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

# Louisiana Construction Law and News Update

Spring 2004 Volume 2, Issue 1

In this issue:



## Construction Law Update

### Work of the 2003 Louisiana Legislature

Three significant changes in the law as it pertains to the construction industry were enacted by the Louisiana legislature in its 2003 regular session.

- Act 880 enacted Louisiana Revised Statute 37:2881-2192 and provides for the licensing of persons performing mold remediation services. The law is interesting in its content, as it provides in part that no one performing mold remediation services at a property can have performed the mold assessment on the property, or even own an interest in the company which performed the mold assessment services. This requirement was foreshadowed by the portion of the enactment which declares the purpose of the law, wherein the Legislature characterizes the field as one in which "unqualified individuals may injure or mislead the public."

- Act 919 reduces the "peremptive" period for filing construction contract actions to five years (from seven years). In our last edition of this newsletter, we reported on a case which dealt with the dichotomy between the then-existing seven-year peremptive period within which to bring suits on construction contracts and what appears to be a conflicting provision in the Louisiana Civil Code providing for a longer period of time to bring certain construction-related lawsuits. The most recent amendment to the statute, La. R.S. 9:2772, only intensifies the debate. Our discussion on the matter from our prior edition may be viewed on the firm's website.
- Act 863 reduces from 45 days to 30 days the time within which a performance bond surety on a Louisiana Department of Transportation and Development project may respond to notification by the DOTD of contractor/principal default. The statute, La. R.S. 48:255.2, now provides that the surety, within the shortened period, must present the DOTD with a plan to either assume performance of the contract, pay the full bond penal sum, or provide the DOTD in writing with a reasonable response for the contractor's alleged default. Failure by the surety to act within the allotted time frame subjects the surety to payment up to the penal sum of the bond for both the DOTD's completion of the project and any liquidated damages assessed by the public entity. The statute also provides for liquidated damages, attorney's fees and court costs in excess of the bond penal sum if the surety's refusal to respond under the section is determined to be in bad faith.

### Giving something back

In an appeal handled by this firm for the surety and its principal, *Gootee Construction, Inc. v. Amwest Surety Insurance Company*, 856 So.2d 1203 (La. 2003), the Louisiana Supreme Court ruled that monies collected on a judgment which was subsequently reversed must be returned even though the reversed matter is remanded for a full trial on the merits. The plaintiff argued that it was entitled to retain the monies – $710,814.17 – paid on the judgment, a subcontractor's performance bond surety by alleging that the pending liquidation proceedings of the surety and apparent insolvency of the subcontractor made it unlikely that the plaintiff could ever recover the monies if it ultimately prevailed on its claims at trial. The Louisiana Supreme Court disagreed, holding that the reversal of the judgment which originally allowed the plaintiff to obtain the funds eliminated the basis for the payment and, by law, required the repayment of the monies.

continued on page 3



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# 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 Federal Cases

*P. J. Dick, Inc. v. Principi*, 324 F.3d 1364 (Fed. Cir. 2003)

The Court of Appeals clarified some of its earlier decisions on the Eichleay factors required for recovering unabsorbed home office overhead, including an elaboration on the "standby" requirement for such recovery.

After significant discussion of existing case law, the court summarized the Eichleay factors as follows: (1) was there a government-caused delay that was not concurrent with another delay caused by some other source; (2) did the contractor demonstrate that it incurred additional overhead (*i.e.*, was the original time frame for completion extended or did the contractor satisfy the *Interstate*[1] three-part test); (3) did the government CO issue a suspension or other order expressly putting the contractor on standby; (4) if not, can the contractor prove there was a delay of indefinite duration during which it could not bill substantial amounts of work on the contract and at the end of which it was required to be able to return to work on the contract at full speed and immediately; (5) can the government satisfy its burden of proof by showing that it was not impractical for the contractor to take on replacement work (*i.e.*, a new contract) and thereby mitigate its damages; and (6) if the government meets its burden of proof, can the contractor satisfy its burden of persuasion that it was impractical for it to obtain sufficient replacement work.

On the "standby" requirement, the court declared that standby may be proven simply by showing that the contracting officer "has issued a written order that suspends all the work on the contract for an uncertain duration and requires the contractor to remain ready to resume work immediately on short notice." However, absent such a written order, the contractor is required to show three things: (1) that the government-caused delay was not only substantial but was of an indefinite duration; (2) that during the delay the contractor was required to be ready to resume work on the contract, both immediately and at full speed; and (3) effective suspension of "much, if not all" of the contract work.

The court disagreed with suggestions by the contractor that prior decisions of the Federal Circuit Court of Appeals had held that a contractor was placed on standby "merely because a government-caused delay of uncertain duration occurred, at the end of which the contractor must be ready to resume work."

*Elmhaven Construction v. Neri Construction*, 281 F.Supp.2d 406 (D. Conn. 2003); *American Casualty Company of Reading Pa. v. D. L. Withers Construction, L.C.*, 64 P.3d 210 (Ariz. App. Div. 1 2003)

In both of these cases, the general contractor was prevented from recovering against a subcontractor payment bond. In *Elmhaven*, the general contractor sought to be classified as a "claimant" under the payment bond as a plea in the alternative to recovery under the subcontractor's performance bond. The court, relying upon the reasoning of *L & A Contracting v. Southern Concrete Services, Inc.*, 17 F.3d 106 (5th Cir. 1994), held that the general contractor failed to declare a default and give sufficient notice of the default as required by the language in the performance bond and subcontract (the contractor had merely given notice of the subcontractor's inadequate performance, without literally declaring a default, and the surety had actually responded with the subcontractor's argument that the general contractor had breached the subcontract). The general contractor's efforts to be classified as a claimant under the payment bond were rejected by the court because the general contractor was clearly the obligee on the bond and was not providing materials or labor to the subcontractor.

In *American Casualty*, immediately prior to entering a subcontract, the subcontractor unilaterally eliminated from its subcontract a performance bond requirement and ultimately provided only a payment bond. Thereafter, the subcontractor fell behind schedule, and agreed to allow the general contractor to engage an additional subcontractor to expedite the work. The general contractor made a claim against the payment bond, arguing that the work of the additional subcontractor constituted a "direct contract" with the new

continued on page 3

[1] *Interstate Gen. Gov't Contractors, Inc. v. West*, 12 F.3d 1053 (Fed. Cir. 1993). The three factors from *Interstate* are examined (in addition to the other Eichleay prerequisites) in the event that work on a contract has been suspended but no delay to completion occurred. In such a case, the contractor must show that from the outset of the contract it: (1) intended to complete the contract early; (2) had the capability to do so; and (3) actually would have completed early, but for the action of the government.

# Construction Law Update continued from cover

### Workers' compensation limitation enforced despite improper equipment alterations by employer

A construction worker installing rebar on a cement canal wall fell when the hook on his safety belt slipped off the bar to which it was attached. The worker sued outside the workers compensation statutes, alleging that his employer was liable to him for an intentional tort because the harness had been intentionally altered to disengage a safety device on the wall hook. The court of appeal in *Nicks v. AX Reinforcement Company,* 841 So.2d 987 (La. App. 5th Cir. 2003), affirmed the trial court's summary judgment in favor of the employer, denying the intentional tort claim and limiting the worker to workers' compensation recovery. The court of appeal adhered to established case law on the meaning of "intent" in the context – requiring that the alleged offender either consciously desired the physical result of his act (*i.e.*, the injury) or knows that the result is substantially certain to follow from the conduct. The lack of prior evidence of accidents occurring from the unsafe practice, and testimony by both plaintiff and defendant that no one expected the plaintiff to be injured using the altered harness, while perhaps establishing gross negligence, did not meet the "substantial certainty" requirement of the intentional act exception to the Louisiana Workers' Compensation Act.

### Public work outside scope of existing contract must be separately bid

The Louisiana Attorney General, in Opinion No. 03-0236, addressed the matter of a request by the Cameron Parish Police Jury regarding the legality of expanding an existing road project to include refurbishing of an additional road not originally the subject of the public bid. The Parish sought an opinion as to whether the execution of an additive change order for the new work would be in violation of Louisiana Public Bid Law. The Attorney General, finding that the original bid included work on only one road and did not "contemplate the possibility that additional roads would be added or included in the overall project," declared that the proposed addition was "outside the scope" of the original contract and could not be the subject of a change order (the proposed work did not exceed $100,000.00 and, therefore, did not trigger the corresponding provision of the Public Bid Law which requires separate bidding of even in-scope changes).

### Recent decisions on toxic mold claims

*Caldwell v. Curioni,* 125 S.W.3d 784 (Tex.App. - Dallas 2004)

This personal injury action was brought by lessees of property who spent approximately one week in a mold-tainted residence. The court of appeal reversed the trial court's summary judgment against the plaintiffs, holding that the defendant failed to conclusively prove that he owed no duty to the plaintiffs. While this decision is not necessarily important for its findings, it is an interesting read as it involves very brief exposure to mold and a parade of no fewer than three experts (a contractor, a real estate broker and an industrial hygienist) through which the plaintiffs raised disputed material facts about whether the defendant breached any duty which he might have had to the plaintiffs. For a copy of this case, please contact our offices.

*Flores v. Allstate Texas Lloyd's Company,* 278 F.Supp.2d 810 (S.D. Tex. 2003)

Declining to follow *Fiess v. State Farm Lloyds,* 2003 WL 21659408 (U.S.D.C. S.D. Tex), the court held that a Texas Standard Homeowner's Form B Policy may cover mold damage if the damage ensues from an otherwise covered loss under the policy. The court also excused plaintiff's delay in notifying the insurer of facts relating to the claim because, although plaintiffs knew of an initial water event, they were not aware until much later of the resulting mold damage. While noting that a homeowner "cannot sit back and watch mold grow in his home…" the court also stated that "…an insurer is not expected to notify his insurance company each time the toilet overflows or the sink drips, where the insured takes prompt remedial action appropriate to the circumstances."

# Surety Decisions and Federal Cases continued from page 2

subcontractor for "labor reasonably required for use in the performance of the contract pursuant to the terms of the payment bond." Although noting that whether a bond is called a "performance" or " payment" bond is not alone determinative of who may be a claimant under the bond, the court found that the language in the bond (which incorporated the subcontract agreement) providing for "the payment of claims for labor performed and materials furnished" could not serve the dual function of a performance bond because the language addressed only a failure to pay laborers or materialmen, not a failure to perform the subcontract work.

*Tri-State Employment Services, Inc. v. Mountbatten Surety Companies,* 788 N.E.2d 1023 (N.Y. 2003):

In this payment bond case, claimants were defined by the bond as persons having direct contracts with the principal or a subcontractor of the principal for "labor, material, or both, used or reasonably required for use in the performance of the Contract…" The New York high court had the case referred to it by the United States Second Circuit Court of Appeals for a decision on this novel issue: whether a professional employer organization (*i.e.*, a company which handles the outsourcing by its clients of payroll and human resource responsibilities, including the payment of wages and employment taxes) can be a claimant on a payment bond. The PEO, which was owed substantial amounts by the company to which it provided services, attempted to obtain payment for those amounts by claiming against its client's labor and material payment bond. Examining whether the professional employment organization had established with its client's employees indicia that the PEO was in fact the employer of the workers (including such factors as selecting workers, providing

continued on page 4

## News and Notes

- **Building Prices Lower in New Orleans**

Engineering News-Record reported in its September 8, 2003, edition that, led by a materials cost index reduction of 6.5% for the year, the City's building construction index wound up at 0.8% below the prior year. Lumber prices declined 11.5% for the year, after a similar decline (10.3%) in 2002. Likewise, cement and steel prices were down from a year ago, by 4.5% and 3.9%, respectively.

- **Long Arm of Louisiana Law Jails Contractor**

Under the seldom-used criminal provision related to nonpayment of subcontractors and suppliers – La. R.S. 14:202 – a potential jail sentence awaits a contractor or subcontractor who receives payment for a construction project but fails to apply the funds properly to pay amounts due for materials and labor.

Joseph C. Whitaker, head of Whitaker Construction Company in Shreveport, was arrested in July in El Paso, Texas, pursuant to a warrant issued by the Ouchita Parish Sheriff's Office. That office indicated that the warrant followed a complaint filed by owners of a surgical center in Monroe, Louisiana, which alleged that subcontractors on the project had not been paid. Unfortunately for Whitaker, the arrest appears to have cost him a position in the Bush administration as an advisor to Iraq's Ministry of Health (Whitaker had been hired through the United States Defense Department for the position).

### Upcoming Construction Law Seminars

**Shields Mott Lund is pleased to announce two upcoming seminars:**

**Development, Implementation and Legal Issues of Construction Scheduling in Louisiana (Lorman Education Services), April 16, 2004, Fairmont Hotel, 123 Baronne Street, New Orleans, 9:00 a.m. – 4:30 p.m.**

**Louisiana Construction Defect and Mold Litigation (National Business Institute), May 26, 2004, Doubletree Hotel, 300 Canal Street, New Orleans, 9:00 a.m. – 4:30 p.m.**

These 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 sense. Understanding these issues and choices and being prepared for potential problems are the best ways to avoid pitfalls. We sincerely hope you can attend one of these seminars. Additional information on the seminars can be obtained by contacting Dan Lund at Shields Mott Lund (504-581-4445) or on-line at www.nbi-sems.com for the NBI seminar and at www.lorman.com for the Lorman sponsored program.

## Surety Decisions and Federal Cases continued from page 3

documents which indicated employment by the PEO, and supervision of the workers by the PEO – none of which factors were present), the court held that the PEO was not the employer of the workers and, therefore, was not a provider of labor entitled to claim under the bond. The court noted that its finding was supported by the fact that even when the PEO's client ceased payment to the PEO, the workers (who worked directly for the client) continued to staff the job and that only the PEO's payroll and related services were halted.

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