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Attorneys at Law

Winter 2018

# Celebrating 40 Years of Service to the Construction and Surety Industries

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# Watt Tieder Celebrates Its 40th Anniversary

On January 28, 2018, Watt Tieder celebrated its 40th anniversary. As we officially enter our fifth decade, we THANK YOU – our clients, colleagues and friends for your trust and support.

Forty years ago, six attorneys led by Bob Watt and Jack Tieder formed a boutique law firm that specialized in public and private construction and surety law issues. In the 40 years that followed, the law firm grew significantly, opening offices in California, Seattle, Chicago, Las Vegas and Miami in addition to the law firm's main office in Tysons Corner, Virginia.

In the 1970s and 1980s, during a time of massive infrastructure growth in the U.S., the law firm had at least some involvement in almost every mass transit and clean water project in the country. In the years that followed, Watt Tieder worked on legal issues related to the "Big Dig" in Boston, the levee failures in New Orleans following Hurricane Katrina, and the Alaskan Way Viaduct Replacement project, among hundreds of other public and private construction projects across the country.

As a compliment to its thriving coast-to-coast surety and construction practice in the U.S., Watt Tieder developed a substantial international practice that has included work on projects in Greece, Ghana, New Zealand, Dubai, Sri Lanka, Singapore, Germany, Canada, Korea and the post-conflict reconstruction of Afghanistan - to name just a few. Watt Tieder provides training and educational seminars on a wide array of issues to construction companies abroad, and is a founding member of the Global Construction and Infrastructure Legal Alliance ("GcilA"), which offers dispute resolution, litigation, and advisory services on Public-Private Partnership



*Founding partners Bob Fitzgerald, Bob Watt, Jules Hoffar and Jack Tieder*

projects, government contracts and private construction projects around the world.

In recent years, Watt Tieder twice has been named the Leading Construction Law Firm in the United States by Chambers & Partners. Five Watt Tieder partners have been inducted as Fellows in the American College of Construction Lawyers. Also, dozens of Watt Tieder attorneys have been honored over the past 40 years by National and State Best Lawyers, Who's Who, Super Lawyers and Martindale Hubbell, among others.

We enter our fifth decade with more than two dozen partners with in excess of 20 years of experience and outstanding individual reputations in the industry. That wealth of experience and talent is now managing and training the next generation of young attorneys so that the legacy of excellence established by Watt Tieder over its first 40 years will endure. Look for new faces and, potentially, new office locations in coming months and years.

Once again, our sincerest thanks go out to all of our clients, colleagues and friends who have been instrumental in our success and who have shown great confidence in our services over the past 40 years. We look forward to continuing those relationships into our fifth decade and beyond. ◀

Watt Tieder newsletters are posted on our website, [www.watttieder.com](http://www.watttieder.com), under the Resources Tab. If you would like to receive an electronic copy of our newsletter, please contact Peggy Groscup at: [pgroscup@watttieder.com](mailto:pgroscup@watttieder.com)







## Getting Results: Creditors' Rights And Bankruptcy Group Year In Review – 2017

by Jennifer L. Kneeland, Partner

This year, 2018, is an important year for Watt Tieder because we are celebrating our 40th anniversary. It goes without saying that Watt Tieder's growth over the past forty years is a significant achievement. Adding to this growth is the strength of our Creditors' Rights and Bankruptcy Group, which I have the honor to lead.

At the beginning of 2017, I joined Watt Tieder and brought my Creditors' Rights and Bankruptcy practice to the firm. Since we bring new capabilities to the firm, we wanted to explain the breadth of our practice and how we can help and serve clients.

Simply put, we handle business matters that involve creditors' rights, bankruptcy and other insolvency related issues. Our services range from more traditional litigation, collection and recovery techniques to negotiating debt restructuring and work-outs. We have a national practice and a diverse set of clients. They include banks and other financial institutions, landlords, real estate investment companies, sureties, contractors, estates, non-profits, home builders and other parties in the construction industry.

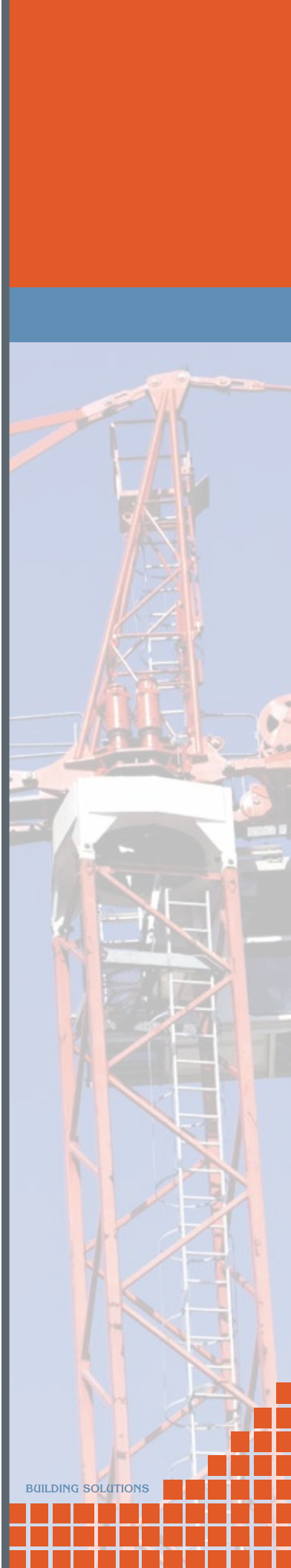
In the past year, we have had many achievements for our clients, several of which I highlight below. Our effective work is the result of the support that Watt Tieder has provided the Creditors' Rights and Bankruptcy Group, as well as the opportunity to work with such a talented and dynamic group of attorneys each day. Each situation is unique. However, our achievements roundly demonstrate our methods and how we turn lemons into lemonade for our clients.

- For a Pennsylvania-based bank, we successfully obtained significant confessed judgments against the bank's borrower (a Maryland-based company) and guarantors. We garnished all of the company's bank accounts, cutting off its access to cash completely. The borrower turned to the bankruptcy court

for protection, but we obtained several bankruptcy court orders to protect the bank that proved useful in the long run. Using the tools available under the Bankruptcy Code, we discovered that the company was diverting funds in violation of the bankruptcy court orders that we obtained for the bank. In response, we successfully moved the bankruptcy court to appoint a chapter 11 trustee and wrested control of the company away from its owners. The trustee currently operates the company and is in the process of completing contracts, winding the business down, and prosecuting claims against third parties who were improper recipients of cash. With the trustee in place, our client receives accurate information regarding the debtor and has a stronger hope of recoupment than it would if the displaced owners continued to run the business.

- In Long Island and Brooklyn, New York, we conducted debtor exams on behalf of a surety against several indemnitors who are facing significant judgments on defaulted indemnity agreement obligations. We learned that an indemnitor had recently cashed-out a significant life insurance policy and was attempting to use the funds. With this information, the Watt Tieder team obtained immediate relief from the court, which ordered that the funds be paid to the registry of the court to protect the surety and preserve the cash from dissipation. At this time, the money remains in the registry of the court, poised to pay the surety when final judgment is entered.
- In Montana, on behalf of another surety, we intervened in a chapter 11 bankruptcy case to increase the anticipated return to such surety by

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over five-fold. In addition, due to our significant contribution that benefitted not just the surety, but other similarly situated creditors, we successfully petitioned the bankruptcy court for payment of a portion of our legal fees so that the surety could be reimbursed for the fees that it paid to Watt Tieder.

- In the State of Washington, we negotiated for and obtained full payment on a surety's claim in a chapter 7 bankruptcy case. Payment included all of Watt Tieder's legal fees and the surety's loss adjustment expenses. What is more, we monetized a portion of the hours spent by the head of surety claims on the file. We successfully negotiated with the chapter 7 trustee to pay additional money to the surety on account of the surety's internal time on the file.
- We are also active in the Toys "R" Us bankruptcy case that is pending in Richmond, Virginia. As you may have read in the newspapers, Toys "R" Us' bankruptcy attorneys have been wildly successful in the bankruptcy case. They have successfully prosecuted all of their motions in the case, even obtaining court authority to pay tens of millions of dollars to the same executives whose poor business decisions, in part, lead to the bankruptcy filing in the first place. By my count, there has been only one instance where Toys "R" Us has "lost" a motion. Who did Toys "R" Us lose to? Watt Tieder. We filed a motion seeking relief from the automatic stay so that our client could extricate itself from the bankruptcy case and obtain adjudication by a state court on its claims against Toys "R" Us. Our written motion was so persuasive that Toys "R" Us called to concede, saving the client the significant cost of going to trial.
- On behalf of a bank client, we completed a work-out involving a grocery store in a strip mall that served as the bank's collateral. The borrower operated a grocery store and owned the real estate that housed the store. The real estate and all of the borrower's assets were pledged as collateral to the bank. When the bank retained us, it had little control over its collateral and the borrower was behind in debt service. Using tools available to us under state law, we removed the borrower from control of the grocery store and placed the real

estate into receivership. We selected our own receiver and management team. Next, we kicked the borrower grocery store out of the real estate that it owned, and re-negotiated a new store lease in the space with another grocery store. This allowed the bank to receive regular debt service on its troubled loan from a party who was more solvent than the borrower. We then set about finding interested bidders who would be willing to purchase the property at a foreclosure sale and take an assignment of the new grocery store lease. The income stream from the new lease pushed up the value of the bank's collateral significantly, and helped bring interested buyers to the table. Our foreclosure sale was successful, resulting in a significant recovery for the bank.

- In Indiana, we successfully caused the ITT Educational Services bankruptcy estate to pay a significant rent claim to our client. Our client received cash before other similarly situated creditors and was able to close its file and re-lease its space to someone new, without becoming embroiled in the bankruptcy case.
- Most recently, in Maryland, we were approached by a landlord client who owned an office building. The landlord's most visible tenant enjoyed a below-market lease for space that could be re-let at a significantly higher rental rate. The tenant filed a chapter 11 bankruptcy. During the bankruptcy, due to the significant value in the lease, the debtor-tenant could have sold and assigned its lease to make a profit. The landlord's charge to Watt Tieder was to reclaim the space so that it could be re-let at an appropriate market rate. As part of the litigation, we took a professional but extremely aggressive deposition of the tenant's corporate designee. The next day, the tenant's attorney called and agreed to our client's demands. Not only did we reclaim the space, we required the tenant to maintain monthly payments to our client during the entire case. Thus, we accomplished the client's goal to recover his space, plus made sure that the client continued to receive cash from his adversary during the bankruptcy litigation.

During my eighteen years of practice, I have learned that smart, consistent, and tenacious

legal strategy is the most effective way to deliver results. To that end, our group typically implements an aggressive and strong approach in order to obtain the results that we can for our clients. I would be remiss if I did not express my gratitude and acknowledge my clients for putting their trust in me and allowing me to represent their interests vigorously. There is

no better feeling than delivering a great result that allows the client to close a chapter on a problem file.

If you find that you are in need of creditors' rights, bankruptcy, or other insolvency-related help, please give me a call. I would be delighted to assist you in any manner that I can. ◀



## The Ninth Circuit To Determine The Limits Of *Escobar's* Two-Part Test For Implied Certification Under The False Claims Act

by Robyn N. Burrows, Associate

### Introduction

Almost two years ago, the Supreme Court in *Universal Health Servs. v. U.S. ex rel. Escobar* upheld the implied certification theory of liability under the federal False Claims Act ("FCA"). Applying a two-part test, the Court provided that implied liability would attach where the defendant (1) makes specific representations to the government about goods or services (2) while failing to disclose noncompliance with a material statutory, regulatory, or contractual requirement, rendering those representations "misleading half-truths."

Many courts post-*Escobar* have considered this test as the exclusive means for establishing liability under the implied certification theory. Other courts, however, have held that the test is not a pre-requisite for applying implied certification and that *Escobar* does not always impose the requirement of "specific representations." A group of relators in the Ninth Circuit has recently advocated for this more expansive interpretation. On December 6, 2017, the Ninth Circuit heard oral argument in *U.S. ex rel. Rose et al. v. Stephens Institute*. The parties' arguments in this case illustrate the continuing debate over the proper bounds of the implied certification theory of liability under *Escobar*.

### Factual Background

The relators in *Stephens Institute* are former admissions representatives at the Academy of Art University ("AAU"), an art and design school in San Francisco. AAU receives federal funding under Title IV of the Higher Education Act. Under Title IV, institutions

may receive funds through student loans or grants but are required to comply with a myriad of regulations, including the incentive compensation ban ("ICB"). The ICB prohibits schools from compensating recruiters based on their success in securing enrollments. The ICB was intended to prevent for-profit universities from incentivizing recruiters to enroll poorly-qualified students that may not benefit from federal subsidies or that might be unable to repay federal student loans.

The relators claim that AAU violated the ICB by improperly incentivizing recruiters through bonuses and other compensation directly tied to enrollment quotas. To disguise its ICB violations, the relators claimed that the university would "reverse-engineer" qualitative performance reviews to support payment decisions that were actually based solely on an employee's enrollment figures. The relators alleged that AAU submitted legally false claims to the Department of Education ("DOE") when it requested Title IV program funds for students while in violation of the ICB.

### District Court Limits *Escobar* Test

Upon the close of discovery, AAU filed a motion for summary judgment. The district court found triable issues as to whether AAU submitted impliedly false claims and, accordingly, denied AAU's motion as to the theory of implied certification. The district court, however, granted a stay of proceedings pending the Supreme Court's decision in *Escobar*, which considered the scope and viability of the implied certification theory. As noted above,

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the Court in *Escobar* upheld implied certification as a valid basis for FCA liability where “at least” two conditions are met: (1) the request for payment makes specific representations about the goods or services provided; and (2) the failure to disclose noncompliance with a material statutory, regulatory, or contractual requirement makes those representations misleading half-truths. As to the second of these conditions, the Supreme Court also established a “rigorous” and “demanding” materiality standard. Thus, under *Escobar*, courts must evaluate multiple factors when considering an implied certification theory, including among others whether the government pays a claim despite its actual knowledge of a violation.

Following *Escobar*, AAU filed a motion to reconsider the district court’s summary judgment order, arguing that the relators’ claims failed *Escobar*’s two-part test. AAU claimed that because an ICB violation does not result in automatic suspension from Title IV participation, AAU remained an “eligible” institution and, consequently, did not make any misleading representations in requesting funds. AAU also argued that the “rigorous” materiality standard was not satisfied. AAU noted that DOE had *never* refused payment of a claim because of noncompliance with the ICB. In fact, established DOE policy provided that ICB violations would be treated as instances of regulatory noncompliance and not issues of fraud.

The district court found that AAU was “incorrect as a matter of law that *Escobar* established a rigid ‘two-part test’ for falsity that applies to every single implied certification claim.” The district court explained that *Escobar* did not set forth an absolute requirement for establishing implied certification, but rather left open the possibility of other circumstances triggering liability. Moreover, even assuming the two-part test applied, the district court determined that AAU’s request for payments was misleading because AAU would not have been an “eligible” institution due to its ICB violations. The court further found that the ICB violations were material, stating that DOE’s lax enforcement history was “not terribly relevant to materiality.” The court also noted that DOE had entered into numerous settlement agreements with schools and assessed fines for ICB violations, demonstrating that DOE “cared about the ICB.” Accordingly, the district court denied AAU’s motion for reconsideration.

### Arguments On Appeal

AAU appealed the district court’s denial to the Ninth Circuit, which heard oral argument on

December 6, 2017. The circuit court judges’ questions and comments revealed the difficulty in discerning the scope of *Escobar*. In response to arguments from AAU’s counsel, for instance, Judge Smith stated that he “never thought about the False Claims Act in this way before,” requiring him to take an in-depth look at *Escobar* to determine whether the two-part test supplies the *only* basis for establishing liability under the implied certification theory.

Despite encountering some difficulty in reconciling the *Escobar* test with the facts before them, the Ninth Circuit judges nevertheless appeared sympathetic toward the relators’ position. For example, Judge Smith’s questions focused on whether *Escobar* contained any language mandating the two-part test in every case. Although AAU argued that *Escobar* established a “minimum threshold,” Judge Smith noted that *Escobar* did not explicitly define the bounds of the test. In the absence of express language to the contrary, he suggested that *Escobar* addressed a limited situation rather than imposing a wholesale test for implied certification. Judge Graber similarly hinted as to the potentially limited applicability of the two-part test, calling into question prior Ninth Circuit opinions that may have “misinterpreted” or “overshot what *Escobar* requires.”

Like the district court, the Ninth Circuit also questioned the relevance of the government’s past enforcement actions. In this regard, for instance, Judge Smith suggested that the court should not decide materiality as a matter of law simply because there is no evidence of the government revoking participation in the Title IV program. The relators agreed with this characterization. Judge Graber also appeared to sympathize with the relators’ position, stating that there may be many reasons why DOE did not decide to pursue enforcement actions. Thus, the circuit court indicated that the government’s decision not to enforce a particular requirement or regulation does not necessarily negate its materiality; rather, such a decision remains only one factor for the court’s consideration in determining whether a violation of the FCA by implied certification has occurred.

### Conclusion

The Ninth Circuit’s decision will add to the mounting case law debating the scope of *Escobar*’s two-part test for implied certification. Assuming courts continue to split over this issue, the Supreme Court may soon have another opportunity to clarify the bounds of implied certification as a basis for FCA liability. ◀



Kathleen O. Barnes

## Hot-Tubs And Other ADR Remedies For Disputes That Ail You (Part 2)

by Kathleen O. Barnes and Christopher J. Brasco, Senior Partners, and George “Trip” Stewart, Associate



Christopher J. Brasco

### Advantages

By far, one of the most significant advantages to hot tubbing is its efficient approach to presenting expert testimony. Because the experts are able to identify topics on which they agree and disagree early in the process, they can then focus their presentations and discussions on the topics that are actually at issue. This organization alone in turn reduces the overall time spent on presentation and



George “Trip” Stewart

cross-examination. In fact, in one of the first Australian cases in which expert evidence was presented concurrently, a hearing that was estimated to last six months was shortened to just five weeks thanks in part to the use of hot tubbing. Such a reduction in hearing time should translate directly to a reduction in costs.

The hot tubbing process is also useful in situations where putting an expert through a traditional direct, cross, and redirect process would be time-consuming and costly. In the all too common situation where multiple experts testify over the course of several days or weeks, the trier of fact must try to recall previous experts’ statements and how they compare to the current expert’s positions. Needless to say, this task is difficult and may lead to confusion or the acceptance of the most recently presented testimony. Where concurrent expert testimony takes place, however, the arbitrator or mediator has the benefit of immediately hearing the differences in the experts’ opinions and can pursue a topic further should he or she choose.

Hot tubbing also reduces the amount of information presented, meaning the trier of fact has less to decipher when reaching a decision.

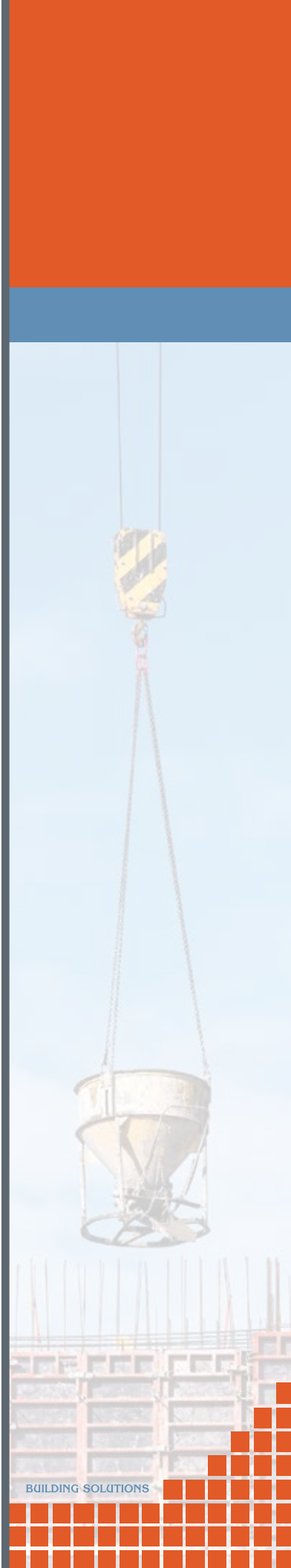
Concurrent expert testimony not only reduces the duration of the hearing as a whole, but it also reduces the amount of information that must be remembered at any given time. As a result, the mediator or arbitrator can make more direct comparisons between the positions staked out by the experts, which enhances their overall ability to rationally analyze each party’s argument. Moreover, by cutting away superfluous technical and scientific testimony about undisputed topics, the arbitrator or mediator may spend more time focusing on the actual disputes in the case rather than wading through very complex and technical material that is often unnecessary for the fact-finder to know or understand.

Importantly, hot tubbing helps to decrease any bias present in expert testimony as it promotes an informal and open discussion that generally is less adversarial than the conventional approach. It also may even help reduce an expert’s willingness to jump to unreasonable conclusions or be outright dishonest because the expert is testifying with others in his or her own peer group, meaning the expert’s opinion could be challenged at any point during the process. At the very least, having experts testify with others of equal status and stature is likely to lessen instances of embellishment, avoidance of tough issues, and harsh rhetoric. This benefit may prove to be particularly useful should attorneys wish to reduce overall hostility in an already contentious matter.

Additionally, the experts address the topics in their own words, often not relying on the attorney’s skills in direct or cross-examination to arrive at the relevant information. The perception that the expert is delivering his or her own opinions almost certainly will help bolster the expert’s credibility. Furthermore, the expert is made to feel more like an independent and impartial third party under this arrangement.

Hot tubbing may also prove especially effective when conveying scientific or statistical information because it enables the fact-finder to observe a public peer review by other experts also concurrently testifying. It allows

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the arbitrator or mediator to understand the methodologies and analyses that the experts undertook to arrive at their conclusions. Also, because the trier of fact has the opportunity to ask their own questions, the arbitrator or mediator would have even more opportunities to enhance their understanding by participating in the discussion that unfolds before them.

Finally, the actual physical placement of the experts themselves helps to affirm a perception that the experts are neutral information-providers rather than party-hired advocates. Because experts typically sit side-by-side during the hot tubbing process, the adversarial relationship between the parties is downplayed significantly. As one Australian court noted, “There is . . . symbolic and practical importance in removing the experts from their position in the camp of the party who called them.” Not only does this placement help increase the credibility of the experts before the arbitrator or mediator, it also places the experts on an even footing in order to prevent one expert’s opinion from appearing dominant solely because that expert is more at ease presenting his or her testimony in an adversarial setting.

#### **Disadvantages**

Of course, hot tubbing is not without its disadvantages. One issue with concurrent expert testimony is that the more experienced, confident, or assertive experts will likely dominate the procedure and, therefore, will more likely appeal to the fact-finder. More so, when experts are not well-matched and have differing levels of credentials or experience, those experts with superior qualifications may prevail despite the inferiority of their opinions.

There also exists the possibility that attorneys will coach their experts on how to respond to questions based on the opinions of the other party’s expert. Although this disadvantage exists in conventional expert testimony practices, one of the purposes of hot tubbing is to eliminate biased and preconceived answers in favor of natural and flowing conversation among multiple experts. If this in fact does occur, it similarly leaves the tribunal in a position where it must decide the merits of the case in the face of a deadlock between the opposing party experts.

Another natural issue with concurrent expert opinion is that without the direction of a skilled moderator, the hot tubbing process will be almost entirely useless. In one scenario, the concurrent testimony may devolve into nothing more than a squabble between the parties. In another scenario, the experts may simply fail

to engage one another and the moderator may fail to intervene, meaning the lawyers revert to the traditional direct and cross-examination styles to elicit answers from the witnesses. In yet another scenario, while the experts may get along and readily converse, they may do so at such a high-level that only those trained in the field will be able to understand.

Arbitrators, mediators, and lawyers also have concern as to how their roles might change if hot tubbing were incorporated more regularly into proceedings. Arbitrators and mediators may resist implementing hot tubbing practices because such a procedure would place additional managerial burdens on them. Alternatively, attorneys often worry that hot tubbing will remove their control of witness examination, thereby disrupting their planned trial strategies. Because attorneys typically will not be present at the “meet and confer” stage of hot tubbing, attorneys may worry that their expert will stipulate to a seemingly innocuous and unimportant fact that later proves to have a negative impact on the case. As such, many of the key participants in the hot tubbing process may simply find the process to be too radical to suit their interests.

Also, some practitioners argue that hot tubbing is simply not conducive to document-intensive cases. The conversational nature of concurrent expert testimony may not be well-suited to expert testimony focused on particular documents, especially when there are voluminous documents that require expert analysis. It also may be very risky to call the tribunal’s attention to large numbers of documents without being prompted to do so. At the very least, having a panel of experts discuss each portion of a number of documents ad nauseam may not be the most efficient use of precious hearing time.

#### **Best Practices For Implementing Hot Tubbing**

One of the fundamental aspects that will determine whether hot tubbing is successful is the tribunal’s ability to facilitate and control the proceeding. This means that the arbitrator or mediator is well-prepared and familiar with the issues being discussed by the experts so that they can better guide discussion. Thus, as moderator of the session, the arbitrator or mediator must ensure that controversies at issue are identified and discussed, which likely entails significant preparation and planning on their part. Moreover, the arbitrator or moderator will help set the tone of the process and must actively work to prevent the hot tubbing session from taking on derogatory or otherwise negative and combative tones.



The expert must also have a number of critical traits due to the fact that the attorney will not be guiding the whole of the expert's testimony via direct and cross examinations. First and foremost, the expert must be able to convey his or her ideas in simple terms using easy-to-follow examples. The expert should be able to communicate his or her ideas in a way that is not condescending and clarifies what typically amounts to highly technical or scientific processes.

Second, the expert must possess the ability to question other experts during the hot tubbing process to effectively underline any areas of error or inconsistency. The expert, however, must be able to conduct this line of questioning without appearing too antagonistic or hostile. Accordingly, it is important that experts have the same level of expertise so that no expert feels that he or she is more qualified to discuss a particular topic and appears condescending or patronizing toward other experts. Additionally, an expert also should be a good listener and make use of the information the other experts

present during the hot tubbing session. Provided that the hot tubbing process is a collaborative process, the expert should be able to build off the information provided by others to enhance his or her own argument.

Finally, the expert must be aware of the overall message his or her party is attempting to convey and ensure that he or she stays on message during the hot tubbing session. This of course means that the expert will know the nuances of the case and understand what facts and issues may potentially impact their client. The expert, therefore, must always be mindful of their client's position and seek to participate in the hot tubbing session in a way that serves to support their client's position in the matter. ◀

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## ▶ CONTRACTS ◀◀



Albert L. Chollet, III

### The Sovereign Act Doctrine And Federal Contracts

*by Albert L. Chollet, III, Partner and Erica Lauer, Associate*



Erica Lauer

Consider this hypothetical: The federal government notifies a contractor in a conflict zone of changes to site access security protocols due to external threats. These security protocol changes starkly contrast with the contract's protocol provisions and will significantly and negatively impact

position that the directive is a sovereign act that does not justify a contract adjustment. Can the federal government avoid liability for the added costs and time resulting from a deviation to the agreement solely by invoking the Sovereign Act Doctrine? As set forth below, the answer likely depends on whether the government's action is related to a broader policy goal.

#### The Sovereign Act Doctrine – The Government's Defense To Claims

Many claims arising out of federal contracts relate to constructive changes to the contract. To pursue a constructive change claim, the contractor must demonstrate that it was required to perform extra-contractual work without a formal change order and that the extra-contractual work was either ordered by the government or caused by the fault of the government. These claims frequently arise where government action or inaction prevents a contractor from proceeding in the most efficient manner. The contractor bears the burden

the contractor's performance by increasing the time and effort for cleared workers to obtain daily access to the project site. The changes will also interfere with material deliveries to the site. When the contractor submits a request for equitable adjustment for direct costs and a time extension resulting from the protocol changes, the contracting officer denies the request. The federal government's denial is due, in part, to its

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of proving its entitlement to an adjustment, including establishing liability, causation, and injury by a preponderance, as well as proving its damages with sufficient certainty. Even if the contractor can satisfy these burdens, the government may still invoke the Sovereign Act Doctrine to avoid liability.

The Sovereign Act Doctrine allows the government to escape liability for contractual breaches when the government's action that hinders the contract's performance is considered a "public and general act" attributable to the government as a sovereign. The United States Supreme Court has held that an act is "public and general" in nature when its impact on public contracts is incidental to accomplishing a broader government objective. Therefore, to invoke the Sovereign Act Doctrine, the government's action must serve the general public welfare and not be targeted toward a particular contractor or contract. For example, when a contractor asserted delay damages after being denied access to a construction site on a military base following the September 11, 2001 terrorist attacks, the court found that the government was not liable since the order limiting access was intended to protect the secrecy of government information.

A natural tension in federal government contracts is the federal government's dual role of contracting party and sovereign entity. A byproduct of that tension, the Sovereign Act Doctrine, is an affirmative defense inherent in every government contract. This defense is premised on the principle that the United States as a contractor cannot be held liable for the government's public acts made as a sovereign or lawmaker. Drawing the distinction between these two roles is not always easy, especially when the government benefits from its actions. Consequently, the Sovereign Act Doctrine frequently collides with contract law when the government's actions deprive a contractor of all or some of the benefits the contractor reasonably expected to receive under its contract with the government.

The Supreme Court has imposed a two-part test for determining the applicability of the Sovereign Act Doctrine: (1) whether the sovereign act is properly attributable to the government as contractor; and (2) whether the act would otherwise release the government from liability under ordinary principles of contract law. This test, however, is often difficult to apply in practice. The goal is to fairly balance the government's freedom to legislate with its obligation to abide by its contracts. In the words of the Supreme Court, "The acts of the one are not to be 'fused' with the other—if an act

of the Government as sovereign would justify non-performance by any other defendant being sued for contract breach, then the government as contractor is equally free from liability for non-performance."

### Limitations Of The Sovereign Act Doctrine

The Sovereign Act Doctrine is not limitless. Even if a government act is deemed a "sovereign act," the court must still determine whether the action would otherwise release the government from liability under ordinary principles of contract law (*i.e.* doctrine of impossibility). Moreover, courts have refused to apply the defense where the government's breach is tainted by a governmental objective of self-relief. A government act cannot be "public and general" if it has the substantial effect of releasing the government from its contractual obligations. In other words, the government cannot rely upon the defense as a means to escape from contracts that it subsequently deems unwise or—as one court put it—when the government has a "change of heart." For example, one court rejected the defense where the government unilaterally terminated a timber contract after deciding that continued performance was unwise and likely to cause environmental damage. The government is charged with an implied duty to act reasonably and in good faith when acting as a sovereign. Consequently, when the government alters or impairs the terms of a contract, there is a natural presumption that the government is not acting in its public or general capacity.

Courts will also reject the defense if the government's directive is contractual in nature or narrowly targeted to relieve the government of its contractual obligations. Therefore, if at least part of the government's action is premised on depriving a contractor from the benefits it reasonably expected from the contract, the government is unlikely to be protected by the Sovereign Act Doctrine. This includes government actions that impact a specific contractor or class of contractors without having a broader public objective. In one case, a court found that the government was not immune from liability where it delayed and denied permits for offshore drilling that the contractor was entitled to receive under the terms of an underlying lease agreement. The court held that the defense did not apply because the government's action was specifically directed at the contractors' contractual right to use the oil platform. Another court similarly refused to apply the government's defense where Congress enacted a statute specifically impacting the duties and water rights of certain water districts holding contracts with the government.

## Conclusion

Although the Sovereign Act Doctrine provides substantial protection to the government, it is not limitless. The applicability of the defense will often involve a fact-specific inquiry probing the motivations and scope of the government's directive. As such, the prudent contractor faced with the contracting officer's

invocation of the Sovereign Act Doctrine in the hypothetical above should clearly document all circumstances leading up to the directive to support its entitlement to a constructive change, including demonstrating all cost impacts. In doing so, it will be necessary to analyze whether the federal government's actions are contract-specific or related to its implementation of a broader national policy. ◀



## Thinking Of Expanding Your Contractor Operations Into California? Here Is What You Need To Know About Licensing

by Donna Tobar, Partner

Are you a contractor looking to expand your operations into California? Unsure what type of license is needed? Not sure what is required for proper licensing? Then this article is for you.

### Determining Type Of License

The first step in obtaining a contractor's license is to determine the appropriate type of license needed for your operations. In California, there are three general categories of contractor's license: (1) Class A General Engineering Contractor; (2) Class B General Building Contractor; and (3) Class C Specialty Contractor.

- General Engineering License

A General Engineering license is much broader than a General Building license and allows the contractor to work on projects such as waterways, airports, bridges, utility or industrial plants, highways, mines and numerous other scopes. *Business and Professions Code §7056* provides additional detail regarding the scopes of work covered under a General Engineering license.

- General Building License

A General Building license is more limited than a General Engineering license, allowing work on any structure built for "the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind" and "requiring the use of at least two unrelated building trades or crafts, or to do or superintend the whole or any part thereof." Moreover, a general building contractor cannot enter into a prime contract

for any project "involving trades other than framing or carpentry unless the prime contract requires at least two unrelated building trades or crafts other than framing or carpentry, or unless the general building contractor holds the appropriate license classification or subcontracts with an appropriately licensed contractor to perform the work." Additional information about the allowable scope of work for a General Building contractor's license is set forth in *Business and Professions Code §7057*.

- Specialty License

The contractor can also obtain specialty licenses or contract with subcontractors who hold specialty licenses for any additional scopes of work, including: C2 Insulation and Acoustical Contractor; C4 Boiler, Hot Water and Steam Fitting Contractor; C5 Framing and Rough Carpentry Contractor; C6 Cabinet, Millwork and Finish Carpentry Contractor; C7 Low Voltage Systems Contractor; C8 Concrete Contractor; C9 Drywall Contractor; C10 Electrical Contractor; C11 Elevator Contractor; C12 Earthwork Contractor; C13 Fencing Contractor; C15 Flooring and Floor Covering Contractors; C16 Fire Protection Contractor; C17 Glazing Contractor; C20 Warm-Air Heating, Ventilation and Air-Conditioning Contractor; C21 Building Moving/Demolition Contractor; C22 Asbestos Abatement Contractor; C23 Ornamental Metal Contractor; C27 Landscaping Contractor; C28 Lock and Security Equipment Contractor; C29 Masonry Contractor; C31 Construction Zone Traffic Control Contractor; C32 Parking and Highway Improvement Contractor;

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C33 Painting and Decorating Contractor; C34 Pipeline Contractor; C35 Lathing and Plastering Contractor; C36 Plumbing Contractor; C38 Refrigeration Contractor; C39 Roofing Contractor; C42 Sanitation System Contractor; C43 Sheet Metal Contractor; C45 Sign Contractor; C46 Solar Contractor; C47 General Manufactured Housing Contractor; C50 Reinforcing Steel Contractor; C51 Structural Steel Contractor; C53 Swimming Pool Contractor; C54 Ceramic and Mosaic Tile Contractor; C55 Water Conditioning Contractor; C57 Well Drilling Contractor; C60 Welding Contractor; C61 Limited Specialty; ASB Asbestos Certification; and HAZ Hazardous Substance Removal Certification.

To the extent that a trade does not fall within any of the limited specialty classifications above, it is likely that a C61 limited specialty license is required. An applicant can contact California's Contractor's State License Board to inquire further and determine whether a limited specialty license would be appropriate. To the extent that the Contractor's State License Board disagrees that a Class 61 license is needed, the Board will likely advise as to what other classification it recommends or will set up a new classification under C61, subclass 64 for non-specialized licenses.

### Steps To Obtain A Contractor's License

Once your company determines which type of license to obtain, the following steps should be taken to apply for a contractor's license:

- Register Your Company With The Secretary Of State

In order to conduct business as a licensed contractor, your company must be registered and in good standing with the California Secretary of State.

- Appoint A Responsible Managing Officer Or Responsible Managing Employee

The person designated as the responsible managing employee: (1) must have four or more years doing journeyman level work in the applicable trade; (2) must be a bona fide employee of the company applying for a license; (3) must be actively engaged in the classification of work for which that responsible managing employee is qualifying on behalf of the applicant and have the proper knowledge and experience in the area of classification; (4) must be responsible for exercising direct supervision and control of his or her employer's construction operations to secure compliance with the laws applicable to contractors and licensing; (5) must pass a criminal background

check by submitting fingerprints; and (6) shall not hold any other active contractor's license while acting, except as allowed under California *Business and Professions Code* §7068.1.

- Take The Appropriate Examinations

Law and business examinations, trade examinations (depending upon the type of license being sought), and asbestos examinations (required even if the applicant is not performing asbestos work) need to be taken. In order to prepare for the examinations, reference guides are available at [www.cslb.ca.gov](http://www.cslb.ca.gov). Many companies also offer courses to prepare for the licensing examinations.

- No Examination May Be Required

The examination requirements may not be required under certain circumstances. First, no examination may be required if, within 5 years, the qualifying individual personally passed the written examination for the same classification or has served as a qualifying individual for a licensee whose license has been in good standing and is in the same classification.

Second, the qualification and examination requirements may be waived where there is reciprocity with another state in which the applicant is licensed, the contractor is licensed in the other state in a similar classification, the license from the other state is proven by written certification to be in good standing for the previous five years, and California's license board in its discretion decides that the professional qualifications and conditions of good standing for licensure are the same or greater as in California.

- Submit The License Application And Fee

Applicants must complete and return the contractor's license application form and pay the fee for the application. The form can be located at [www.cslb.ca.gov](http://www.cslb.ca.gov) and the fee is currently \$330 (note that the fees are subject to change). The application must be signed by both the applicant and by the person qualifying on behalf of the company. The forms to be completed include: (1) an application for original contractor's license; (2) a certification of work experience; (3) an Additional Personnel form if there are additional personnel to report on behalf of the applicant; and (4) a disclosure statement regarding criminal plea/conviction.

- Post A Contractor's License Bond

The contractor must post a contractor's license bond (in a form approved by the Contractor's State License Board) in the amount of \$15,000

(\$100,000 bond required for limited liability companies) issued by an admitted surety in favor of the State of California with the registrar of the Contractor's State License Board within 90 days of the date the bond is issued. The bond shall be issued for the benefit of the parties listed in *Business and Professions Code* §7071.5. In lieu of a bond, a deposit may be made pursuant to *Business and Professions Code* §7071.12.

- Post A Qualifying Individual's Bond

If the qualifying individual is not the proprietor, general partner or joint licensee, a bond in the amount of \$12,500 issued by an admitted surety (in a form approved by the Contractor's State License Board) must be filed with the registrar for the Contractor's State License Board. The

only exceptions to this requirement are if the qualifying individual owns 10% or more of the voting stock or membership interest in the corporation or limited liability company.

- Obtain Insurance

Insurance also needs to be obtained, including providing proof of worker's compensation insurance to the Contractor's State License Board.

Please note that California's licensing requirements are constantly changing. As such, we recommend that a contractor undertake the appropriate measures to ensure that the licensing requirements upon which it relies are current, including consulting with a knowledgeable attorney. ◀

## The Biggest Construction Project In The World – And You Have Never Heard Of It

by John B. Tieder, Jr., Senior Partner

The U.S. press occasionally reports on an important piece of world news. One such piece is the rise of China as an economic power and the forecast that China will become the world's largest economy in the not too distant future. The current Premier of the State Council of the People's Republic of China, Li Keqiang, has even suggested that China stands ready to step into the role of the world's leading economic power.

With this as a backdrop, I was asked to participate in a series of lectures at the University of Peking

focusing on contracting methods for the Belt and Road Initiative, initially called the "One Belt-One Road" (OBOR) project. The project envisions construction of a transportation network generally following the route of the old Silk Road, the main trading route between East and West in the 13th and 14th centuries – think Marco Polo. The Silk Road, which crossed continents and extended thousands of miles, included both sea and land routes, as generally depicted below.

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The OBOR project, when constructed, will replace the old routes with modern means of transportation facilitating the transport of all types of goods and commodities, e.g., oil and gas transmission lines, railroads, highways, seaports, airports, etc. The project will touch more than 68 countries, will be built by thousands of contractors on both public and private bases, and will utilize Public-Private Partnerships, Design-Bid-Build and Design-Bid contracting methodologies. Though in its nascent stages, substantial work on the project has already been completed, including four seaports in Sri Lanka and numerous railroad lines.

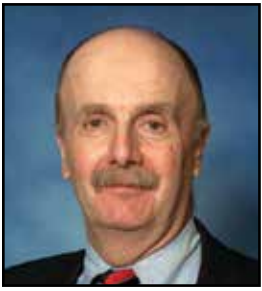
It is difficult to get precise information on the project. For example, although Chinese banks have provided most of the financing to date, I left Beijing without a clear picture of what entities will actually own the various components of the project. It is clear, however, that the Chinese government will exercise significant control. When completed, the OBOR project will be one of the largest, if not the largest, infrastructure projects in history, controlling by some estimates as much as 29% of the World's GDP. The massive scope of the project takes some time to digest - it is proceeding at the rate of approximately one *trillion* US dollars per year.

The group in which I participated is known as the International Construction Law Association (ICLA) and includes only one or two lawyers from each participating country. Part of the group's focus in China was the development of new contract forms and improvement of existing contract forms for use across the entire project. The group will also review and comment on the Rules to be implemented by a separate Disputes Resolution Center, which is being established for the sole purpose of addressing disputes on the OBOR project. I anticipate that a summary of the group's discussions will be available at some time in the future.

I appreciate that all of this is somewhat nebulous, but our law firm intends to continue its involvement. We will endeavor to provide updates in this publication; however, if you would like more information on the OBOR project as it becomes available, please let us know. ◀







## In Memoriam – John B. Tieder, Jr.

We mourn the passing of our dear friend, mentor, founding partner and oracle of construction law, Jack Tieder. Jack opened the doors of the firm

forty years ago and crafted the very foundation of our construction, international and government contracts practice. Under his guidance and example, the firm rose to prominence to become one of the elite firms in our area of practice both in the United States and throughout the World. His indefatigable spirit, intellectual curiosity, commitment to the profession and exuberant wanderlust advanced the development of construction law around the Globe. Jack had an influential presence in every major construction-related legal organization from the American College of Construction Lawyers to the International Bar Association, the London Court of International Arbitration, the International Academy of Construction Lawyers and many more. Over the last four decades, he personally trained, tested and challenged scores of attorneys in our firm. He then would board a plane to lecture eager lawyers in Eastern Europe, Russia, China and

the Middle East. He pursued this passion right up to the end of his life. Attorneys, clients, and consultants from around the World join us in sorrow.

Many of you are familiar with Jack's frequent articles in this Newsletter bringing to life exotic locations from his travels. He was a brilliant, demanding, learned, and creative attorney with a thirst for life and a sense of humor that shines through in his writings. These qualities also combined to make him one of the World's most formidable opponents in any legal contest. In recent years, Jack gravitated towards serving on arbitration panels and dispute review boards on many large, complicated construction projects. Regardless of the outcome of those matters, his thoughtful, well-reasoned decisions typically were lauded by the participating parties. In sum, we and the World have lost one of the paragons of construction law. We can only remember his teachings, his discipline, his spirit and his exacting standards and then carry them forward into the firm's fifth decade. Please join us throughout this coming year in celebrating Jack's legacy and remembering how much he contributed to the practice of construction law, literally, everywhere. ◀

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## ▶ FIRM NEWS ◀

### Recent and Upcoming Events

**American College of Construction Lawyers Annual Meeting**, February 25, 2018; Dana Point, CA; **Shelly L. Ewald** spoke on "Influencing the Future of International Arbitration."

**Northern Virginia Bankruptcy Bar Association's Monthly Meeting**, March 22, 2018; Fairfax, VA; **Jennifer L. Kneeland**, **Hanna L. Blake** and **Marguerite L. DeVoll** will speak on a panel: "From the Surety's Perspective: When a Contractor Files for Bankruptcy or Hits the Zone of Solvency."

**American Arbitration Association 2018 Construction Conference**, March 23, 2018; Santa Monica, CA; **Scott P. Fitzsimmons** will speak on "BIM, VDT, VR -- What Does it All Mean and How Does it Affect Construction Disputes?"

**Watt Tieder CLE Presentation**, March 30, 2018; Irvine, CA; **Rebecca Glos** and **Amanda L. Marutzky** will present on "Subcontractor Default Insurance: Relevant Considerations For The Surety Claims Professional." If interested, please email [mgranados@watttieder.com](mailto:mgranados@watttieder.com).

**The Bankruptcy Bar Association for the District of Maryland's Twenty-Second Annual BBA Spring Break Weekend**, May 4, 2018; Annapolis, MD; **Jennifer L. Kneeland** will be moderating a panel: "Judge's Round Table on Business Bankruptcy Topics."

**The Bankruptcy Bar Association for the District of Maryland's Twenty-Second Annual BBA Spring Break Weekend**, May 5, 2018; Annapolis, MD; **Marguerite L. DeVoll** will be participating on a panel: "Recent Case and Rule Developments in Business Bankruptcy Cases." ◀



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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 Robyn N. Burrows.**

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