



MARCH 2013

Dear Readers,

Our Spring 2013 newsletter highlights recent legal developments affecting the design and construction industry, from ADA liability and greenwashing to builder's risk coverage and from donning and doffing to underground storage tanks. Please consult our News and Notes section for announcements on upcoming seminars, speaking engagements, and publications by our construction attorneys. As always, we encourage you to provide us with any news, information, or other feedback. For the latest information about our firm and the construction and surety industries generally, please visit our webpage at [www.rc.com](http://www.rc.com).

[Martin A. Onorato](#) and [Todd R. Regan](#)  
Editors

## Articles

### IS COMPLIANCE WITH FEDERAL DISABILITY LAW A NONDELEGABLE DUTY?

By [Keane E. Aures](#)

Contracts for architectural services often include indemnification provisions that permit owners to recover damages in the event of the architect's negligence. However, over the last ten years, a growing trend for U.S. District Courts is to nullify indemnification clauses where the damages were incurred as a result of violations of the Americans with Disabilities Act ("ADA") and/or the Fair Housing Amendments Act ("FHA"). While no specific language in those statutes prohibits indemnification between owner and architect, District Courts deciding this issue have ruled that the ADA and FHA do not permit an owner to seek indemnification from an architect against claims of noncompliance under either common law or contractual indemnification theories. This trend will likely concern owners who rely on professional expertise in designing projects that comply with the ADA and FHA.

Click here to read the full article, "[Is Compliance with Federal Disability Law a Nondelegable Duty?](#)"

### FAILURE IN INTERNAL COMMUNICATION FORCES GENERAL CONTRACTOR TO PAY TWICE

By [Jonathan R. Hausner](#)

In a somewhat surprising but thoroughly reasoned decision, the Massachusetts Supreme Judicial Court (SJC) has affirmed a Superior Court decision that resulted in Suffolk Construction (Suffolk) having to pay for the same work twice. In *Reading Co-Operative Bank v. Suffolk Construction Company, Inc.* (Mass. SJC, March 13, 2013), the Court found that where Suffolk was obligated to pay its subcontractor's bank directly (as the result of an assignment), but mistakenly continued to pay the subcontractor (the Subcontractor) directly, the outcome was governed by the Uniform Commercial Code rather than the common law.

Click here to read the full article, "[Failure in Internal Communication Forces General Contractor to Pay Twice.](#)"

### GREEN GUIDANCE FOR RETAILERS AVOIDING FTC CLAIMS OF UNFAIR OR DECEPTIVE MARKETING

By [Brian W. Blaesser](#) and [Kathleen M. Porter](#)

Shopping center owners and retailers, like other business owners, are concerned about the impact of their operations and products on the environment, a concern that is genuine but also motivated by a desire to differentiate their businesses in the competitive marketplace. As a result, shopping center owners and retailers promote their efforts to recycle and/or to reduce waste and energy usage, and appeal to environmentally conscious customers. But making broad unsubstantiated claims about environmental practices, commonly known as greenwashing can expose a company to liability for multiple damages and attorney fees under various federal and state laws, including the Lanham Act, the Federal Trade Commission Act (the "FTC Act"), and state consumer protection statutes.

Click here to read the full article, "[Green Guidance for Retailers Avoiding FTC Claims of Unfair or Deceptive Marketing.](#)" reprinted, with permission, from *Retail Law Strategist--The Problem-Solving Tool for Retail Law.*

### THE FAULTY WORKMANSHIP EXCLUSION - THE DISAPPEARING PRODUCT V. PROCESS DICHOTOMY

By [Gerald "Kip" P. Dwyer](#) and [J. Tyler Butts](#)

Builder's risk and other first-party coverages have traditionally excluded loss or damage caused by "faulty workmanship." A principal point of contention in litigation over this exclusion has been whether the exclusion applies to loss or damage

## Firm News & Notes

### ANNOUNCEMENTS

Senior associate [Robert M. Barrack](#) joined the firm on August 27, 2012.

The Connecticut Bar Foundation has elected Robinson & Cole lawyers [Dennis C. Cavanaugh](#), [Gregory R. Faulkner](#), [Christopher J. Hug](#), and [Brian R. Smith](#) as Fellows to the James W. Cooper Fellows Program. The program honors leaders in the legal profession and the judiciary in Connecticut. Membership in the Fellows is by invitation only. The program promotes a better understanding of the legal profession and the judicial system and explores ways to improve the profession and the administration of justice in Connecticut. The Fellows Program has approximately 850 to 900 members.

Robinson & Cole LLP was again recognized as having the highest number of attorneys in Connecticut selected by their peers for inclusion in *The Best Lawyers in America*® 2013 (© 2012 by Woodward/White, Inc., of Aiken, S.C.).

- [Dennis C. Cavanaugh](#) (Construction Law and Litigation)
- [Gregory R. Faulkner](#) (Construction Law and Litigation)
- [Christopher J. Hug](#) (Construction Litigation)
- [Dwight H. Merriam](#) (Land Use & Zoning Law and Litigation; Real Estate Law and Litigation)
- [Carla M. Moynihan](#) (Real Estate Law)
- [Martin A. Onorato](#) (Construction Law and Litigation)
- [Brian R. Smith](#) (Land Use & Zoning Law)
- [James A. Wade](#) (Construction Litigation)

Robinson & Cole congratulates its 2013 "Lawyers of the Year" designated by *The Best Lawyers in America*® (Copyright 2012 by Woodward/White, Inc., Aiken, SC).

- [Dennis C. Cavanaugh](#) (Hartford Litigation - Construction Lawyer of the Year)
- [Dwight H. Merriam](#) (Hartford Litigation - Land Use & Zoning Lawyer of the Year)

A total of 49 Robinson & Cole attorneys were named *Super Lawyers*® in Connecticut, Massachusetts, and Rhode Island for 2012.

### Super Lawyers

- [Dennis C. Cavanaugh](#) (Construction Litigation)
- [Frank F. Coulom, Jr.](#) (Business Litigation)

caused by a finished product (damage to a desk when a poorly made ceiling falls on it) or the process of workmanship (damage to a windowsill during the process of repairing the window), or to both. In light of recent decisional law, courts appear less inclined to draw a distinction between process and product as a way of limiting the reach of the "faulty workmanship" exclusion.

Click here to read the full article, "[The Faulty Workmanship Exclusion - The Disappearing Product v. Process Dichotomy](#)," reprinted, with permission, from the *Connecticut Law Tribune*.

#### **DONNING AND DOFFING: WHAT CONSTITUTES "CHANGING CLOTHES" COULD BE CHANGING**

By [Nicole A. Bernabo](#)

"Donning and doffing" is a term of art in the employment context. There has been considerable litigation under the Fair Labor Standards Act (FLSA) over the years regarding whether employers must pay employees for time spent putting on and taking off, that is, donning and doffing, various types of gear during the workday. On February 10, 2013, after passing on this issue several times, the United States Supreme Court decided to consider the question of what constitutes "changing clothes" within the meaning of the Fair Labor Standards Act in [Clifton Sandifer et al. v. U.S. Steel Corp.](#)

Click here to read the full blog post, "[Donning and Doffing: What Constitutes 'Changing Clothes' Could Be Changing.](#)"

#### **UNDERGROUND TANKS AT YOUR YARD IN CONNECTICUT? BEWARE OF APPROACHING DEADLINES FOR "FINANCIAL ASSURANCE"**

By [Brian C. Freeman](#)

More than a few construction companies in Connecticut have or used to have underground storage tanks (USTs) at their yards for their equipment fleet. Most of these USTs store gasoline or diesel; some store used oil or other materials that will present health or ecological risks if released to the environment. As many companies have learned, in a painful way, leaks or other releases from such USTs can be hard to detect and costly to clean up.

Click here to read the full article, "[Underground Tanks at Your Yard in Connecticut? Beware of Approaching Deadlines for 'Financial Assurance.'](#)"

#### **CONNECTICUT LOOSENS BONDING AND WITHHOLDING REQUIREMENTS FOR NONRESIDENT CONTRACTORS**

Connecticut recently overhauled its statutory provisions governing the sales tax obligations of nonresident contractors performing work in Connecticut. In the revisions, the state created a new classification - the "verified" nonresident contractor. To qualify for this new verified status, a nonresident contractor must register and file with the Department of Revenue Services (DRS) for verified status and must satisfy other criteria, including having timely filed and paid all applicable taxes. Recognition by the DRS as verified benefits the nonresident contractor by eliminating the following:

- The surety bond requirement for each project (Previously, the nonresident contractor was required to post a bond equal to five percent of the contract)
- Withholding by the property owner or general contractor (Previously, nonresident contractors were subject to withholding of up to five percent of the amount due)
- DRS audits with respect to the amounts posted as bond for each project

Robinson & Cole has extensive experience working with the DRS on nonresident contractor issues, from obtaining verified status to assisting contractors at the audit, administrative appellate, and litigation levels.

Please contact [Scott E. Sebastian](#) if we can assist you with any tax issues.



Robinson & Cole was the presenting sponsor of the 17th Annual Joint Dinner of the Design and Construction Industry. Governor Dannel Malloy was the keynote speaker at the dinner event, on Thursday, February 28, 2013, at the Aqua Turf Club in Plantsville, Connecticut.

- [Gregory R. Faulkner](#) (Construction Litigation)
- [Dwight H. Merriam](#) (Land Use/Zoning)
- [Carla M. Moynihan](#) (Real Estate)
- [Martin A. Onorato](#) (Construction Litigation)
- [Brian R. Smith](#) (Land Use/Zoning)

#### **Rising Stars**

- [Todd R. Regan](#) (Construction/Surety)
- [Peter E. Strniste, Jr.](#) (Construction Litigation)

#### **AT THE PODIUM**

Construction partner [Joseph A. Barra](#) was a panelist for a discussion about situations that can derail mediation, "Lies, Diversions and Other Obstacles to Productive Mediation," hosted by the Boston Bar Association on September 13, 2012.

[Dwight H. Merriam](#) of the LandLaw Section organized, moderated, and spoke at the Connecticut Bar Association's Sixth Annual Property Rights Seminar: Update on Eminent Domain and Regulatory Takings on November 16, 2012. His session was an "Update on National Property Rights Decisions." [Brian R. Smith](#) of the LandLaw Section also participated as a member of a panel on "Takings Claims in Land Use Disputes: An Update of Recent Decisions and Review of Issues for the Trial Lawyer."

Construction lawyers [Peter E. Strniste, Jr.](#) and [Todd R. Regan](#) presented at the full-day seminar "Construction Defect Litigation: From A to Z" in Hartford on February 5, 2013. The seminar was sponsored by the National Business Institute and attendees included in-house attorneys for construction management firms and municipal attorneys, among others.

On February 18, 2012, construction attorney [Gregory R. Faulkner](#) presented the ARCADIS Construction Claims Webinar "Tools of the Trade: Developing a Proper Schedule."

On March 12, 2013, [Jonathan R. Hausner](#) co-taught (with Maureen McDonough from Harvard University) at the Construction Administration Section of the New England Chapter of the Construction Management Association of America's class for aspiring Certified Construction Managers.

On March 13, 2013, [Jonathan R. Hausner](#) presented to the Boston Chapter of the Association for the Advancement of Cost Engineering on legal contracting and claims considerations in design-build projects.

Attorneys [Dennis C. Cavanaugh](#) and [Todd R. Regan](#) will speak at the 38th Annual Meeting of the Surety & Fidelity Claims Institute in Cambridge, Maryland, on June 28, 2013.

#### **IN THE PRESS**

The American Bar Association has published LandLaw Section lawyer [Dwight H. Merriam's](#) ninth book, *At the Cutting Edge 2012: Land Use Law from The Urban Lawyer*. This book, a valuable resource for practitioners, planning professionals, and students, is a compilation that includes the most up-to-date reports from *The Urban Lawyer*. Key topics include Second Amendment jurisprudence, the regulation of fracking, and condemnation law, among others.

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For more information, please contact [Dennis C. Cavanaugh](#), chair of the Construction Law Practice Group, in our Hartford office at [dcavanaugh@rc.com](mailto:dcavanaugh@rc.com).

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