South Carolina Construction Law Update

July 2012 to August 2013

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Table of Contents

South Carolina Construction Law Update
Federal and State Court Decisions
July 2012 to August 2013

Scope Note

This update is a summary of important decisions addressing issues within the practice of construction law from South Carolina State Courts and Federal Courts from July 2012 to August 2013.

I. Arbitration

A. Prior Arbitration Agreement Superseded by Business Service Agreement

Where Plaintiff and Defendants entered into a business service agreement which provided for arbitration before the American Arbitration Association the parties were not allowed to arbitrate new claims under a previous arbitration agreement despite the fact that the parties entered into a consent order which stipulated that any new claims would be arbitrated based upon prior arbitration agreements from previous arbitration proceedings from 2010. Defendants filed a third party complaint and moved to compel arbitration after litigation had proceeded for two months. The district court held that Defendants did not waive their rights to arbitration and that the parties must arbitrate the new claims based on the terms within the business service agreement. Integramed Am. Inc. v. Patton, C.A. No.: 2012-cv-03566-PMD, 2013 WL 1768694 (D.S.C. April 24, 2013).

B. Developer Did Not Waive Rights to Arbitration by Raising Issue at Outset of Case

In September 2008 Owner's filed suit against Developer alleging construction defects with the siding of their home. In May 2010 Developer moved to compel arbitration and the trial court denied Owner's motion holding that Owner's had waived their rights due to the delay in making the motion. On appeal the Court of Appeals held that Developer had not waived its rights to arbitration because neither party had engaged in any discovery prior to the motion, Owner's would not be prejudiced by the motion and the fact that Developer had raised the issue of arbitration at the outset of the case. The court also stressed the fact that the delay was primarily related to the trial court's decision to address an issue with regard to the Right to Cure Act first, and not because of any actions or delays by the Developer. Carlson v. S.C. State Plastering, LLC, 743 S.E.2d 868 (Ct.App. 2013).

C. Contractor's Arbitration Award Vacated Due to Contractor's Failure to Possess Required License

General Contractor built home for Owner where the contract price was in excess of $800,000 but General Contractor only possessed a Group II license limiting it to undertaking construction projects of $100,000 or less. A dispute ensued amongst the parties which resulted in General Contractor filing a mechanic's lien against the property. Owner's moved to stay the case pursuant to an arbitration clause within the contract which the trial court granted. Owner's subsequently moved to dismiss the arbitration pursuant to S.C. Code Ann. § 40-11-370(C), arguing because the General Contractor

failed to possess the required license for the project, he should be denied the right to bring an action at law or equity to enforce the contract. The arbitrator found in favor of General Contractor and awarded damages and attorney's fees. The trial court and court of appeals affirmed the arbitrator's decision and Owner petitioned the South Carolina Supreme Court for a writ of certiorari. The Court granted Owner's petition and reversed the arbitrator's award under S.C. Code Ann. § 40-11-370(C) holding that the arbitrator manifestly disregarded the law because General Contractor failed to possess the required license for the project. C-Sculptures, LLC v. Brown, 742 S.E.2d 359 (2013).

D. Funds Provided in a Foreign Source Transaction Sufficient to Implicate the FAA

Buyer purchased a used car and executed a buyer's order which contained an agreement to arbitrate and a retail installment sale contract which provided an integration clause. Buyer returned the car without having made payment on the loan and Financing Company attempted to collect the outstanding debt. Buyer filed a putative class action in state court and alleged violations of Maryland consumer protection laws. Financing Company removed the case to federal court, the parties entered into discovery and Financing Company moved to compel arbitration and stay the proceedings and claimed that uncertainty in the law regarding whether the case would be forced into class arbitration had caused the delay. The district court denied Financing Company's motion and found that it had waived its right to arbitration by an unjustified delay because the transaction was purely intrastate in nature and due to the fact that it had engaged in discovery. The Fourth Circuit reversed the decision of the district court and held that Financing Company's reliance on funds from a foreign source in a transaction was sufficient to implicate the Federal Arbitration Act. Rota-McLarty v. Santander Consumer USA, 700 F.3d 690 (4th Cir. 2012).

E. Arbitration Clause Incorporated Within Terms of Performance Bond Enforceable

Grading and drainage Subcontractor defaulted on a state DOT project. Subcontractor was required to obtain a payment and performance bond under the terms of the subcontract. The performance bond provided that the subcontract was incorporated by reference. General Contractor declared Subcontractor in default and both parties subsequently entered into negotiations to remedy the default and executed a change order to the subcontract which modified Subcontractor's obligations under the subcontract. Soon after executing the change order General Contractor declared Subcontractor in default under the new terms of the change order. General Contractor notified Subcontractor's surety of the default and demanded payment under the terms of Subcontractor's performance bond. Surety filed a declaratory judgment action in district court alleging that it wasn't liable under the performance bond because the change order had materially altered "the financial obligations under the subcontract" in the event of Subcontractor's default. General Contractor filed a motion to dismiss or stay the proceedings pending arbitration arguing that because the performance bond incorporated the terms of the subcontract, which had an arbitration clause, General Contractor was entitled to submit its claims to arbitration. The district court denied the motion ruling that Surety's claims were unique to the Surety, and therefore, outside the ambit of the arbitration clause.

The Fourth Circuit vacated the district court's ruling and remanded the case. Citing Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88 (4th Cir. 1996), the court noted that Surety's claims bore "a significant relationship" to the subcontract which subjected the Surety's claims to arbitration under the terms of the subcontract. Great Am. Ins. Co. v. Hinkle Contracting Corp., 497 Fed.Appx. 348 (4th Cir. 2012).

F. Class Action Waiver and Fee Splitting Provisions Upheld Within Arbitration Agreement

Employee filed putative class action suit against Employer based on the franchise agreement he signed as part of his employment alleging violations of the Fair Labor Standards Act and Maryland state law claims. Employee argued that he was induced to sign the agreement which improperly classified him as an independent contractor rather than an employee which afforded him less compensation. Employer moved to dismiss Employee's complaint or to compel arbitration. The district court held that Employee's claims were within the scope of the arbitration clause because the claims arose out of the franchise agreement, however the district court found the arbitration clause to be unenforceable based on three provisions it deemed were unconscionable: (1) the fee splitting provision, (2) the class action waiver, and (3) the one-year limitation provision.

On appeal the Fourth Circuit vacated and remanded the district court's findings with respect to the unconscionability of all three provisions within the franchise agreement. In addressing the class action waiver provision the court relied on the 2011 U.S. Supreme Court decision of AT&T Mobility, LLC v. Concepcion, 131 S.Ct. 1740 (2012) which held that the Federal Arbitration Act preempted California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts. Thus, the court held that Employee's claims fell within the scope of the arbitration clause. In addressing the unconscionability of the fee-splitting provision the court held that Employee failed to meet his burden of proving his substantial burden of showing prohibitive costs. See Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 121 S.Ct. 513 (2000). In its analysis of the one year limitations provision the court noted that this provision applied to the entire franchise agreement as a whole and not specifically to the arbitration clause, which presented an issue that would be decided by the arbitrator. Muriithi v. Shuttle Express, Inc., 712 F.3d 173 (4th Cir. 2013).

G. Arbitration Clause Unconscionable Within Home Purchase Agreement

Purchasers bought a home from Home Builder. The purchase agreement included a "Warranties and Dispute Resolution" (WDR) section which contained a warranty from Residential Warranty Corporation (RWC), which appeared to be the only warranty made by Home Builder, except for those warranties which could not be disclaimed by law. The remainder of the WDR section provided that Home Builder comply with all of RWC's enrollment procedures and Home Builder's good standing within the RWC program. The rest of the WDR section appeared to disclaim all other warranties, express or implied, regarding quality, fitness for a particular purpose, merchantability and habitability. The remainder of the WDR section also provided that all RWC warranty disputes were subject to arbitration and also included a limitation of liability clause. The arbitration section contained within the WDR section provided that Purchaser and Home Builder agreed to arbitrate any claims arising out of Homebuilder's construction of the home, Homebuilders performance under any punch list or inspection agreement, Homebuilders

performance under any warranty and any other matters which Purchaser and Homebuilder agreed to arbitrate.

Purchasers brought claims against Home Builder alleging negligence, breach of contract, breach of warranties and unfair trade practices. Homebuilder moved to compel arbitration. The trial court denied Homebuilder's motion to compel arbitration finding "that the arbitration provision was unconscionable, the purchase agreement was merged into the deed, which did not contain an arbitration provision; and the arbitration provision failed to meet the SCUAA." On appeal, the Court of Appeals affirmed the trial court holding that there was a "lack of mutuality of remedy" due to the limitation of liability clause which "purported to exempt [Homebuilder] from liability for monetary damages. On appeal Homebuilder also argued that the arbitration clause was severable from the agreement not making it unconscionable. The court disagreed with Homebuilder's severability argument emphasizing "[Homebuiler's] attempt to waive any seller from liability for monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages." Smith v. D.R. Horton, Inc., 403 S.C. 10, 742 S.E.2d 37 (Ct.App. 2013).

H. FAA Preempts State Law and Choice of Forum Clause

Customers brought putative class action against Internet Service Provider (ISP) alleging violations of Montana state law for invasion of privacy and trespass to chattels related to the ISP's advertising they received while using ISP's service. Customers also alleged violations of the Federal Electronic Communications Privacy Act and the Federal Computer Fraud and Abuse Act. The service subscriber agreement provided to all of ISP's customers had a choice of law clause, specifying New York law applied, and an arbitration clause. ISP filed a motion to compel arbitration. The district court did not enforce either clause holding that the arbitration clause did not satisfy the requirements of Montana reasonable expectations/fundamental rights rule which requires arbitration agreements to be within a party's reasonable expectations because the agreement "amounted to an unknowing waiver of the fundamental constitutional rights to trial by jury and access to courts." The district court also held that the clause was not preempted by the FAA, supporting the application of Montana law as opposed to New York law.

On appeal the Ninth Circuit Court of Appeals held that the Federal Arbitration Act preempted Montana's "reasonable expectations/fundamental rights rule" and "that the district court erred in not applying New York law because a state's preempted public policy is an impermissible basis on which to reject the parties' choice-of-law selection." In its holding the court stated that the Montana reasonable expectations/fundamental rights rule was preempted by the U.S. Supreme Court's decision in AT&T Mobility, LLC v. Concepcion, 131 S.Ct. 1740 (2012) (holding that the FAA preempted California state law invalidating class arbitration waiver agreements in consumer contracts) because "it disproportionately applies to arbitration agreements, invalidating them at a higher rate than other contract provisions." As to the choice of law provision the court stated that because the FAA preempted Montana's reasonable expectations/fundamental rights rule, the same Montana law could not allow for the basis of rejecting the applicability of the choice of law provision. The court vacated the district court's denial of ISP's motion to compel arbitration and remanded the case to the district court with instructions to apply New York law to the agreement. Mortensen v. Bresnan Communications, LLC, 2013 WL 3491415 (9th Cir. July 15, 2013).

I. Employee's Tort Claims Within Scope of Arbitration Clause

Employee and Bank entered into an employment agreement which contained an arbitration provision which stated: "Except matters contemplated by Section 17 below [Applicable Law and Choice of Forum], any controversy or claim arising out of relating to this contract, or the breach thereof, shall be settled by binding arbitration …" Employee sent a letter to his boss which "recognize[ed] his constructive termination" due to his boss' alleged demeaning behavior, verbal abuse, withholding of information related to the Bank's recapitalization and exclusion of Employee's role on the Bank's board of directors. Employee subsequently filed an action against Bank alleging breach of contract/constructive termination, slander/slander per se, intentional infliction of emotional distress, illegal proxy solicitation and wrongful expulsion as a director. The Bank moved to compel arbitration pursuant to the employment agreement and the trial court only granted Bank's motion as to Employee's breach of contract/constructive termination cause of action but denied Bank's motion as to Employee's remaining causes of action holding that there was not a significant relationship between the claims and the employment agreement. The trial court also held that the other claims were not foreseeable at the time the parties entered into the employment agreement.

On appeal, the South Carolina Supreme Court held that Employee's remaining four causes of action were all subject to the arbitration clause. Specifically, in regards to Employee's tort claims for slander and intentional infliction of emotional distress the Court held that "[t]he perceived inability to perform one's job certainly relates to an employment contract." As to Employee's claim regarding illegal proxy solicitation the Court held that Employee's pleadings linked this claim to "his wrongful termination and the resulting breach of the [employment agreement]" making it within the scope of the arbitration agreement. Finally, in addressing Employee's wrongful expulsion as a director claim, the Court held that this cause of action also bore a significant relationship to his employment agreement due to Employee's own admission that "the breach of the [employment agreement] resulted in his expulsion as a director." The Court also stressed that the reasoning for its holding was strongly influenced by the "the strong policy favoring arbitration, the nature of the [employment agreement] and [Employee's] underlying factual allegations" and the fact that Employee "pled himself into a corner with respect to each of his claims." Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 739 S.E.2d 209 (2013).

J. Physician Equitably Estopped from Avoiding Arbitration Agreement

Physician was hired by Hospital as an independent contractor for three months in the summer of 2007. Physician also entered into a contract with a physician's staffing agency (Agency) which specialized in the placement of medical professionals. Hospital also entered into a contract with Agency for the placement of medical professionals. Both contracts contained an arbitration clause which stated that "[a]ny controversy or claim arising out of or relating to the interpretation, enforcement or breach of this [a]greement or the relationship between the parties hereto shall be resolved by binding arbitration in accordance with the Commercial Arbitration Rules for the American Arbitration Association …" Physician's employment with Hospital was terminated after he was the anesthesiologist on call during a delivery of twins which resulted in complications. Physician filed an action against Hospital and Agency alleging retaliatory discharge, defamation, breach of contract and relief under the South Carolina Payment of Wages Act. Hospital and Agency subsequently filed motions to compel arbitration.

The trial court granted Agency's motion but denied Hospitals, ruling that the contract between Physician and Hospital "was a general one, not specific to [Physician] and predated the contract between [Agency] and [Physician]."

On appeal the Court of Appeals reversed the trial court's findings as to the Hospital's motion to compel arbitration, applying the doctrine of equitable estoppel the court held that even though Physician was a nonsignatory to the contract between Agency and Hospital he received a benefit from this contract, which also subjected him to the arbitration agreement. Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597 (Ct.App. 2012).

K. Fourth Circuit Holds McCarran-Ferguson Act Doesn't Apply to South Carolina Law Invalidating Arbitration Agreements in Insurance Policies

South Carolina based welding material Manufacturer was named in various product liability suits in numerous jurisdictions. Manufacturer's Insurer refused to defend and indemnify Manufacturer in the products liability suits so Manufacturer brought an action against Insurer in South Carolina state court. Insurer removed the case to federal court. Manufacturer argued that the district court did not have jurisdiction over the suit pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1], 21 U.S.T. 2517 ("the Convention") which implemented the Convention Act[2] within the FAA making the Convention "judicially enforceable only as incorporated into the act" and that the McCarran-Ferguson Act, which provides for reverse preemption of federal laws by state laws enacted for the regulation of insurance reverse preempted the Convention Act. Insurer argued that the district court didn't have personal jurisdiction over it due to insufficient minimum contacts since Insurer's policies were negotiated and drafted in Sweden. The district court enforced the arbitration agreements within the products liability claims falling under Insurer's policies which were issued from 1989-1993 but remanded the nonarbitrable claims arising under Insurer's 1994-1995 policies to state court.

On appeal the Fourth Circuit upheld the decision of the district court holding that the district court had original jurisdiction to compel arbitration under the 1989-1993 policies and that the McCarran-Ferguson act did not apply because it only applies to domestic affairs. Furthermore, the court held that the district court did not abuse its discretion in remanding the nonarbitrable claims to state court holding that the district court only had supplemental/pendant jurisdiction over these claims. ESAB Group, Inc. v. Zurich Ins. PLC, 685 F.3d 376 (4th Cir. 2012).

L. Optional Life Insurance in Automobile Lease Subject to FAA

Wife executed a lease agreement with vehicle Dealer. The lease agreement included an arbitration agreement, as well as an option for Wife to purchase credit life insurance coverage with Insurer in conjunction with the lease agreement. When Wife's husband died, Wife sought to collect the proceeds from the life insurance policy. However, Dealer had failed to pay the premiums to Insurer, and Insurer denied benefits to Wife. Wife

[1] The Convention obligates signatories to recognize and enforce written agreements to submit disputes to foreign arbitration and enforce arbitral awards in foreign nations.

[2] The Convention Act falls within chapter 2 of the FAA and grants federal district courts original jurisdiction over actions falling under the Convention and allows for removal from state court to federal district court.

subsequently sued Dealer, alleging breach of fiduciary duty, breach of contract, breach of contract accompanied by a fraudulent act, and a violation of the SCUTPA. The circuit court granted Dealer's motion to compel arbitration, and the arbitrator awarded damages to Wife.

Wife appealed the arbitrator's award, arguing that her claims were not subject to arbitration because the Federal Arbitration Act does not apply to insurance contracts in South Carolina. Section 15–48–10(b)(4) of the South Carolina Code (Supp. 2012) provides that a written agreement to arbitrate shall not apply to "any claim arising out of personal injury, based on contract or tort, or to any insured or beneficiary under any insurance policy or annuity contract." The Court of Appeals determined that Wife's claim did not arise from an insurance contract, but rather, a provision in an automobile lease, and section 15–48–10(b)(4) would not apply. Wife's selection of optional insurance through the lease did not create a separate, binding insurance contract, but instead arose out of the original lease. The court ruled that the FAA governed the lease and affirmed the trial court. Walden v. Harrelson Nissan, Inc., 399 S.C. 205, 731 S.E.2d 324 (Ct.App. 2012).

M. Sale of Home Involves Intrastate, not Interstate, Commerce

Homeowner and Contractor entered into a Home Purchase Agreement, where Contractor was designated as the seller, rather than as the contractor for the construction of the house. After discovering numerous construction defects in the house, Homeowner filed an action against Contractor, alleging fraud, negligence, and breach of implied warranty. Contractor argued that the trial court did not have jurisdiction to hear the case because the Agreement contained an arbitration agreement, which stated:

> Mandatory Binding Arbitration. Purchaser and Seller each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of Seller's construction of the home, (2) Seller's performance under any Punch List or Inspection Agreement, (3) Seller's performance under any warranty contained in this Agreement or otherwise, and (4) any matters as to which Purchaser and Seller agree to arbitrate.

Contractor alternatively argued that even if the arbitration provision did not comply with the South Carolina Uniform Arbitration Act, it was still compliant with the FAA because it involved interstate commerce. Specifically, the Agreement required Homeowner to purchase a warranty for the home, and that any claims under that warranty would be submitted to a Georgia company. Further, the home was financed with a North Carolina bank, and building materials and suppliers came from out of state. The trial court ultimately held that the Agreement was not subject to the FAA because there was insufficient evidence to show that the sale of the home involved interstate commerce. The Court of Appeals affirmed, and Contractor appealed to the South Carolina Supreme Court.

The South Carolina Supreme Court first determined that the FAA would preempt any application of the state UAA, but only if interstate commerce was involved. As this was a

novel question for the Court, it looked to the Western District of Kentucky for guidance, which had stated that "a residential real estate sales contract does not evidence or involve interstate commerce." See Saneii v. Robards, 289 F.Supp.2d 860 (W.D. Ky. 2003). The Court applied the Kentucky rule holding that neither the national warranty, out-of-state supplier and subcontractors, nor out-of-state financiers converted the transaction into one of interstate commerce. The Court ruled the FAA did not apply and affirmed the trial court's denial of Contractor's motion to stay the proceedings and compel arbitration. Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 730 S.E.2d 312 (2012).

N. Parties' Consent Authorizes Class Arbitration Within the FAA

Physician filed class action against Insurance Company on behalf of himself and proposed class of New Jersey Physicians which had fee for services contracts agreements with Insurance Company for in network medical coverage. Class alleged that Insurance Company failed to make full and prompt payment to the physicians and was in violation of their contracts and state law. Insurance Company moved to compel arbitration and the state court granted the motion. The parties agreed that the arbitrator should make the decision on whether their contract provided for class arbitration and the arbitrator decided that it did. Insurer filed a motion in federal court to vacate the arbitrator's decision arguing that he had "exceeded his powers under § 10(a)(4) of the FAA." The district court denied the motion and the Third Circuit Court of Appeals affirmed.

On appeal, the U.S. Supreme Court affirmed the decisions of the district court and Third Circuit and analyzed the arbitrator's decision under § 10(a)(4) of the Federal Arbitration Act which "authorizes a federal court to set aside an arbitral award where the arbitrator exceeded his powers." The Court emphasized the fact that the parties had consented to the arbitrator's interpretation and review of their agreement so his decision could not be overturned unless he exceeded his powers. The Court stated that "the arbitrator focused on the arbitration clause's text, analyzing (whether correctly or not makes no difference) the scope of both what it barred from court and what it sent to arbitration," holding that the arbitrator had not exceeded his powers in allowing class arbitration. Oxford Health Plans LLC v. Sutter, 133 S.Ct. 2064 (2013).

O. FAA Did Not Preempt State Law Requiring Arbitration Provision to be Supported by Consideration

Home Buyers filed putative class action against Development Company after Development Company refused to return Home Buyers' deposits as a result of Home Buyers failure to obtain mortgage financing. Development Company filed a motion to dismiss or stay Home Buyers' complaint based on the arbitration provision within their contract. The district court denied the motion holding that under Maryland law "an arbitration provision is treated as a severable contract that must be supported by adequate consideration."

On Appeal the Fourth Circuit upheld the decision of the district court holding that because Maryland state law requires independent consideration for an arbitration provision within a contract, the underlying contract itself may not serve as consideration for the arbitration provision. The court also emphasized that in this particular case the U.S. Supreme Court's ruling in AT&T Mobilility LLC v. Concepcion, 131 S.Ct. 1740, 179

L.Ed.2d 742 (2011) which held that the FAA preempted California's state law making class action arbitration waivers in consumer contracts unconscionable did not apply. The court distinguished the facts of the case holding that Concepcion dealt with class wide arbitration and not state law requiring independent consideration for arbitration clauses. Noohi v. Toll Bros., Inc., 708 F.3d 599 (4th Cir. 2012).

P. Class Action Arbitration Waiver Upheld Despite High Costs of Pursuing Individual Claims

Merchants filed class action against Credit Card Company (Company) for violations of federal antitrust laws regarding Company's fee structure. Pursuant to its agreement with Merchants which contained a class action waiver clause, Company moved to compel individual arbitration under the FAA. Merchants argued that the costs of pursuing individual claims would far exceed the amount of recovery for an individual plaintiff. The district court granted Company's motion and dismissed the underlying claims. The Second Circuit Court of Appeals reversed holding that the Merchants had "established that they would incur prohibitive costs if compelled to arbitrate under the class action waiver, the waiver was unenforceable and the arbitration could not proceed." The U.S. Supreme Court granted certiorari, vacated the judgment and remanded for further consideration. The Second Circuit stood by its original ruling and then reconsidered its ruling sua sponte in light of the Supreme Court's decision in AT&T Mobilility LLC v. Concepcion, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) (holding that the FAA preempted California's state law making class action arbitration waivers in consumer contracts unconscionable). The Second Circuit then held that Concepcion didn't apply reversing the decision of the district court for the third time. The U.S. Supreme Court granted certiorari to determine "whether the FAA permits courts to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim."

The Court reversed the Second Circuit holding that the class action waiver was enforceable notwithstanding the fact that an individual Merchant's pursuit of its claim would require the Merchant to incur substantial costs. The Court stated that "the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy." American Exp. Co. v. Italian Colors Rest., 133 S.Ct. 2304 (2013).

Q. Employee's Activities as Car Dealership Cashier Involved Interstate Commerce

Employee filed action against former Employer alleging causes of action for sexual harassment and retaliation in violation of the Civil Rights Act of 1964. Employee signed an arbitration agreement prior to the start of her employment. Employer subsequently filed a motion to compel arbitration and stay the proceedings. Employer argued that the issues within Employee's suit fell within the coverage of the arbitration agreement, therefore the FAA applied. Employee argued that the FAA only applies to arbitration agreements in which the "underlying transaction" involves interstate commerce and that the "underlying transaction" was "devoid of interstate commerce because it was between cashier [Employee] and [Employer]." Employee also argued that the arbitration clause was unconscionable and unenforceable because she didn't understand the "significance of her right to a jury trial" which would have surprised her and that she also lacked a meaningful choice. Employee also argued that the arbitration clause was

unconscionable because of its requirement that she pay attorney's fees to Employer if she lost her Title VII case.

The district court held that Employee's activities as a cashier within Employer's car dealership involved interstate commerce since Employee's activities involved "selling products manufactured in states other than South Carolina and handling financial transactions with out-of-state financial institutions." The court also found the arbitration clause to be enforceable since the arbitration clause was in bold print, not inconspicuous, and due to the fact that Employee signed the agreement directly below the arbitration clause. As to Employee's arguments regarding the attorney's fees provision, the court held that the arbitration provision only allowed "the arbitrator to award attorneys' fees to a prevailing party when an applicable statue so provides" thus holding that the arbitration provision was not unconscionable. McElveen v. Mike Reichenbach Ford Lincoln Inc., C.A. No. 4-12-874-RBH-KDW, 2012 WL 3964973 (D.S.C. 2012).

R. Arbitration Clause Doesn't Apply to Fraudulent Conduct

Individuals purchased real property from Developer. The contract for purchase included an arbitration provision. The trial court declined to enforce Developer's arbitration agreement and Developer appealed.

On appeal the Court of Appeals affirmed the trial court holding that the parties could not "be required to submit to arbitration any dispute that he or she has not agreed to submit." The court also held that the trial court did not err in finding Homeowner's "homeowner's failure to disclose hazardous substances buried on the Property amounted to conduct that was unanticipated and unforeseeable by a reasonable consumer" because under South Carolina law an individual who signs an arbitration clause could not "have contemplated … that [he/she] was agreeing to arbitrate claims arising from allegedly fraudulent conduct." The court also cited S.C. Code § 27-50-40(A)(6)(2007) (requiring owner of real property to furnish purchaser a written statement disclosing the presence of hazardous materials). Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc., Op. No. 2013-UP-296 (S.C. Ct. App. June 26, 2013).

S. Parties May Not Select Alternate Arbitration Forum Outside the Scope of Their Arbitration Agreement

Individual and Business Defendants signed an arbitration agreement which designated the National Association of Securities Dealers (NASD) as the exclusive arbitral forum. The trial court denied Business Defendants' motion to compel arbitration because the NASD no longer existed, holding that the Financial Industry Regulatory Authority (FINRA) could not be substituted as an alternative arbitral forum.

On appeal the Court of Appeals affirmed the trial court holding that neither Iowa law (which applied to the parties agreement) nor the Eighth Circuit Court of Appeals allowed a "court [to] substitute an arbitral forum when a designated forum has become unavailable to arbitrate." The court also held that under Iowa law, Section 5 of the FAA did not apply "in cases where a specifically designated arbitrator becomes unavailable to

arbitrate." Keller v. ING Fin. Partners, Inc., Op. No. 2013-UP-014 (S.C. Ct. App. January 9, 2013).

T. Construction of Marina Involves Interstate Commerce

Owner hired General Contractor for the construction of a marina on the Wando River. General Contractor hired Subcontractor and both parties entered into a standard AIA form contract and chose to arbitrate any disputes under the contract. The contract provided that the Federal Arbitration Act (FAA) would govern the arbitration process. During the construction phase the project engineer refused to certify further payments to Subcontractor citing various deficiencies in Subcontractor's work. Subcontractor then filed a mechanic's lien against the property to secure the amount due and subsequently filed suit against General Contractor and Owner seeking foreclosure of its mechanic's lien against Owner and breach of contract against General Contractor.

Owner and General Contractor moved to dismiss and compel arbitration. Subcontractor opposed the motion and argued that because Owner wasn't a party to the contract, Owner was prevented from compelling arbitration and argued the transaction failed to impact interstate commerce. The trial court held that the contract did not implicate interstate commerce to "justify or trigger" application of the FAA. The trial court also held that Owner could not enforce the arbitration agreement "absent a showing of some special relationship to a contracting party."

On appeal the South Carolina Supreme Court held that the FAA applied because the "underlying marina construction transaction [fell] within the purview of Congress's commerce power" and due to the fact that several of the materials used in the construction of the dock were manufactured in Ohio and then transported to South Carolina as well as the fact that General Contractor used an out of state engineering and survey company on the project. The Court also focused on the fact that the construction site itself was located "within a channel of interstate commerce" and focused on General Contractor's use of barges to "transport materials and equipment through various navigable waterways and as construction platforms adjacent to the marina site." In regards to Subcontractor's mechanic's lien claim the Court held that the mechanic's lien filed by Subcontractor arose "directly from" the contract between General Contractor and Subcontractor and was subject to arbitration. The Court also held that under South Carolina law of contract interpretation Owner could be properly joined as a party to the arbitration proceedings because Owner "is an entity who is substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration." Cape Romain Contractors, Inc. v. Wando E., LLC, 2013 WL 4082353 (S.C. Sup. Ct. August 14, 2013).

U. South Carolina Rejects Appearance-of-Bias Standard For Determining Evident Partiality

Individual hired Engineering Firm to investigate soil conditions for a commercial building site. Individual's Consulting Business purchased the property and hired General Contractor. A dispute ensued amongst the parties regarding the amount of unsuitable soil which needed to be removed from the building site, which increased the cost of the job. After work was completed an LLC occupied the building. Individual was a member of the LLC. General Contractor filed a mechanic's lien and suit to foreclose the lien claiming a balance due under the contract. Individual, Consulting Business and LLC

(Respondents) asserted counterclaims seeking damages for incomplete and faulty construction work. The trial court ordered arbitration pursuant to an arbitration clause in the parties' contract. The parties selected an arbitrator who determined that General Contractor was owed money under the contract, in addition to interest, costs and attorney's fees. Engineering Firm was not a party to the arbitration proceeding but two of its engineers testified as General Contractor's fact and expert witnesses.

Respondents filed a motion to vacate the arbitration award based on evidentiary rulings and the arbitrator's manifest disregard of the law. The trial court denied the motion and requested General Contractor's counsel to prepare an order confirming the award. Before the order was entered Respondents learned that one of Engineering Firm's engineers was the brother of one of the arbitrator's law partners. Respondents subsequently filed a supplemental motion to vacate the arbitration award arguing that in addition to the prior arguments, the arbitrator's failure to disclose his law partner's familial relationship with Engineering Firm "amounted to evident partiality, requiring the award to be set aside." The trial court granted the motion holding that the arbitrator's failure to disclose the relationship "was tantamount to evident partiality." In its holding the trial court relied on the South Carolina Code of Ethics for Arbitrators which "requires disclosure of any relationship that might reasonably create an appearance of partiality or bias" and held that the language of the South Carolina Uniform Arbitration Act as outlined in S.C. Code § 15-48-130 was not the appropriate legal standard of review.

On appeal the South Carolina Supreme Court held that the trial court applied an incorrect legal standard, specifically in its application of the "appearance of bias standard." The Court held that the trial court erred due to the fact that the language of S.C. Code § 15-48-130(a)(2) "requires us to reject the appearance-of-bias standard applied by the circuit court." The Court noted that the majority of courts have rejected the appearance-of-bias standard and held that "the approach that best comports with the language of S.C. Code § 15-48-130(a)(2) is that which requires the party seeking vacatur to demonstrate that a reasonable person would have to conclude that an arbitrator was partial to the other party in the arbitration." The Court held that the facts of the case did not "give rise to any objective finding of partiality" and that "the mere existence of this relationship alone does not establish bias and cannot, without more, demonstrate evident partiality, notwithstanding the fact that it may appear to relate to the facts of the arbitration." Crouch Constr. Co., Inc. v. Causey, 2013 WL 4082358 (S.C Sup. Ct. August 14, 2013).

II. Contracts

A. Settlement Agreement Susceptible to More Than One Interpretation

Contractor entered into a contract with the South Carolina Department of Transportation (SCDOT) to perform vegetation management within Chester County, South Carolina. Surety procured a performance bond which protected the SCDOT against any defects or failures of Contractor's performance. In conjunction with Surety's issuance of the performance bond, Contractor and indemnitors executed a General Indemnity Agreement (GIA). The GIA required the indemnitors to indemnify Surety for certain liabilities, losses, costs, damages, attorney's fees and other expenses that surety sustained in connection with the bond. A dispute arose where the SCDOT filed a bond

claim against the performance bond. The parties subsequently entered into a settlement agreement.

The first paragraph of the settlement agreement stated "[t]he parties [will release] any and all claims . . ., except as hereinafter set forth . . . . Any claims which [Surety] may have . . . under the [GIA] . . . are excluded from this Settlement Agreement." The third paragraph of the settlement agreement stated that "each party will separately pay their own attorneys and the costs in this matter. The trial court granted contractor's motion for summary judgment which prevented surety from seeking indemnification under the GIA. The Court of Appeals held that summary judgment was improper and stated that the language within the settlement agreement was susceptible to a different interpretation because the third paragraph of the settlement agreement was completely inapplicable to such claims. Allegheny Cas. Co. v. Netmoco, Inc., Op. No. 2013-UP-097 (S.C. Ct. App. March 6, 2013).

B. Limitation of Liability Clause Enforceable In Residential Home Inspector Contract

Buyer contracted with Home Inspector for a home inspection before purchasing a new house. Home Inspector's contract with Home Buyer contained a limitation of liability clause which limited the Home Inspector's liability to the home inspection fee paid by the Buyer. Buyer subsequently contacted Home Inspector regarding certain omissions from Home Inspector's report and Home Inspector refunded the inspection fee. Buyer brought claims against Home Inspector alleging breach of contract and failure to conduct the inspection in a thorough and workmanlike manner and failure to report defective conditions within the home. Both parties filed motions for summary judgment as to the enforceability of the limitation of liability clause and the trial court granted Home Inspector's motion holding that the clause was enforceable.

On appeal the South Carolina Supreme Court held that Home Inspector's limitation of liability clause was enforceable and did not contravene public policy. The Court held that under S.C. Code Ann. § 40-59-500 et seq. "purchasers are protected from unqualified home inspectors by licensure requirements" but that the "General Assembly did not require home inspectors to carry errors and omissions liability insurance." The Court further emphasized that under The Residential Property Condition Disclosure Act home buyers were already afforded a remedy for this situation. See S.C. Code Ann. 27-50-10 et seq. (2007 & Supp. 2011). The Court also held that the limitation of liability clause was not unconscionable because it was not so oppressive that "a reasonable person would make it and no fair and honest person would accept it." Gladden v. Boykin, 402 S.C. 140, 739 S.E.2d 882 (2013).

C. General Agreement of Indemnity Allows Surety to Recover Attorney's Fees

Surety issued payment and performance bonds to General Contractor in connection with several state projects. Indemnitors excited a General Agreement of Indemnity (GAI) in connection with the issuance of the bonds. Subcontractor made several payment bond claims against Surety and General Contractor. After Indemnitors failed to deposit sufficient collateral to Surety at Surety's request, Surety satisfied Subcontractor's bond claims. General Contractor subsequently entered into a settlement agreement with a county tax authority which would have settled claims the tax authority had against Surety, but General Contractor failed to tender the funds in connection with the

settlement agreement. Surety subsequently tendered the funds to the county tax authority and took assignment of the settlement agreement. General Contractor then reimbursed Surety but failed to include payment for Surety's attorney's fees which were incurred as a result of enforcing the settlement agreement.

Surety sued General Contractor in federal court alleging breach of contract and specific performance. Approximately eight months after filing suit Surety filed a motion for summary judgment. The terms of the GAI stated that Indemnitors agreed to:

> [I]ndemnify and save [Surety] harmless from and against every claim … which the Company may pay or incur in consequence of having executed or procured the execution of such bonds … Payment shall be made to the Company by the Indemnitors as soon as liability exists or is asserted against the Company, whether or not the Company shall have made any payment therefor . . .
>
> [Indemnitors shall indemnify] Surety for its fees of attorneys, whether on salary, retainer or otherwise, and the expense of procuring, or attempting to procure, release from liability, or in bringing suit to enforce the obligation of any of the Indemnitors under this Agreement.

The district court granted Surety's motion for summary judgment holding that General Contractor and Indemnitors failed to present any issues of material fact that Surety made payments on the bond claims without a good faith investigation and that the language of the GAI allowed for recovery of Surety's attorney's fees. Western Sur. Co. v. Cooper River Const. Co., Inc., C.A. No. 2:12-cv-2561-PMD, 2013 WL 3320661 (D.S.C. July 1, 2013).

III. Insurance

A. Successive Insurers Held Indispensable Parties Which Prevented Diversity Jurisdiction

General Contractor contracted with Subcontractor for certain drywall work at two developments in Virginia. A domestic shortage of drywall forced Subcontractor to purchase some of its drywall from a Chinese manufacturer. The drywall supplied by the Chinese manufacturer was defective. Subcontractor installed the defective drywall in seventy-four homes within the two developments. During this time period General Contractor had a commercial package policy and commercial umbrella policy from two different insurers. Insurer 1 issued its policies from 2006 to 2007 and Insurer 2 issued its policies from 2007 to 2008. Both policies contained commercial general liability coverage for "those sums that [General Contractor] becomes legally obligated to pay as damages because of bodily injury or property damage to which the insurance applies." General Contractor instituted a remediation plan and executed remediation agreements with individual homeowners. Pursuant to the remediation agreements with homeowners General Contractor agreed to replace the defective drywall, pay location expenses and property damages the homeowners incurred. Neither insurer was a party to General Contractor's remediation agreements with the homeowners. General Contractor sought

indemnification from insurers for the costs of remediation and both insurers denied coverage.

Insurer 1 filed declaratory judgment action against General Contractor alleging that there was no duty to defend or indemnify for the remediation costs. Insurer 1 also joined Insurer 2 as a party, arguing that if Insurer 1 owed a duty to indemnify, then the court could allocate the costs between the two insurers. Insurer 2 answered and filed cross-claims against General Contractor. General Contractor answered and counterclaimed against Insurer 1 and 2. Later General Contractor filed a third party complaint against Subcontractor's insurers. Approximately nine months later the Developers of both neighborhoods joined the case as counterclaim plaintiffs. After two years of litigation the district court granted summary judgment in favor of the Insurers holding that the CGL policy provisions did not cover General Contractor's remediation costs because "[General Contractor] made the remediation voluntarily, rather than under a legal obligation to pay."

While on appeal, General Contractor and Developers moved to dismiss for lack of subject matter jurisdiction arguing that the district court must realign Insurer 2 as a plaintiff, which would destroy diversity since General Contractor and Insurer 2 were both citizens of Virginia and that Insurer 2 was a "required and indispensable party to the case" preventing the appellate court from dismissing them to save diversity jurisdiction. In addressing the first argument the Fourth Circuit realigned Insurer 2 as a plaintiff due to the fact that Insurer 2 shared the principal purpose with Insurer 1 of avoiding a duty to indemnify General Contractor. As to the second argument the court held that Insurer 2 was an indispensable party to the case because along with Insurer 1, it issued a CGL policy which covered the same conduct of General Contractor and both policies were "potentially implicated by [General Contractor's] remediation efforts." Based on this reasoning the court vacated the judgment of the district court and remanded the case for dismissal due to lack of subject matter jurisdiction. Builders Mut. Ins. Co. v. Dragas Mgt. Corp., 497 Fed.Appx. 313 (4th Cir. 2012).

B. Equitable Contribution For Defense Costs Not Available Absent Contractual Provision

Insurer 1 and Insurer 2 issued a policy of general liability insurance to an Insured. The Insured and Insured's business were named in construction defect lawsuits in 2007 and 2008. The allegations within the construction defect cases were that the damages were continuous and repetitive which occurred over several years. The Insured's defense in the construction defect litigation was tendered to Insurer 1 and 2. Insurer 1 agreed to defend the Insured in connection with the construction defect litigation under a full reservation of rights. Insurer 2 denied coverage and refused to defend the Insured in the construction defect litigation.

Insurer 1 sought equitable contribution for its expenses in defending the Insured despite the fact that it was not a party to the insurance contract with Insurer 2 and was without assignment from the Insured. The district court held that Insurer 1 did not have standing to bring these claims against Insurer 2 because Insurer 1 did "not stand in a derivative relationship to Insured." The court further stated "that the duty to defend is personal to each insurer" and "that the insurer is not entitled to divide the duty nor require contribution from another absent a specific contractual right" citing Sloan Constr. Co. v.

Central Nat'l Ins. Co. of Omaha, 236 S.E.2d 818, 820 (1977). Assurance Co. of Am. v. Penn-Am. Ins. Co., C.A. No.: 4:11-cv-03425-RBH, 2013 WL 1282141 (D.S.C. March 27, 2013).

C. D&O Endorsement Within Commercial Liability Policy Excludes Cause of Action Against POA For Property Damage

Condominium Owners brought claims against Developers alleging breaches of fiduciary duty, negligence, and breach of the warranty of habitability. Condominium Owners also brought claims against the Property Owner's Association (POA) alleging breaches of fiduciary duty and negligence in failing to (1) adequately inspect, repair, and maintain the common elements, (2) inform unit owners of the conflict of interest in a developer-controlled POA, and (3) establish a reserve fund to pay for repairs. Developers filed a declaratory judgment action seeking a determination as to whether POA's insurance policy covered all of the claims alleged by Condominium Owners. Both parties agreed that the allegations were based on "wrongful acts" within the D&O endorsement. Insurer filed a motion for summary judgment arguing that Condominium Owner's claims were for "property damage" and punitive damages, which were excluded under the Directors and Officers (D&O) endorsement. Condominium Owners filed a motion for summary judgment arguing the policy did not exclude their claims because the claims were based on breaches of duty and negligence as opposed to property damage. The trial court granted Condominium Owner's motion finding that the complaint sufficiently alleged a breach of fiduciary duties by the POA which related to the initial design and construction defects. In its order the trial court stated that allegations relating to the initial defective design and construction would not be considered property damage and would not be excluded from coverage.

On appeal the Court of Appeals held that the trial court's reliance on Crossman Cmtys. of N. A., Inc. v. Harleyville Mutual Ins. Co., 395 S.C. 40, 717 S.E.2d 589 (2011) was misplaced in ruling that damages for correction of construction defects were covered under the D&O Endorsement. The court focused on the Condominium Owner's complaint and stated that (1) the allegations failed to mention that the POA completed construction or made repairs to the community during the time construction was completed and (2) "any further deterioration of the faulty construction or repairs . . . that could arguably be attributed to [POA's] inaction would at most constitute diminution in the value of [Condominium Owner's] property – a harm specifically included in the definition of property damage."

In addressing Condominium Owner's arguments for breach of fiduciary duty and failure to establish a reserve fund the court held that "the duty to establish a reserve fund, while related to the property damage, did not result in physical damage to tangible property as required by the policy" and that "allegations that [the POA] breached its fiduciary duty by failing to warn of conflicts of interest in a developer-controlled POA do not allege physical injury to tangible property constituting property damage."

The court also ruled on several other policy exclusions which the trial court failed to rule upon. Namely, the court held that "the act of placing the developer's interests before the owners may constitute a breach of fiduciary duty," but failed to "allege any dishonest, fraudulent, criminal, or malicious action" which didn't bar coverage under this exclusion. Another D&O Endorsement exclusion "excluded coverage for damages resulting from the failure of any insured to enforce the rights of the Named Insured against the builder,

sponsor or developer of the property designated in the Declaration." The court held this exclusion did not apply because Condominium Owner's complaint did not allege [POA] failed to enforce any rights or compel the developer to perform a particular action." Several of the Condominium Owner's had served in the past on the POA and the policy listed a "director, trustee or officer" as an insured under the policy. The court ruled that because none of the POA board members were on the board at the time the alleged claims took place, the policy exclusion prohibiting coverage for a claim or suit by an insured against another insured did not apply in this case. Finally, the court held that the D&O endorsement did not cover punitive damages claims because punitive damages were clearly excluded under the policy. Pulliam v. Travelers Indem. Co., 2013 WL 1897175 (S.C. Ct. App. May 8, 2013)

D. Insurer Has Duty to Defend Under Prior Corporate Merger Agreement

Insurer filed declaratory judgment action against Developer seeking a declaration that Insurer did not owe Developer a duty to defend in a construction defect suit and Insurer did not have to indemnify Developer for costs and expenses incurred in defending the suit. Insurer issued a CGL policy to Developer's prior parent corporation which listed the parent corporation as the named insured. Developer merged with the parent corporation subsequent to the issuance of the policy. Developer was named in a large construction defect suit but the Developer's parent corporation was not named as a defendant in the suit. Insurer filed a motion for summary judgment and argued that (1) Developer was not a named insured under the CGL policies nullifying Insurer's obligation to defend, (2) Insurer's policies contained an anti-assignment clause and Insurer never agreed to assign the policies to Developer after the merger, (3) there were no allegations of "property damage" caused by an "occurrence" during the policy period and the "impaired property" provision barred coverage, (4) in the alternative Insurer only had a duty to defend Developer for thirteen buildings involved in the suit because those were the only buildings which were constructed and sold during Insurer's policy period (5) Insurer had already discharged its duty to defend by virtue of its hiring of another law firm to defend against claims involving the thirteen buildings in the suit and (6) the defense costs should be allocated pro-rata amongst all of the insurers who have a duty to defend Developer on a time-on-risk methodology.

Developer argued that (1) the allegations in the suit allowed for potential coverage under Insurer's policy, (2) South Carolina law required Insurer to defend the suit, (3) Insurer's obligations were "personal", "indivisible" and "severable", (4) Insurer had no right of contribution from other insurers that may also have a duty to defend and (5) Insurer breached its duty to defend by limiting its defense to only thirteen buildings involved in the suit.

The district court found that Developer was covered under the Insurer's policy due to the fact that the corporate merger agreement, which was governed by Tennessee and North Carolina law provided for a merger of the Developer's rights with the prior insured's. The court also held that Insurer had a duty to defend Developer due to the fact that the complaint in the construction defect suit alleged repetitive and continuous water damage to the buildings involved at the project. In addressing the impaired property exclusion the court held that because the suit had not yet been tried it was premature to rule on this issue for purposes of indemnification but that the exclusion did not deny coverage for the resulting property damage only potentially for the cost to repair the negligently constructed work itself. See Auto Owners Ins. Co. v. Newman, 684 S.E.2d 541 (2009).

The district court also found that the Insurer's duty to defend applied to the entire lawsuit and not simply to the thirteen buildings which weren't covered by the Insurer's policy, citing Town of Duncan v. State Budget & Control Bd., 482 S.E.2d 768 (1997) and focusing on the fact that Insurer's policy stated that it was obligated to defend the named insured against "any suit" which alleged covered claims. Finally, the district court ruled that the Insurer had breached its duty to defend under South Carolina law. Id. Cincinnati Ins. Co. v. Crossman Cmtys. of N.A., Inc., C.A. No.: 4:09-CV-1379-RBH (D.S.C. March 27, 2013).

E. Insurer Not Entitled to Indemnification for Defense Costs Absent Valid Contractual Provision

Above mentioned Insurer also filed fourth party claims against the remaining insurers (who had a potential duty to defend Developer) seeking a declaration that if it had a duty to defend the Developer, then the remaining insurers were obligated to share the defense costs based upon pro-rata time-on-risk contribution. Each of the remaining insurers filed motions for summary judgment and argued that an insurer who owes a duty to defend an insured was not entitled to contribution from another insurer who may also have a duty to defend the same insured. The district court relied on the South Carolina Supreme Court's opinion in Sloan Constr. Co. v. Central Nat. Ins. Co., 236 S.E.2d 818, 820 (S.C. 1977) which held that multiple insures which both have a duty to defend an insured cannot require contribution from one another, where only one choses to defend, absent a valid contractual provision. The court also distinguished the meaning of "identical risk" within the Sloan decision and the South Carolina Supreme Court's decision in Crossman II stating that Crossman II "allocates progressive damages from the same risk across multiple policy years." See Crossmann Cmtys. of N. C., Inc. v. Harleysville Mutual Ins. Co., 717 S.E.2d 589 (2011). The district court further stated that Crossman II only addressed the issue of indemnification rather than the issue of multiple insurers who each had a duty to defend. The court granted all four of the remaining insurer's motions for summary judgment holding that the duty to defend was broader than the duty to indemnify and that there was no indication by the South Carolina Supreme Court in Crossman II that time-on-risk test would be applicable to the duty to defend. Cincinnati Ins. Co. v. Crossman Cmtys. of N. A., Inc., C.A. No.: 4:09-CV-1379-RBH (D.S.C. March 27, 2013).

F. Contractor's CGL Policy Precluded Coverage for Property Damage

Homeowners hired Contractor to represent them in front of city's board of zoning appeals (BZA) to help obtain the necessary permit and approval to build a barn. Contractor submitted the required applications to the BZA and assured Homeowners that everything was taken care of with respect to the required permitting. The BZA approved the variance and special exception, but the approvals were not sufficient to build the barn Homeowners intended. Homeowners subsequently hired Contractor to build the barn and later were told by the city building inspector that the barn failed to comply with the variance or special exception. Contractor applied for another variance and special exception which the BZA denied and ordered that the barn be torn down. Homeowners sought another variance and special exception which involved the removal of an upstairs apartment within the barn. The BZA granted Homeowner's request and Contractor tore down the apartment to comply with the variance.

Homeowners filed an arbitration demand alleging claims for breach of contract, negligent misrepresentation, breach of fiduciary duty, and unjust enrichment. Upon receiving notice of the demand Contractor informed his insurer which issued his CGL policy. Insurer denied any duty to defend or indemnify under the policy. Homeowners settled with Contractor prior to arbitration and as part of the settlement agreement, Contractor assigned Homeowners any rights he had under his CGL policy.

Homeowners subsequently brought a claim against Insurer alleging it breached its duty to defend and indemnify Contractor. Homeowner's moved for partial summary judgment as to the issue of Insurer's breach of duty to defend and Insurer's liability to Homeowners for their costs, Contractor's costs and attorney's fees in the arbitration pursuant to S.C. Code Ann. § 38-59-40(1). Insurer filed a cross-motion for summary judgment arguing that Homeowner's arbitration claims did not constitute an "occurrence" under the CGL policy resulting in "property damage" and Homeowner's arbitration claims were excluded under the "insured contract", "your work", "intentional acts", and "products-completed operations hazard" exclusions. The trial court granted Homeowner's motion holding that Insurer was under a duty to defend Contractor because Homeowner's suffered property damage caused by an occurrence and the other policy exclusions did not apply.

On appeal the Court of Appeals reversed the trial court holding that Homeowners sufficiently alleged property damage which was caused by an occurrence, but that the damage alleged was not within the "products-completed operations hazard" because the loss of use occurred before Contractor's work pursuant to the permitting contract was complete. The court also held that the policy's "your work" exclusion applied since the alleged property damage was a result of Contractor's defective work. Consequently, the court held that the trial court erred in holding that Insurer had a duty to defend Contractor under the CGL policy. Walde v. Assn. Ins. Co., 401 S.C. 431, 737 S.E.2d 631 (Ct.App. 2012).

G. South Carolina Supreme Court Rules Retroactivity Clause of CGL Occurrence Statute Unconstitutional

Insurer filed petition in the South Carolina Supreme Court challenging the constitutionality of Act No. 26 of the South Carolina Acts and Joint Resolutions (Act), codified in S.C. Code Ann. § 38-61-70 which defines an "occurrence" within the context of a commercial general liability policy covering construction related work. In part the statute provides that:

> (B) Commercial general liability insurance policies shall contain or be deemed to contain a definition of "occurrence" that includes:
>
> > (1) an accident, including continuous or repeated exposure to substantially the same general harmful conditions; and
> >
> > (2) property damage or bodily injury resulting from faulty workmanship, exclusive of the faulty workmanship itself. . . .
>
> (E) This section applies to any pending or future dispute over coverage that would otherwise be affected by this section as to all commercial

> general liability insurance policies issued in the past, currently in existence, or issued in the future.

Id.

Insurer presented three arguments for the unconstitutionality of the statute arguing (1) the Act violated the separation of powers doctrine by virtue of the general assembly's attempt to overturn the South Carolina Supreme Court's decision in Crossman II[3], (2) the Act violated the Equal Protection Clause of the U.S. Constitution by "classifying and treating issuers of CGL policies differently than issuers of other types of insurance policies that make an occurrence a prerequisite to coverage" and the Act was "narrowly drafted to favor only a small section of one particular industry", and (3) the Act violated the state and federal constitution's Contract Clauses. In addressing the first argument the Court held that the General Assembly did not violate the separation of powers doctrine because it was "clear the General Assembly wrote and ratified [the Act] in direct response to this Court's decision in Crossman I[4]," but because the Court revised its decision in Crossman II, the General Assembly did not "retroactively [overrule the Supreme Court's] interpretation of a statute." As to Insurer's equal protection argument, the Court applied the rational basis standard in its analysis, holding that the General Assembly "had a logical reason and sound basis for enacting [the Act]" and that by ratifying the Act, the General Assembly had attempted to provide some clarity to the highly litigated issue of whether construction defects constitute an occurrence within a CGL policy. The Court held the Act violated both the South Carolina and U.S. Constitution's Contract Clauses, stating that the Act (1) "substantially impairs the contractual relationship by mandating that all CGL policies be legislatively amended to include a new statutory definition of occurrence and by applying this mandate retroactively", which in turn "substantially impairs pre-existing contracts by materially changing their terms" and (2) the retroactivity provision was neither "necessary or reasonable." The Court severed the retroactivity provision from the statute, holding that the Act "may only apply prospectively to contracts executed on or after its effective date of May 17, 2011." Harleyville Mut. Ins. Co. v. State, 401 S.C. 15, 736 S.E.2d 651 (2012).

H. District Court Applies Crossmann and Auto BMIC Decisions

Subcontractor entered into agreement with Owner and Contractor to complete all work related to a concrete slab. After completion, Owner discovered that the concrete slab was moving, and sought to have the slab repaired. Owner filed an action against Subcontractor, alleging breach of contract, negligence, breach of warranty of habitability, breach of warranty of merchantability and breach of warranty against latent defects. Owner claimed that Subcontractor failed to design, construct, and repair the building properly, and sought to recover damages for the expenses to hire experts to investigate

[3] See Crossman Cmtys. of N.C., Inc. v. Harleyville Mut. Ins. Co., 395 S.C. 40, 717 S.E.2d 589 (2011) (holding that negligent or defective construction resulting in damage to otherwise non-defective components may constitute property damage but defective construction would not.)

[4] See Crossman Cmtys. of N.C., Inc. v. Harleyville Mut. Ins. Co., Op. No. 26909 (S.C.Sup.Ct. filed Jan. 7, 2011) (holding where an occurrence is defined as an accident, including continuous or repeated exposure to substantially the same general harmful conditions, the term is unambiguous and retains its fortuity requirement.)

the causes of the defects, the expenses to repair the defects, and the loss of use and profits of their property. However, the district court looked to the Your-Work exclusion of the Subcontractor's CGL policy with Insurer, which stated that "property damage to 'your work' arising out of it or any part of it" is not covered. The court determined that Owner's injuries were not "property damage" caused by an occurrence, applying the *Crossmann II* decision to mean that "property damage" is only physical injury to tangible property beyond damage to the work product itself. See Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.,("Crossmann II"), 395 S.C. 40, 717 S.E.2d 589, 592–95 (2011).

The court divided Owner's damages into 3 categories: repairs to the building, loss of use and profits, and depreciation of Owner's property. The district court determined that any repairs to the building would not fall within the scope of the CGL policy because the damage was to the work product itself, allegedly caused by faulty workmanship. Therefore, such damages were not considered an "occurrence" under the CGL policy, causing the court to grant summary judgment on that issue. Similar to damage to the building, the loss of use and profit were not considered "property damage" caused by an "occurrence" because they were not physical injury to tangible property, allowing the court to grant summary judgment on that issue. Last, the court determined that Owner and Contractor did not fully brief the depreciation issue in their Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, and declined to grant summary judgment on that issue.

In addition, the court stated that the Your-Work, Impaired Property, and Professional Liability exclusions of the CGL excluded much of the damage alleged by Owner. Rather than arguing those exclusions did not apply to those types of damage, Owner argued that those provisions were unenforceable because they rendered the CGL policy meaningless and excluded from coverage the essential purpose of the policy. The court determined that the three provisions did not render the policy meaningless, or create internal inconsistencies, rather that the provisions were very specific and avoided internal inconsistencies because they provided coverage for several other risks contemplated by the parties and did not exclude every claim from coverage. The court ruled that the CGL policy did not provide coverage for damages to the building or loss of use or profits, and granted in part and denied in part Insurer's motion for summary judgment. Penn Nat. Sec. Ins. Co. v. Design-Build Corp., 2:11-CV-02043-PMD, 2012 WL 2712555 (D.S.C. July 9, 2012).

I. Subontractor's CGL Policy Excluded Coverage for Improper Cleaning of Brick

Homeowner hired General Contractor to remove synthetic stucco cladding from his home and replace it with decorative brick. General Contractor hired Subcontractor to install the brick. General Contractor and brick manufacturer warned Subcontractor not to pressure wash or use acid to clean the brick. After Subcontractor installed the brick General Contractor was not satisfied with the installation and asked Subcontractor to fix the problems which included mortar and slurry dried on the exterior of the brick. Subcontractor hired another subcontractor to clean the brick that used a pressure washer and acid to clean the brick. General Contractor asked Subcontractor to replace the brick but General Contractor had to replace the brick at its own expense. General Contractor filed an action against Subcontractor alleging breach of contract, breach of warranty and negligence. Both Subcontractor and Insurer failed to make an appearance and General Contractor obtained a default judgment against Subcontractor.

General Contractor subsequently brought a declaratory judgment action against Subcontractor and Insurer seeking coverage under Subcontractor's CGL policy for the damages caused by Subcontractor's subcontractor. The trial court found the incident to be an occurrence under the policy and that the policy provided coverage.

On appeal the South Carolina Supreme Court reversed the trial court due to an exclusion in Subcontractor's CGL policy which excluded coverage under the policy to property damage to:

> That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the property damage arises out of those operations . . .

The Court stated that the exclusion "unambiguously exclude[d] coverage when the insured's subcontractor damages the work product while performing operations, regardless of whether your work is complete under the policy." The Court also held that the "your work" exclusion barred coverage under the policy. Bennett & Bennett Constr. Inc., v. Auto Owners Ins. Co., 2013 WL 3723214 (S.C. Sup. Ct. July 17, 2013).

J. District Court Upholds Provisions Within Claims Made Policy

Insurer's Subsidiary (Subsidiary) issued professional liability policies to Engineering Firm providing coverage from 2005-2011. The 2009 and 2010 policies "covered claims made and reported during the relevant policy period subject to a retroactive date of August 7, 1998" but the 2009 and 2010 policies had a "claims made and reported" restriction which stated:

> Claims must first be made against the insured during the policy period and claims must be reported, in writing, to us [Insurer] during the policy period, the automatic extended reporting period or the extended reporting period, if applicable.

Engineering Firm received notice of the claim at issue no later than April 14, 2010 and had four months left on its 2009 policy but failed to inform Subsidiary of the claim before the 2009 policy expired and the 2010 policy began. Subsidiary first received notice of the claim roughly 47 days into the 2010 policy term. Insurer's first notice was in the form of a courtesy copy of the summons and complaint filed against Engineering Firm. Engineering Firm first notified Insurer of the suit/claim on November 12, 2010. In essence, "[Engineering Firm] did not both receive and report the claim during the same policy period." Due to the fact that Engineering Firm had renewed its policy it was ineligible for an automatic 30 day Extended Reporting Period (ERP) or purchase of a longer ERP. Insurer moved for summary judgment arguing that it was only the parent company of Subsidiary and didn't issue the policies in question. Additionally both Insurer and Subsidiary moved for summary judgment arguing that Engineering Firm's claim wasn't made and reported during the same policy term. Engineering Firm filed a cross-motion for summary judgment arguing that the multiple policy periods "formed a single period of continuous coverage which, together with the language of the ERP, should be construed in favor of the insured to require coverage."

The district court granted both Insurer's and Subsidiary's motions for summary judgment, first holding that there was no evidence that Insurer wrote the policies at issue, and because Subsidiary did not deny that it wrote the policies at issue. Secondly, the court also held that the terms of the policy excluded coverage and rejected Engineering Firm's arguments that all policies should be treated as a single policy, holding that "the South Carolina Supreme Court . . . [would] exclude coverage under the facts of this case and language of the present policy, which clearly and repeatedly advises that coverage requires a claim to be made and reported during the same policy period." The court also emphasized that any ambiguities in the ERP would "not lead to a different result as the claim was first reported to [Subsidiary] more than thirty-days after the close of the 2009 policy period." The court additionally held that the claim would also have been excluded under two additional provisions. GS2 Engr. & Envtl. Consultants, Inc. v. Zurich, C/A No. 3:12-cv-02934-CMC, 2013 WL 3457098 (D.S.C. July 9, 2013).

K. Collateral Source Rule Doesn't Apply to UIM Policy

Individual lost control of his vehicle and vehicle crashed into owner's home which resulted in owner's immediate death and damage to Homeowner's house. Individual had two different insurance policies with $3 million in liability coverage. Homeowner had a home insurance policy and auto policy each with different insurers. Homeowner's home insurance policy had limits of $457,000. The policy provided:

> If a loss covered by this policy is also covered by other insurance, we will pay only our share of the loss. Our share is the proportion of the loss that the applicable limit under this policy bears to the total amount of insurance covering the loss.

Homeowner's auto policy had limits of $300,000 in underinsured motorist (UIM) bodily injury coverage and $100,000 in (UIM) property damage coverage. The policy provided:

> With respect to property damage, this insurance shall be excess over other valid and collectible insurance applicable to the damaged property.

Homeowner's wife settled a wrongful death claim with Individual's insurers and wife agreed to sign a covenant not to execute against Individual, both insurers and Individual's company which owned the vehicle. Homeowner's wife also agreed to resolve her home insurer's subrogation claim out of the settlement proceeds. The probate court approved the settlement and ordered that the $3 million dollar payment was "to be allocated 100% to the wrongful death claim as the parties stipulate there is no valid survival claim." Homeowner's home insurance carrier paid around $128,000 to repair the house but claimed it was entitled to reimbursement for the costs from the $3 million settlement pursuant to its subrogation right. Homeowner's auto insurer paid out the policy limits of $300,000 in UIM bodily injury coverage in exchange for a covenant not to execute as to any bodily injury claim, but refused to pay any amounts under the UIM property damage coverage.

Homeowner's wife filed a declaratory judgment action alleging that auto insurer was obligated to pay out the policy limits in UIM property damage coverage and home insurer was not entitled to subrogation from the $3 million settlement of her husband's wrongful death claim. Homeowner's wife settled with home insurer. Both auto insurer and Homeowner's wife filed cross motions for summary judgment. The trial court granted

summary judgment in favor of Homeowner's wife holding that auto insurer's "other insurance" provision was ambiguous but didn't specify how it was ambiguous or provide any reasoning. The trial court also held that the "other insurance" provision violated the collateral source rule stating that the home insurance policy was a "collateral source which [auto insurer] could not use to decrease its obligations and found there would be no double recovery because the wrongful death claim was settled for [auto insurer's] and [home insurer's] policy limits despite being worth more." The trial court also held that auto insurer's "UIM rider may also contravene public policy since any exclusions inconsistent with the UIM statute are void."

On appeal the South Carolina Supreme Court reversed the trial court holding that auto insurer's policy was not ambiguous because there was "nothing inherently unclear or confusing about the term other valid and collectible insurance, just because the terms weren't defined in the policy didn't make it ambiguous and there was no conflicting provision within the policy. The Court held that because the trial court didn't expressly rule on the issue of public policy there was no ruling to appeal from, but considered the issue nonetheless holding that the "other insurance" provision didn't contravene public policy because UIM property damage coverage is not statutorily mandated, nor did it deprive the insured of any coverage for which she bargained.

The Court also held that the collateral source rule did not affect the "other insurance" provision of auto insurer's policy. The Court held that the home insurer's coverage was only collateral with respect to auto insurer if the rule applied to auto insurer. Auto insurer argued that the collateral source rule only applies to wrongdoers and because it wasn't a wrongdoer the rule did not render its "other insurance" provision invalid. Homeowner's wife argued that the collateral source rule applies to "any party seeking to reduce obligations to a victim as a result of contributions made by others to the victim." The Court held that existing South Carolina law established that auto insurer as a UIM insurer was not a wrongdoer. The Court stated that UIM benefits are a collateral source, and "because a source must be wholly independent of the wrongdoer to be a collateral source, UIM insurance is wholly independent of the wrongdoer" which results in the UIM insurer not being a wrongdoer so the collateral source rule does not apply. The Court stated that applying the collateral source rule against auto insurer as a UIM insurer was inappropriate because this would not serve the policy behind the rule and that applying the rule to UIM insurers would "create the distorted result of permitting tortfeasors to reduce their liability by the amount of any UIM payments made to a victim." The Court also held that auto insurer's "excess" clause did not obligate it pay under the UIM property damage benefits to Homeowner's wife due to the fact that the limits of Homewoner's home insurance policy were not exhausted. Bardsley v. Gov't. Employees Ins. Co., 2013 WL 4082345 (S.C. Sup. Ct. August 14, 2013).

IV. Limitations of Actions

A. Affidavit Insufficient to Avoid Statute of Limitations Under Discovery Rule

Plaintiff hired Accounting Firm to perform auditing and tax services in 2005. In July of 2005 Plaintiff received a tax notice for outstanding taxes for the state of New York. In October of 2005 Plaintiff submitted a check for outstanding tax amount to Accounting Firm with instructions "Post to Account" under the belief that funds would be used to

satisfy his tax liability. In November 2005 Plaintiff received a bill from Accounting Firm for services provided through the end of October 2005 but none of the services indicated Plaintiff's outstanding tax monies were paid. The bill actually reflected a credit in the exact amount of the check Plaintiff submitted for his outstanding tax bill. In late December 2005 Plaintiff submitted Accounting Firm a check for the remaining balance of his October bill which also stated "Post to Account." In late November 2008 Plaintiff received notice from the New York tax authorities that his bank account had been levied in order to collect unpaid taxes.

In March 2011 Plaintiff brought claims against Accounting Firm alleging professional negligence, breach of fiduciary duty, fraud, negligent misrepresentation, conversion, and unjust enrichment. In June 2011 Accounting Firm moved for summary judgment on the ground that Plaintiff knew or should have known of his claims by November 2005 thus barring his claim under the relevant statute of limitations. In October 2011 Plaintiff filed an affidavit which stated that "he agreed to send [the tax payment] to [Accounting Firm] and for [Accounting Firm] to pay the tax penalty on [his] behalf." Plaintiff's affidavit also stated that in April 2010 his bank confirmed that Accounting Firm deposited these funds he believed were used to pay the outstanding taxes and "this was the first time [he] knew that a cause of action related to the failure to pay the tax liability might exist against" Accounting Firm. The trial court granted Accounting Firm's motion for summary judgment and stated in its order that Plaintiff knew or should have known that his claims against Accounting Firm existed when he received Accounting Firm's November 2005 invoice which indicated that none of Plaintiff's October 2005 payment funds were applied to the outstanding taxes.

On appeal the Court of Appeals upheld the trial court's decision holding that the applicable three year statute of limitations had run because under the "discovery rule" Plaintiff knew or should have known that his cause of action arose in 2005. Specifically, the court stated that Accounting Firm's November invoice "would [have] put a reasonable person of common knowledge and experience on notice that the funds had not been applied towards the outstanding tax liability and had instead been applied towards [Accounting Firm's] service charge", thus triggering the start of the three year statute of limitations period. Graham v. Welch, 2013 WL 2560988 (S.C.Ct.App. filed June 12, 2013).

V. Mechanic's Liens

A. Owner Not Allowed to Set-Off Lien Amount Based on Payments to Other Subcontractors

General Contractor failed to pay Subcontractor for the final amount due to Subcontractor for work on a residential home. Subcontractor then filed and served a notice of mechanic's lien and statement of account on the Owners. Subcontractor then filed its lis pendens and lien foreclosure action. When Subcontractor's lien was recorded, Owner's had paid $135,740 of their $300,000 contract to the General Contractor. Owner's did not make any more payments to General Contractor after receiving notice of Subcontractor's lien but continued to pay other subcontractors on behalf of the General Contractor during

the period between receiving notice of the lien and firing of the general contractor. Owner's subsequently bonded off of subcontractor's mechanic's lien and sold the home.

In response to Subcontractor's motion for summary judgment Owner's asserted a payment defense and argued they were entitled to a set-off of damages incurred when the General Contractor breached its contract with Subcontractor by failing to pay Subcontractor its monies due. The trial court granted Subcontractor's motion for summary judgment and concluded that Owners owed Subcontractor the full amount of its lien along with interest, costs, and attorney's fees. On appeal the South Carolina Supreme Court affirmed the trial court and held that any post-lien payments made by Owner's to the remaining subcontractors in order to reduce Owner's lien would violate S.C. Code § 29-5-50, thus denying Owner's ability to set-off any post lien payments made to the remaining subcontractors. Action Concrete Contractors, Inc. v. Chappelear, 2013 WL 2631139 (S.C. Sup. Ct. June 12, 2013).

B. Mechanic's Lien Enforceable against Real Property after Surety Bond Filed

Contractor contracted with Subcontractor for the construction of a convenience store in Anderson County, South Carolina. Subcontractor filed a mechanic's lien on the property and subsequently filed an action to foreclose its lien. Contractor, Convenience Store and LLC defendant (Defendants) removed the case to federal court based on diversity jurisdiction. Between Subcontractor's filing of the mechanic's lien and removal of the case to federal court Contractor bonded off the mechanic's lien and filed a separate action against Subcontractor in the district court of Tulsa County, Oklahoma. In the Oklahoma action Contractor alleged damages resulting from three separate proposal agreements, including the agreement at issue with the Anderson, County convenience store. Defendants moved to dismiss the South Carolina action pursuant to Federal Rule of Civil Procedure 12(b)(1) arguing that both the Oklahoma and South Carolina action involved two of the same parties and included the same agreement. The District Court of South Carolina ruled that it had subject matter jurisdiction based upon diversity by virtue of Contractor being a South Carolina corporation and Defendants all being citizens of Oklahoma and because the amount in controversy was met. In its ruling the court noted that the Fourth Circuit does follow the "first to file" rule where "priority should be given to the first suit filed unless the balance of the convenience favors the second filed." The court held that convenience favored the South Carolina suit because the contract was executed in South Carolina, the lien was filed in South Carolina and the filing of the surety bond to discharge the lien was in South Carolina.

Convenience Store also moved to dismiss Contractor's mechanic's lien pursuant to Federal Rule of Civil Procedure 12(b)(6) on the basis that the lien was discharged when Contractor filed its surety bond with the Anderson County Clerk of Court. The court denied Convenience Store's motion relying on Cohen's Drywall Co. v. Sea Spray Homes, LLC, 374 S.C. 195, 648 S.E.2d 598 (2007), and held that under South Carolina law "a mechanic's lien can be enforced against real property even if a cash or surety bond has been filed." Reed Concrete Const., Inc. v. Millie, LLC, C.A. No. 8:12-3117-HMH, 2013 WL 80487 (D.S.C. January 7, 2013).

C. Subcontractor Allowed to Recover Mechanic's Lien Under Quantum Meruit

Electrical Contractor was hired by Owner to perform some unfinished electrical work on Owner's bingo parlor. Owner was the sole shareholder and president of a South

Carolina Corporation whose purpose was to promote bingo operations within the state. A dispute ensued between the Owner and a former electrical contractor on who would supervise the new electrical contractor's work. Despite this issue, the electrical contractor began work on Owner's bingo parlor. Upon completion of electrical contractor's work, Owner secured a certificate of occupancy in his individual name as opposed to his business name. Electrical Contractor then submitted Owner's business an invoice for the services completed on the bingo parlor. Owner failed to pay the electrical contractor for its work and electrical contractor filed a mechanic's lien on the property and subsequently filed suit to foreclose on its lien. After a bench trial the trial court ruled that the parties did not have a meeting of the minds, and no enforceable contract. The trial court did find that Electrical Contractor was entitled to recover the reasonable value of its labor and materials under its quantum meruit claim. On appeal Owner argued that the trial court erred in finding that Owner realized a benefit in an individual capacity when the Electrical Contractor's work was performed for Owner's bingo parlor business. The Court of Appeals upheld the trial court's decision holding that Electrical Contractor conferred a benefit upon the Owner in his individual capacity due to the fact that Owner was listed as the "owner" on the building permit application before Electrical Contractor began work and after Electrical Contractor finished its work in addition to the fact that Owner "directed the project, maintained control over the premises, spent significant time on-site, and had a direct personal stake in the success of the venture." Boykin Contracting, Inc. v. Kirby, 2013 WL 2017933 (S.C. Ct. App. May 15, 2013).

D. Material Supplier Prevails under Quantum Meruit without Filing Mechanic's Lien

Material Supplier installed and supplied carpet to Developer for condominium project without a formal contract. Material Supplier had entered into prior agreements with Developer based simply upon handshakes and oral agreements. Both parties verbally agreed on the price of materials and shook hands. Developer hired one general contractor who built three buildings and then replaced the general contractor with New General Contractor (New GC) without Material Supplier's knowledge. New GC and Developer entered into a contract for the construction of six buildings. Material Supplier began installing carpet at the Project and Developer asked that all invoices be sent to New GC. Material Supplier was alarmed by this request and was assured by Developer that it would be paid for its work on the Project. After Material Supplier was not paid for work completed on five out of six buildings it threatened to file a mechanic's lien and refused to complete any more work. Developer assured Material Supplier that it would be paid and to send Developer its invoices as opposed to the New GC.

After Material Supplier was not paid for the outstanding invoices it brought an action against New GC, Developer individually (Developer) and Developer's Company for breach of contract, quantum meruit, negligent misrepresentation, and violations of the S.C. Unfair Trade Practices Act. Material Supplier dismissed Developer's Company and New GC prior to the case being submitted to the jury. Developer won a directed verdict motion as to Material Supplier's Unfair Trade Practices claim. The jury found in favor of Developer on the negligent misrepresentation claim and in favor of Material Supplier for the quantum meruit claim. Developer moved for a JNOV arguing that awarding quantum meruit to Material Supplier would result in Developer paying Material Supplier twice because Developer had already paid New GC the full contract price per building. Material Supplier argued that it had presented evidence that Developer's Company had

not paid New GC in full. The trial court granted Developer's motion ruling that Developer had already paid Material Supplier by virtue of having made payment to New GC.

On appeal the Court of Appeals reversed the trial court's granting of the JNOV motion due to the fact that Material Supplier presented evidence that New GC was not paid in full for its work on the Project. The court also held that Material Supplier's failure to file a mechanic's lien did not prevent recovery for quantum meruit because Material Supplier abandoned its breach of contract claim allowing recovery under quantum meruit. Williams Carpet Contractors, Inc. v. Skelly, 400 S.C. 320, 734 S.E.2d 177 (Ct.App. 2012).

VI. Torts/Negligence

A. 4th Circuit Affirms $0 Damages Verdict on Negligence Claim

Subrogee brought an action against General Contractor and plumbing Subcontractor to recover for a claim which Subrogee as property insurance carrier paid out as a result of damaged property and medical equipment at Spartanburg Regional Healthcare System. Subrogee argued at trial that the damaged property and equipment was a result of breach of contract by the GC and negligence of the Subcontractor. Subrogee argued that the damage was a result of leaking pipes which were part of the roof drain system at the Spartanburg Regional facility.

The case went to a jury trial on breach of contract against the General Contractor and negligence against the Subcontractor. The jury found in favor of the General Contractor on the breach of contract cause of action and in favor of Subrogee on the negligence claim against the Subcontractor but entered $0.00 as the amount of damages on the negligence claim. Subrogee subsequently moved for a new trial arguing that the zero damages negligence verdict was inconsistent with South Carolina Law. See Stevens v. Allen, 536 S.E.2d 663, 666 (2000). The district court denied the motion and stated that because Subrogee did not bring the inconsistency to the court's attention or move for re-submission of the issue to the jury, Subrogee waived its right to a new trial. The Fourth Circuit upheld the district court's decision and stated that the district court's jury instructions fairly permitted the jury to render the zero damages verdict on Subrogee's negligence claim. Vigilant Ins. Co. of New York v. McKenney's Inc., C.A. No.: 7:09-cv-02076-JMC, 2013 WL 2278753 (4th Cir. May 24, 2013).

B. No Tort Cause of Action under SPPA for Subcontractor

City hired General Contractor for a public construction project but failed to require that General Contractor secure a payment bond for the project. General Contractor entered into contracts with multiple subcontractors and failed to pay the subcontractors for the total value of their work on the project. City offered to distribute the balance of its contract with General Contractor to the unpaid subcontractors in exchange for a release of City's liability. Two individual Subcontractor's brought claims against City alleging that the City should be required to pay them the amounts due under their subcontracts because City failed to require General Contractor to secure a performance bond, thus violating S.C. Code Ann. § 29-6-250. In 2004 one trial judge granted the City's motion to strike Subcontractor's request for attorney's fees. Subsequently, in August 2005

Subcontractor's filed an amended complaint asserting they were third party beneficiaries of the City's contract with General Contractor, alleging that the City violated the Subcontractors' and Suppliers Payment Protection Act (SPPA), S.C. Code Ann. §§ 29-6-210 - 290 by failing to require General Contractor to secure a payment bond for the project. Subcontractor's also alleged causes of action for negligence, violation of S.C. Code Ann. § 27-1-15, quantum meruit and attorney's fees and prejudgment interest. Another trial judge granted City's motion to strike Subcontractor's claims for attorney's fees and prejudgment interest, holding that the prior trial judge's order constituted the law of the case. Thereafter both parties moved for summary judgment which was granted in favor of City, where the trial judge held that Subcontractor's causes of action sounded in tort and were barred by the South Carolina Tort Claims Act (TCA), S.C. Code Ann. §§ 15-78-10 - 220. The trial judge also stated that the SPPA did not give right to a private cause of action by a subcontractor.

On appeal the Court of Appeals reversed the trial judge's findings with respect to Subcontractor's negligence claim, holding that the SPPA provided for a tort cause of action which wasn't governed by the TCA. The court also held that the two prior trial judge's orders which stated that Subcontractor's claims sounded in tort were not the law of the case and that Subcontractor's amended complaint sufficiently alleged a third party beneficiary breach of contract cause of action for violation of the SPPA. The court also remanded Subcontractor's tort, breach of contract, and quantum meruit claims to the trial court for a determination of liability and damages.

The South Carolina Supreme Court granted the City's writ of certiorari. In addressing Subcontractor's tort cause of action under the SPPA the Court reversed the Court of Appeals holding that the legislature did not intend "to provide a tort remedy under the SPPA" and relied on its holding in Sloan I for its reasoning. See Sloan Constr. Co. v. Southco Grassing Inc., 368 S.C. 523, 629 S.E.2d 372 (Ct. App. 2006). The Court upheld the Court of Appeals as to Subcontractor's third-party beneficiary claim for breach of contract holding that Subcontractor's amended complaint put City on notice of the claim and the fact that the only cause of action which could be asserted under S.C. Code § 29-6-250 sounded in contract. The Court also reversed the Court of Appeals decision with regards to its reversal of Subcontractor's quantum meruit claim holding that there was "no dispute as to the existence or validity of the underlying contract at issue, which is fundamentally at odds with the quasi-contractual theory of quantum meruit." Finally, the Court disagreed with City's argument that summary judgment should have been affirmed because it "satisfied its obligation under the SPPA by paying the remaining balance on its contract with General Contractor to several of the unpaid subcontractors" holding that this issue presented a question of fact. Shirley's Iron Works v. City of Union, 2013 WL 2325263 (S.C. Sup. Ct. May 29, 2013).

C. No Right of Contribution Under South Carolina UCATA Without Preservation of Claim

Individual filed a tort action against Minor and Minor's Parents for injuries he suffered as a result of Minor's negligence when Minor hit Individual while driving his Parent's car. The accident took place outside of a Bar but Individual did not bring an action against the Bar. The parties settled their dispute and Individual, Minor, Minor's parents and Parent's Automobile Insurer entered into a covenant not to execute. The parties entered into the covenant after the statute of limitations had already run on Individual's tort claims. The parties entered into a second covenant not to execute which acknowledged

that Individual had a cause of action against the Bar and that the "[covenantees] were desirous of pursuing a claim for contribution against the [Bar] pursuant to the [South Carolina Uniform Contribution Among Tortfeasors Act]." The second covenant failed to contain a statement that it "served either to release or to discharge any liability of [Bar] in the underlying tort matter." It also stated that "[t]his covenant is not a release, nor shall it be construed as a release of any party, person, firm or corporation."

Automobile Insurer subsequently filed a contribution action against Bar alleging that Bar was jointly liable because it had served alcohol to Minor during regular business hours and after closing, and that Minor had become intoxicated prior to the accident. Automobile Insurer argued that it had "settled the case on behalf of all potentially liable parties, including [Bar], and that [Individual] had released [Minor and Minor's Parents] and [Bar], but that [Bar] did not pay its pro-rata share of the settlement." Bar moved for summary judgment arguing that the first covenant "failed to expressly discharge the liability of [Bar] as required by the UCATA in order to seek contribution." Automobile Insurer argued that the failure to include this language was a scrivener's error and asked the court to consider extrinsic evidence of intent to include such language or reformation of the covenant itself to reflect the intent of the parties. The trial court granted Bar's motion for summary judgment, holding that Automobile Insurer "had failed to properly preserve its right to contribution from [Bar]." The trial court found "as a matter of law that any right to contribution [Automobile Insurer] may have had against [Bar] was forever barred once [the underlying tor action] was dismissed on May 8, 2007."

On appeal the South Carolina Supreme Court affirmed the trial court holding that the language of the first covenant was "clear and unambiguous", which standing alone did not preserve Automobile Insurer's contribution claim. The Court also held that the second covenant "did not cure any deficiency, as it too failed to expressly provide that the liability of the [Bar] (or any other person or entity) was being extinguished" nor did it "fall within the parameters of the contribution statutes." In its analysis of Automobile Insurer's reformation argument the Court held that Automobile Insurer "should not be allowed to use the equitable remedy of reformation to resurrect its contribution rights against the [Bar] where the latter's liability was already extinguished by the time of the parties' settlement of [Individual's] tort action." Progressive Max Ins. v. Floating Caps, Inc., 2013 WL 4009146 (S.C. Sup. Ct. August 7, 2013).

VII. Miscellaneous

A. Surety Prevails with New Value Defense in Bankruptcy Court

Engineering Firm was awarded eight government contracts in 2006. Pursuant to the Miller Act Engineering Firm obtained payment and performance bonds (Original Bonds) from Surety for the government projects. In spring 2007 Engineering Firm borrowed over $12 million from a Capital Group to repay debts and infuse new capital into its business. In May 2007 Engineering firm asked Surety to issue additional surety bonds (New Bonds) which were to be used on seven additional governmental contracts (New Contracts) Engineering Firm sought to obtain. Surety required Engineering Firm to obtain an irrevocable letter of credit from Bank in the amount of $1.375 million naming Surety as beneficiary, which collateralized Engineering Firm's New Bonds and Original Bonds and other existing obligations to Surety. Bank required Engineering Firm to fund

a certificate of deposit (CD) in the amount of $1.375 million as a condition precedent to issuing the letter of credit. Engineering Firm borrowed additional capital from Capital Group to fund the CD and the two parties amended their loan agreement to reflect the loan of additional funds. After Engineering Firm submitted the funds to the Bank Surety issued the New Bonds which Engineering Firm tendered to federal agencies for award of the seven additional contracts.

Engineering Firm subsequently filed bankruptcy under Chapter 11 in August of 2007. Surety then drew on the letter for credit for the full amount of $1.375 million. The bankruptcy court approved the sale of all of Engineering Firm's assets to Capital Group and Engineering Firm assigned Capital Group's affiliate (Affiliate) all of its government contract rights, litigation rights, and rights to the return of any collateral remaining upon completion of the government contracts. In February 2008 the bankruptcy court entered an order allowing Surety to take responsibility for completing the government contracts. In February 2008 the case was converted to Chapter 7. In July 2009, Chapter 7 Trustee and Affiliate entered into a stipulation agreement where Affiliate assigned the litigation rights to the Trustee and the Trustee agreed to split the proceeds from any successful actions with Capital Group. Trustee then filed an adversarial proceeding against Surety arguing that Surety was an indirect beneficiary of Engineering Firm's transfer of Capital Group's loan proceeds into the CD and that the transfer was an avoidable, preferential transfer under 11 U.S.C. § 547. Surety alleged two affirmative defenses to this claim arguing "(1) that the transfer was not a preference because the [Capital Group] Loan proceeds were earmarked specifically for payment to [Surety]," and (2) "that [Engineering Firm] received new value in exchange for the Capital Group loan proceeds." Surety then moved for summary judgment which the bankruptcy court granted, holding that "both the earmarking and new value defenses applied to prevent a determination that Engineering Firm's transfer of funds was a preferential transfer and avoidable by the Trustee." The bankruptcy court stated that "[i]t would be inequitable to require Surety to return the portion of the Capital Group [loan] used to cover the costs to complete the [government contracts] when [Surety] did the work, and paid the obligations." Trustee appealed to the District Court for the Western District of North Carolina and the court affirmed.

On appeal, Surety argued that the bankruptcy court "improperly applied the earmarking defense because [Engineering Firm] did not use the [Capital Group] loan proceeds to pay an antecedent debt." Trustee argued that "the bankruptcy court improperly applied the new value defense because [Surety] did not prove with specificity the amount of the new value it provided [Engineering Firm] and the bankruptcy court clearly erred in its findings of fact. Finally, the Trustee argued that "the bankruptcy court improperly held in favor of [Surety] on independent equitable grounds, which are not recognized as a defense to an avoidance action in bankruptcy." The Fourth Circuit held that the bankruptcy court erred in its determination that the earmarking defense applied in the case because, Engineering Firm received the funds from Capital Group and "the funds at issue were not used to pay an antecedent debt." The court further stated that "the earmarking doctrine applies only when the debtor borrows money from one creditor and the terms of that agreement require the debtor to use the loan proceeds to extinguish specific, designated, existing debt."

In addressing the Trustee's new value defense, the court stated that "[Surety] asserted, and the bankruptcy court agreed, that [Engineering Firm] received new value in the form of the New Contracts as a result of the transfer of funds from [Capital Group] to [Bank] to

[Surety] … [t]he thrust of the Trustee's position is that [Surety] presented evidence demonstrating only a vague assertion that the New Contracts had value in excess of $1,375,000 and thus failed to prove with specificity the amount of the new value [Surety] received." The court held that because Surety proved with specificity "that the New Contracts had a value at least as great as the amount of the alleged preferential transfer in order to demonstrate that [Contractor's] bankruptcy estate had not diminished as a result of the transfer" and Trustee failed to contradict Surety's evidence concerning the value of the New Contracts, Surety was entitled to assert this defense. In re ESA Envtl. Specialists, Inc., 709 F.3d 388 (4th Cir. 2013).

B. Party May Only Recover Costs of Copying or Duplicating Its Files in Federal Court

Distributor was selected by Argentinian Winemaker to be the exclusive distributor of an Argentinian wine in North Carolina. Distributor began selling the wine to numerous wholesalers in the state but failed to distribute the wine to Winery. Winery sued Distributor alleging violations of the North Carolina Unfair and Deceptive Trade Practices Act. The parties subsequently engaged in a discovery dispute concerning Winery's request for production of various emails relating to Distributor's business agreement with Argentinian Winemaker and other distributors. Distributor objected to Winery's request on the grounds that it was not reasonably accessible and due to the expense which it would impose. Winery limited its discovery request by including certain search terms and key words. Distributor subsequently moved for a protective order arguing that Winery's requests were "overbroad, vague, ambiguous, and not reasonably calculated to lead to the discovery of admissible evidence." Distributor argued that the costs of complying with the request would exceed $460,000. Winery opposed Distributor's motion and moved to compel the information. The district court denied Distributor's motion and adopted Winery's proposal for handling the information using search terms and key words. The district court also granted Winery's motion to compel.

Less than two months after Distributor began its document production the district court granted Distributor's motion to dismiss Winery's claim under the North Carolina Unfair and Deceptive Trade Practices Act. Both parties subsequently filed cross-motions for summary judgment and the district court granted the motion in favor of Distributor. Distributor then filed a bill of costs in the district court seeking to recover $111,000 for the costs incurred in complying with Winery's discovery request. The total amount included costs associated with extracting the data, searching the various documents, converting the documents into .pdf format, copying the information, electronic bates numbering and analyzing the documents. Pursuant to 28 U.S.C. § 1920(4) the district court only awarded Distributor the costs associated with "the conversion of native files into TIFF and PDF formats and the transfer of files onto CDs" in the amount of $218.59 and $350 in "[f]ees of the clerk" for a total amount of $568.59. 28 U.S.C. § 1920 governs "[t]he costs that may be awarded to prevailing parties in lawsuits brought in federal court." Taniguchi v. Kan P. Saipan, Ltd., 132 S.Ct. 1997, 1999-2000 (2012). Specifically, 28 U.S.C. § 1920(4) governs "[f]ees for exemplification and the costs of making copies necessarily for use in the case."

On appeal the Fourth Circuit affirmed the district court holding that the statute's legislative history, plain meaning and Supreme Court's narrow reading of the statute supported the findings of the district court that only the costs of "converting electronic files to non-editable formats, and burning the files onto discs" were recoverable under 28

U.S.C. § 1920(4). Country Vintner of N.C., LLC v. E. & J. Gallo Winery, 2013 WL 1789728 (4th Cir. April 29, 2013).

C. Unclean Hands Insufficient to Prevail on Motion to Dismiss But Affidavit Sufficient to Prevail on Summary Judgment

Joint Bank Defendants filed a motion to dismiss Defendants' cross-claim which asserted an equitable indemnification arising out of a sale of real property which failed to close. Bank Defendants argued that Defendants' cross-claim failed to contain any factual allegations and that according to the record it was implausible that the sellers of the property at issue had unclean hands barring them from bringing an equitable indemnification claim. The district court stated that Bank Defendants' argument that unclean hands of the cross-claiming defendants lacked merit at the pleading stage of the case. In its holding the court clarified that because the sale of the property was potentially unclean between the cross-claiming defendants and the plaintiffs, not between the Bank Defendants and cross-claiming defendants, the motion to dismiss must be denied due to the fact that the equitable indemnification claim was not implausible, relying on Bell Atl. Corp. v. Twombly, 550 U.S. 554, 127 S.Ct. 1955 (2007).

In another motion within the same action the court granted summary judgment in favor of a former Trustee defendant who had presided over the trust which held the property at issue. Trustee submitted an affidavit which stated that he was not currently serving as trustee of the trust and was not serving as trustee during the time period at issue. Trustee's affidavit had a Resignation and Appointment of Trustee form attached which reflected that a new trustee had been appointed as well as a Subordination Agreement which was recorded in the County Register of Deeds. The Subordination Agreement reflected a new trustee had been appointed and subordinated a mortgage held by the trust. Plaintiffs alleged that Trustee's affidavit was insufficient to survive summary judgment due to statements Trustee allegedly made at the auction of the real property. Plaintiff's submitted an affidavit which stated that Trustee was present at the auction, stood by the auctioneer until the close of the auction and told Plaintiff that he had the authority to bind all parties with an interest in the property. Plaintiff argued that Trustee had indicated that he had the authority to bind the trust. The court granted summary judgment in favor of Trustee holding that Plaintiff's affidavit was insufficient to create a genuine issue of material fact as to whether Trustee was acting as trustee for the trust at the date of the auction. Pulliam & Patriots Plantation II, LLC v. Clark, C.A. No.: 4:11-cv-03047-RBH, 2013 WL 353671 (D.S.C. January 29, 2013).

D. S.C. Code § 29-5-110 Does Not Apply to Attorney's Fees Claim

Architect was hired to perform certain design and architectural services for Owner in connection with Owner's home. Owner paid Architectural Firm for half of the cost of its services at the start of the design process and agreed to pay the remaining funds after the project was completed. Owner subsequently fired Architectural Firm but Architectural Firm continued to perform its services pursuant to the parties' agreement. Architectural Firm submitted Owner a bill for its services which led to Architectural Firm filing a mechanic's lien against the property due to Owner's non-payment. Subsequent to the trial, Architectural Firm made a motion seeking attorney's fees, costs and interest which the trial court granted and awarded $235,030.31 in attorney's fees and costs and $37,413.92 in prejudgment interest pursuant to S.C. Code Ann. § 29-5-10 and § 27-1-15. On appeal Owner argued that Architectural Firm's amount of total recovery was

limited to the amount of the cash bond he posted with the clerk of court under S.C. Code Ann. § 29-5-110. The Court of Appeals stated that S.C. Code Ann. § 29-5-110 did not apply because the provision "relates to the amount of the judgment and makes no mention of attorney's fees" and emphasized that S.C. Code Ann. § 29-5-10 specifically addresses the issue of attorney's fees in a mechanic's lien action. The court reversed the trial court's award of attorney's fees and remanded the issue back to the trial court because the trial court's order was unclear "as to which fees were awarded under which statutory authority." Spriggs Group, P.C. v. Slivka, 402 S.C. 42, 738 S.E.2d 495 (Ct.App. 2013), reh'g denied (Mar. 22, 2013).

E. Unlicensed Contractor Prohibited From Recovering Negligence Claim Under the Economic Loss Rule

Individual was hired by Owner to oversee construction of Owner's home. Individual did not possess the required residential home builder's license. Individual proceeded to oversee the construction of Owner's home and hired subcontractors, supervised subcontractors and paid subcontractors for their work. Individual filed an action against Subcontractor seeking the costs of repairs to the home and for Subcontractor's alleged double billing. The trial court dismissed Individual's case, holding held Individual's supervisory role on the project made him the general contractor which prohibited Individual from recovery under a breach of contract theory due to his failure to possess the required license per S.C. Code § 40-59-30(B).

On appeal the Court of Appeals affirmed the trial court's findings as to Individual being the general contractor as well as his inability to recover under a breach of contract theory due to his failure to obtain the required statutory license. In its holding the court noted that no South Carolina case had previously addressed a dispute between an unlicensed contractor and a subcontractor. The court looked to the Michigan Court of Appeals for guidance. See Utica Equip. Co. v. Ray W. Malow Co., 516 N.W.2d 99 (Mich. Ct. App. 1994) (barring an unlicensed residential builder from maintaining any action for compensation for the performance of an act or contract for which a license is required). The court adopted the Michigan rule and held that S.C. Code § 40-59-30(B) prevented Individual from bringing an action against Subcontractor for breach of contract. The court also addressed Individual's negligence claim, holding that the economic loss rule prohibited him from recovering in tort, because Individual's claims for the costs of repairs and Subcontractor's alleged double billing were economic losses. McGee v. Thornton & Thorton Bros. Constr., Op. No. 2013-UP-156 (S.C. Ct. App. April 17, 2013).

F. POA Lacked Authority to Bring Cross-Claim Against Developer

In a condominium defect case Property Owner's Association (POA) brought a cross-claim against Developer. The trial court granted Plaintiffs' motion to dismiss the POA's cross-claim against Developer and Developer appealed.

On appeal the Court of Appeals held that the trial court did not err in granting Plaintiffs' Motion, holding that the By-Laws of the POA "to enforce the provisions of the Master Deed or By-Laws [did] not authorize the present action" because the "exception only applie[d] to enforcing the actual provisions in the governing documents rather than implied duties of the Developer." The Court also stated that the "POA committed an *ultra vires* act when it commenced the cross-claim and the Developer's subsequent

counterclaim did not validate the authorized act." The court further disregarded the POA's argument that a balancing of the equities would have entitled it to bring the cross-claim. The court also held that the POA's argument that Plaintiffs "were only entitled to a breach of contract claim for montetary damages or an injunction" was not properly before the court due to the trial court's failure to rule on those issues. Pulliam v. M.U.I. Carolina Corp., Op. No. 2013-UP-324 (S.C. Ct. App. July 17, 2013).

G. Apartment Builder Not Liable to Post-Conversion Condominium Owners

A class of individual condominium owners brought a construction defect action against the builders of the development. The Project was originally constructed as an apartment building by Original Developer, who sold the property to with a one year limited warranty in 2001. The property continued operation as an apartment complex and was sold twice over the next four years. Each sale was "as-is," and each seller expressly disclaimed of all warranties. The Project was sold to Conversion Developer in 2005, who converted the Project to condominiums. This sale was also "as-is," with an express warranty disclaimer.

When Conversion Developer began selling the individual units, the purchase agreements disclosed the Project's history as an apartment complex, and stated that the units were being sold "as-is" with no warranties. While the units were being sold, Conversion Developer sold its remaining interest in the Project to Owner, who continued to sell the remaining units. A master deed was recorded in 2006, which documented the conversion from apartments and created a property owner's association (the "POA") for the Project.

Plaintiffs brought claims against Original Developer, Conversion Developer, Owner, and POA, and generally alleged damages to the common elements and interiors of the units due to design and construction defects present since the original construction.

Original Developer filed a motion for summary judgment based on a number of grounds. Firstly, Original Developer argued that South Carolina Courts' well-recognized rejection of caveat emptor in the context of residential property transactions should not apply to Plaintiffs' claims against Original Developer. Because Original Developer constructed an apartment complex, which is commercial in nature, it did not place the condominiums into the stream of commerce. See Kirkman v. Parex, Inc., 369 S.C. 477, 483, 632 S.E.2d 854, 857 (2006) (Placement in the stream of commerce is the determining factor for imposing the implied warranty of habitability.).

Original Developer also relied upon Smith v. Breedlove, 377 S.C. 415, 661 S.E.2d 67 (2008), in which the South Carolina Supreme Court refused to impose a warranty of habitability on a builder who constructed a residence for his personal use, and later sold the property to third party. When the third party brought suit against the builder/seller, the Court did not impose the warranty because in part, builder/seller could not have reasonably foreseen the sale at the time of construction. Original Developer argued that it could not have reasonably foreseen the 2005 conversion during original construction in 2001.

Further, Plaintiffs had no privity with Original Developer by virtue of the numerous sales of the Project between completion of original construction and purchase by the Plaintiffs. Each of these transactions, with the exception of the sale by the Original Developer in

2001, expressly disclaimed all warranties. While Original Developer's sale did include a one-year warranty, it expired well before the conversion of the Project began in 2005.

Finally, Original Developer argued the economic loss rule barred Plaintiffs claims in tort, which sought purely economic damages in the form of repair costs. Although a narrow exception to the rule exists for residential construction, Original Developer asserted the exception should not apply where Original Developer constructed a commercial apartment building.

Although the trial court has not issued a formal order citing its grounds, the court has issued a Form 4 Order indicating its intent to issue a formal order granting summary judgment to Original Developer. O'Donnell v. Northland Madison at Park West, LLC, C/A No. 2010-CP-10-9095 (S.C. Ct. Com. Pls., Jan. 15, 2013).

VIII. Legislation

A. Gov. Haley Signs Highway Funding Legislation

Gov. Haley signed into law a $600 million road funding package that includes $50 million in recurring funds allocated to the State Infrastructure Bank to be bonded for $500 million, $50 million in one-time funds to be used for bridge repair, and moves half of the sales tax on automobiles to the Highway Fund on a recurring basis, generating approximately $41 million annually. This is the first time in over 20 years that the legislature allocated money for roads in South Carolina.

B. Abandoned Buildings Revitalization Act Signed into Law

The SC Abandoned Buildings Revitalization Act of 2013, H.3093, was signed into law this session by the governer. This bill established provisions allowing a taxpayer making qualifying investments in the rehabilitation of an abandoned building to receive income tax credits or credits against property tax liability in an amount comprising up to twenty-five percent of the rehabilitation costs. These tax credits are available through 2019.

C. Government Contracts Legislation Becomes Law

S. 438, also known as the PLA bill, provides for fair and open competition in governmental contracts by stipulating that state or local entities, officials and employees, in regard to a public building, may not require or prohibit a bidder, offeror, contractor or subcontractor from entering into or adhering to an agreement with one or more labor organizations in regard to the project; and may not discriminate against a bidder for becoming or refusing to become a signatory to an agreement with one or more labor organizations. The bill also provides that state and local entities shall not award a grant, tax abatement or tax credit based on the inclusion of such agreements.

D. Prohibition of Certain Acts by Residential Builders or Contractors Relating to Roofing Systems

The SC General Assembly passed Act No. 77 on June 24, 2013 which provides:

> A person who enters into a written contract for goods or services related to a roofing system with a party who will be paid from proceeds of a property and casualty insurance policy and who subsequently receives written notice from the insurer that all or part of the claim or contract is not a covered loss under the policy may cancel the contract prior to midnight on the fifth business day after the insured has received the written notice of the denial of coverage.

The Act applies to licensed residential builders, registered specialty contractors and persons who engage in the business of residential building or residential specialty contracting without having registered with the commission or obtaining a license form the commission. The notice of cancellation must be in writing to the builder or contractor at the address provided in the contract.

E. Manufactured Housing Board

Act 97 amended the Code of Laws of South Carolina, 1976, by adding § 40-29-95 which requires the Manufactured Housing Board to consider the financial responsibility of an applicant in the licensing process and allows the Board to restrict or modify the activities of the licensee if he/she fails to meet the financial requirements. The act also requires licensed manufactured housing dealers to include their license number on any advertising material for the sale of a manufactured home in South Carolina Effective June 20, 2013. A retail dealer must now provide a financial statement reviewed by a certified CPA. The Act does not require a lienholder who sells, exchanges, or transfers by lease-purchase a repossessed manufactured home if the sale, exchange or transfer is through a licensed manufactured retail dealer. The Act also requires that a licensee who has been subject to a violation or is unable to meet the financial guidelines may be required by the Board to increase the amount of a surety bond or other approved security. Effective June 20, 2013.

F. Fireplace Regulations

Act 65 amended § 6-9-55, Code of Laws of South Carolina, 1976, relating to the South Carolina Building Codes Council extending a provision regarding regulations and residential fire sprinkler systems, and provides that § 501.3 of the 2012 International Residential Code must not be enforced prior to July 1, 2015; and also added § 6-10-35 which provides for requirements for fireplaces in lieu of requirements of the 2009 edition of the International Energy Conservation Code. Effective June 14, 2013.

G. Governmental Contracts

Act 46 amended the Code of Laws of South Carolina, 1976, by adding § 8-15-70 to provide for the fair and open competition in governmental contracts by stipulating that state or local entities, officials, and employees, in regard to a public building, may not require or prohibit a bidder, offeror, contractor, or subcontractor from entering into or adhering to an agreement with one or more labor organizations in regard to the project and may not otherwise discriminate against a bidder, offeror, contractor, or subcontractor for becoming or refusing to become a signatory to an agreement with one or more labor organizations in regard to the project. The act also provides that state and

local entities, officials, and employees shall not award a grant, tax abatement, or tax credit conditioned upon the inclusion of such agreements in the award, and provides exceptions to and exemptions from these provisions. Effective June 7, 2013

H. Abandoned Buildings Revitalization Act

Act 57 amended the Code of Laws of South Carolina, 1976, by adding Chapter 67 to Title 12 to enact the "South Carolina Abandoned Buildings Revitalization Act" which provides that a taxpayer making investments of a certain size in rehabilitating an abandoned building based on the population of the political subdivision in which the building is located may at the taxpayer's option receive specified income tax credits or credits against the property tax liability. The act also provides the procedures, criteria, and requirements necessary to obtain these credits. The act also provides that the provisions of Chapter 67, Title 12 are to be repealed on December 31, 2019. Effective June 11, 2013.

I. Pending Legislation to Amend The South Carolina Procurement Code

Bill H. 3860 was introduced in the SC House of Representatives on March 21, 2013. The bill seeks to amend S.C. Code §11-35-3005 by eliminating the requirement that an entity or individual offering to contract for design-build, design-build-operate-maintain or design-build-finance-operate-maintain project delivery methods hold a license required by Title 40 (Professions and Occupations) as long as the person who actually performs work regulated by Title 40 holds the appropriate license. The bill also seeks to amend the South Carolina Procurement Code, specifically S.C. Code § 11-35-3030(2)(a) to require performance and payment bonds up to one hundred percent of the value of the construction prior to commencement of the work on those portions of the project.