WATT TIEDER

WATT, TIEDER, HOFFAR & FITZGERALD, L.L.P.

BUILDING SOLUTIONS®

Attorneys at Law

Fall 2017

Inside...

The newsletter of
Watt, Tieder, Hoffar & Fitzgerald, L.L.P.

visit us on the web at
www.watttieder.com

BUILDING SOLUTIONS

Kathleen O. Barnes

Christopher J. Brasco

George "Trip" Stewart

Hot-Tubs And Other ADR Remedies For Disputes That Ail You (Part 1)

by Kathleen O. Barnes and Christopher J. Brasco, Senior Partners, and George "Trip" Stewart, Associate

Introduction

When contemplating dispute resolution for complex construction projects, the role of the expert is an essential consideration. One expert-centered approach to expert presentation that has gained significant notoriety internationally is what is most commonly referred to as concurrent expert testimony or "hot tubbing" expert witnesses. This paper explains the hot-tub process and then explores how lessons learned from the hot tub's emphasis on expert participation in determining a dispute's outcome can be adapted to alternative ADR methods to make them more effective in quickly and efficiently resolving matters.

The Potential Benefits And Disadvantages Of Hot Tubbing

Experts play a critical role in litigation and ADR proceedings, particularly where complex technical issues are in dispute. Experts are retained to explain the technical or scientific elements of a case that exist outside of the judge's and attorneys' purview. Also, unlike lay witnesses, expert witnesses may rely upon specialized knowledge when testifying. Yet, the way experts are employed in typical American litigation may fail to make the best use of their knowledge and expertise.

Under traditional American trial and ADR proceedings, each party in a lawsuit selects its own expert witnesses. One party then presents all of its evidence on all relevant issues before the opposing party has an opportunity to provide its opposing opinions and evidence. Thus, the testimony of the opposing experts may be separated by days, weeks, or even months. This approach may make it difficult for the fact-finder to compare the opposing expert opinions or to identify any issues on which the parties agree.

Inherent in the adversarial American system of dispute resolution, where experts are chosen by the opposing parties, is the perception of bias in the opinions reached by the expert witnesses. This perception is further exacerbated when the experts on opposing sides come to polar-opposite conclusions, leaving the trier of fact to weigh sharply conflicting opinions on highly technical and complex issues. Consequently, a fact-finder that is unable to fully understand or reconcile opposing opinions may decide to reject both opinions and decide the matter on more arbitrary grounds, such as which expert is more qualified or which expert was able to state his or her opinion more simply and concisely.

Indeed, fact-finders are often resigned to the fact that each party will present the expert witness most favorable to his or her client's position regardless of whether it is useful or not. Ultimately, this common expert-based approach in adversarial proceedings leaves the fact-finder with an ineffective mechanism for assessing the merits of expert opinions. Also, the expert witness is often forced to struggle between his or her role as the expert or the party advocate.

One way to resolve this issue is to permit experts to testify concurrently from the witness stand. In other words, instead of proceeding sequentially during a party's case, both sides' experts sit together and discuss the relevant issues with each other and the fact-finder under oath. This process is known as "hot tubbing," and it is currently used by courts in Australia and New Zealand and increasingly in international arbitration.

This hot tubbing process is unique in that it allows each side to still have a say in the process of selecting an expert witness. However, it also cuts down on the potential for bias by the experts and allows the trier of fact to more effectively hear and understand the expert testimony being presented in the dispute.

Origins Of Hot Tubbing

Hot tubbing has its roots in the Australian Competition Tribunal and is sometimes considered the "Australian approach" to expert testimony. It became popular among Australian judges because of its design to remove partisan advocacy from expert testimony. Moreover, many judges, attorneys, and commentators note its potential to remove tension during testimony and allow experts to better respond to their colleagues, rather than simply answering the opposing lawyers' questions. Consequently, hot tubbing has become more popular throughout Australia and has officially been introduced into the Rules of the Federal Court of Australia, the Uniform Civil Procedure Rules for the Supreme Court of New South Wales, and the Court Rules of the Victorian Supreme Court.

Hot tubbing has expanded beyond just Australia. Canada, for example, has introduced expert hot tubbing into its Competition Tribunal Rules for use in contested antitrust proceedings. In the United States, courts have even occasionally used hot tubbing in the trial setting for an assortment of different cases, including those involving breach of contract, products liability, and patent infringement. The use of hot tubbing outside Australia, however, remains somewhat infrequent. Regardless, hot tubbing provides practitioners a potential method to simplify and expedite expert testimony in litigation, especially in the context of ADR.

How Hot Tubbing Works

While there are different variants of hot tubbing, there are several key elements of the process that tend to appear in each version. Typically, hot tubbing begins with the preparation of written expert reports, which are then exchanged between the parties prior to the experts' testimony. Often, the experts then "meet and confer" in order to prepare a joint report about the topics on which they agree or disagree. This process is intended to reduce the issues remaining in dispute and subject to expert testimony. Lawyers generally are not present at these "meet and confer" sessions.

Experts that do end up testifying at a hearing generally conduct their testimony after both parties' cases-in-chief have been heard and all the lay witness testimony has been offered. They also typically testify together or directly after one another. Generally, the plaintiff's expert will start with a brief discussion and then will be questioned by the defendant's experts without the intervention of counsel. The process is then reversed to address the defendant's experts. Finally, at the end of this stage, each expert is afforded the opportunity to present a brief summary of their positions.

Once this initial step is complete, the attorneys are usually provided the opportunity to cross-examine experts. Even in this cross-examination stage, experts are allowed to continue questioning one another and adding to other expert testimony. This stage of the hot tubbing process allows attorneys and experts to discuss and distinguish conflicting expert testimony, hear from each side simultaneously, and have the opportunity to defend and further explain their own evidence.

Notably, the actual hot tubbing itself tends to be an informal process. The arbitrator or mediator may ask an expert to comment or ask questions about an issue in the case or to address a point raised by another expert. Only one expert speaks at a time during this process, which promotes a respectful and constructive dialogue among the experts. Also, the lawyers and experts are able to pose questions to different experts during the discussion phase. Fundamentally, the idea behind hot tubbing is to foster a collective dialogue that simplifies the fact-finder's role in assessing the contentions of either party. In many ways, this process represents a significant departure from the typical adversarial type of expert testimony that is so prevalent in courtrooms and ADR proceedings today.

Is Hot Tubbing Permissible?

Before hot tubbing can be introduced into courtrooms and ADR throughout the United States, it is important to understand whether such concurrent testimony is even permissible under applicable rules of procedure. The Federal Rules of Evidence provide a framework that allows the practice of hot tubbing by providing the court the power to manage the presentation of testimony and to question witnesses. Indeed, there is no prohibition in the Federal Rules of Evidence that prevents the use of hot tubbing in the courtroom.

Similarly, there is no existing rule of arbitration that prohibits the use of alternative procedures for handling expert witnesses. There are, however, international rules and protocol

...continued on page 4

applicable to arbitrations that contemplate the possibility of hot tubbing. Under the International Bar Association Rules, for example, there are numerous provisions designed to foster cooperation among experts in the pre-hearing stages of the arbitration. One such rule states that "[t]he Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who have submitted Expert Reports on the same or related issues meet and confer on such issues." Another Rule also provides the tribunal "complete control" of the presentation of testimony during the course of the evidentiary hearing.

Most notably, Article 8(2) of the International Bar Association Rules considers the use of concurrent expert witness testimony during the hearing. In pertinent part, the rule holds that the "Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses presented by different Parties be questioned at the same time and in confrontation with each other." Accordingly, this rule permits all expert witnesses to be subjected to questioning at the same time as is done in the hot tubbing process. As such, Articles 5 and 8 of the International Bar Association Rules envisage the use of hot tubbing to streamline and simplify expert testimonies.

Additionally, although the Chartered Institute of Arbitrators Protocol does not specifically mention whether expert witness conferencing may take place during the hearing, it does implicitly adopt the rules promulgated by the International Bar Association. Further, the Chartered Institute of Arbitrators Protocol, akin to the International Bar Association, also permits conferencing at pre-hearing stages so that "before any hearing the greatest possible degree of agreement between the experts" is established. Accordingly, the Protocol seeks to foster expert consensus by promoting the exchange of draft outline opinions and facilitating meet and confer sessions prior to the hearing. Even during the hearing itself, the Protocol explains that "[t]he Arbitral Tribunal may at any time, up to and during the hearing, direct the experts to confer further and to provide further written reports to the Arbitral Tribunal either jointly or separately." While the Chartered Institute of Arbitrators Protocol may not be as straightforward as the Internal Bar Association Rules, it would seem the Protocol at least permits the use of hot tubbing should the arbitrator deem it appropriate.

Lastly, while arbitration through the American Arbitration Association ("AAA") or in connection with a dispute before the Armed Services Board of Contract Appeals ("ASBCA") or the Civilian Board of Contract Appeals ("CBCA") may not expressly reference the use of hot tubbing, the arbitrators are granted broad authority to alter the proceedings to expedite the resolution of the dispute. Specifically, Rule 32 of the AAA Commercial Arbitration Rules and Mediation Procedures explains that an arbitrator has the authority to vary the procedure by which witnesses are examined "provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case." As for the various boards of contract appeals, the applicable forum rules and federal laws grant wide latitude for the arbitrator to conduct the arbitration in an informal manner that will yield expeditious resolution of the matter.

Given the broad discretion provided by the different methods of arbitration under international and domestic tribunals, hot tubbing certainly is a potential method of quickly and efficiently conducting expert testimony in both the courtroom and ADR.

Although hot tubbing has tremendous potential, its use in practice is often limited by those implementing it. Attorneys may resist the use of hot tubbing because they do not want to relinquish their control over the adversarial process. Also, given that the success of hot tubbing often rests on the arbitrator's or mediator's ability to structure and control the process, attorneys may be unwilling to abandon their conventional approach for this seemingly riskier method of expert testimony. Indeed, hot tubbing may result in the fact-finder being persuaded simply by the more articulate or more authoritative personality, or may result in the expert inadvertently delivering a message that harms the client's interests. Thus, independent, neutral expert testimony usually only occurs in the United States where it is either imposed by the court, strongly recommended by the arbitrators, or agreed to because both parties believe the neutral testimony will be harmless or mutually beneficial.

Nevertheless, parties should be mindful of the distinct advantages and disadvantages concurrent expert testimony offers in trial and ADR settings. While an attorney may be hesitant to give up his or her control over the process, hot tubbing can certainly offer a more unique approach to expert testimony that may be more beneficial to his or her client in the

long run. That said, hot tubbing also has several drawbacks that should also be weighed in light of the circumstances surrounding the trial or ADR.

CONTRACTS

2017 revisions To The AIA's General Conditions

by Stephanie M. Rochel, Associate

This year, the American Institute of Architects (AIA) revised the A201 series of standard Contract Documents for the first time in a decade. This article is the first in a series of articles that will highlight and discuss some of the more significant 2017 revisions.

The 2017 revisions impact the roles, rights and responsibilities of the various participants on construction projects, including owners, architects, contractors and subcontractors. AIA Document A201-2017 General Conditions of the Contract for Construction replaced the previous 2007 General Conditions. A201-2017 is adopted by reference in the AIA's Conventional (A201) family of documents – which includes the agreements between the Owner and Architect, the Owner and Contractor, and the Contractor and Subcontractor for design-bid-build projects. In revising the documents, the AIA Documents Committee attempted to provide standardized general conditions that follow recent trends in the construction industry, including changes in the law. It is important for contracting parties to understand the revisions to the A201 series of standard Contract Documents, whether the parties intend to use the standard form documents as written or to negotiate and modify their terms.

Notice And Communication

The 2017 version of A201 requires that all agreements must be in writing, including subcontracts. See Section 5.3. Relatedly, all notices under the Contract exchanged between the parties must be "in writing." Section 1.6. In addition to requiring written notice, the General Conditions set forth the various forms of service for notices. Notably, bucking the trend in modern business practice, A201-2017 does not permit Notices of Claims to be served by email. The permitted forms of service of Notices of Claims are described in Section 1.6.2.

A201-2017 reduces the time period within which the Contractor must notify the Owner and Architect of discovered, concealed or unknown conditions. The A201-2017 notice period is 14 days. The previous notice period was 21 days. Section 3.7.4.

A201-2017 facilitates direct communication between the Owner and the Contractor, rather than requiring that all communications go through the Architect. The parties must, however, include the Architect on any communications that relate to the Architect's services or professional responsibilities. The Owner is obligated simply to notify the Architect of Project-related communications when they do not relate to the Architect's services or professional responsibilities. Section 4.2.4.

A201-2017 permits the Contractor to reject minor changes issued by the Architect when and if the Contractor believes that a minor change will impact the Contract Price and/or the Contract Time. The Contractor's failure to object to a minor change will result in a waiver of the Contractor's claim for adjustment based upon the minor change. Section 7.4.

Financing

An Owner's ability to fulfill its financial obligations can be unclear to the Contractor, particularly given that owners are often single-purpose, limited liability corporations (LLCs).

...continued on page 6

Consequently, A201-2017 assists contractors in obtaining financial information about owners. Section 2.2 directs the Owner to submit "reasonable evidence" of its ability to fulfill the Contract's financial obligations in response to a written request received from the Contractor. The Owner's obligation to provide this information is continuing, and the Contractor can invoke its right to request financial information during its performance on the Project under certain conditions. Additionally, the Owner must provide the Contractor with prior written notice of material changes to its financial arrangements. The Owner's failure timely to provide the evidence of its financial condition may entitle the Contractor to increases in the Contract Time and Contract Sum. A201-2017 also obliges the Contractor to treat the Owner's financial information as confidential.

Insurance And Bonds

A201-2017 shifts a number of the insurance provisions in the previous version of A201 to the Insurance and Bonds Exhibit attached to the Owner-Contractor agreement. The insurance and bonding requirements mandate that the Owner identify the sub-limits on its Builders Risk policy. Insurance and/or bonds must be issued by companies lawfully licensed to issue insurance and/or bonds where the Project is located. See Article 11.

Warranty

Section 3.5.2 of A201-2017 specifies that the Contractor's warranties are for the Owner's benefit. The provision requires that "material, equipment, or other special warranties required by the Contract documents" be issued in the Owner's name or otherwise be transferable to the Owner.

Schedules

Section 3.10.1 of A201-2017 sets forth additional requirements for details to be included in the Contractor's construction and submittal schedules.

The Contractor must submit changes to the Schedule of Values to the Architect, which will be used to evaluate applications for payment. Additionally, the Contractor must substantiate changes to the Schedule of Values with data satisfying to the Architect. Section 9.2.

Termination

In the event the Owner wrongfully terminates the Contract for default or for cause, A201-2017 provides that the Contractor may recover the following from the Owner:

- payment for the Work executed;
- reasonable overhead and profit on Work not executed; and
- direct costs incurred by reason of such termination.

Section 14.1.3. On the other hand, in the event the Owner terminates the Contract for convenience, the Contractor's recovery from the Owner includes:

- payment for Work properly executed;
- direct costs incurred by reason of the termination; and
- the termination fee, if any, set forth in the Agreement.

Section 14.4.3. The Owner-Contractor agreements set forth the "termination fee" and require that the parties establish a "termination fee" payable if the Owner terminates the Contractor for convenience.

The AIA notes that the standard AIA Contract Documents may require modification to comply with state or local laws, especially as they relate to professional or contractor licensing, building codes, taxes, arbitration and indemnification. Users are encouraged to consult with counsel before completing or modifying any AIA document.

Don't Risk Losing Your Rights – Comply With Contractual Notice Requirements

by Mark Rosencrantz, Partner

Introduction

It is widely accepted in the construction industry that contracts are an important tool for establishing rights and protections for all parties involved. In fact, there is perhaps no industry in which they are utilized more for that purpose than construction. Essentially all construction projects from large multi-million dollar public infrastructure jobs to small private home renovations always generally involve at least a simple contract.

Despite that, it is less common to see companies invest significant time and effort into making sure they follow and comply with all of the provisions in their contracts. One of the key problem areas for many contractors is notice provisions. Frequently contractors simply do not have sufficient controls in place to insure that claims for additional time or money are promptly submitted. Notice issues can be critical in other areas as well. For example, some contracts require contractors to dispute notices they receive within a specified time, or to invoke certain other rights within a certain time frame.

Traditionally many contractors have operated under the assumption that as long as they substantially comply with notice provisions, or if the party they have a contract with directed extra work or knows a delay claim is on the way, they have done enough to preserve their claims. However, a growing body of case law is beginning to require strict compliance with contractual notice provisions, and to impose results that can be harsh on contractors who fail to meet the actual obligations.

The Traditional Majority View

Traditionally, many lawyers and contractors have viewed contractual notice provisions as generally not requiring strict compliance. As a federal court in Hawaii recently wrote:

> Many states, as well as federal contract law, have adopted a purpose based interpretation of such contractual notice provisions. Under this liberal approach, notice provisions are typically not strictly enforced absent evidence that the party claiming no notice was materially prejudiced by not receiving it.

As described by a leading legal treatise, the policy behind this interpretation is to protect contractors who perform extra work or suffer delays, while making sure that parties against whom claims are being made have a fair opportunity to:

> (1) [A]ssess the implications and potential liability that may be created; (2) investigate whether the claimed item truly is "extra" to the original contractual undertaking; (3) document costs incurred in performance of the extra work; and (4) fairly adjust the contract price before memories fade, documents are lost and the facts recede into the "construction haze."

Put simply, under this approach so long as the party evaluating the claim knew it was coming and was able to sufficiently investigate what occurred and why, courts have generally believed it unfair to allow one party to receive a benefit it did not pay for, whether that be extra work, changed work, or not having to pay for delays the contractor suffered but did not cause.

Some Courts Are Rejecting The Majority View In Favor Of Strictly Applying Notice Claims

Some courts have retreated from this view, believing instead that parties should be held to the literal terms to which they contract. One example is the Washington Supreme Court, who issued the 2003 *Mike M. Johnson, Inc. v. County of Spokane* opinion that shocked many in the construction industry. In that case, Mike M. Johnson ("MMJ") was the general contractor on two sewer contracts for Spokane County. Both contracts contained mandatory procedures for claims for additional sums or time.

...continued on page 8

On one of the contracts, MMJ encountered delays due to buried telephone lines. Although MMJ sent the County a letter indicating that it was being delayed and incurring additional costs, it did not strictly follow the claim procedures in its contracts.

As a result, the County refused to pay MMJ for its claimed extra costs or time despite having attempted to negotiate a time extension. MMJ then sued. The trial court dismissed MMJ's claim for failure to follow the mandatory claims procedures. Although the Court of Appeals reversed the decision, the Washington Supreme Court reinstated it.

In making its decision, the Washington Supreme Court made several observations. First, it held that: "Washington law generally requires contractors to follow contractual notice provisions unless those procedures are waived." It went on to rule that: "A party to a contract may waive a contract provision, which is meant for its benefit, and may imply waiver through its conduct.... Waiver by conduct, however, "requires unequivocal acts of conduct evidencing an intent to waive." The court went on to hold "that 'actual notice' is not an exception to contract compliance."

The court expressly rejected prior case law more in line with the majority view, which had held that:

> [T]he [owner] became immediately aware of the changed conditions as soon as they developed and ordered the contractor to perform the changes and extra work involved ... [u]nder such conditions, the county cannot defeat recovery by a contractor even if no written notice was given.

In August of 2017 the Michigan Court of Appeals reached a similar decision in *Abhe & Svboda Inc. v. Michigan Department of Transportation*. There, the contract had specific provisions for requesting time extensions. It also provided for "liquidated damages in the amount of $3,000.00 a day for each calendar day by which completion of the project was delayed."

Ultimately, Abhe & Svboda delivered the project significantly late, and the Michigan Department of Transportation ("MDOT") imposed liquidated damages for 644 days. Abhe & Svboda then filed suit against MDOT, arguing that it encountered significant delays outside its control, including among others MDOT's "failure to approve a prerequisite to work in a timely manner." Abhe & Svboda argued that:

> [I]t and MDOT "engaged in numerous discussions throughout the project which led ASI to believe that MDOT would fairly and equitably address these issues at the end of the project;" and plaintiff specifically asked MDOT, in writing, by telephone, and in person, to waive the liquidated damages.

The trial court dismissed Abhe & Svboda's claims on the basis that it failed to comply with the mandatory process for claiming a time extension. The Michigan Court of Appeals then affirmed the dismissal, observing that:

> Because plaintiff [Abhe & Svboda] did not make a timely request for an extension of time, defendants [MDOT] did not breach the contract by declining to grant any such request. Likewise, because there is no persuasive indication that defendants [MDOT] did not take the contract seriously, there is no reason to believe that defendants [MDOT] waived the liquidated damages provision.

Given this ruling, Abhe & Svboda lost both the ability to request an extension of time, and to argue against MDOT's imposition of $3,000.00 a day in liquidated damages.

While cases such as these are not the rule, they have occurred in other courts as well, such as Virginia and New Hampshire, and contractors should keep them in mind when administering contracts.

Contractors Should Carefully Review Notice Provisions Of *Force Majure* and Related Clauses

The notice provisions in *force majure* clauses may become the subject of substantial litigation in the near future. Given, among other issues, the significant impacts caused by Hurricane Harvey in Texas, Hurricane Irma in Florida, and other storms faced this year, it is clear that many construction projects across a wide swath of states have and will suffer from significant damage and delays not caused by contractors or owners. What is less certain is who will pay for such delays and related impacts.

Force majure is a Latin term that means "superior force." *Force majure* clauses, which are commonly found in construction contracts, operate to free both parties from their obligations, as well as liability from failing to meet their obligations, where an extraordinary event or circumstance beyond the control of the parties, such as a war, strike, riot, or

an event described by the term Act of God – typically considered to be hurricanes, floods, earthquakes, volcanic eruptions, and the like – prevents one or both parties from fulfilling their contractual obligations. Generally, such clauses do not excuse a party like a contractor from completing a project, but do provide for reasonable time extensions. Because *force majure* clauses involve extraordinary circumstances very rarely encountered, parties frequently neglect to take the time to understand how they work. And even when parties do, the impacts of an event like a hurricane often divert attention to other more immediate issues.

However, *force majure* clauses frequently contain language requiring a party like a contractor to provide timely notice that a *force majure* event has occurred, and even to include a reasonable estimate of the anticipated delay. Failure to timely provide notice of a *force majure* event, even where everyone involved knows of the event, could cause a contractor to become liable for delays associated with the event.

Conclusion

Contactors with notice provisions in their contracts would be well-advised at the beginning of each project they perform to take their contract, make a checklist of all notice obligations and their related deadlines, and to designate a project manager or other similar person to be in charge of monitoring the project and making sure timely notices are given. Although doing so can certainly create more work, the downside of failing to provide adequate notice can, as some contractors have found, result in multi-million dollar losses.

BANKRUPTCY

Filing A Proof Of Claim In A Bankruptcy Case: Rules Update And Other Tips That Every Potential Creditor Needs To Know

by Marguerite Lee DeVoll, Associate

Depending on the type of bankruptcy case, either Rule 3002 or Rule 3003 of the Federal Rules of Bankruptcy Procedure (the "Rules") will govern whether and when you, as a potential creditor, secured or unsecured, need to file a proof of claim. Rule 3002 governs the filing of a proof of claim in chapter 7, 12, and 13 cases; Rule 3003 governs the filing of a proof of claim in chapter 9 and 11 cases. This article provides an overview of Rule 3002 and its upcoming changes, an overview of Rule 3003, and a discussion of some common pitfalls for creditors regarding the claims process in general.

Rule 3002(a) (Chapter 7, 12, And 13 Cases)

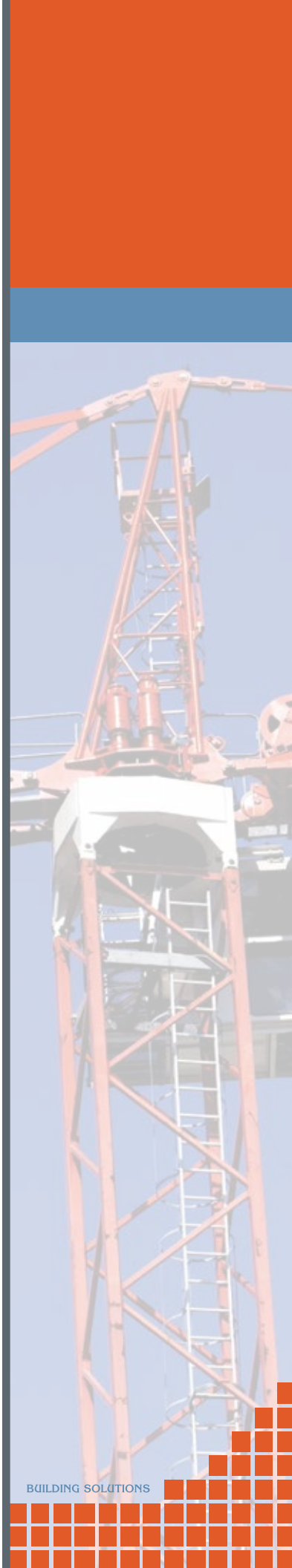
On December 1, 2017, several amendments to Rule 3002 will take effect that will impact both the requirements and deadlines for filing a proof of claim in chapter 7 (individual and business liquidation), 12 (family farmer/fisherman), and 13 (individual consumer reorganization) bankruptcy cases. These amendments will affect creditors for all chapter 7, 12, and 13 cases filed on or after December 1, 2017.

- The Requirement To File A Proof Of Claim: Pre- And Post-December 1, 2017

Under the pre-December 1, 2017 version of Rule 3002(a), only two types of creditors are required to file a proof of claim: unsecured creditors and equity owners. Secured creditors are not required to file a proof of claim.

Starting December 1, 2017, Rule 3002(a) will require ***all*** creditors in chapter 7, 12, and 13 cases to file a proof of claim. The purpose of this change is to address issues that have arisen where secured creditors have failed to file a proof of claim in such cases.

...continued on page 10



- Consequences For Not Filing A Proof Of Claim

Under both versions of Rule 3002(a), the failure of an ***unsecured*** creditor to file a proof of claim has the same result: the creditor would not receive a distribution from the debtor's estate. In contrast, the pre-December 1, 2017 version of Rule 3002(a) did not clearly delineate what happened to a secured creditor's claim if it failed to file a proof of claim. As a result, courts disagreed over how to treat a secured creditor that failed to file a proof of claim.

For instance, courts have struggled with reconciling section 506(d) of the Bankruptcy Code with Rule 3002(a). Section 506(d) of the Bankruptcy Code provides that the failure to file a proof of claim does not void the secured creditor's lien on the property securing its claim. Consequently, most courts have held that if a secured creditor failed to file a proof of claim, its lien against a piece of property would nonetheless attach to the proceeds of the sale of that property. Some courts, however, have held that a failure to file a proof of claim may, in fact, cause the secured creditor to lose its lien against the property.

Another issue has arisen where a creditor that is undersecured – *e.g.*, where the amount of a secured creditor's claim exceeds the value of the property securing the claim – failed to file a proof of claim. Given that only a portion of its claim is secured, the undersecured creditor should have filed a proof of claim for at least the unsecured portion of its claim – *i.e.*, the amount of the claim in excess of the value of the property. However, such undersecured creditors have often failed to file the proof of claim required of unsecured creditors and therefore have been denied a distribution on the unsecured portions of their claims.

The amendments to Rule 3002(a) are intended to address and provide clarity regarding such issues. In particular, starting December 1, 2017, ***all*** creditors, including a secured creditor, must file a proof of claim in order to have an allowed claim in chapter 7, 13, or 12 bankruptcy cases. The imposition of this additional requirement upon secured creditors could serve to help them by reducing the likelihood of total loss on any portions of their claims that prove to be unsecured. Rule 3002(a) was further amended to reflect the provisions in section 506(d) of the Bankruptcy Code, specifically to clarify that a secured creditor's failure to file a proof of claim does not void its lien.

- When To File: Pre- And Post-December 1, 2017

The amendments to Rule 3002 also impact the calculation of the deadline to file a proof of claim in chapter 7, 12, and 13 cases. In voluntary chapter 7 and chapter 12 and 13 cases, Rule 3002(c) previously calculated the deadline to file a proof of claim as 90 days after the section 341 meeting of creditors, which usually occurred 30 or more days after the case-filing date. Under the amendments, the deadline is now shortened to 70 days after the case-filing date.

Similarly, the deadline for filing a proof of claim in an involuntary chapter 7 has also been changed. Previously, the deadline to file a proof of claim was 90 days after the section 341 meeting of creditors. Under the amendments, the deadline is now 90 days after entry of the order for relief – *i.e.*, the day the court approves the involuntary filing.

In addition, Rule 3002(c) now imposes a clear deadline for filing a proof of claim when a case is converted from another chapter, *e.g.*, from chapter 11 to a chapter 12 or 13 case. The new deadline is 70 days after entry of an order converting the case to a chapter 12 or 13 case. The changes to Rule 3002(c) regarding when a case is converted are important, particularly when a case is converted from a chapter 11, because as discussed below, chapter 11 cases have different deadlines and requirements for filing a proof of claim.

Rule 3003 (Chapter 9 And 11 Cases)

The existing Rule 3003 governing the requirement to file a proof of claim in chapter 9 and 11 cases will remain unaffected following the amendments taking effect on December 1, 2017. Nonetheless, the requirements for whether and when to file a proof of claim in chapter 9 and 11 cases are not straightforward and require diligence and attention to the debtor's filings with the court, as well as any applicable court orders.

- The Requirement To File

In general, under Rule 3003 a creditor is not required to file a proof of claim in a chapter 9 or 11 reorganization case if the debtor lists that creditor on its schedule of liabilities ***and*** the creditor's claim is listed as undisputed, not contingent, and liquidated. In contrast, a creditor must file a proof of claim if the debtor

does not list the creditor's claim on the schedule of liabilities ***or*** the claim is listed as disputed, contingent, and/or liquidated. Similar to Rule 3002, the failure to file a proof of claim, if one is required, will prevent the creditor from receiving a distribution from the debtor's estate. In addition, the failure to file a proof of claim, whether or not required, can impact the creditor's other rights in a chapter 9 or 11 case.

In a chapter 9 or 11 case, the goal is for the debtor to reorganize its affairs. As such, the debtor is required to propose a plan explaining how it will reorganize its affairs and pay its creditors. With some exceptions, creditors are generally entitled to vote on the plan. One of those exceptions occurs, however, where the creditor is required to file a proof of claim under Rule 3003 and fails to file such a claim. Consequently, where a creditor that is required to file a proof of claim fails to do so, it loses its ability to have a say in how the debtor reorganizes its affairs.

Even if the creditor is not required to file a proof of claim, the creditor should generally file a proof of claim. Under Rule 3003, the debtor's schedule of liabilities is *prima facie* – correct until proven otherwise – evidence of the creditor's claim. In other words, if a debtor lists you as an unsecured creditor with a $100,000 claim, but you are actually a secured creditor with a $100,000 claim, unless you file a proof of claim you could be treated as and only have the rights of an unsecured creditor. In contrast, if you are improperly scheduled as a secured creditor but in actuality are an unsecured creditor with the largest claim, then you may be eligible to participate on the committee of unsecured creditors, which guides the reorganization process. Serving on the committee of unsecured creditors has some benefits, however, in exchange for those benefits the members of the committee have fiduciary duties to the other creditors in the bankruptcy case. As such, whether one should serve on a committee of unsecured creditors varies from case-to-case and depends on the facts of each individual case. Additionally, whether one should file a proof of claim different from what is listed on a debtor's schedule of liabilities also varies from case-to-case and depends on a variety of factors.

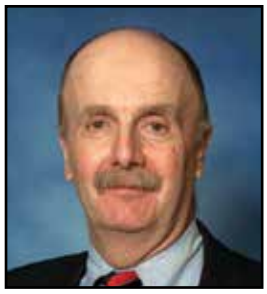
- When To File

Rule 3003 does not set a clear deadline for filing a proof of claim. Instead, Rule 3003 leaves it to the court to fix the deadline for filing. Sometimes the deadline for filing is contained in a chapter 9 or 11 plan. As such, it is important for a creditor in a chapter 9 or 11 case to consult with counsel to ensure that you meet all deadlines for filing a proof of claim.

Conclusion: Beware Of Common Pitfalls In The Claims Process

The Federal Rules of Bankruptcy Procedure dictate whether a proof of claim is required and when to file a proof of claim in a bankruptcy case. Simply following the Rules, however, does not guarantee that you will receive a distribution from the debtor's estate, or that you will receive the amount to which you are entitled. For instance, as noted above, your rights may be materially affected depending on whether you are considered secured, undersecured, or unsecured. Further, if you are determined to be an oversecured creditor – *i.e.*, the amount of your claim is less than your secured collateral – then you may be entitled to recover your post-bankruptcy petition attorneys' fees from the sale of your collateral. Consulting with a bankruptcy attorney will help you maximize your recovery and navigate the many potential pitfalls attendant to the bankruptcy claims process.

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**



Watt Tieder Does Oktoberfest

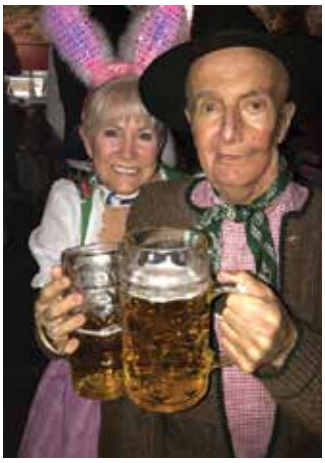
by John B. Tieder, Jr., Senior Partner

Those of you who receive this newsletter should also receive, usually in early August, an invitation to Watt Tieder's annual Oktoberfest celebration in Munich (if not, please contact the editors and you will be added to the list). Space is limited so an early acceptance is always a good idea. Oktoberfest in Munich is hard to describe in words. I can think of no comparable event in the U.S. Carnival in Rio de Janeiro may approach it, but that is usually a single bacchanalian night while Oktoberfest lasts for 16 days and nights. Describe the indescribable - I will try.

First, the history. For those of you who know Germany, the State of Bavaria is the home of many of Germany's best beers and festivals. Oktoberfest started as a public celebration of the marriage of the Crown Prince Ludwig of Bavaria to Princess Therese von Sachsen-Hildburghausen on October 12, 1810. The public was treated to beer in a large field near the city, now known as Theresienwiese. It was thought that everyone enjoyed it so much that it became an annual event. The event still takes place at the Theresienwiese but its name has been shortened to "Wiesen."

The Wiesen abuts the city limits of Munich and is readily accessible by the S-Bahn. Each of the major Munich, and only Munich, breweries has at least one "Festhalle" at the Wiesen. The breweries are Spaten, Pschorr, Löwenbräu, Paulaner, Augustiner, Hacker-Pschorr, and

Hofbräu. The Festhalles are sometimes referred to as tents, and in fact they are made of canvas, but placed over a permanent wooden structure. Each tent has seating for up to 5,000 people at closely spaced tables and benches with seating for another 2,000-3,000 just outside the tent. In the center of each is a bandstand. One would think that with seating of up to 5,000 and two seatings a day (2:45 and 5:45), getting a reservation could be easy. In fact, it is virtually impossible, and reservations are typically made a year in advance. You will have a better chance of getting a reservation if the party is a group; individual or couple reservations are virtually impossible.



So what does one do at Oktoberfest? The first thing is proper dress – all the locals wear their local attire which is known as "Tracht;" dirndls for the women; lederhosen and either a blue or red striped shirt for the men. These are not costumes but local dress worn regularly by the Bavarians for special and formal occasions similar to the full "kilt" attire worn by the Scots. Here is your correspondent and his wife properly attired.

As a visitor, you will feel significantly out of place without at least some portion of the Tracht clothing. Certainly if you come as our guest, Tracht is strongly encouraged. If you want the best, your first stop in Munich should be the London-Frey store. Lederhosen (literally translated as "leather pants") are made of thick, high quality leather, typically deer skin. They will last for generations and many locals are the proud owners of generations old lederhosen. By the time you add in the proper socks, suspenders, shirt and hat, expect a bill in excess of 1,000 euros. Dirndls are in the same range. Cheaper versions are readily available and can even be ordered from the internet. Dressed in this finery, you then sit elbow-to-elbow at a cramped table. The beer is specially brewed for Oktoberfest and served in one liter mugs (or mas). The pictures of waitresses delivering up to ten mas are not exaggerated (you can try yourself but it is near impossible, even if the mas is empty). For the first half-hour, you drink your first mas and perhaps eat the Oktoberfest food specialty – grilled chicken. After the first mas and for the next several hours you are standing on your seats (benches) and dancing and singing with the other 4,999 participants. You start with your own crowd but you often find a new space at an adjacent table. Every 10-15 minutes, the band sings the Gemütlichkeit song which ends in "Eins, zwei, drei: Prosit" at which time you toast whoever is within arm's reach. One of the miracles of Oktoberfest is the always full mas. Every time you set it down, a full one appears. Time seems to stand still and before you know it 4-5 hours have elapsed and it's closing time.

The atmosphere is one of joy. Despite tens of thousands of at least partially inebriated people, there is virtually no bad behavior. In almost 30 visits, I have seen only one fight and that was between two "kilt," not lederhosen, wearers. This altercation lasted all of 10-15 seconds before the always present, but never intrusive, security forces arrived and escorted the combatants to the exit.

...continued on page 14

Another tradition is "silly hats." There is a new one every year. This year it was the "dancing chicken." These fashion statements can be purchased from vendors who wander their way through the crowd. After a few mas, 40 euros for a silly hat just feels right. Below are a few photos of partners from Watt Tieder and HFK Rechtsanwälte LLP (our Munich affiliate firm), along with their families. Some of you who attended will notice that there are no photos of you or indeed any non-Watt Tieder or HFK persons or family members. What happens at Oktoberfest, stays at Oktoberfest.

Oktoberfest is always the last two weekends of September and the first weekend of October for a total of 16 days. Although some years are hot while others are cold and rainy, the typical weather is sunshine with blue skies and temperatures of early autumn. Against this magnificent background, we developed a full weekend. We arrive on the Friday before the opening Saturday. After a short nap, we go to the Seehaus in the Englisher Garten, a beer garden on the shores of a lake. Saturday is the official opening; a short parade from the center of Munich to the Weisen. The burgermeister is accorded the honor of tapping the first wooden keg of special Oktoberfest beer by hammering a spigot into it. The burgermeister takes the first mouthful and the party begins. We have little planned for that day, but like to watch the opening ceremony and then retire to one of the beer gardens which proliferate in Munich. We also often have a group dinner.

The official program begins on Sunday morning when we meet at the offices of HFK for a private viewing of the annual parade and a typical Munich breakfast. The parade is called the Trachten und Schützenzug, which consists of groups of people and bands in traditional clothing, a beer wagon from each of the Festhalles, and often the German Chancellor (although Merkel did not attend this year). HFK's office is on the second floor directly overlooking the parade route. The Munich breakfast is white sausage and wheat beer which must be eaten before 11:00 A.M. On Monday, we have a seminar on a current issue of international construction and arbitration law. This is followed by a catered lunch. After lunch, everyone leaves to don their Tracht and we meet at the designated Festhalle. After that – drink, eat a chicken, dance and sing.

The pictures in this article should give you some hint of the joy of this annual event. The City of Munich is one of the world's undiscovered treasures. The residents are friendly and kind. I can hardly count the acts of kindness and generosity which have come my way over my years of attending. If heaven is a projection of our fondest wishes, my heaven would be Munich. Even if you have never had a beer in your life, Munich is worth a visit. RSVP early as we generally limit attendance to 24-30 guests a year. As one client told me – "This is a life changing experience."

FIRM NEWS

Honors

U.S. News and World Report - Best Law Firms 2018

Watt, Tieder, Hoffar & Fitzgerald, L.L.P. is once again ranked nationally as a Tier 1 Law Firm by **U.S. News and World Report** in Construction Law and Construction Litigation. **Watt Tieder** is also recognized as a Tier 1 Firm in Washington, D.C. for Arbitration, Mediation, Construction Law and Construction Litigation, as well as in Orange County, California for Construction Law and Construction Litigation.

U.S. News and World Report - Best Lawyers 2018

The following **Watt Tieder** attorneys were named among the Best Lawyers in America for 2018: **Lewis J. Baker**, **Christopher J. Brasco**, **Shelly L. Ewald**, **Robert M. Fitzgerald**, **Vivian Katsantonis**, **Jennifer L. Kneeland**, **Robert C. Niesley**, **Kathleen O. Barnes**, **Edward J. Parrot**, **Carter B. Reid**, and **John B. Tieder, Jr.**

U.S. News and World Report – Lawyer of the Year, Arbitration

Watt Tieder is proud to announce that **Lewis J. Baker** was named Lawyer of the Year for Arbitration. Attorneys with the highest overall peer-feedback for a specific practice area and geographic region are recognized. Only one attorney is recognized as the "Lawyer of the Year" for each specialty and location.

Legal 500

Legal 500 United States has recognized **Watt, Tieder, Hoffar & Fitzgerald, L.L.P.** as a top construction law firm for 2017. **Lewis J. Baker** of the McLean, Virginia office was recognized as a Legal 500 Leading Lawyer.

Recent and Upcoming Events

National Utility Contractors Association of the District of Columbia, September 13, 2017; **Jonathan R. Wright** spoke on "From the Trenches: How to Make a Profit and Protect Your Bottom Line."

2017 National Bond Claims Seminar, October 5, 2017; Greensboro, GA; **Albert L. Chollet** spoke on "Affirmative Claim Preparation and Analysis."

Bankruptcy Bar Association for the District of Maryland, October 13, 2017; Baltimore, MD; **Jennifer L. Kneeland** hosted and moderated the Bankruptcy Training Seminar.

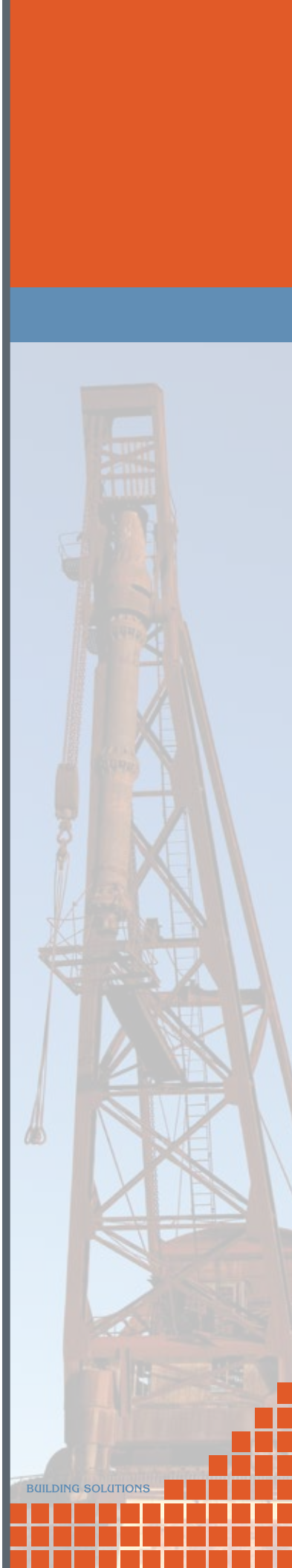
ABA Public Contract Law Section, November 3, 2017; Louisville, KY; **Mitchell Bashur** moderated a panel entitled "The Bull Ring – Small Business and Disadvantaged Business Opportunities."

Bankruptcy Bar Association for the District of Maryland, Greenbelt Chapter, November 14, 2017; Bethesda, MD; **Marguerite Lee DeVoll** co-presented on "Recent Developments in 363 Sales."

Risk Management in Underground Construction Conference, November 28-29, 2017; Washington, D.C.; **Kathleen O. Barnes** will be participating in a session on case histories and lessons learned.

ABA Public Contract Law Section, Small Business Committee and Mergers and Acquisitions Committee Joint Meeting, November 28, 2017; Washington, D.C.; "Challenges and Considerations in Small Businesses Transactions." (**Mitchell Bashur** Co-Chair).

Construction SuperConference, December 4-6, 2017; Las Vegas, NV; **Shelly L. Ewald** to speak on admission of expert witness testimony. **Christopher J. Brasco** and **Vivian Katsantonis** will be participating in a panel session entitled "Strategies for Prompt and Effective Resolution of Government Claims Utilizing the Court of Federal Claims and Board of Contract Appeals." **Kathleen O. Barnes** and **David F. McPherson** will also be participating in a panel discussion entitled "Complex or Bet the Company Case? Win the War Through Strategic Decisions on Forum Selection, Innovative ADR, ESI Management, Budgeting and More."



>> BUILDING SOLUTIONS®

WATT TIEDER

WATT, TIEDER, HOFFAR & FITZGERALD, L.L.P.

Attorneys at Law

WATT TIEDER

WATT, TIEDER, HOFFAR & FITZGERALD, L.L.P.

1765 Greensboro Station Place, Suite 1000
McLean, Virginia 22102

1765 Greensboro Station Place
Suite 1000
McLean, Virginia 22102
(703) 749-1000

2040 Main Street
Suite 300
Irvine, California 92614
(949) 852-6700

10 South Wacker Drive
Suite 2935
Chicago, Illinois 60606
(312) 219-6900

6325 S. Rainbow Boulevard
Suite 110
Las Vegas, Nevada 89118
(702) 789-3100

1200 Brickell Avenue
Suite 1800
Miami, Florida 33131
(305) 777-3572

1215 Fourth Avenue
Suite 2210
Seattle, Washington 98161
(206) 204-5800

HFK Rechtsanwälte*
Maximilianstrasse 29
D-80539 Munich, Germany
Phone 011 49 89 291 93 00

*Independent Law Firm

Global Construction & Infrastructure
Legal Alliance
91, rue du Faubourg Saint-Honoré
75008 Paris, France
Phone 33 (0)1 44 71 35 97

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**.

BUILDING SOLUTIONS