BRADLEY ARANT ROSE & WHITE LLP **Second Quarter 2004**

CONSTRUCTION AND PROCUREMENT LAW NEWS

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

James F. Archibald, III
Axel Bolvig, III
John D. Bond, III
Joel E. Brown
Stanley D. Bynum
Roy D. Campbell, III (j)
Rhonda R. Caviedes
Donna M. Crowe (w)
Danielle Daigle Ireland (j)
Douglas E. Eckert
Julie S. Elmer
A. H. Gaede, Jr.
John W. Hargrove
Jonathan B. Head
Gary C. Huckaby (h)
David G. Hymer
Jeffrey D. Komarow (w)
Arlan D. Lewis
Stanley Allen Martin
Michael D. McKibben
Andrew J. Noble, III
David W. Owen
J. David Pugh
E. Mabry Rogers
Walter J. Sears III
H. Harold Stephens (h)

A Worst Case Scenario

The "z-clip" would not snap into place. If the worker could not install this z-clip, the skylight would leak onto the airport terminal floor far below and create a hazard for the millions of travelers passing through each year. At that moment, the worker made a critical decision which, in turn, began a chain of events all too familiar to construction contractors. First, the worker snapped out of his safety lanyard. Next, he left the secure footing of his work platform in order to achieve better leverage on the stubborn clip. Finally, he braced against a 2 x 12 which was not attached to anything. It was a worst case scenario. Everything moved at once, the worker lost his balance, and he fell to the concrete floor below.

The lawsuit which was filed was similar to many we see in the construction industry. The employee's immediate employer, which was the second-tier skylight subcontractor, was sued for workers' compensation. The construction manager, the general, the first-tier sub skylight supplier, and several individual co-employees all were sued for negligence. Insurance companies were put on notice right and left, and cross-claims for indemnity were filed by everyone. The principal issue presented in *Fulgham v. Daniel J. Keating Co.*, 285 F.Supp.2d 525 (D. N.J. 2003), was which contractors were entitled to indemnity and which ones were not.

Employers receive some degree of statutory immunity from injury claims by their own employees in every state in this country in return for no-fault liability for workers' compensation. Many states provide that same immunity to general contractors when the general contractor has a statutory obligation to provide "back-up" workers' compensation if a subcontractor fails to provide it. This leaves everyone else on the job, from the owner or the CM to other subcontractors and their employees, to fend for themselves.

Inside:

A variety of indemnity and immunity claims were presented and discussed in *Keating*:

1. The CM sued the GC for indemnity pursuant to the construction contract between the owner and the GC since there was no contract between the CM and the GC (the CM's contract was directly with the owner). The CM's theory was that it was an unnamed third-party beneficiary of the construction contract;

2. The GC claimed statutory immunity under the back-up employer theory discussed above;

3. The first-tier subcontractor skylight supplier sued the second-tier subcontractor skylight installer under the indemnity provisions in its purchase order; and

4. The skylight supplier sued the installer on the theory that the same purchase order relinquished any and all control of the jobsite to the installer.

The GC was granted its statutory back-up employer immunity by the court. However, all of the indemnity claims were denied for a variety of reasons, all of which boiled down to technical issues related to contractual language. In some documents the indemnity was general and not expressly related to workers' compensation claims, in others the language was not included until after the incident sought to be indemnified occurred, and in others the parties were not clearly identified.

Although this case arose under Pennsylvania law, the *Keating* court discussed several general considerations which are important points in drafting indemnity agreements. They are:

1. Put the agreement in writing;

2. Identify which parties are providing the indemnity and which parties are entitled to the indemnity;

3. Expressly provide the type of claim for which the indemnity is being provided; and

4. Be sure the indemnity is signed before work begins.

These tips can help obtain enforcement of your indemnity clauses by courts traditionally hostile to them.

Court Defers to Arbitrators on Enforceability of Stay Provision

In *Siemens Westinghouse Power Corp. v. Dick Corporation*, 293 F. Supp 2d 344 (S. D. N. Y 2003), Siemens and Dick formed a consortium ("the Consortium") to design and build a power plant. The owner assessed liquidated damages against the Consortium for delays in constructing the power plant. After Siemens paid the liquidated damages, Siemens sued Dick and its sureties, seeking reimbursement for the liquidated damages it paid to the owner.

In response, Dick filed a third-party complaint against the owner and against Limbach, one of its subcontractors, asking the Court to find that Limbach was liable for any liquidated damages that Dick was ordered to pay to Siemens. Dick and Limbach were already involved in an arbitration against each other, which involved the same project and claims.

Limbach's subcontract with the Consortium contained a broad arbitration clause calling for arbitration of "any dispute of any kind" between Limbach and the Consortium. The subcontract also provided that in the event of a dispute between the owner and Consortium, Limbach agreed to join and be bound by results of that proceeding and "to stay any [related] action" it had filed against the Consortium. After adding the owner and Limbach to the *Siemens* lawsuit, Dick asked the arbitrators to stay the Limbach arbitration and the court to stay the *Siemens* lawsuit. According to Dick, the existence of claims between the Consortium and the owner in the *Seimens* lawsuit meant that the Limbach arbitration had to be stayed under the subcontract.

Before the court ruled on Dick's motion, the arbitrators decided not to stay Limbach's arbitration. Dick still had a shot at convincing the court to enjoin the arbitration, but the court refused to do so. According to the court, the stay provision did not limit the scope of arbitration, but rather constituted a substantive matter within the scope of the arbitration clause. Thus, the question of whether the stay provision had been triggered by the contractor's claim against owner was a question for the arbitrators, not the court, to decide.

This case displays, once again, the impact of a broad form arbitration clause. If parties agree to arbitrate "any dispute of any kind," the parties may have empowered arbitrators to decide not only claims and other breach of contract disputes, but also disputes about the procedures for resolving disputes.

Pennsylvania Court Rules That Settlement Discussions Made Outside of Mediator's Presence Are Not Privileged

Parties often share confidential information during mediation. They expect that this information will remain confidential and cannot be used subsequently by a non-settling party, or in subsequent litigation. But disclosure could make the confidential information discoverable, if certain steps are not taken to protect the confidentiality. Several parties learned this lesson the hard way in *United States Fidelity & Guaranty Company v. Dick Corporation/Barton Malow*, 215 F.R.D. 503 (W.D. Pa. 2003).

In *Dick/Barton Malow*, several defendants and counter-claim plaintiffs (the "Defendants") attempted to settle their disputes in mediation. They exchanged confidential documents to facilitate mediation. They were not able to settle their claims during the mediation session, but they continued to negotiate directly with each other after the mediation. The Defendants eventually settled among themselves, and afterward, the plaintiff sought copies of correspondence related to the Defendants' settlement efforts. Defendants attempted to shield their settlement discussions by relying on Pennsylvania's statutory mediation privilege, 42 Pa.C.S.A. § 5949, which states:

> …all mediation communications and mediation documents are privileged. Disclosure of mediation communications and mediation documents may not be required or compelled through discovery or any other process.

The statute further defines a "mediation communication" as one

> made by, between or among a party, mediator, mediation program or any other person present to further the mediation process when the communication occurs during a mediation session or outside a session when made to or by the mediator or mediation program.

The Pennsylvania court strictly construed the statutory mediation privilege. Defendants could not shield their settlement discussions under the statute, because they did not run them through the mediator. The settlement communications did not occur "during a mediation session," nor were they made "to or by the mediator or mediation program." They were made directly between the Defendants without the protection of filtering them through the mediator.

The Defendants perhaps saved time and money by settling their counter-claims directly, without the added burden of allowing the mediator act as gate keeper. The Defendants probably believed the prior mediation session shielded all subsequent settlement discussions. Could they have continued their subsequent settlement discussions without waiving confidentiality? Perhaps. In hindsight, the obvious answer is that Defendants could have protected their confidential information by filtering all settlement discussions through the mediator, in strict compliance with the statute. Another option could have been to ensure that all offers to compromise and settle were clearly identified as such under Federal Evidentiary Rule 408, which states that, "Evidence of conduct or statements made in compromise negotiations is… not admissible." State

evidentiary rules often track federal rules, perhaps providing another layer of protection to confidential offers to compromise disputed claims.

Lender Liability Allegation Is Sustained

In 1996 Metric Constructors contracted with a developer, CELP, to build a trash-to-cash power plant in North Carolina. The Bank of Tokyo-Mitsubishi led a consortium of banks that financed the project. When the project's forecast profitability fell, during construction, the banks declined to make further advances on the loan. Metric sued the banks (the developer was defunct) under various lender liability theories, including quantum meruit. Quantum meruit is a theory of liability asserting that the claimant conveyed a value to an entity; the benefited entity knew the claimant was not doing the work for free, and the claimant has not been paid for the benefit.

In a prior appeal (230 F.3d 1353 (4th cir. 2000; 2000 WL 1288317), the Court of Appeals had agreed Metric could not sue the banks under theories of interference with contract or fiduciary duty. This appeal reported at 72 Fed. Appx. 916; 2003 WL 21752892, allowed the claim to proceed on the quantum meruit theory, for the time when Metric continued to work on the project without knowing the banks were considering whether to continue funding the project. Because this period covers nearly 3 months of the construction, the benefit conferred may be over $20,000,000, notwithstanding that the plant ultimately was not marketable as a plant and was sold as scrap. The case will be tried on this theory in summer, 2004.

New Provision of Architect's Code of Professional Conduct Addresses Minimum Construction Administrative Services

During its February 2004 meeting, the Alabama Board for Registration of Architects (the "Board") adopted the proposed Paragraph 3.7 (entitled "Full Disclosure") to its Code for Professional Conduct ("CPC") which requires the sealing architect to report to the Board and the appropriate building official when he/she has not been, or is no longer, engaged to perform at least "minimum construction administration services" on a project for which a building permit has been issued. "Minimum construction administration services" are defined by Paragraph 3.7(b) to be "periodic site observations of the construction progress and quality, review of contractor submittal data and drawings, and reporting to the building official and owner any violations of codes or substantial deviations from the contract that the architect observed." Paragraph 3.7 becomes effective May 1, 2004.

Alabama Code § 34-2-30(2) identifies construction administration as a component of the practice of architecture. However, the statute says little else about the architect's construction administration obligations. According to a Board official, the adoption of Paragraph 3.7 arose from the Board's concern that an architect could prepare plans and specifications for an owner and, if the architect is not engaged to perform minimum construction administration services, significant deviations from the plans and specifications during construction could jeopardize the health, safety and welfare of the public.

The regulation appears designed to insure that a "design/build" Contractor keeps the "designer" on the payroll. This may, thus, be a piece of the national puzzle – about "design/build" delivery systems. *See Rogers, Crowe, Campbell, "The Effect of Licensing Laws on Design-Build Projects," Construction Briefings (March, April, 2001).*

Bankruptcy Filing May Not Halt Perfection of Lien Rights

Generally, when the owner of property files a petition for bankruptcy, the automatic stay provision of the federal bankruptcy laws (11 U.S.C. § 362(a)) essentially stops all collection efforts against the bankrupt. The stay applies to, among other things, "any act to create, perfect, or enforce any lien against property of the estate." *Id.* § 362(a)(4). As a general rule, then, where an owner files for bankruptcy mid-project, leaving contractors, subcontractors and suppliers who have provided labor and materials but have not been paid, the automatic stay would seem to cut off pursuit of mechanic's lien rights. However,

there are exceptions to the general rule. One exception is 11 U.S.C. § 362(b)(3), which provides that the stay is inapplicable to "any act to perfect, or to maintain or continue the perfection of, an interest in property." Thus, where a creditor had a pre-existing "interest in property" at the time the bankruptcy petition was filed, the stay does not prohibit perfection of that interest.

Key to the applicability of the exception in the construction context, then, is a determination that mechanic's lien rights fulfill the "interest in property" requirements. Such a determination is not straightforward. Much confusion arises because state lien laws vary significantly as to when and how liens are created and perfected. For example, in some states, a mechanic's lien does not attach until a notice of lien is filed. In other states, the lien attaches upon the first visible sign that work is being performed. States also differ as to the priority a lien may have over competing interests in the property. Some statutes provide that a properly perfected lien relates back in time to the visible commencement of the work on the project, regardless of whether the particular lienholder had started work or provided materials at that time. As a result, a contractor providing labor and materials in the late phases of a project may have a lien priority relating back to a time before she furnished any value. Other statutes base the priority of a lien as of or after the date of its attachment.

A couple of recent cases illustrate the different results obtained depending on state lien law. In *In re Excel Eng'g, Inc.*, 224 B.R. 582 (Bankr. W.D. Ky. 1998), for example, the court found that an equipment lessor on a public project, who filed a Statement of Lien pursuant to a Kentucky statute 6 days after the general contractor filed a petition for bankruptcy, did not have a valid mechanic's lien on the funds due the contractor. This was so because, under the statute, the lien did not attach until the time the Statement of Lien was filed. Thus, because the Statement of Lien was filed postpetition, the lessor's "interest in property" did not arise until postpetition, and § 362(b)(3)'s exception did not apply. By contrast, in *In re Stein & Giannott, Inc.*, No. 02-88737-478 (Bankr. E.D.N.Y., June 18, 2003), a medical waste carrier furnished labor and materials to a medical waste incinerator for a period of time prior to the incinerator's filing for bankruptcy. After the filing of the bankruptcy petition, the carrier filed a notice of mechanic's lien. The timing of the notice complied with the requirement under New York lien law that notices be filed within 4 months of completion of work. The incinerator claimed that the filing of the notice of lien created the mechanic's lien, and therefore because it was filed postpetition, it did not fall under the exception to the automatic stay. The court disagreed. It found that the carrier's filing of the notice was both an act to create a lien and an act to perfect a lien. It therefore qualified as an act to perfect. Furthermore, under New York lien law's relation back provisions, the filing of the notice served as an act to perfect the carrier's interest in the incinerator's property to a date that not only preceded the incinerator's petition for bankruptcy but also the attachment of the lien.

Because state lien laws differ significantly and can have an extreme impact on a contractor's lien rights in the context of bankruptcy, contractors should consult with their attorneys, including bankruptcy specialists, to make sure not only that their rights are preserved but also that they are not proceeding in violation of bankruptcy laws.

So, You Are An Additional Insured – What Coverage Do You Really Have?

In construction contracting it is not uncommon for owners to require general contractors to name them as an additional insured under their CGL policy. Often this requirement will flow down through multiple subcontracting tiers. The protection afforded by additional insured endorsements can vary dramatically as is illustrated by the outcomes of *Vitton Construction Co., Inc. v. Pacific Insurance Co.*, 2 Cal.Rptr.3d 1 (Cal. App. 2003) (broad policy language providing additional insured coverage for liability arising out of contractor's work for the additional insured) and *Liberty Mutual Fire Insurance Company v. Statewide Insurance Company*, 352 F.3d 1098 (7th Cir. 2003) (additional insured endorsement limiting coverage to claims of strict liability).

In *Vitton*, a general contractor, and its excess insurance carrier sued a subcontractor's insurer seeking, among other things, declaratory relief on the ground that the general contractor was an additional insured entitled to coverage under the subcontractor's umbrella policy. In *Vitton*, an employee of a roofing subcontractor was injured when he fell through an uncovered hole in the roof decking that had been made by another subcontractor, Pacific Erectors, Inc., ("PEI") that had since completed its work and left the jobsite. The general contractor was an additional insured under PEI's insurance with respect to "liability arising out of" PEI's work on the project.

The issue before the court was whether there existed a minimal causal connection between the injury and the subcontractor's work to trigger coverage under the subcontractor's policy. The court held that the general contractor was entitled to coverage in that the language of the endorsement was broad and did not purport to allocate coverage according to fault.

By contrast, in *Statewide*, the Seventh Circuits refused to extend coverage to a contractor that was named as an additional insured on a subcontractor's CGL policy. The endorsement essentially limited the additional insured's coverage to claims in strict liability even though the subcontractor did not engage in any such activity on the construction project. The contractor argued that the narrow language of the endorsement furnished no tangible coverage that could ever apply on the particular project, and illusory coverage is against public policy. The court disagreed noting that the limited coverage made sense given that the additional premium for the endorsement was only $35 and the policy had been submitted to the Illinois Department of Insurance, which had not rejected it. In addition, the certificate of insurance provided by the subcontractor put the contractor on notice that it should review the policy and there was no evidence that the contractor objected to the policy.

Simply being named as an additional insured may not protect an owner or contractor from liability to the extent expected. Additional insured endorsements may be issued with language limiting coverage to situations involving vicarious liability for negligent conduct by the named insured or even strict liability as in *Statewide*. For maximum protection, negotiate coverage for liability "arising out of the named insured's work," which may be interpreted more broadly. Finally, don't fall for the false sense of security a certificate of insurance provides – always read the endorsement!

Lawyer Activities:

January 7, 2004: Bradley Arant attorneys Axel Bolvig, Rhonda Caviedes, Jonathan Head and Mabry Rogers presented a one day seminar in Birmingham, Alabama, on "Construction Contracting for Public Entities in Alabama."

January 29, 2004: Bradley Arant attorneys Joel Brown, Donna Crowe, Nick Gaede, David Owen and Wally Sears presented a one day seminar in Birmingham, Alabama on "AIA Contracts in Alabama."

March 31, 2004: Bradley Arant attorneys Jim Archibald, Rhonda Caviedes, David Pugh and Alan Spencer presented a one day seminar in Birmingham, Alabama, on "Fundamentals of Construction Law."

April 29, 2004: Bradley Arant attorneys Jim Archibald, Rhonda Caviedes, David Pugh and Wally Sears will present a one day seminar in Birmingham, Alabama, on "Construction Management/Design-Build in Alabama."

May 18, 2004: Bradley Arant attorneys Rhonda Caviedes, David Pugh, Bob Greene, Mabry Rogers and David Roth will present a one day seminar in Birmingham, Alabama, on "So You Thought Environmental Law Was for the Chemical Companies: A Review of Recent Environmental Issues Percolating in Construction."

Disclaimer and Copyright Information

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

This newsletter is a periodic publication of Bradley Arant Rose & White LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult your own lawyer concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact your lawyer or any of the lawyers in our group whose names, telephone numbers and E-mail addresses are listed below; or visit our web site at www.bradleyarant.com.

James F. Archibald, III ..... (205) 521-8520 ..... jarchibald@bradleyarant.com
Axel Bolvig, III..... (205) 521-8337 ..... abolvig@bradleyarant.com
John D. Bond, III ..... (205) 521-8970 ..... jbond@bradleyarant.com
Joel E. Brown ..... (205) 521-8416 ..... jbrown@bradleyarant.com
Stanley D. Bynum ..... (205) 521-8000 ..... sbynum@bradleyarant.com
Roy D. Campbell, III (Jackson) ..... (601) 948-9934 ..... rdcampbell@bradleyarant.com
Rhonda R. Caviedes ..... (205) 521-8683 ..... rcaviedes@bradleyarant.com
Donna M. Crowe (Washington, D.C.) ..... (202) 393-7150 ..... dcrowe@bradleyarant.com
Douglas E. Eckert ..... (205) 521-8519 ..... deckert@bradleyarant.com
Julie S. Elmer ..... (205) 521-8431 ..... jelmer@bradleyarant.com
A. H. Gaede, Jr. ..... (205) 521-8323 ..... ngaede@bradleyarant.com
John W. Hargrove ..... (205) 521-8343 ..... jhargrove@bradleyarant.com
Jonathan B. Head ..... (205) 521-8054 ..... jhead@bradleyarant.com
Gary C. Huckaby (Huntsville)..... (256) 517-5140 ..... ghuckaby@bradleyarant.com
David G. Hymer..... (205) 521-8289 ..... dhymer@bradleyarant.com
Danielle Daigle Ireland (Jackson) ..... (601) 948-9942 ..... direland@bradleyarant.com
Jeffrey D. Komarow (Washington, D.C.)..... (202) 393-7150 ..... jkomarow@bradleyarant.com
Arlan D. Lewis ..... (205) 521-8131 ..... alewis@bradleyarant.com
Michael D. McKibben ..... (205) 521-8421 ..... mmckibben@bradleyarant.com
S. Allen Martin..... (205) 521-8052 ..... amartin@bradleyarant.com
Andrew J. Noble, III..... (205) 521-8342 ..... anoble@bradleyarant.com
David W. Owen ..... (205) 521-8333 ..... dowen@bradleyarant.com
J. David Pugh..... (205) 521-8314 ..... dpugh@bradleyarant.com
E. Mabry Rogers ..... (205) 521-8225 ..... mrogers@bradleyarant.com
Walter J. Sears III..... (205) 521-8202 ..... wsears@bradleyarant.com
H. Harold Stephens (Huntsville)..... (256) 517-5130 ..... hstephens@bradleyarant.com

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

BRADLEY ARANT ROSE & WHITE LLP **Third Quarter 2004**

CONSTRUCTION AND PROCUREMENT LAW NEWS

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

James F. Archibald, III
Axel Bolvig, III
John D. Bond, III
Joel E. Brown
Stanley D. Bynum
Roy D. Campbell, III (j)
Rhonda R. Caviedes
Donna M. Crowe (w)
Danielle Daigle Ireland (j)
Douglas E. Eckert
Julie S. Elmer
A. H. Gaede, Jr.
John W. Hargrove
Jonathan B. Head
Gary C. Huckaby (h)
David G. Hymer
Jeffrey D. Komarow (w)
Arlan D. Lewis
Stanley Allen Martin
Michael D. McKibben
Andrew J. Noble, III
David W. Owen
J. David Pugh
E. Mabry Rogers
Walter J. Sears III
H. Harold Stephens (h)

Bradley Arant Expanding to Charlotte

Bradley Arant has opened an office in Charlotte, North Carolina, on the 26th floor of the Bank of America Corporate Center in downtown Charlotte. Our sixth office is anchored by John D. Bond, III, former President and General Counsel of J. A. Jones Construction, and prior to that, an excellent construction lawyer in Washington, D.C. The Charlotte office will build principally on the firm's Procurement and Construction Practice Group.

John returned to private practice of law last October (2003) when he joined Bradley Arant's main office in Birmingham. He is a member of the AGC's National Contractors Committee, and he serves on the Board of Directors of the American Arbitration Association and is a member of its National Panel of Arbitrators for complex cases.

This office provides us with another opportunity to serve any of your needs anywhere in the country, including, of course, the Carolinas. The office numbers are on the last page of this Newsletter.

Pre-Hearing Limits of Arbitration

This firm has been a strong proponent of arbitration, long before it became fashionable. We have engaged in thousands of arbitrations, beginning in the late 1960's, and we continue to believe in arbitration, particularly for complex construction matters. As illustrated in a recent case, *Gresham v. Norris*, 304 F. Supp. 2d 795 (E.D. Va. 2004), pre-hearing discovery in arbitration is limited, and its applicability varies from state to state.

In the *Gresham* case, the trial court held that, under the Federal Arbitration Act, as applied by the Fourth Circuit of the Federal courts (this is the circuit having supervision over Virginia and the Carolinas), an arbitrator may not subpoena a witness for a pre-hearing deposition, absent a showing of "special need." There is some difference of opinion among the Federal courts on this issue, but this case represents the general rule. There are ways around this issue, particularly if a state's law allows an arbitrator to issue subpoenas for depositions, if the parties consent to depositions, or if a party seeking a deposition actually arranges for the arbitrator to appear at the deposition for a "hearing."

Inside:

www.bradleyarant.com

Birmingham Office
One Federal Place
1819 5th Avenue North
Birmingham, AL 35203
(205) 521-8000

Huntsville Office
200 Clinton Ave. West
Suite 900
Huntsville, AL 35801
(256) 517-5100

Montgomery Office
Alabama Center for Commerce
401 Adams Avenue, Ste. 780
Montgomery, AL 36104
(334) 956-7700

Washington D.C. Office
1200 G Street, N.W.
Suite 550
Washington, D.C. 20005
(202) 393-7150

Jackson Office
188 East Capitol Street
One Jackson Place
Suite 450
Jackson, MS 39215
(601) 948-8000

Charlotte Office
Bank of America Corp. Ctr.
100 N. Tryon St.
Suite 2690
Charlotte, NC 28202
(704) 332-8842

One of the obvious considerations in agreeing to arbitration is the lack of pre-hearing discovery, which may be a positive or negative factor in any specific arbitration. However, as our readers are aware, one must consent to a pre-dispute arbitration clause in the contract itself (obviously prior to any dispute), so one must evaluate the general consideration of whether pre-hearing discovery will most likely be favorable or unfavorable to the company in future disputes. The crystal ball is never clear, but one should consult with one's lawyer in making this forward projection.

Prompt Payment – USDOT

Prompt payment is always of interest to the readers of this Newsletter. The U.S. Department of Transportation ("USDOT") issued, effective July 16, 2003, regulations limiting the period of time for which a prime contractor may effectively withhold payments to a subcontractor. The regulation requires all states accepting federal money for construction in public works projects (which is all of them) to include prompt payment provisions in their contracts as part of their respective DBE programs. The regulation requires contractors to release retainage to their subcontractors within 30 days of satisfactory completion of the sub's work, regardless of when the prime contractor completes the entire project. The regulation authorizes states already operating under state prompt payment statutes to use their own statute, so long as it complies with the requirements of the new regulation.

Primes worry that the new regulation requires them to pay retainage to subcontractors even where the state is withholding retainage from them, and the primes lose leverage with subcontractors in the event that problems arise involving the sub's work, after they have been fully paid. This concern, on USDOT-funded contracts, can be addressed, in part, by making sure that the subcontractor's surety (for a bonded sub), when consenting to final payment, furthermore agrees that the bond will stand for any and all warranty and latent defect claims. One could either craft a letter to this effect for the surety to countersign, or study the actual bond provided by the subcontractor (assuming one was obtained) to determine whether the bond already stands behind such continuing obligations of the subcontractor. Subcontractors, of course, embrace the new regulation, hoping it will help to eliminate cash flow problems and insure their financial security. The text of this regulation may be found at 49 C.F.R. 26.29.

Alabama Corner: Sales Tax Exemption Repealed What Does It All Mean?

As you are well aware if you are an Alabama contractor, the Legislature passed an Act (2004-638) repealing the sales tax exemption on materials purchased for public projects. However, the Act, somewhat hastily drafted, left open a number of questions regarding the details of the repeal. Bradley Arant lawyers aided trade groups and the Governor's Office in drafting a request for an Attorney General's opinion, which has now been received and clarifies many of the questions favorably for contractors.

First, the opinion makes clear that contracts not "revised, renegotiated or altered" (read, change order) are grandfathered under the former sales tax exemption. Any contracts awarded, which the AG interprets to mean "official action is taken by the governing body of the governmental entity to enter into the contract," before July 1, 2004, qualify for the exemption.

The Act purports to have a sunset provision that would terminate the Act, or "repeal the repeal," on October 1, 2006. However, as expected, the AG opined that the Legislature did not "demonstrate[] a legislative intent to revive the provisions" of the former statute, and thus another legislative act will be necessary to restore the exemption.

Under the sales tax regime existing before the exemption, the Alabama Department of Revenue established guidelines by which a contractor could serve as a public entity's purchasing agent, thus exempting material purchases from sales tax. While somewhat cumbersome, this system is one that was familiar to most contractors and, fortunately, the AG opined that "[a]ll sales and use tax rules in effect before the enactment" of the exemption "will continue to be applicable...." The

opinion also states that specific tax exemptions, such as those for health care facilities, "that have a reasonable field of operation that may, at times, cover the same situations as the contractor exemption... are not affected by the repeal...."

One significant concern regarding the effect of the repeal was whether acceptance of change orders would subject new material purchases to tax, or whether **all** purchases made under the contract before or perhaps only after the date of the change order would become subject to tax. In short, the answer is probably the best that could be expected. Many had hoped that if the contract had been awarded prior to July 1, it would be entirely grandfathered, which would ease administration. However, to the extent a change order does not "result in the purchase of additional tangible personal property, the revision or 'change order' will not cause the contract to lose its exempt status." In other words, there will be no retroactive application of the tax to purchases that were already made under the tax-exempt framework. Only the purchases made as a result of the change order will be subject to sales or use tax.

A copy of the AG opinion is available from our office. Bruce Ely, who heads the firm's state and local tax practice group, is the appropriate contact for further advice and can be reached at (205) 521-8366.

Is A General Contractor Liable for Death of Subcontractor's Employee at Space and Rocket Center?

On April 9, 2004, the Alabama Supreme Court issued an important ruling outlining the liability of a general contractor for injuries or death to an employee of a subcontractor. *Stovall v. Universal Construction Company*, 13 ALW 16-1 (Case No. 1021938) (Ala. April 9, 2004), addressed issues which arose after a subcontractor's employee fell from an unsecured ladder while painting a replica of the Saturn V rocket at the U.S. Space and Rocket Center in Huntsville. The subcontractor's employee brought a claim against the general contractor. The trial court entered a summary judgment in favor of the general contractor. On appeal, the employee's family raised several issues.

First, the claim was made that the general contractor had been negligent in failing to provide adequate lighting for the painting work which was being done at night. The Alabama Supreme Court emphasized that in most cases a general contractor owes no duty to the subcontractor whom he has employed. However, the Court noted three exceptions to this rule: (1) the general contractor is liable for injuries to a subcontractor's employee which were caused by the contractor's own negligence; (2) a general contractor is liable for injuries to a third person when the work being performed is intrinsically dangerous; and (3) a general contractor is responsible for the manner of performance of his non-delegable duties. While the subcontractor's employee alleged that the general contractor had retained possession and control over the lighting in the work area where the death occurred, the Court in *Stovall* noted that the employee had failed to produce substantial evidence indicating that the general contractor reserved the right to control how the subcontractor performed its work. Finding no evidence of reservation of control over how the subcontractor used lighting, the Court held that there was no duty owed by the general contractor to the employee of a subcontractor.

The second issue raised in the case was whether the general contractor could be liable for failing to provide a safe workplace. The Court noted a duty to provide a safe workplace is a statutorily imposed duty upon employers in Alabama. In addressing the claim of failing to provide a safe workplace, the Court noted that the critical issue is whether the general contractor has retained possession and control over the premises. The Court observed that where the general contractor does not own the premises and/or where it has not reserved control over the manner in which the work is being performed, a general contractor cannot be held liable for failure to provide a safe workplace. The Court found insufficient evidence of retained control on the part of the general contractor.

Third, the deceased employee's family alleged that the general contractor had been involved in setting up a safety program for the painters. However, the Court again stressed that the general contractor had not reserved control as to

how the subcontractor's employees (the painters) would do their work.

The family of the deceased employee also argued that the painting of the interior of the mock rocket was intrinsically dangerous. This argument was rejected. The Court noted that certain activities such as use of dynamite, aerial spraying of pesticides or application of highly caustic paint remover are "intrinsically dangerous" activities, but it refused to find that painting from a ladder is "intrinsically dangerous."

Finally, the family argued the general contractor was liable for alleged negligent inspection of the premises. The Alabama Court found no substantial evidence indicating that the general contractor had undertaken to inspect the premises.

The decision in *Stovall* has several important messages for general contractors everywhere, as the principles are similar, state to state. First, the general contractor should let subcontractors select their "means and methods." The general contractor in this case avoided liability by not reserving control over how the subcontractor did its job. Second, as to those contracts dealing with intrinsically dangerous work, a general contractor will always have potential liability for injury or death of subcontractors' employees. Thus, on inherently dangerous work, the general contractor should choose its subs carefully and monitor the safety implementation of its subcontractors pertaining to such work. These are fundamentals, and *Stovall* is a tragic reminder.

Accident Investigation Checklist

As we discussed in *Stovall* above, a jobsite accident that results in the serious injury or death of a worker is the worst experience in contracting. Unfortunately, in many instances despite best efforts, accidents happen. To effectively manage the circumstances surrounding a serious accident it is essential to have procedures in place to protect the injured and to meaningfully inspect and analyze jobsite accidents. The following is an 11-step accident investigation checklist and discussion of practices and procedures that may be implemented to mitigate and manage the impact of a serious jobsite accident. To be effective the practices and procedures for managing serious accidents must be reviewed and practiced regularly by the jobsite team.

1) Care for the injured. The first concern at an accident scene, regardless of the seriousness, is to care for the injured. Fire and rescue services should be summoned immediately. Prompt efforts must be undertaken to assure that emergency rescue personnel and equipment have access in and out of the accident area. Nothing should interfere with the concern of caring for the injured except the safety of rescue personnel themselves.

2) Protect other people and property. The condition of the accident site must be stabilized. The actual investigation should begin only after the accident site is safe to approach.

3) Notify appropriate corporate leadership and OSHA and insurance carriers. An emergency call list should be posted in the jobsite office identifying the names and telephone numbers of corporate personnel to be contacted, the insurance carrier and the area OSHA office.

4) Preserve the scene as it was immediately after the accident. Cordon off or barricade the area to keep curious bystanders from destroying evidence. The condition of the accident site should be maintained as nearly as possible to the conditions that existed at the time of the accident to assure effective examination and accurate photographic and video recording of the scene. Barricade tape or rope may be used to create a boundary around the accident site. Stairways and walkways leading to and from the accident area should be closed. Site personnel and perhaps hired security guards may be utilized to regulate access to the accident area.

5) Make a visual walk-through inspection of the accident site. Conditions at an accident scene will change rapidly. During the walk-through inspection the location of all items of evidence should be noted and recorded. Mark the location of any item likely to be moved, such as lightweight, moveable items, particularly if they are of high value.

6) Obtain the identities of all people who might have information about the accident. If accident witnesses are connected with the project, record their names, crafts, and employer's names; otherwise obtain their name, home addresses and telephone numbers.

7) Examine the evidence. Identify and examine any items that will provide information about what happened as well as how and why. The examination of the accident site evidence should begin with a general survey of the area, equipment, vehicles and structures involved. Items of evidence should not be removed from the accident site until a systematic inspection of the area, diagramming and photographic documentation has occurred.

8) Photograph all evidence. As soon as possible after the accident, take photographs and video recording of the general accident area, major elements of the accident site and articles of evidence. The photographer should be fully trained in the operation of the photographic equipment. To assure that photographic recording captures the maximum visual information available, a series of pictures should be taken of the general area. Approach views, overhead views, close-up and medium range views of the area should be recorded, as well as any items of evidence and weather conditions. It is essential that all photographs indicate the time and date taken. The photographer's name, a description of the object and area photographed and camera positioning should be noted on the back of each photograph, along with its date (if not automatically recorded on the image itself).

9) Make a diagram of the accident site. Sketch the accident scene recording the locations of all evidence essential to understanding the accident situation. Measure any distances involved and record them on the sketch. Diagrams should be accurate, well drawn and easy to understand. The diagram should make cross-reference to photographs taken and notes included in the accident report. The diagram should be labeled to include the date and time that it was drawn. The diagram should be signed by the person who created it.

10) Interview and obtain statements from all witnesses. As soon as possible after the accident all persons who may be able to contribute information about the accident should be interviewed. Witnesses should be interviewed individually at the accident site unless the conditions of the area are too distracting or noisy; if so, the interviews should be conducted in a private location. Detailed notes must be taken; sometimes, it is helpful to videotape or record the interview. Either written or tape recorded statements should be obtained from the witnesses if possible.

11) Effectively manage the OSHA inspection process. As indicated above the area OSHA office should be notified of any serious jobsite accident as soon as reasonably possible. OSHA is fairly prompt in coming to the site to investigate serious accidents. Cooperation with OSHA is essential. The OSHA inspection should involve an opening conference, an inspection tour and a closing conference. Detailed notes should be taken by the contractor throughout the entire inspection process. The opening conference should be utilized to verify the credentials of the inspecting OSHA agent and to give him/her a preliminary explanation of the nature of the accident. During the inspection tour, a contractor's representative and a representative of the injured person's employer should accompany the OSHA agent at all times. During the inspection tour take notes of everything seen, said and done by the OSHA agent. Take photos of everything photographed by the OSHA officer. Make sure you understand fully everything the OSHA agent does or comments on. Ask questions if you don't. Do not comment on any alleged safety hazard as a violation of an OSHA standard. This can usually only be determined after a thorough investigation of all factors and applicable standards has been completed. At the closing conference take notes of anything discussed. Make sure that no questions concerning the inspection are unanswered. Avoid giving estimates of remedial times or methods for correcting an alleged violation. Generally, the OSHA officer will discuss the

results of the inspection with the contractor at the closing conference and will advise the contractor of all apparent violations for which citations and penalties may be issued. The OSHA Area Director will make the final decision on issuance of citations and assessment of penalties.

Aside from these evidentiary and precautionary actions, the responsible persons should keep in mind the emotional reality and take appropriate steps regarding the injured person(s) and the morale impact on the project.

Surety Buys $847,000 Terrazzo Floor

The owner of a new downtown high-rise in Des Moines contracted with its general contractor for a $147,000 terrazzo floor. Terrazzo is flooring consisting of small chips of marble set in mortar which then is ground and polished. The flooring subcontractor in this case did not place the terrazzo very well, and a lawsuit ("Lawsuit 1") was filed by the general contractor against the flooring subcontractor and its performance bond. The surety's obligation under the performance bond was to provide the floor or pay a penal sum up to $147,000, the amount of the terrazzo subcontract.

The three parties – the general, the sub, and the surety – resolved Lawsuit 1 by entering into a settlement agreement. That settlement agreement contained four key provisions which would be determinative of the resolution of Lawsuit 2 (discussed next):

1. The settlement agreement provided that the surety would repair and replace the floor as necessary to bring the floor up to a commercially reasonable finish;
2. The settlement agreement provided that another flooring company would repair the defective floor for $68,000;
3. The owner specifically was named as a third-party beneficiary of the settlement agreement which gave the owner the right to bring its own lawsuit directly, if necessary; and
4. Nothing in the settlement agreement waived or superseded the limitations in the bond *as between the flooring subcontractor and its surety*.

After this settlement agreement was entered into, the new flooring company decided that the floor could not be repaired for $68,000 as the parties had understood. Instead, the cost for demolition and replacement would be $847,000, or $700,000 more than the original performance bond. The surety refused to perform, and the owner sued the surety directly for the $847,000 ("Lawsuit 2"). Lawsuit 2 proceeded all the way to trial and ultimately to resolution by the Iowa Court of Appeals. *Employers Mutual Casualty Co. v. United Fire and Casualty Co.*, 2004 WL 239909 (Iowa App. 2004). The court held that the surety was liable to the owner in the amount of $847,000, stating:

> When a surety takes over performance of a contract, the surety's liability is no longer limited by the amount of the bond.
>
> * * *
>
> Ordinarily, a surety on a bond is not liable beyond the penalty named therein. However, this limitation may be varied by the contract, and where a surety assumes the role of the principal and completes the contract, the surety is liable to pay sums in excess of the penal sum.

Critical to the court's analysis was that the surety agreed to provide repairs to the floor to a "commercially reasonable finish" and that the *owner's* rights against the surety, by express terms of the settlement agreement in Lawsuit 1, were not limited by the amount of the bond.

As with many construction disputes, the issue in this case arose from imprecise contract drafting. The settlement agreement in Lawsuit 1 was crafted in a mediation, and it may have been drafted in a hurry or under pressure. The surety, while believing that it had reduced its potential liability from $147,000 to $68,000, actually increased its liability to an unlimited amount in the settlement agreement. Whether in mediation or otherwise, step back from settlement drafts and

read them carefully as a whole – and avoid buying an $847,000 terrazzo floor.

Total Cost Claim Allowed By Eighth Circuit Under Miller Act

Many subcontractors attempt to calculate construction claims using the total cost method, but total cost claims are disfavored in many courts and arbitration tribunals. Total cost claim opponents contend that total cost claims rely on unrealistic assumptions of perfect bidding and performance by the claimant. Nevertheless, sometimes total cost claims are successful.

In *Lighting & Power Services, Inc. v. Roberts*, 354 F.3d 817 (8th Cir. 2004), an electrical subcontractor asserted a Miller Act claim against a general contractor, arising out of a military barracks project in Missouri. The subcontractor asserted a total cost claim, seeking all costs it incurred over what it had been paid.

The jury found against the subcontractor, and the subcontractor appealed. The Eighth Circuit reversed, ruling that the trial court had improperly instructed the jury that a subcontractor asserting a total cost claim must prove that the general contractor had some responsibility for causing the subcontractor's loss. According to the Eight Circuit, neither the Miller Act nor the total cost method requires a showing of fault by the general contractor. Rather, a Miller Act total cost claimant must show (1) losses are impracticable to prove with a reasonable degree of accuracy, (2) the claimant's bid was realistic, (3) the claimant's actual costs were reasonable, and (4) the claimant was not responsible for its added costs. (In a non-Miller Act claim, where breach is at issue, the claimant must also show a breach – "fault" – by the other party.)

Though favorable, the opinion should not give total cost claimants too much optimism. The four factors set forth by the Eight Circuit are difficult to prove. We recommend that claimants attempt to link discrete costs to specific claims or events to maximize chances for a successful claim. Nonetheless, if a discrete approach cannot be utilized, this case holds that a claiming Miller Act subcontractor can assert a total cost claim without proof of fault by the general contractor.

Pass-Through Claims Recognized Under Texas Law

The use of "pass-through" claims has become common in the construction industry, but not all states have directly addressed the validity of such claims outside of the federal project context. In the typical pass-through arrangement, a party who has suffered damages (often a subcontractor) makes a claim against a responsible party with whom it has no contract (often an owner) and those claims are presented through an intervening party (often a general contractor) who has a contractual relationship with both.

In Interstate Contracting Corporation v. City of *Dallas*, 2004 WL 835705 (April 16, 2004 (Tex.)), the Supreme Court of Texas (responding to questions certified by the Fifth Circuit) held that pass-through claims are recognized under Texas law. In *Interstate Contracting*, the City of Dallas (the "City") and ICC entered into a contract for, among other things, the construction of levees and the excavation to create two storm water detention lakes. ICC subcontracted the levee construction and excavation to Mine Services, Inc. ("MSI"). The excavated material was to be used for levee construction. MSI discovered that the excavated material was unsuitable and manufactured the fill material, which decreased its productivity and increased its costs. The City denied any responsibility for MSI's increased costs because "manufacturing" fill was not contemplated by the contract.

ICC filed suit on behalf of MSI against the City, and the jury found that the City breached its contract with ICC as well as an implied warranty to provide suitable plans and specifications in light of the subsoil conditions. On appeal, the City argued that the district court erred in allowing ICC to seek damages on behalf of MSI because there was no privity of contract between the City and MSI.

MSI's subcontract granted ICC sole discretion to bring a claim against the City on behalf of MSI at MSI's expense. If such a claim were brought, MSI agreed to release ICC from further liability in exchange for whatever ICC recovered from the City. ICC and MSI later executed a "Claims Presentation and Prosecution Agreement" which

set forth the terms under which the parties would pursue a claim against the City in ICC's name.

The Court held that pass-through claims are premised on a contractor's continuing liability to its subcontractor. Thus, if a contractor is liable to the subcontractor for damages sustained by the subcontractor, the contractor can bring an action against the owner for the subcontractor's damages via a pass-through claim. However, the contractor does not need to reduce its liability to a binding settlement agreement. Conditional liability as expressed in a subcontract, liquidating agreement, or some other type of claims-presentment arrangement is sufficient to prove liability, even when the agreement provides that the contractor has no obligation to pay the subcontractor unless and until it recovers from the owner. Moreover, in the Court's reasoning, the owner bears the burden of proof to disprove the contractor's liability and can only do so if it can show that the contractor would not be liable to the subcontractor if it refused to present the pass-through claim or to remit any recovery to the subcontractor. *Id.*

The Texas Supreme Court concluded that pass-through agreements promote judicial economy and protect subcontractors against an owner's breach without undue prejudice to the owner. While a majority of states which have considered the issue have reached a similar conclusion, parties considering pass-through arrangements should determine the requirements necessary to make such agreements enforceable in the applicable state.

Florida Legislature Responds to The Explosion of Condominium Litigation

On June 18, 2004, Governor Jeb Bush signed into law a new construction defect bill that sprang from intense lobbying by those being subjected to the explosion of litigation in Florida concerning residential construction in general and condominiums in particular.

New Florida Statute 558.01, *et seq.* requires a claimant to give notice of construction defects to the allegedly responsible party, so that they may have an opportunity to remedy any problems. The claimant may not initiate an arbitration or file a lawsuit until certain notices are given, and time for cure has passed, or the party has declined to repair the alleged defect.

The statute is written broadly to apply to any construction defect claim arising out of the design or construction of a dwelling, and restricts claims by a homeowner, association, tenant or subsequent purchaser.

The statute contains many time requirements, most important of which is that a claimant may not demand arbitration or file a lawsuit until 60 days after giving notice of claim to the allegedly responsible party, and including a description of the defect and the damages resulting therefrom. If a claimant fails to do so, the case will be dismissed until it has satisfied the requirements of the statute.

The statute also permits the affected contractor to inspect the dwelling within five business days of receiving notice in order to assess the claim. Within ten days of receiving notice, the party receiving the notice must forward it on to all subcontractors or others who may be responsible for the defects, and they in turn have five business days to give a written response to the contractor who forwarded the claim. This response must indicate whether the subcontractor takes responsibility for the problem, what he or she is willing to do to remedy it, and when that work can be completed.

Within twenty-five days of receiving notice of claim from the claimant, each contractor must give a written response to the claimant and 1) offer to fix defects at no cost; or 2) offer to pay a sum of money within 30 days of acceptance of the offer; or 3) reject the claim.

If there is an offer to fix the defects or pay money, the claimant must reject it in writing within certain periods of time or it is deemed accepted. The failure to follow the requirements of this statute is admissible in court.

If claimants take this new statute seriously, it may do what the legislature intended and permit tempers to cool, and minor defects to be fixed and not become major problems. But, in some larger condo association cases, it may just add time before a lawsuit is filed and create a new requirement that contractors must follow or be

subject to claims of not acting in good faith once in court. In others it may expose the unreasonable position of a condo owner who refuses to accept a contractor's reasonable offer of repair. Time will tell.

Is Your Accident an "Occurrence"?

Commercial General Liability policies typically define a covered "occurrence" as an "accident," and two recent cases address just how far courts will go in interpreting those terms. Standard form CGL policies generally cover property damage or bodily injury resulting from a covered "occurrence," or "accident" that is not "expected or intended from the standpoint of the insured."

In *Standard Construction v. Maryland Casualty*, 359 F.3d 846 (6th Cir. 2004), the insured general contractor made a demand on its insurer to defend and indemnify it in an action for trespass. The insurer refused and the contractor sued to determine the insurer's duties under the policy. The contractor had been sued for dumping debris from a road-widening project onto the land of an elderly woman, whose daughter had previously given written permission to the contractor.

The trial court found that the insurer had a duty to defend on the claim for trespass and ruled for the contractor, but then tried the question of whether the insurer had a duty to indemnify. The court found that the elderly woman was incompetent and incapable of giving her consent to dumping and found the daughter without authority to act on her mother's behalf. The trial court concluded that the dumping was intentional, but the fact that it was done without proper legal permission was not intentional. The court was persuaded that even if the original act of dumping was intentional, the resulting damage was an accident and hence an "occurrence" covered under the CGL policy. The insurer was forced to pay the costs of settlement, legal fees and interest.

Similarly, *In re ML & Associates*, 302 B.R. 857 (N.D. Tex 2003), highlights how broad the definition of "occurrence" or "accident" may be. There, a contractor was sued for defective work and for negligence in performing its work. The insurer refused to defend and filed an action to determine its rights.

The court determined that there was "property damage" as defined in the policy because the complaint alleged that the plaintiff had suffered a loss of use of the building at issue as a result of damage to the building. The insurer argued that by permitting a CGL policy to cover defective workmanship on a building, it was being converted into a performance bond and abrogating the well accepted principles of business risk exclusions in CGL policies.

The court looked to two lines of Texas cases, and reasoned that if the insured has committed an intentional tort, then the resulting damage, no matter how unexpected, is not covered by a CGL policy. But, if the contractor is merely negligent, then the unintended damage that results is arguably an occurrence giving rise to a duty to defend. The Court did not ultimately decide whether the facts of this case gave rise to a duty to indemnify, reserving that for a trial, but said unequivocally that an "occurrence" would be liberally construed and where the consequences of one's actions were not intended, the insurer would have a duty to defend.

The ML & Associates court's position is not accepted by courts in all jurisdictions, and in fact, there are many cases interpreting these standard terms and many variations state by state. However, there cases taken together stand for the principle that courts may liberally construe insurance policies to provide a duty to defend and, ultimately, coverage. You should not easily give up when an insurer denies coverage, and should consult counsel to see if the circumstances of your lawsuit under a particular state's law could give rise to an "occurrence" under your CGL policy.

Lawyer Activities:

February, 2004: Nick Gaede was elected Vice-President of The American College of Construction Lawyers (ACCL), an organization of 120 select lawyers from across the country dedicated to excellence in the specialized practice of construction law, at the annual meeting held in Coral Gables, Florida. Mr. Gaede will automatically become the ACCL President in February 2005.

Spring 2004, On behalf of the Alabama Chapter of the Association of Builders & Contractors, Joel Brown and Robert Campbell drafted and assisted in negotiating prompt pay legislation for public works projects. The legislation was passed by the Alabama Legislature and signed by the Governor in May 2004, and became effective August 1, 2004.

April 15, 2004: David Pugh participated in a roundtable discussion on public contracting in Alabama with a group of regional Facilities Directors from Alabama schools.

April 21, 2004: Bradley Arant Rose & White LLP was a co-sponsor of the AGC of Metropolitan Washington DC's 75th Anniversary celebration. Mabry Rogers, John Bond, Arlan Lewis and Donna Crowe attended the event, which honored Clark Construction and Tompkins Builders, each of which was a founding member of the AGC of DC in 1929.

April 29, 2004: Bradley Arant attorneys Jim Archibald, Rhonda Caviedes, David Pugh and Wally Sears presented a one day seminar in Birmingham, Alabama on "Construction Management/Design-Build in Alabama."

May 10-11, 2004: John Bond attended the annual meeting of the American Arbitration Association board members in New York City, New York.

May 11, 2004: Bradley Arant attorneys Joel Brown, Nick Gaede, Jonathan Head, David Owen and Wally Sears presented a one-day seminar in Huntsville, Alabama on "AIA Contracts in Alabama."

May 18, 2004: Bradley Arant attorneys Rhonda Caviedes, David Pugh, Bob Greene, Mabry Rogers and David Roth presented a one-day seminar in Birmingham, Alabama, on "So You Thought Environmental Law Was for the Chemical Companies: A Review of Recent Environmental Issues Percolating in Construction." Topics discussed during the seminar included statutory and regulatory requirements that potentially impact construction projects, managing environmental risks on construction projects, bidding and negotiating remediation contracts, and a survey of recent litigation trends including an update on the present state of mold and asbestos litigation. In addition, we have developed a "mold disclaimer" for inclusion in construction contracts.

May 17-18, 2004: Nick Gaede and Mike Goodrich, President of BE&K, presented a program entitled "Steps to Assure the Owner Gets What It Paid For" at the "Owners' International Construction Superconference: Rebuilding the World's Deteriorating Infrastructure" in London, England.

May 24-28, 2004: Nick Gaede taught a course on International Arbitration at Fribourg University in Switzerland as part of a University of Alabama School of Law exchange program.

June 1, 2004: Mabry Rogers presented a seminar on "Contract Management – Best Practices" to a client's engineering and contract administration employees.

June 8, 2004: Donna Crowe attended a special panel discussion presented by the Board of Contract Appeals Bar Association and the George Washington University Law School Government Procurement Law Program on "Assessing Change for the Boards of Contract Appeals." The panel discussion was led by judges from the various Boards.

June 10-13, 2004: David Pugh attended the Associated Builders and Contractors State (Alabama) Convention in Destin, Florida and presented a program entitled "Mold and How it Relates to Construction."

September 29, 2004: Bradley Arant attorneys Doug Eckert, Nick Gaede, Arlan Lewis, Mitch Mudano and David Pugh will present a one-day seminar in Birmingham, Alabama on "The Fundamentals of Construction Contracts: Understanding the Issues in Alabama." Highlights of the seminar include basic contract principles, essential contract terms, model contract forms and clauses for different project delivery systems and dispute resolution.

Fall 2004: Nick Gaede will be teaching a course on negotiation at the Cumberland School of Law in Birmingham, Alabama.

Fall 2004: Wally Sears will be teaching a course on construction law at the University of Alabama School of Law.

Disclaimer and Copyright Information

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

This newsletter is a periodic publication of Bradley Arant Rose & White LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult your own lawyer concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact your lawyer or any of the lawyers in our group whose names, telephone numbers and E-mail addresses are listed below; or visit our web site at www.bradleyarant.com.

James F. Archibald, III	(205) 521-8520	jarchibald@bradleyarant.com
Axel Bolvig, III	(205) 521-8337	abolvig@bradleyarant.com
John D. Bond, III	(704) 332-8842	jbond@bradleyarant.com
Joel E. Brown	(205) 521-8416	jbrown@bradleyarant.com
Stanley D. Bynum	(205) 521-8000	sbynum@bradleyarant.com
Roy D. Campbell, III (Jackson)	(601) 948-9934	rdcampbell@bradleyarant.com
Rhonda R. Caviedes	(205) 521-8683	rcaviedes@bradleyarant.com
Donna M. Crowe (Washington, D.C.)	(202) 393-7150	dcrowe@bradleyarant.com
Douglas E. Eckert	(205) 521-8519	deckert@bradleyarant.com
Julie S. Elmer	(205) 521-8431	jelmer@bradleyarant.com
A. H. Gaede, Jr.	(205) 521-8323	ngaede@bradleyarant.com
John W. Hargrove	(205) 521-8343	jhargrove@bradleyarant.com
Jonathan B. Head	(205) 521-8054	jhead@bradleyarant.com
Gary C. Huckaby (Huntsville)	(256) 517-5140	ghuckaby@bradleyarant.com
David G. Hymer	(205) 521-8289	dhymer@bradleyarant.com
Danielle Daigle Ireland (Jackson)	(601) 948-9942	direland@bradleyarant.com
Jeffrey D. Komarow (Washington, D.C.)	(202) 393-7150	jkomarow@bradleyarant.com
Arlan D. Lewis	(205) 521-8131	alewis@bradleyarant.com
Michael D. McKibben	(205) 521-8421	mmckibben@bradleyarant.com
S. Allen Martin	(205) 521-8052	amartin@bradleyarant.com
Andrew J. Noble, III	(205) 521-8342	anoble@bradleyarant.com
David W. Owen	(205) 521-8333	dowen@bradleyarant.com
J. David Pugh	(205) 521-8314	dpugh@bradleyarant.com
E. Mabry Rogers	(205) 521-8225	mrogers@bradleyarant.com
Walter J. Sears III	(205) 521-8202	wsears@bradleyarant.com
H. Harold Stephens (Huntsville)	(256) 517-5130	hstephens@bradleyarant.com
Colin R. Stockton	(205) 521-8376	cstockton@bradleyarant.com

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

BRADLEY ARANT ROSE & WHITE LLP **Fourth Quarter 2004**

CONSTRUCTION AND PROCUREMENT LAW NEWS

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

James F. Archibald, III
Axel Bolvig, III
John D. Bond, III (c)
Joel E. Brown
Stanley D. Bynum
Roy D. Campbell, III (j)
Rhonda R. Caviedes
Donna M. Crowe (d.c.)
Danielle Daigle Ireland (j)
Douglas E. Eckert
Julie S. Elmer
A. H. Gaede, Jr.
John W. Hargrove
Jonathan B. Head
Gary C. Huckaby (h)
David G. Hymer
Michael Wayne Knapp (c)
Jeffrey D. Komarow (d.c.)
Arlan D. Lewis
James William Manuel
Stanley Allen Martin
Michael D. McKibben
Mitchell S. Mudano
Andrew J. Noble, III
David W. Owen
Jeffrey A. Peters
J. David Pugh
E. Mabry Rogers
Walter J. Sears III
H. Harold Stephens (h)
Colin Stockton
Sabra Barnett Wireman

Birmingham Business Journal Recognizes Bradley Arant Partners and Clients

The Birmingham Business Journal recently joined with the Associated General Contractors of Alabama and the American Subcontractors Association of Alabama to publish a list of "Who's Who in Construction." The list included general contractors, subcontractors, architects, engineering companies, surety and bonding agents, accountants, and lawyers. Honorees included Jimmy and Gary Ard from Ard Contracting, Gary Baughman from Washington Group, David Boyd from Vulcan Painters, Rob Burton from Hoar Construction, Jay Chapman from Capstone Building Corporation, Andrew Edwards from Dunn Building Company, Aubrey Garrison from The Garrison Barrett Group, Ted Kennedy and Mike Goodrich from BE&K, Barry Morton and Wayne Gordon from The Robins & Morton Group, Miller and Jim Gorrie from Brasfield and Gorrie, Bill Harbert, Sr. and Billy Harbert from BL Harbert International, Wayne Killion from Shook & Fletcher, Chris Phillips from Rust Constructors, Merrill Stewart from Stewart Perry, Jody Saiia from Saiia Construction Company and Mac Dauphin from Ellard Construction. We are very proud for our clients who received this richly deserved recognition. Although all of the people identified on the Birmingham Business Journal's list have offices in Birmingham, most have performed work beyond the city itself. Indeed, many have left lasting symbols of their hard work and dedication through successfully completed construction projects all over the world.

We were also gratified that our partners, Nick Gaede and Mabry Rogers, were recognized on the list as leaders in the construction industry. Both have dedicated substantial portions of their distinguished professional careers to the construction industry, representing not only some of the other Birmingham-based honorees, but also construction industry leaders from all over the United States and the world. We are grateful for their hard work and dedication to the construction industry, and we congratulate them on receiving yet another well-deserved honor for their distinguished work.

Inside:

Arbitrator in Missouri Awards Punitive Damages 6,000 Times Greater Than Actual Damages – Court Upholds

Would a court uphold an arbitrator's $6 million punitive damages award, where the arbitrator only awarded a total of $4000 in actual and statutory damages, and where the arbitration agreement contained an apparent waiver of punitive damages? According to the recent case *Stark v. Sandberg*, 2004 WL 1900319 (8th Cir. Aug. 26th, 2004), surprisingly, the answer is yes.

The case involved alleged violations of the Fair Debt Collection Practices Act ("FDCPA"), and the language in the arbitration agreement stated that "borrower and lender expressly waive any right to claim [punitive damages] to the fullest extent permitted by law." The arbitrator found that the defendant violated the FDCPA and awarded the two plaintiffs $1,000 each in actual damages, $1,000 each in statutory damages, $22,780 in attorneys' fees, and $9,300 for the cost of the arbitration. More importantly, the arbitrator awarded the plaintiffs $6 million in punitive damages. The trial court vacated the punitive damages award, but the Eighth Circuit Court of Appeals (the federal court supervising trial courts in Arkansas, Iowa, Minnesota, Missouri, Nebraska and the Dakotas) reversed the district court, and reinstated the punitive damages award.

The court noted that the waiver clause only provided a waiver "to the fullest extent permitted by law." Because Missouri law did not permit the defendant to waive its liability for intentional torts, the court held that the waiver clause in the arbitration agreement did not and could not provide for a waiver of punitive damages for intentional torts. The arbitrator concluded that the defendant committed intentional torts; thus, the court held that the waiver clause did not waive punitive damages in this case. Accordingly, the court held that the arbitrator did not exceed his authority in awarding punitive damages.

The Eighth Circuit upheld the $6 million punitive damages award in spite of a previous United States Supreme Court case (*Gore*) declining to uphold a large punitive award as compared to the compensatory damages awarded. The *Stark* court noted that, in order for an arbitration award to be set aside, the award must be "completely irrational or evidence a manifest disregard for the law." The court further stated that an award only manifests disregard for the law "where the arbitrators clearly identify the applicable governing law and then proceed to ignore it." The court found that the plaintiff "failed to present any evidence that the arbitrator 'clearly identified the applicable, governing law (including *Gore*) and then proceeded to ignore it.'"

It is unclear whether other jurisdictions will follow the Eighth Circuit's lead in a similar case. However, at the very least, this decision, while not a construction case, suggests that it is advisable for your lawyer to consider raising *Gore* (and provide a copy) to the arbitrator if punitive damages are sought against your company.

Commercial Impossibility Not Shown in Mississippi Termination for Default

Contractors or subcontractors occasionally believe they may be excused from performance altogether because of defective plans and specifications. As illustrated by a recent decision from Mississippi, it is far better to attempt to perform, in conformity with the "defective" plans, than to refuse the attempt, relying instead on "impossibility." In *Evan Johnson & Sons Construction, Inc. v. Mississippi*, 877 So. 2d 360 (Miss. S. Ct. 2004), Johnson was confronted with a design utilizing rolled "z" purlins for a curved barrel vault roof on a national guard facility. Johnson's sub informed Johnson and the state during construction that the design was defective, but the state instructed Johnson to proceed with the design as shown. Instead, the sub and Johnson built a different deck, not utilizing the rolled "z" purlins. The State rejected the roof and terminated Johnson's contract for default. Johnson sued the State and the designer. Not only did Johnson lose in its affirmative claims, but it also was ordered to pay liquidated damages to the State. In reaching this conclusion (based on motions, not a jury trial), the trial and supreme court relied on the fact that Johnson never attempted to comply with the allegedly defective specification. Moreover, during discovery, the State found a fabricator in California (unknown at the time of the contract) who could and was willing to fabricate rolled "z" purlins, and the state actually constructed a partial full scale mock up of the roof using the rolled "z" purlins. Relying principally on federal contract cases, the Mississippi Supreme Court held that the Contractor had to show both "subjective" impossibility ("I can't do it") and objective impossibility ("no one can do it"). Having failed on both prongs, Johnson lost not only his defense to the default termination but also his claim against the designer for negligence (based on errors and omissions in the defective design).

The cardinal point here is that one should attempt to comply with an allegedly defective specification, because it may be that compliance will be achieved, and one can successfully argue for increased costs. A second point is that the contract did not have an "impracticability" standard in the clauses governing excuses from performance. "Impracticability" is a standard generally considered more easily met, when attempting to prove "excuse," than is "impossibility." Hence, be very clear about the exculpatory clauses--and how they have been construed in the particular jurisdiction--before relying on "defective plans and specifications" as an excuse for non-performance. Third, note that the parties here were the builders, not vendors. Frequently a vendor may have a different standard to meet to excuse non-performance, and that excuse may be grounded in the Uniform Commer-

cial Code (applicable to manufacturers, but usually not to builders), not the contract or purchase order.

To repeat a refrain oft heard in this publication: consult your lawyer before you refuse to perform. Generally, if there is any way for your company to finance the efforts to perform, or at least attempt to perform, you will likely thereby end up in a better legal position.

Court Denies Contractor's Petition to Arbitrate Against South Carolina Condominium Homeowners Association

After a South Carolina homeowners association discovered defects in its condominium building, it sued the general contractor in state court for negligence and breach of the implied warranty of good workmanship. The general contractor subsequently sued the association in federal court, proceeding under the Federal Arbitration Act to force arbitration. The contractor asserted that the association was required to arbitrate their claims under the general construction contract and the master deed. However, the federal trial court denied the general contractor's motion to compel arbitration and the United States Court of Appeals for the Fourth Circuit, supervising federal courts in the Carolinas, Maryland, Virginia, and West Virginia, upheld the trial court ruling.

In this case, the general construction contract was between the general contractor and the developer. The master deed was between the developer and the association. Although both of these agreements required arbitration, the court found that there was no agreement between the contractor and the association compelling arbitration. The contractor argued that the association should be bound by the arbitration provision because it sought to enforce other provisions of the general construction contract through the association's claims.

The court found, however, that under South Carolina law, a contractor has a legal duty to perform to industry standards and refrain from constructing housing that it knows or should know will pose serious risks of physical harm. Furthermore, the court found that under South Carolina law, a warranty arises from a contractor's role as a builder and protects homeowners from shoddy construction practices. Because contractors have a legal duty under South Carolina law, the court found that the association's claims did not hinge on any rights it might have under the general contract and therefore was not bound by the arbitration clause contained in the contract.

The court clarified its ruling by stating that it did not mean that an association would never be compelled to arbitrate against a contractor. The court stated that if the association brought a negligence or breach of implied warranty claim because the developer had contracted with the contractor for blue paint and the contractor painted the building brown, the association would be bound to the arbitration provision because it was trying to enforce a duty created by the contract. But in this case, the association was suing under theories created by South Carolina law, not the contract, and therefore had a right to a jury trial. The court also stated that even if the association asserted a claim against the contractor for breaching the general construction contract, it could still bring a case based on extra-contractual duties that the state imposes on a builder and avoid arbitration so long as the claims do not hinge on any rights it might have under the general construction contract.

Condominium construction is home building, not commercial. The courts may be hesitant to compel arbitration between homeowners and contractors where no contract exists between the parties. Therefore, if arbitration is desirable with the homeowners, the contractor must seek to require, in its contract with the developer, to require the developer to include, in the master deed and in each deed, a covenant that each homeowner and the association agree to arbitrate (using "broad form" language) disputes with, involving, or against the contractor (and, possibly, to include subcontractors and vendors).

When Do Texas Owners Warrant Plans And Specifications?

Typically in two instances. The first is in jurisdictions which recognize an implied warranty that the plans and specifications are accurate and suitable for their intended use. The second is when the contract documents say so.

Some in the industry might say that the Supreme Court decision in *U.S. v. Spearin* is the single most important construction case. In that 1918 decision, the Supreme Court held that, when an owner provides detailed specifications, there is "imported a warranty that if the specifications [are] followed, the [construction will] be adequate. This implied warranty is not overcome by general disclaimer clauses requiring the contractor to examine the site, check the plans and specifications, and assume responsibility for the work until completed." Thus was born the implied warranty of design.

The *Spearin* Doctrine is not accepted in all jurisdictions, however. For example, in *Lonergan v. San Antonio Loan & Trust Co.*, the Supreme Court of Texas rejected any notion of an implied warranty of design. The *Lonergan* Court stated: "If there be any obligation resting upon the [owner], as guarantor of the sufficiency of the specification, it must be found expressed in the language of the contract, or there must be found in that contract such language as will justify the court in concluding that the parties intended that the [owner] should guarantee the sufficiency of the specifications." While rejecting an implied warranty theory, the Texas Supreme Court left open the possibility of the parties apportioning the risk among themselves.

The recent case of *Alamo Community College District v. Browning Construction Co.*, 131 S.W.3d 146 (Tex. App. – San Antonio), addressed this exact issue. The owner in *Browning* argued that it had no liability to the contractor for design errors. After quoting *Lonergan* and noting that the owner had no implied liability (*Spearin*), the *Browning* Court turned to the contract documents. The relevant provision stated:

> The Contractor shall not be liable to the Owner or Architect for damage resulting from errors, inconsistencies or omissions discovered. The Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents unless the Contractor recognized such error, inconsistency or omission and failed to report it to the Architect.

Based upon this language (which is similar to 3.2.3, AIA A-201 (1997)), the court concluded that the owner indeed had guaranteed the sufficiency of the specifications.

The warranty of design found by the *Browning* court was a warranty implied from the express language removing the design defect burden from the contractor, unless the contractor knew of defects and failed to alert the owner. Thus, despite the rejection of the *Spearin* Doctrine in Texas (and in other jurisdictions as well), its result may, as here, be found in express language in the contract terms.

Miller Act's One-Year Limitation Period May Not Be Absolute

The Miller Act provides that "no [] suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him" 40 U.S.C. § 270b(b). After the one-year mark has passed, a claimant has no Miller Act remedy. However, as shown by the case of *U.S. f/u/b/o J&M Environmental v. Metropolitan Abatement Company, Inc.*, 2004 WL 1661205 (E.D. La.), there are equitable considerations which may allow a claimant to file a Miller Act lawsuit beyond the one-year period.

Metropolitan Abatement Company ("MAC") entered into a contract with the United States for certain demolition and construction work at the U.S. Coast Guard Air Station New Orleans in Belle Chase, Louisiana. Accordingly, MAC provided a Miller Act payment bond for the Project with Gulf Insurance Company as the surety. MAC entered into subcontracts with J&M Environmental, U.S. Waterproofing Systems, and Thermal Guard Roofing, L.L.C. for various work on the Project. Because of alleged non-payment, J&M, U.S. Waterproofing, and Thermal stopped work.

Each of them asserted claims against Gulf on the Miller Act payment bond, but each filed suit more than one year after last performing work on the Project. Accordingly, Gulf filed a motion to dismiss the subcontractors' lawsuits on the basis that they were barred by the Miller Act's limitations period.

But each subcontractor alleged that during the months beyond the one-year mark, it had dealt with Gulf through Gulf's claim analyst in a number of ways including: (1) giving notice of its claims; (2) receiving and completing proof of claim forms; (3) submitting affidavits and other materials requested by the analyst; and (4) receiving assurances that releases would be forwarded and checks would be sent. Gulf denied the allegations. However, the Court noted that, for purposes of deciding the motion to dismiss, the allegations of the subcontractors were taken as true. Consequently, because a surety may be estopped from relying on the Miller Act's one-year limitation period if sufficient equitable considerations exist and because the surety's motion to dismiss failed to "establish beyond doubt" that the subs could not prove any set of facts to support their claims, the Court held the allegations were sufficient to survive Gulf's motion to dismiss.

It is important to note that the court did not determine whether sufficient equitable considerations existed so as to excuse the subcontractors from the one-year limitations period, rather the Court simply stated that this issue could not be determined "at this stage." Hence, Miller Act claimants would be wise to adhere to the statutory one-year limitations period, and not rely on an exception which may not exist.

Prejudgment Interest Not Barred in New York Where Contract Precluded Recovery of Cost of Capital

Many construction contracts contain provisions designed to limit the recovery of certain kinds of damages. One provision that appears in many construction contracts is a waiver of consequential damages. Such a clause might provide as follows:

> Neither [party] shall in any event be liable to the [other party] for any indirect, incidental, special or consequential damages, including but not limited to, loss of revenue, loss of profit, cost of capital, loss of business reputation or opportunity, whether such liability arises out of contract, tort (including negligence), strict liability or otherwise.

In *Siemens Westinghouse Power Corp. v. Dick Corp.*, 320 F. Supp. 2d 120 (S.D.N.Y. 2004), a federal judge in New York addressed whether such a provision constituted a waiver of a claimant's right to recover prejudgment interest in a breach of contract action.

The case arose out of construction of a power plant in New Hampshire by a Consortium consisting of Siemens Westinghouse Power Corporation ("SWPC") and Dick Corporation. Bradley Arant Rose & White represented the owner of the power plant, AES Londonderry and Sycamore Ridge.

The owner assessed approximately $15,000,000 in liquidated damages against the Consortium due to project delays. SWPC paid the liquidated damages to the Owner but then filed suit against Dick, its Consortium partner, claiming that Dick was the party who, upfront, was obligated to pay the liquidated damages. The judge agreed, and entered final judgment in favor of SWPC in the amount of $15,000,000.

SWPC then asked the judge to add approximately $1.5 million to its judgment, based on 9% prejudgment interest from the date of the assessment of liquidated damages. Dick argued that prejudgment interest had been waived under the Consortium agreement, citing the waiver of consequential damages clause that identified "cost of capital" as a prohibited category of consequential damages.

The judge disagreed with Dick, and concluded that prejudgment interest was distinct from the term "cost of capital," reasoning that "cost of capital" as a category of consequential damages refers to costs incurred to borrow money by the non-breaching party to cover for the breach. Prejudgment interest, on the other hand, is available to the prevailing party in a breach of contract action as a matter of law, regardless of whether the prevailing party actually borrowed money or paid any interest itself. In the final analysis, the judge did not believe that "cost of capital" encompassed prejudgment interest, but rather was merely an example of the kinds of indirect or consequential damages that were prohibited by the Consortium agreement.

In light of this decision, we believe that a party seeking to avoid liability for prejudgment interest must say so expressly. An attempt to utilize a waiver of consequential damages clause, while perhaps creative, likely will not persuade a court that it should not apply prejudgment interest to the amount of a breach of contract judgment.

Connecticut Judge Says That an Indefinite Suspension is an Unforeseen Delay and Thus an Exception to a "No Damages for Delay" Clause

In *Morganti National, Inc. v. Petri Mechanical Co.*, 2004 WL 1091743 (D. Conn. May 13, 2004), a general contractor (Morganti) sued its mechanical/plumbing subcontractor (Petri) on a Federal Bureau of Prisons job in Brooklyn, New York. Petri countersued claiming breach of the same contract. The court denied each party's motion for summary judgment.

However, the judge addressed a possible exception to a standard "no damages for delay" clause: unforeseen delay. The subcontract contained the typical provision that Morganti would not be monetarily liable for delays that it caused, although the subcontractor could receive an extension of time only. The subcontract provided:

> Should [Petri's] performance of this Subcontract be delayed . . . by any acts of [Morganti] . . . , [Petri] shall receive an equitable extension of time for the performance of this Subcontract, but shall not be entitled to any increase in the Subcontract Price or to damages or additional compensation as a consequence of such delays. . . .

During the course of the project, the FBOP terminated Morganti. Although Morganti challenged the termination as wrongful, Morganti suspended Petri's work on the job. Petri made a claim for outstanding amounts due for subcontract work completed prior to the suspension. However, after a takeover agreement was negotiated on the job and Morganti's surety hired another contractor to complete the work, Petri refused to remobilize and complete its work under the subcontract. These disputes resulted in the underlying lawsuit.

Morganti defended on the basis that Petri's only remedy for suspension was an extension of time under the "no damages for delay" clause. The court recognized the enforceability of the clause, but ruled there is an exception for exclusions, "unforeseen" delays. The court determined that whether a delay is unforeseen hinged on the intent of the parties at the time of contract. In this instance, the judge decided the contract did not cover an indefinite suspension due to the termination of the general contractor. Thus, the "no damages for delay" clause in the subcontract was not intended to apply to this type of situation and was inapplicable.

The lesson learned: When drafting a "no damages for delay" clause, try to include specific and broad examples of delay to later prove the intent of the parties at the time of the contract and that the type of delay was actually contemplated in negotiations. On the other hand, a subcontractor faced with such a clause should attempt to negotiate specific exceptions to its coverage.

Written Change Order Requirement Abandoned by Contractor in Tennessee

The Court of Appeals of Tennessee recently decided that a general contractor abandoned its right under its subcontract to have all changed and extra work authorized in advance by written change order.

In *Amprite Electric Company v. Tennessee Stadium Group, LLP*, 2003 WL 22171556 (Tenn. Ct. App. 2004), the subcontract provided, "in no event shall Subcontractor proceed with changed work without a Change Order . . . and Contractor shall not be liable for any additional costs incurred . . . without such a written Change Order." The subcontract contemplated that the subcontractor would submit pricing (a Change Order Proposal) in response to a request for changed or extra work, and if the proposal were approved, a Change Order would be issued authorizing the subcontractor to proceed with the changed work.

On more than 200 occasions, the general contractor orally requested that the subcontractor proceed with changed work without first submitting a Change Order Proposal, in order to keep the work progressing in accordance with the construction schedule. The subcontractor testified that the general contractor repeatedly assured the subcontractor that it would be paid for the changed work despite the fact that it had not been authorized in writing.

A dispute arose over payment for the extra and changed work performed by the subcontractor. The general contractor disagreed with the subcontractor's pricing of the changed work and refused to pay. The subcontractor took the position that the general contractor had abandoned the change order provisions of the subcontract and that it was entitled to be paid in full the amounts billed.

The court agreed with the subcontractor that the general contractor had abandoned the requirement that changed and extra work be authorized in advance in writing. It held that the written change order requirement would not preclude the subcontractor's recovery for the changed work, based on cost plus pricing.

Owners, contractors and subcontractors should fully understand their rights and obligations under the change order requirements of their contracts, including provisions: (1) requiring that changed work be authorized in advance in writing, (2) addressing what happens if there is no agreement on price prior to the performance of changed work, (3) allowing the owner or contractor to direct that extra or changed work be performed even if the contractor or subcontractor does not want to perform that work, (4) addressing what happens if there is a dispute over price or as to whether the work in question is extra or changed work, and (5) addressing what remedies are available. If the circumstances of a project require you to proceed in a manner contrary to the written provisions of your contract, you should consult with your attorney to determine the legal implications of your various options.

Bradley Arant Lawyer Activities:

August 20, 2004: Nick Gaede and Mabry Rogers were named in this year's "Who's Who in Construction" by the Birmingham Business Journal, the Associated General Contractors of Alabama, and the American Subcontractors Association.

Fall 2004: Nick Gaede, Wally Sears and Mabry Rogers have been named in the 2005-06 edition of *The Best Lawyers in America* for Construction. Bradley Arant has 57 lawyers listed, 11 of whom are listed in multiple categories. Nick Gaede is also listed under International Law.

Fall 2004: Nick Gaede is teaching a course on negotiation at the Cumberland School of Law in Birmingham, Alabama.

Fall 2004: Wally Sears is teaching a course on construction law at the University of Alabama School of Law in Tuscaloosa, Alabama.

September 29, 2004: Jonathan Head, Arlan Lewis, Mitch Mudano and David Pugh presented a one-day seminar on "The Fundamentals of Construction Contracts: Understanding the Issues." Highlights of the seminar include basic contract principles, essential contract terms, model contract forms and clauses for different project delivery systems and dispute resolution.

October 4-5, 2004: Will Manuel attended HarrisMartin's seminar "Current and Emerging Issues in Silica Litigation" in Las Vegas, Nevada.

October 8, 2004: Jim Archibald and Patrick Darby presented a one-day seminar on "Construction Issues in Bankruptcy: The Clash of Cultures."

October 28, 2004: Sabra Wireman spoke at the University of Alabama School of Law regarding legal careers in the construction industry.

November 5, 2005: John Bond presented at a one-day seminar on "Tricks, Traps and Ploys Used in Construction Scheduling." Seminar highlights include: using CPM as a management tool; effective use of a scheduling expert in litigation; and using the contract to prevent schedule abuse.

December 1, 2004: Jim Archibald, Rhonda Caviedes, David Pugh and Wally Sears will present a one-day seminar on "Construction Management/Design-Build." Objectives of the seminar include: interpreting the design-build delivery system; understanding construction management; obtaining required licensing; and managing risk through insurance and bonding.

December 9-10, 2004: Nick Gaede will serve as Chair of the luncheon session at the Construction Superconference on "Building for the Future: Considerations in Light of the Paris Airport Collapse and the World Trade Center."

January 19, 2005: Axel Bolvig, Mitch Mudano, David Pugh, and Wally Sears will present a one-day seminar on "AIA Contracts." The focus of the seminar will be on examination of AIA form contracts and their terms, including specific form contractual provisions. Also, the consequences of modifying the form language and suggestions to assist in contract negotiations will be addressed.

January 27, 2005: Mabry Rogers and David Pugh will present at a one-day seminar in Montgomery on "Building Code Compliance." The Bradley Arant attorneys will present on complying with international building codes.

Disclaimer and Copyright Information

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

This newsletter is a periodic publication of Bradley Arant Rose & White LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult your own lawyer concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact your lawyer or any of the lawyers in our group whose names, telephone numbers and E-mail addresses are listed below; or visit our web site at www.bradleyarant.com.

James F. Archibald, III.....(205) 521-8520 .....jarchibald@bradleyarant.com
Axel Bolvig, III.....(205) 521-8337 .....abolvig@bradleyarant.com
John D. Bond, III .....(704) 332-8842 ..... jbond@bradleyarant.com
Joel E. Brown.....(205) 521-8416 ..... jbrown@bradleyarant.com
Stanley D. Bynum.....(205) 521-8000 .....sbynum@bradleyarant.com
Roy D. Campbell, III (Jackson) .....(601) 948-9934 .....rdcampbell@bradleyarant.com
Rhonda R. Caviedes.....(205) 521-8683 ..... rcaviedes@bradleyarant.com
Donna M. Crowe (Washington, D.C.) .....(202) 393-7150 .....dcrowe@bradleyarant.com
J. Patrick Darby.....(205) 521-8332 ..... pdarby@bradleyarant.com
Douglas E. Eckert .....(205) 521-8519 .....deckert@bradleyarant.com
Julie S. Elmer.....(205) 521-8431 ..... jelmer@bradleyarant.com
A. H. Gaede, Jr.....(205) 521-8323 ..... ngaede@bradleyarant.com
John W. Hargrove.....(205) 521-8343 ..... jhargrove@bradleyarant.com
Jonathan B. Head .....(205) 521-8054 .....jhead@bradleyarant.com
Gary C. Huckaby (Huntsville) .....(256) 517-5140 .....ghuckaby@bradleyarant.com
David G. Hymer.....(205) 521-8289 ..... dhymer@bradleyarant.com
Danielle Daigle Ireland (Jackson).....(601) 948-9942 ..... direland@bradleyarant.com
Michael Wayne Knapp (Charlotte).....(704) 332-8842 .....mknapp@bradleyarant.com
Jeffrey D. Komarow (Washington, D.C.) .....(202) 393-7150 ..... jkomarow@bradleyarant.com
Arlan D. Lewis.....(205) 521-8131 ..... alewis@bradleyarant.com
Michael D. McKibben .....(205) 521-8421 .....mmckibben@bradleyarant.com
James William Manuel (Jackson) .....(601) 948-9936 .....wmanuel@bradleyarant.com
S. Allen Martin .....(205) 521-8052 ..... amartin@bradleyarant.com
Mitchell S. Mudano .....(205) 521-8544 .....mmudano@bradleyarant.com
Andrew J. Noble, III .....(205) 521-8342 .....anoble@bradleyarant.com
David W. Owen .....(205) 521-8333 .....dowen@bradleyarant.com
Jeffrey A. Peters.....(205) 521-8583 .....jpeters@bradleyarant.com
J. David Pugh.....(205) 521-8314 .....dpugh@bradleyarant.com
E. Mabry Rogers.....(205) 521-8225 ..... mrogers@bradleyarant.com
Walter J. Sears III .....(205) 521-8202 .....wsears@bradleyarant.com
H. Harold Stephens (Huntsville).....(256) 517-5130 .....hstephens@bradleyarant.com
Colin R. Stockton.....(205) 521-8376 ..... cstockton@bradleyarant.com
Sabra Barnett Wireman.....(205) 521-8549 ..... swireman@bradleyarant.com

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