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Spring 2014

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Construction Law

In This Issue…

Variance and equitable adjustment contractual clause does not insulate the government from liability for negligent estimates

Solicitations are routinely based on unit quantities. Such solicitations will almost always contain a variance and equitable adjustment clause in order to reset the price if the work falls below or exceeds the estimated quantity. One of the most common variance and equitable adjustment clauses used in federal contracting is Federal Acquisition Regulation clause 2.211-18, which provides for an equitable adjustment when the variance in estimated quantities exceeds 115 percent or is below 85 percent.

It is not uncommon, however, that more contract-specific variance and equitable adjustment clauses will be used, such as in the recent case of *Ravens Group v. United States*. In *Ravens Group*, the contractor, a company founded by the former head of the Army Corps of Engineers, Lieutenant General (Retired) Joe Ballard, responded to a solicitation issued by the Army to provide maintenance and repair of senior officer housing at Fort Myer and Fort McNair. The solicitation included a variance

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Caution to general contractors and construction managers: How you could end up paying the price of a subcontractor's noncompliance with a PLA, and how to avoid doing so

In *Sheet Metal Workers International Association Local Union No. 27 v. E.P. Donnelly, Inc.*, the Third Circuit Court of Appeals (which has jurisdiction over New Jersey, Pennsylvania, Delaware and the Virgin Islands) issued a decision that cautions general contractors and construction managers on projects subject to project labor agreements (PLAs) to ensure their diligent enforcement downstream, or face the costly consequences.

In *Donnelly*, the general contractor on a New Jersey public project, Sambe Construction Co., Inc. (Sambe) was a signatory to a PLA on the project. The PLA contained provisions common to many PLAs, including a requirement that all contractors and subcontractors sign and agree to the terms of the PLA.

Ensuing Litigation in Multiple Venues

Disputes arose when Donnelly—one of the subcontractors on the project and signatory to the PLA—assigned roofing work to a carpenters' union, but failed to require the carpenters to agree to the terms of the PLA. The sheet metal union—which was signatory to the PLA—protested the assignment and instituted an arbitration per the PLA's grievance procedure to enjoin the assignment; the arbitrator awarded the work to the sheet metal workers.

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Negligent estimates in unit priced contracts may be grounds for a claim against government (continued)

and equitable adjustment clause, which provided for additional compensation once the number of labor hours exceeded 5 percent and used as a basis for compensation the contractor's marked up labor hour rates.

The contractor based its lump sum unit price of $15,000 per month on verbal information provided by the contracting officer of an estimated 50 service calls per month. As it turned out, the contractor received a far greater number of calls, so much so that the contractor requested an adjustment to the monthly price from $15,000 per month to $102,675 per month. The Army rejected this request, calling the new pricing "astronomical."

In the ensuing litigation, the contractor claimed, among other things, that the Army breached the contract by negligently providing an estimate of only 50 calls per month. The Army moved to dismiss the claim, contending that information on the number of calls per month was not kept and that such information was not available from other military installations. The contractor presented evidence, thru the affidavit of Retired General Ballard, that such information was kept, based on Ballard's having formerly lived in officer's quarters at Fort McNair, and that the 50 calls per month estimate was, as characterized by the court, "wholly fabricated."

Based on this affidavit, the court held that the contractor met its burden to defeat the Army's motion to dismiss by demonstrating that the Army's estimate was not in good faith and was not based on the use of reasonable care in confirming the estimated number of anticipated hours of repair time.

The Army also moved to dismiss the contractor's claim on the basis that, in any event, the contract's variance and equitable adjustment clause limited the contractor's claim to the amount calculable under the clause. The court rejected this argument, holding that the variation and equitable adjustment clause served only to protect the Army from unforeseen circumstances at the time of contract formation. The clause does not protect the government from providing inaccurate data by way of a negligent or misleading estimate.

Ravens Group, thus, usefully reminds that contractors do have recourse against the government if the estimated quantities are far greater or far less and there is evidence that the numbers were negligently prepared by the government or were misleading. *Ravens Group* also teaches that, in such cases, the variance and equitable adjustment clause in the contract will not bar such claims, as the clause is only intended to protect the government from unforeseen conditions existing as of the time of contracting between the parties.

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Caution to general contractors and construction managers: How you could end up paying the price of a subcontractor's noncompliance with a PLA, and how to avoid doing so (continued)

After this award, the carpenters' union threatened to picket if the work was reassigned, and Donnelly filed a jurisdictional dispute charge with the National Labor Relations Board (NLRB). Because the carpenters had not agreed to the PLA grievance procedure (arbitration), the NLRB had jurisdiction over the entirety of the dispute. Ultimately, the NLRB awarded the work to the carpenters' union.

While the NLRB proceedings were ongoing, however, the sheet metal union filed a grievance with the Local Joint Adjustment Board (LJAB) pursuant to its own collective bargaining agreement against both Donnelly and Sambe, seeking confirmation of the first arbitration award and to compel reassignment of the work. In addition, shortly after filing its grievance, the sheet metal union filed suit against both Donnelly and Sambe in federal district court under section 301 of the Labor Management Relations Act of 1974 (LMRA), seeking declaratory relief, money damages for breach of the PLA, and enforcement of the first arbitration award.

Shortly after the sheet metal union's federal suit was filed, the NLRB's decision awarding the work to the carpenters was issued. Despite this, the sheet metal union persisted with the federal suit, later amending its complaint to seek only breach of contract damages, as the project had been completed by that time and the work already performed. The district court found in favor of the sheet metal union on its breach of contract claims for breach of the PLA, awarding the union roughly $365,000 in damages against Donnelly and nominal damages of $1 against Sambe.

The Third Circuit's Decision

On appeal, the Third Circuit upheld the NLRB's award of the work to the carpenters, vacated the first arbitration award, and upheld the NLRB's ruling that the sheet metal union's continuance of the federal lawsuit after the NLRB's award to the carpenters was an unfair labor practice in violation of the National Labor Relations Act. Critically, however, the court limited this ruling to the suit against subcontractor Donnelly—the employer that had made the disputed work assignment to the carpenters and that was bound by the conflicting NLRB award requiring Donnelly to award the work to the carpenters. This bar on litigation did not, however, apply to Sambe, the general contractor.

The Third Circuit therefore sent the case back to the district court to address whether Sambe had failed "to assure [Donnelly's] compliance" with the PLA, and, if so, how much Sambe owed to the sheet metal union for this breach of the PLA.

Takeaways

For general contractors, construction managers and similarly positioned entities on a PLA project, the result in this case is one that could have been avoided. Simple preventative measures can and should be taken, including: (i) ensuring that all subcontractors—at all levels—working on a PLA project sign the PLA and (ii) adding a term to subcontractor agreements providing a guarantee that the sub will (a) sign and comply with the PLA, (b) require anyone it hires to sign and comply with it, and (c) indemnify you in the event of litigation or loss arising out of a failure to comply with the PLA.

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Is there coverage for damage caused by faulty construction? The courts change course.

For the past 15 years or so, contractors have had to deal with the uncertainty arising from the question of whether claims brought against them for property damage or bodily injury allegedly caused by their faulty workmanship would be covered under their standard Commercial General Liability (CGL) policies. Insurers, emboldened by early success in the courts, have frequently argued that no coverage was available because claims alleging faulty workmanship did not constitute an "occurrence" under the standard CGL policy, and therefore, there was no coverage for the resulting bodily injury or property damage.

For example, in 2006, the Pennsylvania Supreme Court, in *Kvaerner Metals Division v. Commercial Union Insurance Company*, weighed into the debate, finding that claims of faulty construction do not constitute an "occurrence" under the terms of the CGL policy. The court held that Kvaerner's insurers had no obligation to defend or indemnify it in connection with claims that Kvaerner had breached its contract in connection with the construction of a coke oven battery. While Kvaerner dealt with claims associated with damage to the contractor's own work, subsequent decisions by the Pennsylvania Superior Court seemingly expanded that holding to bar coverage not only for damage to the contractors work but also for any damage arising from the faulty construction. For example, in 2007, in *Millers Capital Insurance Co. v. Gambone Brothers Development Corp.*, the Superior Court relied on the Supreme Court's statement that faulty workmanship claims did not present the degree of fortuity contemplated by the term "accident" in the definition of occurrence. It thereby extended the reasoning of *Kvaerner* to bar claims for damages caused by all natural and foreseeable acts, including rainfall, which tend to exacerbate the damage, effect or consequences of the faulty workmanship. Thus the court found that damage to other property caused by water leaks due to construction defects and product failures were also barred as not involving an occurrence.

Recently courts in general, including Pennsylvania courts, have begun to reject that expanded view. In 2013, in *Indalex Inc. v. National Union Fire Insurance Company of Pittsburgh, PA.*, the Superior Court found that a product manufacturer was entitled to coverage in connection with lawsuits alleging that the windows and doors it manufactured were defectively designed or manufactured, which resulted in water leakage that caused physical damage such as mold and cracked walls. In so finding, the court limited the holding of *Kvaerner, Gambone* and other previous Superior Court authority as barring coverage only to situations "where the underlying claims were for breach of contract and breach of warranty, and the only damages were to the [insured's] work product." Thus the Court found that because the underlying complaints alleged defective products resulting in damage to property other than the policyholder's products, there was an "occurrence." Even though this rejection of a broad reading of the "faulty construction" argument was made in the context of a product claim, its analysis should also be relevant in claims arising from a contractor's work. While the Superior Court has denied rehearing, the insurer may still appeal this result to the Pennsylvania Supreme Court, so this may not be the last word on this issue.

This clarification in Pennsylvania law has been mirrored nationwide, where the clear majority rule now is that claims of faulty construction can constitute an occurrence under the terms of the CGL policy. The recent decisions of the West Virginia and Connecticut Supreme Courts reinforce this trend.

In C*herrington v. Erie Insurance Property and Casualty Company*, the West Virginia Supreme Court, in 2013, found that the contractor's CGL policy provided coverage against claims for property damage as a result of defective workmanship performed by subcontractors. In so holding, the West Virginia Supreme Court acknowledged its line of cases finding that defective work did not constitute an occurrence. After reviewing contrary precedent from other states, the West Virginia Supreme Court changed its course and concluded that "defective workmanship causing bodily injury or property damage is an 'occurrence' under [a CGL policy]." The Court found further support for its position in the express language of the contractor's CGL policy, which provided coverage for the acts of the subcontractors while excluding damage to the contractor's work. Because the defective work in this case was performed by a subcontractor, the court reasoned that "[c]ommon sense dictates that had [the contractor] expected or foreseen the allegedly shoddy workmanship its subcontractors were destined to perform, [the contractor] would not have hired them in the first place."

The Connecticut Supreme Court, in 2013, reached the same result, finding that "defective workmanship can give rise to an 'occurrence' under the [CGL]," explaining that "the mere fact that defective work is in some sense volitional does not preclude it from coverage under the terms of the policy." *Capstone Building Corporation v. American Motorists Insurance Company.*

With the addition of Connecticut and West Virginia, 17 state Supreme Courts, a clear majority, have held that faulty construction can constitute an occurrence. Moreover, three states have statutes that require policies to cover faulty workmanship.

In conclusion, there is still a great deal of uncertainty on this issue, and the question of whether coverage is available will depend on the policy language and exclusions, the underlying facts, including the manner in which they are plead, and the state law that is to be applied to the policy. Nonetheless, these recent cases should be viewed as a welcome development for contractors.

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Customizing arbitration: Have it your way

At its best, arbitration is a flexible, streamlined and efficient dispute resolution process that results in lower costs, quicker determinations and more predictable results. Unfortunately, such benefits are not always realized. When misused, arbitration can become cumbersome, aimless and costly. These issues have discouraged the selection of arbitration.

The negotiation of arbitration clauses is generally not viewed as an opportunity to create a project-specific approach to handling disputes. Unfortunately, most standard form construction contracts reinforce this attitude by effectively reducing the analysis of dispute resolution to merely checking the box next to "litigation" or "arbitration," which typically results in the default application of the rules promulgated by the American Arbitration Association (AAA).

The better approach is recognizing that arbitration does not need to be a one-size-fits-all process, and that the general arbitration rules will not address the project-specific concerns and interests of the parties if a dispute arises. Arbitrators and the AAA generally respect that the arbitration process belongs to the parties and that the parameters set forth in the contract govern. The parties should consider a broad menu of options for creating a customized arbitration process well before any dispute arises. Such options include, but are not limited to, the following:

- Limiting the **Scope of Arbitration** to only include certain type of disputes
- Setting the **Number & Qualifications of Arbitrator(s)**
- Specifying the **Hearing Locale**
- Requiring the **Hearing to Commence** within certain time periods and to proceed on continuous days until completed
- Requiring **Mediation and other Conditions Precedent** to filing a demand for arbitration
- Allowing or barring **Motions Practice and Requests for Injunctive Relief**
- Providing for or limiting **Document Discovery**, including electronic discovery
- Allowing, limiting or prohibiting **Depositions**
- Setting **Limits on Remedies and/or Structured Remedies**
- Providing for the award of **Attorneys' Fees** to prevailing parties
- Setting a **Tiered Approach** to various items listed above based on the amount in controversy

The range of options available to customize the arbitration process is limited only by the foresight and creativity of the contracting parties and their counsel. The arbitration process is not always preferable to litigation, and we frequently hear from clients who have had a bad arbitration experience and want no part of the process in the future. However, for many parties involved in construction, arbitration is a valuable process. Those parties should consider modifying the process to meet their concerns, rather than abandoning it altogether.

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Tips on software license agreements

These days, every company uses software to run certain portions of its business. A lot of that software is of the Microsoft Office variety, but many companies have software that is relatively unique to their line of business. While Microsoft Office software comes with shrink-wrap licenses, the more involved/complex operating and database system software packages are subject to license agreements that should be reviewed carefully and negotiated to the extent possible.

Here are a few helpful hints when reviewing and negotiating these types of software licenses:

- **License grant provisions** – Software is generally licensed and not owned. Because of that fact, the language granting the software license rights to your company should match the rights your company needs to make full use of the software, whether in terms of the number of users or the ability to propagate the software throughout your company.

- **Indemnification** – A software license should provide your company with an indemnity (including responsibility to hold harmless and defend the company) in the event of any allegation of infringement against your company based on its use of the licensed software.

- **Warranty** – Generally, software warranties are not long lasting, the argument being that unlike hard goods or equipment, software does not break. That being said, however, there should be some warranty or acceptance period during which the software will perform in conformity with its specifications. If the software fails to so perform, your company should be able to return the software for a full refund. Also, pay attention to the warranty provisions as they may contain broad disclaimers, and some software licenses may even have an "as is" warranty.

- **Limitation of Liability** – All software vendors try to limit their liability both in terms of a hard cap (e.g., software license fees paid over the prior 12 months) and type (direct damages only). These limitations may not fit the purpose for which your company intends to use the software and should be negotiated accordingly.

- **Maintenance and Support** – Depending on how "mission critical" the software is to your company, you should have the proper level and hours of support. If the software is mission critical, meaning that without it your business or the particular project comes to a halt, you should try to negotiate response times for various levels of severity of software malfunctions. This is known as a service level agreement.

- **Term and Termination** – Many software licenses are perpetual in nature, but be aware that most licenses also have automatic renewal terms in their maintenance and support provisions. These provisions should be negotiated so that your company does not end up spending money for maintenance and support it no longer needs. In other words, after a given period of time, your company should be able to terminate maintenance and support (keeping in mind that if your company wants to later restart maintenance and support there may be some sort of catch-up charge).
- **Boilerplate** – This is where the devil in the details resides. Important provisions, like governing law, jurisdiction and venue, are always written in favor of the software company in order to avoid having contracts subject to varying jurisdictions or laws. However, your company does not want to be subject to the same thing or to be hauled into court across the country. Jurisdiction, venue and governing law are an important part of the agreement and should be negotiated so that your company can bring a claim in its own jurisdiction and where its counsel is already licensed to practice. Other provisions, such as assignment or a time limitation on claims, should be carefully reviewed as well.

The above is just a sampling of the more important types of terms and conditions contained in most software licenses. Software licenses vary greatly in length and content, but that does not necessarily correlate to the complexity of the software itself. Some very complex software is accompanied by very short and simple, but incredibly one-sided, agreements depending, for the most part, on that software provider's market power. The same market power will also affect your ability to negotiate terms significant to your company.

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Preparing for when the government comes knocking

There is no advance telephone call to management to warn you or a friendly knock on your company's door to signal the beginning of a government investigation. Rather, it happens swiftly, with an unannounced visit from law enforcement accompanied by a search warrant for your books and records and a laundry list of documents and "tangible things." What do you do as the owner or corporate officer to respond?

This is an intimidating experience for the experienced, let alone the inexperienced and unprepared. Most businesses engaged in the construction industry are familiar with stories of the trade. Further, many contractors are familiar with many of the laws and regulators who enforce them. But, most do not expect a visit from law enforcement, because that is something for true criminals (bank robbers), or they think this cannot happen to us. But, as many have learned, this is not always the case. Companies may be the subject of a search warrant for many reasons, even if there is suspicion of criminal wrongdoing in connection to others suspected of such wrongdoing. Federal, state or local law enforcement have broad-ranging powers to enforce criminal laws, and a search warrant is but one tool used to obtain evidence. These broad-ranging powers cover suspected criminal activity arising from the regulation of business activity.

"Federal, state or local law enforcement have broad-ranging powers to enforce criminal laws, and a search warrant is but one tool used to obtain evidence."

This can range from regulation of taxes, labor laws and environmental laws to laws so complex they affect doing business in foreign countries.

The execution of a search warrant is clearly stressful and is rarely good news for the company. However, with careful preparation, the stress and panic can be reduced, and the company can be put in the best position to respond to the warrant and the investigation to follow.

1. **Designate a search warrant (crisis) response team in advance.** Depending on the nature of your company and its facility or facilities, the plan should include designation of a single person at each facility subject to search to speak for the company and coordinate the response of that facility. In addition, one person in management—which could be the general counsel, compliance officer or chief operations officer—should be in charge of the company's overall response.
2. **Identify the lead investigator(s) and, if possible, all law enforcement personnel and agencies.** While many search warrants involve multiple law enforcement agencies, at each location there will typically be a lead investigator who will provide a copy of the warrant (and any supporting affidavit) and the investigator's card.

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Atlantic Marine Construction Company: Supreme Court revises law regarding forum selection clauses, but presumption of enforceability remains the same

In the Fall 2013 edition of the *Construction Law* newsletter, we alerted you to a case pending before the United States Supreme Court, *Atlantic Marine Constr. Co., Inc. v. U.S. District Court for the Western District of Texas*, which had significant implications for the enforcement of contractual forum selection clauses in federal court. Since that time, the Supreme Court has issued a decision that revises the test used by many Circuits to determine whether such clauses should be enforced, but that also preserves a key feature of federal jurisprudence—that the burden of proof remains squarely on the party resisting the application of a forum selection clause and that such provisions may only be avoided in rare circumstances.

> *"Thus, the presence of a forum selection clause might just be one consideration among many, which could be trumped by factors such as the convenience of witnesses, location of documents or the docket congestion of the Courts."*

In *Atlantic Marine*, the Supreme Court addressed a dispute in which venue was proper in the federal court where the plaintiff's lawsuit was filed, but a forum selection clause required disputes to be settled in another forum. The *Atlantic Marine* decision does not apply to situations where venue in federal court would not be proper, such as when the requirements for jurisdiction in federal court are not met.

Prior to the Supreme Court's decision in *Atlantic Marine*, if a plaintiff filed an action in federal court in a forum other than the one specified in a parties' contract, a defendant desiring to enforce that forum selection clause faced several options. The defendant could move, under Rule 12(b)(3) or 28 U.S.C. § 1406, for the case to be dismissed or transferred to another federal venue, on the grounds that the forum was "improper" as a result of the parties' contract. Another possibility was to file a motion, under Rule 12(b)(6), to dismiss the case for "failure to state a claim." Still another option, pursuant to 28 U.S.C. § 1404(a), was to ask the court to transfer the action to the proper federal forum based on the "convenience to the parties." Each option required different, sometimes significantly divergent, burdens of proof, and which option a party selected would depend, in large part, on the court in which a defendant found itself, as different Circuits followed different tests.

In *Atlantic Marine*, the Supreme Court determined that Option 1—moving to dismiss under Rule 12(b)(3) or Section 1406 on the basis of "improper venue"—was in error (the Court left open the question of whether a Rule 12(b)(6) motion might be appropriate). The Court reasoned that the venue of a federal court is controlled by federal law, and the parties cannot contractually limit that venue.

Rather, the Court found that the proper procedure is to request a transfer under Section 1404(a). At first blush, a motion under Section 1404(a) might appear to disadvantage the party seeking to enforce a contractual provision. Section 1404(a) typically employs a balancing test that looks at a host of factors to determine which forum is most convenient to the parties. Thus, the presence of a forum selection clause might just be one consideration among many, which could be trumped by factors such as the convenience of witnesses, location of documents or the docket congestion of the courts. Further, Section 1404(a) is typically deferential to the forum selected by the plaintiff—usually the party seeking to avoid an inconvenient contract provision.

The Supreme Court, however, held that when a forum selection clause is in play, "adjustments" are required to the Section 1404(a) analysis. "Private interest" considerations, such as the preferred forum of the plaintiff, are not valid concerns—only "public interest" considerations are relevant. As a result, the Court held that except when there are truly "extraordinary circumstances" that "clearly" would warrant a decision not to enforce a forum-selection clause, a motion to enforce a forum-selection clause should be granted. The Court observed that the practical result of its ruling is that a contractual clause will control "except in unusual cases."

For contractors that conduct business throughout the country, and so rely on forum selection clauses to help ensure that litigation will take place in a single, reliable venue, the *Atlantic Marine* decision reinforces what most Circuits had acknowledged for years—forum selection clauses should be enforced in federal court, and a party resisting the clause faces a significant uphill battle. Although the mechanism for enforcement will change in several Circuits, contractors can rest assured that, in the majority of situations, the clause they bargained for will be enforced.

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Should the insurer pay for non-approved contractor self-help?

Before being inundated with complaints in 1999, Lennar Corporation had constructed over 800 homes using an exterior insulation and finish system (EIFS), also called synthetic stucco. During its investigation of the complaints, Lennar learned that the problems with the EIFS were frequent and substantial. Lennar decided to be proactive by contacting all of its homeowners and offering to remove the EIFS and replace it with conventional stucco. The costs of remediation amounted to millions of dollars. Only three lawsuits ultimately were filed, all of which settled.

> *As prejudice is a question of fact, and the jury had rejected a claim of prejudice, the Texas Supreme Court held that Markel was legally liable for the costs of repair.*

Early in the remediation process, Lennar notified its insurers, including Markel American Insurance Company (Markel), that the homebuilder would seek indemnification for the costs of repair. Lennar's insurers, however, refused to cooperate and ultimately denied coverage. Litigation between Lennar and its insurers followed. After two trials, and two trips to the intermediate appellate court, two issues were argued to the Texas Supreme Court:

1. Not having consented to the homebuilder's remediation program, was Markel, the insurer, nevertheless responsible for the costs of repair if it suffered no prejudice as a result?

2. Was the insurer, Markel, responsible for (i) costs incurred to determine property damage as well as to repair it and (ii) costs to remediate damage that began before and continued after the policy period?

On both issues, the Texas Supreme Court ruled in favor of Lennar. As to prejudice, Condition E of the insurance policy stated in part, "It is a requirement of this policy… that no insured, except at their own cost, voluntarily makes any payment, assumes any obligation, or incurs any expense… without [Markel's] consent." Markel conceded that this provision would not excuse Markel's liability unless the insurer could show that it had been prejudiced by the settlements between Lennar and the homeowners. As prejudice is a question of fact, and the jury had rejected a claim of prejudice, the Texas Supreme Court held that Markel was legally liable for the costs of repair.

As to the issue of damages, Markel noted that the removal of the EIFS in many instances confirmed that damage to many of the homes was minimal. Markel, the carrier, then construed a "because of" phrase in the policy to mean that the costs associated with removing *all* of the EIFS on *all* of the affected homes, so the homebuilder could locate sometimes isolated areas of water damage, was not covered under the language of the policy. The Texas Supreme Court rejected this argument, stating rather that "no reasonable construction of the phrase could lead a person to conclude that the costs of locating the damage were not 'because of' the damage." The Court also found that the insurer was responsible for all of the homebuilder's costs to remediate damage, including damage that had begun before and continued after the policy period.

Under the *Lennar* decision, homebuilders and contractors in Texas now may argue, successfully, that voluntary payments made by the insured without the consent of the insurer—even when the insured actively solicits claims that otherwise may never have been pursued—does not necessarily mean that the insurer suffered any prejudice.

Despite Lennar's success, though, every policyholder should also keep the following in mind: Lennar had to slog through years of litigation, and make its way to the highest court in Texas, before receiving vindication. So, when confronted with potential claims, the best course is to involve the insurer early on. And once involved, hopefully the insurer will recognize that it may have substantial risk and ultimately determine that doing "the right thing" makes sense.

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Preparing for when the government comes knocking
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3. **Make sure that employees are trained to respond properly to a search warrant.** Employees should be courteous and professional and should not interfere with the activities of the investigators executing the warrant. They should also be advised that they have the right to decline to be interviewed by investigators, to be interviewed at a convenient time, and to have counsel present during any interviews to which they agree.

4. **Have a document retention and electronic information policy in place.** The ideal document retention policy will minimize the disruption to business operations as a result of the loss of documents seized during such warrant and assist in defending against claims that documents have been lost or even destroyed. Such a policy should include off-site backup of all affected computer servers in the event the government seizes the actual computer equipment used by the particular facility as opposed to imaging the server. Even if the government leaves the equipment and images the server, the IT department should take an image of the servers so that the company has a copy of what the government has imaged or taken.

5. **Prepare for seizure of privileged documents and information.** Document any seizure of privileged documents.

There is an old adage most appropriate in the context of responding to search warrants: Hope for the best; prepare for the worst. Preparation is smart and cost-effective.

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Construction Law Group News

Eckert Seamans was recognized by U.S. News – Best Lawyers® "Best Law Firms" 2014 for 63 national and metropolitan practices including a National Ranking for Construction Litigation. Additionally, 41 Eckert Seamans attorneys achieved placements in The Best Lawyers in America® 2014 edition, including **Chris Opalinski, Scott Cessar** and **Neil O'Brien**.

Chris Opalinski, **Scott Cessar** and **David McGlone** were selected as Super Lawyers®, published by Thomson Reuters, for 2014 in the Construction Litigation category, and **Audrey Kwak** was selected as a *Rising Star*, also for Construction Litigation. Chris, Scott and Audrey were selected in Pennsylvania and David in Massachusetts.

Scott Cessar led a panel on the "Ethics of a Construction Claim" at an ACBA CLE Seminar held in December 2013.

Joining the Firm

Robert I. Tuteur and **Joan N. Stern** have joined the firm's Philadelphia office. Bob and Joan are municipal finance attorneys who have significant experience in public-private partnerships (P3) as they relate to infrastructure construction. They will be working with the firm's Construction Law group in assisting clients on P3 projects.

The information in this publication is for the purpose of informing and educating our clients about various aspects of the law and is not intended to be used as legal advice. If you have questions concerning any of the topics, please contact your Eckert Seamans attorney. Eckert Seamans Cherin & Mellott, LLC. All rights reserved © 2014.

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