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The Third Circuit Paves The Way For Reduced Damage Assessments Against DBE Contractors And Those Working With DBEs On Federally-Funded Highway Projects

by Hanna Lee Blake, Partner and Kevin J. McKeon, Senior Partner

In the Watt Tieder Fall 2015 Newsletter, we published an article entitled "DBE Contractors And Those Working With DBEs Travel A Treacherous Road On Federally-Funded Highway Projects," which explored the background of and regulations applicable to the U.S. Department of Transportation's Disadvantaged Business Enterprise ("DBE") program, the common types of DBE fraud schemes, and tips for avoiding the significant consequences of noncompliance.

Since that time, the U.S. Court of Appeals for the Third Circuit issued a significant decision in what has been referred to as the largest reported DBE case in history, concerning the Pennsylvania-based company Schuylkill Products, Inc. ("SPI"), its subsidiary CDS Engineers, Inc. ("CDS"), and certified DBE Marikina Engineers and Construction Corp. ("Marikina"). The decision addresses how to calculate losses related to DBE fraud, and may pave the way for reduced criminal and civil penalties against contractors found to have run afoul of the regulations. The decision is, however, by no means an excuse to relax vigilant efforts to avoid noncompliance. Given the array of criminal, civil and administrative penalties at the government's disposal, education and diligent compliance remains a critical component to the success of contractors working on federally-funded highway projects.

Overview Of Historic DBE Fraud Scheme

SPI was a concrete beam manufacturing company owned by Joseph Nagle and Ernest Fink. CDS was a wholly-owned subsidiary of SPI that installed SPI's beams and other suppliers' products on highway projects. In or about 1993, SPI entered into an arrangement with Marikina, a Connecticut construction company, to obtain work on federally-funded projects in Pennsylvania. Marikina was owned by Romeo Cruz, an American citizen of Filipino descent, and was certified as a DBE in Pennsylvania and other states.

SPI and Marikina agreed that Marikina would bid as a subcontractor for federally-funded contracts let by the Pennsylvania Department of Transportation ("PennDOT") and the Southeastern Pennsylvania Transportation Authority ("SEPTA"). Under the arrangement, Marikina would receive the DBE contract on paper, but SPI and CDS would perform all of the work and would pay Marikina a fixed fee for the use of Marikina to obtain work otherwise intended for a legitimate DBE. SPI and CDS would retain all of the profit as is typical of a classic front scheme. Marikina would not perform any commercially useful function in complete disregard for the regulations addressed in our Fall 2015 Newsletter.

During the government's investigation and as proven in the subsequent prosecutions, SPI identified subcontracts that SPI and CDS could fulfill, prepared the bid paperwork, and submitted the information to prime contractors in Marikina's name. SPI and CDS went to extreme efforts to conceal the fraudulent scheme in furtherance of obtaining and performing the DBE contracts. For instance, SPI used stationery and email addresses bearing Marikina's name to create correspondence to prime contractors. SPI also used Marikina's log-in information to access PennDOT's electronic contract management system. When performing Marikina's contracts, CDS employees used vehicles with magnetic placards displaying Marikina's logo and covering SPI's and CDS's logos. SPI and CDS employees went as far as using Marikina business cards and separate cell phones to disguise the fact that they were not legitimate Marikina employees. SPI even used a stamp of Cruz's signature to endorse checks from prime

contractors for deposit into SPI's bank accounts. While Marikina's payroll account paid CDS's employees, CDS reimbursed Marikina for the labor costs.

In its investigation, the government demonstrated that between 1993 and 2008, Marikina was awarded contracts under the PennDOT DBE program worth more than $119 million and under the SEPTA DBE program worth more than $16 million. Between 2004 and 2008 alone, Marikina was awarded contracts under the DBE programs worth nearly $54 million.

Prosecution And Sentencing

In 2009, a federal grand jury in the United States District Court for the Middle District of Pennsylvania returned an indictment against Nagle and Fink charging each with conspiracy to defraud the United States (18 U.S.C. § 371), conspiracy to engage in unlawful monetary transactions (18 U.S.C. § 1956(h)), eleven counts of wire fraud (18 U.S.C. § 1343), six counts of mail fraud (18 U.S.C. § 1341), and eleven counts of engaging in unlawful monetary transactions (18 U.S.C. § 1957). Other participants in the scheme were indicted separately, including: Romeo Cruz, Marikina's owner; Dennis Campbell, SPI's Vice President in charge of sales and marketing; and Timothy Hubler, CDS's Vice President in charge of field operations.

Cruz, Campbell and Hubler pled guilty to the charges and agreed to cooperate against Nagle and Fink. Cruz and Hubler were both sentenced to 33 months of incarceration, two years of supervised release and ordered to pay $119 million in restitution. Campbell was sentenced to 24 months of incarceration, two years of supervised release and ordered to pay $119 million in restitution. The sentences of Cruz, Campbell and Hubler were based upon the district court's finding that the amount of loss for which they were responsible under the applicable sentencing guidelines was the face value of the contracts Marikina received.

In DBE fraud prosecutions and settlements, the government has long argued that its loss amounts to – and it is thus entitled to restitution/recoupment of – the full face value of any contract obtained improperly by way of fraud without any credit for work done on the contracts. With regard to calculating jail time for Cruz, Campbell and Hubler, the district court adopted the government's position that the defendants were not entitled to a credit against the loss for the work performed because they had not refunded the contract price to allow a legitimate DBE to perform the work. This conclusion was significant because, under applicable sentencing guidelines, as the loss increases, the offense level increases, potentially resulting in longer incarceration time.

Fink ultimately pled guilty to one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 1957 and, in July 2014, was sentenced to 51 months of incarceration, among other penalties. Importantly, Fink's sentence was based upon the previous loss opinion in the Cruz, Campbell and Hubler sentencing. In that regard, Fink was held responsible for the face value of the PennDOT and SEPTA contracts that Marikina received while he was an executive, totaling $135.8 million. Under the sentencing guidelines, this amounted to a twenty-six-level increase in Fink's offense level.

Nagle did not plead guilty and, instead, went to trial. On April 5, 2012, a jury found Nagle guilty on all of the charges presented in the indictment, except for four of the wire fraud charges. In June 2014, Nagle was sentenced to 84 months of imprisonment, among other penalties. Consistent with the other sentencing processes, Nagle was held responsible for the face value of the PennDOT and SEPTA contracts that Marikina received while Nagle was involved in the scheme, which amounted to $53.9 million. This finding amounted to a twenty-four-level increase in Nagle's offense level under the sentencing guidelines.

Although the district court calculated incarceration time for Fink and Nagle similarly to how it did for the other defendants, the district court took a different approach with respect to calculating restitution. More specifically, the district court rejected the government's argument that the *appropriate amount of restitution* was the same as the *amount of loss* under the sentencing guidelines. The district court reasoned that SPI and CDS fully performed the contracts, so the government received what it paid for and, as such, the government was entitled only to the difference between the face value of the contracts and what it would have paid SPI and CDS knowing that they were not DBEs. Since the government failed to prove the difference in payment, the district court found that no amount of restitution could be assessed.

Nevertheless, both Nagle and Fink appealed to challenge the calculation of the amount of incarceration time because the district court used the full face value of the fraudulently obtained DBE contracts as the basis to apply the sentencing guidelines and to calculate incarceration time.

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The Third Circuit's Loss Calculation For Incarceration Time

In a thorough and well-reasoned opinion, the Third Circuit Court of Appeals departed from the district court's opinion, finding that under the applicable notes to the sentencing guidelines, for purposes of calculating jail time, the amount of loss that Nagle and Fink were responsible for was the face value of the contracts Marikina received ***minus the fair market value of the services they provided under the contracts***.

The Third Circuit noted that in normal fraud cases, the victim's loss is computed as the difference between the value he or she gave up and the value he or she received. The court also considered procurement fraud cases where the amount of loss was calculated by offsetting the contract price by the actual value of the components provided. Analogizing the Nagle and Fink scheme to the other fraud cases in the Third Circuit, the court found that the defrauded parties before the court, *i.e.*, PennDOT and SEPTA, gave up the price of the contracts and received the performance on those contracts. This reasoning was consistent with and supported by the court's reading of Application Note 3(E)(i) to Section 2B1.1 of the sentencing guidelines, which states that: "'[T]he fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected' shall be credited against the loss." The Third Circuit found that the existing law on fraud recovery and the applicable sentencing guidelines required the subtraction of the fair market value of the services rendered by SPI and CDS on the contracts before arriving at a final loss value for the Nagle and Fink sentences.

The Third Circuit expressly rejected as unpersuasive the government's argument that because Nagle and Fink were not DBEs, they did not render any valuable services. In that regard, while the court recognized that the transportation agencies did not receive the entire benefit of their bargain, in that their interest in having a DBE perform the work was not fulfilled, the court, nonetheless, affirmed that PennDOT and SEPTA *did* receive the benefit of having the building materials provided and assembled, which must be given credit.

Ultimately, the Third Circuit made clear that:

> [I]n a DBE fraud case, regardless of which application note is used, the District Court should calculate the amount of loss under [the sentencing guidelines] by taking the face value of the contracts and subtracting the fair market value of the services rendered under those contracts. This includes, for example, the fair market value of the materials supplied, the fair market cost of the labor necessary to assemble the materials, and the fair market value of transporting and storing the materials.

As such, the Third Circuit's directive is clear for purposes of calculating jail time – contractors must be given credit for the work performed and materials supplied, even when the contract is improperly obtained. Less than clear, however, is the court's final instruction in the above-quoted paragraph that "[i]f possible and when relevant, the District Court should keep in mind the goals of the DBE program that have been frustrated by the fraud."

Conclusion

Though the Third Circuit's directive regarding the appropriate calculation of loss in DBE fraud cases is admittedly limited to the context of applying criminal sentencing guidelines, the analysis and sentiment is useful (as is the district court's ruling on the restitution calculation) for any contractor facing a criminal investigation or negotiating a settlement concerning allegations of DBE fraud. As noted above, the Third Circuit's decision may pave the way for reduced criminal and civil penalties to contractors found to have run afoul of the regulations. What this means for Nagle and Fink's sentences remains to be seen. In addition, how the district court will interpret and implement the Third Circuit's suggestion that the lower court keep in mind the goals of the DBE program that Nagle and Fink frustrated is yet to be determined. It may not bode well for Nagle and Fink that the district court, during the original sentencing of Fink, declared that "DBE fraud is pervasive in the construction industry and persons so inclined to commit the same kind of fraud need to be aware that they face serious consequences from DBE fraud."

While helpful, the Third Circuit's ruling is by no means an excuse for noncompliance. DBE fraud remains a priority of the U.S. Department of Transportation and investigations and prosecutions are unlikely to wane as a result of the decision discussed above. Finally, it should be noted that in addition to the criminal consequences faced by the parties referenced above, the companies and individuals involved in the fraudulent scheme were each previously debarred by the Federal Highway Administration and PennDOT and, as such, they have essentially "hit a dead end."

Sweeping Amendments To Federal Rules Of Civil Procedure Take Effect December 1, 2015

by Sarah Simmons Wronsky, Associate

On December 1, 2015, significant changes to the Federal Rules of Civil Procedure will take effect. The amendments include revisions to Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, as well as the abrogation of Rule 84 (a collection of practice forms) in its entirety. They represent the culmination of five years of efforts to overhaul current discovery, procedural, and trial practices.

The amendments widely inject into the rules principles of cooperation among parties, efficiency, reasonableness in expenses, and early consideration of e-discovery issues. For example, Rule 1 is amended to provide that parties share a responsibility with the courts to secure the just, speedy and inexpensive determination of every action. The Judicial Conference Committee on Rules of Practice and Procedure, which drafted and approved the amendments, explains that "[e]ffective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure." The amendments extend this philosophy to all phases of litigation. The critical amendments are summarized below.

Most Significant Changes

The most significant change to the Federal Rules of Civil Procedure is an expressly narrowed scope of permissible discovery under Rule 26(b)(1). Prior to the amendments, discovery was broadly permitted into any nonprivileged matter relevant to any party's claim or defense or into any matter "reasonably calculated" to lead to discoverable information. The amendment to Rule 26(b)(1) limits the scope of permissible discovery by adding that the discovery must be "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." The amendment also removes the "reasonably calculated" language from the rule because, as the Committee notes, "[t]he phrase has been used by some, incorrectly, to define the scope of discovery" and "has continued to create problems[.]" Such revisions emphasize the need for proportionality and a desire by courts to avoid "overdiscovery" or abusive discovery tactics.

Rule 37, which governs sanctions for a party's deletion of relevant data, also is significantly amended. The previous Rule 37(e) generally opened the door for sanctions for a party's failure to preserve electronically stored information (ESI), but provided a safe harbor for parties who delete ESI due to the "routine, good-faith operation of an electronic information system." The simple and limited rule has led to significantly different standards among federal circuits and states regarding how, when, and against whom sanctions should be imposed for spoliation and whether parties were permitted to cure their deletions. Consequently, parties often expend excessive time and money on data preservation efforts in order to avoid the risk of severe sanctions. The revised Rule 37(e) provides express guidance and standards that must be satisfied before a court may impose sanctions for spoliation. Rooted in a party's common-law obligation to preserve data in anticipation of litigation, the revision "authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures." Specifically, Rule 37(e) now provides:

> If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court may:
> (1) upon finding prejudice to another party from loss of the information, order

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measures no greater than necessary to cure the prejudice; or
(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation:
(A) presume that the lost information was unfavorable to the party;
(B) instruct the jury that it may or must presume the information was unfavorable to the party; or
(C) dismiss the action or enter a default judgment.

Other Amended Rules

Other rules are amended to demand cooperation and proportionality among parties and to encourage speedy, efficient resolution of actions. For example, Rule 4 requires a plaintiff to serve a defendant with a copy of the complaint within 90, not 120, days after the complaint is filed. Similarly, Rule 16, which governs pretrial conferences, scheduling, and management of actions, is amended to accelerate the beginning of litigation. It now requires courts to enter scheduling orders within 90, not 120, days after service of a complaint on a defendant. Rule 16 also encourages courts to require parties to cooperate and participate in a judicial conference before a party may file a motion related to discovery. Such conferences often are an efficient way to resolve discovery disputes without the time and expense of formal motions practice.

Rule 26 is amended to permit protective orders related to the allocation of expenses related to discovery. Rules 30, 31 and 33, which govern depositions and requests for answers to interrogatories, expressly incorporate proportionality considerations by reference to the revised, narrowed scope of discovery of Rule 26(b)(1).

Certain rule amendments emphasize that parties should focus their attention on e-discovery issues as early as possible in the litigation process. For example, Rule 16 is amended to encourage up-front consideration of e-discovery issues. It permits the court's initial scheduling order to direct parties to consider specific ESI preservation issues. Similarly, the discovery plan required by parties under Rule 26(f) shortly after the commencement of an action now must include consideration of preservation of ESI. The discovery plan also may implement protective orders under Federal Rule of Evidence 502, a tool which allows parties to provide for the return of inadvertently produced privileged documents without fear that the disclosure waived related attorney-client privilege or work product protections.

Additionally, Rule 26(d)(2) is added to allow a party to deliver Rule 34 Requests for Production of Documents in advance of the Rule 26(f) discovery planning conference between the parties (also known as a "meet and confer" conference). The Committee believes that early delivery of requests for production may facilitate a focused discussion during the Rule 26(f) conference regarding documents needed by parties to support their claims or defenses and may result in streamlined changes to document requests.

The amended Federal Rules of Civil Procedure and its undertones of cooperation and proportionality should assist parties in streamlining their litigation expenses and lead to efficient, effective resolution of cases.

Plan Ahead To Protect Against Data Breaches

by Mark Rosencrantz, Partner

Introduction

Headlines involving computer hacking, data breaches, and computer security issues have become commonplace. Companies such as Trump Hotel Collection in Las Vegas, Target, Ashley Madison, Home Depot, Comcast, Neiman Marcus, Wyndham Worldwide, and Sony Pictures all suffered recent high profile intrusions of their computer systems, and as a result spent well over $100 million in investigatory fees, fines, legal settlements, mandatory legal notifications, attorneys' fees, public relations costs, and a multitude of other issues.

High-profile stories reported on by the national news media represent a small fraction of the total problem, however, and such incidents are only increasing. According to a September 2014 report from the Ponemon Institute,

43 percent of companies experienced a data breach in the previous year. Of those companies, 60 percent suffered more than one data breach in the preceding two years.

This trend will continue to increase, as companies become even more interconnected and reliant on computer systems. As reported recently in a paper from the Wharton School of Business:

> A multitude of companies of different sizes and across sectors incur losses as a result of this crime. According to the Identity Theft Resource Center, a nonprofit research and education group that aids cyber-crime victims, at least 441 U.S. companies, government agencies, and other institutions reported material breaches to their computer networks during the first three quarters of 2013. This figure likely underestimates the real magnitude of the crime. As Michael Levy, chief of computer crimes at the U.S. Attorney's Office for the Eastern District of Pennsylvania, notes, '[c]ompanies often don't know that they have been victims of cyber attacks, and if they do know it, they are reluctant to disclose such intrusions because they fear this might damage their reputations or cause them to lose their shareholders' confidence.

In sum, as the PCI Security Standards Council wrote earlier this year: "For any organization connected to the internet, it is not a question of if but when their business will be under attack…."

Companies Need To Be Wary Of A Multitude Of External And Internal Threats

Breaches of computer systems can occur in a multitude of different ways. Most commonly they occur in one of three ways:

- Malicious or criminal attack
- System glitch
- Human error

The first category, malicious and criminal attacks, tends to generate many of the headlines in the news media. For example, the Ashley Madison hack was conducted by a group of hackers known as the Impact Team. Although it is not yet known exactly how the Impact Team was able to breach Ashley's Madison's security, the hackers stole large amounts of data without Ashley Madison realizing its security had been breached. Ashley Madison appears to have first become aware of the hack when the Impact Team publicly demanded that Ashley Madison take down its site, as well as another site it owned.

What is now known is that despite promising its users confidentiality and robust security, Ashley Madison failed to follow through. As the Digital Guardian recently reported:

> A blog post from a cracking group called CynoSure Prime exposes that Ashley Madison failed to use a robust encryption strategy for its user passwords, allowing the group to crack over 11MM passwords in just 10 days.

One popular problem that has arisen in recent years is "ransomware." Hackers gain access to a system either directly or indirectly— for example, by convincing someone to open an innocuous looking email and click on a link. Software then encrypts files, which cannot be accessed until the hacker provides a decryption key, which requires the payment of a ransom. The software used by such hackers is frequently so good that even the FBI advises some companies to pay the ransom in order to get their data back. As recently reported by The Security Ledger:

> The FBI wants companies to know that the Bureau is there for them if they are hacked. But if that hack involves Cryptolocker, Cryptowall or other forms of ransomware, the nation's top law enforcement agency is warning companies that they may not be able to get their data back without paying a ransom.
>
> 'The ransomware is that good,' said Joseph Bonavolonta, the Assistant Special Agent in Charge of the FBI's CYBER and Counterintelligence Program in its Boston office. 'To be honest, we often advise people just to pay the ransom.'

Companies need to keep in mind, however, that although criminal hacker groups are often the first to jump to mind when potential threats are considered, malicious attacks frequently do not come from outside sources. For example, in January 2014 more than 20 million South Koreans, 40 percent of the country's total population, had personal data such as identification numbers, addresses, and credit card numbers stolen. The breach came from the Korea Credit Bureau, which provides credit scores to banks and other credit card issuers. The data was copied by an employee to an external drive for more than a year without anyone's knowledge.

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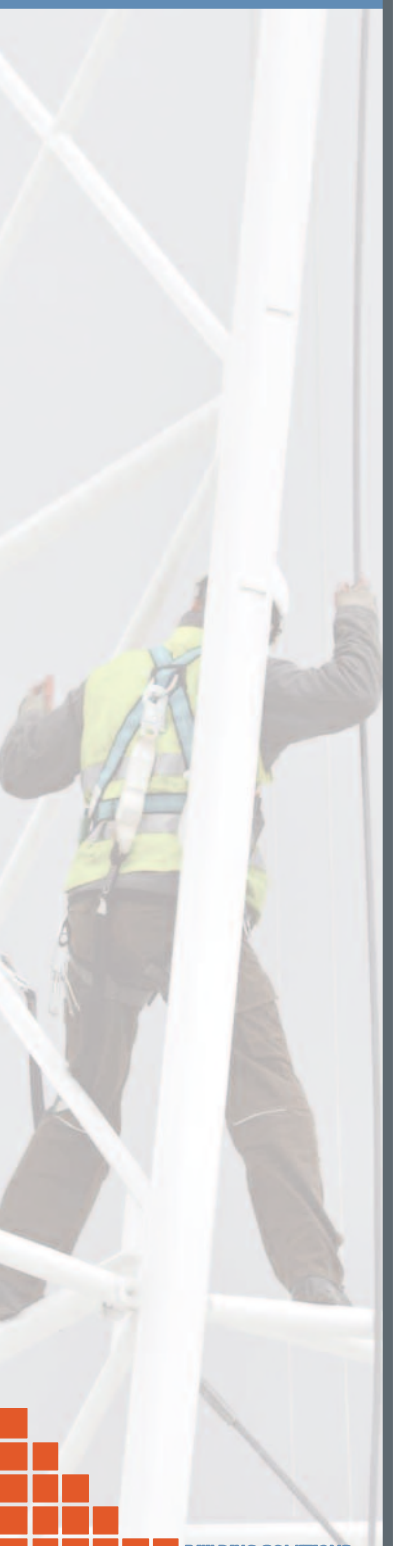

In fact, Michael Bruemmer, vice president of the credit information company Experian's data breach resolution group, recently explained in a USA Today article that although "shadowy hackers in Eastern Europe often get the blame" for hacking attacks, "more than 80 percent of the breaches" his company works with "had a root cause in employee negligence." The problems of employee negligence cannot be overstated. For example, can employees use passwords such as "password" or "123456?" Although it seems commonsense that no one in this day and age would do so, thousands of Ashley Madison users used each of those passwords. Also, how careful are employees trained to be about clicking on links in external emails?

Similarly, what kinds of financial controls does your company maintain? Imagine the following scenario, which has successfully been used on more than one unsuspecting company. A hacker infiltrates a company's computer system and gains access to the calendar and email account of a company's CEO. The hacker then picks a Friday when the executive is traveling, and sends an email from the CEO's account to the accounting department directing that it is critical that a large wire transfer be sent that day to a specific account to keep a large project going. By the time the company discovers that the wire should never have been sent, the money has been forwarded to one or more offshore accounts in places like Jersey, Guernsey, the Isle of Man, or the Seychelles, and cannot be recovered.

Companies also need to keep in mind that not all attacks are financially motivated. For example, the Ashley Madison attack appears to be an example of "hacktivism," in which the hackers are trying to make a social or political statement:

> The Ashley Madison hack was not a random hit. It was what is known as hacktivist vigilantism. The hacking group purposely targeted the site because they profit "off the pain of others," the stated reason for the group's attack on the site. Ashley Madison, no doubt, took a public approach to a semi-taboo subject (adultery) in American society, and arguably courted controversy as part of their marketing scheme. Unfortunately, no matter what your business is, there is probably someone that doesn't like what you do or represent (*e.g.*, oil companies, Planned Parenthood clinics, medical research facilities, Microsoft, Sony, defense contractors, all the way to innocuous companies whose management has taken a public stance that has angered others) and is willing to go to some lengths to embarrass or attempt to undermine or destroy your business.

In that vein, companies need to consider threats such as denial of service attacks, in which hackers take control of large numbers of computers and use them to, for example, send so much email traffic to a company that its system is unable to keep up and crashes. Such attacks are bad enough on a routine day, but what if one occurred on a day when a company needed to upload its bid on a controversial public project such as a power plant or a military base?

Data Breaches Can Cause Problems For Years

As touched on above, the kinds of problems a hack can cause are widespread. Aside from the obvious short-term problems caused by a computer system becoming temporarily unusable, problems can persist for years to come. For example, more sophisticated hackers from Eastern Europe and other places, many of whom are affiliated with organized crime, will steal personal information about system users or employees and hold on to it for a year or more before using it for additional wrongdoing or selling it to others.

Similarly, the Ashley Madison hackers released portions of Ashley Madison's source code, which means that other hackers can now study it at their leisure and attempt to find additional security vulnerabilities. As with personal information, source code or simply an explanation of how a successful hack took place can be sold to third parties for future use.

Companies that lose personal information about users or employees also have to send out legally mandated notifications. Currently, 47 states have mandatory disclosure requirements, almost none of which are the same. Moreover, the required form that needs to be used is generally governed by the residence of the affected individual, not where the breach took place. Thus, if a company has a breach involving employees living in 25 states, it should be assumed that many different kinds of notices will need to be sent to different groups of employees.

Data breaches may also affect security clearances for government projects, customer confidence, employee morale, and a host of other issues.

Have A Data Breach Plan

Given the reliance most businesses place on their computer systems, it has become critical that companies create and update response plans for data breaches. Although not intended to be comprehensive, the following list contains items that all companies should be thinking about:

- Has your system been tested for vulnerabilities? Do you know how difficult it would be to hack into your system, or for someone to gain physical access?

- Do you provide any employee training on using strong passwords; periodically updating passwords; knowing how to spot potential phishing emails; and the necessity of keeping USB drives, cell phones, and laptops secure?

- Is your system sufficiently backed up? If necessary, for example, in the event ransomware infects your system, could you simply delete the affected files and replace them in a few hours? And is your backup stored such that it is itself vulnerable to hacks?

- Do you monitor who is downloading what data? Do you have an employee downloading excessive amounts of files, especially one who might have been passed over for a promotion or who has resigned and is merely closing out a few final tasks before leaving?

- Do you have cyber insurance? Policies have become commonplace, and companies should strongly consider speaking to their current broker about such a policy or even consulting a specialty broker about adding and regularly updating coverage. If you do have coverage, who is your point of contact at the insurer to report a breach?

- Do you have a designated law enforcement contact, for example at the FBI, in the event of a data breach?

- Do you have a public relations policy established in the event of a data breach? What will you do if, for example, someone publicly announces they have hacked your site and will begin releasing sensitive company information in the event you do not withdraw from consideration of and publicly condemn a lucrative project? Who is responsible for speaking to the press?

- In the event you lose sensitive information about your employees or customers, such as addresses and social security numbers, who is going to send out the legally required notices?

Conclusion

Computer systems have revolutionized the way business is done. Although they bring benefits such as increased productivity and connectivity, they also come with a variety of new and ever changing risks. Businesses need to be aware of such risks, and be proactive in implementing plans to address the potential day when a hack or other similar problem occurs.

The Supreme Court Of Nevada Recognizes Partial Subordination Of Construction Loans

by Jared M. Sechrist, Partner

In 2006, real estate development seemed like the safest bet in Las Vegas. Developers rushed to fill open lots with projects of unprecedented scope. Manhattan West — a twenty-acre, seven hundred condominium, $350 million development — was such a project. As conceived, Manhattan West would be a new type of development for Las Vegas — a mixed commercial/residential complex far from the Las Vegas Strip. Unfortunately, the economic downturn of the late 2000s halted nearly all of the ambitious projects underway at the time, including Manhattan West.

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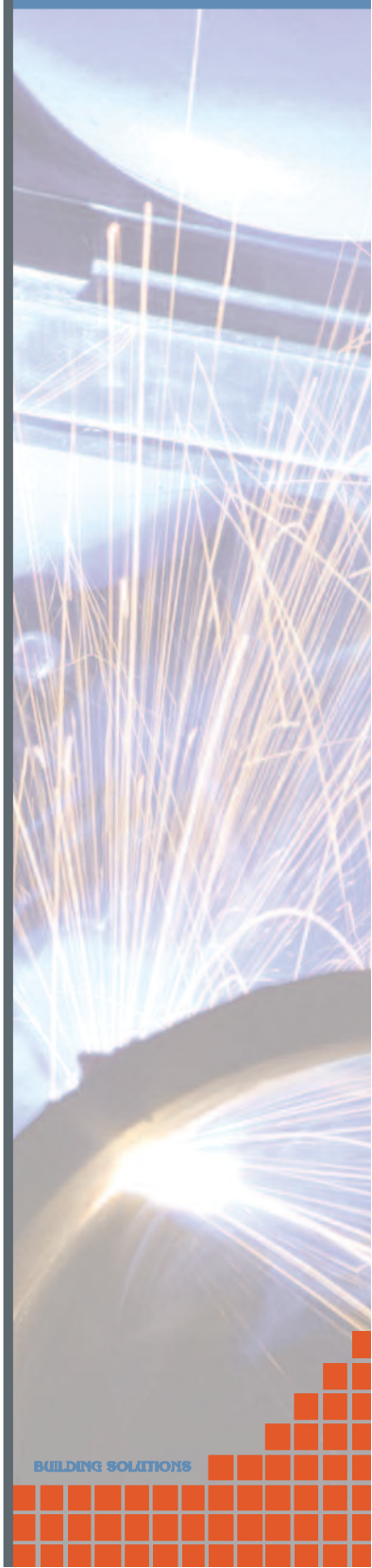


By October of 2008, construction across Las Vegas had fallen by ninety-two percent. In November of 2008, for instance, Clark County issued only eighty new home building permits, whereas it had averaged five hundred per month throughout 2007. As the value of real estate plummeted, lenders quickly became under-secured, rendering mechanic's liens of junior priority worthless. In the case of Manhattan West, though, a substantial loan was made after the contractors had started work on the project. In *In re Manhattan West Mechanic's Lien Litigation* the Supreme Court of Nevada considered whether a loan made subsequent to the commencement of construction activities can partially subordinate a prior loan, thereby preserving the senior priority to the extent of the amount of the senior loan.

In Re Manhattan West Mechanic's Lien Litigation

In 2006, Scott Financial Corporation ("SFC") agreed to make several loans to Gemstone Apache, LLC ("Apache") to develop Manhattan West. *In re Manhattan West Mechanic's Lien Litigation*, 131 Nev. Adv. Op. 70 (2015). Apache recorded the first three loans, which financed the purchase of the property, in 2006 in the aggregate amount of $38 million (the "Mezzanine Loan"). *Id.* at 1. APCO Construction ("APCO"), Apache's general contractor, commenced construction activities in April 2007, establishing the accrual date for the contractors' and subcontractors' mechanic's liens pursuant to NRS § 108.225. *Id.* The following year, Gemstone Development West, LLC ("Gemstone") purchased Manhattan West from Apache, including Apache's loan obligations. Gemstone then borrowed $110 million from SFC (the "Construction Loan") and a corresponding deed of trust was recorded on February 7, 2008. *Id.* Commensurate with the issuance of the Construction Loan, SFC and Gemstone entered into a subordination agreement whereby SFC intended to subordinate the Mezzanine Loan to the Construction Loan. *Id.*

Gemstone was not immune from the economic turmoil sweeping across Las Vegas in 2008. The value of Manhattan West had fallen so far and fast that Gemstone lost any realistic chance of earning a profit on the project. As a result, its relationship with APCO rapidly deteriorated, causing APCO to stop work and sue to foreclose on its mechanic's lien. *Id.*

The precipitous decline in the real estate market meant that the party with first priority would likely be the only one to realize any recovery from the proceeds of the sale of the property. The project sat fallow for more than five years while APCO and SFC fought over the priority of their claims and the market continued to tumble. Manhattan West was finally sold in 2013 for approximately $20 million—$18 million less than the Mezzanine Loan and $90 million less than the deed of trust recorded for the Construction Loan.

SFC claimed that the subordination agreement between it and Gemstone had preserved the priority position to the extent of the $38 million Mezzanine Loan because it partially subordinated the prior loan. *Id.* at 2. APCO claimed that the Construction Loan, which was issued after the commencement of construction activities, had fully subordinated the Mezzanine Loan thereby abdicating its priority position and placing the mechanic's lien holders in the first position. *Id.*

After multiple battles in district court, the court had ruled in favor of SFC and the matter worked its way to the Supreme Court of Nevada. *Id.* The court identified two approaches to evaluating the effect of subordination agreements: full subordination (the minority approach) and partial subordination (the majority approach). *Id.* at 3. With full subordination, the subsequent loan establishes a new and later priority date for the loans, including the first loan, thereby placing liens accruing between the issuance of the two loans in a senior position. *Id.* Partial subordination preserves the priority date of the original loan to the extent of that loan. *Id.* The priority of liens is simply rearranged without affecting the priority or validity of intervening liens. Ultimately, the court adopted partial subordination, finding that it "cannot determine any reason SFC would have intended to completely subordinate the [Mezzanine Loan], only for APCO's mechanic's liens to then take the first-priority position." *Id.* at 4. In doing so, the court gave effect to SFC's stated intent "that it should be allowed to freely contract the order of payment as between itself." *Id.* Further, the court noted that the commonsense majority approach "weighs in favor of partial subordination" because nothing in the subordination agreement mentioned the mechanic's lien or an intent to fully subordinate the Mezzanine Loan. *Id.* The mechanic's liens were thus left in the same priority position as prior to the subordination agreement.

Finally, the court also determined that NRS § 108.225, which gives priority to mechanic's liens over liens attaching after commencement of construction, did not prohibit negotiations concerning priority between those with liens senior and those with liens junior to mechanic's

lien holders. *Id.* The court found that such negotiations do not alter the mechanic's lienholders' position and are, therefore, not prejudicial to the lienholder or contrary to the intent of the mechanic's lien statutes. *Id.*

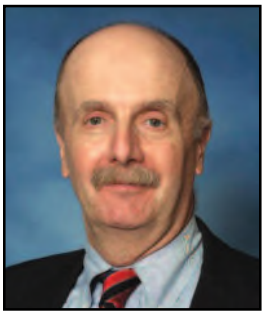
What *Manhattan West* Means For Lienholders

The *Manhattan West* decision is too recent to have yet spawned interpretive precedent or treatment by the courts. Nevertheless, it will likely have some foreseeable impact on lienholders.

In the short-term, *Manhattan West* likely forecloses the possibility of meaningful recovery on mechanic's liens that accrued prior to or during the early years of the economic downturn because under-secured lenders will retain first priority absent an express statement of intent to permit mechanic's lienholders to assume the first position. In this sense, the lienholders' position remains unchanged — they were junior to the initial lender prior to Manhattan West and remain so now.

Although *Manhattan West* cuts off one means of payment for mechanic's lienholders, its effect may be to create additional opportunities for work. The decision offers assurances to lenders that by putting new money into existing projects they will not automatically relinquish the priority position of the initial lenders. This may entice lenders to more aggressively invest into the Las Vegas real estate market again, creating more work for contractors and subcontractors.

INTERNATIONAL



Romania – Unexpected

by John B. Tieder, Jr., Senior Partner

I normally do not write about my travels in Eastern and Central Europe unless they are connected with a teaching assignment or some other professional activity that gives insight into the educational, legal, business and political workings of a country that are not available to a tourist. In particular, the views of students as to the conditions and the future of their country cannot be gathered as a sightseeing tourist. But, Romania proved so interesting, I am making an exception.

I had no particular interest in Romania as a country. I have, however, been fascinated by the Carpathian Mountains. This fascination came from several sources: a book entitled *Blood on Snow*, which discusses the winter campaign of 1914-1915 in WWI, between Austria, Hungary, and Russia; another book entitled *The Transylvanian Trilogy*, by Miklos Banffy, a Hungarian (most of the Carpathians were part of the Austro-Hungarian Empire at that time), which addresses life in the Mountains in the decades leading up to WWI; and a National Geographic article on rural life in the Carpathians documenting it as one of the least developed and most naturally beautiful areas of Europe.

The Carpathians And Romania

The Carpathians are a relatively low (2000 M) but extremely steep and rugged mountain range. They consist of the Southern, Eastern, Northern and to a lesser extent, Western ranges. They almost completely encircle, with a gap in the Northwest, the region of Transylvania. There are only a limited number of routes over them and each is a beautiful, if not hair-raising, series of narrow switchbacks. It is hard to imagine what it was like to cross these mountains in WWI with an army in the winter and without the current roads.

The mountains at various times and even currently are, at least partially, in the political

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boundaries of several countries: Hungary, Ukraine, Serbia, but now mostly Romania. At the start of WWI, the region of Transylvania and major parts of the mountains were in the Austro-Hungarian Empire and regarded as a significant barrier between Austria-Hungary and the Ottoman Empires. Their history is sufficiently confusing that the first decision in planning a trip was where to start - Bucharest, Romania became the obvious choice.

Romania – A Place And A Country

Like many other countries in Eastern and Central Europe, the current country name is more reflective of a people and a culture than a long-defined geopolitical entity.

- A Brief History Of Romania

Romania was initially inhabited by a group called the Dacians who were eventually conquered by and incorporated into the Roman Empire. Their language is based on Latin and today's Romanian is identifiably a romance language written in the Latin alphabet. This is in contrast to most of their direct neighbors, *e.g.*, Bulgaria, Ukraine, who speak a Slavic language written in the Cyrillic alphabet, and the incomprehensible language of Hungary.

As the Roman Empire disintegrated, the area that now constitutes Romania consolidated into three kingdoms: Wallachia, Moldavia, and Transylvania. The borders of these entities were in constant flux and it is still a regional joke that one can go to bed as a Ukrainian, wake up as a Moldovan and go to bed again as a Romanian. Each of these entities (if something so fluid can be called an entity), was at various times part of the Ottoman and Holy Roman Empires, the Kingdom of Hungary, and the Austro-Hungarian Empire.

Due to war and plagues, the region of Transylvania was only sparsely populated by the 12th and 13th centuries. This left a large open space to the East of the Hungarian empire and fertile territory for invading armies. To correct this problem, German settlers were

encouraged. They built seven major fortified towns, which still exist today - Sibiu, Cluj, Sighetul-Marmatiei, Gura-Humorului, Sighisoara, and Brasov. These towns have a distinctly German "feel" and indeed each one still has both a Romanian and a German name, *e.g.*, Sibiu is also Hermannstadt. The fortified towns had several defensive towers; each tower was built, maintained and, in times of war, manned by a separate guild. At one of the towers, a group of young men in clothes distinctly of several centuries ago were making repairs with tools, also of a design of several centuries ago. We learned that they are part of a program to maintain old trades. Following the rules of the carpenters' guild of the 14th-15th century, they were at the journeyman stage. They had to move from location to location every three months (*i.e.*, journeyman) for three years. At the end, they became master carpenters. They could not return home, use cell phones or even land lines, and generally lived as much as possible as guild members of 500-600 years ago.

A historical atlas would be months of work so I will skip a few centuries to 1859 when, with the role of the Ottoman Empire fading, Wallachia and Moldova signed a Union becoming Romania and appointed King Carlo I, a prince of the German Hohenzollern family, as monarch.

The early 20th Century brought the demise of the Ottoman Empire as most Eastern European countries sought some degree of independence and fought among themselves over boundaries. Transylvania was part of the Austro-Hungarian Empire but totally muddled about whether German or Hungarian should be the official language, whether ethnic Romanians were entitled to certain civil rights, etc.

Romania (as in Wallachia and Moldova) remained neutral in WWI until 1916. It then decided to join Russia and the Western Allies because it offered an opportunity to gain Transylvania from Austria-Hungary in a post-war settlement. For a while, the decision seemed like a disaster. Russia left the War in 1917 and Romania's old-fashioned army was totally outnumbered and outmanned by the Austro-Hungarian and German armies. In the end, however, they were on the right side and Transylvania was awarded to them through the Treaty of Versailles and its progeny.

I have always been interested in WWI and in my European travels seek out the WWI memorials in the towns I visit. Perhaps some of you have seen these memorials to "The Great War" where, especially in the United Kingdom, sometimes ten or more men of the same family name died in the same month at one of the great fiascoes of the Western Front like the Somme. In Romania, I found the same such memorials with the same sad history of names indicating the end of a family. The interesting difference was, there was no reference to WWI or the "Great War;" the memorials were for the War of Romanian Unification and the dates were 1916-1918, not 1914-1918. While the Western World fought "the war to end all wars," the Romanians saw a much more limited purpose to their sacrifices.

The final piece of Romania's current border was decided at the end of WWII. The Romanians joined the Axis powers and for their efforts lost the eastern most part of the region of Moldova, which is now a small separate country. The penalty for picking the losing side was actually more severe, as Romania was subjected to an extremely oppressive com-munist regime until the early 1990's.

General Impression

Not being involved with the academic or legal community, my knowledge of the overall political and economic situation came from observation and random conversations. The first impression was, of course, the airport and the capital city of Bucharest. The airport was modern and appropriate in size with amenities for a city of 2,000,000. Bucharest is in transition. The architecture of the older part of the City is late 19th/early 20th century. When communism ended, property was returned to its pre-revolution owners. Some of the returned buildings have been modernized; others reflect decades of neglect. There are a lot of trees and parks, a few modern buildings and, on the outskirts, the ubiquitous concrete apartment blocks of the soviet era. All in all, it is a pleasant city.

The dictator through most of the communist period was Nicolae Ceausecu. Ceausecu was mostly hated but did a few things that were admired, like completely paying off all of Romania's foreign debt. This act, although admirable in one sense, placed a tremendous burden on the population. Investment and goods that could have stayed in Romania were exported to pay the debt. He also undertook a massive public works project in the form of a monstrosity of a palace. It is reportedly the second largest office building in the world after the Pentagon. It consumed a great amount of resources, again leaving little for the population. The building was and remains unnecessary – a monument to one man's ego.

Some of you may also remember that Ceausecu made abortion illegal. This led to hundreds of thousands of abandoned children and truly horrific state orphanages. When Ceausecu was deposed in 1991, there was a movement in the west to adopt from these orphanages, but it

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proved difficult because many of the children had severe psychological problems. Ceausecu was shot shortly after he was deposed. There is no nostalgia for the "good old days" of Communism.

The Countryside

In addition to the Carpathians, our tour took us to the countryside. The Carpathians surround Transylvania, which is a high plateau primarily used for agriculture. It reminded me a great deal of Central/Western Montana although it gets more rain and is therefore greener than Montana.

Outside the cities, small farm agriculture is dominant. Indeed, it was the promise of rural life of a century ago that was one of the reasons for our trip. Traditional clothing is becoming rare but still visible. We stayed in a small village and were entertained by traditional dancers—clearly for the benefit of tourists but a skill that is being preserved. Traditional clothing is still worn on Sundays and holidays, for watching the goats or herding sheep.

It was haying season and there are a variety of different types of haystacks, all stacked by hand. It was interesting to notice that it was always the women who lifted the hay up to the top of the stack, while the men arranged it. We saw numerous hay wagons and all of them were horse drawn; not a single tractor. Wagons were also used for most other farm purposes like taking the pig to market. Most of the farm houses, however, had automobiles, and I could not tell if tractors were used for other types of

farm work like plowing and mowing. But, the movement of hay was all by horse. It was also the early harvest season: vegetables, peaches, plums, and especially watermelons. Every town had a produce market and the prices were incredibly low, *e.g.*, a kilo (2.2 lbs.) of vine-ripened tomatoes were less than USD .50, watermelons were .75/kilo and the sweetest any of us had ever eaten. Indeed, eating in Romania was a treat. The food was fresh and excellent and it was hard to spend more than USD 10/person including beer, wine, and the mandatory after dinner brandy.

Virtually everyone in Romania distills their own brandy. It is made from a variety of fruits: plum is probably the most popular, but cherry, strawberry, rasp-berry, grape and others are also widely consumed. It is sold at roadside stands, usually in reused plastic soda bottles, at about USD 5/liter.

Other traditional skills were also regularly used. A particularly unusual one was the use of a man-made whirlpool for washing carpets. Water is diverted from a stream into a mixer, which spins like the rinse cycle in a modern washer – very efficient.

Communication was quite easy as the cell phone network was excellent and every hotel or guest house had reliable Wi-Fi. The roads were in good condition; however, there simply were not enough of them for the traffic. On the other hand, the railroad system was antiquated and unreliable. I have noticed this in other Eastern and Central European countries. The investment has been in roads, not railroads. Somewhat disconcerting was the natural gas distribution system in rural areas. It was all above ground and not in the best state of repair.

Finally, a fascinating aspect of the countryside is the migratory storks. They spend the winters in Africa but return to Romania (and other countries in the region) in late March and early April. They build their nests in high places. When we arrived in July, most of the young

storks had fledged. What was striking was the number of nests. Every light pole on some streets had a nest.

Forts, Churches, Fortified Churches, Monasteries

The region that now constitutes Romania is bordered on the south and east by what constituted the Ottoman Empire until the mid-19th Century. The Ottoman Empire, like other empires, expanded and contracted during its life before its final demise in 1918. Also, Ottoman control took many different forms. Some parts of what is now Eastern Europe were provinces of the Empire, others were somewhat independent as long as they provided the Sultan with money, military support, etc. Regardless, Romania was almost always on the border and if, nothing else, the battleground between the Ottomans and the West, between Islam and Christianity.

Not only was Romania on the border of Islam and Christianity, it was on the border of Eastern Orthodoxy and Roman Catholicism and later, because of the German Saxons, of Roman Catholicism and the Lutheran Church. The result of all this is a landscape of forts, churches, fortified churches and monasteries.

Forts were secular structures. They were typically built on strategic highpoints, but were only manned and used when all other defenses had failed. Most of them have been neglected for centuries although a few are being restored. Nevertheless, they are impressive edifices and the prospect of assaulting one on its precipice still appears daunting. A particularly foreboding fort was built in a mountain pass by Count Dracula, allegedly by slave labor in a matter of weeks.

Transylvania was colonized by Germans, primarily from Saxony. Their religion was Roman Catholicism and the churches and monasteries they built were obviously to celebrate that faith. The unique aspect was that many of them in smaller cities and towns were also fortresses, as were many of the monasteries. These fortifications were a first line of defense against mercenaries and even more serious invading armies. When things got too serious, everyone withdrew to the actual fortresses. Many of these monasteries and churches have been or are in the process of being restored, not as relics of the past but as active places of worship and, in the case of monasteries, retreats. There are hundreds of them. When the Protestant reformation started in Germany, it spread to the Transylvanian Saxons and many of the churches were converted to Lutheran.

In their continual war with the Ottomans, it was common practice for victories to be celebrated with the construction of either a Roman Catholic or Eastern Orthodox monastery, depending on the belief of the General. The notorious Count Dracula was, among other things, an extremely successful General and commissioned several monasteries. Some of the most magnificent are the painted monasteries. The interiors of all the churches are full of frescoes and paintings, but the painted monasteries are unique in that the exteriors are covered with beautiful murals. One of the most popular themes of the murals was judgment day. Many of these paintings are centuries old and reasonably well-preserved.

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Northern Transylvania is heavily forested and is known as the Maramures Region. Woodcarving is a highly developed art form, which is not only in every village, but most farms and homes have elaborately carved wooden gates. In fact, in this region, most of the churches are built with wood. They all date from the late 18th century because an invasion by the Ottomans in the middle of that century burned most of the existing ones. Some are quite large and others can hold only a few parishioners. However, in spite of its hundreds of churches and monasteries, there are several new ones under construction. Indeed, there seems to be some considerable debate over whether the country has prioritized properly its needs as new church construction apparently exceeds new hospital construction.

As mentioned above, a particular motivation for visiting the Carpathians was the book *The Transylvanian Trilogy*, written by Banffy. The book is based on the author's family and describes the family estate in detail. For those of you who have read it, you will have formed a picture of its beauty. Unfortunately, WWII and decades of neglect have left little. It is under restoration, but it appears to be a process of decades.

Gypsies (Not Roma)

Anyone who has recently traveled in Europe, especially southern Europe, has undoubtedly run into gypsies and either seen their encampments or been harassed by their begging. During a walk to our hotel in Bucharest after dinner, we were set upon by a loud noisy pack of gypsy children. They were quite persistent and it took a few minutes before they gave up and went in search of easier prey. They are often referred to as Roma and believed to come primarily from Romania.

A part of our trip was a visit to a gypsy family and they were very clear that "gypsy" is the proper term – not "Roma." We visited an extended family compound. The spokespersons were two lovely sisters who spoke excellent English learned from watching American television shows. A brief summary of what we learned was that gypsies originally emigrated from India. There is a definite caste system and the family we visited was of the highest caste known as Gabors. Gabors are metal workers - a trade which takes years to learn and provides a good income. Gypsy marriages are arranged by parents at an early age (12-13 for girls; 16-17 for boys). Although the boy may opt out of a selected bride, the girl seldom can. Weddings are held as soon as the girl reaches puberty. Children seldom go to school and the State does not require it. Divorces are extraordinarily rare. Families live together with the wife moving to the husband's home. Four generations in a home is the norm. They have a separate language, which is an adaptation of several other languages, but is not written. There is almost never marriage outside the group and little effort to integrate. They are not, however, nomadic and most live in their own villages.

Dracula

Probably the greatest boon to Romanian tourism is Bram Stoker's novel "Dracula." Indeed, the very mention of Transylvania conjures up Dracula and vampires. There was a Count Dracula and he was a very bloody minded character, but hardly a vampire. Moreover,

many of Stoker's references are to actual identifiable locations in Romania, although they have no relationship to the historical Dracula and he lived many centuries before Stoker's 19th century creation. The word Dracula is a real Romanian word indicating a title - it is probably roughly translated as "Duke." Both the infamous Dracula and his father had this title.

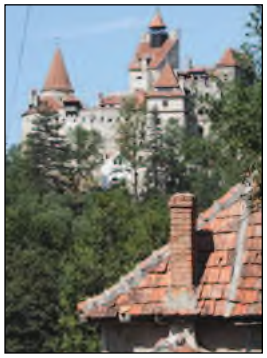
Dracula was born in 1431 in the town of Sighisoara. His birthplace is now a restaurant and of course, we had dinner there. Yes, blood soup is on the menu, although it tasted very much like tomato soup. Dracula's real name was Vlad Tepes. Tepes is still a common name and one that we noticed on one of the war memorials.

As set forth above, there was almost constant warfare between the Ottoman Empire and the various Christian rulers of Eastern and Central Europe. Vlad's father reached a peace treaty with the Ottomans and as was common practice at the time, sent Vlad and his brother to the Sultan to guarantee the treaty. If it was broken, Vlad and his brother would have been sacrificed.

Fortunately Vlad's father honored the treaty, but not before Vlad was well schooled in the various means of torture and execution employed by the Ottomans. When he became a ruler, his preferred method of execution was impalement and thus his nickname, "Vlad the Impaler." It was a ruthless time and he thrived in this environment. Among other anecdotes, he was once visited by embassies of the Sultan; they knelt, but refused to remove their hats. He asked them why and they replied that it was not their custom to remove their hats for anybody other than their Sultan. Vlad said he believed this to be a good custom and to strengthen their observance of it had their hats nailed to their heads.

Vlad's nickname, however, comes from his use of impalement as a form of execution for criminals and political enemies. However unpopular this may have been him in his own time, he is well regarded by Romanian history primarily because he thwarted an Ottoman invasion by the same army that had conquered Constantinople. Vastly outnumbered, he used Guerilla tactics. Among other things, he impaled over 20,000 Turkish prisoners and set them up for miles along the Ottoman's path. This so dismayed the invaders that they abandoned their campaign and returned to their own territory. Vlad had saved his country from the Ottomans - the same army that had ended the Byzantine Empire a few years earlier.

The Dracula of myth did not live in Transylvania. His kingdom was the province of Wallachia. Dracula's castle, known as Bran Castle, is a real place, but it was not built until the 18th century, whereas Vlad died in the 15th century. It is a major tourist attraction. Any reader of Stoker's novel will understand its layout. Not only was it not built until 300 years after Dracula's death, it is physically located several hundred miles from where Stoker places it, which is the actual location of a castle that Vlad had built. This combination of myth and reality gives the Dracula story its special appeal.



Next

I will be teaching this year at the Immanuel Kant Baltic Federal University located in Kaliningrad, Russia (formerly Königsberg, East Prussia). I taught in Russia in 2006 and I am very interested to see how the more expansive and confident Russia of 2015 under Vladimir Putin is regarded by my students.

Honors

Watt, Tieder, Hoffar and Fitzgerald, L.L.P. is recognized in the **2015 U.S. News and World Report "Best Law Firms"** rankings. **Watt Tieder** is listed as a Tier 1 law firm in the following areas:

- Nationally – Construction Law and Litigation-Construction;
- Washington, D.C. – Arbitration, Construction Law, Litigation-Construction, and Mediation;
- Orange County, California – Litigation Construction.

Watt Tieder is also listed as a Tier 2 law firm for Construction Law in Orange County, California.

Watt Tieder is pleased to announce that the following partners have been recognized in the **22nd Edition of the Best Lawyers in America 2016©**:

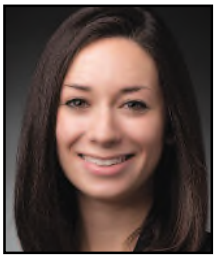
- **Kathleen O. Barnes** (Construction Law);
- **Shelly L. Ewald** (Construction Law and Litigation-Construction);
- **Robert M. Fitzgerald** (Construction Law and Litigation-Construction);
- **Vivian Katsantonis** (Construction Law);
- **Edward J. Parrot** (Litigation-Construction);
- **Carter B. Reid** (Construction Law and Litigation-Construction);
- **John B. Tieder, Jr.** (Construction Law and Litigation-Construction)

Watt Tieder Welcomes Two New Associates

Brenna D. Duncan joins the McLean, Virginia office. Brenna's practice will focus on commercial litigation, government contracts and construction. Before joining Watt Tieder as a first-year associate, Brenna clerked as a summer associate at the firm. Brenna was also a summer clerk to the Honorable Judge Anita Brody of the U.S. District Court for the Eastern District of Pennsylvania, and interned in the U.S. Justice Department Commercial Litigation branch.

In law school, she occupied the highest student-held position on the *German Law Journal*, a peer-reviewed source for developments in European law, which during her tenure was the number two ranked journal covering European law in the United States. Prior to that, she worked at Equal Justice Works where she helped secure funding for young attorneys working in public interest law.

Brenna received her J.D. from Washington and Lee University School of Law, Lexington, Virginia in 2015 (*cum laude*) and her B.A. from Tufts University, Medford, Massachusetts in 2010 (*cum laude*). She is a member of the Virginia Bar.



Julia M. Fox joins the McLean, Virginia office. Julia focuses her practice in the areas of construction litigation, government contracts and suretyship. She represents contractors, owners, subcontractors, and sureties in all aspects of public and private development projects. She joined Watt Tieder as a first-year associate after having clerked for the firm as a summer associate.

During law school, Julia served as the Associate Articles Editor of the American University Law Review and completed two judicial internships with the Honorable Rosemary M. Collyer at the United States District Court for the District of Columbia and with the Honorable Michael K. O'Keefe at the Superior Court for the District of Columbia.

Julia received her J.D. from American University Washington College of Law, Washington, D.C. in 2015 (*cum laude*) and her B.A. from Ursinus College, Collegeville, Pennsylvania in 2012 (*magna cum laude*). She is a member of the Virginia Bar.

Appointments

Keith C. Phillips has been appointed to the Advisory Panel of the Inter-Pacific Bar Association Committee that is preparing and will publish Guidelines on Privilege and Confidentiality in International Arbitration.

Upcoming Events

French International Contractors Association, November 24, 2015; Paris, France; **John B. Tieder, Jr.** and **Shelly L. Ewald** to speak, along with other GCila members.

Construction SuperConference 2015, December 7-9, 2015; San Diego, California; **John E. Sebastian** to speak on "Best Practice for Construction-Controlled Insurance" and "What to Watch Out For and Include When Negotiating a Bond with an Owner and Subcontractor."

International Construction Law Society, January 15, 2016; Paris, France; **John B. Tieder, Jr.** and **Christopher Wright** will speak on North American Contract Law.

ABA Forum on Construction Law's Midwinter Meeting, January 21-22, 2016; San Francisco, California; **Scott P. Fitzsimmons** to speak on project audits.

Inter-Pacific Bar Association Conference, April 13-16, 2016; Kuala Lumpur, Malaysia; **Keith C. Philips** to speak on April 14 at a session titled "Latest Developments in Construction Law – Around the World in 90 Minutes;" and **Christopher Wright** to speak on April 15 in a session titled "Time Related Claims and Concurrent Delay – Civil Law vs. Common Law, A Mock Arbitration."

Publications

Hanna L. Blake, "Commercially Useful Function – Knowing and Avoiding DBE Fraud;" published in **Modern Contractor Solutions**, October 2015

Watt Tieder newsletters are posted on our website, www.watttieder.com, under the Resources Tab. If you would like to receive an electronic copy of our newsletter, please contact Peggy Groscup at: **pgroscup@watttieder.com**

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The Watt, Tieder, Hoffar & Fitzgerald newsletter is published quarterly and is designed to provide information on general legal issues that are of interest to our friends and clients. For specific questions and concerns, the advice of legal counsel should be obtained. Any opinions expressed herein are solely those of the individual author.

Special Thanks to Editors, **Robert G. Barbour, Keith C. Phillips, William Groscup** and **Heather Stangle**.

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