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Fourth Quarter 2018

CONSTRUCTION AND PROCUREMENT LAW NEWS

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

General Contractors Working in Maryland: Amend Your Subcontract Form Now

A new Maryland law – Md. Code, Lab & Empl., § 3-507.2 (the "Maryland Wage Payment and Collection Law") – makes general contractors on public and private projects in Maryland liable for unpaid subcontractor employee wages, regardless of subcontractor tier, plus treble damages and legal fees. The new statute, which mirrors an existing law in the District of Columbia, became effective October 1, 2018.

Specifically, the new Maryland law states that "a general contractor on a project for construction services is jointly and severally liable for a [wage violation] that is committed by a subcontractor, regardless of whether the subcontractor is in a direct contractual relationship with the general contractor." The law also states that "the court may award the employee an amount not exceeding 3 times the wage, and reasonable counsel fees and other costs."

This new law creates a great deal of financial risk for general contractors. In an attempt to provide fairness to general contractors, the new law provides general contractors a statutory right of indemnity against the offending subcontractor, including legal fees. However, there are two important caveats to this statutory indemnity right. First, general contractors are not entitled to statutory indemnity if "indemnification is provided for" in the subcontract between the general contractor and the subcontractor. Second, no right of indemnity is permitted if the subcontractor's wage violation "arose due to a lack of prompt payment" under the contract between the general contractor and the subcontractor.

Even where statutory indemnity is applicable, this new Maryland law provides little practical security to general contractors. Many subcontractors committing wage violations may be insolvent, bankrupt, or

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otherwise financially unable to indemnify against a treble damages wage judgment (including legal fees).

General contractors in Maryland will likely amend their subcontract forms and requirements to mitigate the substantial risk posed by this new law. Among other actions, general contractors may amend their Maryland subcontracts to require: (1) indemnity against unpaid wage judgments rendered against the general contractor; (2) wage law compliance warranties by the subcontractor; (3) the subcontractor to flow-down wage-law compliance clauses and other GC-protecting clauses to all subcontractors of any tier; (4) the first-tier subcontractor to post a payment and performance bond, with a specific clause in the bonds covering wage violation judgements; and (5) execution of new final payment and progress payment waiver documents, amended to provide for indemnity against unpaid wage violations.

The subcontract changes listed above are examples of the steps that general contractors working in Maryland may take to protect against the financial risk posed by this new unpaid wage law. Of course, subcontractors should also be prepared for demands of this nature when negotiating new subcontracts with general contractors.

By Tom Lynch

More than Meets the Eye: Policy Exclusion May Not Apply When Initial Event is Covered Occurrence

In a 2017 opinion, *Xia v. ProBuilders Specialty Insurance Company*, the Washington State Supreme Court analyzed whether an insurer breached its duty of good faith and fair dealing in refusing to defend its contractor insured on the basis of a pollution exclusion clause where it was alleged that the damages arose from negligent installation of a hot-water heater, which was a covered occurrence under the policy. The Court's finding that coverage existed should cause both insurers and insureds to conduct a deeper analysis of the particular events that form the basis of a claim that facially appears to be barred under a policy exclusion.

In May 2006, Zhaoyun "Julia" Xia ("Ms. Xia") purchased a new home constructed by Issaquah Highlands 48 LLC ("Issaquah"). Issaquah carried a commercial general liability policy (the "CGL policy") through ProBuilders Specialty Insurance Co. ("ProBuilders"). Soon after moving into her home, Ms. Xia began to feel ill. On December 8, 2006, a service technician determined that an exhaust vent attached to the hot water heater had not been installed correctly and was discharging carbon monoxide into the basement of Ms. Xia's home.

Ms. Xia notified Issaquah of her injuries and provided information regarding the exhaust vent issues. ProBuilders's claims administrator, NationsBuilders Insurance Services Inc. ("NBIS") declined coverage of Issaquah under the CGL policy on multiple grounds, including the CGL policy's pollution exclusion. On that basis, NBIS refused to defend or indemnify Issaquah for Ms. Xia's claimed damages. Ms. Xia initially pursued a lawsuit against Issaquah and provided a courtesy copy of her complaint to NBIS. Issaquah and Ms. Xia ultimately entered an agreed judgment whereby the parties stipulated to damages and Issaquah assigned its claims against ProBuilders and NBIS to Ms. Xia in exchange for a covenant not to execute or enforce the judgment. Ms. Xia then filed suit against ProBuilders and NBIS regarding their failure to defend or indemnify Issaquah on the basis of the CGL policy's pollution exclusion.

The Washington Supreme Court analyzed: (1) whether the specific pollution exclusion in the CGL policy included the carbon monoxide released from the hot water heater exhaust vent; and (2) whether the pollution exclusion precluded coverage under the CGL policy where the cause of the loss was a covered occurrence under a different provision in the CGL policy. As a first point, the Court found that ProBuilders correctly determined the plain language of its pollution exclusion applied to the release of carbon monoxide into Ms. Xia's house. The Court held, however, that the rule of "efficient proximate cause" provides insurance coverage where a "covered peril" (*i.e.*, negligent installation of the hot water heater's exhaust vent) sets in motion a chain of events that leads to an uncovered peril (damages arising from the release of carbon monoxide). Since the initial event or "efficient proximate cause" was covered under the CGL policy, there was insurance coverage regardless of the pollution exclusion. The Court did state, however, that insurers could continue to write exclusions into policies that deny coverage where the excluded event or occurrence starts the causal chain that leads to the claimed loss.

Based upon these findings, the Court held that the allegations in Ms. Xia's lawsuit provided a reasonable

basis for ProBuilders and NBIS to believe that Issaquah's negligent installation of the hot water heater exhaust vent started the process which led to Ms. Xia suffering damages related to the discharge of carbon monoxide.

The *Xia* decision should prompt insurers and insureds to analyze the precise factual scenario underlying an insurance claim to determine whether the catalyst for the claim is a covered occurrence or is within a policy exclusion.

By: Justin Scott

Ohio Supreme Court Bucks Recent Trend and Holds No Coverage for Construction Defects Under Commercial General Liability Policy

The insurance coverage analysis under a commercial general liability ("CGL") insurance policy begins with the "insuring agreement." The standard CGL policy provides coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage.'" The standard CGL policy further provides that the property damage must be caused by an "occurrence," which is in turn defined as "an accident." Traditionally, courts had held that a construction defect was not an "accident," and thus losses associated with such defects or faulty workmanship were not covered under a CGL policy. However, the recent trend has been for courts to find that construction defects or faulty workmanship do satisfy the "occurrence" and "property damage" requirements for CGL coverage. Yet, a recent decision out of Ohio bucks this trend of finding that claims of faulty workmanship may be covered under a CGL policy.

In *Ohio N. Univ. v. Charles Constr. Servs. Inc.*, the Ohio Supreme Court recently held that construction defects do not constitute an occurrence under a standard-form CGL policy, and that an insurer has no obligation to defend or indemnify claims for defective work. The underlying claim in this case involved a contract between Ohio Northern University ("Owner") and Charles Construction Services, Inc. ("Contractor") to build a new conference center and hotel. After the project was complete, Owner discovered extensive water damage and structural defects. Owner filed suit against Contractor, which in turn filed third-party claims against its subcontractors. Contractor tendered the defense to its insurer, Cincinnati Insurance Company ("Cincinnati"), which intervened and sought a declaration that it had no duty to defend or indemnify Contractor.

In the trial court, Cincinnati filed a motion for summary judgment on the declaratory judgment claim and asserted that claims for defective workmanship are not claims for "property damage" caused by an "occurrence." The trial court granted Cincinnati's motion for summary judgment, finding there was no duty to defend or indemnify for faulty workmanship.

On appeal, the Ohio Supreme Court considered the CGL policy definition of "occurrence" as an "accident including continuous or repeated exposure to substantially the same general harmful conditions." The court opined that an accident was unexpected or unintended – involving fortuity. Because a subcontractor's faulty work is not fortuitous, it could not satisfy the "occurrence" requirement in the CGL.

Importantly, the Ohio Supreme Court recognized that its decision conflicted with decisions in other states as well as the trend of finding coverage for construction defects – but the court explained that "[r]egardless of any trend in the law," it was required to interpret the plain and unambiguous language of the policy. The court also noted that the Arkansas legislature had enacted a statute requiring that a CGL policy sold in Arkansas must define "occurrence" as including "property damage resulting from improper workmanship." The *Ohio N. Univ.* Court noted that the Ohio General Assembly could pass similar legislation in response to the decision.

While the recent trend across the country has been for courts to find that construction defects may be covered under a CGL policy, this case may indicate a pendulum swing in the other direction. Even if it proves to be an outlier, it highlights the importance of knowing which law will apply to the interpretation of insurance policies, because the law can vary significantly from one jurisdiction to another.

By Heather Howell Wright

Reasonable Expectations Cannot Overcome Unambiguous Policy Language

In a recent decision, the Third Circuit Court of Appeals (a federal appellate court supervising the federal trial courts in Delaware, New Jersey,

Pennsylvania, and the Virgin Islands) enforced the plain meaning of an insurance policy, and rejected an appeal to the common law reasonable expectation doctrine. In *Frederick Mut. Ins. Co. v. Hall*, the court explained that a general liability policy cannot be construed more broadly than the unambiguous language of the policy allows, despite a reasonable expectation of the insured.

Hallstone, Inc. ("Hallstone"), through its principal, Donald Hall ("Hall"), contacted an insurance agent seeking all-encompassing, "soup to nuts" coverage for the company. The insurance agent, in turn, obtained a liability policy from Frederick Mutual Insurance Company ("Frederick"). Frederick and Hall never corresponded with each other directly, and Hall never received a copy of the insurance policy. Thereafter, Hallstone performed around $300,000 of custom masonry work on a home which ultimately had to be repaired for $352,294. The homeowners alleged that Hallstone's poor workmanship necessitated the repairs and filed suit in Pennsylvania state court for breach of warranty, negligence, and associated statutory claims.

Frederick defended the case under a reservation of rights, and at the same time instituted an action in the federal district court seeking a declaration that Frederick did not have a duty to defend or indemnify Hallstone for its allegedly defective workmanship. The district court held a bench trial and entered judgment for Hallstone because, even though the policy unambiguously excluded faulty workmanship coverage, the court found that Hallstone had a "reasonable expectation of workmanship coverage."

On appeal, the Third Circuit reversed and explained that, "[g]enerally, courts cannot invoke the reasonable expectation doctrine to create ambiguity where the policy itself is unambiguous." As a result, the district court erred when it continued its analysis beyond the determination that the policy language was unambiguous. The *Hall* court then distinguished the case from *Tonkovic v. State Farm. Mut. Auto. Ins. Co.*, a Pennsylvania Supreme Court case which the trial court heavily relied on in its opinion, where the reasonable expectation doctrine was applied to extend coverage to the insured.

In *Tonkovic*, a man specifically sought to obtain disability insurance that would cover his mortgage payments even if he was entitled to worker's compensation benefits. Despite this clear expression of his requirements for an insurance policy, the insurance company issued him a policy that excluded such payments. Evidence also showed that he never received a copy of the policy, and the insurer never advised him of the differences between what he requested and the coverage that was actually provided. Comparatively, Hall "did not apply for the specific type of insurance coverage he now claim[ed] that he expected as he asked in general terms for 'soup to nuts' coverage through a broad term that was not specific." The *Hall* court reasoned that failure to "bargain for a particular coverage precludes a court from finding that the insured expected such coverage." Moreover, even if the reasonable expectation doctrine did apply, "only objectively reasonable expectations are protected." Hall's claimed expectation that "soup to nuts" coverage included workmanship coverage was, according to the court, "no more reasonable than if a purchaser of auto insurance expected his policy to cover repairs if his car breaks down... It is simply not the kind of coverage insurance agents and insurance companies expect to provide unless the insured explicitly requests such coverage."

Never assume that a document—whether a bid, contract, or insurance policy—says anything more than what is unambiguously stated. If a document is silent on an issue entirely, do not assume that the missing element is somehow included as part of the larger scope or objective of the document. When in doubt, ask questions, read all applicable document(s), and, when still in doubt, contact counsel. As *Hall* points out, reasonable expectations may not be enough to overcome unambiguous, contradictory language.

By Alex Thrasher

Florida Courts Consider Control, Not Contractual Privity, for Negligence Claims Against Design Professionals

Though many states require a contractor to hold a contract directly with a design professional to pursue a claim against a designer for design omissions or defects, a recent case confirms that, in Florida, contractual privity (the legal term for a direct contractual relationship) is not required to recover purely economic damages. In *Suffolk Construction Co., Inc. v. Rodriguez and Quiroga Architects Chartered*, the Museum of Science, Inc. ("Museum") contracted with Suffolk Construction Co., Inc. ("Suffolk") to construct a science museum in Miami. Two years into the project, Museum

terminated Suffolk's right to proceed under the contract for convenience and entered into a direct contract with Suffolk's subcontractor, Baker Concrete Construction, Inc. ("Baker"). Suffolk and Baker then brought claims of negligence in a federal trial court in Florida against the project's executive architect and design architect, as well as the structural engineer and engineering firm that performed the design and engineering of the mechanical, electrical, and plumbing systems, alleging that their design documents were flawed and caused Suffolk and Baker to experience increased costs and delays.

To prove a claim of negligence, a plaintiff must show that (1) a defendant owed him a legal duty to protect him from unreasonable risk, (2) the defendant breached that duty, (3) the defendant's breach caused his injuries, and (4) damages. The defendants in this case moved to dismiss the claims against them on the grounds that they did not owe Suffolk or Baker a legal duty because they had no contract with either contractor and no supervisory role or control over either contractor. The court, applying Florida law, rejected this argument, concluding that the defendants owed Suffolk and Baker a duty because they were in "the foreseeable zone of risk" of the defendants' actions. Specifically, the court stated that an "architect[']s] or engineer's knowledge that a third party will use its designs, plans or reports" constitutes sufficient control over that third party contractor for a duty to arise. The court also ruled that Suffolk and Baker had adequately alleged actual supervisory roles for the designers. Whether control exists must be determined on a case-by-case basis, but generally, in the absence of contractual privity, control can be established by showing either (1) the architect or engineer had a supervisory role or (2) the architect or engineer knew the contractor would rely on its designs or plans.

The defendants next argued that they did not owe a duty to Baker because Baker was only a subcontractor on the project. The court acknowledged that the design professionals' duty does not extend to subcontractors, but noted that Baker alleged it acted as general contractor at various points of the project after Museum terminated Suffolk's right to proceed. Thus, so long as Baker relied on the defendants' designs or plans during the time it acted as general contractor, the defendants owed Baker a duty of care.

The main takeaway here is for design professionals: because (in the vast majority of construction projects) the contractor necessarily relies on designs or plans provided by an architect or engineer, design professionals practicing in Florida (and in most other states) can't depend on the lack of contractual privity to shield themselves from liability to contractors for errors or omissions in their design documents. This "rule" varies from state to state, so design professionals and contractors should research the rights and remedies available to them in each state where they take on work.

By: Abigail Harris

Safety Moments for the Construction Industry

The Occupational Safety and Health Administration (OSHA) recently published a final rule clarifying certification requirements for crane operators and requiring employers to ensure that crane operators can safely operate the equipment. Employers should ensure, as we begin 2019, that they are following all updated requirements.

Bradley Arant Lawyer Activities

Our firm is extremely honored and grateful to our clients to have been recognized as the "**Law Firm of the Year**" in **Construction Law** for 2018 by the *U.S. News & World Report* in its "Best Law Firms" rankings. Bradley has held a National Tier 1 ranking in Construction Law every year since the rankings began and has earned Tier 1 metropolitan rankings in Construction Law for its offices in Birmingham, Alabama; Houston, Texas; Jackson, Miss.; Nashville, Tenn.; and Washington, D.C. We are very proud of this honor, and even more proud to have the opportunity to advise our clients on projects locally at home, throughout the country, and around the world.

In U.S. News' 2018 "Best Law Firms" rankings, **Bradley's Construction and Procurement Practice Group** received a Tier One National ranking, the highest awarded, in Construction Law and a Tier Two ranking in Construction Litigation. The Birmingham, Nashville, Jackson, and Washington, D.C. offices received similar recognition in the metropolitan rankings.

Chambers USA ranks lawyers in specific areas of law based on direct feedback received from clients. **Bill Purdy, Mabry Rogers** and **Ralph Germany** are ranked in *Litigation: Construction.* **Doug Patin, Bob Symon** and **Ian Faria** are ranked in *Construction*. The firm's Washington D.C. office is recognized as a "Leading Firm" for Construction Law.

Jim Archibald, Ryan Beaver, Axel Bolvig, David Owen, David Pugh, Mabry Rogers, Walter Sears, Monica Wilson Dozier, Jim Collura, Ian Faria, Ralph Germany, Jon Paul Hoelscher, Bill Purdy, David Taylor, Eric Frechtel, Douglas Patin, and Bob Symon have been recognized by *Best Lawyers in America* in the area of Construction Law for 2019.

Jim Archibald, **Michael Bentley**, **Axel Bolvig**, **Ian Faria**, **David Pugh, David Owen, Mabry Rogers,** and **Bob Symon** were recognized by *Best Lawyers in America* for Litigation - Construction in 2019. **Keith Covington** was recognized by *Best Lawyers in America* in the areas of Employment Law - Management, Labor Law - Management, and Litigation - Labor and Employment. **John Hargrove** was recognized in the area of Litigation - Labor and Employment. **Frederic Smith** was recognized in the area of Corporate Law.

Mabry Rogers, Doug Patin and **David Taylor** were also recognized by *Best Lawyers in America* in Arbitration for 2019.

Ian Faria was recognized as Lawyer of the Year in Construction Litigation (Houston). **David Pugh** was recognized as Lawyer of the Year in Construction Litigation (Birmingham). **Bill Purdy** was recognized as Lawyer of the Year in Construction Law (Jackson).

Jim Archibald, Axel Bolvig, Bill Purdy, Mabry Rogers, Wally Sears, Bob Symon, Ian Faria, Doug Patin, Ralph Germany, David Taylor, David Owen and **Jeff Davis** were named *Super Lawyers* in the area of Construction Litigation. **Aron Beezley** was named a *Super Lawyers* "Rising Star" in the area of Government Contracts. **Amy Garber, Jackson Hill, Jon Paul Hoelscher**, **Aman Kahlon, Luke Martin**, **Andrew Stubblefield**, and **Bryan Thomas** were listed as "Rising Stars" in Construction Litigation. **Ryan Kinder**, **Justin Scott**, and **Mary Frazier** were recognized as "Rising Stars" in Business Litigation. **Monica Dozier** was named a 2018 North Carolina *Super Lawyers* "Rising Star" in Construction Litigation, and **Matt Lilly** was named a "Rising Star" in Energy and Resources.

In Texas, **Andrew Stubblefield, Jon Paul Hoelscher**, **Ryan Kinder**, and **Justin Scott** were named 2018 Texas *Super Lawyers* "Rising Stars."

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

Jim Archibald, Ian Faria, Eric Frechtel, Mabry Rogers and **David Taylor**, have been selected as Fellows of the Construction Lawyers Society of America (CLSA). **Mabry Rogers** was elected as the 2019 President (CLSA). **David Taylor** received the CLSA Community Service Award.

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

Jim Archibald, Ian Faria, Arlan Lewis, Doug Patin, David Pugh, Bill Purdy, Mabry Rogers, and Robert Symon were recently listed in the *Who's Who Legal: Construction 2019* legal referral guide. **Mabry Rogers** has been listed in *Who's Who* for 21 consecutive years.

Axel Bolvig, **Stanley Bynum**, **Keith Covington**, and **Arlan Lewis** were recently recognized by *Birmingham's Legal Leaders* as "Top Rated Lawyers." This list, a partnership between Martindale-Hubbell® and ALM, recognizes attorneys based on their AV-Preeminent® Ratings.

Ralph Germany has been appointed a 2018 Leader in the Law by the Mississippi Business Journal.

Sarah Osborne was recently elected as Secretary and Treasurer of the Construction Section of the Alabama State Bar.

Abba Harris was recently elected to the Board of Directors for the Birmingham Chapter of the National Association of Women In Construction.

Monica Dozier was awarded the first "Above and Beyond" Award by the Associated Builders and Contractors of the Carolinas at the 2018 Excellence in Construction Awards Gala in Charlotte, North Carolina. The "Above and Beyond" Award recognizes an ABC member for outstanding leadership and service to ABC.

Arlan Lewis was appointed to lead the Division Chairs Standing Committee of the American Bar Association Forum on Construction Law. This committee manages the operations of the Forum's 14 substantive divisions.

Chris Selman serves on the Board and **Carly Miller** and **Aman Kahlon** are currently serving as Members of the Young Professionals of the Alabama Chapter of the Associated Builders & Contractors.

Jon Paul Hoelscher recently concluded his service as Chair of the Houston Bar Association Construction Law Section after serving on the council for seven years.

Abba Harris was selected to participate in the 2019 class of Future Leaders in Construction with the Alabama Chapter of the Associated Builders & Contractors.

David Taylor was recently named to the Board of Directors of the Nashville Conflict Resolution Center.

Michael Knapp was recently appointed to the Board of Trustees for the Patriot Military Family Foundation, a group that raises money and awareness to benefit wounded veterans and their families.

David Taylor was recently reappointed to the Executive Committee of the Tennessee Bar Association's Construction Law Committee. He was also recently reappointed to the Legal Advisory Counsel of the Associated General Contractors of Middle Tennessee.

David Taylor will speak at the annual meeting of the Tennessee Bar Association's Construction Law Committee on January 25, 2019 regarding "The Prime Contractor's Perspective in Handling Disputes" and "Bad Faith Mediation in Construction Disputes."

Aman Kahlon spoke at the 5th Annual Alabama State Bar Construction Law Summit in Birmingham, Alabama on "Public and Private Change Order Administration."

On November 16, 2018, **David Taylor** spoke at the annual meeting of the Tennessee Association of Construction Counsel on "Bad Faith Mediation: What Crosses the Line."

Katie Blankenship spoke at the Tennessee Association of Construction Counsel fall seminar on November 9, 2018 regarding 2018 Construction Law Updates.

On November 8, 2018, at the Southeast Renewable Energy Summit, **Monica Dozier** moderated the panel "Utility Renewable Energy Procurement Plans and Green Energy Tariffs" and **Aman Kahlon** moderated the panel "Gulf Coast: Mississippi, Louisiana, and Alabama" addressing the market and opportunities for renewable power in the Gulf Coast states.

Bob Symon participated in a panel for Javits-Wagner O'Day Legal Symposium on October 3, 2018 at George Washington University Law School.

David Taylor spoke at the second annual Construction Law Society of American (CLSA) conference in Banff, Canada in September 2018 on "Bad Faith Mediation: What Crosses the Line." **Mabry Rogers** attended the CLSA conference and presided as acting President. At the conference, **Bradley** was awarded a Law Firm Award in recognition of the firm's high acumen and ability in construction law, construction arbitration, surety, and other construction-related fields.

Ian Faria spoke at the Bay Area Builder Association (a Division of the Greater Houston Builders Association) on "Best Contract Practices and New Developments in Construction Law" on September 4, 2018.

Bradley celebrates New Year with opening of new Dallas, Texas office. On January 3, 2019, our firm opened a Dallas, TX, office, led by highly regarded litigator Richard A. "Dick" Sayles, who is joined by William S. Snyder, Mark E. Torian, Shawn C. Long, Robert L. Sayles and E. Sawyer Neely, counsel Mark D. Strachan, and senior attorneys Samuel T. Acker and Stacy D. Simon. For more on this announcement and on the new lawyers who have joined Bradley in Dallas, please see the link below: https://www.bradley.com/insights/news/2019/01/bradley-law-firm-celebrates-new-year-with-opening-of-new-texas-office

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