BRADLEY ARANT BOULT CUMMINGS LLP **First Quarter 2013**

CONSTRUCTION AND PROCUREMENT LAW NEWS

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

James F. Archibald, III
David H. Bashford (c)
Charlie Baxley
Ryan Beaver (c)
Aron Beezley (d.c.)
Axel Bolvig, III
Stanley D. Bynum
Robert J. Campbell
Jonathan Cobb
F. Keith Covington
Joel Eckert (n)
Eric A. Frechtel (d.c.)
Ralph Germany (j)
Daniel Golden (d.c.)
John Mark Goodman
John W. Hargrove
Jonathan B. Head
Michael P. Huff (h)
Rick Humbracht (n)
Aman Kahlon (d.c.)
Michael W. Knapp (c)
Michael S. Koplan (d.c.)
Alex B. Leath
Arlan D. Lewis
Tom Lynch (d.c.)
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David W. Owen
Douglas L. Patin (d.c.)
Vesco Petrov
Steven A. Pozefsky (d.c.)
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Chris Selman
Eric W. Smith (n)
Frederic L. Smith, Jr.
H. Harold Stephens (h)
Robert J. Symon (d.c.)
Bethany A. Tarpley (j)
David K. Taylor (n)
D. Bryan Thomas (n)
C. Samuel Todd
Darrell Clay Tucker, II
Paul S. Ware
James Warmoth (c)
Monica Wilson (c)

Significant Commercial General Liability ("CGL") Insurance Changes on the Horizon

On April 1, 2013, the Insurance Services Office, Inc. ("ISO") will introduce some significant changes to standard Commercial General Liability ("CGL") forms and endorsements. This is particularly important to the construction industry where CGL coverage still remains a key component of risk management and transfer.

First, many significant changes relate to Additional Insured ("AI") coverage. There are three changes to the standard AI endorsement that are particularly noteworthy: (1) ISO is adding language that should eliminate prior confusion over whether an AI must have privity of contract with the named insured in order to obtain coverage; (2) ISO is adding language related to the application of anti-indemnity statutes to insurance requirements in contracts, and it appears ISO is seeking to clarify that anti-indemnity statutes should not affect parties' ability to transfer risk through insurance; (3) ISO is adding language in an attempt to clarify that the insurance limits available to the AI should be tailored to the underlying contract requirements and not necessarily connected to the limits stated for the named insured in the policy declarations. These changes could have a major impact on the meaningful use of additional insured requirements in construction contracts.

Second, ISO is amending the "other insurance" clause, which typically pushes the primary risk for any loss to other available insurers. The new language should clarify that when a party is seeking coverage under its own policy as a named insured and under another's policy as an additional insured, the additional insured's coverage should have primary responsibility for providing a defense and indemnity for any claim.

Inside:

This has always been the intent, but ambiguities in the "other insurance" language of some policy forms has led to ongoing debate on this point.

Third, ISO is revising the definition of "insured contract" in the policies to confirm that assumed tort liability must be caused in whole or in part by the named insured. This will be significant to parties that agree by contract to indemnify others without regard to ultimate responsibility. Historically, one route to coverage related to such indemnity agreements was through the "insured contract" exception to the "contractual liability" exclusion in the CGL policy. All parties now need to recognize that under this new language, this typical route to coverage may no longer be available if the named insured (the indemnifying party) is not even a partial cause of the damage.

The ultimate significance of these changes will not be known until parties and courts have had opportunity to apply and interpret them in response to real losses. For now, these changes further illustrate the need for all parties to carefully consider (including consultation with insurance brokers and agents) the actual terms of any insurance policies that may satisfy the insurance requirements in a construction contract. Once a coverage dispute develops, the language in the as-issued insurance policy will almost always control, regardless of any contrary intent or understanding by the party seeking coverage. The time for clarification is before the project begins, or at the time these changes are issued to your company as a renewal amendment of an existing policy, not after coverage is needed to respond to a lawsuit.

By Alex Purvis

New Tax Court Decision Highlights Need for Construction Contractors to Consider Expanded IRS Voluntary Worker Classification Settlement Program

For years, the question of whether construction workers should be treated as employees or independent contractors has been an important issue that many contractors have overlooked or chosen to ignore. However, a recent U.S. Tax Court decision highlights the need for construction contractors to focus on how they classify their workers for employment tax purposes.

The taxpayer in *Kurek v. Commissioner* was a sole proprietor who worked as the general contractor in renovating home interiors. During the tax year at issue, the taxpayer hired approximately 30 workers to assist him on various home renovation jobs. None of the workers worked full time for the taxpayer, and he paid them on a project-by-project basis. He paid each worker a weekly flat fee based on the percentage of work completed on a particular job. The workers set their own hours and work schedules. The taxpayer supervised the workers' progress on a project and was at the worksite once a day or once every other day. Although the taxpayer permitted the workers to work simultaneously on other projects with him or with other construction groups, he would replace workers if a deadline was approaching or if a worker was holding up a job.

The workers brought their own sets of small tools, worth around $1,000, to the worksites. The taxpayer did not reimburse the workers for those tools, but he did buy or rent all larger tools, which he left at the worksites. He also purchased materials needed for the projects, and the homeowners would reimburse him. Occasionally, workers purchased lightweight materials as needed during the project, and the taxpayer would reimburse them.

The taxpayer did not offer any employee benefits nor did the workers sign an independent contractor agreement. He did not carry unemployment insurance or workers' compensation insurance for the workers. Most importantly, the taxpayer did not issue Forms 1099-MISC or Forms W-2 to any of the workers for the tax year at issue. Following an employment tax audit, the IRS determined that the workers were the taxpayer's employees and that he should have paid Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax Act (FUTA) taxes, as well as income tax withholdings on the workers' wages. The taxpayer appealed the IRS's determination to the U.S. Tax Court.

Whether a worker is an employee or an independent contractor is a factual question. In short, the right of the principal to exercise control over the agent, whether or not the principal in fact does so, is the "crucial test" for the existence of an employer-employee relationship. Under the common law, an employer-employee relationship exists when the principal has the right to control and direct the service provider regarding the result and how the result is to be accomplished. The

principal need not actually direct or control the manner in which the services are performed; the principal need only have the right to do so.

Despite the presence of several factors in favor of independent contractor status, the Tax Court concluded that the workers should be classified as the taxpayer's employees because the taxpayer failed to prove that he did not have control over the workers. Although the workers set their own hours and provided their own small tools, the taxpayer set deadlines and monitored their work, visiting the worksite daily or every other day. The Tax Court found it important that the taxpayer: (1) had the ultimate authority in instructing the workers as to their job responsibilities, (2) had the right to approve the quality of their work, and (3) paid them weekly rather than at the end of the project. Moreover, only the taxpayer communicated with the homeowners, and he alone was responsible for the success or failure of the projects. The Court also held that the taxpayer did not qualify for alternate relief otherwise available under Section 530 because he did not file Forms 1099 for any of the workers, which is a critical element of that statutory safe harbor. This case highlights the importance of properly classifying workers and of completing the proper paperwork to satisfy tax code requirements.

The IRS recently announced that it has expanded its Voluntary Classification Settlement Program (VCSP) to allow more taxpayers to reclassify their workers as employees for future tax periods. The VCSP offers substantial relief from federal payroll taxes to eligible employers who have been treating their workers (or a class or group of workers) as independent contractors or otherwise as nonemployees and now wish to begin treating them as employees. A significant caveat about how one approaches the reclassification: as an exclusively federal tax program, VCSP can provide no shelter with regard to possible problems with various state and local authorities. Those authorities apply their own standards for determining employee status, which may differ substantially from federal tax standards. Thus, the VCSP does not affect state payroll tax, state unemployement insurance tax, or workers' compensation obligations.

Under the expanded VCSP program, employers under IRS audit (other than an employment tax audit) can still qualify for the VCSP. To be eligible to participate in the VCSP, an employer must currently be treating workers as nonemployees; consistently have treated the workers in the past as nonemployees, including having filed any required Forms 1099 (see below for a special limited-time exception to this requirement); and not be currently under audit on payroll tax issues by the IRS or on worker classification issues by the Department of Labor or a state agency.

Normally, employers are barred from the VCSP if they failed for the past three years to file required Forms 1099 for the workers they are seeking to reclassify. However, the IRS is waiving this eligibility requirement for taxpayers who come forward *before June 30, 2013*. Contractors not previously eligible for the VCSP due to their failure to file Forms 1099 should decide quickly whether to take advantage of this brief window of opportunity to clean up their worker classification practices before they find themselves in the same boat as the general contractor in *Kurek*.

Employers can apply for the program by filing Form 8952, Application for Voluntary Classification Settlement Program, at least 60 days before they want to begin treating the workers as employees. Employers accepted into the program will generally pay an amount effectively equaling just over one percent of the wages paid to the reclassified workers for the past year. No interest or penalties will be due, and the employers will not be audited on payroll taxes related to these workers for prior years.

Employers accepted into the program no longer will be subject to a special six-year statute of limitations on such reclassifications; instead, they will come under the three-year statute that usually applies to payroll taxes. Employers that failed to file Forms 1099 may also apply for the temporary relief program, but they likely will pay a slightly higher amount (including some penalties) and will need to file any unfiled Forms 1099 for the workers they are seeking to reclassify as employees.

If you have any questions regarding worker classification issues, or if you are interested in participating in the IRS VCSP, feel free to contact your lawyer or lawyers in our BABC Tax Practice Group.

By Jim Archibald, Bruce P. Ely, Stuart J. Frentz, and William T. Thistle, II

Contractors Whose Bids are Improperly Rejected as Nonresponsive on Federal Contracts are Not without Recourse

The U.S. Government Accountability Office ("GAO") recently sustained a construction contractor's bid protest after it determined that the procuring agency's rejection of the contractor's bid as non-responsive was unreasonable. This case, *W.B. Construction and Sons, Inc*., is noteworthy because it illustrates that contractors whose bids are improperly rejected by procuring agencies are not without recourse.

In *W.B. Construction*, the procuring agency rejected the contractor's bid submitted in response to the invitation for bids ("IFB") because the contractor failed to provide the price for one of many line items included in the bid schedule and because, in the agency's view, the bid was "materially unbalanced." The contractor argued that its omission of the price for the line item was immaterial and should be waived as a "minor informality" under GAO case law. In addition, the protester argued that, even if its proposed prices were "materially unbalanced," this should not render its bid nonresponsive because the agency did not determine that this lack of balance in the contractor's pricing posed an "unacceptable risk" in accordance with Federal Acquisition Regulation ("FAR") 15.404-1(g).

The GAO concluded that the agency's rejection of the contractor's bid as nonresponsive was unreasonable. Specifically, GAO concluded that rejection of the bid for failing to provide the price for one of many line items in the bid schedule was improper because the item for which the price was omitted was divisible from the IFB's overall requirements, was *de minimis* as to total cost, and would not affect the competitive standing of the other bidders. In other words, the omission should have been waived as a minor informality. In addition, the GAO concluded that rejection of the bid as "materially unbalanced" was improper because the agency failed to conduct a risk analysis to determine whether the contractor's unbalanced bid posed an unacceptable risk to the government, as required by FAR 15.404-1(g).

Given its conclusions, the GAO recommended that the agency re-evaluate the contractor's bid to determine if the lack of balance in its bid posed an unacceptable risk to the government. If the agency determined that the lack of balance did not pose an unacceptable risk, the GAO instructed the agency to waive the omission of the one line item price as a "minor informality," and to award the contract to the contractor. This noteworthy result illustrates that the bid protest process remains available to contractors whose bids are improperly rejected by procuring agencies. If you believe that your bid has been improperly rejected, be sure to contact your lawyer immediately, because the bid protest process contains short deadlines which can trap the unwary bidder.

By Aron C. Beezley

The Eroding Protection of the Limited Liability Company in South Carolina

South Carolina limited liability contractors should take heed of a recent decision by the Supreme Court of South Carolina in *16 Jade Street, LLC v. R. Design Construction Co., LLC,* in which the Court allowed an individual member of a limited liability company to be held personally liable for negligent construction performed by the LLC under his direct supervision.

This case involved the construction of a condominium project located in Beaufort, South Carolina. The general contractor for the project was R. Design Construction Co., LLC (the "General Contractor"), a limited liability company with only two members, Carl Aten, Jr. and his wife. Mr. Aten was also the license holder and qualifier for the General Contractor.

The General Contractor commenced work on the project under the direct on-site supervision of Mr. Aten, but quickly was confronted with alleged construction defects. Despite consultations with the engineer and assurances to the owner, the General Contractor did not correct the alleged defects identified by the engineer. Eventually, the General Contractor abandoned the project. The owner hired a replacement general contractor to complete the project. Upon beginning work, the replacement contractor and engineer identified over 60 individual defects in the work performed by the General Contractor.

As a result of the defective construction on the project, the owner sued the General Contractor for breach of contract and Mr. Aten, individually, for negligence. The claim against Mr. Aten centered on the fact that he was the individual responsible for on-site

supervision of the work performed by the General Contractor and its subcontractors. Despite statutory language that appears to shield individual members of an LLC from personal liability for work performed on behalf of the LLC, the trial court found that Mr. Aten was individually liable for the defective construction performed by the limited liability company under his supervision. The Supreme Court of South Carolina confirmed the decision to hold Mr. Aten individually liable because he personally supervised the construction, and did so in a negligent manner. The Supreme Court's rationale was further highlighted by its explicit finding that Mr. Aten's wife, the other member of the LLC, was not individually liable for the defective work since she did not have any personal involvement in the supervision of the construction.

In reaching its decision, the Supreme Court of South Carolina relied heavily on similar decisions regarding individual liability from a multitude of other jurisdictions across the nation, suggesting that the danger of personal liability for negligent supervision of construction exists outside South Carolina.

Individuals that personally supervise the work of their limited liability company should take note of this decision, regardless of the jurisdiction in which the LLC is formed or works. The general protections against individual liability previously provided by the structure of an LLC may not protect individual members of an LLC if the individuals are personally involved in the performance and supervision of the work.

By Ryan Beaver

Don't Poke the Bear—A Reminder Regarding Environmental Regulations

Many articles in this newsletter and in recent construction industry publications have noted an increase in federal and state stormwater pollution enforcement actions. Non-point source pollution is a contractor's single most prevalent, though not necessarily the most severe, environmental risk. The Environmental Protection Agency ("EPA") has made violations of the stormwater regulations an enforcement priority. Simply put, if you haven't learned the rules in this area, learn them now. Violation of these rules can result in significant penalties, including jail time for aggravated misconduct.

A recent case from the Western District of Washington reminds owners and contractors of the need to heed applicable environmental regulations. The case is exceptional for the contractor's blatant disregard of applicable regulations, but it is a healthy reminder to all contractors to obey environmental regulations.

In *United States v. Stowe,* a contractor and its president pled guilty to knowing and intentional stormwater violations. The contractor's actions led to a six-month jail sentence (with an additional one-year supervised release) and a $300,000 fine for the president (the corporation was assessed a separate $350,000 fine). Violations included:

1. Exceeding a clearing permit's area limits by 300%;
2. Vastly exceeding the amount of discharge (more than 200% of the standard) allowed;
3. Failing to respond or offer remediation for violations found in seven different inspections;
4. Avoiding a detention pond by piping stormwater directly into a creek;
5. Precipitating three landslides closing two highways (one of the two closures lasted a week); and
6. Joining in or ordering falsification of reports to the government.

While any one of these actions could lead to trouble, the combination of these violations unsurprisingly brought about swift response from the EPA. The severity of these violations reminds me of the old maxim – "Don't poke the bear" – meaning that you shouldn't give someone in authority even more interest in you by acting like a jerk. The same principle applies to everyday operations that carry potential criminal sanctions, such as stormwater violations.

Contractors often, many times with good reason, complain about federal overreach in regulations. However, the contractor here asked for trouble, and it got it. What is the lesson to a responsible business, which would certainly never allow violations of this severity? One mistake leads to another. Good companies can slip into serious violations by allowing, and then covering up, rule-breaking. Consult your lawyer, or one of us listed on the back cover, if you have a question

about environmental regulations and compliance at the national, state, or local level.

By Jonathan Head

Third-party Liability of Design Professionals in California Residential Construction

The potential for third party tort liability remains an ongoing concern for design professionals, a concern that was driven home in the recent California case, *Beacon Residential Community Association v. Skidmore, Owings and Merrill LLP*. In that case, a California Court of Appeal held that design professionals could be sued by a third party homeowners association ("HOA") for negligent design defects.

The HOA alleged multiple defects in the project caused by negligent architectural and engineering design. The design professionals sought dismissal of these claims, arguing that they owed no duty of care to the third party HOA. The design professionals claimed that the owner of the development had exercised control over the design specifications. The trial court agreed, and the HOA appealed.

On appeal, the California Court of Appeal reversed the trial court's decision and reinstated the HOA's claims. The Court concluded that the foreseeability of harm to the HOA and other policy considerations created a third party duty of care. Specifically, the Court balanced and analyzed the following six factors to determine that a duty of care existed:

(1) The extent to which the transaction was intended to affect the plaintiff;

(2) The foreseeability of harm to him or her;

(3) The degree of certainty that the plaintiff suffered injury;

(4) The closeness of the connection between the defendant's conduct and the injury suffered;

(5) The moral blame attached to the defendant's conduct; and

(6) The policy of preventing future harm.

Addressing these factors, the Court found that (1) the design professionals were aware of the impact defective designs would have on third party home purchasers, (2) the licensing requirements of the design industry signal the critical nature of design in the construction of projects such that the impacts of defective design on third parties should have been foreseeable, (3) if true, the alleged design defects were certain to lead to damage to the HOA, (4) the construction defects alleged were clearly linked to defective design regardless of other contributing factors, (5) substantial moral blame could be attributed to the design defects insofar as they resulted in the alleged defects which resulted in "life safety hazards," and (6) public policy concerns favored protection of unsophisticated homebuyers with a limited ability to discern potential defects at the point of purchase over knowledgeable design professionals with a greater ability to effectively distribute loss. Given that each of the six prongs of the analysis supported the imposition of liability, the Court concluded that the design firms owed a duty of care to the third party HOA.

The Court also relied on the recent passage of California Senate Bill No. 800 to buffer its determination that the design firms could be liable to a third party. This bill provides standards for residential housing construction, defining what constitutes a defect in construction. The text of the bill includes design professionals as parties that may be held liable for the negligent violation of the applicable construction standards described. Further, the Court gleaned from the bill's legislative history that the Legislature intended to assign liability to negligent design professionals for defects which resulted in damages to third parties. The court concluded that, even if its policy analysis of the six factors discussed above had not been conclusive, the plain language and legislative history of the bill confirmed that design professionals can owe a duty of care to third party purchasers in residential construction.

This case demonstrates that design professionals may owe a duty of care to third party purchasers for defects in the design. The case provides a potential avenue for third parties to recover damages for design defects, and reiterates the need for design professionals to maintain adequate insurance coverage over their design.

By Aman Kahlon

Economic Loss Rule Bars Condominium Homeowners Association's Claim for Negligence against Contractor

In *Long Trail House Condominium Association v. Engelberth Construction, Inc.*, the Vermont Supreme Court held that the economic loss rule barred a condominium owners association's claim of negligence against a contractor despite a lack of privity of contract between the two parties.

This case involved the allegedly deficient construction of a condominium complex known as the Long Trail House Condominium project. Stratton Corporation (the "Owner") and Engelberth Construction (the "General Contractor") entered into a standard form agreement for construction of the condominiums. After the completion of the project, the Long Trail House Condominium Association ("Association") notified the Owner and General Contractor of defects at the condominiums. The Owner and the Association entered into a settlement agreement and release of claims, where the Owner paid the Association over $7 million for the design and construction defects. The Owner then filed suit against the General Contractor for these damages.

After its settlement with the Owner, the Association hired a repair contractor to repair the defects. This repair cost approximately $1.5 million more than the Association received in the settlement from the Owner. The Association sued the General Contractor on a negligence theory for the repair costs. The General Contractor moved for summary judgment based on the economic loss rule, which limits the damages contractual parties can recover to those arising out of the contract (as opposed to arising out of tort). The trial court granted its motion, despite the lack of contractual privity between the Association and the General Contractor. The Association appealed. The Vermont Supreme Court agreed with the trial court, upholding dismissal of the Association's claim.

The Court found that despite the lack of a direct contractual relationship with the General Contractor, the Association's damages were contractual in nature. In the Court's view, reductions in value or costs of repairs from construction defects are contractual in nature. The Court further highlighted the fact that the Association had already recovered over $7 million from the Owner for these defects based on a breach of contract action, and noted that the Owner had an ongoing action against the General Contractor for these same damages. The Court therefore dismissed the Association's negligence claim.

The Court rejected the Association's argument that contractual privity was required before the economic loss rule could be applied. While the Court acknowledged that recovery for purely economic loss due to construction defects was possible in tort cases, it noted that a special relationship was required between the parties to create a cognizable duty between them. The Court found no such duty existed between the General Contractor and the Association which would entitle the Association to purely economic damages.

The Court's ruling in this case may have been influenced by the fact that both the Owner and Association were suing the General Contractor for similar damages. However, it is a good reminder that most construction disputes are contract disputes, and will be governed by the terms of the contract between the parties. The economic loss rule is a method courts in some jurisdictions use to ensure that parties' disputes are decided pursuant to contractual agreements.

By Bethany Tarpley

Bradley Arant Lawyer Activities:

U.S. News recently released its "Best Law Firms" rankings for 2013. **BABC's Construction Practice Group** received a Tier One National ranking, the highest awarded, in both Construction Law and Construction Litigation. The Birmingham, Nashville, Jackson, and Washington, D.C. offices received similar recognition in the metropolitan rankings.

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

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

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

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

Jonathan Head recently attended LegalTech New York, the largest national trade show for lawyers doing electronic discovery, and the service and product suppliers that support them.

David Taylor recently became the Chair of the Tennessee Association of Construction Counsel for 2013.

Russ Morgan was recently featured in the "Q&A Keys to successful crisis communications" in the NashvilleBizBlog. Russ was interviewed after a recent seminar entitled "Crisis Communications In a Word of Instant Media."

Aron Beezley authored an article in January 2013 for the Bloomberg BNA Federal Contracts Report entitled "Recent Court of Federal Clams Bid Protest Decision Highlights Little-Known Issues That Exist When Contracting With The U.S. Postal Service".

Ryan Beaver and **Monica Wilson** co-authored an article for Construction Executive magazine entitled "Contractual Modifications for a Changing Marketplace".

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

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

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

Eric Frechtel recently taught a seminar at the Mechanical Contractors Association of America's Advanced Institute for Project Management in Austin, Texas.

David Pugh moderated a panel of speakers on the topic of Trends in Major Land Development at the ABC BizCon Business Development Conference in Ft. Lauderdale on February 19-20. David was also recently appointed to serve a two year term on the ABC's National Board of Directors.

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

Eric Frechtel, **Steve Pozefsky**, and **Aron Beezley** authored an article entitled "The Gutting of The Veterans First Contracting Program?" for the January/February 2013 edition of Federal Construction Magazine.

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

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

Eric Frechtel, **Steven Pozefsky**, and **Aron Beezley** have written for the February/March 2013 issue of *Federal Construction Magazine* an article on key small business provisions of the National Defense Authorization Act of 2013.

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

It is with mixed emotions that we report that Joel Brown has decided to accept a very exciting new position working in-house with one of our long-time construction clients. We wish Joel the best, and are delighted to continue to work with him in his new endeavor.

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

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

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James F. Archibald, III, Attorney ... (205) 521-8520 ... jarchibald@babc.com
David H. Bashford (Charlotte), Attorney ... (704) 338-6001 ... dbashford@babc.com
Charlie Baxley, Attorney ... (205) 521-8420 ... cbaxley@babc.com
Ryan Beaver (Charlotte), Attorney ... (704) 338-6038 ... rbeaver@babc.com
Aron Beezley (Washington, D.C.), Attorney ... (202) 719-8254 ... abeezley@babc.com
Axel Bolvig, III, Attorney ... (205) 521-8337 ... abolvig@babc.com
Abby Brown, Construction Researcher ... (205) 521-8511 ... cpgrecords@babc.com
Stanley D. Bynum, Attorney ... (205) 521-8000 ... sbynum@babc.com
Robert J. Campbell, Attorney ... (205) 521-8975 ... rjcampbell@babc.com
Jonathan Cobb, Attorney ... (205) 521-8614 ... jcobb@babc.com
F. Keith Covington, Attorney ... (205) 521-8148 ... kcovington@babc.com
Jeff Dalton, Legal Assistant ... (205) 521-8804 ... jdalton@babc.com
Joel Eckert (Nashville), Attorney ... (615) 252 4640 ... jeckert@babc.com
Eric A. Frechtel (Washington, D.C.), Attorney ... (202) 719-8249 ... efrechtel@babc.com
Ralph Germany (Jackson), Attorney ... (601) 592-9963 ... rgermany@babc.com
Daniel Golden (Washington, D.C.), Attorney ... (202) 719-8398 ... dgolden@babc.com
John Mark Goodman, Attorney ... (205) 521-8231 ... jmgoodman@babc.com
John W. Hargrove, Attorney ... (205) 521-8343 ... jhargrove@babc.com
Jonathan B. Head, Attorney ... (205) 521-8054 ... jhead@babc.com
Anne Henderson, Legal Assistant ... (205) 521-8371 ... ahenderson@babc.com
Michael P. Huff (Huntsville), Attorney ... (256) 517-5111 ... mhuff@babc.com
Rick Humbracht (Nashville), Attorney ... (615) 252-2371 ... rhumbracht@babc.com
Aman Kahlon (Washington, D.C.) Attorney ... (202) 719-8230 ... akahlon@babc.com
Michael W. Knapp (Charlotte), Attorney ... (704) 338-6004 ... mknapp@babc.com
Michael S. Koplan (Washington, D.C.), Attorney ... (202) 719-8251 ... mkoplan@babc.com
Alex B. Leath, Attorney ... (205) 521-8899 ... aleath@babc.com
Arlan D. Lewis, Attorney ... (205) 521-8131 ... alewis@babc.com
Tom Lynch (Washington, D.C.), Attorney ... (202) 719-8216 ... tlynch@babc.com
Luke Martin, Attorney ... (205) 521-8570 ... lumartin@babc.com
Wilson Nash, Attorney ... (205) 521-8180 ... wnash@babc.com
David W. Owen, Attorney ... (205) 521-8333 ... dowen@babc.com
Emily Oyama, Construction Researcher ... (205) 521-8504 ... eoyama@babc.com
Douglas L. Patin (Washington, D.C.), Attorney ... (202) 719-8241 ... dpatin@babc.com
Vesco Petrov, Attorney ... (205) 521-8102 ... vpetrov@babc.com
Steven A. Pozefsky (Washington, D.C.), Attorney ... (202) 719-8210 ... spozefsky@babc.com
J. David Pugh, Attorney ... (205) 521-8314 ... dpugh@babc.com
Bill Purdy (Jackson), Attorney ... (601) 592-9962 ... bpurdy@babc.com
Alex Purvis (Jackson), Attorney ... (601) 592-9940 ... apurvis@babc.com
Jeremiah S. Regan (Washington, D.C.), Attorney ... (202) 719-8221 ... jregan@babc.com
Lewis P. Rhodes (Washington, D.C.), Attorney ... (202) 719-8208 ... lrhodes@babc.com
E. Mabry Rogers, Attorney ... (205) 521-8225 ... mrogers@babc.com
Walter J. Sears III, Attorney ... (205) 521-8202 ... wsears@babc.com
Chris Selman, Attorney ... (205) 521-8181 ... cselman@babc.com
Eric W. Smith (Nashville), Attorney ... (615) 252-2381 ... esmith@babc.com
Frederic L. Smith, Attorney ... (205) 521-8486 ... fsmith@babc.com
Michele Smith, Legal Assistant ... (205) 521-8347 ... msmith@babc.com
Winston Smith, Legal Assistant ... (205) 521-8756 ... wsmith@babc.com
H. Harold Stephens (Huntsville), Attorney ... (256) 517-5130 ... hstephens@babc.com
Robert J. Symon (Washington, D.C.), Attorney ... (202) 719-8294 ... rsymon@babc.com
Bethany Tarpley (Jackson), Attorney ... (601) 592-9955 ... btarpley@babc.com
David K. Taylor (Nashville), Attorney ... (615) 252-2396 ... dtaylor@babc.com
Darrell Clay Tucker, II, Attorney ... (205) 521-8356 ... dtucker@babc.com
D. Bryan Thomas (Nashville), Attorney ... (615) 252-2318 ... dbthomas@babc.com
C. Samuel Todd, Attorney ... (205 521-8437 ... stodd@babc.com
Paul S. Ware, Attorney ... (205) 521-8624 ... pware@babc.com
James Warmoth (Charlotte), Attorney ... (704) 338-6211 ... jwarmoth@babc.com
Loletha Washington, Legal Assistant ... (205) 521-8716 ... lwashington@babc.com
Monica L. Wilson (Charlotte), Attorney ... (704) 338-6030 ... mwilson@babc.com

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

BRADLEY ARANT BOULT CUMMINGS LLP

invites you to attend a complimentary legal seminar and breakfast:

2013 Construction Seminar: Getting Paid on a Construction Project

Please choose a location and date most convenient to you:

May 3	May 17	May 24	May 31
Birmingham, AL	**Nashville, TN**	**Jackson, MS**	**Charlotte, NC**
One Federal Place	1600 Division St.	188 East Capitol St.	Charlotte City Club
1819 Fifth Ave. North	Suite 700	Suite 400	121 West Trade St.
Birmingham, AL 35203	Nashville, TN 37203	Jackson, MS 39201	Charlotte, NC 28202

Summary

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

- Key Payment Contract Clauses
- Insurance and P&P Bond Claims
- Mechanics Lien Claims
- Top 10 Payment Mistakes Made

Schedule

7:30 a.m. to 8:00 a.m.	Registration & Breakfast
8:00 a.m. to 10:30 a.m.	Program: Part 1
10:30 a.m. to 10:45 a.m.	Break
10:45 a.m. to 11:45 a.m.	Program: Part 2
11:45 a.m. to 12:00 p.m.	Question & Answer

Who Should Attend?

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

To confirm your attendance please e-mail rsvp@babc.com no later than one week prior to the event.

Seating is limited.

No representation is made that the quality of legal services performed is greater than the quality of legal services performed by other lawyers

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

Your Name:

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

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

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

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Bradley Arant Boult Cummings LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104

Emily Oyama
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104

BRADLEY ARANT BOULT CUMMINGS LLP **Second Quarter 2013**

CONSTRUCTION AND PROCUREMENT LAW NEWS

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

James F. Archibald, III
David H. Bashford (c)
Charlie Baxley
Ryan Beaver (c)
Aron Beezley (d.c.)
Axel Bolvig, III
Stanley D. Bynum
Robert J. Campbell
Jonathan Cobb
F. Keith Covington
Joel Eckert (n)
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Daniel Golden (d.c.)
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D. Bryan Thomas (n)
C. Samuel Todd
Darrell Clay Tucker, II
Paul S. Ware
James Warmoth (c)
Monica Wilson (c)

Proving a Type I Differing Site Conditions Claim

Many construction contracts contain differing site conditions clauses that grant the contractor the right to seek additional time and compensation if it encounters unexpected conditions that make the work more difficult. These clauses usually recognize two types of differing site conditions: a Type I condition, where the site conditions differ from the conditions described in the contract documents, and a Type II condition, where the site conditions differ from the conditions that the contractor would ordinarily expect to find in the area.

Inside:

The Armed Services Board of Contract Appeals (ASBCA) discussed the requirements for asserting a Type I differing site conditions claim in its recent decision *Appeal of NDG Constructors*. The ASBCA denied the contractor's Type I claim because, even though the site conditions were wet and difficult, the contractor could not show that the actual conditions differed materially from any specific representation about the site conditions in the contract documents. The ASBCA's decision underscores the danger of making assumptions about site conditions based on optimistic interpretations or extrapolations from the data in pre-contract geotechnical reports.

To establish a Type I differing site conditions claim a contractor must prove that (1) the conditions indicated in the contract differ materially from those actually encountered during performance; (2) the conditions actually encountered were not reasonably foreseeable based on the information available to the contractor at the time of bidding; (3) the contractor reasonably relied upon its interpretation of the contract and contract-related documents; and (4) the contractor was damaged as a result of the material difference between expected and encountered conditions.

In *Appeal of NDG Constructors*, the contractor entered into a fixed price contract with the Corps of Engineers to construct a 16 inch waterline under I-90 to bring water into Ellsworth Air Force Base in Idaho. The contract documents contained two soils reports, showing seven borings performed in the area around the proposed waterline. During construction, the contractor claimed that it encountered shale deposits in the wrong location as well as unexpectedly prevalent "fat" clay soils and wet conditions that delayed its

work and increased its costs. According to the contractor, the shale location, "fat" clay, and wet conditions each differed materially from what the two soils reports described, and it submitted a Type I differing site conditions claim for additional time and money. The contracting officer denied the claim, and the contractor appealed.

In a lengthy opinion, the ASBCA thoroughly dissected the contents of the two soils reports and carefully compared the reports to the conditions encountered in the field. The ASBCA stringently applied the rule that a Type I claim requires proof that actual conditions differ from something actually stated in the contract documents. In each of its three claims, the contractor predicated its position on either an outright assumption or an optimistic interpretation of mixed data contained in the two soils reports.

First, the contractor claimed that it encountered "Carlile Shale" material in a different location than expected, based on the contract documents. The contractor had assumed the location of Carlile shale by drawing a straight line connecting the point at two borings where "Carlile Shale" was indicated. The ASBCA recognized that the soils report did not precisely state where "Carlile Shale" would be located. Yet, the ASBCA refused to grant the contractor relief for incorrectly assuming that the soil would transition from clay fill material to "Carlile Shale" along a straight line because the contract documents did not promise a straight line transition.

Next, the contractor argued that it encountered unexpectedly large amounts of "fat" clay soil, when the soils report indicated a mixture of "fat" and "lean" clay. "Fat" clay has higher moisture content than "lean" clay. The ASBCA scrutinized the soils reports and boring logs and found, once again, that the actual conditions were not inconsistent with any specific representation made in the contract documents. The soils reports stated that soil conditions could vary all the way from "fat clay" to "lean clay," and the boring logs did not say "mostly lean clay" or preclude "mostly fat clay." The contractor assumed that it would encounter approximately equal amounts of "fat" and "lean" clay, but the soils report did not offer any conclusions about what the ratio might be. Indeed, the soils reports alerted the contractor that subsurface conditions could differ at different times and locations. The ASBCA concluded that actual conditions were within the range of what was promised. The contractor's optimistic interpretation of the borings - that it would encounter roughly equal amounts of "fat" clay and "lean" clay - was found lacking because the soils reports did not specifically say that equal amounts would be encountered.

Finally, the contractor claimed that site conditions were wetter than anticipated. Once again, the ASBCA found that the soils report notified the contractor that wet conditions could be present on the site. The contractor attempted to show that it encountered excessive moisture beyond what the soils reports indicated through testing and sampling, but the ASBCA found that the contractor relied on an "unconventional" sampling technique applied to samples that were likely contaminated by the contractor's own work efforts. Thus, the contractor's excessive moisture proof was rejected. If the contractor had compiled better evidence showing higher percentages of moisture than the percentages indicated in the contract documents, this claim might have succeeded.

This case offers important guidance for estimators and for claimants. At the estimating stage, contractors should be careful about making assumptions that are not supported by the contract documents. Overly optimistic projections or extrapolations about overall site conditions based on limited, qualified data may result in an estimate that is too low to cover the actual cost of overcoming the site conditions, with an insufficient basis for making a viable claim. If a claim arises, the contractor must review the contract documents carefully, and make every effort to tie its differing site conditions arguments to specific representations from the contract documents.

By James Archibald

Hasta La Vista, Baby: Threatening To Stop Work Can Provide Valid Basis for Terminating Contract

A federal court recently ruled in *Mometal Structures, Inc. v. T.A. Ahern Contractors Corp*. that a general contractor was justified in terminating a subcontractor for default because the subcontractor threatened to stop work unless the general contractor agreed to perform certain actions that were not required under the parties' contract. The Court ruled that the general contractor was justified in terminating the subcontractor even though: (1) the subcontractor continued working on the project until the date of termination; (2) the general contractor had no reason to terminate the subcontractor, other than the subcontractor's threat to stop work; and (3) the general contractor was delaying and increasing the cost of subcontractor work by failing to timely respond to subcontractor RFIs and other design submittals. The *Mometal* case is an important reminder regarding the legal concept of "anticipatory breach," which generally holds that a party breaches a contract when he "declares his intention not to fulfill a contractual duty."

The *Mometal* case arose out of a three-phase construction project for the New York City School Construction Authority ("Owner"). T.A. Ahern, the general contractor on the project, hired Mometal to fabricate and erect structural steel. Mometal's work included preparing erection and fabrication drawings in accordance with design drawings provided by the Owner. Mometal was scheduled to begin its on-site work in October 2007. Due to project delays caused by design and architectural issues, the site was *still* not available for

structural steel erection in August of 2008, when Mometal was terminated.

During this period of delay, the general contractor failed to provide information that Mometal required in order to begin steel fabrication including approval of outstanding drawings, responses to outstanding RFIs, and approval of Mometal's crane logistics plan. At the time of termination, these issues were still preventing Mometal from timely completing its work. In August of 2008, Mometal wrote a letter to Ahern stating it would only start erecting structural steel in September 2008 (the date requested by Ahern) if Ahern met seven conditions: (1) the site be fully available; (2) all shop drawings be approved and returned; (3) the parties agree on a change order covering Mometal's delay and extra work claims; (4) agreement to payment by joint check; (5) voiding of the contractual liquidated damages provision; (6) holding Mometal free of responsibility for acceleration costs; and (7) agreement to pay for the storage of fabricated material.

Ahern refused to meet Mometal's demands and instead terminated Mometal for default. Mometal then sued Ahern for breach of contract. Ahern asserted a counterclaim for its costs to complete Mometal's work. The Court concluded that Mometal breached the contract, even though Mometal's work was not faulty and it did not stop work prior to its termination, because its threat to stop work constituted an anticipatory breach. The court relied on two key facts in reaching this conclusion: (1) the contract contained a standard AIA "disputed work" provision requiring Mometal to continue work despite the existence of contractual disputes; and (2) Mometal had no contractual right to insist that Ahern comply with its seven demands.

The Mometal case illustrates the defining characteristic of an anticipatory breach that contractors should be careful to avoid. Merely communicating to your contracting partner that you intend to not perform your contractual duties, or threatening to not perform unless the contracting partner performs actions not required under the contract, can constitute a breach of contract. As this case shows, the threat to stop work can have serious consequences and contractors should consult legal counsel before issuing any letter threatening to stop work.

By Thomas Lynch

Failure To Comply With FAR And DFARS Clauses Could Leave Government Contractors Working For Free

A recent case from the U.S. Armed Services Board of Contract Appeals ("ASBCA"), *Dynamics Research Corp*., serves as an important reminder to government contractors to carefully comply with the requirements of the Defense Federal Acquisition Regulation Supplement ("DFARS") clause 252.232-7007 (Limitation of Government's Obligation), commonly referred to as the "LOGO" clause, and similar Federal Acquisition Regulation ("FAR") clauses.

The contract in *Dynamics Research Corp*. incorporated the DFARS LOGO clause. The DFARS LOGO clause, which is similar to the FAR Limitation of Costs clause (FAR 52.232-20), requires the contractor to "notify the [Contracting Officer] in writing at least 90 days prior to the date when, in the Contractor's best judgment, the work will reach the point at which the total amount payable by the Government … will approximate 85 percent of the total amount then allotted to the contract[.]" The clause also provides that the contractor is not authorized to continue work once the total work performed approximates the amount allocated to the contract.

Nevertheless, the contractor in *Dynamics Research Corp*. performed work in excess of the funded amount and subsequently filed a claim demanding payment of more than $280,000 for "unfunded work" that it performed. The Contracting Officer denied the contractor's claim because, among other things, the contractor failed to comply with the LOGO clause requirements. The contractor then filed an appeal with the ASBCA.

Ultimately, the ASBCA denied the contractor's appeal, finding that the contractor failed to notify the Contracting Officer when it reached 85% of the funded amount and that the contractor failed to stop work when it reached the funded amount. In denying the contractor's appeal, the ASBCA remarked: "A contractor cannot create an obligation on the part of the Government to reimburse it for a cost overrun by voluntarily continuing performance and incurring costs after the cost limit has been reached."

Limitation of funding type clauses are difficult to manage, but difficulty is not an excuse for mismanagement. One must forecase not simply when the "incurred" costs are at 85%, but, if one has claims for changes, delays, or the like, those costs too must be assessed in determining when to give the 85% notice. On a project that is not a federal project, but is a project funded solely by bonds issued by a single purpose entity, a similar issue arises about continuing to work when the costs forecast to complete (including changes and amounts owed by the owner to other entities like the designer) exceed the bond amount, one must start managing the financial end. The ASBCA's decision in *Dynamics Research Corp*. serves as an important reminder to scrupulously comply with funding limits, either expressly stated, as in a LOGO clause, or as implied by a funding limit under state or local law. As the contractor in *Dynamics Research Corp*. learned the hard way, failure to manage these financial funding realities could result in a situation where the contractor is essentially performing work for free.

By Aron C. Beezley

Florida Supreme Court Limits the Economic Loss Doctrine

Florida is one of several states in which the courts have held that parties in contractual privity – that is, parties with contracts between them governing their relationship – cannot recover damages based on non-contractual theories of recovery for economic losses arising from performance of a contract. This is known as the economic loss doctrine. The Florida Supreme Court, however, recently placed a substantial limitation on the economic loss doctrine in *Tiara Condominium Association, Inc., v. Marsh & McClennan Companies, Inc.*, limiting the ban on recovering economic losses in such instances to products liability cases.

The Court in *Tiara Condominium* held that a condominium association may bring an action for negligence and breach of fiduciary duty against its insurance broker, despite contractual privity between the parties and the absence of property damage or personal injury. In other words, the losses alleged were purely economic. The matter resulted from a dispute between a condominium association and its surety broker over the broker's representations regarding the scope of the condominium association's insurance coverage. After two hurricanes damaged the condominium, the association relied on the broker's assurances of coverage in selecting remediation options for repair of the building. When the association sought payment from the insurer, the insurer insisted its loss limit was measured in the aggregate (rather than per occurrence, as the broker had stated), eventually leading the association and the insurer to settle for an amount less than the association's cost of remediation.

The Florida Supreme Court reviewed the history of the economic loss rule, noting that it was "developed to protect manufacturers from liability for economic damages caused by a defective product beyond those damages provided by warranty law," but that it had over time been extended to apply to all actions involving parties in contractual privity. The Court then declared that any expansion of the doctrine beyond the products liability context was "unwise and unworkable in practice." It ultimately held that "the economic loss rule applies only in the products liability context," overturning all prior holdings in Florida extending the rule beyond the products liability context.

The Court thus held that the association's claims in negligence and breach of fiduciary duty against the broker – claims based on non-contract theories of recovery, despite the existence of a contract between the parties – could proceed.

The *Tiara Condominium* opinion expands the sources from which an aggrieved contractor or subcontractor or owner may seek relief, because the doctrine had been used to exclude claims by a contractor against a designer for delays or impacts arising from poor design.Contractors, owners, and design professionals should be aware of this change in the law in Florida and should adjust risk assessments for projects in Florida accordingly.

By: Monica L. Wilson

The "Fear of Failure" May Constitute Property Damage Under a Commercial General Liability Policy

Traditionally, courts have held that "fear of failure" caused by faulty or defective workmanship is not sufficient to constitute "property damage" under a standard form commercial general liability ("CGL") policy. *Forrest Construction, Inc. v. The Cincinnati Ins. Co.*, a recent decision by the United States Court of Appeals for the Sixth Circuit (a federal supervisory court over trial courts in Kentucky, Michigan, Ohio, and Tennessee), applying Tennessee law, may provide insureds the opportunity to assert that such "fear of failure" claims are sufficient to trigger an insurer's duty to defend.

Forrest Construction, Inc. was hired to construct a home. A dispute arose between Forrest and the homeowners regarding the amount owed to Forrest, and Forrest filed suit. The homeowners filed a counterclaim for alleged defective workmanship. The allegations of defective workmanship were limited to the following:

- "Among other items, the [homeowners] discovered significant cracking in the foundation at the right rear corner of the dwelling, creating an unsafe and potentially life-threatening condition."
- "Forrest recklessly performed, or caused to be performed, work of such poor workmanship that it created an unsafe condition, causing a potentially deadly collapse of the residence."
- "Forrest recklessly constructed the foundation or recklessly caused to be constructed the foundation of the [homeowners'] residence."

Forrest asked its CGL to provide a defense. The insurer refused to defend Forrest and denied the claim based on the "your work" exclusion in the CGL policy. (CGL policies typically exclude coverage for claims arising from defective work performed by the insured). In its denial letter, the Insurer noted that the policy contained an exception to the "your work" exclusion for work that is performed by a subcontractor. However, the insurer stated that Forrest was not protected by this subcontractor exception because the counterclaim did not assert that any faulty work was performed by a subcontractor.

After the insurer issued its denial, Forrest filed suit in federal court asserting that the insurer breached the insurance contract by failing to defend and indemnify, and the trial court found that the insurer breached its obligations under the policy when it failed to defend Forrest. The insurer appealed to the intermediate appellate court.

The appellate court noted that under Tennessee law, "an insurer's duty to defend the insured is triggered when the underlying complaint alleges damages that are within the risk covered by the insurance contract and for which there is a *potential* basis for recovery." The appellate court held that the allegations in the homeowners' counterclaim against Forrest were sufficient to trigger the insurer's duty to defend. Specifically, the court held the allegations in the underlying complaint that "Forrest recklessly performed, or caused to be performed" were sufficient to trigger the subcontractor exception to the "your work" exclusion because the "the usual way a contractor would 'cause' work to be performed is by hiring a subcontractor."

In addition, the appellate court rejected the insurer's argument that "property damage" occurs under a CGL only where there is damage to something other than the structure the contractor was hired to build. Instead, the appellate court held that "'property damage' occurs when one component (here, the faulty foundation) of a finished product (the house) damages another component." The court noted that the complaint alleged that the faulty workmanship "created an unsafe condition, causing a potentially deadly collapse of the residence." While the appellate court noted that the allegations were ambiguous as to the nature of the damages flowing from the faulty foundation, the allegations that the house was "unsafe to even enter" were sufficient to put the insurer "on notice that more than the foundation itself was affected by the faulty workmanship and that the [homeowners] were alleging loss of use of their property."

Forrest Construction may allow policyholders to assert that allegations of "an unsafe condition" or "fear of failure" of one part (or all) of a structure arising from another allegedly defective part are sufficient to satisfy the "property damage" requirement of a CGL policy, at least for purposes of determining whether an insurer has a duty to defend. It is important to note that in the insurance context, careful pleading regarding alleged faulty workmanship is often essential to triggering an insurer's duty to defend. It is critical that you involve your lawyer early in the process when you believe you may have a potential insurance claim under a CGL or similar policy.

By Heather Howell Wright

Follow Fundamentals Or Work Without Pay

We periodically choose to highlight a case in this newsletter that illustrates the fundamental concept that every state requires a company to register to do business in the state, and nearly every state requires a contractor, subcontractor, or designer to be licensed even to bid a project in that state or jurisdiction. California is one of those states, and an intermediate appellate court ruled recently in *Twenty-Nine Palms Enterprises Corporation v. Bardos* that the contractor for work on tribal land had to disgorge (that is, pay back) $751,995 for work it did on tribal land. Why? The contractor was not licensed when it performed the work on the casino at issue.

The case illustrates two arguments that companies sometimes make to try to get around licensing requirements, both of which generally fail. First, the contractor argued that the work was on tribal land for a tribal entity and therefore the state license requirement did not apply. The court ruled it mattered not where the work was done: no license, no pay. Second, the contractor was a sole proprietor, who owned another contractor, which was licensed, and he tried to "borrow" that license as a defense; the court disallowed borrowing the license and held that if the entity performing the work is not licensed, it cannot be paid, nor retain payments previously made under an illegal contract.

When one considers that the contractor had paid subcontractors for their work, it is easy to imagine the cost of this failure to observe the licensing statute as well over $1,000,000.

This case takes us back to the basics: check the licensing laws in a given jurisdiction; comply with them for the entity proposing the work (this can be tricky sometimes for joint ventures); be sure you renew the license timely. In many states, the penalty for working as an unlicensed entity is disgorgement of all payments under the contract and a possible misdemeanor charge from state officials. Many states do not allow a 'cure' of the failure to obtain a license or of working under an expired license, so timely renewals are as important as obtaining the original license.

By E. Mabry Rogers

Tennessee Court Rules that Liquidated Damages is an Owner "Claim" and Subject to the Strict AIA Imposed Time Limitations

Many times lawyers lecture their construction clients about the importance of meeting procedural deadlines for claims for both money and time: "Get It Right, Get It Written." Sometimes these arguments are discarded by judges or arbitrators on the basis of fairness, or the legal concepts of waiver are used to get around strict deadlines. Nonetheless, a

decision by the Tennessee Court of Appeals in *RCR Building Corp v Pinnacle Hospitality Partners* shows that these claim deadlines have teeth and may be costly if ignored.

The project involved a hotel built under a modified AIA contract. The parties agreed on a liquidated damages clause of $1,500 per day. The project was not substantially completed until 158 days after the scheduled deadline, and while not stated in the opinion, the contractor agreed that some of the delays were his fault. However, the owner continued to make progress payments without deducting any amounts for LDs, and after the completion of the project, during negotiations, the owner admitted that he owed the contractor over $600,000. However, nine months after the project's substantial completion the owner demanded that $237,000 in liquidated damages be deducted from the $600,000 due the contractor. The contractor refused to accept this deduction, and filed suit for the entire contract balance.

The trial court agreed with the owner's position, ruling that while the owner contributed to some of the delays, under the contract, the deduction of LDs was automatic, and the contractor itself waived its rights by failing to seek an extension of time using the claims procedure in the contract. The contractor appealed the decision, and the appellate court reversed the ruling.

The owner presented several arguments, all of which failed. First, the owner argued that it was entitled to LDs as a "matter of law" because the contractor failed to request an extension of time. The owner next argued that its claim for LDs was not a "Claim" and therefore not subject to Article 4.3 of the AIA A201 General Conditions ("claims by either party must be initiated within 21 days after occurrence of the event giving rise to such claim") and Article 4.3.11 (strict compliance with Article 4.3 shall be a "condition precedent to the commencement of a dispute resolution proceeding concerning any claim"). Finally, the owner argued that going through the formal process of a "Claim" would have been fruitless because it was a "simple case of math."

The court rejected all of the owner's arguments and ruled that any claim for LDs, even if otherwise substantially valid, was not proper because the owner delayed making a claim under the contract. The court noted: "we cannot excuse the owner from compliance with the claims procedure simply because it now contends that it would have been a waste of time."

The individuals in charge of a project, whether for the owner, contractor or subcontractor, must be informed – over and over again – about any deadlines for notice under the terms of the contract. These days a simple email or letter may suffice. The failure to provide notice gives an easy excuse not to grant the relief requested, and as shown in the case above, that failure may be costly.

By David K. Taylor

Bradley Arant Lawyer Activities:

U.S. News recently released its "Best Law Firms" rankings for 2013. **BABC's Construction Practice Group** received a Tier One National ranking, the highest awarded, in both Construction Law and Construction Litigation. The Birmingham, Nashville, Jackson, and Washington, D.C. offices received similar recognition in the metropolitan rankings.

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

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

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

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

Brian Rowlson served as panelist on the ABC Carolinas lien law seminar on February 28, 2013, explaining recent changes to North Carolina's mechanics' lien law statutes effective April 1, 2013.

Jonathan Head recently attended LegalTech New York, the largest national trade show for lawyers doing electronic discovery, and the service and product suppliers that support them.

Lewis Rhodes recently spoke at the ABC Carolinas Charlotte luncheon about current issues and trends in the federal government contracting market.

David Taylor, as current President of the Tennessee Association of Construction Counsel, chaired the group's spring meeting in Memphis on May 10 and also spoke on "Ethical Issues facing Construction Lawyers."

Russ Morgan was recently featured in the "Q&A Keys to successful crisis communications" in the NashvilleBizBlog. Russ was interviewed after a recent seminar entitled "Crisis Communications in a World of Instant Media."

Aron Beezley authored an article in January 2013 for the Bloomberg BNA Federal Contracts Report entitled "Recent Court of Federal Clams Bid Protest Decision Highlights

Little-Known Issues That Exist When Contracting With The U.S. Postal Service".

Ryan Beaver and **Monica Wilson** co-authored an article for Construction Executive magazine entitled "Contractual Modifications for a Changing Marketplace".

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

Eric Frechtel recently taught a seminar at the Mechanical Contractors Association of America's Advanced Institute for Project Management in Austin, Texas.

David Taylor and **Bryan Thomas** gave a presentation to the Middle Tennessee Chapter of ABC on April 9 entitled "Tennessee Law Update and Retainage".

Eric Rechtel, Steve Pozefsky, and **Aron Beezley** wrote an article for the June/July 2013 issue of *Federal Construction Magazine* on the U.S. Court of Federal Claims' recent decision in *Miles Construction LLC v. United States.*

David Pugh moderated a panel of speakers on the topic of Trends in Major Land Development at the ABC BizCon Business Development Conference in Ft. Lauderdale on February 19-20. David was also recently appointed to serve a two year term on the ABC's National Board of Directors.

Axel Bolvig, **Stanley Bynum**, **Keith Covington**, and **Arlan Lewis** were recently recognized by *Birmingham's Legal Leaders* as "Top Rated Lawyers." This list, a partnership between Martindale-Hubbell® and ALM, recognizes attorneys based on their AV-Preeminent® Ratings.

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

Eric Frechtel, **Steve Pozefsky**, and **Aron Beezley** authored an article entitled "The Gutting of The Veterans First Contracting Program?" for the January/February 2013 edition of Federal Construction Magazine.

David Taylor and **Bryan Thomas** recently gave a presentation at the 12th Annual Tennessee Commercial Real Estate Seminar on May 1 on default termination entitled "Terminating your Contractor: the Nuclear Option".

Ryan Beaver and **Monica Wilson** recently co-authored an article in the Charlotte Business Journal entitled "Meeting Our Road Needs," addressing the challenges and opportunities for the construction industry to meet North Carolina's growing infrastructure needs.

David Taylor will be speaking to the Tennessee Municipal Lawyer's Association in Memphis on June 24 on "Avoiding Construction Disputes".

Eric Frechtel, **Steven Pozefsky**, and **Aron Beezley** published for the February/March 2013 issue of *Federal Construction Magazine* an article on key small business provisions of the National Defense Authorization Act of 2013.

Jim Archibald and **Luke Martin** will speak at a construction seminar on July 18 in Birmingham on "Understanding Bonding and Insurance Issues in Construction."

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

The Construction Practice Group recently hosted the 2013 Construction Seminar entitled *Getting Paid on a Construction Project*. The seminars, held on May 3 in Birmingham, May 17 in Nashville, May 24 in Jackson, and May 31 in Charlotte, were taught by attorneys in the practice group. Thanks to all those who attended. We hope that it provided you with valuable tools to assist you on current and future projects.

An electronic copy of this newsletter, as well as prior editions, can be found on the BABC website at www.babc.com/construction_and_procurement.

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

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James F. Archibald, III, Attorney ..... (205) 521-8520 ..... jarchibald@babc.com
David H. Bashford (Charlotte), Attorney ..... (704) 338-6001 ..... dbashford@babc.com
Charlie Baxley, Attorney ..... (205) 521-8420 ..... cbaxley@babc.com
Ryan Beaver (Charlotte), Attorney ..... (704) 338-6038 ..... rbeaver@babc.com
Aron Beezley (Washington, D.C.), Attorney ..... (202) 719-8254 ..... abeezley@babc.com
Axel Bolvig, III, Attorney ..... (205) 521-8337 ..... abolvig@babc.com
Abby Brown, Construction Researcher ..... (205) 521-8511 ..... cpgrecords@babc.com
Stanley D. Bynum, Attorney ..... (205) 521-8000 ..... sbynum@babc.com
Robert J. Campbell, Attorney ..... (205) 521-8975 ..... rjcampbell@babc.com
Jonathan Cobb, Attorney ..... (205) 521-8614 ..... jcobb@babc.com
F. Keith Covington, Attorney ..... (205) 521-8148 ..... kcovington@babc.com
Jeff Dalton, Legal Assistant ..... (205) 521-8804 ..... jdalton@babc.com
Joel Eckert (Nashville), Attorney ..... (615) 252 4640 ..... jeckert@babc.com
Eric A. Frechtel (Washington, D.C.), Attorney ..... (202) 719-8249 ..... efrechtel@babc.com
Ralph Germany (Jackson), Attorney ..... (601) 592-9963 ..... rgermany@babc.com
Daniel Golden (Washington, D.C.), Attorney ..... (202) 719-8398 ..... dgolden@babc.com
John Mark Goodman, Attorney ..... (205) 521-8231 ..... jmgoodman@babc.com
John W. Hargrove, Attorney ..... (205) 521-8343 ..... jhargrove@babc.com
Jonathan B. Head, Attorney ..... (205) 521-8054 ..... jhead@babc.com
Anne Henderson, Legal Assistant ..... (205) 521-8371 ..... ahenderson@babc.com
Michael P. Huff (Huntsville), Attorney ..... (256) 517-5111 ..... mhuff@babc.com
Rick Humbracht (Nashville), Attorney ..... (615) 252-2371 ..... rhumbracht@babc.com
Aman Kahlon (Washington, D.C.) Attorney ..... (202) 719-8230 ..... akahlon@babc.com
Michael W. Knapp (Charlotte), Attorney ..... (704) 338-6004 ..... mknapp@babc.com
Michael S. Koplan (Washington, D.C.), Attorney ..... (202) 719-8251 ..... mkoplan@babc.com
Alex B. Leath, Attorney ..... (205) 521-8899 ..... aleath@babc.com
Arlan D. Lewis, Attorney ..... (205) 521-8131 ..... alewis@babc.com
Tom Lynch (Washington, D.C.), Attorney ..... (202) 719-8216 ..... tlynch@babc.com
Luke Martin, Attorney ..... (205) 521-8570 ..... lumartin@babc.com
Wilson Nash, Attorney ..... (205) 521-8180 ..... wnash@babc.com
David W. Owen, Attorney ..... (205) 521-8333 ..... dowen@babc.com
Emily Oyama, Construction Researcher ..... (205) 521-8504 ..... eoyama@babc.com
Douglas L. Patin (Washington, D.C.), Attorney ..... (202) 719-8241 ..... dpatin@babc.com
Vesco Petrov, Attorney ..... (205) 521-8102 ..... vpetrov@babc.com
Steven A. Pozefsky (Washington, D.C.), Attorney ..... (202) 719-8210 ..... spozefsky@babc.com
J. David Pugh, Attorney ..... (205) 521-8314 ..... dpugh@babc.com
Bill Purdy (Jackson), Attorney ..... (601) 592-9962 ..... bpurdy@babc.com
Alex Purvis (Jackson), Attorney ..... (601) 592-9940 ..... apurvis@babc.com
Jeremiah S. Regan (Washington, D.C.), Attorney ..... (202) 719-8221 ..... jregan@babc.com
Lewis P. Rhodes (Washington, D.C.), Attorney ..... (202) 719-8208 ..... lrhodes@babc.com
E. Mabry Rogers, Attorney ..... (205) 521-8225 ..... mrogers@babc.com
Walter J. Sears III, Attorney ..... (205) 521-8202 ..... wsears@babc.com
J. Christopher Selman, Attorney ..... (205) 521-8181 ..... cselman@babc.com
Eric W. Smith (Nashville), Attorney ..... (615) 252-2381 ..... esmith@babc.com
Frederic L. Smith, Attorney ..... (205) 521-8486 ..... fsmith@babc.com
Michele Smith, Legal Assistant ..... (205) 521-8347 ..... msmith@babc.com
Winston Smith, Legal Assistant ..... (205) 521-8756 ..... wsmith@babc.com
H. Harold Stephens (Huntsville), Attorney ..... (256) 517-5130 ..... hstephens@babc.com
Robert J. Symon (Washington, D.C.), Attorney ..... (202) 719-8294 ..... rsymon@babc.com
Bethany Tarpley (Jackson), Attorney ..... (601) 592-9955 ..... btarpley@babc.com
David K. Taylor (Nashville), Attorney ..... (615) 252-2396 ..... dtaylor@babc.com
Darrell Clay Tucker, II, Attorney ..... (205) 521-8356 ..... dtucker@babc.com
D. Bryan Thomas (Nashville), Attorney ..... (615) 252-2318 ..... dbthomas@babc.com
C. Samuel Todd, Attorney ..... (205 521-8437 ..... stodd@babc.com
Paul S. Ware, Attorney ..... (205) 521-8624 ..... pware@babc.com
James Warmoth (Charlotte), Attorney ..... (704) 338-6211 ..... jwarmoth@babc.com
Loletha Washington, Legal Assistant ..... (205) 521-8716 ..... lwashington@babc.com
Monica L. Wilson (Charlotte), Attorney ..... (704) 338-6030 ..... mwilson@babc.com

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BRADLEY ARANT BOULT CUMMINGS LLP **Third Quarter 2013**

CONSTRUCTION AND PROCUREMENT LAW NEWS

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

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David H. Bashford (c)
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D. Bryan Thomas (n)
C. Samuel Todd
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Paul S. Ware
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Construction Defects: Navigating the Tense and Precarious Situation

A recent case out of Texas reminds contractors, designers, sureties, and owners alike of two fundamental principles intertwined with any construction defect: 1) a contractor's right to receive notice and to have an opportunity to cure a defect and 2) the responsibility of the owner to preserve evidence. Failure to comply with these principles can be very costly. In this Texas case, the failure to comply cost an owner almost two million dollars.

In *Miner Dederick Construction v. Gulf Chemical and Metallurgical Corp.*, the owner of a processing facility, Gulf Chemical, discovered a leak in an expansion joint that was constructed by Miner Dederick, its contractor. Gulf Chemical invited Miner Dederick to inspect the leak and asked that Miner Dederick make the repairs required by Gulf Chemical's architect. Miner Dederick visited the site to inspect the leak, but refused to make the repairs because it claimed that the leak was the result of a defective design, not defective construction. Gulf Chemical retained another contractor to make the repairs, hired a consulting firm to investigate the cause of the leak, and informed Miner Dederick that it would seek damages. Miner Dederick requested that it be allowed on-site during the repairs so that it could investigate the construction of the expansion joint that was not visible to it in its prior visits. Gulf Chemical refused, believing it had already provided Miner Dederick notice and an opportunity to investigate and cure its defective work. The trial court agreed with Gulf Chemical's approach and issued a judgment against Miner Dederick for the damages associated with the defective construction of the expansion joint.

However, the appellate court saw the case differently, focusing instead on Gulf Chemical's failure to allow Miner Dederick to conduct a detailed inspection of the allegedly defective work as well as its duty reasonably to preserve the defective work. The appellate court considered the Owner's actions to constitute spoliation. Spoliation occurs when a) there is a duty to preserve evidence, b) the party with the obligation to preserve the evidence fails to do so, and c) the failure results in prejudice. The appellate court explained that a party has a duty to preserve relevant and material evidence when it knows or reasonably should know that a claim may be filed. Once the duty to preserve

Inside:

arises, reasonable care must be taken to preserve the evidence for inspection. If the court finds that reasonable care was not taken resulting in prejudice, it has the option of invoking any of several remedies, ranging from adverse jury instructions to barring claims.

The appellate court found that Gulf Chemical knew litigation was likely to occur with regard to the expansion joint. Before conducting the inspection and repairs, Gulf Chemical hired a consultant to determine the root cause of the leak and put Miner Dederick on notice of the defect. The appellate court concluded based on these facts that a duty had arisen requiring Gulf Chemical to exercise reasonable care to preserve evidence.

According to the appellate court, extraordinary measures to preserve the evidence were not necessary. However, Gulf Chemical's refusal to allow Miner Dederick to inspect the expansion joint during the repairs and before the inspection joint was covered in concrete was not reasonable, prejudiced Miner Dederick, and hindered its ability to present a defense. This, the court stated, constituted spoliation. The appellate court returned the matter to the trial court to determine the appropriate sanction.

The lesson from this case is to act with caution when dealing with construction defects. Given the circumstances, one must, where feasible, provide notice and an opportunity to cure the defect. While there are differences among applicable contracts and governing state laws as to what constitutes "notice' and "opportunity to cure," the principle remains constant. A party is entitled to reasonable notice and an opportunity to cure the defect. Contractors and subcontractors should insist on being given this opportunity and should document their requests. What constitutes "reasonable" will differ, depending on how urgent the problem is. Preservation will be measured, likewise, by the circumstances: is there a need to destroy the evidence in order to repair it? Must it be covered in order to repair it? Upon notice, has the contractor dragged its feet or made unreasonable inspection demands, increasing the owner's damages while awaiting repair? These factual indicators will influence what steps are "reasonable."

From an owner's or designer's perspective, if time permits, an owner should allow reasonable inspections requested by contractors, and should document all actions taken in this regard. Owners, designers, sureties, and contractors alike should always remember that notice and collaboration in the investigation may be beneficial, even if there is disagreement about financial responsibility. Moreover, it may be a breach of the contract not to provide notice, and it may be deemed "spoliation" that will bar otherwise collectible damages.

By Bryan Thomas

There's No Looking Back - Testing the Reasonableness of a Liquidated Damages Provision under Mississippi Law

Liquidated damages clauses are nothing new to construction contracts and play a major role in the day-to-day operations of the construction industry. The Mississippi Court of Appeals recently provided a refresher on the law surrounding liquidated damages provisions. In *Hovas Construction, Inc. v. Board of Trustees of Western Line Consolidated School District*, the Mississippi Court of Appeals enforced a liquidated damages provision because the court found the amount of damages prescribed by the contract to be "reasonable and proportionate to the overall costs of the project."

The Owner agreed to pay Hovas Construction, as general contractor, $450,000 for renovations and the construction of an addition to a high school in Mississippi. The contract contained a provision for liquidated damages at a specified rate of $500 for each day the project was delivered beyond the completion date. After beginning the job with little complication, Hovas was late in erecting the steel building addition because the manufacturer and supplier of the steel beams required additional time. In the end, Hovas achieved substantial completion 39 days late, resulting in $19,500 in liquidated damages, which the Owner withheld from Hovas. Hovas brought suit, asking the court to rule that the liquidated damages provision was unenforceable.

Hovas first argued that the contract's liquidated damages provision was not a reasonable estimate of the actual damages the school district would incur if the project was not delivered on time. Hovas contended that this provision was nothing more than a penalty.

In rejecting Hovas' arguments, the court reasoned that an agreement for liquidated damages will be upheld absent evidence showing that the amount of damages is "unjust or oppressive, or that the amount of damages is disproportionate to the damages that would result from the breach" of the agreement. The court reminded Hovas that oftentimes "parties agree to the payment of liquidated damages in circumstances where it is difficult to predict actual damages that may result from a breach." Relying on the parties' intent, their awareness of the contractual provision for liquidated damages, and the reasonableness

of the amount of damages, the court concluded that Hovas' arguments were without merit.

Hovas next argued that the liquidated damages provision was not enforceable because the school district did not suffer actual damages due to the delay in completion. The court disagreed, responding that "the issue of actual damages does not have an impact on the amount of liquidated damages to which the [Owner] is entitled." The concurring opinion further explained that "Mississippi apparently utilizes a prospective or front-end approach that instead focuses on the reasonableness of a liquidated-damages clause as of the time the contract was executed—not in hindsight." Applying Mississippi's prospective approach, the court concluded that because the amount of damages was reasonable at the time the contract was executed, it was enforceable.

While liquidated damages provisions are commonplace in contracts today, this case serves as a reminder that the damages prescribed must be reasonable and may not equate to a penalty. In many states, such as Mississippi, reasonableness is determined at the time the contract is entered. However, in other states, reasonableness may be determined using a retrospective approach whereby the amount of liquidated damages required in the contract is compared to the amount of damages actually incurred. Regardless of the approach used, contracting parties should attempt to arrive at a reasonable estimate of expected damages at the time of contracting if they desire the liquidated damages provision to be enforceable. Because the Owner and its designer often calculate the liquidated damages, it is wise to preserve the evidence of how the damages were estimated in foresight, in the event a challenge is leveled that the LD's are unreasonable.

By Chris Selman

Clear Trend Finds Construction Defects Satisfy "Occurrence" and "Property Damage" Requirements of CGL Policy

The insurance coverage analysis under a commercial general liability ("CGL") insurance policy begins with the "insuring agreement." The standard CGL policy provides coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage.'" The standard CGL policy further provides that the property damage must be caused by an "occurrence," which is, in turn, defined as "an accident." Many courts have held that a construction defect was not an "accident" and thus losses associated with such defects or faulty workmanship were not covered under a CGL policy. The recent trend, however, has been for many (but by no means all) courts to find that construction defects or faulty workmanship satisfy the "occurrence" and "property damage" requirements and that losses sustained as a result of such defects may be covered by a CGL policy.

Two additional states recently joined this nationwide trend of finding that claims of faulty workmanship can be covered under CGL policies. A West Virginia appellate court decided for the first time that construction defects may constitute an occurrence under a standard-form CGL policy. In addition, the Georgia Supreme Court, which had previously held that defective workmanship may constitute an occurrence, expanded CGL coverage by finding that an insured need not demonstrate damage to property or work of someone other than the insured in order the satisfy the "occurrence" requirement.

West Virginia

In *Cherrington v. Erie Insurance Prop. & Cas. Co.*, West Virginia joined the growing majority of states recognizing CGL coverage for defective workmanship. The state appellate court acknowledged in *Cherrington* that it was influenced by the trend of other states finding CGL coverage for defective workmanship and overruled several prior cases (decided between 1999 and 2005) that had reached the opposite conclusion.

Lisbeth Cherrington entered into a contract with The Pinnacle Group, Inc. ("Pinnacle"), for the construction of a home. Pinnacle had a CGL insurance policy issued by Erie Insurance Property and Casualty Company ("Erie"). After the home was completed, Cherrington alleged numerous defects, including an uneven concrete floor, water infiltration through the roof and chimney joint; a sagging support beam; and numerous cracks in the drywall throughout the house. Cherrington sued Pinnacle for negligent construction. Erie denied coverage to Pinnacle, and Pinnacle filed a third-party complaint seeking a declaration of coverage. The trial court ruled in favor of Erie, finding there was no "occurrence" or "accident" that had caused the damages.

On appeal, the appellate court reversed. After discussing the recent trend in "occurrence" decisions and the policy language defining "occurrence" as an "accident," the court found that Pinnacle did not

intentionally construct a defective house: "Common sense dictates that had Pinnacle expected or foreseen the allegedly shoddy workmanship its subcontractors were destined to perform, Pinnacle would not have hired them in the first place. . . To find otherwise would suggest that Pinnacle deliberately sabotaged the very same construction project it worked so diligently to obtain at the risk of jeopardizing its professional name and business reputation in the process." As a result, Pinnacle's faulty workmanship, including the faulty workmanship of its subcontractors, was an "accident" and thus an "occurrence" under the CGL policy.

Georgia

In *Taylor Morrison Services, Inc. v. HDI-Gerling America Insurance Co.*, the Georgia Supreme Court answered two certified questions from the Eleventh Circuit regarding the interpretation of "occurrence" and "property damage" under a CGL policy under Georgia law: (1) whether Georgia law requires damage to property other than the insured's work for an "occurrence" to exist; and (2) if not, whether the "occurrence" requirement may be satisfied by claims for fraud or breach of warranty. The *Taylor Morrison* court held that defective construction can be an "occurrence," even without damage to property other than the work or property of the insured. The court also determined that while a fraud claim, with its intent element, likely would not constitute an "occurrence," a breach of warranty claim could be an "occurrence" sufficient to trigger coverage under a CGL.

Taylor Morrison, the insured, was a homebuilder that had been sued in a class action by more than 400 homeowners in California who alleged that the concrete foundations of their homes were improperly constructed. The class complaint alleged that the faulty foundations caused "tangible physical damage" to the homes, including "water intrusion, cracks in the floors and driveways, and warped and buckling flooring." HDI-Gerling America Insurance Company initially defended Taylor Morrison in the underlying construction defect action, subject to a reservation of rights.

HDI-Gerling then filed suit in federal trial court based in Georgia seeking a declaration that Taylor Morrison had no coverage under the policy. Even though the underlying construction defect lawsuit was pending in California, Georgia law applied to the interpretation of the policy because the policy at issue had been delivered to Taylor Morrison in Georgia. The trial court agreed with HDI-Gerling, ruling that there was no "occurrence" because the only property damage alleged was damage to the insured's work – the homes constructed by Taylor Morrison. On appeal, the federal appellate court sent the questions to the Georgia Supreme Court.

In addressing whether the insured's own defective construction can be an "occurrence," the Georgia Supreme Court noted that the insurance contract defined "occurrence" as an "accident." In a previous case, the court had held that faulty workmanship can constitute an "occurrence." In this previous case, however, the allegedly faulty workmanship had caused damage to "other property" – property other than the property of the insured.

In *Taylor Morrison*, there was no alleged damage to "other property." Rather, the damaged property was the work of the insured. The court considered the definition and usage of the term "accident" and found "the word is not used usually and commonly to convey information about the nature or extent of injuries worked by such a happening, much less the identity of the person whose interests are injured." Applying this analysis, the court found that the "occurrence" requirement of the CGL "does not require damage to the property or work of someone other than the insured."

As to the second certified question, regarding whether fraud or breach of warranty can constitute an occurrence, the court again focused its analysis on interpretation of the word "accident." Because the elements of fraud require an intentional act, the court found that "[i]t is difficult for us to conceive of a circumstance in which a claim of fraud might properly be premised upon 'bodily injury' or 'property damage' that was caused by an 'accident.'" As to a claim for breach of warranty, however, the court noted that while the making of a warranty is an intentional act, the breach of warranty may be committed negligently. The Georgia Supreme Court concluded that faulty workmanship may constitute such a breach of warranty, and therefore could be an accident or "occurrence."

Insureds should take note of the increasing trend of courts across the country that are finding that construction defects may be covered under a CGL policy. In the *Cherrington* and *Taylor Morrison* cases, both courts acknowledged that a proper CGL coverage

analysis requires a step by step approach: First, the insured must identify property damage caused by an occurrence. Second, the insurance company must establish the applicability of any exclusions that apply. If you are confronted with a construction defect claim, consider alerting your insurance carrier(s) (for all potentially applicable time periods) as an early risk-management approach. If you investigate on your own, without notifying your carrier, you may be accused (by the carrier) of having violated various provisions of your policy.

By Heather H. Wright

New SBA Small Business Subcontracting Rule goes into Effect on August 15, 2013

The U.S. Small Business Administration ("SBA") recently issued a long-awaited final rule in 78 Fed. Reg. 42391 amending its regulations to implement certain provisions of the Small Business Jobs Act of 2010. The new regulations, which formally went into effect on August 15, 2013, will likely impact both large and small federal government contractors during both the proposal preparation and contract performance phases of the procurement process.

The final rule, which applies to all "covered contracts" (i.e., contracts for which small business subcontracting plans are required), requires prime contractors performing covered contracts, among other things, to "notify the contracting officer in writing whenever the prime contractor does not utilize a small business subcontractor used in preparing its bid or proposal during contract performance." The phrase "used in preparing the bid or proposal" is defined in the final rule to include the following situations:

(i) The offeror references the small business concern as a subcontractor in the bid or proposal or associated small business subcontracting plan;

(ii) The offeror has a subcontract or agreement in principle to subcontract with the small business concern to perform a portion of the specific contract; or

(iii) The small business concern drafted any portion of the bid or proposal or the offeror used the small business concern's pricing or cost information or technical expertise in preparing the bid or proposal, where there is written evidence (including email) of an intent or understanding that the small business concern will be awarded a subcontract for the related work if the offeror is awarded the contract.

The final rule also requires prime contractors to notify the contracting officer, in writing, if they "pay[] a reduced price to a small business subcontractor for goods and services provided for the contract or the payment to a small business subcontractor is more than 90 days past due under the terms of the subcontract[.]" The final rule states that "'[r]educed price' means a price that is less than the price agreed upon in a written, binding contractual document." The final rule further provides that prime contractors "shall include" in their written notifications to the contracting officer "the reason for the reduction in payment to or failure to pay a small business Subcontractor[.]"

Moreover, the rule clarifies that, as part of the overall performance evaluation of the prime contractor, the contracting officer is responsible for evaluating the prime contractor's compliance with its small business subcontracting plans. Among other things, the final rule makes clear that the contracting officer's review must include an evaluation of the prime contractor's written explanation for (i) failing to utilize during contract performance small business subcontractors that were used in preparing the prime contractor's proposal, and/or (ii) any reduced or untimely payments to small business subcontractors. The rule states that, if the contracting officer finds that the prime contractor "has a history of unjustified untimely or reduced payments to subcontractors," the contracting officer must "record[] the identity of the prime contractor in the Federal Awardee Performance and Integrity Information System (FAPIIS), or any successor database."

While several commentators have expressed uncertainty about how the rule will work in practice, it is clear that the SBA is serious about attempting to reform the way that certain prime contractors deal with small business subcontractors in both the proposal preparation process and during contract performance. As such, both large and small business contractors should familiarize themselves with these new regulatory provisions. If you have any questions about specific issues, contact one of the members of the CPPG or your lawyer.

By Aron C. Beezley

Florida Court Finds That Replacement Cost Insurance Coverage Includes Overhead and Profit of General Contractor

Insureds are often uncertain as to what costs are covered under their policies when a covered loss occurs. Florida's highest court recently considered, in *Trinidad v. Fla. Peninsula Ins. Co.*, whether replacement cost insurance coverage includes a general contractor's

overhead and profit. The *Trinidad* court found these costs to be within the scope of a replacement cost policy where the insured is reasonably likely to need a general contractor for the repairs.

The home of Amado Trinidad ("Trinidad") was damaged by fire in 2008. Shortly thereafter he filed a claim with his homeowner's insurance company, Florida Peninsula Insurance Company ("Florida Peninsula"), though Trinidad had elected not to repair the home. Florida Peninsula admitted coverage and made a payment on a claim for the cost of the repairs. However, Florida Peninsula withheld from its payment an amount for a general contractor's overhead and profit. Florida Peninsula believed that, based on the language of the policy and relevant statutes, it was not liable for these amounts unless and until Trinidad made the repairs. Rejecting this viewpoint, Trinidad subsequently brought suit against Florida Peninsula for breach of its insurance policy. The matter reached the Florida Supreme Court.

The court noted that replacement cost insurance "is measured by what it would cost to replace the damaged structure on the same premises" and that it is "designed to cover the difference between what property is actually worth and what it would cost to rebuild or repair that property." The court defined overhead as "fixed costs to run the contractor's business, such as salaries, rent, utilities, and licenses" and profit as "the amount the contractor expects to earn for his services." Having defined the relevant terms, the Trinidad court's focus turned to a prior Florida appellate court opinion that had addressed a similar issue.

In that case, the court was asked to determine whether overhead and profit were included within the scope of an actual cash value policy. That court did not distinguish between overhead and profit and other costs of the repair, such as material and labor, reasonably incurred by the insured. The court in that case concluded that overhead and profit are included in the scope of an actual cash value policy "where the insured is reasonably likely to need a general contractor for repairs."

The *Trinidad* court found the earlier case instructive because of the relationship between replacement cost and actual cash value. Actual cash value is generally defined as "replacement costs minus normal depreciation." Therefore, replacement cost policies provide greater coverage because depreciation is not excluded from replacement cost coverage. Because that case had previously found the narrower actual cash value policies to include overhead and profit, the *Trinidad* court reasoned that replacement cost policies should also include such costs.

The limiting language used by the earlier decision, adopted in *Trinidad*, is important to note. A general contractor's overhead and profit are proper replacement costs only in those circumstances in which the repairs are reasonably likely to require the services of a general contractor. If only the services of an individual trade contractor, such as an electrician or plumber, are required, then only the overhead and profit of that contractor would be proper.

The *Trinidad* opinion serves as a useful guidepost for insureds that experience a covered loss under a replacement cost policy to determine what repair costs are properly payable.

By Charlie G. Baxley

Bradley Arant Lawyer Activities:

U.S. News recently released its "Best Law Firms" rankings for 2013. **BABC's Construction and Procurement Practice Group** received a Tier One National ranking, the highest awarded, in both Construction Law and Construction Litigation. The Birmingham, Nashville, Jackson, and Washington, D.C. offices received similar recognition in the metropolitan rankings.

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

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

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

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

David Taylor, as current President of the Tennessee Association of Construction Counsel, chaired the group's spring meeting in Memphis on May 10 and also spoke on "Ethical Issues facing Construction Lawyers."

An article authored by **Eric Frechtel**, **Steven Pozefsky**, and **Aron Beezley** on the importance of complying with 8(a) subcontracting limitations will be published in the August/September 2013 issue of *Federal Construction Magazine*.

David Bashford and **Monica Wilson** co-authored an article in the upcoming edition of Solar Business Focus entitled "Site Conditions on a Solar Project: Contractual Risk and Project Enforcement."

Eric Frechtel recently taught a seminar at the Mechanical Contractors Association of America's Advanced Institute for Project Management in Austin, Texas.

David Taylor and **Bryan Thomas** gave a presentation to the Middle Tennessee Chapter of ABC on April 9 entitled "Tennessee Law Update and Retainage".

Eric Frechtel, Steve Pozefsky, and **Aron Beezley** wrote an article for the June/July 2013 issue of *Federal Construction Magazine* on the U.S. Court of Federal Claims' recent decision in *Miles Construction LLC v. United States.*

Ryan Beaver and **Monica Wilson** attended the ABC of the Carolinas Summer Conference in August, where BABC was a sponsor as a member of ABC Carolinas' Platinum Executive Club.

Axel Bolvig, **Stanley Bynum**, **Keith Covington**, and **Arlan Lewis** were recently recognized by *Birmingham's Legal Leaders* as "Top Rated Lawyers." This list, a partnership between Martindale-Hubbell® and ALM, recognizes attorneys based on their AV-Preeminent® Ratings.

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

Eric Frechtel, **Steve Pozefsky**, and **Aron Beezley** authored an article entitled "The Gutting of The Veterans First Contracting Program?" for the January/February 2013 edition of Federal Construction Magazine.

David Taylor and **Bryan Thomas** recently gave a presentation at the 12th Annual Tennessee Commercial Real Estate Seminar on May 1 on default termination entitled "Terminating your Contractor: the Nuclear Option".

Ryan Beaver and **Monica Wilson** recently co-authored an article in the Charlotte Business Journal entitled "Meeting Our Road Needs," addressing the challenges and opportunities for the construction industry to meet North Carolina's growing infrastructure needs.

David Taylor spoke to the Tennessee Municipal Lawyer's Association in Memphis on June 24 on "Avoiding Construction Disputes".

Luke Martin spoke at a construction seminar on July 18 in Birmingham on "Understanding Bonding and Insurance Issues in Construction."

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

BABC's Construction and Procurement Practice Group recently hosted the 2013 Construction Seminar entitled *Getting Paid on a Construction Project*. The seminars, held on May 3 in Birmingham, May 17 in Nashville, May 24 in Jackson, and May 31 in Charlotte, were led by attorneys in the practice group. Thanks to all those who attended. We hope that it provided you with valuable tools to assist you on current and future projects. A related seminar is planned for Washington D.C. in November.

Carly Miller will join the Construction and Procurement Practice Group in early September and will be working in Birmingham, AL. Carly graduated in May from Tulane Law School. We look forward to having her join our practice group.

Lisa Markman recently joined the Construction and Procurement Practice Group and is working in our Washington, D.C office. Lisa graduated in May from Washington & Lee Law School. We look forward to having her join our practice group.

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

NOTE: YOU CAN FIND THIS NEWSLETTER AND PAST NEWSLETTERS ON OUR WEBSITE. IF YOU ACCESS THIS NEWSLETTER ON OUR WEBSITE, CASE-LINKS WILL BE AVAILABLE UNTIL THE NEXT NEWSLETTER IS PUBLISHED. WE DO NOT VIEW THIS NEWSLETTER AS WRITTEN FOR ATTORNEYS BUT RATHER FOR PRACTICING MEMBERS OF THE CONSTRUCTION INDUSTRY. IF YOU OR YOUR LAWYER WOULD LIKE TO KNOW MORE INFORMATION ABOUT A PARTICULAR ARTICLE OR WOULD LIKE THE CASE CITES, YOU MAY GO TO WWW.BABC.COM/PG_CONSTRUCT.CFM OR CONTACT ANY ATTORNEY LISTED ON PAGE 9 OF THIS NEWSLETTER.

NOTES

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

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James F. Archibald, III, Attorney ..... (205) 521-8520 ..... jarchibald@babc.com
David H. Bashford (Charlotte), Attorney ..... (704) 338-6001 ..... dbashford@babc.com
Charlie Baxley, Attorney ..... (205) 521-8420 ..... cbaxley@babc.com
Ryan Beaver (Charlotte), Attorney ..... (704) 338-6038 ..... rbeaver@babc.com
Aron Beezley (Washington, D.C.), Attorney ..... (202) 719-8254 ..... abeezley@babc.com
Axel Bolvig, III, Attorney ..... (205) 521-8337 ..... abolvig@babc.com
Abby Brown, Construction Researcher ..... (205) 521-8511 ..... cpgrecords@babc.com
Stanley D. Bynum, Attorney ..... (205) 521-8000 ..... sbynum@babc.com
Robert J. Campbell, Attorney ..... (205) 521-8975 ..... rjcampbell@babc.com
Jonathan Cobb, Attorney ..... (205) 521-8614 ..... jcobb@babc.com
F. Keith Covington, Attorney ..... (205) 521-8148 ..... kcovington@babc.com
Jeff Dalton, Legal Assistant ..... (205) 521-8804 ..... jdalton@babc.com
Joel Eckert (Nashville), Attorney ..... (615) 252 4640 ..... jeckert@babc.com
Eric A. Frechtel (Washington, D.C.), Attorney ..... (202) 719-8249 ..... efrechtel@babc.com
Ralph Germany (Jackson), Attorney ..... (601) 592-9963 ..... rgermany@babc.com
Daniel Golden (Washington, D.C.), Attorney ..... (202) 719-8398 ..... dgolden@babc.com
John Mark Goodman, Attorney ..... (205) 521-8231 ..... jmgoodman@babc.com
John W. Hargrove, Attorney ..... (205) 521-8343 ..... jhargrove@babc.com
Jonathan B. Head, Attorney ..... (205) 521-8054 ..... jhead@babc.com
Anne Henderson, Legal Assistant ..... (205) 521-8371 ..... ahenderson@babc.com
Michael P. Huff (Huntsville), Attorney ..... (256) 517-5111 ..... mhuff@babc.com
Rick Humbracht (Nashville), Attorney ..... (615) 252-2371 ..... rhumbracht@babc.com
Aman Kahlon (Washington, D.C.) Attorney ..... (202) 719-8230 ..... akahlon@babc.com
Michael W. Knapp (Charlotte), Attorney ..... (704) 338-6004 ..... mknapp@babc.com
Michael S. Koplan (Washington, D.C.), Attorney ..... (202) 719-8251 ..... mkoplan@babc.com
Alex B. Leath, Attorney ..... (205) 521-8899 ..... aleath@babc.com
Arlan D. Lewis, Attorney ..... (205) 521-8131 ..... alewis@babc.com
Tom Lynch (Washington, D.C.), Attorney ..... (202) 719-8216 ..... tlynch@babc.com
Lisa Markman (Washington, D.C), Attorney ..... (202) 719-8215 ..... lmarkman@babc.com
Luke Martin, Attorney ..... (205) 521-8570 ..... lumartin@babc.com
Carly Miller, Attorney ..... (205) 521-8919 ..... camiller@babc.com
Wilson Nash, Attorney ..... (205) 521-8180 ..... wnash@babc.com
David W. Owen, Attorney ..... (205) 521-8333 ..... dowen@babc.com
Emily Oyama, Construction Researcher ..... (205) 521-8504 ..... eoyama@babc.com
Douglas L. Patin (Washington, D.C.), Attorney ..... (202) 719-8241 ..... dpatin@babc.com
Steven A. Pozefsky (Washington, D.C.), Attorney ..... (202) 719-8210 ..... spozefsky@babc.com
J. David Pugh, Attorney ..... (205) 521-8314 ..... dpugh@babc.com
Bill Purdy (Jackson), Attorney ..... (601) 592-9962 ..... bpurdy@babc.com
Alex Purvis (Jackson), Attorney ..... (601) 592-9940 ..... apurvis@babc.com
Jeremiah S. Regan (Washington, D.C.), Attorney ..... (202) 719-8221 ..... …jregan@babc.com
E. Mabry Rogers, Attorney ..... (205) 521-8225 ..... mrogers@babc.com
Walter J. Sears III, Attorney ..... (205) 521-8202 ..... wsears@babc.com
J. Christopher Selman, Attorney ..... (205) 521-8181 ..... cselman@babc.com
Eric W. Smith (Nashville), Attorney ..... (615) 252-2381 ..... esmith@babc.com
Frederic L. Smith, Attorney ..... (205) 521-8486 ..... fsmith@babc.com
Michele Smith, Legal Assistant ..... (205) 521-8347 ..... msmith@babc.com
H. Harold Stephens (Huntsville), Attorney ..... (256) 517-5130 ..... hstephens@babc.com
Robert J. Symon (Washington, D.C.), Attorney ..... (202) 719-8294 ..... rsymon@babc.com
Bethany Tarpley (Jackson), Attorney ..... (601) 592-9955 ..... btarpley@babc.com
David K. Taylor (Nashville), Attorney ..... (615) 252-2396 ..... dtaylor@babc.com
Darrell Clay Tucker, II, Attorney ..... (205) 521-8356 ..... dtucker@babc.com
D. Bryan Thomas (Nashville), Attorney ..... (615) 252-2318 ..... dbthomas@babc.com
C. Samuel Todd, Attorney ..... (205) 521-8437 ..... stodd@babc.com
Paul S. Ware, Attorney ..... (205) 521-8624 ..... pware@babc.com
Loletha Washington, Legal Assistant ..... (205) 521-8716 ..... lwashington@babc.com
Monica L. Wilson (Charlotte), Attorney ..... (704) 338-6030 ..... mwilson@babc.com

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READER RESPONSES

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

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

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

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Bradley Arant Boult Cummings LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104

Emily Oyama
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104

BRADLEY ARANT BOULT CUMMINGS LLP **Fourth Quarter 2013**

CONSTRUCTION AND PROCUREMENT LAW NEWS

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

James F. Archibald, III
David H. Bashford (c)
Charlie Baxley
Ryan Beaver (c)
Aron Beezley (d.c.)
Axel Bolvig, III
Stanley D. Bynum
Robert J. Campbell
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D. Bryan Thomas (n)
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Darrell Clay Tucker, II
Paul S. Ware
Monica Wilson (c)

Limitations of Liability: Are they Enforceable?

A limitation of liability clause limits the amount for which the party at fault may be liable to the other party. For instance, the AIA's limitation of liability states that:

> [t]he Owner agrees that to the fullest extent permitted by law, the Architect's total liability to the Owner shall not exceed the amount of the total lump sum fee due to negligence, errors, omissions, strict liability, breach of contract or breach of warranty.

In a recent case decided by the federal appeals court that supervises trial courts in Indiana, Illinois, and Wisconsin, the court examined and applied Indiana law to enforce the above limitation language, notwithstanding the architect's own negligence in the design of a hotel. The architect designed a Homewood Suites for the Owner (in Ft. Wayne, IN) which, upon completion and before occupancy, was condemned by local code officials. It was torn down, costing the Owner $4.2 M. The architect's contract, however, was for $70,000, and the court ruled that the limitation of liability limited the Owner's recovery to $70,000, even though the limitations clause did not specifically refer to the architect's own negligence.

This result might not be applicable in every jurisdiction, but the drafting and negotiation point is clear: If one negotiates, or is confronted with, a limitation of liability clause, it may well be enforceable, even as to the party at fault. The parties should give careful consideration then to the amount of the limitation and whether it is adequate for the reasonably foreseeable damages that might arise from a party's breach or negligence, to the availability of insurance for the reasonably foreseeable events, and to the costs, to one party or the other, of increasing

Inside:

the risks of the contract by increasing (or decreasing) the damages that might be at issue.

By Mabry Rogers

Acceleration Costs for Failure Timely To Acknowledge Excusable Delay

Recently, the U.S. Civilian Board of Contract Appeals ("CBCA") in *Fluor Intercontinental, Inc., d/b/a J.A. Jones International v. Dep't of State* awarded a construction contractor damages for constructive acceleration costs incurred in connection with its performance of a U.S. Department of State ("DOS") contract for the construction of a new embassy in Haiti. This case highlights the importance of methodically maintaining project schedules and tracking and documenting all delays and costs, regardless of the contract type.

In 2005, the contractor and the DOS entered into a firm, fixed-price, design-build contract to construct a new embassy in Port-au-Prince, Haiti. The contract was to be substantially completed by July 3, 2007. Subsequently, the DOS extended the performance period, which resulted in a revised substantial completion date of January 29, 2008. Substantial completion ultimately occurred on March 31, 2008.

During the performance of the contract, the security situation in Haiti worsened. The contractor had anticipated certain security issues prior to entering into the contract and sought time extensions for excusable delays due to the unforeseen security issue.

After completing the project, the contractor filed suit in the CBCA, seeking damages for constructive acceleration, breach of the implied duty of good faith and fair dealing, and differing site conditions, among other things. The CBCA denied all of the contractor's claims, except the excusable delays claim. Excusable delays entitle a contractor to an extension of time but not compensation for the delay. The CBCA determined that the contractor was entitled to excusable delays totaling 111 days, but that the contractor already had been compensated for those days, given that the Contracting Officer previously granted the contractor 143 additional days. However, the CBCA found that the DOS's late recognition of excusable delays caused the contractor to accelerate performance. Ultimately, the CBCA found that 5% of the contractor's acceleration costs were linked to excusable delays and awarded minimal damages based on that calculation.

Although the contract at issue was a firm, fixed-price, design-build contract, the contractor was able to recover for constructive acceleration due to its methodical tracking of the schedule, excusable delays, and acceleration costs. This case thus underscores, for the contractor, the importance of closely tracking and documenting project schedules and all delays and costs, and, for the owner (or contractor faced with a subcontractor's request for time extensions), the importance of evaluating the request timely and measuring the delay "price" against an accelerating "price."

By Aron Beezley

Claim for Latent Defects Untimely, Even Though Discovered in Time under the State Statute of Limitations

An owner of a construction project has a limited amount of time to file a lawsuit for construction defects. The time limits for filing such actions can be established by law or by agreement. In a recent California appellate court case, *Brisbain Lodging, L.P. v. Webcor Builders, Inc.*, the owner of a hotel in California was precluded from pursuing its contractor for latent construction defects, because the owner did not timely file suit, even though it did not learn of the defects until after the statute of limitations had run. The court instead applied language from the parties' contract which rendered the owner's claims untimely.

All states have statutes of limitations that limit the time period for a claimant to assert construction defect claims. Depending on the state, the time limits typically range from two to 10 years from the date the claim arises. A general rule is that a claim arises when a wrongful act is done and damages arise.

A latent defect is a kind of defect where the potential claimant is not aware of its claim and thus fails to file suit within the statute of limitations. Most states have a "discovery rule" for latent defects.

Discovery rule requirements may vary among states, but, in general, discovery rules delay the accrual of a cause of action for latent defects until the defect was discovered or could have been discovered through the exercise of reasonable diligence.

The owner in *Brisbain* discovered defective plumbing below its hotel approximately five years after substantial completion. The owner notified its contractor who notified the plumbing subcontractor. The subcontractor unsuccessfully attempted to repair the defective work. The Owner then discovered that ABS pipe was used instead of cast iron as was required by code. The owner brought suit against the contractor for the defects.

According to California's "discovery rule" the owner timely filed its suit; however, the court dismissed the lawsuit for violating the statute of limitations. The contract between the owner and contractor was a 1997 AIA form contract with A201 general conditions. The contract stated that all claims accrued upon "Substantial Completion" of the project. Using substantial completion as the accrual date for the latent defects, rather than discovery, the owner failed to file its suit within the statute of limitations. The court pointed out that other states had similarly enforced this same AIA A201 provision.

The *Bisbain Lodging* opinion is a valuable reminder that when negotiating contract provisions, one should be mindful of how provisions may limit remedies otherwise available under the law.

By David W. Owen

Failure to Strictly Comply with Notice Provisions May Bar Recovery

A recent federal decision applying Iowa law confirms that a party that relies on oral representations, rather than contractual terms, does so at its own peril. In the case of *In re Central States Mechanical*, the subcontractor (Central) agreed with the prime contractor (Agra) to provide approximately twenty five million dollars of piping work for two biofuel plant projects located in Iowa. The subcontracts between Central and Agra incorporated the terms of the prime contract between Agra and the plant owner, including the general conditions and notice provisions for extra work and time extensions. Central was contractually required to submit written requests and claims for extensions of time and additional work to Agra within time periods varying from three to twenty-one days. The contract also provided that all modifications to the contract must be in writing and that a change order must be issued before beginning additional work.

During the course of the projects, Agra's designer repeatedly failed to timely provide the necessary drawings. As a result, Central was significantly delayed and required to accelerate its work. Agra also failed to timely process submitted change order requests and urged Central to perform additional work even before a formal change order was approved. Central performed the work requested, incurring over $1.1 million dollars in costs for delays, scope of work changes, and acceleration. However, Central did not comply with the contractual notice requirements and waited nearly five months later to submit its requests for additional compensation for these claims.

Central suspended its work and walked off the site following Agra's refusal to pay in full Central's pay application. Agra terminated Central and hired a replacement contractor to complete the project. Central eventually filed bankruptcy. The bankruptcy court disallowed Central's $1.1 million impact damages claim against Agra. The court instead awarded Agra $3 million needed to complete the projects due to Central's improper suspension of its work. Despite finding evidence that Agra made oral representations that payment would be allowed prior to approval of a formal change order, the bankruptcy court ruled that the parties did not waive the formal notice requirements contained in the contracts.

On appeal, the Kansas federal trial court rejected Central's arguments that the failure to comply with the notice requirements was a 1) "technical breach," 2) unenforceable due to waiver, or 3) futile. To the contrary, the court found that the parties had clearly contemplated that potential delays may occur on the complicated, design-build projects, and that strict compliance with the notice procedure was necessary to ensure efficient completion of the job. The court

recognized that written change orders may be waived in certain circumstances, but there was no definitive evidence that Agra had agreed to relax the contractual notice requirements. Even though Agra had made representations of payment during the parties' "frenzied efforts" to complete the project, these communications were insufficient to constitute an enforceable oral modification. Finally, Central's futility argument was rejected, because Agra had paid the majority of the change order requests that were timely submitted by Central. Accordingly, the trial court affirmed the bankruptcy court's ruling in favor of Agra.

Central States confirms that handshake agreements during the course of a project are not always reliable, and strict compliance with the contract is mandatory to ensure payment for work performed. Regardless of informal representations made on site, contractors, subcontractors, suppliers, and design professionals would be wise to heed the warnings articulated in *Central States* and submit their claims in writing within the timelines specified in the contract. Otherwise, these parties bear the risk of nonpayment for their hard-earned efforts.

By Brian Rowlson

U.S. Supreme Court Enforces Contractual Forum Selection Clauses

Forum selection clauses are often negotiated as part of construction contracts and allow parties to designate a specific forum for dispute resolution. Recently, the Supreme Court resolved a split among federal circuit courts and established clear guidelines on the enforceability of these clauses. At issue in the case, styled *Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas*, was the procedure available to a defendant who seeks to enforce a forum-selection clause.

The case first came before the United States District Court for the Western District of Texas on claims of breach of contract, quasi contract and violations of Texas law pursuant to a subcontract for construction work done at Fort Hood, Texas. The subcontract included a forum selection clause designating courts in Virginia as the proper forum. The court first addressed whether the plaintiff, J-Crew Management, Inc. ("J-Crew") could avoid the forum selection clause by invoking a Texas statute which makes forum selection clauses in construction contracts voidable by the party obligated to perform the construction when that construction is performed within Texas and the forum selection clause designates the courts of another state as the appropriate venue for disputes. The court held the statute inapplicable by noting that Fort Hood is a federal enclave to which state law does not apply. This issue was not addressed by either the circuit court or the Supreme Court on appeal. Therefore, it is unclear what, if any, impact this result will have on state forum selection clauses like the clause in Texas which requires venue in Texas state court for construction projects performed in Texas. The trial court's finding that Fort Hood is a federal enclave was not examined by the appellate courts.

The issue which carried the case to the Supreme Court presented itself when the defendant, Atlantic Marine Construction Co. ("Atlantic") moved the court to dismiss the action on the basis of the forum-selection clause under a federal statute which obligates district courts to dismiss an action if it is brought in the wrong venue or, if in the interest of justice, the court may transfer the case to a district in which the case could have been brought. In the alternative, Atlantic requested the court transfer the suit to Virginia under a separate federal statute which permits a district court to transfer an action for the convenience of the parties or in the interest of justice to another district in which the case could have been brought, although venue is proper in the original court. The district court noted that if the forum-selection clause had designated a state-court forum, an arbitral forum, or a forum in a foreign country, the proper remedy would be dismissal, but because the forum selection clause designated a specific federal forum, it determined a transfer analysis was the proper approach. The court noted that federal law determines when venue is proper in a federal court, and because the Western District of Texas was a proper venue under federal law, the court would not dismiss on the basis of improper venue.

The trial court next looked to whether transfer would be appropriate. The court placed the burden on the defendant, Atlantic (who had not chosen the forum initially, but had invoked the venue clause in the contract), to establish the propriety of transfer. The court determined that the private and public interests weighed in favor of retaining the case and declined to transfer the action to Virginia, notwithstanding the forum selection clause.

Atlantic appealed to the federal appeals court which supervises trial courts in Texas, which affirmed the district court decision. It stated that the result was logical because private parties should not have the power to transcend federal venue statutes that have been duly enacted by Congress and render venue improper in a district where it otherwise would be proper under congressional legislation. The Fifth Circuit also agreed with the district court's decision to place the burden on Atlantic to show the propriety of transfer.

The Supreme Court reversed the lower courts. According to the Supreme Court, the presence of a valid forum-selection clause changes the calculus for evaluating the proper venue in three ways. First, the plaintiff's choice of forum merits no weight (unlike the case where there is no forum selection clause), and the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted. Second, the district court should not consider the parties' private interests because, when parties agree to a forum-selection clause, they waive the right to challenge the preselected forum. Accordingly, private interest factors weigh entirely in favor of the preselected forum. Third, when a party bound by a forum-selection clause ignores its contractual obligation and files suit in a different forum, transfer of venue will not carry with it the original venue's choice-of-law rules—a factor that in some circumstances may affect public interest considerations. The Court remanded the case to the district court to see if any other public interest factors outweighed transfer.

Atlantic Marine establishes clear rules to enforce contractual forum-selection clauses. It ensures that parties who disregard venue selection clauses in the applicable contract will have a heavy burden to avoid the contractual venue (unless there are other considerations, such as a state law that invalidates such clauses, as is the case, for example, in Texas and Florida). Accordingly, the decision may reduce forum-selection related litigation and provide some security to parties who rely on these clauses to forecast possible litigation obligations.

By Lisa Markman

Mississippi's Stop-Notice Statute for Subcontractors Struck-down

Those performing work in Mississippi should keep an eye on continued developments regarding the validity of Mississippi's 'stop-notice' statute. A federal appellate court in *Noatex Corporation v. King Construction of Houston, LLC* recently struck down the statute as unconstitutional. The *Noatex* ruling means that subcontractors working on un-bonded private Mississippi construction projects have lost a powerful statutory remedy that allowed them effectively to suspend - for their own benefit - the prime contractor's payments from the owner. It is currently unknown whether the *Noatex* decision will be appealed to the U.S. Supreme Court.

Prior to the *Noatex* decision, Mississippi law allowed a subcontractor on un-bonded private Mississippi construction projects the right to issue a notice (commonly referred to as a "stop-notice") to the project owner of amounts claimed to be owed by the prime contractor and asserting the right to have this amount withheld from future payments to the prime contractor. Upon receipt of a stop-notice the owner was left at risk of double payment if the owner failed to withhold the claimed amount out of future payments to the prime contractor. In *Noatex*, the federal appeals court ruled that this statute was unconstitutional because it allowed the prime contractors' project earnings to be withheld without due process.

In *Noatex*, King Construction of Houston, LLC ("Subcontractor") agreed to perform work for Noatex Corporation ("Prime Contractor") on a project for Auto Parts Manufacturing Mississippi ("Owner"). A dispute arose between the Prime Contractor and

Subcontractor. The Subcontractor issued a stop-notice to the Owner claiming to be owed $260,410.15. As a result, the Owner suspended all payments to the Prime Contractor. At the point when the Subcontractor issued the stop-notice to the Owner, no court ruling or arbitration award had established whether the Prime Contractor actually owed the amount the Subcontractor claimed it was owed.

In response to the stop-notice, the Prime Contractor filed suit against the Subcontractor claiming, among other things, that the Mississippi stop-notice statute was unconstitutional because it allowed subcontractors to seize prime contractors' project earnings without due process of law. Upon appeal, the appellate court agreed that the statute was unconstitutional. The court noted that the following facts were instrumental in its decision:

(i) The stop-notice statute did not require any hearing before the stop-notice was issued or went into effect;
(ii) the Subcontractor did not have to provide an affidavit supporting its entitlement to the amount claimed;
(iii) the statute did not require the Subcontractor to post a bond to stand as security; and
(iv) the statute did not require any showing of extraordinary circumstances that would justify the seizure.

The *Noatex* decision has drawn significant attention in the Mississippi construction community. Various industry groups are investigating what if anything will be done in terms of legislative action to address the court's ruling. In addition, it is unknown at this point whether the decision will be appealed to the U.S. Supreme Court. For now, please contact your present counsel or any of the construction lawyers in our Jackson, MS office if you are currently performing work under, or negotiating to perform work under, a contract for projects in Mississippi and have questions regarding this issue. Moreover, for work in other states that provide a "stop notice" remedy to subcontractors, this decision provides cause for examining the constitutionality of the particular state law provisions to determine whether a "due process" challenge may be appropriate for enforcement of that powerful tool.

By Ralph Germany

Construction Industry Employers and the Play-or-Pay Penalties under the Affordable Care Act

Beginning in 2015, "applicable large employers" will become subject to the "shared responsibility payments" (sometimes called "play-or-pay" penalties) under the Affordable Care Act ("ACA") as well as related mandatory reporting requirements. These employers may be subject to penalties if they do not offer the required minimum essential coverage or even if they offer such coverage but have employees who are certified as eligible for premium tax credits or cost-sharing reductions. However, employees are generally not eligible for the premium tax credits or cost-sharing reductions if the coverage meets the affordability and minimum value requirements under ACA.

Who is an Applicable Large Employer?

An "applicable large employer" is defined under ACA as one that employed an average of at least 50 full-time employees, including full-time equivalent employees, on business days during the preceding calendar year. Accordingly, the number of employees during 2014 will determine the status of an employer as an applicable large employer for purposes of the play-or-pay penalties in 2015.

A "full-time employee" under ACA is generally one who works at least 30 hours per week. "Full-time equivalent employees" are determined by taking the number of hours of paid service in a month and dividing by 120. To determine "applicable large employer" status for play-or-pay purposes in 2015, an employer should, for each month in 2014, calculate its number of full-time employees and full-time equivalent employees.

If the average monthly result is less than 50, the employer is not an applicable large employer for 2015. If the average monthly result is 50 or more, the employer will be subject to the play-or-pay penalties unless the seasonal worker exception applies.

What is the Seasonal Worker Exception?

ACA contains an exception for employers with seasonal workers, which are common in the construction industry. Seasonal employees perform services on a seasonal basis where, ordinarily, the employment pertains to, or is of the kind exclusively performed at, certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. The seasonal employee exception provides that an employer will not be considered to employ more than 50 full-time employees if (1) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and (2) the employees in excess of 50 during such period were seasonal workers. If the seasonal employee exception does not apply, the employer will be an applicable large employer for 2015.

If you have questions about the new regulations, please contact any of the attorneys in the Construction or Employee Benefits & Executive Compensation groups at Bradley Arant Boult Cummings LLP.

By Marc Bussone

Bradley Arant Lawyer Activities:

David Pugh Appointed to ABC National Board of Directors

David Pugh was recently appointed to serve on the National Board of Directors for the Associated Builders and Contractors ("ABC"). David has worked tirelessly for this organization since 2008, when he began as a Board member for the ABC Alabama Chapter.

Jay Reed, President of ABC Alabama, had this to say of David's role in ABC:

> *David's leadership role in our association has been a key part of our success. His background represents the real face of ABC and what we stand for. Both the contractor and the associate member share an equal voice. David's appointment to the Executive Committee is a testament to our representing the entire industry.*

Fellow board member, and outgoing Chairman for the Alabama chapter's board of directors Bruce Taylor, who serves as President of Marathon Electrical Contractors, Inc., was also very complimentary of David's hard work within ABC:

> *David's strong points have been extremely important to the Board of Directors over the past few years. His knowledge of our industry made him the perfect fit for our Executive Committee. He brings leadership, construction experience and contract law experience to the table. All of these traits have proven invaluable as we raise the association's political presence in Montgomery and DC.*

U.S. News recently released its "Best Law Firms" rankings for 2013. **BABC's Construction and Procurement Practice Group** received a Tier One National ranking, the highest awarded, in both Construction Law and Construction Litigation. The Birmingham, Nashville, Jackson, and Washington, D.C. offices received similar recognition in the metropolitan rankings.

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

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

Mabry Rogers and **David Taylor** were recognized by *Best Lawyers in America* in the areas of Arbitration and Mediation for 2013. **Keith Covington** was also recognized in the area of Employment Law – Management.

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

Bill Purdy and **David Taylor** were named *Mid-South Super Lawyers* for 2013 in the area of Construction Litigation. In addition, **Alex Purvis** was named a *Mid-South Rising Star* for 2013 in the area of Insurance Coverage.

Keith Covington taught a client seminar on December 3 on "Modern Communications: Perils and Pitfalls of Email Communications".

Jim Archibald and **Eric Frechtel** led a panel discussion at the Construction SuperConference in San Francisco entitled "The Government's Duty of Good Faith and Fair Dealing: The Bell Tolls for Thee?"

David Taylor, as current President of the Tennessee Association of Construction Counsel, chaired the group's spring meeting in Memphis on May 10 and also spoke on "Ethical Issues facing Construction Lawyers."

Ryan Beaver, **Brian Rowlson**, and **Monica Wilson** attended the ABC of the Carolinas Excellence in Construction Awards Banquet on November 21 in Charlotte. Monica presented awards at the ceremony as co-chair of the Excellence in Construction Committee.

An article authored by **Eric Frechtel**, **Steven Pozefsky**, and **Aron Beezley** on the importance of complying with 8(a) subcontracting limitations was published in the August/September 2013 issue of *Federal Construction Magazine*.

David Bashford and **Monica Wilson** recently co-authored an article published in the December 2013 edition of Solar Business Focus entitled "Management of a Utility-Scale Solar Project: Contract by Communication."

Mabry Rogers, **Bill Purdy**, and **Doug Patin** were recently named to *The International Who's Who of Business Lawyers 2013*. The list identifies the top legal practitioners in the world in 32 areas of business and commercial law. All three were recognized in the area of Construction Law.

Monica Wilson attended the 2013 Energy Summit hosted by the Charlotte Chamber of Commerce, focusing on the roles that clean and safe energy, technology, and the government play in the future of the industry.

In July **Jim Archibald** was selected to serve as Vice President of the Alabama State Bar's Section on the Construction Industry.

David Taylor spoke in San Diego to the ICSC Legal Conference on "Using Arbitration in Commercial Real Estate disputes"

Ryan Beaver and **Monica Wilson** attended the ABC of the Carolinas Summer Conference in August, where BABC was a sponsor as a member of ABC Carolinas' Platinum Executive Club.

An article authored by **Eric Frechtel**, **Steven Pozefsky** and **Aron Beezley** on a proposed bill that would move the VA SDVOSB certification function to the Small Business Administration was published in the October/November 2013 issue of *Federal Construction Magazine*.

Axel Bolvig, **Stanley Bynum**, **Keith Covington**, and **Arlan Lewis** were recently recognized by *Birmingham's Legal Leaders* as "Top Rated Lawyers." This list, a partnership between Martindale-Hubbell® and ALM, recognizes attorneys based on their AV-Preeminent® Ratings.

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

Monica Wilson attended The Solar Power: "3-Day MBA" program hosted by Green Power Academy, focusing on key issues and trends affecting the solar business worldwide.

David Taylor and **Bryan Thomas** spoke at the National Meeting of the Construction Specification's Insitute held in Nashville on "The Nuclear Option: Terminating a Contractor for Cause".

Luke Martin spoke to construction project managers for a client's project management group on documentation on the construction project in December.

Ryan Beaver and **Monica Wilson** recently co-authored an article in the Charlotte Business Journal entitled "Meeting Our Road Needs," addressing the challenges and opportunities for the construction industry to meet North Carolina's growing infrastructure needs.

Charlie Baxley participated in the ABC of Alabama's 2013 Future Leaders in Construction class, a four day leadership training seminar attended by representatives of various construction industry companies.

David Taylor spoke to the Tennessee Municipal Lawyer's Association in Memphis on June 24 on "Avoiding Construction Disputes".

Luke Martin spoke at a construction seminar on July 18 in Birmingham on "Understanding Bonding and Insurance Issues in Construction."

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

Mabry Rogers, **Wally Sears**, **Bob Symon**, **Bryan Thomas**, and **Monica Wilson** taught the client seminar Contracts 401: Advanced Discussion of EPC Contracts in an Industrial, Power Plant, or Commercial Design and Construction Context on November 8 in Washington, D.C.

We would like to welcome two new associates to our practice group, **Carly Miller** and **Lisa Markman**. Carly, who graduated in May from Tulane Law School, is working in our Birmingham, AL office. Lisa, who graduated in May from Washington & Lee Law School, is working in our Washington, D.C. office. We are delighted to have both joining our practice group.

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

NOTES

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

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James F. Archibald, III, Attorney ..... (205) 521-8520 ..... jarchibald@babc.com
David H. Bashford (Charlotte), Attorney ..... (704) 338-6001 ..... dbashford@babc.com
Charlie Baxley, Attorney ..... (205) 521-8420 ..... cbaxley@babc.com
Ryan Beaver (Charlotte), Attorney ..... (704) 338-6038 ..... rbeaver@babc.com
Aron Beezley (Washington, D.C.), Attorney ..... (202) 719-8254 ..... abeezley@babc.com
Axel Bolvig, III, Attorney ..... (205) 521-8337 ..... abolvig@babc.com
Abby Brown, Construction Researcher ..... (205) 521-8511 ..... cpgrecords@babc.com
Stanley D. Bynum, Attorney ..... (205) 521-8000 ..... sbynum@babc.com
Robert J. Campbell, Attorney ..... (205) 521-8975 ..... rjcampbell@babc.com
Jonathan Cobb, Attorney ..... (205) 521-8614 ..... jcobb@babc.com
F. Keith Covington, Attorney ..... (205) 521-8148 ..... kcovington@babc.com
Jeff Dalton, Legal Assistant ..... (205) 521-8804 ..... jdalton@babc.com
Joel Eckert (Nashville), Attorney ..... (615) 252 4640 ..... jeckert@babc.com
Eric A. Frechtel (Washington, D.C.), Attorney ..... (202) 719-8249 ..... efrechtel@babc.com
Ralph Germany (Jackson), Attorney ..... (601) 592-9963 ..... rgermany@babc.com
Daniel Golden (Washington, D.C.), Attorney ..... (202) 719-8398 ..... dgolden@babc.com
John Mark Goodman, Attorney ..... (205) 521-8231 ..... jmgoodman@babc.com
John W. Hargrove, Attorney ..... (205) 521-8343 ..... jhargrove@babc.com
Jonathan B. Head, Attorney ..... (205) 521-8054 ..... jhead@babc.com
Anne Henderson, Legal Assistant ..... (205) 521-8371 ..... ahenderson@babc.com
Michael P. Huff (Huntsville), Attorney ..... (256) 517-5111 ..... mhuff@babc.com
Rick Humbracht (Nashville), Attorney ..... (615) 252-2371 ..... rhumbracht@babc.com
Michael W. Knapp (Charlotte), Attorney ..... (704) 338-6004 ..... mknapp@babc.com
Michael S. Koplan (Washington, D.C.), Attorney ..... (202) 719-8251 ..... mkoplan@babc.com
Alex B. Leath, Attorney ..... (205) 521-8899 ..... aleath@babc.com
Arlan D. Lewis, Attorney ..... (205) 521-8131 ..... alewis@babc.com
Tom Lynch (Washington, D.C.), Attorney ..... (202) 719-8216 ..... tlynch@babc.com
Lisa Markman (Washington, D.C), Attorney ..... (202) 719-8215 ..... lmarkman@babc.com
Luke Martin, Attorney ..... (205) 521-8570 ..... lumartin@babc.com
Carly Miller, Attorney ..... (205) 521-8919 ..... camiller@babc.com
Wilson Nash, Attorney ..... (205) 521-8180 ..... wnash@babc.com
David W. Owen, Attorney ..... (205) 521-8333 ..... dowen@babc.com
Emily Oyama, Construction Researcher ..... (205) 521-8504 ..... eoyama@babc.com
Douglas L. Patin (Washington, D.C.), Attorney ..... (202) 719-8241 ..... dpatin@babc.com
Steven A. Pozefsky (Washington, D.C.), Attorney ..... (202) 719-8210 ..... spozefsky@babc.com
J. David Pugh, Attorney ..... (205) 521-8314 ..... dpugh@babc.com
Bill Purdy (Jackson), Attorney ..... (601) 592-9962 ..... bpurdy@babc.com
Alex Purvis (Jackson), Attorney ..... (601) 592-9940 ..... apurvis@babc.com
Jeremiah S. Regan (Washington, D.C.), Attorney ..... (202) 719-8221 ..... jregan@babc.com
E. Mabry Rogers, Attorney ..... (205) 521-8225 ..... mrogers@babc.com
Walter J. Sears III, Attorney ..... (205) 521-8202 ..... wsears@babc.com
J. Christopher Selman, Attorney ..... (205) 521-8181 ..... cselman@babc.com
Eric W. Smith (Nashville), Attorney ..... (615) 252-2381 ..... esmith@babc.com
Frederic L. Smith, Attorney ..... (205) 521-8486 ..... fsmith@babc.com
Michele Smith, Legal Assistant ..... (205) 521-8347 ..... msmith@babc.com
H. Harold Stephens (Huntsville), Attorney ..... (256) 517-5130 ..... hstephens@babc.com
Robert J. Symon (Washington, D.C.), Attorney ..... (202) 719-8294 ..... rsymon@babc.com
David K. Taylor (Nashville), Attorney ..... (615) 252-2396 ..... dtaylor@babc.com
Darrell Clay Tucker, II, Attorney ..... (205) 521-8356 ..... dtucker@babc.com
D. Bryan Thomas (Nashville), Attorney ..... (615) 252-2318 ..... dbthomas@babc.com
C. Samuel Todd, Attorney ..... (205) 521-8437 ..... stodd@babc.com
Paul S. Ware, Attorney ..... (205) 521-8624 ..... pware@babc.com
Loletha Washington, Legal Assistant ..... (205) 521-8716 ..... lwashington@babc.com
Monica L. Wilson (Charlotte), Attorney ..... (704) 338-6030 ..... mwilson@babc.com

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