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The Critical Path

The Newsletter of the Construction Law Committee

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Leadership Note

From the Chair

by Michael P. Sams

We often hear that our members want networking opportunities, and we understand that. So, among other things, we're partnering with construction organizations to provide you with opportunities…all you need to do is get involved.

This past summer, we sent four Committee members to San Antonio to present a four hour program at the Construction Financial Management Association's (CFMA) Annual Meeting. This fall, we are sending approximately 25 Committee members to speak in five different states to local National Association of Home Builders (NAHB) chapters. This is part of a pilot partnering program with NAHB that we anticipate will spread to many other states, opening up opportunities for numerous additional Committee members. So keep your eyes on our Communities page because that is where these opportunities get posted. We also are looking to add partnerships with other organization and anticipate CFMA will want to have us again send speakers this year to its annual meeting.

Accordingly, if you want to be involved, if you're looking to broaden your resume with references to prior speaking engagements, we have all that.

If you want network opportunities via writing, there's the Communities Page where you can post every day. We also have *The Critical Path* newsletter and opportunities to write in *For The Defense* and *In House Quarterly*, a publication for in-house counsel. If you have articles or ideas for any of these, let me or our publication team (John McCants jmccants@rogerslewis.com and Ryan Harrison rlh@painebickers.com) know!

Additionally, our Seminar is coming in March and it's another opportunity for networking and great education. It will open with golf, registration and dinner networking on March 1 with programs on March 2-3. The Seminar will be at the Cosmopolitan in Las Vegas, so we'll have a lot of fun too. Please calendar it now and keep your eyes out for more as we finalize planning and complete the brochure.

Finally, if you want to pursue leadership opportunities in our Committee, we want you! The first step is to get involved with an SLG. Our SLGs and their respective Chairs and Vice-Chairs are as follows:

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Aaron R. White
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Seize the opportunities! We look forward to hearing from you.

Featured Article

Force Majeure Contract Clauses

by Andrew L. Smith

After the devastation and chaos caused by Hurricane Katrina members of the construction industry have learned the hard way that unanticipated events and natural disasters can have enormous impacts on the price of materials and the cost of labor. Such factors can significantly impact the bottom line of any construction project agreement. One way to plan against these risks is to use a force majeure clause in the construction contract.

A force majeure clause in a contract defines the scope of unforeseeable events that might excuse nonperformance by a party. The term force majeure used in drafting project documents comes originally from the Code Napoléon of France and means “superior force.” Force majeure clauses are included in commercial contracts to provide flexibility in a volatile economy.

The following is a common example of such a clause:

> *A party shall not be liable for any failure of or delay in the performance of this Agreement for the period that such failure or delay is due to causes beyond its reasonable control, including but not limited to, acts of God, war, strikes or labor disputes, embargoes, government orders or any other force majeure event.*

The exact terms and scope of a force majeure clause are left to the negotiation skills of the parties to the contract. The clause can state that the contract is temporarily suspended, or that it is terminated if the event of force majeure continues for a prescribed period of time. A general list of force majeure events

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might include war, terrorism, riots, fire, flood, hurricane, typhoon, earthquake, lightning, explosion, strikes, lockouts, slowdowns, prolonged shortage of energy supplies, and acts of state or governmental action prohibiting or impeding any party from performing its respective obligations under the contract. Courts tend to interpret force majeure clauses narrowly. Indeed, only the events listed and events similar to those listed will be covered.

Importantly, in the absence of a force majeure clause, parties to a contract are left to the mercy of the narrow common law contract doctrines of impracticability, impossibility, and frustration of purpose, which rarely excuse nonperformance. Therefore, it is imperative to draft a clause tailored to the subject matter of the contract between the parties.

When drafting a well-written force majeure clause, the following factors should be considered in analyzing the facts specific to each project and each contract:

- What is the definition of force majeure events?
- What happens when a triggering event occurs?
- What notice is required to communicate a force majeure event?
- Who can suspend performance and when?
- How does a force majeure event impact the contractual obligations of the parties?
- What happens if the force majeure event continues for more than a specified period of time?

Common Law Requirements

To use a force majeure clause as an excuse for nonperformance, the nonperforming party bears the burden of proving that the event was beyond the party's control and without its fault or negligence. *Stand Energy Corp. v. Cinergy Servs*., 144 Ohio App. 3d 410, 760 N.E.2d 453 (2001). Mistaken assumptions about future events or worsening economic conditions, however, do not qualify as a force majeure. "When a party assumes the risk of certain contingencies in entering a contract, * * * such contingencies cannot later constitute a 'force majeure.'" *Dunaj v. Glassmeyer*, 61 Ohio Misc. 2d 493, 497, 580 N.E.2d 98 (1990).

A party cannot be excused from performance merely because performance may prove difficult, burdensome, or economically disadvantageous. *Stand Energy Corp. v. Cinergy Services, Inc*., 144 Ohio App.3d 410, 760 N.E.2d 453 (2001), citing *State ex rel. Jewett v. Sayre*, 91 Ohio St. 85, 109 N.E. 636 (1914). The inability to purchase a commodity at an advantageous price is not a contingency beyond a party's control. *Id.* If it were, fixed-price contracts, where the parties allocate the risk of price rises in a fluctuating market, would serve no purpose. *Id.*

The Ohio Supreme Court in *Piqua v. Morris*, 98 Ohio St. 42, 120 N.E. 300 (1918), explained:

> *The term 'Act of God' in its legal significance, means any irresistible disaster, the result of natural causes, such as earthquakes, violent storms, lightning and unprecedented floods. It is such a disaster arising from such causes, and which could not have been reasonably anticipated, guarded against or resisted. It must be due directly and exclusively to such a natural cause without human intervention. It must proceed from the violence of nature or the force of the elements alone, and with which the agency of man had nothing to do.*

For example, in *Stand Energy Corp*., the plaintiff refused to perform under the contract, which would have required it to "purchase power at high market prices and provide it to Cinergy at a low contract price," because of "unseasonably hot temperatures * * *, record demand for power and unprecedented high hourly prices for electric power." At trial, Stand Energy's president testified that she had relied upon force majeure to preserve the economic vitality of the company, and to save the jobs of fifty employees. The court held "[t]he inability to purchase a commodity at an advantageous price is not a contingency beyond a party's control," and may not subsequently constitute a force majeure. In *Stand*, there

was no evidence of a refusal to work by employees or independent contractors.

In *Milton Taylor Constr. Co. v. Ohio Dept. of Trans.*, 61 Ohio App. 3d 222, 572 N.E.2d 712 (1988), the Franklin County Court of Appeals held that two inches of rainfall in 24 hours did not constitute a force majeure event. The contractor was building a culvert under a roadway. After completion of the project, the contractor sought reimbursement from ODOT under the contract documents for the additional expenses associated with repairing work caused by the rain. The court held the heavy rainfall did not constitute an act of God based on the testimony establishing that rainfall of that severity could occur every year. Further, the court indicated that the rainfall could reasonably have been expected and was not an unforeseeable event.

Likewise, in *Fiber Crete Construction Corp. v. L.W.L.*, 3rd Dist. No. 2-86-24, 1987 Ohio App. Lexis 9290, the court considered contractor's claim that damage to a construction project was caused by severe weather and not misuse of equipment. In denying the contractor's claim, the court held:

> *An Act of God, or vis major, is an irresistible disaster, the result of natural causes, such as earthquakes, violent storms, lightning or unprecedented floods, which could not have been anticipated. The evidence here is of a light snow and a freeze at night on December 30th. This change in weather conditions is not unusual in Auglaize or adjoining counties in the closing days of December. The variation in the weather was ordinary and normal, not extraordinary in nature. Such a change in the weather is common knowledge and one to be anticipated in the community.*

Id. at *6.

In addition, the court noted to constitute an unexpected vis major it is essential that the event be the sole cause of the damage without human intervention. The human intervention in *Fiber Crete* was the exposure of the equipment to the snow without a cover and the contractor's failure to watch or check its operation overnight. Indeed, "failure to do so is not excused by normal changes in the weather such as may be anticipated in the heart of the winter season." *Id.*

Points to Remember

A force majeure clause in a contract defines the scope of unforeseeable events that can excuse nonperformance by a party. In the absence of a force majeure clause, parties to a contract are left to the mercy of the narrow common law contract doctrines. Thus it is imperative to draft a clause tailored to the subject matter of the contract between the parties.

In sum, reliance upon a force majeure clause requires one or more of the following conditions be fulfilled:

1. The specified event is beyond the control of the claiming parties;
2. The event prevents or delays, in whole or in part, the performance of the contract;
3. The event makes performance of the contract imprudent, substantially more difficult, or substantially more expensive;
4. The event was not due to the fault or negligence of the claiming party; and
5. The claiming party has exercised reasonable diligence to overcome or remove the specified force majeure event (i.e. mitigation of damages).

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Articles of Note

Texas Supreme Court extends *"Exclusive Remedies"* Defense on Construction Projects

by David V. Wilson II

The Texas Supreme Court addressed the applicability of the workers' compensation exclusive remedies provision in the case of "owner-controlled insurance programs" ("OCIP") or "contractor controlled insurance programs ("CCIP") in its recent opinion styled ***TIC Energy & Chem., Inc. v. Martin,* No. 15-0143 (June 3, 2016)**. In the case below, ***TIC Energy and Chemical, Inc. v. Kevin Bradford Martin*, 2015 WL 127777 (Tex. App.-Corpus Christi 2015, pet. granted),** the plaintiff Martin was an employee of Union Carbide Corporation, and suffered injuries while attempting to service heavy equipment at Union Carbide's Seadrift facility. Unfortunately, the injuries necessitated the amputation of Martin's leg. Martin made a claim for, and received benefits, under Union Carbide's workers' compensation insurance policy, which was an OCIP. Subsequently, he sued TIC, a subcontractor for the Seadrift facility enrolled in the OCIP for negligence and damages related to his injuries. TIC filed a traditional motion for summary judgment asserting the "exclusive remedies" defense of the Texas Workers' Compensation Act. See Texas Labor Code Ann. §408.001. While the trial court denied the motion, the trial court did grant TIC permission to appeal the ruling on an interlocutory basis.

On appeal, the Corpus Christi Court of Appeals focused on the text of §406.123 of the Texas Labor Code, which allows a general contractor and subcontractor to agree to a comprehensive insurance program whereby both entities' employees are covered by the same workers' compensation insurance policy. Under those circumstances, the general contractor becomes the employer of the subcontractor and the subcontractor's employees only for purposes of the workers' compensation laws of Texas.

By contrast, §406.122 of the Texas Labor Code provides that a subcontractor and the subcontractor's employees are not employees of the general contractor for purposes of the workers' compensation act if the subcontractor is operating as an independent contractor. The plaintiff/appellee argued on appeal that it could not be the employee of TIC, because §406.122 provides that the employees of independent contractors are not employees of the general contractor. By contrast, TIC argued that §406.123 of the Labor Code specifically contemplates a comprehensive insurance program which provides "deemed employee" status to co-insureds under the comprehensive insurance program. The Corpus Christi Court of Appeals determined that the two sections "irreconcilably conflict." Procedurally, the Court noted that TIC did not present the alleged irreconcilable conflict to the trial court in its motion for summary judgment. Likewise, it noted that TIC's motion did not mention §406.122 at all. Therefore, the Court of Appeals refused to resolve the conflict between the statutes, because it determined that issue was not before the trial court. The Court held that TIC did not meet its summary judgment burden and affirmed the denial of the motion for summary judgment.

The Texas Supreme Court granted Petition for Review, and case was argued before that Court in February, 2016. In that same month, the 9th Court of Appeals ruled on a similar issue in ***Therold Palmer v. Newtron, No. 09-15-00248-CV (Tex. App. – Beaumont) (February 18, 2016)***. In other words, the appellate court in Beaumont refused to await a ruling in the ***TIC*** case. Plaintiff Palmer was employed by Motiva, and was injured in the course and scope of his employment on September 26, 2013. The injury allegedly occurred when a Newtron employee stepped on him while descending on scaffolding. Palmer filed a traditional negligence suit for his personal injuries against Newtron. Newtron filed a traditional motion for summary judgment asserting that Newtron and Motiva entered into a procurement agreement for services under which Motiva provided workers' compensation insurance and employers' liability insurance through a rolling contractor insurance program ("RCIP") which covered Newtron and its employees working in the Motiva plant in Port Arthur, Texas. That same policy provided insurance for all of Motiva's employees, including the plaintiff. Newtron subsequently argued that this RCIP's workers' compensation coverage was the exclusive remedy for Palmer's claims for personal injury.

In its response to the motion for summary judgment, Palmer claimed Newtron was not his employer, and therefore it could not establish it was entitled to the exclusive remedy defense of the Texas Workers' Compensation Act. In fact, Palmer cited the ***TIC Energy*** opinion of the Corpus Christi Court of Appeals. Consistent with that opinion, Palmer argued that Texas Labor Code § 406.122(a),

(b) and §406.123(a), (e) of the Texas Labor Code irreconcilably conflict. The trial court, in granting summary judgment to Newtron, rejected Palmer's argument.

On appeal, the Beaumont Court of Appeals affirmed. In construing the Texas Labor Code's provisions with respect to workers' compensation, the Beaumont court interpreted §406.122 of the Labor Code, which indicates that independent contractors and their employees are not employees of a general contractor, by construing this section in harmony with §406.123. Specifically, the Court of Appeals ruled that §406.123 permits general contractors and subcontractors to enter into written agreements, pursuant to which the general contractor agrees to provide workers' compensation insurance contractor to the subcontractor and the subcontractor's employees. When this takes place, the general contractor becomes the employer of the subcontractor and the subcontractor's employees. See Texas Labor Code Ann. §406.123(e).

Applying the principles of statutory construction where provisions are to be interpreted in harmony, the Court concluded that §406.122(b) addresses the relationship between a general contractor and subcontractor generally, while §406.123 contemplates a specific circumstance where the general contractor and subcontractor agree to a comprehensive workers' compensation insurance program.

Accordingly, Newtron was entitled to the benefit of the exclusive remedy provision of the Texas Workers' Compensation Act and the summary judgment was affirmed. It may be taken as a sign that the 9th Court strongly disagreed with the Corpus Christi Court by authoring an opinion that created a direct conflict, while the issue was already pending before the Texas Supreme Court. Indeed, the Beaumont Court specifically noted that TIC Energy's petition for review had been granted by the Texas Supreme Court on December 18, 2015.

However, on June 3, 2016, any conflicts between the ***Palmer*** opinion of the Beaumont Court of Appeals and the ***TIC Energy*** opinion of the Corpus Christi Court of Appeals were resolved by the Texas Supreme Court. In reversing the Corpus Christi Court, the Texas Supreme Court found no irreconcilable conflict in the Texas Labor Code. The Supreme Court noted that TIC produced evidence of a written agreement that extended workers' compensation insurance coverage under the OCIP to TIC and its employees. TIC alleged that 406.123(a) of the Labor Code provides a permissive exception to 406.122 of the Labor Code, and results in "comprehensive coverage of workers at a single site in pursuit of a common objective, and therefore extends the Workers' Compensation Act's benefits and protections both vertically and horizontally among multiple tiers of contractors that may be working side-by-side at a job site." The Texas Supreme Court analyzed the applicability of Sections 406.122 and 406.123 of the Labor Code, and stated that "406.123 in turn provides for an election by which a general contractor may become a statutory employer by agreeing, in writing, to provide workers' compensation insurance to the subcontractor." The Texas Supreme Court ultimately agreed with TIC and held that "TIC is entitled to rely on the Workers' Compensation Act's exclusive-remedy defense as Martin's co-employee," and reversed and rendered in favor of TIC on its affirmative defense under section 408.001 of the Workers' Compensation Act.

Practitioners should now investigate, after there is a job-site accident involving workers on a construction project, whether an OCIP or CCIP is in place providing worker's compensation insurance. If so, it is unlikely that a common law personal injury action can result against the project's contractors. The intended effect of such insurance policies, that all enrolled contractors receive the same insurance coverage, now has the added benefit of extending the "exclusive remedies" defense to all enrolled contractors.

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Understanding Misconduct Proceedings Against Professional Engineers

by Kriton A. Pantelidis

Engineers, as licensed professionals pursuant to the New York State Education Law (hereinafter "Educ. Law"), must comply with a rigorous code of professional ethics. These rules and the

definition of professional misconduct are set forth in the Educ. Law and by the rules promulgated by the New York State Board of Regents (hereinafter "Board of Regents"). (N.Y. Educ. Law § 6509 and 8 NYCRR §§ 29.1 and 29.3).

While the vast majority of engineers take their responsibilities extremely seriously, and many complaints brought are simply frivolous, all engineers should understand the process involved in responding to an investigation by the New York State Education Department (hereinafter "Educ. Dep't.").

Complaints made to the Educ. Dep't. are investigated by a professional conduct officer. In the instance the complaint involves a question of professional expertise, the officer may, but is not required to, consult with a panel of three members of the State Board for Engineering, Land Surveying and Geology (hereinafter the "Board of Engineering"), which was created to assist with "matters of professional licensing, practice, and conduct." (N.Y. Educ. Law § 6508). The investigation may be as simple as requesting certain documents or may involve a more in-depth process involving all the project documents and in-person meetings.

After his review, the professional conduct officer has two options: 1) He may terminate the proceeding because substantial evidence is lacking or 2) he may determine – after consulting with a professional member of the Board of Engineering – that substantial evidence exists in support of the complaint. (N.Y. Educ. Law § 6510(1)(b)). If the matter moves forward, it will involve either expedited procedures or adversary proceedings. (N.Y. Educ. Law § 6510(3) and 8 NYCRR §17.3). Both processes are discussed below.

Expedited Procedures

Minor or technical violations may be resolved by what are known as expedited procedures. (N.Y. Educ. Law § 6510(2)(a)). Some examples that qualify for expedited procedures include: "isolated instances of violations concerning professional advertising or record keeping, and other isolated violations which do not directly affect or impair the public health, welfare or safety."

The professional conduct officer, with the advice of a member of the Board of Engineering, has the discretion to determine whether a violation is minor or technical. If it is determined that a violation exists, but is minor, the professional conduct officer (after consulting with a member of the Board of Engineering) may issue an administrative warning or prepare and serve formal charges. If the latter option is chosen, a violations panel will schedule a meeting with the engineer. Thereafter, the panel may issue a censure and reprimand and/or may impose a fine **not to exceed five hundred dollars** for **each** instance of minor or technical misconduct.

Adversary Proceedings

In the instance a complaint is not terminated for lack of substantial evidence or resolved by way expedited procedures, disciplinary proceedings will continue and the engineer will be subject to adversary proceedings. (N.Y. Educ. Law § 6510(3)).

The Hearing

The initial step once adversary proceedings are initiated is a hearing, similar to a trial, before a panel of at least three individuals, two of which must be members of the Board of Engineering. At the hearing, the design professional (or his counsel) can (among other things): produce witnesses and evidence in his defense; cross-examine adverse witnesses; and examine adverse evidence. (N.Y. Educ. Law § 6510(3)(a)). Importantly, the hearing panel is not bound by the rules of evidence and a guilty verdict requires only a preponderance (i.e., 51%) of the evidence. (N.Y. Educ. Law § 6510(3)(c)).

After the completion of the hearing, the panel issues a written report with findings of fact, a ruling on each charge (a guilty verdict requires at least two votes), and a recommended penalty in the instance of a guilty verdict. (N.Y. Educ. Law § 6510(3)(d)).

Review of the Regents Committee

The report of the hearing is reviewed by a three person "Regents Review Committee" appointed by the Board of Regents. (N.Y. Educ. Law § 6510(4)(a)). This committee acts similar to an intermediate appellate court and will schedule a meeting to discuss the findings of the hearing. Thereafter, the Review Committee will prepare their own report and forward it to the Board of Regents. (N.Y. Educ. Law § 6510(4)(b)).

Decision of the Board of Regents

Once the Board of Regents receives the report of the Regents Review Committee, it evaluates all the prior evidence, proceedings, and rulings and issues a final order. (N.Y. Educ. Law § 6510(4)(c)).

The penalties which can be imposed include but are not limited to: censure and reprimand; suspension, revocation, or annulment of the engineer's license; and **a fine not to exceed ten thousand dollars per guilty charge**. (N.Y. Educ. Law § 6511).

Conclusion

While many complaints are meritless, the disciplinary process detailed above can be involved and serious. If a complaint is filed with the Educ. Dep't., all engineers should engage legal counsel in order to understand the full scope of the ramifications and to chart out an appropriate course in responding to the Educ. Dep't. Ideally, counsel should be retained prior to any substantive communications with the Educ. Dep't.

Cypress Point Redux – New Jersey Supreme Court Holds Developer's CGL Policy Covers Condominium Association's Consequential Damages Caused by Water Infiltration

by Mark D. Shifton and Milena Shtelmakher

A recent issue of *The Critical Path* (Volume 20, Issue 1 – April 2016) discussed a recent decision of the New Jersey Appellate Division, holding that consequential damages caused by a subcontractor's deficient work on a construction project constituted "property damage" caused by an "occurrence" under a CGL policy issued to the Developer, and that damages caused to common elements and unit-owners' property – but not the allegedly defective work itself – would be covered under the general contractor's insurance policy. *Cypress Point Condominium Association, Inc. v. Adria Towers, L.L.C., et al.*, 118 A.3d 1080 (N.J. App. Div. 2015), *certif. granted*, 124 A.3d 240 (2015). This issue has been one of the more quickly evolving (and more important) issues in construction law, as it is of great importance to contractors, insurers, and policyholders (and construction attorneys representing any of the three). We also noted that the New Jersey Supreme Court had (somewhat not surprisingly) granted the insurers' petitions for certification, and that New Jersey's highest court would soon decide whether the Garden State would follow the ever-increasing number of jurisdictions holding such claims to be covered.

On August 4, 2016, the New Jersey Supreme Court answered the Appellate Division's question in the resounding affirmative, and held that a Condominium Association's claim of consequential damages resulting from water infiltration due to the deficient work of a Developer's subcontractor was indeed covered by the Developer's CGL policy. *Cypress Point Condo. Assoc., Inc. v. Adria Towers, L.L.C.*, ___ A.3d ___, 2016 WL 4131662, *1 (N.J., Aug. 4, 2016). In doing so, the New Jersey Supreme Court joined several other jurisdictions in holding that unexpected damage to property due to faulty workmanship is covered. *See, e.g.*, *Greystone Const. v. Nat'l Fire & Marine Ins. Co.* , 661 F.3d 1272 (10th Cir. 2011); *Sheehan Constr. Co. v. Cont'l Cas. Co.* , 935 N.E.2d 160 (Ind. 2010); *Architex Ass'n v. Scottsdale Ins. Co.* , 27 So.3d 1148 (Miss. 2010); *Travelers Indem. Co. v. Moore & Assocs.*, 216 S.W.3d 302 (Tenn. 2007); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007).

This case started (as so many interesting, complicated, and far-reaching cases

do) as a garden-variety construction defect action. After substantial completion of the building (a 53-unit luxury tower in Hoboken, New Jersey), and after control transitioned from the Developer to the Condominium Association, various unit owners began to complain of water infiltration into their units, as well as into common areas of the building. After negotiations with the Developer failed, the Condominium Association filed a construction defect action against the Developer and the several of its subcontractors, alleging that water infiltration through the building envelope had damaged significant portions of the building, such as steel supports, interior and exterior sheathing, and insulation. After the Developer's insurance carriers declined to indemnify the Developer in the litigation (a decision that likely left insufficient insurance coverage by which to make settlement of the matter possible), the Condominium Association's counsel filed direct claims against the Developer's insurers, seeking a declaratory judgment that the Developer's insurers were obligated to indemnify the Developer against the Condominium Association's claims of consequential damages to the building as a result of the Developer's subcontractors' deficient workmanship.

As discussed in the April 2016 article of *The Critical Path*, the trial court held that the Developer's subcontractors' alleged faulty workmanship did not constitute an "occurrence" that caused "property damage" under the Developer's policies, and granted the Developer's insurers' motions for summary judgment. After the Appellate Division reversed, the Developer's insurers filed petitions for certification to the New Jersey Supreme Court. On August 4, 2016, the New Jersey Supreme Court affirmed the Appellate Division's decision, making New Jersey the most recent state to hold that consequential damages due to a subcontractor's deficient work is a covered claim under a standard CGL policy.

In arguing against coverage for the Condominium Association's claims, the Developer's insurers argued that under well-established New Jersey law (including the nationally-known and often-cited New Jersey Supreme Court decision in *Weedo v. Stone-E-Brick*, 405 A.2d 788 (N.J. 1979), the Developer's CGL policies were not intended to provide coverage for damage caused by its subcontractors' faulty workmanship. Additionally, the insurers argued that a subcontractor's faulty workmanship was not a "fortuitous" event constituting an "accident," and thus could not constitute an "occurrence" under the Developer's policies. In other words, according to the insurers, damage to a construction project caused by deficient construction is "one of the normal, frequent, and predictable consequences of the construction business," and was not the type of covered damages contemplated by the parties to a CGL policy. The Condominium Association, on the other hand, argued that its consequential damages should be covered by the Developer's CGL policy, as holding such claims covered would both be line with judicial precedent (especially with developing precedent in other jurisdictions), as well as the plain language of the Developer's policies (in light of changing language found in more modern policy forms). As with any insurance coverage dispute, the New Jersey Supreme Court engaged in a three-step analysis: (1) whether the policy provides coverage for the claim (i.e. whether there is both an occurrence and property damage under the meaning of the policy's language); (2) whether any of the policy exclusions operated to exclude the claim from coverage; and (3) whether there were any exceptions to any exclusions from coverage.

The threshold issue to be decided by the New Jersey Supreme Court was whether the Condominium Association's alleged damages (damages to other portions of the building as a result of water infiltration) constituted "property damage," and whether the Developer's subcontractors' allegedly deficient workmanship constituted an "occurrence" under the meaning of the Developer's insurance policies. The Developer's policies contained the relevant policy language:

> 13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
>
> . . .
>
> 16. "Property damage" means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property . . .; or
> b. Loss of use of tangible property that is not physically injured.

In interpreting these policy definitions, the New Jersey Supreme Court held that,

under the plain meaning of the Developer's policies, the term "accident" "encompassed unintended and unexpected harm caused by [the Developer's subcontractors'] negligent conduct," thus holding that the water infiltration experienced by the Condominium Association was indeed an "occurrence" under the Developer's policies. Further, because water infiltration that resulted from the Developer's subcontractor's faulty workmanship was unforeseeable, it was indeed "property damage," and thus was covered by the policies.

Having decided the threshold issue of whether the Developer's policies provided coverage for the Condominium Association's claims, the Supreme Court tackled the next step in the analysis, which was to determine whether the policies contained any exclusions that would eliminate coverage. Significantly, the New Jersey Supreme Court's holding on this issue relied on an analysis of the seminal case of *Weedo v. Stone-E-Brick*, 405 A.2d 788 (N.J. 1979), and an in-depth look at some of the very important differences between the ISO's 1973 and 1986 policy forms, specifically with regard to the application of the "your work" exclusion and the "subcontractor's exception." As to these two important provisions, the Developer's policies contained the following language:

> 2. Exclusions.
>
> This insurance does not apply to:
>
> ....
>
> 1. Damage to Your Work
>
> "Property damage" to "your work" arising out of it or any part of it …
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

The policy defines "Your Work" as:

> a. Work or operations performed by you or on your behalf; and
>
> b. Materials, parts or equipment furnished in connection with such work or operations.

As one can tell from a plain reading of the policy language above (and any experienced construction attorney knows by heart), the "your work" exclusion operates to exclude from coverage all damages as a result of the insured's own work. The subcontractor exception, however – much like its name – provides for an exception to the "your work" exclusion in those cases where the alleged damages were caused by a subcontractor of the insured. In *Cypress Point*, the insurers argued that the seminal New Jersey case of *Weedo* controlled, and mandated the holding that the Condominium Association's claims were not covered (in *Weedo*, decided in 1979, the New Jersey Supreme Court held that an insurer had no duty to indemnify its insured for faulty workmanship, where the alleged damages were the cost of correcting the faulty workmanship itself). The New Jersey Supreme Court, however, distinguished *Weedo*, on the grounds that the policy provisions in the two cases were completely different. In so doing, the Court drew a bright-line distinction between policies written before and after the ISO's promulgation of new CGL forms in 1986, which crafted several important changes. The New Jersey Supreme Court noted that the policy in *Weedo* involved the 1973 form, whereas the Developer's policies in this case involved the 1986 form, and there were several important differences in exclusions contained within pre-1986 CGL policies, most significant of which was the "subcontractor's exception," which was not found in the 1973 ISO form.

The subcontractor's exception provides an exception to the standard "your work" exclusion, and allows for coverage if the defective work was performed by an entity rather than the insured itself. The subcontractor's exception is, as is noted above, often found directly within the "your work" exclusion (and is worth reproducing here for the sake of clarity):

> 2. Exclusions.
>
> This insurance does not apply to:

....

1. Damage to Your Work **[the "Your Work" Exclusion]**

"Property damage" to "your work" arising out of it or any part of it. . .

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor. (emphasis added)

The New Jersey Supreme Court noted that the mere existence of the subcontractor's exception supported the argument that consequential damages caused by a subcontractor's deficient work were covered; if the parties to an insurance contract did intend for these damages to be covered, it would beg the question as to the very existence of the subcontractor's exception in the first place. The Court went on to state:

> Indeed, as courts and commentators have acknowledged, the 1986 ISO standard form CGL policy's inclusion of the "subcontractor exception" "resulted both because of the demands of the policyholder community (which wanted this sort of coverage) an the view of insurers that the CGL [policy] was a more attractive product that could be better sold if it contained this coverage. (citations omitted)
>
> …
>
> Moreover, the ISO itself addressed the addition of the subcontractor exception in a July 1986 circular, which "confirm[ed] that the 1986 revisions to the standard CGL policy … specifically 'covere[ed] damage caused by faulty workmanship to other parts of work in progress; and damage to, or caused by, a subcontractor's work after the insured's operations are completed.'" (citations omitted)

Not surprisingly, in *Cypress Point*, the Developer's policies included the usual "your work" exclusion, but also the subcontractor's exception, which the Supreme Court held essentially operated to vitiate the "your work" exclusion. Ordinarily, the "your work" exclusion would eliminate coverage for any property damage arising from the Developer's own work (or the work performed by any of its subcontractors during construction of the building). The Developer's policies, contained an exception to the "your work" exclusion, however, which declared that "if the damaged work or the work out of which the damage arises performed on [the Developer's] behalf by a subcontractor," the "your work" exclusion would not apply. Accordingly, because the Condominium Association alleged that the water infiltration had been caused by the faulty workmanship of the Developer's subcontractors, which was performed on behalf of the Developer, the "your work" exclusion would not apply to defeat coverage of the Condominium Association's claims under the Developer's policies, as the subcontractor exception would apply.

The issue is now settled – the New Jersey Supreme Court has made it clear that consequential damages resulting from a subcontractor's poor workmanship does indeed constitute "property damage" and an "occurrence," and is covered by a standard CGL policy. Notably, however, the New Jersey Supreme Court declined to address one (possibly) important issue raised by the Appellate Division below, and one which itself might be a harbinger of further coverage litigation – whether the existence of the subcontractor exception itself creates a reasonable expectation among the parties to an insurance contract that consequential damages caused by a subcontractor's faulty workmanship constituted both property damage and an occurrence. In *Cypress Point*, however, the New Jersey Supreme Court declined to consider the issue, holding that as the Developer's policy unambiguously provided coverage, there was no need to reach the issue.

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Q. Is My Arbitration Provision Enforceable? A. Maybe

by Joshua A. Bennett

Contractors often insert provisions into their contracts that seemingly would benefit them if a dispute were to arise down the road. However, the question often arises whether such provisions are always enforceable. Unfortunately, the answer is usually a resounding "maybe." Recently, on July 6, 2016, the South Carolina Supreme Court issued an opinion that exhibits why it's difficult to give a definitive answer to the question of whether an arbitration provision is always enforceable in South Carolina.

In *Smith v. D.R. Horton, Inc.*, Op. No. 27645, the Smiths entered into a home purchase agreement with D.R. Horton for the design and construction of a new home in Summerville, South Carolina. Paragraph 14 of the agreement contained an arbitration provision, a warranty disclaimer, and a prohibition against monetary damages.

In 2010, after the Smiths experienced a number of problems with their home that resulted in severe water damage to the property, they filed a construction defect case against D.R. Horton and its subcontractors. In response, D.R. Horton filed a motion to compel arbitration. The Smiths opposed the motion, arguing that the arbitration agreement was unconscionable and therefore unenforceable. The circuit court denied D.R. Horton's motion to compel arbitration, finding that the arbitration agreement was unconscionable. D.R. Horton appealed, and the South Carolina Court of Appeals affirmed the circuit court's order. As a result, the case made its way to the South Carolina Supreme Court with the issue of whether the arbitration agreement is unconscionable.

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Simpson v. MSA of Myrtle Beach, Inc*., 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007). The *Smith* court noted that in determining whether a party lacked a meaningful choice to arbitrate, courts should consider the relative disparity in the parties' bargaining power, the parties' relative sophistication, whether the parties were represented by independent counsel, and whether the plaintiff is a substantial business concern.

In *Smith*, the South Carolina Supreme Court ultimately found that the Smiths lacked a meaningful choice in their ability to negotiate the arbitration clause in the agreement. In reaching this conclusion, the court noted that the Smiths didn't enjoy a stronger bargaining position against D.R. Horton, they were not represented by independent counsel, and they were not a substantial business concern of D.R. Horton. The court also looked at the agreement and noted that D.R. Horton's attempts to disclaim implied warranty claims and prohibit any monetary damages were clearly one-sided and oppressive. On this issue the court stated that "[u]nder the terms of paragraph 14, the only remedy provided for a defect in the home is repair or replacement—options left entirely in the discretion of D.R. Horton . . . . [t]his is no remedy at all because it leaves the relief to the whim of D.R. Horton while simultaneously allowing no monetary recuperation when, as here, the repairs are simply inadequate."

As a result of the above, the South Carolina Supreme Court held that the arbitration provision was unconscionable and, thus, unenforceable. However, it was a close 3-2 decision. Justice Kittredge dissented and wrote that, in his opinion, state law does not provide a valid basis to avoid enforcing this particular agreement to arbitrate, and the court of appeals erred in upholding the circuit court's refusal to compel arbitration.

As you can see, there is no disputing that the question of whether an arbitration provision is enforceable is a tough one to answer. Though the South Carolina Supreme Court held the arbitration provision in the *Smith* case was

unenforceable, in another case, the South Carolina Court of Appeals recently ruled in favor of the enforceability of such a provision in the construction context. *See One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.* , No. 2014-002115 (S.C. Ct. App. June 1, 2016). Even in the *Smith* case itself, different judges had varying opinions regarding the enforceability of the arbitration provision along the way. While in South Carolina, there may be just as many opinions regarding the enforceability of any arbitration provision in your client's particular contract.

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Oregon Supreme Court Holds That Statute of Limitations for Negligent Construction Claims is Two Years after Claim Accrues

by Jamison McCune

In *Goodwin v. Kingsmen Plastering, Inc.*, 359 Or 694, 375 P.3d 463 (June 16, 2016), the Oregon Supreme Court held that negligence claims for construction defects are subject to a two-year statute of limitations, with a discovery rule. The limitations period for negligent construction claims was previously put into question by *Abraham v. T. Henry Construction, Inc.*, 350 Or 29, 249 P.3d 534 (2011). Before *Abraham*, it was generally accepted that the limitation period for negligent construction claims was six years. However, in *Abraham*, the Oregon Supreme Court stated in a footnote that "[t]ort claims arising out of the construction of a house must be brought within two years of the date that the cause of action accrues . . . ." *Id.* at 34 n 3. While the defense bar argued this was a correct statement of the law by Oregon's highest court, the plaintiffs' bar argued the statement was only dictum.

After *Abraham*, Oregon trial courts applied three different limitation periods: (1) two years with a discovery rule (ORS 12.110(1)); (2) six years (ORS 12.080(3)); or (3) six years with a discovery rule (ORS 12.080(3)). The applicable limitation period not only varied from county to county, but in some cases, judges in the same county applied different limitation periods. *Goodwin* conclusively establishes that negligent construction claims are subject to a two-year limitation period with a discovery rule. *Goodwin* also reverses a line of appellate decisions which either implicitly or explicitly held that negligent construction claims are subject to a six-year limitation period (whether the discovery rule applied or not). This important decision and its potential implications on owners and contractors are discussed below.

Background

The *Goodwin* plaintiffs were a husband and wife who purchased a house in 2004. The defendant subcontractor installed stucco siding during construction of the house. The subcontractor completed its work in May 2001.

In March 2011, the plaintiffs filed a complaint against the subcontractor alleging claims for negligence and negligence *per se*. The plaintiffs alleged that numerous construction defects in the siding led to water intrusion and caused property damage. The plaintiffs alleged they did not learn of the damage until May 2010.

The subcontractor moved for summary judgment, arguing that the plaintiffs' claims were time-barred. Relying on the *Abraham* footnote, the subcontractor argued the plaintiffs' negligence claims were subject to ORS 12.110(1), a two-year limitation period with a discovery rule. The subcontractor argued the plaintiffs' claims were not timely under ORS 12.110(1) because the plaintiffs obtained reports from two experts that noted defects in the siding in 2004. The subcontractor also offered evidence the plaintiffs obtained bids to repair the siding in 2005, 2007, and 2008.

In response, the plaintiffs argued their claims were subject to the six-year limitation period in ORS 12.080(3). ORS 12.080(3) provides “an action for waste or trespass upon or for interference with or injury to any interest of another in real property” shall be commenced within six years. The plaintiffs also argued the six-year limitation period in ORS 12.080(3) included a discovery rule.

The trial court granted the subcontractor’s motion for summary judgment. The trial court ruled that negligent construction claims are subject to the six-year limitation period in ORS 12.080(3). However, the trial court ruled that ORS 12.080(3) did not include a discovery rule and that the six-year limitation period began to run when the subcontractor completed its work in May 2001. Consequently, the trial court ruled the plaintiffs’ claims were time-barred. The trial court did not determine when the plaintiffs discovered or should have discovered the subcontractor’s alleged negligence.

Oregon Court of Appeals

The plaintiffs appealed. *See Goodwin v. Kingsmen Plastering, Inc.*, 267 Or App 506, 340 P.3d 169 (2014). The plaintiffs argued on appeal that the trial court erred by concluding that ORS 12.080(3) did not include a discovery rule. The Oregon Court of Appeals agreed with the plaintiffs and reversed the trial court. Like the trial court, the Oregon Court of Appeals held that negligent construction claims are subject to the six-year limitation period in ORS 12.080(3). *See also Riverview Condo. Assn. v. Cypress Ventures*, 266 Or App 574, 399 P.3d 447 (2014) (holding that construction defect claims alleging injury to an interest in real property are governed by ORS 12.080(3)). However, unlike the trial court, the Oregon Court of Appeals also held that the six-year limitation period in ORS 12.080(3) included a discovery rule. *See also Tavtigian-Coburn v. All Star Custom Homes, LLC*, 266 Or App 220, 337 P.3d 925 (2014) (holding that ORS 12.080(3) contains a discovery rule)). Thus, according to the Oregon Court of Appeals, the six-year limitation period began to run when the plaintiffs discovered or should have discovered the subcontractor’s alleged negligence.

Oregon Supreme Court

The Oregon Supreme Court allowed review. After reviewing the text, context, and legislative history of both ORS 12.110 and ORS 12.080, the Oregon Supreme Court held that negligent construction claims are subject to the two-year limitation period in ORS 12.110. The Oregon Supreme Court reached this conclusion for several reasons.

First, the Oregon Supreme Court noted that ORS 12.080(3) excludes certain types of claims from its six-year limitation period. Among those exceptions are claims subject to ORS 12.135, a statute that governs actions for damages from construction, alteration, or repair of improvement to real property. Accordingly, the Oregon Supreme Court concluded the six-year limitation in ORS 12.080(3) does not apply to construction defect claims by its own terms.

Second, the Oregon Supreme Court reasoned that ORS 12.080(3) only applies to actions “for interference with or injury to any interest of another in real property.” The Oregon Supreme Court distinguished between an injury to a property interest from property damage. The Oregon Supreme Court concluded that an injury to a person’s property rights is different than physical injury to the property itself.

The Oregon Supreme Court concluded that “[a] construction defect claim for damage to the property itself is subject to the two-year limitation period of ORS 12.110, unless another limitation period especially enumerated” applies. *Goodwin*, 359 Or at 714. Although the Oregon Supreme Court agreed with the *Goodwin* plaintiffs that the *Abraham* footnote was dictum, the Oregon Supreme Court described the *Abraham* footnote as a correct statement of the law. The Oregon Supreme Court remanded the case to the trial court to determine whether the plaintiffs’ claims were timely under ORS 12.110(1) because the trial court did not make a determination regarding the date of discovery.

Conclusion

Goodwin provides much needed clarification for the bench and bar regarding the statute of limitations for negligent construction claims in Oregon. The limitation period for negligent construction claims is ORS 12.110(1), two years with a discovery rule. The decision will also have important ramifications for both owners and contractors.

Goodwin significantly reduces the amount of time owners have to assert negligence claims against contractors. Under *Goodwin*, owners have two years from the date they knew or should have known of the alleged negligence to file suit. This means owners must be diligent in both discovering property damage and filing suit after property damage is discovered. In cases where owners are not diligent or do not file suit in a timely manner, contractors may have a viable statute of limitations defense.

Goodwin may also affect the types of claims being asserted against contractors. The statute of limitations for breach of contract claims is still six years. ORS 12.080(1). Therefore, an owner may be able to pursue a breach of contract claim against a contractor even though a negligence claim against the contractor would be barred under ORS 12.110(1). Such breach of contract claims could create insurance coverage concerns for contractors because commercial general liability policies typically exclude breach of contract claims.

In light of the foregoing, the viability of a statute of limitations defense and its potential implications on both the owner and contractor need to be considered on a case-by-case basis.

Jamison McCune *is an associate with Bodyfelt Mount LLP in Portland, Oregon. Jamison specializes in representing clients in complex civil litigation cases with an emphasis on construction defect, product defect, and catastrophic injury. Jamison graduated Order of the Coif from the University of Oregon School of Law in 2013 and is admitted to practice in state and federal court in Oregon.*

Companies Can Reduce Cost of Litigation for High Volume Electronic Discovery (E-Discovery) Through Technology Assisted Review

by Joseph J. Bosick

Due to the escalating quantity of data in the discovery process, technology assisted review is seen as a solution for spiraling litigation costs. Technology assisted review of documents uses technology to locate relevant documents quickly and produces savings in the cost of review. Technology assisted review is also known by other names such as predictive coding or computer assisted review. The cost savings in discovery for a successful technology assisted review project relates to the documents that do not have to be reviewed through the use of sampling techniques.

In the year 2010, technology assisted review was rarely used in litigation. Today computer assisted review is considered by many to be an essential technology because of its prioritizing of documents and because it reduces the time that it takes to review the documents.

Predictive coding utilizes a series of algorithms. An algorithm is a formally specified series of computations that, when executed, accomplishes a particular goal. The algorithms used in E?Discovery are implemented as computer software.

The escalating quantity of data that may be subject to discovery requests in litigation was mentioned by IBM when it recently reported that: “Every day, we create 2.5 quintillion bytes of data – so much so that 90% of the data in the world today has been created in the last two years alone.”

More and more data is stored today in the cloud for business purposes. From an e-discovery viewpoint, having a centralized location for searching data is helpful but without technology assisted review can be expensive.

Companies now have social media sites because of the increase in user activity on those sites. Below is a graph that shows the increase in activity on social media sites between September of 2011 and June of 2016.

Outlet	September 2011	June 2016
Facebook	500 million	1.65 billion

LinkedIn	100 million	433 million
Twitter	190 million	310 million
YouTube	2 billion views (daily)	4 billion views (daily)
Instagram	0	400 million
Snapchat	0	100 million (daily)

Adverse parties in litigation now customarily request information posted by companies on social media sites over an extended period of years. Social Media environments are dynamic and constantly changing. This, in turn, increases the cost of responding to requests for production of documents that are served on parties in litigation.

Technology assisted review can result in substantial cost savings to companies and their insurers relative to discovery requests for traditional corporate records (letters, memoranda, email, drawings, photographs, agreements, meeting minutes, financial statements, etc.) as well as discovery requests related to social media.

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Upcoming

Construction Law Conference – March 1-3, 2017, Las Vegas, Nevada

by Mark D. Shifton

As we all enjoy the last days of summer and prepare ourselves for the work that has been piling up since Memorial Day, please do not forget to mark your calendar for the 2017 Construction Law Seminar, which will be held at the Cosmopolitan Hotel and Casino in Las Vegas, Nevada, from March 1-3, 2017.

The Construction Law Committee is hard at work putting together an incredibly dynamic array of speakers and programs spanning a broad range of topics of interest to construction law practitioners (of all levels of experience). From tips on drafting and negotiating construction contracts, an in-depth discussion of the Pulte Homes Energy Efficient House Program, a timely and relevant program dealing representing clients with public relations/crisis management issues, and a skills-based clinic for young lawyers – there will be several programs of interest for attorneys of all levels of experience.

Should this be your first time attending (or even thinking about attending) our annual meeting, please don't get the wrong impression – we well know that all work and no play makes for dull attorneys, so rest assured there will be *plenty* of diversion to be found – networking receptions, meets and greets, lunches and dine-arounds, and of course, games of skill and luck for those foolish enough to believe they possess either. Finally, to round out the program, and for those of us who can get back to the hotel at a reasonable hour, on Friday morning Judge Mark Davidson of the Eleventh Circuit will present "Rock and Roll Rules of Ethics," a program which is absolutely not to be missed.

Please stay tuned for further information, including registration details and deadlines. If anyone wishes to become more involved in the committee, including helping us plan the upcoming seminar, please do not hesitate to reach out to myself, or to David Jones (DJones@wlj.com), the Seminar Chair.

Hope to see you in Vegas!

Mark D. Shifton

Marketing Chair, DRI Construction Law Committee