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NEWSLETTERS

Barnes & Thornburg Construction Law Update - December 2017

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Welcome to the December 2017 edition of the Construction Law Update, an e-publication that features articles authored by the attorneys in Barnes & Thornburg LLP's Construction practice group.

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Listen to What the Insurance Policy Says: Construing Commercial General Liability Exclusions Without Preconceptions

By John Corbett

Insurance companies have long contended that commercial general liability (CGL) policies do not cover property damage involving alleged deficient workmanship by the insured. In a number of early cases, courts held that deficient workmanship cannot be an accident within the meaning of an "occurrence," reasoning that, whatever a CGL policy actually says, it is not intended to function as a business risk policy. As the trend has moved decisively toward treating deficient workmanship as an occurrence that can trigger coverage of resulting property damage, insurers have retreated to a backup position – that any loss arising out of deficient workmanship falls within the scope of one or more exclusions in the standard CGL policy. The recent decision by the Fourth Appellate District of the California Court of Appeal in *Global Modular, Inc. v. Kadena Pacific, Inc.,* 2017 Cal. App. LEXIS 778 highlights the movement toward narrowly construing the precise text of those exclusions in favor of coverage.

Actions Required by Contract Do Not Give Rise to a General Contractor's Duty of Safety to a Subcontractor's Employee

By Curtis J. Greene and Caitlin Schroeder

A recent Indiana court decision further highlights the importance of closely reading and negotiating your construction contracts, which we discussed in our last issue of the Construction Law update.

Contractor Assessed Significant Liquidated Damages on Mackinaw Bridge Restoration Project

By Scott Murphy

The Michigan Court of Appeals recently affirmed a trial court's award of nearly $2 million dollars in liquidated damages even though the owner and severe weather conditions contributed significantly to the overall delay on the project. In *Abhe & Svboda Inc. v. State of Michigan, Department of Transportation*, 2017 WL 3722001 (Mich App 2017), the

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contractor disputed liquidated damages imposed by the Michigan Department of Transportation (MDOT) claiming that dilatory conduct by MDOT and environmental circumstances beyond its control precluded enforcement of liquidated damages. The trial court disagreed and found that the liquidated damages clause was not an unenforceable penalty and that the contractor failed to make a proper request for an extension of time in accordance with the parties' contract. The court of appeals agreed and affirmed the trial court's ruling.

Seventh Circuit Finds Duty to Defend Triggered in Illinois When Subcontractor's Defective Work Causes Damage To Other Parts Of Project

By Clifford Shapiro and Andrea Warren

As readers of this author's prior published articles know, it is our view (and the view of many other commentators and out-of-state judicial decisions) that Illinois law incorrectly analyzes whether construction defects can constitute an accidental "occurrence" under the standard commercial general liability (CGL) policy. As at least one federal judge in Illinois has acknowledged, this creates a "quandary" for the federal courts when they are required to apply this incorrect analysis to the cases before them. See *Auto Owners Ins. Co. v. John Hagler*, 2015 WL 3862713 at *4 (S.D. Illinois, June 22, 2015) (Judge Gilbert).

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