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CONSTRUCTION AND PROCUREMENT LAW NEWS

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

Government Knowledge of Mistake Required to Establish a Mistake-Based Contract Reformation Claim

Recently, in *Appeal of Lee's Ford Dock, Inc.*, the Armed Services Board of Contract Appeals ("ASBCA") denied a contractor's claim for reformation of a lease agreement based on an alleged "mutual mistake" of fact. The ASBCA's decision is noteworthy because, in denying the contractor's claim, the ASBCA reiterated that, in order for a contractor to prevail on a mistake-based reformation claim, it must show that the government knew of the mistake at the time of the contract award.

The government and the contractor, Lee's Ford Dock, Inc. ("LFD"), entered into a series of leases for commercial concession purposes at the Wolf Creek Dam-Lake Cumberland project in Kentucky. Of particular relevance here, the leases contained a clause that states:

> RIGHT TO ENTER AND FLOOD
>
> The right is reserved to the United States, its officer[s], agents, and employees to enter upon the premises at any time and for any purpose necessary or convenient in connection with Government purposes; to make inspections; to remove timber or other material, except property of the Lessee; to flood the premises; to manipulate the level of the lake or pool in any manner whatsoever; and/or to make any other use of the lands as may be necessary in connection with project purposes, and the Lessee shall have no claim for damages on account thereof against the United States or any officer, agent, or employee thereof.

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Thereafter, in 2007, the government decided to lower the level of Lake Cumberland. The government's decision in this regard was made in response to a series of reviews that found that the Wolf Creek Dam was at risk for failure if the current level of the Lake was maintained.

In 2013, LFD filed with the government a certified claim, seeking reformation of the lease based on an alleged mutual mistake of fact. According to LFD, "the very purpose of the Lease contract [was] frustrated by the … six-year drawdown of Lake Cumberland caused by the [government's] decision to lower the Lake on January 19, 2007." The government denied LFD's claim, and LFD appealed the denial to the ASBCA.

In its Complaint, LFD sought reformation of the "RIGHT TO ENTER AND FLOOD" clause contained in the leases. The government filed a motion for summary judgment against LFD. After considering the parties' arguments, the ASBCA sided with the government. At the outset of its analysis, the ASBCA set forth the standard for obtaining reformation based on a mutual mistake:

> Reformation of a written agreement on the ground of mutual mistake is an extraordinary remedy, and is available only upon presentation of satisfactory proof of four elements: (1) The parties to the contract were mistaken in their belief regarding a fact; (2) That mistaken belief constituted a basic assumption underlying the contract; (3) The mistake had a material effect on the bargain; and (4) The contract did not put the risk of the mistake on the party seeking reformation.

The ASBCA also explained that the contractor must demonstrate that the government knew at the time of contract award that the contractor was mistaken about a material fact. The ASBCA stated: "[K]nowledge on the part of the silent party of the other party's mistake is required for reformation." The ASBCA stated:

> There is no evidence that LFD . . . ever communicated to the government that it would not enter into the Lease if the dam was not in good condition. There is absolutely no evidence that LFD made the condition of the dam an issue during contract formation.

As noted above, the ASBCA's recent decision *Lee's Ford Dock, Inc.* is noteworthy because the ASBCA reiterated that, in order for a contractor to prevail on a mistake-based reformation claim, it must show – in addition to the four elements set forth above – that the government knew of the mistake at the time of the contract award.

By Aron C. Beezley

Pressing the Reset Button on Statutes of Limitations and Statutes of Repose on Condominium Projects

A "latent" defect is a defect that is not obvious on its face and instead only comes to light over time. Latent defect claims arising out of condominium construction projects often present challenging questions regarding the timeliness of the claims that can have varying results depending upon the applicable statutory language. These questions are further complicated when defects are discovered after the condominium developer turns over control of the condominium association to unit owners. In *Henderson Square Condominium Association, v. Lab Townhomes, LLC*, the Supreme Court of Illinois addressed one of these complex statute of limitations issues.

In *Henderson*, the defendants, the developer and its contractors, sold condominium units to individual unit owners in 1996. Over time, several unit owners noticed water infiltration issues in the units, but the condominium association did not complete a formal investigation until 2009, and did not file a lawsuit until 2011. Illinois has a five-year statute of limitations period, meaning claims brought more than five years after they accrue are time barred. Illinois also follows the discovery rule, which means that a cause of action may not accrue until such time as the claimant knows or reasonably should know that that an injury has occurred and that it was wrongfully caused.

Illinois also has a 10-year statute of repose, which prevents any lawsuit from being filed more than ten years from the date the act or omission giving rise to the injury or damage occurred, regardless of when it is discovered. The statute of repose is subject to a fraudulent concealment exception, whereby a claimant who pleads and proves that fraud by the defendant(s) prevented discovery of the cause of action may proceed with his or her claim despite the expiration of the 10-year period.

In *Henderson*, the court permitted the condominium association's claim to proceed despite more than fourteen years having elapsed from the date the condominium units were sold to the date the lawsuit was filed. The court held that the association sufficiently pleaded that the defendants misrepresented and covered up the defects in the units such that the defects could not be discovered except by intrusive investigation into exterior masonry walls. As such, the statute of repose's 10-year limitation did not apply. Additionally, the court determined that initial discovery of water infiltration was not sufficient to put the condominium association or the individual unit owners on notice of the cause of action against the defendants, and the cause of action did not accrue until the 2009 report was completed. Thus, the association's claim could not be considered untimely as a matter of law.

In a separate case in New Jersey, *Palisades at Fort Lee Condo. Ass'n, Inc. v. 100 Old Palisade, LLC*, the Superior Court of New Jersey Appellate Division, took up a similarly complex statute of limitations question and also arrived at a favorable result for a condominium association plaintiff. There, contractors built an addition to an apartment complex, which was completed in 2002. The apartment building was later converted to a condominium complex. In 2005, during the conversion of the building into condominiums, the developer commissioned an engineering report, which identified some, but not all, construction defects in the condominium complex. In 2007, the condominium association completed its own engineering evaluation of the property, which revealed multiple additional construction defects in the condominiums arising out of the 2002 addition to the complex.

In 2009, the condominium association filed a lawsuit against the contractors regarding the construction defects, and the contractors sought to have the action dismissed as untimely. For contract claims, New Jersey employs a six-year statute of limitations period from the date the cause of action accrues, which generally means the date of substantial completion on construction projects. However, New Jersey also follows the discovery rule, which prevents the cause of action from accruing until the claimant discovers or should reasonably have discovered that it has a basis for a claim. The court concluded that association's claim did not accrue until the 2007 engineering evaluation was completed; thus, the association timely filed its claim in 2009.

In both of these cases, the courts arrived at similar conclusions—that sufficient facts existed to avoid dismissal of the plaintiffs' claims as untimely—but the courts arrived at the conclusion differently due to the varied facts of each case and the different statutes at issue. Statutes of limitations and statutes of repose vary across the 50 states, and subcontractors, contractors, and developers need to be aware of the distinctions that exist amongst the states and how each particular state's courts interpret and apply these statutes. You may find this is an important risk consideration to take into account when pursuing work in an unfamiliar jurisdiction.

By Aman Kahlon

So You Want to Help Rebuild Cuba?

On December 17, 2014, President Barack Obama outlined a proposal to normalize U.S. – Cuba relations and depart from a U.S. foreign policy position that has persisted for the last half century. Since that time, the U.S. embassy reopened in Havana, travel restrictions have loosened, and certain U.S. financial institutions and credit card companies have started conducting business on the island. Such rapid changes have the potential to usher in new opportunities for the U.S. construction industry and have prompted some to develop "Cuba teams" to explore a potential market that is as appealing as it is uncertain. Intrigued? Here's what you need to know.

Before proceeding, it must be noted that the U.S. trade embargo with Cuba remains in effect. Practically, this means that U.S. based and owned companies are generally prohibited from conducting business in Cuba and entering into any kind of contract with the Cuban government. Furthermore, with the exception of a few limited categories, the embargo bans the export of U.S. goods to the island. The status of the embargo made recent news in March when President Obama and Cuban President Raul Castro issued a joint statement calling for the embargo to be lifted. Despite this proclamation, the President lacks the authority to unilaterally take this action, as a 1996 act of Congress codified the embargo.

Most experts agree that the end of the embargo is inevitable, with significant change potentially occurring during the next presidential administration. Accordingly, U.S. construction companies interested in Cuba would be wise to use this time to study the current

business environment and evaluate the merits of investing in Cuban ventures.

In 2014, Cuba passed Law No. 118, the Foreign Investment Act, which opened up the country's economy to foreign investment, providing various tax incentives and benefits to would-be investors. This law has prompted foreign companies such as Unilever to return to Cuba with plans to construct plants within a special Cuban geographic zone that features a 0% profit tax during the first 10 years of operation. Moreover, earlier this year, U.S. company Cleber LLC received special approval from the Department of Commerce and the Treasury Department to construct a tractor factory within this Cuban zone. Should this factory be successfully constructed, it would be the first U.S. factory operating in Cuba in over 50 years.

As part of the Cuban government's attempt to attract foreign business, the Cuban Ministry of Foreign Commerce and Investment recently began releasing an annual "Portfolio of Opportunities for Foreign Investment" detailing proposed projects awaiting funding. Amongst these projects, there are multiple that pertain to the construction industry. These projects span from hotel and golf course construction to manufacturing light panels and helping to modernize various plants and facilities. Each of these ventures is structured to comprise varying levels of partnership between foreign and Cuban entities.

In addition to the opportunities listed within the government portfolio, multiple areas of Cuba's infrastructure are in need of modernization and improvement. Specifically, transportation infrastructure, wastewater management, and energy production are all aspects of the island's infrastructure that are in need of an update to accommodate the large influx of individuals expected in the near future.

While this slate of opportunities may be enticing, be forewarned that the shadow of the Cuban government will loom large over any potential project. While Law No. 118 opens up the door for greater foreign involvement, it also creates potential pitfalls that U.S. businesses should be careful to navigate. First, if the government determines that a project has done damage to the environment, the entity responsible will be required to make payment to re-establish the previous environmental conditions. Second, a Cuban government agency is in charge of selecting the labor force, meaning that foreign entities are prohibited from hiring labor directly and face certain limitations to terminating agency-hired employees. Furthermore, the agency will demand a fee for this service and will pay laborers in the weaker Cuban peso (CUP) while charging foreign companies Cuba's more valuable convertible currency (CUC). Finally, U.S. companies should be mindful of the Foreign Corrupt Practices Act (FCPA) in their dealings with the Cuban government. The FCPA makes it illegal to bribe state officials in order to procure business, and it applies to all U.S. persons and companies. Given Cuba's reported history of corruption, U.S. businesses must be careful to strictly comply with the FCPA due to the level of involvement the Cuban government would have in any potential construction project.

The relationship between the U.S. and Cuba is rapidly evolving and there are many updates likely to occur in the months to come. And while there remains a level of uncertainly to forging a path onto the island, there also undoubtedly exists great potential for construction companies willing to be patient with the unique challenges that the Cuban market presents. Stay tuned…

By Jackson Hill

Application of Liquidated Damages Provisions under Ohio Law

A recent decision from the Ohio Supreme Court, *Boone Coleman Construction, Inc. v. Village of Piketon*, clarified the state's enforcement of liquidated damages provisions.

Boone Coleman entered into a public-works contract with Piketon to install a traffic light and complete other improvements to the roadway. The total value of the contract was $683,000. In the contract, the parties expressly agreed that (1) the project needed to be substantially complete within 120 days and (2) Boone Coleman would pay Piketon liquidated damages in the amount of $700 per day for each day past the specified completion date that the project was not substantially complete.

Boone Coleman was unable to complete the project within the required time period. In fact, it did not complete the project until over a year after the expected completion date. At the close of the project, the parties found themselves in court over the final amount owed. The trial court ruled in favor of Piketon and awarded the village $270,900 in liquidated damages. However, the

Court of Appeals overturned the award when it determined that the provision was an unenforceable penalty. The Court of Appeals wrote: "[W]e conclude the amount of damages is so manifestly unreasonable and disproportionate that it is plainly unrealistic and inequitable." Piketon appealed that decision to the Ohio Supreme Court.

On appeal, the Supreme Court examined the law on liquidated damages and determined the Court of Appeals had erred. As an initial matter, the Court reiterated the appropriate test in Ohio for determining whether a provision constitutes a liquidated damages provision or an unenforceable penalty:

> The [damages] should be treated as liquidated damages and not as a penalty, if the damages would be (1) uncertain as to amount and difficult to prove and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof.

Second, the Supreme Court found that the appellate court improperly evaluated the aggregate liquidated damages award ($277,900) in relation to the total value of the contract ($683,000) when it should have looked at the reasonableness of the per diem amount. Third, the Supreme Court found that the Court of Appeals improperly engaged in a retrospective analysis to conclude that the provision was unconscionable. The correct analysis should focus on whether the provision was reasonable at the time the contract was formed. As the Supreme Court noted, if a retrospective analysis is used, the same provision may be enforceable or not depending on the length of the delay. Finally, the Supreme Court noted that the parties agreed to a per diem amount – which is favored in Ohio – and chose an amount which was within the standards for the industry. The significant aggregate amount was ultimately caused by the significant delay in completing the project.

As an aside, at trial Boone Coleman sought additional compensation for work it alleged was outside the scope of the original agreement. The claim was rejected based on Boone Coleman's failure to follow the unambiguous notice provisions for claiming additional compensation outlined in the contract. This serves as an important reminder to contractors and subcontractors of the importance of following the notice provisions in agreements to avoid possibly losing out on what may be otherwise legitimate claims for relief.

This case more importantly serves as a reminder that, if a liquidated damages provision is to be included in a contract, the parties must pay particular attention to the provision during the formation of the contract. In Ohio, special attention should be paid to the form of the liquidated damage - per diem is favored - as well as the relationship between the amount chosen and the standards in the particular jurisdiction and industry.

By Matthew Lilly

Binding Arbitration: Limited Appeal Rights - Finality is the Rule

One of the touted advantages of having a construction dispute resolved via binding arbitration is that the opportunity to appeal an adverse arbitration ruling is limited. The phrase often used is "finality is the rule rather than the exception." This result has been hailed in the industry because it provides finality, to both parties.

Nevertheless, sometimes a party may consider challenging an award. Any ability to vacate an arbitration award is governed by the applicable statutes (including each state's arbitration acts and the Federal Arbitration Act). These statutes were primarily written to allow courts to enforce arbitration agreements and to allow a winning party to go to court to convert awards into enforceable legal judgments. These statutes generally include provisions by which a court can vacate an award, but they are limited to specific grounds for reversal such as arbitrator fraud or a serious undisclosed arbitrator conflict of interest. In the past, some courts recognized narrow exceptions to these limited appeal rights, including arguments that an arbitration award was "in manifest disregard of the law" or "violated public policy." However, in recent years, many state and federal courts have clamped down on these limited exceptions and ruled that the specific appeal rights set out in the arbitration statutes must be strictly construed without any exceptions.

The bottom line of these rulings is that, even if it is crystal clear that an arbitrator completely missed the boat, unless a losing party can prove fraud or a conflict

of interest, that losing party is stuck with the award. A perfect example of this trend is a non-construction case decided by the Texas Supreme Court called *Leonard K. Hoskins v. Colonel Clifford Hoskins and Hoskins, Inc.* In this case, two siblings engaged in arbitration over the allegedly improper transfer of certain mineral rights from their father's estate. Following the arbitration, one of the siblings asked a trial court to vacate the arbitrator's decision, arguing that the arbitrator "manifestly disregarded the law" by disregarding clear, established Texas law, and that he conducted the hearing in a way that substantially prejudiced his rights. Following the national trend, but reversing some intermediate Texas appeal courts, the Texas Supreme Court refused to vacate the award, ruling that even if the arbitrator disregarded Texas law, because the sibling chose arbitration, what comes with arbitration is limited appeal rights. Further, as the Texas arbitration statute did not list "manifest disregard" as a basis for vacating an award, the sibling had no grounds for vacating the award.

There are multiple pros and cons of binding arbitration. A company should know these costs and benefits, and understand the limited appeal rights underlying any arbitration. Your lawyer can provide additional insight into the arbitration versus litigation decision. This decision should be considered carefully and should be consciously made in all of your contract negotiations.

By David Taylor

DOL Tones Down White-Collar Exemption Regulations

Receiving over 270,000 comments to its proposed final overtime rule defining and delimiting the exemptions for executive, administrative, professional, outside sales and computer employees under the Fair Labor Standards Act must have impressed the U.S. Department of Labor (DOL), because it scaled back the provisions originally stated or hinted at in the proposed rules, with final rules issued May 18 that go into effect on December 1, 2016. Under the new rules, the minimum salary level to be exempt will go from $23,660 per year ($455 per week), last set in 2004, to $47,476 annually ($913 per week). Rather than using a 40th percentile national average of all salaried employees, DOL compromised and used the lowest salaried region according to the U.S. Census, currently the South.

DOL will also allow up to 10 percent of the salary ($91.30 per week) to be earned and paid through nondiscretionary bonuses, incentive pay and commissions, which can be paid no less often than quarterly. If bonuses are included that means the base weekly salary could be as low as $821.70 per week, and can continue to be paid either weekly, biweekly, semi-monthly, or monthly. If the amount of the bonus does not meet the full 10 percent of the required salary payment, then the employer has until the next pay period to "true up" the minimum salary payment.

DOL also increased the minimum salary required for qualification as a highly compensated employee from $100,000 per year to $134,004 per year (calculated as the 90th percentile of full-time salaried workers nationally). Under the highly compensated test, employees must receive at least the minimum weekly salary amount (now $913 per week), but employers may credit nondiscretionary bonuses, incentives and commissions toward the remainder of the $134,004. If total annual compensation does not meet the required amount by the last pay period of the 52- week year, employers may make a single "catch up" payment during the last pay period or within one month after the end of the year. Highly compensated employees have a less rigorous duties test and need only customarily and regularly perform any one or more of the exempt duties or responsibilities under the white-collar regulations to qualify for exempt status.

The minimum salary level will be updated every three years starting January 1, 2020. DOL will provide a notification of the new salary levels 150 days prior to their effective date. It is important to note that if an employer wants to exempt part-time employees, they must be paid the full required salary amount to qualify for exemption under the general salary basis test and under the highly compensated test – there is no pro-rated salary option.

Importantly, the Department discussed but did not attempt to make any changes to the duties test to be an exempt executive, administrative, or professional employee (EAP). The primary duty of each salaried exempt employee must continue to be in compliance with the duties test set forth separately for each exemption in the regulations, official interpretations, and Wage and Hour Division opinion letters. Instead, the Department's new mantra, stated a number of times and in slightly different ways, was that "the Department has long recognized that the salary level test is the best

single test of exempt status for white-collar employees, with the salary test being an objective measure that helps distinguish white-collar employees who are "overtime-eligible" (a new DOL term of art) from those who may be bona fide exempt executive, administrative, or professional employees." The DOL's new position has actually been used for quite a while by some practitioners when reviewing the status of salaried designated-exempt employees. If employees were not making in the $45,000-$60,000 range on an annual basis there was a good chance that their duties were not of sufficient importance to the organization for them to truly qualify as exempt under the duties test, even though their salary may have been well above the level required since 2004.

The commentary sets forth a number of options available to employers to comply with the regulations, including:

- increasing the employee's salary level
- holding hours of work to 40 or less per workweek
- hiring of part-time employees to share the work load
- conversion to hourly status with time and one-half overtime pay
- reducing hourly pay to take into account expected overtime hours (though the DOL seems to believe that not many employers will try that approach)
- other pay plans which will involve some component of overtime pay

Be wary of salary compression issues with salaried employees who are being paid slightly more than the new minimum. When reviewing their pay plans, employers should carefully consider how best to utilize the 10 percent non-discretionary bonus toward satisfaction of the new salary requirement.

Other pay plans which might be considered would be the fluctuating workweek (FWW) salaried pay plan where a base salary covers base pay for all hours worked. The effective hourly rate goes down as the number of work hours go up. Therefore, the FWW pay plan involves reducing the halftime rate after 40 hours in a work week. However, due to severe limitations set forth in 2011 regulation changes, an employer should tread carefully before adopting such a plan, especially since normal sick-leave day limits cannot be set. Likewise there is the possible use of a fluctuating day-rate plan which involves paying a set amount per day regardless of the number of hours actually worked. The calculations under it are similar to that under an FWW pay plan, but without the same regulatory or sick leave limitations. Still, it is recognized that most employers who do not increase salary levels for an employee to remain exempt will likely simply convert to some hourly rate and pay time and one-half for overtime after 40 hours per workweek.

Keep in mind that computer-related occupations may qualify for exempt status either as professionals under Section 13(a)1 of the Fair Labor Standards Act, or under the statutorily enacted separate Section 13(a)17 of the Act, which uses an hourly rate of $27.63. DOL has no authority to change the Act itself; however, the hourly rate under the computer-related occupations is still more than what the new regulations will require for a professional exemption to potentially apply. DOL also kept in place the carve-outs from the salary requirement for certified or licensed teachers, doctors, and lawyers, meaning the new regulations will not directly impact those professions. There was also no change to the "Outside Sales" exemption which does not have a salary requirement.

DOL seems to think their new regulations will result in considerably less court litigation than we have seen since 2002. Only time will tell. Employers should already have started their review process of all salaried exempt employees to determine who will be changed in status and to what type of pay plan. You have some reprieve for now to do the project carefully.

By Tony Griffin

Safety "Moments" for the Construction Community

Falls are the leading cause of construction worker fatalities. Each year between 150 and 200 workers die and more than 100,000 are injured as a result of falls at construction sites. Special trade contractors, such as roofers, carpenters, and structural steel erectors, accounted for half of the fatal falls. Knowing and implementing basic fall protection measures could just save your life.

Subscribe to Bradley's construction and procurement blog for more insights relevant to the industry

***BuildSmart: Developments of Interest to Design, Construction and Government Contract Professionals*.**

Check it out at
https://www.buildsmartbradley.com/

Bradley Arant Lawyer Activities

Earlier this year, **Bradley's Construction and Procurement Practice Group** launched its new blog *BuildSmart: Developments of Interest to Design, Construction and Government Contract Professionals*. https://www.buildsmartbradley.com/

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

Jim Archibald was recently invited to join the American College of Construction Lawyers ("ACCL") a national organization of lawyers who have demonstrated skill, experience, and high standards of professional and ethical conduct in the practice of construction law. **Jim** joins **Mabry Rogers, Wally Sears,** and **Bill Purdy** as Bradley lawyers who are fellows or senior fellows of the ACCL.

Mabry Rogers was recently recognized as one of only four 2015 BTI Client Service Super All-Star MVPs for consistently setting "the standard for outstanding client service."

Doug Patin, **Bill Purdy**, **Mabry Rogers**, **David Pugh**, **Bob Symon**, and **Arlan Lewis** were recently listed in the *Who's Who Legal: Construction 2016* legal referral guide. **Mabry Rogers** has been listed in Who's Who for 21 consecutive years.

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 2016.

Axel Bolvig, **Ralph Germany**, **David Owen**, **Doug Patin**, **David Pugh**, **Bill Purdy**, **Mabry Rogers, Wally Sears, Bob Symon**, and **David Taylor** were recognized by *Best Lawyers in America* in the area of Construction Law for 2016.

Mabry Rogers and **David Taylor** were recognized by *Best Lawyers in America* in the area of Arbitration for 2016. **Keith Covington** and **John Hargrove** were recognized in the area of Employment Law – Management. **Frederic Smith** was recognized in the area of Corporate Law.

Jim Archibald, Ryan Beaver, Ralph Germany, Bill Purdy, Mabry Rogers, Wally Sears, Bob Symon, David Taylor, and **Darrell Tucker** were named *Super Lawyers* in the area of Construction Litigation. **Arlan Lewis** and **Doug Patin** were similarly recognized in the area of Construction/Surety. **Frederic Smith** was also recognized in the area of Securities & Corporate. **Aron Beezley** was named a 2016 *Super Lawyers* "Rising Star" in the area of Government Contracts. In addition, **Monica Wilson** was listed as a "Rising Star" in Construction Litigation, **Amy Garber** was listed as a "Rising Star" in Construction Law, and **Tom Lynch** was listed as a "Rising Star" in both Construction Litigation and Construction Law.

David Taylor was recently named Nashville's *Best Lawyers* 2016 Lawyer of the Year in the area of Arbitration.

Mabry Rogers was recently selected as Birmingham's *Best Lawyers* 2016 Lawyer of the Year in the area of Arbitration.

Bill Purdy was recently named Jackson's Best Lawyers 2016 Lawyer of the Year in the area of Construction Law.

Jim Archibald, **Axel Bolvig**, **Keith Covington**, **Arlan Lewis**, **Doug Patin**, **David Pugh**, **Bill Purdy**, **Mabry Rogers**, **Wally Sears**, **Bob Symon**, and **David Taylor** were recently rated AV Preeminent attorneys in Martindale-Hubbell.

Mabry Rogers was recognized by *Law360*, in February, as one of 50 lawyers named by General Counsel as a top service provider.

Aron Beezley was recently named by *Law360* as one of the top 168 attorneys under the age of 40 nationwide.

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.

Mabry Rogers was one of three U.S. construction lawyers recognized for outstanding client service in London on February 26, 2015 by the publishers of *Lexology* based on a survey of its in-house counsel subscribers, as well as all members of the Association of Corporate Counsel.

Keith Covington was honored by *Birmingham Magazine* as a 2016 Top Attorney for Immigration. The magazine's annual Top Attorneys list recognizes attorneys in 35 practice areas and is selected through a peer review survey of approximately 4,000 local attorneys registered with the Birmingham Bar Association.

David Taylor and **Bryan Thomas** were recently named to the AGC of Middle Tennessee Legal Advisory Committee.

David Pugh will again serve as the Chair of the Hospital and Health Care Construction Track at the Associated Builders & Contractors' Fourth Annual User's Summit in New Orleans on October 12-13, 2016, which is intended to bring owners, developers, and contractors together to share "best practices" and to discuss candidly and openly ways to improve safety, efficiency, productivity, and quality in the design and construction process.

Jim Archibald is moderating a panel and speaking at the ALFA International 2016 Construction Law Seminar, in Palos Verdes, California, on July 29, 2016. Jim's panel includes former Bradley partner David Bashford, who is now in-house counsel to a leading global solar PV developer and contractor. Their topic is "Building Overseas: The Unique Challenges of International Construction." The 3-day Seminar will be attended by lawyers and clients from all over the world, and will address the State of the Construction Industry. ALFA International is a global network of international law firms comprised of 150 independent member firms, including 70 firms from Canada, Mexico, Latin America, Europe, Asia, Australia, and Africa.

Aman Kahlon presented "How to Document and Minimize Liability Working with Independent Contractors" on June 8, 2016 to the Association of Builders and Contractors ("ABC") Alabama Chapter.

Law360 published an expert analysis article by **Keith Covington** on May 17, 2016 titled "What Employers Should Know About the New 'Smart' Form I-9."

On May 13, **Carly Miller**, **Keith Covington**, **David Pugh,** and **Brian Rowlson** spoke at the annual Construction Law 101 seminar in Birmingham for various regional clients.

David Taylor, **Bryan Thomas**, and **Bridgett Parkes** spoke at the firm's 15th Annual Commercial Real Estate seminar in Nashville on May 4 on "Top 10 Mistakes in Drafting Construction Contracts."

Keith Covington presented a seminar for the DeKalb County Economic Development Authority on avoiding liability under the Fair Labor Standards Act and the Fair Credit Reporting Act.

On April 18, **David Taylor** and **Bryan Thomas** presented "Arbitration vs Litigation" at Vanderbilt University Law School.

Aron Beezley wrote an expert analysis article published by *Law360* titled "Inside Proposed Amendments to GAO Bid Protest Regulations."

Doug Patin and **Amy Garber** wrote an article titled "The Miller Act and the Enforceability of Contingent Payment and Disputes Resolution Subcontract Clauses" for the summer edition of *Construction Lawyer*.

On March 23, 2016, **Beth Ferrell**, **Mike Huff**, and **Aron Beezley** published an article in *The Government Contractor* titled "The Most Important Government Contract Disputes Cases of 2015."

At our recent Construction and Procurement Group Learning Day in Nashville on March 14, most of our members received negotiation training from Dr. Susan Williams, Professor Emirata at Belmont University, and are now "Trained in the Harvard Program of Negotiation."

Brian Rowlson and **David Taylor** made a claims avoidance presentation to Tobin Construction in Ft. Lauderdale, FL on February 16, 2016.

On February 11, 2016, **Slates Veazey** presented at the Annual Insurance Professionals of Jackson's Education

Day regarding insurance coverage issues facing the construction industry.

David Taylor was recently reappointed to the Executive Committee of the Tennessee Bar Association's Construction Law Committee.

Tony Griffin is renewing his status as a Board Certified Specialist in labor and employment law.

Bridget Parkes recently became the President of the Associated Builders and Contractors (ABC) Middle Tennessee Chapter Emerging Leaders.

Arlan Lewis was elected to the 12-member Governing Committee of the American Bar Association's Forum on Construction Law during its Annual meeting in April in Boca Raton, Florida.

David Pugh has been named to the lawyer position on the Jefferson County Board of Code Appeals, which governs issues concerning the interpretation and application of the International Building Code in Jefferson County. He replaces **Mabry Rogers,** who served on the Board for over a decade.

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*.

NOTES

An electronic version of this newsletter, and of past editions, is available on our website. The electronic version contains hyperlinks to the case, statute, or administrative provision discussed.

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

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

Your Name:

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

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

_____

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

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

Comments:

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