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

Louisiana Construction Law and News Update

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Construction Law Update

Some things are better (not) left unsaid

The "statutory employer" rules forming a part of the Louisiana Workers Compensation statutory scheme were unsuccessfully opposed by an injured worker in *Duncan v. Dow Pipeline Company*, 2007 La. App. LEXIS 393 (3rd Cir.). In the *Duncan* case, the plaintiff's employer contracted with the defendant to repair several of the defendant's oil pipeline platforms in the Atchafalaya Basin. Although the defendant, Dow, had included in its contract with the plaintiff's employer the required triggering language from the statutory employer statutes, the court noted that the fulfillment of that statutory requirement provides only a "rebuttable presumption" regarding the additional requirement in the statutes that the contractor's work in question actually be "an integral part of or essential to the ability of the principal (here, Dow) to generate that individual principal's goods, products, or services."

The plaintiff opposed a motion for summary judgment by Dow on the statutory employer issue, asserting (as would be expected), first, that the work performed on the platforms was not considered a part of Dow's trade, business or occupation. The court readily rejected this defense, noting not only a lack of proof by the plaintiff but also that the repairs to the platforms clearly met the concept entailed by the statute. As a second defense, the plaintiff asserted that the contract between Dow and the employer contained "both a statutory employer provision and an independent contractor provision." The court characterized this defense as the plaintiff's effort to show a "conflict and contradiction in the contract" which might be determined in favor of plaintiff (and against the finding of a statutory employer relationship). Such a determination would have allowed the plaintiff to pursue Dow in tort.

The court rejected the second defense on the purported conflict between the statutory employer and independent contractor provisions solely on the basis that the plaintiff failed to introduce evidence of the existence of the independent contractor provision in the contract. While the result reached on this issue is apparently correct, the fact that the court appeared to consider the plaintiff's defense at all is of some concern. Research reveals no prior Louisiana cases in which the defense was sustained or even entertained by a Louisiana court, and other evidence suggests that the defense is without any merit at all under any circumstances. Although the statutory employer statutes (Louisiana Revised Statutes 23:1061-1063) do not in their text ever label the contractor party as an "independent" contractor, in fact, the heading of the subpart containing the applicable statutes is entitled, "LIABILITY OF PRINCIPAL TO EMPLOYEES OF INDEPENDENT CONTRACTOR." Other state court decisions addressing statutory employer/employee matters have seen fit to describe the relationship between the principal and contractor as one involving an "independent" contractor, with no suggestion that such a relationship somehow jeopardizes the protections of the statutes. See, for example, *Bynog v. M.R.L., L.L.C.*, 903 So. 2d 1197 (La. App. 3rd Cir. 2005); *Morrissey v. Rhodes*, 885 So. 2d 1209 (La. App. 1st Cir. 2004); *Bonds v. Byrd*, 765 So. 2d 1205 (La. App. 2nd Cir. 2000).

It is not clear whether the appellate court in this case was genuinely considering the problematic defense, although it is possible (but not revealed in the reported written decision of the court) that the plaintiff was attempting to apply another provision of the Louisiana Workers Compensation Law to the matter, namely, La. R.S. 23:1021(7), which declares that independent contractors "are expressly excluded from the provisions..." of the workers compensation law. Although the statutory employer statutes, by their specific provisions, would appear to trump this exclusion, the silence of the court of appeal in *Duncan* on the availability of the defense under any circumstances leaves open the possibility that others may attempt to assert it.

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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

Travelers Casualty and Surety Company of America v. United States of America 75 Fed. Cl. 696 (2007)

On a major dredging project in King Cove, Alaska, the surety, as assignee for the general contractor, brought a claim against the United States Army Corps of Engineers seeking increases to the contract sum on the basis of a "Type I" differing site condition at the dredge site. As part of its work, the general contractor, with the consent and approval of the government owner, endeavored to conduct a significant portion of the dredging work by a hydraulic or suction dredging technique. In so doing, and upon encountering significant incidences of large "cobbles" (described by the court to be "rounded or ragged stones between three and 12 inches in diameter" and not unlike cobblestones historically used to pave city streets) at the site, the contractor was required to abandon the technique and to revert to a "clamshell" dredging method, which resulted in cost increases to the contractor totaling $2,729,242.00 The plaintiff sought this cost increase, as well as a performance extension of 335 days, as part of a request for equitable adjustment under the applicable federal regulations.

"Type I" site condition claims focus on "subsurface or latent physical conditions at the site which differ materially from those indicated in the contract (including the plans, specifications and other items which form the contract documents)." Plaintiff contended that the various reports and other documents which were available to it and which arguably formed a part of the contract down-played in all instances the extent to which the cobbles were present in the areas to be dredged, noting the use of the word "few" at several points in the documents where the potential for encountering the condition was described. In a motion for summary judgment against the plaintiff, the government asserted all manner of objections and defenses, including that the contract documents were clear on the matter of the frequency within which the contractor would encounter the cobbles, or, alternatively, that the term "few" was vague and should have prompted the contractor to inquire further regarding its meaning. The court disagreed, finding that the contract documents were clear on the subject, and that the word "few" was reasonably interpreted (and, concurrently, reasonably relied upon) by the contractor as having the meaning given in the dictionary for the word. That meaning is: "amounting to or made up of a small number." As the contract documents were clear on the subject, and the contractor's interpretation of the documents was consistent with the court's and otherwise reasonable under the circumstances, the court refused the government's assertions that the contractor had a duty or otherwise breached that duty to conduct further pre-dredging site investigations. Finding that the contractor actually encountered the described unforeseen site conditions, the court acknowledged the appropriateness and validity of the differing site condition claim. The matters of the calculation of damages and the requested time extension were reserved by the court for a full trial on the merits.

In re: Pyper Construction Company 2007 Bankr. LEXIS 1642 (S.D. Ohio)

This case involves a claim by a bankruptcy trustee seeking to avoid a payment made by a general contractor to a sub-subcontractor. The bankrupt debtor was the subcontractor which had been involved between the general contractor and the sub-subcontractor. The bankruptcy trustee urged that the sub-subcontractor received an unfair preference by receiving from the general contractor monies allegedly due the debtor, which monies were characterized by the trustee as being a part of the bankruptcy "estate" of the debtor. Asserting both the improper preferential payment and a violation by the general contractor of the bankruptcy stay, the trustee sought return of the money to the bankruptcy estate. For the general contractor's part, it had paid in settlement to the sub-subcontractor an amount in order to have an admittedly deficient lien removed from the private construction project at issue.

In allowing the general contractor's payment to stand and refusing the trustee's claims, the court held that, notwithstanding any "legal or equitable" interests that the debtor might have to monies held by the general contractor, those interests do not attach to retained funds paid by the general contractor to (for example) a sub-subcontractor when the general contract contains "a provision establishing an independent obligation on the part of the (general) contractor..." to make the payment. In this matter, the general contract contained a provision which required the general contractor to keep the construction not only free of liens, but also free of the broader category of "claims" against the project. As long as the general contractor reasonably addressed and paid or otherwise settled such a claim in fulfillment of its overriding general contract obligation, the funds used for the payment would not be considered to be part of the bankruptcy estate and the payment could not be avoided by the trustee (although the court noted that it would generally appear to be in the "best interest" of the parties involved in such a payment to obtain a court determination in advance whether the involved funds are property of the debtor's estate).

Western Surety Company v. Alliance Steel Construction, Inc. 2007 U.S. Dist. LEXIS 38845 (W.D. Wisc.)

Western Surety, as assignee for its steel erector sub-subcontractor principal, sought to recover monies from the principal subcontractor for erection work performed at a dining facility at Fort

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No license to kill means little money in the till

For those who surmise that contractor licensure in Louisiana somehow became more lax following Hurricane Katrina, the case of *Tradewinds Environmental Restoration, Inc. v. St. Tammany Park, L.L.C.*, 2007 U.S. Dist. LEXIS 29372 (E.D. La.), provides evidence to the contrary and a sobering admonition to those attempting operate "under radar." In the case, plaintiff sued to recover in excess of $150,000 for what was described as mold remediation work in a St. Tammany Parish apartment complex damaged in Hurricane Katrina. Plaintiff, however, lacked either a Louisiana contractor's license or a Louisiana mold remediation license during the time that it entered into the contract and performed the incident work. Seeking to avoid a negative result in its case, plaintiff urged that its work was other than "mold remediation" as defined by the Louisiana licensing statutes governing the practice. The court rejected this argument, noting that the mold remediation provisions in the licensure law (La. R.S. 37:2182) were broad enough to cover the plaintiff's mold-prevention work (which were described by plaintiff to include operation of dehumidifiers, air scrubbers and air movers).

In the alternative, the plaintiff urged as a public policy argument that the decision of the Louisiana State Board of Licensing for Contractors following the hurricane to temporarily "delay active and aggressive enforcement of licensure laws" should excuse the plaintiff's failure to comply with the law. The court disagreed, noting an ongoing service typical of open accounts claims following Hurricane Katrina did not suspend the licensing requirements.

Finding a licensure violation, the court was required to declare the entirety of the contract "absolutely null" and, therefore, unenforceable in any manner by the plaintiff. Plaintiff was therefore relegated to recover under the alternative theory of unjust enrichment which, in this case (in keeping with other similar reported cases on the subject) allowed only for the actual cost of materials, services and labor expended by the plaintiff, with no allowances for profit or overhead.

No means no: Louisiana Supreme Court denies contractor's detective work claim against its own CGL insurer

Following a decision by a state court of appeal reversing a trial court's refusal of a contractor's claim against its own CGL policy, the Louisiana Supreme Court held in *Supreme Services and Specialty Company, Inc. v. Sonny Greer, Inc.*, 2007 La. LEXIS 1245, that a contractor may not recover from its own CGL policy for repair or replacement of its own defective work. Although the rule announced by Louisiana Supreme Court in this case is not a new concept, the high court of the state had not previously tackled the issue head on. The case reached the Supreme Court on the ruling by the Louisiana Third Circuit Court of Appeal that the "work product" exclusion in a CGL policy was inapplicable to the contractor's work to the extent the work had been performed by subcontractors and, further, that the "products-completed operations hazard" language in the policy was ambiguous (requiring a finding in favor of coverage).

After a thorough analysis of the policy provisions (none of which appeared to be atypical or unique CGL policy language), the Louisiana Supreme Court reversed the court of appeal. Noting general principle that a "CGL policy is not written to guarantee the quality of the insured's work or product," the Supreme Court found "no contradiction" (and, hence, no ambiguity) between the work product and completed operations provisions of the CGL policy, rejected the concept that subcontractor work was excepted from the work product exclusion, and declared that the completed operations coverage applied only to cover other damage caused as a consequence of the defective work (and did not cover the repair or replacement of the defective work itself).

Dissenting opinion leaves open issue on accounts

Traditionally, suits to recover on construction contracts have not been fodder for attorney's fees claims under the Louisiana open accounts statute, Louisiana Revised Statute 9:2781. Under Louisiana law, parties in litigation are not entitled to recover their attorney's fees unless either an agreement between the parties or a specific statute provides for that recovery. The cited statute serves as that provision for many transactions, but, traditionally, not construction contracts. In *Frey Plumbing Contracting, Inc. v. Foster*, 2007 La. App. LEXIS 1160 (4th Cir.), a plumbing contractor challenged the customary rule, and the Louisiana Supreme Court, granting writs in the case, directed the Louisiana Fourth Circuit Court of Appeal to render an opinion concerning certain decisions of that appellate court which the Supreme Court deemed to be in "apparent conflict" with each other on the subject. The court of appeal conducted an exhaustive review of not only the cases specified by the Supreme Court but also of other cases on the subject of the Louisiana open accounts statute, ultimately finding no discrepancy among the case law. The court of appeal declared that under any circumstances a construction contract for a single job could not come within the purview of the attorney's fees provision of La. R.S 9:2781.

However, a strong dissent was issued by one of the three judges on the appellate court panel. Noting that the open accounts statute was amended in 1983 to allow for "professionals" to sue for attorney's fees when seeking to recover charges for their services - even if the professional rendered only a one-time service rather than an ongoing service typical of open accounts claims – the dissenting judge reasoned that the revision (which was not exclusive in its listing of professionals which could benefit from the amended law) should be read to include master and journeyman plumbers (and, therefore, the plaintiff in this case), each of whom must be licensed by the state and participate annually in continuing professional education to maintain those licenses.

News and Notes

Shields Mott Lund L.L.P. congratulates attorney Elizabeth "Betsy" Gordon for her recent election to the Board of Directors of the New Orleans Chapter of the National Association of Women in Construction (NAWIC).

Federal "electronic discovery" rule amendments: litigants beware!

Recent changes to the Federal Rules of Civil Procedure as those govern the discovery of electronic information put a substantial responsibility on both attorneys and their clients to preserve and turn over in litigation electronic data. The 2006 amendments to the Federal Rules clarify that discovery of electronically stored information stands on equal footing with discovery of paper documents. For further reading on the topic, a document on the subject of electronic discovery was released in June, 2007, by The Sedona Conference® and is entitled, "The Sedona Principles," Second Edition. That document is available free of charge for individuals to download from The Sedona Conference® web site, www.thesedonaconference.org (information on republishing, licensing and other use of the document is contained on the download webpage). *Shields Mott Lund L.L.P. makes no warranty or representation regarding the contents of the document herein referenced. Readers should always seek the advice of competent counsel for any matters on which they need legal advice.*

Construction Law Seminars and Publications

Shields Mott Lund L.L.P. is pleased to announce these upcoming construction law seminars:

Construction Lien Law in Louisiana, (Lorman Education Services), August 28, 2007, New Orleans, Louisiana - 8:30 a.m. - 4:30 p.m.

Managing Construction Projects, (Lorman Education Services), October 3, 2007, New Orleans, Louisiana - 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 seminars 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.

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McCoy in Monroe County, Wisconsin. The principal subcontractor had withheld approximately $263,000.00 of the contract balance from the erector, citing expenses incurred from delay (including liquidated damages) and also assessing against the erector the principal subcontractor's future "lost profits" allegedly suffered because of the delays by the erector. Western Surety sought a partial summary judgment on the matter of whether the "lost profits" were properly the subject of a deduction by the principal subcontractor.

It was undisputed that the sub-subcontract allowed for the assessment of the liquidated damages, and also covered the principal subcontractor for damages caused by delay. However, in pertinent part, the sub-subcontract allowed the principal subcontractor to recover (in addition to liquidated damages) only "... for any expense the Contractor [the principal subcontractor] may suffer as a result of the Sub-Contractor's failure to carry out the provisions..." of the sub-subcontract. Ruling in favor of Western Surety and against the principal subcontractor, the court held that the term "expense" in the foregoing quoted provision from the agreement, according to its "ordinarily understood meaning," did not include future lost profits. Citing principally to dictionary sources, the court noted that an "expense" means something one must pay out, whereas "profit" is defined as something one gains. According to the court's reasoning, therefore, loss of profit, because it entailed no paying out of anything, could not generate a claim cognizable under the pertinent default provision within the agreement wherein only "expenses" could be claimed.

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