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

Louisiana Construction Law and News Update

Spring 2007

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Construction Law Update

New "wait" loss plan: lose all you want!

For years Louisiana courts have wrestled with the problem of the lack of "privity" between design professionals and contractors in claims by contractors that they have been adversely affected by actions or inaction of the design professional on a construction project. The cases are few and far between in Louisiana (as well as in other states) wherein contractors are allowed recovery directly against an architect or engineer under a tort theory (generally, an assertion of negligence) for delays and other direct costs associated with bad plans, a design professional's unreasonable refusal to timely consider change order requests or requests for information, and the like. Nonetheless, it has been widely accepted for years that there is at least some potential for contractors to make such recoveries against architects and engineers with whom only the project owner has a contract.

In *J. Ray McDermott Engineering. L.L.C. v. Fugro McClelland Marine Geosciences, Inc*., 2007 U.S. Dist LEXIS 9761 (E.D. La.), the federal court in New Orleans dealt with what some might consider to be an inappropriate delay claim of the contractor plaintiff against an engineer: for additional costs and lost revenues on two unrelated projects. The plaintiff made the claim on the basis of actual losses it sustained on the two projects, which losses it said were incurred as a result of numerous delays on the immediate project resulting from substandard engineering reports issued by the defendant for the construction of an oil and gas platform on the Outer Continental Shelf off Louisiana's coast. The defendant engineer filed a motion for summary judgment seeking to have the court declare that the claims of the plaintiff were "too attenuated," that is, not the type of damage that was foreseeable by the defendant and for which the defendant had a duty to the plaintiff.

In denying the defendant's motion for summary judgment and allowing the plaintiff to proceed on its somewhat extraneous delay and lost profit claims, the court applied Louisiana law and a duty/risk analysis which encompassed two separate and independent duties of the design professional. The court acknowledged that the first of those duties – that is, the duty to avoid a "negligent undertaking" of its work to avoid physical damage to property – was not applicable to the claims the plaintiff. Instead, the court found that a separate and independent duty of the design professional existed to meet the standard of care of similar professionals in the area, and that this duty, according to the court, extended to third parties (such as the plaintiff) "who suffer economic losses because of the engineer's negligence." The federal court further held that under the facts of the case the design professional knew or should have known that the plaintiff would rely on the engineer's reports, and also noted that the plaintiff was the only contractor which was intended to rely on the reports, a fact which the court viewed as cutting strongly against the argument of the defendant that the type of liability sought to be imposed against the design professional was radically "expansive or indeterminate."

The impermeable meets the unstoppable force of law

Moldy conditions in a newly-constructed nursing home and assisted living facility in uptown New Orleans prompted the suit in *Touro Infirmary v. Sizeler Architects*, 2006 La. App LEXIS 2862 (4th Cir.) to be filed by the owner against the general contractor and several subcontractors, as well as against the architectural firm which designed the project. During the course of the litigation, separate partial summary judgments were taken by the owner against several of the suppliers of products installed on the job, including the distributor of vinyl wall coverings installed in the building. In the case of the wall coverings, the trial court accepted testimony that the materials were "impermeable" and that the impermeability of the vinyl wall coverings was a "redhibitory" defect entitling the owner to recovery against the distributor. According to the Louisiana Civil Code, "redhibitory" defects are those characteristics of the product which render "the thing useless, or its use is so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect." Louisiana Civil Code Article 2520.

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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 Non-Louisiana Cases

Lyndon Property Insurance Company v. Duke Levy and Associates LLC, 2007 U.S. App. LEXIS 93 (5th Cir.)

In an appeal from a Mississippi federal district court ruling, the United States Fifth Circuit Court of Appeals in New Orleans tackled the issue of the potential liability of an engineering firm to a surety under a professional services agreement. That agreement was between the engineering firm and the public owner of the project, however, and the surety was not a party to the contract.

As a part of the engineer's responsibility under the professional services agreement, the firm inspected the bonded project as part of the progress payment certification process. The surety claimed that the engineer breached its duty to the public owner in failing to properly conduct its inspection and payment duties under the contract (which resulted in a prematurely diminished general contract fund). The surety asserted its rights against the engineering firm pursuant to the doctrine of equitable subrogation, arguing that the surety, by virtue of its payment of completion costs for the project under its performance bond, had stepped into the shoes of the public owner for purposes of the claim.

Whereas the district court granted summary judgment to the engineer, the court of appeals reversed, allowing the surety to pursue its claims. As part of its holding, the court rejected the contractual defense urged by the engineer pursuant to an exculpatory clause in the general conditions of its professional services contract. That clause provided, in pertinent part, that none of the engineer's work under the contract would give rise to any "duty or responsibility" to any contractor, subcontractor or supplier for the job, or to any of their sureties. According to the court of appeals, it was beyond the ability of the public owner to "bargain away" the potential duty of the engineer to a surety which, by virtue of the doctrine of equitable subrogation, might step into the shoes of the public owner.

United States of America v. Allen's Construction, Inc., 2007 U.S. Dist. LEXIS 3847 (S.D. Miss.)

Does the existence of a joint check agreement diminish the rights of one of the parties to assert claims under the Miller Act? In the *Allen's Construction* case, a material supplier participated in a joint check arrangement such that the general contractor wrote joint checks made payable to the supplier and to the subcontractor to which the materials were provided. The supply contract was in the amount of $365,000, and the subcontract to which it pertained had a contract sum of $684,000. During the course of the project, joint checks were written to the supplier and subcontractor in the total amount of $668,613.83, which checks were all endorsed by the supplier. However, from these monies, the supplier claimed it was underpaid by the subcontractor, leaving a balance remaining on the supply contract of nearly $94,000. The supplier filed a Miller Act claim against the general contractor's surety for that amount.

The surety resisted the claim, asserting that the supplier was essentially paid by the joint checks or, in the alternative, that the supplier was negligent in endorsing the checks without ensuring that it was paid all amounts that it was owed from those checks. In a fact-intensive decision, the court ruled against the surety and in favor of the supplier on the Miller Act claim. Chief to the court's decision were factors which worked against a finding that the joint check arrangement somehow guaranteed that the supplier would be paid. On the point, the court noted that (1) prior case law held that joint check agreements do not automatically act as a waiver of rights under the Miller Act, (2) the "thrust of the Miller Act is... whether in truth the materialman got his money..." (3) the general contractor issuing the joint checks neither designated a portion of the check to be paid to the supplier nor even knew how much the supplier should be paid out of each of the joint checks, and (4) the surety provided no evidence that the general contractor somehow "detrimentally relied" – that is, changed its position to its detriment – on the basis of its knowledge that the supplier endorsed the joint checks that were being issued (in other words, the payments by the general contractor were viewed as being no different from payments made to a subcontractor without a joint check restriction).

Essex Builders Group, Inc. v. Amerisure Insurance Company, 2006 U.S. Dist. LEXIS 93955 (M.D. Fla.)

A general contractor on an apartment construction project became a target of claims by the owner when water damage in the apartment buildings was discovered. The owner claimed against the contractor and its surety, as well as against the contractor's CGL carriers. The liability insurers resisted the claims, although the surety ultimately paid $6,250,000 to the owner to resolve the dispute. Thereafter, the general contractor sued the CGL carriers, alleging that the insurers breached their insurance agreements (urging, essentially, that the carriers were responsible for the claims of the project owner) and demanded to recover from the insurers on the basis that the surety's payment rendered the general contractor "unbondable" and had destroyed the contractor's business.

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The principal complaint concerning the wall covering was a claim that the impermeability of the product rendered it "useless in a hot and humid environment like New Orleans…" and that the wall covering trapped moisture and promoted the growth of mold and mildew. In fact, no one disputed the watertight nature of the wall covering, and the distributor urged that the feature added to the durability of the product. In reversing the partial summary judgment granted by the trial court, the court of appeal noted that the principal causative factor of the mold in the structure was water intrusion because of other matters of faulty design and/or construction of the building. Although the court of appeal declined to declare this factor alone to be dispositive of the issue of the appropriateness of the wall covering, the court found the wall covering to be suitable for the project based upon the fact that in areas where the product was used and water intrusion had not been experienced no mold was present.

Sorry – that's not my job

On the job mold exposure is nothing new. Lawsuits over the matter are. In *Ruffin v. Poland Enterprises, L.L.C.*, 946 So.2d 695 (4th Cir. 2006), two plaintiffs, both clerical workers, filed suit against their employer, the Louisiana Department of Social Services, alleging injuries caused by exposure to mold and other contaminants in their offices in New Orleans. In the suit, the employer urged as a defense to the tort claims against it the exclusive remedies of the Louisiana Workers Compensation Act (WCA), arguing that the plaintiffs' sole recourse was to pursue workers compensation recovery for the injuries allegedly sustained on the job. The plaintiffs resisted the defense (hoping to garner a more significant recovery by virtue of their tort claims), urging that exposure to mold does not fall within the ambit of the WCA. Although the court disagreed with claimants on this point, it nonetheless ruled in favor of the plaintiffs. The court held that, although injuries from mold and mold exposure might be subject to the "occupational disease" category defined by the WCA, such would depend on whether the exposure is "characteristic of or peculiar to" the work performed by the claiming employee. In the cases of the two clerical workers, the court found that the type of mold exposure about which the plaintiffs complained was not characteristic of the clerical work for which the plaintiffs were hired, and allowed the plaintiffs to continue to pursue their tort claims against the employer.

When *lien* times don't call for tough measures

The lien and privilege statutes of the state of Louisiana are deemed "*stricti juris*" by Louisiana courts, for the reason that those statutes create rights against property of another which are contrary to typical ownership principles. The upshot of the "*stricti juris*" treatment is that the statutes are strictly construed, so that their requirements must be followed exactly – or else the claiming party typically has no right of recovery under the statutes.

Courts have seen fit, however, to alter this approach in the context of public works projects, particularly regarding subcontractor and material supplier claims, since the property rights affected by the privilege preserved in the public works context are rights against the general contract funds and not the immovable property of the owner. In *VVP America, Inc. dba Binswanger Glass Company v. Design Build Development Services, Inc.*, 2007 La. App. LEXIS 123 (2nd Cir.), the Louisiana Second Circuit Court of Appeal was faced with a late-filed Public Works Act claim of the roofing materials supplier on a Caddo Parish School Board construction project. The filing was not just a day or a week late, however, but was accomplished approximately nine months beyond the statutorily prescribed 45-day period (following the public filing of the notice of acceptance or substantial completion of the project) for lodging such claims.

The public owner resisted the supplier's claim (characterized by the court as a "lien") on the basis that the claim was filed too late. The court of appeal overruled the defense, however, because the owner had actually withheld general contract funds attributable to the claim, and awarded the supplier the full amount of its Public Works Act claim. In so ruling, the court of appeal noted that the only decisions allowing dilatorily filed Public Works Act claims to proceed required the concurrent fact of the public owner holding sufficient funds to cover the claim. The court also resisted arguments by the public owner that modern amendments to the Public Works Act effectively superseded the earlier cases allowing prosecution of the late claims, noting that earlier versions of the Public Works Act (enacted in 1918 and 1926) also contained a similar 45-day filing requirement.

Owners and general contractors celebrate their independence

Two recent decisions of Louisiana Fifth Circuit Court of Appeal affirmed the viability of the rule protecting contracting parties from the negligence of independent contractors hired by them (or hired by their agents). In each case, plaintiffs brought suit against the project owner and the general contractor for injuries incurred at or around a construction site in Jefferson Parish. Summary judgments filed by the owners and general contractors urged as an opposition to the claims of the injured parties the court-created defensive doctrine of principal and independent contractor. According to that doctrine, if the work of an "independent contractor" (and negligence associated with that work) causes injury to a third party, the hiring party (*i.e.*, the "principal"), as well as any person to whom the principal may be answerable (such as the project owner), are insulated from liability.

In each case, the court considered the following factors in ultimately ruling in favor of sustaining the defenses and dismissing the claims against the owners and general contractors: (1) the existence of a valid subcontract between the principal and the alleged independent contractor, (2) whether the subcontract work could be accomplished by the alleged independent contractor by its own "non-exclusive means" which it controlled (except that the general contractor could demand a particular result), (3) a specific price for the subcontracted work, and (4) the existence of a stated duration of the work and a resulting circumstance of breach of the subcontract should either party to the subcontract unilaterally terminate the contract without cause. The court also noted that the property owner would lose the benefit of the defense if it either expressly or impliedly authorized the subcontractor to utilize unsafe practices, actually controlled the work of the subcontractor, or if the work in question was "inherently or intrinsically dangerous or ultra hazardous." See the cases of *Crayton v. Central Storage Center, LLC*, 944 So.2d 643 (La. App. 5th Cir. 2006), and *Hartman v. Carco, Inc.*, 942 So.2d 1140 (La. App. 5th Cir. 2006).

News and Notes

Shields Mott Lund L.L.P. congratulates our partner, Sonny Shields, for being named one of the top 50 lawyers in the New Orleans region by New Orleans CityBusiness in its 2007 "Leadership in Law" publication.

Movin' On Up!

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

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All firm telephone numbers and email addresses remain the same.

Construction Law Seminars and Publications

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

Managing Construction Projects (Lorman Education Services), July 18, 2007, Raleigh, North Carolina, 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 seminar can be obtained by contacting Sonny Shields at Shields Mott Lund (504-581-4445), or from Lorman at www.lorman.com.

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.

Surety Decisions and Non-Louisiana Cases continued from page 2

In response to the suit filed against them, the insurance carriers sought summary judgment, requesting the court to determine as a matter of law that no legally cognizable theory of liability allowed the recovery against the carriers for claims of the type asserted by the contractor. The court resisted this initial defense concerning the nature of the damages sought to be recovered, instead focusing on whether the purported destruction of the construction business "as a result of the CGL insurers' refusal to pay the project owner's claim was a consequence within the contemplation of the parties at the time the insurance policies were issued." Ruling in favor of the insurers and dismissing the claims of the contractor, the court found that the contractor presented no evidence that either insurer actually knew or should have known at the time of issuing its insurance policy that the "natural consequence" of denying a claim of the type in question would deprive the contractor of its ability to obtain surety bonds. In so doing, the court refused to take what it described as "too great a leap of faith" to assume that what was "common knowledge" to those involved in the surety bonding realm was universally understood among companies writing CGL policies.

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