THE HARMONIE GROUP®

2009 SIGNIFICANT CASES

VERDICTS • DISMISSALS • ARBITRATION

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VERDICTS

CASE SUCCESS: PRODUCT LIABILITY

COUNSEL: **Joe Selep, Alex Bicket and Matt Breneman**

FIRM: **Zimmer Kunz, PLLC**

HEADQUARTERS: **Morgantown, West Virginia**

In a "bet the company" case, counsel successfully defended Rescar, Inc. in a jury trial in West Virginia. The lawsuit followed the largest toxic chemical spill in West Virginia history, a release of over 23,000 gallons of Coal Tar Light Oil (CTLO-a product with a high concentration of benzene) that escaped during a trans-loading operation from a railcar to a tanker truck. Approximately 800 residents from the village of Westmoreland, West Virginia, were evacuated from their homes. Suits were brought by the residents for personal injury, medical monitoring, diminution of property value, as well as for general damages such as pain and suffering, annoyance and inconvenience. Extensive environmental remediation and monitoring costs were incurred—and continue to be incurred—as a result of the spill.

After the underlying suits were resolved, Marathon Petroleum pursued contractual indemnity and contribution claims against Rescar in excess of $21 million alleging that Rescar failed to inspect and repair a defective top-operated bottom outlet valve that was in the frozen open position at the time of the trans-loading thus allowing the escape of the CTLO. Rescar's insurer tendered the balance of their insurance policy limits pre-trial but the offer was rejected by Marathon. Rescar's potential exposure far exceeded the available policy limits. Rescar denied the allegations and defended on the basis that Marathon retained an incompetent independent contractor to perform the trans-loading operation and that the contractor, Techsol Chemical Co, did not have the required spill containment that would have prevented the CTLO from escaping the Techsol site into the community, storm sewers and creeks.

After a two-week trial, the jury found Marathon 60% at fault with Techsol 30%. Rescar's liability was determined to be 10%. Since Marathon's negligence exceeded 49% it was precluded from recovering under the West Virginia Comparative Negligence Statute. Rescar's exposure was thus limited to 10% under the contractual indemnity claim, an amount substantially less than the pre-trial offer and within the available coverage. ■

CASE SUCCESS:

PRODUCT DESIGN DEFECT

CO-COUNSEL: **Hugh J. Bode**

FIRM: **Reminger Company, LPA**

HEADQUARTERS: **Cleveland, Ohio**

CO-COUNSEL: **Charles K. Reed of McKenna, Long & Aldridge**

Plaintiffs sued American Honda Motor Company claiming a defect in the fuel tank of a 1995 Honda Civic allowed fuel to leak after a crash and that the resulting fire caused the death of their 17 year old daughter. The Honda Civic was struck from behind at a high speed by a much larger vehicle while nearly stopped on an Interstate highway. The impact crushed the Honda Civic 50 inches and propelled it 280 feet down the highway. The defense asserted that the crash was so severe, more severe than 99.7% of all crashes, that it was not reasonably foreseeable. The defense also asserted that the decedent was killed by the impact forces, not by the fire that ultimately ensued. After an eight day trial, the jury returned a unanimous verdict in favor of American Honda. The co-defendant driver of the striking vehicle was found liable for $7 million. ■

CASE SUCCESS:
INSURANCE COVERAGE

COUNSEL: **James R. Sutterfield and John J. Danna**

FIRM: **Sutterfield & Webb, L.L.C.**

HEADQUARTERS: **New Orleans, Louisiana**

Bayou Steel engaged a barge line to transport steel from Louisiana, hiring a stevedore to unload the barge in Illinois. During unloading, an employee of the stevedore was severely injured and consequently sued Bayou and others in Illinois state court. Bayou's primary wharfinger's liability ("WL") insurer accepted coverage. Bayou placed its excess WL insurer, its primary GL insurer and its excess GL insurer on notice. All denied coverage and refused to participate in settlement. Bayou then sued the three in federal court in Louisiana, seeking coverage, bad faith damages and penalties. In light of the plaintiff's substantial claims, and the acceptance of coverage by its underlying WL insurer, the excess WL insurer agreed to fund Bayou's $3.5 million part of a $6 million settlement in exchange for an assignment of Bayou's rights against the two GL insurers. The excess WL carrier then realigned as plaintiff.

At trial, the GL insurers argued that the loss was excluded by the watercraft exclusion and the Longshore and Harborworkers Compensation Act (LHWCA) exclusion in the primary policy. The excess WL insurer claimed that the loss was excluded by a subcontractor's employee exclusion in its policy, and that the watercraft and LHWCA exclusions of the general liability policies did not apply. Following a lower court ruling for the GL carriers on the LHWCA exclusion, Bayou and the excess WL carrier appealed. The US Court of Appeals reversed, finding that the LHWCA exclusion did not shield the GL insurers from coverage under the facts of the case. The Court remanded the case to District Court to enter judgment in favor of Bayou and its WL insurer and against the GL insurers. ■

CASE SUCCESS:
CONSTRUCTION SITE CO-EMPLOYEE LIABILITY

COUNSEL: **Richard Mincer and Tom Nicholas**

FIRM: **Hirst Applegate, LLP**

HEADQUARTERS: **Cheyenne, Wyoming**

Plaintiff, a co-employee, was working off of a field-crafted wooden man basket raised approximately 8-10 feet in the air by a forklift when the platform failed. Plaintiff fell and fractured several vertebrae but did not require surgery. Plaintiff alleged the General Superintendent, the Job Superintendent, and the company owner all had knowledge of the use of such platforms at job sites but failed to purchase a new "OSHA-approved" metal basket before the accident despite alleged requests from the crew. The defense maintained that Plaintiff failed to prove willful and wanton misconduct on the part of the client. Specifically, there was no evidence that the client knew there was a high probability that Plaintiff would be injured when he went up on the platform based on testimony that every worker who was either involved in the construction or use of the man basket believed it was safe. Defense also argued that the General Superintendent had only general supervisory responsibilities over the work site and not the direct supervisory responsibilities required by Wyoming law. After a six day jury trial, the jury found in favor of all three co-employee defendants. ■

CASE SUCCESS:
INTERSTATE LAND SALES ACT, FRAUD, AND CONSPIRACY LITIGATION

COUNSEL: **Frank J. Albetta, Christopher Hinnant, Melody Canady**

FIRM: **Cranfill Sumner & Hartzog LLP**

HEADQUARTERS: **Raleigh, North Carolina**

The complaint in the case—over 200 pages and 1300 paragraphs long—was filed on behalf of 130 purchasers of lots in coastal development communities in NC and SC naming Cooperative Bank as a defendant along with developers, marketers, six other mortgage lender banks, and others. The plaintiffs alleged violations by Cooperative of the Interstate Land Sales Act (ILSA), the NC Unfair and Deceptive Trade Practices Act, as well as conspiracy and fraud. The seven lender banks and one developer moved for dismissal of all claims. The defense produced memoranda in support of dismissal based upon extensive research and drafting sorting out and analyzing the complex issues of jurisdiction, statutory construction, conspiracy, and fraud raised by the lengthy complaint. Following oral argument, the court dismissed all claims against Cooperative and the other lending banks with prejudice and without leave to amend. ■

CASE SUCCESS:

JURISDICTION/OIL RIG DEATHS/GULF OF MEXICO

COUNSEL: **Michael Williams, Mark Clemer and Charles Conrad**

FIRM: **Brown Sims, P.C.**

HEADQUARTERS: **Houston, Texas**

Plaintiffs filed claims against United States contractors for the personal injury and wrongful death of Mexican offshore rig workers. The claims arise from the allision (collision) of the jack-up drilling rig Usumacinta with an offshore oil production platform in the Bay of Campeche, offshore Mexico. Of the 86 workers on the rig, 22 workers were allegedly killed and another 46 workers were allegedly injured. This was the deadliest offshore accident in the Gulf of Mexico in over 30 years. The rig workers were killed or injured in the allision or when the lifeboats in which they evacuated capsized in heavy weather. Defendants moved to dismiss Plaintiffs' claims under the maritime law of forum non conveniens - arguing that Mexico provides an adequate forum to litigate the claims and that all of the relevant evidence and witnesses are located in Mexico. The Court agreed and dismissed Plaintiffs' claims against defendants, allowing Plaintiffs to proceed with their claims in Mexican courts. ■

CASE SUCCESS:

BREACH OF CONTRACT/NEGLIGENCE/INDEMNITY

COUNSEL: **Kevin C. Schiferl and Richelle M. Harris**

FIRM: **Frost Brown Todd LLC**

HEADQUARTERS: **Indianapolis, Indiana**

Vectren, a gas utility company, asserted cross-claims and a third-party complaint against KLP Construction Company for breach of contract, negligence, indemnity, and fraud arising out of a gas explosion. KLP performed work for Vectren pursuant to a gas pipeline re-line contract which required KLP to remove gas stop boxes. KLP did not remove all of the stop boxes pursuant to the contract. Several years after KLP completed the work; Evansville, Indiana, water department employees mistakenly accessed a gas stop box near a home and caused a gas leak. Vectren employees responded to the leak but failed to follow proper procedure to restore service to the residence and caused an explosion. Two elderly women were killed. The negligence claims with the Estate eventually settled and/or were dismissed. Vectren sought indemnity for the amount it contributed to the settlement. Vectren argued that KLP was required to remove the valve stop boxes pursuant to the contract and its failure to do so constituted a breach of contract and negligence, leading to the explosive events. At trial, KLP argued there was no breach of the contract, nor was KLP negligent, because Vectren's chief inspector accepted KLP's work without comment on non-removal of any stop box, which constituted a waiver and/or modification of the terms of the contract. KLP also advanced arguments of intervening cause and lack of proximate cause between its work and the explosion. KLP's potential exposure was a multi-million dollar plaintiff's verdict. After a two-day bench trial preceded by significant pre-trial motion practice, a District Judge for the Southern District of Indiana returned a 38-page written opinion entering a judgment in favor of the defendant, KLP. ■

CASE SUCCESS:

INSURANCE COVERAGE/OPERATION OF FORKLIFT

COUNSEL: **Frederick J. Smith**

FIRM: **Peterson, Johnson & Murray, S.C.**

HEADQUARTERS: **Milwaukee, Wisconsin**

Plaintiff, a truck driver, was injured by a forklift operator while making a delivery of a load of pallets to a storage facility. The storage facility's employee ran into the truck driver while operating the forklift. The plaintiff had previously unsealed his trailer, opened the trailer's doors, and backed his trailer into the loading dock so the forklift operator could extract the cargo. After several pallets had been removed from his trailer, the truck driver noticed that some of the boxes on the pallets were not what the storage facility had ordered. He walked to where the forklift operator had placed the pallets he had already unloaded, and was struck by the forklift operator at that time. The plaintiff sued the storage facility and its insurer, Acuity, which then in turn impleaded the truck driver's insurer Harco. Harco successfully defended against Acuity's claim in both the trial court and the court of appeals. The trial court determined that Harco did not waive its right to contest coverage by refusing to accept Acuity's tender of defense because Harco's policy did not provide coverage for bodily injury to an employee of the insured when the injury arises out of employment activities. This conclusion was upheld on appeal, where the court took judicial notice of the fact that the motor carrier at issue was registered in Iowa under a single state registration system. This made a Wisconsin statute, which might otherwise invalidate the exclusion, inapplicable. The plaintiff's pretrial demand exceeded $1 million. Harco paid nothing, and the Wisconsin Law Journal identified the court of appeals' decision as one of the most significant insurance decisions in Wisconsin last year. ■

CASE SUCCESS:
PREMISES LIABILITY

COUNSEL: **Jerald L. Rauterkus**

FIRM: **Erickson Sederstrom, P.C., L.L.O.**

HEADQUARTERS: **Omaha, Nebraska**

The insured, Dillinger's, a nightclub located in Lincoln, Nebraska, catered primarily to students from the University of Nebraska as well as young working individuals in Lincoln. Dillinger's, along with one of its security personnel, was sued by one of its patrons following a bar fight. The patron/plaintiff alleged that the security personnel had used excessive force in removing the patron from the bar after the patron/plaintiff got in a fight with one of his friends. The theories of liability were intentional torts, specifically a count for assault, and a count for battery. Dillinger's was a party based on respondeat superior. The bar and security employee were defended based on the affirmative defenses of defense of others and self-defense. After five hours of deliberation, the jury returned a unanimous verdict for both defendants. ■

CASE SUCCESS:
PRODUCT LIABILITY

COUNSEL: **Christy D. Jones, Michael B. Hewes, Kari L. Sutherland, Ben J. Scott**

FIRM: **Butler, Snow, O'Mara, Stevens & Cannada, PLLC**

HEADQUARTERS: **Jackson, Mississippi**

CO-COUNSEL: **Drinker Biddle**

Butler Snow served as Lead Counsel in a second high profile product liability case against Johnson & Johnson and McNeil Consumer Healthcare in connection with Children's Motrin which plaintiffs allege caused the child to develop Stevens-Johnson Syndrome. The suit alleged the child, approximately 3-years-old at the time of injury, lost her sight and suffered from Stevens-Johnson Syndrome as a result of her use of Children's Motrin. The jury returned a unanimous defense verdict. ■

CASE SUCCESS:

NEW YORK LIQUOR AUTHORITY CONTROL

COUNSEL: **Earl Cantwell**

FIRM: **Hurwitz & Fine, P.C.**

HEADQUARTERS: **Buffalo, New York**

New York State Liquor Authority ("NY-SLA") issued a declaratory ruling that "Moxie Mania" touch screen video games produced by Pace-O-Matic, Inc. were illegal games of chance under New York law and therefore barred from bars, taverns and restaurants licensed by the NY-SLA to sell alcoholic beverages. As a result, hundreds of "Moxie Mania" games installed in establishments, and games produced and ready for shipment and sale, were deemed illegal. After a hearing, the New York Supreme Court ruled that the NY-SLA decision was irrational, arbitrary and capricious, and permanently enjoined and barred the NY-SLA's ruling. The Court concluded that all of the verifiable record information supported a determination that the "Moxie Mania" game was NOT an illegal gambling device, allowing Pace-O-Matic's "Moxie Mania" games to be operated, installed and played in New York bars, taverns and restaurants licensed by the NY-SLA. ■

CASE SUCCESS:
INTELLECTUAL PROPERTY CASE

COUNSEL: **Thomas A. Kendrick and Celeste P. Holpp**

FIRM: **Norman, Wood, Kendrick & Turner**

HEADQUARTERS: **Birmingham, Alabama**

The plaintiff sued her former employer, a managed-care company, claiming that her employer breached an agreement over the development of software, committed fraud in the wrongful acquisition of software developed by the plaintiff, and was liable under other legal and equitable theories of liability. The plaintiff claimed $750,000 in compensatory damages and sought treble punitive damages. The case was successfully defended over a two week trial. The defense successfully proved that the software was not the property of the plaintiff, but was developed as "work for hire" and therefore belonged to the employer. The jury returned a defense verdict after 20 minutes of deliberation. ■

CASE SUCCESS:
MEDICAL MALPRACTICE

COUNSEL: **Brian P. Miller and Derek J. Williams**

FIRM: **Snow, Christensen & Martineau**

HEADQUARTERS: **Salt Lake City, Utah**

Plaintiff claimed that the orthopedic physician was negligent in deciding upon and performing first and second metatarsal resection arthroplasties. The orthopedic surgeon ruled out fusions (in part because plaintiff was a heavy smoker) and implants. Plaintiff did well following the surgery but ultimately suffered from transfer metartarsalgia—a known and discussed risk of the procedure. Plaintiff sought care from a podiatrist and underwent additional surgery. Plaintiff claimed inability to work, disability in her foot and damage to her knee, all as a result of the alleged negligent care by the surgeon. Trial resulted in a unanimous defense verdict in favor of the orthopedic surgeon finding that he did not breach the standard of care required of him in his care and treatment of the plaintiff. Prior to trial, plaintiff demanded a six-figure settlement. ■

CASE SUCCESS:

ELDER ABUSE & MEDICAL MALPRACTICE - WRONGFUL DEATH

COUNSEL: **Louis W. Pappas**

FIRM: **Manning & Marder, Kass, Ellrod, Ramirez LLP**

HEADQUARTERS: **Los Angeles, California**

An 85-year-old patient was treated at a hospital emergency room for stroke-like symptoms, and was released to a Skilled Nursing Facility. The admitting physician (defendant internist) served as her primary care provider with the patient's consent because her own provider did not have privileges at the hospital.

During her brief 14-hour stay at the skilled nursing facility, the patient got out of bed without assistance (although instructed not to do so), fell and injured her wrist. X-rays were read as negative, and these results were relayed to defendant internist telephonically. He ordered conservative treatment, but did not visit or examine her during her stay at the facility.

The patient's family became dissatisfied with the care and removed her from the facility the next day, taking her home. Within eight hours, the family drove her to a different emergency room with complaints of chest pain, shortness of breath and a painful wrist. While there, a second x-ray of the wrist was taken and read as a fractured wrist. Plaintiff's wrist was casted and she was discharged home in stable condition six days later by her long-time primary care physician. She was readmitted to different hospitals twice more in the next 45 days for other conditions before she passed away of complications totally unrelated to her fractured wrist.

Plaintiff originally sued for medical malpractice and wrongful death, but ultimately went to trial against defendant internist under the Elder Abuse statutes, alleging inadequate care, treatment and management while at the skilled nursing facility. Plaintiff argued the internist should have personally examined decedent following the fall. The defense successfully demonstrated to the jury that the charged physician in no way neglected the decedent during her brief stay at the skilled nursing facility. ■

CASE SUCCESS:
PREMISES LIABILITY

COUNSEL: **Bob Hickey**

FIRM: **Ryan Ryan Deluca LLP**

HEADQUARTERS: **Stamford, Connecticut**

Plaintiff sued Maritime Properties claiming that it maintained a defective premises. The plaintiff was a USPS letter carrier who was delivering the mail to a large, upscale apartment building. A large gang mailbox fell out of the wall as she attempted to open a master lock to the mailbox. The box fell on her foot and she claimed to have sustained an injury involving RSD/CRPS of the lower right extremity. She claimed she was totally disabled as a result of the injury. The defense focused on the lack of notice with regard to the allegedly defective condition and disputed the diagnosis of RSD/CRPS. The case was tried for 10 days. The plaintiff's counsel asked for $1 million in past and future lost wages and a proportionate amount for pain and suffering. The jury returned a general verdict in the defendant's favor. ■

CASE SUCCESS:
PREMISES LIABILITY

COUNSEL: **Irwin Miller**

FIRM: **Abrams, Gorelick, Friedman and Jacobson, P.C.**

HEADQUARTERS: **New York, New York**

Plaintiff was attending her employer's holiday party at defendant's premises in Manhattan when she slipped and fell on the dance floor while dancing the Electric Slide. As a result of the fall, she sustained injuries which included a comminuted fracture of the interdtrochanteric region of the left femur and a fracture of the left distal radius, each of which required surgery to reduce the fractures. After a lengthy hospitalization, plaintiff underwent intensive physical therapy with a poor result. Consequently, plaintiff claimed her injuries are permanent and that she suffers from residual problems that have necessitated further surgery and treatment. Defendant contested liability, claiming that it was not responsible for plaintiff's accident because it did not have actual or constructive notice of the alleged dangerous condition (ice and liquid dropped by party attendees). Plaintiff's lowest demand was $1 million. The workers compensation lien was $149,000. Efforts to reach a high/low agreement failed and the jury returned a defense verdict on liability, finding that defendant's actions were not the proximate cause of the accident. Defendant's carrier was QBE. ■

CASE SUCCESS:

EMPLOYMENT DISCRIMINATION

COUNSEL: **Cathy L. Arias and Allyson Cook**

FIRM: **Burnham Brown**

HEADQUARTERS: **Oakland, California**

Defense obtained a unanimous verdict on behalf of a Securities Firm in an arbitration before the Financial Industry Regulatory Authority ("FINRA") after a Compliance Manager complained of discrimination. The employee contended that the Securities firm terminated him based on his age, disability, and sexual orientation. Prior to the arbitration, the employee demanded $12.5 million, which was reduced to $2.5 million during closing argument. The FINRA Arbitration Panel found no evidence of discrimination and found the Securities Firm terminated him for a legitimate non-discriminatory performance reason. ■

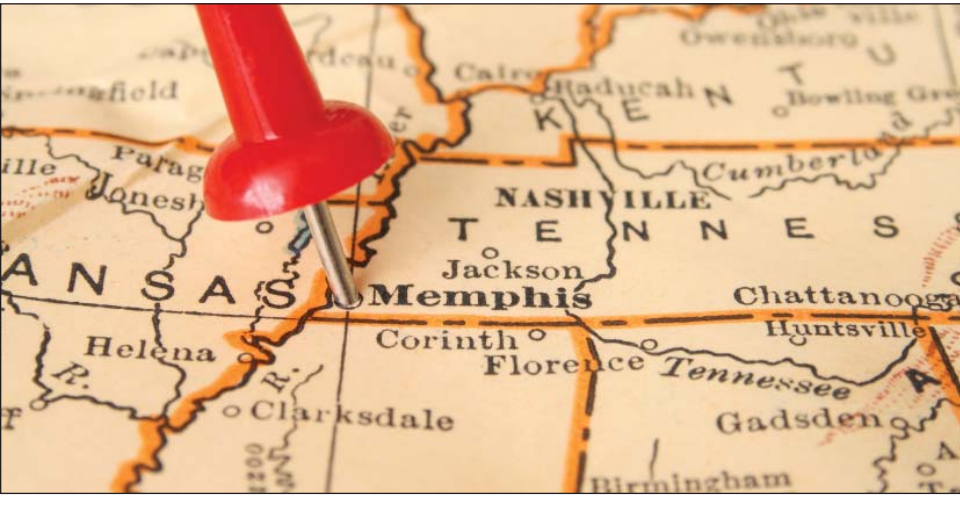
CASE SUCCESS:

DISMISSAL OF HISTORIC $1.3 BILLION INTERSTATE WATER RIGHTS CASE

COUNSEL: **Leo Bearman Jr., David Bearman, and Kristine Roberts**

FIRM: **Baker, Donelson, Bearman, Caldwell & Berkowitz, PC**

HEADQUARTERS: **Memphis, Tennessee**



The State of Mississippi filed suit against the City of Memphis, Tennessee, and its utility division. The subject matter of the lawsuit is the Memphis Sands Aquifer, a vast underground ground water system underlying and utilized by several states including Mississippi, Tennessee, and Arkansas. Mississippi alleged that Memphis had wrongfully withdrawn ground water that was "owned" by Mississippi. It is undisputed, however, that all of Memphis' pumping occurs within Tennessee's state borders and in compliance with Tennessee's laws. Mississippi seeks money damages in an amount up to $1.3 billion dollars.

The District Court dismissed Mississippi's lawsuit finding that the State of Tennessee was a necessary and indispensable party to such a dispute and that Tennessee could not be joined without the district court losing jurisdiction. The District Court's dismissal was affirmed by the Fifth Circuit Court of Appeals. Mississippi has filed a Petition for a Writ of Certiorari with the United States Supreme Court, and a Motion for leave to file an Original Action against Memphis, its utility division and the State of Tennessee. ■

CASE SUCCESS:

MARITIME PRODUCTS LIABILITY/ NEGLIGENCE ACTION

COUNSEL: **John R. Owen, Danielle D. Giroux, Les C. Brock**

FIRM: **Harman, Claytor, Corrigan & Wellman, P.C.**

HEADQUARTERS: **Richmond, Virginia**

Plaintiff, a civilian contractor, filed a $10 million lawsuit against Wiggins Lift Co., Inc. seeking damages for injuries sustained aboard the U.S.S. Roosevelt when struck by a forklift truck necessitating an above-the-knee amputation of his left leg. The lift truck was specifically designed and manufactured by Wiggins for the U.S. Navy for removing debilitated aircraft from the flight deck of aircraft carriers during wartime. The plaintiff alleged that the lift truck was defectively designed in that it should have been equipped with mirrors and wheel guards. The Judge granted Wiggins Lift's motion for summary judgment on two independent grounds:

1) The causation opinions of plaintiff's sole liability expert had previously been excluded through defendant's motion in limine leaving the plaintiff with no evidence that could lead a reasonable juror to conclude that the design and manufacture of the forklift caused the plaintiff's accident; and

2) The government contractor defense bars the plaintiff's claims because Wiggins followed reasonably precise specifications in the design and manufacture of the lift truck, a team-like effort existed between Wiggins and the Navy throughout the design process, and the Navy's long-term use of the lift truck establishes the government's approval of the design. ■

CASE SUCCESS:

CONSTRUCTION DEFECT, ERRORS AND OMISSIONS, WARRANTY CLAIMS

COUNSEL: **Gary Snodgrass, William Thomas**

FIRM: **Rabbitt, Pitzer & Snodgrass, P.C.**

HEADQUARTERS: **St. Louis, Missouri**

The City of Pacific, Missouri, filed a claim in arbitration against its general contractor, Frederich Construction, alleging the contractor improperly and deficiently installed piping, baffle systems and aeration equipment for a sewage lagoon used to treat the city's effluent. The city claimed it was damaged in excess of $700,000 for warranty repair work, re-design and remediation work and delay damages. In a six-day arbitration, the contractor defended and third-partied into the arbitration two of its subcontractors, made its own claims of damages based on delays and defective plans, also faulting the owner for decisions it made to change the design after contract award. The contractor was able to recover $60,000 in damages for its expert fees and money due and the city was awarded nothing on its claim. After a mediation which followed the arbitration, the contractor recovered an additional $250,000 in damages for its attorney's fees and delays against all the parties to the project, including its subcontractors, a total vindication for the firm's client. ■

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For more information about
The Harmonie Group
contact:
Tim Violet, Esq., Executive Director
634 Woodbury Street
St. Paul, Minnesota 55107 USA
p: (651) 222-3000
c: (612) 875-7744
tviolet@harmonie.org
www.harmonie.org