August 2006

The newsletter of the ABA Forum on the Construction Industry

UNDER CONSTRUCTION

Illegality Challenges – For Arbitrator or Court?

By Stephen P. Withee
Frost Brown Todd LLC

Who decides whether an arbitration provision contained in a contract challenged on grounds of illegality is enforceable? Is this issue for the court or arbitrator to decide? This is not an academic question for construction lawyers as illegality challenges can arise in a number of contexts, e.g., unlicensed status of contractor or design professional.

Nearly forty years ago the United States Supreme Court created what is now known as the Severability Doctrine (also known as the Separability Doctrine). In Prima Paint Corp. v. Flood & Cantelin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1901, 18 L.Ed. 22 1270 (1967), the Court held that in disputes governed by the Federal Arbitration Act (FAA) federal courts were only permitted to decide challenges based upon fraudulent inducement that directly pertained to the arbitration clause itself. 388 U.S. at 404. Fraudulent inducement claims related to the contract as a whole were to be determined by the arbitrator.

Thus, the arbitration clause is "severable" from the contract as a whole. While the entire contract might be void due to the fraud challenge, the arbitration clause would nonetheless operate to place the issue before the arbitrator. The severability of the arbitration clause is a rule of substantive federal arbitration law and not merely procedural.

What if a party asserts the entire contract is void because it is illegal? Given the experience, expertise and judicial powers of the courts, would they not be the more appropriate forum to rule on issues of alleged illegality? While Prima Paint suggests an answer, it was not until this year that the matter was finally settled.

In Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. ____, 126 S.Ct. 1204, 163 L.Ed.2d, 1038 (2006) the Supreme Court directly addressed illegality challenges. In an 7-1 decision, it ruled that the Severability Doctrine applied to challenges to the validity of the arbitration clause based upon the alleged illegality of the contract as a whole.

John Cardegna and Donna Rueter entered into various "cash advance" transactions with Buckeye. They would write a check to Buckeye in the amount of the cash received plus a processing fee. Buckeye would hold the check until the following payday. With each such transaction, Cardegna and Rueter executed an agreement containing an arbitration clause.

Cardegna and Rueter subsequently filed a class action suit against Buckeye claiming that Buckeye charged usurious interest rates and, therefore, violated various Florida lending and consumer protection laws. They further claimed these alleged statutory violations rendered the contracts criminal on their face.

Buckeye moved to compel arbitration. The trial court's denial of Buckeye's motion was appealed eventually to the Florida Supreme Court. That court held that since the contract was allegedly unlawful it would be improper for the arbitrator to decide the validity of the contract because that "could breathe life into a contract that not only violates state law, but also is criminal in nature."

The U.S. Supreme Court reversed. The Court set out three propositions that guided

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Don't forget to check out the online version of the Newsletter at http://www.abanet.org/forums/construction/publications for interactive links to cases and other useful information.

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Newsletter Editor
Patrick J. O'Connor, Jr.
2200 Wells Fargo Center
Minneapolis, MN
612-766-7413
poconnor@faegre.com

Associate Editor
Morgan Holcomb
229 Nineteenth Avenue South
Minneapolis, MN 55455
612-625-3533
holc0026@umn.edu

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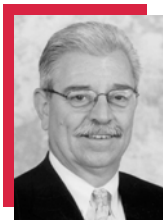
Defending Liberty Pursuing Justice

MESSAGE FROM THE CHAIR ELECT

Mike Tarullo, Chair-Elect



A Legacy of Greatness and Strategy for Success

In all we do each day we leave a legacy for those we touch. The legacy left by great leaders of the Forum is both positive and one upon which succeeding leaders of this great organization continue to build. This is a legacy of fellowship, commitment to excellence, and service to the construction industry. A legacy that leads to success.

Through its programs and publications the Forum has earned a reputation of providing the highest quality. In thirty years, the Forum has grown from the days of Robert Hume and B.C. Hart, when the primary Forum production was *The Construction Lawyer*, to its current reach of three national programs and a regional program a year, multimedia CLE products, and numerous publications beyond an expanded version of *The Construction Lawyer*. As significant as these quality products are the Forum is uniquely distinguished for the camaraderie and fellowship shared by its members.

The legacy of the first thirty years provides a solid foundation upon which to build future greatness and better achieve success for its members. The Forum contributes to your success by helping to:

- Build a solid foundation of skill
- Formulate a plan to build upon that foundation through learning experiences
- Develop relationships for personal and professional growth
- Learn from the experiences of others
- Refine skills of communication to build trust.

This is a solid foundation for anyone interested in building upon for the future.

The Forum will continue in its mission in this coming year to bring top quality programming to its members and to the construction industry. For the Fall meeting we revisit a great venue – the Hyatt Gainey Ranch in Scottsdale, Arizona on October 12 and 13, 2006. The program will focus on Advanced Analysis of Contract Risk-Shifting Provisions. The Joint Mid-Winter Meeting (with the Fidelity and Surety Law Committee) will be held January 25, 2007 at the St. Francis Hotel in San Francisco with a program centered on critical issues associated with design-build construction projects. The 2007 Annual Meeting of the Forum will be held April 12 and 13, 2007 in San Juan, Puerto Rico at El San Juan Hotel & Casino. This program will consider Lessons Learned from the Good, Bad and Ugly of Other's Experiences.

Planning is also underway for meetings in 2008 and 2009, with a planned return to New Orleans in 2009 for the Forum's Annual Meeting. In addition to these national meetings the Forum will present regional programming on Fundamentals of Construction Law on November 2, 2006 in seven cities – Bozeman, Montana; Pittsburgh, Pennsylvania; Atlanta, Georgia; Kansas City, Missouri; New Brunswick, New Jersey; the Washington DC area, and New Orleans, Louisiana. With these regional programs we will bring value to those whose budget or

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A Legacy of Greatness and Strategy for Success

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schedule makes attending the national programs a challenge.

Receiving your copies of *The Construction Lawyer* and *Under Construction* may satisfy your current needs, however, the legacy of greatness within the Forum and the foundation for success it builds goes well beyond these two excellent publications. At its 2006 Annual Meeting the Forum celebrated this legacy in a DVD produced in conjunction with the anniversary of the 30 years of service the Forum has provided. The DVD included personal interviews with many former leaders of the Forum, and highlighted the foundation of the Forum, its Programs, Publications, and People. Listening to B.C. Hart, Hugh Reynolds, Leslie O'Neal Coble, Larry Harris and others describe their experiences as part of the Forum reinforced a very important message that is often lost, even on our own members. Being engaged in the Forum brings incalculable benefits and immeasurable contribution to professional success.

Even if you are successful in your current practice you can be enriched further by being an active member of the Forum. I am a simple man with a legacy of hard work and hard headiness learned from parents that grew up during the Depression Era. I am humbled to be among the leadership of this great organization, and am committed to the continued excellence of the Forum. I encourage all of you to get involved in the Forum because the benefits personally and professionally will bring you success. The Forum's legacy of greatness will continue, we will pursue our mission and chart a path for the continued success of the Forum. Your strategy for success should include the Forum. ♦

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its decision: (a) as a matter of substantive federal law, an arbitration provision is severable from the remainder of the contract Prima Paint, 388 U.S. at 404; (b) unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance; and (c) this rule applies in state as well as federal courts. Southland Corp. v. Keating, 465 U.S. 1, 12 (1984). Simply put, the holding in Prima Paint applies with equal force to claims of illegality. Therefore, the court reaffirmed its holding in Prima Paint that a challenge to the contract as a whole is to be decided by the arbitrator.

The Court was careful to distinguish questions of a contract's validity from those related to whether a contract was actually formed. The Court's decision does not apply to the latter. The implication is that such questions are to be resolved by a court – although the Court does not expressly state so.

It is important to note that the Severability Doctrine applies to state courts. That is to the extent the arbitration clause is governed by the FAA. This inquiry breaks down into two separate questions: Does the transaction at issue "involve commerce" under § 2 of the FAA? (Most do.) Have the parties clearly chosen to apply state arbitration law? (Most do not.) If the answers to these questions are "yes" and "no," the FAA and its Severability Doctrine apply.

Practitioners should carefully examine relevant state law as it may differ from federal arbitration law. For example, under California arbitration law, where a party alleges a contract as a whole is illegal and void, it is for the trial court to first determine whether the contract is illegal and the arbitration clause enforceable. Loving & Evans v. Blick, 33 Cal. 2d 603, 204 P. 2d 23(Cal. 1949). Conversely, Ohio courts have held that questions regarding the illegality of the entire contract must be decided by the arbitrator. DiPietro v. Ginther, 2002-Ohio-4772 (Ohio App. 10th Dist.) ; Cross v. Carnes, 132 Ohio App.3d 157, 724 N.E.2d 828 (Ohio App. 11th Dist. 1998)(recognizing Ohio's adoption of the form of analysis set out in Prima Paint).

The question of who reviews questions of illegality is not academic. A party that is required to have the arbitrator decide the question has a limited ability to appeal the decision to a court.

Parties may avoid the application of the Severability Doctrine if they so desire. They can insert a choice of arbitration law provision into their contracts. In Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989), the Supreme Court held that the FAA did not preclude the application of California law preventing an arbitration from moving forward in deference to a related litigation, where the parties agreed the contract would be controlled by California law. The Court stated that the FAA was intended to have arbitration agreements enforced pursuant to the parties' agreement.

The issue in Volt was arguably a "procedural" matter, i.e., the timing of the arbitration proceeding. The Severability Doctrine, however, is a "substantive" federal arbitration rule. Is there a pre-emption issue raised where state arbitration law interferes with this federal "substantive" right?

Not as far as the California courts are concerned. In Hotels Nevada LLC v. Bridge Bank LLC, 130 Ca. App. 4th 1431, 30 Cal. Rpt. 3d 903 (Cal. App. 2d Dist., 2005), the contract at issue was a loan agreement between companies from Nevada and California. Accordingly, the FAA controlled the arbitration agreement, unless the

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parties agreed otherwise. There was a choice of law provision selecting California law. One party challenged the legality of the contract and the arbitrator deferred to a court to make that decision. The appellate court held the arbitrator was correct. It noted the parties selected California law to apply to the contract and California law required claims of illegality to be decided by a court, not an arbitrator.

Whether California is an exception or the norm remains to be seen. Moreover, other U.S. Supreme Court precedent holds that general choice of law provisions will not be construed to invoke a state's arbitration law over the FAA. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995). ♦

The Effect of Section 199 on the Construction Industry

By Morgan Holcomb
University of Minnesota

Are your clients taking advantage of tax break offered by Internal Revenue Code Section 199? Businesses with "qualified production activities," as the Code defines that term, are entitled to take a 3% deduction from net income (by 2010, the deduction jumps to 9%). Section 199 is part of the American Jobs Creation Act of 2004 --intended to provide a tax break to, among other businesses, the construction industry. Although Section 199 could well provide a tax break for your clients, its scope and application have proven nettlesome for taxpayers and their advisors. The first attempt to clarify the provision was in January 2005, when the IRS issued Notice 2005-14. Proposed Regulations followed in October of 2005 (Reg-105847-05). The notice and the proposed regulations were intended as a guide to those businesses qualifying for the domestice production activities deduction ("DPAD").

But attempts to clarify the complex and often-confusing provisions for determining the deduction continue to stir up concerns—especially in the construction industry where contractors and their lawyers struggle to find sure footing. And, nearly two years after the DPAD was enacted into law, it seems as if the best guidance the agencies could have offered practitioners in the construction industry may be the simplest: consult a tax lawyer.

Those involved in a variety of construction-related activities, including contractors, subcontractors, and suppliers, are eligible to benefit from the deduction. However, the provisions of Sec. 199 pose a number of complex challenges that may prevent taxpayers from taking advantage of the deduction and that may hamper attempts to maximize the benefits offered to the taxpayer.

Below is a brief overview of some of the many challenges taxpayers, attorneys, and accountants must face when calculating the deduction for qualifying production activities.

The Sec. 199 deduction allows a permanent deduction for income generated by qualifying domestic production activities ("QPAI"), including activities typically related to the construction of 'real property.' If either (1) taxable income as computed before the deduction or (2) 50% of 'W-2 wages' paid by the taxpayer are less than QPAI, the deduction will be limited to the lesser of the two. Prop. Reg. 1.199-1(b)(1). In such cases, the taxpayer is not allowed to carryover any deduction—a burdensome problem in an industry in which taxable income fluctuates from year to year.

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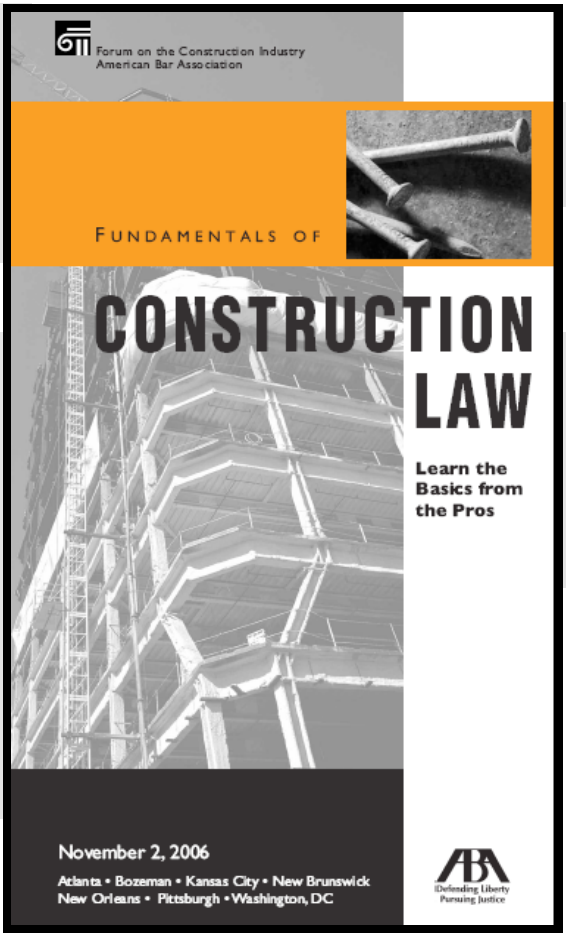
Don't Miss the Forum's next set of regional programs – conveniently located in a city near you.



The Effect of Section 199 on the Construction Industry

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Under Prop. Reg. 1.199-3(1)(1)(i), real property is limited to "inherently permanent structures other than tangible personal property in the nature of machinery …, inherently permanent land improvements, … and infrastructure" in the United States. For the purposes of Sec. 199 however, "construction" activities must be accompanied by a capital expenditure, excluding activities many in the industry would consider as, at least, tangentially-related to construction.

The rehabilitation of existing buildings or land improvements to existing structures are not qualified production activities. And engineering and architectural services, unless provided by the contractor, are expressly excluded from construction-related Sec. 199 deductions. Even some services that many contractors would consider essential to construction—such as delivering materials or removing demolition and debris from the worksite—fall outside the Sec. 199 deduction.

To complicate matters, the proposed regulations provide two distinct sets of rules for real property and tangible personal property. Because the proposed rules distinguish between a contractor's incomes from installing purchased materials, a qualifying production activity, and the resale of those materials, a non-qualifying activity, a taxpayer may be required to recognize and apportion aspects of qualifying activities as non-qualifying activities. For long-term contractors, whose contracts often involve the purchase and resale of both types of property, the calculation becomes even more difficult.

Once a taxpayer distinguishes between qualifying and non-qualifying production activities, QPAI can be determined. But it comes at the administrative cost of unbundling revenue streams—an accounting task that most contractors may have difficulty carrying out. Section 1.199-1(c)(i) of the proposed regulations defines QPAI as gross receipts from qualifying production activities (DPGR), less the cost of goods sold allocable to those receipts, other deductions, and expenses or losses allocable to those receipts. Non-qualifying income, although related, must be subtracted as well. The QPAI, in other words, is determined on an item-by-item basis, requiring the allocation of income and expenses to qualifying activities to be distinguished from those of non-qualifying income.

This presents the taxpayer or tax planner with a tremendously important and immensely complicated decision. The choice of accounting method, given the flexible income streams from qualifying or non-qualifying production can be used to maximize the Sec. 199 benefits available to the taxpayer. In other words, tax and accounting decisions may affect how contractors operate, draft contracts, and plan projects.

The proposed regulations treatment of land serves to showcase how tax decisions may impact a contractor's decisions when entering contracts or planning construction projects. Contractors who purchase land for use in construction, for example, must follow specific guidelines for removing the underlying, non-qualifying land transaction from QPAI.

For any contractor, calculating the Sec. 199 deduction will be burdensome. Anticipating the effect of business operations on benefits will often be demanding and requires a nuanced understanding of how a contractor's business practices may diminish their qualifying income base. But the benefits of Sec. 199 are far from trivial. With the right planning, taxpayers and tax planners can ensure that domestic construction makes the most of a deduction that will reach 9% of qualifying income by 2010.

Thanks goes to Christopher Gorman, 2nd year law student at the University of Minnesota Law School. ♦

EDITOR'S NOTE: CPR INSTITUTE RELEASES NEW EXPEDITED RULES FOR CONSTRUCTION DISPUTES BASED ON A 100-DAY HEARING TIME FRAME

On July 7, 2006, the International Institute for Conflict Prevention & Resolution (CPR Institute) announced the completion and promulgation of Expedited Rules for Construction Disputes, effective June 2006. These new Rules are designed as an alternative to assist the construction industry when faced with prolonged litigation or arbitration of disputes.

These Rules are in response to a growing dissatisfaction with the prolonged time frames and expense associated with construction arbitration within the United States. This frustration, coupled with CPR's familiarity with the United Kingdom's speedier construction adjudication process, led CPR to challenge the existing American structure and develop an expedited arbitration procedure for construction disputes centered on a 100-day hearing time frame.

The process seeks to regain the hallmarks historically associated with arbitration: a fair, expeditious, private, and generally less expensive process than litigation. It also contains familiar protections to avoid erosion of parties' rights that could occur with a less carefully-drafted procedure. Nonetheless, it allows tight arbitrator control and fosters compressed time frames to bring about sought-after speed and reduced expense.

For more information, please visit our web site at www.cpradr.org or http://www.cpradr.org/ConstRules06.asp?M=9.8

Arbitration and the Mechanics' Lien: Navigating Through the Thicket

By Paul S. Sugar & Michael P. Balducci
Ober Kaler

Arbitration agreements and mechanics' liens maintain an uneasy co-existence in construction law. Put broadly, parties agreeing to arbitrate disputes obligate themselves to proceed in a private tribunal. On the other hand, if the dispute involves an owner withholding payment, a contractor may seek a mechanics' lien that is available only through a judicial proceeding. This article discusses some of the issues that can arise when these two procedures meet, including waiver, arbitration agreement ambiguities, arbitrating under a third-party beneficiary theory, obtaining lien damages in arbitration and procedural pitfalls.

When addressing the issue of whether a contractor waives its contractual right to arbitrate by filing a mechanics' lien, courts often apply the rule that a party may waive a contractual right, including arbitration, by demonstrating the intent to waive. A party's actions that are inconsistent with the right to arbitrate, especially participating in litigation, may indicate this intent. How much participation constitutes a waiver is a question of fact under the circumstances of each case.

In one case, a contractor was found not to have waived his right to arbitrate by filing a mechanics' lien action during arbitration proceedings because, although it participated in a lien hearing, where the proceeding was only to determine whether probable cause existed for an interlocutory lien to attach and not resolve the merits of the claim. (*Brendesl v. Winchester Const. Co.*, 392 Md. 601 (2006).) Other facts the Court relied upon to conclude that the contractor did not intend to waive arbitration included a "non-waiver" clause in the arbitration agreement, the party's consent motion to arbitrate, and the contractor's lien filing which stated that the contractor intended to proceed to arbitration on the merits.

Filing cross claims and counterclaims may indicate an intent to waive arbitration. When a subcontractor filed a mechanics' lien, the contractor filed several cross and counterclaims and sought to compel arbitration. (*MPACT Const. Group, LLC v. Superior Concrete Constructors, Inc.*, 802 N.E.2d 901 (2004).) In this case, because the cross claim was permissive, it was argued that the contractor was actively participating in litigation and, thus waives its right to arbitrate. However, the Court concluded that because (i) the counterclaims were compulsory, (ii) the contractor stated in its answer that it was not waiving its right to arbitrate, (iii) the contractor requested in its affirmative defense that the claims be submitted to arbitration, and (iv) the contractor did not file motions to dismiss or for summary judgment before asserting its right to arbitrate, the contractor did not waive its right to arbitrate.

Some jurisdictions do not look at the intent of a party when determining waiver, but instead focus on procedural and statutory requirements. In one case, a contractor filed a mechanics' lien action despite its agreement to arbitrate. (*Dominion Consulting and Mgmt., Inc. v. Davis*, 63 Va. Cir. 548 (2004).) The lien action was stayed pending arbitration because the jurisdiction's arbitration statute provided that when parties have agreed to arbitrate, submission of "any claim or controversy to arbitration pursuant to such agreement shall be a condition precedent to institution of suit or action thereon." The jurisdiction had adopted the Uniform Arbitration Act (the "UAA") and therefore the decision provides an indication of how a court may view the issue under the UAA. Of note, the arbitration agreement was contained in the AIA General Conditions A 201 (1987). In this case, the contract did not provide any "carve-out" in the arbitration agreement allowing a lien filing, but simply stated that "any controversy or claim" shall be settled by arbitration. Therefore, arbitration was a condition precedent to the contractor's lien filing.

Before a party attempts to compel arbitration, it must ensure that the arbitration clause is unambiguous. An owner's motion to compel arbitration after the contractor filed a mechanics' lien action was denied because the construction agreement provided that, "either party may institute an arbitration" but also stated that, "any and all of said disputes arising out of this Agreement, and/or the Project shall be decided by a court of competent jurisdiction." (*Showboat Marina Casino v. Tonn & Blank Constr.*, 790 N.E.2d 595 (2003).) This ambiguity was construed against the drafter of the contract who, in this case, was the owner. The contractor, therefore was not compelled to arbitrate.

Where the contract contains no arbitration agreement, a party may attempt to arbitrate as a third-party beneficiary under one that does. An owner may find itself in a difficult position when it is not a party to the arbitration agreement between its general and a subcontractor and the subcontractor files a mechanics' lien. In one case, a subcontract stated that none of its provisions were "for the benefit of or enforceable by anyone other than the parties hereto." (*J.W. Hodges Drywall, Inc. v. Mizner Falls LLP*, 865 So.2d 681 (2004).) Therefore, the owner's motion to compel arbitration was denied.

Parties who file mechanics' lien actions and then stay the proceeding to pursue arbitration must request in the arbitration all of the damages which would have been available in court, or risk a lesser recovery. A contractor filed a mechanics' lien

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Arbitration and Mechanics' Lien

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action which was stayed to pursue arbitration. After having secured an award, the contractor filed a motion to enforce it. In the motion, the contractor requested that the court not only enforce the award, but also award costs and attorney's fees pursuant to the local lien statute. (*Aponik v. Lauricella*, 844 A.2d 698 (2004).) The arbitration award did not include costs and attorneys' fees. Although the contractor did not waive its mechanics' lien rights, it did agree to submit such rights to binding arbitration. Any claim available to the contractor under the mechanics' lien statute was available to it in arbitration and so its failure to request such damages in arbitration foreclosed the matter when seeking to enforce the award in court.

Besides damages, parties who fail to arbitrate all matters relating to the project in arbitration risk being prevented from litigating these issues at a later time under the principle of *res judicata*. A general contractor refused to pay a subcontractor due to allegedly defective work. The subcontractor then filed a demand for arbitration and asserted a claim for a mechanics' lien. The contractor never responded to the demand for arbitration and the subcontractor obtained a favorable award. The contractor then brought an action against the subcontractor for the allegedly defective work. The scope of the arbitration agreement, however, included any matter concerning the subcontractor agreement and any work performed. Therefore, the parties were required to submit all claims to the arbitrator for a decision. (*Palmetto Homes, Inc. v. Bradley*, 593 S.E.2d 480 (2004).) The contractor was thus barred from asserting such claims outside of the arbitration.

Such consequences may result from procedural confusion while pursing arbitration and a mechanics' lien action concurrently. In one case, a subcontractor filed a mechanics' lien and the owner, instead of filing an affidavit or a verified answer (as required under the lien statute), filed a motion to compel arbitration, claiming that the subcontract's arbitration agreement encompassed the disputes surrounding the lien. (*Cottage City Mennonite Church, Inc. v. JAS Trucking, Inc.*, 167 Md. App. 694 (2006).) The contractor and subcontractor proceeded to arbitration where the subcontractor was awarded damages. When the subcontractor moved for an order establishing the lien in the amount of the award, the owner attempted to assert defenses. The time for asserting defenses, however, was when the subcontractor first filed its lien action, as required by statute. Failure to file an answer or counter-affidavit required the acceptance of all statements of fact in the subcontractor's lien action.

Those in the construction industry must be aware of the conflicts created between arbitration agreements and mechanics' liens and be prepared to properly address these issues. ♦

Division 10 Implements Quarterly State Law Updates

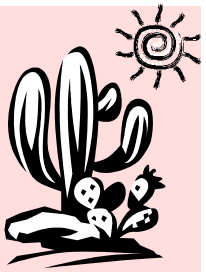
Perfecting it's role as "Server to the Forum", Division 10 has implemented a quarterly information request service that researches developing case law or legislative activity affecting the construction industry from all fifty states. The information submitted in response to these requests is posted on a state-by-state basis on Division 10's web site under "Division Related Materials", located at: http://www.abanet.org/dch/committee.cfm?com=CI110000.

As a "Member's Only" site, interested Forum members can access the Division 10 site by logging into the Forum's main web page. First-time users will be asked for their ID number (i.e., their ABA registration number) and after that they can then create their own password. This is a good time to become more familiar with the "Members Only" section of the Forum web page, and to take a look at what's happening in the 50 states. Moreover, if a development in your state is worth noting to the entire membership, please contact Denise Farris at dfarris@farrislawfirm.com. ♦

Attention Golfers: Fall Program (Oct. 12-13, 2006)

On Friday afternoon, October 13, during the Fall Program in Scottsdale, the Forum will conduct a golf tournament at the golf course adjoining the hotel. With a 1:00pm shotgun start, the tournament will be formatted to give all participants a chance to win team and individual prizes. For $120, each golfer will play 18 holes with a cart, have lunch, and have free beverages on the course. Although $120 covers only a portion of the greens fees, cart and lunch, the remaining cost for this event is being underwritten by various competition sponsors, including Capital Project Management, Construction Process Solutions, Greyhawk, Lovett Silverman, Navigant, Rimkus, and Veritas. We will pair foursomes into sponsored teams. Prizes will be awarded for individual and team competition. Players of all levels are welcome for an afternoon of fun and sun. We picked this type of golf format to accommodate players of all levels. You may register online for the tournament or contact Alanna Sullivan at sullivaa@staff.abanet.org for a registration form. Please sign up no later than **Friday September 29th**.

Join Us in Scottsdale
For Our 2006 Fall Meeting!



WHEN: October 12-13, 2006

WHERE: Hyatt Regency Gainey Ranch Resort
7500 East Doubletree Ranch Road
Scottsdale, AZ 85258
(480) 991-3388

TITLE: Advanced Analysis of Contract Risk-Shifting Provisions: Sharpen Your Clauses!

TELL ME MORE: This two-day litigation oriented program is designed to provide you with an advanced and thorough analysis of those risk-shifting provisions routinely included in contracts drafted by, or issued to, our clients. Whether you represent providers or procurers of construction services, this Program will provide you with unique perspectives and insight into the various ways these provisions may be interpreted. Moreover, what better place to learn such important practice oriented information than among the stunning vistas of Arizona and the magnificent grounds of the Hyatt Regency Gainey Ranch Resort.

Register by September 27, 2006 for advance registration rates. To register for the program online or to download a registration form, please visit the Forum's website, at www.abanet.org/forums/construction.

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321 N Clark Street
Chicago, IL 60610