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BUILDING & BONDING

THE CONSTRUCTION GROUP NEWSLETTER

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INSIDE THIS ISSUE

Monetary Matters and Musings

As the year winds to a close over the next few months, many companies, businesses and even individuals will assess their recent financial performance. Oftentimes, success is dependent upon and a function of not only performance at the individual or business level, but also actual remuneration for that performance. In this issue of *Building and Bonding*, we present several articles focusing on monetary recovery issues.

The first of these articles, coming from Damon Fisk of our San Francisco office, examines a recent Nevada Supreme Court decision that invalidated a provision on prospective lien waivers and pay-if-paid provisions. Second, Amy Joseph of our Pittsburgh office discusses a recent Pennsylvania Superior Court case in which the court concluded that Pennsylvania does recognize the possibility for recovery by a subcontractor for unjust enrichment without proof of payment to the contractor by the owner.

Next we turn to Charles Lewis from our Chicago office, who shares from a mediator's perspective tips on maximizing the opportunities to have a successful monetary resolution of your dispute without further litigation. Finally, in the latest edition of *Issued for Construction*, we discuss how modifying performance behavior is a key element to maximizing the ability to continue monetary successes on the projects being encountered.

Overall, this issue summarizes some of the decisions and developments that are or may shortly be impacting your monetary recovery. We also address some points to consider to make sure your financial performance of the year to come equals or exceeds your year-beginning expectations and planning.

Robert A. Prentice
Edward B. Gentilcore

The Venetian Saga Continues...

Nevada Supreme Court Invalidates Prospective Lien Waivers and Pay-If-Paid Provisions

By Damon M. Fisk

On June 12, 2008, the Nevada Supreme Court issued its ruling in what is expected to be one of the last cases arising out of the construction of one of the largest casino-resorts in Las Vegas. The dispute, which began in 2001, resulted in the filing of over $300 million in mechanic's liens by the casino's construction manager and its subcontractors and a counterclaim by the owner for more than $220 million for defective and delayed construction.

Although the central issue in dispute between the parties was decided in June 2003, when a jury awarded the construction manager and its subcontractors $44.2 million in contract damages, the Supreme Court's recent ruling signaled a decisive end to the enforcement of prospective lien waivers and pay-if-paid provisions in construction contracts under Nevada law.

The decision follows the enactment of statutes by the Nevada legislature between 2001 and 2003 designed to eliminate the use of prospective lien waivers and pay-if-paid provisions in construction contracts, and brings Nevada into conformity with the existing mechanic's lien laws of many of its neighboring states, including California, in connection with the prohibition against these contract provisions.

THE UNDERLYING FACTS OF *LEHRER MCGOVERN BOVIS, INC. v. BULLOCK INSULATION, INC.*

On February 15, 1997, the owner of one of the largest casino-resorts on the "Strip" in Las Vegas entered into a Construction Management Agreement with Lehrer McGovern Bovis, Inc. ("Bovis"), under which Bovis agreed to manage the remaining construction of the casino-resort (the "Resort"). Bovis later subcontracted with numerous subcontractors, including the firestopping subcontractor Bullock Insulation, Inc. ("Bullock").

The subcontract between Bovis and Bullock incorporated the general conditions of the Construction Management Agreement between the owner and Bovis, which included one of the two provisions central to the Supreme Court's ruling. The subcontract agreement incorporated the Construction Management Agreement's prospective lien waiver clause, whereby both Bovis and Bullock promised "not [to] suffer or permit any lien or other encumbrance to be filed" against the project. Although the lien waiver clause was located in the agreement immediately following other provisions addressing final payment terms and conditions precedent to final payment, the lien waiver itself was not dependent upon Bullock's receipt of any payment for its labor or materials.

The Supreme Court's recent ruling signaled a decisive end to the enforcement of prospective lien waivers and pay-if-paid provisions in construction contracts under Nevada law.

The subcontract also contained a pay-if-paid provision, under which Bullock's right to payment from Bovis for its work was contingent upon Bovis' receipt of payment from the owner.

The dispute arose out of Bovis' direction to Bullock to perform certain firestopping retrofit work to comply with Clark County Building Department requirements. Retrofitting the walls required a substantial amount of work, as most of the rooms at the Resort had already been completed.

Following completion of the retrofit work, Bullock recorded a mechanic's lien on the project in the amount of $1,636,170.57 and, thereafter, filed a district court complaint against Bovis for breach of contract and the owner for foreclosure of the mechanic's lien, respectively. At trial, the district court struck down the lien waiver and pay-if-paid provisions, concluding that Nevada public policy, as codified in 2001 and 2003 by the Nevada legislature, prohibited the enforcement of both clauses.

Bovis then appealed the district court's rulings.

PROSPECTIVE LIEN WAIVERS FOUND TO BE AGAINST PUBLIC POLICY IF CONTRACT PROVISION FAILS TO PROVIDE SECURITY FOR PAYMENT OF CONTRACTOR

The Nevada Supreme Court, reviewing the district court's rulings *de novo*, affirmed the decision, based on a review of the public policy underlying Bullock's right to payment and ability to secure this right through the recording of a mechanic's lien.

> A contractor has a statutory right to a mechanic's lien for the unpaid balance of the price agreed upon for labor, materials, and equipment furnished. "The object of the lien statutes is to secure payment to those who perform labor or furnish material to improve the property of the owner."
>
> ". . . [public] policy strongly supports the preservation of laws which give the laborer and materialman security for their claims." Underlying the policy in favor of preserving laws that provide contractors secured payment for their work and materials is the notion that contractors are generally in a vulnerable position because they extend large blocks of credit; invest significant time, labor, and materials into a project; and have any number of workers vitally depend on them for eventual payment. (*Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.* (2008) 124 Nev. Adv. Rep. 39.)

The court also addressed and explicitly overruled the earlier Nevada Supreme Court decision in *Dayside Inc. v. District Court* (2003) 119 Nev. 404, in which the court held that

> "[a]bsent a prohibitive legislative proclamation, a waiver of mechanic's lien rights is not contrary to public policy" and will be enforced if it is clear and unambiguous. Because Nevada's public policy favors contractor's rights to secure payment, because *Dayside* removes public policy from the analysis of the enforceability of particular lien waiver provisions, we now overrule *Dayside* and find that it is appropriate for the district court to engage in a public policy analysis particular to each lien waiver provision that the court is asked to enforce.
>
> (*Id*. at 22.)

Interestingly, the Supreme Court emphasized that not every lien waiver provision violates public policy. "The enforceability of each lien waiver clause must be resolved on a case-by-case basis by considering whether the form of the lien waiver clause violates Nevada's public policy to secure payment for contractors." Specifically, the court referred to a series of California cases and statutory lien waiver forms designed to permit lien waivers executed by the lienholder in conjunction with payment, or a promise of payment. (See, *e.g*., Cal. Civ. Code §3262(d); see also *William R. Clarke Corp. v. Safeco Ins. Co.* (1997) 15 Cal.4th 882.)

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Stirred to action largely due to this dispute, which began in 2001, and the urging of numerous subcontractor interest groups, the Nevada legislature enacted certain amendments to Chapter 108 of the Nevada Revised Statutes (NRS) to prohibit lien waivers unless such waivers comply with the statutory requirements outlined in NRS 108.2453 and NRS 108.2457. (2003 Nev. Stat., ch. 427, §§25-26, at 2590-95.) As such, the statutory scheme applies to any contract entered into after 2003 and the Supreme Court's decision, which is consistent with the policy underlying the statutes, applies to any contract entered into prior to 2003.

PAY-IF-PAID PROVISIONS ALSO FOUND TO BE AGAINST PUBLIC POLICY AND UNENFORCEABLE UNDER NEVADA LAW

As with the legislation spurred by this dispute in connection with lien release clauses, the Nevada legislature also amended NRS Chapter 624 to include prompt payment provisions contained in NRS 624.624 through 624.626, which make pay-if-paid provisions entered into subsequent to the legislature's amendments unenforceable. (See 2001 Nev. Stat., ch. 341, §§5-6, at 1615-18.)

Although the statutes were amended well after execution of the Construction Management Agreement and subcontracts incorporating the payment terms of that agreement, the Nevada Supreme Court's analysis of the enforceability of the pay-if-paid clause followed the policy behind enactment of the amendments. In particular, the Supreme Court stated in *Lehrer*:

> Because a pay-if-paid provision limits a subcontractor's ability to be paid for work already performed, such a provision impairs the subcontractor's statutory right to place a mechanic's lien on the construction project. Nevada's public policy favors securing payment for labor and material contractors. Therefore, we conclude that pay-if-paid provisions are unenforceable because they violate public policy. (*Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc., supra*, 124 Nev. Adv. Rep. 39 at 26.)

As with its prospective lien waiver clause analysis described above, the Supreme Court held that public policy underlying the statutory amendments by the legislature similarly supported its holding invalidating the subcontract's pay-if-paid provisions.

Both the Nevada legislature and judiciary have now issued clear declarations against the use of blanket prospective lien waivers and mandated that all lien waivers are made in conjunction with payment or a promise of payment to the subcontractor.

CONCLUSION AND RECOMMENDATIONS FOR CONTRACT DRAFTING FOLLOWING *LEHRER*

The *Lehrer* case resolves the ambiguity regarding the use and enforceability of prospective lien waiver provisions created in light of the Nevada Supreme Court's earlier ruling in *Dayside*. Both the Nevada legislature and judiciary have now issued clear declarations against the use of blanket prospective lien waivers and mandated that all lien waivers are made in conjunction with payment or a promise of payment to the subcontractor.

Similarly, both branches of the Nevada government have expressly prohibited the enforcement of pay-if-paid provisions as contrary to public policy.

Parties to construction agreements under Nevada law should pay particular attention to the requirements of NRS 108.2453 and NRS 108.2457 prior to negotiation of an agreement that includes any type of lien waiver provision.

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Contractors Beware:

Pennsylvania Permits Recovery by Subcontractors for Unjust Enrichment Without Proof of Payment to Contractor by Owner

By Amy M. Joseph

SETTING THE STAGE

In a recent ruling, the Pennsylvania Superior Court permitted a subcontractor to recover damages against a contractor on a theory of unjust enrichment without having to prove that the owner had paid the contractor. By so ruling, Pennsylvania joins a growing number of jurisdictions that have allowed subcontractors to recover damages against a contractor for unjust enrichment, or quantum meruit.

Based on the equitable doctrine that no one who benefits by the work of another should be unjustly enriched, quantum meruit as an amount of recovery means "as much as deserved" and measures recovery under implied contract to pay compensation as reasonable value of services rendered.

Certainly, in most jurisdictions, the concepts of damages for breach of contract and damages under the theory of quantum meruit are mutually exclusive. That is, quantum meruit damages cannot be awarded where a contract is found to exist. *See, e.g., Powell Co. v. McGarey Group, LLC*, 508 F. Supp. 2d 1202, (N.D. Ga. 2007) ("Plaintiff may not bring a claim for quantum meruit where an express contract exists."); *Gee v. Eberle*, 420 A.2d 1050 (Pa. Super. Ct. 1980) (unjust enrichment clearly inapplicable when parties' relationship founded on written agreement/express contract); *Schaefer v. Stewartstown Dev.*, 647 A.2d 945, 948 (Pa. Super. Ct. 1994) (where parties' relationship was founded on an express contract, the doctrine of quantum meruit was inapplicable); *A&V 425 LLC Contracting Co. v. RFD 55th St. LLC*, 830 N.Y.S.2d 637, 644 (N.Y. 2007) ("existence of written contract covering issues in dispute which has fully been performed" precluded the pursuit of any quasi-contractual remedies). While the Pennsylvania Superior Court's recent ruling on unjust enrichment does not disturb the common principle that quasi-contract-based recovery is unavailable where an express contract exists, in the absence of an express contract, the law becomes less clear among jurisdictions.

THE CASE

In *Northeast Fence & Iron Works, Inc. v. Murphy Quigley Co.*, 933 A.2d 644 (Pa. Super. Ct. 2007), the subcontractor, Northeast Fence & Iron Works, Inc. ("Northeast Fence"), filed a complaint in Bucks County Court of Common Pleas against the general contractor, Murphy Quigley Co. ("Murphy"), for breach of contract, unjust enrichment and violation of the Contractor and Subcontractor Payment Act. The dispute arose out of a contract between Murphy and the Bucks County Correctional Facility (the "Prison") for a construction project that included the modification of perimeter fencing, creation of seven fence-enclosed recreational yards, demolition work and security upgrades. The general contract, which was valued at $713,000, largely comprised the perimeter fencing and recreational yards.

Murphy originally entered into a subcontract with Eagle Fence for the perimeter fencing work; however, Eagle Fence left the worksite after completing approximately 10 to 15 percent of the fencing work. Murphy obtained estimates for both completion and repair of Eagle Fence's perimeter fencing work, and eventually awarded the subcontract to Northeast Fence. At trial, it was undisputed that Northeast Fence and Murphy entered into a verbal, lump-sum contract for $26,500 for the completion of the perimeter fencing work. The parties disagreed, however, as to the subcontract price for the installation of the fencing surrounding the seven recreational yards. Murphy's project manager testified that Northeast Fence's proposal was high, but that he accepted that the maximum price for each recreational yard would be $17,500, for a total of $122,500. Murphy's project manager further testified that the maximum subcontract price would be $149,000, including both the perimeter fencing work and recreational yards.

On the other hand, Northeast Fence's owner testified that the subcontract was an emergency agreement due to Eagle Fence's abandonment, and that when he visited the worksite, the poor conditions prevented him from determining the exact amount of work required to complete the recreational yards. He testified that he presented, and Murphy accepted, Northeast Fence's proposal of $3,500 per diem with no maximum number of days.

TRIAL COURT HOLDING

In light of the disagreement over the subcontract price for the recreational yards, the trial court held that there was no meeting of the minds and thus no contract. Turning to Northeast Fence's unjust enrichment claim, the court considered the subcontractor's evidence of $134,428 of outstanding invoices and testimony that Murphy's project manager promised to pay Northeast Fence. The trial court also noted that the general contractor never raised any issues about the quality of Northeast Fence's work or the credentials of its workers. The trial court flatly rejected Murphy's evidence that it refused to pay some of Northeast Fence's invoices because Northeast Fence used nonunion workers in violation of the general contract with the Prison, and that Murphy expended in excess of $75,000 for incomplete and defective work after Northeast Fence left the worksite. Specifically, the trial court stated that Murphy's defenses "appeared to be created solely for litigation."

In light of the disagreement over the subcontract price for the recreational yards, the trial court held that there was no meeting of the minds and thus no contract.

The trial court held that Northeast Fence was entitled to recover on a quantum meruit theory. The court reiterated the elements for a quantum meruit recovery, stating that a plaintiff must demonstrate that it conferred benefits on the defendant, the defendant appreciated those benefits, and the defendant accepted the benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. In assigning a value to Northeast Fence's unpaid subcontract work, the trial court awarded the subcontractor its total outstanding invoices ($134,428) less 15 percent that Eagle Fence performed on the project before abandoning the worksite, resulting in a total damages award of $114,246.

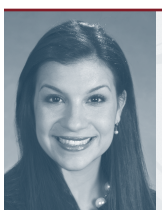
THE APPEAL

On appeal, Murphy argued that Northeast Fence did not plead quantum meruit, and should not have been permitted to recover on that theory. The Superior Court rejected Murphy's argument, holding that Northeast Fence pled "unjust enrichment," which is synonymous with "quantum meruit" under Pennsylvania law.

Second, Murphy argued on appeal that the trial court's award for quantum meruit was improper because the subcontractor was not required to show that the general contractor, Murphy, was paid for the work by the owner. Again, the Superior Court rejected Murphy's argument, reasoning that because Murphy was the general contractor for the construction project, Northeast Fence's work clearly benefited Murphy, as it satisfied Murphy's obligations under its general contract with the Prison. The Superior Court specifically held that the subcontractor need not prove payment by the owner to the general contractor in order to recover for quantum meruit. Satisfaction of its general contract obligations was sufficient to meet the "benefit conferred" requirement for quasi-contractual recovery.

CONCLUDING THOUGHTS

It is nearly impossible to overstress the importance of an enforceable written subcontract agreement. The court's decision in Northeast Fence clearly opens the door to quasi-contractual recovery where, in the absence of a written agreement, the subcontractor can demonstrate that there was "no meeting of the minds." The fact that the court was willing to disregard the parties' verbal subcontract because the amount was in dispute further emphasizes the need for a written subcontract that clearly and unambiguously spells out the parties' agreement as to scope of work and amount. In the absence of such an agreement, it is entirely possible (and probable) that a general contractor could end up on the hook for unjust enrichment, regardless of whether the owner has even paid for the work at issue.



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A View from the Mediator's Chair:

Ten Tips for Making Your Mediation Successful

By Charles Lewis

The popularity of mediation, the use of an independent third-party neutral to assist in the settlement of a dispute, has grown tremendously over the last 20 years.

For those of you who have participated in a commercial mediation that was not successful in settling the dispute, the experience can be a frustrating one. Having acted as a mediator in hundreds of disputes, I have come to the conclusion that you can do a number of things, as a participant in the mediation process, to increase the likelihood that your commercial mediation will be successful.

Your mediator must be willing and able through the force of personality to control the process and move the parties to a settlement.

But even before you begin the process, one of the most important decisions you must initially make is who will act as your mediator. I learned when representing parties to mediations that a good mediator can make all the difference. Each mediator will have his or her own mediation style. A mediation style that gently coaxes the parties toward a mutual resolution of the dispute can be just as effective as a mediation style that is more direct and evaluative. It is important for you to determine whether the mediator you eventually choose has been successful in the past. Speak with his or her references as well as anyone else who may have used him or her as a mediator. Your mediator must be willing and able through the force of personality to control the process and move the parties to a settlement. You may have only one opportunity to mediate your case, so make sure the mediator you choose is experienced, capable and effective.

Having chosen the right mediator for your dispute, your chances of successfully resolving your dispute are immeasurably enhanced if you keep the following points in mind.

BE PREPARED

What mediator doesn't want the participants to the mediation to be prepared historically (know the facts), mentally (ready to cogently articulate them) and psychologically (willing to settle the dispute on a principled basis)? But this simple, if not oversimplified, admonition is surprisingly lost on many.

To "be prepared" means more than steeling yourself to the possibility of having to sit in a room all day with a lawyer who is charging you by the hour. It means understanding the arguments of the other side in advance of the mediation in sufficient detail to respond intelligently, if not persuasively, to them. Oftentimes, a mediation will fail because one of the parties was not fully apprised of the position of the other party or was not familiar with documents presented by the other party during the mediation.

To prevent this from happening, some type of document exchange among the parties is necessary to allow everyone involved in the process to understand everyone else's position so that there are no surprises at the mediation. Surprises cause delay and may even convince one of the parties that it is useless to mediate.

In addition to a document exchange, it is important that each side submit a position paper setting forth any and all of its affirmative claims and any defenses. Exchange of

Surprises cause delay and may even convince one of the parties that it is useless to mediate.

these position papers is important not only to advise the parties of what is at issue but also to fully educate the mediator.

Knowledge is power; use it to your benefit.

DON'T LET YOUR MONEY GET MAD

Mediations fail when emotions take over. Emotions have a tendency to take over when the individuals who represent your company at the mediation are the same individuals involved in the day-to-day activities that gave rise to the dispute.

Make sure that an executive who was not involved with the day-to-day events that gave rise to the dispute is the primary representative of your company at the mediation. Also make sure that the executive from the other side is an individual who was not involved in the events that gave rise to the dispute. Transcending the emotional elevates the tone of the negotiations and increases the likelihood of a resolution.

DON'T BE OVERLY CONFRONTATIONAL

If you start out with the proposition that the parties have decided to mediate a dispute because they feel there is a common purpose in trying to settle the dispute, then both parties should work off that commonality from the start. I've heard lawyers in opening remarks call the other side everything from liars to criminals.

Confronting the other side in this manner while in joint session is neither helpful nor does it have the desired effect. First of all, your mediator should immediately cut off such ad hominem attacks. Secondly, the normal reaction of your adversary to these tactics will be to get up and walk out of the room. You may remember Sean Connery, as the tough Irish cop in *The Untouchables*, telling Eliot Ness, "They bring a knife, you bring a gun; they send one of our guys to the hospital, you send two of his to the morgue. That's the Chicago way." Now that's one way to settle disputes, but it is not the recipe for a successful mediation.

BE A GOOD LISTENER

At the beginning of the mediation when the parties have an opportunity to present their positions in a joint session, listen to your adversary's presentation and try to understand his point of view. Do not interrupt the other side, even if the other side has digressed to the point of nonsense.

"Venting," the articulation of all your frustrations, can be a very positive step in successfully mediating a case if done in private. It allows you to engage in a cathartic experience. If you need to vent, however, do not do it in a joint session. If the other side vents in joint session, allow the other party to get all of his or her suspicions, complaints or frustrations on the table. Invariably, the person who was venting in joint session will later regret what he or she said and act differently thereafter. You would be surprised how much you learn when you really listen to what someone else is saying.

Transcending the emotional elevates the tone of the negotiations and increases the likelihood of a resolution.

RESTATE THE ISSUES IF NECESSARY

Sometimes the answers to issues as formulated by the other party are not helpful to your position. To the extent that you can restate the issues in an honest manner, do so. Do so only, however, if the reformulation has some merit and can be articulated in a convincing manner.

TALK ABOUT THINGS THAT WENT RIGHT

Oftentimes, the focus in the mediation is solely on what went wrong. When the claim is that your company is the party that caused things to go wrong, talk about all the things that went right. And if you didn't do anything right, you should have settled the case long ago and moved on to the next project.

NEVER FORGET THERE'S ALWAYS ANOTHER ANSWER

When the settlement negotiations begin to break down because of strong disagreement as to what one party will accept and the other party will offer to settle the dispute, come up with an alternative settlement scenario.

Your mediator should also be able to provide you with a different perspective and alternatives to what's already on the table. Think of ways of offering money without offering money. Think of something else you will accept other than money in order to settle the case. Be inventive.

BE SENSITIVE TO CULTURAL DIFFERENCES

When you're negotiating with people from other countries or cultures, invariably the way they negotiate is quite different from the way we negotiate. There may be a greater sensitivity to being direct, and saying things more indirectly may be the best way to make your point.

Several years ago I represented an American contractor that was negotiating a joint venture agreement with a Japanese counterpart. When we initially met the Japanese, we exchanged business cards. When the Japanese sat down at the negotiating table, they put each of our business cards in front of them on the conference table directly across from where each of us was sitting. Seeing this, we did the same thing. Unfortunately, in the middle of what turned out to be a somewhat difficult negotiation, the president of my client absentmindedly picked up the business card of the president of the Japanese company and began to pick his teeth with it. This was an unpardonable sin. Needless to say, the negotiation did not go well.

You have chosen a good mediator, now use his or her talents.

THE LAST HURRAH

When negotiations have come to a standstill, sometimes the best way to favorably settle a case is to convey to the other side that you are capable of walking away without a settlement. The problem is, of course, you can really only use this once, because if you use it more than once, no one is going to believe you. The danger is, of course, that the other side may call your bluff. But if you really are near or at your pain maximum, this tack can be very stimulating for a mediation.

TRUST YOUR MEDIATOR

You have chosen a good mediator, now use his or her talents. When you are candid and frank with your mediator in private session, you'll help him or her figure out how best to approach the other side. Educate your mediator as to the strengths of your case and don't mislead him. Marion Barry, the former mayor of Washington, D.C., once said that "[t]here are two kinds of truths – the real truth and the made-up truth." Don't tell your mediator made-up truths, because when they are revealed to be untrue, your mediator will lose all confidence in you and your settlement position.

Remember, your mediator can be your most effective advocate in convincing the other side it is overreacting, being unfair or relying on facts that simply will never get into evidence. Don't lose his or her trust.

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Action and Reaction

By Edward B. Gentilcore

In many differing circumstances and on an equally varied spectrum of projects, new issues have been encountered resulting in changed approaches toward design and construction. In some instances, the interpretation of the issues that arose on a given project which led to disputes and/or claims have resulted in changes to the law. The idea behind modification of approach or behavior was to avoid repeating the consequences that occurred following the incident, circumstance or claim.

Sometimes our behavior is modified only when an unfortunate outcome has already been experienced. Consider the example discussed in the last issue of *Building and Bonding* addressing the recent modification by the AIA of the A312 payment bond form that had been in existence and had been utilized since 1984 without modification. Under that bond form, the surety was afforded 45 days in which to respond to a given claim made by entities seeking payment for reasons identified in the notice of claim against the bond. Unfortunately, beginning in Maryland and then extending to Florida and other jurisdictions, the surety's failure to respond adequately within that 45-day window gave rise to an assertion by the claimant that the surety's failure to respond constituted a waiver of any defenses to the underlying claim, and an acceptance of that assertion by the courts in those jurisdictions.

The surety industry reacted almost incredulously initially, not believing the first and then subsequent and repeated outcomes from the courts stating that they had indeed waived their defenses by failing to respond in the 45-day window. Only after having been taught the lesson the hard way did the surety industry react to these decisions and begin the process of evaluating how best to address the clearly unfortunate precedent that was now becoming established law.

The AIA reacted as well, providing its own assistance by modifying the provision in question in significant respects to eliminate concerns over the waiver of defenses language, but at the same time allowing for recovery of attorney's fees and costs in the event that the claim is disputed and ultimately the surety is ordered to pay on the claim. Whether this modification will be adequate to fully address a surety's true concerns here remains to be seen. It also remains to be seen whether this will be the only modification made to the 1984 A312 bond forms or whether the industry will begin to look to other forms such as ConsensusDOCS to supply the base surety requirements in the performance and/or payment bond context.

Another example where the construction industry is being forced to react regards those developers, owners, lenders, title companies, contractors and subcontractors in the Commonwealth of Pennsylvania dealing with recent amendments to that state's mechanic's lien law. While Pennsylvania is not the only jurisdiction that has recently modified its mechanic's lien laws, it was some significant changes in the ability to procure up-front waivers of lien (a lien waiver that is obtained prior to any performance or payments on the project) that has sent the industry in this commonwealth into a series of evaluation, strategy and risk management sessions seeking to find the best method to operate under the new statutory construct.

For example, without the ability to obtain up-front waivers of lien on most projects in Pennsylvania, many title companies are faced with issues that were never really confronted on projects of any significance in this state. With up-front waivers of liens largely banished to the pages of history, title companies may now face additional exposure to the titles of these various projects when and if contractors, subcontractors (and now even some sub-subcontractors) insist that they have not been adequately compensated for the work and materials provided to the project.

Even under these amendments, there will be methods under which and by which these title companies as well as owners, contractors and subcontractors will be able to assure that they are not unduly or multiply exposed on these projects when payments are being made or where payments are being withheld. In short, under these amendments, those parties with these plans in place are likely to experience less uncertainty from the statute's changes.

A final and also still nascent change that is occurring in the industry and which will likely have a tremendous impact on

contractual risk and responsibility allocation stems from the expansion of green building. As has occurred many times in the past, the law tends to follow technology and developments in the industry, reacting to these sometimes radically new technological challenges. Consider as brief examples, electronic design transmissions and even BIM (Building Information Modeling) have necessitated and resulted in the development of specific, tailored contract language that seeks to reduce the uncertainty in adopting these technological features on a project. With green building becoming such a focus in the design and construction of new facilities, and with a building allowance, tax incentive and other programs offering expedited permitting in exchange for achievement of certain levels of green performance standards, all project participants should now begin the process of evaluating their existing contractual relationships to determine whether these new technological concepts of green will be enforceable or without consequence in the event of failure to achieve the desired standard of performance. What is becoming apparent is that many project participants on all levels are reacting negatively to broad and sweeping language of warranty and guaranty of achievement of relevant green standards.

Indeed, the insurance industry is already voicing dissatisfaction or outright denial of coverage for projects in which these warranties or guaranties are being sought from and provided by the design and/or construction teams. Instead, the industry as a whole now must face how it is best able to place into the respective participants' camps the risks and responsibilities of achieving the desired green result.

These are just a few examples of how the entire industry should remain vigilant in the face of these changes in laws, environment of performance and technologies. Only with this advanced forethought, planning and adjustment will the participants in this process be able to avoid learning their lessons the hard way in pursuing their projects and will continue to be able to build and bond for a better tomorrow!

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Duane Morris Construction Group lawyers are located in many of our offices around the United States and internationally. Accompanying our extensive geographic coverage, we provide a full range of legal services to clients engaged in all aspects of construction and government contracting, including contracting with public and private entities, bid protests and award disputes, complex contract claims and surety litigation, claims preparation and negotiation, contract defaults and terminations, alternative dispute resolution, environmental risk management, surety bond and insurance issues, contractor licensing matters, property damage claims, labor and employment counseling and OSHA compliance.

Our lawyers have handled the legal problems common to entities engaged in the design, development, financing, performance and management of major construction and government projects. We regularly represent prime contractors, public and private owners and developers, construction managers, subcontractors, equipment suppliers, architects/ engineers and other design professionals, and sureties. This experience enables us to handle the complete spectrum of issues arising before, during and after project completion.

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