Appeals Court Allows Quick-Take of Land for Mountain Valley Pipeline

The 4th U.S. Circuit Court of Appeals has upheld the "take first, pay later" approach to building the Mountain Valley Pipeline, in which the company condemned private property in the project's path before paying opposing landowners for their losses, **reports** *The Roanoke Times*.

Reporter **Laurence Hammack** writes that the ruling was a blow to pipeline foes, who have long decried the use of eminent domain to take parts of family farms and rural homeplaces to make way for a 303-mile natural gas pipeline through West Virginia and Virginia.

Landowners did not contest the laws that allowed the pipeline company to obtain forced easements through nearly 300 parcels in Southwest Virginia, but they objected to a lower-court ruling granting immediate possession of the disputed land before deciding how much each property owner should be compensated, Hammack explains.

Read the article.

Parties Must Proceed to Arbitration Despite Unavailability of Arbitration Forum Specifically Named in the Contract

An Ohio appellate court has addressed an issue that arose when an arbitrator specified in a contract is no longer available.

Pepper Hamilton's **Constructlaw** blog covers the case in which a homeowner sued a contractor, alleging unjust enrichment and fraud. The contractor moved to compel arbitration under the agreement arbitration provision. But the specified arbitrator, the Ohio Arbitration and Mediation Center, appeared to be defunct.

"Because it was still possible to arbitrate the issues, the Court determined the agreement was not unenforceable due to impossibility," writes **Ryan R. Deroo**. "The Court explained that this conclusion was consistent with the intent of the parties as they agreed to arbitrate disputes, and a change in forum should not override the fundamental purpose of the arbitration provision."

The appellate court directed the trial court to appoint another arbitrator.

Read the article.

Jordan, Lynch & Cancienne Wins Take-Nothing Decisions in Texas, Louisiana

Trial lawyers with Jordan, Lynch & Cancienne PLLC scored big **defense wins** recently for two separate clients, securing a quick summary judgment for The Dow Chemical Company in Texas and prevailing in a jury trial for Union Carbide Corporation in New Orleans.

In the Texas case, MMR Constructors Inc. tried to claim an additional $17 million from Dow after it had already paid MMR for work on its plant in Freeport, Texas. That case ended with a summary judgment for the defense.

And in the New Orleans case, jurors heard three weeks of testimony related to the death of an oil field worker who died of mesothelioma. The jury found Union Carbide and Montello were not responsible.

Read details of the cases.

Court Holds That Arbitration Clauses Bind Nonsignatories Who Seek to Enforce Contracts

A **post on the website** of Pepper Hamilton describes a North Carolina case that involved non-signatories to a construction contract attempting to avoid the contract's arbitration claim.

When the building's current owner asserted various claims against the original owner, architect and general and subcontractors, the general contractor moved to have the suit dismissed on the ground that they were subject to arbitration. Plaintiffs argued that the arbitration clauses were not binding on them because the contracts that contained them were not assigned to plaintiffs when they purchased.

"The court held that the plaintiffs' argument could not be squared with the language of the Contractor Warranty. On its face, the Contractor Warranty stated that [the general contractor] performed all work 'in accord with the Contract Documents.' This express reference to [the contractor's] construction contract put the plaintiffs on notice of the contract's existence," explains the article's author, **Jane Fox Lehman**.

Read the article.

West Mermis Named to National Best Law Firms for 2019

Houston-based construction and business litigation firm West Mermis, PLLC, has earned **national recognition** among the Best Law Firms in the country by *U.S. News & World Report* and *The Best Lawyers in America*.

The firm was selected to the 2019 list of construction litigation firms recognized nationally, and in the Houston metro area, West Mermis is ranked in the top tier of such law firms.

The *U.S. News – Best Lawyers* selection process involves a lawyer survey and feedback from clients on a firm's expertise, responsiveness and cost-effectiveness along with other questions.

Read details about the award.

Interpreting Indemnity Provisions in Construction Contracts

Liability in the construction process is usually determined and allocated by contract, explains **a post** on the website of Faegre Baker Daniels LLP.

"It is quite common for construction contracts to contain indemnity provisions requiring one party to defend and reimburse the other against various expenses or losses. When contracts include express indemnity provisions, they will likely receive more attention, and be the subject of more negotiations between counsel, than any other provisions. Yet, if pressed to state what it means to 'indemnify' or 'hold harmless,' many are at a loss," according to the firm.

The post discusses strict construction, express negligence, and the liberal or fair construction rule.

Read the article.

Contract Roulette: The Top Five Agreements That Get

Businesspeople into Trouble

You can do a lot of damage with a signature, warns Jack Garson of Garson Law LLC in Bethesda, Maryland. You can go broke.

In **an article** on the website of *Forbes*, he discusses five types of contracts that have caused the most disasters.

First, he warns of the dangers of assuming that leases are standard, so there's no reason to read every clause.

On the subject of loan agreements, Garson's advice is to negotiate, consult advisors, and bargain. Most of all, he adds, get the right to prepay the loan.

He also covers construction contracts, partnership agreements, and personal guarantees.

Read the article.

Teaming Up? Avoid Unenforceable Agreements to

Agree

There is a growing trend in the construction industry wherein contractors, subcontractors and designers are working together to pursue large construction projects, according to a **JD Supra post** by Snell & Wilmer.

“The terms of these collaborations are typically referred to as ‘teaming agreements’ which are intended to define the relationships, rights and responsibility of all parties involved during both the pursuit of the work and, if ultimately successful, the performance of the project including the financial remuneration,” the post explains.

It continues: Your goal in drafting these agreements is to define the relationship, the rights and responsibility of all parties involved on the “team” during both the pursuit of the contract and, if the contract is awarded, the performance of the project.”

Read the article.

Minimum Volume Commitments in the Midstream Industry

Minimum volume commitment contracts (MVCs), often referred to as throughput agreements, are agreements under which a shipper or producer—a counterparty—undertakes to transport an agreed minimum volume of a commodity such as natural gas, NGL or crude oil through a third-party operator's assets, such as pipelines or processing plants, over a specified period, explains **a post** on the website of Opportune.

"In the midstream industry, these contracts are typically utilized to enable the operator to recoup the costs of constructing infrastructure, such as a processing plant or pipeline lateral, for the benefit of the counterparty. Under these agreements a counterparty pays a shortfall or deficiency fee if the MVC is not met for a specified period—monthly, quarterly or annually," the authors write.

Read the article.

Construction Arbitration: The Pros and Cons

It's an unfortunate fact that many construction projects end in disputes, driving the parties into some form of dispute resolution, writes **Jason T. Strickland**, a litigator with Ward and Smith.

Many of these construction disputes are resolved through arbitration, he writes in a **web post**.

His article explains how arbitration is different, the major differences between arbitration and lawsuits, court involvement in the arbitration process, avoiding unfavorable local law, and third-party administration of arbitration.

Read the article.

Texas Court Construes Breach of Contract Exclusion Narrowly in Duty-to-Defend Case

In a victory for policyholders, a recent decision from the Western District of Texas narrowly construed a common breach-of-contract exclusion and held that the insurer had a duty to defend its insured against an underlying lawsuit over construction defects, according to the **Hunton Insurance Recovery Blog**.

“The allegations potentially supported a covered claim, as the conduct of the insured’s subcontractor could have been an independent, ‘but for cause of the property damage at issue, thereby triggering the insurer’s duty to defend’,” explain

Lorelie S. Masters and Tae Andrews.

"Many CGL policies have similar or identical breach-of-contract exclusions," they write. "Longstanding principles of law regarding the duty-to-defend analysis hold that exclusions should be narrowly construed against the insurer and in the insured's favor, and that when making a duty-to-defend analysis, any doubts or ambiguities should be resolved in the insured's favor."

Read the article.

AIA Changes – It's Time to Convert Before It's Too Late

Jeffrey M. Reichard of Nexsen Pruet offers a reminder that the American Institute of Architects (AIA) will discontinue support of older versions of its most popular standard form contracts after Oct. 31, 2018.

"This means you will no longer be able to create, edit or even finalize a 2007 AIA document after that date," he warns. "If you haven't already done so, now is the time to convert your standard form contracts to the 2017 versions."

He writes that one important change is the creation of a new insurance exhibit which changes and expands the terms related to insurance coverage previously included in the body of the

A201.

Read the article.

When Your Contract Includes an Arbitration Clause: Who Decides the Arbitrability of the Dispute?

Williams Mullen partner **Robert K. Cox** writes in a post on the firm's website that the answer to who decides the arbitrability of a dispute – in a case in which a contract includes an arbitration clause – requires consideration involving a multi-step inquiry.

In his **article**, a court resolving an arbitrability dispute first must determine who decides whether a particular dispute is arbitrable – an arbitrator or the court. Second, if the court determines that it is the proper forum to adjudicate the arbitrability of the dispute, then the court must decide whether the dispute is in fact arbitrable.

"Parties wishing to ensure resolution of 'gateway' questions of arbitrability by a specific decision-maker –whether the court or arbitrator –should spell out their preference as clearly as possible in the arbitration clause," Cox writes.

Read the article.

Sometimes You Get Away with Unwritten Contracts

One area where the distinction between written versus unwritten agreements makes a difference is in the calculation of the statute of limitations, points out **Christopher G. Hill** in his **Construction Law Musings** blog.

Virginia's 5- year statute of limitations for written contracts – compared to the 3-year statute unwritten contracts – came into play in *M&C Hauling & Constr. Inc. v. Wilbur Hale* in the Fairfax, Virginia Circuit Court.

M&C provided hauling services to the defendant through a subcontract with Hauling Unlimited. No separate written contract between M&C and Hauling Unlimited or Hale existed. Hauling Unlimited filed a plea in bar to have the matter dismissed as being brought beyond the 3-year statute and argued that no signed or other written contract existed.

"The Court determined that Hauling Unlimited and Mr. Hale assented to M&C's terms and did not insist on a signature to make their contract a written one," writes Hill.

Read the article.

Has the Government 'Waived' Goodbye to Strict Compliance with Your Contract Specifications?

A recent Armed Services Board of Contract Appeals decision confirmed that waiver defenses can defeat government demands for strict compliance with contract requirements, reports **Cohen Seglias Pallas Greenhall & Furman**.

Authors **Maria L. Panichelli** and **Alissandra D. Young** explain that the Board found in *Appeal of American West Construction, LLC* that the U.S. Army Corps of Engineers had effectively waived the right to enforce a construction contract specification.

"This meant that the government could not recover from the contractor the difference in the price it paid for the original specification and the lower amount spent by the contractor to perform the deviation," they write. "In a world where the government often has the right to strictly enforce contract requirements and hold contractors financially responsible for any deviation, this decision is a big win for construction contractors."

Read the article.

Fixed-Price Contracts Are Simple – Or Are They?

A **podcast** posted by Pepper Hamilton discusses the definition of fixed-price contracts and cases in which the audit provision in the contract has been unsuccessfully used to assert claims for reimbursement and False Claims Act liability.

“Fixed-price contracts are well-known among contractors,” the firm says on its website. “These agreements seem simple – they do not allow the contract price to be modified after the award unless the parties expressly agree. But is it really that simple? In reality, there is very little case law guiding the practical approach to these types of contracts.”

In the podcast, **Marion Hack**, a partner in Pepper’s Construction Practice Group, discusses these types of contracts.

Listen to the podcast.

Eliminating the Surprise Factor from Construction Contracts: Tips for Owners and Developers

On construction projects, owners and developers often are familiar with standard contract language and provisions, but the industry is continually evolving, according to a **paper published** by Zetlin & De Chiara LLP.

The paper discusses 10 key contract provisions and tips to help parties avoid pitfalls.

Those areas include scope of work, compliance with schedule, meeting the owner's target for the budget, contingency, changes in the work, indemnification, insurance, dispute resolution, general conditions, and subcontract issues.

Read the article.

Progress Payments: What to Do When the Money Stops Trickling In

A post on the **Faegre Baker Daniels** website asks the question: What does a contractor do when the owner stops making progress payments?

The contractor has two options: it can either continue to perform the work or cease the work, neither of which is a perfect solution.

“The owner’s failure to pay progress payments that are ‘clearly due and owing’ generally entitles the contractor to stop work until the progress payment is made. While this rule seems clear, it is not that simple,” according to the post.

The contractor should look to its contract with the owner to find answers to two questions: Does the contract require the contractor to take a certain action? And, is payment”clearly due and owning?”

Read the article.

Fifth Circuit Allows Non-

Signatories to Enforce Arbitration Agreement

The Fifth Circuit has affirmed an order compelling arbitration, despite the fact that the parties seeking to compel arbitration were not signatories to the relevant arbitration agreement, according to a post on Carlton Fields' **Reinsurance Post**.

Jason Brost explained that the case involved a real estate sale contract that contained an arbitration agreement under which the parties agreed to arbitrate any disputes "in accordance with the Comprehensive Arbitration Rules and Procedures administered by J●A●M●S/Endispute."

The plaintiff claimed that the defendants in the case induced the buyer to enter into the 1998 agreement based on the false premise that he would get a properly constructed home. The defendants, who were non-signatories to the agreement, moved that the arbitration clause be enforced.

The appellate court found for the defendants.

Read the article.

Avoid Prejudgment Interest By

Expressly Saying So in the Contract

Striking an interest provision from a draft subcontract wasn't enough to keep a party to the agreement from being required to pay interest, according to a review of a Missouri case by **Jane Fox Lehman** in Pepper Hamilton's **Constructlaw** blog.

When the general contractor later failed to pay the subcontractor, the sub sued and won a verdict that included prejudgment interest at the rate of 9 percent pursuant to Missouri law. The general contractor appealed.

Lehman explains the outcome: "The court held that it could not consider the stricken interest provision because it was extrinsic evidence. 'The rationale,' it explained, 'is that the writing excised from the agreement, whether by way of striking, erasing, or simply transferring the agreement to a new piece of paper without the stricken language, is not part of the agreement between the parties.'"

Because the parties had failed to reach an express agreement on an interest rate, the trial court's ruling was upheld.

Read the article.