BR&H

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The Voice of
Bell, Rosenberg & Hughes LLP
ATTORNEYS AT LAW

Greetings from the Editor

During the past few months our attention has turned to world events as the United States battled Saddam Hussein in Iraq. Please join us at our next Breakfast Forum on June 5, 2003. Our speaker, Ted Jacob, a preeminent engineer in California and a native of Iraq, will speak regarding rebuilding Iraq after the war.

—Cathy Fisher ❖

In this issue:

Information about the upcoming BR&H Breakfast Forum appears on page 6.

VISUALIZING THE FUTURE IN FOUR DIMENSIONS

PICTURE THIS: You've just won the construction contract of a lifetime—literally. You're charged with erecting a huge, state-of-the-art cathedral, and you can procure the finest materials available, employ the most skilled craftsmen, and direct the work as you see fit. Better still, the schedule is open-ended, with construction expected to run for as many decades as necessary. On the downside, you have to manage all of this with just a plumb bob, a try square, and a scrap of parchment with a hen-scratch plan that is decidedly not to scale. As the granite slowly ascends toward the heavens you have time on your side, but precious little besides your wits and experience to guide the work. The success of the project depends on your ability to mentally visualize each space and every phase of the project, and to communicate that vision to the toiling stonecutters and laborers.

Flash forward half a millennium and your problems are different. Today you are grappling with equally big but infinitely more complex projects on an accelerated timeline measured not in decades, but in months, weeks, and precious days, with the threat of liquidated damages spurring the placement of every brick, stud and rafter. But while contemporary scheduling expectations may be punishing, the tools of the trade for visualizing and managing building projects are light years beyond what anyone could have imagined even a few decades back, and there are new and better tools evolving every day. Computer-aided design has improved efficiency and accuracy in conventional two-dimensional plans, and the advent of affordable 3-D CAD modeling provides a significant leap forward in visualization tools for the construction professional. Complex spatial relationships and curvilinear forms that were impossible to depict in conventional plan or section view can be easily presented and quantified in virtual space with three dimensions. Builders can examine a construction area from a variety of views and levels of detail so that they fully grasp the intended final result before the hammering starts.

Today's contractor also employs the latest generation of sophisticated scheduling software for strategic planning of manpower requirements, material deliveries, and trade coordination with greater accuracy than ever. Still, even with a great schedule and a realistic 3-D model you won't always ferret out all the glitches in sequencing, trade stacking, access limitations, and tight storage conditions. These hard-to-predict problems can cause delays that result in claims and litigation. The evolving technology of 4-D modeling melds a 3-D CAD model with a project schedule to create a four-dimensional model that depicts the

Continued on page 2

VISUALIZING THE FUTURE IN FOUR DIMENSIONS

Continued from page 1

construction process through time. First pioneered by large EPC (Engineering, Procurement, and Construction) firms for analysis of process plant construction and operation, 4-D modeling is rapidly gaining advocates in mainstream construction.

Dr. Martin Fischer and his associates at the Center for Integrated Facility Engineering at Stanford University are particularly interested in the value that 4-D models bring to conventional building. His team has demonstrated that 4-D CAD models produce increased productivity at almost any scale, but they are particularly effective on large projects that include many stakeholders, in urban projects with tight site conditions, and in renovation projects surrounded by ongoing enterprises. Kathleen Liston, Fischer's associate at Stanford and president of Common Point Technologies, has identified several specific ways that 4-D models can contribute to successful projects. First, they communicate schedule sequences to a variety of project stakeholders—owners, investors, board members, general and subcontractors, superintendents, and others. This educational function fosters assimilation and buy-in from team partners, and a regular review of the model at meetings keeps the project focused and on track. Next, the model can help the team identify problems "virtually" before the errors occur in the field and cause costly changes and repairs. It also enables team members to compare alternative schedule sequences visually and rapidly. Compromised safety conditions can be apparent in the model before expensive remediation steps are required. Cost and schedule information can be integrated into the model for advanced day-to-day forecasting and estimating. Finally, the model can help mitigate schedule and project risk by communicating the schedule and performance sequence clearly to all the building partners. Most 4-D models are flexible enough to accept changes and variations that make it easy to generate multiple "what-if" scenarios for simultaneous comparison of alternatives.

> THE EVOLVING TECHNOLOGY OF 4-D MODELING MELDS A 3-D CAD MODEL WITH A PROJECT SCHEDULE TO CREATE A FOUR-DIMENSIONAL MODEL THAT DEPICTS THE CONSTRUCTION PROCESS THROUGH TIME.

The animated 4-D model has value beyond its utility as a construction tool—before groundbreaking begins and after building is complete. For marketing purposes, it's hard to beat the vision of the building emerging from the ground to inspire pride of ownership in owners, developers, and potential investors. And after the last coat of paint has dried, such models can be welcome additions to the arsenal of illustrative tools in the courtroom when construction disputes result in litigation. Conventional 2-D sketches and detailed construction documents can be confusing and boring to a panel of jurors. The impact of a realistic, three-dimensional illustration animated across time refreshes glazed eyes and sparks attention. Issues and conditions difficult to describe with words and flat diagrams are easy to grasp when they are easy to visualize.

Building a 4-D model is a relatively straightforward proposition. There are three primary components—a 3-D CAD model that can be exported in virtual-reality language format, a detailed Microsoft Project or Primavera construction schedule, and a 4-D interface program that correlates all of the data from the model with that of the schedule. The level of detail in the model can be customized to meet the needs of the project and the construction team. A large urban planning model might be composed of simple geometric solids while a significant historic renovation project might need to include ornamental detailing. Whatever the scale and level of detail, the model and schedule must be coordinated

to match tasks with physical items. Perhaps the trickiest task is analyzing the model and organizing its constituent parts so that the vast number of lines and planes that comprise the model are grouped into logical building components—slabs, walls, columns, windows, and so forth—that can be associated with line items in the schedule. Similarly, the project schedule must be massaged and revised so that every object in the building model is represented by a scheduled task.

Once the linking is complete, the user can view the proposed building sequence and the accrued construction cost at any moment in time. At this point, any anomalies in the scheduled sequence of tasks become much easier to identify. Building components that haven't been accounted for or are out of sequence in the schedule appear as free-floating objects. Little anachronisms that might be hard to spot among thousands of lines cascading down a complex schedule are revealed graphically.

All of this sophisticated vision comes with a price tag, of course, but according to its proponents, 4-D modeling is a good investment on most projects. Liston has overseen the development of scores of 4-D projects. She claims that virtually every model has paid for itself in savings on conflict catches and resolution, schedule refinement, and improved work flow. And while it is possible to spend hundreds of thousands of dollars on an elaborately detailed model, Liston and company have built working 4-D models from scratch for under $10,000. The cost of setting up shop in-house depends on what level of additional investment needs to be made. If you are already running CAD programs and MS Project or Primavera in-house, then the investment in software and training is relatively inexpensive.

Ongoing research at Stanford consistently demonstrates that 4-D models are excellent predictors of potential conflicts and delays. In a recent study, graduate students built a 4-D model of a completed project. They were given no information about the actual construction process, but their model accurately identified at least half of the conflicts that had occurred while building the project—conflicts that conventional constructability studies and schedule analysis had missed.

—Paul Kotapish ❖

Resources

To read more about 4-D modeling and applications, visit the Stanford research site online at www. stanford.edu/group/4D. The website includes case studies of 4-D models that can be viewed with common media players, research papers, news about developments in the field, and links to other research and application websites.

4-D Modeling Software and Services

There are at least a half-dozen businesses providing software and services for 4-D modeling, and most of them have websites that explain their services and offer guided tours of real-world applications of their products. The following list is a representative sample.

Common Point Technologies Inc.
www.commonpoint.com

Bentley Systems, Inc.
Bentley Schedule Simulator
www.bentley.com

Intergraph Corporation
SmartPlant Review
ppo.intergraph.com

Construction Systems Associates, Inc.
www.csaatl.com

VirtualSTEP
4D Project Navigator
www.virtualstep.com

Genisys Information Systems
Visual Project Manager
www.genisystems.com

BALFOUR Technologies
fourDviz
www.bal4.com

Visual Engineering
Visual Project Scheduling
www.visual-engineering.com

LYING ABOUT EXPECTED PROJECT COSTS, *PROBLEM OWNERS*, AND WHAT THIS IMPLIES FOR CONTRACTORS

In their article *Underestimating Costs in Public Projects, Error or Lie?* published in the Journal of American Planning Association, Vol. 68., No. 3, Summer 2002, Professors Flyvbjerg, Holm, and Buhl report on their cost estimating study of 258 transportation infrastructure projects representing different project types, geographical regions, and historical periods. The study finds with overwhelming statistical significance that cost estimates used by public owners to decide whether transportation infrastructure projects should be built are highly misleading. The study further reports that other types of public projects are at least as prone to cost underestimation. The study concludes that underestimation cannot be explained by error and is best explained by strategic misrepresentation; in other words, lying.

A public body that was misled regarding true project costs is likely to be a *problem owner,* in the sense that such an owner will purposefully (at the project staff level) or unintentionally (by the awarding body) frustrate the natural assumptions inherent in the underlying bargain reflected in the bid. This is especially true when all known contingencies and uncertainties have not been fully disclosed to the awarding authority at bid time.

Parties entering into a fixed price agreement for a construction project generally make the following assumptions:

- The plans and specifications are complete and adequate.
- The contract price and time are reasonable for the work to be performed.
- The contract fairly allocates the risk of loss consistent with the parties' understanding.
- The parties will cooperate in good faith to administer the claims procedure in a manner consistent with the contractual risk allocation.

An awarding body who was lied to about the ultimate costs, who was not informed of known shortcomings in the bid documents, or who was not informed of other risk factors, is likely to have unreasonable expectations about expected time extensions and ultimate project cost. At the same time, project staff that were complicit in deliberately underestimating project costs and hiding known contingencies from the awarding body, are more likely to be compromised in their ability or willingness to recognize appropriate changes. In other words, the fact that project costs were misrepresented during the development process increases the risk for contractors that attempts will be made to make them the scapegoat for increased costs. When the contractor is looked to as a scapegoat, a *problem owner* will frustrate the legitimate expectations of contractors by failing to own up to defective plans and specifications, by imposing unreasonable expectations regarding the project schedule, by denying legitimate requests for change orders, and by administering a claims procedure in a one-sided and oppressive manner, all in order to achieve results that are inconsistent with the agreed upon allocation of risk.

Failing to Provide Complete and Adequate Plans and Specifications: In a traditional design-bid-build project the owner warrants that the plans are complete and adequate for construction. *See, United States v. Spearin, 248 U.S. 132, 39 S. Ct. 59, 63 L. Ed. 166 (1918).* In determining its bid price, the contractor is necessarily constrained by the plans and specifications provided by the owner. Additional costs that may result from defects in the plans cannot readily be determined at the outset of construction. Moreover, even though it may on occasion be a mere legal fiction, the doctrine that the owner warrants the accuracy of plans and specifications, from a practical standpoint, means that a bidder who makes assumptions to the contrary will not likely be submitting the low bid.

An owner who solicits bids on incomplete or defective contract documents is a *problem owner* unless the owner has a clear-eyed understanding of the extra costs that will be incurred, and an adequate contingency to deal with these increased costs. This "if" presents a clear risk factor for prospective bidders. How this risk is evaluated with these increased costs depends on the owner's reputation and the contractor's knowledge and past experience with the owner and the architect, if any. The risk increases geometrically in light of the number of changes that are likely to be required, the magnitude of claims that may arise from defective or incomplete plans, and the extent to which the awarding body may have been misled regarding the expected final costs.

Having Unreasonable Expectations Regarding the Schedule: An unrealistic schedule presents an obvious risk factor. If an overly ambitious schedule can be recognized from the bid documents, the extraordinary resources required can be factored into the bid. The more difficult risk to assess, however, is when the anticipated schedule is extended due to claims arising from defective plans or unforeseen conditions. A *problem owner* does not own up to schedule delays resulting from defective plans or unforeseen conditions that are allocated to the owner by the agreement. If the owner was misled regarding the degree of risk, the owner is more likely to be a *problem owner* for the contractor during construction.

Unreasonable or One-Sided Contract Terms: The risk posed by one-sided and oppressive contract terms is not likely to be a problem with a commercially reasonable set of plans and no unforeseen conditions. A *problem owner,* therefore, is one who drafts and employs one-sided contract terms in order to defeat the legitimate expectations of the contractor to receive time extensions and additional compensation due to the impact of defective plans, owner changes, or unforeseen conditions allocated to the owner by the agreement. A one-sided contract should act as a red flag announcing: *problem owner.* Assessing the risk posed by one-sided contract terms depends upon the problems that are expected, and upon the owner's resolve to use oppressive technical provisions in order to alter the basic allocation of risk that is the traditional basis of such agreements. The fact that oppressive and one-sided contract terms may be administered by individuals who were complicit in misleading the awarding authority regarding the true costs of a project should be a matter of serious concern for contractors.

Uncooperative or Abusive Administration of Claims Procedure: Whereas unfavorable and one-sided contract terms can be assessed before a bid is submitted, it is less readily apparent how an owner will use such provisions if they prove to be unworkable. In order to assess this risk, the contractor will first draw upon his past experience with the owner, architect, and construction manager. The contractor should also attempt to obtain information regarding the reputation of the owner, the architect, the construction manager, and (not least) the lawyers representing the owner. An outside law firm may have drafted the onerous provisions—what is their reputation in a claims context? If the owner's construction budget reflects a dishonest assessment of the expected costs, the *problem owner* will have motivation to administer a claims procedure in an uncooperative and abusive manner that frustrates the legitimate expectations of the parties regarding increased construction costs.

CONCLUSION

The basic expectation of the parties in entering into a construction contract is that the owner will pay for any increased costs resulting from owner changes, as well as for modifications required due to inadequate plans and specifications. The fact that a public body awarding a construction contract may have been misled regarding the true costs of the work at different times during the development process should be consciously considered as an additional risk factor by contractors when deciding whether to bid on a project, what price to submit, and how to staff a project. An owner who embarks on a project with false expectations, then attempts to repudiate responsibility for increased costs or time resulting from defects in the design, or who uses onerous contract terms to actively frustrate the basic bargain between the parties is a *problem owner* who should be given a wide berth.

—Roland Nikles ❖

BR&H BREAKFAST FORUM welcomes

Ted Jacob, PE, CIPE

Principal-in-Charge, Ted Jacob Engineering Group, Inc.

Speaking on

Rebuilding Iraq

Date:	June 5, 2003
Time:	7:30 A.M. Continental Breakfast 8 A.M. Presentation
Location:	Clarion Suites, Lake Merritt Hotel 1800 Madison Street Oakland, California

BELL, ROSENBERG & HUGHES LLP is pleased to announce guest speaker **Ted Jacob**, PE, CIPE, of Ted Jacob Engineering Group, Inc. Mr. Jacob's engineering firm, with offices in Oakland and Pasadena, is the preeminent planning and design firm for hospital and laboratory projects in California.

Mr. Jacob, born in 1950 in Baghdad, Iraq, will speak on economic and construction opportunities in Iraq after the war, and will comment on the historical and cultural background of Iraq and the Middle East.

Mr. Jacob has actively supported medical supply donation programs to Iraqi medical facilities since sanctions began in the early 1990s.

We anticipate that this will be a very well-attended session, so PLEASE reserve your place early by contacting Sheila Garvey at skg@brhlaw.com or (510) 832-8585.

SB 800 — New Standards For Homes & New Protections For Builders

On September 20, 2002, Governor Gray Davis signed Senate Bill 800 which affects sales of new homes and condominiums on or after January 1, 2003, and will have a dramatic effect on the way that homeowners and builders resolve construction defect claims. SB 800 is intended to provide both homeowners and homebuilders the opportunity for a quick and fair resolution of claims. The new statutory scheme has three broad elements. First, it defines minimum standards for the construction of new homes. Second, it provides a detailed prelitigation repair and claim resolution process, and third, it defines a number of affirmative defenses for builders.

Functionality Standards

The primary provisions of SB 800 are included in new California Civil Code sections 895 to 945. Section 896 is the core of the new law. That section sets out 45 "functionality standards" or minimum standards that must be met by a newly constructed dwelling. These functionality standards are divided into seven categories including: water intrusion, structural, soils, fire protection, plumbing and sewer, electrical, and "other." Each standard gives a description of how that component of a home should work. For example, section 896(e) says: "With respect to plumbing and sewer issues: Plumbing and sewer systems shall be installed to operate properly and shall not materially impair the use of the structure by its inhabitants."

Many standards adopt a statute of limitation less than the current 10-year period. For example, an action for violation of the plumbing and sewer standard must be brought within four years after close of escrow. If there is no statute of limitation given for a given standard, the 10-year period applies. Thus, as under the current law, a homeowner cannot bring an action more than 10 years after the home is sold.

A builder may offer warranties that are greater than the functionality standards, but a builder cannot ask that a homeowner accept anything less. If a builder chooses to offer greater protection, it must inform the homeowner no later than the close of escrow.

In addition to the functionality standards, the new law requires a one-year warranty covering the fit and finish of cabinets, mirrors, flooring, interior and exterior walls, countertops, paint finishes, and trim.

Right-to-Repair and Prelitigation Claim Procedures

The other key provision of SB 800 is the requirement that the homeowner follow a formal claim procedure before filing a lawsuit. A builder must, at the time the sales agreement is signed, notify the homeowner whether the builder will rely on the statutory scheme or an alternate dispute resolution procedure. The homeowner must then follow the applicable procedure to insure that a builder has notice of any alleged defect, and that the builder has an opportunity to investigate and repair the defect before the homeowner files suit.

The statutory procedure sets forth short time frames for a builder to respond to a prelitigation claim. If the builder fails to timely comply, it loses the protections of the claim procedure, and the homeowner may proceed to sue. The builder is obligated to maintain and to provide to the homeowner on demand, the following information:

- copies of all relevant plans, specifications, grading plans, final soils reports, Department of Real Estate reports, and engineering calculations;
- builder's maintenance and preventative maintenance recommendations and specifications;
- all manufactured products maintenance and warranty information; and
- builder's express, limited warranty information.

The first step in the claims resolution process, which is designed to be completed within about six months after the homeowner first gives notice of a claim, is inspection and repair. During the process, the builder has the right to inspect the alleged defect, bring in subcontractors or insurance carriers to inspect, and offer a proposed repair or a cash settlement. The repair plan must include:

- All applicable damages;

Continued on next page

SB 800 — NEW STANDARDS FOR HOMES & NEW PROTECTIONS FOR BUILDERS

Continued from page 7

- A detailed statement of the repair and a time frame for the repair;
- Specific information relating to the contractors who will perform the work;
- Plans or technical documentation requested by the homeowner, if available;
- An advisory to the homeowner of his or her right to request up to three additional contractors from which the homeowner may select one to perform the repair; and
- An offer to mediate, prior to the repair, if the homeowner chooses.

If the homeowner elects mediation, the builder chooses and pays for the mediator, unless the homeowner wants input on the selection, in which case he or she must share the cost. The mediation is limited to four hours. If the mediation fails to resolve the dispute, the builder may still proceed with the repair. The builder cannot force the homeowner to execute a release in exchange or a repair, but the builder may insist on a release if the parties decide on a cash payment in lieu of the repair.

The homeowner can file suit only if the homeowner complies with the statutory claim procedure and is still dissatisfied—or if the builder fails to comply with the procedure.

Affirmative Defenses

While there are no new concepts in the affirmative defenses set forth in SB 800, the bill codifies some common law defenses, and lists those available in a single code section for easy access by builders and homeowners. The affirmative defenses are:

- Unforeseen act of nature;
- Homeowner's unreasonable failure to minimize or prevent damage;
- Homeowner's failure to follow maintenance recommendations or obligations;
- Homeowner alterations, ordinary wear and tear, misuse, abuse or neglect;
- Statute of limitation;
- A valid release from the homeowner; and
- Successful repair of the defect.

The most effective step a builder can take to enhance its rights under the affirmative defenses is to provide homeowners with comprehensive, detailed maintenance recommendations, including any provided by component or equipment manufacturers prior to sale. Most builders will need to scrutinize their existing maintenance recommendations to see if they are adequate.

Summary

SB 800 sets new standards for homebuilders and a new procedure for homeowner claims. Builders should obtain a copy of SB 800 and review the requirements in detail because the statute requires the builder to make a number of elections, and requires builders to give notice to homeowners of those elections and of the owner's rights under the new law at or before the close of escrow. In all cases, builders will need a copy of the new law to provide to their customers, and in most cases, they will need to amend their sales agreements. Builders may also wish to revise their subcontracts to require their subcontractors to comply with the functionality standards, and to participate in the prelitigation proceedings.

The full text of the bill is available on-line in the "Publications" section of our website, www.brhlaw.com.

EDITOR'S NOTE: One consequence of SB800 is that the rule announced in Aas v. Superior Court *(2002) 24 Cal.4th 627 that physical injury needs to be proven in order for an owner to recover for building defects, is now reversed in the area of residential construction. If a standard has been violated, there is liability regardless of the lack of property damage. Another important change in the law is the requirement that a homeowner give the builder the opportunity to inspect and repair prior to filing of a lawsuit. One common criticism of the law, however, is the vagueness of the functionality standards, e.g., "paint shall be properly applied" and "driveways, hardscape, sidewalks and patios shall not contain cracks that display significant vertical displacement or that are excessive." Future litigation over some of the standards is inevitable.*

— Cathy Fisher and Teresa Main ❖

THE SHRINKING NOTICE OF NONRESPONSIBILITY

The Participating Owner Doctrine has been a staple of real property law, allowing an owner to be held not responsible for a tenant's improvements. When property is subject to a lease, and the lessee orders work to be done on the leased premises without the lessor's knowledge, then the lien attaches only to the lessee's leasehold interest. Improvements constructed with the owner's knowledge, however, are deemed to be at the instance of the owner and the owner becomes a "participating owner"—unless the owner posts a Notice of Nonresponsibility.

Courts have traditionally interpreted the Notice of Nonresponsibility in the following way: if an owner "participates" through lease provisions by requiring the lessee to make improvements to the leasehold, then the owner cannot shield its property interest. *Lessor Liability for Mechanic's Liens Under the California Participating Owner Doctrine (1992) 24 Pacific L.J. 83, 97.* If the lessee's right to make improvements is merely optional, then the owner is not participating, and the Notice of Nonresponsibility protects the owner from liability.

A recent appellate court decision, however, limits the ability of an owner to shield itself from liability by posting a Notice of Nonresponsibility. In *Howard S. Wright Construction Company v. The Superior Court, 2003 Cal. App. LEXIS 230,* the Court ruled that an owner's Notice of Nonresponsibility did not shield it from liability. Howard S. Wright Construction Company had performed tenant improvement work for a telecommunications business, named "360networks," at a warehouse owned by BBIC Investors. 360networks went bankrupt, and Wright Construction attempted to foreclose its mechanic's lien on the property. BBIC contested Wright Construction's lien foreclosure and attempted to expunge the lien based on BBIC's posted Notice of Nonresponsibility.

The Court of Appeal disagreed with BBIC, overruled the lower court, which had expunged the lien, and remanded the case for further proceedings.

First, the Court found that the lease contemplated a 15-year term so that 360networks could operate a telecommunications business. By agreeing to lease to 360networks and its telecommunications business, BBIC stood to collect "enhanced rents."

Second, the Court ruled that the "fact that the lease did not require any particular improvements is not determinative—the question is whether the improvements were a practical necessity for the contemplated use of the premises." Here, the Court found that Wright Construction's work was necessary for 360networks to operate a telecommunications business. Taken together, these two findings by the Court of Appeal establish that Wright Construction's lien was probably valid, and that the trial court needed to hear additional evidence to make a final determination.

The Court's embrace, however, of an expansive definition of what a participating owner is—one who then benefits from enhanced rents from tenant improvements, and one who leases to a tenant who makes improvements that are a practical necessity of the contemplated use of the leased premises—appears to drastically reduce the ability of an owner to shield itself from mechanic's liens by posting a Notice of Nonresponsibility.

—Christian A. Carrillo ❖

AN UPDATE ON ARBITRATION CLAUSES IN EMPLOYMENT CONTRACTS

In 2001, we reported on *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, in which the California Supreme Court set forth a series of factors to be considered in determining whether an arbitration clause in an employment contract is enforceable. Since then, we have reported on a number of cases interpreting *Armendariz*. The most recent offering is *O'Hare v. Municipal Resource Consultants* (March 2003) 03 C.D.O.S. 2573.

In O'Hare, the Court of Appeal held that the arbitration clause in question was unenforceable because it violated several of the *Armendariz* guidelines, and was, therefore, procedurally and substantively unconscionable. First, the clause was substantively unconscionable because it lacked mutuality. Only the employee had to arbitrate—the employer had a choice. In addition, the clause required the parties to share the costs of arbitration. *Armendariz* specifically held that if arbitration is required, the employee cannot be required to pay any costs that he or she would not incur in litigation — such as the cost of arbitration. Finally, the clause prohibited any discovery. While the court did not make a final determination on that

COURT WATCH

INSURANCE

Improper manufacture of concrete piles constituted an "occurrence" for purposes of an insurance policy; Removal of the work of others caused by defective work of the insured is covered property damage

DeWitt, a subcontractor, installed concrete piles for the foundation of a large commercial project. The concrete, however, did not meet the standard required for strength, and DeWitt had to install an additional 300 piles in different locations. The owner filed a demand with DeWitt for $3.5 million, and DeWitt tendered its defense to the Travelers Insurance, its insurance carrier. Travelers declined to accept the tender.

The Court held that coverage was incorrectly denied, citing, among other things, that: (1) Improper manufacture of the concrete piles constituted an occurrence; and (2) The presence of the defective piles at the site is not insured "property damage" because under the faulty workmanship exclusions coverage is provided only for damage separate from the defective product itself—coverage does extend, however, to damage to the work of other subcontractors which had to be removed and destroyed. *DeWitt Construction Co., Inc. v. Charter Oak Fire Insurance Company v. Opus Northwest LLC*, 307 F.3d 1127 (9th Cir. 2002).

ALTERNATE BIDS

Use of Alternatives on Public Contracts

When a public agency selects alternates, the bidders shall be ranked from lowest to highest before the public agency is informed of the identities of any of the bidders or their proposed subcontractors or suppliers. (Public Contract Code §§ 10126, 10780.5, 20103.8 as amended by Statutes of 2002, Chapter 455, AB 138, January 1, 2003).

AN UPDATE ON ARBITRATION…

Continued from page 9

point, it expressed doubt as to whether the discovery rights accorded by the specified arbitration service (in this case AAA) were sufficient to overcome this deficiency.

The court also found that the arbitration clause in question was procedurally unconscionable. In contrast to substantive unconscionability, which focuses on the nature of the contractual provision in question, procedural unconscionability focuses on the circumstances surrounding the contract's making. As the court put it, "procedural unconscionability focuses on the oppressiveness of the stronger party's conduct." For a clause to be unenforceable, both procedural and substantive unconscionability must be present, but they are viewed on a sliding scale—if one is extreme, evidence of the other need not be strong.

In *O'Hare*, there was no evidence regarding the circumstances under which O'Hare signed the agreement, but the court found that the contract was clearly a boilerplate document given to all employees, and that there was no evidence of give and take or negotiation. That, coupled with the degree of substantive unconscionability that "[permeated] the contract," was sufficient for the arbitration clause to be unenforceable.

For a review of the *Armendariz* decision, visit our website at www.brhlaw.com and see the February 2001 edition of *News in Brief*.

—Teresa Main ❖

Firm Overview

Since its founding 30 years ago, Bell, Rosenberg & Hughes LLP has steadily developed a reputation for its successful involvement in complex and challenging cases. Bell, Rosenberg & Hughes LLP is a full-service law firm with expertise in both litigation and dispute resolution.

We serve a diverse group of clients ranging from small, local businesses to multinational corporations. Our practice benefits from the services of trial lawyers experienced in many areas of law, including construction, commercial litigation, environmental, trusts and estates, partnership and shareholder disputes, and insurance coverage. The firm's corporate and business practice offers services involving corporate and securities law, mergers and acquisitions, trusts and estates, real estate, environmental, and construction. The firm's specialized practice group serving the construction industry has achieved international recognition.

Our goal is to establish long-term relationships with clients who appreciate the four areas in which our firm excels: effectiveness, integrity, cost-efficiency, and personal service. ❖

For further information

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Join us for the next
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"Rebuilding Iraq"

Join us for the next

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Ted Jacob speaks on "Rebuilding Iraq"

June 5, 7:30 a.m.

See complete information on page 6.