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CONSTRUCTION UPDATE *Solutions*

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Dear Readers,

We are pleased to present you with our Winter 2011 issue of *Solutions*. It has been a challenging year for all of us in the construction industry and we wish all of you a happy and prosperous 2012.

The first article featured in this issue explores the effect of partial lien waivers on the priority of a contractor's or subcontractor's mechanic lien with a first date of work preceding the recordation of the bank's mortgage documents. We also explore a recent Connecticut Appellate Court case interpreting the State's Waiver of Sovereign Immunity in the context of construction contracts. Additionally, there is an article describing recent alterations to the standard ACORD Certificate of Insurance issued on most projects and the effects of this modification. Finally, this issue features an article outlining recent changes to the Connecticut Department of Revenue's treatment of nonresident contractors and an article summarizing a rule recently promulgated by the NLRB requiring employers to post notices of certain employee rights.

Our goal with each issue of *Solutions* is to keep you informed of legal developments surrounding the construction and surety industries. Please review our News and Notes section for announcements of upcoming seminars, speaking engagements, and publications by our construction attorneys. As always, we encourage you to provide us with any news, information, or other comments. For the latest information about our firm and the construction and surety industries in general, please be sure to visit www.rc.com.

[Peter E. Strniste Jr.](#)
Editor

ARTICLES

Connecticut Appellate Court Examines the Confines of State's Waiver of Sovereign Immunity in Public Works Contracts—*Paragon Construction Company v. Department of Public Works*

By [Alexandria E. Baez](#)

On July 19, 2011, the Connecticut Appellate Court held that sovereign immunity barred a general contractor's unjust enrichment claim for contested work. The court ruled that the general contractor's complaint plead facts sufficient to support a breach of contract claim against the State of Connecticut Department of Public Works (DPW) that fell within the statutory waiver of sovereign immunity under Conn. Gen. Stat. § 4-61(a).

The case arose out of the construction of a correctional facility in Cheshire, Connecticut. The project's general contractor, Paragon Construction Company (Paragon), filed suit against the DPW alleging that the State breached its contract with Paragon by failing to pay for certain "deleading" work and by causing construction delays that required Paragon to perform additional work. Paragon also alleged that the DPW was unjustly enriched as a consequence of its refusal to pay Paragon for the deleading work, the delay, and the alleged extra work.

Click here to read the full article, "[Connecticut Appellate Court Examines the Confines of State's Waiver of Sovereign Immunity in Public Works Contracts-Paragon Construction Company v. Department of Public Works.](#)"

Are You Covered? Change to ACORD Certificate of Insurance Form Affects Construction Stakeholders

By Jonathan R. Hausner

In September of 2009, the Association of Cooperative Operations Research and Development (ACORD), the insurance industry organization that issues many standard insurance forms, altered the ACORD 25 certificate of insurance. The ACORD 25 is familiar to most construction stakeholders because it identifies the various insurance coverage types (i.e., commercial general liability, auto, umbrella, and workers' compensation) and limits maintained by contractors. It is the industry standard certificate.

Click here to read the full article, "[Are You Covered? Change to ACORD Certificate of Insurance Form Affects Construction Stakeholders.](#)"

Mechanic's Lien First in Priority Despite Partial Lien Waivers

By [Keane E. Aures](#)

In *Wachovia Bank Nat'l Ass'n v. Superior Constr. Corp.*, 2011 N.C. App. LEXIS 1468 (N.C. Ct. App. July 19, 2011), the North Carolina Court of Appeals permitted a general contractor's mechanic's lien to take priority over a mortgage deed recorded after the general contractor's first day of work. This was despite the execution of partial releases where the general contractor waived its right to lien beyond the date on which the mortgage deed was recorded. In *Wachovia Bank*, Superior Construction entered into a contract with the property owner, Intracoastal Living, LLC, to construct certain improvements on real estate known as The Preserve at Oak Island in Oak Island, North Carolina. One of the more unusual aspects of this

case is that Intracoastal did not have the project financing in place until after Superior began its work. With each application for payment, Superior submitted executed partial lien waivers. The period covered by these partial lien waivers extended beyond the date on which the construction mortgage deed was recorded by the owner's lender.

Click here to read the full article, "[Mechanic's Lien First Priority Despite Partial Lien Waivers.](#)"

DRS Issues New Guidance for Nonresident Contractors in Connecticut

By [Scott E. Sebastian](#)

Public Act 2011-61, which became effective on October 1, 2011, made sweeping changes in the treatment of nonresident contractors working in Connecticut. The new standards significantly impact the relationship between general contractors, subcontractors, property owners, and property developers.

Under the prior law, nonresident contractors—those construction contractors who do not maintain permanent business offices in Connecticut—were required to post a bond with the Department of Revenue Services (DRS) in the amount of 5 percent of the contract price for each nonresidential construction contract to be performed in Connecticut. Under the former version of the law, any person who hired a nonresident contractor who did not post such a bond was required to withhold 5 percent from the contract price. Failure to comply under the previous regime rendered the contractor or property owner/developer liable for the contractor's Connecticut tax liability arising from the project.

Click here to read the full article, "[DRS Issues New Guidance for Nonresident Contractors in Connecticut.](#)"

The NLRB Publishes Final Rule Requiring Employers to Post Notices of Employee Rights

By [Nicole A. Bernabo](#)

Effective January 31, 2012, employers will be required to inform their employees about their rights under the National Labor Relations Act (NLRA, Act) by posting a conspicuous notice where other workplace notices are typically posted. The NLRA is the primary labor law governing relations between employees and employers in the private sector and guarantees the right of employees to organize and bargain collectively with their employers and to engage in other protected concerted activity, with or without a union, or to refrain from all such activity. The required notice lists employees' rights under the NLRA to form, join, and support a union and to bargain collectively with their employer; provides examples of unlawful employer and union conduct that interferes with those rights; and indicates how employees can contact the National Labor Relations Board (NLRB, Board), the federal agency that enforces these rights, to ask questions or to file complaints.

Click here to read the full article, "[The NLRB Publishes Final Rule Requiring Employers to Post Notices of Employee Rights.](#)"

FIRM NEWS & NOTES

Announcements

Robinson & Cole announces that in the latest *U.S. News—Best Lawyers®* 2011-2012 "Best Law Firms" rankings, our Construction Practice Group received top-tier national recognition in Construction Law and Litigation.



Robinson and Cole LLP is pleased to announce the election of construction attorneys [Peter E Strniste Jr.](#) to partner and [Todd R. Regan](#) to counsel. Promotions are effective January 1, 2012.

The Construction Group welcomes associate [Ryan M. Burns](#). He concentrates his practice in construction law, commercial litigation, and surety and fidelity law. Mr. Burns represents owners, contractors, subcontractors, suppliers, architects, engineers, and design-professionals in drafting and negotiating contracts as well as in litigation. Prior to joining Robinson & Cole, he was an associate in Rawle & Henderson's New York office.

A total of 52 Robinson & Cole attorneys were named *Super Lawyers®* in the states of Connecticut, Massachusetts, New York, and Rhode Island. The *Super Lawyers®* designation is based on regional balloting by attorneys, third-party research, and a peer review process encompassing myriad practice areas.

Recognized attorneys in the construction practice include [Dennis C. Cavanaugh](#), [Gregory R. Faulkner](#), [Martin A. Onorato](#), [Peter E. Strniste Jr.](#), and [Todd R. Regan](#).

Construction chair [Dennis C. Cavanaugh](#) was one of five Robinson & Cole attorneys named a "Lawyer of the Year" by *The Best Lawyers in America®* (Copyright 2011 by Woodward/White, Inc., Aiken, SC). Mr. Cavanaugh was named Hartford Construction Law Lawyer of the Year.

At the Podium

Construction partner [Gregory R. Faulkner](#) presented "Risk Transfer and Assignment Issues in Contracts: Indemnification and Liability Trends" at the 2011 Annual Conference of the National Association of College and University Attorneys (NACUA) in San Francisco, held from June 26 to 29, 2011. The program featured a discussion of common risk transfer provisions found in contracts and creative approaches to negotiating such clauses. Robinson & Cole was a silver sponsor of the conference, which drew over 1,000 attendees. NACUA, founded in 1960-1961, educates attorneys and administrators about campus legal issues and provides continuing legal education to university counsel.

Construction counsel [Peter E. Strniste Jr.](#) presented a paper and led a roundtable discussion at the Defense Research Institute's Fidelity and Surety Roundtable in Chicago, Illinois, on May 13, 2011. Mr. Strniste coauthored the paper with fellow construction attorney [Alexandra E. Baez](#). The paper is titled "A Nightmare on Main Street: Strategies for Resolving Subdivision Performance Bond and Maintenance Bond Disputes in Today's Post-Housing Bubble Crisis."

Construction partner [Joseph A. Barra](#) presented at the May 26, 2011, Massachusetts Continuing Legal Education seminar "Practical Cutting-Edge Tips and Trends for the Experienced Construction Lawyer" in Boston, Massachusetts. The seminar agenda covered updates on construction law developments and trends, including the hiring of counsel, public-private partnerships, and the new Massachusetts Prompt Payment Act.

In Print

Robinson & Cole ranked 84 on *The American Lawyer* magazine's 2011 pro bono annual report of the Am Law 200 firms. Rankings are based on the average number of pro bono hours per lawyer and the percentage of lawyers performing 20 or more hours of pro bono work in the previous year. Robinson & Cole lawyers averaged 44.1 hours of pro bono work per lawyer, with 39.8 percent of the firm's lawyers dedicating more than 20 hours to pro bono work in 2010.

The New England chapter of the Construction Management Association of America published an article written by construction partner [Joseph A. Barra](#) in the association's fall 2011 newsletter. The article, "Massachusetts Design Professionals Now File A Lien For Unpaid Design-Phase Services," covered a new amendment to the Massachusetts lien law.

LandLaw attorneys [Brian W. Blaesser](#) and [Gregory S. Sampson](#) have published an article entitled "Green Leasing for Retail: Landlord and Tenant Perspectives" in the *Retail Law Strategist* of the International Council of Shopping Centers. The article provides a practitioner's guide to negotiating and drafting "green leases" in commercial property transactions from the separate perspectives of the landlord and the tenant. The three-part article explains the problem of the "split incentive" in the typical commercial lease and how to "green" the lease through provisions that incorporate sustainability goals and requirements. Both Mr. Blaesser and Mr. Sampson are LEED Accredited Professionals.

Environmental partner [Pamela K. Elkow](#) coauthored the article "Creating a Results-Focused Sustainability Program for Your Business," published in the summer 2011 issue of the *Environmental, Energy, and Business Law Reporter*, a newsletter of the Environmental, Energy, and Natural Resource Law Committee of the American Bar Association's Business Law Section.

Of Note

Robinson & Cole was a program sponsor of the December 7, 2011, CCIA Annual Membership Meeting and Holiday Reception held at the Aqua Turf Club in Plantsville, Connecticut. The program was attended by over 400 members of the construction industry.

Robinson & Cole hosted a table at the Associated General Contractors (AGC) of Connecticut's Seventh Annual Industry Recognition Awards Dinner on the evening of October 13, 2011 at the Aqua Turf Club in Plantsville, Connecticut. The AGC honored nine professionals in Connecticut's commercial construction industry who exemplify exceptional leadership and character and who have exhibited a commitment to excellence and service and a determination to exceed expectations over the span of their careers. [Click here](#) for a photo from the event.

Real estate counsel [Kevin C. George](#) represented Brynwood Partners in the sale of its Bronx property, which had been home to the iconic cookie factory Stella D'oro from the 1930s through 2009. The roughly \$19 million sale has been highly publicized in local media and was featured in the *Wall Street Journal* article "From a Cookie Factory to a Shopping Center" on August 8, 2011, as it has the potential to transform the neighborhood.

Attorneys [Hiram B. Carey III](#) and [Danielle Andrews Long](#) successfully defended in Land Court an appeal of an approval of a subdivision by the Town of Berkley, Massachusetts. The abutter claimed that the developer did not have the right to use and improve a certain roadway as part of the subdivision plan. Representing the subdivision developer, and using recorded title documents, historical aerials and other extrinsic evidence, Robinson & Cole's attorneys proved the original grantor's intent to create an easement by implication in the roadway to benefit the property now owned by the developer. [Brian W. Blaesser](#), who obtained the subdivision approval for the developer in 2009, assisted at trial and on the post-trial brief.

Construction chair [Dennis C. Cavanaugh](#) was named president-elect of the national board of directors of the University of Connecticut Alumni Association for the 2010 to 2011 term. Mr. Cavanaugh's term as president of the association became effective June 2011.

The Connecticut Building Congress (CBC) elected construction attorney [Martin A. Onorato](#) president for the 2011-2012 term, which began on July 1, 2011. Mr. Onorato was most recently a member of the CBC's Industry Practice and Ways and Means Committees. CBC has been Connecticut's premier networking organization for construction industry firms, including owners, engineers, architects, attorneys, contractors, construction managers, subcontractors, and others for nearly 60 years.

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

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