Construction Tool Box: Construction Laws, Cases, Notes and Alerts

A Service of The Harmonie Group Construction Law Committee

Vol. I No. 2 (August 2012)

Introduction

This is the Second Edition of Harmonie's Construction Tool Box. Thanks to all who have submitted alerts and updates, and thanks to others for your comments and suggestions. Our endeavor is still a construction "work in progress".

This Edition features some continuing topics such as Chinese drywall and the "economic loss doctrine", and some new cases on government contract issues.

Remember, this Tool Box resource is available for all access all the time at Harmonie.org (click on "Resource Center").

Summer is construction season, at least where the Editor resides and practices in Western New York, and the cases and new developments keep on coming, and we will keep collecting and reporting them for you.

- The Editor

Index of Topics Covered

National Focus

Government Contracts- Bid Alteration

Rochon Corp. v. City of St. Paul, 2012 Minn. App. LEXIS 44 (May 7, 2012)

Shaw was low bidder on a municipal project for the City of St. Paul, Minnesota. Shaw entered $68,800.00 instead of $688,000.00 in a spreadsheet which rendered its bid substantially lower than it otherwise would have been. The city allowed Shaw to correct the mistake on the ostensible basis that correcting that mistake still did not displace Shaw as the low bidder. The next lowest bidder sued claiming that the city should have voided the contract with Shaw. The trial court disagreed and upheld the contract, but the Minnesota appeals court reversed and voided the contract.

A material change in a bid affects the price, quality, quantity or manner of performance, or other items that go into determination of the amount of the bid. The appellate court ruled that this change was material and discounted the argument that the change still did not displace Shaw as the low bidder. The concern about allowing changes to bids after submittal and opening involves the possibility and perception of fraud or collusion, not necessarily actual fraud or collusion. The appellate court ruled that, because Shaw made the material change to its bid post-opening, the contract with the City was void.

National Focus

Government Contracts - Differing Site Conditions

D&M Grading Inc. v. Department of Agriculture, 2012 CIVBCA LEXIS 129 (April 24, 2012).

D&M Grading was terminated on a roadway maintenance contract with the Department of Agriculture, with the agency arguing that D&M failed to perform brush work on about 50 miles of road. The contractor argued that the default was improper, and that due to differing site conditions it was entitled to additional payments. The contractor claimed the contract only called for "routine brushing" which was inadequate for the actual site conditions. The contractor argued that there were uneven and rough roadways, heavy brush, and roads that were "neglected for 30 years." Apparently, there was no actual site visit prior to the contract because the site was not accessible due to snow pack. The Civilian Board of Contract Appeals ruled in the government's favor.

There was no "Type I" DSC because the contract terms were not limited to "routine brushing" and were defined by the characteristics of the vegetation to be removed with appropriate pricing. The Board also refused to find a "Type II" DSC since the record did not demonstrate that the conditions were unusual or beyond the scope of contracted services. The contractor made a limited case, however, and presented no evidence on this point other than its own contention that it had never seen such "bad roads". Expert testimony might have supported a "Type II DSC", but the Board found that no differing site conditions existed, and that the agency had not required work outside of the contract scope. This case represents the

importance, particularly concerning a "Type II" DSC claim, of expert testimony, or testimony from other contractors, that may be needed in supporting a claim that site conditions differed materially from those normally encountered.

National Focus

Government Contracts- Content of Claim

Whiteriver Construction, Inc. v. Department of Interior, 2012 CBCA 2349 (2/2/12). The Federal Contract Disputes Act (CDA) requires a claim against the U.S. government to be made in writing, but there is not much specific guidance. This case better defines the requirements in the context of a dispute about additional costs for an "as built" contract modification. The contract officer allowed $107,000 for the change, the contractor claimed $343,000. The government argued that the contractor's claim letter was insufficient to (literally) state a claim under the CDA. The case explains what the content and legal requirements of a CDA claim should include:

1. State and certify the amount of the claim. The contract officer may not rule on an uncertified claim.
2. Request a decision on the claim.
3. Cite or rely on the history of correspondence and detail about the claim.
4. Other pending claims or appeals should not bar or delay a claim decision.

National Focus

Unilateral Arbitration Clause Enforceable

U.S. f/u/b/o Maverick Construction Management Services, Inc. v. Consigli Construction Co., 2012 U.S. Dist. Lexis 77718 (D.C. Me. 6/5/12).

The construction project was at the U.S. Navy Shipyard in Portsmouth. The general contractor Consigli terminated subcontractor Maverick "for convenience". Maverick sued Consigli for $2 Million for cost overruns and delay damages. The contractor moved to compel arbitration, which plaintiff opposed. The motion to compel arbitration was granted.

Maverick first argued that the arbitration clause did not bind Consigli to the results of arbitration, but the court disagreed based on the referenced AAA Construction Arbitration rules. Maverick also contended that the clause was unenforceable because it was "unilateral" and lacked consideration. The court ruled that in this commercial context Maine state law would not invalidate a unilateral arbitration clause for lack of special consideration or as being against public policy.

California

Insurance Coverage-Theft of Construction Materials Not Covered Loss

Aslan Yan v. Pacific Specialty Insurance Co. 2012 WL 1436721 (Cal. Ct. App., April 26, 2012).

A California Appeals Court held an insurer did not have to pay for stolen construction materials because the house under construction was "unoccupied" during the 60 day period preceding the theft. The home was undergoing a renovation, the family was living at another home during the renovation, and a policy endorsement excluded losses occurring while the home was "unoccupied". A theft occurred of approximately $200,000 of construction materials. The insurer argued that the house was "unoccupied" under the policy because no one was living and sleeping there habitually. The insured argued the house was "occupied" *inter alia,* because workers were present and working there during weekday business hours.

The appellate court ruled for the insurer noting that a home is considered occupied if it is the home or dwelling place of some person living and sleeping there habitually on a usual and ordinary basis, even if temporary absence occurs. The Court noted that the family was living at another residence during the 60 day period before the break in and theft. The construction activity on a daily basis did not constitute "occupancy", and the exclusion applied.

Hawaii

Economic Loss Doctrine Bars Negligent Design Claim

Leis Family Limited Partnership v. Silversword Associates LLC, 2012 Hawaii APP. LEXIS 69 (February 16, 2012).

Generally, a party cannot recover in tort for purely economic loss and is limited to contractual remedies. There are, however, certain "exceptions" to what is called the "economic loss doctrine". In this case, the plaintiff wanted the court to adopt one of those exceptions in attempting to recover for alleged design negligence on a thermal energy system construction project. Some possible exceptions to the economic loss doctrine are where the loss occurrs due to a violation of a building code, deviation from industry standards, and/or constructing a structure known to pose risk of physical harm.

In this case, the plaintiffs wanted to apply the second exception arguing that the designers violated a legal duty separate from any contractual duty. The court however, rejected the plaintiffs' argument that the designers deviated from industry standards and adhered to cases involving architects and engineers in which it was held that contract law is better suited to resolve professional and design negligence claims. The court concluded that a "deviation from industry standards" exception to the economic loss doctrine generally does not apply to design professionals. The "economic loss doctrine" therefore barred this claim.

In addition to the above "exceptions" which have some support in the authorities noted above, some courts have also ruled that the economic loss doctrine does not apply (or there is an exception) where the claim is for "negligent misrepresentation", and where there is an alleged violation of a health or safety law, including a building code.

In short, the economic loss doctrine continues to be a backstop against claims involving architects, engineers, and other design professionals, although there is frequent litigation as to whether the doctrine applies in a particular case, or whether any "exceptions" which have evolved are applicable.

Indiana

Construction Manager Not Responsible For Worker Safety

Hunt Construction Group, Inc. v. Garrett (Indiana Supreme Court, 3/22/12). The Court held that a construction manager has a legal duty of care to workers on the job site for job safety in (only) two basic circumstances: (1) when such a duty is imposed on the construction manager by a contract to which it is a party; or (2) when the construction manager assumes such a duty, even if done gratuitously or voluntarily. In this case, the Court found that there were no provisions in the construction manager's contract by which Hunt contractually accepted a duty to maintain safety on the project. The Court held that Hunt's contract did not create a duty to employees for job site safety, and that Hunt's only duties for safety were owed to the Stadium Authority, not individual workers.

Garrett, the injured worker, argued that Hunt's safety representative conducted weekly safety committee meetings and inspected the site daily for violations of the project safety program, and alleged that Hunt assumed responsibility and owed a duty to workers for job site safety. The Court found that these activities were activities required by Hunt's contract with the owner and, therefore, were not new or additional duties "voluntarily assumed" by Hunt to job site workers. Hence, the Court found that Hunt did not assume specific supervisory responsibilities for job site safety beyond those set forth in its contract and, therefore, there was no direct duty owed by Hunt to Garrett (or other workers) for job site safety.

The Court ruled that a construction manager's duty for job site safety is normally only owed to the owner rather than to individual workers for contractors and subcontractors. Construction Managers should note, however, this case did not address what liabilities a construction manager might incur under OSHA or state labor laws for job site injuries.

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Louisiana

Chinese Drywall – First Party Property Damage

Not Covered

*Dupuy v. USAA Casualty Insurance Co., 2012 WL 832291 (*M.D. La. March 9, 2012). Federal Court in Louisiana ruled that damages from tainted Chinese drywall were not covered due to exclusions in homeowners insurance policy. The homeowners sued USAA Insurance asserting coverage for damages from drywall off-gassing. The homeowners argued that the drywall was functioning as intended (i.e. not a defective product), and also argued that a "corrosion" exclusion did not apply. The court disagreed and denied coverage. The court held that the "defective materials" exclusion barred any loss from faulty materials. The court also ruled that the plaintiffs' theory of corrosive damage from the off-gassing also was barred by the "corrosion" exclusion.

Cross-reference the Travco Insurance case from Virginia also reported in this Edition.

Louisiana

Out of State Forum Selection Clause Void

E. Cornell Malone Corp. v. St. Mary's Academy of the Holy Family, 2012 U.S. Dist. Lexis 71890 (E.D. La. 5/23/12).

The construction project was located in New Orleans. Malone, a subcontractor, sued to recover approximately $135,000 for work performed and filed a lien. A motion to dismiss or stay for improper venue was filed based on a forum selection clause which required dispute litigation in Texas.

The trial court noted that a "forum selection" clause is generally enforceable unless it is "unreasonable under the circumstances". The court noted a Louisiana statute relating to construction contracts and purchase orders which generally states that, if one of the parties is domiciled in Louisiana, and the work is to be done in Louisiana, clauses requiring disputes to be resolved in a forum outside of Louisiana or to be governed by non-Louisiana law are unenforceable. La. R.S. §9: 2779 A, B.

Therefore, venue in Louisiana was deemed proper, and the court would not require suit to be filed in or transferred to Texas.

Nevada

"Statutory Damages" Are Not Necessarily Based on Punitive Damages Standards

Webb v Shull, 2012 Nev. LEXIS 22 (March 1, 2012). Nev. Rev. Stat. §113.150 (4) awards treble damages for a seller's nondisclosure or delayed disclosure of known property defects. Trial court made an award due to known soil problems at a residence based on negligent misrepresentation and failure to disclose. On appeal, it was argued that, since a treble damages statute is akin to primitive damages, there must be a finding of gross negligence, reckless or intentional misconduct in order to impose statutory treble damages.

The appellate court disagreed and held that the statute does not expressly or inherently require a particular level of enhanced culpability. The statute was deemed not purely "punitive" in nature since the treble damages serve other purposes such as ensuring full compensation and promoting private enforcement of the law. Therefore, any "heightened" proof or state of mind requirement applicable to punitive damages did not necessarily apply or have to be found in order to award statutory treble damages.

New York

Electronically Stored Information (ESI) – Bearing the Costs of Discovery

U.S. Bank National Association v. GreenPoint Mortgage Funding, Inc., (1st Dept. 2/28/12). The *U.S. Bank* case established a general rule in New York that the cost of locating and producing ESI, and also physical documents in discovery, should initially be borne by the producing party, although the court may shift all of part of the costs within its discretion. The *U.S. Bank* case, along with an earlier case of *Voom HD Holdings v. EchoStar Satellite LLC* dealing with spoliation of evidence, generally aligned New York e-discovery practices with generally prevailing federal e-discovery standards such as established in *Zubulake v. UBS Warburg, LLC,* 220 F.R.D. 212, et. seq. Previously, the law and decisions of the trial courts in New York had not addressed the question of who should bear the initial cost of ESI or extensive document discovery consistently or "with one voice".

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Virginia

Chinese Drywall – Insurance Coverage Questions

Travco Insurance Co. v. Ward, 2012 WL 66230 (4th Cir. 3/1/12). A beach home in Virginia was allegedly damaged by noxious gases emitted by Chinese-manufactured drywall. The suit was transferred to the Eastern District of Louisiana where many such suits have been consolidated. Travco insured the property; the policy contained several possible exclusions which the District Court held barred coverage. The Fourth Circuit certified questions to the Virginia Supreme Court to respond how Virginia would rule as a matter of state law on the four cited possible insurance coverage exclusions:

1. "Mechanical breakdown, latent defect" exclusion. Insured alleged this did not apply because he was not arguing the drywall was structurally inferior or deteriorating.
2. "Faulty, inadequate or defective materials". Insured's argument was that the drywall was serving its intended function and was not "defective".

3. "Rust or other corrosion". Insured argued this applied to naturally occurring corrosion over time, not damage caused from off-gassing of sulfur fumes from the drywall.
4. "Pollutants". Insured asserted this exclusion was intended to limit coverage for past environmental contaminants, not a product liability claim.

The Virginia Supreme Court will have to address these issues, and provide legal answers on these questions as a matter of Virginia state law to guide the Fourth Circuit.

Cross-reference to the Louisiana case of *Dupuy v. USAA Casualty Insurance Co., 2012 WL 832291 (*M.D. La. March 9, 2012) also reported in this Edition.

Texas

Breach of Contract as Excuse For Non-Performance

1.9 Little York Ltd. V. Allice Trading, Inc., 2012 Tex. App. LEXIS 2012 (March 15, 2012). A material breach of contract may render it unenforceable, so the issues are often who breached the contract first and how badly (was it material?). In this case, the subcontractor was accused of walking away from an incomplete retention pond. The sub countered that the owner failed to supply sufficient fill and other materials. A jury found that the owner's breach was material, excusing the sub's failure to perform. That verdict was upheld on appeal.

Failure to perform may be excused by the other party's prior (a) material breach, or (b) repudiation of the agreement. The owner asserted that the sub's breach was an essential part of the work, and that the sub's failure precluded recovery. The court rejected that argument, essentially holding that the sub's failure to finish the pond was the result of the owner's prior breach or repudiation of the contract in failing to supply dirt and other material.

Washington

Contract Notice Requirement Applies Even Post- Termination

Realm, Inc. v. The City of Olympia, 2012 Wash. App. Lexis 553 (5/8/12). Contractor was working on a fish tunnel which City terminated for convenience. Realm submitted and sued on a $1.1 Million claim, but the Trial Court held that Realm waived its right to sue for failure to comply with the contract notice provisions. Realm argued (essentially) that since the contract had been terminated it did not have to comply with contract notice provisions.

The Court ruled that under the contract, even if terminated, Realm had to file a notice of dispute. Since Realm had not given contractual notice of dispute regarding costs of termination, non-payment for work performed, or the City's final change order, it was held to have waived its right to sue.