Fast and (Sometimes) Furious: Acceleration and Compensability in Construction Contracts

Brian L. Lynch, writing for **Faegre Baker Daniels**, discusses the principle of acceleration in construction contracts.

A major consideration in acceleration clauses is whether the contractor is getting for the speed up in work. He covers the three types of acceleration, which usuall dictate whether the contractor is being compensated for additional costs related t the disruption.

In three sections of the article, Lynch discusses directed acceleration, constructive acceleration, and voluntary acceleration.

Read the article.

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Liquidated Damage Provisions – A Good Idea or an

Unenforceable Penalty?

A post by **Joshua M. Pellant** of **Faegre Baker Daniels** discusses the use of a provision for a stipulated or "liquidated" damage amount in the event of specified contract breaches in construction contracts.

"These provisions can be an effective tool to recover losses that otherwise may go uncompensated because they cannot be proven or because the damages are not recoverable under an ordinary contract," he explains. "However, courts generally will not enforce a liquidated damage provision that is seen as a 'penalty' unrelated to any anticipated or actual loss. The question, then, is whether a particular contract provision will be interpreted as an enforceable liquidated damages provision or an unenforceable contractual penalty."

He discusses general enforceability standards and how much is too much (or not enough).

Read the article.

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Construction Contracts and Arbitration Provisions: Is

the Word “May” Mandatory? Maybe!

According to some courts, the traditional line of reasoning in defining “may” versus “shall” is no longer the trend in the context of arbitration provision in construction contracts, writes Matthew DeVries in **Best Practices Construction Law**.

Traditionally, the use of “may” could be interpreted as making performance permissive or optional, while “shall” makes performance mandatory.

DeVries cities a case in which the Supreme Court of Virginia held that the parties’ use of the word “may” in the dispute resolution provisions of their construction contract required mandatory participation in arbitration at the election of one of the parties.

Read the article.

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Should I Have an Arbitration Clause in My Construction Contract?

Although it is typical for AIA form contracts to contain

arbitration clauses, as a contractor you should consider whether you should have an arbitration clause in your construction agreement, advises **Paul W. Norris** of Stark & Stark.

In an article posted on the **New Jersey Law Blog**, Norris explains "there are numerous factors to consider in determining whether mandatory arbitration is the preferred dispute resolution mechanism, or whether the state court system is preferred. Although arbitration may have some advantages, there are also disadvantages which must be considered rather than simply adopting the AIA form."

He discusses the cost of the arbitration proceeding, judge or jury vs. an arbitrator, discovery during an arbitration process vs. the state court process, timeliness of the proceeding, judgments, and appeals from arbitration of a state court.

Read the article.

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Unsigned Contract = No Proper Insurance Coverage

Commonsense Construction Law reports on a case in which an unsigned contract meant that the contractual liability exclusion in the subcontractor's insurance policy would control, since there was no obligation "assumed in a contract

or agreement . . . [where the claim] occurs subsequent to the execution of the contract or agreement."

Stan Martin wrote the article.

"And this was not just a matter of having an agreed contract form which the parties never got around to signing," he explains. "The subcontract at issue stated that it 'is not valid without the Subcontractor General Conditions Version 2012-003 signed and agreed to by all parties.' There was no dispute that the parties had not signed the general conditions."

Read the article.

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The Dumbest Class Action Claim Ever

The Milwaukee Journal Sentinel reports on a pair of class-action lawsuits against Home Depot and Menards that **Above the Law** calls "the dumbest class action claim ever."

As *Journal Sentinel* reporter **Rick Romell** explains:

> Menards and Home Depot stand accused of deceiving the lumber-buying public, specifically, buyers of 4×4 boards, the big brother to the ubiquitous 2×4.
>
> The alleged deception: The retailers market and sell the

> hefty lumber as 4x4s without specifying that the boards actually measure 3½ inches by 3½ inches.

Above the Law's **Joe Patrice** explains that everybody who ever built anything already knew that 3½ by 3½ is the industry standard:

> In fact, if retailers started selling boards that *were* 4 inches by 4 inches, they'd actually be useless because they wouldn't match up with all the other standardized materials that assume the board will be 3 1/2″ by 3 1/2″.

Read the **Journal Sentinel** and **Above the Law** articles.

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Foley Adds Construction Attorney Lisa Glahn in Boston

Lisa Glahn has joined **Foley & Lardner LLP**'s Construction Practice as a partner in the Boston office.

Glahn's practice focuses on construction, real estate and project development, where she counsels on strategic deal structuring, contract formation, complex litigation and claims resolution, among other issues. She represents clients in both the public and private sectors, including contractors,

developers, lenders and owners through all project phases.

“Lisa has a versatile practice and can offer services from the transactional commencement of a project until the last dispute is resolved in litigation,” said Jeffrey Blease, chair of Foley’s Construction Practice. “She’s particularly adept at litigating and managing trial teams on complex, high-stakes projects that involve multiple parties.”

In a news release, the firm said:

> Glahn has successfully handled construction litigation cases and disputes related to waste-to-energy and EPC projects, design-build ventures, and hospital, university, real estate and transportation development projects. On the transactional side, she drafts and negotiates general contracts, subcontracts, consultant agreements, construction management agreements, development agreements and other project related documents.
>
> “Lisa has the judgment and experience to handle the most complex construction issues, of which there are many across Boston’s burgeoning industries and real estate market,” said Susan Pravda, managing partner of Foley’s Boston office. “In addition to the excellent service she provides to clients, Lisa regularly lends her professional skills to the local community and supports organizations that promote the greater good.”
>
> From 2004 to 2005, Glahn worked as a special assistant district attorney with the Middlesex District Attorney’s Office, where she tried more than 30 cases and advocated for social justice and human rights on behalf of underrepresented and marginalized constituencies. She serves on the board of the non-profit organization Women in Construction, and is a former board member of the National Association of Women in Construction – Boston Chapter. Lisa is also a member of the American Bar Association,

Massachusetts Bar Association and Women's Bar Association.

Prior to joining Foley, Glahn was a member at Mintz Levin.

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Webinar: Avoiding Construction Claims and Disputes

A Baker Tilly **on-demand webinar** provides an overview of strategies to identify potential claims scenarios and potential resolutions available to mitigate claims.

"Conflict and disagreements are normal on construction projects; however, when everyday disagreements escalate into unresolvable issues, claims and disputes may result," the firm says on its site. "These can lead to costly and time consuming distractions for your organization and your project."

Learning objectives:

- Understand red flags associated with high-risk projects
- Learn characteristics of a culture of claims avoidance
- Learn contractual methods/provisions that can help to proactively avoid disputes
- Understand remedies not requiring legal action

Watch the on-demand video.

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Construction Contracts: Allowance or Contingency?

While both relatively simple concepts, allowances and contingencies are often confused with one another. Conflating the two can lead to pitfalls, warn **Randolph E. Ruff** and **Jonathan M. Mraunac** of **Ogletree Deakins**.

“An easy way to remind oneself of the difference is: allowances are for *known* unknowns, and contingencies are for *unknown* unknowns,” they write.

In their article, they explain the differences between allowances and contingencies, how they are used, and how they can be drafted.

Read the article.

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AIA Releases 2017 Construction and Design Agreements

The American Institute of Architects has released several revised documents including the primary agreements between the owner and contractor and the owner and architect, reports Dickinson Wright PLLC.

The article on the firm's website explains that any of the revisions are attempts to clarify existing provisions. A number of changes, however, are more significant.

The update covers general conditions of the contract for construction, such as building information modeling and digital data, evidence of owners' financial arrangements and minor changes in the work.

It also discusses agreements between the owner and the contract, including assumptions, contractor progress payments and owner termination.

Topics also include the agreement between the owner and arthitect.

Read the article.

The Beneficiaries of 'Pay-if-Paid' Clauses in Construction Contracts

In construction law, general contractors have largely negotiated a shift in the distribution of risk away from the general contractor and to the subcontractor with the inclusion of "pay-if-paid" contractual clauses," writes **Dana Chaaban** in Shutts & Bowen's **Construction Law Blog**.

Writing for the Florida firm, Chaaban explains that such clauses make the general contractor's receipt of payment from the owner a condition precedent to the general contractor's ultimate payment to the subcontractors. Absent such a provision, general contractors bear the risk of an owner's potential insolvency.

Subcontractors have sought to circumvent contractual "pay-if-paid" provisions by bringing claims against both the general contractors and their sureties who may guarantee payment.

Chaaban discusses some cases on the subject.

Read the article.

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Mitigation of Construction Defect Litigation – Top 10 Construction Contract Issues

When negotiating a construction contract with a general contractor, the owner/developer should be aware of, and address, a number of issues to attempt to mitigate or limit the risk of construction defect litigation for a residential project, including multi-family and for-rent residential apartment and senior housing projects, advises **Rebecca W. Dow** in Holland & Hart's **Construction Law Blog**.

She explains that tandard forms of construction contract – such as the American Institute of Architects (AIA) or ConsensusDocs – are more beneficial to the contractor than the owner in many respects.

A construction contract will need to be reviewed thoroughly and revised to better protect the owner, and in the case of residential construction, should in particular, address 10 key issues.

She discusses those issues, which include: scope of work, change orders, indemnification, warranties, subcontracts, insurance, dispute resolution, compliance with laws/environmental matters, construction lender, damages/attorneys' fees.

Read the article.

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Clear Arbitration Provision Deemed Enforceable

In his **Petes' Take** blog for Porzio, Bromberg & Newman, **Peter J. Gallagher** describes a New Jersey case in which a court ruled that a clear arbitration provision, negotiated by a sophisticated party while represented by counsel, is enforceable.

In Columbus Circle NJ LLC v. Island Construction Co., LLC, the appellate court held that the arbitration provision in the AIA contract used in this case satisfied the requirements to explain to the signer the possible consequences of giving up the right to adjudication in a court of law, Gallagher explains.

"By its terms, the provision required plaintiff to choose between arbitration and 'litigation in a court of competent jurisdiction,' therefore, when plaintiff chose 'arbitration,' it did so 'with full knowledge that arbitration [was] a substitute for the right to have [its] claim adjudicated in court.' Moreover, the Appellate Division noted that neither the LLC nor its sole member was 'an average member of the public,'" according to Gallagher.

Read the article.

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Drafting Arbitration Clauses in Construction Contracts

Many construction lawyers who specialize in transactional work acknowledge that they do not spend much time considering or negotiating the arbitration clauses in construction contracts, points out
Patricia H. Thompson in a post on the **website of JAMS**.

She addresses the question: Should an arbitration clause be just a boilerplate provision, taken "off the shelf," or should it be specifically negotiated and crafted for the particular construction project and to accommodate the parties' requirements?

The post lists some of the major questions to consider, such as: Should arbitration be mandatory or permissive? Should there be one or three arbitrators, should they all be neutral, and should they have particular qualifications or professional expertise? Should the arbitrator's power be broader or more limited than otherwise provided by relevant statutes or rules?

Read the article.

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How Do Additional Insured Obligations Work with Subcontract Flow-Down Clauses?

In his **Commonsense Construction Law** blog, Stan Martin asks the question "How do additional insured obligations work with subcontract flow-down clauses." And he answers it with one word: "They don't."

"Unless the subcontract is carefully drafted, that is. So where the prime contract required the owner to be named as an additional insured, and the subcontract flow-down clause passed along the GC's obligations to the owner, as the sub's obligations to the GC, this did not by itself result in a requirement that the sub name the owner as an additional insured. That is one lesson from a New York court decision," Martin explains.

He discusses *Navigators Ins. Co. v Merchants Mut. Ins. Co.* at length and concludes with two lessons to be learned.

Read the article.

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Contract Barred Recovery of Lost Productivity Damages Suffered by Contractor

Because there are often multiple causes of delays and a variety of types of delay damages on construction projects, it is critical that the parties consider and properly allocate the risk of such delays and the potential resulting costs in the contract documents, advises **Robinson+Cole**.

Elizabeth Wright explains that the Massachusetts case of *Cumberland Farms, Inc. v. Tenacity Constr., Inc.* offers insight into the importance of the contract in allocating the risk of delay damages.

"In this case, the court noted that the contract not only provided that the contractor is only entitled to an extension of time for delay damages but it also expressly provided that the contractor would only be entitled to time and material costs for Winter condition work," she writes.

Read the article.

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When Construction Contracts Go Sideways in Bankruptcy

When a contractor on a project files a bankruptcy case, the property owner and subcontractors have some serious decisions to make, writes **Tracy Green** in the **California Construction Law Blog**.

The blog is a publication of **Wendel Rosen Black & Dean LLP**.

When a party to a contract files bankruptcy, the other party's actions are constrained by the bankruptcy code, Green explains.

The article covers the types of bankruptcies involved, benefits of bankruptcy for the debtor, benefits of bankruptcy for the creditor, executory contracts, liens and bonds, getting the work done, preferences, and doing business with a distressed contractor.

Read the article.

The Importance of Clear Contract Terms

Many legal battles in the construction industry revolve around contract interpretation disputes. Care in contract drafting is

a valuable way to avoid disputes, writes **Michael Wilson** in Greensfelder, Hemker & **Gale's Construction Law Blog**.

"A fundamental principle of contract interpretation is to ascertain and give effect to the parties' objectively expressed intent. What a party was trying to say, without accurately expressing it, does not count. Contract terms are usually given their ordinary (i.e., dictionary) meaning unless the contract specially defines them or the industry has adopted a special meaning known to both parties," Wilson writes.

In his article, he discusses at length the principle of identifying and interpreting ambiguity, and the tools that can be used to improve a contract.

Read the article.

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Construction Contract Keystones, Part I: Payment Mechanisms

Much Shelist, P.C. has published **an article** reviewing the three most commonly used payment mechanisms in construction contracts and the benefits and drawbacks of each.

David A. Eisenberg discusses at length the benefits and

drawbacks of fixed price, or lump sum payments, which he calls "perhaps the simplest and most commonly used payment mechanism." Then he examines cost-plus contracts, in which the owner agrees to pay the contractor for its actual costs incurred in performing the work, plus a predetermined fee.

Finally, the covers the guaranteed maximum price, in which the owner is responsible for paying the contractor's costs up to a certain cap. It is essentially a cost-plus contract with a cap.

Read the article.

Are Non-Compete Agreements Right for Your Construction Company?

Peter C. Vilmos of **Burr Forman** writes in an article published by **JDSupra Business Advisor** that contractors have several reasons to require that their high-level employees (e.g., C-Level) enter non-compete agreements.

"Non-compete agreements, or non-competition agreements, are contracts into which an employer and an employee enter that restricts the work the employee can perform for another company when the employee's tenure at the employer company ends," Vilmos explains. "Typically, it's illegal to

intentionally restrain trade; however, some states allow employers and employees to voluntarily enter into agreements with future employment restrictions."

Read the article.

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