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Construction Law Update

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Gordon & Rees' Construction Group is pleased to publish the latest issue of our Construction Law Update, a quarterly take on trends of interest to design professionals, contractors, and developers throughout the country.

Third Quarter 2022

By **Brittany T. Bihun**

Does a contractor's appearance at required, pre-construction meetings trigger a right to file a mechanic's lien if the project is halted by the owner shortly thereafter? Does the acquisition of specifically manufactured equipment trigger a right to file a lien against the property before it is delivered to the site? What about the performance of site clearing work? Each of these activities, common to modern, large construction projects, which involve preparatory and often required or necessary activities prior to beginning physical work on a construction project, do not fit squarely within the archaic wording of the South Carolina Mechanic's Lien statute, codified at S.C. Code Ann. § 29-5-10, *et seq*. (the "Statute"). Unfortunately, a lot of the available case law in the area is also very old, leaving contractors to seek out legal guidance in determining whether they may assert a lien right on an owner's property. Of course, there are also very strict procedural hurdles within which to assert a lien right, which are beyond the bounds of this article.

The Statute recognizes two types of rights to file mechanic's liens: (1) S.C. Code Ann. § 29-5-10(a) creates a lien right for a contractor who contracts directly with the owner; and (2) S.C. Code § 29-5-20 creates a lien right for a contractor who contracts with the general contractor (or someone other than the owner), which has been authorized by the owner.[1]

To read a full, expanded version of this article, **click here**.

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By **Shaun D. Loughlin**

2022 welcomes two new form agreements from the American Institute of Architects ("AIA") for owners utilizing two architects to complete design services on a project: "AIA Document B111–2022 Standard Form of Agreement Between Owner and Design Architect," and "AIA Document B112–2022 Standard Form of Agreement Between Owner and Architect of Record." Borne out of the popular "B103–2017 Standard Form of Agreement Between Owner and Architect for a Complex Project," these new form agreements more clearly delineate the roles and responsibilities between two architects separately responsible for the design development and construction phases of a project, respectively.

The AIA recommends utilizing B103 agreements on "large or complex" construction projects, in which the project owner retains its own scheduling and cost consultants, while the architect renders services in five, discrete phases: schematic design; design development; construction documents; procurement; and construction. Given recent increases in the desire to use multiple architects for projects of such magnitude, however, the AIA now offers forms B111 and B112 to delineate between a "Design Architect" (i.e., the architect responsible for developing a project's design intent, schematic design, and design development) and an "Architect of Record" (i.e., the architect responsible for developing construction documents and overseeing construction efforts). A majority of the owner's obligations in these agreements remain consistent with form B103.

To read a full, expanded version of this article, **click here**.

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By **Kimberly A. Blake**

As a follow up to our updated 50 State Legal Matrices for 2022 released in earlier this year, we bring you our 50 State Legal Matrices for Offer of Judgment Provisions and Material Breach/First to Breach Rules. Click on a chart title below to download.

(1) Offer of Judgment Provisions

An "Offer of Judgment," also known as an Offer of Settlement or Offer to Compromise, is a rule aimed at encouraging settlement and controlling unnecessary litigation. Rule 68 of Federal Rule of Civil Procedure applies to Offer of Judgment in Federal matters. This matrix discusses when a settlement offer is designated as an Offer of Judgment in a state civil litigation matter. When an Offer of Judgment is served, then later rejected and the final court decision is less than favorable than the offer made, the party rejecting the offer can be subject to certain penalties. These penalties include the opposing side's costs, and in some circumstances, these costs include the payment of attorney's fees and/or the services of expert witnesses. An Offer of Judgment is not applicable in divorce proceedings or child custody.

NOTE: *Unless otherwise provided in the Offer of Judgment Rule, the reference to costs are assumed to be taxable costs (filing costs, service of process costs, etc.) and those rendered at the court's discretion. The states that include different or additional costs, such as attorneys' fees and/or expert services, will be outlined in the Consequence of Non-Acceptance column.

(2) Material Breach/First to Breach Rules

The matrix provides insight into the general law of material breach for each state, including, the first to breach rule, nonpayment as material breach, and the prevention doctrine. A material breach of a contract is a breach that severely impairs the core of the contract, rendering the entire agreement unenforceable and, thus,

undermining the entire purpose of the contract. In this instance, the parties to the contract fail to acquire the benefit of the bargained-for exchange. If a material breach occurs, the non-breaching party can terminate the agreement and petition a court for damages caused by the breach. In deciding whether a breach of contract constitutes a "material" breach, courts often look to guidance from the Restatement (Second) of Contracts, as well as historical court decisions arising from various contract disputes.

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Boston Partner **Jay Gregory** and Associate **Shaun Loughlin** recently prevailed on a motion to dismiss pursuant to Massachusetts' anti-SLAPP statute (M.G.L. c. 231, § 59H), and also received an award of costs and fees incurred in defending the claim. The firm's client, in its capacity as an owner's project manager on a public construction project, wrote a letter to the mayor of the city where the project was located that critiqued a subcontractor's performance. The subcontractor, in turn, filed a defamation lawsuit. Gregory and Loughlin moved to dismiss the claim, arguing that it violated our client's right to petition the government. A Massachusetts Superior Court agreed, and also awarded our client fees and costs associated with filing the motion. Read more

Boston Associate **Stephen Orlando** recently obtained summary judgment on behalf of a design professional client. The plaintiffs alleged that his client provided negligent design services which caused more than $500,000 in damages. The court granted summary judgment as to all claims asserted within the Complaint, including the claim for an alleged violation of the Massachusetts Consumer Protection statute.

Las Vegas Partner **Robert Schumacher** has been named to *Nevada*

Business Magazine's 2022 list of "Top Rank Attorneys." Formerly known as "Legal Elite," this annual list represents the top talent in the legal industry in the State of Nevada. here.

Omaha Partner **Earl Greene**, for the second time in the past four years, authored a chapter titled, “Medical Malpractice and Risk Management,” in “Ballweg’s Physician Assistant: A Guide to Clinical Practice,” 7th ed., a textbook utilized by the Creighton University School of Medicine, Physician Assistant program. This textbook is also used nationally by many other Physician Assistant programs.

On June 15, 2022, New York Associate **Suleman Malik** served as a faculty panelist for the New York City Bar Association's Taking and Defending Depositions: Strategies & Techniques CLE webcast. The panel of skilled and diverse litigators discussed strategies and techniques for maximizing your effectiveness at preparing to take depositions, preparing to defend depositions, and conducting the examination.

On June 28, 2022, Louisville Partner **Angela Richie** and Of Counsel **Denise Motta**, presented a client webinar entitled, "Toto, We’re Not in Kansas Anymore: Best Practices for Supporting and Obtaining Payment of Change Orders." A link to the presentation can be found here.

On July 19, 2022, Louisville Senior Counsel **Chip Clay** presented a client webinar entitled, "Highway to the Danger Zone: 7 Tips for Managing Personal Injury Claims Arising from Construction Projects." A link to the presentation can be found here.

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The Gordon & Rees Construction Law Blog continues to post new content addressing topical issues affecting the construction industry throughout the country. From analysis of new court decisions, discussions of timely

legislation, and commentary on real-world, project-specific issues, Gordon & Rees' Construction Law Blog provides insight on the issues that affect the construction industry now.

We invite you to visit the blog at **www.grconstructionlawblog.com** and see for yourself what we are up to. If you like what you see, do not hesitate to subscribe under the "Stay Connected" tab on the right side of the blog. There you can choose how you would like to be informed of new content (Twitter, LinkedIn, email, etc.). If you have any questions about the blog or would like to discuss further any of its content, please do not hesitate to contact us.

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Gordon & Rees' Construction Group consists of more than 190 lawyers in offices nationwide. In 2019, the firm opened its 68th office, creating the world's first 50-state law firm. The full list of Gordon & Rees' offices and local contacts can be found **here**.

Gordon & Rees' construction attorneys focus their practice on the comprehensive range of legal service required by all participants in the construction industry – architects, engineers, design professionals, design joint ventures, owners, developers, property managers, general contractors, subcontractors, material suppliers, product manufacturers, lenders, investors, state agencies, municipalities, and other affiliated consultants and service providers.

We serve clients who design, develop, or build all types of structures, including commercial buildings, single and multifamily residential projects, industrial facilities, universities, hospitals, museums, observatories, amusement parks, hotels, shopping centers, high-rise urban complexes, jails, airports, bridges, dams, and power plants. We also have been involved in projects for tunnels, freeways, light rail, railway stations,

marinas, telecom systems, and earth-retention systems. Our experience includes private, public, and P3 construction projects.

If you have questions about this issue of the Construction Law Update or our nationwide construction practice, **click here** to visit our practice group page or contact partner **Daniel Evans**.

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