BRADLEY ARANT BOULT CUMMINGS LLP **Fourth Quarter 2009**

CONSTRUCTION AND PROCUREMENT LAW NEWS

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

F. Wendell Allen	Jonathan Cobb	Jonathan B. Head	Luke Martin	E. Mabry Rogers
James F. Archibald, III	F. Keith Covington	Michael P. Huff (h)	Michael D. McKibben	Walter J. Sears, III
David H. Bashford (c)	Rob Dodson (j)	Rick Humbracht (n)	Mitchell S. Mudano	Eric W. Smith (n)
Jeremy Becker-Welts (d.c.)	Joel Eckert (n)	David G. Hymer	David W. Owen	James C. Smith (c)
Axel Bolvig, III	Edward J. Everitt	Josh D. Johnson	Douglas L. Patin (d.c.)	H. Harold Stephens (h)
John D. Bond, III (c)	Eric A. Frechtel (d.c.)	Michael W. Knapp (c)	Jeffrey A. Peters	Robert J. Symon (d.c.)
Joel E. Brown	Ralph Germany (j)	Michael S. Koplan (d.c.)	Steven A. Pozefsky (d.c.)	David K. Taylor (n)
Stanley D. Bynum	Daniel Golden (d.c.)	Arlan D. Lewis	J. David Pugh	Darrell Clay Tucker, II
Robert J. Campbell	John Mark Goodman	Tom Lynch (d.c.)	Bill Purdy (j)	D. Bryan Thomas
Rhonda Caviedes	John W. Hargrove		Gregory H. Revera (h)	Nicholas J. Voelker (c)

Don't Forfeit Future Claims in a Contract Modification

The United States Court of Appeals for the Federal Circuit recently reversed a trial court's award of damages to a contractor who signed a release of liability. At issue in the case was whether a contractor, who released the government from "any and all" liability upon an initial contract modification, was later entitled to damages for cumulative impact attributable to the modification.

In *Bell BCI Co. v. United States*, the contractor agreed to build a five-story laboratory building for the government. Several months into the construction, the government expanded the plans to include a sixth floor. The contractor agreed to a daily liquidated damages amount and also agreed to meet fourteen revised substantial completion milestones. In exchange, the government paid the contractor an additional $2.2 million as a full and equitable adjustment for all delays stemming from the modification. The modification included a release whereby the contractor released the government from "any and all liability" under the contract attributable to the modification at issue.

After missing thirteen of the fourteen milestone dates, the contractor requested an equitable adjustment for cumulative impacts. At trial, the court drew a distinction between a "delay" claim and a "cumulative impact" claim and stated that the release language in the modification did not address cumulative impact damages. Accordingly, the trial court awarded the contractor more than $6 million in damages on its cumulative impact claim. The appellate court reversed this decision on the grounds that the language in the modification was sufficiently broad to encompass cumulative impact damages.

The Court of Appeals did not question the trial court's finding that the contractor suffered a cumulative impact. Rather, the appellate court considered whether the contractor had released the government

Inside:

www.babc.com

Birmingham Office	Huntsville Office	Nashville Office	Montgomery Office	Washington, D.C. Office	Jackson Office	Charlotte Office
One Federal Place	200 Clinton Ave. West	Roundabout Plaza	Alabama Center for Commerce	1133 Connecticut Ave. N.W.	188 East Capitol Street	Bank of America Corp. Ctr.
1819 5th Avenue North	Suite 900	1600 Division Street	401 Adams Avenue, Ste. 780	Twelfth Floor	One Jackson Place	100 N. Tryon Street
Birmingham, AL 35203	Huntsville, AL 35801	Suite 700	Montgomery, AL 36104	Washington, D.C. 20036	Suite 450	Suite 2690
(205) 521-8000	(256) 517-5100	Nashville, TN 37203	(334) 956-7700	(202) 393-7150	Jackson, MS 39215	Charlotte, NC 28202
		(615) 252-2396			(601) 948-8000	(704) 332-8842

from liability for that impact. The court determined that the modification language releasing the government from "any and all liability" was unambiguous and that the Contractor's claims for cumulative impact were barred by this modification. The appellate court noted that if the parties plan to leave some issues open and unsettled, their intent should be made clear.

The practical implication of this holding is simple: be mindful of the scope of the releases or waivers that you sign. If possible, do not sign a release that waives all claims when in the midst of construction, as unforeseeable issues could arise. If you must sign a release, to the extent possible you should carve out exceptions in this release for unknown cumulative impact along with any known claims. This is achievable in Federal contracts; in other public contracts, and in private contracts, a reservation of rights can be very difficult to negotiate. If you always remember that a release may be viewed as a binding contract which may have serious consequences on your ability to recover in the future, you will more likely treat a release as you would any other significant contract document.

By Jonathan Cobb

Arbitration: Alabama Adds Another Advantage

Arbitration clauses are common in construction contracts. Generally, arbitration allows parties to have disputes heard more quickly, on average, than in a courtroom. It is meant to offer a cost-effective alternative to litigation. It provides an opportunity to select an arbitrator(s) with specific experience in construction issues, which can simplify the sometimes difficult task of explaining complex construction disputes.

The Alabama Supreme Court recently confirmed the power of arbitral bodies to determine whether a party has satisfied all prerequisites for arbitration. Specifically, the Court held that the arbitrator, not the court, is to determine whether a party has done everything required by the arbitration clause in the parties' contract as a condition to arbitration.

The dispute in *Brasfield & Gorrie, LLC v. Soho Partners*, LLC, involved a claim for amounts owed to the general contractor by the owner under a construction contract. The prime contract contained provisions requiring a party seeking arbitration to submit the dispute to the architect and to mediate the dispute before pursuing a claim in arbitration. The contractor submitted a demand for arbitration, and the owner filed a lawsuit to stop the arbitration based on the contractor's alleged failure to submit the claim to the architect and to mediate before demanding arbitration. In response, the contractor argued that the question of whether it had satisfied all pre-conditions to arbitration was one for the arbitrator to make. The trial court rejected the contractor's argument and stopped the arbitration.

The contractor appealed the trial court's decision to the Alabama Supreme Court, which reversed the trial court's opinion. The Court held that the question of whether the contractor had complied with all contractual provisions was a decision for the arbitrator, not the court. The *Brasfield & Gorrie* decision shows an increasing willingness by the courts to enforce arbitration clauses as written in construction contracts by the parties. It further demonstrates that when parties agree to arbitration, the courts are going to defer to the arbitrator's decision on as many issues as possible, including, as in this case, questions regarding whether a party has the right to pursue its claim in arbitration.

By Darrell Tucker

South Carolina Modifies Its Lien Law

To perfect and enforce a mechanic's lien in South Carolina, the person asserting the lien (1) must serve upon the owner or person in possession and file with the register of deeds or clerk of court a notice or certificate of lien containing the lien amount, a description of the real property, and other required information "within ninety days after he ceases to labor on or furnish labor or materials for such building or structure"; (2) must commence a lawsuit seeking to enforce the lien within six months after ceasing to provide labor or materials for such real property; and (3) must file a notice of the pending action within six months after ceasing to provide labor or materials for such real property.

In June 2009, the South Carolina legislature amended various portions of the South Carolina lien law, including adding a provision allowing landscape service providers to take advantage of the lien statute's protection. The new law also includes a new requirement for a lien claimant to provide the Clerk of Court or Register of Deeds proof that it is licensed or registered, if required by law to be licensed or registered. The revised statute also provides a penalty for the filing of a frivolous lien of up to $5,000, the loss of contractor registration or license, or both. In addition, the revised statute provides procedures to dissolve a mechanic's lien when the party asserting the lien fails to perfect its lien by filing suit.

The new legislation affects other code sections as well. It is now a misdemeanor to engage in the business of residential building or residential specialty contracting without registering with the commission or procuring a license from the commission, or to file false information to the commission in order to obtain a license. Additionally, a party who is required by law to be licensed, but that has not filed for a license or registered with the commission, may not file a mechanic's lien or bring an action at law or in equity to enforce the provisions of a construction contract.

As is true in each jurisdiction, if you do work in South Carolina, you should be aware of the general lien requirements to ensure compliance with lien deadlines or filing requirements. Moreover, an owner or developer doing business in South Carolina should be aware of the changes as they may provide additional defenses to contractor lien claims.

By Nick Voelker

Government Contractors Beware: Certify Carefully

In *Daewoo Engineering and Construction Co., Ltd. v. United States*, the U.S. Court of Appeals for the Federal Circuit loudly proclaimed, again, that certifying claims on federal projects is very serious business. The claim at issue arose on an $89 million contract with the U.S. Government to build a fifty-three mile road around the island of Babeldaob in the Republic of Palau in the Northern Pacific. After experiencing significant delays during the first year of performance, the Contractor submitted a certified claim under the Contract Disputes Act for $64 million, including $13.4 million for additional costs previously incurred and $50.6 million for additional anticipated costs to complete the work. As required, the Contractor certified that the claim was made in good faith; that the supporting data were accurate and complete; and that the amount requested accurately reflected the contract adjustment for which the Contractor believed the Government was liable. After trial, the U.S. Court of Federal Claims concluded that the claim was submitted simply as a "negotiating ploy" and that the Contractor did not honestly believe that the Government was liable for the amounts stated. In particular, the Court determined that the portion of the claim relating to future costs of $50.6 million was fraudulent for various reasons, including: the amount assumed, without analysis, that the Government was responsible for all project delay; the Contractor computed the claim amount without the assistance of outside experts; the Contractor failed at trial to justify or explain the amount and its expert witnesses virtually ignored it; and the individual who had certified the claim gave false testimony.

On appeal, the appeals court upheld these findings and rejected the Contractor's argument that a claim is fraudulent only if it is based on false facts. The court held instead that a claim that rests on a baseless calculation is a fraudulent claim. The consequences were brutal: (1) an award for the Government and against the Contractor of $50.6 million (the entire amount of the fraudulent portion of the claim) for violating the anti-fraud provision of the Contract Disputes Act; (2) an award for the Government and against the Contractor of $10,000 as a penalty for violating the False Claims Act; and (3) a forfeiture, under a third federal law, of the Contractor's entire $64 million claim by virtue of containing a fraudulent component. Lesson learned: Certify carefully because the consequences of a fraudulent claim are severe.

By Eric Frechtel

Where Does the Obligation to Indemnify End?

Construction contracts often contain broad indemnity language, such as a subcontract which requires a subcontractor to defend and indemnify the general contractor and others (owner, design professional, etc.) from claims arising out of the subcontractor's negligence. But what happens when the general contractor agrees to indemnify a different contractor on the project? Is the general contractor allowed to pass its own indemnity obligation on to the subcontractor when a claim arises, in part, because of the subcontractor's negligence? The Alabama Supreme Court recently addressed this issue in *Doster Construction Co. v. Marathon Electric Contractors, Inc.*, and found that the general contractor could hold the subcontractor responsible for the third-parties claim.

In this case, Doster (the general contractor) subcontracted with Marathon Electric. The subcontract contained broad indemnity language obligating Marathon to indemnify Doster from all claims arising out of Marathon's negligence. Doster also subcontracted with Steel City for crane and equipment support services on the project. While unclear from the facts provided in the Court's opinion, it appears Doster unintentionally agreed to indemnify Steel City when one of Doster's employees signed a Steel City invoice for overtime work containing form indemnity language.

During the course of the project, one of Marathon's employees was injured after falling from a scissor lift when the crane he was repairing collided with the scissor lift, knocking it over. The employee sued Doster and Steel City for damages. Pursuant to the subcontract, Marathon was obligated to defend and indemnify Doster from this claim. Under the form indemnity language on the overtime invoice, Steel City tendered defense of the employee's claim against Steel City to Doster. Doster refused to honor the indemnity demand, and Steel City sued Doster alleging breach of the indemnity obligation. Doster, in turn, tendered Steel City's indemnity claim to Marathon under the indemnity obligation of their subcontract, but Marathon refused, contending its obligation to indemnify was fulfilled by defending the original claim brought against Doster. Doster then brought a third party claim against Marathon for indemnity, resulting in the decision.

Marathon eventually obtained summary judgment on Doster's demand for Marathon to indemnify the Steel City claim. Doster appealed, and the Alabama Supreme Court overturned the trial court's ruling, holding that because Steel City's claim arose because of Marathon's negligence (Marathon's employee had been found to be partially negligent), Marathon was obligated to indemnify Doster from Steel City's claim.

While the facts of this case deal with indemnity arising from a subcontract, the court's holding should have broad application. Those who agree to indemnify another pursuant to broad indemnity language should remember that the obligation to indemnify may extend to other claims for indemnity, unless, of course, there is a specific exclusion of such claims. Appropriate attention to the indemnity language may limit such claims.

By Ed Everitt

Problems With Collecting Liquidated Damages For Contract Cancellation

A recent Missouri case demonstrates the difficulty contractors, particularly storm or accident repair contractors, may have in enforcing cancellation fees in their contracts. At root, the court in *Repair Masters Const., Inc. v. Gary* could not approve a percentage-based cancellation fee when the total amount of the work, and thus the potential cancellation fee, was unknown at the time of contracting.

A homeowner whose house burned hired a contractor to board up the house until permanent repairs could be made. The contractor presented the homeowner with a contract, within hours of the accident, containing the following provision: "Purchaser further agrees to pay Contractor an amount equal to 15% of the total contract price should Purchaser cancel this contract for any reason prior to the initiation of work on the Purchaser's roof." The homeowner signed the contract.

As is common following a casualty loss, the insurer, contractor, and homeowner's adjuster negotiated over the amount of the loss over an extended period. As is also common, the insurer did not agree to pay the amount that the contractor said was necessary to do the job. Faced with a shortfall in insurance funds, the homeowner canceled the contract with the repair contractor and hired another company to make the repairs at the insurer's price. The contractor sued the homeowner on the cancellation provision.

The homeowner argued successfully that the cancellation provision was unenforceable as applied. The Court's result reflects a belief that the contingent cancellation fee penalized the homeowner unfairly.

Contractors who have good business reasons for including cancellation fees in their contracts should avoid uncertainty in those fees. The court suggested that the fee might have been acceptable had it been tied to a fixed estimate of costs at the time of contracting. Perhaps a remediation or renovation contractor, *i.e.*, those who very often do not know the final scope of the work at the time of contract, should consider a contract that commits the homeowner to an initial scope but allows for later addenda, including appropriate cancellation fees, as the scope grows.

By Jonathan Head

Bradley Arant Lawyer Activities:

Jim Archibald, **Axel Bolvig**, **Doug Patin**, **David Pugh**, **Bill Purdy**, **Mabry Rogers**, **Wally Sears**, and **David Taylor** are named in the 2009 edition of *The Best Lawyers in America* in the specialty of Construction Law.

In late 2008, Several BABC Construction Practice Group attorneys wrote portions of the recently published *Alabama Construction Law Manual* (West 2008). The authors included **Jim Archibald**, **Keith Covington**, **Ed Everitt**, **Arlan Lewis**, **Luke Martin**, **David Owen**, and **Wally Sears**. Several other BABC attorneys authored other portions of the *Manual*, including **Helen Ball**, **Charlie Beavers**, **Patrick Darby**, **Chris Grissom**, **Rod Kanter**, and **David Roth**. The *Manual* has been recently updated by **Jim Archibald, Keith Covington,** and **Jeff Peters**.

Jim Archibald and **Wally Sears** recently updated the Alabama section of the *State-by-State Guide to Construction Contracts and Claims*.

David Taylor's article on Payment and Performance bonds, "Myths and Realities," was published in the October, 2009, *Journal of Real Estate Management*.

Keith Covington published an article entitled "Court Revives OSHA's Multi-employer Citation Policy" in the October/November 2009 edition of the *Alabama Construction News*.

Keith Covington was also published in the November 2009 edition of the *Construction Business Owner*. The article is entitled "E-Verify Now Required for Federal Contractors."

Jeremy Becker-Welts, Joel Brown, and **David Pugh** presented a seminar in conjunction with the ABC on July 16, 2009, entitled "Finding and Building Federal Projects."

Joel Brown spoke at the Independent Electrical Council Meeting on August 10, 2009 about "Finding, Bidding, and Managing Federal Projects."

Michael Knapp taught a course entitled, "Advanced Topics in Engineering Law" at Misr University of Science and Technology in Cairo, Egypt from August 8-12. The course was a master's level course in conjunction with the University of Alabama-Birmingham.

Jeff Peters made a presentation entitled "Navigating Troubled Waters: Development & Leasing Issues in a Challenging Economy, Mechanic's Liens and Other Construction Related Issues" to the N.A.I.O.P.--Commercial Real Estate Association and C.C.I.M. in September.

Joel Brown presented a federal contracting seminar to the Middle Tennessee branch of the Society for Estimating Engineers on September 2, 2009 in Nashville.

Joel Brown and **Doug Patin** presented a federal contracting seminar in Nashville on September 15, 2009 for the Tennessee AGC.

David Taylor delivered a presentation to Pinnacle Bank and SunTrust Bank concerning lien law and its impact on bankers in Nashville.

Frank Caprio and **Doug Patin** presented a seminar entitled “Competing for U.S. Government Contracts in the United States” on September 22 and 23 in London, England.

Arlan Lewis spoke at the ABA National Conference for the Minority Lawyer in Philadelphia, PA on September 24-25, 2009. The session was entitled “The New New Deal: Transactional Skills for a Changing Environment” and was jointly presented by the ABA Forum on the Construction Industry and the ABA Business Law Section.

Jonathan Head taught a seminar concerning e-discovery on September 25, 2009.

Arlan Lewis, Rhonda Caviedes, and **Stanley Bynum** attended the 2009 Fall Meeting of the ABA Forum on the Construction Industry on October 15-16, 2009 in Philadelphia, PA.

BABC co-hosted the ABC Economic Forecast seminar, titled “2010 Economic Forecast: Where the Projects Are” on October 22, 2009.

Mabry Rogers Attended Princeton University Symposium, “Managing the Challenges of Scarcity: The Critical Path for Global Construction,” on November 5-6, 2009.

Keith Covington spoke on November 6, 2009 at the Home Builders Association of Alabama Conference concerning ‘Chinese Drywall’.

David Taylor has been selected to facilitate a ‘Construction Financing’ meeting of bankers, developers, subcontractors, and general contractors in Nashville on November 12, 2009.

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

NOTE: YOU CAN FIND THIS NEWSLETTER AND PAST NEWSLETTERS ON OUR WEBSITE. IF YOU ACCESS THIS NEWSLETTER ON OUR WEBSITE, CASE-LINKS WILL BE AVAILABLE UNTIL THE NEXT NEWSLETTER IS PUBLISHED. WE DO NOT VIEW THIS NEWSLETTER AS WRITTEN FOR ATTORNEYS BUT RATHER FOR PRACTICING MEMBERS OF THE CONSTRUCTION INDUSTRY. IF YOU OR YOUR LAWYER WOULD LIKE TO KNOW MORE INFORMATION ABOUT A PARTICULAR ARTICLE OR WOULD LIKE THE CASE CITES, YOU MAY GO TO WWW.BABC.COM/PG_CONSTRUCT.CFM OR CONTACT ANY ATTORNEY LISTED ON PAGE 8 OF THIS NEWSLETTER.

Disclaimer and Copyright Information

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

This newsletter is a periodic publication of Bradley Arant Boult Cummings 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.babc.com.

F. Wendell Allen	(205) 521-8282	wallen@babc.com
James F. Archibald, III	(205) 521-8520	jarchibald@babc.com
David H. Bashford (Charlotte)	(704) 338-6001	dbashford@babc.com
Jeremy Becker-Welts (Washington, D.C.)	(202) 719-8307	jbeckerwelts@babc.com
Axel Bolvig, III	(205) 521-8337	abolvig@babc.com
John D. Bond, III (Charlotte)	(704) 338-6007	jbond@babc.com
Joel E. Brown	(205) 521-8416	jbrown@babc.com
Stanley D. Bynum	(205) 521-8000	sbynum@babc.com
Robert J. Campbell	(205) 521-8975	rjcampbell@babc.com
Rhonda Caviedes	(205) 521-8683	rcaviedes@babc.com
F. Keith Covington	(205) 521-8148	kcovington@babc.com
Rob Dodson (Jackson)	(601) 592-9918	rdodson@babc.com
Joel Eckert (Nashville)	(615) 252 4640	jeckert@babc.com
Edward J. Everitt	(205) 521-8444	eeveritt@babc.com
Eric A. Frechtel (Washington, D.C.)	(202) 719-8249	efrechtel@babc.com
Ralph Germany (Jackson)	(601) 592-9963	rgermany@babc.com
Daniel Golden (Washington, D.C.)	(202) 719-8398	dgolden@babc.com
John Mark Goodman	(205) 521-8231	jmgoodman@babc.com
John W. Hargrove	(205) 521-8343	jhargrove@babc.com
Jonathan B. Head	(205) 521-8054	jhead@babc.com
Michael P. Huff (Huntsville)	(256) 517-5111	mhuff@babc.com
Rick Humbracht (Nashville)	(615) 252-2371	rhumbracht@babc.com
David G. Hymer	(205) 521-8289	dhymer@babc.com
Josh D. Johnson	(205) 521-8423	jjohnson@babc.com
Michael W. Knapp (Charlotte)	(704) 338-6004	mknapp@babc.com
Michael S. Koplan (Washington, D.C.)	(202) 719-8251	mkoplan@babc.com
Arlan D. Lewis	(205) 521-8131	alewis@babc.com
Tom Lynch (Washington, D.C.)	(202) 719-8216	tlynch@babc.com
Luke Martin	(205) 521-8570	lumartin@babc.com
Michael D. McKibben	(205) 521-8421	mmckibben@babc.com
Mitchell S. Mudano	(205) 521-8544	mmudano@babc.com
David W. Owen	(205) 521-8333	dowen@babc.com
Douglas L. Patin (Washington, D.C.)	(202) 719-8241	dpatin@babc.com
Jeffrey A. Peters	(205) 521-8583	jpeters@babc.com
Steven A. Pozefsky (Washington, D. C.)	(202) 719-8210	spozefsky@babc.com
J. David Pugh	(205) 521-8314	dpugh@babc.com
Bill Purdy (Jackson)	(601) 592-9962	bpurdy@babc.com
Gregory H. Revera (Huntsville)	(256) 517-5129	grevera@babc.com
E. Mabry Rogers	(205) 521-8225	mrogers@babc.com
Walter J. Sears, III	(205) 521-8202	wsears@babc.com
Eric W. Smith (Nashville)	(615) 252-2381	esmith@babc.com
James C. Smith (Charlotte)	(704) 338-6010	jsmith@babc.com
H. Harold Stephens (Huntsville)	(256) 517-5130	hstephens@babc.com
Robert J. Symon (Washington, D.C.)	(202) 719-8294	rsymon@babc.com
David K. Taylor (Nashville)	(615) 252 2396	dtaylor@babc.com
Darrell Clay Tucker, II	(205) 521-8356	dtucker@babc.com
D. Bryan Thomas	(205) 521-8434	dbthomas@babc.com
Nicholas J. Voelker (Charlotte)	(704) 338-6018	nvoelker@babc.com

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

BRADLEY ARANT BOULT CUMMINGS LLP Third Quarter 2009

CONSTRUCTION AND PROCUREMENT LAW NEWS

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

F. Wendell Allen
James F. Archibald, III
David H. Bashford (c)
Jeremy Becker-Welts (d.c.)
Axel Bolvig, III
John D. Bond, III (c)
Joel E. Brown
Stanley D. Bynum
Robert J. Campbell
Rhonda Caviedes
F. Keith Covington
Rob Dodson (j)
Joel Eckert (n)
Edward J. Everitt
Eric A. Frechtel (d.c.)
Ralph Germany (j)
Daniel Golden (d.c.)
John Mark Goodman
John W. Hargrove
Jonathan B. Head
Michael P. Huff (h)
Rick Humbracht (n)
David G. Hymer
Josh D. Johnson
Michael W. Knapp (c)
Michael S. Koplan (d.c.)
Arlan D. Lewis
Tom Lynch (d.c.)
Luke Martin
Michael D. McKibben
Mitchell S. Mudano
David W. Owen
Douglas L. Patin (d.c.)
Jeffrey A. Peters
Steven A. Pozefsky (d.c.)
J. David Pugh
Bill Purdy (j)
Gregory H. Revera (h)
E. Mabry Rogers
Walter J. Sears, III
Eric W. Smith (n)
James C. Smith (c)
H. Harold Stephens (h)
Robert J. Symon (d.c.)
David K. Taylor (n)
Darrell Clay Tucker, II
D. Bryan Thomas
Nicholas J. Voelker (c)

Mandatory E-Verify for Federal Contractors Appears Likely

Two separate developments, both occurring on July 8, 2009, point strongly to the prospect that mandatory E-Verify for federal contractors will soon become a reality. Companies doing or expecting to do work for the federal government should stay tuned.

First, Department of Homeland Security Secretary Janet Napolitano announced that the Obama Administration would move forward with implementation of the regulation that requires federal contractors to use E-Verify to check the immigration status of their employees. This regulation, which was developed by the Bush Administration, was issued in November 2008 and was initially set to go into effect on January 15, 2009. The effective date, however, was most recently postponed until September 8, 2009. Prior to the July 8 announcement, the Obama Administration had been mum on its intentions about the regulation, saying only that it needed additional time to review the regulation and its impact.

This E-Verify regulation amends the Federal Acquisition Regulations to require contracting officers to include in federal contracts exceeding $100,000 a clause mandating a contractor's use of E-Verify to confirm the employment eligibility of (1) all the contractor's new hires and (2) all the contractor's employees—existing and new—who are assigned to the federal contract. Certain existing indefinite-delivery/indefinite-quantity contracts must also be amended to include the E-Verify clause for future orders. If a federal contract is covered by the E-Verify regulation, the contractor must include the E-Verify clause in subcontracts having a value of more than $3,000. There are some contracts excepted from the regulation, including contracts with a performance period of less than 120 days and contracts for commercially available off-the-shelf items.

Inside:

Also on July 8, the U. S. Senate passed its version of the 2010 Homeland Security appropriations bill. This Senate bill includes an amendment which permanently authorizes E-Verify and makes the E-Verify system mandatory for federal contractors. The E-Verify program has previously been authorized and funded by Congress as a "pilot program," is completely voluntary for all employers, and is currently set to expire in September 2009. The 2010 Homeland Security appropriations measure passed by the House of Representatives reauthorizes E-Verify for only two additional years and does not include a provision making E-Verify mandatory for federal contractors. Because of these differences, a joint conference committee must reconcile the Senate's version of the bill with the version passed by the House. This committee will meet within a matter of weeks and many observers expect the Senate amendments to be included in the final version of the legislation.

A federal lawsuit challenging the regulation mandating E-Verify for federal contractors is currently pending and the outcome of that litigation is unclear. The principal basis for this legal challenge is that the regulation's imposition of mandatory E-Verify conflicts with the existing immigration laws enacted by Congress. If the current Congress passes legislation that specifically requires federal contractors to use E-Verify, the lawsuit may become moot. Even if the Senate amendment is not included in the final version of the 2010 appropriations bill, there is no guarantee that the lawsuit challenging the regulation will be successful. Now that the E-Verify regulation has the backing of the Obama Administration, federal contractors and those anticipating federal work should prepare for the likelihood that they will soon be required to adhere to the mandatory E-Verify rules.

by Keith Covington

Public Bid Law: Bidders that Fail to Comply with Bid Specifications May Have their Bids Ignored

In a recent appellate decision from New Jersey, a county agency was found to have properly exercised its discretion when it refused to consider bids from contractors who failed to comply with certain bid requirements. Specifically, the contractors at issue failed to list all of their subcontractors, and failed to provide business registration certificates (BRCs) for all of the subcontractors that were listed.

The county agency advertised for bids on a project for improvements to the county justice complex. The bid specs required each bidder to list its subcontractors if it planned to use subcontractors for a particular trade. The bid specs further required that bidders provide a BRC for each subcontractor listed in the bid.

The low prime mechanical bidder failed to list all of its subcontractors and failed to provide BRCs for all of the subcontractors it did list. In addition, the signature of the company president on the bid was not attested, and there was a math error in the bid. The second lowest bidder's bid was rejected for failure to provide BRCs for three of its subcontractors. Both contractors challenged the county agency's award of the mechanical contract to the third lowest bidder. The trial court rejected their challenges, and on appeal, the appellate court affirmed the trial court's ruling that the bids were properly rejected.

The thrust of the trial court's ruling was that even though the public bid law did not require these specific bid items, the county agency had the right and authority to require them. Furthermore, the court found that the county agency had the authority to make the requirements mandatory if it chose to designate them as mandatory in the bid specifications.

The appeals court agreed that the specific provision of the public bid law at issue did not limit a public entity's discretion to require lists of sub-contractors and to deem those lists mandatory and non-waivable. In fact, the court emphasized that the importance of strict compliance with bid requirements is to prevent contractors from bid shopping.

The practice pointer is that if you submit a bid for public work, ALWAYS comply with ALL of the bid specifications.

By Mitch Mudano

Statute Setting Race-Based Participation Goal Ruled Unconstitutional

In *Rothe Development Corp. v. Department of Defense*, the United States Court of Appeals for the Federal Circuit rejected as unconstitutional a statute setting a goal that 5% of the total dollar value let for certain groups of contracts be awarded to "socially and economically disadvantaged" groups.

The statute, 10 U.S.C. § 2323, dealt with certain contracts awarded by the Department of Defense, the Coast Guard, and NASA. The statute used racial classifications to define those who were socially and economically disadvantaged. The statute and its related regulations allowed up to a 10% adjustment in bid prices in favor of bidders deemed socially and economically disadvantaged.

Rothe Development Corporation bid $5.57 million on a project at the Columbus Air Force Base in Mississippi. A company owned by a Korean-American couple bid $5.75 million. Rothe's bid was adjusted upwards to $6.1 million for bid evaluation purposes. Rothe sued after the job was awarded to the other company.

The Court recognized that race-based remedial programs to cure the problems of past discrimination are acceptable. However, before Congress (or any other governmental entity) can enact such statutes, it must first demonstrate a need for that remedial program because of proven past discrimination. In this case, the record surrounding Congress' enactment of that particular statute did not contain a "strong basis in evidence" of past discrimination, thus the statute was unconstitutional.

It must be noted that the Court ruled solely on 10 U.S.C. § 2323. The Court did not rule on any other federal, state, or local enactments setting minority participation goals. At this point, it is unclear whether other programs will be found to be unconstitutional based on this rationale, but each bidder may want to consult its lawyer, if an RFB/IFB contains explicit race-based criteria.

By Ralph Germany

Does She or Doesn't She? Authority to Bind the Government

Fundamentals of contracting require that the person making the contract have the authority to bind the party for whom or which he or she works. This principle is true in public and private contracts. We hammer on this point in all of our client seminars. The point bears repeating once more.

In *Southwestern Security Services, Inc. v. Dept of HS*, Southwestern Security Services entered into a unit price contract, before Katrina, to provide security forces in southern Louisiana. When Katrina hit squarely in Southwestern's service area, Southwestern received a call to provide security services for a number of federal installations. The person calling: the Contracting Officer's Technical Representative. The 'agreement': that the government would pay certain expenses above those allowed in the contract. The government's answer to Southwestern's later request for payment: No.

Why this result? Southwestern argued the contract was an "implied in fact" new contract, outside the existing contract. But the Technical Representative did not have authority to bind the government outside the contract. Southwestern argued the Technical Representative could bind the government under the contract. But the contract expressly stated that only the Contracting Officer could bind the government under the contract. Southwestern argued that the Contracting Officer ratified the Technical Representative's actions. But the Contracting Officer, when he first learned of the contractor's alleged agreement with the Technical Representative, stated that it was not, and had not been, authorized.

The lesson is one that is worth re-visiting each year: know the authority of the person who orders you to do extra work. On public jobs, it is usually a matter of asking the person for his or her authority. On private jobs, it can be more sensitive, but one must investigate. If the contract states that the architect cannot make a change in money or time, and if a mark-up of a shop drawing by the architect would be such a change, then the contractor should not act on the mark-up until it has given notice to the owner that the change to the shop drawing is a change and received a directive from the owner's project manager to proceed.

By Mabry Rogers

No-Damage-For-Delay Provision Held Invalid in Virginia

In April, the Supreme Court of Virginia in *Martin Bros. Contractors, Inc. v. Virginia Military Institute* upheld a statute prohibiting no-damage-for-delay provisions, which purport to make a time extension the sole and exclusive remedy available to a contractor for owner-caused delay.

Martin Bros. (Martin), a contractor, entered into a public construction contract with the Virginia Military Institute (VMI) for the renovation of its main dining facility, Crozet Hall. Due to changes in the project requested by VMI, completion of the project was delayed by 270 days. VMI was entirely responsible for the delays. The contract contained a provision that, in the event of delay, only certain categories of site direct overhead damages were recoverable, and which also barred any recovery of home office overhead damages. Relying on the limitations, VMI refused to pay any site damages beyond $99,646.20, which VMI determined to be allowable site direct overhead, and refused to pay any home office overhead damages.

Martin filed suit against VMI, arguing that Virginia law made the damage limitation relied upon unenforceable as against public policy and, therefore, it could not be used to limit Martin's recovery for owner-caused delay. VMI insisted that the limitation was an enforceable liquidated damages provision. The lower court agreed with VMI and under freedom of contract principles granted its motion for summary judgment, dismissing Martin's complaint and limiting its damages.

On appeal, the Virginia Supreme Court reversed. The high court ruled that any provision in a public contract that purports to limit or restrict a contractor's right to recover delay damages is void as against public policy (subject to certain exceptions). Refuting VMI's position that the provision involved liquidated damages, the court reasoned that it was not an agreed formula for the calculation of delay damages and, therefore, was not a liquidated damages provision. Instead, the contract acted as an absolute bar to legitimate delay damages incurred by Martin and, therefore, was void and unenforceable under Virginia law.

Individual jurisdictions are split as to the enforceability of so-called no-damage-for-delay provisions, making it critical that contractors and subcontractors confirm whether such provisions are effective in each state. This case demonstrates that where such provisions are deemed void, creative attempts to circumvent the prohibition by limiting or liquidating the available damages may also be rejected. Moreover, courts may find "limited" damages-for-delay provisions like the one in this case to be just as unenforceable as those purporting to bar all damages for delay.

By David Hill Bashford and Nick Voelker

"I Didn't Sign Up For That—Knowing the Limits of your Guarantee Obligations"

In *Builders Supply Co., Inc. v. Czerwinski*, the Supreme Court of Nebraska reminded the construction industry of the potential for surprise liability in guarantee agreements. When a guarantor failed to explicitly limit her liability to a cap agreed to under an earlier credit agreement, the court interpreted the language of an absolute guarantee strictly against the guarantor.

The case involved four parties common to 'Mom and Pop' small commercial construction: Mom, Pop, their Company, and the Supply House. The basic facts are that Company entered into a credit agreement with Supply House and collateralized the credit agreement with a deed of trust on Company's office building. The credit agreement was limited to an amount of $525,000. Later, Mom and Pop executed an absolute and unlimited guarantee in favor of Supply House, which did not reference the $525,000 limitation of liability in the earlier credit agreement.

A few years later, Pop requested that Supply House release the deed of trust, which it did, arguably without Mom's knowledge. Company continued to use its credit line, but Pop died and Company filed bankruptcy. Supply House sued Mom under the absolute guarantee, but Mom raised two defenses. She said that Supply House impaired the collateral that was available to pay the debt and that she owed nothing; alternatively, Mom argued that her liability was limited to $525,000.

The court ruled against Mom, dispatching her first argument on the basis that after Supply House had released the deed of trust, Mom had issued numerous subsequent deeds of trust on Company's office building. The court said explicitly that Mom, not Supply House, impaired the collateral. Mom's second argument failed because the court, while acknowledging that multiple documents part of the same transaction may be read together as one contract, found that the guarantee agreement was independent from the underlying credit agreement. A lack of any cross-referencing between the two contracts made it unnecessary to read the $525,000 limitation of liability into the otherwise plain language of the absolute guarantee.

Guarantee agreements – such as personal indemnity agreements to bonding companies – should always be entered into carefully. If a guarantor intends to rely on collateral to satisfy any part of the debt, the guarantor should require that it be given notice of the disposition of any collateral in the guarantee agreement itself and should further take no steps that would impair the collateral, independently from the principal's actions. Additionally, if the guarantor wants to rely on any part of an earlier transaction or course of dealing between the principal and the obligee, it should make sure all pertinent terms from those earlier dealings are embodied in the guarantee agreement itself. Following these prudent practices will help avoid surprise and allow guarantors to make accurate business decisions based on the amount of exposure and risk they are willing to accept.

By Jonathan Head

Bradley Arant Lawyer Activities:

Jim Archibald, **Axel Bolvig**, **Doug Patin**, **David Pugh**, **Bill Purdy**, **Mabry Rogers**, **Wally Sears**, and **David Taylor** are named in the 2009 edition of *The Best Lawyers in America* in the specialty of Construction Law.

In late 2008, several BABC Construction Practice Group attorneys wrote portions of the recently published *Alabama Construction Law Manual* (West 2008). The authors included **Jim Archibald**, **Keith Covington**, **Ed Everitt**, **David Hume**, **Arlan Lewis**, **Luke Martin**, **David Owen**, and **Wally Sears**. Several other BABC attorneys authored other portions of the Manual, including **Helen Ball**, **Charlie Beavers**, **Patrick Darby**, **Chris Grissom**, **Rod Kanter**, and **David Roth**. This Manual has been recently updated by **Jim Archibald, Keith Covington,** and **Jeff Peters**.

Jim Archibald and **Wally Sears** recently updated the Alabama section of the *State-by-State Guide to Construction Contracts and Claims.*

David Hume recently updated the Alabama section of the *50 State Lien Law Handbook*.

Jeremy Becker-Welts, Axel Bolvig, and **Joel Brown** presented "Federal Construction Projects: Finding, Pricing, and Managing the Work" in Birmingham on May 21, 2009.

Jeremy Becker-Welts, Bill Purdy, and **Joel Brown** presented "Federal Construction Projects: Finding, Pricing, and Managing the Work" in Jackson on June 4, 2009.

David Taylor spoke in June at the Construction Specifications Institute's "Construct2009" national convention in Indianapolis on "Who Owns the Float." He also spoke in June at the Tennessee CSI Convention of the American Subcontractors Association on "Retainage and Enforcing Lien Rights."

Jeremy Becker-Welts, Joel Brown, and **David Pugh** presented a seminar in conjunction with the ABC in

Birmingham on July 16, 2009, entitled “Finding and Building Federal Projects”

Joel Brown spoke at the Independent Electrical Council Meeting in Birmingham on August 10, 2009 about “Finding, Bidding, and Managing Federal Projects”

Michael Knapp taught a course entitled, “Advance Topics in Engineering Law” at Misr University of Science and Technology in Cairo, Egypt from August 8-12. The course is a master’s level course in conjunction with the University of Alabama-Birmingham.

Frank Caprio and **Doug Patin** will be presenting a seminar entitled “Competing for U.S. Government Contracts in the United States” on September 22 and 23 in London, England.

David Taylor recently published an article which will appear in the upcoming volume of the Institute of Real Estate Management Magazine: "Myths and Realities of Payment and Performance Bonds"

Arlan Lewis will be speaking at the ABA National Conference for the Minority Lawyer in Philadelphia, PA on September 24-25, 2009. The session in which Arlan will participate is entitled “The New New Deal: Transactional Skills for a Changing Environment” and is being jointly presented by the ABA Forum on the Construction Industry and the ABA Business Law Section.

Bryan Thomas completed the Bibb Allen Trial Academy sponsored by the Alabama Defense Lawyers Association.

Arlan Lewis and Rhonda Caviedes will be attending the 2009 Fall Meeting of the ABA Forum on the Construction Industry on October 15-16, 2009 in Philadelphia, PA.

It is with mixed emotions that we report that **Donna Crowe** and **David Hume** have left Bradley Arant Boult Cummings to take in house positions in two respected construction industry participants. We would like to thank Donna and David for their years of service and for the time each dedicated to the firm and its construction clients. We wish each the best of luck in their new endeavors.

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

NOTE: YOU CAN FIND THIS NEWSLETTER AND PAST NEWSLETTERS ON OUR WEBSITE. IF YOU ACCESS THIS NEWSLETTER ON OUR WEBSITE, CASE-LINKS WILL BE AVAILABLE UNTIL THE NEXT NEWSLETTER IS PUBLISHED. WE DO NOT VIEW THIS NEWSLETTER AS WRITTEN FOR ATTORNEYS BUT RATHER FOR PRACTICING MEMBERS OF THE CONSTRUCTION INDUSTRY. IF YOU OR YOUR LAWYER WOULD LIKE TO KNOW MORE INFORMATION ABOUT A PARTICULAR ARTICLE OR WOULD LIKE THE CASE CITES, YOU MAY GO TO WWW.BABC.COM/PG_CONSTRUCT.CFM OR CONTACT ANY ATTORNEY LISTED ON PAGE 8 OF THIS NEWSLETTER.

Disclaimer and Copyright Information

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

This newsletter is a periodic publication of Bradley Arant Boult Cummings 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.babc.com.

F. Wendell Allen....(205) 521-8282....wallen@babc.com
James F. Archibald, III ....(205) 521-8520.... jarchibald@babc.com
David H. Bashford (Charlotte)....(704) 338-6001.... dbashford@babc.com
Jeremy Becker-Welts (Washington, D.C.)....(202) 719-8307.... jbeckerwelts@babc.com
Axel Bolvig, III....(205) 521-8337.... abolvig@babc.com
John D. Bond, III (Charlotte)....(704) 338-6007.... jbond@babc.com
Joel E. Brown ....(205) 521-8416....jbrown@babc.com
Stanley D. Bynum....(205) 521-8000....sbynum@babc.com
Robert J. Campbell ....(205) 521-8975.... rjcampbell@babc.com
Rhonda Caviedes ....(205) 521-8683.... rcaviedes@babc.com
F. Keith Covington ....(205) 521-8148.... kcovington@babc.com
Rob Dodson (Jackson)....(601) 592-9918.... rdodson@babc.com
Joel Eckert (Nashville)....(615) 252 4640 .... jeckert@babc.com
Edward J. Everitt ....(205) 521-8444.... eeveritt@babc.com
Eric A. Frechtel (Washington, D.C.)....(202) 719-8249.... efrechtel@babc.com
Ralph Germany (Jackson)....(601) 592-9963....rgermany@babc.com
Daniel Golden (Washington, D.C.)....(202) 719-8398.... dgolden@babc.com
John Mark Goodman ....(205) 521-8231.... jmgoodman@babc.com
John W. Hargrove....(205) 521-8343.... jhargrove@babc.com
Jonathan B. Head....(205) 521-8054....jhead@babc.com
Michael P. Huff (Huntsville) ....(256) 517-5111....mhuff@babc.com
Rick Humbracht (Nashville)....(615) 252-2371....rhumbracht@babc.com
David G. Hymer....(205) 521-8289.... dhymer@babc.com
Josh D. Johnson....(205) 521-8423....jjohnson@babc.com
Michael W. Knapp (Charlotte)....(704) 338-6004.... mknapp@babc.com
Michael S. Koplan (Washington, D.C.) ....(202) 719-8251.... mkoplan@babc.com
Arlan D. Lewis ....(205) 521-8131....alewis@babc.com
Tom Lynch (Washington, D.C.) ....(202) 719-8216.... tlynch@babc.com
Luke Martin....(205) 521-8570....lumartin@babc.com
Michael D. McKibben ....(205) 521-8421....mmckibben@babc.com
Mitchell S. Mudano ....(205) 521-8544.... mmudano@babc.com
David W. Owen ....(205) 521-8333....dowen@babc.com
Douglas L. Patin (Washington, D.C.) ....(202) 719-8241.... dpatin@babc.com
Jeffrey A. Peters....(205) 521-8583....jpeters@babc.com
Steven A. Pozefsky (Washington, D. C.)....(202) 719-8210.... spozefsky@babc.com
J. David Pugh....(205) 521-8314.... dpugh@babc.com
Bill Purdy (Jackson) ....(601) 592-9962....bpurdy@babc.com
Gregory H. Revera (Huntsville)....(256) 517-5129.... grevera@babc.com
E. Mabry Rogers....(205) 521-8225.... mrogers@babc.com
Walter J. Sears, III ....(205) 521-8202.... wsears@babc.com
Eric W. Smith (Nashville)....(615) 252-2381....esmith@babc.com
James C. Smith (Charlotte)....(704) 338-6010.... jsmith@babc.com
H. Harold Stephens (Huntsville)....(256) 517-5130....hstephens@babc.com
Robert J. Symon (Washington, D.C.) ....(202) 719-8294.... rsymon@babc.com
David K. Taylor (Nashville) ....(615) 252 2396....dtaylor@babc.com
Darrell Clay Tucker, II....(205) 521-8356.... dtucker@babc.com
D. Bryan Thomas....(205) 521-8434....dbthomas@babc.com
Nicholas J. Voelker (Charlotte) ....(704) 338-6018.... nvoelker@babc.com

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

BRADLEY ARANT BOULT CUMMINGS LLP **Second Quarter 2009**

CONSTRUCTION AND PROCUREMENT LAW NEWS

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

F. Wendell Allen	Donna M. Crowe (d.c.)	Jonathan B. Head	Luke Martin	E. Mabry Rogers
James F. Archibald, III	F. Keith Covington	Michael P. Huff (h)	Michael D. McKibben	Walter J. Sears, III
David H. Bashford (c)	Rob Dodson (j)	Rick Humbracht (n)	Mitchell S. Mudano	Eric W. Smith (n)
Jeremy Becker-Welts (d.c.)	Joel Eckert (n)	David R. Hume, Jr.	David W. Owen	James C. Smith (c)
Axel Bolvig, III	Edward J. Everitt	David G. Hymer	Douglas L. Patin (d.c.)	H. Harold Stephens (h)
John D. Bond, III (c)	Eric A. Frechtel (d.c.)	Josh D. Johnson	Jeffrey A. Peters	Robert J. Symon (d.c.)
Joel E. Brown	Ralph Germany (j)	Michael W. Knapp (c)	Steven A. Pozefsky (d.c.)	David K. Taylor (n)
Stanley D. Bynum	Daniel Golden (d.c.)	Michael S. Koplan (d.c.)	J. David Pugh	Darrell Clay Tucker, II
Robert J. Campbell	John Mark Goodman	Arlan D. Lewis	Bill Purdy (j)	D. Bryan Thomas
Rhonda Caviedes	John W. Hargrove	Tom Lynch (d.c.)	Gregory H. Revera (h)	Nicholas J. Voelker (c)

Owners and Contractors Beware: Tennessee Retainage Law has Changed

Recently enacted bills in Tennessee limit retainage to 5% for all construction contracts, set strict time limits for the release of retainage and tie the failure to create a Retainage Account to severe penalties under the Prompt Pay Act. These requirements cannot be waived by contract.

Tennessee has enacted new legislation that substantially changes the law regarding withholding of retainage on Tennessee projects. The new law limits the amount of retainage an owner or contractor can withhold from any contract (public or private) to 5% of the contract amount. This new legislation applies if the prime contract is equal to or more than $500,000. The retainage that is withheld "shall" be placed in an interest bearing escrow account and the monies, when funded, become the "property" of the contractor or subcontractor. This funding requirement applies no matter how small the subcontract amount, as long as the prime contract meets the $500,000 dollar threshold. The release of the funds must be accomplished within ninety (90) days of completion of the work (which impacts early completion subcontractors) or substantial completion of the project, whichever occurs first. Contractors must release any retainage due to subcontractors for their completed scope of work within ten (10) days of owner payment and subcontractors must pay sub-subcontractors or vendors within ten (10) days of payment by the subcontractor. The interest earned on such an account is also required to be paid to the subcontractors.

The other primary change in the law is that failure to comply with these retainage requirements is now a violation of Tennessee's Prompt Pay Act. In essence, the old retainage law, which had been almost universally ignored, has been given teeth. Specifically, the Prompt Pay Act not only allows for recovery of attorneys' fees and injunctive relief, it also makes violations a misdemeanor criminal offense and subject to daily penalties of as much as $2,500 a day. This stands in stark contrast to prior law, which provided little penalty for failure to adhere to these requirements other than the allowance of claims for lost interest.

Inside:

Some have questioned whether the new law requires a prime contractor to set up multiple retainage accounts for its many subcontractors, positing that in most instances, if an account is set up, it is formally only between the owner, prime contractor and escrow agent. If multiple accounts are required, this could severely impact a prime contractor's cash flow, potentially tying up 5% of the prime contractor's earned monies in the owner's escrow account, and another 5% in an escrow account for its many subcontractors. While no judge has ruled on this issue, it is believed that given that the statute describes the monies as the property of the company to whom they are owed, the "one" account required "by law" contains retainage owed to subcontractors. The interesting development will be when there is a dispute between an owner (or surety) and a prime contractor involving, for example, a potential roof defect, and the non-impacted subcontractors demand payment of their retainage out of the account.

The 5% requirement is also slowly filtering its way to lenders. Traditionally lenders have allowed an owner 90% of the construction loan proceeds (based on 10% retainage). Loan agreements are not construction contracts and thus this new 5% limitation does not apply to their loan agreements. This can cause issues with project funding unless all parties involved (lender, owner and prime contractor) are aware of the new limits. There have been instances where banks have refused to release the additional 5% to an owner after the project has begun, causing project funding problems with the potential to derail projects.

This change in Tennessee retainage law should remind owners and contractors in all states to be aware of applicable statutory requirements regarding payment. These laws vary from state to state and, as can be seen above, can have serious consequences for the uninformed.

by David Taylor

Eighth Circuit Revives OSHA's Multi-Employer Worksite Policy For "Controlling Employers"

On February 26, 2009, the United States Court of Appeals for the Eighth Circuit issued its long-awaited decision in *Solis v. Summit Contractors, Inc.*, overturning a 2007 decision of the OSHA Review Commission and reviving the so-called multi-employer worksite policy for "controlling employers." Under this policy, a general contractor with supervisory control over the worksite may be cited for a safety hazard even though it did not create the hazard and even though none of its own employees were exposed to it. This policy had resulted in thousands of OSHA citations issued against general contractors for violations committed by subcontractors before the policy was declared invalid by the OSHA Review Commission in 2007.

Summit Contractors was the general contractor for the construction of a college dormitory in Little Rock, Arkansas. During the course of the project, Summit's masonry subcontractor failed to ensure that its employees were utilizing fall protection as required by OSHA's standards. After conducting a worksite inspection, OSHA cited Summit as the "controlling employer," alleging that Summit had failed to detect the hazard and see that it was remediated by the subcontractor. Summit argued that OSHA had acted improperly because it had no authority to cite a general contractor whose own employees were never exposed to the safety hazard. After an Administrative Law Judge ("ALJ") ruled in favor of OSHA and upheld the longstanding multi-employer citation policy, Summit appealed.

The OSHA Review Commission reversed the ALJ's decision and vacated the citation against Summit. The Review Commission based its decision on 29 C.F.R. Section 1910.12(a), a regulation issued by the Secretary of Labor shortly after the OSH Act was enacted in 1970. That regulation states that each construction industry employer is required to "protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate [OSHA] standards. . . ." The Review Commission examined the language of the regulation and interpreted it to require a construction contractor to comply with OSHA's safety standards only as to its own employees. The Review Commission found that OSHA's citation of a general contractor under the "controlling employer" doctrine was incompatible with this regulation and, therefore, improper.

In *Solis v. Summit Contractors, Inc.*, a three-judge panel of the Eighth Circuit, voting 2-1, disagreed with the OSHA Review Commission and found that the language of 29 C.F.R. §1910.12(a) "is unambiguous in that *it does not preclude* OSHA from issuing citations to employers for violations when their own employees are not exposed to any hazards related to the violations." The Eighth Circuit panel vacated the Review Commission's ruling, holding that the Review Commission had "abused its discretion in determining that the controlling employer citation policy conflicted with §1910.12(a)."

While the Eighth Circuit's decision clearly will have an important impact on construction contractors, it does not foreclose the possibility of other legal challenges to the multi-employer citation policy. The Court addressed the meaning of 29 C.F.R. § 1910.12(a), but did not engage in an analysis of the overall policy. At one point, the Court noted that the multi-employer citation policy had not been adopted through the informal rulemaking process of the Administrative Procedures Act and suggested that such rulemaking might be required for OSHA to continue to use the policy in its enforcement efforts. The Court, however, declined to address this issue directly because it had been raised only by the *amici* for Summit Contractors and not by the parties. As always, contractors should stay tuned to developments on this and other decisions regarding workplace safety that may have similar serious ramifications, and contractors should regularly revisit and update their workplace safety practices.

By Keith Covington

Contractors Beware – Violation of State Construction Lien Law Could Result in Criminal Liability

Wisconsin's construction lien statute, like the lien statutes in many other states, safeguards against the misappropriation of construction project funds by creating trust funds for the benefit of owners, subcontractors, and suppliers. The purpose of the "trust fund" is to pay claims for labor and materials used for improvements to real property. The statute prohibits prime contractors from using the money in the trust fund for any purpose other than for payment of claims, until such claims are paid in full. Also, in the event that the prime contractor does not have sufficient funds to pay all subcontractors in full, the prime contractor must pay subcontractor claims proportionally. Violation of the payment provisions of this statute constitutes theft by the prime contractor and, as confirmed in a recent decision interpreting the statute, *State v. Keyes*, subjects the prime contractor to criminal penalties.

In *Keyes*, the defendants, two individuals conducting business as a residential home builder and prime contractor for the project, received seven draws from the owner's loan account for a residential building project. Based on lien releases filed by certain subcontractors, it appeared the defendants paid certain of the subcontractors' claims. The owners later learned that certain other subcontractors on the project were not being paid, and that one of the individual defendants performed some of the project work purportedly as a subcontractor. Ultimately, the owner denied the defendant's request for an eighth draw and requested that its certified public accountant investigate project finances. The accountant's analysis revealed that the defendants failed to pay certain of the subcontractors on the project. As a result, the owners filed a criminal complaint against the defendants for felony theft by a prime contractor pursuant to the construction lien statute.

The defendants filed a motion to dismiss the criminal complaint, which was denied. On appeal, the Wisconsin Supreme Court affirmed the decision. The Court stated that the Wisconsin construction lien statute creates a trust and, as such, payments made to a prime contractor are not owned by the prime contractor. The Court stated that use of the trust fund money "for any other purpose until all claims . . . have been paid in full or proportionally in cases of a deficiency, is theft by the prime contractor. . . ." The Court found that after the final draw from the construction account, there was not enough money to pay the claims due third-party subcontractors and also pay the defendants the full amount for materials. The Court concluded that this was a case of deficiency, and the defendants were to compensate the unpaid subcontractors proportionally. Based on the defendants' failure to compensate the subcontractors proportionally and the amount at issue, the Court held that the defendants' actions constituted a violation of the state construction lien statute and a Class G felony.

It is important to note that pursuant to the Wisconsin statute, theft by a prime contractor in cases where the prime contractor is a corporation, limited liability company or other legal entity other than a sole proprietorship is also deemed theft by any officers, directors, members, partners, or agents of the prime contractor responsible for the misappropriation. New York, Illinois, Michigan and Maryland have enacted construction lien law statutes similar to that in Wisconsin. Michigan courts have also held prime contractors liable for both civil and criminal penalties. It is imperative for companies acting as a prime contractor to understand the applicable state construction lien statutes, because violation of these statutes may result in corporate and individual civil and criminal liability.

By Michael Griffin

Wrongfully Terminated Contractor Entitled to Lost Profits Due to Impaired Bonding Capacity

When a contractor is terminated for default and a claim is filed with its surety, it is certainly foreseeable that the surety would reduce that contractor's bonding capacity. Consequently, the contractor's ability to bid on projects requiring a bond (such as public works projects) will be limited if not prevented altogether. But what if the contractor is wrongfully terminated? Can the contractor recover lost profits from the wrongfully terminating party as damages? In a recent case, *Denny Construction, Inc. v. City & County of Denver*, the Supreme Court of Colorado ruled that a general contractor was entitled to lost profits after losing its bonding capacity as a result of a wrongful termination.

The case involved an established general contractor (Denny) who contracted to construct a new headquarters for the City of Denver's Board of Water Commissioners, a political subdivision of the State of Colorado, for $3.5 Million. In over thirty years of business, Denny had never been declared in default, and at the time of the project half of Denny's revenue came from public works projects.

During the project, Denny requested numerous time extensions due to weather delays; the Board only granted some of the extensions. Because of the delays, Denny failed to meet the project completion deadline, and the Board refused to pay because of unfinished work. Ultimately, the Board declared Denny in default and filed a claim with Denny's surety. Within four months of this default, Denny's surety stopped underwriting bonds for Denny altogether. Denny attempted to obtain bonds from at least three other sureties but was unsuccessful. As a result, Denny was prevented from bidding on any public works projects.

After a subcontractor filed suit to recover its unpaid balance, Denny and the Board filed breach of contract claims against each other. After a trial, the jury found that the Board, not Denny, breached the contract. Therefore, Denny should have never been declared in default. As an element of damages, the jury awarded Denny lost profits due to its impaired bonding capacity. The Colorado Supreme Court eventually upheld the jury's award, holding that lost profits due to a contractor's impaired bonding capacity are recoverable (1) as long as they can be proven with reasonable certainty and (2) are foreseeable at the time the contract is made.

While the facts of this case involve an owner and a general contractor, the same rule could be applied where a general contractor wrongfully terminates its subcontractor. This case demonstrates the need to use caution before terminating a contractor for default. Such an action is drastic and will almost certainly lead to litigation, with a careful review of the terminating parties' actions. Serious consequences await a party found guilty of wrongful termination.

By Ed Everitt

Will Contract Clauses Limiting Liability Be Enforced?

Recently, two state courts have taken up the issue of the enforceability of a contractual limitation-of-liability provision in a subcontract capping damages owed by a subcontractor at the amount of fees paid to it by the general contractor. In *Octillo, LLC v. the WLB Group, Inc.*, the Arizona Court of Appeals held that Arizona public policy did not prohibit the enforcement of such provisions and, therefore, they are valid under Arizona law. However, in *Lanier at McEver, L.P. v. Planners and Engineers Collaborative, Inc.*, the Supreme Court of Georgia held that such provisions are in direct violation of Georgia's Anti-Indemnity statute and public policy and are void.

In the Arizona case, Octillo, a real estate developer, brought an action against WLB, a surveyor, for an erroneous survey conducted on a townhouse project in Phoenix. The limitation-of-liability provision capped damages owed by WLB at the total amount of fees paid by Octillo to WLB on the project. Octillo paid WLB $14,242 for services performed on the project and WLB argued that this was the highest amount of damages it could be liable for under the Subcontract. The trial court granted WLB'S motion for Summary Judgment stating that the contract provision did not violate Arizona public policy and was valid. The Arizona appellate court recognized that although parties in commercial settings are free to contract over which party bears the risk, if such a provision directly violates public policy (e.g. a statute), it is invalid under Arizona law. The appellate court looked at whether such provisions were in violation of the Arizona Anti-Indemnity statute. Because this case was one of first impression in Arizona, Octillo argued that the reasoning set forth in an Alaska case, *City of Dillingham v. CH2M Hill*, should apply. Namely, that an Anti-Indemnity statute, one that prohibits a party to a construction contract from enforcing a provision purporting to indemnify that party for its own negligence, made such a limitation-of-liability provision against public policy. The Court of Appeals disagreed and held that such a provision is not an indemnity provision and, therefore, the maximum amount of damages Octillo could recoup from WLB was $14,242.

In the Georgia case, Lanier, a property developer, brought an action against Planners and Engineers for the negligent construction of a storm water drainage system on a 220-unit apartment complex outside of Atlanta. After completion of the apartment building, Lanier discovered erosion and other physical damage caused by Planners and Engineers totaling roughly $500,000. Planners and Engineers argued that because it was paid $80,514 on the project, and because the limitation-of liability provision in the Subcontract limited its liability to that amount, its liability was capped at $80,514. The trial and appellate courts both found that the provision did not violate any Georgia law, was not a violation of public policy, upheld the provision, and capped damages at $80,514. However, the Georgia Supreme Court disagreed and overturned the lower courts' decisions. The Court held that because the provision was a complete avoidance of liability for a third party's sole negligence in a building contract, it was in direct violation of the Georgia Anti-Indemnity statute.

Due to the conflicting state law pertaining to these types of Subcontract limitation-of-liability provisions, parties involved in construction projects should contact counsel to confirm whether such provisions are valid in the state where their project is located prior to negotiating for such provisions. Otherwise, the party may have bargained for a provision that is not only invalid, but also carries the possibility of unanticipated exposure.

By David Hill Bashford & Nick Voelker

Stimulus Package (ARRA): The Buy American Provision: Get Ready Now!

Among the lesser noticed provisions of the American Recovery and Reinvestment Act of 2009 (ARRA) is the Buy American provision, which took effect February 17, 2009. It requires that all of the iron and steel and "manufactured goods" used in ARRA-funded projects for construction, alteration, maintenance or repair of a "public building or public work" be "produced in the US."

Regulations to implement this provision, as they relate solely to construction materials, have been published at FAR Subpart 25.6, and provide some guidance. They do not, however, define what is a "public building or public work," what are "manufactured goods," and they are not entirely clear as to what constitutes material "produced in the US."

Oddly, it is not clear that this applies only to construction projects. What is the impact on development of a wireless network system? A purchase solely of equipment? Other procurements not involving construction type efforts (food service contracts, as an example)? And is the ARRA applicable only to federal procurements, as is the Buy American Act of 1933? Finally, does the rule follow the dollars, such that a grantee is subject to it, a state, a private entity which then use the dollars to buy iron, steel, or manufactured goods?

As to "manufactured goods," must they be linked to a public building or public work? What if it's the purchase of lawnmowers for routine maintenance? Is an intellectual property (shop drawings, software) a "manufactured good?" The FAR addresses manufactured construction materials, but does not distinguish them from manufactured goods. What if the "manufactured good" is not made of iron or steel? If a manufactured good is partly made of iron or steel, must all of its iron or steel be produced in the US?

What about "produced in the US?" Which test will the government or the courts apply, the "substantial transformation test" (*i.e.*, it is produced in the US if it is "substantially transformed into a new and different article of commerce" in the US) or the "cost of domestic components test" (*i.e.*, more than 50% is US produced, and some additional manufacturing process takes place in US). Even if one solves the test problem, does it apply to the final product (a heating and cooling system in an office building) or to each component? The FAR provides that "steel or iron used as components or subcomponents of other manufactured construction material" is exempt from the "produced in the US" requirement, but fails to define where something becomes a component or subcomponent.

There are important exceptions to the application of this provision—for example, certain foreign trade agreements granting exceptions to country of origin preferences – so one will want to consult your lawyer about the exceptions and whether they apply (or, in the case of a prospective procurement, can be lobbied to apply). Moreover, even if it does not apply, one will still need to analyze whether the Buy American Act applies.

Companies that hope to participate in the ARRA funding need to prepare to examine these issues for any effect on procurement decisions. Quick and accurate action may repay the prepared company. Moreover, one will be better able to assess whether a competitor's bid or proposal can be protested on ARRA "Buy American" grounds.

By Mabry Rogers

Despite Being Unlicensed, Contractor Allowed to Retain Payments

States have licensing requirements of all kinds, for real estate agents, architects, contractors, even lawyers. Most of those statutes provide that those practicing their trade without a license cannot enforce contracts made while unlicensed. That is, those without licenses cannot sue to get paid. Alabama's licensing provision for contractors provides exactly that. The Alabama Supreme Court recently addressed a related, but clearly different, issue. Does an unlicensed Contractor have to return payments that had already been made?

In *Fausnight v. Perkins* the Alabama Supreme Court addressed whether an owner could sue his contractor to recover payments already made solely because the owner learned that the contractor was not licensed under Alabama law. The trial court ruled that the owner could recover the money. The trial court's reasoning was based upon the public policy behind the licensing statute which was to protect the public from unlicensed contractors. The trial court concluded that if the state legislature passed a statute that does not allow a contractor to sue to obtain money owed to him, surely the legislature also meant that a contractor could not retain money voluntarily paid to him by an owner when the owner did not know that the contractor was unlicensed.

The Alabama Supreme Court disagreed. In ruling that the contractor could keep money already paid, it first emphasized that the licensing statute was very penal. The home at issue in the case was already built and occupied by the owner. The money paid by the owner resulted in a home of value which the contractor had provided. Second, in addition to being quite penal, the statute was a change to the common law which would not have barred the unlicensed contractor from bringing suit to enforce his contract. Therefore, the statute needed to be "narrowly construed." In other words, if the statute did not say specifically that the contractor could not retain payments voluntarily made, then the courts did not have the authority to "write in" that provision simply based upon what the legislative intent appeared to be. The Supreme Court further noted that the statute was very specific. In addition to preventing an unlicensed contractor from filing a lawsuit, it provided for criminal penalties (fines) for unlicensed contracting. Clearly, the legislature could have included a provision which also would have prevented an unlicensed contractor from retaining payments voluntarily made, but the legislature did not do that.

Despite the *Fausnight* ruling, contracting without a license in any state is risky business, whether it is home building or work in some other regulated trade or profession. Had the payments in this case been made before the work had been completed for the owner or if the money had been used improperly in some way, the result in the case might well have been different. Moreover, the law in many other states is not as favorable to contractors. A New Mexico case, for example, came out the opposite way on the *Fausnight* issue, and many state licensing statutes (California for one) contain the very provision about refund of voluntary payments that the *Fausnight* Court noted was not included by the Alabama legislature in this case.

By John Hargrove

Bradley Arant Lawyer Activities:

In late 2008, Several BABC Construction Practice Group attorneys wrote portions of the recently published Alabama Construction Law Manual (West 2008). The authors included **Jim Archibald**, **Keith Covington**, **Ed Everitt**, **David Hume**, **Arlan Lewis**, **Luke Martin**, **David Owen**, and **Wally Sears**. Several other BABC attorneys authored other portions of the Manual, including **Helen Ball**, **Charlie Beavers**, **Patrick Darby**, **Chris Grissom**, **Rod Kanter**, and **David Roth**.

Keith Covington spoke on the proposed Employee Free Choice Act at the Legislative Summit for the construction industry held at Associated Builders and Contractors in Homewood on January 23, 2009.

Mabry Rogers and **Wally Sears** attended the annual meeting of the ACCL in Amelia Island, Florida on February 19-22, 2009. Wally presented on Discovery in International Arbitration, along with Nick Gaede.

John Bond, Kay Bains, and David Taylor spoke on a panel at the National Conference of the American Subcontractors Association Annual Meeting in Nashville on March 5, 2009.

David Taylor coordinated and spoke at the National meeting of the American Subcontractors Association in Nashville, Tennessee on "Legal Protections in a Volatile Economy" on March 6, 2009.

Mabry Rogers presented a client seminar on project management to a construction team in San Antonio, Texas on March 16, 2009.

Michael Koplan and Robert Symon presented an in-house Risk Management Seminar for a client on March 19, 2009.

Jonathan Head spoke at the ABA Litigation Section annual meeting on how to deal with inadvertent waiver of privilege in e-discovery in Atlanta, Georgia in April.

Keith Covington, **Chris Glenos**, **Arlan Lewis**, and **David Hume** presented a seminar entitled "Construction Insurance, Bonding, and Liens in Alabama" on April 22, 2009 in Birmingham, Alabama.

David Hume participated and completed the Future Leaders in Construction 101 Program organized by the Alabama Chapter of the Associated Builders and Contractor. **David** is currently participating in the second phase of the program, FLIC 102, which will be complete at the end of May 2009.

Michael Koplan wrote an article on mechanic's lien and change order releases for a client newsletter on April 15, 2009.

Rhonda Caviedes, Ed Everitt, and Arlan Lewis attended the ABA Forum on the Construction Industry Annual Conference held in New Orleans from April 16-18. The program was entitled "Talking Green Blues: Energy, Sustainability, and Green Building Challenges Affecting the Construction Industry."

Ralph Germany presented a construction law update to Barksdale Bonding and Insurance Company on April 20, 2009.

David Hume attended the 2009 Building Science Awards Banquet, Career Expo and Golf Tournament at Auburn University on April 23, 2009.

David Taylor spoke on "Arbitration" at the firm's Litigation Section's In-House Counsel Seminar entitled "Controlling Legal Costs" in Nashville on April 23, 2009.

David Taylor spoke at the Tennessee Association of Construction Counsel's Spring Meeting on "Opening Statements in Mediations" in Memphis on April 24, 2009.

David Hume coordinated and spoke at the 1st Annual FLIC Blind Wine Tasting benefiting the ACE Mentor Program on April 30, 2009. ACE is a nonprofit organization that mentors high school students in the architectural, construction, and engineering sciences for future careers in the industry.

Joel Brown and **David Hume** will participate in the Lorman seminar "Public Contracts and Procurement Regulations" to be held in Huntsville, Alabama on May 6, 2009. Several other BABC attorneys will participate as well, including Hall Bryant, Frank Caprio, Stephen Hall, Warne Heath, and Harold Stephens.

Jeremy Becker-Welts, Axel Bolvig, Joel Brown, Ralph Germany, Arlan Lewis, Doug Patin, William Purdy, and Robert Symon will present a seminar entitled "Federal Construction Projects: Finding, Pricing, and Managing the Work" in Birmingham, Alabama on May 21, 2009 and Jackson, Mississippi on June 4, 2009.

Keith Covington has presented several seminars at ABC regarding unions.

For more information on any of these activities or speaking engagements, please contact Rebecca Harris at 205-521-8504.

NOTE: YOU CAN FIND THIS NEWSLETTER AND PAST NEWSLETTERS ON OUR WEBSITE. IF YOU ACCESS THIS NEWSLETTER ON OUR WEBSITE, CASE-LINKS WILL BE AVAILABLE UNTIL THE NEXT NEWSLETTER IS PUBLISHED. WE DO NOT VIEW THIS NEWSLETTER AS WRITTEN FOR ATTORNEYS BUT RATHER FOR PRACTICING MEMBERS OF THE CONSTRUCTION INDUSTRY. IF YOU OR YOUR LAWYER WOULD LIKE TO KNOW MORE INFORMATION ABOUT A PARTICULAR ARTICLE OR WOULD LIKE THE CASE CITES, YOU MAY GO TO WWW.BABC.COM/PG_CONSTRUCT.CFM OR CONTACT ANY ATTORNEY LISTED ON PAGE 8 OF THIS NEWSLETTER.

Disclaimer and Copyright Information

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

This newsletter is a periodic publication of Bradley Arant Boult Cummings 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.babc.com.

F. Wendell Allen	(205) 521-8282	wallen@babc.com
James F. Archibald, III	(205) 521-8520	jarchibald@babc.com
David H. Bashford (Charlotte)	(704) 338-6001	dbashford@babc.com
Jeremy Becker-Welts (Washington, D.C.)	(202) 719-8307	jbeckerwelts@babc.com
Axel Bolvig, III	(205) 521-8337	abolvig@babc.com
John D. Bond, III (Charlotte)	(704) 338-6007	jbond@babc.com
Joel E. Brown	(205) 521-8416	jbrown@babc.com
Stanley D. Bynum	(205) 521-8000	sbynum@babc.com
Robert J. Campbell	(205) 521-8975	rjcampbell@babc.com
Rhonda Caviedes	(205) 521-8683	rcaviedes@babc.com
Donna M. Crowe (Washington, D.C.)	(202) 719-8212	dcrowe@babc.com
F. Keith Covington	(205) 521-8148	kcovington@babc.com
Rob Dodson (Jackson)	(601) 592-9918	rdodson@babc.com
Joel Eckert (Nashville)	(615) 252 4640	jeckert@babc.com
Edward J. Everitt	(205) 521-8444	eeveritt@babc.com
Eric A. Frechtel (Washington, D.C.)	(202) 719-8249	efrechtel@babc.com
Ralph Germany (Jackson)	(601) 592-9963	rgermany@babc.com
Daniel Golden (Washington, D.C.)	(202) 719-8398	dgolden@babc.com
John Mark Goodman	(205) 521-8231	jmgoodman@babc.com
John W. Hargrove	(205) 521-8343	jhargrove@babc.com
Jonathan B. Head	(205) 521-8054	jhead@babc.com
Michael P. Huff (Huntsville)	(256) 517-5111	mhuff@babc.com
Rick Humbracht (Nashville)	(615) 252-2371	rhumbracht@babc.com
David R. Hume, Jr.	(205) 521-8614	dhume@babc.com
David G. Hymer	(205) 521-8289	dhymer@babc.com
Josh D. Johnson	(205) 521-8423	jjohnson@babc.com
Michael W. Knapp (Charlotte)	(704) 338-6004	mknapp@babc.com
Michael S. Koplan (Washington, D.C.)	(202) 719-8251	mkoplan@babc.com
Arlan D. Lewis	(205) 521-8131	alewis@babc.com
Tom Lynch (Washington, D.C.)	(202) 719-8216	tlynch@babc.com
Luke Martin	(205) 521-8570	lumartin@babc.com
Michael D. McKibben	(205) 521-8421	mmckibben@babc.com
Mitchell S. Mudano	(205) 521-8544	mmudano@babc.com
David W. Owen	(205) 521-8333	dowen@babc.com
Douglas L. Patin (Washington, D.C.)	(202) 719-8241	dpatin@babc.com
Jeffrey A. Peters	(205) 521-8583	jpeters@babc.com
Steven A. Pozefsky (Washington, D. C.)	(202) 719-8210	spozefsky@babc.com
J. David Pugh	(205) 521-8314	dpugh@babc.com
Bill Purdy (Jackson)	(601) 592-9962	bpurdy@babc.com
Gregory H. Revera (Huntsville)	(256) 517-5129	grevera@babc.com
E. Mabry Rogers	(205) 521-8225	mrogers@babc.com
Walter J. Sears, III	(205) 521-8202	wsears@babc.com
Eric W. Smith (Nashville)	(615) 252-2381	esmith@babc.com
James C. Smith (Charlotte)	(704) 338-6010	jsmith@babc.com
H. Harold Stephens (Huntsville)	(256) 517-5130	hstephens@babc.com
Robert J. Symon (Washington, D.C.)	(202) 719-8294	rsymon@babc.com
David K. Taylor (Nashville)	(615) 252 2396	dtaylor@babc.com
Darrell Clay Tucker, II	(205) 521-8356	dtucker@babc.com
D. Bryan Thomas	(205) 521-8434	dbthomas@babc.com
Nicholas J. Voelker (Charlotte)	(704) 338-6018	nvoelker@babc.com

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

READER RESPONSES

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

Your Name:

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

____

____

____

☐ Please add the following to your mailing list:

____

____

____

☐ Correct my name and mailing address to:

____

____

____

☐ My e-mail address:______________________________

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

____

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

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

Comments:

____

____

____

____

____

____

____

____

____

____

____

____

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

Axel Bolvig, Esq.
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104

BRADLEY ARANT BOULT CUMMINGS LLP **First Quarter 2009**

CONSTRUCTION AND PROCUREMENT LAW NEWS

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

F. Wendell Allen	Donna M. Crowe (d.c.)	Jonathan B. Head	Luke Martin	E. Mabry Rogers
James F. Archibald, III	F. Keith Covington	Michael P. Huff (h)	Michael D. McKibben	Walter J. Sears, III
David H. Bashford (c)	Rob Dodson (j)	Rick Humbracht (n)	Mitchell S. Mudano	Eric W. Smith (n)
Jeremy Becker-Welts (d.c.)	Joel Eckert (n)	David R. Hume, Jr.	David W. Owen	James C. Smith (c)
Axel Bolvig, III	Edward J. Everitt	David G. Hymer	Douglas L. Patin (d.c.)	H. Harold Stephens (h)
John D. Bond, III (c)	Eric A. Frechtel (d.c.)	Josh D. Johnson	Jeffrey A. Peters	Robert J. Symon (d.c.)
Joel E. Brown	Ralph Germany (j)	Michael W. Knapp (c)	Steven A. Pozefsky (d.c.)	David K. Taylor (n)
Stanley D. Bynum	Daniel Golden (d.c.)	Michael S. Koplan (d.c.)	J. David Pugh	Darrell Clay Tucker, II
Robert J. Campbell	John Mark Goodman	Arlan D. Lewis	Bill Purdy (j)	D. Bryan Thomas
Rhonda Caviedes	John W. Hargrove	Tom Lynch (d.c.)	Gregory H. Revera (h)	Nicholas J. Voelker (c)

BULLETIN

Proposed EPA Rule Would Establish Effluent Guidelines for Discharges From the Construction and Development Industry

On November 28, 2008, the United States Environmental Protection Agency ("EPA") published a *proposed* rule to address stormwater runoff from construction sites. *The comment period on the proposed rule runs through February 26, 2009*. The proposed rule, if finally adopted by EPA, would establish technology-based Effluent Limitation Guidelines ("ELGs") and New Source Performance Standards ("NSPSs") to control the discharge of pollutants from construction sites. The proposed rule would work in concert with existing state and local programs, and would add nationwide minimum requirements; where a state's requirements are below the minimum, the new guidelines will replace them.

Inside:

EPA initially proposed a rule to address storm-water discharges from the construction and development industry in June 2002. EPA withdrew the rulemaking in April 2004, and the withdrawal was challenged in court. In September 2009, the Ninth Circuit Court of Appeals affirmed a lower court's order compelling EPA to propose and take final action with respect to ELGs and NSPSs for the construction and development industry no later than December 1, 2009.

EPA's proposed rule would require most significant construction sites to implement a range of erosion and sediment best management practices to reduce pollutants in stormwater discharges. Some construction sites may be required to meet a numeric limit on the allowable level of turbidity depending

www.ba-boult.com

Birmingham Office	Huntsville Office	Nashville Office	Montgomery Office	Washington, D.C. Office	Jackson Office	Charlotte Office
One Federal Place	200 Clinton Ave. West	Roundabout Plaza	Alabama Center for Commerce	1133 Connecticut Ave. N.W.	188 East Capitol Street	Bank of America Corp. Ctr.
1819 5th Avenue North	Suite 900	1600 Division Street	401 Adams Avenue, Ste. 780	Twelfth Floor	One Jackson Place	100 N. Tryon Street
Birmingham, AL 35203	Huntsville, AL 35801	Suite 780	Montgomery, AL 36104	Washington, D.C. 20036	Suite 450	Suite 2690
(205) 521-8000	(256) 517-5100	Nashville, TN 37203	(334) 956-7700	(202) 393-7150	Jackson, MS 39215	Charlotte, NC 28202
					(601) 948-8000	(704) 332-8842

upon the acreage of the site and its location. Chemical treatment and filtration of stormwater discharges may be necessary for stormwater discharges containing clays and fine silts that cannot be effectively removed by conventional storm water best management practices such as sediment basins.

Full text of the proposed rule as published in the Federal Register and information about how to submit comments to EPA may be found on the EPA website: http://www.epa.gov/waterscience/guide/construction/. This site can be consulted for questions such as size and type of projects to be covered. One particular concern is the applicability of the rule to existing permits, particularly if, after the effective date of the rule, a permit must be amended for some reason. Any such concern should be expressed prior to the comment closure deadline, currently February 26.

Bradley Arant Boult Cummings and industry groups such as the Associated General Contractors of America and Associated Builders and Contractors continue to monitor progress on this proposed rule. Further information can be found on their websites. Links to these websites are available on Bradley Arant Boult Cumming's online version of this newsletter.

by Rhonda Caviedes

Responding to Claims under the AIA A312 Payment Bond – *45 Days Might Really Mean 45 Days*

Contractors on projects utilizing American Institute of Architects (AIA) A312 Payment Bonds should be aware of recent state court decisions holding that a surety's failure to answer a subcontractor's claim within 45 days results in a waiver of the surety's defenses to the claim, even if the general contractor itself has valid defenses. Several surety companies have reacted to these decisions by refusing to issue A312 bonds without modifications, and the AIA has since issued an interim amendment to the bond form which provides that a surety does not waive its defenses by failing to respond in a timely manner. For projects utilizing an unmodified A312 Payment Bond, contractors must be attentive and work with their sureties to ensure that the surety responds to the claimant within 45 days of its receipt of the claim so that valid defenses are not waived.

Under the A312 Payment Bond form, the claims process generally follows three steps. First, a claimant provides notice that it is making a claim under the bond, setting forth the amount of the claim with substantial accuracy. Second, the surety "answers" the claim and asserts any defenses. Third, the surety pays any portion of the claim that is undisputed. With respect to the second prong, the A312 Payment Bond states, in part, that the Surety shall "Send an answer to the Claimant, with a copy to the Owner, within 45 days after receipt of the claim, *stating the amounts that are undisputed and the basis for challenging any amounts that are disputed*." Recent court decisions have interpreted this provision literally and strictly – rejecting arguments that a general reservation of rights letter issued within 45 days satisfies the bond's response requirements.

In *National Union Fire Ins. Co. of Pittsburg, PA v. David Bramble*, the Maryland Court of Appeals held that a surety that fails to answer a claim with a response delineating which portions of the claim are disputed and the basis therefore within 45 days cannot dispute the claim and the surety is liable for the amount claimed.

In *Casey Industrial, Inc. v. Seaboard Surety Co*, the surety responded to a payment bond claim within 45 days after receipt of the claim, and identified certain bases for disputing the claim. When the subcontractor subsequently filed suit, the surety attempted to raise new factual defenses. The Virginia federal district court, adopting the reasoning from *Bramble*, held that the surety had waived factual defenses not raised within the 45 day period and was precluded from raising new factual defenses in the subsequent litigation. However, the court also held that the surety was not precluded from asserting legal defenses (*e.g.*, statute of limitations).

The most recent published decision comes from Florida. In *J.C. Gibson Plastering Co., Inc. v. XL Specialty Insurance Co.*, a surety responded to a subcontractor's bond claim notice by requesting that the subcontractor submit supporting cost records and complete a proof of loss form. The surety also advised the subcontractor that it was contacting its bond principal to elicit its position on the claim. On summary judgment, the Florida court held that the 45 day response period is triggered upon the surety's receipt of the bond claim notice. The Court rejected the surety's contention that the 45 day period only begins to run after the surety receives the completed proof of loss form and supporting documentation.

As these cases make clear, on projects with an unmodified A312 Payment Bond in place, bond principals (which have indemnity agreements with their sureties) must be prompt in providing their bond sureties sufficient information to permit the surety to respond with any applicable defenses within the 45 day window and must insist that the surety comply with the 45 day requirement. If the surety cannot assert defenses because the bonded principal does not provide the requisite information in a timely manner, the bond principal may be responsible to the surety for any resulting loss under its indemnity obligations. By the same token, if the surety, notwithstanding the principal's actions to prompt the surety to comply, fails to comply with the limit, it may provide a defense to the principal on a claim by the surety under the indemnity agreement.

These principles apply to the Payment Bond claim. The Performance Bond has different deadlines and procedures, and the case law has treated the Performance Bond deadlines with different results depending on the jurisdiction. The proverbial word to the wise: to the extent feasible, comply with the notice and other procedural requirements of each form.

by Michael Koplan

Compliance with Licensing and Notice Laws Protects Payment Rights

The recession continues to ripple through the United States economy. As a result, many contractors and subcontractors find themselves unable to obtain timely payment for the labor and materials they have supplied. With margins tighter, non-payment of a few significant invoices could lead to business failures for even established businesses. Mechanics liens and lawsuits are the ultimate remedies to secure payment for labor and materials. Contractors, subcontractors, and suppliers must be vigilant about protecting their rights to enforce these remedies because they may not be available if the contractor, subcontractor, or supplier fails to comply with specific legal requirements, like maintaining a proper contracting license and providing proper pre-lien notices. While complying with these legal "technicalities" may be frustrating and time-consuming, two recent court decisions demonstrate that the failure to do so can be fatal to otherwise valid claims for payment.

In *JR Construction/Electric, LLC v. Ordner Construction Co.*, the Georgia Court of Appeals ruled that an unpaid electrical subcontractor could not recover payments from the general contractor or enforce a mechanics lien against the owner's property where the subcontractor failed to maintain a proper, valid license to perform electrical work in Georgia. By statute in Georgia and in many other states, a contract is void and cannot be enforced in court where one of the parties fails to maintain a proper license.

Some subcontractors working in multiple states attempt to comply with licensing statutes by forming loose joint ventures or affiliations with local construction firms. The local firm does little more than supply a license to help obtain a permit; work is performed by electricians from the unlicensed national company. The *JR Construction/Electric* Court rejected this practice, reasoning that the work must be performed or supervised by the licensed firm. The Court demanded evidence that the local firm had done more than supply the license at the permit application stage. When the subcontractor could not show that the licensed firm had performed or supervised the work, the Court concluded that the subcontract work was performed by an unlicensed firm. As a result, the subcontract was void, the subcontractor not entitled to payment, and the lien was invalid. This result underscores the importance of complying with state licensing statutes carefully. It is risky to rely entirely upon associating with a local licensed firm; such shortcuts may be found unacceptable. Contractors and subcontractors must research and consider carefully all licensing issues before work begins to assure that you do not suffer the same fate as JR

Construction/Electric. Licensing links to most jurisdictions may be found under the Construction and Procurement Practice Group tab of our website.

Similarly, in *Wallboard, Inc. v. St. Cloud Mall, LLC*, the Minnesota Court of Appeals ruled that a drywall supplier could not assert a lien against a shopping mall because it failed to give proper pre-lien notice before filing its lien. The lien process in this case was complicated by the fact that the supplier had a purchase order with a subcontractor, who had a subcontract with a general contractor, who contracted with a store leasing space from the mall, who had a lease agreement with the owner of the mall. While the subcontractor advanced several creative and equitable arguments in support of its right to claim a lien, the Court insisted upon strict compliance with the lien statute's notice requirements.

Most state lien laws require notice by subcontractors and material suppliers who wish to claim a lien, often in a very specific form. Sometimes, notice must be given before work begins or materials are supplied. In addition, it may be necessary to give notice to lenders, owners, and lessors to properly claim and perfect the lien. As with licensing statutes, contractors and subcontractors should be sure to comply with lien statutes before beginning and while performing work. Failure to do so could result in losing security for payment of a valid claim. In this economy, construction firms cannot afford to lose out on otherwise valid claims for payment due to missed technicalities.

by Jim Archibald

The Employee "Free Choice" Act

The Employee Free Choice Act ("EFCA") presents one of the most significant changes to federal labor law since the Taft Hartley Act in 1947 and a significant challenge for employers addressing union activities. The EFCA passed the U.S. House of Representatives in March 2007, but stalled in the Senate despite majority support. President Obama was a sponsor of this legislation, and with a few more votes the EFCA may pass the Senate and become law. If it passes without modification, it will impose a number of changes to the current law. Here are the two main changes:

Card Check Authorization Rather Than Secret Ballot. Under the EFCA, the National Labor Relations Board (NLRB) would certify a union as the exclusive bargaining representative for employees if (1) the majority of employees have signed authorization cards that designate the union as its representative and (2) no other labor organization has been certified or recognized as the employees' exclusive representative. This "card check" provision drastically changes current law.

Currently, if a majority of the employees sign authorization cards, the employer has the option either to voluntarily recognize a union or to request a secret ballot election (the more common practice). What then follows is an NLRB-supervised "campaign" during which pros and cons of organization are discussed and debated by all. The NLRB then holds a secret-ballot election. Not every employee who signs an authorization card ends up voting for the union - after the campaign period and in the secrecy of the voting booth, card signers often vote against the union.

This legislation would do away with the secret ballot. Without secret ballot protections, employees may be intimidated by union organizers and pro-union coworkers, whether in the locker room, the parking lot, or at the local restaurant. Further, employees will be forced to make their "choice" in full view of coworkers who are attempting to obtain their signature. To compound matters, employers will no longer have the opportunity to present their side of the unionization story through formal discourse and debate. Some have said that the bill will turn every day into a campaign day. Clearly, the "free choice" bill may actually lead to social or workplace coercion.

No More Bargaining to Impasse. The EFCA also guarantees workers a contract when they form a new union. Current law allows the parties to negotiate a contract until they settle on the terms, so long as they negotiate in good faith. If they fail to agree, the union may call a strike, and the employer may implement its last offer or even lock out workers.

This good faith negotiation and use of economic weapons is the essence of voluntary collective bargaining currently available under the NLRA.

Under the EFCA, however, if parties do not meet fixed negotiation deadlines, the terms of their agreement will be supplied by an arbitrator. Specifically, the EFCA provides that if an employer and a union are bargaining for their first contract, but are unable to reach an agreement in 90 days, either party may refer the dispute to the Federal Mediation and Conciliation Service for mediation. If mediation does not produce a contract after 30 days, the dispute will go to binding arbitration. The resulting contract will bind the parties for two years. Accordingly, under the EFCA, the parties will be subject to the strict 90-day negotiating/30-day mediation deadlines unless they agree otherwise. Effectively, if the parties do not form an agreement within 120 days, an arbitrator will impose a contract. The EFCA therefore supplants the parties' right to voluntary collective bargaining with a government-imposed contract. This may have a dramatic impact on small and new employers, because there is no "small business" exemption in the NLRA, the overarching labor act.

The bill in its present form could be described as a benefit to unions who have pushed for years to do away with secret ballot elections. If the bill becomes law, employers may need to make plans for informing employees of the issues involving unionization on a regular basis and even before there is any specific known overture from a union.

by John Hargrove

Contractors Successful in Suits Against Municipalities in Wyoming and in Mississippi

Suits against municipalities face hurdles similar to suits against any owner; two recent decisions from the Supreme Courts of Wyoming and Mississippi provide a survey of the issues presented to the contractor which seeks recovery from a public owner. Each is instructive in that the notice requirement in the contract was found to have been waived or that actual notice was sufficient to satisfy the notice requirement.

In Wyoming, Hladky Construction sought $1,000,000+ from the City of Gillette, Wyoming, for extra work and delay arising from what the Contractor viewed as the City's improper application of a certification requirement to the precast supplier. The Wyoming Supreme Court affirmed a substantial award (and attorney fees) to the Contractor, primarily relying on the duty of good faith and fair dealing which is an implied term of every contract in Wyoming (and in most other states). Because the City had actual notice of the Contractor's claim, the court disagreed with the City's argument that the contractual notice was inadequate. Finally, the court agreed with the trial court that the Contractor's damages, based on the total cost method, were appropriately considered by the jury because the nature of the loss made it highly impracticable to determine damages with a reasonable degree of accuracy, the Contractor's bid or estimate was realistic, its actual costs were reasonable, and it was not responsible for the added expenses. The case represents a significant win for the Contractor, but also illustrates the principle that compliance with contract notice provisions of a municipal contract (or any contract) is always desirable.

The Mississippi case arose in a different posture. The Contractor, Gray Corporation, sued the City of Tupelo for indemnity from a lawsuit brought against the Contractor by its subcontractor for delays. The Contractor's theory against the City was that the delay arose from defective plans and specifications issued by the City, so that the City should reimburse the Contractor for any amounts it was held to owe the sub. The three-way nature of the litigation embodies a concept usually captured in "pass-through" or "liquidating" agreements frequently used by a Contractor to collect and present the claims of its subcontractors to the Owner. The jury awarded the subcontractor a substantial amount, based on total cost damages. The Mississippi Courts agreed, finding the Contractor's argument that the sub had not complied with the contractual notice requirement unpersuasive, in part because the Contractor sponsored the subcontractor's claim in a letter to the Owner. The more unusual result was the indemnity verdict against the City. The Court agreed that the City owed indemnity if its plans and specifications caused the damage to the subcontractor, through the Contractor. The Court also refused to apply a "no damages for delay" clause in the City-Contractor contract because the jury had reasonably concluded that the exceptions to the clause's enforcement applied. While the case represents a significant win for the Contractor, vis-à-vis the City, as a practical matter, the Contractor (a) did not get full indemnity—the jury concluded some of the subcontractor's damages were caused by the Contractor—and (b) the Contractor had to pay the sub's attorney's fees, but the City did not have to pay the Contractor's attorney's fees.

The cases illustrate the pitfalls of suits against municipalities, the fact that such suits can be successful, and, ultimately, the conclusion that such suits should, whenever possible, be avoided in favor of a negotiated settlement.

by Mabry Rogers

Statute of Limitations for Subcontractor Breach of Contract Starts to Run on the Last Date of Labor

In *Harmony at Madrona Park Owners Association v. Madison Harmony Development*, the Washington Court of Appeals considered whether the statute of limitations for breach of contract began to run when the subcontractor stopped its work or when the project as a whole reached substantial completion. The case involved the construction of a twenty-five building condominium complex in Bellevue, Washington. Well after construction was completed, the condominium association sued the developer alleging construction defects. The developer in turn sued the general contractor, Ledcor. The developer and Ledcor settled, and Ledcor subsequently filed a claim for breach of contract and indemnification against its subcontractor, Serock. Serock was responsible for completing the exterior trim on thirteen buildings in Phase 1 of the project.

Serock argued that Ledcor's breach of contract claims were barred by Washington's six-year statute of limitations for breach of contract. Serock last provided labor and materials on the jobsite in May of 1998, and Ledcor filed its complaint in November of 2004, more than six years after Serock left the project. Ledcor countered that the statute of limitations did not begin to run until substantial completion of the project as a whole, not completion of Serock's work, and under this interpretation Ledcor had filed its claims within the six-year limitations period.

The Washington Court of Appeals held that the six-year statute of limitations began to run no later than Serock's last date of labor on the project. Ledcor argued that a statute of repose, which provided a limitation of six years from the date of substantial completion of the project as whole for any claim to arise, extended the time within which Ledcor could assert claims against Serock. The Court rejected this argument, finding that Ledcor's claims were extinguished at the expiration of (a) the six-year limitations period based upon the subcontractor's last date of labor or (b) the six-year statute of repose based upon the project's substantial completion, *whichever came first*.

However, the Court found that Ledcor's claims based upon the contractual indemnity provision in its subcontract with Serock, which included many of the same damages asserted in the breach of contract claims, were *not* barred by the statute of limitations because the time period for the indemnity claims did not begin to run until Ledcor's settlement with the developer, which triggered Serock's liability for indemnity. Thus, Ledcor was able to recover similar damages based upon the indemnity provisions, despite the fact that its breach of contract claims were barred as untimely.

As demonstrated in the *Harmony* case, the statute of limitations for claims by or against subcontractors can begin to run, and potentially expire, before substantial completion of the project as a whole. While claims for breach of contract may be barred by expiration of the statute of limitations, similar claims for indemnity may be valid even after the breach of contract claims have been extinguished. Understanding the length and manner for calculating the applicable limitations period is a complicated and oftentimes confusing endeavor. As a proactive matter, consulting counsel on this issue early in a project may be quite helpful.

by David Hill Bashford & Nick Voelker

Throw Mama from the E-Discovery Train

Companies with significant litigation realize the cost and burden that e-discovery places on the dispute resolution process. Notwithstanding the attempts of the federal judiciary to rein in and better define e-discovery practice by passage of new rules, courts continue to require both parties and third parties to subject themselves to onerous and intrusive inspections of their electronically stored information (ESI). A recent case from the federal court for the Eastern District of Louisiana illustrates this point.

As part of an employment contract dispute, the plaintiff's former employer learned that plaintiff had sent emails to and from his mother's and best friend's computers during the course of his employment. The plaintiff had also used his mother's laptop computer for business-related work. The defendant served subpoenas on the plaintiff's mother and best friend, and the plaintiff (but not the mother or best friend) moved to quash the subpoenas. Although the court ordered protective protocols for personal and privileged information, which were to be agreed on by the parties, it refused to quash the subpoena and ordered the production of the actual hardware in the mother's laptop computer. One potentially significant fact in the judge's decision is that the defendant agreed to bear all of the costs associated with the forensic examination of the ESI.

While this case may be somewhat humorous, modern reality is that a "borrowed" computer may have information reasonably related to litigation. Because one of the defining characteristics of ESI is that it can almost always be recovered, people need to be careful and consider the potential burden they may be placing on third parties when using another computer or sending documents to them. Also, if your company is affected by a subpoena on a third party who does not wish to object to it, you might be well-advised to obtain counsel for that third party who could raise the objection and alleviate the burden on the third party, hopefully avoiding undue costs of e-discovery.

by Jonathan Head

Changes to Labor and Employment Landscape Likely

Now that President Obama has taken office and the new Congress seated, employers should expect significant changes on a number of labor and employment issues. Organized labor provided crucial support and financial backing for President Obama's 2008 Campaign and is now pushing a very aggressive, pro-union agenda. The nation's economic slowdown may force more deliberate change in some areas, but employers must be prepared for a new labor and employment environment, which will likely include these developments:

Pay Discrimination – The Lilly Ledbetter Fair Pay Act was enacted January 29, 2009. This new law amends Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, to overturn a 2007 U. S. Supreme Court decision which rejected as untimely the pay discrimination claims brought by Lilly Ledbetter, a long-time employee at Goodyear's Gadsden, Alabama plant. This new law will make it easier for employees to assert pay claims by clarifying that the time period for filing such a claim begins to run anew each time an employee receives a paycheck, no matter how long the employee has been receiving pay on a discriminatory basis. A second piece of legislation, known as the Paycheck Fairness Act, would amend the Equal Pay Act by making it more difficult for employers to justify legitimate pay differentials among its male and female employees and by allowing aggrieved employees to sue for unlimited compensatory and punitive damages. This legislation has also received early consideration in Congress and passage is considered likely.

RESPECT Act – Organized labor is promoting enactment of the Re-Empowerment of Skills and Professional Employees and Construction Tradeworkers (RESPECT) Act. If passed, this legislation would amend the National Labor Relations Act by narrowing the definition of "supervisor" to include only those individuals who have authority over rank and file employees *for a* majority *of the supervisor's* *work time*. This Act would expand the universe of employees eligible to unionize and have a particularly important impact in the construction industry where the use of leadmen and working foremen is common.

New NLRB Appointments – There are currently three vacant positions on the five-member National Labor Relations Board (NLRB), the quasi-judicial body which decides labor relations cases and sets precedent under the National Labor Relations Act. President Obama will likely fill these positions with appointees who favor organized labor. This is likely to have a significant effect on construction industry employers because the NLRB is expected to address a number of hot-button topics such as bannering, the use of company e-mail to conduct union activities and issues relating to union decertification petitions.

Project Labor Agreements – Most observers expect that one of President Obama's first acts will be to rescind Executive Order 13202, signed by President Bush in 2001. That Executive Order prohibits agencies from requiring project labor agreements (PLA's) on federally financed construction projects. This move, which requires no legislative action, would permit PLA's just in time for the federal infrastructure projects expected under the President's proposed stimulus package. It is not clear whether President Obama will support new policies that require PLA's on federal projects.

Independent Contractors – Under the Independent Contractor Proper Classification Act, which was first proposed by President Obama when he was in the Senate, the IRS would be allowed to reclassify workers incorrectly classified as independent contractors by their employer even when the misclassification results from a long-standing practice in the employer's industry. This legislation would also require the IRS to implement procedures through which workers could challenge their classification as independent contractors. Additionally, employers would be forced to inform workers classified as independent contractors about their federal tax obligations as well as their right to challenge their classification with the IRS.

Arbitration Fairness Act – Many employers have implemented pre-dispute arbitration policies which require their employees to arbitrate discrimination and other employment based claims. Over the past decade, the courts have displayed an increasing willingness to enforce these policies even though they typically prevent employees from having their claims adjudicated in a jury trial. However, these pre-dispute arbitration policies would be rendered invalid under the Arbitration Fairness Act of 2007, which will likely be re-introduced in 2009 and has previously received the support of President Obama. Under this legislation, pre-dispute agreements requiring arbitration of individual employment disputes or disputes arising under any law intended to protect civil rights would no longer be enforceable. Standard arbitration provisions contained in collective bargaining agreements, however, would not be affected.

Amendments to the Family Medical Leave Act (FMLA) – As a Senator, President Obama supported amendments to the FMLA that would reduce the coverage threshold from 50 to 25 employees and require employers to provide leave for certain reasons not now mandated by law. Legislation to make these and perhaps other changes to the FMLA will likely be re-introduced in 2009 and will have a significant chance at passage.

Employee Free Choice Act (EFCA) – This legislation, which is the top priority of organized labor, is addressed in detail elsewhere in this newsletter. President Obama consistently voiced support for the EFCA during his 2008 Campaign and most Washington observers predict a contentious battle over passage this year, probably early in the Congressional term.

Attorneys at Bradley Arant Boult Cummings maintain a wealth of knowledge and offer a broad range of services beyond the construction industry. For example, our government affairs practice group and labor and employment law practice group are available to serve you in responding to these and other proposed and already-enacted laws which may impact your business.

by Keith Covington

Bradley Arant Lawyer Activities:

Michael Knapp attended the Comprehensive Construction Defect Claims and Coverage SuperConference in Las Vegas, Nevada on November 5-7, 2008.

Rhonda Caviedes, **Donna Crowe**, **David Hume**, **Sarah Katherine Nichols**, and **Bryan Thomas** presented a seminar entitled “Green or Sustainable Building: Understanding the Issues” on November 13, 2008 in Birmingham, Alabama.

Rob Dodson and **Ed Everitt** spoke on “Making Changes and Resolving Disputes During the Construction Process” at a seminar in Jackson, MS entitled Construction Law for Architects, Engineers and Contractors on November 20, 2008.

Mabry Rogers attended the celebration of the opening of Stewart/Perry’s new offices, which are spectacularly built around a lake on 4855 Overton Road, Birmingham, Alabama on November 20, 2008.

David Taylor spoke in Orlando at the Annual International Counsel of Shopping Center Legal Conference on “Arbitrating vs. Litigating Construction Disputes” in November, 2008.

Keith Covington attended the Associated Builders and Contractors Attorney’s Conference in Washington D.C. on December 3-5, 2008.

Michael Knapp, **Arlan Lewis**, **Mitch Mudano**, **Jeff Peters**, and **David Pugh** presented “The Fundamentals of Construction Contracts: Understanding the Issues” in Birmingham, Alabama on December 5, 2008. This seminar covered contract principles, dispute resolution, project delivery systems, and subcontracting issues.

Mabry Rogers gave a client seminar on Documentation and Change Management on Veterans Administration jobs in Las Vegas, Nevada on December 12, 2008.

David Owen attended the 23rd Annual Construction SuperConference in December, 2008 in San Francisco, California.

David Taylor spoke on “Design Issues” for the Tennessee Chapter of the American Subcontractors Association on January 3, 2009.

David Taylor spoke on “Retainage and Lien Law” for the Tennessee Association of Roofing Contractors on January 9, 2009.

Michael Knapp attended the Carolinas AGC Annual Conference in West Palm Beach, Florida on January 14–18, 2009.

Rhonda Caviedes, Donna Crowe, Arlan Lewis and **Luke Martin** attended ABA Forum Mid-Winter Meeting January 16, 2009 in Bonita Springs, Florida.

The BABC Construction Practice Group held its annual “Learning day” on January 22, 2009. The presentation was entitled “Stix and Brix” and focused on practical construction methods and technologies. The speakers included Dr. Dan Brown – Geotechnical (formerly of Auburn University), Professor Michael Hein – Concrete (Auburn University), Bill Gibson – MEP (Shaw Power Group), David Hare – Building Envelope (B.L. Harbert International), and Keith Andrews – Road Construction (RaCON, Inc.).

Keith Covington spoke on the proposed Employee Free Choice Act at the Legislative Summit for the construction industry held at Associated Builders and Contractors in Homewood on January 23, 2009.

David Taylor, as Chair of the Tennessee Bar Association Construction Section, coordinated and spoke at a one day seminar entitled Tennessee Construction Law, A-Z.

Rhonda Caviedes presented a Client Seminar for Regions on January 29, 2009.

Eric Frechtel attended the ABA/TIPS/FSLC seminar focusing on public-private partnerships in New York in January, 2009.

Mabry Rogers and **Wally Sears** will attend the annual meeting of the ACCL in Amelia Island, Florida on February 19-22, 2009. Wally will be presenting on Discovery in International Arbitration, along with Nick Gaede.

David Taylor will coordinate and speak at the National meeting of the American Subcontractors Association in Nashville, Tennessee on “Legal Protections in a Volatile Economy” on March 6, 2009.

Mabry Rogers will present a client seminar of Federal procurement on February 10, and on project management to a construction team in San Antonio, Texas in March 16, 2009.

Jonathan Head will speak at the ABA Litigation Section annual meeting on how to deal with inadvertent waiver of privilege in e-discovery in Atlanta, Georgia in April.

David Taylor, Joel Brown and Doug Patin will present a complimentary legal seminar and breakfast entitled "Qualifying, Bidding, Obtaining and Managing Federal Construction Work" on March 3, 2009 at our Nashville office.

Keith Covington, **Chris Glenos**, **Arlan Lewis**, and **David Pugh** will present a seminar entitled "Construction Insurance, Bonding, and Liens in Alabama" on April 22, 2009 in Birmingham, Alabama.

Jim Archibald, Axel Bolvig, Doug Patin, David Pugh, Mabry Rogers, Wally Sears and David Taylor have been selected for inclusion in the 2009 edition of *The Best Lawyers in America* in the specialty of Construction Law.

Axel Bolvig, Mabry Rogers and Wally Sears have been selected for inclusion in the 2009 edition of *Alabama Super Lawyers, Corporate Counsel* edition in the field of Construction Litigation.

Bill Purdy has been selected for inclusion in the 2009 edition of *Mississippi Super Lawyers, Corporate Counsel* edition in the field of Construction Surety/ Construction Litigation

Fred Humbracht has been selected for inclusion in the 2009 edition of *Tennessee Super Lawyers, Corporate Counsel* edition in the field of Construction Litigation

Doug Patin has been selected for inclusion in the 2009 edition of *Washington D.C. Super Lawyers, Corporate Counsel* edition in the field of Construction Litigation

David Hume will participate on the ABC Cares committee for the Alabama Chapter of the Associated Builders and Contractors.

David Hume will also participate in the Associated Builders and Contractors' Future Leaders in Construction 101 training program in 2009.

In late 2008, Several BABC Construction Practice Group attorneys wrote portions of the recently published *Alabama Construction Law Manual* (West 2008). The authors included **Jim Archibald**, **Keith Covington**, **Ed Everitt**, **David Hume**, **Arlan Lewis**, **Luke Martin**, **David Owen**, and **Wally Sears**. Several other BABC attorneys authored other portions of the Manual, including **Helen Ball**, **Charlie Beavers**, **Patrick Darby**, **Chris Grissom**, **Rod Kanter**, and **David Roth**.

For more information on any of these activities or speaking engagements, please contact Rebecca Harris at 205-521-8504.

As of January 1, 2009, Bradley Arant Rose & White LLP and Nashville's well-respected Boult, Cummings, Conners & Berry PLC merged to form Bradley Arant Boult Cummings LLP. Our new firm has more than 350 attorneys in seven offices strategically located in Tennessee, Alabama, Mississippi, North Carolina and the District of Columbia. Together, we will offer you or your clients a talented legal team with not only expanded areas of service and enhanced industry knowledge, but also the continued dedication to excellence in client service you have come to expect from our firms.

Editor's Note:

In December 2008, the former editor of this newsletter, Sabra Barnett, left Bradley Arant to take a position as Legislative Director for the President Pro Tem of the Alabama Senate. We would like to thank Sabra for her efforts as editor and for her years of exceptional service at Bradley Arant. We congratulate her on her new endeavor, and welcome Luke Martin and Bryan Thomas as the new co-editors of our quarterly newsletter.

NOTE: YOU CAN FIND THIS NEWSLETTER AND PAST NEWSLETTERS ON OUR WEBSITE. IF YOU ACCESS THIS NEWSLETTER ON OUR WEBSITE, CASE-LINKS WILL BE AVAILABLE UNTIL THE NEXT NEWSLETTER IS PUBLISHED. WE DO NOT VIEW THIS NEWSLETTER AS WRITTEN FOR ATTORNEYS BUT RATHER FOR PRACTICING MEMBERS OF THE CONSTRUCTION INDUSTRY. IF YOU OR YOUR LAWYER WOULD LIKE TO KNOW MORE INFORMATION ABOUT A PARTICULAR ARTICLE OR WOULD LIKE THE CASE CITES, YOU MAY GO TO WWW.BA-BOULT.COM/PG_CONSTRUCT.CFM OR CONTACT ANY ATTORNEY LISTED ON PAGE 8 OF THIS NEWSLETTER.

NOTES

Disclaimer and Copyright Information

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

This newsletter is a periodic publication of Bradley Arant Boult Cummings 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.ba-boult.com.

F. Wendell Allen	(205) 521-8282	wallen@ba-boult.com
James F. Archibald, III	(205) 521-8520	jarchibald@ba-boult.com
David H. Bashford (Charlotte)	(704) 338-6001	dbashford@ba-boult.com
Jeremy Becker-Welts (Washington, D.C.)	(202) 719-8307	jbeckerwelts@ba-boult.com
Axel Bolvig, III	(205) 521-8337	abolvig@ba-boult.com
John D. Bond, III (Charlotte)	(704) 338-6007	jbond@ba-boult.com
Joel E. Brown	(205) 521-8416	jbrown@ba-boult.com
Stanley D. Bynum	(205) 521-8000	sbynum@ba-boult.com
Robert J. Campbell	(205) 521-8975	rjcampbell@ba-boult.com
Rhonda Caviedes	(205) 521-8683	rcaviedes@ba-boult.com
Donna M. Crowe (Washington, D.C.)	(202) 719-8212	dcrowe@ba-boult.com
F. Keith Covington	(205) 521-8148	kcovington@ba-boult.com
Rob Dodson (Jackson)	(601) 592-9918	rdodson@ba-boult.com
Joel Eckert (Nashville)	(615) 252 4640	jeckert@ba-boult.com
Edward J. Everitt	(205) 521-8444	eeveritt@ba-boult.com
Eric A. Frechtel (Washington, D.C.)	(202) 719-8249	efrechtel@ba-boult.com
Ralph Germany (Jackson)	(601) 592-9963	rgermany@ba-boult.com
Daniel Golden (Washington, D.C.)	(202) 719-8398	dgolden@ba-boult.com
John Mark Goodman	(205) 521-8231	jmgoodman@ba-boult.com
John W. Hargrove	(205) 521-8343	jhargrove@ba-boult.com
Jonathan B. Head	(205) 521-8054	jhead@ba-boult.com
Michael P. Huff (Huntsville)	(256) 517-5111	mhuff@ba-boult.com
Rick Humbracht (Nashville)	(615) 252-2371	rhumbracht@ba-boult.com
David R. Hume, Jr.	(205) 521-8614	dhume@ba-boult.com
David G. Hymer	(205) 521-8289	dhymer@ba-boult.com
Josh D. Johnson	(205) 521-8423	jjohnson@ba-boult.com
Michael W. Knapp (Charlotte)	(704) 338-6004	mknapp@ba-boult.com
Michael S. Koplan (Washington, D.C.)	(202) 719-8251	mkoplan@ba-boult.com
Arlan D. Lewis	(205) 521-8131	alewis@ba-boult.com
Tom Lynch (Washington, D.C.)	(202) 719-8216	tlynch@ba-boult.com
Luke Martin	(205) 521-8570	lumartin@ba-boult.com
Michael D. McKibben	(205) 521-8421	mmckibben@ba-boult.com
Mitchell S. Mudano	(205) 521-8544	mmudano@ba-boult.com
David W. Owen	(205) 521-8333	dowen@ba-boult.com
Douglas L. Patin (Washington, D.C.)	(202) 719-8241	dpatin@ba-boult.com
Jeffrey A. Peters	(205) 521-8583	jpeters@ba-boult.com
Steven A. Pozefsky (Washington, D. C.)	(202) 719-8210	spozefsky@ba-boult.com
J. David Pugh	(205) 521-8314	dpugh@ba-boult.com
Bill Purdy (Jackson)	(601) 592-9962	bpurdy@ba-boult.com
Gregory H. Revera (Huntsville)	(256) 517-5129	grevera@ba-boult.com
E. Mabry Rogers	(205) 521-8225	mrogers@ba-boult.com
Walter J. Sears, III	(205) 521-8202	wsears@ba-boult.com
Eric W. Smith (Nashville)	(615) 252-2381	esmith@ba-boult.com
James C. Smith (Charlotte)	(704) 338-6010	jsmith@ba-boult.com
H. Harold Stephens (Huntsville)	(256) 517-5130	hstephens@ba-boult.com
Robert J. Symon (Washington, D.C.)	(202) 719-8294	rsymon@ba-boult.com
David K. Taylor (Nashville)	(615) 252 2396	dtaylor@ba-boult.com
Darrell Clay Tucker, II	(205) 521-8356	dtucker@ba-boult.com
D. Bryan Thomas	(205) 521-8434	dbthomas@ba-boult.com
Nicholas J. Voelker (Charlotte)	(704) 338-6018	nvoelker@ba-boult.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.*