

Construction Law Update

APRIL 2023

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.

First Quarter 2023

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By **David M. Clarke**

The judicial logjam caused by the pandemic increased demand for alternative dispute resolution, with some studies showing as much as a 17% increase over pre-pandemic use. The pandemic has also given rise to, or at least increased the use of, new alternatives to traditional ADR. One such alternative, Early Dispute Resolution (EDR), was recently featured by the American Bar Association. It is a fast-tracked hybrid between mediation and arbitration – with a readily accessible set of rules and protocols – to facilitate resolution of complex commercial disputes at outcomes no different than resolution after full discovery and motion practice. EDR has not hit the radar of most construction professionals, and is not yet commonly employed by the attorneys advising them, but it is well suited for certain construction disputes.

A key concept of EDR is that the old model of contentious dispute resolution has given way to proactive ‘finesse rather than fight’ conflict resolution. The traditional model arose, in part, out of the notion that attorneys could not make an informed recommendation on the settlement value of a claim until they knew all of the facts – after full discovery and motion practice. This notion is rebutted by survey data on attorney confidence in forecasting the likely result at various stages of a dispute. The survey results from the EDR Institute indicated that attorneys who had met with their clients, reviewed some key documents, and met with a few key witnesses, only gain a marginal increase in confidence in their forecast (just 2%) when they went through full

discovery and motion practice. The survey also revealed that even after full discovery and motion practice the attorneys surveyed only expressed 64% confidence in their forecast. The survey reflects a reality that dispute resolution decisions must be made with less than full confidence no matter how much time, effort, and money is spent. This is also a reality that clients are comfortable with, as most business clients make decisions with limited but sufficient information on a regular basis. Clients have also given greater weight to the downsides of contentious litigation: negative publicity, consumption of client resources, distraction, and destruction of business relationships. If uncertainty is inescapable, if forecasting does not improve significantly with litigated and exhaustive discovery, and if clients are comfortable with resolution on limited but sufficient information, attorneys and clients should recognize the value in pursuing early dispute resolution often.

To read a full, expanded version of this article, [click here](#).

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The GRSM Legal Matrix Attorneys have released the 2023 edition of the 50 State Legal Matrices. The 50 State Legal Matrices are in chart format to be used as an easy reference source for your matters. Matrices included in the package are:

- Anti-Indemnity Statutes for 2023
- Architects/Engineers/Land Surveyors
Claim and Settlement Reporting Requirements for 2023
- Contractors Licensing & Contract Requirements for 2023
- Employment Record Subpoena Responses for 2023
- Insurance Carriers' Record Retention Requirements for 2023

- Licensing, Examination & Continuing Education Requirements for Independent Claims Adjusters for 2023
- Material Breach/First to Breach Rules for 2023
- Offer of Judgment Provisions for 2023
- Patient Record Subpoena Responses for 2023
- Right to Repair Laws for 2023
- Statutes of Limitations for 2023
- Statutes of Repose for 2023

You may view the full package [here](#).

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Gordon Rees Scully Mansukhani is pleased to announce the formation of its Surety Practice Group. The formation of the firm's Surety Practice group is consistent with Gordon & Rees' commitment to serving its existing surety clients while continuing to expand its national surety practice.

The Surety Practice Group attorneys have decades of experience representing sureties in all aspects of suretyship, from advising on underwriting-related issues, to evaluating and defending all types of surety bond claims, through the enforcement of the surety's collateral and indemnity rights. Gordon & Rees' Surety Practice group includes a team of 20 attorneys in the firm's offices across the United States.

The Surety Practice Group is led by Partner [Todd R. Regan](#), who focuses his practice in Connecticut, New York, and Massachusetts. He brings over 20 years of experience in representing sureties. As the only law firm with offices in all 50 states, Gordon & Rees is uniquely positioned to service the needs of its surety clients throughout the country.

Gordon & Rees' surety attorneys have significant experience in defending complex bond claims in arbitration, as well as in state and federal courts,

including claims concerning disputed change orders, project delays, and suspensions, lost productivity and inefficiency, wrongful termination, differing site conditions, defective work, and design errors and omissions. In addition, sureties often rely on the firm's attorneys to respond to threatened defaults and terminations by project owners and to negotiate complex project completion and takeover agreements.

Gordon & Rees' attorneys have particular expertise in defending sureties from extra-contractual claims, including bad faith claims, claims of unfair trade practices, and claims alleging violations of prompt payment acts and the requirements of the Federal Miller Act and state Little Miller Acts.

Our attorneys have also provided legal consultation to sureties regarding pre-litigation disputes, surety financing, setting reserves, claim preservation, perfecting security interests, and contract compliance on ongoing construction projects. Our attorneys are active participants, writers, and speakers in numerous surety industry organizations, such as the American Bar Association's TIPS Fidelity & Surety Law Committee, The Surety Claims Institute, and The National Association of Surety Bond Producers ("NASBP"), among others.

Please [click here](#) to view a listing of the Surety Practice Group's experience and successes.

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By **Shaun D. Loughlin**

Boston Partner, Jay S. Gregory, and Associate, Shaun D. Loughlin, recently obtained a favorable decision from the Massachusetts Appeals Court in a case that will further define the application of the Commonwealth's statute of repose to claims for contractual indemnification.

In *University of Massachusetts Building Association, et al. v. Adams Plumbing & Heating, Inc., et al.*, 102 Mass. App. Ct. 1107 (2023) (Mass. App. Ct. R. 23.0 Decision), the plaintiffs sued a Gordon & Rees client and seven other defendants, alleging negligence, breach of contract, and contractual indemnification stemming from alleged defects in the design and installation of a kitchen exhaust system. Gordon & Rees' client served as the plaintiffs' project manager, and pursuant to its contract with the plaintiffs, was required to indemnify the plaintiffs from and against any claims, losses, damages, etc., to the extent caused by the client's breach of contract or negligence.

The project achieved substantial completion and opened to the public for use in September 2014. The alleged exhaust system defects arose in 2018. The plaintiffs did not file their lawsuit until December 2020, or, more than six years after the project achieved substantial completion and opened to the public for use.

To read a full, expanded version of this article, [**click here**](#).

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By **Bennett J. Chin**

Northern Marianas Housing Corporation, et al. v. SSFM International, Inc.

Honolulu Partner, Bennett J. Chin, recently obtained a favorable decision in the Superior Court for the Commonwealth of the Northern Mariana Islands (CNMI) on the allocation of contribution claims between joint tortfeasors. In 2012, an arbitrator found in favor of a developer and homeowners in a construction defect claim for a housing development in Saipan but failed to allocate liability between the Gordon & Rees design professional client and the general contractor. The firm's client decided to settle with the developer and homeowners to avoid further liability and interest and paid the majority (two-thirds) of the settlement award. The general contractor eventually paid the remaining one-third of the arbitration award, plus interest. The firm's client pursued its contribution claim against the general contractor in litigation. Both sides argued that the other should pay the greater share of liability.

After a 2020 trial in Saipan, the CNMI Superior Court found in favor of the firm's client on virtually all issues. After a three year delay due to an unrelated appeal, the CNMI Superior Court recently issued its ruling on the apportionment of liability, finding 75% fault allocated to the general contractor and only 25% to the firm's client. The firm's client, having paid more than its fair share of the arbitration award, prevailed on its contribution claim, and was awarded a monetary judgment of \$2,273,053.03, plus interest (the original amount demanded was \$2,354,941.76).

The Superior Court summarily rejected an argument raised by the general contractor that the contribution claim was not tenable, simply because it did not extinguish all liability of the general contractor. Associate, Sabrina M. Kawana, drafted the winning brief urging the Superior Court to follow the modern trends and find

in accordance with public policy that promotes and incentivizes settlements of claims.

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Partner [Stephen J. Orlando](#) (Boston) obtained dismissal of a civil lawsuit, on the eve of trial, after convincing the trial judge to preclude any evidence of damages. The lawsuit involved two homeowners who claimed that Mr. Orlando's client negligently performed work at their home. During the final trial conference, Mr. Orlando argued that the plaintiffs could not prove that his client caused their damages — even if the plaintiffs proved that his client was negligent. The trial judge agreed with Mr. Orlando's argument and, based upon the plaintiffs' inability to prove causation, dismissed the lawsuit without a trial.

Partner [Christine Barker](#) recently settled a matter for our Paving Company client. We have had two other matters for this client and both went to trial because they are very aggressive on their recovery for their claims. This matter involved a delay claim on a school district project. The District continually came in with low ball offers. In response to a \$700,000 998, the District made an offer of \$350,000 with a letter justifying its position. Ms. Barker responded with a very detailed response undercutting the District's position and the District, with trial approaching, caved and paid \$663,000.

Senior Partner [Robert Schumacher](#) spoke on a panel at the Disaster Recovery Institute International (DRI) annual convention in Las Vegas, Nevada in January 2023. Mr. Schumacher shared strategies on dealing with insurance companies and defense cases. As an experienced

defense construction trial lawyer, he shared on dealing with Plaintiff's tactics which impact the resolution of cases, whether in settlement or by trial.

Partners [Denise Motta](#) and [Angela Richie](#) hosted a webinar, *"I'm Gonna Make Him an Offer He Can't Refuse," Lessons Learned From the Godfather, or in This Case the Code of Standard Practice*. This webinar looked at the new updates to the Code of Standard Practice. Watch a recording of the webinar [here](#).

Partner [Angela Richie](#) hosted *Back to the Future: How to Manage the Legal Risks Associated with BIM, Scanning Technology, and Smart Contracts*. This webinar looked at current and future technology for the steel industry from a legal perspective. You can view a recording of this webinar [here](#).

Partner [Scott Norman](#) hosted *You Can't Always Get What You Want – How to Get What You Need in Upstream Contracts*. The webinar looked at key strategies and best practices for the steel industry when negotiating upstream contracts to get what you need to mitigate liability and set yourself up for payment. You can view this webinar [here](#).

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Partners [Christine Barker](#) (Orange County) and [Meredith Thielbahr](#) (Boise) hosted *WIC Tuesday Talks: Women & Government Contracting: Understanding Your Opportunities & Knowing the Risks*. Ms. Barker and Ms.

Thielbahr discussed the opportunities for women-owned small businesses (WOSBs) to qualify and obtain Federal contracts. Topics included statistics of women federal contracting awards, how to certify as a WOSB, and qualify for those set-aside awards. They also discussed small business contracting requirements and potential challenges and protests to those awards, as well as addressing the False Claims Act and potential exposure in the small business contracting arena. A recording of that webinar can be viewed [here](#).

Additional past Women in Construction webinars can be viewed [here](#).

We invite you to join us at a future webinar!

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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**](http://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 200 lawyers in offices nationwide and is currently ranked No. 4 out of the Top 50 Construction Law Firms in the Nation, by *Construction Executive*.

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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