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Monticello

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Our Mission

The Jefferson Society, Inc. is a non-profit corporation, founded on July 4, 2012 for the advancement of its members' mutual interests in Architecture and Law. The Society intends to accomplish these purposes by enhancing collegiality among its members and by facilitating dialogue between architects and lawyers.

The Jefferson Society, Inc.
c/o 2170 Lonicera Way
Charlottesville, VA 22911

Know of Another Architect-Lawyer Who Has Not Yet Joined?

Send his or her name to President Tim Twomey at ttwomey@RTKL.com and we will reach out to them. Must have dual degrees in architecture and law.

AUTHORS WANTED

Interested in writing an article, a member profile, an opinion piece, or highlighting some new case or statute that is of interest. Please e-mail Bill Quatman to submit your idea for an upcoming issue of Monticello. Contact: bquatman@burnsmcd.com

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WEBSITE:

www.thejeffersonsociety.org

PRESIDENT'S MESSAGE:
By Timothy R. Twomey, FAIA, Esq.
RTKL Associates, Inc.

Welcome back from summer! I hope you all had an enjoyable time and were able to take some vacation. I also hope that you had an opportunity to reflect on some of the ways in which you can contribute to The Jefferson Society as well as what other initiatives you think we should undertake. Please let me know your thoughts. I'd love to hear from you on this and to tap your energy and enthusiasm to make these happen.

Discussions by TJS's representatives are planned with the AIA's Large Firm Roundtable ("LFRT") Legal Committee at the latter's meeting later this year (after the submission deadline for this issue of *Monticello*), so results of potential shared initiatives will be reported in the next issue.

TJS member and former President Craig Williams, AIA, Esq. continues to co-present the findings of the LFRT sponsored, McGraw Hill published report entitled "Managing Uncertainty and Expectations." Craig co-lead the effort to address this matter and to elicit McGraw Hill's help in producing it. This document is a watershed document addressing the standard of care for design professionals. (See pp. 8-9 of the Oct. 2014 issue of *Monticello*). It should be of interest to all TJS members. You can download a PDF of the report at this address: http://www.globalconstructionsummit.com/images/pdf/Managing-Uncertainty-Building-Design-Construction-SMR.pdf

This report will also be the subject of one of the sessions at the Practicing Law Institute's Dec. 11, 2015, construction law program which I co-chair each year in New York at PLI's headquarters. The proceedings, papers and reports of each year's construction law program are available from PLI. These, too, should be of interest to TJS members. Contact PLI at https://pli.edu.

On another note, several TJS members are set to be sworn into the bar of the U.S. Supreme Court this coming Dec. 2,

(Continued on page 2)

(President's Message Cont'd from page 1)

2015. Those of us sponsoring candidates, as well as otherwise planning to attend, look forward to this exciting event. Donna Hunt, AIA, Esq. is organizing a subsequent opportunity for Supreme Court Admission Day on Nov. 13, 2017, with 26 members (at last count) already expressing interest. If interested please contact Donna at this address: donna.hunt@ironshore.com Donna wrote of her own memorable experience, and of meeting Justice Ruth Ginsburg, in the July 2015 issue of *Monticello*. It's worth a re-read.

Lastly, I wish to remind those members who have not yet paid their dues to please do so promptly. Please write your $50 check to: "The Jefferson Society, Inc." and send it to Suzanne Harness, Treasurer, at 2750 N. Nelson St., Arlington, VA 22207. Note: If you send a company check, please be sure your name is on it so that you get proper credit!

Thank you and I look forward to receiving your thoughts and ideas. Email me at: ttwomey@RTKL.com

Bell Elevated to Fellowship in AIA.

Congratulations to TJS member Michael J. Bell, FAIA, Esq., who was elevated to the AIA College of Fellows at the investiture ceremony during the 2015 National AIA Convention and Design Exposition in Atlanta. Mr. Bell is with Bell Architecture APC in New Orleans, LA. Election to fellowship not only recognizes the achievements of architects as individuals, but also their significant contribution to architecture and society on a national level. Michael J. Bell, FAIA, is a native of New Orleans and a graduate of Tulane University, where he achieved a Master's Degree in Architecture. He founded Bell Architecture in 1992, making it his goal to provide quality services for clients seeking to create distinctive custom homes. Michael has consistently and enthusiastically given back to the architectural profession, including as AIA New Orleans' post – Hurricane Katrina president in 2007, and since 2009 as a member of AIA National's Documents Committee.

Michael has served the Louisiana Children's Museum, St. Charles Avenue Presbyterian Church, Trinity Episcopal School and Tulane University, among others. Through Bell Architecture, Michael has provided pro bono services to Preservation Resource Center, Felicity Redevelopment, Community Sailing Center of New Orleans and Habitat for Humanity, for whom he has provided architectural services for over 500 homes. Michael is shown in the photo above with College of Fellows Chancellor Albert W. Rubeling, FAIA and National AIA President Elizabeth Chu Richter, FAIA.

DOL'S TEST FOR "INTERNS" REJECTED BY SECOND CIRCUIT

In the April 2014 issue of *Monticello*, (pp. 2-3) we alerted you to the 2013 wage and hour case involving interns on the movie "Black Swan," and how that could change the way that some employers use unpaid interns, including design professionals. In a July 2, 2015 decision, the Second Circuit Court of Appeals reversed the 2013 case and held that as a matter of first impression, the "primary beneficiary test" should be used to determine whether an unpaid intern is an employee under the Fair Labor Standards Act ("FLSA"). The Court also ruled that the unpaid interns in the proposed class were not similarly situated and could thus not be certified as a nationwide FLSA collective class. *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376 (2d Cir. 2015).

In this case, unpaid interns who worked either on the Fox Searchlight-distributed film "*Black Swan,*" or at the Fox corporate offices in New York City, filed a class action against Fox Searchlight and Fox Entertainment Group, claiming compensation as "employees" under the FLSA and New York law (i.e. for minimum wages and for overtime pay). The trial court granted partial summary judgment in favor of the interns, certifying their class and the defendants appealed.

In the 2013 ruling, the federal district court judge essentially adopted a 6-factor test used by the U.S. Dept. of Labor (see April 2014 issue of *Monticello*, p. 2) to determine if an intern was really an employee. This summer's surprise ruling reversed that federal district court court's decision and rejected the DOL's 6-factor approach. In its place, the court adopted the "primary-benefit test." The Court of Appeals said: "When properly designed, unpaid internship programs can greatly benefit interns. For this reason, internships are widely supported by educators and by employers looking to hire well-trained recent graduates. However, employers can also exploit unpaid interns by using their free labor without providing them with an appreciable benefit in education or experience. Recognizing this concern, all parties agree that there are circumstances in which someone who is labeled an unpaid intern is actually an employee entitled to compensation under the FLSA. All parties also agree that there are circumstances in which unpaid interns are not employees under the FLSA. They do not agree on what those circumstances are or what standard we should use to identify them."

The Court sided with the employers in adopting the "primary benefit" test. The test has two salient features. First, it focuses on what the intern receives in exchange for his work. Second, it also accords courts the flexibility to examine the economic reality as it exists between the intern and the employer. "Although the flexibility of the primary beneficiary test is primarily a virtue, this virtue is not unalloyed," the Court said. In the context of unpaid internships, the Court set out a "non-exhaustive set of considerations," which include:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

WHAT'S NEW? LAWS PASSED IN 2015.

A review of state laws that have been passed this year revealed a few trends. Two states raised the threshold for public bodies to procure services of a licensed design professional to $100,000, while three states enacted "good Samaritan" laws to provide limited immunity for A/E's who volunteer their services during an emergency. Those laws are each slightly different, so read them carefully before volunteering your services. Others tweaked licensing laws, some just a little, others a lot!

Here is a summary of laws we noticed were passed in the 2015 legislative session. Did we miss one in your state? Drop us a line and we will add it to the next issue of *Monticello*.

Arizona. H.B. 2336 is called "The Arizona Design Professional Prompt Pay Act," which amends the prompt pay act for state projects. It provides that in contracts with design professionals, the contract price or hourly rates agreed to shall constitute the "fair and reasonable cost" of the services, which shall be paid; if a design professional starts work based on a limited notice to proceed, and does not thereafter successfully negotiate its contract, then it is to be paid for costs incurred pursuant to the notice, subject to the state's "Cost Allowability Guidelines." Other provisions of the prompt pay act that previously applied only to contractors and subcontractors were expanded to cover design professionals as well. The governor signed the bill into law on April 13, 2015.

Arkansas. H.B. 1392 creates a "good Samaritan" law for architects and engineers, Arkansas Code §§ 17-15-106, et seq. and 17-30-106, et seq. now provide protection from liability to those who volunteer their services without compensation (other than reimbursement of expenses) in a declared national, state or local emergency. The new law does not, however, provide immunity for wanton, willful, or intentional misconduct. It was passed on March 16, 2015.

Maryland. H.B. 720 amends the licensing laws for architects by redefining "responsible member" of an entity providing architectural services, and allowing an LLC or partnership to perform architectural services "for itself or for an affiliated" entity without a permit from the Board. The law authorizes the State Board of Architects to deny a firm permit to an applicant, reprimand a permit holder, suspend or revoke a permit, or impose a penalty up to $5,000 under specified circumstances. Under the amended law, architecture may be practiced through an LLC that holds a permit from the Board. The bill passed unanimously in the House and Senate, was signed by the governor on May 12th and became effective Oct. 1, 2015.

We saw these Thomas Jefferson baseball hats offered by CafePress for $13.99 on line. Order yours at www.cafepress.com.

Mississippi. H.B. 1214 increased the amount needed for exemption of public works services from requiring a licensed architect or engineer to $100,000. The bill was approved by the governor on March 13th and became effective on July 1, 2015.

Nebraska. L.B. 23 is a sweeping overhaul of the Engineers and Architects Regulation Act. Among the new changes are new definitions of "direct supervision," "responsible charge," and "coordinating professional." Use of the seal is clarified, including projects involving more than one licensed professional. Joint ventures are added to the definition of "organization," which means that JV's need to obtain a certificate of authorization from the Board. The bill was approved by the governor on March 18, 2015.

Nevada. Two new bills relate to A/E services in Nevada. The first, A.B. 106, revised public works laws relating to contracts between a public body and a design professional to eliminate the authority of a public body to require the design professional to "defend" against any lawsuit alleging negligence, errors or omissions, recklessness or intentional misconduct of the design professional. However, if found liable, the court may award attorney's fees to the public body. The bill passed unanimously in the House and Senate and was signed by the governor on May 25th. The second bill, S.B. 374, relates to certain energy conservation standards (contained in the International Energy Conservation Code), and provides that design professionals are not subject to disciplinary action for complying with those, or any stricter, standards adopted by a local government. The bill drew only one "nay" vote in the entire legislature and was approved by the governor on June 5, 2015.

New Hampshire. The second "good Samaritan" law is H.B. 292, which provides statutory immunity for licensed architects and engineers, and firms, when providing volunteer services without compensation in a natural or "human caused" disaster or other life-threatening emergency. Unlike Arkansas and Ohio, this law does not have any exception for expense reimbursement. Like the other two, this law does not provide immunity for gross negligence, wanton or willful misconduct. The bill was enrolled on June 24, 2015.

North Carolina. H.B. 255 reforms building code enforcement by permitting counties to accept the sealed report of a licensed architect or engineer, without further responsibility to inspect components or elements of buildings. The new law states that if a licensed A/E provides the county with a signed document stating the component or element of the building so inspected is in compliance with the North Carolina State Building Code, then "the county, its inspection department, and the inspectors shall be discharged and released from any duties and responsibilities imposed by this Article with respect to the component or element in the construction of the building for which the signed written document was submitted." The bill passed unanimously in the House, but drew 3 "nays" in the Senate (107-4) and was presented to the governor for signature on July 6, 2015.

Ohio. Like Arkansas and New Hampshire, H.B. 17 is a "good Samaritan" law which provides civil immunity for architects, engineers, contractors, surveyors, "and tradespersons" providing volunteer services during a declared emergency. The bill exempts wanton, willful, or intentional misconduct and passed the House by a vote of 96-0 on Feb. 25, 2015 and was sent to the state senate. Ohio operates on a 2-year cycle, so the bill will be considered by the senate when it reconvenes.

Oregon. S.B. 383 expands the Certificate of Merit statute, O.R.S. 31.300, to design professionals licensed "in another state," while the old law only covered those licensed in Oregon. The bill adds a clarification that the certifying professional must have "similar credentials" to the defendant, and must attest that the defendant's conduct failed to meet the "skill and care ordinarily provided by other design professionals with similar credentials, experience and expertise and practicing under the same or similar circumstances." The new law goes into effect on Jan. 1, 2016. It only applies to complaints filed after the effective date.

Tennessee. Similar to the revised Mississippi law, S.B. 978 increases, from $25,000 to $100,000, the threshold for public works projects that require a registered A/E. The bill passed unanimously, and went into effect on May 8, 2015. S.B. 81, authorizes the state licensing board to deny certain certificates of registration to persons with felony convictions. This bill went into effect on May 6th.

Texas. H.B. 2049 relates to the indemnification and defense obligations of A/E's under certain governmental contracts, as well as the standard of care. See the article by Wilkes Alexander on page 6 for the history, details and effects of this new law.

Virginia. H.B. 1637 amended § 2.2-4302.2 of the Virginia Public Procurement Act as relates to design professional 1-year "term contracts," by decreasing the population threshold for localities for the procurement of such A/E services from 80,000 to 78,000, and increasing the single project fee for A/E services for such localities from $2 mil. to $2.5 mil., and the aggregate limit for projects performed in a 1-year contract term from $5 mil. to $6 mil. The bill passed unanimously in the House and Senate, was signed by the governor, and went into effect on July 1, 2015.

TJS Membership Continues To Grow!

The following new members have joined since our last Newsletter. We now have 107 members:

NEW MEMBERS:

Warren G. Feldman, AIA, Esq.
Johathan Nehmer + Assoc.
Rockville, MD

Wyatt A. Hoch, Esq.
Foulston Siefkin, LLP
Wichita, KS

Mark Kalar, AIA
Cuningham Group Architecture
Minneapolis, MN

Attention Delinquent Dues Payers! Yes, you know who you are.

And so do we. If you have not paid your 2015 dues, please write your check for $50 to "The Jefferson Society, Inc." and mail it to our Treasurer, Suzanne Harness, AIA, Esq. at:

Harness Law, PLLC
2750 North Nelson Street
Arlington, Virginia 22207

If you send a firm or company check, be sure your name is written on the memo line so that you get proper credit! If you have already paid your dues, "Thank You"!

"Das Rheingold" Revisited: The Saga of Texas H.B. No. 2049.

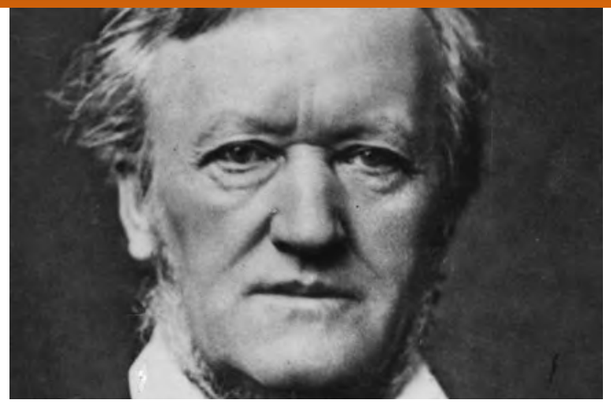
By D. Wilkes Alexander, AIA, Esq.
Fisk Alexander, P.C.
Dallas, TX

When I was asked in early July about this new Texas statute, it was presumed that I probably knew the "back story" to House Bill 2049 (which became Tex. Loc. Gov. Code 271.904 and was effective on Sept. 1, 2015). Yes, I know all about this new statute, which was originally enacted in a substantially different format and amended in 2001 to expressly prohibit governmental entities from seeking both a defense, as well as indemnity from architects and engineers for the government's own negligence. Well, everybody thought that was great except that attorneys negotiating contracts on behalf of the government continued to demand that defense and indemnity obligations in their contracts (subject to proportional responsibility) or they would simply give the work to someone else. As times got tough, some architects and engineers began to accept these uninsurable contract provisions so as to obtain government projects, which for a while was the only game in town for many.

In some strange way, I am reminded by Richard Wagner's operatic cycle known as "Das Rheingold." The main character in these operas is Wotan, who is the king of all gods. (Obviously, this is a reference to architects). Wotan is a character full of contradictions. First of all, he is a seeker of truth who lost an eye to obtain wisdom. This is equivalent to architects turning "a blind eye" in signing horrible contracts so as to obtain wonderful and profitable projects. While Wotan heeds the warnings of many of his consultants (that would be the architects' legal counsel), he is still willing to be led by the mischievous Loge, the god of fire and mischief. If you have ever seen Jim Carrey in "The Mask," you know all about Loge. Loge is the equivalent to the attorneys that represent the government and convince A/E's to sign these horrible contracts.

Secondly, Wotan rules by law and all of the contracts of both gods and man are carved into his spear so that he is the ultimate judge of all disputes. The problem is, he makes a contract with a race of giants to build Valhalla, a huge castle in the heavens in exchange for his wife's sister, the goddess of beauty. Obviously, that did not go over well with his wife so the entire opera is about Wotan trying to break his contract with these giants.

I mention this not only because it is more interesting than the Texas Code, but it also shows us how even in the mid 1800's people were struggling with the apparent conflict of authority, contractual obligations, and enforcement. If Wotan is any example, we should certainly not trust the government to be very forgiving when it comes to defense and indemnity obligations. Fortunately, this past legislative session examined this issue and created House Bill No. 2049 which modifies section 271.904 as follows.



The composer of Das Rhenigold, Richard Wagner

First, in subparagraph (a), the bill clarifies that the only indemnification that a governmental entity can seek in contract is for liability for damages to the extent that the damage is caused by, or results from, an act of negligence, intentional tort, intellectual property infringement or failure to pay subcontractor or supplier. Secondly, subparts (b) through (e) completely eliminate the enforceability of a "duty to defend" but still allows the government agency to seek the reimbursement of the reasonable attorney's fees after final adjudication of liability as outlined in subparagraph (a) above.

The act also limits a governmental entity from trying to create a heightened standard of care. In other words, any contract that seeks to modify and create a higher standard than the standard of care that is ordinarily provided by engineers or architects practicing in the same or similar locality under the same or similar circumstances is void and unenforceable.

Now, we are getting somewhere! The only issue we need to be careful of about is that the effective date of Sept. 1, 2015 is not just limited contracts executed after that time. It only applies to projects in which the RFQ or RFP is issued by the governmental entity after Sept. 1, 2015. So be careful with that one. When I first became aware of H.B. 2049, my first idea was let's stall signing these contracts until after Sept. 1st, but unfortunately the RFQ's had been issued several months prior. There were several versions that were introduced with some minor modifications and the House Bill and the Senate Bill ended up being identical. The Bill Analysis and the Background and Purpose subsections indicate that the primary reason for H.B. 2049 is that interested parties were claiming that many governmental entities were requiring design professionals to defend and indemnify them against allegations of negligence and that these types of contractual provisions were typically uninsurable. A representative of the ACEC testified in favor of the Bill. Testifying against it were representatives of Harris County, Texas, the Texas Conference of Urban Counties, the Texas Municipal League and the Texas Association of Counties. Several other public entities voiced their opposition, while not testifying.

The take away from all this? Legislation is like a Wagnerian Opera. Not really, but that reference will hopefully keep your attention on an otherwise dry topic. This revised statute is a good development for Texas A/E's and two of the issues that we often fight the most about in contract negotiations with the government are now clarified, i.e. defense and standard of care. This should level the playing field when design professionals feel compelled by the market to sign nasty contracts just to survive.

FLORIDA GOVERNOR VETOS NEW STRUCTURAL ENGINEER LAW.

The Florida legislature overwhelmingly passed H.B. 217, which created a new license type for structural engineers. Starting March 1, 2017, the new law would bar anyone not licensed from practicing or using the title "structural engineer," or any derivation of that title. Structural engineering was spun off into its own section of the licensing law, as a specialty license, with its own unique examination requirements. However, the bill provided a "grandfathering" provision for applicants prior to Sept. 1, 2016, under which applicants were exempt from taking the National Council of Examiners for Engineering and Surveying Structural Engineering Examination if the applicant is already a licensed engineer in Florida and has four years of experience in structural engineering design, or if the applicant is licensed as a threshold building inspector and meets other requirements.

The bill drew three "nay" votes in the House (104-3), and two more in the Senate (38-2), and was set to go into effect on July 1, 2015. In a surprising move, the bill was vetoed by Gov. Rick Scott on June 11th, whose veto message stated

that the new law, "provides an unwarranted mechanism to exempt currently licensed engineers from having to take and pass the qualifying examinations." The "grandfathering" provision exempts currently licensed P.E.'s from the new exam. The governor felt that all engineers who engage in structural engineering should have to take the same exam. NSPE national opposed the new law as it is generally against specialized licensing in any state. NSPE's long-standing policy has been to advocate that engineers be licensed as professional engineers. NSPE endorses and supports the concept of licensure of engineers only as a "professional engineer" and opposes licensure status by designated branches or specialties. (NSPE Position Statement No. 1737, Licensure and Qualifications for Practice).

Utah: Court of Appeals Upholds Statute of Repose

Adam T. Mow, AIA, Esq.
Jones Waldo
Salt Lake City, UT

Attorneys defending design professionals in Utah have long argued that Utah Code section 78B-2-225(3)(a) is a statute of repose rather than a statute of limitations. Utah Code section 78B-2-225(3)(a) states that a claim against a design professional or contractor "based in contract or warranty shall be commenced *within six years of the date of completion* of the improvement or abandonment of construction," unless a contract provides otherwise. Plaintiffs in construction cases have often argued that Utah Code section 78B-2-225(3)(a) is a statute of limitations subject to equitable tolling if they did not discover a design or construction defect for a number of years after completion of the project.

The Utah Court of Appeals recently clarified in *Willis v. DeWitt*, 2015 UT 123, that Utah Code section 78B-2-225(3)(a) is indeed a statute of repose and that breach of contract claims must be made within six years of completion. William and Paula Willis contracted in 2005 with Raymond C. DeWitt and RC DeWitt Construction, Inc. for the construction of a new house in a residential development. DeWitt discovered that multiple lots in the development contained expansive soil that could damage houses. Consequently, before any houses were constructed, DeWitt had sixteen feet of soil removed and replaced with compacted fill on the lots containing the expansive soil. DeWitt knew that the fill included some expansive soil. However, he believed that the compacted fill would be suitable for construction.

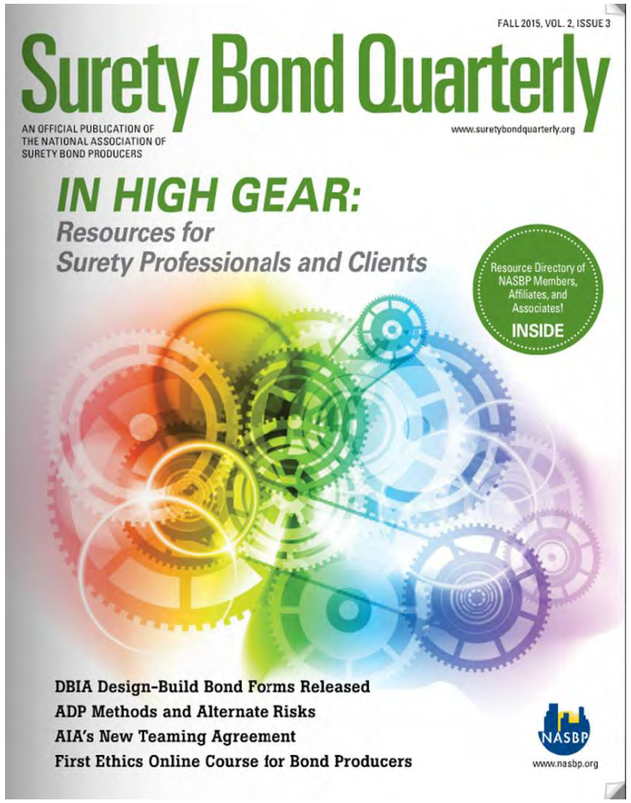
Following construction, the Willises took possession of their house on Dec. 27, 2005. A few months later, the Willises noticed cracking of their driveway, garage ceiling, and exterior walls, which appeared to be related to earth movement or settlement. The Willises received a letter from a neighbor several years later claiming that expansive soils caused damage to neighboring houses.

Based on DeWitt's failure to disclose the presence of expansive soil in the residential development, the Willises filed a lawsuit against DeWitt on June 15, 2012. They alleged fraudulent misrepresentation, fraudulent nondisclosure, negligent misrepresentation, breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of implied warranty. The district court granted DeWitt's motion for summary judgment, concluding that the Willises' June 2012 contract-based claims were time-barred under Utah Code section 78B-2-225(3)(a).

The Willises appealed, arguing that the district court erred in concluding that there was no genuine issue of material fact as to when the Willises had knowledge of their claims. They further argued that the court erred in concluding that "the discovery rule does not apply to toll the statute of limitations." On appeal, the Utah Court of Appeals affirmed on the basis that Utah Code section 78B-2-225(3)(a) is a statute of repose not subject to equitable tolling and there were no disputed facts regarding when that statute began to run or when it expired with respect to the Willises.

First, the Court found that the very language shows it is a statute of repose. It then found support in *Craftsman Builder's Supply, Inc. v. Butler Mfg'g Co.*, 1999 UT 18, 974 P.2d 1194, where the Utah Supreme Court concluded that the predecessor statute to Utah Code section 78B-2-225(3)(a) was also a statute of repose. Finally, it addressed the seemingly incompatible case of *Moore v. Smith*, 2007 UT App 101, 158 P.3d 562, which upheld a district court's equitable tolling of the limitations period in Utah Code section 78B-2-225(3)(a). It effectively concluded that *Moore* was an aberration because the question of whether Utah Code section 78B-2-225(3)(a) was a statute of repose had never been addressed.

Having concluded that Utah Code section 78B-2-225(3)(a) is a statute of repose, the Court of Appeals then held that the Willises had to bring their claims against DeWitt within six years of taking possession of the house, even though the defects were not discovered until months after possession.



Two TJS Members Published.

The Fall 2015 issue of *Surety Bond Quarterly* features two articles written by members of The Jefferson Society. *Surety Bond Quarterly* is the official publication of The National Association of Surety Bond Producers ("NASBP"). In the current issue, TJS member Frank D. Musica, Assoc., AIA, Esq. of Victor O. Schinnerer & Co., Inc. authored "Contractors in a New Age of Product Delivery," in which he discusses a contractor's expanded liability when offering design-build services. TJS Board member G. William Quatman, FAIA, Esq. of Burns & McDonnell Engineering Co. authored "DBIA Releases New Bond Forms for Design-Build Projects," explaining the 14 new bonds and related documents issued in 2015, which are endorsed by both NASPB and the Surety and Fidelity Association of America ("SFAA").

Have You Been Published? Let the TJS Editor know so we can spread the news in an upcoming issue!

Subrogation Alert: New Texas Statute Affecting Condominium Construction Defect Claims

By David H. Fisk, Esq.
Kane Russell Coleman & Logan, PC
Dallas, TX
(reprinted with permission)

Before filing a lawsuit or initiating an arbitration proceeding pertaining to a construction defect, a condominium association in Texas with 8 or more units must now comply with the newly added Section 82.119 to Chapter 82 of the Texas Property Code. This is in addition to compliance with the Texas Residential Construction Liability Act (RCLA) and any preconditions included in the condominium association's declarations.

Section 82.119 requires affected associations to have a licensed professional engineer inspect the units and common elements in question and prepare a written report that (1) identifies the specific units or common elements, (2) describes the present physical condition of the units or common elements, and (3) describes any modifications, maintenance, or repairs to the units or common elements performed by the unit owners or the association.

At least 10 days before the engineer's inspection, the association must provide written notice of the inspection to each party subject to a claim. The notice must (1) identify the engineer, (2) identify the specific units or common elements to be inspected, and (3) include the date and time the inspection will occur. Each party subject to a claim has a right to have representatives attend the inspection. As soon as the engineer's report is complete, the association is required to provide the report to each party subject to a claim. Each party subject to a claim then has at least 90 days to inspect and correct any condition identified in the report.

After completion of the engineer's report and the minimum 90-day inspection/correction period, the association must provide each unit owner with written notice of the date, time, and location of a meeting to be held, at which approval to file suit or initiate arbitration must be obtained from unit owners holding more than 50% of the total votes allocated under the declarations. The meeting notice must also include:

1. a description of the nature of the claim, the relief sought, the anticipated duration of prosecuting the claim, and the likelihood of success;
2. a copy of the engineer's report;
3. a copy of the contract or proposed contract between the association and the attorney selected by the board to assert or provide assistance with the claim;
4. a description of the attorney's fees, consultant fees, expert witness fees, and court costs, whether incurred by the association directly or for which the association may be liable as a result of prosecuting the claim;
5. a summary of the steps previously taken by the association to resolve the claim;
6. a statement that initiating the a lawsuit or arbitration proceeding to resolve a claim may affect the market value, marketability, or refinancing of a unit while the claim is prosecuted; and
7. a description of the manner in which the association proposes to fund the cost of prosecuting the claim.

The meeting notice cannot be prepared or signed by the attorney who represents or will represent the association in the claim or by anyone employed by or affiliated with the attorney or the attorney's law firm.

The effects of this new law, which was sponsored by two real estate developers, remains to be determined, but it will likely decrease the lawsuit risk for condominium developers, limit an association's ability to pursue construction defect claims, and increase the upfront costs to an association pursuing such claims.

Section 82.119's effect on an insurer subrogated to the rights of an association also remains to be determined. Arguably, a subrogated insurer should not be required to comply with the procedures set forth in Section 82.119 because the statute does not specifically address subrogated insurers. However, the safer practice would be to at least comply with the engineer inspection and notice requirements. If the association/subrogor decides to pursue a claim for its deductible interest or other uninsured loss, the association would certainly have to comply with all of the required procedures.

A subrogated insurer with a claim against the builder of a condo should comply with the written notice and opportunity to inspect and offer to repair required by RCLA Section 27.004 before performing any repairs; otherwise, the builder will not be liable for the cost of any repairs.

Revised AAA Construction Industry Arbitration Rules and Mediation Procedures.

Effective July 1, 2015, the American Arbitration Association ("AAA") has new rules. Construction arbitrations have become more complex in recent years, and, through focus groups held across the country, users of the AAA Construction Arbitration Rules have communicated their preference for a more streamlined, cost-effective and tightly managed process. Working with its National Construction Dispute Resolution Committee ("NCDRC"), composed of a diverse group of leading construction industry and related organizations, the AAA received input from all industry sectors.

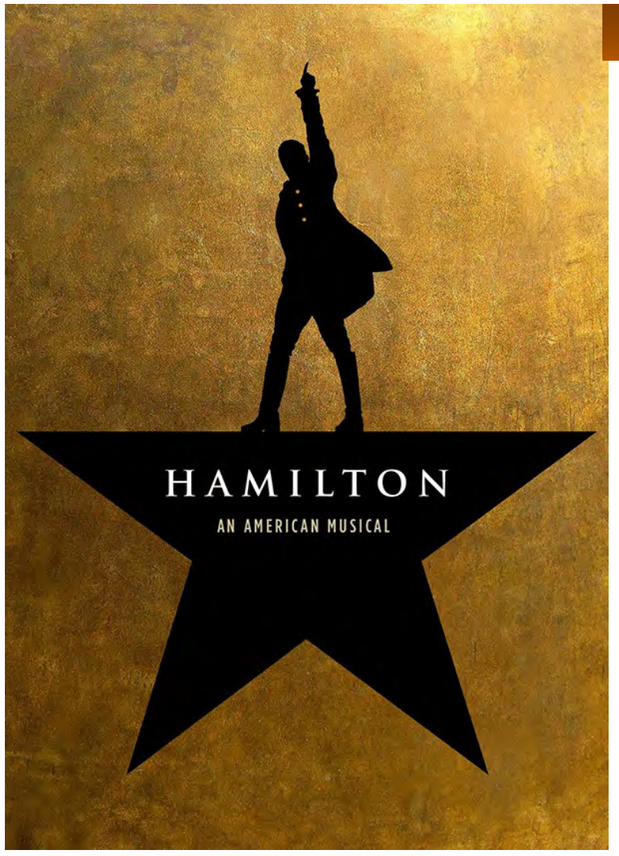
These revised Rules further align the AAA Construction Rules with most construction industry contract documents. Significant focus was placed on the need for effective management of the arbitration process, and hence the revised Rules provide arbitrators with additional tools and authority to do so. The revisions include:

- **A mediation step** for all cases with claims of $100,000 or more (subject to the ability of any party to opt out).
- **Consolidation and joinder time frames and filing requirements** to streamline these increasingly involved issues in construction arbitrations.
- **New preliminary hearing rules** to provide more structure and organization to get the arbitration process on the right track from the beginning.
- **Information exchange measures** to give arbitrators a greater degree of control to limit the exchange of information, including electronic documents.
- **Availability of emergency measures of protection** in contracts that have been entered into on or after July 1, 2015.
- **Enforcement power of the arbitrator** to issue orders to parties that refuse to comply with the Rules or the arbitrator's orders.
- **Permissibility of dispositive motions** to dispose of all or part of a claim or to narrow the issue in a claim.

To download a copy of the revised Rules, click here.

Butt Dials Admissible In Court.

A federal court has ruled that recorded "butt dials" or "pocket dials" – when a phone makes a call without its owner's knowledge – may be used in court. In the July 21, 2015 6th Circuit Court of Appeals case, one woman received a butt dial call and overheard a co-worker conspiring to discriminate against her. She recorded the conversation and reported it. The co-worker sued, saying his private conversation had been recorded and disseminated illegally. But Appeals Court Judge Danny Boggs said that was like leaving your drapes wide open and not expecting anyone to look into your home. In *Huff v. Spaw*, 794 F.3d 543 (6th Cir. 2015), Mr. Huff inadvertently placed a "pocket-dial" call to Carol Spaw while he was on a business trip in Italy. Spaw stayed on the line for 91 minutes and listened to face-to-face conversations that Huff had with a colleague, and with Mr. Huff's wife. Spaw transcribed what she heard and used an iPhone to record a portion of the conversation. The Court noted that Mr. Huff admitted that he was aware of the risk of making inadvertent pocket-dial calls and had previously made such calls on his cellphone. "A number of simple and well-known measures can prevent pocket-dials from occurring," the Court said. "James Huff lacked a reasonable expectation of privacy … [A] person who knowingly operates a device that is capable of inadvertently exposing his conversations to third-party listeners and fails to take simple precautions to prevent such exposure does not have a reasonable expectation of privacy with respect to statements that are exposed to an outsider."



Hamilton, The Musical: A Rapping Thomas Jefferson?

Run, do not walk, to see the new hit Broadway musical "Hamilton," by Lin-Manuel Miranda. Tickets are hard to get for this new play, but it is the talk of New York City's theater crowd. "Hamilton" is the life story of Alexander Hamilton, the first Secretary of the Treasury. Boring, you say? Hardly. The play is more like an opera, with all the dialogue in song . . . rap, actually. Phenomenal musical and dance numbers by an energetic cast bring this story to life. The cast is largely minority, so don't be surprised to see a black George Washington, black Thomas Jefferson, black Aaron Burr, and Hispanic Alexander Hamilton. A critic for *The Wall Street Journal* wrote, "Hamilton is the most exciting and significant musical of the decade. Sensationally potent and theatrically vital, it is plugged straight into the wall socket of contemporary music. This show makes me feel hopeful for the future of musical theater." Another reviewer wrote: "Sensational! In order to dislike it you'd pretty much have to dislike the American experiment. A beautiful and moving musical." *New York Magazine*. Actor Lin-Manuel Miranda wrote the play (including the music and lyrics) and stars as Alexander Hamilton. A sample of the rap-lyrics from the opening number, sung by Aaron Burr:

"Scannin' for every book he can get his hands on,
Plannin' for the future, see him now as he stands on,
The bow of a ship headed for a new land,
In New York you can be a new man,
The ship is in the harbor now,
See if you can spot him.
Another immigrant comin' up from the bottom,
His enemies destroyed his rep, America forgot him,
And me? I'm the damn fool that shot him!"

Alexander Hamilton (1755-1804) was born and raised in the Caribbean, and is considered one of the founding fathers of our nation. He was, among other roles, chief staff aide to General George Washington, founder of the nation's financial system, the founder of the Federalist Party, and the Father of the U.S. Coast Guard. He is featured on the ten dollar bill. He was killed in a dual by Aaron Burr in 1804.

Prevailing Wage Assessment Against Design Professional Reversed

D. Creighton Sebra, Esq.
Morris Polich & Purdy, LLP
Los Angeles, CA

In a recent prevailing wage enforcement decision, the California Dept. of Industrial Relations ("DIR") originally determined that the scope of work performed by an architect's subconsultant was covered [prevailing wage] work and fell under the classification of "Field Soils and Materials Tester." However, the Director reversed the Wage Assessment and reasoned that the consultant was not subcontractor to the general contractor, but was a subconsultant to the architect, who had an ongoing services contract with San Diego Association of Governments ("SANDAG"). Also, the Director reasoned that the consultant's tasks were not "an integrated aspect of the 'flow' process of construction" and that the consultant's workers "were not functionally related to the process of construction."

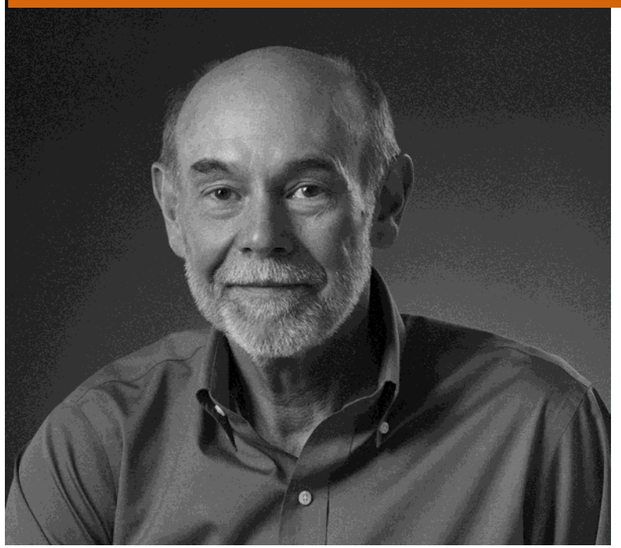
Facts Regarding the Project. In July 2008, SANDAG entered into a design services agreement with David Evans and Associates, Inc. ("DEA"), under which DEA was to provide various design and related architectural and engineering services to SANDAG on an ongoing, on-call basis. The services were related to the construction of 1.1 miles of railroad track parallel to the existing track, east of I-805 in San Diego. Under the service agreement, SANDAG would issue task orders further specifying the nature and scope of requested work. In Feb. 2012, SANDAG issued to DEA, the prime designer for this design-bid-build project, "Task Order No. 47" for the project. ASM Affiliates, Inc. was a subconsultant team member on the DEA team for the SANDAG on-call agreement. On Jan. 18, 2010, ASM was contracted by DEA to conduct an archaeological survey and evaluation of cultural resources within the Area of Potential Effect ("APE") of the project. ASM's study took place over two years prior to the start of construction. In Nov. 2010, ASM prepared a Historic Property Treatment Plan (HPTP) for the project.

From Dec. 2011 through early March 2012, ASM implemented the data recovery program. The program resulted in the recovery of over 21,000 artifacts and cultural materials including bone and shell artifacts, ceramics, stone tools, vertebrate remains and charcoal. The contractor (Flatiron/H&R), a joint venture, began grading operations in June 2012 and continued through at least Feb. 2013. Under its subconsultant agreement with DEA, ASM monitored the contractor's grading activities for purposes of preserving the cultural resources. Soils that were disturbed during the construction that had yielded human remains during ASM's previous archaeological data recovery program was water screened to recover human remains and artifacts. No soil testing was ever performed by ASM. The data recovered by ASM on the site was not relevant to the construction of the project. Rather, all data recovered by ASM related to archaeological artifacts and cultural materials were incorporated into historic reports and cultural resource reference documents. According to the decision, ASM performed three typical job duties: (1) Water screening, which required the employee to spread five gallon buckets of soil over a mesh screen to allow water to remove soil from the cultural artifacts to be identified; (2) Monitoring of the construction near the culturally sensitive sites; and (3) Dry screening, which again permitted soil to be screened to identify cultural artifacts.

For purposes of the assessment, the DIR inspector deemed ASM's work to be covered under the Field Soils and Materials Tester classification of the prevailing wage order.

DIR's Analysis. The DIR established that ASM was not a subcontractor pursuant to Labor Code section 1772. However, the DIR relied on *Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742, 749-750 and *O.G. Sansone Co. v. Dept. of Trans.* (1976) 55 Cal.App.3d 434, 127 Cal.Rptr. 799, to look beyond the transactional characterizations of the parties and focus on the actual nature of the work in question. Critical to this analysis in the *Williams* and *Sansone* cases was whether the functions performed "were integral to the performance of the public works contract." Of particular importance to the issue posed here is whether an operation is fully independent of the contract construction activities. i.e., whether it is integrated into the flow process of construction." The DIR found that the archaeologists employed by ASM were not performing work pursuant to the specifications of any construction contract, and were not providing goods or services directly related to the construction of the project. Moreover, ASM's work was not necessary to the physical completion of the project, the safety of the project, or the integrity of the completed structure, and had nothing to do with the construction process. Furthermore, the DIR found that ASM's work was "necessary for a reason extrinsic to actual construction requirements or standards" and only required by the National Historic Preservation Act legal mandate. The DIR concluded that the tasks performed by ASM's workers were not "functionally related to the process of construction and that the tasks were not an integrated aspect of the 'flow' process of construction. Rather, ASM's tasks were "fully independent of the contract construction activeties" and ASM's employees performed their work separately from the construction.

Conclusion. While this decision involved fairly narrow and specific facts, the analysis and reasoning is helpful for design professionals to understand the reasoning and logic that is applied by the DIR is determined whether design related services would be covered under the Prevailing Wage Laws. The DIR will often look beyond the contract to the actual scope of services performed to determine if prevailing wages apply.



MEMBER PROFILE:

ERIC O. PEMPUS, AIA, ESQ.

TJS Board Member Eric O. Pempus had his first connection with the construction industry from his father's design-build project, the family home and machine shop in the Amish country of rural northeastern Ohio. "It remains my favorite building that inspired me," Eric says fondly. "Watching and helping my father in construction were the early days etched into my memory, and lead me on the path to architecture school." Eric's undergraduate degree at Miami University in Oxford, Ohio was a combination of architecture and psychology research. He got his Master of Science in Architecture from the University of Cincinnati.

His entry into law came from his masters' thesis which focused on the legal and property rights for access to solar energy. As a result, Eric created, and to this day maintains, a not-for-profit website for sharing related information called "solar access" – with a website at: www.solaraccessresearh.org. Several people have utilized his research, such as high school teachers developing a curriculum for their classes on the environment, and legislators developing their own ordinances for solar rights.

After few years working as an intern in southwestern Ohio Eric soon learned that he didn't want a traditional path in the architectural profession. "I moved to Los Angeles and enrolled in night school at Southwestern Univ. School of Law, working during the day at Skidmore Owings & Merrill (SOM). I completed my California architecture license while in law school, and became NCARB certified before moving back to northeast Ohio for family reasons," Eric told us. He also has architecture licenses in both Ohio and North Carolina.

Back in the mid-west, Eric passed the Ohio Bar, and took a position as General Counsel /Vice President of Specifications at a large A/E/CM firm, and since 1987 developed and started teaching the graduate level professional practice courses at Kent State University's College of Architecture & Environmental Design. His most recent travel abroad includes serving as a chaperon for students from the combined Kent State Univ., Miami Univ. and Lawrence Tech's architecture programs at the Palazzo dei Cerchi in Florence, Italy. Eric is a frequent guest lecturer at many universities' schools of architecture and engineering, and he has chaired his city's Board of Zoning & Appeals for the last 20 years. Rocky River is a western suburb of Cleveland where the river meets Lake Erie, a community founded in 1805. Eric has received the AIA Ohio Mentor and Public Service Honor Awards, is a "Citizen Architect" with the AIA, serves on the AIA Ohio Board of Directors, and serves as an AIA Advisory Group Leader of the Construction Contract Administration Knowledge Community and the AIA Committee of Civic Leadership.

Continuing to combine his background in architecture and law, for the last 10 years he has been a risk manager at the Cleveland based Oswald Companies, providing educational programs for loss prevention and contract review support for his 600+ clients throughout Ohio, western PA and West Virginia. He holds a Property & Casualty insurance license in Ohio, and serves as the Program Director of the Construction Managers Association of America's Ohio chapter.

In his spare time (which is not much), Eric volunteers to develop and teach professional practice related study review sessions for graduates of schools of architecture, preparing to take ARE exam.

Eric's daughter Hannah in her studio at the University of Oregon's Master of Architecture in Urban Architecture and Design's Portland Program.

Eric also has an interest in astronomy, and follows closely as possible the Mars One Mission (a nonprofit organization based that has put forward plans to land the first humans on Mars and establish a permanent human colony by 2027).

Apples don't fall far from the tree, and Eric is proud of his daughter (Hannah) who recently graduated with her Masters of Architecture in Urban Architecture and Design from the University of Oregon's Portland Program, and is working at a local architecture firm. In the small world category, one of his daughter's professors also taught Eric's undergraduate program at Miami University. Eric's oldest son (Brian) graduated from Penn State University, and is a journalist in Virginia. His other son (Greg) is studying Information Technology at night, working during the day as a machinist in the Cleveland area. Eric's wife (Barbara) is a registered nurse, but left patient-care when they lived in Los Angeles, and is now an Informatics IT Specialist at the Cleveland Clinic.

Eric O. Pempus was recently named an Advisory Group Leader in the AIA Construction Contract Administration Knowledge Community ("CCA KC"), relating to construction phase services.

The CCA KC was established to help AIA members better understand the issues, actions and resultant impact of the decisions required in this often neglected part of project delivery. "The CCA KC provides direction in developing guidelines for new and evolving approaches to construction phase services," Eric says, "as well as guidance in the continuing education of emerging young professionals. Our primary mission of the CCA KC is to create a dialogue among its members and to disseminate knowledge throughout the profession."

During the week of July 20, 2015, the KC Advisory Group leaders and AIA board and staff convened in Denver for their annual Knowledge Leadership Assembly ("KLA"). Eric was a convener on the topic of the "Overview of the Train-the-Trainer AIA National Education Program." This conversation provided a summary of the four recently released AIA National Health/ Safety/Welfare educational programs. The four programs are designed to be delivered by pre-determined presenters at AIA National, Regional, and State Conventions, and at local AIA chapters. Eric is one of the presenters, having delivered all four at various venues this year alone!

Ryan's two children, Charlie (age 6) and Izzy (age 4) keep him and his wife, Paige, very busy. Shown here attending a soccer game for Sporting Kansas City.

MEMBER PROFILE:

RYAN MANIES, AIA, Esq.

Polsinelli Law Firm
Kansas City, MO

Ryan Manies, AIA, Esq. attended the University of Kansas for his architectural degree since he was a Kansas resident. For law school, Ryan chose the University of Missouri-Kansas City due to its close proximity to his home. "Knowing I wanted to practice law in Kansas City, UMKC was a logical choice," he said. Why combine the two studies? Ryan said: "I am often asked whether I miss the practice of architecture. My response is that I feel closer to the architectural community today than I ever did as a practicing architect. The professions of architecture and law are not that far afield. In architecture we are given a program and we must figure out how to satisfy our client's needs. In law we are given a problem, a case or an issue and, again, we must figure out how to best represent our client's needs." Ryan feels that the logic behind transcending from point A to point B is quite similar in both instances. "I believe the practice of architecture and law are a perfect fit."

His first job out of architecture was working for a small husband and wife owned architectural firm in Kansas City called International Architects Atelier (IAA). Following Ryan's short tenure at IAA, he went to work for a mid-sized architectural firm in Kansas City, Shaw Hofstra + Associates. Ryan spent 6 years at Shaw Hofstra working on a range of projects including high-end residential, hospitality and commercial. It was during Ryan's time at Shaw Hofstra he decided to apply to law school. "I saw a real niche for an architect turned attorney. There are many engineer - lawyers, and contractors – turned - attorney but very few attorneys with an architectural background that can sit down across from their client and speak the same language." After law school, he worked for the law firm of Shughart Thomson & Kilroy (STK) in Kansas City, where he was trained by TJS member, Bill Quatman, FAIA, Esq. "I saw great potential in Ryan," Bill said, "and hired him immediately." In 2009 STK merged with another Kansas City based firm and the combined firm is now named "Polsinelli, PC." Ryan works in the firm's Construction Law Practice Group. What's the best part of my job? Ryan said, "Utilizing my architectural education every day in assisting architects, engineers, contractors and owners." Ryan has remained very active in the local AIA Chapter, serving on the Chapter Board of Directors for several years as Treasurer. He currently serves as the outside general counsel for AIA/KC.

Ryan's son Charlie isn't quite sure what to make of the Cowardly Lion and the "courage" badge. We're not in Kansas any more!

Ryan married into a construction family. His wonderful wife, Paige Geiger, is the daughter of the owner of a large ready-mix concrete supplier, Geiger Ready-Mix. Paige is a research scientist and professor at the University of Kansas Medical Center. The couple have two children: Charlie (age 6) and Helen Elizabeth, or "Izzy" (age 4). "They keep us on our toes at all times!" Ryan added. "Given the fact both my wife and I have full time, demanding, professions - and two kids under the age of seven - there is little time for hobbies or interests. That said, I am an avid runner and try to squeeze in as many miles as I can each week. We love to travel when able. Additionally, I coach my son's soccer team and am the Den Leader for his Cub Scout Den."

Ryan loves his hometown of Kansas City, "The Paris of the Plains." "It is one of the country's best hidden secrets; I shouldn't even be telling you about it," he said. "KC has everything. If you're into sports: Chiefs, Royals and Sporting KC. If you're into culture: The Nelson Atkins Museum of Art (with new addition by Steven Holl), The Ballet Company, opera, symphony, Kauffman Center for the Performing Arts (designed by Moshe Safdie)," just to name a few. "If you're into food: BBQ and numerous James Beard nominated restaurants." Did you know that Kansas City was named in 2014 by Huffington Post as the "Coolest City in America?"

TJS Member Ryan Manies on a ski trip with his family, Prof. Paige Geiger and daughter Izzy (age 4) and son Charlie (age 6).

As to any favorite building that inspires him, Ryan added that, "Several years ago my wife and I visited La Sagrada Familia in Barcelona, Spain. You cannot possibly come away from that building without being awe struck and inspired." His favorite architects are Frank Gehry, Louis Kahn, Le Corbusier, and Jean Nouvel.

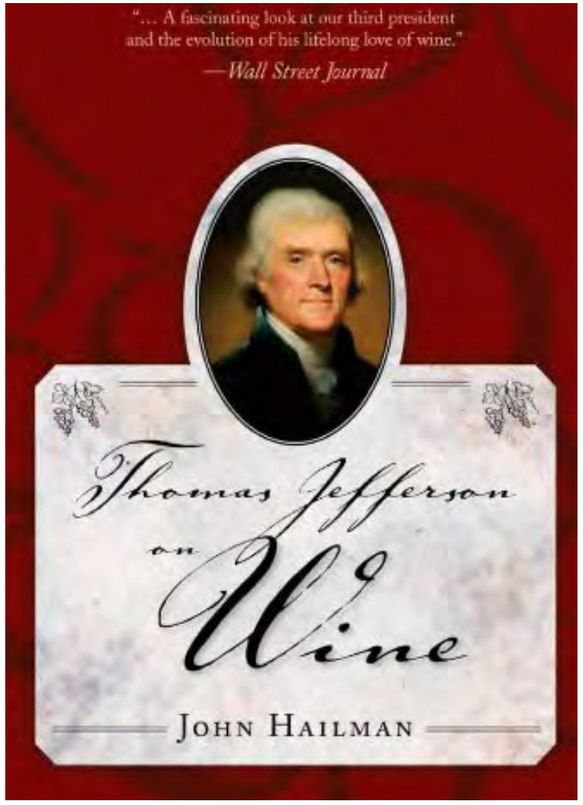
When asked if he had any advice for a young architect thinking about law school, Ryan said, "Get some architectural practice under your belt before going to law school. That hands-on experience as an architect will serve you well in legal representation of architects, engineers, contractors and owners."

Ryan is the author of the AIA Trust White-Paper on "Managing the Risks and Embracing the Benefits of Going Green." (Sept. 2014), and he has authored papers for the ABA Forum Committee and Aspen Publications.

THOMAS JEFFERSON ON WINE

In 1818, Thomas Jefferson claimed that "in nothing have the habits of the palate more decisive influence than in our relish of wines." His own habits had been formed over 30 years before in Paris and in the vineyards of Burgundy and Bordeaux. Before his journey to France in 1784, Jefferson, like most of his countrymen, had been a consumer of Madeira and port, with the occasional glass of red wine. As he recalled in 1817, "The taste of this country (was) artificially created by our long restraint under the English government to the strong wines of Portugal and Spain." After breaking of the bonds of British colonial government, Jefferson rejected the alcoholic wines favored by Englishmen as well as the toasts that customarily accompanied them. He chose to drink and serve the fine lighter wines of France and Italy, and hoped that his countrymen would follow his example.

In *Thomas Jefferson on Wine*, by John Hailman (Univ. Press of Mississippi, 2006) the author celebrates a founding father's lifelong interest in wine and provides unprecedented insight into Jefferson's character from



this unique perspective. In both his personal and public lives, Jefferson wielded his considerable expertise to influence the drinking habits of his friends, other founding fathers, and the American public away from hard liquor toward the healthier pleasures of wine.

Hailman, an international wine judge and nationally syndicated wine columnist, discusses how Jefferson's tastes developed, which wines and foods he preferred at different stages of his life, and how Jefferson became the greatest wine expert of the early American republic. Mr. Hailman explores the third president's fascination with scores of wines from his student days at Williamsburg to his lengthy retirement years at Monticello, often using Jefferson's own words from hundreds of immensely readable and surprisingly modern letters on the subject. A new epilogue covers the ongoing saga of the alleged wine swindle involving bottles of Bordeaux purported to belong to Jefferson.

From Amish Construction "Barn Raising" to Integrated Project Delivery: Have We Really Come Up With Anything New in Construction Phase Services?

By Eric O. Pempus, AIA, Esq.

The *Wall Street Journal's* Aug. 2008 article, "From Barn Raising to Home Building," discussed how the Amish have long been famous for community barn raisings. Barn raisings and modern project delivery methods, such as Integrated Project Delivery ("IPD"), have some interesting similarities and differences. For example, the Amish community often can erect a better-built structure faster and for less money than architects, engineers, construction managers, and construction contractors, frequently using simpler methods like wooden pegs in lieu of bolted steel connections and metal fasteners. The Amish involve their neighbors and use family members as workers, keeping their overhead low, while utilizing the various skills of community members. Few Amish use computers or go through the added expense of hiring non-Amish to do three-dimensional drawings or models of their hand-drawn sketches. And while these Amish barn-raisers are likely uninsured and have no written contracts, they certainly can manage to immediately correct problems without finger-pointing when issues arise during construction. The idea is simple: correct the problem and work towards completion.

Amish barn raising and IPD methods have similar characteristics. The intent of the AIA's Single Purpose Entity Agreement ("SPE") for Integrated Project Delivery C195 (2008 ed.) is to "achieve its object and purpose in a collaborative environment." Likewise, the Amish people work in a community / collaborative environment when raising their barns.

The members of the IPD team (Owner, Architect, and Construction Manager/ Contractor, together with their consultants and subcontractors through "joining agreements") are "expected to contribute their knowledge, skill and services" and "to bring to bear their collective expertise at the most opportune time." The Amish as well utilize the various skills of their neighbors and community members. With IPD, "the successful accomplishment of the Project is paramount and takes precedence over individual concerns or desires."

The IPD team members "acknowledge and agree that success or failure shall be shared and measured not in individual terms, but upon meeting the specifically defined and agreed - upon Project Goals." Similarly, the Amish share in the success of building better-built barns on time and on budget.

However, despite the similarities between Amish barn raising and IPD, there are some significant differences. The Amish delivery method is likely a verbal arrangement and a handshake, whereas AIA's C195 SPE Agreement is an 18-page contract, not counting the other associated and related AIA documents. The barn-raising plans are likely a hand-drawn sketch compared to IPD's Building Information Modeling (BIM). Members participating in a barn-raising receive modest pay, but enjoy a sense of community involvement and the satisfaction of helping a neighbor. With IPD, "Goal Achievement Compensation" means payments made to the members for achieving Project Goals in the Target Cost Amendment.

Despite the differences between barn raising and IPD, have we really come up with a new way to deliver our projects? Haven't collaboration, collective skills, and resolving problems without litigation always been keys to successful project delivery? As was written in Ecclesiastes 2300 years ago, "There is nothing new under the sun."

Have You Worked With the AIA's C195 Single-Purpose Entity Agreement? How About an IPD (Tri-Party Agreement)?

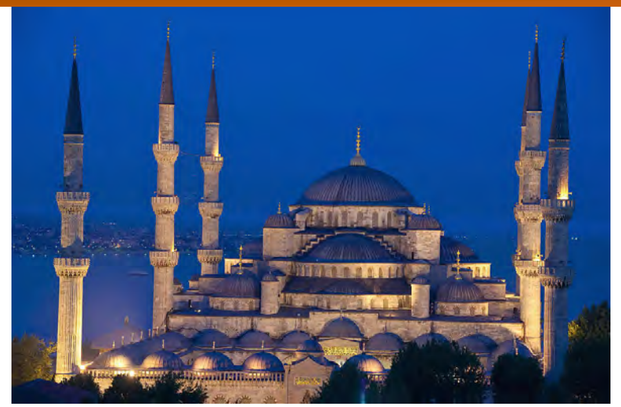
If so, would you be willing to write an article for an upcoming issue! Share your knowledge and experience with your peers through Monticello. We'd love to hear what worked, what didn't, etc. Thanks.

We saw this Thomas Jefferson bobble-head in a gift shop in Washington, D.C. and were tempted to buy it. Maybe this should be a gift to each in-coming president of The Jefferson Society. It would look great on Tim Twomey's desk at RTKL, don't you think?

Talking Turkey: TJS Member's Travel Diary

Joyce Raspa-Gore, AIA, Esq. helped to coordinate a recent architectural tour of Turkey with fellow AIA New Jersey members of the Architects League of Northern NJ. The tour was pre-approved for 27 Continuing Education credits. You may not know that Turkey spans both two continents, Europe and Asia. Its ancient history of Anatolia (Asia Minor) can be traced from stone age to the Hittite period, the Bronze Age and Early Iron Age, The Hellenistic Period, and the Byzantine Period spanning the early medieval period to the age of the Crusades and the Turkish Ottoman conquest of Anatolia in the 15th century. Much of the Bible's new testament was written here, especially in Ephesus and Patmos.

Day 1 of our trip began in Istanbul, with a Turkish coffee and apple tea on Pierre Loti Hill overlooking the Golden Horn, an estuary inlet to the Bosphorous River, followed by a river **c**ruise up the Bosphorous with views of the Dolmabahce and Beylerbeyi Palaces**,** Ottoman Houses, ancient city walls of the Rumeli Fortress, and new luxury villas. We walked through the city visiting the Egyptian Spice Market built in the 17th century



The landmark Blue Mosque in Istanbul, with its six iconic minaret towers.

A.D. where we sampled Turkish delight (candies) and baklava of many variety; and toured the Rustempasa Mosque, also known as the "Suleyman Mosque," with its beautiful Iznik tiles, built in 1560 A.D. by the greatest Ottoman imperial architect Sinan (Koca Mimar Sinan) for the son in law of the Grand Vizier of Suleyman the Magnificent.

Day 2 started with a tour of Sultan Ahmet Square in the heart of the "Old City" from where the Byzantine and Ottoman Empires ruled; then we toured the beautiful Hagia Sophia, ("Church of the Divine Wisdom"), one of the greatest marvels of architecture, constructed as a basilica in the 6th century by Roman Emperor Justinian (now converted to a mosque). Then we visited the famous Blue Mosque, known for its blue tiles and unique minarets; the Hippodrome and the ancient Egyptian Obelisk of Theodosius. We toured the Topkapı Palace, one of the major residences of the Ottoman sultans for almost 400 years (1465–1856 A.D.) of their 624-year reign, it is one of the best examples of palaces of the Ottoman rule. Finally, we went underground to see the ancient Cistern, built to supply water to the Topkapi Palace**.**

Day 3 of Istanbul included a tour of the Kariye Museum (Chora Church) with its 14th century mosaics and frescoes with scenes from the Bible, then we toured the grand Dolmabahce Palace. Day 4 included a tour of the Archaeological Museum in Istanbul, followed by an architectural walking tour of Istiklal Street which has been the center of the nightlife of the city over 150 years. An example of which is the Galata Tower with fabulous views of Istanbul, built by Emperor Theodosius II. Finally, we visited the Museum of Modern Art for a change of pace, and some of us ended the day with a visit to the Ancient Hamam (Turkish Bath)!

After four packed days in Istanbul, we left on Day 5 for the Anatolia Region of Turkey known as Cappadocia, where we visited the Devrent Valley where the unusual geological formations called "fairy chimneys" are abundant. We saw Pasabagi (Monk's Valley) with multiple stems and caps formations. Then to Avanos which is known for its pottery, a craft dating back to the ancient Hittite period of 1600 BC. Then to Goreme Open Air Museum with chapels and monasteries carved into the natural volcanic rock, dating to the 10th century, with frescos painted on many walls. Day 6 began early at 4:00 am to enjoy sunrise for a fabulous hot air balloon ride over the Cappadocia region, including Rose Valley, one of the most beautiful valleys in the region. Then we explored the famous rock - cut churches by hiking through the valley, continuing the hike in Cavusin, an old Greek village, known for its Christian houses and churches. We also toured Ortahisar Castle, and the Kaymakli Underground City**,** five levels below grade, where early Christians lived in fear and faith.

The next day (Day 7), we visited the Ihlara Valley of Cappadocia created from the ashes of the volcanic Mt. Hasan along the Melendiz River**;** then proceeded to Selime where fairy chimneys populate the steep hillside; then the Derinkuyu Underground Village where dwellings with stables, cellars, storage rooms, refectories, churches and wineries were used as refuges for the Christian communities. We visited a Caravansary to see a performance of the Whirling Dervishes of the Sufi religious order, then flew to Izmir.

Day 8 started the day with a visit to the House of the Virgin Mary, a shrine believed to be where the Virgin Mary spent her last years accompanied by St. John, a place of pilgrimage for many Christians (and visited by three popes). This was followed by the highlight of the trip: a tour of the famous ruins of Ephesus**,** an important cultural center of the ancient world. We explored 2,000 year-old Marble streets, a theater, the Celsius Library, a gymnasium and Hadrian's Temple.

On our last day (Day 9), we drove to the city of Izmir for a visit to the Archaeological Museum which had an excellent collection of ancient coins, pottery and mosaics. We ended our tour of Turkey with a walking tour through the ancient Agora, and the iconic clock tower at the Konack Square before heading to the airport for home! If you ever get the chance, do not pass up a trip to Turkey. Let me know if you need any travel tips.

Above, the beautiful Rose Valley of Cappadocia with its volcanic rock formations. Below, the central hall of the Topkapi Palace in Istanbul. Below/left, Joyce and her group in ancient Ephesus, in front of the Celsius Library.

DO STATE CERTIFICATE OF MERIT LAWS APPLY IN FEDERAL COURT?

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We are all familiar with Certificate of Merit ("COM") laws passed in multiple states, requiring a plaintiff to file an affidavit from either a qualified expert or, in some states, a lawyer, attesting to the merit of the lawsuit. Although a few of these laws have been struck as unconstitutional by state courts, they are largely upheld. But not all suits against design professionals are filed in state court. When there is diversity jurisdiction, and the plaintiff files suit in Federal court, does a COM law apply? The courts are split on this question, with some holding that the COM applies, while others hold that the COM law conflicts with Federal rules that require only "notice" pleading. As this article shows, Federal courts are not in agreement on this issue, yet significant authority suggests that there is no direct conflict between the Federal rules and a state laws requiring that a COM be filed in a malpractice lawsuit. The prevailing theme appears to be that COM statutes still apply, even in a Federal court, but there are exceptions. Most of these cases come in the context of a medical malpractice lawsuit. Only one case has dealt with design professionals. *(See p. 24)*

Choice of law becomes even more important in these cases, since not all states have a COM law and those that do vary widely on what is required. If your firm is sued in Federal court, and a COM is not filed by the plaintiff, your options are: 1) do nothing, knowing that the court will likely grant leave to amend; 2) file a motion for judgment on the pleadings, under Fed.R. Civ.P. 12(c); or, 3) file a motion to dismiss for failure to state a claim, under Fed.R. Civ.P. 12(b)(6). Several of the cases reviewed found that the plaintiff failed to comply with the state COM law, but gave the plaintiff time to file an amended complaint to correct the deficiency. But in states where failure to file a COM is grounds for dismissal "with prejudice," it may be worth the effort to file a motion.

Cases Applying COM.

Under the "Erie Doctrine," a Federal court must apply state law on substantive issues and federal law on procedural issues.*Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938). Plaintiffs will argue that state COM laws are in direct conflict with Fed.R.Civ.P. 8, which governs pleading requirements in Federal court. A COM requirement is claimed to impose a "heightened pleading standard" that conflicts with the less rigorous notice pleading standard set forth in Fed.R.Civ.P. 8(a). In three cases, the Third Circuit analyzed whether state statutes requiring the filing of an affidavit of merit applied in federal court. *Chamberlain v. Giampapa,* 210 F.3d 154 (3d Cir.2000); *Nuveen Mun. Trust ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.,* 692 F.3d 283 (3d Cir.2012); *Liggon–Redding v. Estate of Sugarman,* 659 F.3d 258 (3d Cir.2011). In the first of these decisions, *Chamberlain,* the court held that New Jersey's COM statute did not conflict with Federal rules 8 and 9, and affirmed the district court's decision to apply the statute. The *Chamberlain* court based its finding on five points: 1) the required affidavit is not a pleading; 2) the COM statute has no effect on what is included in the pleadings of a case; 3) the purposes behind the COM statute and the Federal rules are different, as the rules "give notice of the plaintiff's claim," while the COM statute "assures that malpractice claims for which there is no expert support will be terminated at an early stage in the proceedings;" 4) timing: the COM statute allowed a plaintiff 60 days after filing of the complaint to submit the affidavit of merit, thus, the COM "is not filed until after the pleadings are closed;" and 5) because the COM must contain only a statement from an expert "that a 'reasonable probability' exists that the care that is the subject of the complaint falls outside acceptable professional standards"—unlike a plaintiff's complaint, it "does not contain a statement of the factual basis for the claim." *Chamberlain* has become the most often cited case in upholding COM statutes in Federal courts. Outside the Third Circuit, however, no clear answer emerges from the court decisions, with even Federal courts within a single state or district coming to different conclusions.

In a 2009 Washington case, a patient at a mental health center sued the center and its employees for medical malpractice and professional malpractice, among other claims. The defendants moved to dismiss plaintiff's Federal suit for failure to file a COM at the

time the complaint was filed, as required by Washington statute RCW 7.70.150. The court engaged in a choice-of-law analysis to determine whether the statute governed plaintiff's state law claims in Federal court, asking: First, does the state law directly conflict with Federal law? If not, the court must follow the *Erie* doctrine and apply state law on substantive issues and Federal law on procedural issues. Next, is there an overriding Federal interest that requires application of Federal law despite the substantive nature of the state law in question. The court rejected the notion that a state law requiring plaintiffs to file a COM amounted to an additional pleading requirement in conflict with the Federal rules. Citing to the *Chamberlain* case, the court concluded that Federal rules that govern pleading and the COM statutes are directed towards different purposes, and can "exist side by side" without conflict. The court then applied the *Erie* rule to determine if the state law should apply, and concluded that the state legislature enacted the COM statute in an effort to provide alternative methods for resolving malpractice disputes, and to control the cost of malpractice insurance by preventing frivolous medical malpractice actions. "These goals implycate the substantive outcomes of such litigation," the court found, and applying the statute as substantive law would serve to prevent forum shopping and ensure equitable administration of the law. Therefore, the court ruled that the COM statute applied. The plaintiff showed that it had provided defendants with a certificate from a doctor, but it was never filed with the court. The plaintiff moved for leave to amend the complaint to add the COM. The court looked to Fed.R.Civ.P. 15(a), which requires that leave to amend "shall be freely given when justice so requires," and ruled that the amendment should be allowed as it was not in bad faith, would not cause undue delay, and was not futile. See, *Lewis v. Center for Counseling*, 2009 WL 2342459 (W.D.Wash. 2009).

In the most recent COM case on this issue, *Davis v. Ace Hardware Corp.,* 2014 WL 688132 (D. Del. 2014), the result was similar. The plaintiffs sued multiple defendants in Delaware state court for personal injury caused by exposure to asbestos. After the case was removed to Federal court (also in Delaware), some defendants moved to dismiss the complaint for failure to file a COM under Florida's Asbestos and Silica Compensation Fairness Act, Fla. Stat. §§ 774.201–209. That law requires that plaintiff "*must include with the complaint or other initial pleading a written report and supporting test results* constituting prima facie evidence of the exposed person's asbestos-related or silica-related physical impairment." It was undisputed that plaintiffs failed to attach the required report when the complaint was filed. Plaintiffs argued that the Act is only applicable to cases filed in Florida courts, although they could not cite a case in support of this theory. In a lengthy opinion, the trial court went through the five points raised in *Chamberlain* and found a "direct collision" between Fed.R.Civ.P. 8 and the COM law. Nonetheless, the court ruled that application of Rule 8 "would alter a state-created right." Therefore, the COM should be applied. However, the court granted the motion to dismiss "without prejudice," permitting the plaintiffs 45 days to file an amended complaint address-ing the deficiency.

Cases Holding the COM Does Not Apply.

A similar outcome was found in *Mastec North America, Inc. v. Coos County*, 2006 WL 1888928 (D. Or. 2006), where plaintiffs filed a Federal suit against the county for breach of contract for the construction of a natural gas pipeline. In turn, the county filed third-party claims for breach of contract and indemnification against two other companies that were hired by the county as project advisors. Those two moved to dismiss for failure of the county to file a COM un-

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der Or. Rev. Stat. § 31.300. The trial court noted that the statute bars suit against a "construction design professional" unless the claimant files a COM, which applies equally to a counterclaim, cross-claim, or third-party complaint. While it was not disputed that the two project advisors were "construction design professionals," and that the county did not file a certification, the county argued that the COM law conflicted with the pleading requirements set forth in Fed.R.Civ.P. 8(a). The trial judge agreed, stating that Rule 8 only requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Nevertheless, the judge found an out by granting the county leave to amend under Fed.R. Civ.P. 15(a), to permit the filing of the COM.

Case Dismissed With Prejudice.

In *Williams v. U.S.,* 754 F.Supp.2d 942 (W.D. Tenn. 2010), a veteran and his wife sued the U.S. government for negligence and medical malpractice of VA doctors. The government filed a motion for judgment on the pleadings, based on the Tennessee COM law for medical malpractice cases. The plaintiffs argued that the state COM law did not apply to claims brought under the Federal Tort Claims Act ("FTCA"). The court cited to multiple district courts within and outside of the Sixth Circuit that had concluded that COM statutes are substantive, not procedural. In finding that the COM applied, the court con-cluded that the Tennessee Act is "outcome-deter-minative," and failing to apply it in Federal court would encourage forum-shopping and result in inequitable administration of the laws. The COM law being, therefore, substantive, applied in Federal court to claims brought under the FTCA. The plaintiffs were required to file a COM within 90 days of filing the complaint, and under Tennessee law, this required dismissal with prejudice, which the Federal court granted on the medical malpractice claims. As to the wife's claim to loss of consortium, the court held that such claim is a derivative claim from the malpractice claim. Since a spouse seeking recovery for loss of consortium cannot recover unless the defendant has been held liable to the injured spouse, the court held that the wife's claim also fails and must be dismissed, also with prejudice.

In another FTCA case out of Colorado, *Hill v. SmithKline Beecham Corp.,* 393 F.3d 1111 (10th Cir. 2004), a prisoner appearing pro se sued the United States and Bureau of Prisons staff members for injuries allegedly caused from taking prescription medication. He sued under Colorado law and the Federal Tort Claims Act. The trial court dismissed the suit for failure to file a COM under Colo. Rev. Stat. § 13–20–602(1)(a). The plaintiff claimed that the COM did not apply because the individual defendants were not licensed by the State of Colorado. The 10th Circuit Court of Appeals held that in a federal action predicated upon diversity jurisdiction, Colorado's COM requirement was a substantive rule of law. Consequently, the statute was applicable to professional negligence claims brought under the FTCA. Simply because the professionals practicing with the Bureau of Prisons were not licensed by the state did not "render [the government] liable for professional negligence claims where private parties would not be." The dismissal of the FTCA claim was upheld.

Conclusion.

The outcome of your case will depend upon the applicable state law, precedent in the Federal circuit in which your case is pending and, most often, whether the trial judge is willing to risk reversal on appeal rather than grant leave to amend the complaint to correct a deficiency. Perhaps one day this issue will be presented to the U.S. Supreme Court to resolve a conflict in the Federal courts. For a case in point, see the following California case.

CALIFORNIA: Engineer May Be Liable To Bidder; COM Inapplicable!

The City of Eureka, Calif. solicited bids for a new wastewater pipeline by use of a technique known as horizontal directional drilling. The City hired SHN Consulting Engineers ("SHN") as lead engineer. Part of SHN's job was to conduct a geotechnical study of the site and, based on its findings, to prepare plans, reports, and specifications describing the project. The geotechnical report was furnished to the bidders, intending that contractors would rely on the report and drawings to estimate the work. The report on soil stability was based on a single test bore, drilled a significant distance from the planned project. Apex Directional Drilling, LLC ("Apex"), the low bidder, sued SHN after encountering mud and flowing sands. The engineer moved to dismiss, claiming that an engineer does not owe a contractor any non-contractual duty of care. The court ruled against the engineer, saying, "In fact, a faithful application of the relevant California authorities compels the conclusion that, based on the allegations in the complaint, SHN did owe Apex a duty of care." SHN also failed in its challenge to the negligent misrepresentation claim, the court holding, "Even if a defendant does not, as a matter of law, owe a duty of care sufficient to support a professional negligence claim, that defendant may nevertheless be liable to the same plaintiff for negligent misrepresentation." The court noted that, "If SHN had a duty of care here, it was owed only to a specific, foreseeable, and well-defined class," not an unlimited liability to a nebulous group of future plaintiffs. "SHN supplied its information to a closed universe of third parties: those contractors interested in bidding on the project." SHN also argued that Apex failed to comply the certificate of merit ("COM") statute. Apex argued, however, that the certificate requirement is procedural in nature. The Federal district court agreed and denied the engineer's motion to dismiss. This August 2015 case is *Apex Directional Drilling, LLC v. SHN Consulting Engin-eers*, 2015 WL 4749004 (N.D. Cal.).

ILLINOIS: CM Not Liable to Football Player for His Injuries

In 2013, a professional arena football player was injured in U.S. Cellular Coliseum after he collided with, and fell through, a gate built into dasher boards surrounding the football field. He sued several parties, including the City, the arena manager, and the construction manager (for general negligence in constructing the Coliseum and installing the dasher boards). He also sued the supplier of the dasher boards for strict liability in designing and manufacturing them in a defective manner. The City was dismissed on municipal tort immunity. The CM argued that none of its employees participated in the procurement, supply, delivery or installation of the dasher board system. However, there was evidence of a communication from one of the CM's employees to another defendant directing them not to proceed with the fabrication of any dasher board materials until a question over the fastening system was resolved. The CM argued that its duties were solely limited to its contract with the City, to provide general administrative oversight to the construction site during the construction and to assist in obtaining bids from subcontractors, and advise the owner as to the appropriateness of the bids. The court agreed, that in Illinois, "the general rule is that a party that entrusts work to an independent contractor is not liable for that independent contractor's acts of negligence. [citation omitted] In other words, generally, a construction manager/ general contractor owes no duty to third parties harmed by the negligence of independent subcontractors."

However, there is an exception to this rule known as the "retained control exception" and it allows a contractor or CM who has entrusted work to an independent contractor to be liable for acts of negligence when such a contractor retains sufficient control over any part of the work that causes an injury. Here, however, there was no such evidence of retained control. The CM's motion for summary judgment was granted. The court also dismissed the dasher board supplier's claim against the CM for contribution pursuant to the Illinois Joint Tortfeasor Contribution Act, saying: "If a defendant is not a tortfeasor *vis-a-vis* the original plaintiff, it cannot be a joint tortfeasor *vis-a-vis* a codefendant and may not be held liable to that codefendant for contribution." The case is *Rivers v. Cent. Illinois Arena Mgmt., Inc.*, 2015 WL 5332226 (C.D. Ill.).

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MISSISIPPI:

A worker injured in a scaffold collapse sued the architect and engineer claiming negligent design and inspection. The architect successfully excluded an expert affidavit on the basis that, as an engineer, he was not qualified to opine as to the duties of an architect; the court granted the architect summary judgment. The court also ruled that since the worker was an illegal immigrant, he was unable to recover even if there was negligence. On appeal it was held that: "Mississippi law imposes on design professionals, including architects and engineers, the duty to exercise ordinary professional skill and diligence." However, there was no evidence that the design caused the plaintiffs' injuries. "Only in limited circumstances will [an engineer], independently of express contract language, have a duty to supervise the construction site to ensure safe operations." Citing to the AIA B141 Agreement, the Court found that the architect was not responsible for construction methods or safety precautions "in connection with the work," and was not obligated to inspect the scaffolding. The Court sidestepped the issue of whether an illegal alien has the right to recover. *McKean v. Yates Eng'g Corp.*, 2015 WL 5118062 (Miss. Ct. App.)