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The Critical Path

The Newsletter of the Construction Law Committee

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In this Issue

Leadership Note

From the Chair

by Kathy R. Davis

In writing this letter, I know the country has experienced many weather events in the last few weeks. The South, where I am located, was basically shut down due to what might have been considered a small weather event in the North, but to the Southern States it caused great trauma to the residents, children spent the night in schools, parents spent the night at their offices, and many vehicles were damaged when drivers tried to make it home in the snow. But, as we say, "the South will rise again" and it is sunshiny and 70 outside today.

The same can be said about DRI's Construction Law Committee, the Committee is shining again. Under David Wilson's leadership the last few years, the Construction Law Committee began its revitalization after the down turn in the economy which affected almost all types of construction across the entire country. Housing starts and building permits are both considered leading indicators and according to one economist, we should look for a 6% gain in 2014 and the NAHB predicts the market will approach "normal" next year. One commercial construction indicator forecasts a 9% increase in commercial construction starts for 2014. All of these predictions are encouraging indicators that the construction industry as a whole is "rising again."

The Construction Law Committee is planning a great Construction Law Seminar at the Hard Rock Hotel in San Diego, California, September 11-12, 2014, and the construction industry forecasts will just be one of the topics discussed. Also planned are presentations by leaders in the fields of architecture, emerging technology in the construction industry, issues related to WRAPs and ISO forms, and advice from counsel, both plaintiff and defense, who were involved in the litigation of a major national disaster. Additionally, we plan to continue the popular presentation by two insurance industry professionals on defending construction cases from a client's perspective.

Our Specialized Litigation Groups (SLGs), under the guidance of Robin Liebrock, with Century Insurance, are going stronger than ever. If you are interested in getting involved in one of our SLGs, please do not hesitate to contact me, one of the SLG chairs, or Robin directly. Details about the SLGs can be found on the DRI Construction Law Committee website. This year is shaping up to be an exciting year for those involved in the construction industry, and we welcome any new ideas and fresh approaches to the Construction Law Committee.

Finally, I hope you are all enjoying the DRI Updates on Construction. DRI is now sending out timely articles on construction in areas which will help us all.

It is never too early to start planning, so I hope to see everyone at the Hard Rock in San Diego. I also encourage everyone to get involved in your Construction Law Committee.

Kathy R. Davis
Carr, Allison

effective.

Join a Committee

Committee Leadership

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Upcoming Seminar

Featured Article

The Fluidity of Liquidated Damages: Are They Enforceable In Your Jurisdiction?

by Michael P. Sams and Jared A. Fiore

Often, unexcused delays and breaches of contract for construction projects present difficult calculations of an aggrieved party's actual damages. Liquidated damages can provide a solution as a predetermined sum or formula that contracting parties agree shall be paid when delays or breaches occur. Liquidated damages allow both parties to avoid some uncertainty, predict potential loss, and plan accordingly. In construction practice, liquidated damages are typically a specified amount assessed to a contractor on a daily basis for every unexcused day that a project Liquidated damages provisions are regularly included in both private and public construction project contracts. Both AIA A201-2007 General Conditions and ConsensusDOCS 200 provide that the waiver of consequential damages as specified in those documents does not preclude recovery of liquidated damages. Accordingly, it is important to understand what a liquidated damages provision is, how to assess its validity, and the defenses that can be raised to enforcement even if the provision is valid on its face.

Enforceability Basics

Although commonly included in contracts to encourage timely performance, liquidated damages provisions are not always valid and are subject to judicial scrutiny. In some jurisdictions, courts view liquidated damages as an equitable remedy that cannot be enforced where equity principles would be violated.

Generally speaking, two criteria must be met to enforce a liquidated damages provision: (1) that at the time of contracting, actual damages were difficult to determine; and (2) that the agreed sum is a reasonable forecast of damages. Therefore, a court will look back in time to the point of contract formation to determine enforceability. *See Carrothers Const. Co., L.L.C. v. City of South Hutchinson*, 207 P.3d 231, 242-43 (Kan. 2009) (embracing a single-look prospective analysis as the sole basis for evaluating liquidated damages); *Kelley v. Marx*, 705 N.E.2d 1114 (Mass. 1999) (rejecting a second-look approach that includes actual damages, and instead, focusing on the forecast at the time of contracting).

Other courts go further and look at the *actual* damages. *See Kernz v. J.L. French Corp.*, 667 N.W.2d 751 (Wis. Ct. App. 2003) (evaluating the harm anticipated at the time of contract formation **and** the actual harm at the time of breach to determine reasonableness of forecast); *Orr v. Goodwin*, 953 A.2d 1190 (N.H. 2008) (applying a prospective-retrospective, two-pronged approach to evaluate if actual damages are easily ascertainable and grossly disproportionate to the stipulated damages).

The single-look approach, at least arguably, most accurately reflects the parties' expectations when they agreed to the contract. It helps to resolve disputes efficiently by making it unnecessary for aggrieved parties to wait until actual damages can be proved, and it appears to be the majority approach.

Where the parties could reasonably ascertain actual damages at the time of contracting, liquidated damages normally will not be enforceable. For example, actual damages from a delay on a renovation project may be determinable at the time of contracting because the typical damages to the owner consist of the costs of housing people and materials in another location. If rental information is available through an executed lease or a market rate estimate, the actual damages may be reasonably ascertainable at the time of contracting.

Construction Law

September 10–12, 2014
San Diego, California

DRI Publications

The Collateral Source Rule: A Compendium of State Law

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Where actual damages were not reasonably ascertainable at the time of contracting, however, the liquidated damages can not be set as a penalty. They still need to be a reasonable estimate of actual damages. For instance, in Massachusetts, the Supreme Judicial Court found a liquidated damages provision within an equipment rental contract to be a penalty where, as damages for partial non-payment, the provision called for the lease balance to be paid, plus eighteen percent of the acquisition cost of the leased equipment. *TAL Financial Corp. v. CSC Consulting, Inc.*, 844 N.E.2d 1085 (Mass. 2006). In *TAL*, the Court found that the eighteen percent figure was grossly disproportionate to a *reasonable estimate* of actual damages at the time of contract formation where the leased items would have little or no residual value after the lease term. *Id*. at 1091-92, 1094 (applying the single-look approach).

Actual Damages

A lack of actual damages may preclude enforcement of liquidated damages, depending on the jurisdiction. In Connecticut, liquidated damages can be barred where there are no actual damages. *See, e.g.*, *Vines v. Orchard Hills, Inc.*, 435 A.2d 1022 (Conn. 1980) (holding that an otherwise valid liquidated damages provision is unenforceable upon a finding that no damages ensued from the breach of contract). Conversely, in Massachusetts, the Supreme Judicial Court found a liquidated damages provision in a real estate purchase agreement enforceable where the would-be buyers breached the purchase and sale agreement, but the sellers completed a sale and suffered no actual loss. *Kelley v. Marx*, 705 N.E.2d 1114 (Mass. 1999). In viewing the facts *at the time of contract formation*, the Court found the deposit of five percent of the purchase price to be a reasonable estimate of the damages arising from a host of issues, including finding another buyer and waiting for an uncertain period of time to sell based on the market. *Id*. at 1117.

Double Recovery

Generally, liquidated damages and actual damages cannot be recovered together for the same delay or breach. Likewise, allowing a party to choose between liquidated damages and actual damages defeats the purpose of the liquidated damages provision and typically will be unenforceable. However, a liquidated damages provision may liquidate only some types of damages. *See, e.g.*, *Gilbane Bldg. Co. v. Nemours Foundation*, 666 F. Supp. 649 (D. Del. 1985). For instance, enforcement of a liquidated damages provision for a project delay would not prevent the owner from recovering actual damages unrelated to the delay, such as the cost of repairs for defective work or the cost of completing "punch-list" items.

Does It Matter Who Delays or Breaches the Contract?

Courts have reached different conclusions in answering this question. In some jurisdictions, where the owner is partially or fully to blame for delayed project completion, the owner is prohibited from recovering any liquidated damages. *See Bd. of Educ. of City of Sault Ste. Marie v. Chaussee,* 177 N.W. 975 (Mich. 1920) (where delay is due to the owner, liquidated damages cannot be recovered, and where delay is due to the owner and the contractor, the court will not attempt to apportion such damages); *Peabody N.E., Inc. v. Town of Marshfield*, 689 N.E.2d 774 (Mass. 1998) (where both the owner and the contractor are to blame for delay, the owner is not entitled to liquidated damages). In Wyoming, however, if a contract provision provides that an owner's delay creates additional time for project completion, liquidated damages still can be asserted, but must be reduced by the amount of delay attributable to the owner. *Keith v. Burzynski*, 621 P.2d 247 (Wyo. 1980).

Conclusion

Liquidated damages provisions are commonplace and serve an important function in protecting parties in the event of contract breach where the anticipated damages cannot reasonably be ascertained at the time of contract formation. Although specific enforcement varies by jurisdiction, generally speaking, parties cannot expect to recover a windfall when the liquidated sum is excessive; nor can the parties attempt to enforce them as a penalty. Counsel should be attentive to the general principles behind liquidated damages and the jurisdictional-specific case law. Do not assume, just because the contract contains a liquidated damages provision, that it will be enforceable.

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Forward to a Friend

Articles of Note

Long Arm of the Law Affirms Default Judgment against Chinese Drywall Manufacturer

by Josh Bowlin

On January 28, 2014, the Fifth Circuit upheld a $2.7 million default judgment against a Chinese drywall manufacturer, Taishan Gypsum Co., Ltd. (“Taishan”) arising from the well-known multi-district litigation captioned, *In re Chinese-Manufactured Drywall Products Liability Litigation*, No. 09–MD–2047 (E.D.La.) (“MDL”). The Fifth Circuit’s ruling is significant not only with respect to jurisdictional challenges for foreign defendants, but it is also important for contractors with allegations against foreign manufacturers of allegedly defective products.

As a way of background, Taishan is a Chinese drywall manufacturer with purported global distribution. On May 1, 2009, Taishan was named in a putative class action in the Eastern District of Virginia. Subsequently, on June 15, 2009 the judicial panel for multi-district litigation transferred all federal actions involving Chinese-manufactured drywall to the Eastern District of Louisiana for coordinated consolidated proceedings. Consequently, the putative class action lawsuit naming Taishan as a defendant was transferred and consolidated in the MDL proceedings in October 2009. In accordance with the Hague Convention, Taishan was served with process prior to consolidation. On November 18, 2009, the district court granted a default judgment in favor of the existing plaintiffs against Taishan. On December 21, 2009, the district court granted the plaintiff’s Second Amended Complaint adding seven Virginia couples and homeowners to

the litigation.

On May 11, 2010, the Court found in favor of the seven Virginia homeowners and issued an award totaling $2,758,356.20 against Taishan. It was not until June 10, 2010 that Taishan filed an appearance in the action and, at the same time, sought to vacate the default judgment based on (1) lack of personal jurisdiction, and (2) allegedly procedurally defective service of process. Thereafter, the parties spent more than a year and a half engaged in extensive discovery to determine whether the district court had personal jurisdiction over Taishan. Finally, on June 29, 2012, the district court determined that plaintiffs established personal jurisdiction over Taishan based on the substantive law of Virginia and the federal law of the Fifth Circuit.

Given that the Fifth Circuit denied Taishan's jurisdictional challenge, the facts concerning Taishan's contacts with the forum state of Virginia may be surprising. Specifically, Venture Supply, Inc. ("Venture") is a Virginia distributor that distributed drywall and other building materials to customers in many states. Venture originally contacted Taishan in 2005 to inquire about purchasing Taishan's drywall. Notably, it was undisputed that Taishan had no physical presence in Virginia, the forum where couples who obtained the default judgment against Taishan resided. In fact, all of Taishan's contacts with Virginia arose from the business relationship with Venture. Taishan never manufactured or actually sold its drywall in Virginia, never maintain offices in Virginia, and had no property or bank accounts in Virginia. In fact, Taishan never went to Virginia to negotiate business with Venture and never solicited any business from any Virginians.

Instead, Venture originally contacted Taishan to inquire about purchasing drywall and, after the initial phone call, a Venture agent traveled to China to negotiate a contract with Taishan. The first contract between Taishan and Venture was executed on November 17, 2005. Following the first contract, Venture and Taishan engaged in discussions regarding future business and, in December 2005, Venture's agent returned to China to inspect drywall purchased under the first contract and to execute a second contract on Venture's behalf.

In the appeal, Taishan argued that the district court should have applied Fourth Circuit precedent since the case originated in Virginia, rather than Fifth Circuit precedent in performing its personal jurisdiction analysis. The district court applied the "stream-of-commerce test" as articulated *Asahi*, holding that it had specific jurisdiction over Taishan because Taishan "placed its drywall into the stream of commerce with the knowledge that its drywall would end up in and be used in Virginia." The district court went on to conclude that the seven couples' claims "relate to" or "arise out of Taishan's contacts with Virginia because the presence of Taishan' drywall in Virginia properties was the alleged cause of their injuries."

Taishan argued that the district court erred in applying Fifth Circuit precedent and should have used Fourth Circuit precedent which, according to Taishan, required a stronger showing to establish minimum contacts over a foreign defendant. The Fifth Circuit acknowledged different approaches to personal jurisdiction minimum contacts analysis exist following the Supreme Court's plurality opinions in both *Asahi Metal Industry Co., Ltd. v. Superior Court of California,* 480 U.S. 102 (1987), and *J. McIntyre Machinery, Ltd. v. Nicastro*, 1131 S.Ct. 2780 (2011). However, The Fifth Circuit rejected Taishan's argument, and ultimately affirmed the district court's ruling.

Under the "stream of commerce" analysis, the Fifth Circuit noted certain facts which it found were persuasive in determining the connection of Taishan to Virginia. For example, Taishan designed and packaged products for Venture and directed its products to Virginia. Additionally, Taishan knowingly sold its products directly to Virginia, linking the product to a Virginia area code, which "ensured that the product's end-users would identify the product with a Virginia resident." Consequently, Taishan's activities when taken together were neither random nor isolated and supported the assertion of jurisdiction over Taishan even though they had no actual physical contacts with the state of Virginia. By knowingly selling its products to Venture and designing its product for market in Virginia, Taishan "purposefully directed its activities" with an understanding that its drywall would "end up in and be used in Virginia." The Fifth Circuit also stated that even under the Fourth Circuit standard, the defendant has the burden to establish a "compelling case that the presence of some other considerations would render jurisdiction unreasonable." According to the Fifth Circuit, Taishan did not meet its burden even according to the Fourth Circuit's standard. For the

Fifth Circuit, it was sufficient to justify the exercise of personal jurisdiction because even though Taishan had no presence in the United States, they consented to do business and contemplated future business with Venture. As such, Taishan's contacts were not "of an isolated or unsolicited character."

The Fifth Circuit's decision may affect many companies in a number ways. For example, manufacturers in other countries which have strategically decided to not have a presence in the United States may now be subject to personal jurisdiction in the U.S. If the foreign company negotiates and delivers products to a U.S. company but never actually sets foot on U.S. soil, precedent may now exist for a U.S. court to determine that personal jurisdiction exists over that foreign company depending on their contacts. While this may have been true in the past, the recent opinion certainly should draw attention given Taishan's contacts with Venture and the forum state of Virginia (which to some may appear rather attenuated). The Fifth Circuit's precedent in this case may also provide some U.S. contractors and distributors of foreign manufactured products some additional litigation possibilities. Namely, U.S. purchasers may have viable grounds to drag a foreign company to their forum state if they receive a defective or faulty product.

Indeed, the Fifth Circuit's decision in the *In re Chinese-Manufactured Drywall Products Liability Litigation* makes the world an even smaller place to transact business.

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Mississippi's Stop Notice Statute Ruled Unconstitutional

by Brian A. Hinton

Historical Background

Historically, Mississippi has been perceived as one of the more difficult states in the country for subcontractors to do business. This is due, in part, to a perceived lack of protection or remedy afforded subcontractors. Consider the not so unusual situation where a prime contractor informs a subcontractor that the owner is not making payments as required by the contract. The subcontractor is requested to keep working with the promise of payment upon completion of the project. What happens if that promise is not fulfilled? Subcontractors on construction improvements are prohibited from filing a traditional "construction lien" unless they are in direct contract with the Owner. So, what rights does a subcontractor have in Mississippi? Until recently, a subcontractor who found himself in this situation had basically one right: the issuance of a stop payment notice under § 85-7-181 of the Mississippi Code. The "stop notice" was simply a letter to the owner stating that the sub had not been paid and demanding that the owner refrain from paying the prime until the dispute was resolved. Seems straightforward and effective, right? Wrong. A recent ruling by the U.S. Fifth Circuit Court of Appeals has made things more tenuous than ever for subs in Mississippi, at least for the moment.

The Stop Notice Statute

Prior to last fall, the relevant portions of the stop notice law provided:

> **§85-7-181** ***When any contractor*** or master workman ***shall not pay any person who may have furnished materials, labor*** or rental or lease equipment used in the erection, construction, alteration, or repair of any house, building, structure, fixture, boat, water craft, railroad, railroad embankment, ***the amount due by***

> ***him to any subcontractor therein, or the wages of any journeyman, rental or lease equipment supplier or laborer*** employed by him therein, ***any such person***, subcontractor, journeyman, laborer or rental or lease equipment supplier ***may give notice in writing to the owner thereof of the amount due him and claim the benefit of this section***; and, thereupon the amount that may be due upon the date of the service of ***such notice by such owner to the contractor or master workman, shall be bound in the hands of such owner for the payment in full, or if insufficient then pro rata, of all sums due such person, subcontractor,*** journeyman, rental or lease equipment supplier or laborer who might lawfully have given notice in writing to the owner hereunder … .

However, in its decision in Noatex Corporation v. King Construction of Houston, LLC, 732 F.3d 479 (5th Cir. 2013), the Fifth Circuit Court of Appeals, in effect, made use of Mississippi's Stop Notice statute "illegal."

NoatexV. King Decision

Auto Parts Manufacturing Mississippi ("APMM"), the owner, entered into a contract with Noatex Corporation ("Noatex"), the general contractor, to build a manufacturing facility. Thereafter, Noatex hired King Construction of Houston, L.L.C. ("King") as its sub to provide materials and labor on the project. A dispute arose between Noatex and King in which Noatex questioned some of King's invoices. King notified the owner, utilizing Mississippi's Stop Notice statute, that Noatex owed King $260,410.15, and, therefore, King was filing a "Laborer's and Materialman's Lien and Stop Notice" in a Mississippi state court. As a result of King's notice, funds in the amount of $260,410.15 were "bound in the hands" of APMM. APMM then deposited the $260,410.15 into the hands of the court.

Noatex argued on appeal that the Stop Notice statute deprived it of property without due process of law. The State of Mississippi, as an intervenor in the lawsuit seeking to defend the constitutionality of its statute, argued that the deprivation of property under the Stop Notice statute was appropriate. As justification, the State argued 1) the statute had sufficient procedural safeguards and 2) the State had a significant interest in providing a mechanism to protect subcontractors.

However, the Firth Circuit disagreed with the State and held the statute unconstitutional in that the "Stop Notice statute deprives the contractor of a significant property interest, the right to receive payment and to be free from any interference with that right" because the statute "authorizes the withholding of monies earned from the contractor for an indefinite period of time and could prevent a contractor from paying its ordinary business obligations." Further, the Court listed what it believed to be deficiencies in the Stop Notice statute's procedural safeguards including, but not limited to, the lack of: (1) any pre-deprivation notice or hearing; (2) requirement for posting a bond; (3) requirement for a showing of exigent circumstances; and, (4) requirement for an affidavit or attestation setting forth the facts of the dispute of legal basis for the attachment.

Where Do We Go From Here?

Again, Mississippi law does not provide lien rights to subcontractors having no direct contract with the owner. The *Noatex* decision eliminates the only real remedy subcontractors have had to enforce payment rights. Following Noatex, monies owed by the owner to the general contractor can no longer be "bound in the hands" of the owner. Additionally, the prime contractor is no longer under any threat of having its right to receive payment from the owner halted.

So, what do we advise our clients to do in the meantime? Aggressive pre-payment conditions or direct contracts with owners are the only viable options to provide security and protection to subcontractors. Admittedly, however, these are harder conditions for subcontractors to impose, given unequal leverage in the market between subs, prime contractors and owners.

Without question, the best possible solution is legislative action. Thankfully, during the 2014 Mississippi Legislative Session, bills were introduced in both the Mississippi House of Representatives as well as Senate, to address the constitutional issues raised by the Noatex decision. What is evolving is a process whereby a true right of special lien is to be granted to, among others,

subcontractors. There are certain conditions included as a pre-requisite to a right of lien, such as proper licensing and substantial compliance, and a procedure for a payment action within 180 days after filing of the lien. Although the bill introduced in the House of Representatives died without action, Senate Bill 2622 has cleared the Senate and has been referred to the House Judiciary A Committee for consideration.

Afterward

Since this article was written, the Mississippi Legislature has completely rewritten the lien law for commercial and residential projects. Senate Bill 2622, signed by the Governor, provides lien rights to prime contractors, subcontractors, and material suppliers. The new lien law will require those seeking to file a lien to comply carefully with strict notice and filing requirements. An error in complying with these requirements could lead to a "claim of lien" being ineffective or unenforceable.

- There are no lien rights if a contractor has provided a payment bond. (*Miss. Code Ann.* §85-7-431.)

- To have lien rights the party filing a "claim of lien" must be properly licensed by the Mississippi State Board of Contractors. However, it should be noted that there are counties and municipalities that also have licensing requirements. (*Miss. Code Ann.* §85-7-403.)

There are numerous ways that a contractor, subcontractor, and materialman can lose its "claim of lien," including:

- If the contractor fails to provide a list of subcontractors to the owner within a reasonable period of time after requested or if the subcontractor fails to furnish a list of its subcontractors to the contractor within a reasonable period of time after requested. (*Miss. Code Ann*. §85-7-407.)

- If lien claimant fails to provide the required ninety (90) day notice following the last labor, services, or materials provided. (*Miss. Code. Ann*. §85-7-405(1)(b).)

- If the owner has made payment to the contractor in reliance upon a lien waiver issued by the lien claimant. (*Miss. Code Ann*. §85-7-413(1)(a).)

- If a "payment action" is not commenced within one hundred eighty (180) days after the "claim of lien" is filed, the "claim of lien" is unenforceable. (*Miss. Code Ann*. §85-7-421(1))

The basic requirements for filing a "claim of lien" are set forth in Miss. Code Ann. §85-7-405. If a party fails to comply with any of the requirements the "claim of lien" shall not be effective or enforceable. The filing of a "claim of lien" is not intended to prejudice a party's right to arbitration.

- The right to claim a lien cannot be waived in advance of furnishing labor, services, or materials.(*Miss. Code Ann*. §85-7-419.)

- The "special lien" granted by the statue to contractors, subcontractors, and materialmen is limited to the amount due and owing under the terms of the express or oral contract, subcontract, or purchase order. (*Miss. Code Ann.* §85-7-403(3).) The "special lien" also includes interest. (*Miss. Code Ann*. §85-7-403(4).)

- A judgment secured in a "payment action" to enforce a "claim of lien" is limited to a judgment *in rem* against the property and does not impose any personal liability upon the owner. (*Miss. Code Ann*. §85-7-405(1)(d)(ii).)

- If payment is made by the owner in reliance on a lien waiver or statements of the contractor, the aggregate lien amount of the subcontractors and materialmen not in privity with the contractor shall not exceed the unpaid balance of the contract price between the owner and the contractor at the time the first notice of lien is filed. (*Miss. Code Ann*.§85-7-405(5)(a))

- A party seeking to assert a "claim of lien" must be in "substantial compliance" with the contract, subcontract, or purchase order. (*Miss. Code Ann*. §85-7-405(1)(a).)

- A "Claim of lien" must be filed in the chancery court of the county by a contractor, subcontractor, or materialman where the property is located and within ninety (90) days of the ***last*** labor, services, or materials provided. It must also contain certain language notifying the owner of its right to contest the lien and be sent to the owner and contractor within two (2) days after it is filed. (*Miss. Code Ann*. §85-7-405(1)(b).)

- A subcontractor or material supplier not in privity with the contractor, or, if there is no contractor, with the owner, must provide notice within (30) days following the ***first*** delivery of labor, services, or materials as a condition precedent to filing a "claim of lien." (*Miss. Code Ann*. §85-7-407(2).)

- The "claim of lien" can be amended at any time provided there is compliance with certain procedures. (*Miss. Code Ann*. §85-7-405(1)(e).)

- All liens under Miss. Code Ann. §85-7-403 have equal priority. If the proceeds are insufficient to satisfy all liens, distribution is on a pro-rata basis. (*Miss. Code Ann*. §85-7-403(3(d).)

- A "payment action" (lawsuit) to enforce the "claim of lien" must be commenced within one hundred eighty (180) days from the date of the filing of the "claim of lien." (*Miss. Code Ann*. §85-7-405(1)(c).) This period can be shortened by the owner filing a "Notice of Contest of the Lien." (*See*, *Miss. Code Ann.* §85-7-423.)

- A *lispendens* notice must be filed with commencement of the "payment action" and furnished to the owner and contractor. (*Miss. Code Ann*. §85-7-405(1)(d)(ii).)

- The court in its discretion may award reasonable costs, interest and attorney's fees to the prevailing party in an action against the owner to enforce a lien against the property. (*Miss. Code Ann*. §85-7-405(3)(c).)

- The statute provides a procedure for "bonding off" a lien. The amount of the bond is required to be one hundred ten percent (110%) of the amount of the "claim of lien." (*Miss. Code Ann*. §85-7-415.)

There are also substantial penalties for not complying with certain aspects of the lien law and filing a false "claim of lien."

- The penalty for filing a knowingly false "claim of lien" is three (3) times the value of the "claim of lien." (*Miss. Code Ann*. 85-7-429.)

- The penalty for not paying a subcontractor after securing a waiver and release of lien without good cause is three (3) times the amount claimed on the face of the waiver and release. (*Miss. Code Ann*. §85-7-407(3).)

- There is a penalty of three (3) times the actual damages suffered by an owner, purchaser, or lender if the contractor falsely and knowingly submits a statement that the agreed price or reasonable value of the labor, services, or materials has been paid or waived in writing by the lien claimant. (*Miss. Code Ann*. §85-7-413(1)(b).)

- There is a penalty of not less than $500/day plus reasonable attorney's fees and costsfor failing to cancel a "claim of lien" within fifteen (15) days after fully paid. (*Miss. Code Ann*. §85-7-421(3).)

Residential projects require a slightly different process. Lien claimants on residential projects must give the residential owner at least ten (10) days before filing a "claim of lien." (*Miss. Code Ann*. §85-7-409(2).)

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A Blueprint for a Successful Construction Mediation

by Nancy Holtz

Project: Settlement. Construction mediation is no different than any other type of mediation. However, it can present additional challenges since there are frequently a multitude of parties, as well as numerous collateral issues which can impede settlement. Let's take a look at the critical path to getting the case settled.

The Program. For almost every construction case, the best pathway out of the dispute is through settlement rather than through adjudication by judge, jury or arbitrator. Point out to your client that in choosing mediation over litigation, your client is retaking control of his business – and life. Because as litigation unfolds, your client will quickly and unhappily experience a complete lack of control over what happens. But with mediation, your client will have control over the timing, process and outcome of the dispute. Your client's business will have no interruption occasioned by assisting in discovery, attending depositions, and, worst of all, attending and testifying at trial. There will be no bad blood between business entities with whom your client wishes to continue to work. Bear in mind, people in the construction industry are used to having a fair amount of control over their part of a construction project. So, the idea of regaining control of their fate regarding the legal dispute is very appealing.

Design-Build. The beauty of mediation is that the parties can create whatever dispute resolution process they feel will be most effective. Formats to consider include mediation, mediation-arbitration, or arbitration-mediation.

Seek Bids for the Job - The Mediator. A construction mediator should possess the characteristics of any good mediator: skill, fairness, and common sense. But, because of the challenges of construction mediation, more is needed. No one wants a mediator who thinks The Eichleay Formula is a Robert Ludlum book; but, to resolve a tough construction dispute, you will want a mediator who has certain traits beyond some level of fluency in construction law. An effective construction mediator must have highly developed interpersonal skills, tenacity, and boundless energy for the marathon sessions which can occur.

A mediator should be flexible and be able to move between approaches – facilitative and evaluative – depending on the circumstances of the mediation and needs of the parties. Specifically, you will want a mediator who can speak to questions of evidence and other legal issues which may arise if the case goes to trial.

Erect the Scaffolding. A candid pre-mediation telephone conversation is crucial to the success of the mediation. Although dubbed a "pre" mediation call, it is in fact the beginning of the mediation because you will begin to describe the case from your perspective during this conversation. This is also the time where you should talk about the trial date, what settlement discussions have already occurred, and any particular challenges you anticipate. For example, are there issues regarding insurance coverage; in multi-defendant cases, is there a question of apportionment among the defendants; what to do about a non-participating defendant; and, whether a defense-only mediation session might be helpful. There may also be personality issues to address. Finally, you should discuss opening statements which, on occasion, can be unduly lengthy, provocative and even counterproductive.

The Project Documents. A good mediation summary should distill the significant information into a format which is persuasive and manageable. An unfiltered data dump of plans, photos, and technical information does not provide the mediator with the most effective tools to question and challenge the other side's position.

Assembling the Team. The oft cited advice of bringing the people with authority to settle is a good starting point. Beyond that, consider bringing people who are

knowledgeable on anticipated areas of controversy. You may want to bring someone at a senior management level who is above the fray of having worked on the project himself. Such a person can bring great knowledge without the protective feelings of ownership regarding the project. You, as advocate, need to move beyond the role of warrior and become a diplomat. As the attorney at a mediation, you should be part of the solution-not part of the problem.

No Hard Positions on Hard Hats. The construction industry is populated by people who take great pride in their work. So, if your opening statement includes claims which might be taken as insulting, such as shoddy workmanship, try to soften your words a bit. A successful mediation needs buy in from all participants. Harsh statements attacking the integrity or competence of a party are sure ways to harden positions.

Loss of Productivity. Be careful if you choose to bring an expert. An expert should attend a mediation to help educate and elucidate - not carry the day for your side. The goal of mediation is to move the parties beyond their positions and focus on their interests. So, do not waste valuable time having the expert expound on why your client's position is 100% unassailable.

Also, sometimes even powerful evidence presented at mediation can be a waste of time. Such evidence is not particularly valuable if it is so technical that it will never be understood by a fact finder or, worse still, will never pass evidentiary muster. Never forget that this is a legal dispute headed for court if it cannot be resolved. To make the session productive, focus on those items which will be admissible and persuasive to the ultimate fact finder. That is what will elicit movement on the other side.

Delay Damages (Don't). Do not spend the whole session trying to jam a week's worth of evidence into a single day in order to prove the liability part of your case. Regardless of the strength of your case, your interest now is to get it settled. So, like it or not, you simply must move to the numbers and - working with the mediator - find the number that everyone can live with.

Be Ready for Change Orders. Come to the mediation with a settlement range in mind, but, be prepared to be flexible. Those last moves beyond your hoped for end point may be tough but will be worth it when the case settles.

Terminations for Convenience. It can be tempting to take the easy route and walk out on a mediation when it is not going well. But remember, rarely is your client better served by a trial. The brief moment of righteousness upon walking out will soon be eclipsed by the specter of a lengthy expensive trial looming in your client's future.

Concurrent Delays. As the parties near resolution, there are some obstacles which tend to crop up all at once. You may have some terms which you consider minor but which the other side might balk at. Do not wait until the very end of negotiations to raise these terms. When you present additional terms after the other side thinks they have struck a deal, it can derail the process. In fact, you may be providing the other side with new leverage. So, raise these issues earlier rather than later in the negotiations.

Another cause for delay at the end is the task of reducing the settlement to writing. Even when everyone is exhausted and content with a handshake, do not leave until the basic terms of the settlement are memorialized in a binding agreement. Your mediator should provide the parties with a Memorandum of Understanding to use once a settlement is reached. But, you should come to the mediation with any particular language which you want to be included in the Memorandum of Understanding already prepared. You will want to address any liens and logistics of releases of those liens. Consider the collateral effect of this settlement. Do you want language relating to any warranties or on any ongoing insurance litigation. These are all items which can be anticipated and you should have language ready to include in the Memorandum of Understanding if at all possible. It is much wiser to have an enforceable Memorandum of Understanding when the mediation breaks than hope the necessary terms will all be included in a later drafted settlement agreement and release.

Punch List. If the case does not settle at mediation, the project is still not over. Construction mediations can take more than one session – in person or by phone. Keep working with your mediator. With the right plan you can complete Project: Settlement within an acceptable budget and your client will thank you for it.

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Ewing v. Amerisure **Redux: Texas Supreme Court Saves the Construction Industry From the Fifth Circuit**

by Mark D. Shifton

Regular readers of *The Critical Path* may remember our discussion of the June 2012 decision in *Ewing Construction Company v. Amerisure Insurance Company, in which the Fifth Circuit,* employing a novel interpretation of a CGL policy's contractual liability exclusion, held that an insurer had no duty to defend its insured subcontractor. After much uproar, the Fifth Circuit withdrew its own opinion, and certified the question to the Texas Supreme Court. On January 17, 2014, the Texas Supreme Court definitively answered the question, holding that a general contractor's contractual obligation to perform its work in a good and workmanlike manner would not trigger the contractual liability exclusion in its policy. *Ewing Const. Co. v. Amerisure Ins. Co.*, ___ S.W.3d ___, No. 12-0661, 2014 WL 185035, *1 (Tex., Jan. 17, 2014).

A brief recap of the facts and procedural history will be helpful: Ewing Construction Company entered into a contract with a school district in Corpus Christi, Texas to construct tennis courts. After the tennis courts allegedly began flaking and crumbling, the school district filed a construction defect action in Texas state court. Amerisure, Ewing's insurer, denied Ewing's request for a defense and indemnification, relying on the policy's contractual liability exclusion, which stated there would be no coverage for "'property damage' for which [Ewing] is obligated to pay damages by reason of the assumption of liability in a contract or agreement." *Ewing Const. Co., Inc. v. Amerisure Ins. Co.*, 690 F.3d 628, 630 (5th Cir. 2012). Relying on the 2010 Texas Supreme Court decision in *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118 (Tex. 2010), the Fifth Circuit affirmed the District Court's holding that Amerisure owed no duty to defend Ewing because the contractual liability exclusion operated to exclude coverage. The crux of the Fifth Circuit's opinion centered on whether Ewing's obligation to perform its contract in a workmanlike manner constituted an "assumption of liability" which would trigger the contractual liability exclusion. Ewing argued that merely entering into a construction contract – which the District Court held to be an assumption of liability sufficient to trigger the contractual liability exclusion – was not the same as actually assuming liability for faulty workmanship under the contract.

The Fifth Circuit's opinion ran contrary to the vast majority of courts dealing with this issue, and (according to many commentators) had the potential to throw much of the construction industry into a state of turmoil. Under the Fifth Circuit's

analysis, the contractual liability exclusion would no longer operate solely to exclude coverage for liability assumed by an insured; it would exclude coverage for essentially all claims made against a contractor where the contractor performed its work pursuant to a contact with an owner. Two months after its decision in *Ewing*, however, however, the Fifth Circuit withdrew its decision, and certified the following questions to the Texas Supreme Court:

> 1. Does a general contractor that enters into a contract in which it agrees to perform its construction work in a good and workmanlike manner, without more specific provisions enlarging this obligation, "assume liability" for damages arising out of the contractor's defective work so as to trigger the Contractual Liability Exclusion.
>
> 2. If the answer to question one is "Yes" and the contractual liability exclusion is triggered, do the allegations in the underlying lawsuit alleging that the contractor violated its common law duty to perform the contract in a careful, workmanlike, and non-negligent manner fall within the exception to the contractual liability exclusion for "liability that would exist in the absence of contract."

Ewing, 690 F.3d at 633. On January 17, 2014, the Texas Supreme Court answered the first question in the negative, and did not reach the second question. In contrast to the Fifth's Circuit's mental gymnastics and leaps of logic, the Texas Supreme Court distinguished *Gilbert* with relative ease, and reached the opposite result.

In *Gilbert*, the Dallas Area Rapid Transit Authority (DART) contracted with Gilbert Construction Company to construct a light rail system. The construction contract required Gilbert to protect a third-party adjacent property owner from damages caused by Gilbert's work, and to repair any damages to the adjacent property. After the adjacent property was damaged, the owner sued both DART and Gilbert. All of the owner's claims asserted against Gilbert except a breach of contract claim (under the theory that the adjacent property owner was a third-party beneficiary of the DART/Gilbert contract) were dismissed on summary judgment. The Texas Supreme Court held that Gilbert's obligation to repair the adjacent property was an assumption of liability which triggered the contractual liability exclusion. Because Gilbert enjoyed governmental immunity, there was no independent basis for liability in the absence of the DART/Gilbert contract. Consequently, Gilbert's liability was based solely on its contractual obligation to the third party. Accordingly, the contractual liability exclusion operated to exclude coverage for the claims made by the adjacent property owner.

Under the Texas Supreme Court's reasoning in *Gilbert*, the contractor's obligation to repair or pay for damage to a third-party adjacent property owner extended beyond its obligations under "general law principles." In *Ewing*, however, the Court determined that the contractor's agreement to perform its work in a good and workmanlike manner did not enlarge its obligations beyond any common-law duty it would otherwise have. As the Texas Supreme Court noted:

> As we said in *Gilbert*, the exclusion means what it says: it excludes liability for damages the insured assumes by contract unless the exceptions bring the claim back into coverage. But we also determined in *Gilbert* that "assumption of liability" means that the insured has assumed a liability for damages that exceeds the liability it would have under general law. Otherwise, the words "assumption of liability" are meaningless and are surplusage . . .
>
> Accordingly, we conclude that a general contractor who agrees to perform its construction work in a good and workmanlike manner, without more, does not enlarge its duty to exercise ordinary care in fulfilling its contract, thus it does not "assume liability" for damages arising out of its defective work so as to trigger the Contractual Liability Exclusion.

Ewing, 2014 WL 185035, at *6.

The Texas Supreme Court's decision has thankfully calmed the storm, and has returned the state of the law in the Fifth Circuit to the *status quo ante*. Taken to its

logical conclusion, the Fifth's Circuit's interpretation of *Gilbert* – holding the contractual liability exclusion triggered by the mere signing of a construction contract – would have essentially precluded coverage for all construction claims where breach of contract claims are asserted.

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The Prevailing Wage Double Whammy

by James E. Sell

Projects that call for the payment of "prevailing wages" can be a challenge for prime contractors, especially when they discover that one or more of their subcontractors have failed to pay their employees "prevailing wages." That challenge becomes even greater when the government entity charged with investigating and enforcing wage claims utilizes an unnecessarily heavy handed procedure against the prime contractor to ensure payment of the prevailing wages.

Contractors on most public works projects are well aware of the requirement to pay "prevailing wages" which typically include wages, benefits, and other payments such as apprenticeship programs and industry promotion. The Davis-Bacon Act and its amendments pertain to federally funded projects. There are 32 states that also have prevailing wage laws, also known as "little Davis-Bacon Acts." The rules and regulations vary from state to state. California, of course, has its own prevailing wage laws.

Typically, it is not the prime contractor that fails to pay prevailing wages, but one or more of the prime contractor's subcontractors who (innocently or fraudulently) fail to pay prevailing wages. The problem for the prime contractor is that it, and its payment bond surety, is ultimately responsible for paying the prevailing wages, regardless of the fault or solvency of the delinquent subcontractor. With this background, the following is a cautionary tale involving a California prime contractor on a public works project.

Near the completion of the project, the prime contractor learned that its plumbing subcontractor, despite signing certified payroll records under penalty of perjury, had failed to pay its employees prevailing wages. The prime contractor, the subcontractor, and the project owner were served with a notice of Civil Wage and Penalty Assessment (CWPA) from the Division of Labor Standards Enforcement (DLSE). The DLSE not only investigates and enforces wage claims, but adjudicates them as well. The CWPA notice stated that the DLSE had determined that approximately $415,000 in prevailing wages had not been paid and assessed penalties in the amount of approximately $70,000, for a total claim of $485,000. Pursuant to Labor Code §1727, the CWPA directed the project owner to withhold $485,000 from the prime contractor as security. California Labor Code §1742.1, further provides for the imposition of *liquidated damages*, essentially a doubling of the unpaid prevailing wages, if those wages are not paid within sixty days following service of the CWPA. However, the prime contractor can avoid the liquidated damages if it (or the subcontractor) deposits with the Director of Industrial Relations (DIR) the full amount claimed in the CWPA.

Thus, after being served with a CWPA, the prime contractor and/or the subcontractor has the following options: 1) pay the wage and penalty assessment; 2) appeal the assessment and request a settlement conference and/or a formal hearing; or 3) deposit with the DIR the full amount claimed in the CWPA to avoid the imposition of the liquidated damages, appeal, and request a

settlement conference and/or a formal hearing.

The prime contractor here opted to avoid the liquidated damages, deposited the $485,000 with the DIR, and appealed the CWPA assessment. A couple of months passed and when it came time for the prime contractor to be paid its retention, it learned, *for the first time,* that in addition to the $485,000 already deposited with the DIR, the DLSE was also insisting that the project owner continue to withhold from the prime contractor's final payment an additional $485,000 pursuant to California Labor Code §1727. Thus, the prime contractor was now out of pocket a total of $970,000 on a claim that probably had an actual value of less than $400,000.

When asked why the DLSE was taking such draconian action, the informal response was essentially "because we can." Officially, the DLSE contends that Labor Code sections 1727 and 1742.1 are "two separate statutory schemes" which permits it to "double withhold." When the prime contractor sought relief at a pre-conference hearing, the DLSE hearing officer acknowledged that the "double withhold" was economically harsh, but that the prime contractor's remedy was to "take it up with the Legislature."

The goal and intent of Labor Code sections 1727 and 1742.1 is to ensure that there are sufficient funds to satisfy any wage and penalty assessments entered against a prime contractor and/or one of its subcontractors, *not* punish a prime contractor by extracting and holding twice the amount necessary to satisfy a potential wage and penalty assessment. The DLSE also has the additional remedy of having the prime contractor's payment bond surety satisfy any such award. Given these safeguards already in place, there is absolutely no reason for the DLSE to "double withhold."

The prime contractor's experience with the DLSE and its "double withhold" policy has been brought to the attention of a number of California trade associations and their respective legislative committees are now working on amending the statutes to eliminate the DLSE's ability to require the project owner to withhold progress or retention payments from the prime contractor when the prime contractor has deposited the full amount claimed in the CWPA with the DIR. However, if you are prime contractor who has been caught in this "double withholding" whammy, good legal grounds may well support, at least in California, a motion filed with the Court (a.k.a. a "writ") compelling the return of some or all of your "deposit."

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Implications of The Supreme Court's Ruling on Forum Selection Clauses

by Dorothy L. Tarver

In *Atlantic Marine Constr. Co., Inc. v. United States Dist. Courtfor the Western District of Texas*, 571 U.S.—, 134 S. Ct. 568 (2013), Atlantic Marine, a Virginia corporation, entered into a subcontract with J-Crew Management, Inc., a Texas corporation, to supply labor and materials to construct a children's development center in Texas. The subcontract contained a forum-selection clause, requiring that all disputes arising out of the contract be settled in state court in Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia." *In re Atlantic Marine Constr. Co.*, 701 F. 3d736, 737-738 (CA5 2012).

After completion of the project, Atlantic Marine withheld payment to J-Crew for allegedly providing defective work. J-Crew filed suit against Atlantic Marine in the Western District of Texas, invoking the court's diversity jurisdiction. In light of the contract's forum-selection clause, Atlantic Marinemoved to dismiss, arguing that the forum selection clause rendered venue in the Western District of Texas "wrong" under 28 U.S.C. § 1406(a)and "improper" under Federal Rule of Civil Procedure 12(b)(3).*Id.* at 738.

Atlantic Marine moved to transfer the case to the Eastern District of Virginia under § 1406(a).*Id.*The district court denied Atlantic Marine's motions finding that §1406 was inapplicable because a substantial part of the events giving rise to the litigation took place in Texas, such that venue was indeed proper under 28 U.S.C. § 1391.*Id.*The court rejected Atlantic Marine's attempt to enforce the forum-selection clause through a challenge to venue and held that § 1404(a) is the exclusive means for enforcing a forum selection clause in favor of another federal forum. Generally, the transfer-for-convenience analysis involves balancing "public interest" and private interest" factors, with the movant bearing the burden of showing that a transfer is "in the interest of justice" and the district court has great discretion concerning whether to grant the motion. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981).

Atlantic Marine petitioned the Fifth Circuit, for a writ of mandamus directing the court to dismiss the case under § 1406(a)oralternatively, transfer the case to the Eastern District of Virginia pursuant to § 1406(a). The Fifth Circuit denied Atlantic Marine's petition because Atlantic Marine had not established a "clear and indisputable" right to relief and affirmed the district court's decision on the grounds that Texas had a public and private interest in adjudicating the dispute and declined to disturb the district court's decision.*Id.* at 738; see *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 381 (2004).

TheSupreme Court granted Atlantic Marine's petition for certiorari to resolve a circuit split among the circuits regarding how to enforce forum-selection clauses. Unlike the Fifth Circuit's approach, some circuits treat forum-selection clauses as matters of venue, subjecting a suit filed in violation of a valid forum selection clause to dismissal for improper venue under Rule 12(b)(3) and § 1406(a). *Id.* at 738.

In a unanimous decision, the Supreme Court reversed the Fifth Circuit on December 3, 2013, and remanded the case to Texas,holding that a valid forum-selection clause does not defeat venue. The Court reasoned that because venue is governed by statute and whether venue is "wrong" or "improper" depends on whether the court where the suit was filed meets the federal venue statutes requirement. Specifically the Court held "§ 1404(a) provides the exclusive mechanism to enforce the forum selection clause. Section 1404(a) is a codification of the doctrine of *forum non conveniens,* so a court considering a motion to transfer venue would apply those factors to determine whether the transfer is appropriate."571 U.S. __ (2013).

The Court maintained that any determination whether a venue in a certain federal district is a "wrong" or "improper" venue is dictated by 8 U.S.C. § 1391. A motion to transfer to a different venue may be filed if the case fits within any of the three statutory categories in § 1391(b):

> (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

Consequently, when a plaintiff asserts that a venue in a federal district is improper "[t]he district court must determine if the case fits within any of the three statutory categories.If it does, venue is 'proper' and the case may not be dismissed; if it does not, then the case must be dismissed or transferred under § 1406(a), which applies when a case is filed in the 'wrong' venue. But in no event can a forum-selection clause make (by supplanting the statutory framework) a venue wrong or improper." *Id.*

The Court's decision concernedthe enforceability of forum-selection

clauses for venues across state lines. Civil action may be taken to transfer the case to a new venue within the federal court system pursuant to § 1404(a), and"a forum-selection clause becomes relevant and can be enforced through a motion to transfer.Transfer within the federal court system is governed by § 1404(a), which authorizes transfer to any district in which the case might have been brought or to any district to which the parties have agreed by contract or stipulation.Transfer to a state or foreign court; on the other hand, is governed by the doctrine *forum non conveniens*." *Id.*

In fact, the court noted, "§ 1404(a) is simply a codification of the *forum non conveniens* doctrine for the federal court system. However, public and private interests must be considered by the district court if a motion to transfer is filed under § 1404(a) or the *forum non conveniens*." *Id.*Therefore, "[a] motion to transfer under either rule requires the district court to weigh the convenience of the parties and public-interest considerations. When, however, there is a forum selection clause, courts must give controlling weight to that clause in all but the most exceptional cases." *Id.*

The Court reasoned that "if parties agreed to the venue provided in the forum-selection clause, the right of either party to challenge the venue later as inconvenient in one's pursuit of litigation and/or convenience has been waived." *Id.*Lower courts now have limited reasons to allow one party in a civil dispute to litigate the case in a venue different from the one specified in the selection clausein the contract.*Id.*

The Court's decision left unresolved a court's ability to decline to transfer or dismiss cases filed in violation of valid forum-selection clauses. However, the Court reasoned that such cases would be a rarity. Specifically, the Court stated, "[w]hen the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause," and "[o]nly under circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied." *Id.*The Court recognized that the enforcement of forum-selection clauses is crucial to contracting parties who rely on such clauses to be able to control and predict where disputes may occur and to "protect [the parties'] legitimate expectations." *Id.* Finally, the Court commented that enforcing valid forum-selection clauses "further[s] vital interests of the justice system." *Id.*

In conclusion, litigants seeking to enforce the venue stipulated by a forum-selection clause will benefit greatly by the Court's decision in *Atlantic Marine*.Forum-selection clauses are valuable because they allow businesses to expand their geographical scope of operations while reducing potential litigation costs associated with retaining counsel in multiple jurisdictions. However, the cost of litigating disputes across state lines for large corporations and small businesses differ significantly.Large corporations have deeper financial pockets and can absorb litigation costs across state lines. Small businesses, on the other hand,bear a heavy burden when they are forced to litigate disputes in a different state.

The *Atlantic Marine*decision will have a profound effect on general contractors, yet the Court's decision does not reflect how forum-selection clauses typically operate in the construction industry. Contractors, particularly larger general contractors, have the resources, experience, and manpower, not to mention bonding capability, to accept work across state lines. Rigid enforcement of forum-selection clauses providesthese contractors with predictability and cost control should disputes arise under the contract. Small businesses, such as local sub-contractors hired by the general contractor, who are bound by out-of-state forum-selection clauses,are at a distinct disadvantage. Despite the potential ramifications of the *Atlantic Marine* decision on the construction industry, the reality is that many, if not most, modern construction contracts call for alternative dispute resolution in lieu of litigation.

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