

UNDER CONSTRUCTION

FORUM AND TIPS JOINT MIDWINTER PROGRAM: GETTING TO THE BOTTOM OF CONSTRUCTION CLAIMS

By: Theodore M. Baum

There is a curse widely attributed to the Chinese, although in actuality, it is probably of Western origin and more recent vintage: "May he live in interesting times." Thirty-six years ago, Robert F. Kennedy, speaking to an audience in Cape Town, South Africa, invoked the "Chinese curse" and observed, "Like it or not, we live in interesting times..."

Flash forward to the turn of the millennium - the tech-stock bust; the tragedies of September 11, 2001; the Enron collapse and the related accounting and corporate scandals; troubling political and diplomatic developments around the globe. These are interesting times indeed. Were these calamities predicted by zealots, or simply a strange series of coincidences justifying the ravings of madmen?

Whatever the cause, the trip down from the dizzying economic heights of the boom years of the mid- to late 1990s was not a gradual slow-down, but a rapid descent ending with a jarring jolt. The construction industry has already felt the impact of these events. The hardening of the insurance and surety markets conspired with the weakened economy to hasten the demise of many in the construction industry.

The ripple effects of such events are many. One effect is an increase in construction claims. When economic times get tough, or "interesting," claims become more prominent. And so, the focus of the January 30, 2003 joint meeting of the ABA's Forum on the Construction Industry and the TIPS Fidelity & Surety Law Committee will be construction

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NOMINATING COMMITTEE ANNOUNCED

Pursuant to Article 6 of the Bylaws, [Deborah S. Ballati](#) has appointed the following people to serve on the Nominating Committee for the annual election of the Chair-Elect and three Governing Committee Members-at-Large:

CHAIR

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The election will be held on Friday, May 9, 2003 in Boston at the Forum's Town Hall Meeting during its Annual Meeting. Please forward your nominations or expressions of interest, along with a curriculum vitae including details of the nominee's activities in the Forum, the ABA and its Sections and Divisions, and in the legal profession generally, to [John Heisse](#) by January 20, 2003.

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2002-2003

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MESSAGE FROM THE

CHAIR

John R. Heisse II,
Chair-Elect

ELECT



In this issue of Under Construction, we announce the Nominating Committee, which will select the nominees for my

successor as Chair-Elect and for three members of the Governing Committee. These nominations will be announced next Spring, with the elections to follow at our Annual Meeting in Boston on May 8 and 9, 2003. With nominations due in early January, this is a good time to discuss Forum leadership and how one gets involved.

Our twelve Divisions are the lifeblood of this organization. It is our Divisions that produce many of the articles in the Construction Lawyer and Under Construction, develop program ideas for our meetings, and foster e-mail exchanges among Division members on topics of interest. The Divisions have also been the driving force behind many of our book publishing efforts and our membership recruitment and retention program. Each of these Divisions is led by a Chair and a Steering Committee of five to nine members. Chairs typically serve a two-year term. Although Steering Committee members are appointed for one-year terms, most serve several terms.

The Chairs of each Division report to the Governing Committee—the Forum's nine member "board of directors." The Governing Committee members serve three-year terms. These terms are staggered, with three new members joining the Governing Committee each year. In

addition to this group of nine are our Chair, Chair-Elect, and Immediate Past Chair. Also, the editors of Under Construction and The Construction Lawyer, our liaison to the ABA Young Lawyers Division, and our Technology and Publications Chairs are typically invited to attend Governing Committee meetings as non-voting participants.

Individuals are appointed to positions on Division Steering Committees by the Governing Committee. Each year its Division Selection Subcommittee canvasses the current Division Chairs and considers self-nominations before recommending a slate of Division appointments. Often we have only one or two openings per Division per year since individuals typically serve on the Steering Committees for several years. The current members of the Division Selection Subcommittee are Governing Committee members [Kim Hurtado](#) (Chair), [Lynn Axelroth](#), [Doug Green](#), and [Mike Tarullo](#). Those interested in serving on a Division Steering Committee should make their interest known to both their Division Chair, and one or more members of the Division Selection Subcommittee, as appointments are made at our Annual Meeting.

Unlike Division appointments, our Chair-Elect and Governing Committee members are elected by the membership at large at our Annual Meeting. Consistent with the announcement of the Nominating Committee on the cover of this issue, a slate of candidates is selected by the Nominating Committee and announced in advance of the Annual Meeting.

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Forum's Midwinter Program

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claims in our rapidly changing world. We will discuss techniques to prevent construction claims from arising, as well as strategies to deal with such claims once they have arisen.

Now is the time to take a fresh look at the process of asserting, evaluating and resolving claims and disputes. The many new developments, new case decisions, new contract language, and better litigation assessment techniques combine to add new wrinkles to the already complex world of construction claims and disputes. This year's joint program will concentrate on such new thinking, and highlight new techniques in the drafting, claims and dispute resolution processes. You will hear about the use of formal litigation risk assessment techniques, including mathematical formulae for weighing the many paths in the "decision tree," and look at the recent evolution of key contract clauses that affect claim rights. The complexities presented when one party to a claim declares bankruptcy will be examined, and an in-depth discussion of the hard decisions faced by owners and sureties when the issue of default termination arises.

The midwinter program will start with an examination of the claims "lifecycle." Moderated by noted construction law veteran [Louis Pepe](#) of [Pepe & Hazard, LLP](#), Hartford, CT, the panel will be rounded out by [Michael Libor](#) of Philadelphia's [Morgan, Lewis & Bockius, LLP](#) and [Carol Patterson](#) of [Zetlin & De Chiara](#) of New York. This segment of the program will examine the construction claim

from cradle to grave, beginning with compliance with notice requirements and other contractual limitations on claims, moving through claim preservation issues while physical construction continues, and finishing with special litigation or other dispute resolution problems.

In a departure from the ordinary, and a particularly interesting facet of the midwinter program, the second segment will examine the application of the decision tree analysis to construction claims. Using a hypothetical case, litigators [Barbara Werther](#) of the Washington, DC office of [Thelen Reid & Priest, LLP](#) and [Robert Crewdson](#) of Atlanta's [Alston & Bird, LLP](#) will examine, support and criticize the decision tree analysis process, which will be presented by noted consultant [Craig Miller](#) of the [Miller Group](#), headquartered in Savannah, GA. The discussion of this process will provoke analytical thought of construction claims in every member of the audience, from the construction law neophytes to the old construction claim warrior. The presentation will give you a new way of evaluating construction claims and making go/no go decisions.

Not to be forgotten are the owners. [John E. Menechino, Jr.](#) of [Smith, Currie & Hancock LLP](#), Atlanta, GA will take the stage for the third segment along with [Robert F. Miller](#), counsel with [Union Oil Company](#) of California, El Segundo, CA. This segment will review the many quandaries presented to owners when they are faced with the possibility of default termination. Never an easy row to hoe, Menechino and Miller will guide us

through the issues which provide pitfalls for the unwary in every jurisdiction.

No discussion of construction claim issues in hard times would be complete without a section on bankruptcy, and so [John Sebastian](#) of [Leo & Weber, PC](#), Chicago will be joined by [DeWitte Thompson](#), a member of [Thompson & Slagle, PC](#) based near Atlanta, to discuss the impact of bankruptcy on construction claims. In an interesting twist, John and DeWitte will not only discuss contractor bankruptcy, but owner bankruptcy as well, which seems just as likely in these "interesting" times.

A discussion of surety issues will complete the program. Specifically, moderator [Donna McCaffrey](#) of [Amtrak](#) will keep things on track while two Florida litigators discuss the surety's assertion of construction claims. Issues from the esoteric to the practical will be the focus of presentations by [Patricia Thompson](#) of the Miami office of [Carlton Fields](#) and [Edward Etcheverry](#) of [Etcheverry, Kouri & Harrison, LLP](#), located in Fort Lauderdale.

The luncheon speaker for the Program will be [John H. Beyer](#) of the New York based [Beyer Blinder Belle, Architects & Planners](#). Mr. Beyer leads the team of architects engaged by the Port Authority of New York and New Jersey and the Lower Manhattan Development Corporation, evaluating and planning the reuse of the World Trade Center site. He will provide some insights into the planning complexities for this highly emotional project.

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NEGOTIATING PAYMENT TERMS IN PRIVATE CONTRACTS UNDER THE LIMITS SET BY PROMPT PAY ACTS

By [Thomas D. Czik, Esq.](#) and [Jayne Czik, Esq.](#)

Contracting parties typically may include whatever payment terms they agree on in their contracts. Today, however, state courts and legislatures are becoming more involved where it appears that a party, particularly one that provides services or materials to a construction project, may not be paid through no fault of its own. Accordingly, many states have voided pay-if-paid contract clauses. In addition, legislatures continue to enact prompt pay acts for both public and private contracts. See John W. Hays, Prompt Payment Acts: Recent Developments and Trends, Vol. 22 *The Const. Lawyer* No. 3, at 29 (2002). These prompt pay acts set limits on the time allowed for payment and consequences for the failure to comply.

Rather than rely on the courts for enforcement, careful construction practitioners should take steps to protect their clients within the framework of these prompt pay acts. The following are points that the construction lawyer should be aware of when negotiating the payment terms of a construction contract or in representing a lender or surety.

REPRESENTING SUBCONTRACTORS

Subcontractors are the major beneficiaries of prompt pay acts. In fact, subcontractor lobbying frequently leads to the enactment of these statutes. Prompt pay acts limit the general contractor's ability to withhold payment from its

subcontractors after it has been paid. If the general contractor does not pay within the time allotted, the subcontractor generally is entitled to statutory interest and the general contractor may be subject to penalties.

Subcontractors' attorneys should take steps to ensure that the subcontract does not include terms that seek to sidestep payment provisions found in their state's prompt pay act. For example, in New York's recently enacted statute ([N.Y. Gen. Bus. Law Chapter 20, Article 35-E, effective Jan. 14, 2003](#)), the provisions that require notice and information to be given to the subcontractor regarding payments made by the private owner are only default provisions. The subcontractor, therefore, should not allow its subcontract to include language that says the subcontractor is not entitled to these notices or to this type of information. Otherwise, the subcontractor will lose the benefit of having knowledge of the general contractor's payment status with the owner.

REPRESENTING GENERAL CONTRACTORS

The general contractor's attorney should make certain that its client's contracts with the owner and its subcontractors are consistent. Otherwise, the general contractor may wind up financially squeezed between the owner and the subcontractor. The general contractor must negotiate with both the owner and its subcontractors to ensure that it is only required to pay the subcontractors

with funds that it receives from the owner. For example, if, as in New York, the owner is not required to pay the general contractor until it receives payment from the lender, the general contractor needs to make sure that its subcontracts do not include any language that would require it to pay a subcontractor before the owner pays the general contractor. However, in negotiating contingency payment language, contractors must be aware of whether their state legislatures have legislated against, or their state courts have refused to enforce, "pay when paid" or "pay if paid" clauses. See William M. Hill and Donna M. Evans, Pay When Paid Provisions: Still a Conundrum, Vol. 18 *The Const. Lawyer* No. 2, at 16 (1998).

REPRESENTING OWNERS OR LENDERS

Prompt pay acts that include a payment cycle benefit owners and lenders by providing fixed time periods within which the general contractor, its subcontractors and suppliers must get paid. The owner should expect that the work will progress better if those involved with the work are getting timely payments. Owners should not be afraid to share payment information with subcontractors and suppliers when this information is sought. Owners will benefit by being aware early on in the payment cycle whether the general contractor is complying with its payment obligations. This type of information should help prevent the filing of mechanic's liens and

the assertion of claims against the owner's property by those working under the general contractor.

The owner's attorney should include a provision in its construction contracts that requires the general contractor to give the owner documentation of the general contractor's compliance with the prompt pay act. The owner should use this information as a tool to ensure subcontractors and suppliers are being paid, even if its state has no prompt payment act. Requiring the owner and the general contractor to notify the subcontractor when payment has been made will help prevent payment problems early.

REPRESENTING SURETIES

Sureties can also benefit from making certain that their contractors comply with prompt pay laws. First, by giving subcontractors another alternative to making a

claim against a payment bond, sureties may see fewer payment bond claims. Additionally, where prompt pay acts require owners and general contractors to give subcontractors payment information, subcontractors will be able to register their payment claims directly to the owner and have the information ready to back up those claims. Again, this gives owners and subcontractors the opportunity to deal with payment problems at an earlier stage in the payment cycle.

CONCLUSION

At the risk of sounding naive, it is shameful that construction payment practices have deteriorated to the point that legislatures must now step in to establish payment periods. Some owners and general contractors have lobbied against prompt pay acts on the ground that they interfere with their right to contract. Yet, arguing

that someone who has provided materials and/or labor on a construction project should be paid at the whim of the owner or the general contractor rings hollow.

Everyone involved in the construction process benefits from payment within reasonable time periods. There is the obvious benefit for all the parties of regular and predictable cash flow. In addition, lenders and sureties may be unintended beneficiaries of these prompt pay acts - they can rely on more consistent payment cycles and may learn of and be able to resolve payment problems sooner. 

Thomas D. Czik of Thomas D. Czik & Associates in Garden City, NY, is a member of Division 5 of the Forum. Jayne Czik, Tom's sister, is an associate at Thomas D. Czik & Associates and a member of Divisions 4 and 12.

The Forum on the Construction Industry

CALENDAR OF MEETINGS

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

**Forum on Construction
Annual Meeting
May 8-9, 2003
Sheraton Copley Plaza
Boston, MA**

**Forum on Construction
Fall Meeting
October 2-3, 2003
The Mayflower Hotel,
Washington, D.C.**

**See you
there!**

Message

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According to our by-laws, candidates for Chair Elect must have served at least one year on the Governing Committee at the time of the election. Although Governing Committee nominees are At-Large, and are subject to no prequalification criteria, the Nominating Committee typically considers each candidate's past service to the Forum and potential for future service. All interested in being considered for these nominations should contact me or one or more of my fellow Nominating Committee members - [Lynn Axelroth](#), [Adrian Bastianelli](#),

[Anne Gorham](#), and [Mike Zetlin](#).

I have found involvement in Forum leadership at both the Division and Governing Committee levels to be stimulating, enlightening, and fun. It has deepened my knowledge and understanding of our industry, and introduced me to a wonderful network of practitioners and professionals. If you have the time and inclination to become more involved, please let us know. 

John Heisse is the managing partner of the San Francisco office of Thelen Reid & Priest LLP.

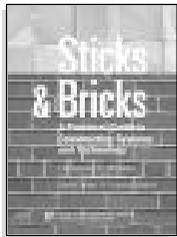
Forum's Midwinter Program

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Please join us for a lively day of insight and learning on these issues of considerable significance to construction and surety lawyers alike. We look forward to seeing you in New York at the always graceful and elegant [Waldorf-Astoria Hotel](#). 

Theodore M. Baum is a partner with Ernstrom & Drete, LLP in its Rochester, NY office and Co-Chair of the Program.

ABA FORUM ON THE CONSTRUCTION INDUSTRY

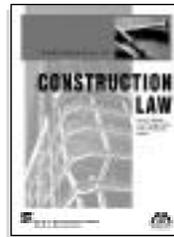


Sticks & Bricks: A Practical Guide to Construction Systems and Technology

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

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Announcement Corner

20 YEAR MEMBERS

The Forum is pleased to honor the following members who are celebrating their twentieth year with the Forum:

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Season Pass Program

Remember the Forum's Season Pass Program when budgeting for your CLE in 2003. A season pass entitles you or someone from your firm to attend all three Forum programs held in 2003 at a discount. One pass (3 programs) provides a savings of 20%, two passes (6 programs) provide a savings of 25%, and three passes (9 programs) provide a savings of 33%. The programs for the upcoming year include:

Midwinter Program, January 30, 2003 in New York, NY.

Annual Meeting, May 8-9, 2003 in Boston, MA.

Fall Meeting, October 2-3, 2003 in Washington, D.C.

To obtain more information about these programs, visit the Forum's website at

www.abanet.org/forums/construction/html/future_programs.html.

To order season passes, send your name, firm name, address, and phone number or e-mail address, along with number of passes desired and payment (or your credit card information) by fax to 312-988-5677 or by mail to the ABA Forum on the Construction Industry, Attention: Kate Flanagan, 750 N. Lake Shore Dr., Chicago, IL 60611.



Don't Miss the Next Forum Meeting!

- WHEN:** January 30, 2003
- WHERE:** Waldorf-Astoria, 301 Park Avenue, New York, NY
- TITLE:** Getting To The Bottom Of Construction Claims
- TELL ME MORE:**
- Sessions include:
- A look at the legal landscape from three key points in the claims lifecycle
 - Use of the decision tree analysis method to evaluate construction claims
 - The owner's perspective on contract termination
 - The effects of bankruptcy on construction claims
 - The surety's assertion of construction claims

LUNCHEON

- SPEAKER:** John H. Beyer
Beyer Blinder Belle, Architects & Planners, LLP
New York, NY

To register for the program, call the ABA 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.

When economic times get tough, claims become more prominent in the construction industry. Our next meeting will take a fresh look at the process of asserting, evaluating and resolving claims and disputes. The many new developments, new case decisions, new contract language, and better litigation assessment techniques combine to add new wrinkles to the already complex world of construction claims and disputes. This year's joint program by the Forum and the TIPS Fidelity & Surety Law Committee will focus on such new thinking and techniques in drafting, and the claims and dispute resolution processes. You will hear about the use of formal litigation risk assessment and look at the recent evolution of key contract clauses that affect claim rights. The complexities presented when one party to a claim declares bankruptcy will be examined, and an in-depth discussion of the hard decisions faced by owners and sureties when the issue of default termination arises. Please join us for a lively day of insight and learning on these issues of considerable significance to construction and surety lawyers alike. We look forward to seeing you in New York at the always graceful and elegant Waldorf-Astoria Hotel.



UNDERCONSTRUCTION

The newsletter of the
ABA Forum on the
Construction Industry

December 2002

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through Education and Leadership

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