Insurance, Surety & Liens

A Newsletter of Division 7 of the ABA Forum on Construction

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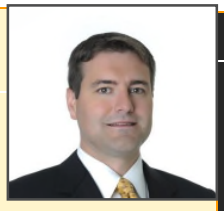
Message from the Chair



As this may be my last message as the Chair of Division 7, I want to take time to reflect on the last two years. Division 7 has continued to broaden its horizons by working with other Divisions, including Division 11 (In-house Counsel) and Division 12 (Owners and Lenders). Although the fruits of these efforts are still in the works, it is been a true pleasure to work with these Divisions in an effort to better the service and commitment to the Forum's constituents.

I also want to highlight the Terry J Galganski Outstanding Service Award for Division 7, which was implemented in 2015. Division 7's very own Terry Brookie, former Chair of Division 7 and former Chair of the Forum, was the inaugural recipient of the Award.

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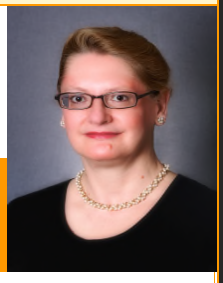
Public Private Partnerships— A Cause for Concern about Payment Security



By: E. Colette Nelson
American Subcontractors Association (ASA)

Could one of your clients be working on a public construction project without the payment assurances it thinks it has under state or federal law? With the increased use of public-private partnerships (P3s), this question is a real concern for construction subcontractors and suppliers that rely on statutory payment assurances such as payment bonds and mechanic's liens.

P3 projects, historically used for traditional transportation infrastructure projects

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In This Issue

The Completed and Accepted Doctrine: *Slashing the Liability Shield*

By: Brent C. Bell, Esq., Sarah Donini Rodriguez, Esq., Jonathan M. Lawler, Esq

Is a general contractor liable for a personal injury to a third-party after its work is completed and accepted by the project owner? The answer may depend on whether that particular state applies the Completed and Accepted Doctrine.

The Completed and Accepted Doctrine:

Under the Completed and Accepted Doctrine, a contractor may not be held liable to a third party for injuries sustained as a result of a patent defect in construction after the project has been completed and accepted by the owner. This doctrine, applicable in many jurisdictions, has the uncanny ability to operate as a shield for a contractor, despite the contractor's admitted negligence. The Completed and Accepted Doctrine typically may only absolve a contractor for patent defects as opposed to latent defects. Some jurisdictions, such as Florida and California, have extended application of the doctrine to design professionals in addition to contractors. McIntosh v. Progressive Design & Eng'g, Inc., 166 So. 3d 823 (Fla. 4th DCA 2015) review denied, 177 So. 3d 1269 (Fla. 2015); Neiman v. Leo A. Daly Co., 148 Cal. Rptr. 3d 818, 821 (Cal. Ct. App. 2012), as modified (Nov. 14, 2012) (granting summary judgment to an architect based on the completed and accepted doctrine).

Pros and Cons of the Completed and Accepted Doctrine:

The basis for the Completed and Accepted Doctrine is as follows. After a contractor's work reaches the completed and accepted phase, the contractor loses control of the completed work. By accepting the patently defective condition, the owner in possession and control of the property is charged with knowledge of the defect and responsibility for rendering the condition safe and warning of the dangerous condition until it is rendered safe. Thus, the acts of the design professional or contractor are no longer the legal cause of the accident. The cause, instead, is the owner's failure to render the condition safe for third-parties.

However, the Completed and Accepted Doctrine is increasingly under attack as it is incompatible with modern tort jurisprudence, which tends to shy away from "black-letter" limitations on liability. Similarly, comparative fault statutes strive towards a fair allotment of liability and have eaten away at the bright line tort liability safeguards, such as the Completed and Accepted Doctrine. See Emmanuel S. Tipon, L.L.B, L.L.M., *Modern status of rules regarding tort liability of building or construction contractor for injury or damage to third person occurring after completion and acceptance of work; 'completed and accepted' rule*, 74 A.L.R.5th 523 (1999).

Which States Apply the Completed and Accepted Doctrine:

Many states have abandoned the Completed and Accepted Doctrine. Those states purport to follow the modern *Restatement* approach, where "a builder or construction contractor is liable for injury or damage to a third person as a result of negligent work, even after completion and acceptance of that work, when it was reasonably foreseeable that a third person would be injured due to that negligence." Davis v. Baugh Indus. Contractors, Inc., 159 Wash. 2d 413, 417, 150 P.3d 545, 547 (2007) (citing Restatement (Second) of Torts §§ 385, 394, 396 (1965)). The table below indicates which states still apply the Completed and Accepted Doctrine:

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Default is not in our Stars: California Court Comes to Bury (not Praise) the Requirement of Declaring Default under Subcontractor Performance Bond.

By: Shailendra (Shay) Kulkarni
Sullivan, Hill, Lewin, Rez & Engel, APLC

The tripartite relationship among an obligee, a principal, and a performance bond surety is one of the hallmarks of construction and surety law. And at the heart of that relationship is the performance bond. Whether required by an owner to guaranty the prime contractor's construction of the whole project, or requested by a prime contractor to safeguard a subcontractor's performance of a smaller scope of work, the performance bond stands as the physical manifestation of the surety's pledge to stand behind the principal and, if called upon by the obligee, to provide security in the event of the principal's default. But what exactly is a "default" within the context of a performance bond? And under what circumstances may an obligee maintain an action against a performance bond surety without the necessity of first declaring the principal in default of the underlying contract? The California Sixth District Court of Appeal recently addressed these questions in JMR Construction Corp. v. Environmental Assessment & Remediation Management, Inc., 243 Cal.App.4th 571 (2015), 197 Cal. Rptr. 3d 84, (*reh'g denied*).

Although the JMR decision is notable for many reasons -- not least of which is that it marked the first time that a California court recognized the *Eichleay* formula as an acceptable method of calculating home-office overhead in delay damages claims -- this article will focus on the surety-related aspects of that decision.[1]

In JMR, at issue was whether the issuing surety ("SureTec") of two subcontractor performance bonds ("the Bonds") could be held liable to the prime contractor/obligee ("JMR") for certain acceleration and delay damages allegedly incurred as a result of the tardy performance of the subcontractor/principal ("EAR") under separate plumbing and electrical subcontracts ("the Subcontracts") on a federal construction project ("the Project"). The Bonds in question had been issued using a form developed by the Associated General Contractors of America ("the AGC"). Although JMR had experienced certain issues with EAR's progress under the Subcontracts during the course of the Project (and had communicated with EAR on several occasions documenting those issues), JMR had neither formally declared EAR in default under the Subcontracts nor made demand upon SureTec under the Bonds to facilitate the completion of EAR's work. As such, EAR proceeded to complete its work under the Subcontracts and demobilize from the Project.

Upon the completion of the Project, JMR filed suit against both EAR and SureTec seeking damages in connection with EAR's delayed performance. In response, SureTec argued that, because a declaration by JMR of EAR's default under the Subcontracts stood as a condition precedent to SureTec's liability under the Bonds, and because -- by JMR's own admission -- JMR had not declared such a default, SureTec could not be held liable to JMR. In upholding the trial court's rejection of SureTec's arguments, the California Sixth District reasoned that, per its examination of the Bonds, "there was no language expressly conditioning SureTec's performance under the bonds upon receipt of a notice of default from JMR."[3]

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1 For a more detailed discussion of the significance of JMR's acceptance of the *Eichleay* formula, please see Steven M. Cvitanovic, *California Court Puts Out The Welcome Mat For The Eichleay Formula In Computing Home Office Delay Damages - What Took So Long?*, February 4, 2016, http://www.hbblaw.com/California-Court-Puts-Out-The-Welcome-Mat-For-The-Eichleay-Formula-In-Computing-Home-Office-Delay-Damages---What-Took-So-Long-02-04-2016.

2 See AGC Document No. 606 (1988), Subcontractor Performance Bond.

3 JMR, supra, 243 Cal.App.4th at 597

(Public Private Partnerships— A Cause for Concern about Payment Security — Continued from page 1)

like turnpikes, are increasingly being used for social infrastructure such as college dorms and hospitals. P3s are long-term contractual agreements between a public entity and a private partner, in which the private partner, in exchange for compensation, invests its own assets and delivers a public service or facility . Governments are turning to P3s because infrastructure needs far exceed the funding available in the budgets raised through taxes, or that could be accessed with revenue bonds or borrowing. Typically, the public entity will authorize the private entity to design and build, and frequently , to operate and maintain the resulting public work. P3 agreements attract the private capital for needed projects now, and the private party is paid back though some stream of public revenue that the public entity grants, such as the right to collect tolls, which in turn provides profits to the private partner's investors.

For construction subcontractors and suppliers, one major concern with P3s is that established payment assurances under existing law may not apply. Mechanic's lien laws generally do not apply to construction on public land, and federal, state or local governments most often own the land on which P3 projects are built. Statutory payment bonds are required in all states for contracts awarded by public owners based on a public design and with public funding. Under a P3, however, the private partner, frequently called a concessionaire, contracts with the public entity, and the private partner then retains the construction contractor to complete the construction phase of the P3. Under normal circumstances the concessionaire would be required to follow all procurement laws, including providing payment and performance bonds, but legislation is being enacted specifically for these projects.

Attorneys should make sure that their subcontractor and supplier clients bidding and working on P3 projects carefully review and understand the contract's payment assurances. They cannot assume that state or federal law will provide them. A subcontractor or supplier working on a P3 project may not have payment protections, unless they are specified in the authorizing legislation relating to P3s or a provision in the solicitation and award documents related to a specific P3 project.

As with all projects, subcontractors and suppliers on P3 projects should assess the source and quality of payment assurances. A subcontractor should treat a payment bond like any other contract document. That is, the subcontractor should request and obtain a copy of the bond and read it, preferably before signing the subcontract.

Among the key items the subcontractor should evaluate is whether it is among those protected by the payment bond and whether it can meet the claim and notice requirements. In addition, the subcontractor should verify the authenticity of the bond. The *Bond Obligee Guide*, published by the Surety and Fidelity Association of America, contains a list of surety companies that have volunteered to be included on this list along with information as to how they can be contacted for the purposes of authenticating a bond. The *Guide* and additional information is available at http://www.surety.org/?page=VerifyYourBond. Subcontractors and suppliers also can determine if a surety is admitted in the jurisdiction of the project by checking with the state insurance department; the National Association of Insurance Commissioners' Web site has an interactive map that links to each state's department at http://www.naic.org/state_web_map.htm. The Department of Treasury's Circular 570 contains a list of approved sureties for federal projects; the so-called Treasury List is available at https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570_a-z.htm.

If the prime contractor has not provided a payment bond, the subcontractor should determine whether other subcontractor assurances are in place. For example, has the concessionaire or prime contractor provided a letter of credit or parental guarantee? If so, are they structured in a way to provide payment assurances for subcontractors and suppliers on the project or are they only for protection of the government owner? Are the procedures for filing a claim for payment clear and attainable?

Government entities in the United States have required bonds for more than a century to provide performance and payment assurance for the nation's public construction projects. Although new procurement methods have evolved—including the increased use of P3s in the U.S. —construction risks remain the same, making surety bonds just as relevant and important today.

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(The Completed and Accepted Doctrine: Slashing the Liability Shield Continued from page 2)

State	Doctrine still applicable	Illustrative case
Alabama	**No**	McFadden v. Ten-T Corp., 529 So. 2d 192 (Ala. 1988); But see Hosea O. Weaver & Sons, Inc. v. Balch, 142 So. 3d 479 (Ala. 2013).
Alaska	**No**	Brent v. Unicol, Inc., 969 P.2d 627, 630 (Alaska 1998).
Arizona	**Yes, with limitations**	Porras v. Campbell Sales Co., 589 P.2d 1352, 1354 (Ariz. Ct. App. 1978).
Arkansas	**No**	Suneson v. Holloway Const. Co., 337 Ark. 571, 992 S.W.2d 79 (1999).
California	**Yes**	Hale v. Depaoli, 33 Cal. 2d 228, 230, 201 P.2d 1, 2 (1948).
Colorado	**Yes, with limitations**	Collard v. Vista Paving Corp., 292 P.3d 1232 (Colo. App. 2012).
Connecticut	**No**	Coburn v. Lenox Homes, Inc., 173 Conn. 567, 574, 378 A.2d 599, 602 (1977).
Delaware	**Probably not**	Taylor v. Reddy, CIV. A. 88C-JN29, 1991 WL 35681, at *4 (Del. Super. 1991)
District of Columbia	**No**	Hanna v. Fletcher, 231 F.2d 469, 474 (D.C. Cir. 1956).
Florida	**Yes**	Slavin v. Kay, 108 So.2d 462 (Fla. 1958).
Georgia	**Yes**	Smith v. Dabbs-Williams Gen. Contractors, LLC, 653 S.E.2d 87, 89 (Ga. Ct. App. 2007).
Hawaii	**Unclear**	See explanation in, Bragg v. Oxford Const. Co., 285 Ga. 98, 102, 674 S.E.2d 268, 271 (2009).
Idaho	**Yes**	Black v. Peter Kiewit Sons' Co., 94 Idaho 755, 757, 497 P.2d 1056, 1058 (1972).
Illinois	**Yes**	Hunt v. Blasius, 74 Ill. 2d 203, 209, 384 N.E.2d 368, 371 (1978).
Indiana	**Yes**	U-Haul Intern., Inc. v. Mike Madrid Co., 734 N.E.2d 1048, 1052 (Ind. Ct. App. 2000).
Iowa	**Yes, with limitations**	Kragel v. Wal-Mart Stores, Inc., 537 N.W.2d 699, 707 (Iowa 1995).
Kansas	**No, but with caveats**	Talley v. Skelly Oil Co., 433 P.2d 425 (Kan. 1967).
Kentucky	**No**	Gilbert v. Murray Paving Co., Inc., 147 S.W.3d 736 (Ky. Ct. App. 2003); But see Saylor v. Hall, 497 S.W.2d 218, 224 (Ky. 1973).
Louisiana	**Yes, with limitations**	Griffin v. Int'l Ins. Co., 727 So. 2d 485, 491 (La. Ct. App. 1998) writ denied sub nom. Griffin v. Int'l Ins. Co., 99-0854 (La. May 7, 1999), 741 So. 2d 656; But see Marine Ins. Co. v. Strecker, 234 La. 522, 539, 100 So. 2d 493, 499 (1957).
Maine	**Unclear**	See explanation in, Bragg v. Oxford Const. Co., 285 Ga. 98, 102, 674 S.E.2d 268, 271 (2009).
Maryland	**Probably not**	Council of Co-Owners Atlantis Condo., Inc. v. Whiting-Turner Contracting Co., 308 Md. 18, 25, 517 A.2d 336, 340 (1986).

(The Completed and Accepted Doctrine: Slashing the Liability Shield Continued from page 5)

State	Doctrine still applicable	Illustrative case
Maryland	**Probably not**	**Council of Co-Owners Atlantis Condo., Inc. v. Whiting-Turner Contracting Co., 308 Md. 18, 25, 517 A.2d 336, 340 (1986).**
Massachusetts	**No**	McDonough v. Whalen, 365 Mass. 506, 511, 313 N.E.2d 435, 438 (1974).
Michigan	**No**	Feaster v. Hous, 359 N.W.2d 219, 223 (Mich. Ct. App. 1984).
Minnesota	**Probably not**	Murphy v. Barlow Realty Co., 206 Minn. 527, 532, 289 N.W. 563, 565 (1939).
Mississippi	**Yes**	EMJ Corp. v. Contract Steel Const., Inc., 81 So. 3d 295, 299 (Miss. Ct. App. 2012).
Missouri	**Yes, with limitations**	Weber v. McBride & Son Contracting, Co., 182 S.W.3d 643, 645 (Mo. Ct. App. 2005).
Montana	**No**	Pierce v. ALSC Architects, P.S., 270 Mont. 97, 108, 890 P.2d 1254, 1260 (1995).
Nebraska	**Yes, with limitations**	Moglia v. McNeil Co., Inc., 270 Neb. 241, 253, 700 N.W.2d 608, 619 (2005).
Nevada	**Yes**	Anderson v. Wells Cargo, Inc., 54962, 2011 WL 5579009 (Nev. 2011).
New Hampshire	**No, with caveats**	Russell v. Arthur Whitcomb, Inc., 100 N.H. 171, 173, 121 A.2d 781, 782 (1956).
New Jersey	**No**	Totten v. Gruzen, 52 N.J. 202, 210, 245 A.2d 1, 5 (1968).
New Mexico	**Yes, with limitations**	Tipton v. Clower, 1960-NMSC-111, 67 N.M. 388, 394, 356 P.2d 46, 49.
New York	**Yes, with limitations**	Meseck v. Gen. Elec. Co., 195 A.D.2d 798, 799, 600 N.Y.S.2d 384, 386 (1993).
North Carolina	**Yes**	Price v. Johnston Cotton Co. of Wendell, Inc., 226 N.C. 758, 40 S.E.2d 344 (1946).
North Dakota	**Probably not**	Mayville-Portland Sch. Dist. No. 10 v. C. L. Linfoot Co., 261 N.W.2d 907, 911 (N.D. 1978).
Ohio	**No**	Marshall v. Edgewood Skate Arena, Inc., 2000 WL 140840, 2000-Ohio-1643 (Ohio App. Ct. 2000).
Oklahoma	**Yes**	Stephens v. APAC-Cent., Inc., 11-CV-427-JED-TLW, 2013 WL 2434552 (N.D. Okla. 2013).
Oregon	**No**	Thompson v. Coats, 274 Or. 477, 485, 547 P.2d 92, 96 (1976).
Pennsylvania	**No**	Patraka v. Armco Steel Co., 495 F. Supp. 1013, 1018 (M.D. Pa. 1980).
Rhode Island	**Yes, with limitations**	Bromaghim v. Furney, 808 A.2d 615, 617 (R.I. 2002).
South Carolina	**No**	Dorrell v. S. Carolina Dept. of Transp., 361 S.C. 312, 321, 605 S.E.2d 12, 16 (2004)
South Dakota	**Unclear**	See explanation in, Bragg v. Oxford Const. Co., 285 Ga. 98, 102, 674 S.E.2d 268, 271 (2009).
Tennessee	**No**	Johnson v. Oman Const. Co., Inc., 519 S.W.2d 782 (Tenn. 1975).
Texas	**No**	Strakos v. Gehring, 360 S.W.2d 787, 791 (Tex.1962).
Utah	**No**	Tallman v. City of Hurricane, 1999 UT 55, 985 P.2d 892 (Utah 1999); Williams v. Melby, 699 P.2d 723, 729 (Utah 1985).

(The Completed and Accepted Doctrine: Slashing the Liability Shield Continued from page 6)

State	Doctrine still applicable	Illustrative case
Vermont	Unclear	See explanation in, Bragg v. Oxford Const. Co., 285 Ga. 98, 102, 674 S.E.2d 268, 271 (2009).
Virginia	Yes, with limitations	City of Richmond v. Branch, 205 Va. 424, 429, 137 S.E.2d 882, 885 (1964); McCrorey v. Thomas, 109 Va. 373, 63 S.E. 1011, 1013 (1909).
Washington	No	Davis v. Baugh Indus. Contractors, Inc., 159 Wash. 2d 413, 417, 150 P.3d 545, 546 (2007).
West Virginia	Yes, with limitations	Roush v. Johnson, 139 W. Va. 607, 636, 80 S.E.2d 857, 873 (1954).
Wisconsin	Yes	Nelson v. L. & J. Press Corp., 65 Wis. 2d 770, 778, 223 N.W.2d 607, 611 (1974); Cadden v. Milwaukee County, 44 Wis. 2d 341, 345, 171 N.W.2d 360, 362 (1969).
Wyoming	No	Lynch v. Norton Constr., Inc., 861 P.2d 1095, 1098–99 (Wyo. 1993).

Practical Considerations:

Construction law practitioners must know whether the Completed and Accepted Doctrine is applicable in their jurisdiction, and if so navigate the contours in which the courts apply the doctrine. The practitioner must also recognize that the Completed and Accepted Doctrine is generally limited to personal injury contexts as these authors have seen several misapplications of the doctrine. A common misapplication is in attempting to use the Completed and Accepted Doctrine in a purely contractual case in a jurisdiction that limits its use to a tort context. Finally, and depending on how the case is postured, the practitioner must weigh the pros and cons of admitting to a patent defect. More specifically, for example, does counsel honestly wish to advise its general contractor client to affirmatively argue that its work was patently defective?

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Upcoming Forum Events:

ABA Forum 2016 Fall Meeting (Division 7 Planning Retreat Will be Held at Fall Meeting)
October 6, 2016—October 7, 2016 | Location: Chicago, IL
ABA Forum 2017 Midwinter Meeting
February 2, 2017—February 3, 2017 | Location: Palm Desert, CA
ABA Forum 2017 Annual Meeting
April 27, 2017—April 29, 2017 | Location: Washington, D.C.

(Default is not in our Stars Continued from page 3)

The California Sixth District's holding in the JMR case is potentially problematic for several reasons. First, although the JMR court held that the language of the Bonds did not require JMR to declare EAR in default of the Subcontracts, the section of the Bonds entitled "Principal Default" arguably did just that.[4] Therein, the Bonds provided that SureTec's obligations to perform under the Bonds would be triggered "[w]henever the Principal shall be, and is *declared* by the Obligee [*i.e.*, JMR] to be in default under the Subcontract[.]"[5] Upon a declaration of such default by the obligee, the Bonds stated that SureTec could either a) remedy the default (presumably by supplementing EAR's work force and/or cash flow), b) complete the work under the Subcontracts itself, c) obtain new completion contractors to complete EAR's work, d) pay JMR the amount of damages incurred as a result of EAR's default, or e) deny liability.[6] In other words, although the Bonds provided for a panoply of potential courses of performance by SureTec in the event of a default by EAR, those responses were all arguably predicated upon a *declaration* of such default by JMR -- a declaration which JMR admitted that it did not make.

Second, the vast majority of existing jurisprudence concerning performance bonds holds that a declaration of default *is* a necessary prerequisite to any liability on the part of the issuing surety.[7] Whereas the JMR court justified its departure from this line of authority by focusing its analysis on the particular language of the Bonds, it should be noted that the bonds at issue in JMR were set forth on standard AGC performance bond forms, which are used widely in the construction and surety industry.[8] Indeed, the courts in both L&A Contracting Co. v. Southern Concrete Services, Inc., 17 F. 3d 106 (5th Cir. 1994) and Balfour Beatty Construction, Inc. v. Colonial Ornamental Iron Works, Inc., 986 F. Supp. 82 (D. Conn. 1997) interpreted almost identical bond language as requiring the obligee's declaration of default as a condition precedent to the liability of the therein-subject performance bond sureties.[9]

Perhaps most importantly, the JMR decision could fundamentally undermine the deterrent function of the performance bond. From a practical standpoint, placing a principal in default under a performance bond is an uncertain and unwieldy process. In order to do so, the obligee must determine that the principal is in default of the underlying construction contract, issue correspondence to the surety formally declaring the principal in default (usually taking care to observe the notice and/or meet-and-confer requirements often written into the bonds),[10] and hope that the surety will agree that the principal is actually in default.[11]

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4 See AGC Document No. 606 (1988), Subcontractor Performance Bond, at § 4.

5 See AGC Document No. 606 (1988), Subcontractor Performance Bond, at § 4 (emphasis added) (bracketed text added).

6 See AGC Document No. 606 (1988), Subcontractor Performance Bond, at § 4.

7 See Hunt Constr. Group, Inc. v. Nat'l Wrecking Corp., 587 F. 3d 1119 (D.C. Cir. 2009); Elm Haven Constr. Ltd. v. Neri Constr., LLC, 376 F. 3d 96 (2d Cir. 2004); Memphis-Shelby County Airport Auth. v. Ill. Valley Paving Co., 2007 WL 2904539 (W.D. Tenn. 2007); Dooley andMack Constructors, Inc. v. Developers Sur. & Indem. Co., 972 So. 2d 893 (Fla. App. 1997); Dragon Constr., Inc. v. Parkway Bank & Trust, 678 N.E. 2d 55 (Ill. App. Ct. 1997).

8 See AGC Document No. 606 (1988), Subcontractor Performance Bond.

9 Although the L&A and Balfour cases do not specifically mention that the respective performance bonds there at issue used AGC bond forms, the language quoted from those bonds is substantially similar to that at issue in the SureTec bonds in JMR.

10 By way of example, in order to comply with the formalities of declaring an obligee in default under a standard American Institute of Architects ("AIA") A312 (2010) performance bond, the obligee must a) provide written notice to the surety that the obligee is considering declaring the principal in default, b) give the surety five business days after receipt of notice to request a conference among the obligee, principal, and surety, c) participate in such a conference (if requested) within ten business days after the surety's receipt of the initial notice, d) formally declare the principal in default by separate correspondence (assuming the matter remains unresolved), e) terminate the underlying construction contract (taking care to follow the independent set of contractual formalities typically associated with such termination), and f) send formal notice of the default and termination to the surety by still another separate correspondence. See AIA A312 (2010) at § 3.

11 As the United States Fifth Circuit explained in L&A, "[n]ot every breach of a construction contract constitutes a default sufficient to require the surety to step in and remedy it. To constitute a legal default, there must be a (1) material breach or series of material breaches (2) of such magnitude that the obligee is justified in terminating the contract." L&A, 17 F. 3d at 110.

(Default is not in our Stars Continued from page 8)

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If the surety denies liability (*i.e.*, if the surety does not concur that the principal has defaulted under the contract), the obligee faces the prospect of potentially incurring additional up-front, out-of-pocket expenses to supplement the principal's workforce and/or independently engage a completion contractor, with compensation for those additional costs recoupable only if the obligee can establish liability under the bond in a subsequent lawsuit against the surety. Even if the surety confirms that the principal is in default, the prospect of potentially having a completion contractor (or even the surety, itself) mobilize to the job site in order to complete or supplement the principal's work inherently carries with it the risk of seriously delaying the completion of the project. Stated simply, the cumbersome nature of the default declaration process (and all of the time delays, uncertainty, and danger of increased up-front expenses that go along with it) is one of the primary factors which push the parties to work out their disputes on a construction project rather than look to the surety in times of conflict.

Although it is not yet certain whether JMR will be upheld by the California Supreme Court, the reverberations of JMR could potentially be far-reaching. In removing the requirement of a declaration of default, JMR arguably eliminates much of the risk that an obligee would otherwise run in asserting a marginal or equivocal claim under a performance bond after the completion of the construction project; secure in the knowledge that the work has already been performed, the obligee would be in no danger of experiencing unnecessary delays or incurring up-front completion costs in the event that the surety does not agree that the principal is in default of the underlying contract. This could lead to an increase in post-completion lawsuits by obligees against their performance bond sureties -- which could, in turn, result in an increase in bond premiums in an effort to offset the increased risk. In these (and other) ways, although its ultimate effects remain unclear, JMR threatens to transform the rights and responsibilities that flow within the classic tripartite relationship among an obligee, a principal, and a performance bond surety.

By: Shailendra (Shay) Kulkarni

Sullivan, Hill, Lewin, Rez & Engel, APLC

(Message from the Chair—Continued from page 1)

This Award was bestowed upon Terry in recognition of his efforts for both Division 7 and the Forum. For those who did not have the opportunity and pleasure to meet Terry Galganski, he was truly a unique and inspirational colleague for many of us. He embodied what the Forum is and will continue to be in the future.

Division 7 continued to expand the world of "products" it is delivering to its members. In addition to the quality newsletter being published on a quarterly basis, Division 7 embarked on a robust task of synthesizing all 50 States Mechanic's Lien laws into a usable pamphlet that will be both available in hardcopy and online. This pamphlet is near completion. On the horizons, Division 7 will be publishing a similar 50 State review of the Little Miller acts.

Finally, I leave Division 7 in the trusted and well deserved hands of Tim Ford. Tim will be the next Chair of Division 7 for the upcoming two bar years. Tim is going to receive the guided assistance of several quality Division 7 Steering Committee members, to which we have added Julia Hunting, Robert Dietz, and Phil Truax during my tenure. I appreciate all of the assistance, friendship, and and support of my fellow Steering Committee members and the members of Division 7. My hope is for Division 7 is to continue its long history of being very successful within the Forum in it's contributions, it's support, it's volunteerism, and assistance to any other Division or member who needs our help.

Division 7 Member Spotlight

Julia Hunting , Esq.
Berding & Weil LLP

Julia Hunting is an attorney at Berding & Weil LLP in Northern California. She concentrates in all facets of construction law, from construction contracts and dispute resolution to complex construction defect litigation. She represents commercial and residential property owners and homeowners' associations in a variety of construction issues ranging from construction contracts, mechanics liens, release bonds, settlement agreements construction defect litigation and post-litigation reconstruction projects. She also handles a broad array of insurance coverage issues that frequently arise in construction projects under commercial general liability and builder's risk policies.

Before joining Berding & Weil, Julia worked as a structural engineer for over 12 years at a large civil-structural engineering firm in San Francisco. She is a California licensed Professional Engineer and Structural Engineer, and her project experience as an engineer encompasses new and existing multistory office, residential and hospital structures, retail rollouts and tenant improvements.

Julia joined the Forum in 2013, and in 2016, she received the Forum's Diversity Fellowship and became a member of Division 7's steering committee. She is a co-editor of Division 7's 50-state mechanics lien law summary and a session coordinator for the Forum's 2017 Midwinter Meeting. Julia is honored to be able to contribute to producing quality publications and programs for the Forum's members, and looks forward to collaborating with her fellow construction law attorneys and Forum members on future projects.

During her free time, Julia enjoys tackling home construction projects and hitting the local California beaches and trails with her family.

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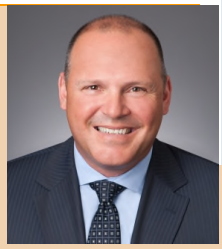
Editor's Corner

Steven Cvitanovic, Editor



As we head to Nashville for the Annual meeting, I thought it would give you a head start on some interesting facts about this great city from USA Today.

If you think Nashville is all cowboy boots and country bars, you are mistaken. Sure, Nashville is home to country music but it is also a place of high culture and rich history.

Long before Nashville became Music City, it was known as the Athens of the South because of its many higher educational institutions. The Nashville area has over 20 postgraduate institutions, including Vanderbilt University, one of the finest institutions in the world. In the 1890's the city built a replica of Athens' Parthenon for the 1897 Tennessee Centennial Exposition.

Nashville boasts the World's Longest-Running Live Music Radio Show. The Grand Ole Opry has been broadcasting every week since 1925 on AM radio station WSM. The show has had many venues through the years, beginning in the studios of WSM but has been broadcasting from the stage of its permanent home at the Grand Ole Opry since 1974.

"Good to the Last Drop". Maxwell House Coffee's well-known "Good to the Last Drop" slogan originated in Nashville. In 1907, President Theodore Roosevelt was visiting the the former home of Andrew Jackson and is said to have asked for some coffee while touring the home and was given a local brand named after the Maxwell House hotel in Nashville. After drinking the coffee, Roosevelt is said to have uttered the phrase, "good to the last drop." Afterwards, the company began touting the connection between its catch phrase and Roosevelt in its ads.

Congratulations to our authors and Division 7 for another fine Newsletter. As I read through the articles, I picked up a ton of information on P3's, surety obligations in the absence of a declaration of default, and the "Completed and Accepted Doctrine." I trust you will find these articles as informative and interesting as I did. And remember to check out the Member Spotlight about Julia Hunting, who is now on the Steering Committee.

Best Regards,

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