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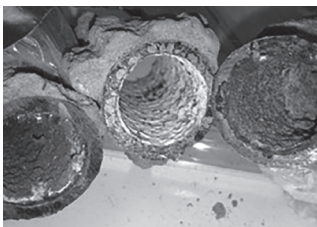
Proliferation of Lead-Exposure Litigation Creates New Risks for Contractors

Michael D. Lane and Cynthia M. Bologna

The Flint Water Crisis: Increased Scrutiny of Drinking Water Operations

The filing of lawsuits involving lead-tainted drinking water has escalated rapidly in the past several years due to the infamous public health crisis in Flint, Michigan. In April 2014, thousands of Flint residents were exposed to toxic levels of lead in their drinking water when the city changed its water source to the Flint River and chose to forego corrosion control measures to mitigate lead levels in the water. Shortly after switching water supplies, Flint's citizens began noticing strange odors emanating from their tap water and the appearance of unexplained rashes on their bodies. By the time city officials acknowledged the problem, thousands of residents were exposed to toxic lead in the drinking water supply.

On January 16, 2016, President Obama declared a federal state of emergency in Flint. Dozens of class actions were filed in state and federal courts against government officials and agencies involved in the decision to change Flint's water source.¹ Among other claims, the plaintiffs alleged gross negligence, intentional misconduct, fraud, assault and battery, and intentional infliction of emotional distress. Notably, several lawsuits also named as defendants the engineering firms retained by the city to study alternative drinking water sources and to design and implement the new water treatment system using the city's existing water plant.²



Lead from corroded pipes in Flint, Michigan. Credit Siddhartha Roy/FlintWaterStudy.org (<https://www.wpr.org/lead-contamination-remains-major-issue-wisconsins-drinking-water>)

National media coverage of the Flint water crisis has understandably resulted in increased scrutiny of the nation's drinking water systems. In May 2016, an investigation by USA Today revealed that between 2012 and 2016, nearly 2,000 water systems across the country contained lead levels that exceeded the EPA's action levels.³ Given the frequency of coverage that lead-tainted drinking water continues to receive in the media, the prevalence of lead in the country's drinking water supply, and the adverse health effects of lead poisoning, lawsuits stemming from lead exposure or contamination are likely to multiply over the next decade.

B. How Does Lead-Exposure Litigation Implicate Contractors?

Contractors are particularly susceptible to the increased risk of lead-exposure complaints given the potential impacts of roadway construction and repairs, underground work (such as replacement of sewer or drain lines), and other disruptive construction activities. In the past year, class actions were filed in Chicago, Philadelphia, and Fresno alleging that city officials knowingly undertook construction work that

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disturbed old lead pipes, causing toxic levels of lead to leach into the city's drinking water.⁴

In *Micheli v. City of Fresno*, the plaintiffs sued the city as well as two private contractors that installed new water meters. The class plaintiffs claimed that the city of Fresno and its private contractors negligently connected brass water meters to galvanized piping, which allegedly violated industry standards, accelerated corrosion of existing lead pipes, and exposed residents to toxic levels of lead in their drinking water.

Although the contractors were not sued in the Philadelphia or Chicago class actions, the plaintiffs alleged that construction activities resulted in disturbances to underground lead piping that has caused widespread harm to residents and their properties. The class plaintiffs in *Delopoulos v. City of Philadelphia* claimed that drilling, hammering, sawing, refitting of piping, and related activities damaged lead service lines connected to the residences that caused lead to contaminate the water supply. The class plaintiffs in *Blotkevich v. City of Chicago* alleged that the city's efforts to replace hundreds of miles of lead piping has increased the amount of lead particulates in the drinking water.

It is not hard to envision similar claims against contractors that perform construction or repair work on behalf of the government, whether sued directly by plaintiffs or brought in as third parties by a public body or agency seeking indemnification.⁵ Because litigation linking lead-tainted drinking water to construction activity is a relatively new phenomenon, it remains to be seen if government contractors will become a popular target of such litigation.

C. Considerations for Reducing Risk of Involvement with Lead-Exposure Litigation

Depending on the nature of the project, the contractor's relationship with the utility/owner, and the jurisdiction where the project is located, a proactive contractor and its counsel may have several avenues to avoid or limit liability arising from lead-exposure lawsuits:

1. Notify residents about the work to be performed in the area, the risk of increased lead levels in drinking water potentially associated with the work, the dangers of lead exposure, and protective measures to ensure safety of drinking water.
2. Put the owner on notice of potential effects of the work on underground lead-containing pipes or structures and, if possible, recommend alternative means and methods to minimize or reduce potential release or dispersal of lead particulates.
3. Retain a third party to collect data on lead levels in the drinking water before and after work to identify any measurable changes.
4. Implement safety protocols recommended by

the EPA to reduce the risk of lead exposure in addition to any special requirements of the owner.

5. Ensure strict compliance with contract requirements when performing work by utilizing quality control inspectors tasked with overseeing the work and thoroughly documenting compliance with plans and specifications.

In addition to these practical measures, a contractor should confer with its insurance broker to determine if its program provides coverage for lead-exposure claims. A contractor's counsel should also be familiar with federal and state immunity law. In addition to the immunity recognized in *Boyle* and its progeny that applies to federal projects,⁶ many jurisdictions have enacted immunity statutes with their own unique requirements. A contractor's counsel should also be aware of any pitfalls in any applicable anti-indemnity or limitation-of-liability statutes.

D. Conclusion

Most lead-exposure suits to date have not targeted the contractors who performed the work that allegedly caused or exacerbated the contamination, but contractors should be prepared in the event that changes. Prudent contractors should be aware of the risk of getting ensnared in this type of litigation before bidding on work that may impact or disturb underground lead-containing pipes or structures. At a minimum, contractors and their counsel should explore available insurance coverage options, assess the ramifications of any indemnity or insurance obligations required by the contract, and take necessary steps when performing the work to satisfy the legal requirements of applicable federal and state immunity law. ■



Michael D. Lane, Cynthia M. Bologna, Kingsmill Riess, LLC, New Orleans, LA, Members of Division 1 (Litigation & Dispute Resolution)

Endnotes

1. See, e.g., *Mays v. City of Flint*, No. 16-106112 (Mich. Cir. Ct.-Genesee Jan. 19, 2016) (state class action against City of Flint, Receivership Transition Advisory Board, and individual state and city officials); *Mays v. Snyder*, No. 15-14002, 2015 WL 7175656 (E.D. Mich. Nov. 13, 2015) (federal class action against governor, State of Michigan, City of Flint, and individual state and city officials); *Boler v. Earley*, No. 16-10323, 2016 WL 691240 (E.D. Mich. Jan. 31, 2016) (same); *McMillian v. Snyder*, No. 16-10796, 2016 WL 861350 (E.D. Mich. Mar. 7, 2016) (same).

2. See, e.g., *Mason v. Lockwood, Andrews & Newnam*, No. 16-106150 (Mich. Cir. Ct.-Genesee Jan. 25, 2016) (state class action against engineering firms for professional negligence); *Gilcreast v. Lockwood, Andrews & Newnam*, No. 16-11173, 2016 WL 1258320 (E.D. Mich. Mar. 31, 2016) (federal class action against engineering firms for professional negligence). The city of Flint hired two engineering firms to

prepare the city's water treatment plant to produce the city's drinking water supply after the switch. These defendants allegedly failed to include necessary upgrades for anti-corrosive treatment.

3. Laura Ungar, *Lead Taints Drinking Water in Hundreds of Schools, Day Cares Across USA*, USA Today (Mar. 17, 2016), <https://www.usatoday.com/story/news/nation/2016/03/17/drinking-water-lead-schools-day-cares/81220916>.

4. See *Blotkevic v. City of Chicago*, No. 16-2292, 2016 WL 692549 (Ill. Cir. Ct.-Cook Feb. 18, 2016); *Delopoulos v. City of Philadelphia*, No. 16-503980, 2016 WL 3091171 (Pa. Comm. Pl. June 2, 2016); *Micheli v. City of Fresno*, No. 16-2937 (Fresno Sup. Ct. Sept. 9, 2016).

5. Kay Baxter, Benjamin Heckman, & Joseph Speelman, *Lead Litigation: Lead in Drinking Water Issues in the 21st Century*, http://www.iadcmeetings.mobi/assets/1/7/13.1-LEAD_IN_DRINKING_WATER_ISSUES_IN_THE_21st_CENTURY_Panel_2-21-2017.pdf. (noting that the types of defendants in such suits "may continue to grow to include also contractors, civil engineers, civil planners, and others who designed and built public water systems with lead-containing pipes, or even to contractors who knowingly built homes with lead pipes, used lead fixtures, or hooked into the lead main source without determining other viable alternatives.").

6. *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988).

Become the Associate Editor for *Under Construction* or *The Construction Lawyer*

APPLY BY JANUARY 31, 2018

The ABA Forum on Construction Law is accepting applications for Volunteer Associate Editor Positions at its two flagship periodicals, *The Construction Lawyer* and *Under Construction*. Candidates for each of these positions are expected to have substantial legal writing and editing experience. Each carries a three-year term beginning in May 2018. Reimbursement for attendance at the Governing Committee meetings specified will be per the Forum's approved policies. Interested members should email a letter expressing their interest and qualifications to Harper Heckman, Chair of the Search Committee, at hheckman@nexsenpruet.com. The Search Committees would also welcome applicants to discuss their perceptions regarding the strengths, weaknesses or new opportunities for the publication. Applicants are encouraged to apply for either or both of the positions. The deadline for submitting applications is January 31, 2018.

Quarrelling Collaborators: The Flip Side of BIM's Interoperability by Kyle Smith, Latham and Watkins, Washington, DC and Finalist of the ABA Forum on Construction Law's 2017 Law Student Writing Competition



Law Students – apply for the competition next year!
Read the full article at *Under Construction Online*
(www.ambar.org/FCLUC).

ON CORPORATE COUNSEL'S DESK

From Div. 11



Carl J. Circo, a Professor at the University of Arkansas School of Law, discusses the benefits of corporate counsel externships for law students and in-house counsel. This type of experiential learning produces significant results for the law students and the companies that participate in the externship programs. Read Mr. Circo's article on *Under Construction Online* at <http://ambar.org/FCLUC>.



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I am Proud to be a Member of the Forum on Construction Law

I am proud to be a member of the Forum on Construction Law. Why? It is the preeminent organization of construction lawyers in the world. It is the place you want to be if you are a construction lawyer. It is the number one provider of high quality educational programs. It provides networking opportunities and it provides an opportunity for construction lawyers to hone and improve their skills.

I recently attended the American Bar Association Section Officers Committee (“SOC”) Meetings. The SOC is made up of the leaders of the numerous sections, divisions and forums within the ABA. A major takeaway for me was recognizing how much more we do in the Forum on Construction Law for our members. No organization of our size within the ABA puts on the number of programs we do — the webinars, the podcasts, trial academy, regional programs, and the like. I heard others discuss the challenges they have with putting on a meeting or two. I heard others talk about the challenges they face getting members to volunteer to do things. I sat back in marvel and thought how wonderful the members of the Forum on Construction Law are as we put in the time to deliver to each other the highest quality programs. For these reasons, I am proud to be a member of the Forum on Construction Law.

The Forum does more. When you tell others that we leave thousands of dollars for local food banks in the communities we visit, they look at you in amazement. When you tell others about the service projects we have done, they are surprised. When we tell others about our books, *The Construction Lawyer*, *Under Construction*, and the blogs that many of our divisions do, we are told to stop bragging. At the recent SOC meeting, I had several people ask me, “does the Forum do a blog?” I responded that we do so in the plural sense — we have multiple blogs that come out from the Forum’s numerous divisions and other groups.

I am proud to be a member of the Forum on Construction Law because of our commitment to the next generation of construction lawyers and to enhancing the diverse make up of our organization. We have an extremely robust Young Lawyers Division (“YLD”). YLD held a three-hour planning retreat at our recent meeting in Washington, D.C., in April 2017. I was invited to sit in. I observed the members of YLD actively engaged in thinking through what they can do as members of the Forum, how they can enhance their group, and how they can improve the Forum for everyone. It was great. Many people were talking at the same time. They were talking over each other. They were excited. They were animated. It was fantastic. I turned to the gentleman

sitting to my left several times and said “this is great.” It was truly a wonderful experience, and I walked away with the biggest smile on my face realizing that the Forum is in fantastic hands with our next generation of leaders.

The Forum’s commitment to diversity is strong. We are doing a good job in what was traditionally a male-dominated construction industry, to bring along female, African-American, Hispanic, gay, lesbian and other diverse construction lawyers into our organization. We attend diverse Bar Association meetings to recruit members. We award diversity scholarships and receive many more applicants for those scholarships than we can award. I am proud of our efforts to make the Forum more inclusive and we will continue to strive to do better all the time in this regard.

I am proud to be a member of the Forum on Construction Law, yet at the same time we face challenges. We have the most competent, dedicated staff persons that we have ever had. They do a great job for us on a daily basis. Yet, they work within an ABA bureaucracy that often frustrates their ability to be as good as they can be. They work within an ABA structure that often slows down our efforts to accomplish everything we want to do. They face these challenges on a daily basis, yet they continue to work zealously on our behalf.

We have challenges like all organizations with membership recruitment. Millennials are not joining organizations like ours in the numbers that prior generations did. We need to address that challenge head on. The ABA is losing revenue and membership. Those two factors will impact us. Whether we like it or not, we are part of a larger organization, and the ABA’s challenges are our challenges too. We will have to deal with conserving and better using our resources. We will have to look at our costs and expenses. We will have to face the fact that we need to do more with less.

I am honored and humbled to be the Chair-Elect of the best organization of construction lawyers in the world. I look forward with great excitement to the next two years and working with all members of the Forum on Construction Law to maintain this organization as the best organization of construction lawyers anywhere. ■



Thomas L. Rosenberg, Chair-Elect, Roetzel & Andress, Columbus, OH

YLD Helps Ensure Law Student Liaison's First Forum Meeting was a Success

Andrew Murphy

My first trip as Student Liaison to the Forum's fall meeting was nothing short of spectacular. I walked away with knowledge not taught at most law schools, new professional relationships, and, most importantly, a fun experience.

On the first day of the meeting, I attended the Young Lawyers Division's Mobsters and Lobsters Trolley tour and dinner. As a native New Yorker, I was really impressed by Boston. What was more impressive was meeting and talking to young lawyers and construction professionals from all across the nation sitting in the trolley. I remember discussing organized construction labor with a young lawyer from Virginia, notably how trade unions in NYC will send its members to various commercial non-union construction sites and blow up a giant air balloon rat to protest non-union labor, which I learned doesn't usually happen in Virginia. Also on the trolley, I met a civil engineer from Chicago who taught me a bit about the pros and cons of modular building. The night ended with me meeting one of the former Law Student Liaisons, now a practicing construction attorney in NY, who offered insightful advice on the position.

The following day was the first day of plenaries. The content was very informative, and, as law students, we feel fortunate learning now about the new AIA documents and the other legal issues discussed. I also was

introduced on stage as the Forum's new Law Student Liaison. I don't consider myself a shy person, but being in front of seven hundred attendees, I was terrified.

On the last day of the meeting after the last plenary, it was time for the site visit to a high-rise Suffolk Construction project. As I went to give one of my colleagues a hard hat and a vest with the Forum logo on them, she looked at me and said "Andrew, I have never seen you this excited in almost three years of law school!" She could be right. I couldn't help but reflect back to the first day I put on a hard hat and stepped onto a commercial construction site to work as a laborer mixing fireproofing plaster. Fast forward to now, I can't help but feel fortunate where I am and for attending the Forum's Fall Meeting in Boston. Most of all, I am appreciative of the lasting professional relationships I formed with many Forum members who were all willing to share with me their experiences and knowledge acquired throughout their legal careers. I truly am blessed to be a part of this organization. I look forward to attending future Forum events. ■



Andrew Murphy, Roger Williams University School of Law, ABA Law Student Liaison

ANNOUNCEMENT OF FORUM NOMINATING COMMITTEE FOR 2017-18

Per Section 6.1(a) of the Forum Bylaws, Forum Chair Wendy Venoit (2017-2018) announces the following Forum Members have been appointed to the Nominating Committee: Thomas Rosenberg (Chair of Nominating Committee/Chair-Elect of the Forum), David Senter, Terrence Brookie, Tracy James, Allen Estes, Jeffrey Cruz, and Michael Kamprath

The Nominating Committee as so constituted is charged per the Bylaws with nominating one Forum Member for the position of Chair-Elect, and four Forum Members for the four open positions on the Governing Committee. Those persons wishing to be considered for an open position should submit their expression of interest/self-nomination to the Chair of the Nominating Committee, Thomas Rosenberg (contact information below), by **Friday, January 5, 2018**.

Nominations may be made by the candidates themselves or by third-persons on their behalf. All nominations or expressions of interest should include a resume and a written submission that details the candidate's activities in the Forum, the ABA and the legal profession. In addition, the Committee is interested in why the candidate wishes to serve in this role, and if the candidate has any initiatives or practices he or she may be interested in proposing if elected to the position sought. In accordance with the Forum's Bylaws, any nominee for Chair-Elect must have served at least two years on the Governing Committee.

The Nominating Committee will convene at the Midwinter Meeting to be held January 17-19, 2018. An election to fill all open positions will be held at the business meeting of the Forum, to be held April 12, 2018 at the Forum's 2014 Annual Meeting in New Orleans, LA. The Committee's report of the nominees so chosen will be posted on the Forum's website as provided in the Bylaws.

All submissions should be addressed to the Nominating Committee Chair:
Thomas Rosenberg
Roetzel, 41 South High Street, Huntington Center, 21st Floor, Columbus, OH 43215
Phone: 614.723.2006; Fax: 614.463.9792; Email: trosenberg@ralaw.com

New Settlement Concept: Lower Expectations Likely to Result in “Happier” Parties

Eric Schatz

A good settlement is one in which neither party is happy.” This may be a valid rationalization. Or, it may be the result of both sides having unrealistic expectations, which are inevitably left unmet. If the latter is the case, claimants and defendants need to readjust expectations of how they approach settlement discussions. This is not to say that attorneys should counsel a “get ready to lose” mindset (which would not be very inspiring, nor lead to a productive business model). However, there is great value in honestly and thoroughly assessing your client’s exposure and communicating this to them as early on as possible.

Several years ago, the *Journal of Empirical Legal Studies* published a study showing that most plaintiffs who declined a financial settlement offer and proceeded to trial ended up receiving less money than the offered amount.¹ A New York Times article on the study interviewed attorneys, many of whom empirically agreed, and shared the following insights:²

- “Most clients think they are completely right.”
- Lawyers may not be explaining the odds to their clients – or clients are not listening to their lawyers.
- A good lawyer has to be able to tell clients that a judge or jury might see their position differently. “Part of it is judgment and part of it is diplomacy.”

Recognizing a greater financial exposure does not imply abandoning aggressive strategies and negotiation techniques, nor does it equate to making a worse deal or a deal at all costs. But setting more realistic expectations can improve the chance of resolving a dispute and being satisfied with the results.

Resist the Dark Side

Hotly disputed issues often have a long and emotion-filled history between the parties. While one of these contentious issues may be the critical issue in a case, other times this issue is just what makes people angriest and they can’t stop talking about it. In the context of preparing for settlement discussions, it is important to avoid giving in to your clients’ anger and getting distracted. Instead, focus on the money and the issues that have the greatest cost impact.

Getting Down to Dollars

At the start of a dispute, there may be limited information regarding the financial details of a claim, from either the claimant or defendant perspective. However, once the claim and supporting documentation are provided, an early assessment of damages offers insights and helps shape strategy. Without this evaluation, both the attorney and client are only gauging exposure on the strength of

legal and factual issues, but not the corresponding costs.

For example, there may be a significant delay on a project, but most of the claimed damages are associated with a loss of productivity. Or, the focus may be on a disputed extra work claim, but much of the damages are due to delays in implementing this change.

Once a claim is submitted, both the claimant and defendant should evaluate it objectively. This means more than a cursory justification of the defendant’s flat-out rejection, or the claimant’s affirmation that all its costs are completely accurate. Claims may be overstated by owners or contractors, either intentionally or unintentionally. It is important that the claimant recognize any overstated items.

The Circle of Trust

While a trusting relationship between parties may have deteriorated long ago, to reach a settlement (especially one that everyone is pleased with), the parties need to be able to trust and verify that the claimed costs are accurate and reasonable.

While contractors may be sensitive about sharing financial information, including bid estimates and cost reports, owners are sensitive about overpaying and the feeling of getting “ripped off.” However, contractors should be willing to provide these documents, and in many public contracts they are required to do so. Some owners may be reluctant to pay claims in the first place, but if they are convinced of their own exposure, most are generally willing to pay for the reasonable impacts.

Sharing financial records is critical in allowing owners to have confidence in their decision making and being able to provide justification to senior management or public agencies. If the claimant has prepared a well-supported claim, transparency through the underlying financial records only reinforces the strength of its case (at least, prior to considering entitlement).

On the other hand, sharing financial documentation that shows a claim is significantly overstated still has settlement benefits to both sides. The defendant can use the information to make its own assessment of a reasonable amount, rather than dismissing the claim outright because of a lack of support. When presented with this information, it will often prod the claimant to reassess what its claim is really worth.

Hi, Low! Nice to Meet You

Ranges are a useful tool for making decisions. Rather than approaching settlement discussions with a single value in mind, a helpful approach is to provide high and low

evaluations for the different components of the claim. This first step would include both analysis of damages and entitlement, but would hold off on legal considerations for the time being.

Investigation of facts, legal research, and expert consultation are all important aspects to determining the merits of a position. However, there can be a tendency to overvalue the strength of an argument after being immersed in this intensive information gathering process. This can lead to false confidence in the merits of a position, not just for attorneys, but for clients and decision makers, who may become more entrenched as time goes on.

Try establishing the low value based on what you would consider reasonable on a normal day. Then, while still considering the damages and entitlement analysis, establish the high number based on what you could envision as reasonable on your most generous day. This does not mean conceding everything, but viewing it from an objective, neutral perspective. As there are always gray areas, this is an opportunity to capture the uncertainty and see how things would look giving the other side the benefit of the doubt on items that are not cut and dry.

Quantifying Legal and Trial Risks

While analyzing damages and entitlement is a significant task, and analyses do differ, there is still a relative level of technical certainty. However, quantifying legal and trial risks has much more uncertainty.

The previously referenced New York Times article quoted a lawyer who said, "An attorney could advise a client that they have a strong defense to enforcement of a contract, but that is not the same thing as forecasting what the likely outcome at trial would be." After completing the high-low claim evaluation, it is a good time to evaluate legal and trial considerations, such as:

- Notice provisions
- Executed releases
- No damages for delay clauses
- Preclusion of evidence
- Witness availability / credibility
- Interest

- Trial costs
- And others

Quantifying these risks is not an easy process. It demands removing biases and should involve discussions with various team members to capture a range of legal experience and perspectives. Different adjustment factors may be applied to the low and high evaluations overall, or to specific components. Additionally, it makes sense to address some of these risks individually (e.g., interest) and other factors collectively (notice provisions, releases, and no damage for delay clause).

Other risk management approaches, including decision trees and statistical computer modeling (e.g., Monte Carlo simulations), can be applied to forecast litigation outcomes and quantify, in dollars, the technical, legal, and trial risks.

Conclusion

So, no, you do not need to give away the store to reach a settlement, but it is important to honestly recognize and quantify the full exposure in a case with thorough technical and legal considerations. "Good or Bad" and "Strong or Weak" do not translate to valuable recommendations for a settlement amount. The evaluation exercise does not limit aggressive negotiations, or require a client to make full concessions. However, preparing realistic expectations can help you achieve a good settlement that you and your client are both comfortable and "happy" with. ■



Eric Schatz, P.E., Arcadis, Hartford, CT, Division 1 (Litigation & Dispute Resolution) and Division 3 (Design)

Endnotes

1. Kiser, Randall L., Martin A. Asher, and Blakeley B. McShane. *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*. *Journal of Empirical Legal Studies* Volume 5, Issue 3, 551-591, September 2008
2. Glater, Jonathan. "Study Finds Settling Is Better Than Going to Trial." *New York Times*, <http://www.nytimes.com/2008/08/08/business/08law.html>, (August 7, 2008).

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These additional articles are available on the online page of *Under Construction* Online

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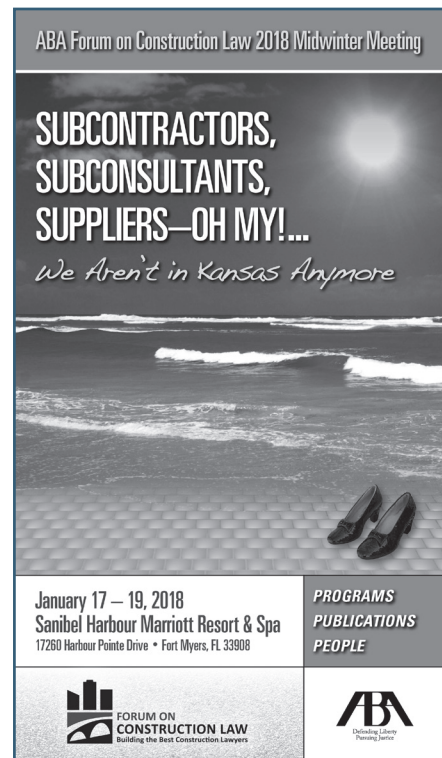
Let's go over the rainbow to examine issues for subcontractor and supplier success on a construction project. Learn how the subcontractor's design liability arises and how to mitigate or shift it in the contract. Determine options to manage risk of subcontractor non-performance from the owner and contractor standpoints. Consider risks of no-damage-for-delay, liquidated damages, waivers of consequential damages, pass-through claims, and the False Claims Act along with payment issues and bond claims...and more. Sessions will prepare transactional, in-house, and litigation counsel whether representing subcontractors, suppliers, or other contracting parties.

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ABA Forum on Construction Law 2018 Midwinter Meeting

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