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# Watt Tieder Opens in Boston

## *Inside...*



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## GRAND OPENING

# Watt Tieder Expands Its Reach Into New England

In November, Watt Tieder opened its fifth office in Boston, broadening its industry-leading expertise to New England. The addition of four veteran attorneys, with practices in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont, advances Watt Tieder's core strength of providing client-focused service marked by boutique expertise and big firm depth. Watt Tieder's New England partners, Bradford Carver, CharCretia Di Bartolo, Paula-Lee Chambers and Jonathan Burwood, are seasoned construction, surety and commercial litigators, ranked Tier 1 by U.S. News & World Report for Construction Law and Construction Litigation.

For almost forty years, Brad has been one of the premier surety, fidelity and construction attorneys in New England, while also maintaining a top-notch commercial litigation practice. Brad received his bachelor's degree from Colgate University and his law degree from Western New England College School of Law. Brad is an experienced trial lawyer, and was recognized by Best Lawyers publication as Boston's Lawyer of the Year for Construction Litigation in 2019.

CharCretia is an accomplished commercial litigator specializing in surety, fidelity and construction. She also represents businesses and insurers in responding to various contract, employment and tort claims. CharCretia holds bachelor's and law degrees from Washington University in St. Louis. Her active litigation practice extends from Massachusetts to Rhode Island where she regularly appears before the state and federal courts and various administrative agencies.

Paula-Lee is an experienced trial attorney practicing in Maine, Massachusetts, New Hampshire and Vermont specializing in construction, surety and fidelity, insurance coverage disputes and consumer practices. She received a bachelor's degree from Merrimack College and her law degree from the Massachusetts School of Law. Paula-Lee brings her considerable experience as a former in-house claims attorney to her sophisticated litigation practice. Paula-Lee also served in the Army Reserve, SP5.

Jonathan has two decades of experience as a commercial litigator, with an exclusive focus on construction and surety matters. He holds degrees from American University's School of Public Affairs and Arizona State University's Sandra Day O'Connor College of Law. Jonathan's practice emphasizes quality and efficiency in the management of complex and high-stakes disputes, with a premium placed on practicality and client-favorable business decisions.

For over forty years, Watt Tieder has been recognized as one of the top firms for construction, surety, government contracts, insolvency, commercial litigation and transactions, in the United States and internationally. With its new office in Boston, Watt Tieder looks forward to advancing that legacy by building solutions for our clients across New England.

# Two Truths And A Lie: Getting To Know Construction Industry Trends For 2019

*by Jonathan Burwood, Partner*

Icebreakers are the worst. I think we can all agree on that point. Yet, twenty years into my career I suddenly find myself as the "new guy" at Watt Tieder, with the opening of the firm's newest office in Boston. So here I am, contributing to this newsletter for the first time, making first impressions, and wondering if icebreakers do have some value in becoming familiar with something new. Given this format, I think trust falls are out. Which has me thinking about the old icebreaker standby "Two Truths and a Lie." For those not familiar, you share three statements about yourself, two of which are true and one that is … well, you get it. And since we are all here to talk about construction, I will gladly not make this about me. Instead, let's explore "Two Truths and a Lie" about construction trends for 2019, and along the way get to know our industry a little better.

**Truth Or Lie? New Technologies Will Become Table Stakes For Staying Competitive In The Construction Industry**

The Internet of Things (IoT) is here. It's in your pocket, in your home and car, and gaining traction at construction projects everywhere. What were recently viewed as gimmicky or premium applications of technology at construction sites are quickly becoming imperatives for pricing, quality, and safety. Construction professionals are not new to gathering data critical to a project's success. But progress is lately exponential in how that data is collected and put to work. The proliferation at construction sites of technologies such as drones, RFID (radio frequency identification), GPS, Lidar (light detection and ranging – laser mapping), IR imaging, 3D printing, robots, and even smart hard-hats only scratches the surface. And though some of these technologies have been used in construction for some time, their initiation into the IoT is allowing the industry to super-leverage those tools. For example, drones were originally used to take aerial photographs and video of construction sites, most often to the benefit of marketing. Today, construction drones are equipped with and connected by the IoT to tools that move the needle on cost estimation, scheduling, security and safety. The data collected by drones is now routinely paired with systems providing virtual and augmented reality, predictive analytics (AI) and BIM (building information modeling) to drive context-based decision making from project bid to completion.

The utility and proliferation of technology in construction is without question. The same can be said about the cost of that technology, with respect to both equipment and personnel qualified to operate it. Will 2019 be the year the industry tips the scales on technology from a luxury to a competitive necessity? On one hand, the market remains ultra-competitive, profit margins are thin, and the increase in overhead associated with a push into new technologies will undoubtedly impact the bottom line. On the other hand, sometimes you have to spend money to make money. Which is to say that project owners, their finance partners, and design teams are becoming increasingly sophisticated in terms of progressive project delivery methods. In many urban areas project sites have small footprints, labor is tight, and material costs and supply chains are strained. For those reasons, the push to lean construction and "just in time" delivery is considerable, and the technology increasingly utilized at construction sites is both the cause and effect of that movement.

The high-end of the market, particularly complicated private work, already requires contractor sophistication with new technologies. Public works and more moderately priced projects admittedly do not yet have the same standards, though it is only a matter of time until a truly progressive suite of construction technology is necessary to stay competitive – in both securing work and retaining the best employees. Given the substantial learning curve and pace of growth associated with those technologies, it may be too expensive to wait.

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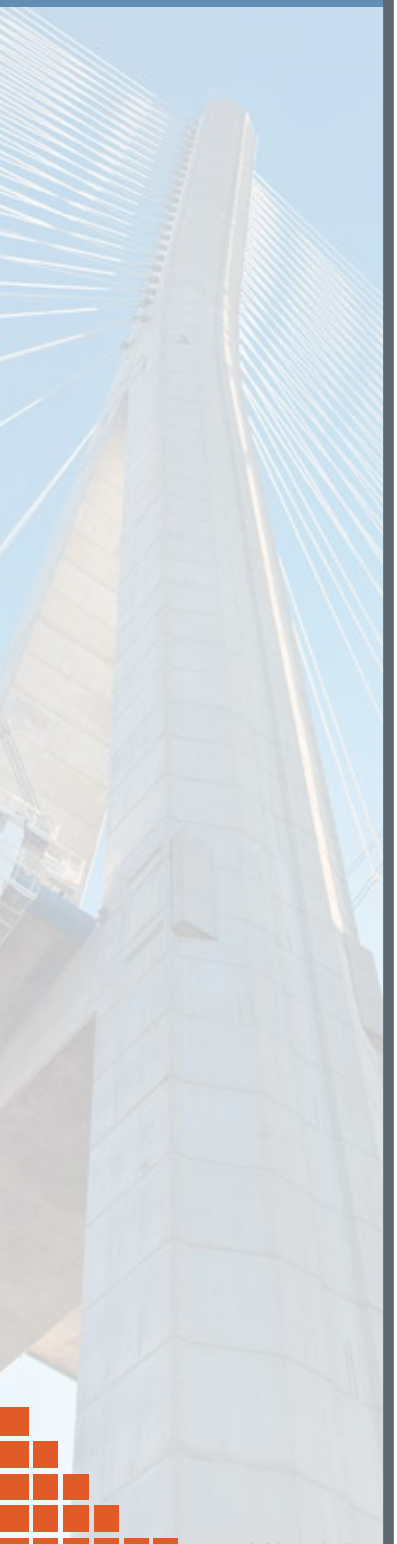

**Truth Or Lie? Increased Construction Costs Will Moderate Demand For New Construction Projects**

Since the end of the Great Recession almost a decade ago, labor, materials and market conditions have driven construction costs higher every year. During the third quarter of 2018, the Association of General Contractors estimated unemployment for workers with construction experience at a historically low 3.4%, below what economists consider full employment. The recession forced many skilled construction workers away from the industry, and a disproportionately large segment of the existing construction workforce is older. At the same time, the rate at which millennial workers are replenishing the construction labor pool is lagging, blamed largely on perceptions of the industry as slow to adapt. In that respect, adopting construction technology and addressing the labor shortage may have a lot in common. All of those forces translate to a considerable increase in labor costs. A quick solution is unlikely to present itself, and overall construction costs are likely to bear a disproportionate labor burden for some time to come.

As to material costs, tariffs and global trade tensions are most often cited as driving the steady increase in prices. Indeed, there is a growing chorus of economists downplaying the actual impact of tariffs on material costs, instead citing the self-fulling prophecy caused by the heavy media coverage of tariffs and contractors' particular sensitivity to cost uncertainty creeping into bids. Those economists maintain that, in fact, material costs are up as a result of fundamental economics, namely that the overall demand for construction projects is high. If that's the case, this trend may ultimately be defined more by the capacity of the market to sustain that demand.

The private sector has seen strong activity, but its future appears to be a toss-up. Recently, interest rates and the stock market are most often attached to the word "volatility." Underwriting for project financing remains conservative, and that mindset has leaked into the availability of contract surety credit, a factor that is more influential today given the increase in private owners requiring payment and performance bonds to mitigate default risks. A divided Congress, a peculiar political climate, and the run-up to the 2020 Presidential election do not promise stability or inspire risk.

Though speaking of our government, the prospect of public works continuing to drive construction momentum is strong. The government shut-down is over, the term "infrastructure" appears in response to literally every Google search pertaining to the future of the construction industry, and our federal, state and local governments are by far the most prolific funders of construction projects from Maine to California. And speaking of California, there are even whispers of a $5.7 billion public works project running from San Diego to Corpus Christi. Opportunity zones, an influx of federal funding into local public works, incentives for renewable energy, and a backlog of necessary education and transportation projects constitute a considerable share of today's construction demand. And though there has been very little consensus about how to fund it so far, it is widely accepted that Congress and the President will find common ground on considerable infrastructure legislation in the immediate future.

Premium labor costs are likely here to stay for now, and increased material costs may just be the price to pay for a robust construction market. So far, overall demand for projects appears to be absorbing those costs, and the broad shoulders of public construction look poised to continue supporting the industry.

**Truth Or Lie? Surety Will Continue Its Run Of Premium Growth And Low Loss Ratios**

For some time now, surety has been outperforming other financial service sectors, with years of steady and substantial growth. According to the Surety and Fidelity Association of North America, surety has seen the most growth recently in contract bonds for private construction projects. At the same time, surety is achieving historically low loss ratios, credited to advances in underwriting, prequalification, and expense efficiency. With growth in private sector bonding, and a steady diet of public works, can sureties maintain the high-wire act of strong premium and minimal losses? Surety consolidation and sophisticated approaches to leveraging risk through reinsurance and co-surety have largely supported that effort to date, though there are clouds on the horizon.

First, look no further than unstable construction costs to upset even the best underwriting. With respect to labor, the risk to a surety goes beyond the precision of its principal's bid. Labor shortages are impacting the ability of contractors to prosecute quality work on schedule, directly threatening sureties with performance obligations. And when faced with a default, sureties do not presently have the pool of historically available replacement contractors hungry to complete the work at surety friendly pricing.

Further, domestic sureties have seen recent success moving into global markets, seeking premium traditionally available to international banks. Their achievements, though, may also pose a threat in the form of international insurers now eyeing the U.S. surety market given the mandatory bonding requirement for qualifying public works, the cresting wave of infrastructure projects, and low loss ratios. Competition from financially strong international sureties, willing to take market-entry risks that domestic sureties have effectively avoided for years, may put pressure on surety underwriting, with the effect of exposing the industry to a higher risk of losses.

Surety is cyclical. Expansion ultimately leads to a peak, with contraction and a trough to follow. It is difficult to forecast if that will happen in 2019, though increased economic pressure on bonded principals, a labor shortage, a likely surge in public infrastructure works, and the threat of competition from abroad will certainly pose challenges.

**So, Which One Is The Lie?**

As it turns out, we will have to wait and see. There is likely some "truth" in each of these trends, though the prospect of any one having a considerable impact on the construction industry remains to be seen. Construction technology is no doubt on an upward trajectory, but its proliferation may not reach any sort of competitive critical mass for years to come. Construction costs are up and likely here to stay, but overall demand may be sufficient to absorb them and maintain momentum. And though surety profits presently tower over losses, what goes up must come down. Regardless of how things play out, getting to know the industry trends is important to understanding what opportunities and challenges 2019 may present.

# The Granston Memo's Ongoing Impact On FCA Litigation

***by Matthew D. Baker, Associate***

In January 2018, the U.S. Department of Justice ("DOJ") circulated an internal memo directing government attorneys to consider whether the government's interests are served by seeking the dismissal of non-intervened *qui tam* actions brought under the False Claims Act ("FCA"). The public release of the Granston Memo, the document outlining this guidance, immediately led to speculation regarding the ultimate impact of this new policy. Developments over the course of the last year have provided some insight. Although the DOJ continues to vigorously pursue potential violations of the FCA, it appears willing to consider the dismissal of *qui tam* actions that are meritless, unduly burdensome to the government, and/or counterproductive. This article explores the policy announced by the Granston Memo, its application in practice, and what contractors facing *qui tam* actions need to know about this important policy development.

**The Granston Memo**

The FCA authorizes the Attorney General to bring suit against any person who knowingly submits a false claim to the federal government. 31 U.S.C. § 3730(a). However, the FCA also permits a private person (a "Relator") to bring a *qui tam* action on behalf of the United States. 31 U.S.C. § 3730(b). The DOJ reviews all such *qui tam* actions and elects to intervene and conduct the litigation or declines to intervene and permits the Relator to conduct the litigation. 31 U.S.C. § 3730(c). Even if the DOJ declines to intervene, it still frequently must monitor and sometimes participate in the litigation.

Significantly, the DOJ is expressly authorized to dismiss *qui tam* actions "notwithstanding the objections" of the Relator. 31 U.S.C. § 3730(c)(2)(A). Prior to the issuance of the Granston Memo, this section was used only sparingly. Granston Memo at p. 1. Although

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the Relator is entitled to a hearing, the FCA fails to set forth either a standard or specific circumstance for when dismissal under 31 U.S.C. § 3730(c)(2)(A) should be granted. Courts are divided as to whether the DOJ has an "unfettered right" to dismiss a *qui tam* action under 31 U.S.C. § 3730(c)(2)(A) or whether it must show that dismissal is rationally related to the accomplishment of a valid government purpose. *Cf. Swift v. U.S.*, 318 F.3d 250, 252 (D.C. Cir. 2003) *with U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998).

Noting the significant increase in *qui tam* complaints and the demands of such cases on the government's limited resources, the Granston Memo encourages government attorneys to consider seeking the dismissal of non-intervened FCA actions when consistent with the government's interest. Envisioning the DOJ as the FCA's "gatekeeper," the Granston Memo casts 31 U.S.C. § 3730(c)(2)(A) as an "important tool to advance the government's interest, preserve limited resources, and avoid adverse precedent." Granston Memo at p. 2.

Although noting that dismissal could be sought based on factors other than merit, the Granston Memo cautioned government attorneys to be "judicious" in utilizing 31 U.S.C. § 3730(c)(2)(A). Nevertheless, the Granston Memo identified a non-exhaustive list of seven factors/circumstances supporting the potential dismissal of a *qui tam* action including:

(1) curbing meritless *qui tams*;
(2) preventing parasitic or opportunistic *qui tam* actions;
(3) preventing interference with agency policies and programs;
(4) controlling litigation brought on behalf of the United States;
(5) safeguarding classified information and national security interest;
(6) preserving government resources; and
(7) addressing egregious procedural errors.

Although noting that dismissal under 31 U.S.C. § 3730(c)(2)(A) should generally be sought close to the time of declination, the Granston Memo recognizes that such a motion may also be justified at a "later stage" particularly where there is an "intervening change" in the law or the evidence. Granston Memo at p. 8. The Granston Memo further emphasized that DOJ attorneys should consult with affected agencies and obtain their recommendation prior to seeking dismissal. *Id.*

**The Granston Memo Applied**

After releasing the Granston Memo, the DOJ shiftily moved to incorporate its guidance into other key agency documents. On September 25, 2018, the DOJ released the new U.S. Attorney's Manual (renamed the Justice Manual) which echoed the Granston Memo in urging government attorneys to consider seeking dismissal of *qui tam* actions when consistent with the government's interest. *See* Justice Manual 4-4.111. The re-issued Justice Manual restated the Granston Memo factors and also noted that a single factor may be sufficient to justify dismissal.

The DOJ has further signaled its intention to implement the Granston Memo through its actions in several high-profile cases. For example, in November 2018, the DOJ filed an *amicus* brief in *U.S. ex. rel. Campie v. Gilead* advising the U.S. Supreme Court of its intention to seek dismissal of the relator's suit pursuant to 31 U.S.C. § 3730(c)(2)(A) if *certiorari* was granted and if the case was remanded. The DOJ explained in its brief that this determination was based on its investigation and a desire to avoid burdensome discovery which could distract the affected agency from its responsibilities. In December 2018, the DOJ further sought to dismiss ten major FCA actions filed by a network of professional corporate relators alleging a fraudulent healthcare kickback scheme. *See, e.g. U.S. ex rel. Health Choice Group LLC v. Bayer Corp. et al.*, Case No. 5:17-CV-126-RWS-CMC (E.D. Tex.). After spending over 1,500 hours investigating relators' claims, the government concluded such claims lacked factual and legal support and would impose a substantial litigation burden on the United States. *See* Mot. To Dismiss at p. 7 & 15.

Additionally, several decisions over the course of the last year illustrate when the government will seek (and obtain) dismissal under 31 U.S.C. § 3730(c)(2)(A). Recognizing the government's "interest in reining in weak *qui tam* actions," the court in *United States ex rel. Maldonado v. Ball Homes, LLC*, No. CV 5: 17-379-DCR, 2018 WL 3213614, at p. *5 (E.D. Ky. June 29, 2018) granted dismissal. In *Maldonado*, the relator alleged that the defendant builder falsely certified that a newly constructed home did not have any earth fill for purposes of obtaining an FHA-insured loan. *Id.* at p. *1-2. In addition to the likely burden of litigation, the government based its motion to dismiss on the weakness of the relator's claim given the government's position that the use of earth fill would not necessarily preclude the issuance of an FHA-insured loan.

*Id.* at p. * 4. In *United States ex rel. Toomer v. TerraPower, LLC*, No. 4:16-CV-00226-DCN, 2018 WL 4934070, at *1 (D. Idaho Oct. 10, 2018), the court similarly granted dismissal. In *Toomer*, the relator alleged that the defendant contractor sought to obtain a patent on a subject invention without disclosing the same to the government as required by its Cooperative Research and Development Agreement. *Id.* at p. *1 -2. In addition to maintaining that the suit was premature, lacked merit, and would drain limited government resources, the government argued that, under the circumstances, litigation would impair or delay its work with the defendant and would discourage private companies from working collaboratively with the government in the future. *Id.* at *5.

The government has also suffered some reversals in its attempts to obtain dismissals under 31 U.S.C. § 3730(c)(2)(A). In *United States v. Acad. Mortg. Corp.*, No. 16-CV-02120-EMC, 2018 WL 3208157, at p. *3 (N.D. Cal. June 29, 2018), the court, applying *Sequoia Orange Co.*, denied the government's motion to dismiss based on the government's failure to perform a "minimally adequate investigation" of the relator's amended complaint. The government has appealed this decision.

**Takeaways For Contractors**

Following the issuance of the Granston Memo, the DOJ continues to aggressively litigate potential FCA violations. The DOJ obtained over $2.8 billion in FCA verdicts and settlements in fiscal year 2018. (The Department of Justice, "Justice Department Recovers Over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018," December 21, 2018). Most of these recoveries originated from matters which the DOJ directly pursued or in which it intervened. Nevertheless, the DOJ appears to be taking an active role in attempting to curb the worst abuses of the *qui tam* process.

Contractors facing *qui tam* litigation must evaluate whether their case may be a candidate for dismissal based on the guidance provided by the Granston Memo. The Granston Memo's author has recently cautioned that dismissal under 31 U.S.C. § 3730(c)(2)(A) will "remain the exception, not the new rule." (C. Ryan Barber, "DOJ Fraud Leader Tempers Defense Dreams of More Whistleblower Dismissals," The National Law Journal, March 4, 2019 (quoting comments by Michael Granston, Director of the Civil Fraud Section of the Civil Division of the U.S. Department of Justice)). However, cases generally lacking merit, which entail sweeping government discovery, and/or that will interfere with important agency objectives or public policies may, under appropriate circumstances, be considered by the DOJ for dismissal.

Contractors should act promptly to make their case to the DOJ for dismissal under 31 U.S.C. § 3730(c)(2)(A) since the Granston Memo cautions government attorneys against waiting until the later stages of a case to determine whether to seek a dismissal. Granston Memo at p. 8. Indeed, as discovery progresses, the potential benefit to the government of dismissal may decrease. Despite the other Granston Memo factors, lack of factual or legal merit appears to be critical to the government's decision to seek dismissal. Similarly, the potential burden that litigation is likely to impose on the government seems to carry significant weight. Negative impacts on ongoing projects, contracts, or agency objectives are all also relevant. In addition to direct communications, contractors should be mindful that their own motion to dismiss (where appropriate) may be an important means of persuading the government to consider dismissal pursuant to 31 U.S.C. § 3730(c)(2)(A).

Since the release of the Granston Memo, the DOJ has demonstrated an increasing willingness to seek dismissal of *qui tam* actions which: are determined to lack merit; impose undue burden on the government; and/or interfere with agency objectives. The DOJ continues to actively enforce the FCA. However, over the course of the last year, the DOJ appears to have embraced the Granston Memo's mandate to seek the dismissal of *qui tam* actions that are contrary to the government's interests.

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Albert L. Chollet, III

Sara M. Bour

# Delegated Design And The Black Hole Of The Inartfully Drafted Contract

*by Albert L. Chollet, III, Partner and Sara M. Bour, Associate*

Nearly forty years after the catastrophic collapse of two walkways at the Kansas City Hyatt Regency Hotel in 1981, the disaster still resonates throughout the construction industry. It remains an indelible example of the pitfalls of delegated design and highlights the importance of contractually allocating design responsibility and liability. The fallout of that disaster, however, has not curtailed the practice of delegating design. In fact, design delegation is a thriving practice in certain types of construction, driven by the desire to build faster, at lower costs and with fewer schedule constraints.

Delegated design is the relatively common practice of reallocating design responsibilities, traditionally within the scope of the architect of record, to a contractor or subcontractor. This delegation is usually accomplished by specifying performance and/or design criteria in the contract or subcontract documents. Delegated design should not be confused with a contractor's means and methods, nor should it be confused with design assist, which is generally provided by a specialized consultant to the architect of record. More importantly, delegated design should never be used as a tool for filling in the gaps of a design that were incomplete due to budget or schedule constraints. This article discusses how design responsibility, along with the attendant liability, should be addressed in complex construction agreements, including a discussion of the pitfalls of failing to address certain salient considerations when utilizing the delegated design approach to construction.

To be effective as a collaborative tool, delegated design requires clear and unequivocal language in the contract documents reflecting the intent to transfer design responsibility from the architect of record to the contractor or subcontractor for a specific portion of the contracted work. When done correctly, the owner will likely enjoy benefits of the contractor's or subcontractor's participation in the design decisions, permitting a smoother construction process with fewer cost and schedule overruns. As a tool, design delegation is especially useful for complex project systems that are engineered and fabricated by the contractor (or subcontractor) that is ultimately responsible for installation.

The practice of delegating design was informally employed in the construction industry for decades. It was not until 1997, however, that the practice was formally incorporated by the American Institute of Architects into its A201 General Conditions of Contract for Construction. Prior to 1997, the standardized documents required the "contractor to produce the result 'intended' by the contract documents," including the project drawings, specifications, and addenda. When compared to the provisions contained in the current version of the AIA A201 document, the previously utilized language clearly leaves room for different interpretations regarding who bears responsibility for faulty design or resultant injury. That, in turn, led to substantial litigation over liability. The current AIA documents contain express provisions permitting the design professional of record to delegate specific aspects of the design to a contractor. The AIA A201 provides that the owner and architect shall specify "all performance and design criteria that the contractor's professional services must satisfy where the contract documents specifically require the contractor to provide professional design services or certifications related to systems, materials or equipment." The AIA A201 also entitles the contractor to "rely on the adequacy and accuracy of the performance and design criteria provided in the contract documents."

Despite the architect of record's responsibility to review the design specification, the AIA A201 document narrows the scope of the architect's overall responsibility. In that regard, the AIA A201 requires the architect to review and approve of the contractor's delegated design, but only "for the limited purpose of checking for conformance with information given and the design concept expressed in the contract

documents." Moreover, the AIA A201 expressly confers liability on the contractor for any deviations from the contract documents that occur without the prior approval of the project architect. The contractor may avoid this liability only if the architect provides written approval of the specific deviation as a "minor change in the work," or a change order is issued authorizing the deviation from the contract documents. Even so, the contractor remains responsible and liable under the AIA A201 for any errors or omissions in its submittals to the project architect.

Despite the revisions to the AIA A201 document and the industry's efforts to address this issue, litigation continues to ensue where the contract documents are unclear and poorly worded design delegations create a black hole of responsibility and liability for the design. To avoid this contractual no-man's land, it is critical that the contract language clearly set forth both the responsibilities and liabilities of all involved parties, including but not limited to owners, project architects, specialty designers, general contractors and subcontractors. Coordination among all contract documents is crucial. So, for example, the contract should include clear and concise language narrowly defining the scope of a specialty designer's responsibilities, and the project's description of the architect's scope of services should be narrowly tailored to avoid overlap with the specialty designer's responsibilities. The failure to avoid such overlap would muddy the waters around responsibility and provide the basis for a dispute over liability in the event of impacts stemming from a faulty design or a related injury on site. Those drafting contract language should keep in mind that project architects, general contractors and design subcontractors frequently have overlapping responsibility for the design and the approval process for any secondary designs on the project. These processes tend to expose all the project participants to a portion of the risk associated with the secondary design.

Contract documents should also specifically address which party bears the duty of professional care when design responsibility is delegated to a party other than the architect. For example, in the design-bid-build paradigm, the architect of record often assumes a duty of professional care that extends beyond project architecture, which the architect satisfies through the use of engineers. A poorly drafted contract that fails clearly to bridge the gap between the architect's scope of work, the scope of work delegated to its engineers, and the contractor's scope of work for a particular system (*e.g.*, curtain wall, deep foundation, shoring, MEP, etc.) could leave open the question of which party would be held liable for defective design. The resulting confusion could have significant cost and time impacts on the project or, worse, lead to litigation.

In addition, those drafting contract language should be well versed in and cognizant of the state laws governing the delegation of design to contractors, including those that mandate that certain liabilities remain with the project architect as a matter of law. For example, New York Regulations set forth, in pertinent part, that delegated design does not constitute unprofessional conduct where: i) the delegated design work is limited to "ancillary project components;" ii) the project architect specifies in writing all the parameters the design must satisfy; iii) the delegated design's function performs in accordance with the specifications established by the architect; iv) the contractor is licensed, or otherwise legally authorized, to perform the design work involved and signs and certifies any designs prepared; v) the architect reviews and approves in writing the contractor's designs, noting their conformance with the established specifications; and vi) the architect is required to determine, in writing, that the contractor's design conforms to the overall project design and can be integrated into such design. *See* N.Y. Comp. Codes R. & Regs. tit. 8, § 29.3 (West, 2018).

Similarly, the Florida Administrative Code specifically sets forth a project engineer's responsibilities when delegating any portion of its responsibility to a contractor. In that regard, the project engineer is required to communicate in writing the engineering requirements to the delegated contractor. The project engineer must also require the contractor to submit any delegated engineering plans and must review the submitted plans for compliance with his written engineering requirements to confirm that: i) the delegated engineering documents have been prepared by an engineer; ii) the delegated engineering documents conform with the intent of the project engineer and meet the written criteria; and iii) the effect of the delegated engineer's work generally conforms with the project engineer's design intent. The Florida Administrative Code also sets forth the framework that governs professional responsibility where multiple engineers share related design functions. *See* Fla. Admin. Code Ann. R. 61G15-30 to R. 61G15-34 (2003). Where state laws such as these govern the parties' responsibilities, specific reference to the applicable laws should be included in the contract documents to ensure that each of the contracting parties is aware of its statutorily prescribed responsibilities and liabilities.

Other issues merit the attention and consideration of the drafting parties. For

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example, some local jurisdictions require the submission of shop drawings stamped by a professional engineer in connection with permitting. In those instances where permitting is contemplated to occur before the contract is awarded or before the selection of subcontractors, suppliers and fabricators to whom ultimate responsibility for the design may be delegated, a heightened level of coordination and foresight on the part of the drafting party will be required. Similarly, the sufficiency of insurance coverages merits attention if a contractor to whom design responsibility is delegated does not ordinarily carry professional liability insurance. The contractor who retains a licensed professional to perform the delegated design work will need to secure appropriate coverage, and the owner will need to make sure that any potential gaps in coverage are closed as part of the contract requirements. The owner may also require the retention of professionals for testing on critical project systems for which design is delegated to provide an added layer of protection and quality control. The costs of such testing should be clearly addressed and assigned to one or more parties under the contract documents.

Design delegation is common in the construction industry thanks, in large part, to the potential benefits it provides, including lowering costs, improving coordination, and cutting time. The attendant risks can be high, however, if the contract documents do not define clearly the responsibilities and liabilities of each contracting party. Drafters of contract documents should also be familiar with and take care to address statutorily mandated responsibilities and liabilities, so that every contracting party is fully aware of its duties under governing law. Ultimately, the best approach to avoiding the pitfalls of delegated design starts at the beginning of the project with a clear vision, cooperation and communication between all of the project's participants.

## ILLINOIS UPDATE

Frank J. Marsico

Aniuska Rovaina

# Time Is Money: How Strict Time Limitations Can Invalidate Blanket Lien Claims Under The Illinois Mechanics Lien Act

***by Frank J. Marsico, Partner and Aniuska Rovaina, Associate***

The Illinois Mechanics Lien Act ("Act"), 770 ILCS 60, serves as a powerful tool for contractors and subcontractors who seek payment for labor and materials furnished to improve a property. While the Act (in conjunction with interpretive case law) also provides useful guidelines for whether contractors may assert a single statement claim ("blanket lien") against multiple lots under the same contract (rather than the need to apportion the total claim between multiple lots or parcels), a misapplication of those guidelines can invalidate the lien and make it unenforceable. As such, before planning to file a lien against a property with multiple lots or tracts of land, a claimant must have a clear understanding of how the Act's stringent time limitations might impact the decision as to whether a blanket or an apportioned lien claim is filed.

This article is not intended to cover all potential considerations as to whether a blanket lien claim or an apportioned lien claim should be filed. Rather, the purpose of this article is to provide a general understanding and examples of considerations that potentially impact whether a blanket lien claim or apportioned lien claim is filed.

**Requirements For A Valid Lien Under The Illinois Mechanics Lien Act**

Section 7 of the Act provides that a valid verified lien "shall consist of a brief statement of the claimant's contract, the balance due after allowing all credits, and a sufficiently correct description of the lot, lots or tracts of land to identify the same." Section 1 of the Act, in part, addresses various circumstances under which

a single, blanket (i.e., non-apportioned) lien claim can attach to more than just one single parcel or tract of land:

> [A] contractor ... has a lien upon the whole of such lot or tract of land and upon *adjoining or adjacent* lots or tracts of land of *such owner constituting the same premises* and occupied or used in connection with such lot or tract of land *as a place of residence or business*; and in case the contract relates to *2 or more buildings, on 2 or more lots or tracts of land*, upon all such lots and tracts of land ... from the date the same is due.

770 ILCS 60/1(emphasis added).

- Blanket Liens Contemplated By Section 1 Of The Act

Rarely, if ever, are two projects identical. Sections 1 and 7(b) contemplate at least five different scenarios where a contractor asserts a lien against an owner's property pertaining to the same, single contract. Section 1 contemplates the following potential scenarios:

(1) Improvements are made to only one lot or tract of land ("Scenario 1");

(2) Improvements are made to only one lot or tract of land, but the improvements made on that tract of land are: (a) part of the same "premises" of the owner that extend onto other adjacent lots (even if the claimant's improvements themselves were not made on those adjacent lots); and (b) that same "premises" extending onto the adjacent lots is also occupied or used as a place of residence or business ("Scenario 2");

(3) Improvements are made to more than one set of adjacent lots or tracts of land, and the improvements made on those adjacent tracts of land are: (a) part of the same "premises" of the owner that extend onto those multiple, adjacent lots; and (b) the same "premises" extending onto the adjacent lots is occupied or used as a place of residence or business ("Scenario 3"); and

(4) Improvements are made to 2 or more buildings that are located on 2 or more lots or tracts of land (Section 1 of the Act does not specifically reference these 2 or more buildings on 2 or more lots or tracts of land as being adjacent or non-adjacent, but the *Schmidt v. Anderson* and *Connelly* opinions below addressed four separate buildings on four separate, non-adjacent lots) ("Scenario 4").

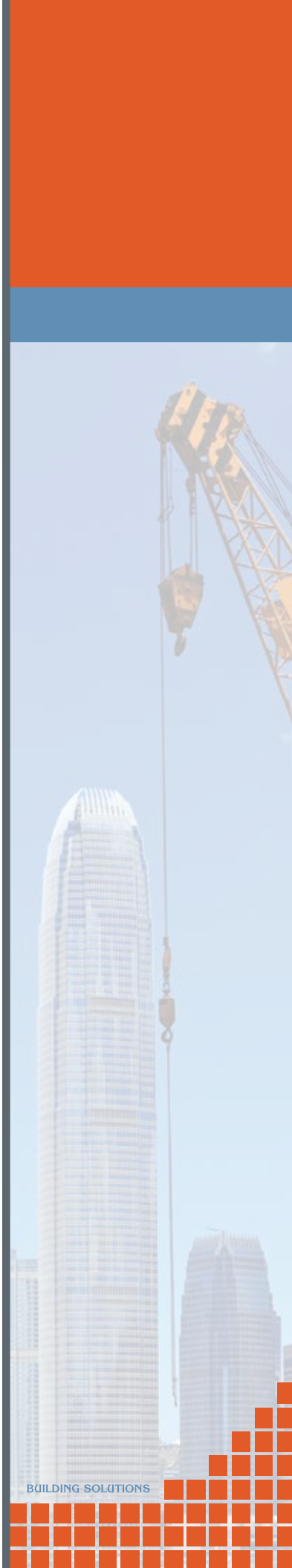
Additionally, Section 7(b) of the Act provides that for a claim involving *materials only* (and not including labor) for a number of buildings under a contract between the same parties, if the claimant can establish that the materials were in good faith delivered to one of several buildings, or to the owner or his or her agent, for the purpose of being used in the construction of any one or all such buildings falling under the same contract, then the lien shall attach to all of said buildings, together with the associated parcels or tracts, the same as in a single building or improvement. ("Scenario 5").

Regardless of which of these foregoing scenarios may apply, a contractor must, nevertheless, timely record the lien claim (i.e., within four months of the completion of claimant's work) or file suit in order for the claim to remain valid and enforceable against third parties (such as mortgagees, innocent third party purchasers of the parcel(s) in question, etc.). Specifically, Section 7(a) requires that:

> No contractor shall be allowed to enforce such lien against or to the prejudice of any other creditor or incumbrancer or purchaser, unless *within 4 months after completion*... he or she shall either bring an action to enforce his or her lien therefor or shall file in the office of the recorder of the county in which the building, erection or other improvement to be charged with the lien is situated, a claim for lien...."

770 ILCS 60/7(a) (emphasis added). However, Section 7 *itself* does not specifically require that the last date of work be included in the recorded lien claim, nor does Section 7 specify exactly how the four-month requirement applies to each of Scenarios 1 through 5 above.

Because Scenario 1 contemplates that the claimant's improvements under the contract are all performed upon a single lot or tract of land, the four-month limitation will only apply to one date, i.e., the last date of completion of work on the single lot. (Note that courts have interpreted the completion of work date as the date upon which all work essential to the completion of the contract was furnished, and the four-month period is not tolled by work that is "trivial or inconsequential," such as work that is in the nature of maintenance or correction of a completed job or punchlist work. *See DeAnguera v. Arreguin*, 234 N.E.2d 808 (Ill. App. Ct. 1968); *Miller Bros. Industrial Sheet Metal Corp. v. LaSalle National Bank*, 255 N.E.2d 755 (Ill. App. Ct. 1969); *Merchants Environmental Industries v. SLT Realty Ltd. Partnership*, 731 N.E.2d 394 (Ill. App. Ct. 2000) (whether or not such work was requested by the owner is another factor to consider)).



However, when improvements relate to or are performed upon multiple lots (or involve two or more buildings located upon two or more lots), Section 7 itself does not specifically elaborate upon how the four-month requirement applies where the last date of completion of work does or does not vary between each lot. Fortunately, the *Schmidt* and *Connelly* opinions of the Supreme Court of Illinois, discussed below, provide further guidance on these issues.

- Supreme Court Of Illinois Precedent - Blanket Liens Involving Multiple Lots

In *Schmidt v. Anderson*, 97 N.E. 291 (1911), the Illinois Supreme Court examined the four-month time limitation under the Act as it related to a blanket lien claim relating to multiple, separate, non-adjoining lots (i.e., Scenario 4 above). By way of background, the contractor (Anderson) made an oral contract with the owner (Schmidt) to install gas fittings, electric wiring, plumbing, and other improvements to *four separate houses* on *four separate lots*:

(1) *Division St. House:* Work completed middle of November, 1907 – lot sold by Schmidt and new deed recorded before November 15, 1907;

(2)&(3) *Two Prospect St. Houses:* Work completed middle of November, 1907 – lots sold by Schmidt and new deeds recorded before November 15, 1907;

(4) *Oak St. House:* Work completed March 14, 1908; lot sold by Schmidt and new deed recorded on September 23, 1908.

*Schmidt*, 97 N.E. at 292. *Anderson recorded his blanket lien claim against all four non-adjoining lots on May 14, 1908* (for a combined balance due of $1,751.95), which was: (a) more than four months after all work was completed on the Division St. and Prospect St. Houses; and (b) less than four months after all work was completed on the Oak St. House. The Supreme Court of Illinois, applying Sections 1 and 7 of the Act (which were substantially similar as enacted in 1903 as today in 2019), noted that the legislature amended the Act in 1903 to specifically allow a contractor to file a blanket, single lien claim against separate buildings on lots that were not adjacent to or adjoining each other, where the work was performed or material furnished for all of such buildings under a single contract (which is exactly what Anderson recorded on May 14, 1908). *Id.*

HOWEVER, the Supreme Court held that while the specific language of the Act *itself* did not state that the single, blanket lien claim had to be recorded no more than four months after the *earliest* completed lot (in this case, by no later than mid-March, 1908, but was not in fact recorded until May 14, 1908), the entire purpose of the four-month requirement is to protect the rights of third persons dealing with the property to have notice of the existence of a timely, enforceable lien claim. With this legislative purpose in mind, the Supreme Court of Illinois noted that if Anderson had instead recorded an apportioned lien claim on May 14, 1908 as to the four separate houses on four separate lots, he at least could have enforced a timely lien claim as *apportioned* to the Oak St. House. [Conversely, had Anderson filed his blanket lien no more than four months after the earliest of the four completion dates, such claim also would have been valid under this alternative scenario]. However, since Anderson's lien claim was: (a) not apportioned; and (b) was recorded more than four months after the *earliest* of the four completion dates, there was no way for the court (or third parties) to ascertain what portion of Anderson's claim *was* enforceable as to the Oak St. House (which would have been timely per Section 7's four month requirement), versus those portions that were stale and unenforceable (i.e., were not timely recorded within four months after completion of the work on the remaining three houses). Because the lack of apportionment in Anderson's blanket lien claim made it impossible to determine what portion of the overall claim for $1,751.95 was timely and enforceable as to the Oak St. House only, Anderson's *entire* lien claim was rendered unenforceable. *Id.*

Over 70 years later, the Supreme Court of Illinois issued its opinion in *First Fed. Sav. & Loan Ass'n of Chicago v. Connelly*, 454 N.E.2d 314 (1983). The lien claimant ("Rossi") was a subcontractor to the general contractor ("Connelly") in connection with the construction of four apartment buildings (i.e., like *Schmidt*, analogous to **Scenario 4**) above). Rossi furnished and installed wall-to-wall carpeting in all four apartment buildings, and filed a single, blanket lien claim for $12,102.00 as to all four apartment buildings on June 3, 1980. Rossi's lien claim stated that all work was completed on all four of the buildings on or about March 15, 1980, but Rossi's lien claim did NOT: (a) apportion the $12,102.00 between the four separate buildings; and (b) reference separate completion dates for each of the four apartment buildings. *Connelly*, 454 N.E.2d at 315-316.

Six weeks after Rossi filed his lien, Plaintiff, First Federal (which held prior mortgages on three of the apartment buildings in question) filed suit to foreclose its mortgage on one of the four buildings, and argued that Rossi's lien claim

was unenforceable as to that particular building, given that the recorded lien claim did not (1) establish whether work was completed *on that particular building* less than four months before the lien recording date; and (2) apportion the overall claim for $12,102.00 between the four separate buildings. *Id.* at 316.

Notwithstanding its prior opinion in *Schmidt*, the Supreme Court of Illinois held that Rossi's blanket lien claim did in fact comply with Section 7 of the Act. The court first noted that nothing in the lien claim *itself* suggested that work was completed on the building in question (or on any of the other three buildings) any later than March 15, 1980, nor did First Federal offer any other evidence showing that Rossi's work was in fact completed on the apartment building in question more than four months prior to the lien recording date (June 3, 1980). *Id.* at 316-317. In *Schmidt*, however, there WAS evidence showing that work was completed on several of the four houses/four lots more than four months before the recording of the single, non-apportioned blanket lien claim. *Id.* at 317-318. The absence of such information in *Connelly*, combined with the failure of Section 7 to specifically require the inclusion of separate completion dates for all lots in a recorded lien claim, provided sufficient grounds for the Supreme Court of Illinois to reach a completely different holding as compared to the blanket lien claim rejected in *Schmidt*. *Id.* The Connelly court then held that *Schmidt* does not mandate a *per se* rule requiring apportionment of a lien claim anytime multiple properties are involved, and it limited its prior holding in *Schmidt* to the "circumstances analogous to the facts of that case." *Id.* at 318. Given the lack of evidence that any of Rossi's work on any of the four separate apartment buildings was completed more than four months before June 3, 1980, there was no reason to believe that any third parties' rights (i.e., First Federal's) were prejudiced (as First Federal received actual or constructive notice of Rossi's lien claim in a timely fashion, i.e., less than four months after completion on the apartment building in question). *Id.* at 318-319.

Although Section 7 *itself* does not specifically require that the lien claim reference a last date of work in the recorded lien claim itself, the practitioner must nevertheless be cognizant of two subsequent, conflicting opinions from the Appellate Court of Illinois, namely:

(1) **First District:** *Merchants Envtl. Indus., Inc. v. SLT Realty Ltd. P'ship*, 314 Ill. App. 3d 848, 731 N.E.2d 394 (Ill. App. Ct. 2000) (whereby the Appellate Court, First District, held that while Section 7 of the Act *itself* does not specifically require the inclusion of a last date of work, such a requirement nevertheless must be inferred, as the legislative purpose of the four month requirement is to allow third parties to learn from *reading the recorded lien claim itself* as to whether it is enforceable); and

(2) **Second District:** *Nat'l City Mortg. v. Bergman*, 405 Ill. App. 3d 102, 939 N.E.2d 1 (2010) (whereby the Appellate Court, Second District, held that the Supreme Court of Illinois's opinion in *Connelly* stated that strict construction of the Act's requirements only applies to requirements that are specifically included in the language of the Act itself, and therefore, **the absence of such language in Section 7 means that the claimant does not need to include the last date of work in the recorded claim**).

The Appellate Court of Illinois is comprised of five separate districts, and a given district is not required to follow the decisions of its sister districts, or even its own prior decisions. *Natl's City*, 939 N.E.2d at 6. However, in the event that there are conflicting opinions between the various appellate districts (where the Supreme Court of Illinois has not yet addressed the legal issue in question), a trial court in Illinois is required to either: (1) follow the precedent established by whichever appellate district it sits in; or (2) if there is no precedent in the appellate district that it sits in, it must follow the precedent otherwise established by the Appellate Court of Illinois' various other districts. *Rein v. State Farm Mut. Auto. Ins. Co.*, 945 N.E.2d 94, 101-102 (Ill. App. Ct. 2011). Where the Appellate Court's pronouncements on an issue are unsettled, or express conflicting views, a party cannot rely upon only one of those conflicting views and ignore the other views. *See Schmidt v. Ameritech Illinois*, 768 N.E.2d 303, 309-310 (Ill. App. Ct. 2002) (*citing People v. Granados*, 666 N.E.2d 1191 (1996)).

In light of the conflicting authorities of *Merchants* and *Nat'l City*, and until the Supreme Court of Illinois resolves this conflict, the safe approach is for the lien claimant to *include* a last date of work in their Section 7 recorded lien claim (even though this is not currently required for counties and circuit courts sitting within the Second District of the Appellate Court).

**Conclusion**

Assuming a lien claimant can meet one or more of the foregoing criteria for filing a blanket lien claim, potentially significant sums of investigative costs and attorneys' fees can

*...continued on page 14*

be avoided by not having to apportion the claim between multiple lots or tracts of land. However, the claimant is strongly advised to be well-acquainted with the various factors and case law authorities which govern whether a blanket lien claim or an apportioned lien claim, should be filed.

Where a lien claim potentially involves different completion dates for the multiple buildings and/or tracts of land in question, the claimant must: (a) accurately determine exactly when the last dates of work were for each such building or lot; (b) ensure that the Section 7 lien claim is filed within the requisite four-month period *vis a vis* each separate building/lot and corresponding last date of work (whether filing a blanket lien or apportioned lien claim); and (c) include the last date of work in the recorded Section 7 lien claim itself – particularly if recorded within the boundaries of the First District Appellate Court (and if located in one of the four other appellate districts, consider erring on the side of including (rather than excluding) the last date of work until the Supreme Court of Illinois has resolved this conflict).

## FIRM NEWS

# Honors

## Watt Tieder Named Construction Law Firm Of The Year

**Lawyer Monthly** has published the official Winners' Edition of the 2018 Legal Awards and we are pleased to announce that **Watt, Tieder, Hoffar & Fitzgerald** has been named Law Firm of the Year in Construction. The firm is one of just 200 recipients being recognized for "the ambition, skill and expertise to deliver for their clients" making them the best in the legal industry. The Legal Awards are based on months of research and readership feedback and are intended to celebrate "the success, innovation and achievements of firms, individual lawyers, solicitors and barristers that have dedicated their resources to serve their clients."

# Recent and Upcoming Events

**Walter Chandler Inn of Court**, January 16, 2019; Washington, D.C. **Marguerite Lee DeVoll** appeared on a panel regarding "Issues in Retail Bankruptcies."

**ABA, Fidelity and Surety Law Committee**, January 17, 2019; San Diego, California. **Bradford R. Carver** spoke on "Common Defenses and Affirmative Claims Asserted by Principals and Indemnitors."

**Old Republic Surety 2019 Annual Meeting**, February 11, 2019; Las Vegas, Nevada. **Robert G. Barbour** and **Christopher J. Brasco** spoke on "Evaluating Risk in an Uncertain Market" and addressed the risks inherent in bonding set-aside contractors.

**Global Launch, ICC Commission Report on Construction Industry Arbitrations (2019 Update)**, February 19, 2019; Stockholm, Sweden. **Shelly L. Ewald** was a member of the Working Group for the 2019 Update (available at https://iccwbo.org/publication/construction-industry-arbitrations-report-icc-commission-arbitration-adr/).

**American College of Construction Lawyers Annual Meeting**, February 23, 2019; St. Petersburg, Florida. **Shelly L. Ewald** spoke on "What can we steal from International Arbitration to Use in Domestic Construction Arbitration" and "Hot Tips for Key Jury Trial Issues."

**Construction Law Foundation of Texas and the Construction Law Section of the State Bar of Texas's 32nd Annual Construction Law Conference**, March 1, 2019; San Antonio, Texas. **Kathleen O. Barnes** spoke on "What Do You Mean We Have to Arbitrate *AND* Litigate?

**Maryland Bankruptcy Bar Association**, March 13, 2019; Bethesda, Maryland. **Marguerite Lee DeVoll** presented on "Recent Developments in Discharge and Dischargeability Actions."

**Society of Construction Law, NA and the American College of Construction Lawyers**, March 25, 2019; Washington, D.C. **Shelly L. Ewald** will appear on a panel entitled "Can We Steal from International Arbitration to Improve Domestic Construction Arbitration."

**ABA Tort Trial & Insurance Practice Section, Fidelity & Surety Law Committee Spring Conference**, May 9-11, 2019; Austin, Texas. **Christopher J. Brasco** and **Vivian Katsantonis** will speak on "A Roadmap for Successful Project Closeout and Keeping It Closed."

**American Road & Transportation Builders Association, Project Management Academy**, June 4, 2019; Washington, D.C. **Christopher J. Brasco** and **Kathleen O. Barnes** will present on "Construction Documentation: Successfully Managing Risk and Preserving Claims."

**American Road & Transportation Builders Association, 2019 Law & Regulatory Forum**, June 5, 2019; Washington, D.C. **Christopher J. Brasco** and **Kathleen O. Barnes** will speak on "Damages Without a Cause: Liquidated Damages Are a Penalty When Contractors Are Not Allowed to Raise Concurrent Delay As a Defense."

**AACE International, 2019 International Conference & Expo**, June 16-19, 2019; New Orleans, Louisiana. **Christopher J. Brasco** and **Kathleen O. Barnes** will speak on liquidated damages.

# Publications

**Bradford R. Carver**, Law of Performance Bonds, *"Common Defenses and Affirmative Claims Asserted by Principals and Indemnitors;"* ABA Fidelity and Surety Law Committee, 2019.

# Watt Tieder Welcomes a New Partner

**Colin Holley** joins Watt Tieder's Irvine office. Colin's practice focuses on the litigation of complex business disputes, including matters involving commercial law, real property, unfair competition, intellectual property, trade secret misappropriation, labor and employment law, and appellate advocacy. His practice involves trial and arbitration of matters in federal and state courts nationwide. Prior to joining Watt, Tieder, Colin was for over a decade a partner in the boutique litigation firm he co-founded, HamptonHolley LLP. Colin was also formerly at DLA Piper where he practiced business and intellectual property litigation and was part of a team that managed and litigated software piracy actions in federal and state courts throughout the United States.

# Watt Tieder Welcomes Two New Associates

**Sara M. Bour** joins the firm as an associate in Watt Tieder's Chicago, Illinois office. Sara's practice focuses on a range of complex litigation and transactional matters, with her core practice centering on commercial, construction, suretyship and insurance disputes. This includes pre-litigation investigation and case analysis, formal litigation including discovery, drafting pleadings, settlement negotiations and case evaluation, mediation, arbitration, motions practice, conducting and defending depositions, and trial. Sara is experienced in representing owners, general contractors, subcontractors and sureties in both the public and private context.

Prior to joining the firm, Sara practiced family law, where she focused primarily on litigation, trial work, negotiations and alternative dispute resolution. She successfully represented clients both inside and outside of the courtroom.

**Brian C. Padove** joined Watt Tieder's Chicago office in 2018 after spending three years working as a litigation associate at a national insurance defense firm.

Brian focuses his practice in the areas of commercial litigation, construction law, and suretyship while representing a wide variety of clients including contactors, subcontractors, sureties, and owners. He is admitted to practice law in Illinois, Indiana, and Wisconsin as well as multiple federal district courts.

Brian received his J.D. from the University of Wisconsin Law School in 2014. During law school, he completed a judicial internship under Justice David Prosser of the Wisconsin Supreme Court and spent two summers as a law clerk at a national law firm.

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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, William Groscup, Christopher M. Harris** and **Marguerite Lee DeVoll**.

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