.D. Humphries, Stites & Harbison PLLC, 303 Peachtree Street, N.E., 2800 SunTrust Plaza, Atlanta, GA 30308, [404] 739-8817, jhumphries@stites.com
Hawaii	Ken Kupchak & Tred R. Eyerly, Damon Key Leong Kupchak Hastert, 1001 Bishop Street, 1600 Pauahi Tower, Honolulu, Hawaii 96813, (808) 531-8031, www.hawaiilawyer.com
Idaho	Melissa A. Orien, Holland & Hart LLP, 60 East South Temple, Suite 2000, Salt Lake City, Utah 84111, (801) 799-5863, morien@hollandhart.com
Illinois	Jeff Hamera Duane Morris LLP 190 South LaSalle Street, Suite 3700, Chicago, IL 60603-3433, (312) 499-6782, jlhamera@duanemorris.com
Indiana	David Bostwick, Attorney at Law, 5434 North Capitol Avenue, Indianapolis, Indiana 46208, (317) 652-2268 davidbostwick@bostwicklaw.net
Iowa	Benjamin B. Ullem & John F. Fatino, Whitfield & Eddy, PLC, 317 Sixth Avenue, Ste. 1200, Des Moines, Iowa, 50309-4195, (515) 288-604, fatino@whitfieldlaw.com
Kansas	Scott C. Long, Long, Luder & Gordon, P.A., (913) 491-9323, slong@llglaw.com
Kentucky	Angela R. Stephens**,** Stites & Harbison, PLLC**,** 400 West Market Street**,** Suite 1800**,** Louisville, KY 40202-3352**,** (502) 681-0388, astephens@stites.com
Louisiana	Scott J. Hedlund and Keith Bergerson, Deutsch, Kerrigan & Stiles, 755 Magazine St., New Orleans, LA 70130, (504) 581-5141, www.dkslaw.com, shedlund@dkslaw.com, kbergerson@dkslaw.com
Massachusetts	Bradley L. Croft, Ruberto Israel & Weiner, 100 North Washington Street Boston, MA 02114 (617) 570-3506 bcroft@riw.com
Montana	Sean Hanlon, Holland & Hart LLP, 55 17th Street, Suite 3200, Denver, CO 80202, (303) 295-8270, smhanlon@hoillandhart.com
Nebraska	Gretchen Twohig, Baird Holm LLP, 1500 Woodmen Tower, Omaha, Nebraska 68102 (402) 636-8352, gtwohig@bairdholm.com and Kerry L. Kester, Woods & Aitken LLP, 301 South 13th St. Suite 500, Lincoln, NE 68508 (402) 437-8513, kkester@woodsaitken.com
Nevada	Jeffrey J. Steffen, Fennemore Craig, P.C., 300 S. Fourth Street, Suite 1400, Las Vegas, NV 89101, (702) 692-8000, jsteffen@fclaw.com
New Hampshire	Nicholas K. Holmes, Nelson, Kinder, Mosseau & Saturley, PC, 99 Middle Street, Manchester, N.H. 03101 (603) 606-5004, nholmes@nkms.com
North Carolina	David Senter, Nexsen Pruet Adams & Kleemeier, 701 Green Valley Rd, Suite 100, Greensboro, NC 27402, (336) 373-1600, www.nexsenpruet.com
Oklahoma	Michael A. Simpson, Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C. , 525 S. Main, Suite 1500, Tulsa, Oklahoma, 74103, (918) 582-8877, msimpson@ahn-law.com
Oregon	Mark A. Jurga and Robert S. May, Smith, Freed, & Eberhard, Portland, Oregon, (503) 227-2424, rmay@smithfreed.com and mjurga@smithfreed.com
Rhode Island	Michael D Williams, Esq.**,** Little Medeiros Kinder Bulman & Whitney, P.C., 72 Pine Street, Providence, RI 02903, (401) 272-8080, mwilliams@lmkbw.com
South Carolina	L. Franklin Elmore Elmore & Wall, P.A., 301 Main St, Suite 2000 (29601), Greenville, SC 29602, (864) 255-9500, frank.elmore@elmorewall.com, www.elmorewall.com
Tennessee	Brian Dobbs, Bass, Berry & Sims, 315 Deaderick St., Suite 2700 Nashville, Tennessee 37238-3001, (615) 742-7884, bdobbs@bassberry.com, www.bassberry.com

Texas	Gary Richard Thomas, Thomas, Feldman & Wilshusen, LLP, Suite 900, 9400 N. Central Expy, Dallas, TX 75231, gthomas@tfandw.com
Utah	Melissa A. Orien, Holland & Hart LLP, 60 East South Temple, Suite 2000, Salt Lake City, Utah 84111, (801) 799-5863, morien@hollandhart.com
Virginia	Steven J. Koprince, Akerman Senterfitt Wickwire Gavin, 8100 Boone Boulevard, Suite 700, Vienna, Virginia 22182, 703-790-8750, steven.koprince@akerman.com
Washington	Allen W. Estes, III, Peter N. Ralston, Diane C. Utz, and Tymon Berger, Oles Morrison Rinker & Baker LLP, 701 Pike Street, Suite 1700, Seattle, WA 98101, (206) 623-3427, estes@oles.com
Wyoming	Sean Hanlon, Holland & Hart LLP, 55 17th Street, Suite 3200, Denver, CO 80202, (303) 295-8270, smhanlon@hoillandhart.com

INTRODUCTION

Division 10 is proud to present our annual publication, ***2007-2008 Construction Law Update: Case Law & Legislation Affecting the Construction Industry.*** Submissions and/or brief summaries from our many "Fifty-State" volunteers have been regularly posted on the Division 10 web page and passed along to the Forum's publications committees for potential inclusion in upcoming publication articles.

In 2007-2008, we had a number of "return" contributors—those construction lawyers who submitted case summaries and legislative updates last year who also stepped up to the plate this year. In addition, we had a number of "green" contributors, who had not been involved in the Forum in the past, but wanted to join our efforts in bringing you this year's publication. A special thanks to the attorneys who contributed content for this paper.

As a reminder, the **Construction Law Update** is not an exhaustive list of every case or piece of legislation that affects our practice in each of the states, but is based upon the submissions of our Forum members. It is written by you and for you. Please feel free to contact us with your comments and suggestions for future updates.

Matthew J. DeVries
Co-Editor

Melissa Orien
Co-Editor

Christopher D. Montez
2007-2008 Division 10 Chair

Alabama

Case law:

1. In *Medical Services, LLC v. GMW & Co.*, 969 So.2d 158 (Ala. 2006), an owner (Medical Services) entered into a construction contract with a general contracting company (GMW) owned by the project architect (Waldheim). The general conditions to the construction contract contained an arbitration provision, but also provided that the architect could not be a party in any arbitration arising out of the construction contract except by written consent of the architect, owner, contractor, and any other person or entity sought to be joined in the arbitration proceeding. During the project a number of disputes arose which ultimately led the owner to terminate the contract. The resulting consolidated lawsuits involved GMW's claims against Medical Services, Medical Services' claims against GMW and Medical Services' claims against Waldheim. The trial court granted GMW's motion to compel arbitration of all claims. On appeal the Alabama Supreme Court held that to the extent the owner's claims sought damages against Waldheim in his capacity as the "architect," those claims were specifically excluded from arbitration based upon the clear language of the contract general conditions. However, to the extent the owner's claims against Waldheim were essentially claims against GMW, or against him as an employee of GMW, those claims must be submitted to arbitration.

2. In *Paragon Ltd., Inc. v. Boles*, 2007 WL 4464880 (Ala. 2007), the Supreme Court of Alabama held that a contractor did not waive its right to arbitration merely by filing a lien against the property that was the subject of the contract containing the arbitration clause. The owner initiated litigation by filing suit against the contractor for breach of contract. Three days after the complaint was filed, the contractor filed a lien against the property. The contractor later filed an answer denying the allegations of the complaint, asserting several defenses and asserting a counterclaim to enforce the lien. The contractor also filed a motion to compel arbitration contemporaneously with its answer. The Court held that filing the lien merely protected the contractor's rights to the property and did not substantially invoke any litigation concerning the construction contract. Moreover, filing the lien did not put the owner in a position where it would be substantially prejudiced by a subsequent order requiring it to submit to arbitration.

3. *Alabama Dep't of Transp. v. Harbert Int'l, Inc.*, 2008 WL 615912 (Ala. 2008) involved a contractor's claim for funds withheld as liquidated damages and retainage, as well as claims for extra work and expenses arising out of its contract with the Alabama Department of Transportation ("ALDOT") for the construction of a bridge. The contractor sued ALDOT, its Director, and the Governor. Although the Supreme Court of Alabama held that ALDOT was a "State agency" which was immune from suit under Section 14 of the Alabama Constitution of 1901, it recognized that in certain situations mandamus relief directing State officers to pay liquidated damages or contractually specified debts is appropriate. Here, the trial court properly found that the liquidated damages provision was unlawfully applied and properly directed payment of the withheld retainage to the contractor. The Court reasoned that, in paying, the State "suffers no more than it would" had the state officers originally performed their duties and paid the debts. The Court, however, denied the contractor's claims for damages arising from alleged extra work, the defendants' alleged failure to properly consider an alternative erection sequence, and inverse condemnation, because the claims effectively sought compensatory damages

for breach of contract which are forbidden under Section 14. Thus, retroactive relief in the nature of compensatory damages was unavailable because such relief affects a property or contract right of the State and under Section 14 the trial court could not direct the Governor and the ALDOT Director to pay such damages.

Legislation:

1. Ala. Code § 34-11-1(7), Licensure of Engineers Providing Expert Testimony. Effective June 8, 2007, defining "Practice of Engineering" was amended with the following additions:

> Notwithstanding any other provision of this chapter, in qualifying a witness to offer expert testimony on the practice of engineering, the court shall consider as evidence of his or her expertise whether the proposed witness holds a valid Alabama license for the practice of engineering. Provided, however, such qualification by the court shall not be withheld from an otherwise qualified witness solely on the basis of the failure of the proposed witness to hold such valid Alabama license.
>
> * * *
>
> d. The practice of engineering shall include the offering of expert opinion in any legal proceeding in Alabama regarding work legally required to be performed under an Alabama engineer's license number or seal, which opinion may be given by an engineer licensed in any jurisdiction.

The 2007 amendments were made in response to the issues raised by *Board of Water and Sewer Comm'rs of City of Mobile v. Hunter,* 956 So.2d 403 (Ala. 2006) wherein the Supreme Court of Alabama held that by adding the term "testimony" to the definition of the "practice of engineering" under Ala. Code § 34-11-1(7), "the legislature superimposed the licensing requirement contained therein onto Rule 702, Ala. R. Evid. [and] the trial court no longer had the discretion to allow testimony on engineering matters unless the witness was a licensed engineer in [Alabama]." The 2008 amendments struck the word "testimony" as it existed in the 1997 amendment and sought to clarify the statute's application to testimony on engineering matters.

Submitted by: Arlan D. Lewis, Bradley Arant Rose & White LLP, One Federal Place, 1819 5th Avenue North, Birmingham, AL 35203, (205) 521-8131, alewis@bradleyarant.com

Arizona

Case law:

1. In *Harrington v. Pulte Home Corp.,* 119 P.3d 1044 (Ariz. Ct. App. 2005), the court held that Arizona's "strong public policy, both federal and state, favoring arbitration" means that these provisions are almost always enforceable. *Harrington* involved the enforceability of an arbitration provision that a home builder put into its sales contract. The trial court found the provision unenforceable because the purchase contracts were pre-drafted and non-negotiable and the purchasers did not get the chance to negotiate whether they wanted to arbitrate. The Appeals Court reversed, holding that the

arbitration provision was enforceable because the builder has no "reason to believe the other party would not have accepted the agreement if he had known that the agreement contained the particular term." In other words, the court found that if an arbitration clause is in a contract, it does not matter if one party is unaware the clause exists or if that party was forced to accept it, if the party trying to enforce the provision did not know that the party challenging the provision would not have entered the contract if they had known about it.

Submitted by: Joshua Grabel and Jim Sienicki, Snell & Wilmer, L.L.P., One Arizona Center, Phoenix, AR 85004, (602) 382-6000, jgrabel@swlaw.com, jsienicki@swlaw.com

Legislation:

1. House Bill 2779, The Legal Arizona Workers Act. The "Legal Arizona Workers Act" ("LAWA") took effect January 1, 2008. At its heart, LAWA prohibits the knowing or intentional hiring of unauthorized workers and requires the permanent revocation of a business license for certain repeat offenders. As it stands now, LAWA is one of the most stringent employer-sanction laws in effect anywhere in the country.

LAWA applies to virtually every employer in Arizona. An "employer" is defined as any individual or organization that (1) transacts business in Arizona; (2) has a license issued by an Arizona agency; and (3) employs one or more individuals who perform services in Arizona. This definition includes the state of Arizona, any political subdivision of the state of Arizona, and any self-employed persons.

As of January 1, 2008, an employer found to knowingly hire unauthorized workers will be subject to a three-year probationary period. Within that probation period, the court will order the employer to terminate the employment of all unauthorized workers, to file quarterly reports with the County Attorney of each new hire, and to execute an affidavit that the employer will not hire unauthorized workers again. The court may choose to suspend the employer's business license for up to ten days.

A finding of intentional hiring of an unauthorized worker results in these same sanctions, except that the probationary period for an intentional violation is five years, and the court is required to suspend the employer's business license for a minimum of 10 days. Employers who violate LAWA during a probationary period will face permanent revocation of their business license.

LAWA also requires employers to verify the employment eligibility for all employees hired after January 1, 2008 through E-Verify, an Internet-based system operated by the Department of Homeland Security in partnership with the Social Security Administration. Although LAWA does not prescribe any penalties for failing to use E-Verify, when an employer uses E-Verify a rebuttable presumption is created that the employer did not intentionally or knowingly employ an unauthorized worker. Compliance with Form I-9 requirements also creates this same rebuttable presumption.

LAWA provides the Attorney General and each County Attorney investigative powers, and requires them to investigate all possible violations of LAWA upon receipt of a complaint. Every county, except Maricopa, requires a verified complaint before an investigation can begin, and filing a frivolous or false complaint is a misdemeanor. Enforcement power under LAWA rests with the each County Attorney, who may bring an

action for a LAWA violation in Superior Court. Complaints will be heard, in most cases, by a judge, not a jury.

Various business and civil-rights groups are challenging the constitutionality of LAWA. Those challenges remain unresolved and will likely continue for some time. LAWA may also be affected and/or clarified by bills currently waiting to be scheduled for hearing. If passed into law, those bills will make E-Verify optional (H.B. 2341); clarify that independent contractors are employees under LAWA (H.B. 2342); and prohibit anonymous complaints (H.B. 2343).

Submitted by: Manuel Cairo and Jim Sienicki, Snell & Wilmer, L.L.P., One Arizona Center, Phoenix, AR 85004, (602) 382-6000, mcairo@swlaw.com, jsienicki@swlaw.com

Arkansas

Case Law

1. In *Essex Ins. Co. v. Holder*, No. 07-803 (Ark. Mar. 6, 2008), the Arkansas Supreme Court decided the issue of whether, within the context of commercial general liability insurance policies, defective construction or workmanship constituted an "accident" and, as a result, an "occurrence." The court reviewed applicable case law from around the country, and noted the majority opinion was that defective workmanship, standing alone, does not constitute an accidental occurrence under a general liability insurance policy where the defective workmanship results only in damages to the work product itself. However, Arkansas law has consistently held that (i) an undefined contractual term is not necessarily ambiguous and (ii) an "accident" is defined as "an event that proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected." The court noted that faulty workmanship was not an "accident," but rather a "foreseeable occurrence." Therefore, the court held that defective workmanship, standing alone and resulting only in damages to the work product itself, was not an occurrence under the general liability insurance policy at issue.

2. In *Bryant v. Cadena Contracting, Inc.*, No. 07-376 (Ark. App. Dec. 5, 2007), the Arkansas Court of Appeals reviewed when notice of a right to a lien must be given in order for the lien to be valid. Ark. Code Ann. § 18-44-107 defines "contractor" and "sub-contractor" separately. Under Ark. Code Ann. § 18-44-115, a contractor is required to give notice of its right to a lien before supplying any materials or fixtures. Section 115 requires that the language of its "IMPORTANT NOTICE TO OWNER" be incorporated into or affixed to the contract. Under Ark. Code Ann. § 18-44-114, notice of a lien must be given at least ten (10) days prior to filing, but this section applies to all "persons." On appeal, the subcontractor argued that Section 115 applied only to contractors, meaning that a subcontractor was a "person" under Section 114 and need only provide notice of a lien ten days prior to filing.

In reviewing the statutory language, the Arkansas Court of Appeals noted that Section 115 also provided that any potential lien claimant "may also give notice" based on that section. The statute's legal distinction between contractors and subcontractors was that a contractor must provide notice before work is commenced, whereas a subcontractor *may* provide such notice. A subcontractor can then protect his or her right to a lien if a contractor fails to fulfill the statutory obligations imposed on contractors.

However, the court stated that it served no benefit for a subcontractor to notify owners of outstanding claims after the work was done, the contractor was in default, and the owner had exhausted his financing. Therefore, the court held that either the contractor or the subcontractor must provide the "IMPORTANT NOTICE TO OWNER"—as required in Section 115—before work is done in order for the notice to be of practical value.

Legislation

1. **Affidavit of notice — Ark. Code Ann. § 18-44-117.** The Arkansas mechanic's and materialman's lien law was amended to require an "affidavit of notice." When filing a lien, the lien claimant must file an "affidavit of notice" attached to the lien itself. The affidavit must contain: a sworn statement (affidavit) evidencing compliance with all of the pre-lien notice requirements, and a copy of each notice given. In effect, a lien claimant must state under oath that all pre-lien notices were given correctly. The new law also states that the clerk shall refuse to file a lien that does not contain the affidavits and the attachments (the required notices) described in the new section.

The new law implies, but does not clearly state, that the one claiming the lien shall file the affidavit of notice. The new law does not specifically state that attorneys for lien claimants may file the affidavit of notice, but other lien laws indicate that is permissible. As a result of this ambiguity, attorneys for lien claimants may prefer claimants to sign the affidavit, since attorneys may be uncomfortable swearing that notices were given correctly where they did not give all of the required pre-lien notices themselves.

2. **Hold harmless clauses — Ark. Code Ann. § 22-9-214.** This act provides that a clause in a construction contract "is unenforceable as against public policy" to the extent that a party to that contract is required to indemnify, defend, or hold harmless another party against:

> (1) damage from death or bodily injury to a person arising out of the sole negligence or fault of the indemnitee, its agent, representative, subcontractor, or supplier; or
>
> (2) damage to property arising out of the sole negligence or fault of the indemnitee, its agent, representative, subcontractor, or supplier.

Essentially, the company being indemnified cannot be indemnified for its sole negligence. This provision does not apply if the party seeking indemnification requires the other party to provide liability insurance coverage for the indemnitee's negligence or fault if the other party's obligation is limited to the cost of the required insurance. The new law also does not apply if the party seeking indemnification requires the other party to name the indemnitee as an additional insured.

3. **State prohibited from contracting with employers of illegal immigrants — Ark. Code Ann. § 19-11-105.** This act prohibits an agency of the State of Arkansas from entering into or renewing a public contract for services with a contractor, where the contractor knows that it or the subcontractor employs illegal immigrants to perform work under the contract. Prospective contractors and subcontractors must now certify that

they do not employ illegal immigrants prior to executing any public contract. If a contractor learns that a subcontractor has employed illegal immigrants in violation of this section, the contractor may terminate its contract with the subcontractor.

4. **Demolition as contractor work — Ark. Code Ann. § 17-25-101.** Under the statute governing contractors licensing law, the definition of "contractor" was amended to include any person who submits a bid to demolish, contracts or undertakes to demolish, manages or supervises over demolition, or engages in demolition of a structure defined under the act. The addition of "demolition" is made elsewhere throughout the act where relevant and necessary to include demolition in the contractors licensing law of Arkansas.

Submitted by: Stephen Lancaster and Patrick Wilson, Wright, Lindsey & Jennings LLP, 200 West Capitol Ave., Suite 2300, Little Rock, Arkansas 72201, (501) 371-0808, slancaster@wlj.com, pwilson@wlj.com

California

Case Law:

1. In *Otay River Constructors v. San Diego Expressway*, 158 Cal. App. 4th 796 [70 Cal. Rptr. 3d 434] (Cal. Ct. App. 2008), the court provided that "the prevailing party in any proceeding (including appeals)" was entitled to recover reasonable attorneys' fees from the losing party. The contract also provided for binding arbitration. The trial court granted the owner's motion to compel arbitration. The owner then moved to recover attorneys' fees. The trial court denied the request on the theory that there was no final disposition of the action. The Court of Appeals reversed, holding that the order compelling arbitration was a final disposition of the court action, and remanded with direction to determine the owner's reasonable attorneys' fees and issue an award.

2. In *Murray's Iron Works, Inc. v. Boyce,* 158 Cal. App. 4th 1279 [71 Cal. Rptr. 3d 317] (Cal. Ct. App. 2008), a decorative iron provider (Murray's) entered into a contract with a homeowner for a total value of $195,771.40, to be paid "50% Deposit/Net upon Satisfactory Completion of Project." The owner made the initial deposit payment of $96,725. Upon Murray's completion of the work, Murray's sent a final invoice for $116,222.40. The owner paid $50,000 but refused to pay any more because of a dispute over the materials provided. The trial court found the owner breached the contract by refusing to pay in full and entered judgment in Murray's favor for $66,222.40. Pursuant to California's prompt payment statute (Civil Code § 3260.1), the trial court also awarded Murray's its attorneys' fees and statutory penalties. The Court of Appeals reversed, holding that Civil Code § 3260.1(b), which requires the owner to promptly pay "any *progress payment* due," was inapplicable to *final* payments, such as the payment owed to Murray's. Therefore, Murray's was not entitled to recover either attorneys' fees or statutory penalties.

3. In *Fassberg Constr. Co. v. Housing Authority of the City of Los Angeles*, 152 Cal. App. 4th [60 Cal. Rptr. 3d 375] (Cal. Ct. App. 2007), the court resolved a variety of false claims allegations by giving new direction on what does, and what does not, constitute a "claim" under California's False Claims Act. Per the court, requests for progress payments were "claims," but weekly payroll reports and (most importantly) change order proposals **were not** claims. The court held that a "change order proposal

is not a 'request or demand for money, property, or services' within the plain meaning of the statutory language, but rather is a 'record or statement' made or used 'to get a false claim paid or approved.'" The only way to make sense of this holding is to interpret it as holding that it is the progress payment request incorporating the change order proposal which is the false claim, and if the change order proposal is never incorporated into a progress payment request, no false claim has been made.

4. In *Condon-Johnson & Assocs., Inc. v. Sacramento Mun. Util. Dist.*, 149 Cal. App. 4th 1384 [57 Cal. Rptr. 3d 849] (Cal. Ct. App. 2007), the contract between the owner (a local public entity) and the contractor contained the following disclaimer: "[i]t is the sole responsibility of the Contractor to evaluate the jobsite and make his own technical assessment of subsurface soil conditions . . . and make his own financial impact assessment prior to bidding. . . . The [owner] will make no additional compensation or payments . . . if the subsurface soil conditions are different than that assumed by the Contractor." The owner also provided soil boring information, but the contractor encountered subsurface conditions very different than those reflected on the soil borings, and submitted a claim for the resulting additional work. The owner relied on the contractual disclaimer to deny the claim. The trial court held that the disclaimer ran afoul of Public Contract Code section 7104, which requires that a local public entity that has contracted for public work involving an excavation deeper than four feet issue a change order altering the contractor's cost of performing the work when the subsurface conditions materially differ from those indicated in the contract. The trial court found that the contractual disclaimer was void as an attempt to avoid the mandate of section 7104. It awarded the contractor $1,265,166 as a result of the changed subsurface conditions, and the court of appeals affirmed the ruling.

Submitted by: Ben Patrick, Watt, Tieder, Hoffar & Fitzgerald, L.L.P., Citigroup Center, One Sansome Street Suite 1050, San Francisco, CA 94104, (415) 623-7000, bpatrick@wthf.com

Colorado

Case law:

1. *Park Avenue Lofts Condo. Ass'n v. Atlas Dev. Corp.*, No 2003 CV 36 (Summit County Dist. Ct., May 13, 2006). Colorado courts have recently held that defenses arising from a real property owner's purchase contract may apply where a homeowners' association (HOA) sues representatively on behalf of unit owners for damage to a common element to which the unit owners hold title. In this case, the court held that because the HOA was an intended third party beneficiary of an individual unit owner's purchase contract, the HOA was bound by a jury waiver contained in the contract.

2. *Miller v. Lewis*, No. CIVA03CV1259WDMOES, 2006 WL 894901 (D. Colo. 2006). Colorado courts have further defined the Colorado Consumer Protection Act's ("CCPA") "significant public impact" requirement. In *Miller v. Lewis*, the court dismissed the plaintiffs' CCPA claims where they failed to provide "any evidence of consumers other than themselves who were directly affected by the alleged deceptive trade practice." *See also Alpine Bank v. Hubbell*, No CIVA05CV00026EWNPAC, 2007 WL 684141 (D. Colo. Mar. 2, 2007) (holding that the defendants and counterclaimants had not demonstrated a genuine issue of material fact as to the public impact of the plaintiff-counterclaim defendant's alleged deceptive trade practices where defendants did not (1)

allege that any more than one of plaintiff's employees engaged in the purportedly deceptive practice; or (2) estimate the number of consumers whom this employee of plaintiff had the potential to deceive).

3. *Fire Ins. Exch. v. Monty's Heating & Air Conditioning*, 2007 WL 416340 (Colo. App. Feb. 8, 2007). In this case, the court clarified that a subrogated insurer's claims against a construction professional are subject to the two-year real property statute of limitations pursuant to Section 13-80-104(1)(a), C.R.S. (2007), rather than the 90-day indemnity statute of limitations in Section 13-80-104(I)(b)(II), because the definition of "claimant" under the indemnity statue of limitations refers to construction professional defendants seeking indemnity, which the insurer was not.

4. *Boulder Plaza Residential, LLC v. Summit Flooring, LLC*, No 04CV1109 (Boulder County Dist. Ct. Feb. 15, 2006). In this case, the court permitted a commercial developer to pursue an attorneys' fees claim against an allegedly negligent subcontractor based on the "wrong of another" doctrine for the fees incurred by the developer in pursuing claims against the general contractor for a defective flooring system. The court found that a "natural and probable consequence" of the subcontractor's negligence was the developer's need to sue the general contractor who had agreed to indemnify the developer in the event of the subcontractor's negligence.

Legislation:

1. S.B.07-087. This legislation will significantly impact the enforceability of indemnification provisions in Colorado construction contracts. Beginning July 1, 2007, S.B. 07-087 eliminates broad form indemnity in construction contracts by prohibiting businesses and individuals from delegating responsibility for their own negligence.

Before S.B. 07-087, owners, architects, contractors and subcontractors negotiated various types of indemnity provisions in Colorado construction contracts. At one extreme – known as "broad form" indemnity – Party A (the indemnitor) would agree to be liable for all damages incurred by Party B (the indemnitee), even if those damages were caused by third parties or by Party's B's own negligence. At the other end of the spectrum – known as "narrow form" indemnity – Party A would agree to be liable only for Party B's damages actually caused by Party A. Now, S.B. 07-087 eliminates broad form indemnity in construction contracts.

Despite its seemingly broad language, however, S.B. 07-087 contains some important qualifications and exceptions. For example, the statute allows a negligent indemnitor to indemnify or insure other parties to the extent of the percentage of fault attributable to the indemnitor or its agents, representatives, subcontractors or suppliers. S.B. 07-087 also permits contract clauses requiring an indemnitor to purchase insurance covering its own acts and/or naming the indemnitee as an additional insured on the indemnitor's insurance policy covering the indemnitor's liability for its own acts. Finally, S.B. 07-087 does not apply to builder's risk insurance, nor does it abrogate or affect the exclusive remedy available under the workers' compensation laws or the doctrines of respondeat superior or vicarious liability. As for exceptions, S.B. 07-087 excludes the following from the definition of construction agreements covered by the statute: 1) property owned or operated by railroad; 2) various types of water, sanitation, and

sewage disposal districts; and 3) lease or rental agreements between a landlord and tenant.

2. **H.B. 1338, The Homeowner Protection Act of 2007**. This new legislation, signed into law on April 20, 2007, significantly impacts the ability of Colorado architects, contractors, subcontractors, developers, builders, engineers and inspectors to contractually limit their exposure to damages and remedies on residential construction projects.

H.B. 1338, an amendment to Colorado's "Construction Defect Action Reform Act of 2003," effectively eliminates a construction professional's ability to contractually limit the rights, remedies and damages of residential property owners. Thus, it will have the practical effect of expanding the exposure the construction industry faces on residential construction projects.

H.B. 1338 expressly applies only to "residential property owners," although that term is not defined in the statute. The heart of H.B. 1338 renders void and unenforceable any restrictions on the legal rights of residential property owners relating to construction defects. This new law effectively silences:

- waivers of consequential damages;
- waivers of implied warranties;
- waivers of negligence or other specific claims for relief;
- waivers of right to collect treble damages under the Colorado Consumer Fraud Act;
- limitations on the amount of recoverable monetary damages;
- limitations on where and when litigation may be commenced; and
- limitations or qualifications on warranties implied by law or statute.

Finally, the language of H.B. 1338 indicates that this act is intended to apply retroactively. Any civil action or arbitration proceeding filed after April 20, 2007, is subject to the statute.

3. **COLO. REV. STAT. § 12-45-101.** Effective January 1, 2008, landscape architects are now licensed professionals in the State of Colorado. According to section 12-45-118, a license to practice landscape architecture is not required for residential landscape design. Further, according to the same section, the licensure of landscape architects does not restrict or limit the scope of the current practice of architects, engineers or land surveyors. Section 12-45-119 clarifies the intent of the legislature that the issuance of a license to practice landscape architecture does not entitle the licensee to practice architecture. It is expected that the general principles of law pertaining to architects and engineers will apply with equal force to landscape architects.

4. **COLO. REV. STAT. § 12-25-202.** Amended in 2007, this Section includes "Basic Control for Engineering Projects" within the definition of surveying tasks for which a surveyor's license is required. Many contractors have historically relied upon experienced employees who were not necessarily licensed surveyors to accomplish layout of lines and grades for new construction. Basic Control for Engineering Projects is defined as establishing survey markers on or in the vicinity of a construction project to enable all components of the project to be built in compliance with plans and

specifications with respect to the project location, orientation, elevation, and relationship to property, easement, or right-of-way boundaries. It would appear that the practice of having unlicensed employees provide project layout may continue *provided* that licensed surveyors establish markers from which lines and grades are established.

5. **COLO. REV. STAT. § 24-93-101 *et. seq*., Integrated Delivery Method for Public Project Art**. A wide variety of Colorado public agencies have long sought ways to circumvent Colorado's competitive bidding statutes on publicly funded projects. C.R.S. § 24-93-101 now provides a statutorily sanctioned method of accomplishing what many agencies have attempted through a variety of means that may or may not have been in compliance with Colorado's competitive bidding laws.

"Integrated Project Delivery," or "IPD," is defined in the statute as a method or means of project delivery in which the public agency contracts with a single entity for design, construction, alteration, operation, repair, improvement, demolition, maintenance, financing *or any combination of the listed services* for a public project.

6. **H.B. 07-1146.** H.B. 07-1146 requires every board of county commissioners and every governing body of a municipality that has enacted a building code to adopt an energy code that meets or exceeds the standards in the 2003 International Energy Conservation Code as minimum requirements that apply to the construction of, and renovations and additions to, all commercial and residential buildings in the county or municipality.

Submitted by: Matthew J. Ninneman, The Holt Group, LLC, 1675 Broadway, Suite 1130, Denver, CO 80202, (303) 225-4223, matt.ninneman@holtllc.com, www.holtllc.com

Connecticut

Case law:

1. In *C.R. Klewin Northeast, LLC v. City of Bridgeport,* 282 Conn. 54 (2007), a contractor hired to manage construction of a new sports arena in Bridgeport, CT, filed a demand for arbitration claiming damages resulting from breaches of contract by the city. After the arbitration panel awarded $6,020,231 in damages and interest to the contractor, the city moved to vacate, claiming that the arbitration panel lacked subject matter jurisdiction because the contract containing the arbitration clause was void ab initio because it was illegally procured through payment of bribes to governmental officials.

On appeal, the Connecticut Supreme Court held that the issue of the legality of a contract containing an arbitration clause is to be decided by the arbitration panel – rather than the trial court in the first instance. The Court concluded that, in the absence of an attack on the validity of the arbitration clause, which is an issue for the trial court, the issue of the legality of the entire underlying contract lies solely within the purview of the arbitration panel. In addition, the Court held that where a party fails to present a sufficient factual record to substantiate its public policy claims in the arbitration, subsequent judicial review of those claims is precluded.

2. In *Ferguson Mechanical Co. v. Dep't of Public Works,* 282 Conn. 764 (2007), the contractor requested that the Department of Public Works ("DPW") substitute a new subcontractor after the previous one disputed a subcontract term. DPW authorized the substitution, and denied the subcontractor's subsequent petition protesting the substitution. The subcontractor sought judicial review of DPW's decision in the Connecticut trial court pursuant to the Uniform Administrative Procedures Act ("UAPA"). However, the trial court dismissed the action on the ground that it lacked subject matter jurisdiction over the action because the plaintiff had no standing to bring an appeal under the UAPA.

The Connecticut Supreme Court affirmed. It explained that the UAPA grants a right to judicial review of agency decisions only to parties aggrieved by a final decision in a contested case. A predicate for contested case status is that a party must have enjoyed a statutory or regulatory right to a hearing. The Court concluded that the subcontractor did not have such a right under either the competitive bidding statutes or DPW regulations. Because there was no hearing, there was no agency determination in a contested case. As such, the subcontractor had no right to judicial review of the DPW decision because it was not aggrieved by a final decision required to trigger judicial review under the UAPA.

3. In *Banks Bldg. Co., LLC v. Malanga Family Real Estate Holding, LLC,* 102 Conn. App. 231 (2007), the plaintiff contractor agreed to construct the shell of a building in a shopping plaza for the defendant owner. The parties' written contract included a "time is of the essence" clause. Shortly before the required completion date, the owner paid the contractor one progress payment but made no mention of the impending completion date. In allowing the contractor to continue working it failed to notify it of the breach and even worked collectively with it. The contractor completed construction of the shell approximately one month after the deadline, after which it submitted a final invoice. When the owner refused to pay certain items on grounds that the plaintiff had not completed performance by the contract deadline, the contractor sued. The trial court rendered judgment in favor of the contractor.

The Appellate Court affirmed the judgment, upholding the trial court's conclusion that the contractor did not materially breach the contract by missing the deadline because (1) the parties had modified their original agreement concerning the allocation of work; and (2) the owner failed to notify the contractor of an intention to insist upon the deadline. Thus, the owner's failure to enforce the deadline while allowing the contractor to continue working constituted waiver of the "time is of the essence" provision.

4. In *Precision Mechanical Servs. v. Shelton Yacht and Cabana Club, Inc.,* 97 Conn. App. 258, *cert. denied,* 280 Conn. 928 (2006), the owner hired a contractor to fabricate and install a sprinkler system in a catering and banquet hall after the fire marshal warned that the hall violated the fire code. The contractor discovered that the building was larger than the contract stated and issued a change order that reflected the increased cost due to the additional square footage. While negotiating the final price, the owner instructed the contractor to proceed with the work. Thereafter, the contractor stopped work due to nonpayment and subsequently billed the owner for the unpaid cost of the completed work and recorded a mechanic's lien. The trial court ultimately rendered a judgment in favor of the contractor in the action to foreclose on the mechanic's lien.

On appeal, the owner argued that the written contract was never modified, and thus, both parties were bound by its original terms. The Appellate Court disagreed, specifically noting that the owner instructed the contractor to continue working, while knowing that the contractor priced the job at a certain dollar amount per square foot.

5. In *Stamford Wrecking Co. v. United Stone America, Inc.,* 99 Conn. App. 1 (2007), a wrecking company sought to recover damages for a contractor's failure to abide by a subcontract agreement under which the wrecking company was to perform 85% of the demolition work on a U.S. Navy project. The contractor's agreement with the Navy included contradictory provisions requiring the contractor to self perform a minimum of either 15% or 25% of the work. Shortly after receiving the award, the contractor notified the wrecking company that it would not serve as the subcontractor. The wrecking company sued the contractor for promissory estoppel, unjust enrichment, breach of contract, fraud, and CUTPA violations. Following a trial by jury, the wrecking company prevailed on its promissory estoppel and unjust enrichment claims.

On appeal, the contractor argued that the trial court improperly excluded evidence that would have created a contractual ambiguity. The Appellate Court disagreed on the grounds that there was never any actual confusion regarding the work allocation. Accordingly, the excluded evidence was not admissible to clarify the subcontract.

6. In *Cianbro Corp. v. Nat'l Eastern Corp.*, 102 Conn. App. 61 (2007), the plaintiff contractor hired the defendant subcontractor to perform steel fabrication and provide materials in connection with the construction of a major bridge. To resolve their outstanding disputes after completion of the project, the parties both submitted claims to arbitration. The arbitration panel awarded the contractor damages and other expenses, which the trial court subsequently confirmed.

On appeal, the subcontractor argued that the arbitration panel exceeded and imperfectly executed its powers because its award did not conform to the parties' submission. Specifically, the defendant subcontractor challenged – as outside the scope of the submission – the panel's order that the plaintiff pay a portion of the award to a third-tier subcontractor in satisfaction of the subcontractor's obligations. The subcontractor argued that the third-tier subcontractor was not a party to the arbitration and that therefore, the order was improper. The Appellate Court rejected the argument, holding that the remedy fashioned by the panel drew its essence from the terms of the parties' agreement that addressed the right of the plaintiff to withhold amounts from the defendant if the defendant failed to pay any of its subcontractors and thus was within the scope of the submission.

7. In *Scrivani v. Vallombroso*, 99 Conn. App. 645, *cert. denied,* 282 Conn. 904 (2007), the plaintiff homeowners, who had hired the defendant contractor to remodel their home, alleged breach of contract and negligence claiming that the contractor failed to perform and complete the work in a proper manner. In addition, the plaintiffs alleged a violation of the Connecticut Unfair Trade Practices Act (CUTPA), because the defendant's contracts did not comply with the Home Improvement Act (HIA). The Court found in favor of the plaintiffs on all counts and awarded both compensatory and punitive damages, as well as attorneys' fees.

On appeal, the contractor argued that for the plaintiffs to recover, they had to not only (1) establish a per se violation of CUTPA based on a violation of HIA and (2) an ascertainable loss, but also that (3) the loss was related to the HIA violation. The Appellate Court agreed that the loss must be one caused by a HIA violation, but remanded the case for further articulation because the record was unclear whether the trial court had determined that the HIA violations contributed to the plaintiffs' loss.

8. In *C.R. Klewin Northeast, LLC v. James T. Fleming, Comm'r of Public Works, City of Bridgeport,* 2007 Conn. LEXIS 434, __ Conn. __ (2007), a disputes arose between the contractor and Department of Public Works ("DPW") over extra costs associated with community college construction. The parties negotiated a settlement whereby the state would pay the contractor $1.2 million, whose payment was recommended to the government pursuant to the process set forth in Conn. Gen. Stat. § 3-7(c), and which the Governor authorized. The contractor, after subsequently failing to receive payment, filed a writ of *mandamus* to compel the Commissioner of DPW and the State Comptroller to pay the $1.2 million settlement. The State officials moved to dismiss for lack of subject matter jurisdiction under the doctrine of sovereign immunity. The trial court denied the motion and ordered payment of the $1.2 million settlement.[1]

On appeal, the Supreme Court reversed and the case was remanded with direction to dismiss the action for lack of subject matter jurisdiction. The Court held that § 3-7(c) does not create a mandatory duty which obligated the State officials to effect payment of settlement to the contractor once the Governor had authorized it. Rather, the Court concluded that the provision merely set up a simplified claim settlement procedure without requiring that the officials actually make payment in the amount in settlement of the claim. Although the Governor's certification confers the power to settle on an official, it does not create a mandatory duty in a department official to pay a settlement of a disputed claim.

9. In *Weber v. Pascarella Mason Street, LLC*, 103 Conn. App. 710 (2007), the owner of an office and residential building used the architect's work product for such purposes as obtaining permits and marketing the rentable spaces to prospective tenants. When the owner failed to pay in full, the architect filed a mechanic's lien and subsequently brought suit to foreclose on it. The owner asserted defenses challenging the lienability of the architect's services and filed an application to discharge the lien—which the trial court denied. On appeal, the dispositive issue before the court of appeals was whether architectural services satisfied the physical enhancement test, evidencing a direct association with the physical construction or improvement of the real property. The court of appeals concluded that the physical nature of the architectural services provided to the owner were "undeniable," stating that they "laid the groundwork for the physical enhancement" and thus "played an essential role in the scheme of physical improvement" of the owner's property. As such, the architect was entitled to seek relief under the mechanic's lien statute.

Submitted by Wendy Venoit, Pepe & Hazard LLP, Goodwin Square, Hartford, CT 06103, (860) 241-2647, wvenoit@pepehazard.com

[1] The DPW recommended acceptance of the settlement to the Connecticut Attorney General, who, pursuant to the process set forth in Conn. Gen. Stat. § 3-7(c), recommended to the Governor that the settlement be accepted.

Delaware

Caselaw:

1. In *Millsboro Fire Co. v. Construction Management Services, Inc.*, 2006 WL 1867705 (Del. Super. Jun. 7, 2006) the Superior Court rejected the general contractor's claim that architects and engineers could be held liable in tort for errors and/or omissions in their design when only economic damages are alleged to have occurred as a result. In *Millsboro*, the general contractor filed a third-party complaint against the architect and the engineer alleging that the damages owner claimed against the general contractor for defects in construction were in fact the result of the faulty design by the architect and its engineering sub-consultant. The *Millsboro* Court held that only those professions expressly in the business of supplying information can be held liable in tort for purely economic losses. In granting the design professionals summary judgment, the Court held that the provision of plans and design drawings used to construct an expansion and renovation project do not constitute conduct undertaken while in the business of supplying information, a requirement to the application of the Professional Negligent Misrepresentation exception to the Economic Loss Doctrine as found in the Restatement (Second) of Torts Sec. 552 (1997). Finally, the Court held that because the ultimate purpose of the contractual relationship between the owner and the design professional was the building of a tangible object, information incidentally supplied to the general contractor by the design professional during construction administration cannot serve as an independent basis for a cause of action in tort.

2. In *Delaware Art Museum v. Ann Beha Architects, Inc.*, *et al*., 2007 WL 2601472, (D.Del. Sept. 11, 2007), the U.S. District Ct. for the Dist. of Del. dismissed the owner's negligent misrepresentation claim against the MEP engineer subconsultant of the architect holding that such a claim was barred by the economic loss doctrine. The owner alleged errors and omissions in the drawings increased construction costs and caused delays to the project. However, the Court concluded that when an engineer's responsibilities involved more than the "provision of calculations, specifications or reports," such as designing components of a project, then such conduct falls outside of Delaware's adopted §552 exception. *Id. at 3*. Although the Court concluded that determining if a party is in the business of supplying information requires a "case-specific inquiry" that examines the "nature of the information and its relationship to the kind of business conducted", the Court found dismissal at the pleading stage appropriate stating further discovery was unnecessary in determining whether the defendant acted as more than an "information provider," because the "end and aim" of the contractual relationship was to provide the owner with "certain completed systems that they designed, and any information provided was ancillary to this claim." *Id*.

3. In *RLI Ins. Co. v. Indian River School Dist.*, 2007 WL 4292109 (D.Del. Dec. 4, 2007), the U.S. Dist. Ct. for the Dist. of Del. District Court found that the plaintiff was in violation of Fed.R.Civ.P. 26(a) (2) by failing to contemporaneously disclose the basis for an expert opinion that sought to evaluate delays to a project which utilized the Critical Path Method for scheduling. The defendant argued that the entire report was inherently unreliable because it did not identify the critical path at the time of the first delay, it utilized as a foundation the milestone schedule contained in the project specifications which lacked sufficient logic to constitute a complete critical path and because the expert had not identified the critical path because the expert was not able to identify which of

two scheduled tasks was driving the critical path. *Id*. The Court, focusing on the reliability issues for admissibility under a F.R.E. 702 "methodology used" analysis, found the report to be a "poorly-organized time line [w]ith analysis scattered throughout," that did not sufficiently establish the methodology employed. *RLI Ins. Co.,* 2007 WL 4292109, at *5-6. The Court stated that to be reliable, the expert must accurately identify the critical path at the start of the project and throughout his entire analysis. *Id*. at 6.

4. In *Donald M. Durkin Contracting, Inc., v. City of Newark,* 2008 WL 952984, (D.Del. Apr. 9, 2008), the U.S. Dist. Ct. for the Dist. of Del. granted the defendant's motion for judgment as a matter of law and re-calculated the measure of damages concluding that, "In the context of a construction contract where the builder is precluded from completing his performance by a material breach of the owner, […] the builder is entitled to receive the contract price (or so much as remains unpaid) less the amount it would cost the builder to complete the job." *Id*. at *5 (internal citations omitted). In contrast, the contractor had sought, and received from the jury, a damages award calculated to compensate the contractor for losses incurred as a result of conditions not created by the owner's breach, such as weather inefficiencies or the contractor's inadequate bid allowances, which would have awarded the contractor his actual costs to perform the contract. The contractor also successfully argued to the jury that he was entitled to post-contract losses allegedly suffered because the contractor could not secure further work due to the taint of termination. In reversing the jury's award, the Court held that the contractor could not recover cost increases that would have been incurred regardless of the owner's breach and, further, that the contractor could not recover its actual completion costs. *Id*., at *5-6. The contractor's damages were limited to its expected profit on the remainder of the contract plus any unpaid retainage. Further, the causal connection between the contractor's post-termination losses and the owner's breach was too speculative to form proper basis for an award.

Legislation:

1. New Castle County Council expanded the licensing requirement of contractors working in the County from those contractors performing work pursuant to a permit to all contractors engaged in any type of construction activity. The licensure requirement is broadly defined to include all individuals and business entities who perform services covered by Section 23 of the North American Industry Classification System ("NAICS") code, excluding those solely engaged in subdivision and land development (NAICS 2331), electrical contractors (NAICS 2353), heavy utility construction in the Delaware Department of Transportation (DelDOT) right of way (NAICS 234), and maintenance employees of state owned facilities. New Castle County Code § 6.02.001. Beginning January 1, 2008, contractors wishing to do business in NCCo must register through the County Dept. of Land Use and obtain a license, information regarding which will remain available to the public. Contractors found to be engaging in construction related activities in violation of this requirement, are subject to civil and criminal penalties and are barred from bringing legal action to recover payment for their work. Section 6.03.004.

Submitted by: Paul Cottrell and Patrick McGrory, Tighe & Cottrell, P.A., 704 King St., Suite 500, Wilmington, DE 19899, (302) 658-6400; p.cottrell@tighecottrell.com; p.mcgrory@tighecottrell.com

Florida

Case Law:

1. *Sobi & Sukiennik v. First South Bank, Inc.,* 32 Fla. L. Weekly D192b (Fla. 1st DCA 2007). Action against construction contractor and lender alleging that house was built below seven-foot minimum slab elevation required by county building code and Federal Emergency Management Agency for flood zone in which property was located. No error in entering judgment in favor of lender on claims that lender breached its duties to plaintiffs when it continued to disperse funds under construction loan without obtaining a flood elevation certificate. Under Florida law, as a general rule, lender has no liability for construction defects. Although construction loan agreement gave lender the right to require flood insurance, nothing in the agreement required lender to obtain a flood insurance certificate before funding construction draws. Economic loss rule precluded plaintiff's tort claims. Plaintiffs' attempt to create remedy based on implied covenant of good faith, fair dealing, and commercial reasonableness is without merit.

2. *Boatwright Constr., LLC v. Taar*, 32 Fla. L. Weekly D1484a (Fla. 5th DCA 2007). Contract for construction of restaurant was unenforceable where contractor was not licensed as a contractor in Florida. Contract between unlicensed contractor and licensed contractor under which licensed contractor agreed to serve as unlicensed contractor's qualifying agent and obtain necessary building permits was also illegal and unenforceable where licensed contractor did not have obligation to perform supervisory work at job site. Where licensed contractor subsequently entered into agreement with owner to complete project, and unlicensed contractor agreed to guarantee licensed contractor's performance, an agreement between unlicensed contractor and licensed contractor, under which licensed contractor agreed to endorse all checks it received from owner to unlicensed contractor in return for unlicensed contractor's agreement to hold licensed contractor harmless from all claims arising from licensed contractor's involvement in project, was a valid agreement. Unlicensed contractor's agreement to hold licensed contractor harmless from all potential claims arising out of licensed contractor's involvement with project was new and legal consideration given in return for licensed contractor's promise to endorse to unlicensed contractor any checks it might receive from owner. Error to grant licensed contractor's motion for judgment on pleadings in action brought by unlicensed contractor after licensed contractor refused to endorse to unlicensed contractor checks received from owner.

3. *Allan & Congrad, Inc. v. Univ. of Central Florida,* 32 Fla. L. Weekly D1794a (Fla. 5th DCA 2007). Action by state university board of trustees against multiple construction defendants for negligence and breach of contract based on alleged latent construction defects in building constructed on university's campus. Statute of repose -- Commencement of period -- Date of completion or termination of contract -- Trial court correctly concluded that correct measuring point for commencement of repose period under section 95.11(3)(c) was the latest date that any of the entities enumerated in the statute, professional engineer, registered architect, or licensed contractor, completed or terminated their contract -- Accordingly, trial court correctly concluded that repose period commenced on date contractor completed its contract with university, not on earlier date that architect for whom defendants were providing services completed its contract.

4. *Giller v. Cafeteria of South Beach Ltd, LLP,* 32 Fla. L. Weekly D2064a (Fla. 3d DCA 2007). An architect against whom professional malpractice was brought individually is entitled to invoke an arbitration clause in a contract between plaintiff and corporation. Although the corporation is expressly identified as "the Architect," a provision of the AIA Document A201 General Conditions, which were incorporated by reference, further defined the term "Architect" as "the person lawfully licensed to practice architecture." Since the contract plainly and unambiguously included the corporation's architect among those who can demand arbitration under the terms of agreement, the architect can avail himself of the arbitration clause. Even though the action against the architect sounds in tort, the duties alleged to have been breached are imposed by contract, and the plaintiff is estopped from repudiating the contractual obligation to arbitrate. "One cannot both take advantage of contract provisions to seek to impose liability on an individual professional and at the same time avoid another contract term or provision for which it has no use. … In short, plaintiff cannot have it both ways. It cannot rely on the contract when it works to its advantage, and repudiate when it works to its disadvantage."

5. *Specialty Engineering Consultants, Inc. v. Hovstone Properties Florida, LLC,* 32 Fla. L. Weekly D2685a (Fla. 4th DCA 2007). Chapter 558 details an alternative method for resolving construction disputes of multiple parcels, such as condominiums. The Fourth DCA held that Chapter 558's pre-suit requirements do not apply where the claimant is both the owner and contractor for the condominium project.

Submitted by: Scott Pence, Carlton Fields, 4221 West Boy Scout Blvd., Suite 1000, Tampa, FL 33607, (813) 229-4322, Spence@carltonfields.com

Georgia

Legislation:

1. The contract statutes (Title 13) have been revised to provide that any indemnity provision with respect to the building of a structure which indemnifies the indemnitee from its own negligence is unenforceable and contrary to public policy. This new provision is effective July. This amendment reflects a continued trend in the country to limit, or condition, indemnity liability in the construction industry.

Submitted by: J.D. Humphries, Stites & Harbison PLLC, 303 Peachtree Street, N.E., 2800 SunTrust Plaza, Atlanta, GA 30308, (404) 739-8817, jhumphries@stites.com

Hawaii

Case Law:

1. *Ass'n of Apartment Owners v. Venture 15, Inc.*, 167 P.3d 225 (Haw. 2007). Association of Apartment Owners sued the developer, the site development general contractor, the soils compaction subcontractor, the soils engineer, and the masonry subcontractor, claiming that as a result of severe ground settlement and defective concrete floor slabs, the building and foundations at the condominium had shifted, settled, and cracked. The lower court granted summary judgment to the developer on an implied warranty claim and for all defendants on claims of misrepresentation, unfair or

deceptive acts, breach of contract, strict liability, punitive damages and negligence. The Supreme Court affirmed summary judgment against the Association on its misrepresentation, contract, and unfair practices claims. The Court reversed, however, the grant of summary judgment to the developer on the implied warranty of habitability claim because the developer did not provide a disclosure abstract stating that no warranties existed under Haw. Rev. Stat. 514A-61 (c). The Court also reversed the grant of summary judgment to all defendants on the ground that the negligence claims were barred by the statute of limitations in Haw. Rev. Stat. 657-7 because genuine issues of material fact existed as to whether the Association, through reasonable diligence, should have discovered that the cracks were caused by a defect more than two years before filing the action. Finally the Court remanded the case with instructions to grant summary judgment to the masonry subcontractor on the negligence claims based on contract specifications.

Legislation:

The following is a list of construction-related legislation passed by the Hawaii Legislature, in the 2007 session:

1. **HB853**. Clarifies that a contractor's violation of the prevailing wage law under Haw. Rev. Stat. Chap. 104 arises out of each separate public works project in which the Department of Labor and Industrial Relations finds a failure to comply with the law, and is not considered to have committed only one violation where other violative acts may be occurring simultaneously on multiple public works projects performed by the same contractor.

2. **HB863.** Clarifies that a construction contract between private parties is a public works project if more than 50% of the assignable square feet of the project is leased or assigned for use by the State or county, whether or not the property is privately owned. Also requires the construction project owner to sign a lease or other agreement that the owner complies with state prevailing wage law.

3. **SB17.** Amends Haw. Rev. Stat. Chap. 103D to prohibit contracts of less than $100,000 between a governmental body and contractor for services of professional architects, landscape architects, engineers, and surveyors, from requiring the contractor to defend the governmental body from any liability arising out of the contractor's performance under the contract. The contract may require the contractor to indemnify and hold harmless the governmental body from and against liability arising out of the contractor's negligent, reckless, intentional or wrongful acts.

4. **SB795.** Requires the Department of Accounting and General Services to establish a comprehensive state building code that includes hurricane resistant standards.

5. **SB1425.** Amends Haw. Rev. Stat. 444-10.6 to ensure that an adequate supply of licensed contractors is available to perform necessary repairs and reconstruction work during a state of emergency or disaster.

6. **SB1946.** Amends Haw. Rev. Stat. Chap. 179D to improve safety of dams and reservoirs in the state.

7. **SB1**. On October 31, 2007, the legislature approved legislation permitting resumption of service by the Superferry while an environmental assessment is performed. In August 2007, the Hawaii Supreme Court ruled that an environmental assessment must be performed regarding improvements at Kahului (Maui) Harbor to be used by the Superferry, and that the assessment must take into account secondary effects of the Kahului Harbor improvements. The lower court on Maui ruled in September 2007 that the ferry could not use Kahului Harbor until the environmental assessment was completed. In passing the bill, the legislature found it was in the public interest for the Superferry to commence service as soon as possible and that harbor improvements continue to be constructed and used while the environmental assessment is conducted. The bill provides that the construction, use or operation of any facilities or improvements authorized by any agreement between the Superferry and any State agency shall not be subject to or require any county permits or approvals. The governor is expected to sign the bill but will likely impose operating conditions for the Superferry.

Submitted by: Ken Kupchak & Tred R. Eyerly, Damon Key Leong Kupchak Hastert, 1001 Bishop Street, 1600 Pauahi Tower, Honolulu, Hawaii 96813, (808) 531-8031, www.hawaiilawyer.com

Idaho

Case Law:

1. In *BMC West Corp. v. Horkley*, 174 P.3d 399 (Idaho 2007), the Supreme Court affirmed the trial court's grant of summary judgment upholding a supplier's right to a mechanic's lien. The court determined that the supplier was entitled to lien two buildings constructed with materials that the supplier provided to a contractor on open account because (1) the supplier did not receive full payment for the materials the supplier furnished for the construction of the project, (2) the open account defense was inapplicable since the supplier did not rely exclusively on the builder's general credit and the vast majority of the invoices referenced defendants' project, (3) defendants remained in arrears on their debt to the builder since not all of their payments were for materials, (4) the lien was timely filed since an insulated storage building qualified as an "improvement" on the land, (5) the lien was not destroyed by the fact that a liened building sat upon the land of a third person, and (6) the verification of the supplier's agent was not defective since her typewritten name was sufficient.

Submitted by: Melissa A. Orien, Holland & Hart LLP, 60 East South Temple, Suite 2000, Salt Lake City, Utah 84111, (801) 799-5863, morien@hollandhart.com

Illinois

Case Law:

1. *Czarnik v. Wendover Fin. Servs.*, 374 Ill. App. 3d 113; 870 N.E.2d 875 (2007). The appellate court affirmed the denial of a motion to compel arbitration of a counterclaim for contribution based on the doctrine of collateral estoppel. The plaintiff fell through the roof of a building owned by Wendover and another defendant, ONB, while he was inspecting the roof as part of the investigation of a mold and water damage claim. ONB filed a counterclaim for contribution against Wendover and others in the *Czarnik* suit and Wendover moved to dismiss the counterclaim and compel arbitration pursuant to an arbitration clause in ONB and Wendover's contract. The appellate court

held “that the principle litigation will have preclusive effect, barring any subsequent arbitration of the contribution claim.”

2. *Pierre Condo. Ass’n v. Lincoln Park Wes Assocs.,* 2007 Ill. App. LEXIS 1390; 317 Ill. Dec. 420 (Dec. 31, 2007). The building owned by the plaintiff association suffered damage due to adjacent excavation performed by the defendants. Lincoln Park West counterclaimed against the excavation subcontractor under the indemnification and hold harmless provision in Section 4.6.1 of the excavation subcontract, AIA A401, *Standard Form of Agreement Between Contractor and Subcontractor*. The Subcontract moved for summary judgment, arguing that the clause violated the Indemnification Act (740 ILCS 35/1 *et seq*.) by purporting to indemnify the owner for its own negligence. The court held that although the subcontract language may support the argument that the clause violates the Indemnity Act, the court would “read the disputed provision as requiring contribution, not indemnification” in order to prevent the clause from implicating the Indemnity Act or being void as a against public policy. However, the court, looking to the Contribution Act (740 ILCS 100/1 *et seq*.) for guidance, also held that “any claim for contractual contribution without an accompanying dismissal provision based on a good-faith settlement to be invalid as against public policy.”

3. *Vancil Contracting, Inc. v. Tres Amigos Properties, LLC*, 2008 WL 207534. Vancil Contracting, Inc. ("Vancil") filed a Second Amended Complaint ("Complaint") including Count III to foreclose a mechanics lien. Count III of Vancil's Complaint names Busey Bank ("Bank"), which has a mortgage interest in the property, as a defendant. The Bank filed a Motion to Dismiss Count III alleging that the "Contractor's Notice and Claim for Lien" ("Lien Notice") was defective because it was not verified by affidavit, as required by Illinois law. The Court held that although the Lien Notice contained factual allegations of the contract with Tres Amigos, the work done on the project, and the amounts claimed to be due, it contained no representation that the affiant was placed under oath, or that he represented to the notary that, by oath or affirmation, he was verifying the truth of the matters set forth in the Lien Notice. Based on these facts, it held that the affidavit was simply an acknowledgement that identifies Ron Vancil as the person signing the Lien Notice and not a verification to the truth of the matters set forth in the Lien Notice as required by Section 7 of the Lien Act. The Court held that the Lien Notice was defective and inadequate to preserve Vancil's statutory lien rights. However, the Court held that Vancil preserved its lien rights by filing a suit to foreclose within four months of completing construction.

4. *Federated Dep’t Stores, Inc. v. M.J. Clark, Inc.*, 2007 U.S. Dist. LEXIS 51826 (N.D. Ill., July 17, 2007). Following a flood at a department store, plaintiff corporations sued defendants, a contractor, a subcontractor, and the building manager. During construction, Federated Dept. Stores, Inc. ("Federated") was a party to an "all-risk" insurance agreement. In support of its motion for summary judgment, the contractor argued that the corporations' claims against it were waived due to a waiver of subrogation provision in the contract between Federated and the contractor where each waived any rights against the other for any loss or damages occasioned to either party, their respective property, or the premises arising from any liability, loss, damage or injury caused by any peril for which any property insurance was carried or required to be carried. Granting summary judgment on the breach of contract and negligence claims, the Court concluded that the corporations' damages were caused by a peril covered by the insurance agreement and the loss did not fall within any exclusion to coverage. Only the claim for indemnification survived the waiver provision.

5. *Cycloneaire Corp. v. ISG Riverdale, Inc*., 2007 Ill. App. LEXIS 1388 (2007). Cycloneaire Corp. ("Cycloneaire") sued defendant ISG Riverdale, Inc. ("Mill Owner"), asserting a subcontractor's claim for lien under the Mechanics Lien Act. The trial court found that Cycloneaire's Notice of Lien was sent outside the 90-day written notice period, and that any services performed and replaced parts provided by Cycloneaire during the 90-day period preceding the Notice of Lien constituted warranty service that could not extend the time for written notice. In affirming the trail court's decision, the appellate court could not find that the trial court's judgment was against the manifest weight of the evidence, because the evidence established that the Mill Owner shipped all equipment to be provided under the contract to the facility more than 90 days prior to the date of the Notice of Lien and the services performed during the 90 days preceding the Notice of Lien were warranty services that did not extend the time for notice.

Legislation:

1. 820 ILCS 185/1 (PA 95-26, effective Jan. 1, 2008), THE EMPLOYEE CLASSIFICATION ACT. The Illinois Legislature passed the Employee Classification Act to provide a single standard for determining whether construction workers should be classified as employees or independent contractors under various statutes and to reduce the loss of tax revenue through misclassification of workers as independent contractors. The Act sets penalties for misclassification and establishes a rebuttable presumption of employee status for individuals. Sole proprietorships, partnerships and LLCs are subject to a legitimacy test before individual workers are analyzed to determine if they are employees or independent contractors. The individual test is based on whether or not the worker is free from control or direction, provides a service not normally provided by the company, and is engaged in an independent line of work.

2. 815 ILCS 603/1 *et seq.*, CONTRACTOR PROMPT PAYMENT ACT – ILLINOIS PRIVATE PROJECTS. On August 31, 2007, Illinois enacted a prompt payment statute for private construction projects (public projects are addressed in other acts), known as the "Contractor Prompt Payment Act," which provides a mechanism to expedite payments for any design or construction contract or subcontract. Under the Act, an owner is obligated to pay the amount due a contractor within 15 days of approval of a payment application. If the owner does not approve an application for payment, it must provide a written statement of the amount withheld and the reasons for the withholding within 25 days of receipt of the application. The owner may only withhold the reasonable value of the portion of the work that is not approved and must pay for the remainder of the work performed. Payment must be made for all portions of the work that were performed in accordance with the contract. The form of approval is not established but directions to a lender or architect to process payment does not constitute approval. If the owner does not provide a written statement of withholding within 25 days, the payment application is considered to be approved. A contractor must pay its subcontractors within 15 days of receipt of payment from the owner for the subcontractor's work, provided that the subcontractor performed in accordance with the subcontract and the work is accepted by the owner, owner's agent, or the contractor. A subcontractor owes the same obligation to its sub-subcontractors, suppliers and materialmen. If a payment is not timely made, the late paying party is liable for interest

at 10% per annum. Importantly, a party who has not been paid on time may stop work seven calendar days after giving written notice of its intent to do so.

Submitted by: Jeff Hamera Duane Morris LLP 190 South LaSalle Street, Suite 3700, Chicago, IL 60603-3433, (312) 499-6782, jlhamera@duanemorris.com

Indiana

Case Law:

1. *Alberici Constructors, Inc. v. Ohio Farmers Ins. Co.,* 866 N.E.2d 740 (Ind. 2007). A supplier to a sub-subcontractor on a public highway project sought to recover from the general contractor's performance bond when the supplier was not paid. The court, in siding with the bond surety, held that Ind. Code § 8-23-9-9 requires a payment bond to pay for all labor and materials supplied by a contractor and all subcontractors. Although "subcontractor" is not defined by the statute, the definition of "subcontractor" in Ind. Code § 4-13.6-1-18, which relates to surety bonds, suggests that the term only includes parties in privity with the general contractor, as do the INDOT regulations adopted to implement the payment bond statute. Although the court in *Title Guaranty* adopted a functional coverage test that would have included the supplier in the scope of the bond surety's obligations, that decision was based on the specific language of the bond at issue, which was not a statutory payment bond. *Title Guar. & Sur. Co. of Scranton, Pa. v. State ex rel. Leavenworth State Bank*, 61 Ind. App. 268, 109 N.E. 237 (1915). Moreover, in the factually similar case of *Republic Creosoting Co. v. Foulkes Contracting Co*., 103 Ind. App. 457, 8 N.E.2d 416 (1937), the court refused to extend coverage beyond the subcontractor. Finally, the court found public policy would be better served by a bright-line rule limiting the scope of payment bonds on public projects.

2. *Yeager v. McManama*, 874 N.E.2d 629 (Ind. Ct. App. 2007). In *Yeager*, the appellants were alleged to have made a number of representations that induced homeowners to make purchases in the development. Their exclusive builder allegedly represented to the homeowner that the development would be an exclusive upscale community similar to Hilton Head. Subsequently, the developers permitted the construction of much smaller homes in the development. Litigation ensued during which the trial court denied the appellants' motion for summary judgment. The appellants eventually suffered an adverse trial verdict for liability on constructive fraud.

In affirming, the Court held that (1) an implicit fiduciary relationship or duty between parties will support a claim for constructive fraud on the basis of representations as to future conduct; (2) denial of summary judgment was proper as material issues of fact existed as to whether the exclusive builder's statements were sufficient to support the homeowners' claims for constructive fraud and their claim for breach of fiduciary duty; (3) the combination of the builder's statements and the owners' failure to enforce the building standards constituted at the very least a breach of the owners' duty of fair dealing and created a situation in which the purchasers were constructively defrauded; and (4) because the developer designated the builder as its exclusive builder for the development and authorized him to respond to questions about the future of the development, the builder had the apparent authority necessary to create an agency relationship.

3. *Delta Bldg. Group, Inc. v. Laurenzano*, 873 N.E.2d 1132 (Ind. Ct. App. 2007). After homeowners terminated a home construction contract, they initiated arbitration. At arbitration, the contractor received damages for its completed work. Instead of paying the contractor, the homeowners filed a complaint for interpleader against the contractor and the lienholders, in which they sought to deposit the arbitration award with the court in satisfaction of their liability for the project. The trial court ordered that the award be distributed to the lienholders. The contractor appealed.

The Court of Appeals in affirming, ruled that the interpleader was not an improper motion to vacate or modify the arbitration award. Rather, the trial court's order merely enforced the arbitrator's award and distributed it so as to protect the homeowners from multiple liabilities under Indiana Trial Rule 22.

The contractor also challenged the trial court's determination that the lienholders' claims had priority over the contractor's attorneys' lien on the arbitration award. Since the arbitrator's award specifically denied the contractor's claim for attorney fees and did not include the fees in the arbitration award, the contractor's attorney had no legal claim to the funds and was not entitled to a lien on the arbitration award.

4. *Clark v. Hunter,* 861 N.E.2d 1202 (Ind. Ct. App. 2007). In *Clark*, an electrical contractor appealed a trial court decision in its favor. The court of appeals affirmed in part and reversed in part. The Court of Appeals affirmed the trial court's award of damages without prejudgment interest on the breach of contract claim. The trial judge was entitled to consider his own personal experience in considering the evidence, which was sufficient to support his finding. Further, refusal to award damages was a proper exercise of the trial court's judgment in resolving a good faith dispute.

The trial court erred, however, in refusing to foreclose the mechanic's lien or to award attorneys' fees incurred in the suit. It was undisputed that the lien was valid and that the contractor was entitled to payment; consequently, the trial court was required to order the sale of the property. Further, because the lien was valid, recovery of attorney fees was mandatory under Ind. Code § 32-28-3-14(a). This was in spite of language signaling that their award is discretionary. The court of appeals held the statutory language in a prior version before recodification had mandatory statutory fees and the language's change was not intended to be a substantive change in the law.

5. *State of Indiana v. CCI, LLC,* 860 N.E.2d 651 (Ind. Ct. App. 2007). In *CCI*, the subcontractor was awarded a judgment by the trial court on a theory of unjust enrichment, which included attorneys' fees. On appeal, the subcontractor conceded the owner was not unjustly enriched, but it characterized its judgment as a claim on the retainage itself. The Court of Appeals disagreed. Since the owner was entitled to set off costs it incurred to complete the work against the retainage, the owner, not the general contractor, was entitled to the retained funds, and the subcontractor's judgment was reversed. It is worth noting that because the project in question was a public project, the subcontractor could not utilize Indiana's mechanic's lien remedy at Ind. Code § 32-28-3-1, *et. seq.*, which would have required the owner to pay the subcontractor what it was owed, regardless of whether the owner could assert setoffs against the general contractor.

6. *Novotny v. Renewal by Andersen Corp.*, 861 N.E.2d 15 (Ind. Ct. App. 2007). In *Novotny*, the homeowner had alleged a number of claims in the trial court, including breach of contract, breach of express and implied warranties, fraudulent inducement, and detrimental reliance. The supplier successfully moved the trial court to dismiss the claims and compel arbitration.

On appeal, the homeowner made two primary arguments: that the trial court erred by compelling arbitration before determining whether the contract was valid; and that the Indiana Uniform Arbitration Act's exemption of consumer leases, sales, and loan contracts precluded the parties from agreeing to arbitrate. The Court of Appeals rejected both arguments. The question of whether an arbitration agreement was made is a threshold question for the court; issues such as fraud in the inducement, waiver, and termination of contract arise after formation of the agreement to arbitrate and are to be determined in arbitration. However, in a footnote the Court distinguished this case from prior cases in which the claimed fraud goes to the contents of the contract itself.

The Court also rejected the proposition that arbitration was barred by the Indiana Uniform Arbitration Act. Although the act would not otherwise have applied to the contract, parties remain free to enter into agreements to arbitrate disputes. Moreover, the Federal Arbitration Act preempts Indiana's arbitration act, preventing a court from invalidating arbitration agreements under state laws that are applicable only to arbitration agreements.

7. *Am. Fire & Cas. Co. v. Roller*, 860 N.E.2d 1275 (Ind. Ct. App. 2007). *American Fire* is an insurance case involving a builder asserting coverage for a claim for defective workmanship and the insurer seeking to quash it on the grounds of late notice. The trial court denied a motion for partial summary judgment on the ground that there were questions of fact as to whether the notice was late and whether the late notice prejudiced the insurer.

The Court of Appeals held that the trial court did not err in denying summary judgment for the insurer on the grounds that the policy's definition of "occurrence" did not include faulty workmanship because the insurer had conceded that it had a duty to indemnify for damage to other property caused by the defective workmanship. The court of appeals also affirmed the trial court's denial of summary judgment in the builder's favor on the builder's theory that the insurer's bad faith in investigating the claim estopped it from seeking to avoid coverage. Although the court of appeals agreed that the builder alleged facts that may have supported the theory, it noted that the cases recognizing such a theory treated the issue of estoppel as a question of fact, not law.

Judge Barnes, in a lengthy concurrence, observed that the Court of Appeals was not permitted to rule on the trial court's denial of the builder's motion for summary judgment. He continued with a discussion of the insurer's likely liability under the bad faith estoppel theory and proposed that Indiana courts should adopt the bad faith estoppel exception.

Submitted by: David Bostwick, Attorney at Law, 5434 North Capitol Avenue, Indianapolis, Indiana 46208, (317) 652-2268 davidbostwick@bostwicklaw.net

Iowa

Case Law:

1. *Speight v. Walters Dev. Co.,* 744 N.W.2d 108, 114 (Iowa 2007). The Iowa Supreme Court has extended the common law of implied warranty of workmanlike construction to allow subsequent purchasers to recover damages against a builder-vendor for a breach of the implied warranty. The Court held that implied warranty of workmanlike construction is a judicial creation and does not, in itself, arise from the language of any contract between the builder-vendor and the original purchaser. Id. at 115. Thus, it is not extinguished upon the original purchaser's sale of the home to a subsequent purchaser. Id. In Iowa, the statute of limitations and statute of repose are the same for original purchasers and subsequent purchasers, thus eliminating any increased time period within which a builder-vendor is subject to suit. Id. at 114-15; see also Iowa Code sect. 614.1(11) (2008).

Legislation:

HF830. Signed into law by the Governor during the 2007 legislative session. As reported in the last edition, HF830 continues to clarify the movement to combine all public bidding procedures and requirements into a single code chapter. HF774, which was signed into law on April 17, 2007, stated that, for purposes of Iowa's mechanics' lien law, a lender who obtains an interest in real estate by assignment of a mortgage shall be entitled to the same priority as the original mortgagee. Iowa Code sect. 572.1 (2008). The bill made other non-substantive language changes.

Submitted by: Benjamin B. Ullem & John F. Fatino, Whitfield & Eddy, PLC, 317 Sixth Avenue, Ste. 1200, Des Moines, Iowa, 50309-4195, (515) 288-604, fatino@whitfieldlaw.com

Kansas

Case Law:

1. In *Buchanan v. Overley*, ____ Kan. App. ____, 178 P.3d 53 (2008), the Court required that the claimant, a contractor, verify the truth of the facts asserted in a mechanic's lien statement filed pursuant K.S.A. 60-1102. The mechanic's lien statement represented that the labor and materials supplied to the project were set forth in an attached exhibit. The claimant did not state, nor did he verify, his address for purposes of service of process, as required by the statute. His address, however, was printed on every page of the attached exhibit. The Court held the claimant should have put his verified address on the face of the lien statement and, by failing to do so, did not *strictly* comply with the requirements of the statute for perfection of a mechanic's lien, thereby invalidating the lien.

2. In *Senne & Co., Inc. v. Simon Capital Ltd. Partnership*, 155 P.3d 1220, 2007 WL 1175858 (Kan. App. 2007) (*Unpublished*), a museum leased space from defendant and hired several contractors, including plaintiff, to make improvements to the leased premises. The museum eventually abandoned the premises without paying the contractors. In turn, the contractors sought to enforce their mechanic's liens on Defendant's property. A bench trial was held. The issue on appeal was whether Plaintiff's improvements provided a benefit to the Defendant, which would imply an

agency relationship and impose liability for the improvements. Plaintiff contended Defendant had input into the planning of all improvements. Moreover, Defendant attended most, if not all, of the construction meetings and authorized all construction plans.

The Court found that although Plaintiff made significant improvements to the leased premises, there was no evidence Defendant actually received a benefit; the improvements were only beneficial to the museum. The Court also considered the fact that the Defendant would have to pay to have the improvements removed to accommodate any future tenants. Consequently, the district court held the trial court properly found no implied agency existed between the museum and Defendant.

3. In *Suitt Const. Co., Inc. v. Hill*, 150 P.3d 335 (Kan. App. 2007) (*Unpublished*), the Court held K.S.A. § 60-1101 requires a contractor or subcontractor seeking to establish a lien provide labor, equipment, or supplies *at the site* before the lien will attach. Plaintiff's engineers' activities involved making marks in the sand, marking walls with magic markers, and attempting to drill holes in walls. The Court found, while demolition of an existing building, clearing, grading, filling, or construction staking could be work sufficient to cause a lien to attach, mere visits to the site and the taking of a mental image were not sufficient to constitute providing work at the site.

4. In *Edwards v. Anderson Engineering, Inc*., 284 Kan. 892, 166 P.3d 1047 (2007), Defendant, a construction design professional, was retained to perform services on a construction project. In doing so, Defendant requested a contractor who was also working on the project cut a concrete pipe into four pieces. Defendant gave specific directions on the locations to make the cuts to the contractor. During this process, an employee of the contractor was killed. The contractor was found to have failed to comply with safety standards and, in turn, the employee's family brought a wrongful death suit against the contractor and Defendant.

In its analysis, the Court considered the application of K.S.A. 2006 Supp. § 44-501(f), which provides limited immunity to a construction design professional retained for professional services on a construction project. This immunity bars a construction design professional's liability arising from injury caused by a contractor's failure to comply with safety standards if the injury is compensable under the Workers' Compensation Act. The construction design professional's immunity does not apply when he negligently prepares design plans or specifications. The Court found that Defendant's markings on the concrete pipe to be design plans or specifications within the purview of K.S.A. 2006 Supp. § 44-501(f). It found, therefore, the limited immunity granted by the statute did not apply. The Court held that a material dispute of fact existed as to whether the proximate cause of the employee's death was the contractor's failure to comply with safety standards, or defendant's negligence in preparing the design plan for cutting the pipe. As such, summary judgment was denied.

5. In *Owen Lumber Co. v. Chartrand*, 283 Kan. 911, 157 P.3d 1109 (2007), Plaintiff sought to foreclose its lien on Defendants' property. Defendants, a married couple, contended Plaintiff should not be permitted to foreclose its mechanic's lien because it failed to properly serve a copy of the lien statement on Defendants as required by K.S.A. § 60-1103(c). The district court found Plaintiff had met the notice requirement because it had proven it attempted service by first-class mail, and was allowed the rebuttable presumption of receipt of service.

On appeal, the Kansas Supreme Court reversed, holding the theory of presumptive receipt of legal service does not apply to service of mechanic's liens. The Court elaborated that K.S.A. § 60-1103(c) requires service of a lien by restricted delivery, not first class mail. The Court also found, however, that under the savings provision of K.S.A. § 60-1103(c), the requirements for service of a mechanic's lien are met if the person to be served actually received a copy of the lien statement. Plaintiff had proven Defendants had, indeed, received a copy of the lien statement. Therefore, the statutory notice requirement was satisfied.

6. In *Newman Memorial Hosp. v. Walton Const. Co., Inc*., 37 Kan.App.2d 46, 149 P.3d 525 (2007), the Court held the actions of Plaintiff in constructing and leasing a medical office building were a proprietary function pursuant to K.S.A. § 60-521, which provides a governmental unit is subject to statutes of limitation when acting as a private party. This finding allowed Defendant, a contractor, to rely on its asserted statute of limitations defenses prescribed in K.S.A. § 60-512(1) and K.S.A. § 60-511(1). The Court considered that Plaintiff's medical office building generated a gross profit in 1999, 2000, and 2002, none of the medical office building tenants were members of Plaintiff's medical staff, and the tenants paid the market rent in accordance with written lease agreements. Thus, the Court concluded, Plaintiff's enterprise was commercial in character.

The Court also addressed Plaintiff's argument that Defendant should be equitably estopped from asserting its statute of limitation defenses. Plaintiff argued Defendant caused it to delay filing suit by continuing to make remedial repairs to the medical office building. The Court dismissed Plaintiff's arguments and found Plaintiff failed to prove Defendant, by its acts, representations, admissions, or silence when it had a duty to speak, induced Plaintiff to believe certain facts existed. Because Plaintiff did not demonstrate it relied and acted upon such an inducement, Defendant was not estopped from asserting the defense.

Legislation:

Kansas Senate Bill 379, which prohibits indemnification clauses in all contracts, is now in the House Judiciary Committee. The current Kansas law on the topic, K.S.A. § 16-121, voids and renders unenforceable as a matter of public policy, any indemnification provision in a construction contract, or any other connected agreement, that requires one party to indemnify another for negligence liability. Senate Bill 379 goes further by not only expanding the scope of K.S.A. § 16-121 to include all contracts, but it also bars indemnity agreements between parties for intentional acts or omissions that result in liability. Furthermore, the Bill prohibits contracts requiring one party to provide liability insurance coverage to another.

Submitted by: Scott C. Long, Long, Luder & Gordon, P.A., (913) 491-9323, slong@llglaw.com

Kentucky

Case Law:

In *Steeplechase Subdivision Homeowners Ass'n, Inc. v. Thomas*, __ S.W.3d __ (Ky. App. 2008), Kentucky recently held that maintenance services, such as mowing,

trimming, edging, and street cleaning, are not services that give rise to a rights to assert a mechanic's lien under the Kentucky mechanic's lien statute.

Legislation:

1. HB 490, KENTUCKY FAIRNESS IN CONSTRUCTION ACT. The Act applies to private and public construction contracts entered into after June 26, 2007. (Section 6 (2)). Utilities, residential construction and processing equipment suppliers are exempt from the provisions of the Act. (Section 6 (1-3)).

- Waiver of Litigation or Arbitration. Provisions waiving a right to resolve a claim by litigation or arbitration are void and unenforceable. (*This is aimed at public agencies that require the public agency appointees to decide a dispute*.) (Section 2 (2(a))).
- Mechanic's Lien Waivers. Provisions in contracts that waive, release or extinguish rights to a lien are void, except as related to partial waivers of lien rights relating to progress payments. (Section 2 (2(b))).
- No Damages For Delay Provisions. Provisions that waive, release or extinguish the right to recover costs, additional time, or damages for delays that are, in whole or in part, within the control of the owner are void. The contract can specify which types of costs are recoverable, and can require the contractor to provide the owner with notice of any delay.
- Payments. Payments "shall be made pursuant to the terms of the contract AND as required in the bill." (Section 2 (1)).
- Timing: Owner Payment. The Owner shall pay the contractor within 30 business days after receipt of a timely, properly completed, undisputed request for payment. (Section 2(5-6)). Failure by the Owner to timely pay results in interest at a rate of 12% per year after the contractor sends notice of when interest begins to run on unpaid sums.
- Timing: Contractor Payment. Contractors must pay their subcontractors undisputed amounts due 15 business days after receipt of payment from an owner. Interest will accrue on unpaid undisputed amounts beginning on the 16th business day after the contractor receives payment from the owner. (Section 2(8)).
- Retainage. Amount Withheld**.** An owner, contractor, or subcontractor may withhold no more than a 10% retainage from undisputed amounts due until the project is 50% complete. After the project is 51% complete, the retainage withheld may not exceed 5% of the total contract amount. (Section 3(1)). Release of Retainage. Thirty (30) days after substantial completion of a project, the owner must release the retainage less an amount equal to 200% of the reasonably estimated cost of the remaining work. Fifteen (15) business days after retainage has been released by the owner, the Contractor must release retainage to the subcontractors. (Section 3(2)). Failure to pay the retainage when due will result in interest at a rate of 12% per year. (Section 3(3)).
- Provisions are Severable. A void provision does not make the whole contract unenforceable. (Section 2 (4)).
- Attorneys' Fees. If, in an action to enforce this Act, a losing party is deemed to have acted in bad faith, the prevailing party shall be awarded costs and reasonable attorneys' fees. (Section 4).
- Mechanic's Lien Filing Deadline. For public construction contracts, a lien may be filed the later of 60 days after the last day of the month in which labor or materials was furnished, or the date of substantial completion.

Submitted by: Angela R. Stephens, Stites & Harbison, PLLC, 400 West Market Street, Suite 1800, Louisville, KY 40202-3352, (502) 681-0388, astephens@stites.com

Louisiana

Case Law:

1. *Frey Plumbing Company, Inc. v. Foster, ___ So.2d ____, 2008 WL 500943.* Defendant hired Plaintiff to do plumbing work at her residence. When the bill went unpaid for 6 months, despite requests for payment, Plaintiff sued under an open account theory, seeking attorneys' fees. Louisiana Supreme Court held that there was an open account, and that to constitute an open account, there is no requirement of one or more than one transactions, nor the contemplation of future transactions between the parties, overruling *Acme Window Cleaners v. Natal Construction Co.,* 660 So.2d 926.

2. *Supreme Services and Specialty Co., Inc. v. Sonny Greer, Inc, 958 So.2d 634, 2006-1827 (La. 5/22/07).* Owner hired Contractor to perform various work, including pouring concrete slabs, which Contractor subbed to Subcontractor. After pouring, cracks developed in the slab, which Contractor cut out and re-poured. Contractor executed an agreement warranting against defects in concrete. When the concrete failed, Owner sued Contractor, claiming breach of contract.

Contractor filed a third-party claim against its CGL Insurer to establish coverage for liability for Subcontractor's defective work. The trial court granted Insurer's motion for summary judgment, finding no coverage under the policy's "work product" exclusion, (i.e. the policy did not cover "work or operations performed by you or on your behalf"). The court of appeal reversed the trial court, finding the "work product" exclusion inapplicable to work performed by subs, and the "products-completed operations hazard" provision ambiguous and favoring coverage.

The Louisiana Supreme Court reversed the court of appeal and reinstated the trial court's ruling. The court said the plain language of the CGL policy, under the "work product" exclusion, excluded coverage. The court noted that the "work product" exclusion applied to the work of the Contractor "as well as others acting on its behalf – subcontractors."

3. *Lee v. Professional Const. Services, Inc., --- So.2d ---, 2008 WL 651622 (La. App. 5 Cir., 2008).* Parish sheriff and parish law enforcement district brought action against construction business, engineers and others for improper design, fabrication and construction of a radio communication antenna tower constructed in1998 that collapsed during hurricane Katrina in 2005. Engineers filed an exception of preemption. Court of Appeal upheld trial court's decision that the preemptive statute controlled over the plaintiff's claim of warranty within the ten year prescription period, and that the cause of action accrued when the parish discovered the damages, not when the contract was formed, so the five year period was appropriate.

Legislation:

ACT 398. Amended LA RS 37:2150 *et seq,* the Contractor Licensing Law, in several ways. First, it raised the cost of the work requiring a residential contractor's license from $50,000 to $75,000. The new portions of the statute allows the Board to issue citations

to alleged violators of the law and allows the option of paying the fine or appearing at an administrative hearing.

Additionally, the statute states that anyone registered or licensed by the board who is the subject of two or more complaints within a 6 month period shall have his name and the nature of each complaint posted on the board's website.

Finally, a home improvement contractor who fails to obtain a certificate of registration when required will be prohibited from filing a lien or statement of claim or privilege.

ACT 335. This act addressed several changes to the State Uniform Construction Code and the Construction Code Council. First, members of the council now serve at the pleasure of the governor, thus eliminating their 3 year terms. It then addressed a series of changes to the code itself, ensuring that it does not run afoul of existing Federal codes and clarifies exceptions to the code for manufactured housing. The new law additionally addresses the responsibility for enforcement of the code at the municipality and parish level.

Submitted by: Scott J. Hedlund and Keith Bergeron, Deutsch, Kerrigan & Stiles, 755 Magazine St., New Orleans, LA 70130, (504) 581-5141, www.dkslaw.com, shedlund@dkslaw.com, kbergerson@dkslaw.com

Michigan

Legislation:

The Michigan legislature has recently enacted changes to the Michigan Construction Lien Act ("CLA"), MCL § 570.1101, et seq. which have a significant impact on residential construction projects.

The greater part of the changes effect the procedures by which contractors, suppliers and laborers recover outstanding amounts from the Homeowners Construction Lien Recovery Fund (the "Fund"), although several provisions now require additional administrative steps be taken by the project owner. The most noteworthy changes include:

- Sworn Statements: Upon receipt of the sworn statement, the owner/lessee must give notice of the sworn statement in writing, by telephone or in person, to each subcontractor, supplier or laborer identified in the sworn statement or who has provided a notice of furnishing. See, MCL § 570.1110.

- Lien Waiver Forms: The amendments included new lien waiver forms to be substantially followed for full and partial Un/Conditional Waivers. Essentially, unless the lien waiver was supplied directly by the lien claimant, the owner/lessee must confirm the authenticity of the waiver by contacting the supplier of the lien waiver in writing, in person or by phone. See, MCL § 570.1115.

- Recover from the Homeowners Construction Lien Recovery Fund: The changes to the CLA have made it harder to recover from the Fund. The Fund must now

be sued within one year of the recording of the Lien. The contractor/ subcontractor must show that it contracted directly with the party that the owner/lessee contracted with. If a supplier is seeking to recover from the Fund, it now must show that its customer submitted a credit application; and, if the customer is a publicly traded company, that the supplier obtained the customer's credit report, or, as to a non-public company, that the supplier obtained the credit report of the owner of the customer and a personal guarantee if the customer has been in business less than four years. However, the Fund will not be liable: (a) if the customer has been delinquent in payments to the supplier for over 180 days; (b) for any amounts exceeding the customer's credit limit; and (c) for time-price differential charges accrued more than 90 days after the recording of the lien.

Submitted by: Michael D. Carroll; Kerr, Russell & Weber PLC; 500 Woodward Avenue, Suite 2500, Detroit, MI, 48226; www.krwlaw.com

Montana

Case Law:

1. *Swank Enterprises v. All Purpose Serv., Ltd.*, 2007 MT 57, 336 Mont. 197, 154 P.3d 52. City contracted with Contractor to construct a water treatment plant. As part of this project, Contractor hired Subcontractor to paint the plant's tanks and pipes. Pursuant to the subcontract, Subcontractor designated Contractor as an additional insured under its two CGL policies. Subcontractor performed its work between December 1997 to February 1998. It was later discovered that Subcontractor had used the wrong paint, requiring stripping and repainting. City brought a negligence action against Contractor. Contractor tendered defense to Subcontractor's insurance carrier as an additional insured. The carrier refused to accept defense of the action, arguing that no injury had occurred under its 1997 policy, which covered property damage defined in part as "physical injury to tangible property." The carrier argued that no physical injury occurred until 1998 when the plant had to be closed for the repairs and therefore only its less-broad 1998 policy applied.

Held: "The Montana Supreme Court held that under a CGL insurance policy a "physical injury" refers to "a physical and material alteration resulting in a detriment." Based on this definition, the defective paint job fell within the 1997 policy because when the paint was applied, the facility had been physically and materially altered, resulting in a detriment to the City even though it was unaware at the time of the injury.

2. *Shults v. Liberty Cove, Inc.*, 2006 MT 247, 334 Mont. 70, 146 P.3d 710 (2006). Plaintiff sued defendant, a developer, to enjoin it from constructing an 82-unit condominium project that had not undergone subdivision review by the county. Defendant had initially applied to subdivide the property but that application was denied based on traffic and ground water concerns. The property had been divided in 1983, which placed it under the state's Subdivision Act. The developer argued the property was exempt from the Act's review requirements based on the size of the divided parcels. Defendant then used the exemption at MCA § 76-3-203, which allows certain condominium projects to be built without subdivision review. Shults subsequently filed an action to enjoin the development, arguing that the project should be required to undergo subdivision review before being approved for construction.

The trial court declared that the development was subject to review under the Montana Subdivision Act, Title 76, Chapter 3, MCA. The Montana Supreme Court reversed, holding that a property divided in parcels greater than 20 acres in 1983 was exempt from the requirements of the Subdivision Act and defendant was therefore "in compliance" with the Act.

3. *Eisenhart v. Puffer*, 178 P.3d 139 (Mont. 2008). Homeowners hired Contractor to construct a home. The contract contained an arbitration provision. When a dispute arose as to the contract price, the Contractor filed a construction lien on the property and the Homeowners purchased a bond through their surety to release the lien. The dispute proceeded to arbitration, and the arbitrator issued an award to the contractor. Contractor brought an action against the homeowners and their surety to enforce the judgment on the arbitration award. Held: the enforcement of an arbitration award is warranted under the lien statute.

4. *Weimar v. Lyons*, 164 P.3d 922 (Mont. 2007). Owner brought action to have construction lien expunged, and contractor counterclaimed by asserting the lien. There was sufficient evidence to demonstrate that the parties had entered into a fixed-price contract, followed by subsequent oral contracts, that the work was performed, and the owner waived the deficiencies in the work. The contractor had standing to assert the lien because he was individually named as a lien claimant doing business as the contractor's company despite the fact that the company had been involuntarily dissolved as a Montana corporation.

5. *LHC, Inc. v. Alvarez*, 160 P.3d 502 (Mont. 2007). When a contractor failed to pay its concrete and gravel supplier, the supplier filed a construction lien against the owner's property for the cost of the materials. The supplier was awarded its lien amount plus prejudgment interest and attorney fees. Under the mechanic's lien statute, establishment of the lien entitles the lien claimant to attorney fees. The statute does not require a proportional reduction in attorney fees when the judgment is less than the amount claimed in the lien. The supplier was therefore entitled to attorney fees without a reduction based on the amount awarded by the judgment.

Legislation:

Mont. Code Ann. § 76-3-203. In 2007, the Montana Legislature amended this code to narrow the condominium exemption at issue in *Shults v. Liberty Cove, Inc., supra*. It appears the condominium exemption now found at Mont. Code Ann. § 76-3-203 (2007) applies to only those projects constructed on land which was subdivided after local review.

Submitted by: Sean Hanlon, Holland & Hart LLP, 55 17th Street, Suite 3200, Denver, CO 80202, (303) 295-8270, smhanlon@hoillandhart.com

Nebraska

Case Law:

1. In *Preston v. Omaha Cold Storage Terminals*, 16 Neb. App. 228, 742 N.W.2d 782 (Neb. App. 2007), the Nebraska Court of Appeals held that noncompliance with the 120-day requirement for filing of a construction lien is an affirmative defense which is waived unless it is specifically pled. The court further held that a claim for damages for breach of contract can be included as part of a complaint for foreclosure of a construction lien.

Legislation:

LB889. The Nebraska Legislature has enacted legislation authorizing the use of design-build and construction management at risk project delivery methods for most public projects. As passed, political subdivisions covered by the act include cities, villages, counties, school districts, community colleges, and state colleges. Projects on which design-build and construction management at risk may not be used include all projects for road, street, highway, water, wastewater, utility, or sewer construction (with a limited exception to the exclusion). The bill was passed and approved by the governor on April 11, 2008.

Case Law Submitted by: Gretchen Twohig, Baird Holm LLP, 1500 Woodmen Tower, Omaha, Nebraska 68102 (402) 636-8352, gtwohig@bairdholm.com

Legislation Submitted by: Kerry L. Kester, Woods & Aitken LLP, 301 South 13th St. Suite 500, Lincoln, NE 68508 (402) 437-8513, kkester@woodsaitken.com

Nevada

Case Law:

1. In *Westpark Owners' Association v. Eight Judicial District Court*, ___ Nev. ___, 167 P.3d 421 (2007), the Court addressed three (3) issues concerning NRS Chapter 40 (construction defects): i) the definition of "residence"; ii) the definition of "new", in the context of a residence; and iii) the effect of a general waiver of construction defects in a sales contract. Westpark Associates, LLC ("*Westpark*") purchased a partially completed condominium project out of bankruptcy, and completed an addition 108 units, but due to market conditions decided to lease the 108 units as apartments, and did so from 1997 through 2003. Westpark started selling the units to the general public, and each contract required the buyer to waive "any" possible construction defect claims. The converted condo owners began experiencing problems with their units, and the Westpark Owners' Association (the "*Association*") served Westpark with a formal Chapter 40 notice. The district court entered partial summary judgment in favor of Westpark, declaring generally that Westpark had "no liability" in connection with the development or sale, relying on several conclusions of law which were revisited by the Nevada Supreme Court. First, contrary to the district court's reasoning, the Court found that the mere fact the units were originally built as apartments does not prevent them from meeting the definition of a residence. The Court found the event conferring "residence" status is the transfer of title to a home purchaser. Second, the Court interpreted "new" as a product of original construction that has been unoccupied as a

dwelling from the completion its construction until its sale. Although the units in this matter did not meet the definition of "new", the Court found that if Westpark altered or repaired the units before their sale, they would fall under NRS 40.615. Finally, while NRS 40.640(5) allows a contractor and homebuyer to stipulate to a waiver of any potential claims under NRS Chapter 40, the "waived" constructional defect must be disclosed to the buyer in clear language before the purchase of the residence. Here, the waivers did not disclose any constructional defects; they stated only that certain defects "may" exist and listed a number of potential defects. This general disclaimer language was not sufficient to waive any claims pursuant to NRS Chapter 40.

2. In *D.R. Horton v. Eight Judicial District Court*, ___ Nev. ___, 168 P.3d 731 (2007), D.R. Horton, Inc. ("*D.R. Horton*") constructed 414 residences in 138 buildings in the First Light at Boulder Ranch Community in Henderson, Nevada ("*First Light*"). Believing that numerous construction defects may exist in each residence, First Light hired experts to assist it in preparing an NRS 40.645 pre-litigation notice of constructional defects. The notice was formulated after using visual and invasive testing in a small representative sampling of homes in the community. First Light did not provide D.R. Horton with the addresses or the expert report of the homes that were tested. Using the information they found, the First Light experts simply extrapolated the percentage of homes in which they believed each defect existed throughout the community. D.R. Horton moved the district court for a declaratory judgment, stating that First Light's NRS 40.645 notice was unreasonable and thus statutorily insufficient. The district court denied the motion, and D.R. Horton filed a writ petition challenging the district court's order. To address the problem of what satisfies the "reasonable detail" requirement of NRS 40.645, the Court formulated the "reasonable threshold" test to be used when pre-litigation notices contain extrapolated data. The scope of the extrapolated notice must be narrow. First, the homeowner's expert must test and verify the existence of an alleged defect in at least one of the homes in each subset of homes included within the scope of the extrapolated notice. Additionally, the claimants must provide the address of each home tested and clearly identify the subset of homes to which the pre-litigation notice applies. In order to provide valid pre-litigation notice, claimants must narrow the scope of their extrapolated notice. They should investigate and identify a subset of homes within the community that has the purported defect. If they genuinely believe that every home in the community may have the alleged defect, then the claimants should test and verify the defect in at least one home from each subset of homes in the community and extrapolate the percentage of homes within each subset that they believe are likely to contain the defect. The court emphasized that the legislature intended NRS 40.645 to provide Nevada contractors an opportunity to inspect and repair defects in the homes they construct. To that end, a pre-litigation notice must contain reasonable detail so that a contractor, who makes the business decision, can decide whether to inspect and repair. The Court also concluded that a claimant cannot utilize the phrase "to the extent known" in NRS 40.645(2)(c) to justify withholding pertinent information from a pre-litigation notice, and that NRS 40.645(4)(c) requires a claimant to disclose the expert opinions and reports in its possession that were used to prepare its pre-litigation notice.

3. In *Pankopf v. Peterson*, ___ Nev. ___, 175 P.3d 910 (2008), the Pankopfs entered into a contract with Peterson for residential design and drawing services for a personal residence. Peterson provided blueprints for a personal residence, and excavation for the residence's construction began. The plans failed to identify the types of trees that would be planted on the site as required by the Pankopf's homeowner's

association, and the excavation process was halted. According to the Pankopfs, a number of deficiencies in Peterson's work ultimately prevented them from building their residence. The Pankopfs brought suit against Peterson, alleging that Peterson's plans contained numerous design defects, mistakes, omissions, and inaccuracies that prevented them from constructing the residence. Peterson subsequently filed a motion to dismiss under NRCP 12(b)(5), arguing that the Pankopfs failed to comply with certain requirements set forth in NRS Chapter 40 that applied in constructional defect cases. The Pankopfs argued that they did not make a claim for relief based on any constructional defect within the scope of NRS Chapter 40. The district court granted Peterson's motion, concluding that because NRS 40.615 defines a constructional defect as a "defect in the design ... of an alteration of or addition to an existing residence, or of an appurtenance" and NRS 40.605 defines an appurtenance as including "the parcel of real property," the Pankopf's claims fell within NRS Chapter 40's purview. The Court, on appeal, stated that because no residence existed, the parcel of real property cannot constitute an appurtenance within the meaning of NRS 40.605. In addition, the Pankopfs primarily complained of mistakes in Peterson's plans for their house, not in the design of any appurtenance. Therefore, the Court concluded that the Pankopf's claims did not fall under NRS Chapter 40 based on the plain language of the definitions set forth in NRS 40.615 and NRS 40.605(1). The Court also addressed the meaning of the term "new residence" as defined by NRS Chapter 40, citing their recent decision in Westpark Owners' Ass'n v. District Court (see above). Specifically, the Court held that "a residence is 'new' when it is a product of original construction that has been unoccupied as a dwelling from the completion of its construction until the point of sale." Since the Pankopf's residence has not been completed, it cannot constitute a "new residence" for the purposes of NRS Chapter 40. As such, NRS Chapter 40 does not apply to completed blueprints for unfinished residences.

Legislation:

1. **Mechanic's Lien Laws.** Assembly Bill No. 359, which expanded the definition of a mechanic's lien claimant, became effective on May 30, 2007. NRS 108.2214(2) was added: "*As used in this section, "laborer" includes, without limitation, an express trust fund to which any portion of the total compensation of a laborer, including, without limitation, any fringe benefit, must be paid pursuant to an agreement with that laborer or the collective bargaining agent of that laborer*."

2. **Civil Action against Design Professionals.** Existing law requires an attorney who files a civil action against certain design professionals for a constructional defect in a residence on behalf of the plaintiff to file an affidavit with the court at the same time the attorney serves the first pleading in the action. The affidavit must state that the attorney has reviewed the facts of the case, has consulted with an expert, who the attorney believes is knowledgeable in the discipline relevant to the action, and has concluded that the action has a reasonable basis in law and fact. In addition to the affidavit, the attorney must submit a report prepared by the expert that includes, among other things, the expert's resume, a copy of each nonprivileged document reviewed by the expert in preparing the report, the expert's conclusions and a statement that the expert has concluded that there is a reasonable basis for filing the action (NRS 40.6884). If the attorney fails to file the affidavit or report or fails to name in the affidavit the expert consulted, the court is required to dismiss the action (NRS 40.6885). Senate

Bill 243, effective October 1, 2007, establishes similar requirements for an attorney in an action against certain design professionals involving nonresidential construction.

Submitted by: Jeffrey J. Steffen, Fennemore Craig, P.C., 300 S. Fourth Street, Suite 1400, Las Vegas, NV 89101, (702) 692-8000, jsteffen@fclaw.com

New Hampshire

Case Law

1. The economic loss doctrine precludes a gravel supplier from bringing tort claims against the owner's engineer. In *Plourde Sand & Gravel v. JGI Eastern,* 154 N.H. 791, 917 A.2d 1250 (2007), the economic loss doctrine arose in the context of a construction case. The Defendant, the owner's engineer, reported that gravel supplied by the Plaintiff did not meet the project specifications. As a result, the owner required the Plaintiff to remove and replace gravel. It was later determined that the Defendant's report was wrong, and the gravel did in fact did comply with the specifications. As there was no contractual privity between the supplier and the owner's engineer, the Plaintiff brought a negligence action against the Defendant. The New Hampshire Supreme Court held that the Plaintiff's tort action was barred by the economic loss doctrine, which precludes parties from pursuing tort recovery for purely economic or commercial losses. The Court further ruled that although a tort action for negligent misrepresentation is a recognized exception to the economic loss doctrine, in this case there was no special relationship between the supplier and the owner's engineer.

Submitted by: Nicholas K. Holmes, Nelson, Kinder, Mosseau & Saturley, PC, 99 Middle Street, Manchester, N.H. 03101 (603) 606-5004, nholmes@nkms.com.

North Carolina

Case law:

1. *Terry's Floor Fashions, Inc. v. Crown General Contractors, Inc.,* 645 S.E.2d 810, 2007 WL 1744165 (2007). This is the first reported case affirming an award of attorneys' fees based on North Carolina's lien law. Subcontractor sued Contractor and Owner to foreclose its lien to collect $7,921.00 it was owed for labor and materials. The North Carolina Court of Appeals upheld the trial court's award of Subcontractor's lien amount and attorney fees against Owner. At issue was the reasonableness of Owner's attempts to settle as well as whether the Subcontractor had the right to a subrogation lien based on a "gross payment deficiency" by the Owner to the Contractor.

2. In *Inland Const. Co. v. Cameron Park II, Ltd., LLC*, 181 N.C. App. 573, 640 S.E.2d 415 (2007). The North Carolina Court of Appeals permitted a contractor to recover the cost of change order work from an owner even though the contractor sent an owner an e-mail stating that the owner would not have to pay for the extra work and even though no change order was executed in favor of the contractor. The promise was made after an HVAC unit was determined to be inadequate for the structure being built. The contractor later sued to recover the cost of the HVAC unit. The owner argued that the contractor was contractually obligated to provide the HVAC unit at no cost because it agreed to do so in an e-mail. The court rejected this argument because the promise was

not supported by consideration. The owner also argued that the contractor could not recover because it did not obtain a change order, as required by the contract. The court rejected the owner's change order argument because "provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived."

Legislation:

1. Senate Bill 1245, An Act Amending the Laws Related to Retainage Payments on Public Construction Contracts. Retainage reform has come to North Carolina. The Act became effective January 1, 2008, and applies to contracts entered on or after that date. The Act:

- Prohibits retainage public projects where total project cost is less than $100,000.
- Limits retainage to 5% on public projects over $100,000
- Requires public owner to stop withholding retainable once a project is 50% complete, if the work is satisfactory.
- Requires release of all retainage upon (1) receipt of a certificate of substantial completion from the designer or (2) beneficial occupancy of the project. Owner may retain funds to complete or correct work, which shall not exceed 2.5 times the estimated value of the work to be completed or corrected. Requires full payment to all trades that are 100% complete with their scope when the project is 50% or less complete.
- Allows a public owner to withhold additional retainage from subsequent periodic payments, not to exceed 5%, so that the owner retains 2.5% total retainage through the completion of the project.
- Allows a prime contractor on a public project to withhold retainage on periodic payments made to its subcontractors to the same extent as Owner withholds retainage.
- Allows Owner to withhold payments for defective, delayed or disputed work or third party claims.

Submitted by: David Senter, Nexsen Pruet Adams & Kleemeier, 701 Green Valley Rd, Suite 100, Greensboro, NC 27402, (336) 373-1600, www.nexsenpruet.com

Oklahoma

Case law:

1. In *Sooner Builders & Investments, Inc. v. Nolan Hatcher Construction Services, L.L.C.*, 2007 OK 50, 164 P.3d 1063 the Oklahoma Supreme Court reviewed whether an arbitrator has the discretion to deny attorney fees to a prevailing party entitled to such fees in the parties' contract. In that case, the arbitrator denied the fee request in the award and, again, after the prevailing party – a subcontractor – filed a motion to modify the award in the arbitration proceeding. In petitioning the District Court to confirm the award, the subcontractor again moved to modify the award to allow for attorney fees, which the District Court allowed. On appeal, the Supreme Court held that the Uniform Arbitration Act (adopted in Oklahoma in 2006) allowed the District Court to modify an award because the arbitrator's refusal to award fees was contrary to the

parties' agreement and, therefore, "exceeded the arbitration power" in violation of 12 Okla. Stat. §1874(A). The Court also adopted the common law "manifest disregard of the law" as an additional basis for vacating or awarding an arbitration award, and applied it to this fact pattern.

2. In *Sentco Construction Co. v. Ross Group Construction Corp.*, 2007 OK CIV APP 117, 172 P.3d 241, the Court of Civil Appeals interpreted a clause requiring a subcontractor's work to "meet the approval and acceptance" of the contractor, architect or owner. In that case, the Government rejected a slab pour made by a concrete subcontractor because it failed to meet the specifications, and ordered the subcontractor to stop work. The subcontractor modified the concrete mix with its supplier, and continued to pour against the Government's instruction. The Government then rejected the entire pour and refused the subcontractor's request to conduct core testing of the later pours. The Court noted that other jurisdictions interpret contract clauses governing acceptance of the work under either an objective, "reasonable person" standard or a subjective, "good faith" standard. The Court adopted the subjective, "good faith" standard and held that the Government rejected the work in good faith based on its initial testing of the concrete.

3. Though not a construction case, *Oklahoma Oncology & Hematology, P.C. v. US Oncology, Inc.*, 2007 OK 12, 160 P.3d 936, holds that an arbitration clause requiring the parties to arbitrate contract modifications is unenforceable under the Federal Arbitration Act and the Uniform Arbitration Act because neither arbitrators nor courts have the power to rewrite contracts for the parties. This holding may have application to attempts to arbitrate change orders or other construction contract modifications.

Legislation:

1. **The "Oklahoma Taxpayer and Citizen Protection Act of 2007,"** addresses illegal immigration. Various provisions in the Act have the potential to affect construction businesses that might employ undocumented immigrants. Though court challenges to the law have been filed, after November 1, 2007, it became a felony to "transport, move or attempt to transport" an illegal alien while knowing or acting in reckless disregard of the fact of their illegal alien status. Effective July 1, 2008, no businesses may contract with the State without being registered and participating in a "Status Verification System" administered by the federal government to verify alien status. Further, any employer not registered in a Status Verification System who discharges a U.S. citizen or permanent resident while retaining an illegal alien is *per se* subject to civil liability for a "discriminatory practice."

2. **House Bill 1774,** effective November 1, 2007, amended 61 Okla. Stat. § 123 to allow state agencies to enter into construction and design-related contracts that set forth estimated progress payments. In such projects, the interim payment applications need not be certified, although the final payment application is still required to be certified.

Submitted by: Michael A. Simpson, Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C. , 525 S. Main, Suite 1500, Tulsa, Oklahoma, 74103, (918) 582-8877, msimpson@ahn-law.com

Oregon

Case law:

1. In *Harris v. Suniga*, 344 Or. 301, ___ P.3d ___, 2008 WL 732002 (March 20, 2008), the Oregon Supreme Court held that homeowners can recover damages directly against the builder for negligent construction even when the homeowners were not the original purchasers. The Supreme Court upheld a Court of Appeals decision that a subsequent purchaser's claims were based on property damage and therefore not barred by the "economic loss" doctrine. Under the "economic loss" doctrine, there can be no recovery in negligence for purely economic loss in the absence of a special relationship between the parties. This case narrows the scope of the economic loss doctrine and increases the number of potential claims against contractors.

2. In *MW Builders, Inc. v. Safeco Ins. Co. of America*, 2008 WL 422222 (9th Cir. 2008), the Court of Appeals held that in order for a defense/indemnity agreement in a subcontract to be valid under ORS 31.140(2), the agreement must require the subcontractor to indemnify the general contractor for the subcontractor's own negligence rather than any negligence or fault of the general contractor.

Legislation:

1. HB 2654.

Insurance-Completed Operation

The liability, injury, and property insurance a licensed contractor maintains must include liability coverage for products and completed operations.

Continuing Education

The Construction Contractor's Board must adopt rules establishing a continuing education system for licensed contractors.

Written Contract

Contractors may not claim a lien for projects greater than $2,000 unless there is a written contract. The rule now requires the Construction Contractor's Board to establish rules requiring that contractors use "standard contractual terms."

Warranty

For a residential structure or a zero lot line dwelling, a licensed contractor is required to make a written offer to the first purchaser or owner of the residential structure/dwelling of a warranty against defects in materials or workmanship in the structure or dwelling.

Maintenance Schedules

Licensed contractors are required to provide maintenance schedules to the first purchasers or owners of a residential structure/dwelling.

Bonding

The bonding requirement for general contractors increased to $20,000. The bonding requirement for specialty contractors increased to $15,000.

2. HB 3242. The purpose of HB 3232 was to raise requirements for commercial construction contractor licensure, bonding and insurance. The bill distinguishes commercial contractors by experience to create tiered licensing and uses these tiers for setting aggregate insurance liability and bonding requirement amounts and hour requirements for continuing education.

Commercial Building Envelope Warranty

Commercial general contractors must provide owners of large commercial structures, with a two-year warranty of the building envelope and penetration components against defects in materials and workmanship.

EIFS Ban

Oregon now bans the use of barrier type EIFS (synthetic stucco), except if applied to CMU walls, to repair or replace an existing system, or as an architectural feature.

Submitted by: Mark A. Jurga and Robert S. May, Smith, Freed, & Eberhard, Portland, Oregon, (503) 227-2424, rmay@smithfreed.com and mjurga@smithfreed.com.

Rhode Island

Case Law:

1. *Metropolitan Property and Casualty Insurance Co. v. Barry,* 892 A.2d 915, (No. 2003-478-Appeal) (2006). The Rhode Island Supreme Court held that the application of pre-judgment interest to arbitration awards is mandatory. Interest in arbitrations is to be calculated and awarded in accordance with Rhode Island pre-judgment interest law (see R.I. Gen. Laws § 9-21-10). The court also re-affirmed that prejudgment interest "shall" be added to the amount of damages in every civil judgment.

Legislation:

1. Public Act ch. 07-73 (Article 18, Section 1), The State False Claim Act Effective July 1, 2007, the Act created R.I. Gen. Laws §§ 9-1.1-1 through 9-1.1-8, a new chapter creating liability for the making of "false claims" to public entities, seeking to take advantage of public funds or property.

2. Public Act ch. 07-150, The Rhode Island Construction Trust Act: Effective June 30, 2007, the Act creates R.I. Gen. Laws §§ 34-27.2-1 through 34-27.4-4, and provides that "any moneys paid under a contract by an owner to a contractor, or by the owner or contractor to a subcontractor, for work done for or about a building by any subcontractor shall be held in express trust by the contractor or subcontractor, as trustee, for those subcontractors." The Act does not require the monies to be held in a separate account, and the existence of trust funds does not prohibit the filing of a lien against the site of the project.

*Submitted by Michael D Williams, Esq.**,** Little Medeiros Kinder Bulman & Whitney, P.C., 72 Pine Street, Providence, RI 02903, (401) 272-8080, mwilliams@lmkbw.com*

South Carolina

Case law:

1. *Simpson v. MSA of Myrtle Beach, Inc.,* 373 S.C. 14; 644 S.E.2d 663 (2007). Consumer sued Dealer over validity of arbitration clause in sales contract. The court held that the threshold validity of an arbitration agreement is for the trial court's determination. The court further held that the provision was contained in a contract of adhesion that gave the consumer no meaningful choice, that it was one-sided in the Dealer's favor in that it allowed the Dealer, but not the Consumer, to elect remedies, and because of the volume of unconscionable and on-sided provisions in the clause, the court severed the entire clause from the contract, allowing the case to proceed in a litigation, rather than arbitration, forum.

2. Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122; 647 S.E.2d 249 (2007). Buyer sued Seller for breach of contract. The contract contained an arbitration provision. Seller did not pursue arbitration but rather engaged in extensive discovery including interrogatories, requests for production, and the taking of depositions. Ten months later, seller attempted to compel arbitration. The trial court held that the seller had waived its right to arbitrate. On appeal, the South Carolina Supreme Court held that seller had waived its right to arbitrate based on the length of time that had elapsed, the amount of discovery that had taken place and the prejudice that the Buyer would suffer if the case was removed to arbitration.

3. Aiken v. World Fin. Corp of S.C., 373 S.C. 144, 644 S.E.2d 705, (2007). Consumer borrowed funds from Lender. Loan agreement contained broad arbitration provision. Consumer ultimately paid off all the loans. Subsequently, Lender's employees used Consumer's personal information to obtain sham loans and embezzle funds from Lender. When Consumer discovered the misuse of his personal information, he sued Lender. Lender sought to dismiss and to compel arbitration.

The trial court found that the arbitration agreement ceased to operate when the relationship between the parties ended, and the Lender's employees' tortious conduct was independent of the Loan agreement. The court of appeals affirmed.

The South Carolina Supreme Court said it would refuse to interpret any arbitration agreement as applying to outrageous torts that were unforeseeable to a reasonable consumer in the context of normal business dealings. The court then held

that the consumer's claims for unanticipated and unforeseeable tortious conduct by the lender's employees were not within the scope of the arbitration agreement. The court said its ruling is limited to outrageous torts which, although factually related to the performance of the contract, are legally distinct from the contractual relationship.

4. *International Fidelity Ins. Co. v. China Const. America (SC) Inc.,* 375 S.C. 175, 650 S.E.2d 677 (S.C. App. 2007) The South Carolina Court of Appeals affirmed summary judgment granted against Surety in the second of two cases involving same subject matter, holding that Surety could not argue defenses which should have or might have been raised in the prior action, and Contractor was not equitably estopped from asserting Surety was liable for judgment obtained against Subcontractor.

The Contractor obtained a judgment in the prior action against the non-appearing Subcontractor. Surety did not object to the judgment. Surety then filed a separate suit against Contractor wherein Surety sought the balance of the subcontract as Subcontractor's subrogated surety. The court held that the Surety had the opportunity to raise defenses in the prior case, and was therefore barred from bringing them as affirmative claims in a separate action to attempt to prevent Contractor's enforcement of its judgment.

5. *Eldeco, Inc. v. Charleston County Sch. Dist.*, 372 S.C. 470, 642 S.E.2d 726 (2007) Subcontractor sued Owner and Contractor for, among other things, breach of contract and tortious interference with prospective contractual relations, after Owner ordered Contractor to use separate subcontractor to perform work outside Subcontractor's scope of work. South Carolina Court of Appeals held that both claims failed because the new work was not in Subcontractor's contractual scope of work.

6. Zurich Am. Ins. Co. v. Sumter Hotel Group Ltd. P'ship., 2007 U.S. Dist. LEXIS 29093 (D.S.C. Apr. 19, 2007) (Currie, J.). Insurer sought declaration that Owner's damages were not covered under a CGL policy Insurer had issued to Contractor. The Owner Sued Contractor, claiming defective painting work. Insurer defended under a reservation of rights.

Contractor confessed judgment and paid Owner a portion of the confessed amount. Contractor assigned its rights under the CGL policy to the Owner. Insurer consented to the Owner-Contractor settlement for the purpose of establishing the damage amount, but did not waive its right to challenge coverage. Insurer brought a declaratory judgment action.

Insurer asserted that there was no "occurrence" or "accident" because the damage was to the Contractor's work and not to other property. Insurer also asserted that coverage was excluded under the "your work" exclusion. Owner argued that replacement of the roof was necessary to correct the appearance problems and likely premature deterioration caused by the defective paint job and was therefore covered.

The District Court found that the roof claim was not an "occurrence" because no damage had actually occurred to the roof, and the possibility of future harm did not constitute an occurrence. The Court also held that the defective paint job itself was subject to the policy's "your work" exclusion. Therefore, the court granted the insurer's motion for summary judgment.

7. Taylor, Cotton & Ridley, Inc. v. Okatie Hotel Group, LLC, 372 S.C. 89, 641 S.E.2d 459 (Ct. App. 2007) Subcontractor sued to foreclose lien and was awarded its lien amount plus interest and attorney fees. Owner appealed on the ground that it had settled with other subs and paid a pro-rata share to each settling party. Subcontractor did not participate in the prior settlement discussions. The South Carolina Court of Appeals held that Subcontractor was not bound by the results of settlements with other subcontractors, who did not have perfected lien rights. The court reversed the trial court's interest award because the subcontractor was not party to the owner/contractor contract. The court awarded Subcontractor statutory interest instead of the higher amount. The court also affirmed the trial court's award of attorney fees on the ground that Subcontractor had prevailed on the underlying lien claim.

8. Skiba v. Gessner, 374 S.C. 208; 648 S.E.2d 605 (2007). Contractor sued to foreclose mechanic's lien. The South Carolina Supreme Court held that landscaping work, without more, does not give rise to a valid mechanic's lien under S.C. Code Ann. § 29-5-10(a) because a person asserting a mechanic's lien must perform work related to the erection, alteration, or repair of a building or structure. Preparing land for landscaping does not fall within the statutory requirements and therefore a mechanic's lien does not attach to real property.

Legislation:

1. H.B. 3034. The South Carolina legislature enacted a requirement that all state building projects now meet Silver LEED certification or obtain two Green Globes. The bill became law when the legislature overrode Governor Sanford's veto. The effective date of the bill was June 20, 2007.

2. Alternative Delivery Methods. S. 282 amended South Carolina's procurement code by expressly stating in the code that alternative delivery methods such as Design Build, Construction Management at Risk and Design Build Finance Maintain are allowed to be used to procure state construction work. The effective date of the new provisions was January 1, 2008.

3. Workers' Compensation Reform. In S. 332 (2007 S.C. Acts 111), the legislature enacted comprehensive worker compensation reform. The bill addresses the repetitive trauma issue, responds to a number of rulings in supreme court and court of appeals case, eliminates the state's Second Injury Fund, provides for a rebuttal presumption for the 50% Back Rule, deals with the motor carrier independent contractor issue, and requires all workers' compensation appeals to go directly to the Court of Appeals, by-passing the Circuit Court. The law became effective July 1, 2007.

4. Eminent Domain Limited. Act 15 ratified an amendment to Section 13, Article 1 of the South Carolina Constitution to provide that private property cannot be condemned by eminent domain for any purpose, including economic development, unless the condemnation if for public use. Exceptions include the use of eminent domain for the limited purpose of remedying blight or under certain conditions as determined by the General Assembly. 2007 S.C. Acts 15.

5. Revisions to Statutes Governing Engineers and Land Surveyors. Legislation modified statutory provisions governing the licensure and regulation of

professional engineers and land surveyors. The Act revises numerous sections of Chapter 22 of Title 40 including, but not limited to, provisions dealing with educational requirements; changes to civil fines; elimination of certain engineering categories; waiver of credential requirements during declared states of public emergency; and provisions to promote development and accountability. 2007 S.C. Acts 58.

6. Building Codes. Section 6-9-40, pertaining to adoption of building codes, was amended to provide that same procedure used for adopting a building code will be used to for modifying an existing build code. Provisions were also added to provide a procedure for adopting emergency building code modifications. 2007 S.C. Acts 54.

Submitted by: L. Franklin Elmore Elmore & Wall, P.A., 301 Main St, Suite 2000 (29601), Greenville, SC 29602, (864) 255-9500, frank.elmore@elmorewall.com, www.elmorewall.com

Tennessee

Case law:

1. In *Travelers Indemnity Company of America et al. v. Moore & Associates Inc.*, 216 S.W.3d 302; 2007 Tenn. LEXIS 234 (Tenn. 2007), the Tennessee Supreme Court ruled as a matter of first impression that water penetration resulting from faulty window installation was an "occurrence" under a disputed insurance policy and, thus, the insurer had a duty to defend the contractor against the claim of faulty workmanship. In this case, the subcontractor's faulty installation of windows resulted in substantial water damage to the construction project. Consequently, the prime contractor's insurance carrier sought a declaratory action that it had no duty to defend or indemnify the prime contractor against claims raised for the defective work performed by the subcontractor.

2. In *Charles Hampton's A-1 Signs, Inc. v. American States Ins. Co.*, 2006 WL 3827319 (Dec. 28, 2006, Tenn. Ct. App.), the plaintiff installed steel structures that held up billboard signs. On one of the sign structures, the sign fell from its pole after installation. A subsequent investigation indicated that all sign poles fabricated by a particular sub-contractor had defective welds. The Court of Appeals held that physical damage arising out of and confined to defective welds performed by an insured was not covered under a commercial liability policy or an umbrella policy.

3. *Hubert v. Turnberry Homes LLC,* 2006 WL 2843440 (Oct. 4, 2006, Tenn. Ct. App.), involved the enforceability of an arbitration clause in a residential construction contract. After the construction was completed, the purchasers filed suit against the builder, alleging numerous construction defects and code violations. The builder moved to compel arbitration pursuant to the contract's arbitration clause. When the purchasers argued that the arbitration clause was invalid because they had not separately signed or initialed it as required by the Tennessee Uniform Arbitration Act, the builder asserted that the Federal Arbitration Act, rather than the Tennessee Uniform Arbitration Act, governed the parties' agreement to arbitrate. The trial court denied the builder's motion to compel arbitration without explanation, and the builder appealed. The appellate court determined that the Federal Arbitration Act preempted the Tennessee Uniform Arbitration Act except insofar as the purchasers' fraudulent inducement claim was concerned.

Legislation:

1. Retainage Law Changes.

- **Tenn. Code Ann. § 66-34-103**. Construction retainage must not exceed five percent of the contract price.

- **Tenn. Code Ann. § 66-11-144.** Any retained amounts (in contracts or subcontracts for $500,000 or greater) must be deposited in a separate, interest bearing escrow account. Upon deposit into such an account, the funds become the property of the party to which they are owed, subject to the rights of the paying party in the event the contractor defaults or fails to complete the contract. The parties may contract in advance for the settlement of retainage disputes through arbitration.

- **Tenn. Code Ann. § 66-34-101 *et seq.*** An owner must release and pay all retainage to the prime contractor within 90 days after completion of the work or 90 days after substantial completion of the project, whichever is earlier. The prime contractor must then pay all retainage owed to subcontractors within 10 days of receiving retainage payment from the owner. These subcontractors must then pay their subcontractors or suppliers within 10 days of receiving their retainage payment.

- **Tenn. Code Ann. 66-11-102.** Parties with lien rights are categorized according to their contractual relationship with the owner. A party that contracts directly with an owner of real property is considered a "prime contractor." A party that contracts with an entity other than an owner of real property (including land surveyors, licensed engineers and architects) is a "remote contractor."

- **Tenn. Code Ann. § 66-11-102.**Liens may not include interest, service charges, late fees, attorney fees or any other amounts that do not result in an improvement to the real property.

- **Tenn. Code Ann. § 66-11-102.** The lien amount may include the reasonable rental value for tools, equipment or machinery for the period of actual use, or may include the purchase price of tools, equipment or machinery if they were purchased for use on the particular improvement and have no substantial value to the lienor after completion of the improvement.

- **Tenn. Code Ann. § 66-11-102.** A prime contractor or remote contractor of a lessee of real property may not acquire a lien on the owner's interest in the property unless the lessee is deemed to be the owner's agent. Whether or not the lessee is the owner's agent will be determined by the following: the extent of the owner's control of the conduct of the lessee with respect to the improvement; whether the lease requires the specific improvement; whether the cost of the improvement is actually borne by the owner through offsets in rent; whether the owner maintains control over the improvement; and whether the improvement becomes the property of the owner at the end of the lease.

- **Tenn. Code Ann. § 66-11-104.** The "visible commencement of operations" (which establishes the attachment date for liens under the statute) excludes demolition, surveying, excavating, clearing, filling or grading, placement of sewer or drainage

lines or other underground utility lines and erection of temporary security fencing. It also excludes the preparation or delivery of materials for these activities.

- **Tenn. Code Ann. § 66-11-106.** A prime contractor's lien continues for one year after the date the improvement is completed or is abandoned and until the final decision of any suit properly brought within that time for its enforcement.

- **Tenn. Code Ann. § 66-11-112.** The statute contains a standard form for the Notice of Lien.

- **Tenn. Code Ann. § 66-11-112.** An improvement is considered to have been abandoned if operations on the improvement cease for 90 days, rather than 60 days as provided under the prior statute.

- **Tenn. Code Ann. § 66-11-115.** To acquire a lien for work, labor, materials, services, equipment or machinery, a remote contractor must (1) serve a Notice of Nonpayment on the owner and prime contractor with which it has a contract; and (2) serve a Notice of Lien, in writing, on the owner of the property on which the improvement is being made any time prior to 90 days after the date of completion or abandonment of the improvement. The remote contractor's lien continues for 90 days from the date of service of the Notice of Lien and until the final termination of any suit properly brought within that time for its enforcement.

- **Tenn. Code Ann. § 66-11-118.** Contracts for improvements on contiguous or adjacent lots require only one claim of lien if the improvements are operated as a single improvement. If the improvements are to be operated separately, a separate Notice of Lien for each lot, parcel or tract of land is required. The separate liens must be in the amount of the improvements on the corresponding lot, parcel or tract of land. If an improvement to a common interest community was contracted for by the association of unit owners, the lien attaches to all units in the common interest. If the improvement was contracted for by a single unit owner, the lien attaches only to that owner's unit.

- **Tenn. Code Ann. § 66-11-126.** A plaintiff that makes an application for attachment must execute a bond payable to the defendant in the lesser amount of $1,000 or the lien claimed. An attachment on real property is not necessary if a bond to discharge the lien was provided and recorded before the suit was filed. When a bond has been posted to discharge a lien, the defendants retain all defenses as to the underlying lien claim. In a suit seeking an attachment or a suit against a bond, the lienor has an obligation to effectively prosecute the suit or pay the defendant's cost of defense.

- **Tenn. Code Ann. § 66-11-135.** If the lien is no longer in effect, the lienor must record a release of lien within 30 days of a written demand or the lienor will be liable for all resulting damages.

- **Tenn. Code Ann. § 66-11-137.** If any amounts remain unpaid on a project of improvement or if an owner has been served with a Notice of Nonpayment that remains unpaid, the owner may not use the proceeds of a construction loan for any purpose other than to pay for labor, materials, services, equipment or machinery supplied to the improvement. Such a misapplication of loan proceeds is a Class E

felony *and* the owner will be liable for any damages and expenses that are the result of the misapplication.

- **Tenn. Code Ann. § 66-11-138.** If any amounts remain unpaid to remote contractors or if a contractor has been served with a Notice of Nonpayment that remains unpaid, that contractor may not use the proceeds of any payment received other than to pay for labor, materials, services, equipment or machinery supplied to the improvement. Such a misapplication of payment proceeds is a Class E felony *and* the contractor will be liable for any damages and expenses that are the result of the misapplication.

- **Tenn. Code Ann. § 66-11-139.** A lienor willfully and grossly exaggerates the amount of a lien, it may be liable for resulting expenses incurred by the injured party.

- **Tenn. Code Ann. § 66-11-142.** An owner may prevent remote contractors from having liens on its property by recording a payment bond in favor of the remote contractors equal to 100 percent of the prime contractor's contract price.

- **Tenn. Code Ann. § 66-11-143.** On the same date that an owner records a Notice of Completion, it must also serve a copy of the notice on the prime contractor and any remote contractor that has served a Notice of Nonpayment. A prime contractor or remote contractor then has 30 days to serve the notice on its remote contractors. (The statute now contains a standard form for the Notice of Completion.)

- **Tenn. Code Ann. § 66-11-145.** A remote contractor must serve a Notice of Nonpayment on the owner and prime contractor within 90 days of each month in which it provided work, labor, materials, services, equipment or machinery to the improvement and for which it intends to claim a lien. (The statute now contains a standard form for the Notice of Nonpayment.)

- **Tenn. Code Ann. § 66-11-148.** The mechanics' lien statutes are to be construed and applied liberally; substantial compliance is sufficient.

Submitted by: Brian Dobbs, Bass, Berry & Sims, 315 Deaderick St., Suite 2700 Nashville, Tennessee 37238-3001, (615) 742-7884, bdobbs@bassberry.com, www.bassberry.com

Texas

Legislation

1. Contingent Payment Statute, Tex. Bus. & Com. Code § 35.521. The statute, a compromise between numerous construction associations and a few general contracting companies, imposes some restrictions on contingent payment clauses. The Statute requires the general contractors to be much more proactive to receive benefits of the clause.

Defective or Noncompliant Work. The Statute states that when the owner's nonpayment is the result of the general contractor failing to meet its contractual obligations, the contingent payment clause is unenforceable. This is the case unless the subcontractor or supplier seeking payment breached its contractual obligations, and that breach is one of the reasons why the owner is refusing to pay.

Owner's Financial Inability To Pay. Who should run the risk of the owner's insolvency was the subject of many lengthy and heated discussions during negotiations. The compromise adopted by the Statute is that the enforceability of the clause is subject to an "unconscionability" test. A contingent payment clause is unenforceable if the judge, jury, or arbitrators find that it would be "unconscionable" to enforce it. Subcontractors now have a "fairness" argument that simply did not exist before this Statute.

The Statute provides that the clause is not unconscionable if: the contractor gives the subcontractor information about the owner's ability to pay for the project and the general contractor makes reasonable efforts to collect the amounts owed or assigned the subcontractor the general contractor's right to sue the owner for unpaid amounts. The Statute further provides that if the owner does not provide the financial information detailed in the Statute, the general contractor (and all subs and suppliers) are relieved from their obligations to start or continue performance of their contracts.

The clauses are also unenforceable when the owner and general contractor are the same entity or when the owner is slow to pay or refuses to pay during construction.

Submitted by: Gary Richard Thomas, Thomas, Feldman & Wilshusen, LLP, Suite 900, 9400 N. Central Expy, Dallas, TX 75231, gthomas@tfandw.com

Utah

Case Law

1. In *Ellsworth Paulsen Constr. Co. v. 51-SPR-L.L.C.*, __ P.3d __, 2008 UT 28 (Utah 2008), a contractor filed a lien against a project that included a $78,000 change order that arose from a separate project. The Utah Supreme Court upheld the appellate court's decision that the lien was not wrongful because it lacked the requisite intent specified in the wrongful lien statute. The statute required that for a lien to be wrongful, proof of intent to extract more than is due is necessary.

2. *Begaye v. Big D. Constr. Corp.*, 178 P.3d 343 (Utah 2008). The widow of a subcontractor worker killed when a wall on a project collapsed was not entitled to recover damages from the general contractor when the general contractor did not direct the means and methods of the subcontractor. The general contractor did not control the method used to brace the wall, nor did it affirmatively interfere with the subcontractor's work. Therefore, the general contractor could not be liable under the retained control doctrine and summary judgment to the general contractor was appropriate.

3. In *Sill v. Hart*, 162 P.3d 1099 (Utah 2007), the Utah Supreme Court upheld the appellate court's reversal of a trial court judgment regarding a contractor's right to assert a mechanic's lien claim. The owner of a residence filed an action against a contractor related to construction of a residence. The contractor counterclaimed with a lien foreclosure action. The trial court dismissed the contractor's counterclaim because the contractor failed to comply with statutory notice prerequisites to bringing a residential lien foreclosures action. The supreme court determined that the appellate court correctly reversed the dismissal because the notice provisions barred only an original action to

foreclose a lien and did not bar a counterclaim after the owner initiated an action against a contractor.

4. In *Uhrhahn Constr. & Design, Inc. v. Hopkins*, 2008 UT App. 41 (Utah Ct. App. 2008), the court determined that an owner can waive a provision requiring change orders to be in writing by granting verbal change orders. The court determined that if the owner verbally directed the contractor to perform extra work and the parties agreed that the owner would pay additional compensation for the performance of the work that the contractor was entitled to recover for the change order even if it was not in writing, so long as the agreement could be clearly proved. The court held that the writing requirement was usually designed to protect the owner and that the owner could waive the provision.

5. Sunridge Development Corp. v. RB&G Engineering, Inc., 177 P.3d 644 (Utah App. 2008). A developer contracted with an engineering company to perform a geological study of 10.2 acres and to perform a geotechnical investigation of the property. Based the findings in the two reports, the developer determined to proceed with construction. The developer formed a new company for liability purposes and conveyed the property to the new company. After additional testing uncovered substantial faults not reflected in the engineering reports, the new company sued the engineering company. The court denied the claim, holding that the old company could not show that it suffered any damages and the new company's claim was barred by the economic loss rule because it did not have a contract with the engineering company.

6. In *SFR, Inc. v. Comtrol*, 2008 UT App. 31 (Utah App. 2008), the court adopted the joint check rule and held that a supplier could not recover under the surety bond for money that the was paid by check jointly to the materialman and a contractor, when the materialman allowed the contractor to retain a portion of the money. The court held that acceptance of only part payment from a joint check would be treated as a waiver of claims to the remaining portion of the joint check from the payor, unless the payor has agreed to allocation of the proceeds. The court also held that even though the supplier was the prevailing party, that its attorneys fees should be reduced by 25 percent, since it only recovered 75 percent of the amount it sought.

Legislation

1. S.B. 81—Illegal Immigration. S.B. 81 seeks to regulate persons not lawfully within the state. The effective date of the bill is July 1, 2009, allowing another legislative sessions for modification.

Contractors Required to Verify Workers. Under the bill, contractors on public jobs must electronically verify the immigration status of their workers. This provision apples to all contracts with public entities for "the physical performance of services within the state." "Contractors" include subcontractors, contract employees, staffing agencies, trade unions, or any contractors regardless of tier. It is unclear whether suppliers are to be included in this definition.

S.B. 81 does not require contractors to verify all workers, but does require verification of workers who meet the follow three conditions:

1. new employees hired on or after July 1, 2009;
2. who are employed in the state of Utah; and

3. who work under contractor's supervision and direction

A contractor is only required to verify its own workers. Each subcontractor must certify its own verification by affidavit.

Unlawful Termination Provisions. S.B. 81 makes it unlawful for an employer to terminate a legal resident and replace him with or have his duties assumed by a worker who:

1. the employer knows or should know is an illegal worked hired on or after July 1, 2009; and
2. is working in Utah in a similar job category with similar skill and requirements.

Employers who use the Status Verification System are exempt from civil liability for a violation of these provisions.

Transport or Concealment. The bill makes it a Class A misdemeanor to transport an illegal alien for over 100 miles for commercial advantage (with knowledge of in disregard of the alien's status) or to knowingly conceal, harbor, or shelter an alien for commercial advantage.

2. S.B. 220—Cause of Action for Defective Construction. S.B. 220 was enacted to limit claims for defective construction. Under the statute, only a party who has a contract with the design team, contractor, or the developer can sue for defective construction.

The effect of the bill is to preclude a subsequent purchaser or homeowners association from suing a designer, contractor, or developer for defective construction. Perhaps unintended, the bill also has the effect of prohibiting a contractor from suing a designer for defects unless the parties had a contract.

The exception to the rule provides that a party can sue for defects if the defect causes personal injury or property damage to property *other* than the defective structure. "Property damage" is neither

1. failure of construction to function as designed; nor
2. diminution in value of property because of defective construction or design

3. H.B. 341: Damage to Underground Facility Amendments. H.B. 341 modified the duties of parties who excavate near or damage underground facilities, including:

- requirements for notice of excavation;
- identification of utilities that need not be marked;
- method for marking utilities;
- civil penalty for violation of provisions;
- requirements to maintain record of excavation notices; and
- creation of a dispute board to arbitrate disputes related to section.

The bill also provides that operators of sewer facilities are not required to mark the location of sewer laterals. The operators may mark the location but are not liable for incorrectly marking the location.

Submitted by: Melissa A. Orien, Holland & Hart LLP, 60 East South Temple, Suite 2000, Salt Lake City, Utah 84111, (801) 799-5863, morien@hollandhart.com

Virginia

Case Law:

1. In *APAC-Atlantic, Inc. v. General Ins. Co. of America*, 643 S.E.2d 483 (Va. 2007), the court held that the one-year statute of limitations for bringing action on payment bond under Public Procurement Act applied to subcontractor's action on bonds issued to general contractor, even though the bonds stated that they would remain "in full force and virtue in law" unless general contractor paid the claims. Because the bonds did not specifically establish a longer limitation period, they were subject to the Act's one-year statute of limitations.

2. *MasTec North America, Inc. v. NextiraOne Federal, LLC*, 2008 WL 484787 (4th Cir. 2008), involved termination of a subcontractor for allegedly deficient work. The court held that the general contractor's periodic updates of "chronic and constant" difficulties it experienced with the subcontractor's work were sufficient to satisfy the obligation for a cure notice; and the default termination was therefore justified.

3. In *St. Paul Fire & Marine Ins. Co. v. Wittman Mechanical Contractors Inc.,* 2008 WL 341719 (4th Cir. 2008), a furnace exploded soon after it was installed by a contractor. The plaintiff alleged that the contractor's failure to perform a "soap and water" leak test on the home's gas pipeline system was the proximate cause of the blast. The court upheld a jury verdict in favor of the contractor, finding that substantial evidence supported the jury's conclusion that the contractor was not required to perform such a test.

4. *DRC, Inc. v. Custer Battles, LLC*, 234 Fed.Appx. 38 (4th Cir. 2007) arose from a contract to build camps for security forces at Baghdad airport. The court upheld a jury verdict permitting a subcontractor to recover from the general contractor in quantum meruit for the construction of the camps because the parties' written contract addressed the hiring of security officers, not the construction of the camps. Although the contract had been largely performed overseas, Virginia law applied.

5. In *Pennsylvania Elec. Coil, Ltd. v. City of Danville*, 2008 WL 919534 (W.D.Va. 2008), quantum meruit was unavailable to a contractor who wished to recover for extra work when the court found that the contractor failed to put the defendant City on notice that it expected extra payment for that work.

6. In *Datastaff Technology Group, Inc. v. Centex Const. Co., Inc.,* 528 F.Supp.2d 587 (E.D.Va. 2007) the court held that the prime contractor and issuer of performance and payment bond for federal construction project were not equitably estopped from asserting Miller Act's one-year statute of limitations as a defense in second-tier subcontractor's action to recover for work performed on project pursuant to contract with defaulting first-tier subcontractor. Although contractor and surety had told the subcontractor that it was a third-tier subcontractor, and therefore not entitled to recover

under the Miller Act, the subcontractor either knew or should have known that it was a second-tier subcontractor eligible to recover under the Act and should have filed within the limitations period.

7. In *P&J Arcomet, LLC v. Perini Corp.*, 2007 WL 3470241 (E.D.Va.,2007), a handwritten purchase order number written on the second page of plaintiff's proposal for the purchase of four cranes was held not to be an offer that was in turn accepted by the return fax of plaintiff. Because no contract was formed, defendant could not be liable for breach.

8. In *R.R. Gregory Corp. v. Labar Enterprises of Rochester, Inc.,* 2007 WL 3376642 (E.D.Va. 2007), a case arising from construction of public school, prime contractor was justified in terminating subcontractor where subcontractor failed to meet the project schedule. The "first breach" rule prevented the subcontractor from using the prime contractor's alleged non-payment as a justification for its delays, because the subcontractor delayed performance prior to any alleged non-payment.

Submitted by: Steven J. Koprince, Akerman Senterfitt Wickwire Gavin, 8100 Boone Boulevard, Suite 700, Vienna, Virginia 22182, 703-790-8750, steven.koprince@akerman.com

Washington

Case Law

1. In *Strand Hunt v. Lake Washington School District No. 414*, 2006 WL 2536315 (Wn. App. Div. 1, Sept. 5, 2006)(Unpublished Opinion), the court denied a contractor's claim because it failed to strictly comply with contractual notice provisions.

The contractor on a $37 million public works contract, Strand Hunt, sent a letter to the District requesting compensation for additional work related to "the inordinate number" of Requests For Information (over 1,500) that Strand Hunt claimed were caused by "defective drawings." The District responded to Strand Hunt's letter stating that the letter did not constitute a claim under the terms of the contract because it did not comply with the contractual dispute resolution terms.

One week later, Strand Hunt sent a letter to the District entitled "Claim for Multiplicity Impacts." Strand Hunt requested a revised contract adjustment to compensate for the impacts that it experienced due to the inordinate number of RFI's issued and other defects in the contract documents. The District denied this request as well.

Subsequently Strand Hunt filed suit against the District on July 31, 2004. Strand Hunt claimed *quantum meruit* damages, "i.e., damages outside the contract that are warranted when substantial changes occur that were not within the contemplation of the parties." Sever months later, in preparation for the parties' mediation of the dispute, Strand Hunt submitted a "Consolidated Request for Equitable Adjustment" that contained, among other claims, a line-item breakdown of items such as Field Overhead Delay Costs, Cumulative Impact Labor Inefficiencies, and Home Office Overhead.

The trial court granted the District's motion for partial summary judgment dismissing Strand Hunt's claims for (1) cumulative impact damages, (2) field overhead

delay damages, and (3) home office overhead damages because it failed to comply with contractual dispute resolution processes. Strand Hunt appealed.

The court of appeals affirmed. The contract required Strand Hunt to pursue delay damages by submitting "a clear description of the Claim, the proposed change to the Contract Sum and/or Time of the Claim and provide data supporting the Claim." Strand Hunt did not conform to these procedures and they were not waived. Therefore, the court ruled that the cumulative impact claims were properly dismissed.

2. *Woodburn Constr. Co. v. EnCon Pacific, LLC,* 2007 WL 174090 (W.D. Wash. January 17, 2007)(Unpublished Opinion). A subcontractor's claim against a general contractor for alleged extra work was denied on partial summary judgment for failure to follow the notice procedures specified in the contract, because the general contractor did not waive those procedures.

3. *American Safety Casualty Ins. v. City of Olympia,* 162 Wn.2d 762, 174 P.3d 54 (Dec. 27, 2007). On December 27, 2007, the Washington State Supreme Court issued its decision in *American Safety Casualty Insurance Company v. City of Olympia*, which re-affirmed the 2003 *Mike M. Johnson* decision. Court ruled against the contractor for not following the contract's written claim notice provision and found no waiver by the owner.

The contractor held that all disputes related to the contract must be brought within 180 days of closeout of the contract. After the owner assessed liquidated damages against the contractor and sought to recover from the surety, the surety attempted to assert a claim against the owner. The owner argued that the claim was barred because it was not brought within the contractual time limitation. The surety argued that the owner waived the limitation by attempting to negotiate with the surety after 180 day period and that this resulted in waiver of the limitation.

The Court ruled that a waiver must be either expressly stated by the owner or the result of "unequivocal" owner's actions. The Court ruled that since the intent of the owner in negotiations was at most "unclear," the owner had not waived the contract requirements. Waiver must be shown by unequivocal acts showing an intent to waive the requirements.

4. *DBM Consulting Engineers, Inc. v. United States Fidelity and Guaranty Co.,* 142 Wn. App. 35, 170 P.3d 592 (2007). In this case, an engineer claimed it was owed money on a project and filed a mechanics' lien on the associated real property. The engineer then filed suit a few weeks later, claiming breach of contract and foreclosure on the lien. The owner bonded around the lien claim in order to sell the land subject to the engineer's lien. A jury ultimately found that the owner breached the contract, and the trial judge entered judgment in favor of the engineer on the breach of contract claim. The engineer did not ask the court to enter judgment on the engineer's lien foreclosure claim.

When the owner failed to pay the engineer on the judgment, the engineer sued the owner's surety for payment on the lien bond. The surety appealed after a trial court held the surety liable for the engineer's judgment against its principal, claiming that the engineer only prevailed on the breach of contract claim and failed to litigate the validity of the lien. The engineer countered that, because of the principal's bond in lieu of lien, there was no lien to foreclose on; thus, Washington's lien statute guaranteed payment where there was a judgment on the claim asserted in the lien. The appellate court disagreed.

In reaching its decision, the appellate court interpreted a portion of Washington's lien statute that had not been previously interpreted. Conceding that the statute was "not a model of clarity," the court nonetheless found that the grammatical construction of the law required a foreclosure on the lien before the claimant/obligee was entitled to payment on the bond. The court pointed out that only professional services that result in an improvement to property give rise to a lien. And that this factual finding—not necessarily determined by the owner's liability for breach of contract—should have been made during the necessary lien foreclosure litigation. The court also pointed out that a bond replaces the property as collateral—it does not replace the lien itself. Therefore, even if it could be determined from the trial that the engineer held a valid lien, the statute's requirement of a lien foreclosure action was still a prerequisite to collecting on the collateral, i.e., the bond.

5. *Majestik Trucking, Inc. v. Obayashi Corp.*, 138 Wn. App. 1027 (2007) (Unpublished). In *Majestik*, a trucking company contracted with a general contractor to transport semi-wet material using trucks with a nine-scoop capacity. The trucking company brought suit after the general contractor failed to pay the company and the trial court awarded judgment in favor of the company, finding that there was no genuine dispute over material facts and that the company was entitled to its expected contractual benefit as a matter of law. The general contractor appealed.

On appeal, the trucking company argued the evidence demonstrated that the company was contractually obligated to provide trucks capable of removing nine scoops of semi-wet material; that the general contractor signed each trucking ticket without objection, acknowledging per industry custom that the trucks and hours were provided to the general contractor as agreed; and that the trucking company was therefore entitled to the agreed payment, regardless of whether the general contractor chose not to fill each truck to its capacity.

The general contractor countered that there was a genuine issue of fact regarding whether the contract was based on the trucking company providing nine-scoop capacity trucks or on the company actually hauling away nine scoops in every load. The Washington Court of Appeals held that the contract unambiguously demonstrated that the general contractor agreed to pay the trucking company by the hour according to the type of truck the company provided for removing material. Moreover, the court found that the general contractor failed to provide any evidence to create a genuine issue of fact regarding the signed tickets or the accepted custom in the industry. Signing such tickets indicated the general contractor's acceptance of performance. Therefore, the court affirmed the lower court's summary award of breach of contract damages in favor of the trucking company.

6. *Silverstreak, Inc. v. Washington State Dep't of Labor and Indus.*, 159 Wn.2d 868, 154 P.3d 891 (2007). In this case, the Washington State Supreme Court held that the state's prevailing wage act entitled end-dump truck drivers delivering fill to public works projects to prevailing wages. The state's prevailing wage act and its related administrative rules require prevailed wages for delivery of materials where the delivery is to a public works project site and involves any spreading, leveling, rolling, or "otherwise participating in any incorporation of the delivered materials" into the project. Citing the legislative purpose for the state's prevailing wage act, the Court significantly broadened the scope of what the Court of Appeals considered "otherwise participating in the incorporation of the delivered materials," ultimately deferring to the Department of Labor and Industries' (L&I) "expertise" in defining the boundaries of the prevailing wage requirements. Accordingly, the Court found that—although end-dump truck drivers may

not actually spread, roll, or level materials—the drivers' delivery "can represent an additional task on the project." And delivering the fill directly to where it will be used (as opposed to a stockpile), including coordinating the dump with graders and dozers, further constituted participation in incorporating the fill into the worksite. Thus, the Court held, such deliveries were part of the public work and must be paid at the prevailing wage.

Nevertheless, the Court found that the plaintiffs in this case detrimentally relied on a 1992 L&I interpretation of what constitutes material deliveries, and under that interpretation, the plaintiffs would not have been required to pay the prevailing wage. The Court found that it would be unconstitutional to allow L&I to arbitrarily change its rule interpretation after the plaintiffs made a good faith payment of market wages. Therefore, the Court held that the plaintiffs ultimately did not owe the higher prevailing wage for material deliveries made to the project.

7. *Belfor USA Group, Inc. v. Thiel*, 160 Wn.2d 669, 160 P.3d 39 (2007). In this case, a contractor was hired to repair damages to a residence. The parties' contract provided for arbitration and allowed recovery for attorneys' fees "incurred in the collection of this agreement." In attempting to collect under the contract, the contractor successfully compelled arbitration. The homeowner appealed the trial court's order, but the court of appeals refused the homeowner's motion for discretionary review, and the court awarded the contractor attorneys' fees for defending the motion.

In a *per curiam* opinion issued by the Washington State Supreme Court, the Court found that the terms of the contract only allowed attorneys' fees for collecting an amount due under the agreement, not for successfully compelling arbitration. While the contractor prevailed in enforcing a term of the contract, the contractor had not yet prevailed in collecting an amount due under the contract. Although the Court left open the possibility that the contractor could collect the expense of compelling arbitration upon prevailing at the arbitration, until that happened, the contractor was "not yet a 'prevailing party' for purposes of the contract's attorney fees provision."

Legislation

1. The Contractor Registration Act. In July 2007, SHB 1483 was enacted into law modifying the Contractor's Registration Statute, RCW 18.27. These changes include, among others, giving the Department of Labor & Industries more control over contractor's Registration, substantially expanding the scope of who is covered by the statute, and prohibiting the use of unregistered subcontractors. Key revisions are listed below:

- **RCW 18.27.010 (1)**: The changes to this section broaden the definition of "contractor" under the statute. The statute now specifically applies to any "entity" involved in construction and specifically adds to the list those who "develop" buildings, roads, improvements to real estate, etc. The definition section has expanded to include "consultant[s] acting as a general contractor," as well as persons who "offer to sell their property without occupying or using the structures, projects, developments, or improvements for more than one year from the date the structure…was substantially completed or abandoned." This may affect individuals who purchase a property with the intent to improve and subsequently sell, or "flip," an investment property.

- **RCW 18.27.010(5)**: The definition of "General Contractor" was expanded to cover a person "who superintends, or consults on" work which falls within the definition of contractor.
- **RCW 18.27.010(12)**: This section now includes a limitation that a specialty contractor may only subcontract work that is incidental to its specialty.
- **RCW 18.27.020(2)**: This provision now makes it a gross misdemeanor for a contractor to hold himself out as a registered contractor when in fact he is not or his registration is suspended or revoked.
- **RCW 18.27.020(2)(e)**: This provision makes it a gross misdemeanor for a contractor "to subcontract to or use an unregistered contractor."
- **RCW 18.27.030(3)(b)**: This section was amended to require the Department of Labor & Industries to suspend a contractor's registration if it is discovered that the registered contractor has an unpaid outstanding final judgment against it for work covered by the Registration Act.
- **RCW 18.27.030(3)(c)**: This new section allows the Department of Labor & Industries to suspend any registered contractor if it discovers that an owner, principal, or officer of the registrant was an owner, principal, or officer of a previous entity that has an unsatisfied final judgment against it.
- **RCW 18.27.040(3)**: This amended section now allows a bond claimant to file suit against the contractor and the bond. It also clarifies the period from which the limitation period to bring suit is applied. Service of process upon the Department also confers personal jurisdiction of the Court on the contractor and surety.
- **RCW 18.27.040(10)**: This new section requires the prevailing party in any bond claim action to provide the department with certified copies of any judgment, settlement document, or arbitration award within ten days of entry of any such order. The failure to do so may subject the prevailing party to a $250.00 penalty.
- **RCW 18.27.080**: This section prohibits an unregistered contractor from bringing or maintaining an action to collect money for work performed. The changes to this section preclude a court from finding that a contractor was in substantial compliance with the RCW 18.27 unless the contractor had "at all times in force" both a surety bond under RCW 18.27.040 and insurance as required by 18.27.050.
- **RCW 18.27.114**: This section now requires the contractor to obtain the signature of the homeowner on the pre-lien disclosure notice and retain the disclosure notice for three years and able to produce a signed copy to the Department upon request.
- **RCW 18.27.200(e)**: Per the new changes, it is now a violation of this chapter and an infraction for any contractor to subcontract to or use an unregistered contractor.

Submitted by Allen W. Estes, III, Peter N. Ralston, Diane C. Utz, and Tymon Berger, Oles Morrison Rinker & Baker LLP, 701 Pike Street, Suite 1700, Seattle, WA 98101, (206) 623-3427, estes@oles.com

Wyoming

Case Law:

1. *Garrison v. CC Builders, Inc.* ___ P.3d ___, 2008 WL 820924 (*Wyo.* 2008). Homeowners entered into a "cost-plus" contract with a builder for the construction of a home. After a dispute arose regarding the reasonable cost of construction, the homeowners brought suit against the builder alleging breach of contract, fraud, and negligent misrepresentation. The builder counterclaimed for breach of contract, quantum meruit, and defamation. Expert testimony was required to prove reasonable costs under the cost-plus contract. Since the central issue—whether the homeowners

were overcharged under the "cost-plus" construction contract—was decided in favor of the homeowners, they were the prevailing parties for purposes of awarding costs.

2. *Baker v. Speaks*, *177 P.3d 803 (Wyo. 2008)*. Homebuyers brought suit against the contractor for breach of construction contract, breach of the covenant of good faith and fair dealing, breach of implied warranty, and promissory estoppel. The contractor counterclaimed for breach of contract. The Wyoming Supreme Court affirmed the trial court's decision that the contractor breached the construction contract by failing to complete the project in a timely manner and failing to perform work in a safe and workmanlike manner and in accordance with industry standards.

3. *Three Way, Inc. v. Burton Enters., Inc.*, 177 P.3d 219 (Wyo. 2008). In lieu of monetary payment for work performed, a developer entered into an agreement with a water and sewer subcontractor that compensation would be provided by the conveyance of real property. As the project neared completion, extra work was required due to high groundwater and each party denied responsibility for the extra cost. The developer refused to convey the property. The subcontractor brought suit for breach of contract and unjust enrichment seeking monetary damages, or in the alternative, specific performance. Finding that the developer breached its contract with the subcontractor, the trial court concluded that specific performance was the appropriate remedy. The Wyoming Supreme Court affirmed the trial court's decision.

4. *Campbell County School Dist. v. State*, __ P.3d __, 2008 WL 67536 (Wyo. 2008). School districts and educational associations brought consolidated actions challenging the state' s funding of public schools, including the statutory and regulatory schemes for capital construction of public education facilities. The Wyoming Supreme Court held that the current statutory scheme for capital construction is constitutional, and that the current regulatory scheme is facially constitutional. The administrative agency authorized to adopt rules and regulations to accomplish the statutory directives adopted "guidelines." Evidence was sufficient to show that the agency's implementation of the guidelines creates the possibility of being contrary to the statutory scheme. The court ruled that the agency must implement its guidelines in accordance with the statutory scheme.

5. *W. N. McMurry Constr. Co. v. Community First Ins., Inc.*, 160 P.3d 71 (Wyo. 2007). Insured general contractor brought action against builder's risk insurer and agent to recover for breach of contract and negligence as result of mistake in policy limits. Insured also sought reformation of policy and amendment of complaint. The contract and negligence claims were barred by the contractor's failure to read the insurance policy documents. The Wyoming Supreme Court decided as a matter of first impression, however, that the equitable remedy of reformation remains viable, despite contractors failure to read the insurance policy documents.

Legislation:

H.B. 270. The General Assembly made changes to § 16-6-707(b)(vii) and created a new subsection (c). The statute relates to construction contracts with public entities and provides that construction managers at-risk shall comply with applicable residency and preference requirements imposed under §§ 16-6-101 through 16-6-107 in the procurement of subcontractors and materials.

Submitted by: Sean Hanlon, Holland & Hart LLP, 55 17th Street, Suite 3200, Denver, CO 80202, (303) 295-8270, smhanlon@hoillandhart.com