

# Construction Law

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## Chairman's Report

by Ken Yalowitz

Why should overworked attorneys with busy schedules that often conflict with such basic life requisites as coaching little league and attending school plays consider joining, let alone becoming actively involved in, the Construction Law Section? The main reason we join is to help make us better attorneys. The Construction Law Section board and trustees are working to accomplish that goal this year.

We should all become better attorneys if the section's CLE programming offers real world insights at levels that compliment our practices, and if the oral and written materials are presented in a fashion that is engaging and permits retrieval when needed. The section has done a good job meeting those objectives over the years by offering mid to upper-level education programming ranging from procurement to claims resolution. This year's mid-year program promises to be no exception. **Doug Oles and Karl Oles** are chairing a nuts and bolts CLE program on June 14, 2002 directed on construction litigation. CLE presenters include **Stuart Oles** and **Paul Luvera**. The program should be of interest to both the AV rated construc-

tion attorney and the trial attorney for whom the "construction" case is the exception. They are working on a CLE manual which will be a useful desk reference.

Another reason to belong to the section is to get to know other attorneys who practice in this challenging field. Historically, the section has provided that opportunity through our "Forum Meetings." The informal programming includes an open bar, a social hour and some no-to-shabby entertainment — Tim Eyman, the Honorable Phil Talmage, the director of Sound Transit, and the King County Superior Court Chief civil judge, to name a few recent speakers. **Karin Nyrop** and **Craig Rusk** put together a successful program for the section's January forum meeting. An impressive lawyer panel discussed current issues in construction procurement and featured **Craig Watson** from the Port of Seattle, **Ron English** from the Seattle School District, **Mary Ellen Combo** from the Washington Department of General Administrations, and **Karin Nyrop** from the University of Washington. Keep an eye out for the section's next forum.

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A third reason to participate in the section's business is less tangible and perhaps a little more personal. The section gives attorneys an opportunity to give something back professionally or to effect some change. The section recently wrote **King County Chief Civil Judge James Doerty** regarding difficulties presented by ex parte consideration of bid protest TRO hearing and invited him to attend the January forum meeting.

Judge Doerty addressed the attorneys at the forum and invited the section to participate in a brown bag bid protest education program for the King County bench. The section also comments on proposed legislation when the legislature is in session and will do so again this session.

The board of trustees is there to provide utility to your membership. I invite you to get involved, to take advantage of the infrastructure the section has developed over the years, and to bring your new ideas to improve the section's work. •

## **CLE Credits for Pro Bono Work? Limited License to Practice with No MCLE Requirements?**

Yes, it's possible!

Regulation 103(g) of the Washington State Board of Continuing Legal Education allows WSBA members to earn up to six (6) hours of credit annually for providing pro bono direct representation under the auspices of a qualified legal services provider.

APR 8(e) creates a limited license status of Emeritus for attorneys otherwise retired from the practice of law, to practice pro bono legal services through a qualified legal services organization.

For further information contact Sharlene Steele, WSBA Access to Justice Liaison at 206-727-8262 or sharlene@wsba.org.

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# False Claim Litigation: A California Legal Earthquake

by: David B. Casselman, John R. Herrig & David Polinsky

The recent case of *Tutor-Saliba-Perini, J.V. v. Los Angeles County Metropolitan Transportation Authority*, Case No. BC 123559, tried to a jury in Los Angeles Superior Court, has raised the level of awareness of the construction bar as well as public transportation agencies throughout the country. The jury awarded the MTA \$32 million on an MTA cross-complaint, which alleged breach of contract, false claims violations, licensing and listing violations, unfair business practices and prejudgment interest under the relevant California statutes.

The initial TSP complaint for construction claims on four subway projects sought \$20 million, including interest. The projects consisted of the tunnels and subway stations on the MTA Redline, including the Wilshire/Normandie Station (Contract B221), Wilshire/Vermont Station (Contract B211), Wilshire/Western Station (Contract B231) and the 7' and Flower Station (Contract A167). \$13 million of these claims were dismissed via motions for summary adjudication prior to trial. The balance were resolved against TSP during the trial.

The court also directed a verdict finding that TSP had violated the false claim and unfair competition statutes as well as subletting, listing, licensing statutes and various breaches of contract. The jury heard 12 weeks of evidence, including evidence on damages. Their award included actual damages, penalties, treble damages and disgorgement of profits. Issues regarding MTA costs and attorneys' fees are now pending before the court.

From apparent garden variety, close-out claims, on four adjacent subway projects totaling over \$236,000,000, some have called the jury verdict a complete shock and an unforeseen reversal of traditional outcomes in public works disputes. TSP was found liable for over 1000 violations of California Government Code Section 12650 *et seq.*, the False Claim Act, as well as a like number of unfair business practices under Business & Professions Code Section 17200 *et seq.*

All of the contracts required TSP to swear under penalty of perjury that all contract provisions had been satisfied as a condition of each payment. Hence, all of the statutory violations were in breach of the contract promise to comply with all governing statutes and laws. These contract breaches also triggered the surety bonds and associated legal fee provisions.

The nature of the False Claim Act violations should be carefully evaluated by the construction bar regardless of jurisdiction or representation. Numerous violations of both the False Claims Act and the Unfair Business Practices Act were found. The following are merely a few of the numerous violations found by the court and jury:

## 1. Front Loading

In violation of contract bid and balanced schedule of values requirements, TSP billed excessive costs not yet incurred, i.e. "front-loading." The MTA was awarded loss of use of capital damages (interest at the government rate) following pre-payment of progress billings under the front loaded schedule of values. On the grounds that TSP misrepresented that the front loaded items were its "actual costs," these damages were trebled under the provisions of the California False Claim Act, Gov. Code Sec. 12651(a). Pre-judgment interest was awarded thereafter from project completion to judgment.

In submitting its monthly progress pay applications, TSP certified that it had complied with all contract provisions and all applicable laws of the state of California. The MTA argued that such certifications were knowingly false since its "actual costs" were admittedly much lower than as billed. Accordingly, each progress bill containing a front loaded item was determined to be a "False Claim" under section 12651(a)(1) subject to a separate penalty of up to \$10,000. The schedule of values submittals that were front loaded were found to be false documents under 12651(a)(2). Further, each violation was also found to be an example of unfair competition under California's Unfair Business Practices Act, Business & Professions Code Section 17200 *et seq.*

## 2. Subcontractor Listing and Substitution Violations

TSP was also found to have violated the California Sublisting and Subletting Fair Practices Act under Public Contracts Code Section 4110. It improperly failed to list or improperly listed subcontractors in the bid disclosures requiring a listing of all subcontractors performing more than one-half of one percent of the contract work. Later substitutions of alternate subcontractors without notice and approval, were also found to be violative of the Act. A penalty of 10 percent of the violative subcontract amounts were assessed in accordance with the statute. Under the same theories, the false monthly certifications of full contract compliance in the TSP progress billings included the improperly listed and/or substituted subcontractors. Each was found to be a false claim under the False Claim Act

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*False Claims . . . (continued from previous page)*

with a corresponding penalty of \$10,000 per billing. The improper listings on the bid form also constituted false documents resulting in an additional penalty of up to \$10,000. Last, each violative document was an example of unfair competition resulting in an additional penalty of \$2,500 per violation.

**3. Subcontractor Licensing Violations**

Certain subcontractors were 1) unlicensed for some portion during the period of performance; 2) licensed outside of the work actually performed; or 3) never licensed. These violations of the California licensing requirements were concealed by false certifications on the payment requests, rendering each progress billing for their services a false claim under the act. The sworn certifications of license compliance were each found to be false documents and each false claim and documents was found to be unfair competition as well.

**4. Disadvantaged Business Enterprise (DBE) Violations**

TSP was found to have knowingly employed fronts and false disadvantaged business enterprises (DBEs) in prosecuting the work. Each monthly statement of full DBE compliance in the progress payment requests was found to be a false claim as well as a false document, giving rise to false claim and false document penalties. Unfair business practice penalties were also assessed.

**5. Quality Assurance/Quality Control Misrepresentations**

TSP representations of an established and competent quality control program, including periodic certification of compliance, were also found to be false. The actual services provided were shown to be totally inadequate and substantially less than promised and required. Each progress bill certifying contract compliance in the face of total disregard for quality control was found to be a false claim. False document and unfair business practice penalties were also assessed.

**6. Buy America Violations**

TSP violations of buy-America requirements were also found to be false claims due to the false certifications in each progress bill assuring the MTA that the contractor was in compliance with the contract and the law. In fact, known, offshore goods were delivered and installed in the project. False document and unfair competition penalties were found as a result.

**7. Specific False Construction Claims**

Although the above false claim elements dominated local and national headlines, the core of the case was the consistent practice of TSP to misrepresent its construction claims and change order facts, specifically its bid day intent, throughout the projects.

**A. False Claims**

TSP presented numerous claims during the course of the project. Although many were ultimately denied by the MTA, nine of the claims which were included by TSP in its lawsuit against the MTA were found to be false.<sup>1</sup> Many were found to be false based on concealed documentation, duplicated costs, documentation inflating and/or manipulating certain costs or other claim documentation. Examples of the claims found to be false include: the TSP Pile Interference Claim; the Subcontractor Pile Interference Claims; the Bridging Beam Claim; the TSP Night Restriction Station Box Inefficiency Claim; the TSP Night Restriction Station Box Delay Claim; the Subcontractor Night Restriction Station Box Claims; the Station Completion Delay Claim; the Wilshire Street Restoration Delay Claim; and Unresolved Project Completion Delay.

**B. Executed Change Orders**

TSP presented numerous claims during the course of the project, many of which were converted into change orders. TSP then received payments. During investigation for the litigation, material was unearthed which confirmed that several such change orders had been falsely presented. Examples of the change orders found to be false included the Tunnel Handrail Change Order; the Escalator Cladding Change Order; the Stair Nosing Change Order; the Night Restriction Slab on Grade Acceleration Change Order; the TSP Night Restriction Side Structure Change Order; and the Subcontractor Night Restriction Side Structure Change Order.

All of the contracts required TSP to swear under penalty of perjury that all contract provisions had been satisfied as a condition of each payment. Hence, all of the statutory violations were in breach of the contract promise to comply with all governing statutes and laws. These contract breaches also triggered the surety bonds and associated legal fee provisions.

All of these issues were vigorously contested. The legal arguments of the parties will be fully briefed in the pending appeal.

The MTA was represented by Robert B. Reagan, Principal Deputy Los Angeles County Counsel; David B. Casselman and David Polinsky of Wasserman, Comden, Casselman & Pearson LLP, Tarzana, California; and John R. Herrig and Heide S. Hart, Herrig, Vogt & Stoll LLP, Kennewick, Washington and Sacramento, California.

For more information concerning this case contact John Herrig at 509-943-6691 or David Polinsky at 818-705-6800. •

<sup>1</sup> Other TSP claims included in the lawsuit were dismissed via motion for partial summary adjudication, but were not claimed by the MTA, and thus not found by the Court to be false.

## Pre-claim Notice/ Materials Supplier/ Specialized Labor

by Heidi Appel, Winston & Cashatt

In *National Concrete Cutting, Inc. v. Northwest GM Contractors, Inc.*, 107 Wn. App. 657 (2001), Division I determined that a subcontractor providing specialized services to a construction project was not considered a supplier of materials, and therefore not required to file a pre-claim notice under RCW 39.08.065 to maintain an action against the contractor or his bond. National Concrete was a subcontractor to the mechanical subcontractor (Northwest GM) on the Lincoln High School remodel project. National Concrete performed concrete cutting, sawing, and coring services for an hourly rate. When National did not get paid for two months, it filed a claim of lien against the project bond and retainage and later filed an action against the General Contractor (Lumpkin, Inc.), Northwest GM, and the contractor's bonding company. Lumpkin argued that National should be considered a supplier of materials required to file a pre-claim notice to the contractor under RCW 39.08.065. Both the trial court and the appeals court held that National did not furnish materials or supplies to the job, based on "materials" being defined as "such articles which either actually have been incorporated into and become a part of the building or have been delivered on the site for incorporation into the finished structure." The supplies and equipment used by National were "purely" incidental to the labor provided to the job, unlike the materialman who drops his goods off at the job site unknown to the general contractor. •

## Arbitration Agreements/ Mandatory Arbitration Rules

by Heidi Appel, Winston & Cashatt

In *Dahl v. Hardwood Floor Co.*, 108 Wn. App. 403 (2001), Division I reaffirmed Washington's strong public policy in favor of the finality of Arbitration decisions. The Dahls and Parquet and Colonial Hardwood Floor, Inc. agreed to select an arbitrator and conduct arbitration under the Mandatory Arbitration Rules (RCW 7.06), but to limit judicial review of the decision as provided in RCW 7.04 (the State Arbitration Act). The Dahls, dissatisfied with Parquet's hardwood floor work, filed a complaint and the case was set for arbitration. The arbitrator found in favor of the Dahls, and Parquet filed a request for a trial de novo, arguing that the provision to limit judicial review was ineffective as it improperly circumvented the trial court's jurisdiction. The court held that once parties agree to

binding arbitration, "they invoke chapter 7.04 RCW in its entirety and not just the parts that are useful to them." Whether parties agree to choose arbitrators and conduct arbitration in accordance with American Arbitration standards, Mandatory Arbitration Rules, or some other scheme is inconsequential to the binding nature of arbitration decisions under RCW 7.04. The Court was especially unsympathetic to Parquet's arguments to invalidate the binding arbitration provision in this case since it was the party who drafted the agreement. •

## Insurance/ Hidden Decay/ Suit Limitation Provision/ Attorneys' Fees

by Heidi Appel, Winston & Cashatt

In *Panorama Village Condominium Owners Association Board of Directors v. Allstate Insurance Company*, 144 Wn.2d 130 (2001), the Supreme Court decided whether a one-year suit limitation clause in an insurance contract barred an insured's claim for dry rot damage. Panorama Village is a condominium complex in Redmond with a long history of maintenance problems. Hidden decay was not detectable from a walk-through investigation, so selective demolition was ordered, which uncovered a serious dry rot problem. Panorama submitted a claim with Allstate for coverage of "risk of direct physical loss involving collapse of a covered building . . . caused by hidden decay." *The policy further required that the insured bring its action for such coverage within one year "after the loss occurs."* The trial court, in its declaratory judgment, found that there was a risk of direct physical loss involving collapse and that the predominant cause of that risk was the hidden decay. On Summary Judgment, Allstate's suit limitation clause defense was dismissed. The Appeals Court reversed the Trial Court's Summary Judgment opinion, holding that the suit limitation provision began to run when Panorama knew or reasonably should have known that the loss was occurring, a.k.a. the "discovery rule." The Supreme Court disagreed, concluding that the Appeals Court wrongfully imposed the discovery rule into the terms of the insurance contract based on its public policy analysis. "Washington courts rarely invoke public policy to override express terms of an insurance policy."

In the Court's plain meaning interpretation of the one year suit limitation clause, it decided that "after a loss occurs" means "subsequent to" or "succeeding the loss," rather than after the "inception of the loss." The court also rejected the Court of Appeal's interpretation of "hidden" as "undisclosed" or "unknown." Since the term was

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*Insurance . . . (continued from previous page)*

undefined in the policy and since the plain meaning of "hidden" could reasonably be defined as "out of sight" or "concealed", the Court decided that the insurer could protect itself by indicating that "hidden" meant "unknown" if that is what it intended. Based on this interpretation, the Supreme Court reinstated the trial court's decision holding that the one-year limitation period for bringing a coverage action did not begin to run until the dry rot became visible.

The Court also addressed the question of whether necessary expenses of litigation were recoverable as part of a reasonable attorney fee award when an insured prevails in obtaining the benefit of their insurance contract under *Olympic Steamship*. In particular, Panorama argued that Westlaw charges and expert witness fees should be included. The Court agreed, reasoning that to truly make the insured whole when he is forced to obtain the benefit of his bargain with the insurer, the insured must be compensated for all of the expenses necessary to establish coverage. •

## **Contractual Notice of Claim Provisions/ Limitation on Time to Sue**

*by Heidi Appel, Winston & Cashatt*

In *Syrett v. Reisner McEwin & Associates*, 107 Wn. App. 534(2001), Division I affirmed the trial court's decision that a 90 day notice of claim provision and a 6-month suit limitation provision were both enforceable. Reisner, McEwin & Assoc., Inc. performed an inspection of a boat for the Syretts and issued a report. The terms and conditions in the report required the Syretts to present Reisner with a notice of claim within 90 days of completion of the work and limited filing suit to 6 months from the time the work was completed. About 18 months after the Reisner's work was complete, the Syretts discovered a dry rot problem and spent a considerable amount of money on repairs. When the Syretts sued for negligence and breach of contract, the trial court granted Reisner's motion to dismiss the matter on summary judgment. The Appeals Court affirmed, citing to a number of well known Washington construction cases such as *Yakima Asphalt*, *City of Seattle v. Kuney*, and *Absher*, for the proposition that contractual limitations on the time to bring suit will be upheld if they are reasonable and not violative of public policy. •

### **Law Week 2002 A Lawyer or Judge in Every School Week of May 1**



**Week of MAY 1**

Law Week 2002 is an exciting opportunity for lawyers and judges to bring public legal education into the classroom. Each year, Law Week provides an enriching experience to youth through positive interactions with lawyers and judges.

Last May, nearly 20,000 Washington students, 66 judges and more than 500 lawyers participated in Law Week. Lawyers and judges in 30 Washington counties met with students to discuss current legal issues and specific areas of the law. Some presentations also included mock trials in which students played all the courtroom roles.

Law Week is one of the many Washington State Bar Association programs designed to increase citizen understanding of the important role that the law plays in their lives. Washington's Law Week coincides with the American Bar Association's Law Day, celebrated on May 1st across the country. Law Day was established in 1958 by President Dwight D. Eisenhower to strengthen the United States' heritage of liberty, justice and equality under the law.

For information on how to participate in Law Week 2002, visit [www.lawweek.org](http://www.lawweek.org) or contact Lisa KauzLoric at 206-733-5944 or [lisak@wsba.org](mailto:lisak@wsba.org).

## Independent Contractors/Negligence of Contractor/Liability of the Owner

by Larry Vance, Winston & Cashatt

Everyone knows that an owner who hires an independent contractor to perform work is generally not liable for the negligence of the independent contractor. However, in *Hickle v. Whitney Farms*, 107 Wn. App 934 (2001), Division III of the Court of Appeals pointed out that exceptions to the general rule may dictate a contrary holding in certain cases.

In *Hickle* two factory owners who produced fruit juice hired an independent contractor (a local farm) to dispose of "wastes" from their fruit juice factories. One of the wastes produced by the fruit juice process was fruit "pomace" (stems, seeds and other material). One of the other "wastes" produced by the fruit juice factories was "diatomaceous earth," which is apparently used to filter the fruit juice and separate and filter items smaller than the stems, seeds and other waste by-products. One of the fruit juice factories (Seneca) contracted with the local farm to dispose of both of these wastes. The other factory claimed that it only contracted with the same local farm to dispose of its diatomaceous earth. Seneca's contracts with the farm (Whitney Farms) required it to "comply with all applicable laws and regulations governing the hauling or disposal of the materials in question." It was unclear if the contract between Whitney and the other factory owner required such compliance.

It was undisputed that Whitney Farms disposed of the waste for many years by digging a large pit on its 136 acre farm property in Benton County and covering it with soil. The dumpsite was not licensed and therefore found to be unlawful. More of a problem is that, although the two wastes are not hazardous "per se" alone, apparently when mixed together and covered with soil, the material ignited through spontaneous combustion. Further, although the illegal dumping had been going on for many years, the pit was not posted with a warning and the fire burning in the pit was not always visible or apparent from ground level. Temperatures of the ash in the pit exceeded 500 degrees in certain places. Some neighbors began to complain in the 1980s about the smoke, odor, and smoldering fire. And, during the 1980s and 1990s, the Department of Ecology and other local agencies notified both fruit juice factories that wastes leaving their properties were being illegally disposed of and that they were responsible for proper disposal of the wastes. In 1996, the plaintiff was hunting on the property and walked over the covered, burning underground pit and broke through. He and other hunters had hunted the property before and it was not posted with "no

hunting" or "no trespassing" signs. The plaintiff-hunter's fall into the burning pit resulted in severe burns, which caused him the loss of use of both legs and one hand.

he injured hunter sued both factory owners as well as Whitney Farms, who was held to have been an independent contractor. The trial court dismissed the factory owners by way of Summary Judgment on the basis of the independent contractor rule. The Court of Appeals reversed and held that there were issues of fact which precluded summary judgment and also held that the factory owners were not necessarily insulated from liability by the independent contractor if they either knew or should have known that the wastes from their factories were being disposed of illegally or if they either knew or should have known of the potential danger(s) of improper disposition. •

### Speak Out!

Wanted: Lawyers to volunteer to speak to schools and community groups on a variety of topics. For more information about the WSBA speakers bureau call Amy O'Donnell at 206-727-8213.

### The WSBA Store is Open

WSBA logo merchandise is now available. The WSBA Store includes Cutter & Buck polo shirts, twill baseball caps, ball-point pens, and brass luggage tags emblazoned with the WSBA logo. To order, contact the WSBA Service Center at 800-945-WSBA or 206-443-WSBA. For more information and to view products, see the WSBA Web site at [www.wsba.org/store](http://www.wsba.org/store).

**Polo shirt** (pewter or white) - \$56

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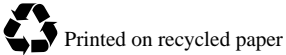
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Prices include shipping and handling.

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