BUILDING SOLUTIONS®

WATT TIEDER

WATT, TIEDER, HOFFAR & FITZGERALD, L.L.P.

Attorneys at Law

Winter 2020

Inside...

The newsletter of
Watt, Tieder, Hoffar & Fitzgerald, L.L.P.

visit us on the web at
www.watttieder.com

BUILDING SOLUTIONS

The Miller Act: Is A Default Judgment Against A Principal Binding On A Surety?

by Bradford R. Carver, Senior Partner

Attorneys who represent sureties have, at one time or another, been confronted with the following dilemma: The surety and its principal are sued by a payment bond claimant. The principal does not respond to the lawsuit and a default judgment is entered against the principal. The surety, on the other hand, properly answers the complaint and asserts substantive defenses to the claim. The plaintiff, however, seizes upon the default judgment against the principal and asserts that it is binding on the surety. Your surety client then asks you: "Is the surety bound by that default judgment?"

All attorneys have lost sleep when asked this question by a client. Fortunately, if you are well-informed as to the law in the particular jurisdiction or jurisdictions where you practice, you can provide an accurate response because most states have established case law on the issue. But what happens if the claim is a Miller Act claim? The answer is less than clear, and it can provide a trap to the unwary. This article will discuss the issue and how to avoid the trap.

The General Rules

For the most part, courts have adopted one of three approaches regarding the preclusive effect on a surety when a default judgment is issued against a principal. To be clear, in this article we are dealing with a default judgment against a principal, and not a judgment that is, in any way, on the merits. For a judgment on the merits, the rules are entirely different and this article does not address that topic.

- **The Default Judgment Is Not Binding On The Surety**

The Restatement (Third) of Suretyship and Guaranty (1996), sec. 67(3), as well as a significant number of jurisdictions, state that a default judgment rendered against a principal is not binding on a surety. The Restatement states that the default judgment is "evidence only of the fact of its rendition." Massachusetts, for example, affirmed this proposition many years ago: "The entry of default against the principal is not equivalent to a final judgment.... As a judgment by default against a principal is not a final judgment on the merits, the surety is not bound by it." *Treasurer and Receiver General v. Macdale Warehouse Co.*, 262 Mass. 588, 160 N.E. 434(1928). Throughout the years, the rule has not changed thereby providing a measurable level of certainty on the issue in Massachusetts. Other states, such as New Jersey, Nevada, Alabama, Kentucky and Vermont follow the same rule. Two states, California and West Virginia have passed statutes that have codified the rule.

- **The Default Judgment Is Evidence Of The Surety's Liability**

Other states' courts take a "middle of the road" approach, and have found that a default judgment against a principal is not binding on the surety, but it is *prima facia* evidence of the surety's liability. Or, phrased another way, the default judgment creates a rebuttable presumption of the surety's liability. In these jurisdictions, the claimant is permitted to use the default judgment as evidence of the surety's liability, but the surety is entitled to submit evidence, both factual and legal, to rebut the evidence. States such as New York, Michigan, Georgia, Texas, Nebraska and Missouri follow this approach.

- **The Default Judgment Is Binding On The Surety**

The most draconian approach taken by some states' courts is that a default judgment against a principal is binding on the surety. In these jurisdictions, the courts often note that the surety is often a co-defendant in the action and therefore the surety had notice of the action. Implicit in these cases is a judicial determination that if the surety was aware of a potential default against its principal, the surety should have taken some type of action to prevent the entry of the default judgment. States such as Mississippi, Colorado, North Carolina, South Carolina and Indiana follow this approach.

The Miller Act And Default Judgments

The Miller Act, 40 U.S.C. sec. 270a *et. seq.*, is the federal statute that, among other things, allows for payment bond claims against sureties on federal projects. What happens when a payment bond claimant obtains a default judgment against a principal on a Miller Act project? Do you apply the law from the state where the project is located - a reasonable assumption. Or, is there some type of federal common law that applies to Miller Act claims? The unfortunate answer is that given some fairly recent decisions, there is a degree of uncertainty on the issue.

The issue of the preclusive effect on a surety of a default judgment against a principal under the Miller Act does not arise often. In one of the more frequently cited cases that addressed the issue, *United States v. Maryland Casualty*, 204 F.2d 912(5th Cir. 1953), the former Fifth Circuit, expressly applying Alabama state law, ruled that a default judgment against the principal was not binding on the surety. *Maryland Casualty*, 204 F.2d at 915. The *Maryland Casualty* decision was consistent with an earlier decision in New York where the court held that a default judgment against a principal on a Miller Act job was not binding on the surety. *United States ex. Rel. Vigilanti v. Pfeiffer-Neumeyer Const. Corp.*, 25 F. Supp 403(E.D.N.Y. 1938).

The *Maryland Casualty* and *Pfeiffer-Neumeyer* decisions, among others, appeared to establish a general rule that in Miller Act cases one would apply the state law where the job was located to determine if a default judgment was binding on the surety. The Eleventh Circuit, however, threw a wrench into that analysis in *Drill South v. Int. Fidelity Ins. Co.*, 234 F.3d 1232(11th Cir. 2000). The facts in *Drill South* are particularly troubling to any attorney who represents sureties.

In *Drill South*, the surety and the principal were sued on a federal project located in Alabama. [Recall that Alabama is a state that follows the Restatement rule that a default judgment against the principal is not binding on the surety.] The principal failed to answer the claim against it and the subcontractor moved for a default judgment. At the hearing, the attorney representing the surety did what many attorneys do in similar situations – he stated that the surety had no particular position on the motion as long as it was clear that the default judgment would not be binding on the surety. The subcontractor's attorney argued that the default judgment should be binding. The trial court then stated on the record: "In other words, [the] surety doesn't get an opportunity to defend? Can somebody say due process." So far, so good.

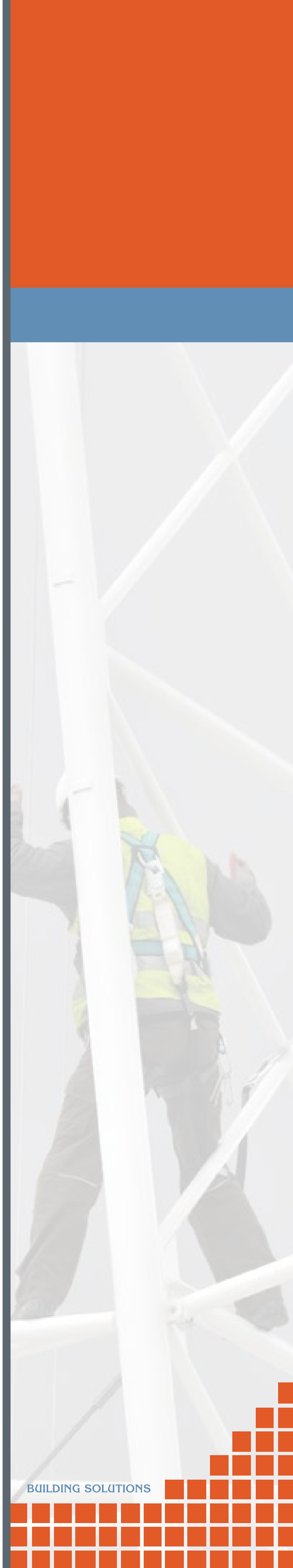
Discovery proceeded and cross-motions for summary judgment were filed. Remarkably, the trial judge completely reversed herself, ruled that the surety was bound by the default judgment and entered judgment against the surety. A judgment, therefore, was entered against the surety and the subcontractor did not need to prove any of the substantive elements of its claim against the surety.

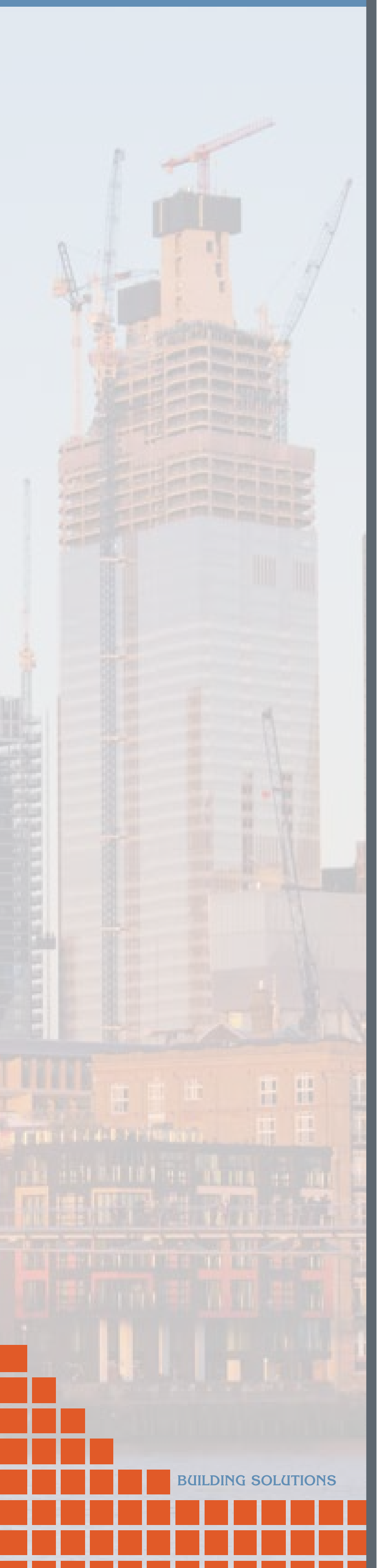
The Eleventh Circuit affirmed the trial court decision. The court stated that the "general rule" is that a default judgment against the principal is binding on the surety. *Drill South*, 234 F.3d at 1237. As discussed above, it is largely incorrect to assert that there is a "general rule." Instead, there are one of three rules depending on the jurisdiction. In that regard, the rule that typically applies in Alabama is that a default judgment is not binding on the surety. *See United States v. Maryland Casualty*, 204 F.2d 912, 915(5th Cir. 1953)("careful consideration" of Alabama law led to conclusion that default judgment against principal was "insufficient to furnish a basis for a judgment against the sureties.").

A 2011 decision in Massachusetts further confused the issue, *United States v. Veterans Const. LLC*, 2011 WL 2076345(D. Mass. 2011). Relying on the holding in *Drill South*, the *Veterans* court found that the surety was bound by a default judgment against the principal. *Veterans* involved a federal construction project in Massachusetts and, as in Alabama, courts in Massachusetts followed the rule that a default judgment is not binding on the surety. The *Veterans* court, however, while acknowledging that there is "some uncertainty" on whether a Miller Act court should apply state law or federal common law, ultimately concluded that federal common law should be applied. *Veterans*, 2011 WL 2076345*1. Citing *Drill South* the court stated that "federal courts generally have held that a surety is bound by a judgment against its principal if it had notice of the proceeding that produced the judgment and an opportunity to participate in that proceeding." *Id. at *1.*

The *Veterans* court's conclusion is incorrect on two fronts. First, federal courts have not "generally" held that a surety is bound by a default judgment. In fact, if there is a "general" rule, it is the opposite. *See Maryland Casualty, supra., Axess Int. Ltd. v. Intercargo Ins. Co.*, 183 F. 3d 935(9th Cir. 1999). Second, to the extent that there is a federal common law on the issue of preclusion, it is that a default judgment has no preclusive effect. In *Bush v. Balfour Beatty*

...continued on page 4





Bahamas, Ltd., 62 F.3d 1319, 1323(11th Cir. 1995), the court held that: "The general federal rule, however, is to the contrary. Ordinarily, a default judgment will not support the application of collateral estoppel because '[i]n the case of a judgment entered by confession, consent, or default, none of the issues are actually litigated.'"[internal citation omitted].

Conclusion

It appears that both *Drill South* and *Veterans* are aberrant decisions that failed to follow the state law where the Miller Act jobs were located. Moreover, even if federal common law applies, the courts failed to follow that law as well. Nonetheless, the combination of the two decisions leaves sureties in a precarious position on Miller Act projects. Although convincing arguments can be advanced that a surety should not be bound by a default judgment against its principal—especially in those jurisdictions where the state law is that there is no preclusive effect—there is no guarantee of success. The best advice to follow is that when confronted with a Miller Act claim and a principal may have a default judgment entered against it, the surety should take necessary steps to have the court enter an express order that the default judgment will not have any preclusive effect against the surety. The failure to do so may result in a court following the incorrect lead set forth in *Drill South* and *Veterans*.

Prefab And Modular Construction – Fitting The Contract Into The Process

by Sara M. Bour, Associate

Prefabrication and modular construction are currently experiencing an upswing in popularity in the United States. For the right project, modular construction offers numerous benefits. The concept, however, is fraught with pitfalls for the unwary and for those who attempt to utilize traditional contracts and methods to manage a modular project. If modular construction is an elaborate puzzle, traditional form contracts can be ill-fitting pieces.

Unlike traditional site-build construction, prefabrication of systems and modular construction is a process by which certain units (collectively referred to as "modules" in this article) are produced in an off-site, controlled environment, assembled in part or in whole, and then shipped to the project site for further assembly, installation and integration with other units. The options for modules are unlimited, ranging from completely assembled rooms to discrete structural components to single fixtures. The complexity for the individual units is similarly varied.

Modular construction has been around since the 1800s, though modern developments in technology, design, fabrication and shipping have led to accelerated development and availability. According to the Associated General Contractors of America, Sears, Roebuck & Co. sold over 75,000 prefabricated homes between 1910-1940, and the process has gained momentum in various industry sectors ever since. Today, numerous visible brands and contractors have invested heavily in the process, with the top sectors represented across the hospitality, healthcare, manufacturing, residential and restaurant industries. Contributing to the growth in the use of this process are market and project factors, including potential budget and schedule savings, a shortage of skilled labor for construction, changes in production costs, and increased capabilities for automation.

While historically lagging behind European and Asian markets, modular construction in the United States is seeing increasing popularity perhaps partly due to the market forces discussed above. The Commercial Construction Index recently indicated that demand for modular construction is on the rise with projected growth expected to be robust by 2021.

In light of market stresses and greater accessibility to technology, modular construction offers numerous benefits. Touted by the Modular Building Institute as "Greener," "Faster," and "Smarter," there are both theoretical and proven benefits to construction in a controlled environment via a consistent process with potential automation or robotic elements. It has been estimated that modular construction may reduce scheduled completion times by 20-50% and reduce costs by 20%. Of course, reducing project duration has numerous benefits for owners, not the least of which is lowering the total cost of financing, total overall costs and risk exposure.

Other benefits touted include higher quality end products, increased labor productivity and reduced labor costs, better use of site space, streamlined quality assurance and quality control processes (i.e., methods utilized to measure and assess product quality), minimization of weather interference and environmental impacts, and limited on-site hazards and on-site storage. Modular construction is also considered safer and, when executed properly, allows for enhanced coordination.

Of course, modular construction is not without its challenges. Critics have pointed to data showing that the cost savings are not realized to the extent promised, and others have identified potential negative impacts to the workforce and significant upfront costs. There are also other practical challenges, including risks in shipping and transportation, design complexities, difficult integration of project teams, and the need for different training.

Among the more notable complexities of modular construction is how to use traditional contract principles and legal standards in modular construction contracts without leaving gaps in risk allocation and responsibility. The short answer is that traditional approaches generally fail to fit into the modular construction puzzle, implicating new potential liability. Consequently, dusting off an old form contract will likely be an untenable option if the goal is to permit a seamless and comprehensive contract to deliver a project using the modern modular process.

Because traditional contracting tools often fall short of accounting for all risks of modular construction, stakeholders need to ask fundamental questions when considering the form, contents and requirements of their contracts. Moreover, they need to be aware of legal pitfalls that await the unwary participants in the modular process.

What Law Will Govern The Contract And The Parties?

In determining applicable law, it is important to first determine whether the modules are considered "Goods" or "Work" in the applicable jurisdiction and under the governing agreements. The answer will determine whether the Uniform Commercial Code ("UCC") or common law will apply and govern the rights and obligations of the parties.

If a contract to provide modular units assembled offsite is determined to be a contract for the sale of "Goods," then the UCC and its particular rules concerning security interests and statutes of limitation will apply to the interpretation and enforcement of the contract, insurance coverage, and other salient issues. These rules are generally found in Articles 2 and 9 of the UCC. If the contract to provide modular units assembled offsite is determined to be a contract for "Work," then common law will generally be applicable to the parties' rights and obligations.

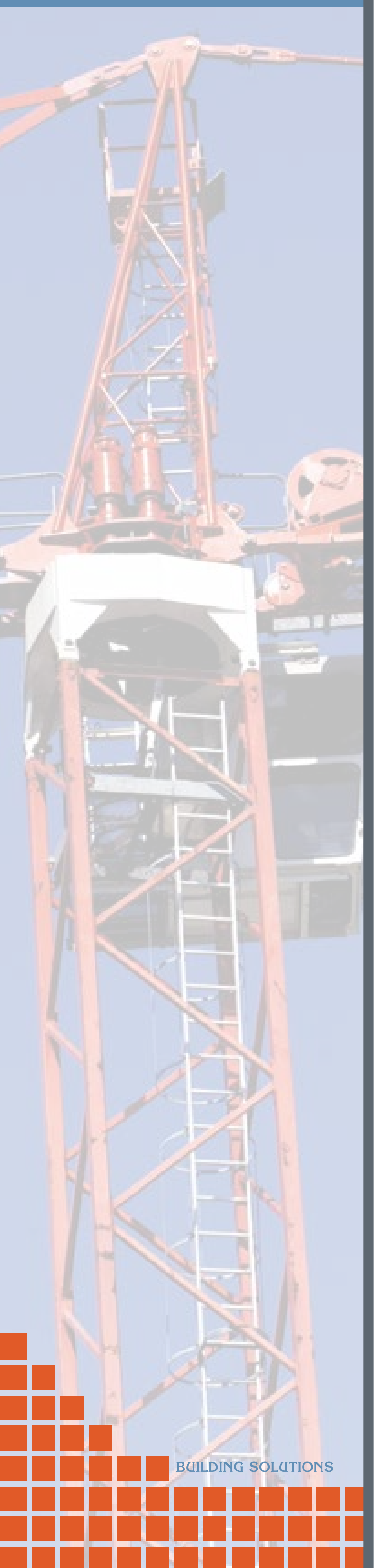
In a majority of jurisdictions, the general rule is that a "Goods vs. Work" determination for mixed contracts of goods and services will likely hinge on the predominant purpose for the transaction. If the predominant factor is the sale of goods, then the UCC will likely apply and the party to the contract will be considered a manufacturer. If the predominant factor is to provide services, then common law will likely apply and the party to the contract will be considered a subcontractor.

Modular construction is a hybrid approach which will require a fact-specific determination in each circumstance and jurisdiction. Among other things, this places a premium on clarity in the contract itself. The parties should carefully define the role that the fabricator will fulfill, clarify the intent of the parties concerning treatment of the units ("Goods vs. Work") and the fabricator (subcontractor or manufacturer), and address governing law. Additionally, the parties should not discount the form of the agreement. This means, for example, that a general contractor should probably question the wisdom of accepting a purchase order from a fabricator of the module units if the general contractor expects the fabricator to perform work as a subcontractor rather than a merchant selling goods for incorporation into the project.

This "Goods vs. Work" determination is important. Among other things, it can impact the module fabricator's security and lien rights under law. For example, a subcontractor providing materials and work for the project may be entitled to a lien claim under state law to secure its right to payment (*e.g.*, a mechanic's lien). On the other hand, an offsite fabricator supplying goods under governing law may be subject to Article 9 of the UCC, which has different and very specific requirements for protecting a right to payment that require upfront planning in the drafting of the contract to protect that right (even before a payment is missed).

Specifically, under Article 9 of the UCC, to create a security interest, there are three

...continued on page 6



requirements: (1) the secured party (*e.g.*, the fabricator) must give value; (2) the debtor (*e.g.*, the owner) must have rights in the collateral (*e.g.*, the modular piece); and (3) the debtor (*e.g.*, the owner) must have authenticated (*e.g.*, signed) a security agreement (*e.g.*, the contract or purchase order). The security agreement must specifically identify the collateral subject to the security interest. The secured party must then "perfect" its security interest in the collateral, usually by filing a financing statement with the appropriate state recording authority. Moreover, if the fabricator is treated as a merchant selling goods, then it may assume risk for items such as product liability, design defects, manufacturing defects or information defects that it otherwise would not normally encounter as a subcontractor. The parties will also want to consider other Article 2 issues, such as, at what point in the delivery process is the risk for the product shifted to the owner (when the modular unit is shipped or when it is delivered) and, thus, when payment is due. In other words, does the fabricator have to ensure that the module is delivered to the destination to be entitled to payment under the contract or is the fabricator immediately entitled to payment once the modular unit is shipped, even if the unit arrives damaged?

Simply, the context and language of a contract with a fabricator can have a significant impact on the parties' roles and exposure. Care must be taken to define the roles of the parties to the contract from the project designer to each fabricator and supplier. It is important to the owner that the general contractor is utilizing appropriate flow down provisions in its subcontracts. This is especially critical to ensure that contract requirements are flowing down to key project participants, that there are no gaps in contractual and design responsibilities, and that the intended risk allocation is appropriately distributed among the parties (*e.g.*, delivery and transportation risk, insurance coverage, design obligations, liquidated damages, and bonding obligations, among many others).

Importantly, the parties may be simultaneously subjected to laws in multiple jurisdictions relating to the same issues. For example, the fabricator's manufacturing site may not be in the same state as the project. Depending on the jurisdictions involved, that fabricator may be concurrently subjected to multiple state-specific licensing requirements for trade contractors and design professionals, obligations for worker safety and health, code requirements and jurisdictional labor issues. The fabricator also may be subjected to on-site inspections, off-site inspections at the factory, or both. This creates a complex set of considerations that require analysis and foresight during contract negotiation and drafting so that risk can be appropriately priced and allocated.

Does The Contract Bridge The Gaps?

A highly integrated process is advisable for modular construction, encouraging extensive collaboration and coordination between design and construction teams from the earliest stages in the project. Project designers, modular designers, and fabricators need to effectively communicate to avoid gaps in structural design. The designer may need to view and treat modules as part of the design process within its responsibility or as part of a design assist, as opposed to a typical plug-and-play unit for incorporation. This may require the parties to take on additional, uncustomary obligations or engage in a robust design-assist type process. Delegated design responsibilities should be clearly articulated in a consistent manner between all contracts. The construction manager, holding the contracts with the fabricators, will generally be responsible for performing an oversight role for the interfacing and coordination of the fabricated elements' design. Through the process, the fabricator may be asked to exceed its usual means and methods. This process therefore poses significant risks and requires a fresh and comprehensive approach to contractual preparation to ensure that all potential gaps in design responsibility are accounted for and adequate insurance is obtained.

It is equally important that the contract also addresses all aspects of a QAQC program both on-site and off-site. Of course, the ability to walk the site to determine that construction is proceeding in accordance with the plans and specifications is substantially limited. Thus, a determination needs to be made concerning deployment of the project team to off-site locations to observe and report on the quality of units in production, what tests and samples will be required, and what other assurances can be provided to the project team concerning the quality of the units. The contracts must permit these inspections, flowing down to all applicable subcontractors and fabricators to allow inspections at appropriate intervals at their assembly locations.

Who Bears The Risk Of Loss In Transportation?

With preassembled modules being delivered from off-site locations, the risks encountered for transportation are significant, ranging from timing and costs to the risk of damage and loss. Again, foresight in contract preparation is key to allocate these risks. For example, consider damage to goods in transit. If the fabricator is considered a manufacturer engaging in a sale of goods under the UCC analysis discussed above, then the risk of loss or damage usually passes to the buyer upon receipt. However, an owner may require more protection, and it should consequently investigate and determine whether a builder's risk insurance policy will cover the goods in transit and also whether the parties' contract specifies who bears that risk.

Is The Project Adequately Insured?

Modular construction implicates a number of insurance considerations that are deserving of their own treatment and can be discussed at length in a separate article. It is worth noting, however, that risk managers for the project stakeholders need to determine whether available coverages include materials and manufactured products located at the fabrication site. Under a typical builder's risk policy, the insurance is limited to property on-site or, in certain circumstances, in transit. This means that a rider to a builder's risk policy may be necessary to obtain coverage for modules stored and produced off-site.

Moreover, the feasibility of an owner-controlled insurance program (OCIP) and contractor-controlled insurance program (CCIP) policy may be questionable in modular construction. With on-site labor costs diminished, wrap-up insurance policies may not be available on modular projects.

Conclusion

Traditional tools for site-built construction are not crafted with modular construction in mind. Modular construction therefore requires a fresh perspective and comprehensive approach to contract drafting and negotiation, one in which a review and assessment of project needs is considered while simultaneously accounting for potential pitfalls and risk associated with the process. It is a complex puzzle, but the benefits of the modular process will ensure that it continues to gain an increasing foothold in the industry for the foreseeable future.

GOVERNMENT CONTRACTS

How Contractors May Respond To Negative Or Missing Performance Evaluations

by Ethan J. Foster, Associate

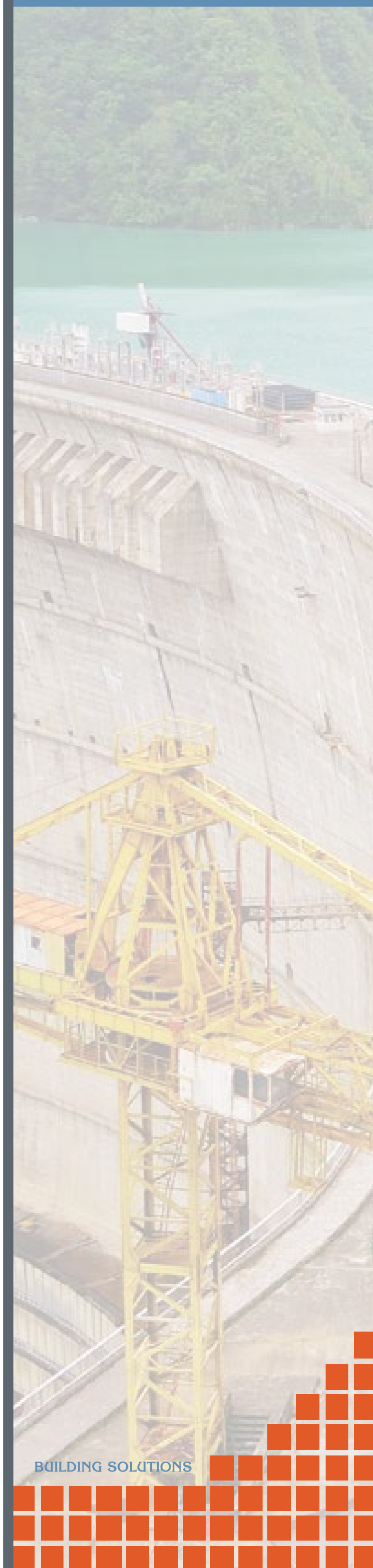
Government contractors face the perpetual threat of unfair or inaccurate performance evaluations that can haunt future bids. Last year, however, the Armed Services Board of Contract Appeals ("ASBCA") paved new ground in its *Protec GmbH* decision. ASBCA Nos. 61161, 61162, 19-1 BCA ¶ 37,362. In *Protec*, the Board published its first-ever opinion addressing the merits of an evaluation stored in the Contractor Performance Assessment Report System ("CPARS"). Although boards of contract appeals and the Court of Federal Claims have asserted jurisdiction to review inaccurate, unfair, or missing evaluations under the Contract Disputes Act ("CDA"), the merits of such claims are rarely analyzed because the requested remedies are either unavailable, or the cases never progress beyond a motion to dismiss. But the ASBCA's *Protec* decision is the latest of encouraging developments that clarify what government contractors can expect from appeals.

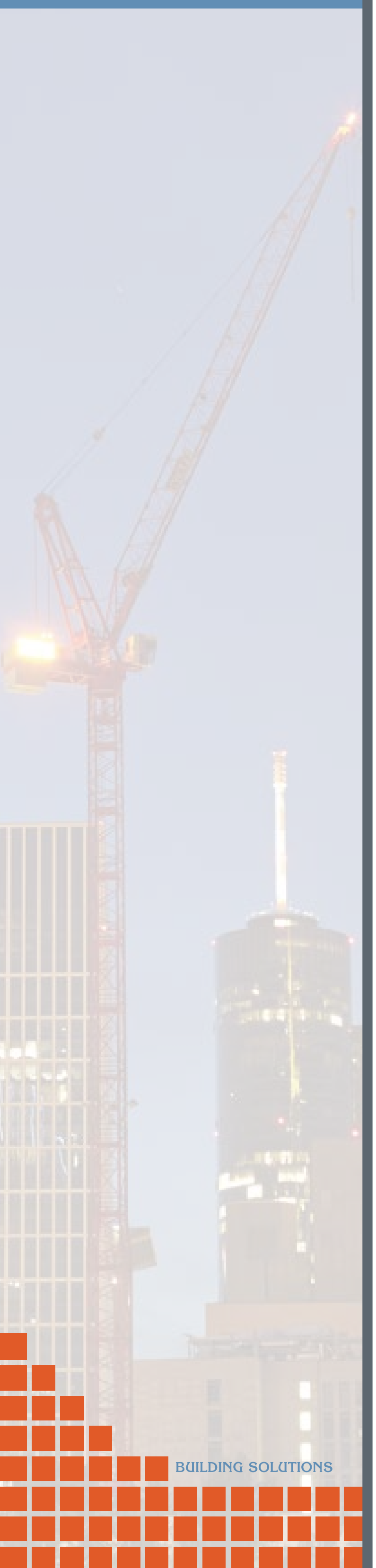
Recent Developments In CDA Claims

Since the Federal Circuit ruling in *Todd Construction, L.P. v. United States* that contractors can respond to performance evaluations by filing claims under the CDA, judges have asserted jurisdiction to review such claims. 656 F.3d 1306, 1311–14 (Fed. Cir. 2011). Lately, these assertions of jurisdiction have opened the door to evaluating the merits of such claims and available relief.

Before issuing its *Protec* opinion, the ASBCA regularly asserted jurisdiction while declining to address the merits of performance evaluations, noting that it could not order anything resembling injunctive relief or specific performance. *See, e.g., Microtechnologies, LLC*, ASBCA No. 59911, 16-1 BCA 36,354 (refusing to order agency to revise contractor's CPAR and refusing

...continued on page 8





to remand the evaluation with a requirement that the agency give a fair and accurate evaluation). *See also Colonna's Shipyard, Inc.*, ASBCA No. 59987, 16-1 BCA ¶ 36,518 (regarding the amended complaint, "we strike the words 'be ordered to' from the language 'the Contracting Officer should be ordered to issue a new CPAR that is fair and accurate.'"). For contractors, then, the *Protec* decision marked a welcome departure from the ASBCA's history of merely recognizing jurisdiction. In *Protec*, the Board stated that while it lacked jurisdiction to grant specific performance, it "may remand a matter to require a CO to follow applicable regulations and provide appellant with a fair and accurate performance evaluation." *Protec GmbH*, ASBCA Nos. 61161, 61162, 61185, 18-1 BCA ¶ 37,064.

Although the *Protec* Board ultimately ruled against the contractor, it analyzed, for the first time, the merits of its CPARS assessment claim. Since the contractor had asserted that the evaluation was inaccurate and unfair, the Board specifically looked for evidence of evaluation errors and considered whether any of the contractor's alternative explanations or excuses justified a finding of inaccuracy or unfairness. *Protec GmbH*, 19-1 BCA ¶ 37,362. Put differently, the Board considered whether any negative aspects of the challenged evaluation were based on excusable conduct. *See id.* Instead, the Board found that "the unexcused failure to perform services in accordance with the approved schedule . . . itself justified the CPARS' assessment's statement that PROTEC failed to perform services in accordance with the approved schedule." *Id.* The absence of justifiable excuses rendered the CPARS assessment not only accurate, but also fair.

Accuracy and fairness are not the only factors that the ASBCA will consider. In a more recent decision, the ASBCA reemphasized that it also has jurisdiction to consider whether an agency's CPARS evaluation was conducted or produced "in bad faith and [was] arbitrary and capricious." *Sungwoo E&C Co., Ltd.*, ASBCA No. 61144, 19-1 BCA ¶ 37,449. Put together, the ASBCA's latest decisions indicate a willingness to evaluate the merits of CPARS challenges with the prospect of remanding the evaluation for reconsideration.

The Civilian Board of Contract Appeals ("CBCA") has established a similar threshold. It has expressed a willingness to consider the merits of a CPARS challenge. *See, e.g., ECC Centcom Constructors, LLC*, ASBCA No. 60647, 18-1 BCA ¶ 37,133 (considering and rejecting appellant's claim that its CPARS rating was the product of "bias or animus on the part of the contracting officer."). In avoiding injunctive relief and specific performance, the CBCA refused to order the removal of unfavorable evaluations or direct the revision of evaluations. *See, e.g., YRT Enters. LLC DBA Tompkins Investigation Servs. v. Dep't of Justice*, CBCA No. 5701, 17-1 BCA ¶ 36,809. Nevertheless, it appears that the CBCA may be willing to grant declaratory relief in future cases. *See CompuCraft, Inc. v. Gen. Servs. Admin.*, CBCA No. 5516, 17-1 BCA ¶ 36,662. Moreover, given that the CBCA's posture toward remedies is similar to the ASBCA's approach, it may later concur that it has the power to remand CPARS evaluations to an agency to be consistent with regulations and to be both accurate and fair.

The relief available at the Court of Federal Claims, though, is not entirely clear. In *Itility, LLC v. United States*, the court noted that the Federal Circuit's *Todd Construction* decision "did leave undecided whether an injunction was available pursuant to the . . . power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just." 124 Fed. Cl. 452, 458–59 (2015) (internal quotations omitted). In *Itility*, the court stated that, at a minimum, "a declaration that a CPAR was arbitrarily issued and contained inaccurate information could be communicated to procurement officials in subsequent contract competitions, and would set the stage for injunctive relief in a bid protest if that CPAR is relied upon to an offeror's prejudice." *Id.* at 459. Nevertheless, the court mused in a footnote that "injunctive relief may nevertheless be available in CDA challenges to performance evaluations, under either the power to remand matters with proper direction or the power to direct the correction of applicable records." *Id.* at 459 n.8 (citing 28 U.S.C. 1491(a)(2)). Thus, above and beyond what boards of contract appeals can offer, the Court of Federal Claims *might* grant additional remedies such as injunctive relief, subject to its jurisdiction under 28 U.S.C. 1491(a)(2).

What Can Contractors Expect From Agencies?

The ASBCA's recent *Protec* decision may give agencies pause. They now have a greater incentive to better substantiate and review their own CPARS evaluations. Indeed, the shortage of cases that progress beyond the dismissal stage is likely the result of each agency's readiness to settle after jurisdiction is established. *See, e.g., JR Servs., LLC v. Dept. of Veterans Affairs*, CBCA Nos. 4826, 5123, 5124, 5189, 5190, 19-1 BCA ¶ 37,212. But now, with the looming threat of having evaluations scrutinized for accuracy and fairness, agencies may be even more responsive and conciliatory when handling agency-level disputes. Time will tell. Either way, contractors are now better situated to prepare claims that, if rejected by COs, can survive dismissal in a CDA claim. Such claims should focus on inaccuracies and unfair elements in the CPARS evaluation, as well as any evidence of bad faith, or arbitrary and capricious conduct. A well-drafted claim at the agency level is more likely to elicit a response if the agency anticipates the claim could prevail as a CDA claim.

What Will Be Examined On Appeal?

To have standing for an appeal, a contractor cannot simply allege that an evaluation was unfair or inaccurate. A contractor must also allege that the agency's errors were prejudicial and caused some sort of injury. *See Todd Constr., L.P.*, 656 F.3d at 1315–16. To have jurisdiction, the claim must be cognizable under the CDA, meaning that the contractor must have already submitted a claim to the agency. Once jurisdiction is established, the dispute may end in a settlement before it proceeds to the merits.

If a case proceeds to an examination of the merits, however, a board of contract appeals will not provide specific performance or injunctive relief, and it is unclear what the Court of Federal Claims may provide. Thus, while a contractor can specify the corrections it seeks from the agency, it might not be able to enforce such specific demands on appeal. Time and again, contractors request specific changes to their evaluations or the removal of their evaluation from CPARS, but such relief is not available at the ASBCA or at the CBCA.

At a minimum, boards of contract appeals are most likely to favor declaratory relief. In addition, a contractor may obtain compensation for an unfair or inaccurate evaluation that resulted from a breach of the duty of good faith and fair dealing, causing calculable harm to future bids. If the contractor estimates the future expense needed to counteract the bad faith evaluation in future bids, compensation may be obtained. *Gov't Servs. Corp.*, ASBCA No. 60367, 16-1 BCA ¶ 36,411. Alternatively, and consistent with *Protec*, a bad evaluation might still be remanded for accuracy and fairness if it is brought before the ASBCA. It is even possible that the CBCA will follow the ASBCA's lead in the future and remand inaccurate or unfair CPARS evaluations to contracting agencies.

Takeaways For Contractors

Contractors should vigilantly respond to unfavorable evaluations once they become available for comment. They should document facts *during* performance that justify positive ratings, so they can more adequately respond to bad evaluations. In preparing a formal claim to the agency, contractors may seek revisions, redactions, and even compensation. But if a formal claim is denied, a contractor should not assume it can obtain injunctive relief or specific performance. Depending on the forum for appeal, it should consider requesting declaratory relief, a remand to the agency to reconsider the evaluation, compensation, or, if brought before the Court of Federal Claims, possibly even an injunction. Regardless, contractors should always anticipate the possibility of a bad CPARS evaluation, consider where their disagreements may end up, and let that potential endpoint inform their early response strategy.

CALIFORNIA UPDATE

Thinking Of Expanding Your Architectural Operations Into California? What To Know About Licensing

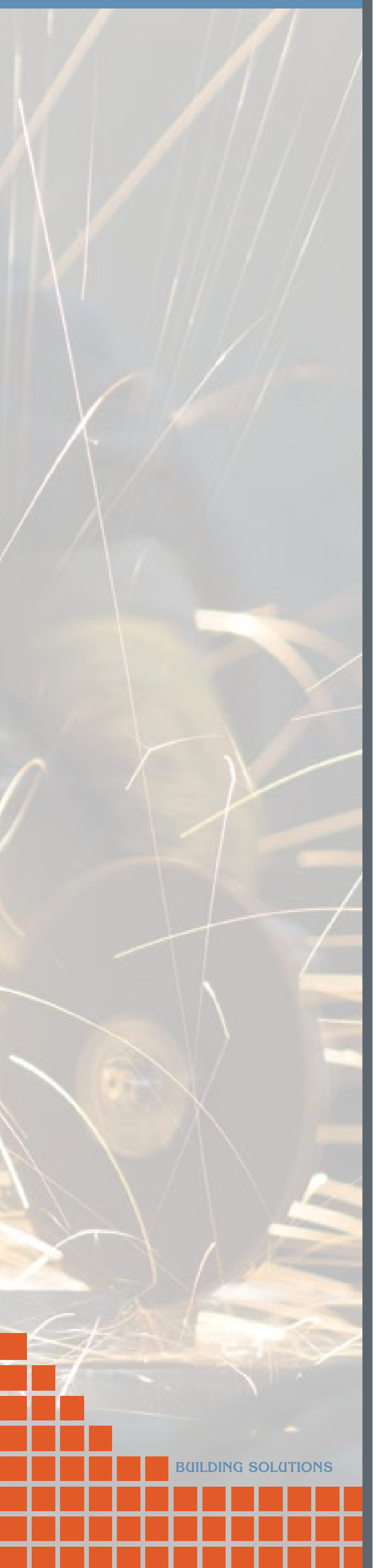
by Donna Tobar, Partner

Are you looking to expand your architectural operations into California? This article will explain the step-by-step process for getting licensed as an architect in California.

When An Architectural License Is Required

As an initial matter, it should be determined whether a license is needed at all and, if so, whether an architectural license or an engineering license is more suitable.

...continued on page 10



An architectural license is not needed for numerous limited scopes of design services in California, with certain exceptions. Specifically, unless building officials require otherwise (which may be likely) and unless the design changes affect the safety of any building (including structurally or seismically), an unlicensed person may design: (1) single-family dwellings of woodframe construction not more than two stories and a basement in height: (2) multiple dwellings containing no more than four dwelling units of woodframe construction not more than two stories and a basement in height and not more than four dwelling units per lot; (3) garages or other structures appurtenant to other exempt buildings, of woodframe construction and not more than two stories and a basement in height; (4) agricultural and ranch buildings of woodframe construction; and (5) nonstructural or nonsiesmic store fronts, interior alterations or additions, fixtures, cabinetwork, furniture, or other appliances or equipment, including nonstructural or nonsiesmic work necessary to provide for their installation.

Where a license is required for design, California has certain limitations on what a licensed architect is authorized to design:

- *Licensed Architect* – May design any type of building *except* for the structural portion of a hospital.

- *Licensed Civil Engineer* – May design any building *except* hospitals and public schools.

- *Licensed Structural Engineer* – No limitations on the types of buildings they design.

Additionally, an applicant should understand that licensing of architects in California is for individuals, not for companies.

Step-By-Step Process For Licensing In California

The path to licensure and the timeframe for such path depends upon whether you qualify for reciprocity in California based upon certification by the National Council of Architectural Registration Boards ("NCARB"). Specifically, an individual may be able to bypass certain testing requirements in California if the individual is currently NCARB certified, thereby demonstrating that the candidate has met the national licensure standard for architects.

<u>Steps To Licensure If Reciprocity Applies</u>

- *Step 1: Apply For Reciprocity*

Visit the California Architect's Board website (www.cab.ca.gov) to submit an application for reciprocity, along with a $35 fee. In the application, among other things, the applicant must provide and/or demonstrate: a listing of the applicant's previous applications for a California license; proof that the applicant is currently NCARB certified; proof of completion of NCARB architectural experience programs ("AXP"); and a listing of jurisdictions where the applicant currently holds licenses.

- *Step 2: Apply For CSE Exam*

Submit an application and $100 exam fee to take the California Supplemental Examination ("CSE"), a California-specific exam that is a prerequisite to licensure. If the applicant requests transmittal of their NCARB certificate and pays NCARB the $385 transmittal fee, the applicant is immediately eligible to take the CSE (as opposed to waiting a longer period of time for their application to be processed before taking the CSE).

- *Step 3: Study For CSE Exam*

Study for the CSE, including reading the CSE Handbook, studying the CSE Test Plan, reviewing the CSE reference material, and engaging in self-directed study for any areas in the CSE Test Plan for which the candidate has limited knowledge. Study materials may be found at the California Architect's Board website. Please note that the California Architect's Board does not endorse any third-party examination seminars or study guides. The CSE is roughly a 3.5-hour multiple-choice exam.

- *Step 4: Take CSE Exam*

Take (and pass) the CSE. The CSE can be taken Monday through Friday at 17 California sites or 22 out-of-state sites. Results from the CSE will be immediately available after the exam at the testing site.

<u>Steps To Licensure If Reciprocity Does Not Apply</u>

- *Step 1: Establish NCARB Record*

Visit the NCARB website (www.ncarb.org) to establish a record, including providing proof of proper education and experience under the AXP.

The AXP requires that the candidate gain comprehensive experience performing 96 key tasks across six practice-based areas: (1) practice management; (2) project management; (3) programming and analysis; (4) project planning and design; (5) project development and documentation; and (6) construction and evaluation. The candidate must establish a record to document compliance with the experience requirements, which include a total of 3,740 hours across the six areas referenced above, with roughly half of the experience earned in an architectural practice under the supervisions of an architect licensed in the United States or Canada. Experienced designers with more than five years of significant experience may be eligible to submit an online portfolio with samples of their work rather than completing the AXP through the hourly method.

Applicable NCARB fees include: $100 application fee for initial licensure candidates who are not already licensed as an architect in a jurisdiction within the United States and $1,100 certificate application fee, as well as annual renewal fees of $85 for licensure candidates and $225 for registered architects.

- *Step 2: Apply For ARE Exam*

Go to the NCARB website to submit an application to take the Architect Registration Exam ("ARE"), along with a testing fee of $1,410.

- *Step 3: Study For ARE Exam*

Study for the ARE, including reviewing the ARE guidelines, studying the ARE handbook, taking the free ARE demonstration exam, reviewing ARE test preparation videos, attending approved ARE test preparation provider programs, and joining the ARE community to address questions or look for study groups. Study materials are located on the NCARB website. Diligent and dedicated study is recommended for the ARE, which is a 21-hour test covering six topics (same as AXP areas of experience above).

- *Step 4: Take ARE Exam*

Take (and pass) the ARE. An appointment to take the ARE must be scheduled at least three (3) days in advance. The ARE is graded on a pass/fail basis, is graded by a computer and your results will be emailed to you once ready.

- *Step 5: Apply For CSE Exam*

Submit an application to take the CSE. See Step 2 above under section "Steps To Licensure If Reciprocity Applies."

Conclusion

Following the above steps should help assist a candidate to become licensed as an architect in California. Further information regarding the licensing process is set forth on the websites for the California Architects Board and NCARB. Candidates should also make sure to research any other steps that may be needed to provide services in California, including but not limited to, registration with California's Secretary of State.

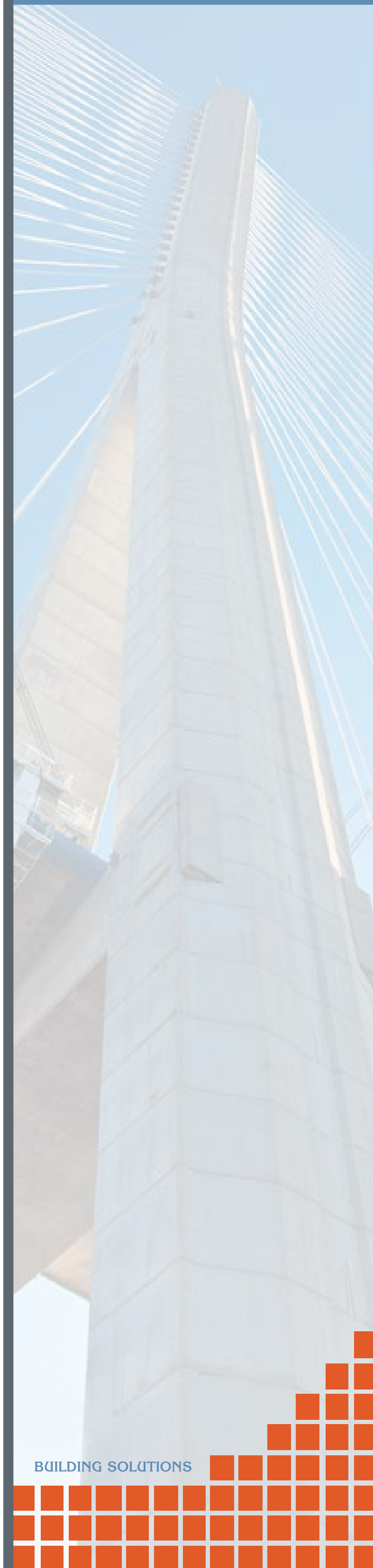
VIRGINIA UPDATE

Leaning-In: Highlights Of Virginia's Mechanic's Lien Law

by Matthew D. Baker, Associate

For contractors seeking to protect their payment rights, a mechanic's lien can be a powerful tool. However, mechanic's lien laws vary across the country and frequently include jurisdiction-specific idiosyncrasies that can ensnare the unwary. Originally codified in 1843, Virginia's mechanic's lien law provides rights which, though robust, can be easily invalidated through a number of procedural or substantive missteps. Appreciating and embracing the complexity of Virginia's mechanic's lien law is essential for contractors seeking to protect their payment rights. While comprehensive treatment of Virginia's mechanic's lien law is beyond the scope of this article, all contractors performing work in Virginia should be aware of the following highlights.

...continued on page 12



Parties Entitled To Claim A Mechanic's Lien

"[A]ll persons performing labor or furnishing materials of $150 or more, including the reasonable rental or use value of equipment..." are potentially entitled to claim a mechanic's lien. Va. Code § 43-3(A). The lien rights of general contractors and first-tier subcontractors are expressly codified. Va. Code §§ 43-4 & 43-7. The lien rights of second-tier subcontractors and suppliers are also expressly recognized. Va. Code § 43-9. Virginia's mechanic's lien law does not expressly recognize third-tier subcontractors as having lien rights. Consequently, although Va. Code § 43-3(A) would appear to include a broad class of parties (i.e., "[a]ll persons...") with lien rights, it is questionable whether third-tier subcontractors have mechanic's lien rights in Virginia. Unlicensed contractors or contractors without the proper class of contracting license are not entitled to mechanic's lien rights. Va. Code § 43-3(D).

Projects Against Which Mechanic's Liens Can Be Claimed

Projects involving "the construction, removal, repair or improvement of any building or structure permanently annexed to the freehold" including railroads are potentially subject to mechanic's liens in Virginia. Va. Code § 43-3(A). Unlike some states, Virginia sets a low threshold ($150 or more of labor or materials) for the value of repairs or improvements to existing structures necessary for lien rights to attach. The owner must authorize the repairs or improvements to an existing structure, however, for lien rights to attach. *Id.* When a person who holds less than a fee simple interest in the property directs the performance of work (i.e., a tenant financed build-out), only such person's interest in the property is subject to a mechanic's lien. Va. Code § 43-20. Mechanic's liens cannot attach against public buildings constructed for public use. *Jones v. Commonwealth*, 267 Va. 218, 222 (2004) (citation omitted).

When Notice Required Prior To Commencing Work

Virginia only requires pre-filing notice for a claimant to preserve its mechanic's lien rights for "one or two family residential dwelling units" where the owner has designated a mechanic's lien agent on the building permit. Va. Code § 43-4.01(A), (C). Such pre-filing notice must be provided within 30 days of when the claimant first performs work or supplies materials or from when the building permit is issued if work was performed prior to issuance. Va. Code § 43-4.01(C). This notice requirement may not apply to certain claimants providing labor or materials for "site development improvements or for streets, stormwater facilities, sanitary sewers or water lines" for individual lots in a development or condominium. Va. Code §§ 43-4.01(C) & 43-3(B).

Enforceability Of Pre-Work Waivers Of Mechanic's Lien Rights

Virginia has recently prohibited the waiver of mechanic's lien rights prior to performing work or supplying materials. Va. Code § 43-3(C). This prohibition extends to mechanic's lien rights held by general contractors, subcontractors, lower-tier subcontractors and material suppliers.

90-Day And 150-Day Deadlines For Perfecting A Mechanic's Lien

In Virginia, a mechanic's lien is perfected by recording a memorandum among the land records in the Circuit Court where the project is located. Va. Code §§ 43-4; 43-4.1. There are two deadlines a claimant must meet to timely record such a memorandum. First, the claimant must record its lien no later than 90 days from the earlier of (i) the last day of the month in which work was performed by the claimant, or (ii) the date the project was "completed, or . . . otherwise terminated." Va. Code §§ 43-4. Second, a claimant can only include work performed or materials supplied within the 150-day "lookback period." Specifically, amounts due for work performed or materials supplied "more than 150 days prior to the last day on which labor was performed or material furnished to the job preceding the filing of such memorandum" cannot be included in the lien. Va. Code § 43-4. There are two exceptions: (i) retainage up to 10% of the contract price, and (ii) sums which are not yet due because the party with whom the claimant is in privity has not received such funds from the owner. *Id.* Improper inclusion of amounts due for work outside the 150-day lookback period can invalidate the lien. *Smith M Bldg. Supply, LLC v. Windstar Properties, LLC*, 277 Va. 387, 392 (2009).

Describing The Property In A Mechanic's Lien

A mechanic's lien may attach against the "building or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment thereof" in connection with which a claimant has provided labor or materials. Va. Code § 43-3(A). Among other requirements, a memorandum of mechanic's lien must include "a brief description" of such property. Va. Code § 43-4. Outside of certain specific circumstances, blanket liens which attempt to burden multiple properties without apportioning the amount of work performed on each are improper. *United Masonry, Inc. v. Jefferson Mews, Inc.*, 218 Va. 360 (1977). Similarly, over-inclusive liens burdening property on which no work was performed yet against which enforcement of the lien is sought are invalid. *Woodington Elec., Inc. v. Lincoln Sav. & Loan Ass'n*, 238 Va. 623, 634 (1989).

What Can Be Claimed In A Mechanic's Lien

A mechanic's lien is a "statutory creation" but "has its foundation in a contract . . . and it is a contractor's performance under the contract that gives rise" to a mechanic's lien. *United Masonry Inc. of Virginia v. Riggs Nat. Bank of Washington, D.C.*, 233 Va. 476, 480 (1987). Consequently, sums due for base-contract work can generally be included in a mechanic's lien. Sums due for work directed by the owner via change order can also generally be included. Interest (but not attorney's fees) can further be claimed. *Am. Standard Homes Corp. v. Reinecke*, 245 Va. 113, 124 (1993). It is worth noting, however, that a mechanic's lien is for "work done and materials furnished." Va. Code § 43-3. Moreover, Virginia's mechanic's lien law is intended to protect the rights of those who have "enhanced the value of [a] 'building or structure' to the extent they have added to its value...." *Addington-Beaman Lumber Co. v. Lincoln Sav. & Loan Ass'n*, 241 Va. 436, 439 (1991). Costs incurred by contractors as a result of delays, acceleration, or inefficiency may not directly enhance the value of a building. Consequently, contractors should approach the inclusion of such claims in their lien with caution. In some situations, recording a stand-alone lien for such costs may be appropriate.

Notice Required In Connection With Recording A Mechanic's Lien

Virginia requires the provision of notice to the owner to properly perfect a mechanic's lien. General Contractors must "file" along with the lien "a certification of mailing a copy" to the owner. Va. Code § 43-4. Failure to file this certification can invalidate a general contractor's lien. *Britt Const., Inc. v. Magazzine Clean, LLC*, 271 Va. 58, 64 (2006). Similarly, subcontractors are required to "give notice in writing to the owner of the property...of the amount and character of [its] claim." Va. Code § 43-7(A). Sub-subcontractors and suppliers are further required to "give notice in writing to the owner...and to the general contractor...of the amount and character of [its] claim." Va. Code § 43-9.

Six Month Deadline For Filing Suit To Enforce A Mechanic's Lien

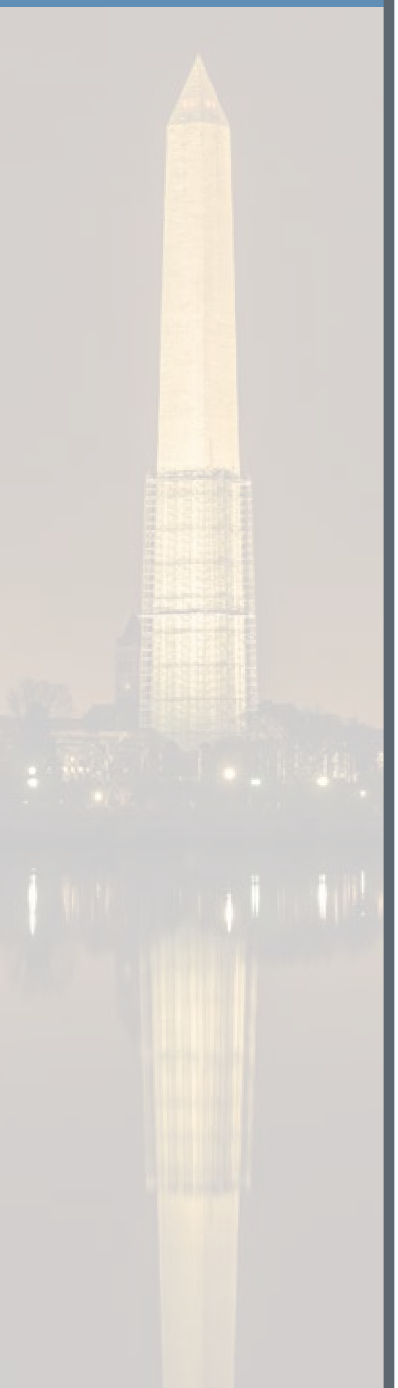
To protect its rights, a lien claimant must not only perfect its lien by timely recording a memorandum of lien, but also must timely file a lawsuit to enforce the lien. Va. Code §§ 43-17, 43-22. Such suit must be filed within "six months from the time when the memorandum of lien was recorded or after sixty days from the time the building, structure or railroad was completed or the work thereon otherwise terminated, whichever time shall last occur." Va. Code § 43-17. Failure to timely file suit renders a claimant's mechanic's lien unenforceable. *Id.*

The Prior Payment Defense

A subcontractor cannot enforce a mechanic's lien in an amount in excess of what the owner owes the general contractor at the time notice of the lien is given or shall thereafter owe the general contractor. Va. Code § 43-7(A). Consequently, "a subcontractor cannot enforce a mechanic's lien unless the owner is indebted to the general contractor." *In re Richardson Builders, Inc.*, 123 B.R. 736, 738 (Bankr. W.D. Va. 1990). The owner may rely on its own claims against the general contractor to set off the subcontractor's lien claim. *Id.* The defense of prior payment applies down the privity ladder. Va. Code § 43-9.

Conclusion

Virginia's mechanic's lien law includes many nuances and facets not addressed in this overview. It is always advisable to consult with knowledgeable counsel regarding how Virginia's mechanic's lien law might apply to the facts of a specific project. Familiarity with the basic aspects of Virginia's mechanic's lien law, however, will help construction professionals identify potential issues on their Virginia projects. Ultimately, construction professionals who are willing to "lean in" and understand the complexities of Virginia's mechanic's lien law will be best positioned to protect and preserve their payment rights.



How To Avoid A Bankruptcy Emergency

by Jennifer L. Kneeland, Senior Partner

In 1999, during the first semester of my 3L experience in law school, I served as a judicial extern for the Chief Judge of the U.S. District Court for the District of Delaware. At the time, the Delaware District Court heard bankruptcy matters as a matter of first impression, and they were not automatically referred to bankruptcy judges. I was working in chambers the day that Planet Hollywood filed its chapter 11 bankruptcy case. At the time, Planet Hollywood was not a famous casino - it exclusively operated restaurants endorsed by the A-listers of the time, including Sylvester Stallone, Bruce Willis, Demi Moore, and the "Arnold" to name a few.

There was a flurry of activity in chambers. We needed to get our judge ready to hear first-day motions and make critical decisions that would impact the case. We studied employee wage motions, debtor-in-possession financing motions, issues related to protecting secured creditors' interests and so on. I chuckle now when I think back and realize that my career was permanently shaped by Planet Hollywood restaurants, but thanks to the introduction I found a focus for my legal career. Creditors' rights and bankruptcy is fast-paced. It can be fraught with risk and anyone who flirts with bankruptcy or its ripple-effect should be well-prepared. These characteristics spoke to me then and continue to resonate now. I like resolving tough problems under pressure.

During the time that has passed since my Planet Hollywood experience, I have come to learn that being a bankruptcy and creditors' rights attorney can be more aptly analogized to the life of a plumber than a famous A-list movie star. I see my job this way because my clients typically call me when the proverbial shower drain has backed up and a house full of company is on its way for an extended holiday weekend. No one really wants a house full of un-showered in-laws, just as no one wants to lose millions of dollars because an unmitigated credit risk or contract party is swirling the drain.

At the risk of writing myself out of future work attending to "emergency clogged drains," I will share 5 tips to mitigate risk and maximize recovery. Or, to harken back to my plumber analogy, 5 tips to keep your pipes in ship shape so that they will not clog up the day before your in-laws arrive for Thanksgiving weekend.

1. If You Have The Right To Secure Collateral, Exercise It!

For sureties, nearly every indemnity agreement that crosses my desk gives a surety the right to file a UCC-1 financing statement. Filing a UCC-1 is a basic step that a creditor can take to elevate their priority over other creditors and stake a more meaningful claim to assets. However, most sureties do not file UCC-1's unless a default has arisen. This is akin to closing the barn door after the livestock has already wandered away.

I have been told that sureties often choose not to file UCC-1 financing statements because they do not want to impact their principal's ability to secure additional debt facilities. My answer to this concern is to file a UCC-1 financing statement and later, if requested, the surety can consent to a release or carve-out to aid a principal who is a good customer.

There are several advantages to this approach. Not only will the surety jump out of the starting gate with a strong position vis-a-vis collateral if possible, but the surety will have a seat at the table and gain crucial information about a principal's financial transactions that post-date the institution of a bonding program. This approach also avoids the dreaded surprise after a default has occurred that there are no longer any available assets for a surety to lien.

For other creditors who are not sureties, consider filing mechanic's liens early and often. Banks and financial institutions should timely default non-paying customers. Landlords should sweep security deposits as soon as leases allow, demand new security and issue timely default letters. The creditor plays a part in preventing the snowball effect from a monetary default that builds out of control.

2. Are Your Contracts Up To Date?

The law is always evolving, particularly in the area of bankruptcy and creditors' rights.

There is a growing trend among the circuits to allow unsecured claims to increase during the pendency of a bankruptcy case. Typically, unsecured claims are fixed on the bankruptcy petition date and are not permitted to accrue post-petition interest or attorneys' fees. There is a growing body of circuits that now permit unsecured claims to increase for post-petition interest or attorneys' fees *if* the underlying contract giving rise to the claim makes adequate provision for the accrual of these post-petition fees. In fact, the Fourth Circuit (covering Maryland, Virginia, West Virginia and North and South Carolina) recently changed its stance last year.

Making a small change in contract language to specify the fees and costs that accrue after the filing of a bankruptcy case are chargeable and can make quite a difference to the potential for recovery. In the Pacific Gas & Electric chapter 11 case, for example, there is a proposed plan that is making its way through the bankruptcy court approval process to pay unsecured creditors in full. In cases such as this, it makes all the sense in the world to ensure that your claim includes a complete and full damage calculation based upon underlying contract language that triggers and maximizes a creditor's rights under the law.

3. Don't Wait To Address A Concern.

If you have a concern about the potential for a loss, the chances are other creditors are also thinking along similar lines. Nine times out of ten, it is best to make haste by gathering as much information as possible regarding the financial position of the principal and indemnitors. I suggest learning about the challenges that the principal and indemnitors must overcome and the tools that can be used to get out of the woods. Next, it is crucial for the creditor to make its own plan (sometimes it's good to make several plans – see Tip 5 below). A creditor's plan should include milestones its debtor must reach within certain timeframes. If a milestone is missed, a creditor should take steps to fortify its position by working the steps in its previously formed recovery plan.

4. Indemnitors Who Are Husband And Wife – Do Not Be Afraid To Exercise The Right To Full And Complete Payment Against Both Spouses.

Most of my clients do a good job in securing the financial guaranties of both husband and wife. Many clients, however, fall down when it comes to leveraging a husband and wife's guaranty. This choice may arise from empathy for an indemnitor that has fallen down on its luck. Or, maybe there is a willingness to overlook a spouse's guaranty because you believe that there may not be a pot of gold at the end of the rainbow.

It may sound cold, but all is fair in love and war, and a substantial loss of money does not invoke feelings of love. Recently, I had the privilege of addressing members of the Washington, D.C. chapter of the Walter C. Chandler Inns of Court. Along with my fellow panelists, we addressed Inns of Court members, including approximately 6 active and retired bankruptcy judges about whether it is appropriate to permit a bankruptcy discharge for a so-called "innocent" spouse who was inactive in the business, giving rise to financial collapse. Although careful not to give advisory opinions, the bankruptcy judges in the audience reflected, universally, that the integrity of our bankruptcy system must never be compromised. The audience eschewed the concept of the "innocent spouse." Simply put, a spouse who participated in a bankruptcy case with her husband and signed on to every misstatement and omission, and failed to fulfill bankruptcy duties just like her spouse, faces the same jeopardy as her husband. For a creditor, achieving denial of a discharge claim allows a creditor to remove the impediment of the bankruptcy. Upon success, the creditor has a powerful tool against its debtors and can demand payment and seek collection until the debt is paid in full.

5. Persistence pays off.

I typically form several plans of attack when I create a strategy to support a client. You will often hear me refer to your "menu." The "menu" is a list of options, handicapped with my estimate for success and accompanied with a best-guess budget. Clients get to choose which options they want to implement. Sometimes it is necessary to choose several different strategies that are executed in seriatim or in a blitzkrieg fashion. Every case is different, every debtor is different, and every outlay of potential assets from which to recover is different. The key to recovery is tenacity. Staying on top of the facts and the law is the best recipe for success.

Please reach out to me as I would love to support your work through these 5 tips. And, of course, if your proverbial shower drain gets unexpectedly clogged the day before the in-laws are due over for a long, holiday weekend, I am always willing to provide the support needed to resolve emergencies.

BUILDING SOLUTIONS®

WATT TIEDER

WATT, TIEDER, HOFFAR & FITZGERALD, L.L.P.

Attorneys at Law

PRSRT STD
US POSTAGE
PAID
PERMIT #6418
DULLES, VA

WATT TIEDER

WATT, TIEDER, HOFFAR & FITZGERALD, L.L.P.

1765 Greensboro Station Place, Suite 1000
McLean, Virginia 22102

1765 Greensboro Station Place
Suite 1000
McLean, Virginia 22102
(703) 749-1000

4 Park Plaza
Suite 1000
Irvine, CA 92614
(949) 852-6700

1200 Brickell Avenue
Suite 1800
Miami, Florida 33131
(305) 777-3572

10 South Wacker Drive
Suite 1100
Chicago, Illinois 60606
(312) 219-6900

175 Federal Street
Suite 1225
Boston, MA 02110
(857) 504-1140

HFK Rechtsanwälte*
Maximilianstrasse 29
D-80539 Munich, Germany
Phone 011 49 89 291 93 00

**Independent Law Firm*

Global Construction & Infrastructure
Legal Alliance
91, rue du Faubourg Saint-Honoré
75008 Paris, France
Phone 33 (0)1 44 71 35 97

The Watt, Tieder, Hoffar & Fitzgerald newsletter is published quarterly and is designed to provide information on general legal issues that are of interest to our friends and clients. For specific questions and concerns, the advice of legal counsel should be obtained. Any opinions expressed herein are solely those of the individual author.

Special Thanks to Editors, **Robert G. Barbour**, **William Groscup**, **Christopher M. Harris** and **Marguerite Lee DeVoll**.

BUILDING SOLUTIONS