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

Louisiana Construction Law and News Update

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Construction Law Update

What do you mean there's nothing personal?

Are sureties bound by arbitration awards rendered in proceedings in which the surety does not participate? *Lacour's Drapery Company, Inc. v. Brunt Construction, Inc.*, 2006 WL 1751899 (La. App. 1st Cir.) was a suit prosecuted principally for the purpose of enforcing an arbitration award against the general contractor defendant. Plaintiff amended its petition to add the defendant's surety as a co-debtor with the general contractor on the arbitration award. The surety defended on the basis that it had not participated in the arbitration, asserting that the plaintiff's sole recourse against the surety would be to separately litigate the principal claims against the surety. The trial court disagreed with the surety, and the surety appealed.

In affirming the trial court's decision and finding the surety liable on the award, the court of appeal took into account the surety's argument that it was unable in the arbitration to defend itself (it was apparently undisputed that although the surety was aware of the subcontractor claim, it was neither invited to participate in nor even aware of the arbitration proceeding). Relying on a 1995 case from the Louisiana Third Circuit Court of Appeal on the subject (*Town of Melville v. Safeco Ins. Co.,* 651 So.2d 404), the First Circuit held that the arbitration award established not only the "upper limit" of the surety's liability but also established the actual liability of the surety, subject only to the surety's opportunity to later offer its unique and personal surety defenses to the claims. The surety was barred by the court of appeal from asserting the personal defenses, however, because the surety failed to assert those defenses at the confirmation hearing on the award – a hearing which is characteristically short and perhaps not the place (because of the surety's pending procedural objection to enforcement of the award) the surety would have expected to be required to present its substantive defenses to attack the award at its roots.

No Internet access: out-of-state manufacturer escapes suit in Louisiana

Since courts have been in business, the ability to reach defendants in other states to haul them into local courts has been a challenge tempered with "notions of fair play and substantial justice." Courts wrestle with the enumeration of the "contacts" the out-of state party has with the state in which suit is filed when deciding whether personal jurisdiction over the defendant is appropriate. Can you sue in Louisiana courts an out-of-state manufacturer of specialized construction materials on the basis of a "contact" with the state that is an advertisement by the manufacturer on the Internet? According to at least one Louisiana court, the answer is "no."

In Quality Design and Construction v. Tuff Coat Manufacturing, 2006 WL 1900964 (La. App. 1st Cir.), a Colorado manufacturer (Tuff Coat) of a polyurethane coating used for water park construction was sued in Louisiana state court based on allegations that pigment from the coating leached from the applied product and both damaged the water purification system at the Louisiana park and required a reapplication of the coating surface. The Colorado company opposed personal jurisdiction, noting that it was not authorized or actually transacting business in Louisiana (although sales of the product to four other Louisiana entities had previously occurred), and its website was actually an "information only" website that did not provide for web-based transactions between the manufacturer and potential customers. In finding in favor

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Shields Mott Lund L.L.P. • 650 Poydras Street • Suite 2600 • New Orleans, Louisiana 70130
504-581-4445 • Fax 504-581-4440 • www.shieldsmottlund.com

Letter From the Partners

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

***Centex Construction v. Acstar Insurance Co.*, 2006 WL 2476541 (E.D. Va.)**

The surety in this case unsuccessfully sought to restrict a conventional subcontract bond to its original penal sum – $170,200 – rather than the increased amount of $2,577,012 urged by the general contractor after the subcontractor defaulted. In fact, the subcontract had been the subject of several substantial change orders which raised the subcontract amount to the multimillion dollar figure. Central to the decision of the court was virtually identical language in the subcontract and bond that declared that work under the subcontract could increase, and an additional bond term that plainly stated that the penal sum of the bond would increase in a corresponding fashion with no need for notice to the surety of the increase or surety's approval. The surety urged several defensive theories, including that

- the increases defied trade/industry custom and practice;
- the increases took the subcontract scope well beyond the type of work contemplated by the original agreement;
- the apparent contemplation of the general contractor obligee and subcontractor principal that separate bonding (which never materialized) would be obtained for the added workscope was proof that the parties never intended to increase the penal sum of the original bond; and,
- the surety never received additional premium to account for the increased penal sum, and the general contractor and subcontractor failed in three quarters of the change proposals to account in the pricing for additional bond premiums,

all of which arguments were rejected by the court in favor of the court's reading of what it deemed to be the "plain meaning" of the language in the bond and related subcontract regarding increases in the work. On summary judgment, the court established the penal sum of the bond to be $2,577,012.

***Appeal of Spindler Construction Corporation*, 2006 WL 2349234 (A.S.B.C.A.)**

The appellant in this Board of Contract Appeals matter sought for its steel fabricator subcontractor an equitable adjustment for increases in steel prices. The adjustment sought was approximately $200,000 on an original anticipated cost to the subcontractor for pre-fabricated steel of $868,375.95. The claim asserted "impracticability" of performance – a doctrine recognized by the state of Utah (the home state of the U.S. Air Force Base at issue) in matters of construction contracts – based upon the significanct changes in steel prices, which altered a "basic assumption on which the contract was made." In rejecting the claim, the BCA noted that commercial impracticability is a "subset" of the doctrine of legal impossibility – requiring for its assertion as a basis for recovery that the impracticability be "genuine." The Board found that the 23% increase in the cost of pre-fabricated steel did not make the contract impracticable (noting examples in prior cases where cost overruns of 57 and 70 percent were held not to render performance commercially impracticable). The Board further found that a fixed price general contract, as a matter of course, places the risk of cost increases on the general contractor (eliminating from possible fulfillment another factor in the impracticability analysis: that the claiming party had not assumed the particular risk of loss).

***United States v. Liberty Mutual Insurance Co.*, 2006 WL 2471651 (E.D. Va.)**

A Miller Act claimant had its suit against the bond dismissed for failure to provide the statutorily mandated 90-day notice, a notice provision applicable only to so-called "second-tier" subcontractors (that is, a claimant in privity of contract with a direct subcontractor to the general contractor). For its part, the claimant asserted it was a first-tier subcontractor, as the party with whom it had contracted, during the project, had been named as the completion contractor when the original general contractor defaulted. In ruling against the claimant, the court held that the focal inquiry was not completely subsumed in the relationship of the claimant to the

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of the Colorado defendant and dismissing the suit against it, the court considered the several sales to Louisiana customers to be "fortuitous" (as opposed to being based on sales efforts directed at Louisiana, which is more characteristic of many other forms of advertising which, by their nature, are necessarily more directed in their focus) and the website to lack the informational back-and-forth capability that has led some courts to adopt a standard that allows for "minimum contacts" to be established principally on the basis of Internet activities. A strong dissenting opinion in the case decried the result as allowing careful electronic advertising to be a doorway for the introduction of hazardous or defective products into a state market with relative impunity.

Contractor tort liability reaffirmed

The plaintiff in *Martin v. Boh Bros. Construction Co, L.L.C.*, 934 So.2d 196 (La. App. 4th Cir. 2006), sued a general contractor on a repaving project for injuries she received when she tripped on an unmarked section of uneven pavement. Undisputed in the case was that the pavement was uneven (it was also determined to be hazardous) and that the condition was inevitable in the construction process.

Part of the general contractor's defense to the claim was according to La. R.S. 9:2771, the state law that provides immunity to contractors from liability based on defects in plans or specifications provided to the contractor for the work. The contractor relied on language in the specifications that indicated that the public owner of the project would be responsible for "detour or warning" signs as the city saw fit. In finding that a warning sign at the site of the plaintiff's accident was necessary but lacking, the court also rejected the statutory defense of the contractor. In the words of the court, "a contractor may not be entitled to statutory immunity… if it has reason to believe that adherence to plans and specifications provided to it may create a hazardous condition or unreasonable risk of harm."

Surety fairly excluded from the Krewe of Wrecks

The plaintiff in *Scott v. Red River Waterway Commission*, 926 So.2d 830 (La. App. 2nd Cir. 2006), brought a civil wrongful death action against several defendants related to an automobile accident on Teague Parkway in Bossier City. Defendant Bossier City filed a third party action against the surety for the original road contractor on the basis of the surety's involvement in the completion of the roadway upon the earlier default of the general contractor/principal. In response, the surety filed an exception of no cause of action (which had the look and feel of a motion for summary judgment) which was sustained by the trial court.

On appeal, the city unsuccessfully urged the appellate court to keep the surety in the case by suggesting that the surety had effectively agreed to undertake the completion of the project and should bear the responsibility of the alleged shortcomings in the work of the completion contractor tendered by the surety. The court of appeal disagreed, focusing on the portion of the tender agreement wherein the city had accepted the tender and had further agreed that the city would work "directly with the Completion Contractor as if the Completion Contractor was the original contractor." This was the result notwithstanding language in the same tender agreement whereby the surety, in fact, literally agreed that it "accept[ed] responsibility for the performance of the work remaining under the Contract." The court went further, noting in dicta that it understood that a surety may assume liability of the type alleged against it if it had "taken on the role of the contractor and acts directly in completing the project," and also stated that in such a circumstance the liability of the surety can "extend beyond the amount of its bond."

Non-conformist's view of the universe

When is a hotel not a hotel? The property owner in *FQCPRQ v. Brandon Investments, L.L.C.*, 930 So.2d 107 (La. App. 4th Cir. 2006), came dangerously close during major renovations to losing the legal non-conforming "hotel" (this is the term used through most of the case; in some instances, though, the term "guest house" is employed) status of a property in the French Quarter. By law, some qualifying properties that do not conform to existing zoning laws may nonetheless enjoy legal non-conforming status based upon certain rules and other Constitutional principles regarding takings. This is true, for example, of properties enjoying a certain legal use when zoning is changed to prohibit such uses – the result is commonly referred to as "grandfathering" of the property and the newly non-conforming use at the site.

One caveat to the continuation of a non-conforming use is that discontinuance of that use for a certain length of time (here, six months) will result in the removal of the "legal" tag from the use and require its cessation. So went the argument of the plaintiff neighborhood group, as it sought to obtain a preliminary injunction by showing that the property at 517 Dumaine Street was being entirely renovated for over six months during which time no guests stayed at the hotel. Although the owner of the property ultimately prevailed in both the trial and appellate courts, it did so on what appeared from the decision to be the slimmest of evidence (the court of appeal noting that the trial court, in denying a preliminary injunction, has broad discretion to interpret the evidence before it) and with the acknowledgement by the appellate court of the zoning maxim that "all doubts [should be] resolved against the continuation" of a non-conforming use.

News and Notes

Our New Digs!

The firm's New Orleans offices are now on the 26th floor of Poydras Center. The firm's address is:

Shields Mott Lund L.L.P.
650 Poydras Street
Suite 2600
New Orleans, Louisiana 70130
Office: 504-581-4445
Fax: 504-581-4440
www.shieldsmottlund.com

Upcoming Construction Law Seminars

Shields Mott Lund L.L.P. is pleased to announce an upcoming construction law seminar:

A Cynic's View of Arbitration and Litigation
(National Bond Claims Association), October 12, 2006
Pinehurst, North Carolina - 8:00 a.m. – 11:30 a.m.

Managing Complex Construction Law Issues
(National Business Institute), February 7, 2007
New Orleans - 9:00 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 seminar can be obtained by contacting Sonny Shields at Shields Mott Lund (504-581-4445), or, for the National Business Institute seminar, from NBI at www.nbi-sems.com.

Surety Decisions and Non-Louisiana Cases continued from page 2

general contractor at a given time, but, rather, centered on the relationship to the contractor that supplied the Miller Act bond. Because the claimant was never in privity with that contractor, it was a second-tier claimant and subject to the 90-day notice provision.

***Capitol Indemnity Corporation v. United States*, 452 F.3d 428 (5th Cir. 2006)**

A surety sought by a wrongful levy action (under 26 U.S.C. § 7426(a)(1)) to have restored certain monies levied and collected by the Internal Revenue Service from a public project owner. Those monies constituted contract funds held by the owner on a job that the surety had completed after the general contractor/tax debtor had defaulted. The principal question tackled by the court was not whether the rights of the surety to the funds primed the rights of the IRS, but, rather, more particularly whether the defaulted contactor – in whose name the IRS executed the levy – had any right at all to the funds. According to the court, in a levy proceeding, "the IRS acquires only such rights to property that the taxpayer himself possesses." Siding with the surety, the court held that the construction contract at issue allowed the owner to withhold funds upon contractor default, and also that the default was never cured by the contractor. As such, the IRS could not prove a "nexus between the property levied upon and the taxpayer," rendering the levy wrongful and requiring the repayment of the funds.

***American Contractors Ins. Co. v. United National Ins. Co.*, 2006 WL 2366433 (E.D. Ky.)**

A contractor on a pipe tunnel boring project caused damage to an adjacent roadway when it failed to properly re-compact certain earth it removed in an effort to free a stuck auger. The rescue mission directed at the auger took a significantly different route than the original tunnel plan. When the contractor defaulted on the whole of the project, its surety (the plaintiff) completed the contract work, and had repaired the damage to the roadway. Seeking to recover its losses on the repairs related to the road damage, the surety sued its principal's CGL insurer (the defendant). The insurer resisted the claim, citing its policy exclusions for damage occurring to property on which work was being performed and caused by the work operations. In response, the surety argued that the location and goal of the auger rescue mission required a finding that the damage from that operation occurred outside of the contracted work and that, therefore, the work exclusion was inapplicable to the damage to the road. The court sided with the CGL carrier, holding that the retrieval effort became part of the contractor's work "incidental to the contract due to the turn of events."

SHIELDS MOTT LUND L.L.P.
ATTORNEYS AND COUNSELLORS AT LAW
650 Poydras Street • Suite 2600 • New Orleans, Louisiana 70130

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