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QUARTERLY JOURNAL OF THE JEFFERSON SOCIETY

Monticello

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.

Inside This Issue

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 TJS President Suzanne Harness sharness@harnessprojects.com and we will reach out to them. Candidates 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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Want to connect with other members? Find us here.

President's Message

By Suzanne Harness, AIA, Esq.
Harness Law, PLLC

How amazing does it get? Twenty-three of our members, including Board members Jeffrey Hamlett, Jacqueline Pons-Bunney, and Rebecca McWilliams, and Founder Chuck Heuer, plus an additional four family and friends, were admitted to the U.S. Supreme Court on Nov. 13, 2018. Pictures (and there are many in this issue) do not do it justice. If you are a member of The Jefferson Society and are not yet admitted to the U.S. Supreme Court, I urge you to step forward to lead another admissions event for our members. You will not be sorry. We cannot thank Donna Hunt enough for organizing and coordinating this wonderful achievement for The Jefferson Society.

We began our 2017 admissions event with an informal dinner at my house in nearby Arlington, Va. on Sunday Nov. 12. We had such a good time! Because our organization is so virtual, our members are from across the country, and we hold only one face-to-face meeting per year, many of us met for the first time that evening. In anticipation of the event, Laura Jo Lieffer's baby daughter, Lucy, wore a Ruth Bader Ginsburg tee shirt. (See her photo on pg. 26). Another highlight of the meal was the Mazzei's Philip Tuscan wine that our member and wine aficionado, Peggy Landry, brought with her. Peggy shared with us that Philip Mazzei was a great friend of Thomas Jefferson and the two started what later became the first commercial vineyard in Virginia.

The next morning nearly sixty of our members and guests, including Thomas Vonier, FAIA, the 2017 President of the American Institute of Architects, met for breakfast in a magnificent private room at the Court. The

(continued on page 4)

First Row Sitting Left to Right:

Rebecca J. McWilliams, Andrea Sue McMurtry, Wendy R. Bennett, Gracia María Shiffrin, Joyce Raspa-Gore, Donna M. Hunt, Justice Ruth Bader Ginsburg, Suzanne Harness, Kellie E. Goss, Jacalyn D. Brudvik*, Jacqueline Pons-Bunney, Laura Jo Lieffers, Joelle Jefcoat

Second Row Standing Left to Right:

Jorge L. Cruz*, Charles R. Heuer, Patrick T. Voke*, Kevin A. Elmer, Steven C. Swanson, Scott M. Vaughn, Mark A. Ryan, Jon B. Masini, Alan B. Stover, Thomas Vonier, AIA President, Jeffrey M. Hamlett, Alexander von Gaalen, Kent Bolling Rainey*, Calvin Lee, Russel Weisbard, Jose B. Rodriguez, Trevor O. Resurreccion, Cara Shimkus Hall, Margaret Landry

*Not TJS members

President's Message
(continued from page 1)

architect in me could not resist shooting a photo of the coffered ceiling (see photo on pg. 30). We nervously ate a delicious breakfast, arranged by TJS member Joyce Raspa-Gore, before receiving instruction from the clerk of the Court (see photo on pg. 28), clearing security, and taking our assigned seats in the court room. We wish that we could publish photos of the moment when our members were sworn-in, but cameras and cell phones are not allowed in the courtroom. Nearly all of the Justices were on the bench that day, but as no argument was being heard, the ceremony was efficiently brief. We returned to the private room where Justice Ruth Bader Ginsburg joined us for group photos with the admitted members (see photo on pp. 2-3) and initiated a discussion regarding court house design. She then offered to take questions and moved to a small table where she was surrounded by our members and their guests, many of whom left the room with delightful memories of their personal conversations with her.

In this issue (pp. 18-19) see how Thomas Jefferson continues to make the news, although perhaps not in the way we would hope. Controversy regarding statues of Confederate leaders dominated our press last year, and the reverence for our namesake Thomas Jefferson and other founding fathers is tarnished by the fact that many of them also held slaves. On that same topic, take a look at my review of the play, *Jefferson's Garden,* (pp. 30-31) now playing at Ford's Theater in Washington D.C., which addresses head-on the inconsistencies between Jefferson's public views and private actions regarding slavery.

Regarding our own members in the news, read about the important work that our member, Julia Donoho, is performing in the fire-ravaged Redwood Empire region of northern California, where she lives and works (pp. 14-15). For most of us last fall's devastating fires were a disturbing news story, but the fires took the homes of many of Julia's friends and neighbors. As always, let us know what you are doing and thinking, and we would be thrilled to publicize your achievements!

(Left) Handsome couple Mark Ryan, AIA, Esq. and his wife Shelli Ryan; (Below, left) TJS Treasurer Donna Hunt, Founding Member Chuck Heuer, President Suzanne Harness, Thomas Vonier, FAIA (2017 President of the AIA), and Board Member Jose Rodriguez, AIA, Esq. pose in front of the fireplace in the West Conference Room inside the U.S. Supreme Court building (Photo by Susan Rainey); (Below), Scott and Laura Jo Lieffers look proud in front of the portrait of a former Chief Justice.

The North Carolina Delegation.
TJS members Joelle Jefcoat and Kellie E. Goss look happy as they stand below the portrait of former Supreme Court Justice Antonin Scalia, who passed away suddenly in Feb. 2016.

(Below) Joyce Raspa-Gore and Scott Raspa; (Below, right) Taylor, Ande, and Tom McMurtry inside the West Conference Room of the U.S. Supreme Court during the TJS reception.

The TJS reception following the admission ceremony was held in the West Conference Room, located just off the Upper Great Hall. The room is used for various ceremonial and administrative functions. Justices Sonia Sotomayor and Elena Kagan were sworn in there. The walls are lined with portraits of the 16 chief justices that have served, not counting the current head of the judiciary, Chief Justice John Roberts.

Did you know that the Court convened for a short period in a private house after the British set fire to the Capitol during the War of 1812? The Court later returned to the Capitol and met from 1819 to 1860 in a chamber now restored as the "Old Supreme Court Chamber." From 1860 until 1935, the Court met in what is now known as the "Old Senate Chamber." In 1935 the Court occupied the current building, which cost less than $9.7 Mil. to build.

MEMBER PROFILE: Ande McMurtry

Horn Aylward & Bandy
Kansas City, MO

TJS Associate Member Andrea (Ande) McMurtry first became interested in architecture in high school. "I was equally interested in architecture and in computers," she said. "In fact, I was such a geek that I bought an Apple computer instead of a car (which was the same price back then!). I was able to combine these interests when, as a senior in high school, I took a computer-aided drafting class at the local college." When she built a model of an earth-berm home for the science fair, that is when she decided she wanted to be an architect and applied to architecture schools. Ande started at the Univ. of Kansas as an architecture student, but soon realized that her artistic abilities fell short of what was required. She changed majors after three semesters and graduated with a B.S. in Business Administration. From there, Ande obtained a Master of Architecture in Architectural Management from KU. It was during that program that Ande took a class titled "Law and the Design Professional," taught by TJS Member Bill Quatman. Bill likes to think that he had some influence on Ande's career development.

After her graduation, Ande moved into computer programming and training, then on to kitchen and bath remodeling. "Each of those career stops required me to understand the many facets of project management," she said. At a high-end kitchen and bath remodeling company, Ande worked as a field superintendent, where her projects allowed her to apply project management skills to the design and construction process. But it was the legal aspects of those projects that most intrigued her. When mold was discovered at one remodeling project, Ande worked with the owners of the company (and their lawyer) to further protect the company from potential liabilities at job sites or unforeseen project costs by modifying contracts and invoices. Her younger brother, a construction lawyer and now general counsel for a major construction company, helped mentor her career. "I guess he wanted to stop giving me free legal advice because he suggested – maybe even begged – that I to go to law school, so I did," Ande said.

For law school, Ande jumped state lines and got her J.D. from the Univ. of Missouri - Kansas City (UMKC). After graduation, she joined the construction law practice group at Horn Aylward & Bandy, LLC in 2010, where she focuses on construction litigation. She became a partner in the firm in January 2018.

What's the best part of her job? Ande says, "One thing I have come to appreciate about being a construction lawyer is that I practice with, and against, some of the best construction lawyers in town." Unlike the stereotypical "plaintiffs" and "defense" lawyers, she says that construction lawyers practice on both sides of the "v," representing both plaintiffs and defendants. "This requires us to remain cordial and professional with opposing counsel, because in any given case, we may end up on the same side of the dispute."

Ande's husband, Tom McMurtry, and she will be celebrating their 25th anniversary in November this year and they hope to celebrate on some sunny beach somewhere. "Tom has been my best friend, my strongest advocate, and my greatest source of strength as I have navigated my various careers," she told us. "Unlike my winding career path, Tom has maintained a steady 34 year-course, navigating internal opportunities and positions at State Street (and its predecessors)." The couple has a daughter, Taylor, who will graduate from the Univ. of Kansas in Dec. 2018.

Outside the office, Ande McMurtry is a songwriter, most often in the genre of Christian music. "Unfortunately, I was not blessed with a singing voice," she said, "and I do not play any instruments, so it is the writing that interests me most." Last year she took tentative steps toward producing one of her songs and launched a production company, "Harmonic Balance Productions." Her plan is to make her songs available this year via social media, streaming and online apps. This has led Ande to study music law, seeking counsel from a lawyer with industry experience, and making connections with other professionals in the recording/production industry.

(Left) Ande McMurtry and her husband Tom McMurtry outside of the U.S. Supreme Court Building during The Jefferson Society admission ceremony and reception on Nov. 13, 2017. Their daughter Taylor also accompanied them on the trip to watch mom swear in at the high court.

Tom's daughter, Nicole, is a special education teacher in Missouri's North Kansas City School District. She is married and has a beautiful 7-year-old daughter, Kimber, so Tom and Ande have been enjoying the roles and benefits of being grandparents for several years.

Ande is active in the Kansas City Metropolitan Bar Association Construction Law Committee, where she has served as its vice chair and chair. Since summer 2016, she has been an Adjunct Professor of Law at the UMKC School of Law, where she teaches Discovery Practice in Civil Litigation. She also has served on the board of the North Kansas City Parks and Recreation Dept. since June 2016, where she is also its current treasurer.

The McMurtrys moved from Kansas City to "North Kansas City" three years ago. "This fact requires many people, including those who live in the Kansas City area, to look at a map to understand the boundaries of the cities," Ande says. Her town is a small municipality, but is centrally located just north of downtown KCMO, with easy access to all big-city amenities, including sporting activities, great restaurants and shopping, concert venues and theaters. "I have a framed print of Wright's famous Fallingwater across from my desk. The story behind the design inspires me to look at cases from different perspectives," she said. "When I find myself looking at a legal situation from one perspective, I am reminded that if Wright had only looked at the waterfalls from one perspective, the house would be facing the waterfalls, rather than being over the water." Nice perspective!

AIA Conference on Architecture in New York City June 21-23, Javits Center

This year's AIA Conference boasts nearly 100 tours of the city's best architecture in Manhattan, Brooklyn, Queens, the Bronx, and Staten Island. The Conference theme is: Blueprint for Better Cities. Registration opens January 24, 2018. See more information at: **http://conferenceonarchitecture.com/**

TJS's Annual Membership Meeting in New York on June 20, 2018!

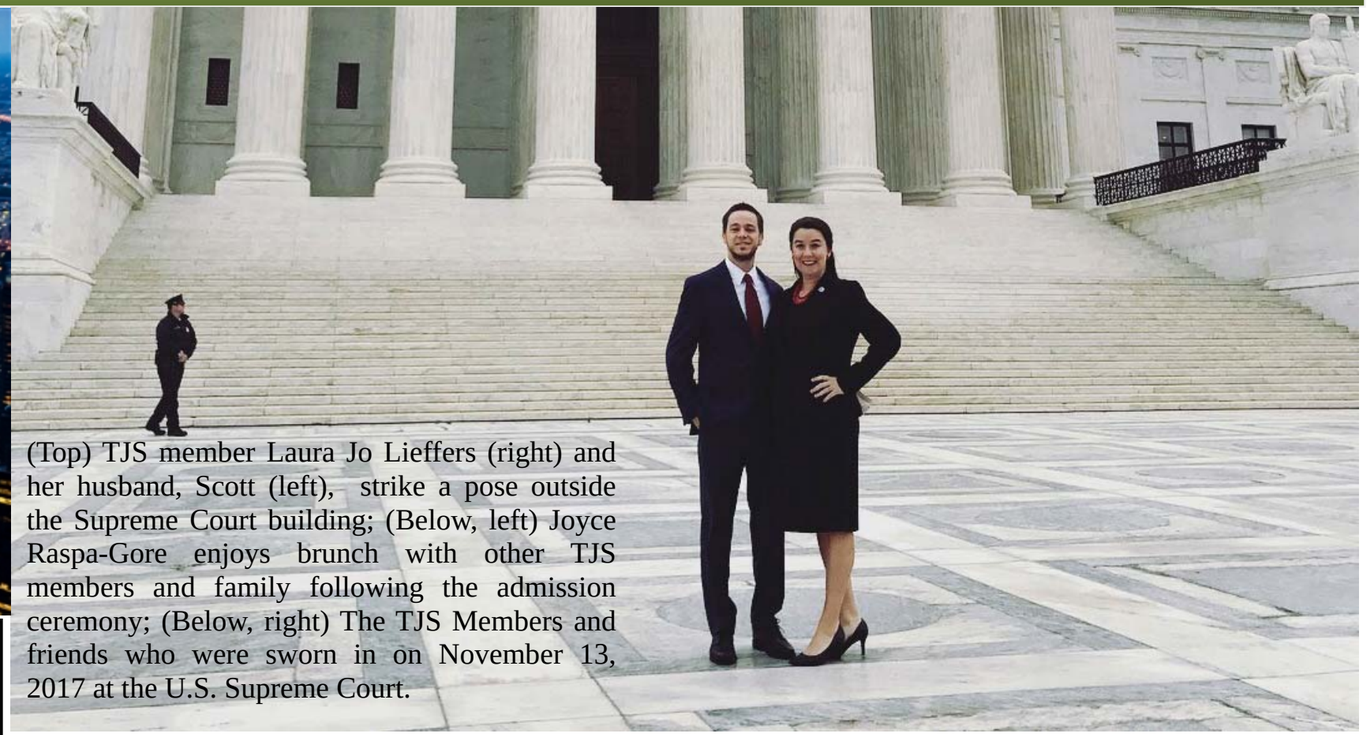
Mark your calendars and plan to join us in the Big Apple on Wed., June 20th, the day before the AIA Conference opens there. As we did last year, we will host a Member-only reception at a great location in Manhattan, followed by dinner and our Annual Meeting and Election. President Suzanne Harness, AIA, Esq. will review the year's activities and discuss her plans for 2018 and beyond. Treasurer Donna Hunt, AIA, Esq. will review the Society's financial condition. There will be plenty of time to enjoy great food, drink and witty conversation. You won't want to miss this meeting.

Help Us Plan The Annual Meeting! Please . . .

Do you live or work in New York City? Or have a favorite hotel or restaurant that you think we should consider for our venue? Please contact TJS President Suzanne Harness, AIA, Esq. with your suggestions. This organization is strictly volunteer-run and we all need to do our part to help when we can. This is your turn.

Things to See In New York City:

Empire State Building, Chrysler Building, Calatrava's Transit Hub, China Town, Times Square, Statue of Liberty, Freedom Tower, Wall Street, Soho, Tribeca, Greenwich Village, Central Park, The National 9/11 Memorial & Museum, Rockefeller Center, Fox/NBC/CBS/ABC Studios, Ellis Island, Radio City Music Hall, St. John the Divine, St. Patrick's Cathedral, The Guggenheim Museum, Herald Square, Brooklyn Bridge, Broadway & the Theater District, The Metropolitan Museum of Art, The High Line, Grand Central Terminal, Madison Square Garden, MOMA, and more!



(Top) TJS member Laura Jo Lieffers (right) and her husband, Scott (left), strike a pose outside the Supreme Court building; (Below, left) Joyce Raspa-Gore enjoys brunch with other TJS members and family following the admission ceremony; (Below, right) The TJS Members and friends who were sworn in on November 13, 2017 at the U.S. Supreme Court.

Montana: Limitation of Liability Clause Upheld in Design-Build Subcontract

This case arises out of the construction of a FedEx Ground facility in Billings, Montana. The project owner hired a design-build contractor, who then hired a design firm (DOWL) for an initial fee of $122,967, later substantially increased to $665,000. The design firm's subcontract contained the following limitation of liability ("LOL") clause:

D. Consequential Damages/Limitation of Liability

To the fullest extent permitted by law, DOWL HKM and Client waive against each other, and the other's employees, officers, directors, agents, insurers, partners, and consultants any and all claims for or entitlement to special, incidental, indirect, or consequential damages arising out of, resulting from, or in any way related to the Project and agree that DOWL HKM's total liability to Client under this Agreement shall be limited to $50,000.

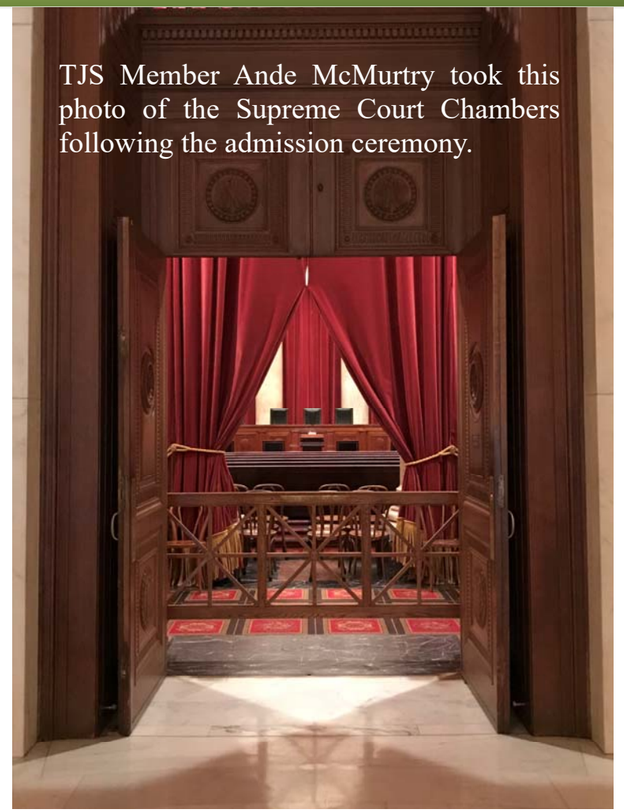
The limitation was never increased even though the designer's fee was more than nearly 5.5 times the original fee by the project's completion.

The design-build contractor sued a trade subcontractor over mechanic's liens. Then, nearly six months later, the contractor filed a third - party complaint against DOWL, the design firm, alleging claims of negligence and breach of contract, claiming over $1.2 million in damages caused by DOWL's design. DOWL filed a motion for partial summary judgment arguing, pursuant to the LOL clause, that DOWL could not be held liable under the contract for any amount exceeding $50,000. The design - builder countered that the contractual limitation of liability violated a state statute that voids exculpatory clauses (MCA § 28-2-702) and, therefore, was unenforceable. The trial court granted partial summary judgment for the design firm and the contractor appealed.

The Montana Supreme Court held that the LOL clause in the subcontract between the contractor and design firm capped the designer's liability for damages at $50,000, was valid and was not against public policy. The state supreme court noted that, "The fundamental tenet of modern contract law is freedom of contract; parties are free to mutually agree to terms governing their private conduct as long as those terms do not conflict with public laws." As to the statute, section 28-2-702, MCA, provides: "All contracts that have for their object, directly or indirectly, to exempt anyone from responsibility for the person's own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of the law." The court stated that private parties generally may contract away liability so long as the parties have equal bargaining power and the interest of the public is not involved and that, "contracts containing clauses that limit liability between two business entities, with equal bargaining power, would not contravene § 28-2-702, MCA."

At the time the design subcontract was signed, the $50,000 limitation was nearly 40% of DOWL's fees. However, after subsequent addenda were executed by the parties, the fee totaled $665,000 but the limitation of liability amount remained the same. Upon completion of the project, DOWL's liability to the contractor was about 8% of its total fee. The contractor argued that the increase in fee had made the LOL clause more burdensome than previously anticipated. But the court rejected this argument, saying, it was, "unwilling to allow [the contractor] to avoid a term of the contract simply because it has become more burdensome due to its own failure to renegotiate." The court made clear that the LOL only applied to the breach of contract claims, however, and noted that the clause did not deny the contractor a remedy, "because DOWL remains exposed to liability on the negligence claim." As a result, the designer's liability was capped only on the contract claim. The summary judgment in favor of the designer was affirmed. The case is *Zirkelbach Construction, Inc. v. DOWL, LLC*, 402 P.3d 1244 (Mont. 2017).

[Editor's Note: Would the result have been different if the LOL clause specifically included claims in contract or tort? Perhaps so.]



South Carolina: 8-Year Statute of Repose Bars Claims Against Architect For Construction Defects

An architectural firm was hired by a developer to design and oversee construction of certain facilities in a residential development. The clubhouse was designed and built in 2006 and 2007, but there was a failure of truss members in the clubhouse mezzanine roof in March 2007 — before substantial completion of the clubhouse — and again in 2009. Remedial work was performed in 2009 or 2010 but the truss members allegedly remained deficient. The developer sued the architect in May 2017, for breach of contract, breach of warranty, negligence, gross negligence, and breach of express and implied warranties. The architect moved for partial summary judgment, claiming that the 8-year statute of repose, S.C. Code § 15-3-640, barred the claims because the structure was substantially completed in 2007 (10 years before suit was filed). The developer disagreed on the date of substantial completion and added that claims for gross negligence are not barred by the statute of repose. The South Carolina statute of repose provides that a certificate of occupancy "shall constitute proof of substantial completion" unless the parties agree in writing on a different date. The developer argued that substantial completion was in Sept. 2007, based on the certificate of occupancy, but the architect claimed a date in July, 2007, based on a certificate of substantial completion signed by all parties. The court said, "the difference between July and September 2007 is immaterial to the statute of repose. This action was filed in May 2017, more than nine years after July or September 2007." As a result, the court held that the state statute of repose barred all claims except for gross negligence, noting that S.C. Code § 15-3-670(A) provides that the statute of repose is not available as a defense to claims of fraud, gross negligence, or recklessness. Since discovery had not yet closed, the court said that it would be premature to consider whether the plaintiff had evidence creating a genuine issue of material fact regarding the elements of gross negligence. The court said that the architect could move for summary judgment as to the gross negligence claims after the close of discovery. As a result, the court granted the architect's motion for partial summary judgment as to all claims except for gross negligence. *See, Hampton Hall, LLC v. Chapman Coyle Chapman & Assoc. Architects AIA, Inc.,* 2017 WL 6622508 (D.S.C. 2017).

TJS Member Julia Donoho Aids in California's Recent Disaster Relief.

This article appeared in *AIArchitect* (Oct. 24, 2017) as "California Fires Prompt Architects to Act," by Steve Cimino.

Recovery and rebuilding can benefit from design thinking.

Earlier in October, the most destructive fire in California's history tore through the state and left thousands in Northern California without homes, offices, or health centers. The rebuilding process will take years and raise new questions about resilient design and planning. But, AIA chapters across the state are looking for ways to connect architects to the people and offices at the center of that process.

In conversations with representatives and members from the deeply affected AIA Redwood Empire chapter—including Julia Donoho, AIA, Esq., RIBA, chair of AIA Redwood Empire's Firestorm Recovery Committee, and Scott Bartley, AIA, co-founder of Hall & Bartley Architects and past president of AIA Redwood Empire—they describe the impact of the fires on local communities, and how architects everywhere can provide smart, measured assistance in a post-disaster rebuilding process.

What is the aftermath of the wildfires in California, and how is AIA Redwood Empire getting involved?

Julia Donoho: It's a lot more destruction than damage. Over 5,700 buildings have been destroyed; Governor Jerry Brown came down and said, "This is the greatest disaster I've seen in California." He's a four-term governor, so he's seen a lot of disasters.

We lost trailer parks, apartments, retail; medical buildings were affected. We lost some historic structures. We already were close to 0 percent vacancy; there's a housing crisis in the Bay Area, and this is just going to make it worse.

I started a committee at AIA Redwood Empire, the Firestorm Recovery Committee, and volunteered our services at a local assistance center for two weeks, giving advice to people who've lost their homes. I've also personally met with California politicians, getting in front of everyone possible, including the governor and Senator Dianne Feinstein. One of the most difficult elements we've faced is a frenzied response from a tract home neighborhood; we're working with a builders' association to develop a plan and rebuild their neighborhood as a neighborhood. That's very difficult when they all each own their property and have made numerous changes over 25 years; they want things differently but in reality they have a tract home and their insurance will only pay to rebuild, not to redesign. Plus, the homes would need to be rebuilt according to new codes, to bring them up to modern standards: green code, fire code, energy code, and structural changes. The original plans are on file at the city, so we're exploring coordinated ways to rebuild affordably and en masse.

We've reminded homeowners that the architects who originally designed the homes may be a great resource, especially if they have the original construction documents on file, but some of the architects of older homes are no longer in business. In addition, many of our local architects are already at or beyond capacity. We're reaching out to AIA San Francisco and AIA East Bay to organize "speed dating" between owners and AEC professionals to fill in some of these gaps.

"We already were close to 0 percent vacancy; there's a housing crisis in the Bay Area, and this is just going to make it worse."
- Julia Donoho, AIA

The 2017 California wildfire season is the most destructive one on record. A total of 9,054 fires burned 1.38 million acres, according to the Calif. Dept. of Forestry and Fire Protection, including five of the 20 most destructive wildland-urban interface fires in the state's history.

In Oct. 2017, 250 wildfires ignited across Northern California, burning over 245,000 acres, becoming the costliest group of wildfires on record. The October wildfires destroyed at least 8,900 structures and killed 44 people and hospitalized or injured at least 192 others. The total economic toll of the 2017 California wildfire season could reach at least $180 billion.

What can architects do, in the aftermath of disasters like these, to make a positive impact?

Scott Bartley: I lost my office in the fires, so I've been scrambling to get my business up and running again for the last few weeks. It's critical that we stay busy and focused; we had a lot of work already, and now the need is even more dramatic. As is the need to be levelheaded contributors to this rebuilding process.

The biggest hurdle I see so far is misinformation. At a luncheon earlier this week, during a conversation about rebuilding, a civil engineer shared that drawings had been tracked down for this certain subdivision and the city would make you a copy, mark it up a tad, and let you start rebuilding. I raised my hand and said, "Excuse me, you can't take someone else's drawings without a release." And he said, "You're right, I never thought of that." I know the bureaucracy wants to say all good things, but I don't want to lead anyone down a path that will hurt them in the future.

Then there's the issue of people wanting to do tweaks and little changes on top of a straight rebuild; that's not how insurance works. Insurance gets your life back as close as possible to the way it was; that is its purpose, not to make improvements here and there. It's going to be a slow process, and though our county is talking about waiving processing fees for people who want to rebuild, I'd be a little surprised. I'm the former mayor of Santa Rosa, California, so I know the size of the pot; the pot is not big enough to hold that kind of money.

Everyone wants to be an optimist right now, and I don't want to be a pessimist, but architects exist because construction is a complicated endeavor. When talking to anyone looking to rebuild, I've told them, "Optimistically, it may be a two-year process." It's going to take six months to clean up the site, and they'll have to wait until next spring because you'll get mudslides if you tear up the topsoil. Then you have your site, so you start construction next fall, which puts you at about two years out. And if you rush it now, you pay for it later; as architects, we're trained to plan, and we need to emphasize that here.

I tell my clients, "Slow down, take a breath. I know you want to rebuild, but we're all still in shock here." Otherwise, you're going to set yourself up for disaster. Don't try to rush anyone back by promising what's not feasible; as architects, we owe it to them and to ourselves to be measured and considerate in our comments and our actions.

[Editor's Note: Ms. Donoho is the 2017 Chair, AIARE Firestorm Recovery Committee].

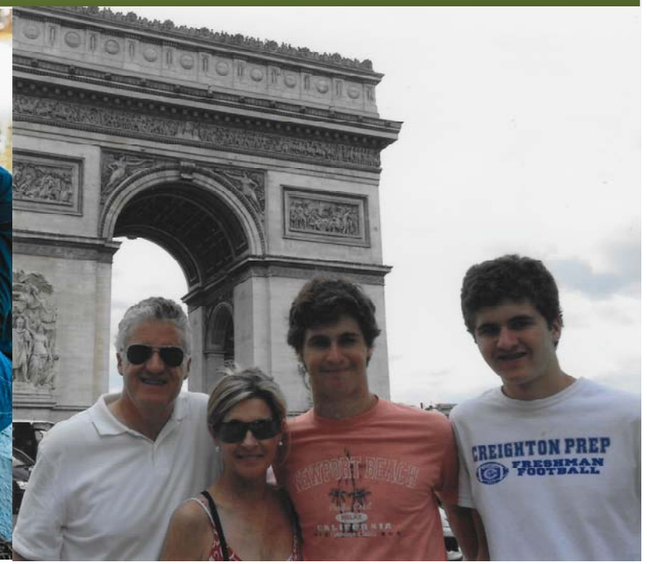
MEMBER PROFILE:
Mark Dunbar
DLR
Omaha, NE

Mark Dunbar is a fan of the timeless qualities of Frank Lloyd Wright, and agrees with Ludwig Mies van der Rohe's "less is more" and Louis Sullivan's "form ever follows function" philosophies. His career started, like many of ours, as an architect. His first job after graduating from architecture school in his home state, at the Univ. of Nebraska at Lincoln (home of the Big Red), was at DLR Group in Omaha. "I worked in the Omaha office for four years, two drafting construction documents and two in business development, chasing schools, jail and hospital projects in my territory of southern Iowa," he said. His career then "went south," literally, as he was transferred to an office in Austin that resulted from DLR's acquisition of a Texas firm. Mark worked there for two years in business development before leaving for law school at the University of Texas at Austin. "Having managed to complete all the various tasks required in the intern development program, I took and passed the NCARB exam for my architect's license in Texas as a second year law student," he said. He had flirted with the idea of law school back in Nebraska, right out of college, but opted not to go. By 1986-87, however, economic and other factors were making architecture in Texas a difficult business, and he realized that he had an opportunity to attend "the great UT law school" at extremely low resident tuition rates. So, he jumped at it. "I didn't have it in my mind that I was combining the two studies of architecture and law," he said. "While I believe that my perspective as an architect was a unique and useful background for a lawyer, I felt law offered an incredible opportunity to broaden my horizons. Perhaps foolishly, I was afraid that my background was going to pigeon-hole me into construction litigation, and I didn't act to exploit my prior experience as I really should have." After law school, Mark was hired in the litigation department of the San Diego office of mega-firm Gibson, Dunn & Crutcher. He worked there for six years before leaving to open his own solo litigation practice in the beautiful seaside La Jolla community of San Diego.

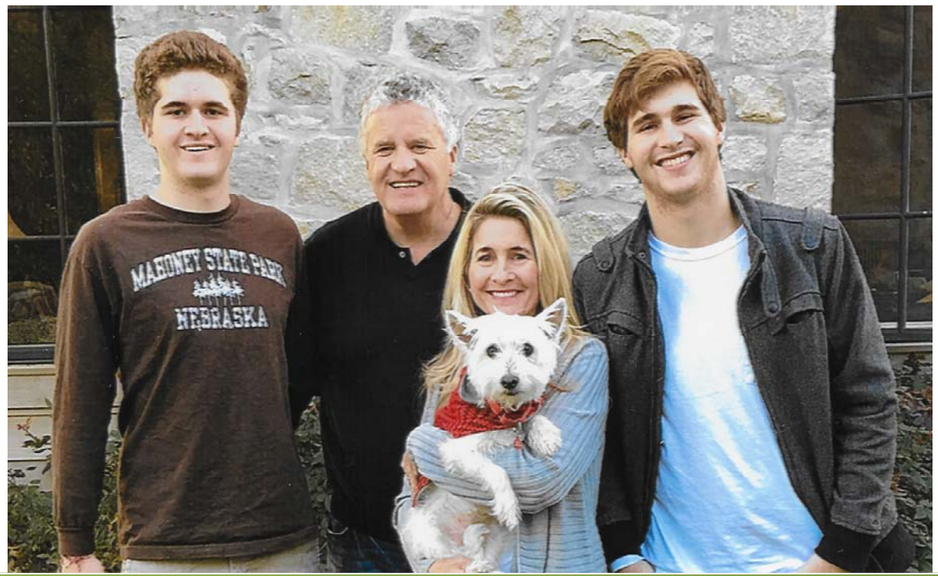
In 2016, Mark returned home to Nebraska ("I returned to my roots"), where he was hired as General Counsel of DLR Group in Omaha. "I am one of the firm's many 'boomerang' employees - who leave and come back - and having taken 29 years to do so, I hold the record for the longest flight. I had never worked as General Counsel, and the firm had never had one, so it was a learning experience for both of us," he recalled.

Mark says that as a litigator, you often find yourself confronted by a client who had been reluctant to take the time or spend the money to run an important contract past someone for a quick consultation. As a result, the client ends up embroiled in a legal problem that could have been easily anticipated and avoided with a just a little legal guidance.

"Prior to my arrival, DLR had not had any in-house lawyers, and while the firm had trusted outside counsel that they could turn to, doing so still carried the baggage of significant expense. Now, with General Counsel, the 1,200 employees of the firm know that there is someone they can turn to, at no cost, for some quality legal advice. It seems that hardly a day goes by that I don't feel that I had a short consultation with someone that may have allowed the firm to avoid a regrettable error."



(Above left) TJS Member Mark Dunbar with sons John and Peter, and his wife, Julie; (Above right) The Dunbar family on a trip to Paris; (Below) Mark with sons John and Peter, while Julie Dunbar holds Lilly, a rescue dog from their "pet charity," Little White Dog Rescue, where Julie is a volunteer.



Mark met his wife, Julie, in college, and the couple will celebrate their 35th anniversary in June. They have two sons, John, a sophomore in college, and Peter, a senior in high school. "I ride on the coat-tails of my wife," he said, "who is a volunteer for Little White Dog Rescue." Interestingly, despite its rather particular name, Mark clarified that the organization doesn't discriminate against dogs that aren't "little" or aren't "white." "It is very rewarding to foster and adopt rescued animals that would otherwise be difficult to place, such as the disabled or older animals."

The Dunbars love their home town of Omaha. "With the metro area now approaching one million people, it has a size that provides nice balance between the amenities of a big city and the advantages of a small town. We live in a beautiful home on boating lake on the outskirts of Omaha, just 25 minutes from the office."

Quatman Honored With Lifetime Achievement Award.

TJS member Bill Quatman, FAIA, Esq., was honored by Missouri Lawyers Media at its first annual In-House Counsel Awards on Nov. 3, 2017, held in St. Louis. More than 200 people attended the event to recognize outstanding inhouse attorneys. A total of twenty-two lawyers were honored in multiple categories of private companies and public agencies. The honors included the first Lifetime Achievement Award, presented to Bill Quatman, senior vice president and general counsel for Burns & McDonnell. Bill said in an interview prior to the event that his goal has always been to combine his love of architecture and law.

Member News:

Denis G. Ducran, AIA, Esq. has announced that after spending the last 6 years in-house with an ENR 400 general contractor, he has returned to private practice with the Houston office of Peckar & Abramson.

TJS Member **Philip Croessman, AIA, Esq.** has started a new position as Global Director of Commercial and Business Services at MWH Constructors, now part of Stantec Construction Group.

TJS Vice President **Mehrdad Farivar, FAIA, Esq.** announced that his law firm Morris Polich & Purdy has merged with the Detroit founded firm of Clark Hill PLC, resulting in a 450-person firm with offices in nine states.

Congratulations to TJS member **Joshua Flowers, AIA, Esq.,** for being elected as 2018 President-Elect/2019 President at AIA Tennessee. Josh serves as the in-house legal counsel for Hnedak Bobo Group in Memphis, TN.

Bill Quatman, FAIA, Esq. will speak at the Victor O. Schinnerer 57th Annual Meeting of Invited Attorneys in New Orleans, May 24-25.

Welcome to Our Two Newest Jefferson Society Members!

We welcome the following:

NEW MEMBERS:

Sheri L. Bonstelle
Jeffer Mangels Butler & Mitchell, LLP
Los Angeles, CA

Mark Dunbar
DLR Group
Omaha, NE

Monuments Bills: Taking Down Confederate Memorials

On Sept. 7, 2017, Sponsor Sen. Cory Booker (D) N.J., introduced S. 1772, *The Confederate Monument Removal Act,* a bill to remove all statues of individuals who voluntarily served the Confederate States of America from display in the Capitol of the United States. Under the proposed law, the Architect of the Capitol is to arrange to transfer and deliver any statue that is removed under this Act to the Smithsonian Institution. A statue provided for display by a State that is removed under this Act must be returned to the State, and the ownership of the statue transferred to the State, if the State so requests and agrees to pay any costs related to the transportation of the statue to the State.

A total of $5 million is appropriated under the Act to cover the costs related to the removal, transfer, security, storage, and display of the statues, with $2 million for the Architect of the Capitol, and $3 million for the Smithsonian Institution. The bill has not made any progress since it was introduced. A companion bill, H.R. 3701, was introduced on the same day by Rep. Barbara Lee (D) CA, and has also not made progress in the House.

What's Next? Removing Jefferson Statues and Memorials

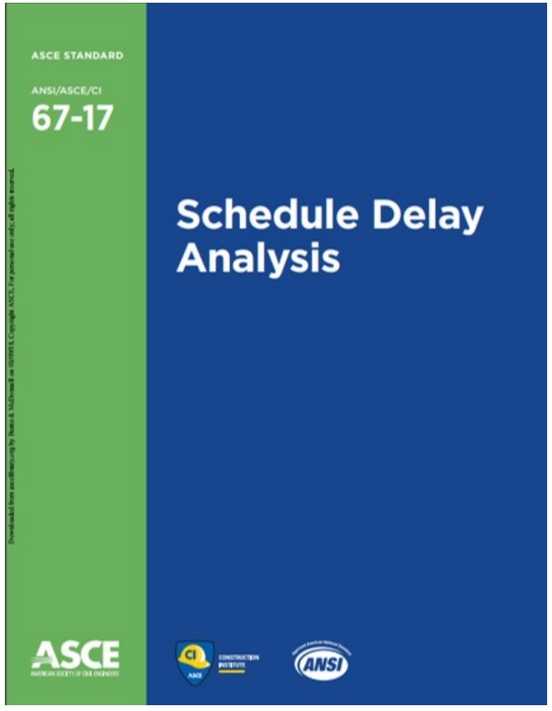
In a June 2015 article titled *"Jefferson Memorial, Confederate Statues Enter National Race Debate,"* the Los Angeles Times wrote that the Thomas Jefferson Memorial, "which has stood near the banks of the Potomac River in Washington for more than 70 years, is a classical tribute to the author of the Declaration of Independence and the third U.S. president." However, the Jefferson Memorial was drawn into the national debate about race following the shooting deaths of nine people in a predominantly black church in South Carolina. "It joins other public statues depicting Southern or Confederate figures, including Jefferson Davis and Robert E. Lee, that some are arguing represent the country's racist past and should be removed," the Times wrote. Two years later, in August 2017, violence in Jefferson's hometown of Charlottesville, Va. prompted renewed debates about how we treat memorials to a president who was a slave-owner. That month, protests turned violent in Charlottesville as white supremacists clashed with counter - demonstrators, and a car ploughed into the crowd of protesters, killing one person. The following month, protesters at Jefferson's famous Rotunda on the campus of UVa covered the statue of Mr. Jefferson in black (see photo, above-right). How do we members of "The Jefferson Society" handle this issue? Is this a topic that we should be discussing? *See, e.g., Suzanne Harness's review of the timely new play "Jefferson's Garden," pp. 30-31.* Let's look at the history surrounding our namesake and his ownership of slaves.

At age 24, Thomas Jefferson inherited 5,000 acres of land and 52 slaves by his father's will. In 1768, Mr. Jefferson began construction of his plantation at Monticello. Through his marriage to Martha Wayles in 1772 and inheritance from her father, John Wayles, in 1773 Jefferson acquired two plantations and 135 more slaves. Historians now accept that after the death of his wife Martha, Mr. Jefferson had a long - term relationship with Sally Hemings, a slave at Monticello, and he fathered several children with her. Hemings is believed to have been only a teenager when she first gave birth.

Jefferson was not alone as a slaveholder, as twelve of the first eighteen American presidents owned slaves. But Jefferson's views on slavery run contradictory to his actions. He called slavery an "abominable crime," yet he was a lifelong slaveholder. In 1784, he proposed federal legislation banning slavery in the New Territories of the North and South after 1800. After he was elected president, he brought a dozen of his slaves from Monticello to work in the White House. In 1820, he wrote that maintaining slavery was like holding "a wolf by the ear, and we can neither hold him, nor safely let him go."

The debate over honoring slave - owners continues today. In August, 2017, former Congressional Black Caucus director Angela Rye demanded that all memorials and likenesses of Washington, Jefferson and Lee be taken down. That same month, Rev. Al Sharpton called for the government to strip public funding of the Jefferson Memorial. And so, the debate continues.

Do you have opinions you'd like to share them with other members of The Jefferson Society? Consider writing an opinion piece for the next *Monticello*.



ASCE's New Schedule Delay Analysis Standard Comes Under Fire

The ASCE has released its new publication titled, "*Schedule Delay Analysis*," Standard ANSI/ASCE/CI 67-17, which it touts as presenting "guiding principles that can be used on construction projects to determine the impact of delays." The ASCE standard provides 35 guidelines that allow for segmentation of responsibility for delays to intermediary milestones and project completion dates. According to ASEC, "The guidelines enable the calculation of delay damages or liquidated damages by using CPM schedule techniques and preparing a schedule delay analysis." Each guideline is accompanied by commentary that explains the reasoning behind and application of that principle. Topics include scope and definitions; critical path, float, and early completion; chronology of delay, concurrent delay, and responsibility for delay; changing schedules after the fact, and acceleration.

According to ASCE, Standard 67-17 "reflects the best engineering principles associated with schedule delay analysis, as well as the standard of practice in the U.S. construction industry. It is an essential reference for construction engineers, project managers, owners, and contracting agents." However, an editorial in the Oct. 23, 2017 issue of *Engineering News Record* criticizes the new ASCE publication for obligating the project owner to grant time extensions for "non-critical path" delays. Mark Nagata, a scheduling expert, called the guideline "flawed," writing: "The industry has long understood that a critical activity is an activity on the critical path. Defying both logic and established industry practice, ASCE's new standard asserts that critical activities don't have to fall on the project's critical path," to qualify for a time extension. Nagata said about the ASCE standard, "It is unfair, inequitable and should not be accepted guidance when evaluating project delay."

The new publication has 12 chapters and is available for download from ASCE online at this web address: https://ascelibrary.org/ in pdf version. It is also available in print soft cover version for $70.00, with a discounted price of $52.50 for ASCE members. The Jefferson Society does not endorse any publications.

Indiana: Design Consultant Wins $4.6 Million on Design-Builder's Payment Bond

We don't see many cases in which an A-E firm attempts to recover on a payment bond, so this one is novel. This case involved a P-3 project to upgrade a 21-mile section of an existing Indiana road into an interstate highway. The project was awarded to a developer under a design, build, finance, operate contract. The developer hired a design-build contractor, who was required to provide a payment bond for $15.35 million. The plaintiff, Aztec Engineering Group, was hired by the design-builder as a subcontractor to perform engineering services on the project. Aztec alleged that the design-builder failed to make payment on multiple invoices totaling over $4.6 million. As a result, the engineer suspended services and made a claim on the payment bond and, later, filed suit against the sureties on the bond.

Motion to Compel Arbitration Denied.

The sureties moved to dismiss the lawsuit, or to stay the suit and compel arbitration, which was required by the engineer's subcontract. However, the trial court denied that motion on the basis that the payment bond did not contain an arbitration clause, nor even reference the engineer's contract. However, the sureties argued that the arbitration clause was broad enough to encompass the payment dispute with the bonded contractor. In an earlier ruling, the court found that the sureties were not parties to the engineering subcontract, "and they cite no authority for their proposition that a non-signatory can invoke an arbitration provision that was not expressly incorporated into a contract to which the non-signatory is a party." See, 2016 WL 6071752 (S.D.Ind., 2016).

Design-Builder Moves to Intervene as a Defendant.

The design-build contractor then moved to intervene as a defendant, to stay the lawsuit, and to compel arbitration of the underlying contract dispute. However, the federal trial judge held that the design-builder contractor could not intervene as of right, and would not be granted permissive intervention either, denying the motion. The contractor argued that as an indemnitor on the payment bond, its interests could be impaired if it could not intervene because it could be forced to indemnify the sureties even though it was not a party to this lawsuit. The engineer countered, however, that the contractor would not be prejudiced if it was not a party to the lawsuit because "only undisputed amounts owed" the engineer were at issue, and the sureties can adequately represent any interest that the contractor had. The engineer admitted that any disputes regarding alleged damages for defective work must be arbitrated, and it emphasized that the design-builder had not initiated arbitration. Surprisingly, the trial court found that the bonded contractor did not have "an interest in the subject matter of the pending litigation." As a result, the contractor was not allowed to intervene. The court stated that if the contractor, "believed it was entitled to initiate arbitration on claims it thinks are arbitrable, there is nothing about this litigation that prevented it from doing so. The fact that it has not initiated arbitration suggests that its proposed intervention here was geared more toward delay than the merits of any dispute."

Engineer is Granted Summary Judgment Against the Sureties!

With the bonded contractor effectively shut out of the litigation, the engineer and sureties then filed cross-motions for summary judgment on the underlying payment bond claim. The sureties argued that the payment bond did not cover "design services," and only covered "just claims for labor performed." The sureties argued that design services are not "labor" because the bond must be interpreted in light of the surrounding circumstances and Indiana law does not require payment bond coverage for the design portion of public design-build construction projects. The court rejected this narrow reading of the bond, finding that the bond covered the entire prime design-build contract, and that the "work" bonded included both design and construction. The sureties also argued that the contractor had a right of set-off for its claims against the engineer. However, the court ruled that neither the sureties nor the contractor had pursued legal action against the engineer for those claims. The court then ruled in favor of the engineer on the payment bond claim for a total of $4,678,451 plus prejudgment interest. The case is *Aztec Engineering Group, Inc. v. Liberty Mutual Insurance Co.,* 318 F.R.D. 362 (S.D.Ind., 2017); and 2017 WL 1382649. Note, however, that an appeal was filed on April 18, 2017 and is now pending before the 7th Circuit Court of Appeals.

[Editor's note: With the growth of design-build nationally, there is concern that design services are not covered by traditional "labor and material" payment bonds. There is at least one prior case ruling against an architect on a payment bond claim on that very basis. See, *Fields Hartwick Architects v. Capitol Indemnity Corp*., 884 P.2d 198 (Ariz. App. 1994). However, the new bond forms issued in 2015 by the DBIA for design-build projects are quite clear that design services are covered, not only under the payment bond, but under the performance bond as well. See, DBIA bond forms no. 620 Performance Bond and no. 625 Payment Bond for Design-Build Projects. The latter defines a "Claimant" as one providing "design and other professional services."]

Design-Build Contractor Loses Lawsuit Against Architect-Sub

This lawsuit involved the design of the $354 million Marriott Marquis Hotel adjacent to the Walter E. Washington Convention Center in D.C. The design-builder (Hensel Phelps) sued the architect (Cooper Carry) for breaching its design services contract by, among others, failing to design the hotel to proper standards, and for breach of the indemnification provision of same contract by failing to indemnify the builder for its increased costs attributable to fixing design mistakes. Cooper Carry was initially hired directly by Marriott to design and monitor construction. Approximately two-and-a-half years later, however, the project was converted to the design-build model of delivery. Marriott assigned its rights and obligations under the design agreement to Hensel Phelps. The court noted that, "Unfortunately, the new arrangement went sour rather quickly."

In early March, 2011, the architect was informed by local codes officials that its designs did not comply with applicable fire codes. Hensel Phelps claimed that fixing these design errors cost it $4.4 million. Over the next three years, Hensel Phelps contended that it discovered more design defects which ran the total cost of correction to nearly $8.5 million. In Jan., 2015, Hensel Phelps initiated dispute resolution proceedings. After a failed attempt at mediation, the design-builder sued the architect alleging breach of contract and indemnification claims. The architect moved to dismiss or, alternatively, for summary judgment, arguing the District of Columbia 3-year statute of limitations for contract claims had already run. Additionally, it asserted that the plain language of Marriott's indemnification clause did not cover "first-party claims" for damages. The federal trial court granted the designer's motion for summary judgment and the design-builder appealed. The Court of Appeals affirmed, holding that the 3-year statute of limitations began to run under District of Columbia law when the design-builder discovered the architect's failure to design the project in accordance with applicable fire safety codes; and that the architect was not required to indemnify the design - builder for losses associated with correcting failures to comply with applicable fire codes. Hensel Phelps argued that the project was governed by "a unitary construction contract," under which courts typically interpret first breach as occurring upon "substantial completion" of the project. Because substantial completion did not occur until April 2014, Hensel Phelps argued its claim was not time-barred. The Court of Appeals rejected that argument, however, finding that "the terms are clear and unambiguous: Hensel Phelps had the right to begin dispute-resolution procedures in March of 2011 and to bring a lawsuit in court if and when those proceedings failed. We must hold Hensel Phelps to its bargain. Because it filed its complaint more than three years after the action accrued, its breach-of-contract claim is time barred." Turning to the claim for indemnity, the court also rejected the design-builder's argument that the clause was broad and was not confined to third - party claims only. The court said, "Unquestionably, indemnification clauses have traditionally been used and interpreted as extending only to third - party claims * * * Here, no clear and unequivocal intent to include first-party claims appears on the face of the instrument and, construing the clause strictly, we decline to expand the scope of its reach." The case is *Hensel Phelps Construction Co. v. Cooper Carry Inc.*, 861 F.3d 267 (D.C. Cir. 2017).

About The Supreme Court Building

In 1929, after occupying space in the U.S. Capitol Building since 1819, Chief Justice (and former U.S. president) William Howard Taft persuaded Congress to authorize the construction of a permanent new home for the U.S. Supreme Court. Architect Cass Gilbert was charged by Chief Justice Taft to design "a building of dignity and importance suitable for its use as the permanent home of the Supreme Court of the United States." Construction, began in 1932 and work was completed in just three years, in 1935.

The classical Corinthian architectural style was selected because it best harmonized with the nearby congressional buildings. The court building was designed on a scale in keeping with the importance and dignity of the Court and the Judiciary as a coequal, independent branch of the United States Government, and as a symbol of "the national ideal of justice in the highest sphere of activity."

The general dimensions of the foundation are 385 feet from east to west, (front to back) and 304 feet from north to south. At its greatest height, the building rises four stories above the terrace or ground floor. Marble was chosen as the principal material to be used and $3 mil. worth was gathered from foreign and domestic quarries. Vermont marble was used for the exterior, while the four inner courtyards are of crystalline flaked, white Georgia marble. Above the basement level, the walls and floors of all corridors and entrance halls are either wholly or partially of creamy Alabama marble. The wood in offices throughout the building, such as doors, trim, paneled walls, and some floors, is American quartered white oak.

The building's architect, Cass Gilbert (1859 – 1934), was also responsible for numerous museums (St. Louis Art Museum) and libraries (St. Louis Public Library), and several state capitols, such as Minnesota, Arkansas and West Virginia. He served as president of the AIA in 1908-09. He was a conservative who believed that architecture should reflect historic traditions and the established social order. His design of the new Supreme Court building contrasted sharply with the large, modernist Federal buildings that were going up along the National Mall in Washington, D.C., which he disliked. Gilbert was one of the nation's first "celebrity architects." His Woolworth Building in New York City was the world's tallest building when built in 1913. He later feared that building would be regarded as his only work!

Washington: 9th Circuit Upholds SJ for Engineer Based on Economic Loss Doctrine

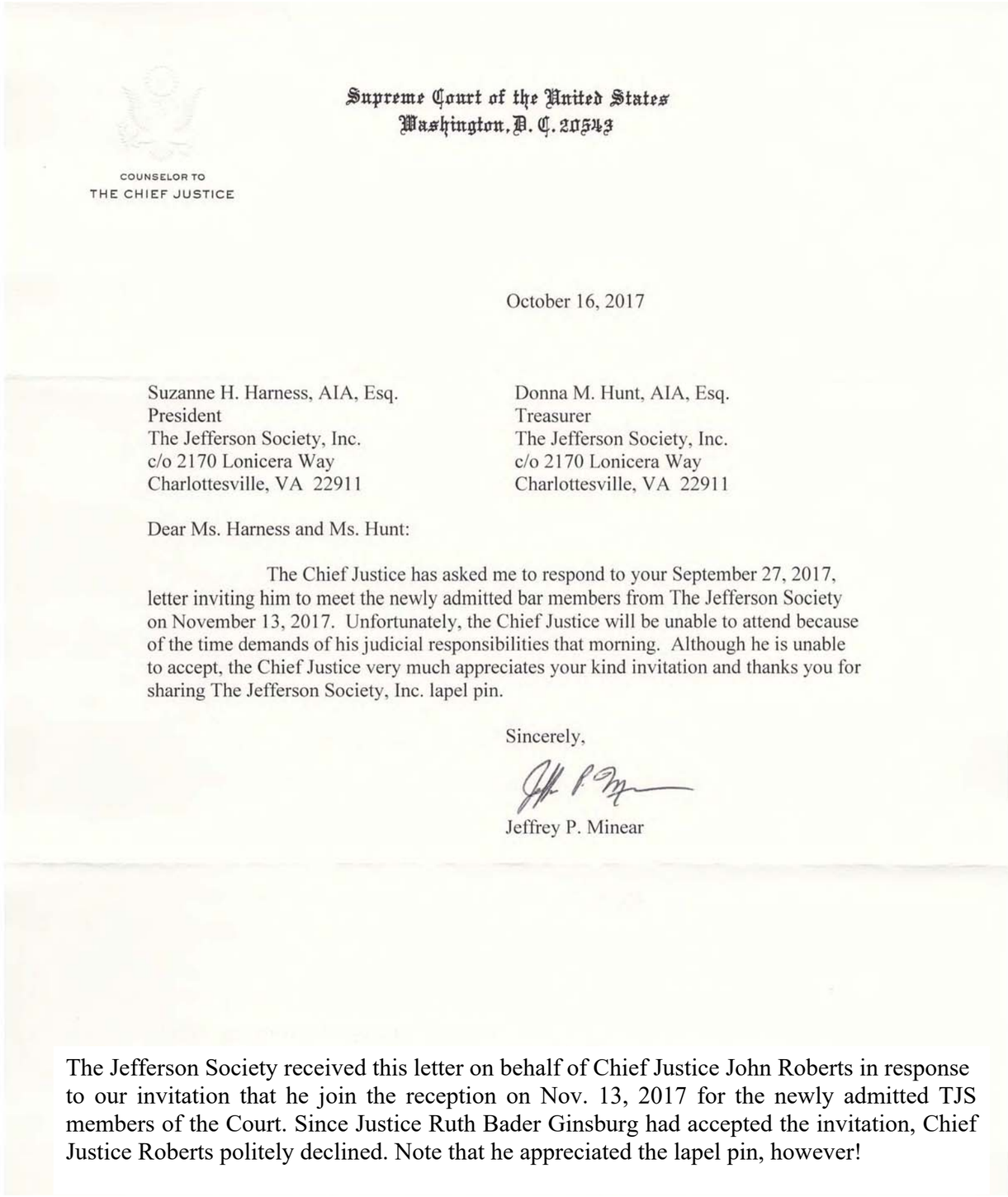
A soil boring subcontractor was hired to perform work related to the installation of a sewer bypass line. The specifications required the contractor (and sub) to dewater the work area as necessary to prevent uncontrolled flows of water and soil. During construction, workers found a big sink hole right above the alignment caused by excessive cobbles. The sub removed its boring machine because it wasn't feasible to finish the section with the planned method. The sub then sued the contractor over its costs due to the unexpected soil conditions. The trial judge denied the claim since the contract required the contractor (and sub) to handle "any and all quantities of cobble actually encountered" and groundwater was clearly a disclosed condition. The court also dismissed claims based on defective specifications. The sub then filed a separate lawsuit against the engineer for professional negligence and negligent misrepresentation for the same claims, alleging that the engineer "manipulated" the geotechnical reports to "shed liability" for unanticipated conditions. The engineer moved for summary judgment based on the economic loss doctrine. The trial judge held that, "A duty may be predicated on violation of either a statute or common law principles of negligence," and the subcontractor alleged a duty arose under professional standards applicable to engineers in the state of Washington, citing to several licensing regulations and statutes. The engineer countered that these laws were for the protection of the public in general, and did not create a duty to the subcontractor. Citing to prior Washington caselaw, the federal judge held that, "There are policy reasons for limiting the duties between contracting parties," and that private parties can best order their own relationships by contract. The damages in this case being solely economic, the court found that there was no duty owed by the engineer to the sub. The sub then argued breach of implied warranty under *U.S. v. Spearin*, 248 U.S. 132 (1918). However, the sub's lawsuit was for negligence and negligent misrepresentation, and did not assert a warranty claim. Therefore, the court declined to consider a *Spearin* Doctrine claim. As to negligent misrepresentation, the trial judge rejected that claim, finding that the conditions encountered were anticipated in the written contract, and that the plaintiff's alleged damages were not proximately caused by the engineer's oral statements, "but by their own actions contrary to their contractual obligations."

On appeal, the Ninth Circuit Court of Appeals upheld that ruling in a Dec. 18, 2017 opinion. The Court stated the district court properly granted summary judgment to the engineer on the sub's professional negligence claims. "Under Washington law, [the sub] may not recover in tort for economic injuries caused by a design professional's negligent plans." As to the negligent misrepresentation claim, the Court affirmed as well, holding that the sub assumed a legal duty to "dewater the work area as necessary," design an alternative boring method, and use the original auger boring plan if the alternative method proved infeasible. [Sub's] decision to accept these contractual obligations, and its failure to fulfill them, proximately caused its injuries." The case is *Pacific Boring, Inc. v. Staheli Trenchless Consultants, Inc.*, 138 F.Supp.3d 1156, 1157–70 (W.D. Wash. 2015); aff'd, 2017 WL 6420397 (9th Cir. 2017).

[Editor's Note: It seems more and more that contractors (and subs) rely on the negligent misrepresentation loop-hole in the economic loss doctrine to make claims against A-E firms. This case points out that risks assumed by contract are an effective affirmative defense].

Manies Takes New General Counsel Role

TJS member Ryan M. Manies, AIA, Esq. has left his private law practice with the Polsinelli law firm in Kansas City and, effective Jan. 1, 2018, he is the new Vice President and General Counsel for McCown Gordon Construction, a 100% employee-owned firm located in Kansas City, MO. Ryan can be reached by email at: rmanies@mccowngordon.com



Supreme Court of the United States
Washington, D. C. 20543

COUNSELOR TO
THE CHIEF JUSTICE

October 16, 2017

Suzanne H. Harness, AIA, Esq.
President
The Jefferson Society, Inc.
c/o 2170 Lonicera Way
Charlottesville, VA 22911

Donna M. Hunt, AIA, Esq.
Treasurer
The Jefferson Society, Inc.
c/o 2170 Lonicera Way
Charlottesville, VA 22911

Dear Ms. Harness and Ms. Hunt:

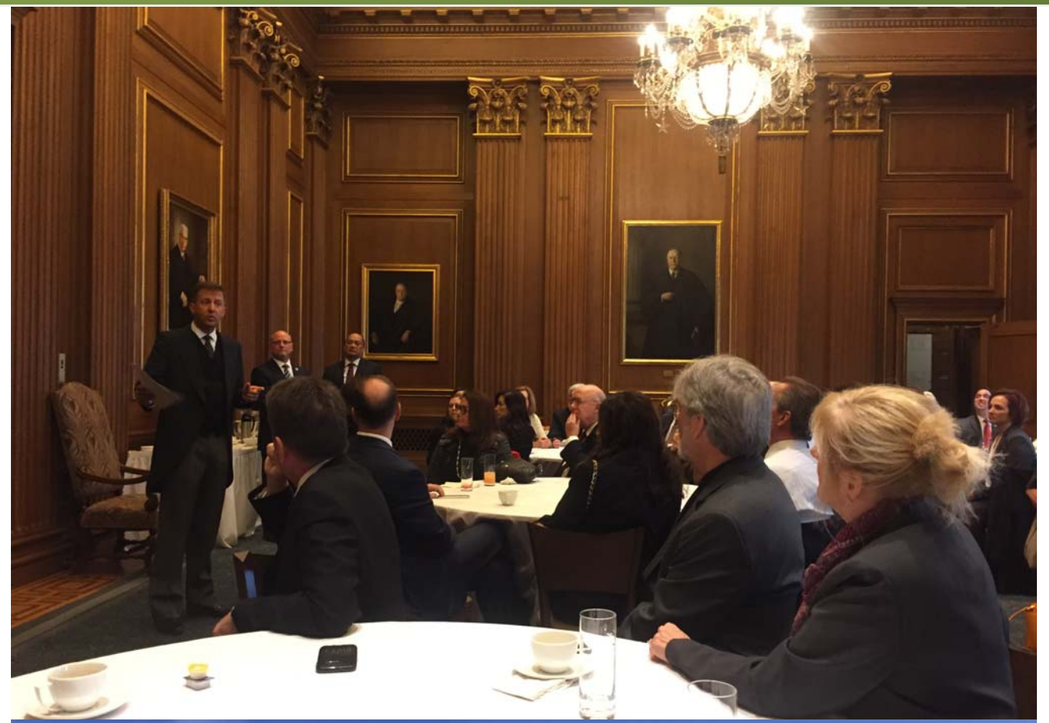
The Chief Justice has asked me to respond to your September 27, 2017, letter inviting him to meet the newly admitted bar members from The Jefferson Society on November 13, 2017. Unfortunately, the Chief Justice will be unable to attend because of the time demands of his judicial responsibilities that morning. Although he is unable to accept, the Chief Justice very much appreciates your kind invitation and thanks you for sharing The Jefferson Society, Inc. lapel pin.

Sincerely,

Jeffrey P. Minear

The Jefferson Society received this letter on behalf of Chief Justice John Roberts in response to our invitation that he join the reception on Nov. 13, 2017 for the newly admitted TJS members of the Court. Since Justice Ruth Bader Ginsburg had accepted the invitation, Chief Justice Roberts politely declined. Note that he appreciated the lapel pin, however!

(Above) Joyce Raspa-Gore under the official portrait of former Chief Justice William H. Rehnquist as he appeared on the bench in a black robe adorned with four gold stripes on each sleeve; (Top Middle) Lucy Lieffers (3 months old), daughter of TJS member Laura Jo Leiffers, attending dinner at Suzanne Harness' home in her “RBG Rules” onesie; (Far Right) TJS members Joyce Raspa-Gore, Jacqueline Pons-Bunney, and Donna Hunt; (Lower Middle) Tom, Ande, and Taylor McMurtry in front of U.S. Supreme Court.



She's Baaack!

It is that time of year again . . . TJS membership renewal. Our Treasurer, Donna M. Hunt, AIA, Esq., wrote to all the members in December to inform us that she was working to get PayPal set up to make everyone's life easier for dues payment. For now, however, we would appreciate if everyone submit their membership dues the old fashioned way, **by check via mail**.
The 2018 yearly membership dues fee is a mere Fifty Dollars ($50.00).
Please forward your check payable to "The Jefferson Society" to:

Donna M. Hunt AIA, Esq.
110 Payson Road
Brookline, MA 02467

There are a number of our members who have still not yet paid their 2017 dues. If you are one of those members, please include an additional $50 for each unpaid year. If you are unsure whether you paid, please drop Donna Hunt a note at:
Donna.Hunt@ironshore.com
She will respond with any outstanding balance amounts. Thank you for your cooperation.

(Page 28, Top) The Clerk of the U.S. Supreme Court gives instructions to the TJS Members and friends prior to the admission ceremony; (Page 28, Bottom) the grant staircase of the U.S. Supreme Court, with unknown tiny people (photos by TJS President Suzanne Harness); (Above left) TJS member Jeff Hamlett and his wife, Jackie Brudvik, who was also sworn in that day; (Left) TJS Member Joelle Jefcoat in front of the Supreme Court building.
Suzanne Harness noted, "It was rainy when we went in at 8:00 and sunny at 11:30 when we left."

Jefferson's Garden: A Review

By Suzanne Harness, AIA, Esq.
Arlington, VA

TJS member Bill Quatman clued me in that a play about our namesake, Thomas Jefferson, was playing at Ford's Theater, well-known as the location where President Abraham Lincoln was shot in April 1865. I could not resist seeing this play, *Jefferson's Garden*, which unflinchingly exposes the central contradiction of America's Revolution: We declared all men created equal, but our constitution did not free the slaves. Instead, to equalize Congressional power, the North and South cut a deal to count each slave as 3/5 of a white person and not to count a single American Indian.

With a hard-working cast of nine very talented actors, each playing multiple roles, the play depicts the making of our young nation through the eyes of "Christian," an idealistic freedom-seeking Quaker from Maryland. After promising his sister that while fighting for freedom he would not take a life (a promise he is forced to break), he travels to Virginia to meet his hero Thomas Jefferson. Upon his arrival he falls head-over-heels in love with a slave named "Susannah" working in a Williamsburg, Va. tavern. Loyalty to both Jefferson and Susannah sets up the central conflict of the plot. Although the play moves at a furious pace, it captures the fever of the quest for liberty, the horror of war, the pain of the slaves, the complexity of family ties, and the economic forces that controlled the decisions of Jefferson and other politicians of the time. Accompanied by a chorus and some current day narration, the play also educates us about the liberties that historians and fiction writers may take to align the facts with the desired story line.

Authored by a woman, British playwright Timberlake Wertenbaker, the play makes the point that women were also not granted equal rights, and achieves what most writing about the American Revolution does not even attempt: It humanizes the British soldier and makes reasonable the British position that it had gone into debt to protect the Colonies in the French and Indian War (1756 - 1763), only to have the ungrateful Colonists demand freedom and declare war only a few short years later.

It is quite remarkable that this play is able to expose so many contradictions in a short 2 hours and 15 minutes. As members of The Jefferson Society, the contradiction that may trouble us most lies within Thomas Jefferson himself. How could this intellectual, a gifted lawyer and architect, who worked throughout his public life to end the slave trade, fail in his personal life to free his own slaves? The play exposes the most likely answer: Jefferson was broke. Not the first, nor the last, architect to borrow money to build a house, *Monticello* and its magnificent gardens, along with Jefferson's elegant lifestyle, kept him perpetually in debt. Only the value of his several hundred slaves, used as collateral, kept Jefferson from bankruptcy.

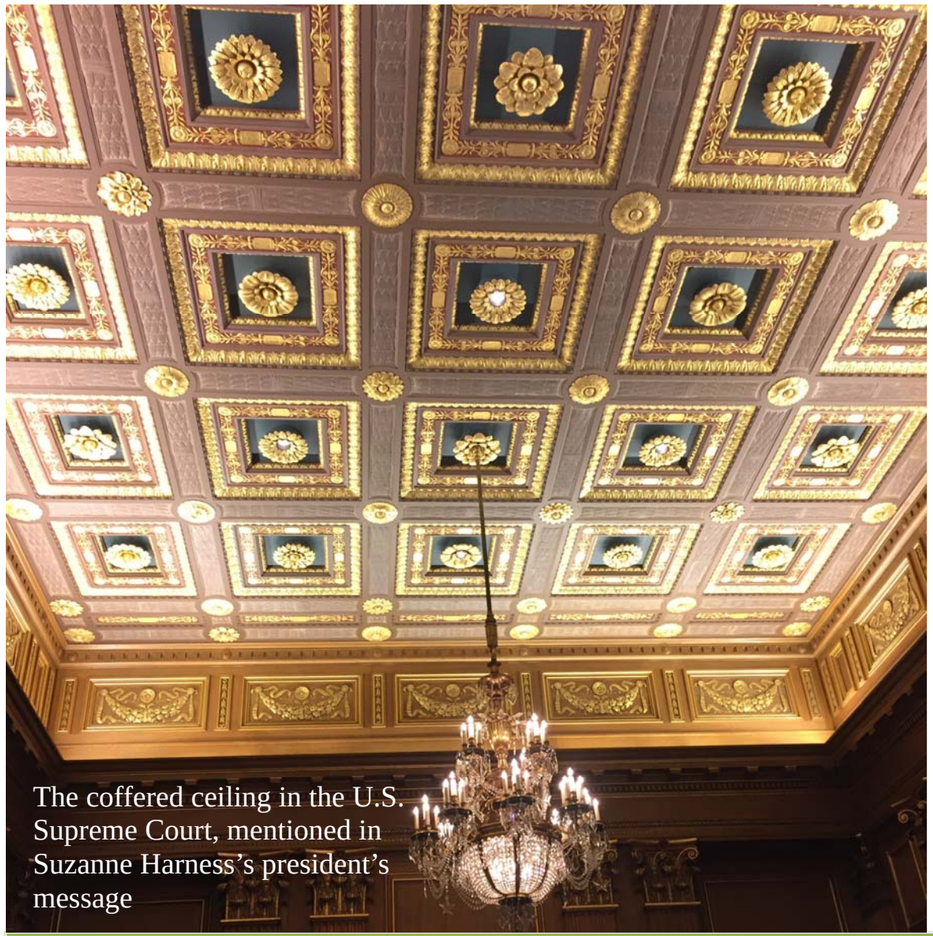
It is now accepted by most historians that Jefferson fathered several children with one of his slaves, Sally Hemmings, the half-sister of his deceased wife Martha. Sally's brother James plays a central role in the play, including a crucial scene in which Jefferson signs a written agreement to free James and all of Sally's children. Indeed, the only slaves that Jefferson freed during his own life were two of Sally's children and her brother James. Upon his death, Jefferson freed his two surviving children with Sally, and three other men, who may also have been Hemmings family members. Jefferson's remaining 130 slaves were sold to pay off debt, but his daughter Patsy allowed informal freedom for Sally, whom Jefferson did not free, and she lived the remaining years of her life with her freed sons.

I wish I could recommend that all of you see this remarkable play when it comes to a city near you, but I am unable to find that any future productions are planned. It will remain at Ford's Theater through February 8, 2018.

[Editor's Note: Since its reopening in 1968, Ford's Theatre has produced plays and musicals celebrating the legacy of Abraham Lincoln and exploring the American experience. This new play continues that theme by exploring the period following the Revolutionary War in which slavery was common, even among the founding fathers such as Thomas Jefferson].

More About the Supreme Court Building!

"The Republic endures and this is the symbol of its faith." These words, spoken by Chief Justice Charles Evans Hughes in laying the cornerstone for the Supreme Court Building on Oct. 13, 1932, express the importance of the Supreme Court in the American justice system. The first session of the Supreme Court was convened on Feb. 1, 1790, but it took some 145 years for the Supreme Court to find a permanent residence here in 1935. Sixteen marble columns at the main west entrance support the portico and on the architrave above is incised, "Equal Justice Under Law." Capping the entrance is the pediment filled with a sculpture group representing Liberty Enthroned Guarded by Order and Authority. Cast in bronze, the west entrance doors depict historic scenes in the development of the law. The east entrance's architrave bears the legend, "Justice the Guardian of Liberty."



The coffered ceiling in the U.S. Supreme Court, mentioned in Suzanne Harness's president's message

Florida: Supreme Court Ruling to Have Big Impact on Duty to Defend Construction Cases

By Elizabeth B. Ferguson
Marshall Dennehey, et al.
Jacksonville, Fla.

A recent case out of the Florida Supreme Court will likely have a big impact on the duty of insurers to defend Florida construction cases. The case, *Altman Contractors, Inc. v. Crum & Forster Specialty Insurance Company,* arises out of a declaratory judgment action filed in the Southern District of Florida: Case No.: SC16-1420 (Fla. 2017). Altman Contractors, Inc. served as the general contractor on a high-rise condominium project. Crum & Forster Specialty Insurance Company insured Altman during the project under a series of commercial general liability policies. From April 2012 to November 2012, Altman received multiple notices of construction defects under Chapter 558, Florida Statutes, following completion of the project. Included in the Chapter 558 Notices, the owner claimed property damage to the building. Chapter 558 lays out a process for the resolution of construction defect claims prior to litigation and is in fact a condition precedent to filing suit on such claims in Florida.

In January 2013, Altman tendered to Crum for defense and indemnity of the 558 Notices. Crum denied, arguing the 558 Notices were not a "suit" as defined in the policies. Altman then hired its own counsel to defend the 558 Notices. In May 2013, Altman received a supplemental 558 Notice, bringing the total number of construction defects claimed to over 800. In August 2013, Crum hired counsel to defend Altman against the claims under a Reservation of Rights, maintaining the position that the Chapter 558 Notices were not a "suit" under the policy. Altman objected to the counsel assigned by Crum and requested its existing counsel be hired to continue to defend the claims. Altman also demanded Crum reimburse it for the fees incurred since tendering to Crum in January 2013 and Crum denied Altman's requests. Eventually, Altman resolved the claims without Crum's involvement and prior to suit being filed. After settling the claims, Altman filed a declaratory judgment against Crum in the Southern District of Florida on the issue of Crum's duty to defend and indemnity to Altman. The Southern District sided with Crum, ruling that the Chapter 558 Notices did not meet the definition of "civil proceeding" under the policies and therefore granted against Crum's summary judgment. Altman then appealed to the Eleventh Circuit, who certified the following question: Is the notice and repair process set forth in chapter 558, Florida Statutes, a "suit" within the meaning of the commercial general liability policy issued Crum & Forster to Altman.

Policy Language. The Crum & Forster policy language stated, "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply. We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result." The policy further defined "suit" as "a civil proceeding in which damages because of 'bodily injury,' 'property damage' or 'personal and advertising injury' to which this insurance applies are alleged." The policy language defining "suit" included: An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

Court's Decision. The Florida Supreme Court's review of the Chapter 558 process found it did not qualify as a "civil proceeding" under the policy, arguing participation was not mandatory and there was no adjudication. However, it ruled the Chapter 558 process does qualify as a form of "alternative dispute resolution," noting the Chapter 558 process was intended to allow the parties a chance to reach a settlement or perform repairs in lieu of a lawsuit. And, as a form of "alternative dispute resolution," the Florida Supreme Court held the Chapter 558 process meets the definition of a "suit" under the policies. In light of the question presented, the Supreme Court did not have to go the next step to the issue of whether the Chapter 558 Notices specifically trigger the duty to defend and indemnify under the policy. But, as the Supreme Court ruled the Chapter 558 Notice was a "suit" under the policy, we can expect the *Altman* ruling to be cited in every demand for defense and indemnity from insureds moving forward.

Justice C. Alan Lawson also issued a separate opinion, concurring in part and dissenting in part, that requires note. Looking back at the policy, Lawson notes the duty to defend only arises as to "suits" for "bodily injury" or "property damage," but there is no duty to defend suits for "which this insurance does not apply." Arguing construction defects are not covered by the policy, it is Lawson's opinion there would not be a duty to defend the Chapter 558 Notices. Although he does concede that in the Chapter 558 Notices in the instant matter, the owner included claims for "property damage to the building" which would arguably be covered.

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