South Carolina Construction Law Update

September 2013 to August 2014

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I. Arbitration

A. S.C. Court of Appeals Upholds Separate Consumer Arbitration Agreements Implicating the SCUAA and FAA

Plaintiff One entered into two purchase agreements with Dealership for two used vehicles. One purchase agreement stated at the top that it was subject to arbitration pursuant to the South Carolina Uniform Arbitration Act (SCUAA). The bottom of the purchase agreement included language which stated that the agreement was subject to the Federal Arbitration Act (FAA).

Plaintiff Two purchased a new 2008 vehicle from a different Dealership and entered into two separate contracts: a buyer's order which governed the sale of the vehicle and a retail installment contract which addressed the financing and payment terms for the vehicle. The buyer's order stated that it was subject to the FAA but that if the FAA were not applicable then the contract would be subject to the SCUAA. The reverse side of the buyer's order also included further terms defining the scope of arbitration including remedy and claim limitations. The installment contract provided that the FAA applied to any disputes arising out of the contract.

Both Plaintiffs filed a single action against both Dealerships alleging misleading business practices. Dealerships filed motions to dismiss and to compel arbitration which were granted by the trial court. Plaintiffs filed a rule 59(e) motion which was denied by the trial court and appealed to the South Carolina Court of Appeals.

On appeal, the South Carolina Court of Appeals upheld the trial court's finding that Plaintiffs were bound by valid arbitration agreements because each Plaintiff entered into an arbitration agreement that (1) involved interstate commerce and complied with the FAA, (2) evidenced an intent to arbitrate, (3) was not unconscionable and (4) was not void as a matter of public policy. The Court held that Plaintiff Two's buyer's order contract was unconscionable because it was tainted by the absence of meaningful choice and contained oppressive one-sided terms and because it provided that the Dealership retained judicial remedies that "entirely superseded the consumer's arbitral remedies" and because both provisions were not severable. However the court did find that Plaintiff Two's installment contract did not "preclude the arbitrator from awarding mandatory statutory remedies and did not incorporate a lack of mutuality of remedies" holding that it was not unconscionable and enforceable.

The Court also rejected Plaintiffs arguments that the arbitration agreements were void against public policy due to the fact that both agreements' bans against class arbitration could not "be invalidated based upon public policy considerations embodied within state law." *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013).

B. South Carolina Uniform Arbitration Act Requires Confirmation of an Arbitration Award after Party Pays Award Prior to Confirmation

Plaintiff filed an action against Dealership alleging Dealership made misrepresentations to her in connection with her purchase of a used vehicle. Dealership moved to compel arbitration which was granted by the trial court. The arbitrator found in favor of Plaintiff and awarded damages for Plaintiff's claims regarding Dealership's violation of the South Carolina Unfair Trade Practices Act ("SCUTPA") and the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act ("Dealers Act"). Plaintiff moved to confirm the arbitration award. Before the trial court was able to confirm the arbitration award Dealership paid the amount of the award to Plaintiff. During the confirmation hearing Plaintiff argued that the action had been stayed pending arbitration, needed to be concluded and that the South Carolina Uniform Arbitration Act ("UAA") mandated confirmation. Dealership argued that confirmation of the award was a moot point since it had already paid Plaintiff. The trial court confirmed the award based on Dealership's violation of the SCUTPA and applied S.C. Code § 14-48-130 which required the court to confirm the award. Dealership appealed and argued that the trial court erred in (1) "rejecting Dealer's assertion that payment of the award mooted the request for confirmation, leaving no justiciable controversy; and alternatively (2) in applying the provision for confirming awards contained in the UAA rather than the Federal Arbitration Act ("FAA")."

On appeal, the South Carolina Court of Appeals upheld the findings of the trial court, holding that "although the arbitration agreement stated the FAA would apply to the arbitration, it did not expressly state the FAA would apply to the subsequent procedure for confirmation once the award was made. However, this is not a concern because the outcome would be the same." The Court also held that the trial court did not err in applying the SCUTPA because the confirmation statute was procedural not substantive. Finally, the Court held that Dealership's payment of the award prior to confirmation failed to make the matter nonjusticiable, stating that "confirmation of an award is a distinguishable issue from a defendant's payment or satisfaction of an award" and that the statutory procedure of the UAA required confirmation of the award. *Henderson v. Summerville Ford-Mercury, Inc.*, 405 S.C. 440, 748 S.E.2d 221 (Ct. App. 2013).

C. Bank's Offer of Employment Letter without Arbitration Clause Still Required Arbitration Due to Arbitration Clause Contained within Employment Paperwork

Bank offered Employee a position as a private financial advisor and sent Employee an offer letter outlining the terms of employment. Part of the terms of employment were that Employee would receive a $100,000 signing bonus but if Employee failed to remain at the bank for sixty months 2.78% of the bonus would be forgiven. The letter also provided that if Employee voluntarily terminated his employment, "or [Employee] was involuntarily terminated before the entirety of any repayment obligation has been forgiven, [Employee] was required to reimburse [Bank] for the outstanding portion of the gross amount owed" in addition to any fees incurred with collection of such amount. The offer letter also required Employee to obtain Financial Industry Regulatory Authority ("FINRA") series licenses within a certain time period. Employee accepted Bank's offer and signed the offer letter.

As part of Employee's FINRA registration, Employee had to complete certain required FINRA forms. One form contained an arbitration clause which provided that Employee agreed to arbitrate any dispute between himself and his "firm." Employee resigned from the Bank before the sixty month time period ended. Bank subsequently demanded Employee repay the outstanding amount of the signing bonus. After Employee disputed his obligation to repay the Bank, the Bank's Investment Branch ("BIB") initiated arbitration proceedings through the FINRA. Plaintiff refused to engage in arbitration and filed a declaratory judgment action in the U.S. District Court of South Carolina. Plaintiff argued that because Bank's offer letter did not contain an arbitration provision and the arbitration provision within the FINRA form only applied to any disputes between Employee and BIB. Bank and BIB filed a motion to dismiss which the district court granted.

The Court based its holding on the fact that Employee consented to arbitration by filling out the required FINRA paperwork and because BIB paid the signing bonus, the dispute fell within the parameters of the arbitration clause which was directly related to the arbitration proceedings initiated by BIB. *Troutman v. SunTrust Bank*, 2013 WL 5657681 (D.S.C. October 16, 2013).

D. Fourth Circuit Applies State Law in Absence of Federal Law in Upholding Arbitration Award

Labor Union and Private Company were parties to a multiple pre-hire agreement which provided for a mandatory arbitration procedure outlined by the National Joint Adjustment Board ("NJAB") to address grievances. The agreement at issue included an "interest-arbitration clause, which established that if negotiations for a renewal came to a deadlock, the parties were to submit the issues to the NJAB for a binding decision."

Labor Union notified Private Company that it wanted to renew the agreement. When Private Company refused to renew the agreement, Labor Union submitted the unresolved negotiations to the NJAB, which ordered the parties to execute an agreement, the interest-arbitration award. When Private Company refused to comply with the interest-arbitration agreement Labor Union filed a grievance with the NJAB. The NJAB then issued a grievance arbitration award in favor of Labor Union. Subsequent to the NJAB's award, Labor Union sought judicial enforcement of the award under the Labor Management Relations Act ("LMRA"). Private Company moved to vacate the award and Labor Union argued that the statute of limitations prevented Private Company from doing so.

The District Court upheld the arbitration award holding that the statute of limitations prohibited Private Company from vacating the arbitration award. The court applied the 90 day statute of limitations period as outlined in South Carolina Code § 15-48-130(b) for vacating an arbitration award because the LMRA did not provide a statute of limitations period which addressed this issue. On appeal the Fourth Circuit affirmed the findings of the district court. *Sheet Metal Workers' Intl. Assn., Local 399, AFL-CIO v. McLeMore*, 541 Fed. Appx. 321 (4th Cir. 2013) (unpublished).

E. Employee's Wage Claims Did Not Fall Within Scope of Arbitration Agreement

Employees owned LLC's that entered into independent sales contracts with a Sales Corporation ("SC") in early 2011. SC was owned by a Cellular Service Provider ("CSP"). The independent sales contracts did not bind or name Employees in their individual capacities. The sales contracts also provided that Employees were employed by SC not the CSP and that the SC's Employees would not be entitled to receive any compensation or benefits from CSP. In late 2011 CSP revised the sales contracts ("compensation agreements") which Employees executed in their individual capacities and became at-will employees of CSP. The compensation agreements provided that Employees would be paid individually and also included an arbitration provision.

Employees filed a putative class action against CSP alleging violations of the Fair Labor Standards Act and South Carolina Payment of Wages Act. In their complaint Employees alleged that CSP had "improperly classified their employment status as independent contractors in violation of federal and state labor law." Employees argued they were actual employees of CSP during the time the independent sales contracts were in place. CSP then moved to compel arbitration based on the compensation agreements. In response to CSP's motion to compel arbitration Employees moved to amend their complaint to limit the allegations "to only those acts occurring prior to the execution of the compensation agreements." The District Court granted Employees' motion to amend and denied CSP's motion to compel arbitration holding that because the compensation agreements only directed arbitration to "those claims, disputes, or controversies arising out of, or in relation to [the compensation agreement] or Employee's employment with [CSP]." The District Court held that the allegations in Employee's amended complaint fell outside of the arbitration provision.

On appeal, the Fourth Circuit Court of Appeals affirmed the district court, holding that the arbitration agreement only applied to "causes of action accruing from the execution of the [c]ompensation [a]greements and onward." The Court focused on the fact that the amended complaint addressed a time period where Employees had not entered into a contract with CSP in their individual capacities. The Court also emphasized that CSP's arbitration agreement could have incorporated CSP's prior relationship with Employees and their LLC's but it failed to do so. Finally, the Court stated that CSP could have drafted a broad arbitration provision which governed the present case but also failed to do so. *Newbanks v. Cellular Sales of Knoxville, Inc.*, 2013 WL 6234098 (4th Cir. December 3, 2013).

F. U.S. Supreme Court Holds that Courts Presume That Parties Contract for Arbitrators to Decide Procedural Preconditions to Arbitration

In the 1990's, British Investment Firm ("BIF") purchased a minority share in MetroGas, an Argentine gas utility company. During this same time, Argentina enacted laws which provided that its regulators would calculate gas tariffs in U.S. dollars, which would ensure that companies such as Metro Gas would generate reasonable returns. In 2001 and 2002, Argentina modified the tariff laws which changed the tariff calculation from dollars to pesos, at a rate of one peso per dollar. During this time, the exchange rate was three pesos to one dollar, which resulted in large losses for MetroGas. Pursuant to an investment treaty between the United Kingdom and Argentina, BIF moved to compel arbitration due to the changes in the tariff system. The investment treaty had a "local

litigation clause" which provided that a party could submit a dispute to arbitration after a period of 18 months had elapsed from the moment the dispute was filed with a local court and the local court had not rendered a final decision.

During the arbitration proceedings which spanned from 2004 to 2006, Argentina argued that the arbitration panel lacked jurisdiction to hear BIF's claims. As part of its decision, the panel also determined that BIF was excused from complying with the treaty's local litigation requirement because Argentina's conduct had waived or excused BIF from complying with the requirement. In 2007, the arbitration panel ultimately determined that it had jurisdiction to hear the dispute and awarded $185 million in damages to BIF. In 2008, both parties filed petitions for review in the District Court for the District of Columbia. BIF moved to confirm the arbitration award and Argentina moved to vacate the award based on the grounds that the arbitrators lacked jurisdiction. The district court confirmed the award but the D.C. Court of Appeals reversed, holding that the circumstances did not excuse BIF from complying with the treaty's local litigation requirement, and that the arbitrators lacked authority to hear the dispute.

BIF filed a petition for certiorari which was granted by the Supreme Court. In its holding, the Court characterized the treaty as an "ordinary contract between private parties" and held "where ordinary contracts are at issue, it up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide." The Court further emphasized that "courts presume that the parties intend courts, not arbitrators" to decide issues of arbitrability but "courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration." The Court held that the text of the local litigation requirement was clear that the provision was intended to be a procedural condition precedent to arbitration. *BG Group, PLC v. Republic of Argentina*, 134 S.Ct. 1198 (2014).

G. Home Builder Necessary Party to Arbitration Dispute

West Virginia Homeowner contracted with West Virginia Homebuilders for the construction of a new home. Homebuilders provided a home warranty which did not authorize them to enroll Homeowner in a third party warranty program. Prior to the closing, Homebuilders enrolled Homeowner in a 2-10 warranty program which contained the identical protection as Homebuilders' original warranty, however the 2-10 warranty contained an arbitration clause. Two years after purchasing her home Homeowner filed a warranty claim. Homeowner then filed a construction defect suit in West Virginia state court against Homebuilder, the Warranty Companies and claims adjusters. Warranty Companies subsequently filed a motion to compel arbitration in district court based on the 2-10 arbitration clause and diversity jurisdiction, but did not join the Homebuilders as parties. Homeowner filed a motion to dismiss, arguing that the petition involved nondiverse parties and Homebuilders were necessary and dispensable parties under FRCP 19. The District Court of West Virginia abstained from ruling on the petition based on the *Colorado River* abstention doctrine, holding that the Home Warranty Companies could "pursue their rights in the state court system and that it could not find that the arbitration issue [could] be resolved efficiently in this court."

On appeal, the Fourth Circuit held that under FRCP 19 Homebuilders were necessary parties to the arbitration because they: (1) had a direct pecuniary interest in the dispute, (2) were critical to the question of whether or not the arbitration clause was enforceable

and (3) were necessary parties to fully resolve the construction defect suit. The Court rejected the Warranty Companies' argument that the FAA's policy in favor of arbitration entitled them to a federal forum for their arbitrability claim, holding that "[t]he FAA applies with as much force in state courts as in federal." The Court also determined that the Homebuilders were indispensable parties which defeated diversity jurisdiction and held that the petition could not proceed in federal court due to the fact that joinder of the Homebuilders would defeat jurisdiction in federal court. The Court remanded the petition to district court with instructions to dismiss based on the lack of subject matter jurisdiction. *Home Buyers Warranty Corp. v. Hanna*, 2014 WL 1678478 (4th Cir. April 29, 2014).

H. Waiver Analysis Isn't Necessary Within the Context of an Invalid Arbitration Clause

Homebuilder appealed a 2011 Court of Appeals' decision which held that the trial court had the authority to determine the validity of an arbitration clause within an employment application. In the same decision, the Court of Appeals determined that the employment application and arbitration clause "were superseded and rendered invalid by the presence of a merger clause in the employment contract between [Homebuilder] and [Applicant]." The South Carolina Supreme Court affirmed the trial court's authority to determine the validity of the arbitration clause but vacated the Court of Appeals' decision regarding waiver, holding that because the Court of Appeals determined that the arbitration clause was invalid, "it was unnecessary to address [Employee's] argument that [Home Builder] waived the right to compel arbitration because a substantial length of time had passed, the parties engaged in extensive discovery, and the parties had availed themselves of the circuit court's assistance." *Davis v. KB Home of South Carolina, Inc.*, 2014 WL 2535489 (S.C. Sup. Ct. May 14, 2014).

I. S.C. Supreme Court Holds Named Arbitral Forum is Not a Material Term to Arbitration Agreement

Daughter entered into a Nursing Home residency agreement on behalf of her mother ("Patient"), but Daughter did not have a healthcare power of attorney authorizing her to sign on behalf of Patient. Daughter also signed an arbitration agreement which provided that all disputes regarding Patient's residency and care would be settled by arbitration under the rules of the AAA. Finally, the arbitration agreement also contained a severability clause which stated that "patient is not required to sign this [] Agreement in order to be admitted to or to remain in the Facility." Patient fell multiple times in 2009, fractured her hip and underwent two operations. Subsequent to the operations, patient experienced complications and passed away.

In 2011, Daughter, acting as the personal representative of Patient's estate, filed a notice of intent to file a medical malpractice suit against Nursing Home and related defendants ("Nursing Home"), in addition to survival and wrongful death claims. Nursing Home filed a motion to dismiss, or, in the alternative, a motion to compel arbitration and stay the litigation. Daughter opposed the motion and argued that the arbitration agreement was unenforceable because the forum selection clause had failed. Daughter also argued that the forum selection clause had failed due to the fact that since "January 1, 2003, the AAA has refused to accept personal injury disputes with a post-injury agreement to arbitrate." Additionally, Daughter argued that the FAA did not apply

because the residency agreement did not involve interstate commerce amongst other arguments. The trial court relied on *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (2009) and invalidated the agreement in its entirety. The court held that "the forum selection is an integral part of the [A]greement and cannot be remedied because the forum selected by [Nursing Home] will not hear this type of dispute."

On appeal, the South Carolina Supreme Court reversed the trial court and remanded the case back to the trial court. The Court found that the terms of the residency agreement implicated interstate commerce and were subject to the FAA because nursing homes "are contractually required to provide meals and medical supplies, which are instrumentalities of interstate commerce" relying on *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). The Court phrased the ultimate issue as "whether the unavailability of the AAA to serve as arbitrator dooms the Agreement as a whole." In characterizing its holding the Court discussed the two views on this issue:

> [A] majority of jurisdictions distinguish agreements requiring a proceeding administered by the named forum from those requiring a proceeding conducted in accordance with the named forum's rules. In the case of proceedings administered by a named forum, most courts view the forum selected as an integral term of the agreement because it is an express statement of the parties' intent to arbitrate exclusively before that forum; therefore, if the forum is unavailable, a material term of the agreement has failed, rendering the entire arbitration agreement invalid.
>
> Conversely, in the case of proceedings conducted in accordance with a named forum's rules, most courts view that forum selection, if it was intended to serve as such, as an ancillary consideration to the parties' primary intent of arbitrating, in front of any arbitrator, while using a set of pre-specified rules; therefore, if the forum itself is unavailable, courts nonetheless uphold the arbitration agreement and compel arbitration in an alternate forum, so long as the alternate forum follows the agreed-upon rules.

The Court adopted the majority view, holding "that the named arbitral forum is not a material term to agreements in which the parties agree to arbitrate in accordance with the named forum's rules, absent other evidence to the contrary." The Court also rejected Daughter's arguments that Nursing Home waived its right to arbitrate because it waited too long to file the motion to compel arbitration. The Court held that Nursing Home's participation in the statutorily required mediation process did not amount to a waiver and Nursing Home filed its motion to compel arbitration at the earliest opportunity. The Court remanded Daughter's arguments regarding the validity of the agreement back to the trial court, specifically her authority to sign the agreement and "whether there was a meeting of the minds between the parties prior to deciding whether to compel arbitration between the parties." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 2014 WL 2765644 (S.C. Sup. Ct. June 18, 2014).

J. Defendants Waived the Right to Arbitration After Engaging in Extensive Discovery

Corporate Defendants entered into sales contracts with Plaintiff "for the purchase and sale of scooters manufactured in China for importation into the United States." The sales contracts contained an arbitration provision which provided that all disputes would be submitted to The Foreign Trade Arbitration Commission of the China council For the Promotion of International Trade ("FTC") in China. Corporate Defendants met with Plaintiff's founder and agreed that the purchase of the scooters would be subject to arbitration in China. Corporate Defendants moved to compel arbitration under the FAA. Plaintiff opposed the motion to compel arbitration and argued that no valid agreement existed, Corporate Defendants waived their opportunity to compel arbitration, and the arbitration agreement did not cover all disputes with the parties.

The Court found that a valid arbitration agreement existed because Corporate Defendants proved that the parties' invoices contained an arbitration provision which was signed by one of Plaintiff's representatives and that Corporate Defendants offered sufficient evidence of an oral agreement to arbitrate through negotiations with Plaintiff. However, the Court found that Corporate Defendants waived their right to compel arbitration due to the fact that the parties had engaged in eight months of litigation, extensive discovery, including $177,000 in legal fees incurred by the Plaintiff, trial preparation, and the fact that Corporate Defendants "availed [themselves] of discovery procedures that would be unavailable or greatly limited in arbitration, as [they] … engaged in extensive discovery and received information and expert witness reports." Furthermore, the Court stated that Corporate Defendants waived their rights to arbitration because they benefited from discovery rules not available under the FTC. *Baja, Inc. v. Automotive Testing & Dev. Serv., Inc.*, 2014 WL 2719261 (D.S.C. June 16, 2014).

K. Arbitration Award Vacated Due to First Party's Breach of Contract

Restaurant Owner's appealed the trial court's order vacating an arbitration award in their breach of contract action. They argued that the arbitrator did not err by "consider[ing] the legal principle that the first party to breach a contract cannot complain when another party subsequently breaches the contract."

On appeal, the Court of Appeals affirmed the trial court holding that "[t]he arbitrator manifestly disregarded the established law that the first to breach a contract cannot later complain of a subsequent breach by the other party." The Court emphasized that because the arbitrator found that the Restaurant Owners were in violation of their contract, this amounted to a breach of the contract. The Court also held that the Restaurant Owners had no right to cure and no right to notice under the contract. *Sun v. Wang*, 2014-UP-250 (S.C. Ct. App. June 25, 2014).

L. U.S. Supreme Court Rejects Class Certification Based on Improper Measure of Damages

Cable Customers filed a class action suit against Cable Corporation alleging violations of federal antitrust laws as a result of Cable Corporation's clustering of its operations within the Philadelphia, PA region. Cable Corporation used a cluster strategy by "acquiring

competitor cable providers in the region and swapping their own systems outside the region for competitor systems located in the region." In their class action suit, Cable Customers alleged that Cable Corporation's cluster strategy violated the Sherman Act, created or attempted to create a monopoly, and that the strategy resulted in the elimination of competition with higher prices. Customers attempted to certify the class under F.R.C.P. 23(b)(3). The District Court certified the class and based its decision on Cable Customers' theory that Cable Corporation's activities "reduced the level of competition from overbuilders, companies that build competing cable networks in areas where an incumbent cable company already operates." The District Court also based its certification on the premise that "the damages resulting from overbuilder-deterrence impact could be calculated on a classwide basis." Cable Customers relied solely on the testimony of one expert to establish this type of damages. The expert noted that the model he used to calculate damages "did not isolate damages resulting from any one theory of antitrust impact." On appeal, the Third Circuit Court of Appeals affirmed the District Court rejecting Cable Corporation's argument that "the class was improperly certified because the model, among other shortcomings, failed to attribute damages resulting from overbuilder deterrence, the only theory of inquiry remaining in the case." The Court of Appeals did not consider this argument because "in its view, such an attack on the merits of the methodology had no place in the class certification theory." The Court of Appeals emphasized that "at the class certification stage, [Cable Customers] were not required to tie each theory of antitrust impact to an exact calculation of damages." The Court of Appeals also stated that "it had not reached the stage of determining on the merits whether the methodology is a just and reasonable inference or speculative," rather the Cable Customers "must assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations."

The U.S. Supreme Court granted certiorari and reversed the Court of Appeals, holding that the class action was improperly certified under Rule 23(b)(3). The Court stated that "[b]y refusing to entertain arguments against [Cable Customers'] damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry. And it is clear that, under the proper standard for evaluating certification, [Cable Customers'] model falls far short of establishing that damages are capable of measurement on a classwide basis." The Court emphasized that the District Court and Court of Appeals disregarded the predominance requirement of Rule 23 by failing to require that Cable Customers "tie each theory antitrust impact to a calculation of damages." The Court stated that because the Court of Appeals concluded that Cable Customers "provided a method to measure and quantify damages on a classwide basis" without deciding "whether the methodology was a just and reasonable inference or speculative" then "at the class-certification stage any method of measurement" would be acceptable "so long as it [could] be applied classwide, no matter how arbitrary the measurements may be." Finally, the Court rejected the reliability of the expert's model holding that because it was calculated by assuming the validity of all four of Cable Customers' theories of antitrust impact, where only one theory remained in the case. *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013).

M. Non-Signatory Not Bound by Arbitration Agreement

Plaintiff filed an action against Financial Firm and other defendants alleging that defendants and Financial Firm acted to divert decedent's assets from Plaintiff to individual defendant. Plaintiff asserted claims of intentional interference with inheritance, aiding and abetting intentional interference with inheritance and civil conspiracy against Financial Firm. Financial Firm moved to dismiss Plaintiff's complaint and compel arbitration and argued that "its only connection to [the] dispute [was] through its contractual duties under the client relationship agreements (CRAs) entered into between Decedent and [Financial Firm], which contained mandatory arbitration clauses." Financial Firm "argued that although [Plaintiff] was a non-signatory to the agreements, any duty, if any owed by [Financial Firm] to [Plaintiff] derives from the CRAs" binding Plaintiff to arbitration. The trial court denied Financial Firm's motion to compel arbitration holding that none of the common law principles of contract and agency law which dictate that a non-signatory may be bound to an arbitration agreement applied to Plaintiff's claims against Financial Firm.

On appeal, the Court of Appeals affirmed the trial court holding that Financial Firm failed to provide any arguments under either contract, agency or third-party beneficiary law to support arbitration of the Plaintiff's claims. The Court noted that Financial Firm's argument that "a general duty from the CRAs binds [Plaintiff]" as a non-signatory "conflates the duties created by the CRA contracts and general tort duties." The Court emphasized that Plaintiff did not allege that Financial Firm breached a duty under the CRA but "rather that it breached the duty owed by all persons not to intentionally interfere with another's expected inheritance." *Malloy v. Thompson*, 2014 WL 4087881 (S.C. Sup. Ct. August 20, 2014).

II. Contracts

A. Developer Awarded Summary Judgment under Terms of Commercial Contract Based on Statute of Limitations

Electrical Service Provider ("ESP") entered into an agreement with Developer in May 2004 where ESP agreed to install underground electrical service facilities in one of Home Builder's developments. ESP also agreed to waive any charges for the installation of the services. Part of the agreement also provided that 95% of all homes within the development be equipped with electric water heaters before the initial residential occupancy and also provided that if Developer permitted anything other than an electric water heater which exceeded "5% of the total number of lots before the initial residential occupancy of each lot, then [Developer] shall immediately owe and pay [ESP] and amount equal to $500 per lot for those lots exceeding 5%." ESP first discovered a potential breach of the agreement in April-May 2012 based on a field audit of the development. Subsequent to ESP's discovery of the breach it made a demand for payment of $80,000 to Developer regarding 160 homes that were in violation of the agreement.

In 2012 ESP brought an action against Developer for breach of contract. Developer filed a motion for summary judgment arguing that the statute of limitations barred a claim for

all of the homes subject to the agreement, and in the alternative it barred ESP's claims for all but seven homes since the homes were sold between 2004 and 2012. ESP argued that under the discovery rule its cause of action didn't accrue until 2012 which was an issue reserved for the jury. ESP also argued that because under the terms of the agreement Developer was "solely responsible for ensuring the homes had electric water heaters installed prior to the initial occupancy" Developer was estopped from asserting a statute of limitations defense. Developer argued that ESP didn't act with reasonable diligence until 2012.

The district court granted Developer's motion for summary judgment, holding that "the initial residential occupancy of a home equipped with a water heating source other than electricity furnished by Plaintiff trigger[ed] a breach of the Agreement" and based on the court's holding in *Richland-Lexington Airport Dist. v. Am. Airlines, Inc.*, 306 F.Supp.2d 548, 566 (D.S.C. 2002) aff'd, 61 F. App'x 67 (4th Cir. 2003) "[ESP] accrued a new cause of action each time a water heating source other than electric was present at the initial residential occupancy, or close date, of a home subject to the Agreement." The Court also held that ESP failed to exercise reasonable diligence in discovering the breach by waiting until 2012 to perform the field audit of the development.

ESP also argued that the terms of the agreement requiring Developer to be "solely responsible for ensuring full compliance" with the agreement "(1) relieved [ESP] from its duty to act with reasonable diligence, and (2) estop[ped Developer] from asserting the statute of limitations." The court strongly rejected these arguments holding that this interpretation of the agreement "leads to absurd consequences" whereby Developer should not be required to notify ESP of any breach of the agreement. *Fairfield Elec. Coop., Inc. v. DR Horton, Inc.*, 2013 WL 5409143 (D.S.C. September 25, 2013).

B. U.S. Supreme Court Holds Forum Selection Clause Should be Enforced Absent Extraordinary Circumstances

Government contracted with Contractor for the construction of a child-development center in the Western District of Texas. Contractor subsequently subcontracted with Subcontractor for work on the Project. The parties subcontract contained a forum-selection clause, which provided that all disputes between the parties "shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the U.S. District Court for the Eastern District of Virginia, Norfolk Division." A payment dispute ensued which resulted in Subcontractor filing suit against Contractor in the Western District of Texas. Contractor moved to dismiss the suit arguing that "the forum-selection clause rendered venue in the Western District of Texas wrong under [28 U.S.C.] § 1406(a) and improper under Federal Rule of Civil Procedure 12(b)(3)." Contractor also moved to transfer the case to the Eastern District of Texas under [28 U.S.C.] § 1404(a). The district court denied Contractor's motions holding that § 1404(a) "is the exclusive mechanism for enforcing a forum-selection clause that points to another federal forum" and Contractor "bore the burden of establishing that a transfer would be appropriate under § 1404(a) and that the court would consider a nonexhaustive and nonexclusive list of public and private interest factors, of which the forum-selection clause was only one such factor." The Fifth Circuit Court of Appeals denied Contractor's petition for a writ of mandamus holding that § 1404(a) is the exclusive mechanism for enforcing a forum-selection clause that points to another federal forum and that "dismissal under Rule 12(b)(3) would be the

correct mechanism to enforce the clause because § 1404(a) by its terms does not permit transfer to any tribunal other than another federal court."

The Supreme Court granted certiorari and reversed the Court of Appeals, holding that § 1406(a) and Rule 12(b)(3) only allow dismissal when venue is "wrong or improper." The Court stated that "whether venue is wrong or improper depends exclusively on whether the court in which the case was brought satisfies the requirements of federal venue laws, and those provisions say nothing about a forum-selection clause." The Court held that a forum-selection clause "may be enforced through a motion to transfer under § 1404(a)" because it "permits transfer to any district where venue is proper or to any district to which the parties have agreed by contract or stipulation." The Court stated that "when the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause" where "only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied." The Court also stated that "the enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system" in addition to the fact that "the overarching consideration under § 1404(a) is whether a transfer would promote the interest of justice, a valid forum-selection clause should be given controlling weight in all but the most exceptional cases." *Atl. Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S.Ct. 568 (2013).

C. Parties' Intent Sufficient to Establish Sum Certain Contract

Contractor filed an action against Home Owner seeking payment on a small project involving the construction of an outdoor shed. The master in equity found the parties' oral agreement that the contract price of $35,000 was a sum certain. Part of the price also included the cost of windows and doors which the home owner was to select. Contractor argued that the contract amount was not for a sum certain and argued under the theory of quantum meruit for the work completed. The master found that because the parties entered into an express contract the Contractor was prohibited from recovering under quantum meruit. He also found that the Contractor failed to prove that the home owners unjustly retained a benefit without paying for it.

On appeal, the Court of Appeals affirmed the decisions of the master, holding that the parties' intent evidenced a sum certain contract because the Contractor's "ledger, spreadsheets, and internal documents reference[d] a contract price of $35,000 and [the Contractor] noted the cost of the project was $35,000 in his ledger." The Court also emphasized that there was sufficient evidence that the parties agreed on a sum certain contract becasue "the parties orally agreed to changes and upgrades to the initial scope of work [and t]he parties agreed on the cost for each change or upgrade, and the [Home Owners] paid [the Contractor] accordingly." The Court also held that because the parties entered into an express contract the Contractor was prohibited from recovering under quantum meruit. In addition, the Court also held that the Contractor was prohibited from recovering under quantum meruit because he failed to prove that the home owners unjustly retained a benefit without paying for it. *Haynie v. Cash*, 2013-UP-489 (S.C. Ct. App. December 23, 2013).

D. Court Upholds Parties' Strict Liability Indemnity Agreement

In 1966 Development Corporation sold a fertilizer manufacturing site to Purchaser. The parties' purchase agreement contained an indemnity provision which stated that "[Development Company] agrees to indemnify and hold harmless [Purchaser] in respect to all acts, suits, demands, assessments, proceedings and cost and expenses resulting from acts or omissions of [Development Company] occurring prior to the closing date." During the time Purchaser owed the site it contaminated the soil through the fertilizer manufacturing process. In 2003, Company purchased 27.62 acres of the Site and incurred substantial remediation costs due to the environmental contamination as a result of the fertilizer manufacturing process. In 2008, Company filed an action against Purchaser seeking a declaration of joint and several liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") as a result of the environmental cleanup costs. Purchaser, in turn, asserted a third party indemnification claim against Development Corporation based on the 1966 indemnity provision seeking indemnification for attorney's fees, costs, and litigation expenses incurred in establishing that Purchaser contributed to the environmental contamination.

The District Court found that Purchaser was liable to Company for the environmental cleanup costs and Purchaser was entitled to indemnification for attorney's fees and costs from Development Corporation. The District Court subsequently vacated its indemnification order and certified the following question to the South Carolina Supreme Court:

> Does the rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts, unless such intention is expressed in clear and unequivocal terms, apply when the indemnitee seeks contractual indemnification for costs and expenses resulting in part from its own strict liability acts?

The Court answered the certified question as "no" holding that "the public policy underlying the negligence rule, the nature of CERLCA liability, and our law respecting the freedom of parties to contract" did not prevent Purchaser from seeking indemnification from Development Corporation for its attorney's fees and costs. The Court noted that "barring indemnification in this case would not serve the deterrent purpose of the negligence rule" and that the "nature of CERCLA liability is fundamentally nota a fault-based determination." The Court also emphasized that Purchaser only sought to enforce the indemnification provision in accordance with its terms which did not run "afoul of the negligence rule." Finally, the Court emphasized that under the premise of parties' freedom to contract, both Purchaser and Development Corporation were sophisticated business entities which chose to place this provision in their contract, which did not support any basis "to invoke the negligence rule to trump the plain language of the indemnity agreement." *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, 2014 WL 3610951 (S.C. Sup. Ct. July 23, 2014).

E. Architectural Firm Awarded Partial Summary Judgment on Existence of Contract Based on a Counteroffer

City entered into a Memorandum of Understanding ("MOU") with Architectural Firm ("AF") to develop a hotel. AF was supposed to complete the design work to determine

the maximum price of the project that was to be used by City to obtain a municipal bond to fund the cost of the project. The MOU provided that Construction Company was to pay AF directly. In June 2003 City received a letter from AF "stating that [AF] would complete its preliminary design on July 10, 2003, and would thereupon cease further work until the bond closing date of October 13, 2003, but required assurance it would be compensated for the work it performed during this time frame." City then approved $650,000 for "interim architectural design services for a period of 90 days prior to [the] bond closing." The bond closing did not take place on schedule but AF continued to perform its work. On December 16, 2003, AF submitted an invoice to City for its services from work that took place from July 10 to December 16, 2003. On December 17, 2003, AF informed Construction Company that "City had voted that day to advance $750,000 to the design team for design services and expenses at cost covering the time period between July 10 to December 15, 2003." Pursuant to the MOU, Construction Company paid AF $698,000. AF continued work on the project but in March 2004 the City abandoned its plans under the MOU and terminated AF. AF sued City for breach of contract under the MOU and July 2003 agreement.

AF moved for partial summary judgment "arguing it had a contract with the City as a matter of law based on the performance of and payment for architectural design services agreed to in July 2003." City argued there was not a separate agreement and the payment of fees was merely an advance of fees under the MOU, while the MOU provided that Construction Company was to pay AF. The trial court granted partial summary judgment in favor of AF "on the sole issue of the existence of a contract under the July 2003 agreement." City, in turn, filed a Rule 59(e) motion arguing that "the authorization of the $650,000 could not constitute an acceptance on seemingly modified terms because any modification of the terms resulted in a counteroffer, which [AF] accepted by performance." City also argued that because AF accepted by performance and was paid this amount, "City had fully performed and the contact was satisfied." The trial court denied City's motion holding that "the City never argued the authorization of payment was a counteroffer."

On appeal, the Court of Appeals affirmed the trial court as modified, "adopting the City's position that the agreement to pay $650,000 was a counteroffer which [AF] accepted by performance." The Supreme Court affirmed the Court of Appeals, and also held that the issue of whether or not the contract was satisfied was not preserved for review due to the fact that "the issue before the circuit court was limited to the existence of a contract" and because the "trial court declined to find the contract was satisfied" without ruling as to a breach of damages, it would be "inappropriate to extend a ruling on this issue." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 2014 WL 4087917 (S.C. Sup. Ct. August 20, 2014).

F. Memorandum of Understanding Insufficient to Form Contract

In a second opinion, the Supreme Court addressed AF's claims for breach of contract, quantum meruit and estoppel in addition to Developer's claims for breach of contract, quantum meruit and breach of the duty of good faith. City moved for summary judgment as to AF's breach of contract claim "arguing that the MOU was not a contract and therefore [AF's] contract claims failed." The trial court granted City's motion on all claims, holding that the MOU "was not a binding contract," and rejected the remaining equitable claims. The Court of Appeals affirmed the grant of summary judgment as to

AF's claim for promissory estoppel, but reversed and remanded the trial court's grant of summary judgment as to whether the MOU was a contract. The Court of Appeals also reversed the trial court's grant of summary judgment as to Developer's quantum meruit claims.

The Supreme Court granted certiorari and held that the MOU was not an enforceable contract due to the fact that the language of the agreement expressed intent to be non-binding. The Court also held that the Court of Appeals erred in holding that a genuine issue of material fact existed as to whether the MOU was a binding contract. The Court held that there was no "meeting of the minds as to all material terms" making the MOU unenforceable. Finally, the Court reversed the Court of Appeals reversal of the trial court's grant of summary judgment as to Developer's quantum meruit claims. The Court emphasized that Developer's failed to demonstrate any evidence that City retained any benefit from their services by simply relying on the project team's work in conjunction with Developer's expertise. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 2014 WL 4087936 (S.C. Sup. Ct. August 20, 2014).

III. Insurance

A. Developer Entitled to Indemnification from Its Predecessor-In-Interest's Insurer

Insurer filed a declaratory judgment action seeking a declaration that it owed no coverage or defense obligations to Developer under Developer's policies for losses arising out of a large construction defect suit involving 77 condominium buildings. Developer filed an answer and counterclaim seeking a declaration that the policies issued by Insurer provided both indemnification and a defense for the claims asserted and damages in the suit ("suit"). Developer also asserted a claim against Insurer for breach of contract.

Developer was a successor-in-interest to prior companies which had insurance policies through additional insurers. Developer subsequently amended its answer to assert a third party complaint against Developer's predecessor-in-interest's Insurer (Prior Insurer) seeking a declaration that Prior Insurer provided coverage and also had a duty to defend in the suit. Prior Insurer subsequently filed an answer and counterclaim against Developer and Insurer seeking a declaration that its policies did not provide coverage or a duty to defend in the suit. Prior Insurer also filed a fourth party complaint against Multiple Insurers, who had issued policies to Developer and its predecessor in interest, seeking a declaration that if Prior Insurer had a duty to defend then Multiple Insurers also had a duty to defend and should be held liable in contribution for any amounts to be paid by Prior Insurer.

In ruling on the parties' motions for summary judgment, the district court ruled that Prior Insurer had a duty to defend "because coverage passed to successors-in-interest through merger", the suit reflected the potential for an "occurrence" during Prior Insurer's policy period, Prior Insurer had a duty to Defend Developer in the suit and Prior Insurer was not entitled to contribution from the fourth party defendants.

The Court set the remaining issues for trial which included (1) "whether there was coverage for any portion of the amount eventually paid by [Developer] to settle the [suit],

and if so, what amount, if any, [Prior Insurer] owed to [Developer] for its pro-rata time-on-risk portion of those covered damages," and (2) "what amount, if any, [Prior Insurer] owed to [Developer] in reimbursement of the reasonable, necessary and related defense costs in the [suit]." Insurer was dismissed from the declaratory judgment action by stipulation of the parties on the first day of trial.

The Court held that because no prior exclusion in Prior Insurer's policies barred coverage, Prior Insurer must indemnify Developer in accordance with the pro rata time-on risk method as provided in *Crossmann Cmtys. of N. A., Inc. v. Harleyville Mutual Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011) (holding that losses in a progressive damage case should be allocated among all triggered policies based on each insurer's time-on-the-risk). In applying this methodology the court held that 12 buildings involved in the 77 building suit triggered coverage and awarded $16,473 on Developer's indemnity claim against Prior Insurer. The Court also held that because the suit triggered Prior Insurer's duty to defend the entirety of all claims in the suit, Developer's remedy for Prior Insurer's breach of its duty to defend (which the court had already addressed in a prior order) was payment for Developer's expenses incurred in providing its own defense. Accordingly, the court applied the twelve factors outlined in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th. Cir. 1978) in its analysis of whether Developer's attorney's fees incurred in defending the suit were reasonable and necessary. The Court emphasized that because (1) Developer had a strong economic incentive to "pay only those attorneys' fees and defense costs that were reasonable and necessary to defend" the suit, (2) Developer closely managed its defense costs through its thorough review of all billings, (3) Developer's Prior Insurer acquiesced in Developer's defense strategy by virtue of its knowledge of status reports and failure to attempt to manage Developer's defense plan, (4) Developer's selection of its lead counsel was reasonable, and (5) because Developer's defense team achieved an excellent result in the suit, all unreimbursed attorney's fees incurred by Developer were reasonable and necessary.

The Court also held that because Developer entered into settlement agreements with six additional insurance carriers from which it sought coverage and a defense in the suit it was prevented from also recovering these costs from Prior Insurer. The Court emphasized that because Developer's settlement agreements with the additional six carriers provided that Developer agreed to "release all claims for coverage under the insurer's policies" and because Developer "claimed both defense and indemnity under the policies at issue and the settlement agreements contained general releases, without allocation of an amount toward defense costs or an amount toward indemnity … the settlement amounts paid by the carriers included payment for both." In its reasoning the court stated that the collateral source rule only applies to tort claims and in this instance because Developer's claim was a breach of contract claim it was prevented from double recovery. Thus, the Court reduced the amount Prior Insurer was obligated to pay Developer by the amount of the settlement payments made by the six additional carriers.

Finally, the Court also held that under South Carolina law Developer was entitled to recover its costs and fees from Prior Insurer for prosecuting its third-party claim in order to enforce Prior Insurer's duty to defend. *Crossman Cmtys. of N.C., Inc. v. Harleyville Mut. Ins. Co.*, 2013 WL 5437712 (D.S.C. September 27, 2013).

After the trial, Insurer filed a Motion for Judgment NOV, to Alter or Amend Judgment, to Amend/Make Additional Findings, and for New Trial. The Court denied Insurer's Motion for Judgment NOV and New Trial related to the Court's award of attorney's fees to

Developer and the allocation of the portion of settlements from other insurers that constituted reimbursement of defense costs, but amended its judgment as to the amount of the time-on-risk indemnity obligation of Insurer to $3,565 per building. *Crossman Cmtys. of N.C., Inc. v. Harleyville Mut. Ins. Co.*, 2014 WL 108316 (D.S.C. January 8, 2014).

Developer subsequently filed a motion for its attorney's fees which Prior Insurer opposed. The Court applied the three part standard outlined in *McAfee v. Boczar*, 738 F.3d 81 (4th Cir. 2013). The Court stated:

> The proper calculation of an attorney's fee award involves a three-step process. First, the court must determine the lodestar figure by multiplying the number of reasonable hours expended times a reasonable rate. To ascertain what is reasonable in terms of hours expended and the rate charged, the court is bound to apply the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974) … Next the court must subtract fees for hours spent on unsuccessful claims unrelated to successful ones. Finally, the court should award some percentage of the remaining amount, depending on the degree of success enjoyed by the plaintiff.

Developer's total time spent by counsel was 1978 hours with an additional 792.65 hours of paralegal and staff time. Prior Insurer argued that Developer "expended more hours than reasonably necessary to litigate the duty to defend issues" as 25 different time keepers from Georgia Firm and 14 time keepers from Local Counsel billed time on the case. In response, Georgia Firm argued that it only sought recovery from 11 timekeepers and Firm Two argued that it only sought recovery for 9 timekeepers. The Court found this was reasonable. Prior Insurer argued that (1) many of the billings contained "duplicative billing and vague entries" but did not present any evidence to support this claim, (2) "the fee award should not include the time spent on preparing motions in limine and other motions that it describe[d] as unsuccessful", (3) "the fees and costs … sought improperly include[d] time spent in preparing pleadings filed on behalf of some of the Fourth Party Defendants", and (4) "the award should not include time spent on tasks related to its indemnity obligations, only its duty to defend." The Court rejected Prior Insurer's arguments as to items 1, 2 and 4 but held that the attorney's fee award should only involve time for work performed "in relation to the dispute between [Developer] and [Prior Insurer]" and made a ¼ reduction in the total time sought by Developer related to the fourth party claims.

The Court also determined that local counsel's rates of $175 - $300 hour for counsel were reasonable but that Georgia Firm's rates of roughly $350 - $715 an hour were like services which could have been provided in South Carolina, and reduced the Georgia Firm's partner rates to $300 an hour, associates to $225 per hour and the paralegal rate to $125 per hour.

In its analysis of deducting fees for unsuccessful claims, the Court decided that no reduction was needed because as Prior Insuer argued, counsel's time for preparing/working on "unsuccessful motions such as motions in limine, motion to bifurcate, and objection to realignment of the parties" did not constitute unsuccessful claims.

Finally, in addressing the percentage amount of the award, the Court stated "while [Developer] received a substantial award, the Court believes that a reduction of the lodestar fee amount by 25 percent is appropriate, taking into account that the Court did not allow a windfall or duplicate recovery to [Developer] and deducted from the award those amounts [Developer] had previously received from other carriers for defense costs." Thus, the Court awarded Developer $308,674.50 in attorney's fees and $102,031.41 in costs. *Crossman Cmtys. of N.C., Inc. v. Harleyville Mut. Ins. Co.*, 2014 WL 2169075 (D.S.C. May 23, 2014).

B. Fallen Billboard Sign and Removal of Additional Signs Constitutes an Occurrence under CGL Policy

A jury determined that Insured was liable in a tort action involving the construction of three outdoor advertising billboard signs. One sign fell into the interstate and the two remaining signs were removed. The jury awarded actual and punitive damages to plaintiffs. Insured then sought indemnification from its CGL Insurer as a result of the tort action. Insurer filed a declaratory judgment action to determine whether or not it had a duty to indemnify Insured as a result of Insured's liability. The trial court found that Insurer's policy covered all damages awarded by the jury and ordered that Insurer was obligated to indemnify Insured for the judgment in the tort action. The court of appeals reversed the trial court based on the trial court's failure to grant Insured's motion to transfer venue to its county of residence. Insured subsequently filed a Rule 59(e) motion and a motion under Rule 60 SCRCP to have the trial court's declaratory judgment order voided. The trial court only struck the portion of its order referencing the money damages awarded by the jury. Insured appealed the trial court's order which the court of appeals affirmed as modified. The South Carolina Supreme Court granted Insured's petition for writ of certiorari.

On appeal, the South Carolina Supreme Court held that the court of appeals correctly affirmed the trial judge's denial of Insured's Rule 60 motion because there was a justiciable controversy sufficient to implement the S.C. Uniform Declaratory Judgment Act. The Court further clarified that the DJ decision regarding property damages was not proper for its consideration because it was based on questions of fact to be presented at trial. The Court also held that there was an "occurrence" under the policy and stated that "we view the fallen sign and the removal of the remaining two signs under a continuum of an occurrence, as this is analogous to the CGL cases involving continuous or repeated exposure to substantially the same general harmful conditions." The Court also held that "because the signs were simultaneously constructed, we view [the falling of the first sign and removal of the other two] as a single occurrence with progressive damage." *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 748 S.E.2d 781 (2013).

C. Consent of Nominal Defendant Unnecessary in Removal of Action to Federal Court

Contractor was insured by multiple insurers from 1995 to 2009. Contractor completed roof work on a project in Charleston which was completed from 1998 to 2001. Contractor was sued in state court for alleged defects in its roofing work performed on the project and later settled with the plaintiff. Three of Contractor's insurers paid equal amounts of the one million dollar settlement while reserving their respective rights to resolve the proper allocation of settlement through arbitration or litigation.

Insurer 1 filed a declaratory judgment action in the Eastern District of North Carolina seeking a declaration of each insurer's rights and obligations related to damages on the Charleston project. Insurer 1 joined all of Contractor's insurers and Contractor in the suit. Insurer 2 also filed a declaratory judgment action in South Carolina state court naming Contractor and other insurers that had covered Contractor seeking a declaration of each insurer's share in the settlement in addition to equitable contribution from the insurers to the extent that Insurer overpaid its share of the settlement. Insurer 2's suit was removed to federal court based on diversity jurisdiction. The remaining defendant insurers consented to removal but Contractor neither consented nor objected, "nor claimed an interest in the outcome of the proceeding at that time."

Defendant Insurer in Insurer 2's action filed a motion to dismiss on the grounds that the suit was duplicative of Insurer 1's action in North Carolina. Insurer 2 moved to remand the case based on Contractor's failure to join in or consent to the notice of removal. Contractor later filed an untimely answer to Insurer 2's complaint and asserted an interest in the outcome of the suit. The district court "found that [Contractor] was a nominal party for purposes of the nominal party exception to the rule of unanimity governing removal" and "determined that the action did not seek any relief from [Contractor] but merely sought to determine the percentage that each insurer was required to pay of a settlement already agreed to by the insurers on behalf of [Contractor]." The court applied two different tests for nominal party status and held that "it was not possible for [Insurer 2] to establish a cause of action against [Contractor], and that there was no reasonable basis for predicting that [Contractor] could be held liable in any way." The court also dismissed the action under the first to file rule.

On appeal, the Fourth Circuit Court of Appeals affirmed the district court, holding that because Contractor had no "palpable interest … in the outcome of the case" Contractor was a nominal party which didn't need to consent to the removal. The Court focused on the fact that because Insurer 2 wasn't seeking any monetary or non-declaratory injunctive relief and the fact that no party sought non-declaratory injunctive relief in the North Carolina Action, there was "absolutely no reason to believe that [Contractor would] be affected by the eventual judgment." *Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co.*, 736 F.3d 255 (4th Cir. 2013).

D. South Carolina Supreme Court Upholds Service of Suit Clause in Insurance Policy

Plaintiff filed a malpractice suit against Nursing Home alleging injuries sustained as a result of the improper placement of a feeding tube. Nursing Home settled the suit without the involvement of its Insurer.

Nursing Home subsequently filed a declaratory judgment action against its Insurer seeking a declaration of coverage for the malpractice claim. The Nursing Home policy contained a service of suit clause which provided:

> It is further agreed that service of process in such suit may be made upon Counsel, Legal Department, Lexington Insurance Company, 200 State Street, Boston, Massachusetts 02109 or his or her representative, and

> that in any suit instituted against us upon this Policy, we will abide by the decision of such court or of any appellate court in the event of any appeal.

Pursuant to the service of suit clause, Nursing Home mailed Plaintiff's complaint to the Legal Department address in Boston. The complaint was signed for on May 20, 2005 as evidenced by the return receipt. When Insurer failed to respond within 30 days a default judgment was entered against it on July 15, 2005. Two months thereafter Nursing Home amended its complaint, asserting Insurer was in default and moved for damages. Nursing Home served the amended summons and complaint by mail to the Boston address. Insurer filed an answer and counterclaim in addition to a motion to set aside the default due to insufficient service of process. At the hearing Insurer argued that it could only be served pursuant to S.C. Code § 15-9-270 which requires service of process through the Department of Insurance. Insurer also argued that service was ineffective because Nursing Home failed to comply with the contractual provisions and that Insurer had no record of the employee who signed the return receipt. The trial court denied Insurer's motion holding that because the parties contractually agreed on an alternate method of service, service through the Department of Insurance was not required. The trial court entered a judgment against Insurer for $153,266.

On appeal, the Court of Appeals reversed the trial court, holding that the "service of suit clause did not absolve [Insurer] of the responsibility to comply with the requirement in section 15-9-270 that it deliver two copies of its summons and complaint to the Director of the Department of Insurance."

The South Carolina Supreme Court reversed the Court of Appeals, holding that the legislative intent behind S.C. Code § 15-9-270 was not to "circumvent the long-standing rule that service can be consented to by the parties or waived entirely" holding that Insurer was "bound by its own policy's terms" and that 15-9-270 is not the exclusive means to serve an insurance company. The Court also rejected Insurer's argument that the trial court erred in failing to set aside the default because the Insurer showed good cause, holding that Insurer's losing of the complaint was not a satisfactory explanation for failing to respond on time. The Court also rejected Insurer's argument that Nursing Home failed to comply with the service of suit clause, holding that "[t]he communication was directed to the legal department, and the mere omission of the word Counsel in the address did not render service ineffective." *White Oak Manor, Inc. v. Lexington Ins. Co.*, 753 S.E.2d 537 (2014).

E. Insured's Awarded Punitive Damages on a Bad Faith Counterclaim Absent Actual and Consequential Damages

Insured was named as a defendant in five product defect suits and tendered its defense to its Insurer which agreed to defend in all five suits. Insured's commercial general liability policies had a $2,000,000 aggregate limit with a $500,000 deductible, which required that Insured reimburse Insurer for "any defense and indemnity costs incurred per occurrence." Insurer settled all five suits within the deductible limits despite Insured's position that the cases should go to trial. After Insured failed to reimburse Insurer for the costs of each settlement, Insurer filed an action against Insured in district court seeking reimbursement for the settlement amounts, in addition to declaratory relief concerning the trigger of coverage. Insured counterclaimed, alleging that Insurer breached the terms of the insurance policies and the implied covenant of good faith and

fair dealing. After a trial, the jury found for both parties for breach of contract damages and awarded Insured consequential damages in the amount of $684,000 and punitive damages in the amount of $12.5 million on its bad faith claim. Both parties filed numerous post-trial motions. In ruling on the post-trial motions, the district court set aside the award of bad faith damages, ruling that because Insured failed to prove actual damages it was not entitled to punitive damages. The court also affirmed the verdict as the breach of contract claims for both parties but refused to award litigation costs and prejudgment interest.

On appeal, the Fourth Circuit Court of Appeals vacated the district court's ruling "that absent actual or consequential damages, [Insured] cannot receive punitive damages", holding that "an absence of ascertainable damages does not necessarily preclude nominal or punitive damages where, as here, the jury finds a party liable for punitive damages." The Court further emphasized that because the jury awarded punitive damages, it found "[Insurer's] actions willful, wanton, or reckless" which did not prohibit Insured from receiving punitive damages. The Court reasoned that the district court failed to specify whether or not the evidence supported the jury's finding of punitive damages, holding that on remand the district court must consider these issues in weighing the punitive damages award.

The Court also denied Insured's arguments for entitlement of attorney's fees, holding that South Carolina law does not support the award of attorney's fees in bad faith tort actions, nor does S.C. Code § 38-59-40 provide for an award of attorney's fees where, in this instance, there was no refusal of a duty to defend by Insurer. The Court also affirmed the district court's award of breach of contract damages to Insurer, holding that Insurer's settlement of the five lawsuits was "the very purpose of the Policies" and completely within Insurer's discretion, despite Insured's disagreement with the approach. Finally, the Court affirmed the district court's refusal to award prejudgment interest, holding that because Insurer's "damages were not fixed at the time the claim arose" Insurer was not allowed to recover prejudgment interest under South Carolina law. *Liberty Mut. Fire Ins. Co. v. JT Walker Indus., Inc.*, 2014 WL 504086 (4th Cir. February 10, 2014).

F. Insurer Awarded Summary Judgment on Water Damage Claim

University Defendants contracted with Developer to perform work on a three story science building at the University. While performing work on the third floor men's room, Developer's employee hit a water supply valve which flooded the bathroom and the third and second floor ceilings. The flooding caused damage to ceiling tiles, computers and lab equipment within the building. University Defendants subsequently filed a civil action against Developer. Insurer issued Developer's policy which had a contractor limitation endorsement that did not provide coverage for:

> Bodily injury, property damage or personal and advertising injury caused by, arising out of, resulting from, or in any way related to the invasion or existence of water or moisture including but not limited to mold, mildew, rot, or related deterioration of any property.

Insurer provided a defense to Developer for the claims in the underlying suit under a full reservation of rights and subsequently filed a declaratory judgment action against the

University Defendants seeking a declaration that the University Defendants were not entitled to an award, judgment or indemnification for the water damage suffered as alleged in the University Defendants' underlying lawsuit against Developer. Both Insurance Company and University Defendants filed cross motions for summary judgment.

In its motion for summary judgment, Insurer did not dispute the existence of an occurrence under the policy but argued that the damages suffered by the University Defendants were "unambiguously excluded from coverage by the water damage exclusion in the Contractor Limitation Endorsement." Insurer also argued that the water intrusion from a pressurized pipe system constituted an "invasion within the plain and ordinary meaning of the word as used in the water damage exclusion."

University Defendants argued that the water damage exclusion was ambiguous and should be construed against Insurer because it had two meanings. University Defendants argued that the first meaning suggested that all water damage was excluded and the second being that only long-term water damage, such as mold, was excluded under the policy. Finally, University Defendants also argued that the purpose of the policy was to insure against losses caused by accidents similar to the one which happened.

The Court awarded summary judgment in favor of Insurer holding that the plain meaning of the contractor limitation endorsement "unambiguously exclude[d] from coverage the property damage at issue in the Underlying Lawsuit." The Court also emphasized that the endorsement "exclude[d] all property damage caused by water and only identifie[d] mold, mildew, and rot as examples of the types of property damage that are excluded," whereby the policy was "not susceptible to more than one reasonable interpretation." *Evanston Ins. Co. v. R&L Dev. Corp., LLC*, 2014 WL 1389803 (D.S.C. April 9, 2014).

G. Replacement Costs Associated With Subcontractor's Defective Work Barred Under Your Work Exclusion

General Contractor subcontracted certain insulation work to Subcontractor on a building project. After Subcontractor installed the installation, masonry subcontractor began construction on a brick veneer exterior wall. Subcontractor's scope of work required that the exterior insulation be sealed to prevent air infiltration. Prior to the completion of the brick wall, General Contractor noticed that the tape used to seal the wall joints was coming lose. General Contractor asked masonry subcontractor to remove the existing brick wall and build a new wall once Subcontractor fixed the wall joints. General Contractor deducted the cost of tearing down and rebuilding the wall from Subcontractor's contract. Subcontractor's commercial general liability policy provided coverage "for those sums that the insured becomes legally obligated to pay as damages because of … property damage." The policy defined property damage a "physical injury to tangible property including all resulting loss of use of that property" and only applied to property damage caused by an occurrence. The policy defined an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy also had a "your work" exclusion. Insurer denied coverage under the policy and Subcontractor filed a declaratory judgment action seeking coverage. The trial court denied coverage under the policy holding that Subcontractor's

loss was not property damage, the loss did not constitute an "occurrence" under the policy, and Subcontractor's losses fell within the your work exclusion.

On appeal, the Court of Appeals affirmed the trial court holding that the "your work" exclusion barred coverage. The Court stated that "the exclusion applie[d] to property that must be restored, repaired, or replaced" and "specifically include[d] materials furnished in connection with such work." The Court found that the "defective tape, and all costs associated with its replacement, f[e]ll squarely within the exclusion." The Court also rejected Subcontractor's argument that the trial court narrowly construed the policy to defeat coverage, holding that "there was no ambiguity in the policy terms at issue." *Precision Walls, Inc. v. Liberty Mut. Fire Ins. Co*., 2014 WL 3610895 (S.C. Ct. App. July 23, 2014).

H. The Duty to Defend May Not be Compelled by Prior Insurer

Insurer 1 filed a declaratory judgment action in District Court seeking an order requiring Insurer 2 to defend in a state court action involving homeowners' suit against the HOA. Insurer 1 insured the HOA under a CGL policy from October 15, 1991 through February 7, 2000 and Insurer 2 insured the HOA under a Non-Profit Management and Organization Liability policy from February 7, 2007 through February 7, 2010. Insurer 1 argued that it was providing a defense in the underlying state action but that Insurer 2 acknowledged a duty to defend but refused to do so. Insurer 2 argued that Insurer 1 could not seek to compel its defense in the state action and even if Insuer 1 could do so, any duty owed by Insurer 2 was "in excess to that of [Insurer 1]." Insurer 1 also asserted causes of action for contribution, unjust enrichment and equitable subrogation. Insurer 2 filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) in addition to a motion for summary judgment.

The Court granted Insurer 2's motion for summary judgment holding that "the duty to defend is personal to each insurer" citing *Sloan Contr. Co. v. Cent. Nat'l Life Ins. Co. of Omaha*, 236 S.E.2d 818 (1977). The Court held that "based on the holding in *Sloan*, the Supreme Court of South Carolina would likely find that, under the facts of this case, [Insurer 1] may not require [Insurer 2] to defend their shared insured." The Court noted that *Sloan* involved a different set of facts where the insurers shared the same risk but that the "general principles set forth in *Sloan* dictate that the Supreme Court of South Carolina would find the present action to be inappropriate." The Court also emphasized that the language in *Sloan* "explaining that the insurer seeking to compel the other insurer to defend was not damaged since it was a stranger to the contract between the other company and its insured" was "equally applicable to a situation where the insurers insure different risks, and where a declaratory judgment action [was] sought rather than contribution."

The Court also granted summary judgment in favor of Insurer 2 as to Insurer 1's claims for contribution, equitable subrogation and unjust enrichment holding that under *Sloan,* Insurer 1 could not seek contribution from Insurer 2 for defense costs. The Court held that Insurer 1's claims for equitable subrogation and unjust enrichment were "simply attempts to plead contribution by another name." The Court noted that both causes of action would also fail even if not pled to seek contribution, holding that Insurer 1 did not confer any benefit on Insurer 2, nor did it pay any debts owed by Insurer 2. Finally, the Court also emphasized that Insurer 1 was merely complying with the terms of its

insurance contract with its insured and nothing more. *Auto Owners Ins. Co. v. Travelers Cas. & Surety Co. of Am.*, 2014 WL 3687338 (D.S.C. July 22, 2014).

IV. Mechanic's Liens

A. Mechanic's Lien Statute Does Not Provide for Entry of Money Judgments

Owner contracted with General Contractor for a development on three parcels of land. General Contractor subcontracted with Subcontractors for work on the project and Bank served as the lender for the Project. After two years, Owner failed to pay General Contractor and Subcontractors, and defaulted on its construction loan with Bank. General Contractor and Subcontractors subsequently filed mechanic's liens on the three parcels and filed a lien foreclosure action against the Bank and alleged a breach of contract claim against Owner. The Master in Equity entered money judgments against Bank but did not rule on the breach of contract claims.

On appeal, the Court of Appeals vacated and remanded the Master's entry of money judgments against the Bank, holding that under S.C. Code § 29-5-260 of the mechanic's lien statute, the sole remedy available to General Contractor and Subcontractors was the foreclosure of their mechanic's liens. The Court also stated that "as matter of law, [Bank] cannot be held liable for money judgments because [General Contractor and Subcontractors] had no contractual relationship with [Bank] or any other right to recover damages." *Moorhead Constr., Inc. v. Enterprise Bank of South Carolina*, 2014 WL 1491619 (S.C. Ct. App. April 16, 2014).

B. S.C. Supreme Court Distinguishes Notice of Furnishing Requirement from Lien Notice Requirements

General Contractor subcontracted with Subcontractor for work on Owner's data center. Owner also directly contracted with Subcontractor to install a "special pre-action fire suppression system" in the data center. In order to complete its work under the direct contract with Owner, Subcontractor purchased materials from Supplier. In September 2007 Supplier sent a notice of furnishing labor and materials to Owner. Owner fully paid Subcontractor for its work under the direct contract but Subcontractor failed to pay Supplier for its materials. In January 2008 Supplier served a Statement and Notice of Mechanic's Lien on Owner and Subcontractor, seeking roughly $15,600. The Statement and Notice maintained that Supplier had furnished Subcontractor materials pursuant to an agreement with Subcontractor "that was entered into with the knowledge and consent and permission and authorization of [Owner]."

In April 2008 Supplier filed a mechanic's lien foreclosure suit and lis pendens against Owner, Subcontractor and other defendants, seeking attorney's fees and interest in addition to foreclosure of its mechanic's lien against all defendants. Owner moved for summary judgment arguing that "(1) there was no evidence [Supplier] had furnished any materials for the benefit of property owned by [Owner] as it was a mere leaseholder; (2) there was no contractual relationship giving rise to liability between [Supplier] and [Owner]; and (3) [Owner] paid in full for all work performed by its contractors, so it had no further liability pursuant to S.C. Code Ann. § 29-5-20(B)." Supplier filed a cross

motion for summary judgment, arguing that "(1) under S.C. Code Ann. § 29-5-30 a leasehold interest in property is subject to a materialman's lien; (2) a materialman supplying materials to a contractor has a lien for the value of the materials on the leaseholder's interest under S.C. Code Ann. § 29-5-20, and the value of the lien is limited to the amount due to the contractor by the owner/leaseholder as of the date of notice under sections 29-5-20 and 29-5-40; and (3) [Owner] should have been aware of its potential claim because [Supplier] gave [Owner] the Notice of Furnishing prior to [Owner's] full payment to [Subcontractor]."

The trial court granted summary judgment in favor of Owner, holding that Supplier's Notice of Furnishing was ineffective under S.C. Code § 29-5-40 because it "explicitly stated that it was not a mechanic's lien and contained no demand for payment." The Court of Appeals affirmed the trial court holding that "the Notice of Furnishing was ineffective under section 29-5-40 because it was sent prior to furnishing all the material, failed to identify the final amounts of the goods delivered, and never made a demand for payment."

The Supreme Court granted certiorari and reversed the Court of Appeals, holding that the "Court of Appeals has added requirements that are not present in [S.C. Code § 29-5-440] and, as a result, erred in concluding that [Supplier's] lien was ineffective as a matter of law." In its analysis the Court noted that the Court of Appeals "confused the requirements for a Notice of Furnishing to an owner under section 29-5-40 with the requirements for a notice or certificate of a lien under section 29-5-90." The Court emphasized that under the proper procedure for the enforcement of a mechanic' lien, Supplier "was required to meet the terms of both section 29-5-20(A) and section 29-5-40 for it to have an inchoate lien attach." The Court focused on the fact that Supplier fully complied with the notice of furnishing requirements of section 29-5-40 when it provided its notice to the Owner in September 2007 and also complied with the requirements of section 29-5-90 in its preparation of a lien notice and statement of account. The Court agreed with the Court of Appeals that a lien notice could not be prepared until all materials had been delivered but emphasized that Supplier "provided both a Notice of Furnishing and a lien notice which serve two different purposes, and it did not file its lien notice under after the delivery of all materials." Finally, the Court also mentioned that the Notice of Furnishing statute does not impose a time limit on when notice should be given to the owner, noting however, under South Carolina law that "the lien is limited to the amount of the unpaid balance at the time the owner receives the notice, so the timing of the notice affects the amount of the potential lien." *Ferguson Fire & Fabrication Inc. v. Preferred Fire Protection, L.L.C.*, 2014 WL 4055533 (S.C. Sup. Ct. August 13, 2014).

V. Torts

A. Bank Did Not Owe Duty of Care to Borrowers of Construction Loan

Plaintiffs financed the construction of their new home with Bank. After Bank disbursed loan proceeds in an amount greater than the completion percentage of the Plaintiff's home, which included construction defects, Plaintiffs filed an action against Bank alleging breach of contract and negligence. Bank subsequently filed a motion for summary judgment which was granted by the trial court.

On appeal, the South Carolina Court of Appeals affirmed the trial court, holding that because Plaintiffs failed to establish that Bank owed them a duty of care, their negligence claim failed as a matter of law. In addition the Court noted that because Bank reimbursed Plaintiffs in full for the excess construction payments, Plaintiffs failed to prove they suffered any injury. As to Plaintiffs' breach of contract claim, the Court held that the construction loan agreement was not an adhesion contract, nor was it unconscionable. Finally, the Court held that because the terms of the loan agreement created no obligation on the Bank in regards to construction inspections, there was no support for Plaintiffs' breach of contract claim. *Carew v. RBC Centura Bank*, Op. No. 2014-UP-069 (S.C. Ct. App. February 19, 2014).

B. Homeowner's Council Owed Homeowners a Duty to Investigate Whether to Assess Homeowner's for Damages to the Common Elements

Condominium Owners ("Owners") filed suit against Owners' Council alleging breaches of the Master Deed, negligence, breach of fiduciary duty, injunctive relief and other causes of action. The Master Deed provided that each "unit's balcony doors including its frame and window glasses, screens, frames, and casings are part of each unit." The Bylaws also provided that the Board of Directors was "responsible for the maintenance, repair, and replacement of the common elements" but the "unit owners [were] responsible for the maintenance and repair of their units." The Master Deed also provided that the Board was not responsible for repair to the common elements in the event of Owner's negligence. Owners began experiencing leaks at the windows and balcony doors.

In 2006 the Board of Directors attempted to amend the Master Deed to include the windows and sliding doors as part of the common elements. During the vote only 63.59% of the Owners voted for the amendment with 66.68% needed to pass. Owner's Council then decided to leave voting open for an additional 30 days, which resulted in over 80% of the Owners voting for the amendment. In 2008 the Board informed Owners that buildings A and B were in need of extensive repairs in the range of $12 to $13 million. Board informed all Owners that the costs would be paid for by a special assessment. Owners of buildings C and D challenged the validity of the 2006 amendment and argued that the individual Owners were responsible for the repairs. In 2009 the Board called a meeting to revote on the amendment which resulted in only a 48.31% vote in favor of the amendment, making the individual owners responsible for the window and sliding door repair costs. Later in 2009 another vote was taken on a special assessment to cover the repair costs which included assessments to units in Buildings C and D. The vote failed to pass but the Council informed the Owners that "the repairs would be incorporated into the 2010 and 2011 operating budgets.

In January and July 2009, Owners from buildings C and D filed suit against the Council. Both suits were consolidated. Owners moved for summary judgment on their negligence and breach of fiduciary duty causes of action which the trial court granted. The trial court found that "the Bylaws and Master Deed impose[d] affirmative duties on the Board to enforce, investigate, and correct known violations of the Master Deed, the Bylaws, and South Carolina Horizontal Property Act." The court also found that "the [Owners'] Council breached its duty to investigate the substantial evidence in the record that reasonably showed that [Owners] had neglected the maintenance of their leaking windows and sliding glass doors, which allegedly caused damages to the common

elements of Buildings A and B." The court also found that the "business judgment rule was not applicable because the Master Deed, Bylaws, and [South Carolina Horizontal Property] Act all governed the Board's actions." Finally, the trial court held that "the [Owners'] Council was precluded from asserting the business judgment rule based on its lack of good faith in enforcing the 2006 amendment after June 2008."

On appeal, the Court of Appeals affirmed the trial court's holding that the Council had a duty to investigate to determine whether to assess individual Owners for the damages suffered to the common elements. The Court reversed the trial court's holding regarding the applicability of the business judgment rule, holding that the rule "applies to actions allowed by the Master Deed, Bylaws and [South Carolina Horizontal Property] Act, *intra vires acts*." The Court further emphasized that the business judgment rule did not apply to *ultra vires acts*, i.e., those actions not allowed by the Master Deed, Bylaws and South Carolina Horizontal Property Act. In a separate footnote, the Court denied the trial court's grant of summary judgment as to Owners breach of fiduciary duty cause of action, holding that the fiduciary duty standard did not apply to planned community organizations under South Carolina law. See *O'Shea v. Lesser*, 308 S.C. 10, 416 S.E.2d 629 (1992). Finally, the Court held that the trial court erred in determining that it breached a duty to the Owners, holding that the record contained sufficient evidence to the contrary, specifically, the fact that the Council hired numerous construction and engineering companies to investigate the water intrusion issues. *Fisher v. Shipyard Village Council of Co-Owners, Inc.*, 2014 WL 2883063 (S.C. Ct. App. June 25, 2014).

VI. Miscellaneous

A. Successor Company of Material Supplier Held to be Proper Claimant Under Miller Act

General contractor entered into a contract with the federal government to provide labor and materials to improve a federal facility and posted the necessary bond under The Miller Act. General contractor subcontracted with Firm to perform some of the work on the project. Firm had previously operated its business as a sole proprietorship and its owners considered Firm to be a successor company. Sole Proprietorship had an open credit account with Material Supplier that supplied Firm with the materials for the Project. Firm failed to pay for all of the materials and Material Supplier attempted to recover the additional monies owed from General Contractor and its Surety. The district court granted summary judgment in favor of Material Supplier holding that it was a proper claimant under the Miller Act because Firm was the successor company to Sole Proprietorship. On appeal, the Fourth Circuit affirmed the decision of the district court, holding that because Successor Company acted as if there was a contractual relationship between itself and Sole Proprietorship. *L&W Supply Corp. v. Greenway Enters., Inc.*, 545 Fed. Appx. 193 (4th Cir. 2013) (unpublished).

B. District Court Upholds Breach of Warranty Cause of Action Filed Against Engineering Firm

Engineering Firm performed engineering and testing services on a home site on behalf of Home Builder. Home Builder subsequently built a home for Home Buyers on the site

and the home developed structural problems after construction. Home Builder made efforts to fix the problems and also offered to conduct further repairs. Home Buyers have initiated arbitration proceedings against Home Builder which is scheduled for a final hearing in March 2014.

Home Builder asked Engineering Firm to participate in the arbitration proceedings and when Engineering Firm declined to participate, Home Builder filed an action against Engineering Firm seeking indemnity for its incurred repair costs and alleged breach of the express or implied contractual obligations and warranties, professional negligence, non-delegable duty/vicarious liability, breach of warranty and breach of contract.

Engineering Firm filed a motion to dismiss arguing that Home Builder's claims were not ripe for adjudication due to the pending arbitration. The district court held that some of Home Builder's claims were ripe for adjudication because they did not arise from or relate to the arbitration proceeding. The Court dismissed Home Builder's breach of non-delegable duty/vicarious liability claims holding that they were not independent causes of action but doctrines related to the professional negligence claim. The Court denied Engineering Firm's motion to dismiss as to Home Builder's breach of express and implied warranty claims holding that the services Engineering Firm provided services that were related to the "testing or preparation of land, a tangible thing" as opposed to a service designed to achieve a specific result. The Court denied this motion without prejudice to renewal of the arguments after completion of discovery. *Pulte Home Corp. v. S&ME, Inc.*, 2013 WL 4875077 (D.S.C. September 11, 2013).

C. Surety's Relief from Contractor's Breach of GIA Prevents Surety from Obtaining Additional Equitable Relief

As part of Surety's issuance of payment and performance bonds to Contractor, Contractor executed a general indemnity agreement ("GIA") which provided that Contractor would indemnify Surety for any and all liability, losses, costs, etc. incurred should Surety pay any claims related to the issuance of payment and performance bonds on Contractor's behalf. Contractor subsequently sent a letter to Surety acknowledging its default and inability to perform the construction contracts which were secured by the bonds which Surety had issued. Surety completed the construction contracts and also made payments on behalf of Contractor on the projects.

Surety subsequently filed an action against Contractor seeking (1) specific performance of the GIA, (2) alleging a breach of the GIA, (3) seeking a permanent injunction for deposit of collateral security, and (4) requesting relief under the equitable doctrines of quia timet and exoneration. Contractor answered and Surety filed a motion for summary judgment. Contractor did not file a response to Surety's motion for summary judgment.

The district court denied Surety's motion for specific performance due to the fact that Contractor admitted its default under the GIA, which provided an adequate remedy of law. Consequently, the court granted Surety's motion for summary judgment as to its claim for Contractor's breach of the GIA due to Contractor's admission of its breach of the GIA. The court denied Surety's motion for a permanent injunction requiring that a collateral security deposit be made due to the fact that Surety failed to present any evidence of irreparable harm. In denying Surety's request for an injunction the court emphasized that Surety only requested deposited collateral in the same amount which it

sought for its claim of breach of the GIA. Finally, the court denied Surety's motion for relief under quia timet and exoneration holding that because it granted Surety's motion for breach of the GIA, Surety was not also entitled to equitable relief as well. *N.A. Specialty Ins. Co., v. Able Constructors, Inc.*, 2013 WL 5439141 (D.S.C. September 27, 2013).

D. Contractor Without License Lacked Standing to Bring Cause of Action against Home Builder

Contractor brought an action against Home Builder for breach of contract. Contractor failed to possess the required license under S.C. Code Ann. § 40-59-30(B). The trial court dismissed Contractor's action holding that because Contractor failed to possess the required license it lacked standing to enforce the contract. On appeal, the South Carolina Court of Appeals affirmed the trial court due to the fact that Contractor failed to possess the required license. *Stolf Constr. LLC v. Sweetgrass Home Builders, LLC*, Op. No. 2013-UP-375 (S.C. Ct. App. October 9, 2013).

E. South Carolina Supreme Court Holds Notice of Furnishing Statute Doesn't Apply to Common Law Payment Bond Claim[1]

Subcontractor was hired to perform mechanical and plumbing work for a high school project and was required to furnish a payment bond. The language of the payment bond issued by Surety stated that if the principal made payment to all persons supplying labor and material for the work in the subcontract then Surety would not have any obligation for payment. Subcontractor subcontracted certain ductwork to HVAC Subcontractor ("HVACS"). HVACS then subcontracted with Plaintiff for temporary skilled labor. Subcontractor fully paid HVACS for its work on the project but HVACS failed to fully pay Plaintiff for its work on the project. During construction Plaintiff's assistant project manager sent Subcontractor's assistant project manager various emails communicating Plaintiff's involvement in the project. Plaintiff subsequently informed Subcontractor's representatives that it wasn't fully paid for its work on the project. Subcontractor then declared HVACS in default due to lack of performance.

Plaintiff brought an action against HVACS for breach of contract and obtained a default judgment. Plaintiff also filed a claim against HVACS' payment bond. Surety moved for summary judgment as to Plaintiff's claim arguing that Plaintiff failed to provide it with adequate notice of its work on the project pursuant to S.C. Code § 29-5-440. Surety argued that its liability on the payment bond was limited to the amount Subcontractor owed HVACS at the time Plaintiff informed Subcontractor of its bond claim and because it had fully paid HVACS, Plaintiff was barred from recovery. The trial court granted Surety's motion for summary judgment holding that Plaintiff failed to satisfy the requirements of S.C. Code § 29-5-440. The trial court held that Plaintiff's emails to Subcontractor did not meet the requirements of "notice of furnishing" because "they were in the nature of solicitations for business rather than notices of furnishing, and were sent

[1] On June 6, 2014 S.C. Code § 29-5-440 was amended and now requires that remote claimants give written notice via certified or registered mail to the bonded contractor which must generally conform to the requirements of S.C. Code 29-5-20(B) on projects secured by both "common law" and "statutory" bonds.

to an assistant project manager stationed at a jobsite trailer" as opposed to Subcontractor's permanent place of business.

On appeal, the South Carolina Supreme Court reversed the trial court, holding that because the payment bond issued by Surety was a "common law bond" as opposed to a "statutory bond" it must be enforced according to its terms, thus Plaintiff "had no duty to comply with section 29-5-440's notice provisions." The Court also held that even if 29-5-440 did apply, the trial court erred in granting summary judgment because Plaintiff's emails to Subcontractor presented a genuine issue of material fact as to whether Plaintiff provided an adequate notice of furnishing under the statute. *Hard Hat Workforce Solutions, LLC v. Mech. HVAC Serv., Inc.*, 406 S.C. 294, 750 S.E.2d 921 (2013).

F. Trial Court's Improper Disqualification of Expert Witness Reverses Large Jury Award in Construction Defect Case

Individual Homeowners ("Plaintiffs") filed an action against general contractor and numerous defendants alleging negligence and breach of warranty of workmanlike service resulting from construction defects caused by water intrusion at an apartment complex on John's Island. The property owner's association filed a separate suit but the two actions were later consolidated. All defendants except the Stucco Applicator settled with the Plaintiffs. During the trial, Plaintiffs' presented the testimony of various experts including the testimony of a repair expert regarding the repair cost to replace the defective stucco. The repair expert originally created an estimate to repair the entire project but presented a "stucco-only" estimate at trial. Plaintiffs also presented the testimony of experts regarding the construction defects and the improper application of the stucco. Stucco Applicator attempted to present an expert witness ("Causation Expert") to offer testimony in construction and engineering. Plaintiffs objected on his qualifications as an expert and also argued that his testimony should be excluded based on a prior discovery violation due to his failure to produce his entire file. The trial court failed to qualify the Causation Expert and ruled that he was only allowed to testify as to his personal observations during his investigation at the project. The jury awarded damages in excess of $7,000,000 to Plaintiffs. After the verdict Stucco Applicator filed motions for new trial absolute, set-off, JNOV and new trial nisi remittitur which the trial court denied. Stucco Applicator also filed a motion to alter or amend the judgment which was denied as well.

After the jury had returned its verdict Stucco Applicator proffered its Causation Expert's testimony. The Causation Expert offered testimony that the water intrusion at the project was caused by the incorrect installation of items surrounding the windows which was outside of the Stucco Applicator's scope of work and "definitive testimony in which he said the water intrusion was not proximately caused by the [Stucco Applicator's] work."

During the ongoing action between Plaintiffs and Stucco Applicator, Stucco Applicator filed a cross-claim against its Subcontractor that had performed stucco repairs at the project. Subcontractor was also a defendant in Plaintiff's suit and settled. Subcontractor filed a motion for summary judgment arguing that because Stucco Applicator wasn't licensed its claims were barred pursuant to statute. The trial court granted Subcontractor's motion. Stucco Applicator then filed a Rule 59(e) motion to alter or amend the judgment which was also denied by the trial court.

On appeal, the Stucco Applicator argued that the trial court erred in failing to qualify its Causation Expert. The Court of Appeals reversed the trial court holding that because the trial court "did not delineate any particular reason for its decision not to qualify [him] … we believe he held the prerequisite experience needed to testify as an expert under Rule 702, SCRE." The Court focused on the Causation Expert's 30 years in the construction industry, the fact that he had a bachelor's and master's degree in civil engineering, knowledge of the International Building Code and work in the coastal region of Georgia holding that these elements constituted sufficient specialized knowledge to qualify him as an expert at trial. Plaintiffs argued that any testimony presented by the Causation Expert would have been cumulative making the trial court's exclusion of his testimony harmless. In addition, Plaintiffs also argued that another one of Stucco Applicator's experts offered testimony at trial which "mirrored [the Causation Expert's] testimony in many ways, and thus [his] testimony would have been cumulative." The Court rejected this argument holding that because the expert was prevented from critiquing any of the architect's work and because he failed to do a forensic analysis of all the buildings his testimony would not have been cumulative. The Court stated that the "trial court's decision to qualify [Plaintiffs'] expert witness who testified to the proximate cause of the water intrusion while declining to qualify [the Stucco Applicator's Causation Expert] created a situation where [the Stucco Applicator] had not expert witness to rebut [Plaintiffs'] expert witness's testimony."

Plaintiffs also argued that the trial court's exclusion of the Causation Expert's testimony was an appropriate discovery sanction due to the Stucco Applicator's refusal to produce part of its Causation Expert's files. The Court of Appeals rejected this argument holding that because (1) the Stucco Applicator agreed it would avoid using the materials which were not produced, (2) the Causation Expert was made available for depositions the day before testifying at trial, (3) the trial court didn't specify that its refusal to qualify him as an expert was a discovery violation and (4) only one of the Plaintiff's deposed the Causation Expert, the exclusion of his testimony did not warrant the sanction of excluding his testimony.

Finally, the Stucco Applicator argued that the trial court erred in granting its Subcontractor's motion for summary judgment due to the Stucco Applicator's operation as an unlicensed subcontractor under S.C. Code § 40-11-270(C). This provision of the statute states that "[a]n entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract …" The Court also reversed the trial court's award of summary judgment holding that (1) a general contractor is permitted to use the services of an unlicensed subcontractor pursuant to S.C. Code § 40-11-270(C), (2) the Stucco Applicator was a subcontractor of the general contractor, and (3) "the pertinent licensing statutes are designed to protect the public interest … [which] does not exist when dealing with claims between contractors." *Teseniar v. Prof. Plastering & Stucco, Inc.*, 407 S.C. 83, 754 S.E.2d 267 (Ct. App. 2014).

G. Inspection Report Triggers the Running of the Statute of Limitations

In 2009, HOA brought a construction defect suit against multiple defendants, including the general contractor, architect and window manufacturer alleging negligence and breach of contract arising out of construction work which was completed in 2002 on

three different condominium buildings. The trial court granted summary judgment in favor of all three defendants based on the statute of limitations.

On appeal, the Court of Appeals affirmed the trial court, holding that a 2003 inspection report, which was recommended by the HOA president and HOA "put the HOA on inquiry notice of defects that would have been discoverable through additional inspections and destructive testing." The Court also noted that the report "also triggered the statute of limitations for claims against all three respondents because the report listed specific defects that put the HOA on inquiry notice to discover whether those defects were attributable to design, construction, or manufacturing errors."

The Court also held that the inspection report put the HOA on notice as to construction defects which existed in the gym and cottage buildings due to the fact that:

> 1. All three buildings were built at the same time, by the same general contractor, and in accordance with the same plans developed by the same architect;
>
> 2. The minutes from the board of directors meeting in May 2003 showed that the board discussed steps that should be followed which included an inspection of the gym and cottage buildings;
>
> 3. The June 2003 board meeting minutes showed that the HOA solicited proposals from companies for additional investigation into the defects highlighted in the inspection report;
>
> 4. The 2003 report urged the HOA to conduct additional investigations and warned of significant and pervasive construct defect problems; and,
>
> 5. A prior inspection report showed that the HOA undertook remedial measures on the gym building some time before 2007 in an effort to inhibit water intrusion at windows.

The Court also emphasized that there was "also evidence that if the HOA had exercised reasonable diligence and investigated the other buildings in 2003, it would have discovered the defects before the statute of limitations ran." Furthermore, the Court stated that another 2007 inspection report related to the gym and cottage buildings "alerted the HOA to defects that existed in 2003 and would have been discoverable." Finally, the Court stated the HOA was also put on notice by an architect's findings which suggested that the deterioration of single-pane windows in the gym existed at the time that construction was completed in 2002. *3 Chisolm Street Homeowner's Assn., Inc., v. Chisolm Street Partners, LLC*, Op. No. 2014-UP-128 (S.C. Ct. App. March 26, 2014).

H. Court Awards Partial Summary Judgment to Surety Under Terms of GIA

Indemnitors signed a General Indemnity Agreement ("GIA") whereby they agreed to indemnity Surety for any damages it sustained as a result of providing surety bonds on Indemnitor's behalf. After incurring losses covered by the GIA, Surety filed breach of contract and common law indemnity claims against the Indemnitors and moved for partial summary judgment. Surety presented evidence that it made payments which exceeded $19 million to cover claims made on the bonds covered by the GIA. Surety's net losses exceeded $12 million.

In support of its motion for summary judgment, Surety relied on the deposition testimony of the Indemnitors. Indemitors did not contest their liability under the GIA, but did "challenge [Surety's] characterization of the evidence as a concession that Indemnitors ha[d] no evidence to support their affirmative defenses, including failure to mitigate damages." Specifically, Indemnitors argued that a portion of the deposition testimony revealed overpayments to subcontractors. They also relied on a declaration that the Surety's take-over of projects negatively impacted the Indemnitor's ability to complete the underlying projects. Indemnitors also pointed to a $2.74 million discrepancy "between the credit for collections from project owners [Surety] use[d] in calculating damages and amounts Indemnitors believe were due from project owners when [Surety] took over the project." Finally, Indemnitors relied on a declaration which "point[ed] to a difference between committed payables owed to suppliers and subcontractors when [Surety] took over the project ($15,862,017) and the amount [Surety] claims was expended for the same work ($16,085,293), suggesting the possibility that [Surety] may have paid subcontractors roughly $223,000 more than [Contractor] was obligated to pay them to complete the subcontract work."

The Court granted partial summary judgment on Surety's breach of contract claim, holding that under the terms of the GIA, Indemnitors were liable as a matter of law. The Court denied Surety's motion for summary judgment as to its common law indemnity claim, holding that "[Surety] … failed to address any basis for imposing liability on Indemnitors other than as a consequence of their express agreement to be bound by the GIA." The Court awarded Surety over $10 million in damages, reducing the amount by the $2.74 million presented in the Indemnitor's declaration. The Court held that this amount presented a genuine issue of material fact "with respect to whether [Surety was] still due amounts from any project owners." *Hartford Cas. Ins. Co. v. Farley Associates, Inc.*, 2014 WL 1912352 (D.S.C. May 12, 2014).

I. Subcontractor's Prevail on Summary Judgment as to General Contractor's Equitable Indemnity Claims

HOA sued General Contractor alleged negligence and breach of warranty claims due to construction defects in a townhome development. General contractor subsequently filed cross claims against Subcontractor One for equitable indemnity, negligence and breach of warranty and also filed a breach of contract claim against Subcontractor Two. Both Subcontractors filed motions for summary judgment as to all of General Contractor's cross claims which the trial court granted.

On appeal, General Contractor argued the trial court erred in treating its cross-claims as a single claim for equitable indemnity. The Court of Appeals rejected this argument, holding that this issue was not preserved for its review, General Contractor conceded its claims were equitable indemnity claims at the summary judgment hearing and General Contractor failed to preserve the issue for appeal due to its failure to file a Rule 59(e) motion. The Court of Appeals also rejected General Contractor's arguments that there were any genuine issues of material fact because it failed to provide any evidence to rebut Subcontractors' expert affidavits which supported the idea that "(1) [Subcontractors'] conduct did not cause the construction defect at issue in this appeal, but, instead (2) [General Contractor] was at fault for the resulting defect because it breached its supervisory duty as general contractor." Finally, the Court held that

General Contractor's expert witness testimony was "too general to show there is a genuine issue of fact remaining for trial." *Stoneledge at Lake Keowee Owner's Assn., Inc., v. IMK Dev. Co., LLC*, Op. No. 2014-UP-209 (S.C. Ct. App. June 4, 2014).

J. Expert's Testimony Rejected Due to Improper Application of ASTM Standard

Plaintiffs filed class action lawsuit against Shingle Manufacturer alleging that Shingle Manufacturer sold and manufactured defective shingles. Shingle Manufacturer filed a motion in limine to exclude Plaintiffs' expert's testimony. Expert was a professional engineer and registered roofing consultant. Plaintiffs moved to exclude testimony regarding (1) the testing of shingles pursuant to ASTM standard D3462 where the testing was done substantially after the time of manufacture; (2) Shingle Manufacturer's "corporate knowledge and objectives"; and (3) "the financial status of Plaintiffs and his perception of their ability to mitigate their damages." Specifically, Shingle Manufacturer argued that Expert's testimony regarding the application of ASTM standard D3462 was incorrect because the standard only tests the strength of shingles at the time of manufacture as opposed to his testing of the shingles years after such date. Shingle Manufacturer also argued that Expert should not be able to offer testimony of corporate knowledge due to the fact that he had never worked for Shingle Manufacturer. Finally, Shingle Manufacturer argued that Expert's testimony regarding Plaintiffs' mitigation of damages was misleading and impermissible under FRE Rule 702.

Plaintiffs argued that Expert's testimony was reliable because he "applied ASTM protocols to test shingles within specific warranty periods for the purpose of determining whether Timberline® shingles have the characteristics, durability, and quality as advertised by [Shingle Manufacturer]." Plaintiffs also argued that Expert's qualifications as a roofing expert allowed him to look at Shingle Manufacturer's documents and explain the meaning of them to the jury in order to explain his opinion. The District Court granted Shingle Manufacturer's motion, holding that Expert's method for testing the shingles under ASTM standard D3462 did not meet the Daubert standard of reliability; limited Expert's testimony regarding Shingle Manufacturer's documentation to explanation of scientific and technical terms; and restricted Expert from testifying about Plaintiffs'' net worth and ability to mitigate damages. *Brooks v. GAF Materials Corp*., 2014 WL 3495427 (D.S.C. July 11, 2014).

K. District Court Grants Material Supplier's Motion for Summary Judgment

Plaintiffs filed an action against Grocery Store alleging negligence, strict liability, negligent failure to warn, negligent infliction of emotional distress and a loss of consortium claim arising from injuries Plaintiff sustained from a "Garden Firelite fuel pot and Napa pourable eco-gel fuel" they purchased from Grocery Store. Grocery Store filed a third party complaint against Ethanol Supplier and other defendants alleging claims for strict liability, negligence, contribution and equitable indemnification. The Court dismissed Grocery Store's causes of action for negligence, strict liability and equitable indemnification. Ethanol Supplier subsequently moved for summary judgment as to Grocery Store's contribution claim arguing that as the supplier of the product it was not liable to the seller, where the component part Ethanol Supplier manufactured was not defective and Ethanol Supplier did not "substantially participate in the design of the end product."

The District Court granted Ethanol Supplier's motion for summary judgment, holding that under the Third Restatement of Torts "raw materials, such as sand, gravel, and kerosene, cannot be defectively designed." The Court also stated that "decisions regarding the use of raw materials in a different final product are attributable to the manufacturer of the final product, not the supplier of the materials." The Court emphasized that none of the Plaintiff's experts indicated that the ethanol was defective. The Court also emphasized that under South Carolina law "the supplier of a component part is liable to the final consumer only if the supplier substantially participates in the integration of the component into the design of the final product." The Court found that Ethanol Supplier had no knowledge of the eco-gel fuel formula or specifications of the bottling and packaging process, which did not create a question of fact as to whether or not Ethanol Supplier "substantially participated in the design of the Napa eco-gel fuel that allegedly injured plaintiffs." The Court also granted Ethanol Supplier's dismissal of the contribution claim on the grounds that there is no duty to warn for components suppliers, noting that Ethanol Supplier complied with all DOT standards for its shipment of the ethanol to the eco-gel manufacturer's facility. *Satterfield v. The Fresh Market, Inc.*, C.A. No. 7:11-1514-MGL (D.S.C. June 17, 2014).

L. Forum Selection Clause Doesn't Apply to Miller Act Claim

Subcontractor filed claims against General Contractor and its Surety alleging breach of contract and a claim under the Miller Act for work on a federal project involving a cemetery. General Contractor moved to dismiss the action based on a forum selection clause in the parties' contract. The forum selection clause provided that the Court of Common Pleas for Charleston, SC would be the exclusive forum for resolution of disputes under the contract. In its motion to dismiss, the general contractor argued that it wasn't a proper defendant on the Miller Act claim and the District Court did not have jurisdiction in light of the forum selection clause. The Court held that the plain language of the payment bond which bound the General Contractor as principal made the General Contractor a proper defendant on the Miller Act claim. The Court rejected the validity of the forum selection clause and emphasized that these provisions "deprive the federal court of its exclusive jurisdiction under the Miller Act" citing to decisions in the 10th Circuit, the Middle District of Georgia and the District Court of Kansas. The Court also denied General Contractor's motion to dismiss the breach of contract claim holding that "applying the forum selection clause to dismiss the state law claims while the Miller Act claim remains pending in federal court would be an unreasonable result." *U.S. ex rel Landmark Constr. v. LW Constr. of Charleston, LLC,* C.A. No. 3:14-cv-00542-CMC (D.S.C. June 3, 2014).

M. Fourth Circuit Rules $24 Million Damages Not An Excessive Penalty Under FCA

Government and two individual Plaintiffs, asserted claims against Shipping Company under the False Claims Act as a result of Shipping Company's bid rigging scheme involving the shipment of goods from the United States to Europe overseen by the Department of Defense. The Department of Defense established the International Through Government Bill of lading program ("ITGBL") with the Direct Procurement Method ("DPM") to contract for transport of the goods in Europe. The Department of Defense oversaw this project through the Military Traffic Management Control ("MTMC"). The MTMC solicited bids from U.S. vendors for "one or more through rates" or unitary

prices for moving the goods, which involved the shipment of goods along numerous shipping channels between the U.S. and Europe. Shipping Company along with its industry associates met in November 2000 and agreed to charge a non-negotiable minimum price for the transportation services in Europe. The minimum price was also incorporated into "the fixed landed rate quoted to the freight forwarders." This meeting and agreement served to support a DPM scheme where Shipping Company was awarded a contract "after colluding with its fellow bidders to artificially inflate the packing and loading component of the submitted bids." After being awarded the contract Shipping Company subcontracted most of the work to its supposed competition. After another company was successful in submitting the low bid for 14 shipping channels between Germany and the U.S., Shipping Company threatened to withdraw financing for other company's purchase of thousands of lift vans, which were necessary to carry out its contract. Shipping Company also participated in the same scheme one year later which involved 12 shipping channels between the U.S. and Germany.

Two Individual Plaintiffs (Ammons and Bunk) brought an action under the False Claims Act, 31 U.S.C.A. §§ 3729-3733. One action was filed in the Eastern District of Virginia and the other in the Eastern District of Missouri. Both actions were consolidated and the Government filed a complaint that superseded the Ammons suit. The Government argued that Shipping Company was "liable under the FCA for treble damages and civil penalties." The district court granted summary judgment on liability as to the Government's FCA claim regarding the shipping channels between the United States and Germany. The remaining issues were tried before a jury. After the end of the Government's case in chief, the district court granted Shipping Company's motion for judgment as a matter of law, holding that Shipping Company was entitled to immunity under the Shipping Act. The district court also awarded judgment in favor of Shipping Company as to the Government's common law claims. However, the district court denied Shipping Company's motion with respect to Bunk's FCA claim which was based on the DPM scheme. After a trial on the remaining claims, the jury found that the Government proved 4,351 acts of fraudulent conduct and found in favor of Bunk on its FCA claim. After numerous post-trial motions, the district court found that the evidence was insufficient to support the jury's findings as to Shipping Channel's 4,351 false claims. The Court found Shipping Company liable for 9,136 false claims with regards to Bunk's second cause of action.

In choosing the amount of civil penalties to be applied to Bunk's FCA claims, the district court concluded that "any penalty in excess of $1.5 million would be constitutionally excessive, and in the event the statute permitted an assessment of less than $50,248,000, it would award $500,000." This was after the district court "rejected Bunk's proposal, in consultation with the government, to accept $24 million in settlement of the judgment." In its final judgment, the district court ordered judgment against Shipping Company in the amount of $5,500 as to the Government's first cause of action, judgment in favor of Shipping Company as to the Government's second, third and fourth causes of action, judgment in favor of Bunk as to its FCA claim, and judgment in favor of Shipping Company as to the civil penalties in the Bunk suit.

On appeal, the Fourth Circuit Court of Appeals rejected Shipping Company's argument that Bunk lacked standing to sue under the FCA holding that "[s]uccessful FCA relators can and do recover both damages and civil penalties." The Court also noted that "the statute provides that both [FCA relators and the Government] share in the ultimate recovery regardless of which directs the litigation." Shipping Company also argued that

"if Bunk's standing depends on Congress having assigned him the right under the FCA to seek redress for the government's sovereign injury, such an action by the legislative branch contravenes Article II of the Constitution." The Court rejected this argument, holding that this issue wasn't raised at trial, which waived Shipping Company's right to argue it on appeal. The Court reversed the district court's application of the excessive penalties clause of the Eighth Amendment to Bunk's $5,500 damage award. The Court emphasized that "the primary purpose of the FCA [is to make] the government completely whole." The Court also noted that the $24 million dollar proposed fine was not excessive within the context of Shipping Company's conduct, holding that "[Shipping Company] is precisely within the class of wrongdoers contemplated by the FCA. [Shipping Company] did not commit some sort of technical offense; its misdeeds were of substance." Thus, the Court held that an entry of judgment for $24 million as to Bunk's FCA claim "would not constitute an excessive fine under the Eighth Amendment." Finally, the Court affirmed the district court's award of summary judgment against Shipping Company as to the Government's FCA claim regarding the German shipping channels but held that "the jury should have been allowed to hear the Government's entire case" because the district court "incorrectly ruled as a matter of law in [Shipping Company's] favor on the price fixing conduct affecting the remaining German shipping channels. *U.S. ex rel Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390 (4th Cir. 2013).

VII. Legislation

A. LEED Bill Signed into Law

H 3592, the Energy Efficiency and Environmental Rating Systems legislation, became Act 150 when Gov. Nikki Haley signed the bill into law in April. As enacted, the bill is the result of a compromise supported by all industry stakeholders, including CAGC. The legislation creates an advisory council of stakeholder groups, of which CAGC is one, that will review newly adopted versions of LEED by the USGBC and will make recommendations to the General Assembly on any points of concern that might not fit in SC - such as prohibitive points for wood products or certain chemical points. The bill then calls for the state legislature to review the recommendations by the Council. It is important to note that this legislation only applies to state projects, not private projects.

B. Payment Bond Statutes Amended

Act No. 264 amended S.C. Code § 29-5-440 relating to suits on payment bonds by adding that a remote claimant send written notice of furnishing that must generally conform to the requirements of section 29-5-20(B) and be sent via certified or registered mail to the bonded contractor. The Act amended this section by adding that the written notice requirement applies to any payment bond whether statutory, public, common law or private in nature that is issued in connection with a construction project or other improvements to real property within South Carolina when such payment bonds are not otherwise required or governed by any other applicable section of the S.C. Code of laws. The Act amended the definition of remote claimant to include a person having a direct contractual relationship with a subcontractor or *supplier* of a bonded contractor, but no contractual relationship expressed or implied with the bonded contractor. The Act also

amended this section by adding that any payment bond surety for the bonded contractor must have the same rights and defenses of the bonded contractor. Additionally, the Act amended the section to provide statutory definitions of statutory and common law bonds.

The Act also similarly amended S.C. Code § 11-1-120, 11-35-3030(2)(c) and 57-5-1660(b) by adding that a remote claimant send written notice of furnishing that must generally conform to the requirements of section 29-5-20(B) and must be sent via certified or registered mail to the bonded contractor. Each of these three sections was similarly amended to provide that any payment bond surety for the bonded contractor must have the same rights and defenses of the bonded contractor and to provide a revised definition of a remote claimant. Effective June 6, 2014.

C. Contractor Licensing Fee Bill Approved

H. 4643, a bill that deletes the licensing fee structure listed in the statute for General and Mechanical Contractors, was signed into law by Gov. Haley in early June. The Contractors Licensing Board is one of only two remaining boards under the SC Department of Labor, Licensing and Regulation (SCDLLR) that still have their fee structures spelled out in statute. SCDLLR is in the process of cleaning up agency regulations and the fee structure will be spelled out in the regulations instead of the statute. SCDLLR is also proposing a decrease in the amount of the license fees for General and Mechanical contractors. In order to make sure the regulations comply with the code of laws, H. 4634 was needed so that the statute and regulations do not contradict one another.

D. CAGC Helps Defeat Garnishment Bill

During this session, H. 4498, a wage garnishment bill was filed that would require employers to garnish the wages of their employees for pay day lending loans. As the supporters testified in the one and only hearing held this session, these are high interest loans, most of them are triple digit interest loans, and they are needed by consumers in South Carolina who have no options for getting loans. While the person(s) receiving the loans can voluntarily fill out a form to have their wages garnished, should they not make the payments, employers are not given a choice on whether or not they choose to participate. However, to sweeten the deal, an employer would be paid $5 for every check they cut to the pay day lender when they garnish their employee's wages. CAGC, along with the National Federation of Independent Business (NFIB), spoke in opposition to the bill. Leslie Hope told the Committee, "our members are Contractors, not debt collectors, we have always opposed expanding the wages that can be garnished by employers, and we oppose this bill as well". The committee adjourned debate on the bill, taking no action, thus killing it for the year.

E. Legislation to File Next Session

Highway Funding Hits Numerous Potholes: Unfortunately, the 2014 legislative session ended without the legislature approving additional highway funds for SCDOT (H. 3412), despite the fact that our state roads are reaching a crisis state. CAGC will continue to work with the SCFOR coalition and other stakeholder groups to get the message out to the members of the legislature on the dire need for dedicating annually recurring funds for the maintenance and construction of roads and bridges in our state.

Work Zone Safety Bill Stalls on Senate Floor: S. 139, a work zone safety bill that would increase fines for speeding in a work zone, failed to get of the Senate this session due to the opposition by just one Senator. The bill would have increased fines to establish a fund in the State Treasurer's office, dedicated to highway safety. That money would then be used to increase the number of police officers and blue lights that are working in construction zones. This bill is needed in South Carolina and will be filed again next session.

Environmental Bills Die on the Vine: Two environmental bills of importance to the construction industry and the business community, H. 3827 and H. 3925, died a slow death on the Senate calendar during the last weeks of the legislative session. H.3827 eliminates the Department of Health and Environmental Control (DHEC) Board review of permitting process unless the permittee, applicant or licensee requests final review by the board. Passage of this bill could save permittees up to 140 days during the permitting process. Since third party groups typically use the final review by the DHEC Board request as a delay tactic, this would be beneficial to contractors and other businesses seeking environmental permits.

H. 3925 addresses action under the Pollution Control Act. In 2012, legislation was passed to institute an administrative remedy through DHEC for persons to petition the agency if they believe an individual or company is operating without a permit. CAGC, along with other business groups, is pushing for the passage of legislation that clarifies the intent of the bill that passed in 2012, stating that there is no private cause of action under the Pollution Control Act (PCA).

The passage of these two bills would help cut through the red tape that negatively impacts the business operations that our members have to deal with daily. CAGC will push for the passage of these two bills next session.