

Construction Law Update

JUNE 2020

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.

Second Quarter 2020

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By **Adam B. Linton**

Over the past twenty (20) years, plaintiff attorneys in Colorado have routinely asserted Colorado Consumer Protection Act (“CCPA”) claims in addition to the “standard” construction defect claims that are the foundation of CD lawsuits. This article sets forth the elements a plaintiff must establish under Colorado law to prevail on a CCPA claim and, in particular, focuses on the “Public Impact” requirement for CCPA claims in the context of a construction defect action.

OVERVIEW OF CCPA CLAIMS

When assessing the viability of a CCPA claim, it is important to understand the reason and purpose behind why the statute was enacted. The CCPA was enacted to prevent and, where appropriate, punish corporate businesses who commit deceptive practices in their dealing with the general public by providing remedies against business who commit consumer fraud. *People ex rel. Dunbar v. Gym of America, Inc.*, 177 Colo. 97, 112, 493 P.2d 660, 667 (1972); *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 146 (Colo. 2003). In sum, the CCPA was enacted to protect the public at large from businesses who use deceptive practices in the course of their business dealings with existing or potential consumers.

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

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By **Adam J. Hiller**

Do we advise our contractor clients to litigate or arbitrate? It is a question that is considered frequently in the construction context; however, with the COVID-19 pandemic and a “new normal” that is all but certain to develop, arbitration may become a preferred means to resolve disputes.

The general theme in Tennessee arbitration law (as well as federal law) is that courts will uphold the parties’ contractual agreement to arbitrate disputes. In fact, arbitration agreements are favored in Tennessee courts. *See Benton v. Vanderbilt University*, 137 S.W.3d 614, 617 (Tenn. 2004). In adherence with the Tennessee Arbitration Act, courts are required to construe an arbitration agreement as broadly as the words and intentions of the parties and will resolve any ambiguities in favor of arbitration. *Wachtel v. Shoney’s Inc.*, 803 S.W.2d 905, 908 (Tenn. Ct. App. 1991).

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By **Christine D. Barker** and **Alexander A. Loh**

As California continues to remain under a state wide Stay at Home order, construction projects have continued in many regions as California has designated construction staff as essential workers.

Construction in Orange County has been seen to be moving ahead, as the county has largely adopted the statewide direction, including designating construction as essential and exempting construction workers from the Stay at Home order. More information on essential jobs can be found [here](#).

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Seattle Partner **Ryan Foltz** and Senior Counsel **Petra Ambrose** recently obtained a full dismissal on summary judgment of all claims brought in a construction defect case against their client, a Washington-based general contractor. The Complaint for construction defects was filed in King County Superior Court by two Plaintiff homeowners with whom the general contractor had contracted for the construction of a custom single-family home in Seattle. The Motion for Summary Judgment was brought on the basis of a one-year contractual limitation clause, which provided that any complaint arising out of the contract must be filed within one year of occupancy. The homeowners, who had moved into the home in April of 2014, did not file suit until August of 2017. Foltz and Ambrose were able to successfully refute Plaintiffs' arguments that the discovery rule did not apply to delay accrual of the statute of limitations, and that equitable estoppel did not operate to toll or revive the time-barred Complaint. The Court granted the Motion for Summary Judgment in favor of the general contractor after the April 24, 2020 hearing, finding: (1) the discovery rule did not apply and that the one-year limitation period was reasonable and enforceable; (2) even if the discovery rule applied, there was no factual dispute that Plaintiffs had ample evidence of alleged defects within the one-year contractual limitation period; and (3) equitable tolling/estoppel did not apply because Plaintiffs had an expert report with alleged defects in their possession prior to expiration of the limitation period. This victory was

especially critical because Plaintiffs had also filed a Cross-Motion for Partial Summary Judgment to establish liability, as a matter of law, which was also argued on the same day. The Court denied Plaintiffs' Cross-Motion as moot. The Plaintiffs subsequently filed a Motion for Reconsideration with the Court, which the Court denied. Foltz and Ambrose have filed a Motion for an award of the general contractor's fees and costs based on a prevailing party provision in the contract, upon which the Court has not yet ruled.

Partner **Peter Strniste** recently obtained a very favorable arbitration award for a client following six days of hearings where he represented a trade contractor seeking compensation for extra work on a public construction project in the State of Connecticut. The trade contractor's scope of work included the removal of asbestos containing materials from a State Office Building as part of a substantial renovation project. Although the State originally characterized certain asbestos containing materials as construction debris that characterization later changed entitling the general contractor to payment of several million dollars in extra work. The general contractor rejected a similar change order request from the trade contractor concealing the State's approval of its change order. Following extensive briefing after hearings, the Arbitrator entered an Award in the client's favor on all counts rejecting the general contractor's counterclaims for damages arising from defective and incomplete work and project delays. In addition to awarding the client full compensation for the extra work the Arbitrator also awarded attorneys' fee, costs, statutory interest and assessed punitive damages against the general contractor for \$500,000.

The Louisville office obtained the following client victories:

- Partner **Angela Richie**, Of Counsel **Denise Motta** were successful on a motion to dismiss pursuant to Federal Rule 12(b)(6) in obtaining dismissal of multiple counts alleged against client in a breach of contract case alleging in excess of \$450,000, which resulted in voluntary dismissal of case with prejudice without any payment by client.
- **Richie** and **Motta** obtained a ruling following an evidentiary hearing

that a contract with a subcontractor was enforceable even though it was not signed, based on actions of the parties, resulting in dismissal and referral to arbitration pursuant to the contract's arbitration clause. The matter was appealed, but the subcontractor agreed to pay client \$15,000 on disputed claim and appeal was dismissed.

- **Richie, Motta**, Partner **Jean Terry**, and Associate **Chip Clay** obtained a favorable ruling denying a motion to compel in a very contentious case where the Owner served multiple sets of discovery, objected to the substance of the responses provided, and made unreasonable demands for a period of six months. The court agreed that the responses provided were in accordance with the requirements of the rule and ruled that no additional responses were necessary.
- **Motta** successfully advised a client regarding strategy for negotiating with replacement general contractor and the owner following termination of the original general contractor, resulting in full payment to client of amounts due under the subcontract.

Partner **Todd Regan** had an article published in the NASBP's Surety Bond Quarterly Spring 2020 Edition (4/21/2020) entitled, "The Benefits of Lien Prevention Bonds". The article can be found [here](#).

Partner **Peter Strniste** had an article published in Construction Business Owner magazine (3/10/2020) entitled, "Coronavirus: Who Will Bear the Risk & Cost for Construction Delays?" The article can be found [here](#).

On March 18, 2020, **Strniste** presented the webinar "The Ten Riskiest (and Most Negotiated) Construction Contract Terms" to over 200 members of the National Association of Surety Bond Producers. Strniste reviewed the ten riskiest and most negotiated contract terms within construction contracts between owners and contractors and between contractors and subcontractors. The attendees included construction surety bond underwriters, agent and claims adjusters throughout the United States. The presentation focused on how to spot the clauses within the contract and then dissect and discuss each contractual provision and the importance and associated nuances. Strniste also reviewed how these contract

provisions have been applied in real life settings, including how the risk of delays, substitutions and non-performance resulting from COVID-19 might be allocated or transferred.

On April 13, 2020, Boston Partner **Jay Gregory** gave a three hour, zoom seminar on “Trends in Dispute Resolution” to graduate students at the Boston Architectural College.

On May 11, 2020, Birmingham Senior Counsel **Stacy Moon** presented on Dealing with Owners and Employees in the Post Shutdown Construction Project to DRI’s Construction Law Committee.

On March 10, 2020, Louisville Partner **Angela Richie** and Of Counsel **Denise Motta** presented a client webinar entitled, "The Best Tool in Your Tool Belt: What You Need to Know About the AISC Code of Standard Practice and How You Can Use it to Your Benefit."

On April 1, 2020, **Richie** and Senior Counsel **Scott Norman** presented a client webinar entitled, "14 Contract Terms You Should Look for in Every Contract Before You Bid (Or Sign) so That You Can Avoid Saying "I've Got a Bad Feeling About This!"

On May 5, 2020, **Richie** and **Motta** presented a client webinar entitled, "Every Rose Has Its Thorn: It’s Time to Take Another Look at Your Subcontracts."

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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 150 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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