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IN THIS ISSUE:

NEW CONSTRUCTION

Construction Cite is conducting a three-part series on the critical and ever-pertinent issue of "total" or "material" breach of contract, structured around the article "Crossing the Rubicon – Contract Termination for Total or Material Breach," written by John Spangler and Debbie Cazan, partners in Alston & Bird's Construction & Government Contracts Group.

The first section (below) introduces the importance of the issue and addresses how courts have attempted to define total or material breach, including the various factors that are considered. The second session will address specific types of material breach, including failure of payment, failure to follow design documents or specifications and timeliness of performance. The third section will address the possibility of waiving the material breach of a counterparty, as well as the consequences of material breach.

Crossing the Rubicon—Contract Termination for Total or Material Breach

By John Spangler & Debbie Cazan, Partners in Alston & Bird's Construction & Government Contracts Groups

Part One

Introduction

While most construction projects do not end up in contention and acrimony, some do. Unexpected costs or delays can cause strife, and if trust or confidence is lost, the Owner will naturally question the Contractor's judgment, if not its motives. Payment applications that were routinely approved will face heightened scrutiny and will frequently be reduced. Retainage that was reduced or even eliminated will be reinstated, and the cash-flow to the Contractor will be reduced. Payments to lower-tier subcontractors and suppliers will be affected, and slowly but inextricably, the project will become a dysfunctional mess. As additional performance issues arise, default letters will be issued, leading to consideration of contract termination.

Contract termination is a very draconian remedy. It inevitably leads to delays in the completion of the project, the incurrence of added costs and the filing of lawsuits or demands for arbitration. For the Owner, termination will cause additional direct damages in the form of additional construction and financing costs, and likely result in the incurrence of consequential damages resulting from the delay in obtaining beneficial use and occupancy of the project.

For the Contractor, termination can be even worse, and is frequently characterized as a death sentence. At a minimum, the Contractor will be out of pocket the costs incurred since the last payment from the Owner, and the Contractor will also have direct and indirect overhead costs. The Contractor may also have consequential damages, as cash-flow from the project, as well as expected revenues, are no longer available. The Contractor may have no option but to draw on its line of credit or infuse additional capital into the company. It also has to worry about answering proposal requests that ask about any prior terminations, and if it has outstanding surety bonds, a termination can cause the surety relationships to founder.

Termination puts in motion a chain of events that is expensive and time-consuming, and it may also unleash a series of unanticipated consequences, not the least of which may be a judicial determination that the termination was wrongful and without basis. Before heading down this path, it is essential to understand that not every breach of a contract authorizes or entitles the non-breaching party to terminate the contract, and that only a total or material breach justifies the remedy of termination. This naturally raises the question of what exactly is a total or material breach, how does one determine whether a breach is total or material and what are the consequences of wrongfully declaring a termination for material breach?

In This Issue

What Is a Total or Material Breach?

Contract termination is only appropriate if there had been a total or material breach of the contract, so this naturally raises the question—what exactly is a total or material breach? Many courts have addressed this question, and while the definitions they provide vary slightly, a total or material breach is generally characterized as a (i) substantial failure to perform, (ii) a breach so substantial as to defeat the purpose of the contract or (iii) one so substantial as to defeat the object of the contract.[1] Other courts characterize the breach as one that goes to the root[2] or essence[3] of the contract, or a breach of such significance or materiality as to preclude adequate compensation in money damages.[4]

According to *Williston*:

> [A] "material" breach is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract. In other words, for a breach of contract to be material, it must "go to the root" or "essence" of the agreement between the parties, or be "one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract." A breach is "material" if a party fails to perform a substantial part of the contract or one or more of its essential terms or conditions, the breach substantially defeats the contract's purpose, or the breach is such that upon a reasonable interpretation of the contract, the parties considered the breach as vital to the existence of the contract.[5]

A breach that is incidental or subordinate to the main purpose of the contract, or one that is not so substantial and fundamental as to defeat the object of agreement, is not a material breach.[6]

Courts have also been asked to determine what constitutes a "substantial breach" since, according to widely utilized AIA forms, a substantial breach by one party entitles the other party to terminate a contract for cause.[7] In attempting to make this determination, courts have noted that the AIA forms fail to define the term "substantial breach," and courts have also held that the term is ambiguous.[8] Consequently, some courts have interpreted the phrase to be the equivalent of a "material breach."[9]

Thus, even when dealing with highly standardized construction industry forms, a court will have to evaluate the overall facts and circumstances to determine whether there has been a material, or substantial, breach entitling the owner to terminate the contractor. If—or perhaps more appropriately, when—the declaration of termination is challenged in court or in arbitration, a finder of fact (be it a judge, jury or arbitration panel) will decide after the fact whether the breach

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1 *Brazell, v. Windsor*, 682 S.E.2d 824, 826 (S.C. 2009); *UHS-Qualicare, Inc. v. Gulf Coast Cmty. Hosp., Inc.* 525 So. 2d 746, 756 (Miss. 1987); *Wiljeff, LLC, v. United Realty Mgmt. Corp.*, 920 N.Y.S.2d 495, 497 (App. Div. 2011); *Cent. Ark. Found. Homes, LLC v. Choate*, 383 S.W.3d 418 (Ark. Ct. App. 2011).

2 *Vidalia Outdoor Prods., Inc. v. Higgins*, 701 S.E.2d 217, 219 (Ga. Ct. App. 2010); *Forsyth Cnty. v. Waterscape Servs., LLC*, 694 S.E.2d 102, 110-112 (Ga. Ct. App. 2010).

3 *D'Andrea Bros. v. United States*, No. 08-286C, 2013 WL 500346 (Fed. Cl. Feb. 8, 2013).

4 *Campbell v. Shaw*, 947 S.W.2d 128, 131 (Mo. Ct. App. 1997) (quoting *Curt Ogden Equip. Co. v. Murphy Leasing Co.*, 895 S.W.2d 604, 608–09 (Mo. Ct. App. 1995)).

5 23 *Williston on Contracts* § 63:3 (4th ed. 2000).

6 *Id.*

7 Article14.2 of the AIA General Conditions A-201 (2007 ed.) addressing Termination by the Owner for Cause simply provides that "The Owner may terminate the Contract if the Contractor otherwise is guilty of *substantial breach* of a provision of the Contract Documents" without defining "substantial."

8 *Schott v. Medrea*, No. 106007153, 2011 Conn. Super. LEXIS 2769, at ___ (Conn. Super. Nov.1, 2011).

9 *Id.*

was sufficiently material so as to justify termination of the contract.[10] When making this inquiry, the finder of fact will look not at the subjective beliefs or understandings existing at the time the termination decision was made, but instead, will determine whether the decision was justified based on an objective evaluation of the facts as they actually existed at the time the termination decision was made.[11]

The Likelihood of Future Performance and the Adequacy of Money Damages

In recognition that the definitions or characterizations of a total or material default are not particularly helpful when determining whether a particular breach justifies termination, the Restatement (Second) of Contracts § 241 offers a list of significant circumstances to be considered when making this determination. As stated in the Restatement:

In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.[12]

Comment (a) to § 241 acknowledges the obvious: the standard of materiality is necessarily imprecise and flexible, and is to be applied in the light of the facts of each case and in such a way as to further the purpose of securing for each party its expectation of performance. The Comment also emphasizes that these are circumstances, not rules, to be considered in determining whether a particular failure of performance is material.[13]

A number of courts have applied the Restatement factors or circumstances when evaluating claims of material breach.[14] Notwithstanding the guidance from the case law and from the Restatement, material breach remains a fact-based determination focused on the adequacy of performance to date and the likelihood that the non-breaching party will obtain substantial performance of the contract from the breaching party. As stated by Bruner & O'Connor:

> [A]n unexcused breach is material only if it reasonably compels a clear inference of unwillingness or inability of one party to meet substantially the contractual future performance expectations of the other party. . . .[15]

Another significant factor or circumstance is the adequacy of money damages as compensation for the breach. Any breach entitles the non-breaching party to recover damages for the breach, but a material or total breach is so significant that even the recovery of money damages fails to provide the non-breaching party an equivalent to full performance. Stated another way, if money damages can provide an equivalent to full performance, then the breach is not material and does not warrant or authorize termination.[16] As stated by the Missouri Court of Appeals:

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[10] *Wiljeff*, 920 N.Y.S.2d at 497; *Madden Phillips Constr. Inc. v. GGAT Dev. Corp.*, 315 S.W.3d 800 (Tenn. Ct. App. 2009); *Premier Golf Mo., LLC v. Staley Land Co.* 282 S.W. 3d 866, 873 (Mo. Ct. App. 2009); *Venture Props., Inc. v. Parker*, 195 P.3d 470, 489 (Or. Ct. App 2008); *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195 (Tex. 2004).

[11] *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1016 (Fed. Cir. 2003).

[12] Restatement (Second) of Contracts § 241 (1981).

[13] *Id.* cmt. A.

[14] *Mustang*, 134 S.W.3d at 199; *Madden Phillips*, 315 S.W.3d at 823; *Venture Props.*, 195 P.3d at 489-90.

[15] 5 Philip L. Bruner & Patrick J. O'Connor, Jr., *Construction Law*, §18:4.

[16] *Vidalia,* 701 S.E.2d at 219; *Mayor of Douglasville v. Hildebrand,* 333 S.E.2d 674 (Ga. Ct. App. 1985).

> Where a party fails to perform according to the terms of the contract, it must be determined whether the breach is material. If the breach is material or if the breaching party's performance is a condition to the aggrieved party's performance, the aggrieved party may cancel the contract. If the breach is not material, the aggrieved party may sue for partial breach, but may not cancel. *In determining whether a breach is material, an important consideration is the degree of hardship on the breaching party and the extent to which the aggrieved party has received the substantial benefit of the promised performance and the adequacy with which he may be compensated for partial breach by damages.* [Emphasis added.][17]

An Owner or Contractor considering contract termination should focus on the impact of the breach upon the future contract performance it is owed. What is the likelihood of the breach being cured, and the likelihood of the remaining contract obligations being performed? Also focus on the adequacy of money damages as compensation for the breach. The more egregious the breach, the more unlikely future performance will occur, and thus the more inadequate money damages as compensation for the breach.

Parts 2 and 3 of "Crossing the Rubicon" will appear in the next two issues of *Construction Cite*. Alternatively, the remainder of the article is available now online .

Indemnity for Active Negligence or Willful Misconduct Now Prohibited in California

By Mark Johnson, Partner in Alston & Bird's Environmental and Construction & Government Contracts Groups

Normally, a general contractor performs little or none of the work on a construction project with its own forces. Instead, subcontractors perform the majority, if not all, of the work. However, the general contractor obviously remains liable to the owner and potentially others for the acts of its subcontractors.

To shield themselves from potential liability for the acts of its subcontractors, general contractors rely on the indemnity provisions of the contracts between the general contractor and the subcontractor. The broadest of these provisions and the one that is most favorable to the general contractor is commonly referred to as a "Type I" indemnity provision. Type I indemnity provisions provide for the express indemnity of the general contractor by the subcontractor even if the active negligence of the general contractor/indemnitee contributed to the problem.

However, in California, Type I indemnity provisions are no longer enforceable in construction contracts entered into after January 1, 2013, for public works, or for private works where the owner does not serve as the contractor or construction manager. Pursuant to Senate Bill 474 ("SB 474"), which amended Civil Code Section 2782 and added Civil Code Section 2782.05, Type I indemnity provisions are void. Particularly, indemnity provisions that require a subcontractor to indemnify a general contractor for the active negligence or willful misconduct of the general contractor (or other subcontractors), or require the subcontractor to defend and indemnify the general contractor for claims that do not arise out of the subcontractor's scope of work, are unenforceable. This limitation cannot be waived even by agreement of the parties.

Previously, these provisions were enforceable as long as they did not require the subcontractor to indemnify the general contractor for its "sole negligence or willful misconduct." "Type II" indemnity agreements, which allow a party to be indemnified for another party's passive, as opposed to *active*, negligence are still legal and enforceable. Passive negligence can include a failure to discover a dangerous condition or a failure by a general contractor to identify a subcontractor's defective work, among other things.

Therefore, contracts that currently require a subcontractor to indemnify a general contractor its active negligence or willful misconduct, or for the active negligence or willful misconduct of another subcontractor, are unenforceable and should be modified to delete this requirement. General contractors that use contracts that contain this provision after January 1, 2013, run the risk that the entirety of the express indemnity provision with the subcontractor will be held to be void. In that event, the general contractor may be limited to a claim for equitable indemnity against the subcontractor.

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[17] *Campbell,* 947 S.W.2d at 131 (quoting *Curt Ogden Equip. Co.,* 895 S.W.2d at 608–09).

In This Issue

SB 474 also impacts the duty of a subcontractor to defend against claims asserted against the general contractor. Currently, under the *Crawford* line of cases, a subcontractor that is obligated to indemnify a general contractor against claims and demands is required to provide an immediate defense to the general contractor upon tender of a claim. In *Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal. 4th 424, the California Supreme Court held that the duty to defend under an express indemnity provision required the subcontractor to defend the developer on request regardless of whether the subcontractor was ultimately found to be negligent. The *Crawford* court explained that the duty to defend is a separate obligation from the duty to indemnify and the duty to defend arose "as soon as a suit was filed … and regardless of whether it was ultimately determined that the [the subcontractor] was actually negligent." *Id*. at 568.

Therefore, under *Crawford,* the duty to defend is owed before there is a determination of whether indemnity is actually owed with respect to the claim and regardless of whether it is ultimately determined that indemnity was actually owed. The duty to defend is typically determined by the facts regarding the claim as alleged in the complaint. In the event that a subcontractor refuses to defend a general contractor against a claim that is covered by the scope of indemnity and the general contractor is required to defend itself from the claim, the general contractor is entitled to reimbursement from the subcontractor for the defense fees and costs incurred by the general contractor.

Under SB 474, a subcontractor is not required to defend a general contractor until the general contractor presents the subcontractor with a written claim that includes all of the information set forth in the underlying claim made by the owner to the general contractor. Once presented with a claim, the subcontractor can elect to respond in one of two ways, either of which will satisfy the subcontractor's defense obligation. The subcontractor may elect to defend the claim, with counsel of his choice, by providing the general contractor with a complete defense of the claims alleged against the general contractor resulting from the subcontractor's scope of work, but not including claims resulting from the acts or omissions of the general contractor or any other party.

Alternatively, the subcontractor may elect to pay the general contractor a reasonable allocated share of the general contractor's defense fees and costs incurred during the pendency of the litigation, subject to reallocation after resolution of the matter. SB 474 does not specify any mechanism to resolve whether the share of the general contractor's fees and defense costs that is allocated to the subcontractor represents his reasonable share as required by SB 474. As a result, it appears that SB 474 may lead to disputes and lawsuits between general contractors and subcontractors regarding whether the share of the general contractor's defense fees and costs allocated to the subcontractor represent his reasonable share. In the event that the subcontractor does not respond to a claim pursuant to either of these options and the general contractor is required to defend himself, as under current law, the subcontractor is potentially responsible for the defense fees and costs incurred by the general contractor and any resulting compensatory or consequential damages, as well as the reasonable attorney fees incurred in the action against the subcontractor.

SB 474 clearly increases the risks of general contractors on construction projects because it reduces their ability to shift risk to subcontractors. This increased risk may cause insurance premiums to increase for general contractors and thereby increase the cost of construction. Proponents of SB 474 assert that it increases fairness on construction projects by essentially ensuring that each party is responsible for its own negligence. While that might be true, it also eliminates an important risk-sharing tool for general contractors and may lead to more litigation regarding allocation of responsibility for defects in a project. It also disregards parties' own ability to find contract value in either negotiations or insurance agreements, rather than leaving value to be determined at a later, more unpredictable stage.

Summaries of Recent Decisions from Around the Country

When Insurance Policies Cover Apartments but Not Condominiums

Subcontractors often obtain insurance in case of damage to the owner's property during construction. These insurance contracts contain specific language about commercial liability coverage, including which types of projects are excluded from being insured. For a subcontractor to be indemnified against damage he causes, the insurance policy must actually cover the damage and the project must fit the type covered under the policy's definitions.

In a recent case from New York City, a subcontractor and insurance company disputed whether the "residential property" on which the subcontractor was working qualified as an "apartment" in order to be covered under the insurance policy. The subcontractor was a welder hired by a general contractor. The general contractor was

converting a single-owner apartment building to a condominium building with several owners. When the general contractor found damage caused by welding sparks, he sued the subcontractor. The subcontractor, believing he was insured for this damage, demanded that the insurance company indemnify him and defend the lawsuit.

The insurance company refused to do either. Under the insurance contract for commercial liability coverage, no damage to residential properties would be covered, "except apartments." The insurance company argued that the property qualified as "condominiums," not apartments; therefore, the project was excluded from insurance coverage under the policy terms.

Although the federal trial court ruled in favor of the insurance company, determining that the project was a condominium project and therefore excluded from insurance coverage, the subcontractor appealed. The Second Circuit found that the intent of the insurance policy terms was to avoid coverage for residential units that are held by multiple owners, but, at the time of the welding sparks damage, the property had a single owner. The apartment exception applied. Therefore, the insurance policy covered the subcontractor's damage.

It may be obvious that *commercial* construction insurance contracts are limited in what damage, if any, is covered for *residential* properties. This case provides an example of the intricacies inherent in insurance policies. A clear understanding of how terms are defined within a policy is absolutely critical to preventing future litigation expenses and delay in receiving the contracted-for relief of indemnification.

Ment Bros Iron Works Co. v. Interstate Fire Cas. Co., 702 F.3d 118 (2d Cir. 2012).

The Importance of Calculating Appropriate Interest on Judgments

When a court awards a judgment to a party, it might seem as though the process of recovery has concluded. The successful party expects to collect and return to business. Yet, in some cases, the collection of the award begins another dispute, which companies should anticipate. Because many judgment awards include a total for damages plus an amount for interest set at a certain percentage to accrue per annum from the payment due date, an additional dispute may arise over the collection of interest owed. In the case of one construction company that served as contractor, three years have passed for the courts to resolve the issue of when interest began to accrue on judgments for work completed on state projects.

A construction company brought a claim against a state agency for amounts due for work performed in five construction projects. The company claimed that it had not been compensated for additional work performed because of unforeseen site conditions and flawed design plans. The company was driven to file for Chapter 11 bankruptcy, and then began this recovery proceeding against the state agency. Not only did the construction company seek its damages, but it also sought interest accruing from the date the amounts should have been due on the projects—"prejudgment interest." The bankruptcy court agreed and awarded a $1 million judgment that included a six percent prejudgment interest rate accruing from the contractual payment date for each of the projects. This decision was upheld in the district court, yet the state authority appealed on several grounds, including an argument that the wrong interest rate had been applied, that the state agency had not engaged in bad behavior to merit the prejudgment interest award, and that too much in taxes had been calculated into the construction company's award.

The appellate court inspected the award and determined that the construction company may not have been entitled to prejudgment interest at all, and that the construction company had not presented sufficient evidence to support the $1 million award. The appellate court also brought up the issue that "postjudgment interest" should have been awarded to the construction company—representing the interest accruing from the initial judgment until the time when the state agency made a payment deposit with the court. Ultimately, the case was sent back to the lower courts, and the construction company is still awaiting recovery.

This contractor's dispute over the appropriate amount of interest on a judgment could have just as easily occurred against an owner or other corporation, rather than against a state agency. In either case, contractors and owners should prepare a litigation strategy that not only addresses accurate calculation of damages, but the accurate calculation of interest on the claims and the appropriate law to support the interest calculation.

In Re: Redondo Construction Corporation, 700 F.3d 39 (1st Cir. Nov. 21, 2012).

In This Issue

A Subcontractor Cannot Assert a Claim on Behalf of a Sub-Subcontractor when the Sub-Subcontractor Is Not Licensed

There are fine lines drawn by courts regarding what constitutes “contracting” and what does not, although parties may not give the issue the attention it deserves. In a recent Alabama case, a general contractor and a framer executed a subcontract. The subcontractor hired forces provided by a third party. The third party was not licensed as a contractor in the state. A dispute between the contractor and subcontractor ultimately resulted in an unpaid balance owed to the subcontractor, and consequently, the third-party sub-subcontractor. The subcontractor filed a complaint against the contractor and surety on behalf of the sub-subcontractor.

The surety and contractor argued that because the subcontractor was essentially bringing a claim on behalf of the sub-subcontractor, which was unlicensed, the subcontractor could not prevail on its claims because the sub-subcontract was illegal. The subcontractor argued that the sub-subcontractor merely acted as a labor broker and did not perform any contracting that would necessitate having a contractor's license. However, the sub-subcontractor's employees were used to frame buildings and supervise other employees, activities expressly recognized to constitute contracting for the purposes of state statute. Because the sub-subcontractor failed to secure a contractor’s license, the contract between it and the subcontractor was illegal. The court did not allow parties to maintain a cause of action if it required reliance in whole or in part on an illegal act or transaction. The subcontractor's cause of action hinged on its contract with the sub-subcontractor, and consequently, could not be maintained. As a result, summary judgment was reversed.

It is crucial for a contractor to ensure that it is properly licensed. Further, it is also important to know what work requires a license and to check the license status of all lower-tiered contractors to ensure that all of the work is properly licensed. As described above, most states do not allow recovery for work performed by unlicensed contractors. Further, some states’ license laws go even further, requiring disgorgement of **all** compensation paid for the unlicensed work.

White-Spunner Constr. v. Constr. Completion Co., 2012 Ala. LEXIS 80 (Ala., June 22, 2012).

Statute of Limitations Applies Differently in the Context of Installation Versus Maintenance

An issue that will always stay relevant in construction disputes is the applicable statute of limitations. The accrual date the statute of limitations begins to run can make or break whether a cause of action is timely.

In *Columbus v. Cielinkski*, the Court of Appeals of Georgia addressed the applicable accrual date for triggering of the period of limitations for a nuisance action brought by a resident against the city regarding an allegedly inadequate drainage system and failure to maintain the drainage system, resulting in repeated flooding of her land and home. The trial court granted the city’s motion for summary judgment with respect to punitive damages but denied it without explanation as to all other claims. The city contended that the trial court erred in denying its motion for summary judgment because the resident’s nuisance claim was barred by the applicable four-year statute of limitations. The city took the position that the resident’s claims were based on the installation of the pipes and inlets near her home in 1991 and therefore that was when the statute of limitations began to run on her nuisance claim.

The court cited to the factually similar case of *City of Atlanta v. Kleber*, in which the Supreme Court of Georgia held that “the classification of an alleged nuisance as continuing in nature directly controls the manner in which the statute of limitations will be applied to the underlying claim.” 285 Ga. 413, 416(1), 677 S.E.2d 134 (2009). The court held that a permanent or continuing nuisance accrues immediately upon the creation of the nuisance and against which the statute of limitations begins to run. To the contrary, a nuisance which is not permanent but is one which can be fixed by the person maintaining it, is a fresh nuisance each time the nuisance is continued and the statute of limitations runs from the time of such continuance.

Based upon this ruling, the court here held that to the extent the nuisance claim was based on installation of the drainage pipe, the cause of action was permanent in nature and thus the limitations period ran from the installation of the pipe. Additionally, the court held that to the extent the cause of action was based on the city’s allegedly negligence or improper maintenance of the drainage system, the claim was continuing in nature and thus the limitations period ran from the dates of maintenance. Thus, the trial court’s holding was affirmed in part, reversed in part, and remanded.

Therefore, it is critical when pleading or responding to a complaint to determine whether the claim arises out of initial installation or maintenance. This issue often controls whether a claim is or is not subject to applicable statutes of limitations.

Columbus v. Cielinkski, 734 S.E.2d 922 (Ga. Ct. App. 2012).

Mechanics' Lien Held Valid Where Subcontractor Named Property Owners in Lien, but Not the Contractor

As with most states, Georgia is very strict in its interpretation and enforcement of its mechanics' lien statute. Nevertheless, courts are still faced with interpretations of basic issues, such as which parties should be named in the claim of lien.

In *Robertson v. Ridge Environmental, LLC,* the petitioners argued that the trial court had erred by enforcing a mechanics' lien when a subcontractor named only the property owner on the lien, but not the contractor for whom work was actually performed. As stated in O.C.G.A. § 44-14-361.1, the claim of lien shall be in substance as follows:

> A.B., a mechanic, contractor, subcontractor, materialman, … (as the case may be) claims a lien in the amount of (specify the amount claimed) on the house, factory, mill, machinery, or railroad (as the case may be) and the premises or real estate on which it is erected or built, of C.D. (describing the houses, premises, real estate, or railroad), for satisfaction of a claim which became due on (specify the date the claim was due, which is the same as the last date the labor, services, or materials were supplied to the premises) for building, repairing, improving, or furnishing material (or whatever the claim may be).

The appellate court held that the plain language of the statute does not require the contractor's name to be included in the claim of lien. However, if the plaintiff attaches the claim of lien to the pleadings, the statements in the claim become factual allegations, requiring the plaintiff to file suit within one year to collect the debt against that entity in order to perfect the claim of lien. In this case, however, the language of the claim of lien did not allege that the contractor is the debtor. Therefore, the appellate court affirmed the trial court's decision to hold the claim of lien valid.

This case is a good practice pointer to those filing claims of lien. In making such a claim of lien, the filer should be careful to make accurate statements about to whom work was performed or should just include more general statements naming the interested party but not stating to whom the debt is owed.

Robertson v. Ridge Environmental, LLC, 2013 WL 203292 (Ga. Ct. App.)(Jan. 18, 2013).

In This Issue

OTHER CONSTRUCTIVE THOUGHTS

UPCOMING SPEAKING ENGAGEMENTS AND PUBLICATIONS OF ALSTON & BIRD'S CONSTRUCTION GROUP

- The lawyers in the Construction Group are some of the most respected practitioners in the field and are acknowledged by *Chambers USA: America's Leading Lawyers for Business*, *The Best Lawyers in America*, *The International Who's Who of Construction Lawyers* and *The International Who's Who of Business Lawyers*.
- On June 12, 2013, G. Christian Roux presented "Recent Developments in D.C., Virginia and Maryland Construction Law" at this seminar sponsored by the CMAA National Capital Chapter.
- Andy Howard has been asked to serve on the American Institute of Architects' contract documents revisions committee for various upcoming document revisions.

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