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The Site Report

Construction Law Insights

June 27, 2022

Welcome to the sixth issue of 2022 of *The Site Report*.

Spilman's construction lawyers are leaders involved in local, state, and national organizations that are focused on the construction industry. From time to time, we will be sharing upcoming events that may be of interest to our readers. This month, we would like to let you know about an excellent event later this week in North Carolina.

The Joint Committee of North Carolina Bar Association's ("NCBA") Construction Law Section and United Minority Contractors of North Carolina ("UMCNC") will be hosting a forum **this Thursday, June 30, from 3 – 4:40 p.m. at the NC Bar Association Center at 8000 Westin Parkway, Cary, NC.** Anyone is invited to attend. This in-depth discussion will be with **Bruce Presnell from CMC Building, Inc.** and our own **Steven Hemric** (Construction Law UMCNC Committee Chair) on the topic of Making Your Bid Stand Out: Tips for Subcontractor Bidding." These forums have been developed for sharing information about legal and legislative developments affecting minority, women, veteran and disabled-veteran contractors, construction firms, subcontractors, suppliers, materialmen, and the construction industry as a whole. The Committee seeks to foster relationships between the minority, women, and veteran and disabled-veteran contractor community and NCBA construction lawyers. You can find out more details by visiting the [NCBA website](#). Please stop by and introduce yourself to Steven if you will be in attendance.

As always, thank you for reading!

Stephanie U. Eaton - Co-Chair, [Construction Group](#); Vice Chair of Southern Offices, Litigation Department; Editor, *The Site Report*

and

[Bridges, Natural Disasters and Liability - *The Skanska Decision* \(Part 2\)](#)

By **[Alexander L. Turner](#)**

In the last edition of *The Site Report*, we discussed the legal issues surrounding the damage caused by Skanska's construction barges to the new Pensacola Bay Bridge ("Bridge") between Pensacola, Florida and Gulf Breeze, Florida during Hurricane Sally. In response to hundreds of lawsuits filed in state court by local residents and businesses who were negatively impacted by the closing of the Bridge, Skanska filed an action in federal court pursuant to the Limitation of Vessel Owner's Liability Act, 46 U.S.C. § 30501, et seq. (the "Limitation Act") to either exonerate Skanska, or limit its liability in the state court actions. In December 2021, following a four day bench trial in October 2021, the Northern District of Florida held that Skanska's negligence caused the damage to the Bridge, and that Skanska was not entitled to have its liability in the state court actions limited by the Limitation Act. See *In Re Skansa USA Civil Southeast Inc. and Skanska USA, Inc., as Owners of Barge KS 5531 Praying for Exoneration From or Limitation of Liability*, 2021 WL 6622423 (N.D.Fla., Dec. 29, 2021). As Paul Harvey used to say, now for the rest of the story.

Click [here](#) to read the entire article.

[Pennsylvania National Mutual Casualty Insurance Company, Plaintiff, v. River City Roofing, LLC, et al.](#)

"A federal district court recently reaffirmed that Virginia remains in the small minority of states that view construction defect claims as a business risk to be borne by the builder, even when the claims arise out of negligent conduct that results in property damage."

Why this is important: This federal district court memorandum opinion, relying on Virginia law, reaffirms Virginia's place on the short list of states that do not treat construction defect claims (sometimes referred to as faulty workmanship claims) as covered claims under a Commercial General Liability ("CGL") policy. Normally, favorable indemnity agreements with subcontractors can protect against having to rely on additional insured coverage, but that requires a solvent and responsible subcontractor.

Insurance coverage for construction defect claims is a contentious area of law. Different states' courts have reached different results as to whether there is insurance coverage for the very same issue. The majority of states now treat construction defect claims as being covered under a CGL policy. Some states have gone so far as to enact legislation defining an "occurrence", under an insurance policy, to include property damage or personal injury resulting from faulty workmanship. Insurance coverage is important as it can provide one with a paid defenses (the insurer's duty to defend) and/or indemnity (the duty to indemnify). An insurer's duty to defend is typically greater than its duty to indemnify.

If disputes arise regarding your defense and/or indemnity for a claim, or lawsuit, a court will determine what state law will apply for a determination of the duties of the parties. A court can decide whether your insurer must provide you a defense and/or indemnity for an alleged construction defect claim by, amongst other things, looking at the language of your insurance contract, determining the location of the loss, and/or where the insurance policy was issued. If your construction company is presented with a claim, or a lawsuit, arising out of alleged defective workmanship, it is important that one immediately contact their insurance professional. An annual insurance check-up with your insurance professional, before a loss occurs, is time and money well spent.

This is not the end of the story for the *River City* matter, as a review of Pacer indicates that River City is appealing this ruling to the United States Court of Appeals for the 4th Circuit, and Pa. Nat'l. Mut. Ins. Co. has filed a cross-appeal. --- [Glen A. Murphy](#)

[Biden, DOT Open Applications for Competitive Bridge Investment Program](#)

"Competitive Bridge Investment Program is a competitive grant initiative that will allow metropolitan planning organizations and local and tribal governments to apply directly to FHWA, making it easier to advance bridge projects at the local level."

Why this is important: The Competitive Bridge Investment Program ("BIP"), established under the Bipartisan Infrastructure Law, will make \$12.5 billion in grant funding available over the next five years with the primary goal of reducing the number of bridges in either poor condition or at risk of falling into poor condition within the next three years. For FY2022, nearly \$2.36 billion is currently available. This is important for two reasons. First, approximately 46,154, or 7.5 percent of the nation's bridges, are in poor condition. The BIP's funds will undoubtedly help reduce this number over the next five years making our transportation infrastructure safer and more efficient. Second, the funds will cover both "large bridge" projects, i.e. those costing more than \$100 million, and traditional "bridge" projects, i.e. those costing less than \$100 million. As a result, municipal governments are now eligible to receive federal funds for smaller, local bridge projects that would not otherwise be available for such projects. The deadline to submit applications for "large bridge" projects is August 9, 2022 with applications for traditional "bridge" projects being due September 8, 2022. --- [Jonathan A. Deasy](#)

Why Real Estate Construction Contract Disputes are Reaching New Heights

"Lessons learned over the last couple years representing owners as it relates to high-end residential and smaller-to-midsized commercial construction projects."

Why this is important: After two years of dealing with the pandemic's effects on the construction industry, many companies are still facing supply and labor shortages. Some of these problems can be attributed to the pandemic's aftereffects, others to international issues like the war on Ukraine, and yet more to the unique position of the current world's economy. When faced with these day-to-day uncertainties, those in the construction industry would be well advised to ensure that their contracts contain sufficient protections for whatever issues may arise as the world continues to adjust. While it is impossible to divine the future, well-written contract clauses that define and address issues such as force majeure and supply delays will go a long way toward mitigating adverse results when these events do arise. Similarly, maintaining a regular flow of communication between the parties on the jobsite will aid in addressing issues early and managing expectations. Quite often, the clarity of the written contract and the quality of inter-party communications can make all the difference between a project where the parties adjusted to address challenges, and a project that devolved into protracted litigation. --- [James E. Simon](#)

Biden Pauses Solar Tariffs, Pushes Defense Act to Boost Stalled Construction

"Under a June 5 directive, President Joe Biden said solar modules and cells can be imported from those countries for 24 months and he authorizes use of the federal Defense Production Act to accelerate U.S. manufacture of the solar components, which currently is limited."

Why this is important: President Biden's directive that allows solar modules and cells to be imported from Cambodia, Malaysia, Thailand and Vietnam, and further authorizes domestic production of solar components is important because solar energy is crucial to the achievement of carbon reduction and renewable resource goals of many businesses and governmental bodies throughout the United States. In the private sector, many companies have developed their own corporate sustainability goals. For example, Walmart Inc. aims to power its facilities with 100 percent renewable energy by 2035 through a combination of renewable energy systems installed on its facilities, as well as through purchases from external renewable energy providers. In the public realm, federal, state and local governments are establishing similar sustainability goals. For example, on October 13, 2021, North Carolina's Governor Roy Cooper signed House Bill 951 into law. House Bill 951 requires the North Carolina Utilities Commission to take necessary steps to ensure that North Carolina reaches a 70 percent reduction in carbon emissions by 2030 and reaches carbon neutrality by 2050. This, in turn, led to the filing of a proposed Carbon Plan by Duke Energy Corporation. This Carbon Plan is based upon significant growth in renewable energy sources, including more than three times the current level of solar energy by 2035. With shortages in supplies needed to construct on-site solar, such as rooftop solar and solar parking canopies, as well as larger solar farms that can serve large numbers of a utility's customers, increasing solar component

importation and production is crucial to achieving these carbon reduction and renewable resource goals. -
-- [Stephanie U. \(Roberts\) Eaton](#)

Drones for Real Estate & Construction Market is Anticipated to Grow at Good CAGR & Top Key Players

"Global demand for drones in real estate & construction industry will reach a cumulative market value of \$20.5 billion and a total shipment of over 6.3 million units for 2017-2025."

Why this is important: The announcement of this report and its conclusions highlights that drones in construction are here to stay and continue to play a larger and larger role for construction companies. From inspections to site management to automated equipment, traditional construction businesses worldwide are taking advantage of new drone technology, and the increased demand for drone use on projects has opened a window for new companies to enter the construction market as specialized drone operators and as suppliers of drones, drone parts, and software tailored to the construction industry's needs. However, using drones on construction projects, in particular using new hardware or software and using drones for new types of tasks, brings a new set of risks and legal requirements to those projects. Companies should be prepared to address legal requirements like FAA regulations and to address the unique risks associated with drone use in their contracts both upstream and downstream. With the advent of new types of subcontractors (e.g. drone service providers), some companies may benefit from drafting their own subcontract form or addendum tailored specifically for projects on which drones will be active. --- [Steven C. Hemric](#)

The Importance of Surety Bonds for the Concrete Contractor

"Construction surety bonds protect the project owners, the public, subcontractors, and suppliers."

Why this is important: Surety bonds are an always present requirement for contractors and subcontractors when being awarded contracts. But, most contractors/subcontractors do not understand how or why surety bonds function. It is important to remember that the bonding company is not necessarily on your side and that if they are forced to pay out a claim then the bonding company will come looking to you as the contractor/subcontractor for reimbursement. However, the bonding company can be utilized in certain situations to assist the contractors/subcontractors when a project goes sideways or a dispute is brewing. The linked article explains the importance of surety bonds for concrete contractors but, for more guidance on surety bonds you should contact the lawyers within the Construction Group at Spilman Thomas & Battle to help you better understand the function of surety bonds and the pros/cons when utilizing the bonding company if the situation arises. --- [Matthew W. Georgitis](#)

5 Tips to Maximize Jobsite Safety with Remote-Controlled Demo Machines

"While demolition robots can provide peace of mind for contractors and crew, there are several safety factors to consider to protect workers and maintain efficiency."

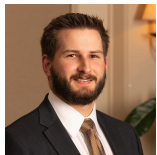
Why this is important: Demolition can be one of the more risk-infused parts of a construction project and typically presents unique safety hazards that construction companies have been working to mitigate for decades. One way the industry has worked to help protect crewmembers is through implementation of remote-controlled machines that allow workers to physically separate themselves from the active demolition. These relatively new machines have helped keep crewmembers out of areas in which they typically would have to work, like drop zones for falling debris and areas contaminated with harmful substances like asbestos. However, using remote demo machines does not remove all risk from the demolition process, and construction companies still need to take steps to protect their workers. This article presents five great initial steps companies can take. Every construction business should also regularly revisit its general safety plans and contracts to ensure they and their employees are adequately protected from the unique risks construction companies and workers face every day. --- [Steven C. Hemric](#)

[White House Incentivizes Stronger Building Codes, Standards](#)

"The Atlantic hurricane season began Wednesday and the White House seized the opportunity to launch a National Initiative to Advance Building Codes, aiming to encourage adoption of new construction standards, reduce energy waste and make communities more resilient to the impacts of climate change."

Why this is important: This is important because modification of building codes is crucial to address both the effects and the causes of broader climate change. Building code updates can mitigate climate change effects by requiring construction of buildings that are more resilient to extreme weather conditions, such as inland and coastal flooding, wildfires caused by extreme drought, increased numbers and intensity of tornadoes, and above average numbers of named tropical storms and hurricanes. These code changes can require (i) structural components that are more wind resistant, such as wall systems constructed with fiber cement boards or insulated concrete forms ("ICFs") and ring-shank nails to connect roof sheathing, (ii) buildings that incorporate materials with higher Class A fire ratings, such as brick stone or aluminum and steel siding, and (iii) structures to be built on higher elevations or with living quarters raised above ground level. Building code modifications can also hone in on the causes of climate change by designing buildings to meet net-zero carbon emissions, and new and existing federal buildings are targeting 2045 to meet this goal. One way to reduce carbon emissions is to increase the energy efficiency of buildings so they require less energy to operate. Another way to achieve this goal may be to reduce emissions from construction itself. This can be achieved by incorporating the use of 3-D printing technologies, which allow for the construction of buildings with fewer construction materials and labor, and in a much shorter amount of time, thereby reducing emissions associated with traditional "stick building" construction techniques. Contractors in every sector of the construction industry will be impacted as these new building codes are adopted, and may need to revise contracts, labor usage, materials and building techniques to ensure that their projects are compliant. --- [Stephanie U. \(Roberts\) Eaton](#)

Featured Attorney Profile



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Steven is an Associate in our Winston-Salem office. His primary area of practice is litigation with a focus on construction law and commercial litigation. Steven is well-versed in several different areas including assisting clients in general commercial disputes at all stages, including litigation, alternative dispute resolution, and postjudgment practice; advising construction industry clients in negotiations of commercial and residential construction contracts and resolution of a variety of disputes on public and private construction projects, including scheduling and delay claims, defect claims, price and scope changes, and payment claims; and advising insurance carriers on coverage and financial responsibility obligations in a variety of coverage situations and industries.

He was named to the North Carolina Super Lawyers "Rising Stars" list for 2022 and is listed in The Best Lawyers in America 2021 - 2022 in North Carolina for Construction Law and Litigation—Construction as "One to Watch".

Steven is Chair of the Minority Contractors Liaison Committee for the North Carolina Bar Association Construction Law Section, a member of the North Carolina Bar Association Construction Council, and a member of the Forsyth County Bar Association, Young Lawyers Division.

Steven received his B.S. and his J.D. from Wake Forest University. He is admitted to the North Carolina and South Carolina State Bars; the United States District Courts for the Eastern, Middle and Western Districts of North Carolina; and the United States District Court for the District of South Carolina.



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