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

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Construction Law Update

Court of Appeal doesn't quite sort out the 7 and 10 year "peremptive" periods on construction suits

In 1999, the Louisiana legislature amended La. R.S. 9:2772 – the statute governing what is known as the "peremptive" period for filing construction contract actions. The principal effect of the amendment was to reduce the period of time within which such suits can be brought from 10 to 7 years. The statute sets a time certain for the filing of suit, but does not state with any clarity when that time is to commence.

In *August v. Grand Lake Construction*, 837 So.2d 78 (La. App. 5th Cir. 2002), the court held (correctly so) that the amendment to the statute was inapplicable to a contract which was confected prior to the time of the amendment, and that the 10-year peremptive period formerly in La. R.S. 9:2772 applied. However, the court thereafter began a discussion of the source of the cause of action for a construction project which "fall[s] to ruin either in whole or in part…" La. C.C. Article 2762. That article in its present form provides for a cause of action for the owner of the building if the damage to the building manifests itself within five or ten years after the building's completion, depending on the type of structure involved. Although the court did not have to wrestle with the issue we now discuss, its application of the cited Civil Code article raises a big question: How can we reconcile the 7-year peremptive period of the current La. R.S. 9:2772 with the 10-year cause of action stated in La. C.C. Art. 2762?

The answer to the foregoing question is not a simple one, and may depend on the time at which the peremptive period begins to run. The court in August suggested that the peremptive period runs as of the time the project is completed, which would seem to entail that under the current statutory scheme there is a direct conflict between the two statutes.

As long as there is no definitive case law on the subject of this apparent conflict, the safest bet is to expect that suit on a construction contract will perempt (or no longer be able to be filed) after the passage of seven years from the completion of the work. This is a significant departure from the former train of thought that most suits on contract can be brought within 10 years, but it is the most conservative manner of trying to make sense out of what the legislature intended when it changed the law in 1999.

Subcontractor's claim tossed for failing to assert date of substantial completion

On a project for which neither the general contract nor a certificate of substantial completion was filed, a subcontractor's lien claim was dismissed for failing to prove what was the date of actual substantial completion. In *C & S Safety Systems, Inc. v. S.S.E.M Corporation*, 843 So.2d 447 (La. App. 4th Cir. 2003), the court, after much discussion of the facts as those played out in the trial court on cross motions for summary judgment filed by the plaintiff and defendant, held that the burden is on the lien claimant/subcontractor to establish the date on which substantial completion of a project occurs. Under the facts of the case, La. R.S. 9:4822C applied, which provides that a liening subcontractor must file its statement of claim or privilege within 60 days of *actual* substantial completion of the project. The court noted that substantial completion, for purposes of the lien statutes, is a matter of state law, not of contract ("substantial completion" is defined by La. R.S. 9:4822H). In rejecting the subcontractor's

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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

National Fire Insurance Company of Hartford v. Fortune Construction Company, 320 F.3d 1260 (11th Cir. 2003): Subcontractor's surety on two Florida projects claimed an equitable subrogation right to the subcontract balance. The general contractor defended, asserting that liquidated delay damages, Davis-Bacon Act violations and other backcharges incurred by the defaulted subcontractor should be set off against any unpaid contract balances that the surety claimed through equitable subrogation. The court held that when a surety completes a project or pays the excess completion costs for same under a performance bond, an implicit agreement exists that the surety has a right to all retained funds and remaining progress sums and that the obligee may not assert a set off against the surety's rights to be compensated. However, the court found that the surety, while it made payments under its payment bond, did not fulfill its performance bond obligations, and subrogation for payment bond claims was deemed by the court to be subject to set off (including deductions related to subcontractor delays, even though the bonds were not express on the subject).

Insurance Company of the West v. The United States, 55 Fed.Cl. 529 (Ct.Cl. 2003): Court held that a surety which, after financing or completing the performance of a defaulted contract (*i.e.*, the surety fulfilled its performance bond obligation), discharges the outstanding claims of subcontractors, may subrogate to the rights of both the defaulted contractor and the subcontractors and assert a claim against the Government standing in the shoes of the general contractor. The Government had argued that the surety who discharged the general contractor's obligation to pay subcontractors was subrogated only to the rights of the subcontractors and did not have enforceable rights against the Government.

The Appeal of American Service & Supply, Inc., A.S.B.C.A. No. 49,309 (2003): This case examined the distinction between a termination for default and a termination for convenience in a Federal contract. The Government had terminated the contract with the general contractor alleging default based upon delays. The contractor defended based upon contract language which declared that a contract could not be terminated for delay if the delays were unforeseeable and not caused by the fault or negligence of the contractor. The administrative judge ultimately held that the Government lacked grounds for termination for cause and declared the termination to be one for convenience, entitling the general contractor the recoveries allowed under the termination for convenience clause of the contract.

United States of America v. Brimhall-Palmer Construction, Inc., 62 Fed.Appx. 141 (9th Cir. 2003): Suit initiated by a subcontractor on a federal project for various contractual damages was dismissed based upon insufficient evidence. The subcontractor invoked the "total cost method" of calculating of damages without proving the threshold requirement to use that method: that the damages cannot precisely be calculated as a practical matter. (The total cost method, rather than itemizing damages, simply shows that the project, from the claimant's point of view, went over the budget.) The court also denied the claimant's claim in "*quantum meruit.*" Summary judgment was granted in favor of the general contractor and its surety.

While we were away...

It is good to note that our courts do not give short shrift to the important issues of persons with whom we may not have a daily connection. Consider the decision in the case of *Pelts & Skins, L.L.C. v. Jenkins*, 259 F.Supp.2d 482 (M.D.La. 2003), wherein the court stated: "The Supreme Court has held that the Constitution prohibits the government from compelling the producers of mushrooms to pay for generic advertising to which they object, but allows the government to compel the producers of peaches to pay for such advertising. Resolution of this case requires the court to determine whether Louisiana alligator producers are more like mushroom producers than like peach producers. The answer to that riddle determines whether a Louisiana statute compelling farmers of alligators to fund generic advertising treads upon the First Amendment rights of plaintiff. For reasons that follow, this court ultimately concludes that the alligator resembles the mushroom more than the peach, and thus, that the First Amendment stands between alligator farmers and Louisiana's mandatory assessments to pay for a generic alligator advertising program." Perhaps it is because the alligator has more teeth.

argument that substantial completion was never reached, the court noted another problem on which it refrained from rendering an opinion: whether the requirement of La. R.S. 9:4822 that the statement of claim or privilege be filed "within" 60 days of substantial completion requires that such a lien claim be filed after substantial completion and not before. The court indicated that there is no case law in the state on that topic.

Architect's liability insurance policy held not to cover third-party tort claims

Plaintiffs in *Doucet v. Huffine Roofing and Construction*, 841 So.2d 916 (La. App. 5th Cir. 2003), brought a class action against several defendants, including an architect and its insurer, claiming injuries from exposure to toxic fumes during a roof replacement project at a public school in Jefferson Parish. The insurer's business policy (not a professional liability policy) carried a standard exclusion for claims related to bodily injury and property damage due to the design professional's failure to properly render professional services. An exception to the exclusion, however, was liability for damages where the architect assumes such liability in a contract.

Plaintiffs argued that the architect's contract wherein the architect assumed responsibility for "supervision" and control of the project constituted an assumption of liability contemplated by the exception noted above. The court disagreed, however, holding that transfer of responsibility for supervision of the project does not equate to a transfer of liability (*i.e.*, the School Board's legal liability.) The court also noted that the design professional understood that a separate policy of coverage for professional liability was required, and that the firm had such a policy with another insurer.

Check stating "full and final payment" is just what it says

In *Precision Dry Wall & Painting, Inc. v. Woodrow Wilson Construction Company, Inc.*, 843 So.2d 1286 (La. App. 3rd Cir. 2003), plaintiff had received from the defendant a check which stated on its face that the check was being tendered in "full and final payment." In response, plaintiff had written to defendant that it completely rejected the tender as full and final payment, but thereafter endorsed the check and deposited it into plaintiff's bank. Defendant took the position that plaintiff's negotiation of the check entailed that the matters between the parties were resolved and that the defendant owed the plaintiff no more money based upon the qualification on the face of the check.

The Court of Appeal agreed, reversing the trial court's judgment in favor of the plaintiff. Although the plaintiff argued to the court that the doctrine of "accord and satisfaction" requires that there be mutual consent (that is, both parties to the deal agree to same), the court declared that when a party negotiates a form of payment that specifically qualifies itself as "full and final payment," mutual consent of the parties exists. Furthermore, the court reversed the trial court's finding that the defendant had breached its contract with the plaintiff on the basis that the parties had reached a settlement and it was, therefore, improper for the trial court to have made a determination on the matter of the alleged breach.

Recent decisions on toxic mold claims

Allison v. Fire Insurance Exchange, 98 S.W.3d 227 (Tex. App.-Austin 2002), *rehearing denied*, February 13 and 21, 2003: This is the seminal case in the state of Texas on mold claims. In the matter, the insured homeowner brought claims against his insurance company for deceptive trade practices, breach of duty of good faith and fair dealing and negligence relating to the insurance carrier's handling of claims for water damage and mold remediation. The insurer was accused of failing to properly and promptly address homeowner's claim relating to water infiltration, and when the homeowner and his family began to suffer ill health effects and were advised that the water infiltration and damage had resulted in the growth of the mold stachybotrys, the homeowner sued the insurer for damages and penalties related to those injuries.

Although the appellate court ultimately reversed the award of damages for mental anguish and punitive damages – which totaled $17 million – the court affirmed an award in favor of the plaintiff in the principal amount of over $4 million, which including payment for replacement of the home which, eight years prior to the time that the insurance policy was written, cost the plaintiff $275,000.00. It should also be noted that the insurance company had coverage limits of $313,000.00 and $187,800.00 for the contents. The raft of complaints against the insurer included misrepresented plumbing tests, misrepresentations regarding additional time needed to review the claim, refusal to promptly pay the claim, participating in sham and fraudulent bids to perform remedial work, appointment of an appraiser who was neither independent nor competent, withholding information in the appraisal process, and misrepresentation leading to underinsuring of the property.

Hebert v. Hill, 2003 WL 21077442 (La. App. 2nd Cir.): In what must have seemed to be a simple matter at the outset, lessees of property notified the lessor in March, 2001, of a water leak from a water heater which dampened carpet and sheetrock in several rooms. The lessor notified his property insurer of the damage and promptly replaced the water heater. However, the damaged carpet and sheetrock remained in place and the inspection by the insurance company did not occur until June, 2001.

Almost a year following the discovery of the leak and damage, one of the lessee's children was diagnosed with neurological hearing loss and required surgery. Test results showed that high levels of toxic and "black" mold existed throughout the house, including in the water heater area. At that time, the carpet and sheetrock still had not been replaced and the mold was linked to the child's illnesses as well as mold allergies suffered by visitors to the home.

In June, 2002, suit was filed by the lessee against the lessor and the insurance company, which included a claim for penalties against the insurer for failing to initiate the loss adjustment within the statutorily prescribed 14 days after

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News and Notes

Stachybotrys Chartarum: A "killer mold?"

The recent settlement in the mold case involving Johnny Carson's former sidekick, Ed McMahon, brought to the forefront the declaration by some lawyers that Stachybotrys is a "killer mold" – a term employed by McMahon's attorneys. McMahon claimed that both he and his wife suffered ill effects when their home was contaminated by the mold, and also that the contamination resulted in the death of a family dog.

Yet, there are still no studies which definitively show that Stachybotrys is the villain it is claimed by many to be. In an article entitled, "The Turmoil Over Mold in Buildings," written by Dennis Hevesi in the March 23, 2003, edition of The New York Times, Hevesi, quoting Dr. Jordan Fink of the Medical College of Wisconsin, Milwaukee, states that there is no documentation that Stachybotrys causes any symptoms other than allergic reactions. While Dr. Fink noted that mold can cause certain lung ailments which, by virtue of inflammation and scarring to lung tissue, can cause death, those types of symptoms show up in a small minority of cases linked to exposure to mold.

As mold remediation becomes a field in which contractors venture, Hevesi notes that the EPA and the New York City Department of Health have promulgated remediation guidelines, and that the American Indoor Air Quality Counsel and the Indoor Air Quality Association offer voluntary certification for contractors. However, there is no formal certification or required training for performing mold remediation work. For more information on remediation techniques, contract selection and other legal issues surrounding mold contamination and mold claims, contact Dan Lund at Shields Mott Lund (504-581-4445) for a free copy of the firm's publication, "Louisiana Construction Defect and Mold Litigation."

Upcoming Construction Law Seminars

Shields Mott Lund is pleased to announce its September 18 seminar entitled, "Advanced Construction Law in Louisiana." Sonny Shields and Dan Lund of the firm will speak at the seminar. The program, sponsored by National Business Institute, takes place at the Doubletree Hotel at 300 Canal Street in New Orleans, with registration at 8:30 a.m. The seminar begins at 9:00 a.m. and concludes at 4:30 p.m. Additional information on the seminar can be obtained by contacting Dan Lund at Shields Mott Lund (504-581-4445) or online at www.nbi-sems.com.

This seminar is 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.

Coming up in January, 2004: "The Mold Challenge in Louisiana," January 15, 2004, in Baton Rouge and January 16, 2004, in New Orleans.

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receiving the claim. The insurer was able to escape at the trial court on an exception of prescription (*i.e.*, statute of limitations), and urged to the Court of Appeal that in addition to the accrual of prescription the third-party claimant had no right against the property damage insurer. The Court of Appeal rejected both arguments, applying a 10-year prescriptive period to the action and declaring that the applicable statute (La. R.S. 22:658A(3)) did not prohibit penalty claims against the property insurer by third-parties such as the lessee. The case has been remanded back to the trial court for further proceedings.

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