The Newsletter of the ABA Forum on the Construction Industry

UNDER CONSTRUCTION

FEBRUARY

FEATURE STORY

Message From the Chair-Elect

By Andrew D. Ness, Jones Day

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Message From The Editor: What's New?

By Jeffrey R. Cruz, E.E. Cruz & Company, Inc.

So what's new at *Under Construction*? Everything. Your Forum newsletter is trotting out yet another format to be beamed to your desktop computer, laptop, tablet and handheld device.

Stay On Course In The Changing World Of Claim Preclusion Clauses

By Daniel M. Drewry, Drewry Simmons Vornehm, LLP, Julia M.I. Holden Davis, Bankston Gronning O'Hara, Julie Sneed Muller, Wyatt, Tarrant & Combs, LLP

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Henry Gifford V. U.S. Green Building Council

By Edward B. Gentilcore

On October 8, 2010, a suit was filed in the U.S. District Court for the Southern District of New York, at Case No. 10 CIV 7747. The matter was initiated by Henry Gifford as a class action suit against not only the U.S. Green Building Council (USGBC), but also a number of other high-ranking officials with the USGBC, including its president, Rick Federizzi. The complaint charged that the the defendants' collective conduct of promulgating the LEED rating system amounted to misrepresentation, false and misleading advertising, monopolization and, through concert and cooperation, conspiracy.

Recent Developments In Establishing Claims For Delays And Lost Productivity

By Charles V. Choyce, Jr., Esq., PSP, PMP, CFCC

One of the most difficult and complex challenges facing a claimant on a construction contract is establishing entitlement and proper quantification of impacts associated with change orders, delays and

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lost labor productivity. If these issues are not resolved during the project, they become a battleground for retrospective disputes, arbitration and litigation.

The ABC's Of The Three C's

By Amy Phillips, Arcadis

Managing client expectations, specifically when more then one group is involved, requires basic skills. In professional practice both counsel and consultant are tasked with addressing and satisfying the clients' needs effectively and efficiently. Learning the "how-to-do's" of the Client, Counsel and Consultant relationship can be as simple as reciting the alphabet.

Spotlight On The Corporate Counsel Division: The Corporate Counsel Brief

By Andrea G. Woods, Nabholz Construction Corporation

The awkward conversation on billing arrangements must happen. There is no way around it if in-house and outside counsels are going to assure the best value for the client. No matter how many years of practice you have under your belt, this conversation can be as uncomfortable as confronting a teenager about their romantic activities. Likewise, the closer the relationship, the more difficult this can be to accomplish.

The Forum's Construction Industry Outreach

By Richard J. Tyler, William M. Hill, Stanley J. Dobrowski

During the past few years the Forum has commenced efforts to forge closer relations with organizations involved in the construction industry.

Message from the Chair-Elect: On Programs and People

Vol. 14 No. 1

By
Andrew D. Ness, Jones Day

Well I can't say they didn't warn me, and repeatedly at that. In considering whether to put my hat in the ring for the position of Forum Chair-elect, I talked with many of the recent Forum Chairs, asking about responsibilities that I might not appreciate, and especially, about how much time rotation through the three Forum officer positions (Chair-Elect, Chair, and Immediate Past Chair) would require over the three year period. The most common advice was "whatever amount of time you think it will require, it takes a lot more." And so it is, right from the start.

The Chair-elect, even when just the nominee for that position, well in advance of the election at the Annual Meeting, quickly becomes consumed with the three national meetings under his or her jurisdiction – in my case those to be held during the 2012-13 ABA yearly cycle. The only aspect that is more or less "fixed" at the outset is that there will be a Fall, a Mid-Winter and a spring (Annual) meeting – everything about the meetings themselves is up for grabs. You don't have to ponder for too long the problem of creating from scratch not one, but three CLE programs that will both attract and educate, in an interesting way, four or five hundred of your colleagues to become pretty daunted by the responsibility in front of you. But the reality, of course, is that you don't do it all yourself – not even close. Actually, all that the Chair-elect really needs to do is just set the machinery in motion to get a program off the ground. Settle on a location, pick a hotel, come up with an idea about a theme, and appoint a Governing Committee liaison and program co-chairs. From there, the marvelous machinery of the Forum takes over, starting with the program co-chairs and GC liaison running with the general concept and brainstorming ideas for specific program topics.

The circle then widens when the Governing Committee gets involved, adding suggestions and comments on the ideas of the co-chairs, and suggesting possible speaker candidates. As speakers are selected, program coordinators (cat-herders) identified, and persons tapped for the many other specialized roles (lunch speakers, Division breakfast speakers, volunteers to coordinate associated events like a golf outing, people to staff the Publications and Division signup tables, and on and on), the circle of those involved gets wider and wider. Eventually, it's a small army, and every person plays a part in the meeting's success. And of course, our Forum staff, led by Forum Manager Amanda Raible, is involved at every step as well.

What is most remarkable about this is that, with the exception of the Forum staff, the entire army is unpaid volunteers, donating their valuable time and effort to creating a CLE program, with its associated events, for the benefit of others. The Forum has been very fortunate for many years now in having an ample number of its members ready and willing to get involved – to volunteer for all of these roles, large and small. But why is that? What causes busy construction lawyers to be so willing to give up potentially billable time (or time off) to work for the Forum?

Being a Forum officer is a lot like being a trustee. I am being entrusted with the care and feeding of this amazing and successful organization for a bit. Objective number one is not to screw it up. Objective number two is to do my part, following on a long line of Chairs before me, to build on past accomplishments and make the Forum an even stronger and better organization. So not surprisingly, in thinking about taking on the Forum officer positions, I found myself spending a lot of time thinking about this question of motivation, and more generally, what makes the Forum such a successful volunteer organization.

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At various times in my career, I have also been active in two ABA Sections outside the Forum, which here shall remain unidentified. I suspect every ABA group trumpets how well-received its programs are, how enthusiastic its active members are, and how collegial it is. These two certainly did. But in both of those instances, to be frank, this was mainly bluster – most Section committees were basically moribund, programs relatively slapdash and participation lackluster. And the bureaucracy! Each clearly had a small leadership group at the top that sincerely enjoyed their participation, but below that veneer there was not a whole lot of energy in the organization. The Forum truly is different, and we are very lucky; the exception and not the rule within ABA-world, so far as I can tell. But why?

There is a long list of possible explanations, of course: We offer top quality CLE that attracts attendees to programs and members to the Forum generally. The networking opportunities are excellent. There is the opportunity to become better known to and respected by your peers across the country. We have good parties. We hold meetings in attractive locations. There is always enough coffee, and occasionally cookies appear at afternoon break. All of these reasons and doubtless many more contribute to our success. But what I concluded in the end is that the Forum is successful because it is fun.

By "fun," I am not just referring here to the parties and the cookies, although both register positively on the fun-meter. I am talking about the entire experience of participating actively in the Forum and its work. The people you meet are friendly and leave their pretentions at home (those few who are mainly interested in impressing others tend to get discouraged pretty quickly, or if they stick around, change their tune to fit the prevailing Forum ethos). Getting involved is easy and low pressure, and the door is always open and welcoming for new faces. Best of all, there is the enjoyment of contributing to the greater good, of being part of something larger than yourself, whether it is participating in a Division project, contributing to a book, speaking at a breakfast meeting, or coordinating a program session. Your contributions directly benefit our chosen field of interest – construction law – and are welcomed and recognized, and that is just plain enjoyable.

Then, at the end of the day, you go to the cocktail party with those nice people you met at the cookie table. And over time you find that they have become good friends, with lots of shared good times at the Forum. The fact that it's fun is why I became and stayed active in the Forum, and I am pretty sure the same applies to most of us.

Then there is what the Forum is NOT. There is a minimum of internal politics, and advancement to more responsible roles is a meritocracy, based on past efforts and the quality of those efforts. Do a great job as a Division breakfast speaker, and down the road people remember you when they are looking for plenary session panelists. And so forth. Bureaucracy is kept to a minimum (truth told, much of what bureaucracy we suffer from stems from ABA policies forced upon us). Politics, pettiness, and bureaucracy aren't fun.

So that is my self-chosen charter as I take on the Chair-elect responsibilities – help make the Forum more fun, and fight back whenever something threatens to take us in the direction of bureaucracy, politics, or pettiness. So whenever you have an idea for making the Forum more rewarding and fun, let me know!

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Message from the Editor: What's New?

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By
Jeffrey R. Cruz, E.E. Cruz & Company, Inc.

So what's new at *Under Construction*? Everything.

Your Forum newsletter is trotting out yet another format to be beamed to your desktop computer, laptop, tablet and handheld device. When I took over as Editor in 2007, the newsletter was printed on paper and mailed to the membership. (If you find this hard to believe or remember, check out the *Under Construction* archive). Since then, for various reasons, and for better or worse, we have migrated to pdf and html formats and are delivering the newsletter to you by email. The new format you are viewing is a better partner for the Forum website, so keep checking this space for enhanced functionality from your electronic newsletter.

What else is new is that I am on a search committee for my replacement. A bittersweet assignment to be sure, but I am very excited to be passing the reins to a new Editor. In fact, we are also searching for an Associate Editor, a new position in the Forum. The next leaders of *Under Construction* will have the opportunity to make the newsletter a better portal to all of the good buzz in the Forum beehive. Twelve thriving Divisions. Forum Books in various stages of preparation for publication. Standing Committees on Publications, Membership, Technology, Diversity and SPEC. Ad Hoc Committees. Podcasts available on iTunes. Three national programs. Regional and One-Day programs. *The Construction Lawyer*. Read Andy Ness' "Message from the Chair Elect" in this issue and marvel at how many dozens of volunteers are pitching in to make the Forum run and grow.

What will the newsletter look like three years from now? With the pace of technology accelerating into 2012, I'll wager we will be looking at *Under Construction* on a device that isn't on the market yet. How will it deliver convenient access to timely and important information, connect Forum members and leaders with each other and the industry, provide a platform for commentary and debate, and interface with the website? All of that will be up to the new Editor and Associate Editor and I encourage anyone who enjoys writing and editing and is looking for a challenge to apply.

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By
Daniel M. Drewry, Drewry Simmons Vornehm, LLP, Julia M.I. Holden Davis, Bankston Gronning O'Hara, Julie Sneed Muller, Wyatt, Tarrant & Combs, LLP



Negotiating, drafting and enforcing claim preclusion clauses can quickly land even an experienced construction practitioner in foreign territory. From notice requirements to "no damage for delay" clauses, the application of claim preclusion clauses varies wildly in content and enforcement from jurisdiction to jurisdiction. This article examines the judicial treatment of claim preclusion clauses, focusing on claim notice requirements and "no damage for delay" clauses, and sets a framework for drafting and negotiating such clauses.

Overview of Notice Requirements

When a contractor encounters delays on a project, the axiomatic response (at least from the construction practitioner's perspective) should be to check the contractual claim notice requirements to identify what notice must be submitted, to whom and when. Too often, however, the notice provisions are ignored or glossed over by the affected contractor. What happens if the contractor fails to furnish the required notice, or is late in doing so? How will its noncompliance be viewed by a court? The answer largely depends on the jurisdiction as courts generally enlist two approaches to noncompliance: (i) strict compliance; or (ii) an equitable actual knowledge/no prejudice approach. The approach selected by a particular jurisdiction will not only drive the outcome in a claim or litigation scenario in which the sufficiency of the notice is disputed, but more importantly should factor heavily into the negotiating and business decisions of the parties when addressing notice requirements at the drafting stage. A proactive approach to dealing with notice provisions is an easy, but overlooked, area in which a practitioner can save his or her client significant time and money on the project.

Strict Compliance Approach: In strict compliance jurisdictions, a contractor's failure to meet the express contractual notice requirements may very well forfeit its entitlement to additional time and/or costs for delay. In these jurisdictions, even substantial compliance with express notice provisions (almost always asserted as a defense to claim preclusion) and/or the owner's actual knowledge of the delay may not preserve the claim. *See e.g. Razorback Contractors of Kansas, Inc. v. The Bd. of Co. Comm. of Johnson Co., Kansas*, 227 P.3d 29 (Kan. 2010) (claim barred despite the owner's/general contractor's actual knowledge of the claim events and where the owner had given more time for the same delay events); *Starks Mech., Inc. v. New Albany-Floyd County Consol. School Corp*., 854 N.E.2d 936 (Ind. App. 2006) (claim barred despite the claimant's timely, ongoing submission of RFI's identifying the problem and impact to the work, and the owner's actual knowledge of the delay and consent to the remedial design work).

Further, even verbal notice of a claim and/or written notice of a possible claim have been found insufficient. *See Razorback*, 227 P.3d 29; *American Nat'l Electric Corp. v. Poythress Commercial Contractors, Inc.*, 604 S.E.2d 315(N.C. 2004). Some courts have cited the purpose of notice provisions, invoking concepts of fairness to distinguish between notice of cost impacts and notice

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that a claimant is expressly seeking payment of those cost impacts from the general contractor or owner. *See Associated Mech. Contractors v. Martin K. Eby Constr. Co.*, 271 F.3d 1309 (11th Cir. (Ga.) 2001). In light of the above, the construction practitioner operating in a strict compliance state must be aware (both at the drafting and claim stage) of the layers of notice required, the timing components and the content requirements for notice set forth in the contract because a reviewing court may well enforce those requirements to the letter.

Actual Knowledge/No Prejudice Approach: Other jurisdictions approach the issue of noncompliance in equitable terms — did the owner or general contractor have actual knowledge of the claim? Were they prejudiced by the lack of notice? In equitable approach jurisdictions, a contractor's failure to meet the express contractual notice requirements will only forfeit its entitlement to additional time and costs *if* the owner can demonstrate the lack of actual knowledge and that it is prejudiced by the noncompliance. *See e.g. James Corp. v. North Allegheny School Dist.*, 938 A.2d 474 (Pa. Commw. Ct. 2007); *Mingus Constructors, Inc. v. U.S.*, 812 F.2d 1387 (Fed. Cir. 1987).

Overview of Enforceability of "no damage for delay" Clauses

No damage for delay (NDD) clauses generally restrict a contractor's right to recover for otherwise compensable delay to an extension of time only. Historically, NDD clauses have been strictly construed based on the common law's aversion to harsh forfeiture provisions. Reflecting this approach, some states have enacted legislation voiding or limiting NDD clauses.

Other states find that the NDD clause is necessary to protect the public interest in fixing the cost of public works contracts. In these jurisdictions, courts generally reason that NDD clauses are necessary to protect public agencies with fixed appropriations or loan commitments against litigation based on claims that the public agency has been responsible for unreasonable delays. *See Board of Education of Worcester County v. BEKA Industries, Inc.,* 190 Md.App. 668, 732-33, 989 A.2d 1181, 1219 (2010). These courts negate forfeiture concerns reasoning that contractors involved in large complex construction projects are sophisticated enough to recognize the impact of the NDD clause and adjust the contract price upward to compensate for the risk. *See Wells Bros of New York v. U.S.*, 254 U.S. 83, 41 S.Ct. 34, 65 L.Ed. 148 (1920).

Judicial exceptions to enforceability of the NDD clause arise from implied contractual obligations such as (1) the obligation of good faith and fair dealing, (2) the obligation of cooperating and (3) the obligation of non-interference. The judicial exceptions generally, include:

Uncontemplated Delays. This exception is based on the concept of mutual assent. Courts upholding this exception for uncontemplated delays find that even though the law assumes mutual consent to contract terms, the law will not assume that a contractor bargained away his right to bring a claim for damages resulting from delays that were not within the contemplation of the parties at the time of contract execution. *See Corinno Civetta Constr. Corp. v. City Of New York,* 67 N.Y.2d 297, 493 N.E.2d 905, 502 N.Y.S.2d 681 (1986). Recent decisions, however, have eroded this exception reasoning that mutual assent does not require the parties to foresee all potential project delays. These jurisdictions find that one of the purposes of the NDD clause is to address unforeseen delay, and to include a price adjusted for this risk. *See Markwed Excavating, Inc. v. Mandan,* 791 N.W.2d 22, 28 (N.D. 2010) (citing *John E. Gregory & Son, Inc. v. A Guenther & Sons, Co*., 147 Wis.2d 298, 432 N.W.2d 584, 587 (1988)).

Intentional abandonment. Based on the concept that a broad NDD clause includes reasonable and unreasonable delays, this exception requires that a delayed contractor establish that the contractee is responsible for delays which are so unreasonable that the delays constitute relinquishment of the contract with the intention of never resuming it. *Corinno Civetta*, 67 N.Y.2d at 312, 493 N.E.2d at 912, 502 N.Y.S.2d at 688.

Active Interference/bad faith. Active interference arises from an implied obligation by the contractee to refrain from doing anything that would unreasonably interfere with the delayed contractor's opportunity to proceed with reasonable economy and dispatch. As the name implies, active interference requires a finding that a defending contractee committed some affirmative, willful act in bad faith which unreasonably interfered with the contractor's compliance with the contract. *See, Law Company, Inc. v. Mohawk Constr. and Supply Co., Inc.,* 702 F.Supp.2d 1304, 1326 (D. Kan. 2010). This exception does not extend to delays resulting from a contractee's mere inept administration, (*see T.J.D. Constr. Co. v. City of New York.* 295 A.D.2d 180 (2002)), or from a contractee's negligent misrepresentation (*see Markwed Excavating,* 791 N.W.2d at 32).

Unconscionability. An NDD clause is unconscionable if it is one no rational, undeluded person would make, and no honest and fair person would accept, or if it is blatantly unfair. This is a fact specific determination, on a case-by-case basis. An NDD clause is not unconscionable if a sophisticated contractor on a competitively bid project could have protected itself against delays through a bid adjustment to its work. *Markwed Excavating*, 791 N.W.2d at 31.

Fundamental Breach. Fundamental breach is a very narrow exception which requires a showing of complete frustration of the performance of one of the parties, not merely a delay in time. *Law Company,* 702 F.Supp.2d at 1321 (citing *Mafco Elec. Contractors v. Turner Constr*., No 07-000114, 2009 WL 807469 (D.Conn. March 26, 2009). A contractor's burden of proving this exception is a strong one. Typical cases for the fundamental breach exception include where the owner has failed in its obligation to obtain title to the work site or to otherwise make the site available to the contractor. *Manshul Constr. v. Board of Educ*. 160 A.D.2d 643, 559 N.Y.S.2d 260, 261 (1st Dep't 1990).

Practical Application

The contract drafting stage provides a prime opportunity to manuscript limitations on recovery. These limitations take many forms – not only notice provisions and specific damage limitation clauses, but also clauses which establish governing law, the location and jurisdiction of any dispute. All of these clauses should be deliberately considered and drafted based on an understanding of the goals of the agreement, the goals and ability of the client, and the needs of the project.

Determine potential risks. One cannot allocate risks without first gaining an understanding of what the potential categories of risk are for a particular project. Many of these are common categories – such as weather related delays, *force majeure* events, risk associated with design errors, unforeseen or hidden conditions, and government actions. Each project may also have specific risks. These may include items such as the inability to grant time extensions, the potential for consequential damages, limited site access, strenuous financing or other third party requirements, and cash flow limitations. The potential risks can also be created by the nature of the parties involved – financial ability, experience, competition, and standard practices all playing a potential role – and the nature of the work itself. There may be specific types of monetary (or non-monetary) risks that need to be considered – including the ability to price those risks. There may also be risks created by other agreements relating to the same project.

Determine appropriate reactions. With knowledge of the types of risks out there, determine what the appropriate reactions to risk should be. This involves, among others, determining the timing and extent of notice, whether there should be an opportunity to inspect certain conditions before they are disturbed, and responsibility for tracking and determining losses (in both time and money). Establish clear communication protocols, identifying (a) who receives or is authorized to provide information or direction, (b) what information or direction should be provided, (c) when is it due, and (d) how should it be communicated (i.e., verbal, email, serial correspondence, etc.). It may be necessary to identify layers of reaction – for example, notice of a condition within a certain time frame followed by the opportunity to inspect for a certain time frame.

Determine default allocation of risk. Understand the default allocation of risk in the jurisdiction governing the contract. Legally, risk may be allocated by statute, by regulation, and by case law, in addition to by contract. Different jurisdictions have different default rules. These rules may establish liability for certain acts, may govern the enforceability or effect of certain clauses, and may limit liability. In addition, determine what may be changed from the default rule. For example, there may be legal restrictions on claim preclusion clauses or indemnity provisions, and certain waivers may be unenforceable as void against public policy. Understanding what can be done assists in determining the goal of any restrictive clauses – i.e., transfer, restriction, limitation, or definition.

Draft any revisions to default allocations of risk. With an understanding of the law and the specific risks, deliberately draft clauses that are meaningful and enforceable. Focus on clauses that accomplish the underlying goals. To strengthen claim preclusion clauses, consider tightening the time lines for notices, expanding requisite notice contents, and implementing multiple notice requirements for the triggering event and when the claim is quantifiable. One may wish to separately address the treatment of ongoing delays, and expressly include waiver terms for noncompliance. Additionally, general contractors or at-risk construction managers should flow-down or otherwise specifically address any upstream notice requirements, and include shorter lower tier notice deadlines than those owed to the owner to preserve the ability to evaluate the validity of the claim and pass it on to the owner or architect within the notice period.

Define delays. To qualify as a delaying event, what parameters must be met – *i.e.*, should there be a critical path analysis? Consider the effect of substantial completion, final completion, and any interim milestones – and to which of these events the proof of delay should tie. Identify ownership of any float, and the ramifications of early completion. To limit NDD clauses, consider narrowly defining the delay for which compensation is barred, and specifically limiting NDD clauses to circumstances outside the client's control.

Define damages. If damages are difficult to price, consider whether they are mechanisms of agreeing to pricing or agreeing to a methodology of pricing that narrows the focus of any dispute. Agreed pricing can benefit both the claimant and respondent by providing certainty and avoiding costs in the event of a dispute. This may be done in many ways, including through liquidated damage provisions, unit price agreements, and establishment of force account rates. To limit NDD clauses, narrowly define delay damages to exclude claims for disruption, acceleration and changed conditions.

Define a method for resolving disputes. There are many methods of dispute resolution available – dispute review boards, mediation, arbitration, and litigation being just a few. Determine which makes most sense for the project and the client. This may include considerations of favorable (or not) jurisdictions, the ability to pay a decision maker, the potential for 3rd party claims, the accessibility of the project site, and the location of the parties, witnesses, and documents.

The time to manuscript limitations on claim preclusion clauses is during contract drafting. By combining both an understanding of the discreet subsets of law dealing with a particular claim preclusion clause, such as notice provisions or "no damage for delay" clauses, with a holistic approach to risk allocation during drafting and negotiation, the construction practitioner can better serve and protect the client's needs.

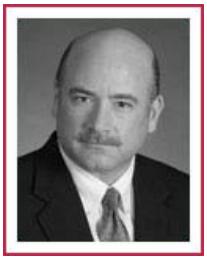
Henry Gifford, et al. v. U.S. Green Building Council

Henry Gifford, et al. v. U.S. Green Building Council: Has Mr. Gifford Been Left with a Leg on Which to Stand to Pursue Discovery? Should He Have Been? May Others Follow?

Vol. 14 No. 1

By
Edward B. Gentilcore

Edward B. Gentilcore is Chair of the Sherrard, German & Kelly, P.C. Construction Services Group and is currently the Environmental Chair of the Division 10 Steering Committee and Co-Chair of the ABA Section of Litigation Construction Litigation Committee. Mr. Gentilcore practices in the area of complex commercial litigation with an emphasis on construction litigation, construction contracts and mechanics lien matters. He is also a LEED AP and has experience in the preparation of design and construction contracts, including those involving green building design and construction, with a focus on dispute prevention considerations.



While anticipation has been widespread on the prospects of litigation over the design and construction of buildings labeled with such environmentally friendly terms as *green*, *sustainable* and *energy-efficient*, the floodgates some predicted have not been unleashed. While some of the earliest cases in this area received widespread attention, including, most notably, the *Southern Builders, Inc. v. Shaw Development, LLC* litigation, which was filed in the Circuit Court for Somerset County, Maryland, Case No. 19-C-07-011405,[1] the remainder of these presently filed actions did not receive equal thrust and scrutiny of attention. There are matters that continue to be pursued regarding the delivery of what were represented to be green or sustainably designed and constructed buildings. However, even these more recently filed cases are very much in early stages and not yet far enough in gestation to yield meaningful insight into the actual risks and responsibilities to be borne by the participants in the cases and ultimately those interested in the respective projects implicated in these matters.

All those cases, however, had at their core a specific project in mind. Whether a claim was one of failure of performance, misrepresentation, or another contract- or tort-based claim, the focal point was that the building did not achieve the planned result and, therefore, did not enjoy the benefits associated with that achievement. Also, more recently, in the *Chesapeake Bay Foundation, Inc., et al. v. Weyerhaeuser Company* matter, filed at Civil Action No. 3411442 in the Circuit Court for Montgomery County, Maryland, the building actually was not meeting the expectations of performance, and the building materials used were themselves resulting in a compromise of the project as measured by more traditional standards of success or failure (namely, the ability to withstand water infiltration).[2]

Then, on October 8, 2010, a suit was filed in the U.S. District Court for the Southern District of New York, at Case No. 10 CIV 7747. The matter was initiated by Henry Gifford as a class action suit against not only the U.S. Green Building Council (USGBC), but also a number of other high-ranking officials with the USGBC, including its president, Rick Federizzi. At the centerpiece of the case, Mr. Gifford alleged that he as well as similarly situated members of the putative class had been damaged by the defendants' collective conduct of promulgating the LEED rating system and its various iterations, and supporting it in such a way that suggested, if not represented outright, that these buildings—designed and constructed to comply with the LEED requirements—were indeed models of health, environment and energy efficiency, with a considerable emphasis on the latter. Mr. Gifford asserted that these actions on the part of the USGBC and the other defendants constituted violations under the Sherman Anti-Trust Act, 15 U.S.C. § 2; unfair competition under the Lanham Act, 15

U.S.C. §1125(a)(1)(B); deceptive trade practices under the N.Y. General Business Law (NYGBL) §§ 349 (a) and (h); false advertising under the NYGBL §§ 350-a(1) and 350-a(3); Racketeer Influenced Corrupt Organization Act wire fraud pursuant to 18 U.S.C. § 1962(C); and unjust enrichment. In plain terms, the thrust of the complaint charged that the defendants' actions and conduct amounted to misrepresentation, false and misleading advertising, monopolization and, through concert and cooperation, conspiracy.

The industry itself reacted with some criticism and surprise. Some focused upon Mr. Gifford himself, casting him as a polarizing figure with an axe to grind. Others were simply dismissive, suggesting in a sense that Mr. Gifford's suit would have no chance of maintaining itself, being certified as a class action or even surviving as a direct action against any of the defendants. Perhaps as a result of some of the initial case scrutiny, and before any response had been presented by the defendants, the case was amended to a much different procedural configuration. Gone from the First Amended Complaint (FAC) were any allegations amounting to or supporting a class action. Also absent were a number of the individual defendants originally joined in the case, leaving the USGBC as the sole defendant. However, parties joining Mr. Gifford in the ranks of plaintiffs included Gifford Fuel Saving, Inc., Elisa Larkin, Andrew äsk and Matthew Arnold, all of whom claimed they were directly aggrieved by the conduct of the USGBC. The counts asserted were similar in tone to the original complaint, but different in terms of the causes of action. The antitrust, wire fraud and conspiracy claims disappeared. Remaining (and in some instances replacing the eliminated counts) were claims for false advertising under the Lanham Act at § 43(a); false advertising under NYGBL §§ 350, 350-a and 350-e; deceptive trade practices under the NYGBL §§ 349(a) and (h); and violation of the common law based on false advertising, unfair competition and unfair business practices. Aside from the specific legal grounds for these assertions in the FAC, the following key allegations emerged:

1. The Plaintiffs assert that LEED buildings are not more energy efficient despite representations to the contrary.
2. The FAC includes the contention that LEED does not verify buildings designed or built to the LEED rating system actually lead to energy savings.

With these core allegations being established in a much more traditional pleading approach, an intriguing proposition emerged. For the first time, the USGBC might, through the process of discovery, be requested and therefore obligated to disclose the details of its review and administration of the certification process. The USGBC might also become subject to discovery focused on how the LEED rating system was developed and the purposes underlying its creation. In this sense, the suit presented a possible means for lawful inquiry of this organization to provide the details of its processes when other disclosures to date have been fully voluntary and formed part of more marketing-based message-delivering strategies.

Shortly after the filing of the FAC, the USGBC filed a motion to dismiss the FAC on April 6, 2011. Its target clearly was Gifford in the first instance, characterizing him as a "gadfly", a "critic" and certainly not a competitor. Therefore, the USGBC asserted that Gifford and the remaining plaintiffs simply lacked standing to sue the USGBC. While that may have been more than sufficient to achieve dismissal of the action filed against them, the USGBC continued their arguments emphasizing that LEED was never intended to be what Mr. Gifford asserted, but rather was "purely voluntary" in nature. The USGBC added that LEED is "aimed at improving environmental performance and does not assess actual . . . performance" in buildings reviewed for certification. The USGBC added that LEED Accredited Professionals—namely those who have been through the rigors of the testing process which was at one time the criteria for receiving the Accredited Professional (LEED AP) designation—"offer[ed] expertise that the FAC does not allege the Plaintiffs possess or market," again, an allegation targeting what appears to be the overall theme of lack of standing.

Next, the USGBC presented its argument that LEED does not verify building performance, just that they are "designed and built using strategies aimed at improving" performance. Viewed in this light, the defense raised by the USGBC certainly can be read to support the critique that following the LEED rating system does not, in and of itself, assure bottom-line results, but rather that the techniques themselves have been designed in such a fashion that one pursuing the LEED rating would seek to increase beneficial performance of the building as a whole.

A final point raised focused on the USGBC's challenge to the New York Consumer Protection Act claim. In this regard, the USGBC asserted "statements from the USGBC website are not directed at consumers," but rather "businesses and professionals." By this contention, the USGBC clearly sought to place the LEED rating system outside of the purview and coverage of the consumer-protection-based statute.

On May 2, 2011, the plaintiffs collectively filed their opposition to the USGBC's motion to dismiss. The key points raised by the plaintiffs were focused mainly on establishing their standing to proceed. With regard to the Lanham Act claim, the plaintiffs asserted that they did not have to directly compete with the USGBC in order to maintain standing under the Lanham Act for a false advertising claim. In fact, the plaintiffs went further, asserting that they were "competitors of USGBC with a very real stake in the market for energy efficient building expertise. . . ."

The plaintiffs next focused their arguments on emphasizing that their services provide guidance to consumers about how to design and construct buildings in such a way so as to conserve energy and, in that sense, they directly compete with the USGBC. They identified Gifford as a "highly respected consultant who provides design and construction guidance on how to reduce energy costs." They described Gifford Fuel Savings, Inc. (GFSI) as a "corporation that provides heating and cooling system designs that are proven to reduce energy costs." Matthew Arnold was presented as being in the business of "providing advice about how to design energy-efficient and sustainable buildings." Andrew äsk was identified as a licensed engineer for 41 years who performed diagnosing, designing and retrofitting of heating and cooling systems "in order to improve performance and energy utilization." Perhaps as an oversight, Ms. Larkin was specifically addressed nowhere in the plaintiffs' response.[3]

What was also interesting about the approach taken by the plaintiffs in their opposition was the analogy they drew regarding these claims. The plaintiffs argued "in the same way that Nair [a chemical-based depilatory cream] led the consumer to believe that using Nair with baby oil made baby oil unnecessary, USGBC leads the consumer to believe that LEED certification makes separate energy saving guidance unnecessary." Stated another way, Gifford contended "LEED certification and LEED 'verification' is not a substitute for energy-saving design and build services, but USGBC wants the consumer to *think* it is." (Emphasis in original). Coupling these contentions with the assertion that this is a niche market in which the predominance of directly competitive attributes are apparent, the plaintiffs contended they had "lost sales in the energy optimization market and damage to the reputation of 'green' building sciences on the whole." Likewise, plaintiffs contended that the USGBC's "false advertising undermines their ability to market their own genuine services."

The next phase of the opposition was also quite interesting because it focused on the factual disputes over whether LEED actually leads to building performance efficiency. This section of the opposition is the most intriguing insofar as it provides a roadmap to potential discovery inquiries that the Gifford team would have sought, provided this matter survived the motion to dismiss. Indeed, Gifford proffered that the "Plaintiffs can easily meet their burden of proving the [USGBC-commissioned] study is not sufficiently reliable to conclude that the Defendant's LEED certified buildings save energy."

As to state-specific counts, Gifford argued that the plaintiffs had standing under NYGBL §§ 349 and 350 because the plaintiffs' contentions implicate and impact the public welfare, citing the potential of reputational damage to the environmental building movement generally as well as the influence of the USGBC's "false advertising on 'the policy decisions of voters, taxpayers, developers, municipalities, and legislators at the local, state and federal levels.'"

The penultimate contention raised by Gifford was that the advertising by the USGBC was, in fact, consumer-oriented and, therefore, actionable under the New York Consumer Protection Law. In this regard, the plaintiffs focused on the USGBC website. However, the plaintiffs made no mention of the *Bain v. Vertex Architects, LLC* case, recently filed in the Circuit Court of Cook County, Illinois, at Case No. 2010-L-012695. In the *Bain* case, the plaintiff asserts that the defendant "failed to diligently pursue and obtain for the Project certification from the USGBC LEED for Homes Program" when "[t]he stated objective … was to 'create a sustainable green modern single family home.'" Perhaps the *Gifford* plaintiffs could have raised this as an example where the USGBC is specifically promulgating a LEED program focused directly on the consuming public and their residences.

In concluding its opposition, the plaintiffs generally argued that the burden of proof on causation should be flexible, prospective and reasonable. They essentially put forth their concern that the skyrocketing success of the LEED brand should not be left unchecked and without at least some discovery-based scrutiny.

About four days thereafter, the USGBC filed its own response brief in further support of the motion to dismiss the FAC. This response was directly critical of the opposition, contending that it was a misstatement of governing law and "irrelevant discussion of standing decisions that turn on facts utterly dissimilar to those alleged in the [FAC]." Furthermore, the USGBC argued that nothing it did "precluded [the plaintiffs] from obtaining LEED accreditation, or that such accreditation is required of those who assist developers in obtaining LEED project certification."

Focusing squarely on the issue of standing, the USGBC argued plaintiffs "have failed to allege any plausible basis for asserting that they have personally suffered or are likely to suffer any injury as a direct result of any of the three isolated, supposedly 'false' statements referenced in the FAC." It argued that the FAC did not even allege reputational harm to these specific plaintiffs individually. Rather, the USGBC observed that the injury asserted in the FAC is "to the reputation of the green building industry as a whole," and, therefore, not an injury for which plaintiffs could claim standing to press for judicial relief.

The USGBC then stated directly in response to the belief that what plaintiffs "'most wish' for is a mandatory injunction 'compelling USGBC to release actual utility rates in its buildings,'" that this "is not something the USGBC could possibly provide. USGBC is a developer of rating systems, not a public utility, and the certification process for nearly all LEED projects relates to the design and construction of buildings only at the point of completion, prior to occupancy or operation, at a time when the buildings do not have operational utilities."

The USGBC was next dismissive of the plaintiffs' ability to claim Lanham Act standing based upon what the defendant characterized as a "rambling and difficult to follow discussion of Lanham Act standing cases." After raising some of what the USGBC identified as controlling cases in the area, it further noted:

> . . . plaintiffs here face an insurmountable problem. The USGBC's 'product' merely provides criteria for meeting a *voluntary* building standard. There is no reasonable basis to believe (and certainly no such basis was asserted in the FAC), that any of the USGBC's allegedly false statements did or could harm plaintiffs in the distinctly different market for heating, cooling, and mechanical systems design and installation.

(Emphasis in original).

The USGBC then turned to an analysis of the allegedly false statements attributed to it. This discussion focused on the plaintiffs' allegations that the attributes of third-party verification and boosting of employment productivity—both used to distinguish the LEED rating system—were false statements. In response, the USGBC characterized these arguments as "wholly conclusory." Further, the USGBC noted the statements attributed to LEED are based upon a study which, despite certain methodological flaws, is still a study that supports the referenced attributes.

Finally, the USGBC tackled the state law claims, arguing that courts in New York had "repeatedly

declined to find advertising aimed at other businesses sufficient to meet the §§ 349 and 350 'consumer-oriented conduct' requirement simply because there is an attenuated link to an alleged public harm." As such, the USGBC argued that the FAC should be dismissed with prejudice, and that no further proceedings (including, significantly, no discovery) should be allowed.

Following the close of briefing in the case, it was learned that lengthy oral argument was held on the matters raised in the motion to dismiss. The court spent considerable time hearing argument on the various issues raised and evaluating whether to permit Mr. Gifford and the remaining plaintiffs a critical "green" light to proceed with the next phase of the case and to embark on discovery in territory not yet pursued with any probing inquiry.

However, on August 15, 2011, Judge Sand issued the court's Memorandum and Order on the motion to dismiss, in the process striking a damaging blow to the plaintiffs' efforts to seek legal relief against their perceived injuries at the hands of the USGBC. Ultimately, the court concluded the plaintiffs' did not have standing to pursue any of the federally-based claims against the USGBC and dismissed those claims with prejudice. As for the New York state law- based deceptive trade practices claim, without the federal claims remaining in the case, the court concluded that it would not continue to entertain those claims further. Importantly, these claims were dismissed without prejudice, thereby giving Mr. Gifford and these (and possibly other) plaintiffs the opportunity to join in continued pursuit of the USGBC at the state level. This leaves open the distinct possibility that the USGBC and the LEED rating system itself may be actually the subject of further legal scrutiny (whether by Mr. Gifford and the remaining plaintiffs or by others), including discovery into the genesis, formulation, maintenance and marketing of the LEED program.

If the end result were not damaging enough, the path the court took to its case-ending conclusion was possibly even more traumatic to those supporting the efforts of Mr. Gifford to challenge the USGBC and the LEED rating system as the true measuring sticks of superior energy and environmental performance. While Judge Sand began the Memorandum on the optimistic note that "Plaintiffs are professionals in the environmental engineering and design industry," little more could be found of favor to the plaintiffs in the remainder of the court's analysis.

Actually, the court endorsed the USGBC's argument that "'the LEED certification process does not assess the *actual* environmental performance of any of the structures for which certification is sought or granted,' but certifies that they were designed in a way that should result in better performance." Op. at p.2 (emphasis in original). The court also appeared to elevate the status of LEED Accredited Professionals (LEED APs) stating that the USGBC "represents approximately 140,000 design professionals whom it has accredited as qualified to advise real estate developers and other consumers on how to design a LEED-certified building" apparently not making any distinction to the many LEED APs who do not have any other "design" qualifications beyond taking and passing the LEED AP examination. Op. at p.2.

It is these two observations that set the tone for the remainder of the court's opinion. It stated the "USGBC receives fees from parties seeking LEED certification for their buildings and from the individual professionals it accredits." The court added the "USGBC advertises and promotes LEED for the purpose of encouraging the expanded use of the certification system." Id. Having made those staging conclusions, it should come as no surprise that Judge Sand held the plaintiffs could not even come close to satisfying the required test for standing to proceed under the Lanham Act claims. It is also interesting that in the process, Judge Sand observed in a footnote that plaintiffs "apparently" had yielded [perhaps in oral argument] on some of its false claim challenges stated in the FAC, leaving only a false energy use claim as the focal point of the case (despite the deference typically given to the complaint's averments on a motion to dismiss). Op. at p.2, ft.1.

The court observed that plaintiffs could not show they were competitors of the USGBC, so they would have to make a "'more substantial showing' of injury and causation to satisfy the reasonable basis prong of the standing requirement" for a Lanham Act claim. Id. at p.5. By stating "Plaintiffs plainly do not compete with USGBC in the certification of 'green' buildings or the accreditation of professionals," and in the process very narrowly defining what the USGBC does and does not do, the court drew an almost impenetrable line that placed Mr. Gifford and remaining plaintiffs outside of that boundary and, therefore, out of court. Indeed, it could be argued the court's approach could mean that only a competing rating agency or organization with a similar green focus could hope to challenge the USGBC or the LEED program, vastly narrowing those who could hope to follow in the *Gifford* plaintiffs' initial and critical footsteps. This could be a much longer lasting legacy of Judge Sand's opinion.

It would have been interesting and perhaps of further assistance to Mr. Gifford and other possible plaintiffs in this green/sustainable realm if the court would have addressed the Nair with baby oil analogy drawn in the plaintiffs' opposition to the motion to dismiss. This analysis could have focused on the juxtaposition of the USGBC's claim that its methods and the LEED accreditation approach and philosophy are the preferred paths to more energy efficient and environmentally friendlier buildings against the views of Mr. Gifford and the other named plaintiffs that the USGBC's ways are "mis-LEED-ing" and that the services the plaintiffs provide are the superior and more certain pathways to energy efficient structures with truer manifestations of sustainability. Unfortunately, no such discussion was presented and instead the court dismissed "Plaintiffs' allegation that 'LEED has begun to subsume the Plaintiffs' roles' [as] entirely speculative." Op. at p. 6.

At the time of this writing, the *Gifford* dismissal has not been appealed. Also, at present, it does not appear there will be a re-filing of a state-law based components of the case in state court. Still, members of the design and building community as well as the legal minds that counsel and assist them should continue to monitor (and evaluate) this case with considerable interest and attention. Should the matter be re-filed in state court, it would seem that further briefing, argument and judicial determination would necessarily provide further detailed legal scrutiny and analysis. However, the far more intriguing result would be any of the case surviving the inevitable dismissive challenge by the USGBC. If the matter should be permitted to proceed with any form of the present

FAC allegations remaining intact (even if entirely state-law based), key and pertinent discovery will likely ensue. This in turn would result, for the first time, in judicially-supervised inquiry that could go to the heart of the development and maintenance of the LEED rating system as well as a detailed exposition of the certification process itself. If not, future plaintiffs could learn from these developments and refine their legal strategy accordingly. Also, perhaps, a plaintiff meeting the court's criteria for standing could be located to pick up the charge started in the *Gifford* action. Should any of these actions survive an initial challenge to the pleadings, potentially enlightening discovery would likely follow.

Endnotes

1. Briefly stated, the "green" aspect of this case was triggered by the developer's counterclaim alleging the contractor failed to "construct an environmentally sound 'Green Building,' in conformance with a Silver Certification Level according to the [USGBC's Leadership in Energy and Environmental Design ("LEED") rating system," which resulted in the loss of tax credits under Maryland's green-building incentive program. This matter was settled on undisclosed terms, but received wide-spread scrutiny as to its meaning in dozens of articles and presentations.

2. These contentions were focused on certain "Parallam" wood structural beams made from strand lumber formed and treated with coating material. In this instance, the coating material was Poly Clear 2000, manufactured by PermaPost Products Co. (as alleged in Weyerhaeuser's Third-Party Complaint). According to the allegations, these Parallam components exposed to the elements began to deteriorate and also permitted water infiltration. Making matters even more complex, the building in question has been reported as one of the earliest projects to achieve the LEED Platinum rating under the LEED rating system. As of the time of this writing, the case is scheduled for a May 2012 trial.

3. In the FAC, Ms. Larkin is introduced as the "President of B'Green Environmental, Inc., . . . specializ[ing] in moisture barrier design and mold remediation." FAC at ¶ 11.

UNDER CONSTRUCTION
The Newsletter of the ABA Forum on the Construction Industry

Recent Developments in Establishing Claims for Delays And Lost Productivity

Recent Developments In Establishing Claims For Delays And Lost Productivity

Vol. 14 No. 1

By
Charles V. Choyce, Jr., Esq., PSP, PMP, CFCC

Charles Choyce, PSP, PMP, CFCC is a Managing Director of FTI Consulting, Inc. in its Rockville, Maryland office, specializing in construction scheduling, project management and claims. He also practiced as a construction attorney for many years prior to joining FTI in 2000.

One of the most difficult and complex challenges facing a claimant on a construction contract is establishing entitlement and proper quantification of impacts associated with change orders, delays and lost labor productivity. These issues can arise during the project based on events that have just occurred, and thus require forward pricing of change order impacts or requests for extensions of time. If these issues are not resolved during the project, they become a battleground for retrospective disputes, arbitration and litigation. Published industry standards and factors are often used to estimate lost productivity and serve as a template for the presentation of change order requests during the course of a project. Additionally, such published industry standards are frequently used as support for claims presented in arbitration or litigation.

For many years the Mechanical Contractors Association of America (MCAA) has published various guides and bulletins for its membership on these subjects. The best-known and certainly the most widely discussed MCAA publication are the "Factors Affecting Labor Productivity", often referred to as the "MCAA Factors", initially published by MCAA in the early 1970s. The MCAA Factors and other MCAA publications have become a standard in the construction industry and are widely relied upon by mechanical and other specialty contractors, attorneys in construction practice, and consultants.

As part of its efforts to educate its membership and to address continuing issues faced by contractors in the current construction environment, the MCAA recently released a comprehensive update to its major reference document: "*Change Orders, Productivity, Overtime—A Primer for the Construction Industry*" (hereinafter called *Change Orders Productivity Overtime*). The publication has been endorsed by the Sheet Metal and Air Conditioning Contractors Association (SMACNA). The National Electrical Contractors Association (NECA) has endorsed the MCAA Factors as a basis for electrical contractors' claims for lost productivity and is continuing to review the other chapters in the publication. Because of its widespread acceptance in the contracting community, this document should be reviewed and consulted by parties supporting or opposing change order requests and claims.

The publication was prepared by various construction experts within FTI Consulting as well as other outside experts, and was subject to peer review from a number of leading industry executives. It addresses three critical subjects in current construction project management and dispute resolution:

1. Change Orders. The Change Orders Section contains the following chapters:

- "*How to Identify and Manage Change Orders*" addresses change order issues and provides extensive guidance on the pricing of changes. Topics covered include issues that give rise to a change order, what the contractor should do when a change is identified, including pricing of the direct costs of the change as well as any indirect impacts. This chapter includes guidance on preparing claims under some of the various standard forms of agreement such as AIA and concludes with a "Recommended Procedures" along with forms and checklists. Contractors, consultants and their attorneys should be familiar with these procedures in order to enhance

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their ability to recover for changes and delays. By the same token, as the chapter points out, failure to adhere to the "Recommended Procedures" can undermine the credibility of the contractor's claim.

- "*How to Organize and Submit a Claim*" sets forth general principles and procedures to follow in preparing and submitting a claim for additional compensation, sets forth basic general protocols to follow in preparing a claim for additional compensation, including delay impacts, actual or constructive acceleration, and lost labor productivity.
- "*Time Impact Analysis – Measuring Project Delay"* provides guidance as to how to prepare a prospective "time impact analysis" of delay events that occur during the course of the project, including the maintenance of proper CPM schedules, following the contract procedures and methods for obtaining an extension of time, and specific techniques for quantifying and establishing delay entitlement during the course of the project.

2. Productivity. By far the most important subject in the book is the productivity section, which consists of the following chapters:

- *"Maintaining Control of Labor Productivity"* sets forth the type of contemporaneous records that a contractor must prepare and maintain in order to record and track labor productivity during the course of the project. By maintaining such records, a contractor can more effectively present a claim for lost productivity in a forward pricing change order request as well as in a retrospective quantification of lost production.
- *"Factors Affecting Labor Productivity"* restate the MCAA Factors affecting labor productivity. The sixteen factors that have an adverse effect on labor productivity are described, and a percentage loss is ascribed to each factor based on whether the impact of that factor is "severe", "average" or "minor."
- *"Connecting the 'Cause' and 'Effect' in Labor Productivity Claims"* is a brief discussion by retired Board of Contract Appeals Judge Gerson B. Kramer that emphasizes that use of the MCAA Factors must be based on applying the particular facts of each project to the factors at issue, and that any quantification based on the MCAA Factors must be tied to the specific events that occurred on the project.
- *"How to Use the MCAA Factors"* is the chapter of greatest interest to attorneys and their consultants since it addresses the proper application of the MCAA Factors. This chapter, initially published by the MCAA in 2005 and updated in 2011, represents a major restatement of the application of the MCAA Factors to quantify lost labor productivity. While the MCAA Factors have been accepted as a reliable basis for measuring lost productivity in court and Board of Contract Appeals decisions, there are cases where the use of the MCAA Factors has been rejected because the MCAA Factors were not properly applied. The chapter "*How to Use the MCAA Factors"* provides detailed guidance on how to properly utilize the MCAA Factors in a forward pricing application as well as a retrospective application so as to avoid the problems identified in those cases where the MCAA Factors were not accepted. Among this chapter's topics that are of interest to attorneys, experts and project managers are:
    - The incorrect application of the percentage loss to the total manhours expended on the project.
    - The proper methods of quantifying the MCAA Factors, noting that simply adding up the factors cumulatively is rarely an accurate measure of productivity.
    - The requirement that a retrospective application of the MCAA Factors be performed by a construction expert, as opposed to the contractor's own personnel.

For any practitioner or contractor contemplating a lost production claim based on the MCAA Factors or a party opposing such a claim, *Change Orders Productivity Overtime* provides the latest guidance from MCAA on the proper application of the MCAA Factors. In addition to the current publication, the MCAA is about to release a chapter on the subject of quantifying the cumulative impact of changes on productivity, based on studies and research conducted by Dr. William Ibbs, PhD, University of California, Berkeley.

3. Overtime. The following chapters address the subject of lost productivity as a result of overtime:

- *"How to Estimate the Impacts of Overtime on Labor Productivity"* sets forth an excellent summary of the various published studies on the productivity effects of working extended overtime, including the the Business Roundtable Study, the NECA study on overtime, studies conducted by Dr. Randy Thomas of Penn State University and the study conducted by the U.S. Army Corps of Engineers. Each of these studies has been accepted or relied upon by courts and project participants to calculate lost productivity due to overtime. The chapter concludes that the four studies that were reviewed in detail showed "*striking similarity of results"* and, as a result, these studies may be useful in establishing a claim for lost productivity due to overtime. The chapter then discusses various methods to apply the results of these studies to both forward priced claims for overtime as well as a retrospective application.
- *"Shift Work and Its Affects on Productivity"* discusses various factors that a contractor should take into account before proceeding with shift work in an effort to maintain scheduled progress.

While designed primarily for the mechanical contracting community, the publication is an essential tool for any practitioner who is required to advise a client regarding the presentation of a forward-priced change order request or a retrospective application. In the latter case *Change Orders Productivity Overtime* provides several recommended practices that can be useful in supporting or defending against a claim in arbitration or litigation.

UNDER CONSTRUCTION
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The ABC's of the Three C's

The ABC's of the Three C's

Vol. 14 No. 1

By
Amy Phillips, Arcadis

Managing client expectations, specifically when more then one group is involved, requires basic skills. In professional practice both counsel and consultant are tasked with addressing and satisfying the clients' needs effectively and efficiently. Learning the "how-to-do's" of the Client, Counsel and Consultant relationship can be as simple as reciting the alphabet.

The following is a list of do's and don'ts — when followed, promote common sense expectations in the Client/Counsel/Consultant relationship:

A. Do discuss any "conflict" issues, even if not enough of a conflict to disqualify the consultant.

B. Do establish reasonable expectations concerning the nature and extent of the analysis that is required. The consultant should then provide counsel with a project understanding, scope of services, a planned schedule or time that it will take to perform that analysis and the estimated costs that will be incurred.

C. Do present counsel with proposed staff for both fact and/or testifying experts. Additionally, if the testifying expert is different than the fact expert he/she should be involved from the inception of the matter, working hand-in-hand with the fact expert. Be clear which services are being provided as a consulting-but-not-testifying expert, which services are being provided as a testifying expert and when, if at all, that role changes during the project.

D. Do give the consultant access to any and all documents and the opportunity to review all available materials.

E. Do know the client . . . who is in "charge" and/or who is the "boss".

F. Do give counsel a timely and accurate response to all queries and work-product goals.

G. Do give an impartial analysis. The consultant's role is to evaluate the records and figure out if the "story", as presented by the client, is valid and defensible. Counsel's role then is to best represent the client and thereby achieve an optimum outcome.

H. Do be entirely honest with counsel and, counsel with client. Do not shade views, opinions or thoughts in an effort to make the case better.

I. Do create a "roadmap" for work to be performed by both counsel and consultant. Do discuss the various approaches and methodologies that can be used and which is most appropriate to the issues.

J. Do plan on an initial oral report. An open and frank discussion will aid in the ultimate case strategy. And, do decide what will be done with drafts when the report proceeds to the written format.

K. Do meet the deadlines and if, for some reason, you cannot do so, then inform counsel well in advance.

L. Do turn work around timely. A consultant who presents a draft a week before the due date allows counsel time to review, edit, and finalize.

M. Do be on time for meetings and dress appropriately for both team and client meetings.

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N. Do stay in touch – return phone calls promptly and do not simply rely on e-mail - no matter what, do not become the "disappearing" expert or attorney.

O. Do not get other consultants involved in the project without notifying counsel and getting approval, if doing so will impact the budget.

P. Do manage the client's resources to expectations. Prepare budgets and what is included in the budget – i.e. exhibits, coding, charts, et cetera. This is important to discuss and to periodically revisit with the client.

Q. Do not over spend the estimated budget without advance notice and discussion of possible revisions to the budget. Relevant to the budget and expenses: do ask/recommend hotel recommendations when traveling to offices or when you are meeting in a neutral city.

R. Do stay within areas of expertise and do not overstep the role. Do limit the scope of the expert report to the factual issues and analysis that fall squarely within the consultant's discipline.

S. Do not puff up credentials or resumes.

T. Do stay on point; do not load the report with "fluff".

U. Do proof read, proof read, proof read - typos or other errors in the work product must be avoided, even in "drafts".

V. Do be careful what you write down — in particular *not* the things that counsel may say in confidence and especially not anything that could adversely affect the outcome for the client.

W. Do make counsel's work easy - plan the points for the direct testimony (after discovery is over so the documents are not discoverable), and identify the trial exhibits that will be referenced.

X. Do memorize and practice - for deposition and trial. The consultant must be able to identify what documents were reviewed (preferably with specificity or by Bates No., rather than by category), who was interviewed, when and about what issues, the source of any factual information relied on by the consultant, and any assumptions made by the consultant (and why).

Y. Do not underestimate opposing counsel or opposing consultant. No matter how unprofessional or amateurish an opposing work product might appear, review it seriously rather than simply dismissing the report as off-base or missing the point. Both counsel and consultant will need to take the time to strip away the clutter so that the team can discern what the opposing expert is saying and respond accordingly.

Z. Do prepare, prepare, prepare. Deposition and trial preparation is serious, hard work. In the end, everything done prior is meaningless if the testifying expert cannot deliver the "message" eloquently and clearly in deposition or at trial.

We hope these ABCs will spell out a smooth and successful resolution — with the matter completed in the clients' best interest.

Spotlight on the Corporate Counsel Division: The Corporate Counsel Brief

Vol. 14 No. 1

By
Andrea G. Woods, Nabholz Construction Corporation

The awkward conversation on billing arrangements must happen. There is no way around it if in-house and outside counsels are going to assure the best value for the client. No matter how many years of practice you have under your belt, this conversation can be as uncomfortable as confronting a teenager about their romantic activities. Likewise, the closer the relationship, the more difficult this can be to accomplish. Nonetheless, it must be done.

My first word of advice to outside counsel is to approach this topic yourselves. Don't wait for in-house counsel to raise it, and don't let the first statement for the New Year be the means of communicating rate increases. One of my best (and often repeated) accounts of outside counsel addressing billing rates was also, selfishly, one that provided for no increase in billing rate. Our local counsel contacted me during a recent autumn to discuss how our company was handling the difficult market. He let me know he understood the difficulties we were facing in the industry and promised me no rate increase the following year.

This discussion can only be described as positive. First, local counsel was keeping up with our industry regionally and nationally. He was well informed on the economic challenges and pressures the construction industry faced in the down economy. In house counsel obviously value outside lawyers who keep up with their businesses and industries. Second, he was aware that, although we were profitable, we experienced layoffs in some regional offices and significantly fewer employees received bonuses or salary increases. If our employees weren't getting increases, why should we pay our outside counsel more? An empathetic outside lawyer will always be welcome in my office. Third, the client was pleased all the way around. Holding a billing rate steady and empathizing with your client goes a long way with management. This was a great discussion to recount to our CFO and CEO. Fourth, and finally, the conversation was a great segue to broach the topic of alternative billing arrangements.

The reality, especially for a small or medium law department, is that every time the call is made to outside counsel, in house counsel considers the cost ramifications of the contact. I once told local counsel, "Everyone in our company is directed to reduce overhead in this economy, and for some, the Legal Department is overhead. I have to assure top value." The partnership between in house and outside counsel is critical and counsel must keep in mind the overarching business realities when approaching any legal task, litigation or otherwise.

My final word of advice is for in house counsel. Don't learn the hard way that you *do* "get what you pay for." I learned this lesson the hard way, and if it can be avoided, avoid it. Take the time to communicate frankly with outside counsel. Their reputations are essential to their practices, and their priority is to provide you quality legal services. Surely they are worth the time and effort of the awkward conversation.

About Under Construction

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UNDER CONSTRUCTION
The Newsletter of the ABA Forum on the Construction Industry

The Forum's Construction Industry Outreach

The Forum's Construction Industry Outreach

Vol. 14 No. 1

By
Richard J. Tyler, William M. Hill, Stanley J. Dobrowski

Richard J. Tyler is Chair of the Marketing Committee. William M. Hill is Co-Chair of the Industry Outreach Subcommittee and Stanley J. Dobrowski is Co-Chair of the Industry Outreach Subcommittee.



During the past few years the Forum has commenced efforts to forge closer relations with organizations involved in the construction industry. The Forum has been involved with the ACE Mentor Program and the National Construction Dispute Resolution Committee of the American Arbitration Association for some time. More recently the Forum has entered into Expressions of Mutual Interest (EMIs) with the Associated General Contractors of America (AGC), the American Institute of Architects (AIA), the Construction Owners Association of America (COAA), the American Council of Engineering Companies (ACEC), the Association for the Advancement of Cost Engineering (AACE) and the National Society of Professional Engineers (NSPE). In addition, the Forum has made overtures to other organizations within the American Bar Association such as the Public Contract Law Section.

Under the EMIs the Forum and the other industry organizations agree to share information and ideas to benefit their respective memberships. Among the purposes sought to be served by the EMIS are to:

1. Promote mutual cooperation and understanding between the organizations and their members;
2. Promote public understanding and awareness of the contributions of the members of the organizations to the construction industry;
3. Promote diversity within the personnel associated with the construction industry;
4. Promote education and training of the members of the organizations; and
5. Promote the commitment to the fair and reasonable allocation of risk and responsibility in design and construction contracts.

To further the purposes of the EMIs the Forum and the industry organizations each appoint a Liaison to the other. The Forum's Liaisons are members of the Industry Outreach Subcommittee of the Marketing Committee. We welcome ideas and interest from Forum members about how best to develop the Forum's efforts to connect and collaborate with construction industry organizations and their members.

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