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Construction and Public Contracts

by Shannon J. Briglia

I remember interviewing for jobs as a judicial law clerk and being told by one interviewer who was trying to encourage me to consider joining her firm, “Construction law is easy — it’s just contract law — offer, acceptance and consideration, so we don’t have to spend much time on the law, we get to focus on the facts, which are fascinating.” As my time in the construction industry has progressed, I often reflect, somewhat ruefully, upon those words. I have to agree that the facts are, frequently, fascinating, but the law applicable to the construction industry is not as easy as

that interviewer asserted. In fact, construction lawyers are often faced with complex, confusing legal issues arising out of applicable statutes and regulations or the intertwining contractual relationships necessary to construct buildings, roads, dams, and industrial facilities or civil works. The path is not always clear, yet our clients expect us to map out the best, most efficient and cost-effective route to resolution, whether that means drafting an “iron-clad” contract, brokering a settlement, or presenting the case to a decision maker.

The articles solicited and collected by the chair of our publications committee, Arnie Mason, in this edition of the *Virginia Lawyer* were written by members of the Construction Law and Public Contracts Section with the goal of educating and helping lawyers in Virginia find the best, most efficient and cost-effective route for our clients to reach their business goals. Each article contributes to the ongoing discourse on topics of interest to our section members, but they also provide interesting reading for lawyers who are not section members. Kristan B. Burch submits *The Effective Use of Jury Instructions in Construction Cases* which, although written from a construction law perspective, easily translates to any area of the law. She counsels developing jury instructions as a matter of first importance, using the instructions to frame the case, the pleadings, discovery, and even the motions practice as well as using the instructions in more traditional ways. By providing sources of model jury instructions, tips on preparing customized jury instructions, and insight on timing requirements, Kristan gives practitioners the practical assistance they need to successfully present any case to a jury.

Shiva S. Hamidinia tackles a more arcane area of construction law in her article, *The Fate of Cumulative Impact Claims on Public Works Contracts in Virginia*. She provides an excellent primer on cumulative impact claims, from their importance to their ubiquity in construction cases. Next, she discusses the limiting effect the Virginia Public Procurement Act may have on presentment of such claims and the somewhat novel approach recently taken by a federal judge in applying the act's notice requirements to a typical cumulative impact claim. Finally, she discusses the more liberal notice requirements applicable to cumulative impact claims in the federal arena, along with the dangers lurking within standard contract modification or change order language.

Rounding out the trio of articles, Melisa A. Roy analyzes another common, but esoteric construction law topic in her article *The Elusive Permissibility of Pass-Through Claims in Virginia*. Pass-through claims, referring to a subcontractor's claim for increased costs caused by the action (or inaction) of an owner, which are "passed-through" the prime contractor to the owner, have long been permitted on federal government contracts. They have a more inglorious history in Virginia. She discusses how such claims fared in the courts before and after a legislative amendment permitting pass-through claims on contracts with the Virginia Department of Transportation before turning her attention to

suggesting ways in which a pass-through claim might pass muster under other contracts.

The articles in this edition of *Virginia Lawyer* cover topics as diverse as the industry that we serve, and provide a sample of the many educational events and programs offered by the Construction Law and Public Contracts Section. Our section is one of the more active sections of the State Bar, with contributions provided from attorneys with all levels of experience. Along with our section's goal of publishing annually in *Virginia Lawyer*, we issue semi-annual newsletters containing articles, case summaries, and legislative updates. We also maintain and publish a Construction Law Handbook that identifies, indexes, and summarizes virtually every Virginia state and federal case having to do with construction law. On the programming front, our section's flagship is our two-day CLE program in early November of each year, where we gather for premier presentations and networking. This year our section will be teaming with the Local Government Law and Litigation sections to present a showcase CLE program at the VSB Annual Meeting in Virginia Beach. Assembling an elite panel to examine the actions of public servants in the wake of *U.S. v. McDonnell*, this program is sure to be a show-stopper.

In addition to these more formal publications and programs, our section sponsors a multitude of other CLEs, webinars, and networking events through the year and throughout the state. We encourage each of you to consider joining our section, or becoming more engaged in our section, as opportunities for involvement and contribution are abundant. Please contact me if you want to find out more about our section or its offerings.



Shannon J. Briglia is a founding member of the construction law firm of BrigliaMcLaughlin PLLC, where she concentrates her practice in the resolution of public and private construction disputes. With more than twenty-seven years of experience in the construction industry, she represents clients in federal and state court trials and appeals, arbitration, mediation, and before commissions and boards of contract appeal. An A.V. rated lawyer and the recipient of numerous professional accolades, she is also a frequent author and speaker on construction and surety issues. She is the chair of the board of governors of the Construction Law and Public Contract Section of the Virginia State Bar.