ANATOMY OF A JURY INSTRUCTION IN CONSTRUCTION LITIGATION:
Distilling the Complex into Plain Language for Compelling and Effective Charges

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For those construction cases suited to presentation before a jury, along with the benefits associated with having the matter decided before a jury of laypersons, a significant distinguishing feature must be considered at the outset. One of the defining aspects of a jury trial which must be given adequate thought and planning is the jury instruction that will be provided by the judge to the empanelled jury members before their final deliberations in the case.

Introducing the Message

In most circumstances, that charge contains the last words that the jury will hear in the courtroom before they retire to their deliberations. After all the opening statements, testimony, expert presentations, graphics, videos, schedules, compilations and, of course, the closing arguments themselves, it is the judge who gets the last word in the courtroom before the jury has its last words with the verdict. It is with this singular charge that the trial court accomplishes a great many of its obligations. The charge provides the jury with an understanding of its role; it provides the basic principles for the jury to consider in deliberations; it identifies the pertinent burdens of proof held by the various parties; and then, last but certainly not least, it also summarizes the law which will guide the jury in its determinations as the ultimate fact finder.

To leave such an important facet such as the jury instruction to chance or to the entire discretion and effort of the court would be a tremendous misstep. A properly crafted jury

instruction with a balanced presentation of the law and those factual issues which the jury is being called upon to decide can provide much assistance to the court in preparing this necessary element of the case. Also, it is another means by which subtle advocacy of your party's position can be advanced, particularly where the law may be susceptible to differing interpretations, and the court's agreement with your interpretation (via acceptance of your proposed charge) can greatly enhance and advance the possibility that a favorable outcome will be rendered by the jury when it returns to deliver its verdict.

In the well-respected legal film, *Anatomy of a Murder*, Otto Preminger directed a concise interpretation of the original novel by Robert Traver and presented the complexity of that novel in a format and on terms where the actors—including Jimmy Stewart, George C. Scott and Lee Remick—could deliver, in a more condensed fashion, the message intended in and from that book. In some respects, the innovative opening credits by Saul Bass foreshadow the efforts and genius of Preminger as a filmmaker and storyteller. Accompanied by the Duke Ellington music overlay, the various puzzle pieces comprising the human body are assembled on-screen, ultimately showing the outline of the murder victim, the focal point for the movie. Almost immediately, the audience joins the parties on this journey of assessing the killer of the man who was the victim and central figure of the jury trial captured on film.

Much the same as the challenge presented to Preminger, construction practitioners are faced with taking the factual and legal complexities of their cases and distilling them in a fashion where they can be delivered with a minimum of legalese and, at the same time, still capturing all of the necessary accuracy to withstand appellate analysis and further judicial scrutiny on the adequacy of the charges presented to the fact finder. So much of early legal learning requires the untrained mind to comprehend and interpret the complex principles presented by the law.

Having embraced and come to understand those complex legal theories, the challenge then becomes how to distill that knowledge and convey it to the jury such that the required components of legal theory are contained therein, but at the same time, the message is delivered with due consideration that the members of the jury are not trained lawyers. Furthermore, the charge should be presented in a way which does not work at cross purposes with the objective of obtaining a decision by the jury in favor of the client for whom the lawyer is providing representation. Making matters even more complicated is the fact that jury trials, along with most other legal proceedings, are taking on highly technological-hued presentation techniques that have not yet found themselves to the delivery of the final charge to the jury itself.

A recently published article appearing in 3 *Litigation Commentary and Rev.* 34 (June/July 2010), contains author Harry Plotkin's evaluation of the changes in case presentation necessitated by the differing generations now present in the given jury pool. In the article entitled "Generations X, Y and the New Speed of Trial," Mr. Plotkin notes there was a time when the lawyers presented their cases without the benefits of PowerPoint, TrialDirector, animations or even blowups or other demonstrative evidence. Further, Mr. Plotkin notes and acknowledges that we cannot convert today's trial completely into a multimedia juggernaut. He then importantly observes that the people making up the jury pool include those coming from generations where news cycles are 24/7 and access to information over the Internet is almost as instantaneous as the click of a mouse button. With the makeup of juries now including members of Generations X and Y and, to a growing degree in the very near future, Generation Z (those presently around 15 years of age), the author's conclusion is that trials can no longer be entirely focused on the spoken word and that jurors must see not just hear the case.

Although not mentioned in the article, consider another challenge of the effective jury charge in today's modern courtroom. The jury instruction process remains an entirely verbal one, not enhanced by demonstrative exhibits, animation, TrialDirector presentation or even copies of the exhibits introduced during the course of evidentiary presentation in the case. Therefore, that written (and ultimately spoken) word must be at its best and most precise to permit it to effectively communicate to the jury the key legal principles necessary to be understood by the jury in its process of analyzing the facts and evidence that were delivered at the trial.

Having defined the necessity of precisely crafting and presenting effective jury instructions to the court for its consideration and, hopefully, future delivery to the jury, there is then the task of actually preparing those instructions. Prior to 2001, there was little, if any, directly relevant materials on the unique issues to be addressed in construction-related cases. Fortunately, that landscape changed with the publication of the American Bar Association's *Model Jury Instructions: Construction Litigation*, released in 2001 by the ABA Section of Litigation and its Construction Litigation Committee. However, even with that valuable resource, which covers potential charges on a variety of uniquely construction-related principles, it remains a challenge to provide trial courts charges with which they are familiar so that the charges may be more readily embraced and, at the same time, are consistent with the legal issues presented in that particular construction litigation. Fortunately, that landscape appears to be changing (albeit slowly), at least in a select number of jurisdictions.

As reported in the July 2005 issue of *ABA Litigation News*, Volume 30, No. 5, California completely rewrote its civil and jury instructions in July 2003. As observed in the article, "California Simplifies Jury Instructions: Will Juror Understanding Improve?" the emphasis and

focus of these efforts was to simplify the jury instructions for organization, style and grammar. However, even as cautioned in the article itself,

> "Simpler is not necessarily better, of course. 'The goal of comprehensibility and plain speech sometimes is in conflict with legal accuracy . . . .'"

Another challenge is presented by the steady statistical decline in jury trials. As reported in the November 2005 issue of *ABA Litigation News*, Volume 31, No. 1, it is becoming increasingly challenging to find opportunities to present matters before a jury. In the article entitled, "Where Have All The Trials Gone? How to Get Trial Experience in a Tightening Court System," it was reported that "[d]espite a fivefold increase in civil filings between 1976 and 2002, state courts in the 22 states that collect this type of data tried 30 percent of civil cases in 1976, as opposed with only 7.5 percent in 2002." Still, there appears to be a desire to place certain construction cases before juries. As such, there must be an ongoing effort to evaluate, consider and craft those instructions which will be presented to these ultimate fact finders.

Just recently, California adopted another new series of jury instructions, including charges specifically relating to construction litigation case principles. These instructions are contained in the *Civil Jury Instructions (CACI) Revisions*, which are to become effective on December 14, 2010, along with other updates to certain existing instructions in California. Also, construction-specific form instructions are now available in Utah (*Model Utah Jury Instructions, 2d Ed.*) and also in Florida (*2-42 Florida Forms of Jury Instructions, 42.syn*). Nevertheless, for most states, these resources remain unavailable. Considering the relative paucity of resources presently available to many construction litigators and in light of the foregoing challenges that are presented to counsel and the parties, along with the court, it would be appropriate to evaluate the standard of review applied to these charges when they are being considered on appeal, as

well as how the court treats jury instruction charges generally and in those instances where the underlying legal principles may be in a state of flux. What may also be in a state of flux are the members of the jury and the necessity of appreciating that juror beliefs may change depending on the nature of the case and the makeup of your jury pool. Even for "standard charges" previously used in construction cases, they should be revisited and refined if at all possible to deliver the message of your present case and the legal principles that support it in such a way that the empanelled jurors will embrace the charge as well as (hopefully) your view of the evidence as presented.

The Standard of Review for Jury Instructions

Appreciating the basic standard of review to be applied in evaluating a jury charge is an excellent starting point for embarking on any jury instruction analysis. In Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996), the court was faced with a number of jury instructions being reviewed on appeal. Included among those jury instructions was a statute of limitations issue, which can be among the issues frequently encountered in a given construction case. The court observed as follows:

> We review the formulation of jury instructions in a civil trial for an abuse of discretion [Oglesby v. South Pacific Transportation Co., 6 F.3d 603, 606 (9th Cir. 1993)] . . . .
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> * * * *
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> The instructions "considered as a whole" do not appear to be "misleading or inadequate." *Id.* The challenged instruction came directly after the district court's main instruction on liability, which required the jury to find either that Marcos had "directed, ordered, conspired with, or aided" in torture, summary execution, and disappearance, or that he had knowledge of that conduct and failed to use his power to prevent it.
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> *** * * ***

> The district court did not abuse its discretion in giving the challenged instruction. Alternatively, if there was any error in the district court's instruction, it is more probable than not that the error was harmless and therefore reversal is not required. Oglesby, 6 F.3d at 606.

Hilao, 103 F.3d at 779.

In another matter, Sundt Corp. v. State of South Dakota Department of Transportation, 566 N.W. 2d 476 (S.D. 1997), the court was requested to evaluate a number of jury instructions on appeal in connection with a paving contractor's suit involving the Department of Transportation of South Dakota. At issue were claims for damages and extra costs incurred by the contractor. The court began its analysis with a discussion of what was necessary to preserve an objection to the jury instruction at trial. The court noted that an "objection [that is] clear so the trial court is advised of what possible errors exist and be granted the opportunity to correct any instructions," was required in order to preserve the matter for appellate review. Thereafter, the court went on to review the standard for assessing the adequacy of the jury instructions as follows:

> Our review of the trial court's refusal to give requested jury instructions is well-settled:
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> > On issues supported by competent evidence in the record, the trial court should instruct the jury. The trial court is not required to instruct on issues lacking support in the record. Failure to give a request and instruction correctly sets forth the required laws as prejudicial error. Jury instructions are reviewed as a whole and are sufficient if they correctly state the law and inform the jury. Error is not reversible unless it is prejudicial. The burden of demonstrating prejudice in failure to give a proposed instruction is on the party contending error.
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> *** * * ***
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> 'A trial court must present only those instructions to the jury which are supported by competent evidence and set forth the applicable law.'

Sundt, 566 N.W. 2d at 480–82 (citations omitted).

Even more recently, in the case of Ted Jacob Engineering Group, Inc. v. The Ratcliff Architects, 187 Cal. App. 4th 945, 2010 Cal. App. LEXIS 1463 (certified for partial publication) (Cal. Ct. App. 1st Dist. August 23, 2010), the court was asked to evaluate certain jury instructions that were presented in a matter where the subcontractor had sued a contractor for damages associated with performance of additional work on a hospital renovation and expansion project. As a part of its decision, the court gave a comprehensive overview of the scope and standard of review to be applied in evaluating a jury instruction challenge on appeal:

> "The propriety of jury instructions is a question of law that we review de novo. [Citation]" (*Cristler v. Express Messenger Systems, Inc.*, (2009) 171 Cal. App. 4th 72, 82 [89 Cal. Rptr. 3d 34].) In *Soule v. General Motors Corp.*, (1994) 8 Cal. 4th 548 [34 Cal. Rptr. 2d 607, 882 P.2d 298] (*Soule*), the California Supreme Court definitively held, '[T]here is no rule of automatic reversal or 'inherent' prejudice applicable to any category of civil instructional error, whether of commission or omission. A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.) . . . [¶]Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.' [Citations.]" (*Soule*, at p. 580.)
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> Ratcliff argues that a more lenient standard for reversal applies when jury instructions are internally inconsistent or contradictory as opposed to flatly erroneous. Citing *Henderson v. Harnischfeger Corp.*, Ratcliff argues reversal is required on a showing that contradictory instructions *possibly* affected the verdict (*Henderson v. Harnischfeger Corp.*, (1974) 12 Cal. 3d 663, 671 [117 Cal. Rptr. 1, 527 P.2d 353] (Henderson).) In *Soule*, however, the Supreme Court clearly held that its "adoption of [the aforementioned] uniform test for civil instructional error disposes of [the] contention that we must find the erroneous [instruction in this case] prejudicial because it raises a mere *possibility* that the jury's verdict was based on an incorrect legal theory. (See, e.g., [citation]; *Henderson* [, at pp.] 671–74 . . . ; [citation].) The oft-repeated maxim that an appellate court may not 'speculate' on the instructional basis of a general verdict cannot mean that a civil judgment must invariably be reversed unless the record *explicitly shows* that the jury *did not* rely on the erroneous theory. Such a rigid rule would be at odds with *People v. Watson* [(1956) 46 Cal. 2d 818, 836–837 [299 P. 2d 243]], which sought to eliminate the notion that the 'mere possibility' of prejudice from trial error warrants reversal under article VI, section 13 of the California Constitution. . . .." (*Soule, supra*, 8 Cal. 4th at p. 581, fn. 11.) The Court noted that article VI, section 13's reference to "'misdirection of the jury' . . . logically includes every

> kind of instructional error. It seems manifest that incorrect, ambiguous, *conflicting*, or wrongly omitted instructions may equally 'misdirect' the jury's deliberations." (*Soule*, at p. 579, italics added.)
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> We apply *Soule*'s "uniform test for civil instructional error," which asks if it is reasonably probable the error affected the verdict.

Ted Jacob Engineering, 187 Cal. App. 4th at 961–62.

Also very recently issued was the decision in Willis v. Indiana Harbor Steamship Co., L.L.C., 2010 Minn. App. LEXIS 153 (Ct. App. Minn. October 19, 2010). In that case, involving a negligence action on a shipping vessel, the court was faced with an appeal on a number of jury instructions, including, notably, an instruction on spoliation, a topic discussed more fully *infra*. In specifics, the appellants argued that the negative-inference jury instruction based on established spoliation was unwarranted under Minnesota law and "unfairly prejudiced appellants on both liability and apportionment of that liability, and therefore that the district court abused its discretion in failing to grant appellants a new trial."

The court began with the discussion of Minnesota law on the issue of spoliation, noting that the courts in that state "have held that spoliation does not have to be intentional to constitute obstruction of justice deserving of a sanction." Willis, 2010 Minn. App. LEXIS 153, *citing* Wajda v. Kingsbury, 652 N.W. 2d 856, 862 (Minn. App. 2002). The court continued "[r]egardless of intent, disposal of evidence may be subject to a spoliation sanction when a party knows or should know that the evidence should be preserved for pending or future litigation." Willis, 2010 Minn. App. LEXIS 153, *citing* Patton v. Newmar Corp., 538 N.W. 2d 116, 118 (Minn. 1995). As such, the court concluded that the spoliation sanction in Minnesota would permit an unfavorable inference to be drawn from the failure to produce evidence, provided that it was in the possession and under the control of a party to the litigation. Before the court

undertook an evaluation of the instruction itself, however, it also noted on what grounds the jury verdict could be overturned. The court observed as follows:

> The determination that the sanction was not authorized does not end our inquiry. We must next determine if the negative-inference instruction substantially prejudiced appellants. Error in a jury instruction is likely to be considered fundamental, and therefore not harmless, if the error destroys the substantial correctness of the entire jury charge, results in a miscarriage of justice, or substantially prejudices a party. . . . The right to a fair trial is among a party's substantive rights. *See e.g.*, Minn. Const. art. I, § 8 (stating that a party is entitled to "obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws"). "If a jury instruction 'is erroneous and an appellate court is unable to determine whether the error affected the jury, a new trial should be granted.'''

Willis, 2010 Minn. App. LEXIS 153 at *11–12.

The court then went on to discuss the instruction which provided as follows:

> If evidence that could reasonably be expected to have been produced, but is not produced due to the actions or inactions of a party that prejudice another party, and the party whose actions allow the evidence to have been altered fails to give a reasonable explanation, you may decide that the evidence would have been unfavorable to that party.

The court then proceeded with its analysis, noting that Willis argued this instruction was "harmless because the instruction allows the jury to determine if evidence was allowed to be altered and who allowed it to be altered." However, the court concluded that because the district court's decision to grant a sanction in the form of a negative-inference instruction placed the weight of the court's authority behind the negative-inference, and because the appellate court could not conclude that the negative-inference instruction did not prejudice the appellant's substantial right to a fair trial, and as well as because the instruction noted above was not authorized, the court reversed the apportionment of liability and remanded for a new trial on liability and apportionment of the causal fault. Willis, 2010 Minn. App. LEXIS 153 at *12–13.

Raise It or Waive It / Objecting to the Jury Instruction

The importance of timely interposing an objection to a jury instruction should also be considered. This point was emphasized in Serio-US Industries, Inc. v. Plastic Recovery Technologies Corp., 05-1106, -1143, -1306 (Fed. Cir. Aug. 10, 2006). In Serio, the court was called upon to review jury instructions on appeal in an infringement action. The court observed that absent a proper and timely objection, including one before the jury retires, that the challenging party could not prevail in an appeal absent some plain error affecting substantial rights and resulting in a miscarriage of justice. As such, without finding a miscarriage of justice in the instructions as a whole, the court refused to overturn the decision of the jury on appeal.

Serio is not alone in this cautionary admonition. See, e.g., Bacon & Associates v. Rolly Tasker Sails (Thailand Co.) Ltd., 841 A.2d 53-63-64 (Ct. Sp. App. Md. 2004), *quoting* Fearnow v. Chesapeake and Potomac Tel. Co., 676 A.2d 65, 72 (Md. 1996) ("In Maryland, in order properly to preserve an objection to a court's instruction to the jury, a party ordinarily must make a specific objection after the instructions are given. . . . [Otherwise] 'the trial court has no opportunity to correct or amplify the instructions for the benefit of the jury if the judge is not informed of the exact nature and grounds of the objection.'").

Keeping the standards of review in mind can be vital and helpful when crafting or modifying a jury instruction for presentation to the court. These standards should also be considered in evaluating when to object to the opposing party's or even the court's own proposed instructions. Stating that objection, as well as the grounds for it in terms consistent with the cases interpreting these jury instructions, may be a key turning point on the ultimate success of challenging these instructions should that be necessary in the appeal phase. Otherwise, the

appeals court may be hard-pressed to reverse the jury's determination. This observation also emphasizes the significance of getting your charges before the jury in the first instance.

Resource for Recourse

As noted above, there was a time when the availability of resources on construction-litigation jury instructions was slim to nonexistent. Aside from general principles of contract and tort law contained in many states' individual standard-form jury instructions, there was no publication or treatise specifically tailored toward the presentation of unique construction issues or terminology. As noted above, all that changed with the publication of the *Model Jury Instructions: Construction Litigation* published by the ABA Section of Litigation. Included within that volume are numerous instructions going to the heart of many complex construction principles. Not only are the proposed instructions for these issues set forth, detailed comment is provided for each charge, along with citation authority that supports the jury instruction presented. Needless to say, the publication does not address each charge on a 50-state basis. However, given the presence of the proposed charge, along with the underlying case authority, it allows the consulting practitioner to consider the charge, review the citing authority, translate that authority into the state's law being presented in the case at issue and review that state's law for consistency with the proposed charge.

A sampling of some construction-related charges within the publication are worthwhile:

> **2.04 Duty to Investigate Site**
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> In this action the contractor seeks compensation for [disputed extra work]. The owner claims that it is not responsible to pay for the [disputed extra work] because the contractor should have realized that the [disputed extra work] was required as a result of its investigation of the site before submitting its bid. A pre-bid site visit is reasonable and required if a reasonably experienced and prudent

> contractor would do so in similar circumstances or if it was required by the parties' contract. The proposed bidders were required in this case to examine and judge for themselves the location and character of the proposed improvements at the site and assume all risks as to the character and nature of the work and the labor and material required to complete the contract. The contractor was informed that the engineer's estimate [of the amount of work required] was not more than a guide, and the bidder must for itself determine the correctness of the estimate, and if the contractor accepts the estimate unchecked and unverified, the contractor does so at its peril. Bidders are expected to use normal powers of observation when conducting site inspections. Generally, however, bidders are not required to conduct independent subsurface investigation in the form of soil borings or test pits, unless specifically required by the bidding documents.
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> If you find that the need for the [disputed extra work] would have been apparent to the contractor from a reasonably conducted site visit before it submitted its bid to perform the work, then the contractor is not entitled to additional compensation. If, however, you find that a pre-bid site visit was not reasonably required or that the [disputed extra work] would not have been apparent to the contractor from a reasonable site visit, the contractor is entitled to be compensated for this extra work.

This particular charge does not appear to be not one that could be found in the standard-form instructions generically available for most commercial litigation jury trials.

Another charge of a similar nature is found dealing with where a contract prohibits changes without written authority. The model charge in that regard is set forth as follows:

> **5.06 Where the Contract Prohibits Changes Without Written Authority**
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> The contract contains a provision that the owner shall not be liable for extra work unless the extra work is authorized in writing. If you find that there was not written agreement authorizing the extra work then you must find for the owner on any claims for extra work. There are exceptions to this rule, however. Parties to a contract may subsequently modify the terms of their agreement, either orally or by other subsequent conduct, to change the need for extra work to be authorized in writing. For example, if you find that the parties entered into an oral agreement authorizing the contractor to do extra work or if the owner agreed to waive the written change order requirement, then the owner must pay for the extra work. However, the contractor cannot recover for services rendered or materials supplied in addition to those specified in the contract unless the contractor proves that there has been a new and subsequent oral or implied contract that it would be paid for such additional work.

> In this case, the contractor alleges to be entitled to extra compensation because of a subsequent oral agreement by the parties that modified the contract by calling for extra work. The contractor has the burden to prove that the parties orally agreed on the performance of the extra work.

Two final examples of the types of construction-specific charges contained in the *Model Jury Instructions: Construction Litigation* are those dealing with extra testimony to prove standard of care, and common knowledge and standard of care. While the use of experts and standard of care charges are not exclusive to the construction industry, the unique aspect of an architect's obligation is recognized and set forth in the following:

> **8.05 Expert Testimony to Prove Standard of Care**
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> A person having special training or experience in a technical field is known as an expert witness. Testimony from an expert witness is required to establish the standard of care for negligence by an architect when such a standard is outside the realm of common knowledge and experience of ordinary people. In this case, an expert witness provided an opinion as to the care, skill, ability, and diligence ordinarily required of an architect.
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> Merely because an expert witness has expressed an opinion based on special training or experience does not mean that you must accept it as true. The same as with any other witness, you must decide whether the expert testimony is credible and whether you should rely on it.
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> ****
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> **8.06 Common Knowledge and Standard of Care**
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> When the lack of care, skill, ability, and diligence ordinarily required of architects is so apparent that it is within common knowledge of ordinary people, expert testimony is not required. In such instances, you must consider the testimony of the witnesses and the exhibits that have been admitted into the record, credibility determinations, and your common sense to determine whether the architect used reasonable care in this case.

However, even though there was a tremendous impact from the publication of these jury instructions, since its publication in 2001, there has not been any substantial update of the publication.

In 2006, some of the individuals who were instrumentally involved to differing degrees in the initial publication of the book collaborated again for a program on jury instructions in construction litigation. Included within these materials was an acknowledgement of the Section of Litigation's *Model Jury Instructions* book, along with an exploration of additional legal developments and a presentation of selected charges on these emerging points. Two of these additional topics addressed during this update were issues of spoliation, discussed earlier in the context of the Willis case, and which are becoming more of a concern in today's electronic data and construction environments, as well as a charge on the issue of negligent misrepresentation, more recently recognized in a number of states as a basis for pursuing a design professional for liability absent contractual privity. The discussion on these two charges follows:

(A) The Spoils of Spoliation[1]

One significant issue which has more recently come into greater focus involves issues of evidence spoliation. While many of these cases have arisen in the context of document issues and, even more recently, issues of electronic data, a more "concrete" component of spoliation law is developing as relates to construction projects. As discussed in detail in an article entitled "Don't Spoliate an Already Bad Ending: Exploring the Ethical Intersection of Spoliation and Remedy of Warranty and Other Deficiency Claims," appearing in the Spring 2004 issue of *Construct!* Vol. 13, No. 3, the legal landscape has become fertile ground for discussions and findings of spoliation when construction components have been eliminated or destroyed in the

[1] This and the next subsection of the materials originally appeared in this author's article entitled, "Jury Instructions in Construction Litigation: Challenges in Crafting Compliant and Convincing Charges in Construction Cases" and was presented the American Bar Association Forum on the Construction Industry meeting on May 18–19, 2006.

process of remedying the alleged deficiency. As such, an instruction on spoliation may be necessary in your next construction case involving defects and/or breaches of warranty.

The recourse typically presented in jury instructions on the spoliation issue pertains to an adverse inference which can be drawn if spoliation is found. For example, in Pia v. Perrotti,[2] the court was called upon to review the following charge on spoliation. This discussion followed a determination by the court that something short of evidence preclusion was warranted in light of the facts and circumstances surrounding the alleged spoliation, being the owner's failure to preserve electrical equipment allegedly implicated in a warehouse fire:

> Also, with regard to the proof of other causes, if you find that there were materials, and I believe it's been argued to you that there was other equipment or chargers or other things in the particular areas where the fire started, if you find that there were things in that area which were under the plaintiff's control and that the plaintiffs disposed of these materials before the defendant had an opportunity to inspect them and that these materials were relevant, that is should have been recognized as bearing on the issues of what did or did not cause the fire, then you may, if you wish, infer that if these materials had been retained and had been able to have been inspected by the defendants, that evidence from those materials would have been unfavorable to the party who made them unavailable.
>
> Again, there is dispute as to whether there were any such materials, under whose control they were, whether or not they were made available. And all of that is for you to decide as a factual matter. But if you decide the facts fit that principle of law which I have enunciated, then you may if you choose, infer that had that evidence been preserved for inspection and been available to be presented to you here in court, that such evidence would have been unfavorable to the plaintiff if you find that it was the plaintiff who controlled the evidence and made it unavailable.[3]

Because this charge met the tripartite spoliation test announced in Schmid v. Milwaukee Electric Tool Corp.,[4] and was adopted by the Supreme Court of Pennsylvania in Schroeder v.

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2 Pia v. Perrotti, 718 A.2d 321 (Pa. Super. 1998).

3 Pia, 718 A.2d at 324.

4 Schmid v. Milwaukee Electric Tool Corp., 13 F.3d 76 (3d Cir. 1994).

Commonwealth, Dept. of Transp., Navistar International Transportation Corp.,[5] the court found the charge to be proper.

Another example of an adverse inference charge relating to a possible construction/warranty spoliation matter is presented below:

> In presenting this case, defendant did not produce the original compressor components that it removed from the generator operated by the plaintiffs at the facility located in Hazleton, Pennsylvania. The general rule is that where evidence which would properly be part of a case is within the control of, or available to, the party whose interest it would naturally be to produce it, and that party fails to do so without satisfactory explanation, you may draw the inference that, if produced, it would be unfavorable to the party.
>
> Applying that general rule to this case, and due to defendant's failure to produce the original compressor components, you may draw the inference that the production of the original compressor components would have [been] unfavorable to the defendant if you find all of the following:
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> (1) that the original compressor components existed and were within the defendant's control;
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> (2) that the original compressor components were not reasonably available to plaintiffs; and
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> (3) the defendant has provided no satisfactory explanation for failure to produce the compressor components.[6]

Overall, crafting an instruction following these general principles should permit presentation of the spoliation issue to a jury in the form of an adverse inference instruction from the court. Obtaining such an instruction would likely be a powerful tool in an instance where a

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5 Schroeder v. Commonwealth, Dept. of Transp., Navistar International Transportation Corp., 710 A.2d 23 (Pa. 1998).

6 *See* Kevin F. O'Malley, et al., 3 Federal Jury Practice and Instructions §§104.26, 104.27 (5th Ed. 2000); Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 334 (3d Cir. 1995), *citing* Gumbs v. International Harvester, Inc., 718 F.2d 88, 96 (3d Cir. 1983); Perricone v. Clarke, 1999 WL 124477, *1 (E.D. Pa. March 5, 1999).

critical component in dispute was disposed of before adequate opportunity was afforded to inspect the component in question.

(B) Building a New Charge – Addressing the Latest Legal Developments

Sometimes the challenges presented in crafting a jury instruction arise when there is a new and unique development in the law in a given jurisdiction. Confronted with such a change in the legal landscape, the trial lawyer is then left to assess that legal development and to prepare from that decision a jury charge which is not only compliant with the new legal concept, but also appropriately embraces the factual questions which should be presented to the jury (as opposed to issues of law to be decided by the court).

Consider the scenario in which construction practitioners now find themselves in Pennsylvania following the decision of the Supreme Court of Pennsylvania in Bilt-Rite Contractors, Inc. v. The Architectural Studio.[7] There, in a case of first impression, the Supreme Court of Pennsylvania held that a building contractor could maintain an action sounding in negligent misrepresentation against an architect for alleged misrepresentations contained in the architect's plans and specifications for a public construction contract, even in the absence of privity between the architect and the contractor. In reaching that determination, the court undertook an extensive review of the law in Pennsylvania as relates to other non-construction scenarios involving negligent misrepresentation claims, the Restatement (Second) of Torts § 552, and a number of decisions from other jurisdictions which have previously recognized the ability of pursuing a negligent misrepresentation claim against the design professional, even in the

[7] Bilt-Rite Contractors, Inc. v. The Architectural Studio, 866 A.2d 270 (Pa. 2005).

absence of privity (when the reliance upon that professional's designs was to be expected under the facts and circumstances presented).

Faced with the decision of the Supreme Court of Pennsylvania in Bilt-Rite, the practitioner could look to the decisions of the cases cited from other jurisdictions which have similarly adopted the negligent misrepresentation exception to the Economic Loss Rule (as is set forth in § 552 of the Restatement (Second) of Torts) for guidance.[8]

Another starting point for crafting the charge could be a review of the Restatement (Second) of Torts § 552, along with the Bilt-Rite decision itself. Section 552 of the Restatement (Second) of Torts provides in pertinent part as follows:

> **Information Negligently Supplied for the Guidance of Others**
>
> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in subsection (3), the liability stated in subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

[8] *See, e.g.*, Donnelly Construction Co. v. Oberg/Hunt/Gilleland, 677 P.2d 1292 (Az. 1984) [Note: Very recently, this decision in Arizona came into question as stated in Flagstaff Affordable Housing, L.P. v. Design Alliance, Inc., 223 P.3d 664, 671-72 (Az. 2010)]; Robert & Co. Assoc. v. Rhodes-Haverty Partnership, 300 S.E. 2d 503 (Ga. 1983); Jim's Excavating Service, Inc. v. HKM Associates, 878 P.2d 248 (Mont. 1994); Davidson and Jones, Inc. v. County of New Hanover, 255 S.E. 2d 580 (N.C. App. 1979); Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 463 S.E. 2d 85 (S.C. 1995); and John Martin Co., Inc. v. Morse/Diesel, Inc., 819 S.W. 2d 428 (Tenn. 1991).

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transactions. . . .[9]

From the foregoing, the following charge could be construed as consistent with the recent instructions of the Supreme Court of Pennsylvania in Bilt-Rite and the requirements for the tort of Negligent Misrepresentation, as set forth in § 552 of the Restatement (Second) of Torts:

> In this case, the plaintiff alleges that it obtained the drawings and specifications prepared [by] the defendant architect as a part of the bid package for this project and further contends that it relied upon those drawings and specifications in preparing its bid. You have also heard allegations by the plaintiff contractor that the drawings and specifications were in error insofar as they did not identify the interference encountered by the contractor when it was performing its work on the project site. The contractor then asserts that this interference, not noted on the drawings and specifications, caused the contractor to spend additional sums as part of its project construction efforts. It is up to you, the jury, to determine the following with regard to the contractor's claims:
>
> 1. Was it anticipated that the contractor would be provided the drawings and specifications prepared by the architect?
>
> 2. Was it reasonable for the contractor to rely upon the drawings and specifications prepared by the architect and included as part of the bid package?
>
> 3. Did the architect, in preparing the drawings and specifications, negligently fail to include the referenced interference that the contractor alleges it encountered and thereby misrepresent a material fact?
>
> 4. If your answer to this immediately preceding question is "yes," was it reasonable for the contractor to rely upon those drawings and specifications with regard to the alleged interference even though it was not noted on the drawings and specifications?
>
> 5. Did the contractor suffer damages as a result of the drawings and specifications not reflecting the existence of the interference?
>
> Should you find that all of the foregoing has been proven by the contractor by a preponderance of the evidence, then your verdict should be in favor of the contractor and against the architect on the claim of negligent misrepresentation,

[9] Restatement (Second) of Torts § 552.

> particularly if you have found that the architect, by failing to include the interference on the drawings and specification, failed to exercise reasonable care in the performance of its professional duties as the architect on the project. If you should so find in favor of the contractor and against the architect, then you will then proceed to determine the damages which have been alleged by the contractor as a part of its claim against the architect as above-described. These damages must also be proven by the contractor against the architect by a preponderance of the evidence.

As can be seen from the above, the charge captures the essential elements of the tort of negligent misrepresentation, as set forth in the Restatement (Second) of Torts at § 552, and also embraces some of the Supreme Court of Pennsylvania's concerns regarding the cause of action as discussed in the Bilt-Rite case.[10] Again, after crafting such an instruction, it might be worthwhile to consider the decisions of courts in other jurisdictions which have already embraced the claim and analyzed a charge on that claim so that an instruction beyond attack on appeal can be offered to the trial court during the jury charge conference.[11]

Additional Resources to Consult and Consider

As mentioned above, Utah very recently issued a model set of jury instructions, including those specifically dealing with many construction issues encountered in that state. There were a number of charges identified with specific reference to Utah case law discussing these principles. It is notable that the Utah instructions also make reference to surrounding jurisdictions' case law

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[10] *See also*, Atkinson Warehousing and Distribution, Inc. v. Ecolab, Inc., 115 F.Supp. 2d 544, 547-49 (D. Md. 2000) (court reviewed and upheld jury instructions given on negligent misrepresentation in warehousing dispute).

[11] *See, e.g.*, Standard Chartered PLC v. Price Waterhouse, 945 P.2d 317, 342-43 (Az. 1997) (in matter involving, inter alia, negligent misrepresentation claim, the court reviewed jury instruction based on §552 of the Restatement (Second) of Torts and concluded that language used by the trial court on reasonable foreseeability too broadly expanded Price Waterhouse's responsibility and directed on remand – ordered on other grounds – that instruction would have to be modified); Huber, Hunt & Nichols, Inc. v. Moore, 136 Cal. Rptr. 603, 623-26 (Cal. Ct. App. 5th Dist. 1977) (in contractor's case against owner and architect for increased costs, the court reviewed negligent misrepresentation instruction that was alleged to have been improperly refused and concluded that the instruction as proposed was incorrect on several principles and, if actually refused, was properly done so by the trial court).

as well as recognized treatises in this area., *e.g.*, *Bruner and O'Connor on Construction Law*, *C.J.S. Contracts*, and even the *ABA Model Jury Instructions: Construction Litigation* publication mentioned above. Several of these specific instructions are set forth below.

CV2209 Defective Plans and Specifications

If [name of contractor] proves that [he] acted reasonably in following [describe plans and specifications] provided by [name of owner], then [name of contractor] can recover from [name of owner] the costs caused by reasonable reliance on the plans and specifications.

Also, included in the Utah instructions is **CV2216**, dealing with waiver of written change notice requirement. **CV2216** states as follows:

The contract requires that change notices be made in writing. [Name of contractor] claims that [name of owner] waived the right to require written notice of contract changes. To succeed on this claim, [name of contractor] must prove that [name of owner], by words or by conduct:

(1) understood that the work performed by [name of contractor] was extra work; and

(2) agreed or acknowledged that this extra work would require a change to the contract [time/compensation].

Waiver is then specifically addressed in **CV2217** as follows:

"Waiver" means intentionally giving up a known right. To decide whether a party has waived a contract right, you must determine that all of the following have been proved:

(1) a party has a contract right;

(2) the party knew of that right; and

(3) the party intended to give up that right.

The intent to give up a right may be expressed or implied, and may be determined by considering all relevant circumstances.

The final instruction example comes in the area of cardinal changes. Here, the *Model Utah Jury Instructions, 2d Ed.*, contains the following:

> **CV2220 Cardinal Changes**
>
> [Name of contractor] claims that [he] should be paid more than the contract amount because of a cardinal change(s). A cardinal change is a change that substantially alters the type of work described by the original contract. To succeed on this claim, [name of contractor] must prove that:
>
> (1) the change(s) were substantially different from the work described in the original contract;
>
> (2) the change(s), were not anticipated under the contract; and
>
> (3) the parties acted as if the original contract no longer applied.

All of these model instructions are available through the Utah court's website, *www.utcourts.gov/resources/muji*. The Utah instructions are also notable for two specific reasons; one, a set of instructions can be built utilizing the web-based format, *see http://www.utcourts.gov/resources/muji/BuildInstructions.asp*. Another useful resource is a set of guidelines for drafting plain-language jury instructions. Indeed, after reviewing some of the basic principles, including those of "Be clear"; "Be brief"; "Remember who your audience is (lay people, with varying degrees of education and language skills)"; etc., the guidelines generally provide notable suggestions on which to not only use and consult the standard-form instructions provided, but also to craft and create one's own case-specific instruction. These guidelines can be found at *http://www.utcourts.gov/committees/muji/guideline%20summary.pdf*. These guidelines are not only useful tools—it appears that they guided the drafting of the *Model Utah Jury Instructions* themselves; insofar as the examples above show, the instructions are precise and direct explanations of the principles discussed, along with the jury's role in deciding that particular issue.

As noted above, another resource is available for Florida construction law attorneys, in the form of the *Florida Forms of Jury Instructions*. Included within those forms is an entire section (Chapter 42) devoted to construction contracts. The first of two examples is the Florida version of the notice of claim requirement under a contract, found at §42.60. This provides as follows:

> INSTRUCTION NOTICE OF CLAIM UNDER CONTRACT
>
> [PLAINTIFF/ DEFENDANT]'S PROPOSED INSTRUCTION NO. _____
>
> The [contract/subcontract] between Plaintiff and Defendant provides _____
> _____
> _____
> _____
> _____
> [quote or paraphrase the contract provisions that require notice of claim]
>
> The [first/next] issue for your determination is whether Plaintiff gave Defendant notice of claim as required by the [contract/subcontract]. If you find that such notice was not given, then your verdict should be for Defendant.
>
> [OPTIONAL (*see Use of Instruction*):]
>
> However, if you determine that Defendant waived or excused Plaintiff's compliance with the notice of claim requirement or that Defendant either agreed or by [his/her/its] course of conduct did not require such notice, and you also determined that Defendant breached the [contract/subcontract], then your verdict should be for Plaintiff.

Another example is a construction-unique instruction dealing with measures of damages for expenditures by contractor due to delays, inefficiencies or acceleration. This charge, found at §42.95 includes the following language:

> If your verdict is for Plaintiff on [his/her/its] claim against Defendant, you should also award the Plaintiff the amounts expended by Plaintiff for labor, services, equipment, or materials, which Plaintiff would not otherwise have made but for _____ [*describe delays in the work or inefficiencies in the work or acceleration of the work*] caused by Defendant's breach of the contract. This includes expenditures for additional labor, services, equipment, and materials, and for increases in the amount that otherwise would have been paid for the labor,

> services, equipment, and materials already required. [*Optional (see Use of Instruction):* This also includes the Plaintiff's overhead and the profit Plaintiff could otherwise have earned from its expenditures for additional labor, services, equipment, materials and for increases in the cost of those items already required under the contract.]

Much the same as in the *Model Jury Instructions: Construction Litigation* publication from the ABA Section of Litigation and the *Model Utah Jury Instruction*, there are specific references to the use of the instruction as well as case law and/or treatise authority supporting the suggested charge language. Therefore, not only is the publication a resource on jury instructions, but it also serves as a direct resource link for the underlying supporting authority for key construction-law concepts.

It may be additionally beneficial to construction litigators that more resources are becoming available that might be of assistance on certain types of construction disputes. Such additional resources for potential jury instructions in construction litigation can be found in the West publications on *Model Jury Instructions*. These publications are meant for use with the *Federal Jury Practice and Instructions, Fifth Edition*, publication of West. The model instructions are broken down by circuit and cover many issues often presented in federal court litigation. In the *Ninth Circuit Manual of Model Jury Instructions—Civil* (West 2007), the following charges are found and could be directly appropriate in construction jury cases in that circuit:

2.11 Expert Opinion

> Some witnesses, because of education or experience, are permitted to state opinions and the reasons for those opinions.
>
> Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.

See Ninth Circuit Manual of Model Jury Instructions—Civil at p. 42.

Section 2.12 deals with Charts and Summaries Not Received in Evidence:

> Certain charts and summaries not received in evidence [may be] [have been] shown to you in order to help explain the contents of books, records, documents, or other evidence in the case. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

Id. at 43.

The unique technological issues associated with presentation of evidence in electronic format are recognized and embraced in Section 2.14's charge on Evidence in Electronic Format:

> Those exhibits capable of being displayed electronically will be provided to you in that form, and you will be able to view them in the jury room. A computer, projector, printer and accessory equipment will be available to you in the jury room.
>
> A court technician will show you how to operate the computer and other equipment; how to locate and view the exhibits on the computer; and how to print the exhibits. You will also be provided with a paper list of all exhibits received in evidence. (Alternatively, you may request a paper copy of an exhibit received in evidence by sending a note through the [clerk] [bailiff].) If you need additional equipment or supplies, you may make a request by sending a note.
>
> In the event of any technical problem, or if you have questions about how to operate the computer or other equipment, you may send a note to the [clerk] [bailiff], signed by your foreperson or by one or more members of the jury. Be as brief as possible in describing the problem and do not refer to or discuss any exhibit you were attempting to view.
>
> If a technical problem or question requires hands-on maintenance or instruction, a court technician may enter the jury room [with [the clerk] [the bailiff] [me] present for the sole purpose of assuring that the only matter that is discussed is the technical problem.] When the court technician or any non-juror is in the jury room, the jury shall not deliberate. No juror may say anything to the court technician or any non-juror other than to describe the technical problem or to seek information about operation of equipment. Do not discuss any exhibit or any aspect of the case.

> The sole purpose of providing the computer in the jury room is to enable jurors to view the exhibits received in evidence in this case. You may not use the computer for any other purpose. At my direction, technicians have taken steps to make sure that the computer does not permit access to the Internet or to any "outside" website, database, directory, game, or other material. Do not attempt to alter the computer to obtain access to such materials. If you discover that the computer provides or allows access to such materials, you must inform me immediately and refrain from viewing such materials. Do not remove the computer or any electronic data [disk] from the jury room, and do not copy any such data.

Id. at p. 45-46.

Another growing area of the law impacting construction projects pursued on the public level are claims under the False Claims Act. As noted in the *Federal Jury Practice and Instructions, Fifth Edition*, publication, cited above:

> Originally enacted in 1863, the False Claims Act [31 U.S.C.A. §§ 3729-3733] (FCA) imposes civil liability upon any person who, among other things, knowingly presents or causes to be presented to an officer or employee of the United States Government a false or fraudulent claim for payment or approval. [footnote omitted] The defendant is liable for up to treble damages and a civil penalty of up to $10,000 per claim.

The publication goes on to note:

> The FCA imposes civil liability upon '[a]ny person' who, among other things 'knowingly presents, or causes to be presented, to an officer or employee of the United States Government … a false or fraudulent claim for payment or approval.'

Federal Jury Practice and Instructions, Fifth Edition, Volume 3C at pp. 746–47, citing 31 U.S.C.A. § 3729(a).

It is also in this publication where a resource on False Claims Act jury instructions can be found. Several of these False Claims Act specific instructions follow:

> **§ 178.01 Nature of the Action**

Plaintiff _____ alleges that on or about [*date*], defendant _____ presented a claim against [*the United States*] [*a program funded in whole or in part by the United States*] by [*filing a claim*] [*causing a claim to be filed*] with [*name*], an officer or employer of [*the United States*] [*government contractor*] [*government grantee*] when defendant _____ knew that the defendant's claim was false or fraudulent.

Defendant _____ denies these allegations and [*set forth any appropriate affirmative defenses*].

*** * * ***

§ 178.10 Nature of the Action

Under the False Claims Act, any person, including a corporation, who knowingly presents, or causes to be presented, to an officer or employee of the United States Government a false or fraudulent claim for payment or approval or who knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the United States Government, or who conspires to defraud the Government by getting a false or fraudulent claim allowed or paid, or who knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the Government is liable to the United States Government for a civil penalty plus damages sustained by the Government.

[The False Claims Act is to be read broadly, and its reach is beyond "claims" that might be legally enforced to all fraudulent attempts to cause the Government to pay out sums of money.]

[The False Claims Act is violated, not only by a person who makes a false statement or a false record to get the Government to pay a claim, but also by one who engages in a fraudulent course of conduct that causes the Government to pay a claim for money.]

*** * * ***

C. ESSENTIAL ELEMENTS OF PLAINTIFF'S CLAIM

§ 178.20 Generally

In order to sustain plaintiff's burden of proof for the charge of knowingly submitting a false or fraudulent claim to the United States, plaintiff _____ must prove the following four essential elements by a preponderance of the evidence:

One: Defendant _____ presented [*caused to be presented*] to [*name*] a claim against the United States;

Two: At the time that the claim was presented [*caused to be presented*], [*name*] was an officer or employee of the [*United States Government*] [*a member of the Armed Forces of the United States*] [*government contractor*] [*government grantee*];

Three: The claim presented was [*false*] [*fraudulent*] in that [*describe allegedly false or fraudulent nature of the claim*]; and

Four: Defendant _____ knew that the claim was [*false*] [*fraudulent*].

[*The False Claims Act reaches beyond "claims" that might be legally enforced to all fraudulent attempts to cause the Government to pay out sums of money. Thus, the False Claims Act is violated, not only by a person who makes a false statement or a false record to cause the Government to pay a claim, but also by one who engages in a fraudulent course of conduct that causes the Government to pay a claim for money.*]

*** * * ***

D. DEFINITIONS

§ 178.30 False

A claim is "false" if it is an assertion that is untrue when made or when used.

*** * * ***

§ 178.31 Fraudulent

A claim is "fraudulent" if it is an assertion that is known to be untrue.

*** * * ***

§ 178.32 Knowing and Knowingly

The terms "knowing" and "knowingly" mean that a person (a) has actual knowledge of the true information, or (b) acts with deliberate ignorance of the truth or falsity of the information, or (c) acts in reckless disregard of the truth or falsity of the information.

It is not necessary, however, for plaintiff _____ to prove that defendant _____ acted with an intent to defraud anyone.

*** * * ***

E. CAUSATION

§ 178.40 Generally

> Plaintiff _____ has the burden of proving each and every element of plaintiff's claim by a preponderance of the evidence. If you find that plaintiff _____ has not proved any one of the elements by a preponderance of the evidence, you must return a verdict for the defendant _____.
>
> [*Defendant _____ has the burden of proving each element of defendant's affirmative defenses by a preponderance of the evidence.*]

Again, these same instructions cannot be adopted wholesale as a part of the instructions preparation efforts in every case, without appropriate tailoring and modification. Nevertheless, they are key tools because they provide a starting point for crafting the charge, provide support and wider recognition for the proposed charge structure and give further underlying analysis for the charge language used.

Crafting a New Charge Without Published Resources to Reference

Unfortunately, beyond some of these more generally applicable resources for the federal court jury instructions, no charges in these particular publications deal specifically with construction litigation matters. While there are a number of charges related to the Americans with Disabilities Act ("ADA") (*see Ninth Circuit Manual of Model Jury Instructions—Civil* at p. 277, *et seq.*), these charges appear to be more directly related to Subchapter I of the ADA that cover claims made by employees or applicants for discriminatory treatment as opposed to Subchapters II and III that cover public services and public accommodations for persons with disabilities. The *Third Circuit Model Jury Instructions—Civil* (West 2010) acknowledges that the suggested charges contained therein are limited to "Title I" ADA claims and do not address "Titles II and III" described above. *See Third Circuit Model Jury Instructions—Civil* at p. 560. That publication notes "for a discussion and application of the standards governing actions under Titles II and III of the ADA, *see* Bowers v. National Collegiate Athletic Assoc., 475 F.3d 524

(3d Cir. 2007)." While that referenced case discussed Title II of the ADA, it dealt more with issues pertaining to an athlete's alleged drug abuse, rather than issues tied to construction of accessible facilities. *See* Bowers, 475 F.3d at 555–56.

Nevertheless, the possibility of ADA-based liability in construction matters has been recognized in a number of cases: Paralyzed Veterans of Am. v. D.C. Arena L.P., 326 U.S. App. D.C. 25, 117 F.3d 579 (D.C. Cir. 1997); U.S. v. AMC Entertainment, Inc., 549 F.3d 760 (9th Cir. 2008). As such, without specific form charges addressing claims under Subchapter III of that statute, when faced with a claim on public-accommodation aspects of construction under the ADA, it may become necessary to prepare instructions dealing with fact issues arising in those cases. A starting point in crafting the charge in this area would be a review of the statute and/or cases establishing those issues considered to be ones of fact for determination in the case at issue. One way of approaching the preparation of such a charge can follow the format discussed above in relation to the negligent misrepresentation claim available in Pennsylvania after the decision in Bilt-Rite.

The key element of potential construction liability under the ADA appears in §12183, dealing with "New construction and alterations in public accommodations in commercial facilities." This section states, in pertinent part, the following:

> **(a) Application of Term**
>
> Except as provided in subsection (b) of this section [dealing with elevators], as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes—
>
> **(1)** a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with the

> standards set forth or incorporated by reference in regulations issued under this subchapter; and
>
> **(2)** with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Where the entity was undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alteration in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

42 U.S.C.A. § 12183(a).

The statute provides a detailed recitation of what is to be construed as acceptable conduct when performing original construction or alterations of an existing structure. Also of assistance could be the decision in Head v. Glacier Northwest, Inc., 413 F.3d 1053 (9th Cir. 2005). While that case involved a claim associated with aspects of the ADA other than Title III, the court nevertheless made the observation that in an ADA case, "'[o]nce at the trial stage, the plaintiff is required to put forward evidence of discrimination 'because of' a protected characteristic. After hearing both parties' evidence, the district court must decide what legal conclusions the evidence could reasonably support and instruct the jury accordingly.'" Head, 413 F.3d at 1065, *citing* Costa v. Desert Palace, Inc., 299 F.3d 838, 856 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003). However, the court went on to conclude the Costa approach actually endorsed having to show that an "ADA plaintiff need not show more than that impermissible motives were a 'motivating factor' in any adverse action. The approach also reflects the fact that the evidence in a particular

case may not suggest more than one possible reason for the challenged action." Head, 413 F.3d at 1065–66.

Then, the instruction crafting counselor could review what were discussed as factual issues precluding the entry of summary judgment in the case of Mass. v. E*Trade Access, Inc., 464 F.Supp 2d 52 (D. Mass. 2006). There, the court summarized one of the presented issues as follows:

> The Plaintiffs move for summary judgment on the grounds that blind persons do not have access to and cannot independently use Cardtronics-owned ATMs constructed or installed after January 26, 1993, and seek an injunction specifying that the ATMs be brought into compliance with the ADA Accessibility Guidelines ("ADAAG") ….
>
> Cardtronics responds that: (1) the Plaintiffs request an impermissibly vague and unenforceable "obey the law" injunction; and (2) the Plaintiffs present no factual basis justifying summary judgment on approximately 25,000 ATMs nationwide. Moreover, the Defendants submit that summary judgment should be granted in their favor on Count V because § 12183(a)(1) does not apply to ATMs. According to the Defendants, § 12183(a)(1) encompasses only the construction of facilities for occupancy, not devices that might later be affixed to such facilities.
>
> The Plaintiffs' motion for summary judgment on Count V is DENIED, because genuine issues of material fact remain. While the Plaintiffs present evidence demonstrating that approximately one dozen tested ATMs fail to provide appropriate accommodations and instructions for use by blind individuals, they have made no systematic showing that the entire fleet of Cardtronics-owned ATMs is not accessible to and independently usable by the blind. Although it would be unreasonable and unnecessary to require the Plaintiffs to test every post-January 26, 1993, Cardtronics ATM in order to demonstrate non-compliance with § 12183(a)(1), at the least the Plaintiffs must present a more comprehensive showing that documents the specific types of accessibility problems or design defects encountered in a larger sample of ATMs nationwide, and that explains why and how it is appropriate to conclude that those documented problems pervade the entire Cardtronics fleet. Indeed, it may be that the information necessary to reach such a conclusion may be secured by the relatively simple devices of requests for admissions or interrogatories addressed to the Defendants. However, the Court cannot grant summary judgment as to 25,000 ATMs based only on an extrapolation from the extremely limited data of record. Accordingly, summary judgment for the

> Plaintiffs is DENIED without prejudice to renewal on the basis of a more substantial factual showing.

E*Trade, 464 F. Supp 2d at 55–56.

Even though this guidance could be viewed as somewhat limited, the necessity of the charge may require a best-efforts approach, tracking the statutory structure as follows:

> At issue in this case is whether there was an alteration that affects or could affect the usability of this facility, in this case being a auditorium which has been determined by this Court to be a public accommodation covered by the ADA as a matter of law.
>
> Therefore, should you find that the plaintiff has proven by a preponderance of the evidence that alterations were in fact made to this auditorium that affects the usability of the facility under the standards of the Attorney General as I have delivered them to you regarding wheelchair patrons, then you must then also decide whether those alterations were performed in a manner that to the maximum extent feasible did not alter the pathway of the area where food concessions were provided and the bathrooms were located in the altered area.
>
> Should you then determine that the plaintiff has proven by a preponderance of the evidence the alterations were not made in a manner to make the path of travel in the altered area readily accessible to and usable by individuals with wheelchairs such as the plaintiff, you must then proceed to determine whether the costs of constructing the altered area to maintain the same wheelchair pathways would not have been disproportionate to the overall alterations in terms of cost and scope.
>
> If you should find the plaintiff has proven by a preponderance of the evidence that the costs of constructing the altered area to maintain the same wheelchair pathways would not have been disproportionate to the overall alterations in terms of cost and scope, then your verdict should be for the plaintiff and against the defendants for the design and construction of this auditorium facility under the ADA, because such characteristics have been determined as a matter of law to be discriminatory under the ADA.
>
> However, should you find the plaintiff has failed to meet its burden of proving by a preponderance of the evidence that (1) the facility was altered, (2) was altered in such a manner that did affect accessibility to the concessions and restrooms, or (3) the alterations were prepared in a manner which were not feasible to the maximum extent or the feasibility of that accessibility was not proportionally cost effective, then your verdict should be for the defendants under the requirements of the ADA.

A recent search could not locate a jury instruction specifically dealing with Section 12183 issues under the ADA. However, it is important to note that the regulations adopted by the U.S. Department of Justice regarding design standards are set to change in March 2011 and also in March 2012. *See* http://www.ada.gov/regs2010/ADAregs2010.htm. Without decisional authority to directly support the interpretation of such an instruction, it may place the practitioner in uncertain territory in certain respects, especially considering the changing design standards. However, given the close approximation of the statutory requirements, coupled with decisional case law that has interpreted the jury instruction standards under the ADA (albeit in the context of different provisions thereunder), the instruction-crafting attorney can at least argue for acceptance of the charge based upon these supportive elements that were the basis of the instruction's creation in the first instance.

Conclusion

There are likely to be matters arising on construction projects that may be best suited for presentation to fact finders other than an empanelled jury. Where a jury is chosen as the fact finder in the matter at issue, care must be taken in selecting and preparing instructions that will be reviewed by the court and ultimately delivered to the jury. Difficult concepts that may take some construction practitioners years to embrace should be presented in a plain-speaking fashion so that the juries and the courts providing those instructions can readily appreciate the significance of the issue in connection with the dispute at hand. Consultation of available resources, including the *ABA's Model Jury Instructions: Construction Litigation*, are an essential first step in this process. Nevertheless, that review should not be an ending point because tailoring the charge for the specific case remains essential to maximizing the opportunity to prevail with the ultimate verdict.

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