

UNDER CONSTRUCTION

ANNUAL PROGRAM TO ANSWER MANY RECURRING QUESTIONS

Q Are some of the following the types of questions you get asked (or wonder about) in your daily practice?

A If the answer is "Yes" then you will find *this year's Annual Meeting* particularly helpful, as it will deal with these and similar issues.

Q Must the owner give the contractor notice of defective work and allow it the right to return and correct the work?

A Usually, but not always. The contract language controls. Even if the contract does not provide for this right, tactically it may be a good idea. The contractor may return and cure the defect and, if not, the owner has provided the opportunity. **Plenary II: Warranties and Guaranties**

Q Do I have insurance coverage if my subcontractor installed a defective product that needs to be taken out and replaced?

A Maybe. Whether the installation of a defective product constitutes "property damage" is another area where insurance companies and construction industry policyholders disagree. Recent case law suggests that insurance coverage exists for property damage that is caused by the defective product but that the cost to remove the defective product itself is not covered. **Plenary IV: Defects Litigation**



Q If the owner and contractor do not include an item on the punchlist, has the owner waived its rights to insist on completion or correction of that item?

A Unless the owner intentionally excludes the incomplete or defective item from the punch list and intends to waive the completion or correction of such item, an owner generally does not waive its right to require completion or correction of such an item. **Plenary I: Getting the Project Complete**

(continued on page 3)

IN THIS ISSUE

Message from the Chair-Elect 2

Divisions Plan Breakfast Programs at Forum's Annual Meeting 4

Contracting for Remedial Work 6

Announcement Corner 7

Next Forum Meeting 8



UNDERCONSTRUCTION

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MESSAGE FROM THE

CHAIR

Deborah S. Ballati,
Chair-Elect

ELECT



As all of you who attended know, our mid-winter program in New York, *Passing the Buck: Legal Limitations*

on Transferring Construction Risk, jointly sponsored by the Forum and the Fidelity and Surety Law Committee of TIPs, was a huge success. The speakers and program materials were some of the best ever, and it was wonderful to see that New York is back on its feet and thriving after the devastating blow it took on September 11, 2001. The program planners put together a first-rate group of speakers, and introduced two new features to this program, which worked very well. First, in addition to the traditional panel discussions and lectures, we had a series of mini-debates on specific topics that put the material provided in the lectures and panel discussions into practical context. Second, we provided to everyone who attended a CD-Rom of the program materials, in addition to the traditional bound volume. We have received much favorable feedback about the CD-Rom, and we are producing one for the Annual Meeting in San Francisco as well.

Finally, we are experimenting right now with a new process tied to the January program which we hope to continue in the future on some of our programs. Those who received the CD-Rom at the program, or when they purchase the program materials separately, will find in it a link to the Forum website which will

allow each user to report to others on the website regarding the laws and cases in their individual jurisdictions involving risk transfer issues, the topic of the January 2002 program. Our goal with this feature is to provide a way for our members to keep each other advised of changes in the laws of the fifty states in this important area. If the experiment is a success, we hope to expand its use to other programs and topics.

Let us hear from you on how you like the CD-Rom; we are always looking for ways to better serve our members. My personal thanks to Jim O'Connor, Chair of the Forum's Technology Committee, Charlie Monroe, our technology consultant, and the Forum Technology Committee, for all their hard work that made this product happen.

As evidenced by the "teaser" discussion in this issue, our upcoming Annual Meeting in my hometown, San Francisco, *After the Dance: Substantial Completion and Beyond*, will be both informative and exciting. We have again compiled a blue ribbon panel of speakers who will focus on all facets of project close-out and the many things that can and do happen after you think the project is done. Separate plenary sessions will address issues related to substantial and final completion, warranties and guaranties, the impact of contractor insolvency on project completion and the use of class actions to pursue construction defect litigation. As always at our Annual Meetings, we will have

(continued on page 3)

Annual Program

(continued from page 1)

Q The contractor and payor on a final check are disputing the balance owed because of unresolved claims. The payor puts the following restrictive endorsement on the check, "Payment in full for all labor, materials and services provided under Contract XYZ." Contractor calls you on what to do with the check. Your advice is . . . ?

A Send the check back to payor and demand full payment. Courts in many states will find the deposit of the check, even with the restrictive endorsement marked out, to be an accord and satisfaction and the Contractor to have waived his right to claim any additional amount under the contract. *Workshop: Waivers, Releases and Project End Change Orders*

Q The boxes of paper I recently provided to the opposition inadvertently contain a memo to my client that is privileged. Have I just waived the attorney-client privilege in its entirety?

A It depends a great deal on the state in which the issue will be raised. *Workshop: Ethics for Construction Lawyers*

Q Does every stupid thing that my employees say come into evidence at an OSHA trial?

A It certainly does. Under Rule 801(d)(2), statements of employees are considered admissions, which are not hearsay, and the compliance officer can testify to those statements at trial without calling the employee as a witness. *Workshop: OSHA*

Q Who is likely to become a target of a class action in construction defects litigation?

A Builders, developers, subcontractors, building product manufacturers and suppliers are all potential targets. Anyone connected with construction involving multiple claimants with something in common such as: (1) numerous homes in a single subdivision constructed by the same contractors using the same materials and resulting in similar claims of defective work; or (2) a claimed defect in a building component (e.g. plastic plumbing, EIFS) used in the construction of many homes or other structures. *Plenary IV: Defects Litigation*

Q Does the practice of holding retainage carry a hidden finance cost that increases total project costs?

A At least one study has shown that subcontractors would reduce their bid prices an average of 3.1% if retainage was not held. *Workshop: Retainage and Retainage Reform*

Q Where and when is this year's Annual meeting?

A Palace Hotel, San Francisco, California. April 18-19, 2002. See you there.

For more questions and answers, Program Co-Chairs Carl Calvert and Fred Wilshusen invite you to join them at the Annual Program. You may register online at www.abanet.org/forums/construction/html/registration.html or call ABA at 312-988-5666 for a brochure 

Message

(continued from page 2)

numerous workshops including ones on retention, best value contracting, liability for latent defects, arbitration of defect disputes, and ethical issues for construction lawyers. Whatever the focus of your individual practice, in light of what has happened in the construction, corporate, insurance and surety markets over the past year, this program will be particularly timely.

The site for our Annual Meeting, the Palace Hotel, is one of our oldest and most spectacular hotels, which underwent a substantial two-year renovation in the 1990s to both enhance its original splendor and prepare it for the new century. Our Annual Reception, to be held in the historical Garden Court on the ground floor of the hotel, will be a terrific event. The Division breakfasts will draw speakers from many of the important Bay Area projects. In addition, at our Friday luncheon, we will honor two giants in the construction industry, Ed Corwin and Allen Overcash, both Past Chairs of the Forum, who will each receive the Forum Cornerstone Award. The many accomplishments Ed and Allen have achieved over the years will be highlighted at the luncheon as they receive their awards and our thanks for all they have contributed to the industry, the practice and the Forum. For more information on the Annual Meeting, visit our website at www.abanet.org/forum/construction/home.html.

Plans are well underway for our [Fall program](#) on problems and issues related to construction defects to be held in Minneapolis on October 3rd and 4th, and our January 2003 [Midwinter Program](#)

(continued on page 4)

DIVISIONS PLAN BREAKFAST PROGRAMS AT FORUM'S ANNUAL MEETING

Over the past few years, a popular addition to the Forum's Annual Meeting has been the Breakfast Programs, sponsored by the Forum's Divisions. The Divisions invite you to attend any program that is of interest to you. At this year's Annual Meeting in San Francisco, on April 19, 2002 between 7:45 and 9:15 a.m., the Divisions plan to present the following programs:

Division 1: Our featured speaker will be [William Quinby](#) speaking on the topic of "Effective Mediation Advocacy." Mr. Quinby is a full time mediator and arbitrator with [Wulff, Quinby & Sochynsky](#) based in San Francisco. Mr. Quinby's talk will be informative and entertaining for anyone who uses mediation, or is considering it, in any phase of a dispute.

Divisions 2 and 12: We plan a joint meeting with the current Chair of the AIA Contract Documents Committee and the AIA's Managing Director of Contract Documents to get the inside scoop on the AIA's contract drafting process, and to discuss ways that input can be encouraged from owners and industry groups.

Divisions 3, 4 and 5: We have scheduled Jeff Morales, Director of the [California Department of Transportation](#), to give a talk in conjunction with our division breakfast meeting. Mr. Morales was appointed to his current post in May 2000. He manages a \$10 billion budget and more than 23,000 employees. His talk is expected to focus on design-build highway construction, toll roads, and other transportation innovations and reforms.

Division 9: Our breakfast meeting topic will be "Is There Insurance Coverage for Limited Form Indemnities?" Subcontractors, suppliers and their attorneys constantly battle indemnities where they assume the liability for someone else's negligence. It is generally accepted that the best case scenario for subcontractors is the limited form indemnity where the subcontractor's contractual indemnity obligations are limited to the subcontractor's own negligence. However, are claims based upon this obligation covered by the subcontractor's commercial liability policy? [Richard Gary Thomas of Thomas, Feldman and Wilshusen](#) of Dallas, Texas will lead the lively discussion on this topic. 

Message

(continued from page 3)

which will again be held in New York. If you have ideas for program topics you would like us to address in the future, please let us know. Planning for our programs starts over a year in advance, and most programs start out as ideas from our members, either from one of our [Divisions](#) or from the membership at large. Once we decide on a particular topic for a program, we undertake a substantial effort to fashion plenary and workshop sessions that address the most important subjects within that topic

and then begin our search for the best and most knowledgeable speakers to address them.

We are always considering ways to make our programs and our publications better and more useful to our members and to the industry we serve, so let us hear from you about how we might do that. If you have a program topic you would like us to address, a book you would like us to write and publish, an article that you think would be appropriate for Under Construction or The

[Construction Lawyer](#), give us your suggestion, and we'll consider it. The Forum belongs to all its members, and it will continue to grow and get better as long as it continues to strive for excellence in all that it does. Help us continue to achieve that excellence by getting involved, by sharing your ideas and by commenting on how we are doing. See you all in San Francisco. 

Deborah Ballati is a partner with Farella, Braun & Martel, LLP in San Francisco, CA.

CONTRACTING FOR REMEDIAL WORK

Different Issues or Just a Different Slant?

By J. W. O'Neil, Jr.

Much of the work performed by the construction industry does not involve new structures but "remedial" work, variously described as repair, restoration, remodeling or renovation. Although many of the issues covered by construction contracts are similar on both new and remedial work, their impact on the parties may differ or the parties may want to distribute the risks differently when remedial work is involved. Therefore, preparing and reviewing standard industry construction contracts for use on remedial projects may require cramming several square pegs into round holes. The following topics provide examples of these differences.

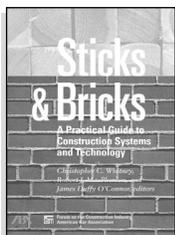
Scope of Work: One obstacle in drafting any construction contract is adequately describing the scope of work. How specific should the description of the work be? For remedial work, the owner may be content with a scope that says, "repair my problem" for a lump sum price. However, using a "do the necessary" type of scope can lead to dissatisfaction all around because it looks only to the result and fails to define the work. Contractors want to understand what they are expected to do for the stated compensation and owners want to know what they are getting for their money. Since remedial work may not be visible when it is finished, the parties may

not be able to see what the contractor accomplished. If there is agreement on what the contractor is to do, the parties will find it easier to price the work. The owner understandably wants predictability, with no claims at the end or changes that increase the project cost. On the other side, the contractor does not want to lose money because things that the contractor did not anticipate are forced into a vague scope of work.

When representing owners, some contract drafters use the phrase "including but not limited to" when describing the scope of work. This phrase serves no purpose other

(continued on page 6)

Two New Books from the ABA FORUM ON THE CONSTRUCTION INDUSTRY

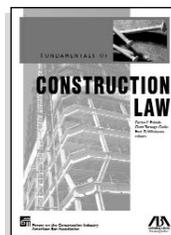


Sticks & Bricks: A Practical Guide to Construction Systems and Technology

Christopher C. Whitney, Robert J. MacPherson, and James Duffy O'Connor, editors

Sticks and Bricks, based on the successful series of programs presented by the ABA's Forum on the Construction Industry, brings together in one volume the expertise of nationally recognized engineers, architects and contractors who explain in clear language their areas of building technology. No matter what your level of expertise, this guide pulls together the basics of constructing a building and presents it in a practical format.

2001, 306 pages, 7 x 10, Paper
Product Code: 5570075
Regular Price: \$144.95
Construction Forum Member Price: \$119.95



Fundamentals of Construction Law

Carina Y. Enhada, Cheri Turnage Gatlin, Fred D. Wilshusen, editors

This book is written by widely regarded attorneys practicing in the field of construction law, and is packed with thirteen chapters of useful information and insights. A "must have" for any lawyer tackling the area of construction law. This book should be of particular interest to lawyers new to the area of construction law, and will definitely assist any lawyer in becoming more efficient and cost effective in prosecuting or defending construction disputes.

2001, 381 pages, 6 X 9, Paper
Product Code: 5570078
Regular Price: \$129.95
Construction Forum Member Price: \$109.95

To order - Phone: 1-800-285-2221 Fax: 1-312-988-5568

E-Mail: service@abanet.org; Online: www.ababooks.org

Contracting for Remedial Work

(continued from page 5)

than to shift risk. The contractor could legitimately ask, "What else do you want done?" A specific scope of work benefits both parties. Their approach to the work should be to do a good job at a fair price, and not just to shift all the risk of perceived problems.

Changes and Extras: On any construction project there are likely to be changes needed as the project progresses. The owner does not want these changes to cause increases in the overall project price. Owners want protection from a contractor who may try to use changes to make up for what the contractor left on the table in the bidding process. However, contractors do not want to absorb all of the cost of changes necessitated by causes beyond their control.

A fair, well-drafted scope of work can avoid many of these disputes. One provision that appears frequently is the representation by a contractor that the contractor has had all the opportunity it

deems necessary to evaluate the work. This provision potentially leads to a waiver of all claims for extras arising from circumstances that the contractor should have discovered. Such a provision takes on new meaning when the project involves a high-rise building that can only be inspected with a comprehensive review of the entire building. Sometimes the extent of needed structural repairs cannot be determined without some demolition or destructive testing. Such representations by the contractor should be commensurate with the time and opportunity given the contractor to review the project. In a remedial contract, the "digging" takes place on the building components instead of in the ground.

Another provision found in standard contracts is the customary section on changes. Generally, this section states that the owner will compensate the contractor only for changes pre-approved in writing. This provision is easy to understand and easily should be acceptable to both parties. However, often owners add an additional provision that requires the contractor to perform promptly whatever changes the owner requests, even if the parties cannot agree on price. This is not a balanced approach. A compromise position is one that allows the work unaffected by the change to progress, while the parties take a careful approach to resolving the "change" by first agreeing on scope and price.

Since remedial projects frequently involve estimated quantities, the final price will be determined as the work progresses. The parties may not be able to tell how deep or wide the deteriorated material is until after the contractor commences tearing it out. Unit pricing can help

reduce the contractor's risk, but the owner will want some protection from unlimited cost. One option is a "guaranteed maximum price." The parties can best solve this issue by considering the possibilities and frequently communicating during the project, not just by inserting risk shifting provisions in the contract.

Indemnification: At the top of the list of reasons why owners want indemnification is the fear of claims from injured workers. One big difference between new and remedial work is that in remedial work, the contractor often is working on occupied buildings. With rare exceptions, the contractor is not likely able to fence the work in and control access and egress. Where the building is in use, the owner is concerned about the potential for injury or property damage claims by third parties. Furthermore, the owner may have its own maintenance personnel working in proximity to the contractor's employees. The contractor has no control over the owner's employees who work in the building and who may disregard yellow tape, signs, and other barricades. Who should be responsible for the actions of the owner's employees? Boilerplate language written from a new construction view often does not differentiate, or even acknowledge that there is a difference. However, some of the standard printed forms use a standard that incorporates comparative fault. These provisions are better suited to the job site where no one party has complete control of the site and its attendant risks.

Insurance: Whose insurance should cover the negligence of the project-participants? The effect of being named as an additional insured

The Forum on the Construction Industry

CALENDAR OF MEETINGS

Forum on Construction Annual Meeting
April 18-19, 2002
The Sheraton Palace
San Francisco, CA

Forum on Construction Fall Meeting
October 3-4, 2002
The Hilton
Minneapolis, MN

Forum on Construction/TIPS Joint Midwinter Meeting
January 30, 2003
The Waldorf-Astoria Hotel
New York, NY

See you there!

(continued on page 7)

Announcement Corner

CORNERSTONE AWARDS

The Forum is pleased to announce that it will present the Cornerstone Award to two prominent leaders in the construction industry at its Annual Meeting in San Francisco on April 18-19, 2002. **Erwin L. Corwin**, the 2001 recipient, will be present to receive his award at the meeting, along with **Allen L. Overcash**, the 2002 recipient.

Ed Corwin was in private practice for over 48 years in New York City and was the founding partner of **Corwin, Solomon & Tanenbaum, P.C.** Ed is a past Chair of the Forum on the Construction Industry, a Fellow in the American College of Construction Lawyers, and has been very active with various Alternative Dispute Resolution organizations. He is currently an active mediator and arbitrator.

Ed has contributed much to the construction industry and the Forum is pleased to present him with its 2001 Cornerstone Award.

Allen Overcash is still actively practicing with the **Woods & Aitken, LLP** firm in Lincoln, Nebraska. He is a former member of the Forum's Governing Committee and a Fellow in the American College of Construction Lawyers. Allen also has been very active in Alternative Dispute Resolution committees and processes. He is a frequent lecturer and author, having written numerous articles about construction topics. The Forum is delighted to honor Allen Overcash as its 2002 Cornerstone Award recipient.

We hope that you will be able to join us as we recognize these two distinguished members of the construction bar.

REPORT OF THE NOMINATING COMMITTEE

In accordance with Section 6.4 of the Bylaws of the Forum on the Construction Industry, the Chairperson announces the following nominees for office in 2002-2003, to be elected at the Annual Meeting of the Forum on Friday, April 19, 2002, in San Francisco, CA:

For Chair (automatic):
Deborah S. Ballati

For Chair-Elect:
John R. Heisse II

**For Governing Committee
Members-at-Large:**
Kenneth R. Kupchak
Michael D. Tarullo, Sr.
Fred D. Wilshusen

Contracting for Remedial Work

(continued from page 6)

often is the subject of debate. However, to the remedial contractor, who lacks control of the site, the issue can be the difference between a reasonable insurance risk and one that will spell disaster if there is a claim. While adding a party as an additional insured might not bring a bill for an extra premium, it increases risk, and this ultimately leads to increases in the cost of doing business.

Separate property insurance is less important on remedial work. While Builders Risk insurance is important for new construction, the contractor's work covered under such a policy is much less on remedial projects. Since most buildings already have property insurance, the risk to be covered by Builders Risk insurance on remedial work is less.

Completion: The **standard AIA contract** defines "substantial completion" in terms of when the owner can occupy a building or use the structure for its intended purpose. Substantial completion when the owner already occupies the building, or has never stopped using the facility, requires a different standard. Defining substantial completion is easier where some part of the building will be out of normal use for a period. Yet, the parties must use some care to develop a fair definition. If the contract calls for testing, that may be an objective standard to use. Otherwise, the parties may agree that design professionals should inspect and certify that the work is complete. Where neither of these options is present, consider letting

the contractor serve notice of completion subject to inspection and agreement on a punch list. By tailoring the contract to fit the project and setting out their expectations, the parties should have a better working relationship throughout the project.

These issues suggest why attention to the nature of the work is important on remedial projects. While the standard construction forms deal with some of the differences, each party should carefully review risk allocation under these contracts to ensure the party understands and adequately protects against the risks it agrees to assume under the contract. 

**J. W. O'Neil, Jr. is General
Counsel of The Western Group
in St. Louis, Missouri.**



Don't Miss the Next Forum Meeting!

WHEN: APRIL 18-19, 2002

WHERE: [The Sheraton Palace Hotel](#), San Francisco, CA

TITLE: [After the Dance - Substantial Completion and Beyond](#)

TELL ME MORE: Plenary Sessions include:

- "Getting the Project Complete: From Substantial to Final Completion"
- "Warranties and Guaranties, Rights and Remedies: When does it ever end?"
- "Getting the Project Complete and Paid For When the Contractor or Owner is Insolvent"
- "Construction Defects Litigation: Use of Class Actions and Seeking Insurance Coverage"

Plus ten workshops on a variety of topics including: retainage reform; best value contracting; post-completion liability for latent defects; waivers, releases and project end change orders; and understanding, negotiating and documenting relationships between design professionals and their consultants.

To register for the program call the American Bar Association at 312-988-5666 to request a brochure or download a registration form from the Forum's website at www.abanet.org/forums/construction/html/registration.html.

Our two-day Annual Program focuses on project close-out and the difficult issues that every construction lawyer faces at the end of a project and beyond. The many topics to be discussed in the four plenary sessions and ten workshops include: when is the project substantially complete, for what warranties will the contractor and subcontractors be responsible, what responsibility does the surety have for latent defects, and when can the contractors expect final payment. There will even be a special session with an engineer on how to read and understand construction drawings. On Thursday evening, the Forum will hold its annual reception in the Palace Hotel's spectacular Garden Court, the site of the meeting of the League of Nations addressed by President Wilson. For those staying the weekend, we have arranged for a special tour of the Sonoma and Napa Valleys on Saturday, complete with wine tasting and a picnic lunch. We look forward to seeing you in San Francisco!



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