SHIELDS MOTT LUND L.L.P.
ATTORNEYS AND COUNSELLORS AT LAW

Louisiana Construction Law and News Update

SUMMER 2012

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Construction Law Update

Work of the 2012 Louisiana Legislature

In its 2012 Regular Session, the Louisiana Legislature passed several bills which are of interest to the construction industry in Louisiana. We provide now a synopsis of some of the more important changes in the law affecting the construction industry.

SENATE BILL NO. 258

Louisiana Revised Statute 9:2772, governing "peremptive" periods for filing suit or initiating arbitration on private construction projects, was amended to address a hiccup of sorts in the law concerning claims for indemnification. In 2011, in the case of, *Ebinger v. Venus Construction Company*, 65 So. 3d 1279 (La. 2011), the Louisiana Supreme Court declared that the five-year peremptive period for filing an action on a construction contract ran contemporaneously against all parties involved in a construction project. For example, in the event that an owner sued a general contractor at the end of the fifth year, it is distinctly likely that the general contractor might not have any ability to seek indemnity from a subcontractor or supplier which may have been responsible for the matters about which the owner complained. That unfortunate result would ensue despite the fact that the general contractor had no way to seek indemnity timely.

The change to the law now provides for the exact circumstance described above. The amendment states that if "within ninety days of" (presumably this means 90 days in **advance** of) the expiration of the five-year peremptive period a claim is brought against any person or entity contemplated by the statute, that person or entity will have ninety days from the date of "service of the main demand or, in the case of a third-party defendant, within ninety days from service of process of the third party demand," to file its own claim for contribution, indemnity or a third-party claim against any other party.

This bill became effective August 1, 2012.

SENATE BILL NO. 338

Taking away the latitude of public owners to delay the execution of awarded contracts for extended periods of time, the Legislature amended La. R.S. 38:2215 by adding language which now provides for a maximum period of time for the final execution of awarded public contracts. Under the added provision, if the contractor has provided all necessary documents to the public entity within ten days of the opening of bids and no bid challenge has been submitted to the public entity, the contractor and public entity shall execute the contract not later than forty-five days from the public entity's acceptance of the lowest responsible bid.

This bill became effective July 1, 2012.

HOUSE BILL NO. 450

Often a change in the law merely adds to the confusion on the topic. The Louisiana lien laws (both Public and Private Works) have been the source of consternation for years based upon the myriad disparate, inconsistent regulations concerning timing and filing in each of the statutory schemes.

One of the principal sources of heartburn is the calculation of the time allowed for filing suit to enforce a claim following the filing of a statement of lien or privilege. On that topic, La. R.S. 9:4823 has now been amended to provide -- for Private Works Act liens only -- beginning on the effective date of the Act that, a claimant will have one year after the filing of the statement of claim of privilege to institute suit a suit to enforce. This is a change from the soon-to-be-former provision which provided that the one-year period for filing suit began to run from the expiration of the deadline for filing the statement of claim or privilege (compare the Public Works Act, which provides that suit to enforce a claim under the Act must be filed within one year following the date upon which the certificate of substantial completion/termination is filed).

This revision arguably benefits no particular group: while the change potentially shortens the period of time a Private Works Act claimant may have to file suit, it means for owners that certain claimants may find it necessary to file suit much earlier than previously required. This may entail that lien claims by trades which complete work early on a major project (for example, pile drivers) may choose to initiate suit during the course of the construction project as opposed to after the job is completed.

Note that the effective date of this portion of the bill is not until August 1, **2013**. Until then, the existing law remains in full force and effect.

HOUSE BILL NO. 996

This bill, amending and reenacting Louisiana Public Bid Law provision La. R.S. 38:2212.10(F) and enacting La. R.S. 38:2212.10(G) concerning E-Verify procedures, clarifies the existing, albeit relatively new law by declaring that the

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Letter From the Firm

We are pleased to deliver to you the latest edition of "Louisiana Construction Law and News Update." This newsletter is provided to keep you and your company current on legal topics that affect the construction industry. The firm hopes you find this information insightful and relevant to your work.

The newsletter is published on a quarterly basis by the firm and is distributed to the construction industry. We encourage suggestions and ideas for articles from our readers so that this publication can be as current and useful as possible.

We appreciate the opportunity to provide this newsletter to you. If you know of others in the industry whom you think might enjoy receiving the publication, please let us know so that we can add them to our industry list.

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Surety Decisions and Non-Louisiana Cases

Hudson Insurance Company v. Simmons Construction, LLC, 2012 U.S. Dist. LEXIS 33907 (D. Az.)

This case, from the perspective of sureties, is the first in a recent pair of disturbing rulings on the issue of a surety's ability to obtain adequate collateralization under general indemnity agreements.

In *Hudson*, plaintiff surety sought a temporary restraining order enjoining the defendant principals subject to a general indemnity agreement from disposing of assets and otherwise requiring the defendants to post $5.6 million in collateral or other security in relation to various claims on several bonded construction projects in Arizona. The surety also sought a lien on all assets of the defendants in the amount of $5.6 million, and other injunctive relief (including access to the defendants's books and records, an aspect of the request for TRO that the defendants did not contest).

The principal dispute between the parties was over the posting of collateral and granting of the lien on all defendants's property. At the hearing on the TRO, the defendants requested that, under any circumstances -- even if a temporary restraining order issued -- the defendants should not be enjoined from continuing to make expenditures to run the business of the principal, and otherwise should be allowed to continue to employ lawyers and other professionals in order to continue to prosecute existing matters in litigation.

The Court noted that the surety was invoking the equitable remedy of *quia timet* as the basis for its demand for immediate injunctive relief, noting that the doctrine "allows a person to seek equitable relief from a future probable harm to a specific right or interest." The Court went on: "Whether Defendants will be required to collateralize Plaintiff through a TRO depends on whether it is likely that Plaintiff will otherwise suffer irreparable injury."

At the end of its analysis, the court was unpersuaded by the surety. Noting significant legal precedent throughout the United States which boded in favor of the surety's request for collateralization and similar relief, the court nonetheless declared that neither the Ninth Circuit (the United States Court of Appeals for the states and territories of Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington) nor the United States district courts within the Circuit had a history of following the cited surety-favorable jurisprudence. Instead, the court opined that the TRO of such magnitude was unwarranted.

Noting that, while "collateralization may improve Plaintiff's position relative to other creditors...," the court was unpersuaded that the surety proved that the defendants' frittering away of assets was "likely," and further held that likely "irreparable harm" was not shown by the surety because the potential losses to the surety were "purely economic" in nature (noting the jurisprudence holding that potential economic loss alone does not constitute irreparable injury). Hence, the court granted only a small portion of the requested TRO, merely enjoining the defendants from "selling, transferring, wasting, encumbering or otherwise disposing of their assets and property except in the ordinary course of business."

The *Hudson* case was followed by *Travelers Casualty & Surety Company of America v. W. P. Rowland Construction Corp.*, 2012 U.S. Dist. LEXIS 68147 (D. Az.). In *Rowland*, the court had before it a demand for preliminary injunction by the surety wherein the surety -- which had already been granted injunctive relief requiring the defendant principals to use contract proceeds from bonded projects to pay off bonded

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debts -- sought in addition $1.3 million to be deposited with the surety as collateral security (as well as an order prohibiting the defendants from transferring or otherwise encumbering assets until the collateral is provided).

Noting the high threshold for granting "mandatory" injunctions and a requirement for the applicant to show "irreparable harm" and an inadequate "remedy at law" before a preliminary injunction can issue, the court refused the plaintiff's demand. According to the court: "Plaintiff has not shown that it is likely to incur any damages other than the economic costs of paying the bond claims prior to receiving collateral." Because that injury could be "remedied by a damage award," the court held that a preliminary injunction granting collateralization was deemed unwarranted.

As part of its opinion concerning the denial of the request for collateralization, the court noted that the surety had not proven that the **surety** (and not the principals) lacked sufficient funds to pay the various claims being made against the bonds (the notion apparently being that the surety would not, in essence, go out of business by paying the claims in the absence of collateralization by the bonded contractor).

In regard to the remaining demand for an order prohibiting the principals from dissipating assets, the court (noting the somewhat lower threshold for the prohibitory injunction) still refused the plea. Although dissipation of assets has been held by courts in the jurisdiction to constitute irreparable harm, the court believed the plaintiff surety had not showed that irreparable harm was likely. On the topic, the surety had alleged in its complaint that the principals were diverting assets into two outside trusts, although at the hearing on the injunction the surety provided information only as to the existence and status of the trusts -- and not evidence that monies were actually being diverted to the trusts.

At the end of its opinion, the court seemed to lob the surety a softball, noting that the surety had proceeded on its injunction believing that state law applied, and not federal law as the court ultimately determined. The court noted that the surety had a high likelihood of success on the merits of its eventual indemnity claim, and suggested that the surety might reapply for preliminary injunctive relief with a more thorough focus on the federal law standards for that.

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E-Verify provisions concerning eligibility to work in the United States do not apply to all "public contract work" but rather only to "contracts for public works." According to the terms of the revised law, "public works" has the traditional meaning of the term in the Public Bid Law, that is, means "the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity."

This bill became effective August 1, 2012.

HOUSE BILL NO. 1129

The Legislature amended Public Bid Law provision La. R.S. 38:2212 on the topic of post-bid document submission. In order to clarify a matter which had become the source of litigation (see, *e.g., L.L. & G. Constr. v. Greater Lafourche Port Comm'n*, 2012 La. App. Unpub. LEXIS 283), the Legislature changed the law to more clearly state that the "other documentation and information" which can be required of bidders after the opening date specifically includes (but is not necessarily limited to) low bidder's attestations pursuant to R.S. 38:2212.10 and 2227. The attestations provided by the cited statutes are comprised of certifications concerning prior criminal convictions (or lack of same) of the low bidder.

This bill became effective August 1, 2012.

A little green piece

The growth of the green building industry has revolutionized the world of construction, in five years increasing in value 14 fold (from $3 billion in 2005 to an estimated $54 billion in 2010. Drew Liming, *Green Job: Green Construction - Careers in Green Construction*, U.S. Bureau of Labor Statistics (June 2011) (statistics based on the green nonresidential building industry)).

Until now, implementing "green" processes has typically been voluntary. With the introduction of the 2012 International Green Construction Code (IgCC), this may be changing.

What is "green building?" The Environmental Protection Agency (EPA) defines green building as "the practice of creating and using healthier and more resource-efficient models of construction, renovation, operation, maintenance and demolition." Federal Executive Order 13514 sets numerous green requirements for the federal government. Now, many state and local governments are enacting "green" legislation -- some uniquely tailored to meet the environmental concerns of a specific jurisdiction, although some requiring compliance with third-party certification systems, such as US Green Building Council's (USGBC) Leadership in Energy and Environmental Design (LEED) and the International Construction Code's (ICC) International Green Construction Code (IgCC).

Since its creation in 2000, LEED has been at the forefront of setting green building standards to encourage and promote energy-efficient construction. LEED allows "green builders" to measure sustainability through a rating system for which points are allocated under various areas of environmental focus, such as water resource efficiency. The LEED rating system is adopted on a *voluntary basis*, serving to push the envelope for developers who commission projects with sustainability characteristics above and beyond the baseline.

The ICC released the 2012 IgCC following the release of the Public Versions 1.0 and 2.0 in 2010. In contrast to LEED, the 2012 IgCC is designed to be an enforceable code, intended to decrease the negative effects of buildings and construction on the natural environment while increasing energy-efficiency of building structures. It establishes baseline sustainable design requirements applicable to new and existing building structures through a regulatory framework adopted on a *mandatory basis*.

According to USGBC, the IgCC is complementary to LEED in that it allows state and local governments "to share many of the benefits of green buildings with the millions of buildings… designed, constructed and renovated to meet minimum code, whether or not they are engaged in the LEED program." Press Release, U.S. Green Building Council, U.S. Green Building Council Applauds Newly Released International Green Construction Code (March 28, 2012) (on file with author). Moreover, IgCC also allows incorporation of other code systems such as ASHRAE 189.1.

Since LEED was launched in 2000, over nine billion square feet have been registered as LEED-certified. Robert Watson, *Green Building: Market and Impact Report 2011*, Greenbiz.com, (2011). For its part, the IgCC has been adopted statewide by Florida, Maryland, North Carolina, Oregon, and Rhode Island as well as certain local jurisdictions in Arizona. The value of the green nonresidential building market is expected to double by 2015 to an estimated value between $120 billion and $145 billion. Liming, *supra,* at note 1.

A thorough understanding of green codes and standards, in addition maintaining access to the latest updates on the issue, is of significant importance to participants in the construction industry. We will continue to provide "green" updates in subsequent issues of this newsletter, as well as in anticipated informational seminars on green building given by Shields Mott Lund L.L.P. Particular inquiries on the topic can be addressed to firm partner Adrian A. D'Arcy at aad@shieldsmottlund.com.

BP Oil Spill Claims

If you believe you or your business may have suffered economic loss because of the Deepwater Horizon Oil Spill, you may be eligible for benefits, including recovery from the economic loss settlement which you may have seen reported in the news.

In regard to economic losses, class members have distinct rights and options with respect to the economic loss settlement, including filing claims, opting out of or objecting to the settlement. Additional information on the matter can be obtained by contacting partner Daniel Lund, III of the firm.

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If you would like to receive this quarterly newsletter electronically rather than by US Mail, please notify us of that by e-mail to dlund@shieldsmottlund.com

News and Notes

Construction Seminars

Shields Mott Lund is pleased to announce the following construction law seminars:

Construction Defects Liability in Louisiana
(National Business Institute)
Baton Rouge, Louisiana
November 7, 2012, 9:00 a.m. – 4:30 p.m.

Louisiana Public Contracts and Procurement Regulations
(Lorman Education Services)
Lafayette, Louisiana
November 13, 2012, 8:30 a.m. – 4:30 p.m.

New Orleans Public Contracts and Procurement Regulations
(Lorman Education Services)
New Orleans, Louisiana
March 27, 2013, 8:30 a.m. – 4:30 p.m.

Our seminars are designed to address the legal issues that the construction industry faces and to zero in on the options that make the best legal advice. Understanding these issues and choices and being prepared for potential problems are the best ways to avoid pitfalls. Additional information on the listed seminars can be obtained by contacting Dan Lund at Shields Mott Lund (504-581-4445).

The partners are pleased to have authored and to announce the release of the ***Louisiana Construction Law Book***, a complete and current reference tool for contractors, surety companies, insurers, owners and design professionals in construction industry disputes - or if seeking to avoid disputes while working in Louisiana.

Published by HLK Global Communications of Vienna, Virginia, the easy-to-use 286-page comprehensive manual will help guide you through the Louisiana statutes and case law governing public works and private construction projects of any size. Topics covered in the book include contract drafting and interpretation, lien claims and enforcement of or defense against those, ordinary claims and disputes on the job (including changes in the work, delay and acceleration claims and claim documentation and preparation), differing site conditions, available damages and remedies, public works bidding and bid disputes, surety bonds, different types of insurance, licensing, statutes of limitation, collection strategies, alternative dispute resolution methods and others. For more information, please go to http://www.constructionchannel.net/law_books/Louisiana.asp.