

SPECIAL REPORT Litigation

Adaptable construction lawyers back in demand

Commentary by Jason Kellogg

It does not seem that long ago that construction cranes filled the skylines in South Florida, leading many to quip that the “crane” had become our new state bird. Then the market crashed, the cranes



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flew off and the construction industry lay in shambles. Contractors, suppliers, designers and developers who relied for years on their construction lawyers to provide day-to-day counsel suddenly found themselves dealing primarily with bankruptcy and work-out lawyers. Many did not survive. And although a healthy bit of post-crash litigation kept construction litigators busy in the aftermath, a lot of that legal work dried up.

Six or seven years later, the “crane” and other “indicator species” are coming back. Developers have placed 200 new condominium buildings into the pipeline. Homebuilders have kicked into gear, restrained only by a shortage of land to build on. Things are going so well that contractors, particularly those

in skilled trades like mechanical, electrical, fire and plumbing, now find it difficult to staff their projects with workers.

Of course, what’s good for the construction industry is typically good for the legal industry. Construction lawyers can expect to see more of the day-to-day legal work. And litigators can expect to see an increase in legal disputes.

As construction litigators head into this new wave, they will find themselves in a somewhat different legal landscape. The first difference rests with their clients, many of whom just survived the meltdown’s burn. Wiser and more focused, those clients will seek out the cost-effective lawyers who strategize toward the most efficient business resolutions rather than employing the classic document-intensive, trench

warfare approach. Arbitration and other alternative dispute resolution procedures will continue to play a part in that.

TORT REMEDIES

Another difference stems from the law itself. A number of important cases and pieces of legislation have emerged in recent years that directly affect the construction industry.

Chief among them is last year's Florida Supreme Court opinion limiting the economic loss rule to its products liability roots. For decades, the rule held its place within construction law's stable of universal affirmative defenses.

Many of the rule's seminal cases arose directly from the construction context. With the economic loss rule no longer available, the construction industry finds itself more vulnerable to negligence and other tort-based claims.

It remains to be seen whether courts and arbiters will declare it open season for such claims or heed Justice Barbara Pariente's concurring opinion, which reminds practitioners that tort remedies remain unavailable to parties who specify and limit their remedies by contract.

Design professionals received some relief from the

Florida Legislature last year when it passed the Design Professional Limitation of Liability Act, which allows design firms to limit the liability provision of their individual members. The limitation only works if certain conditions are met, so design clients should be counseled accordingly.

OFFSITE IMPROVEMENTS

Florida's Legislature also revised the evidence code to adopt the Daubert standard for expert testimony, ending Florida's holdout as one of the last states to use the Frye standard. The Daubert standard provides a rule of evidence for the testimony admissibility of expert witnesses during a trial. Under the Frye standard, the expert opinion based on a scientific method was admissible if the method was generally considered consistent in the relevant scientific community. Local construction experts must be counseled to avoid pure opinion testimony and to tie their conclusions to scientific principles. Pundits and even circuit court judges are unsure what impact this change will have on lawsuits in Florida.

And with a law that many see as a boon to developers and a loss for consumers, the Legislature passed a bill limit-

ing developers' implied warranty of habitability to new home and condo buyers. The bill removes the warranty's application to offsite improvements such as streets, utilities, roads, drainage and driveways.

In a recent decision, the Florida Supreme Court prevented the new law's retroactive application. However, for all of those thousands of new homes and condominiums coming on line in the next few years, the new law likely will apply.

In whatever way this changing legal landscape ultimately affects construction disputes, the consensus remains that a resurgence in construction-related legal services is expected to follow the recent resurgence of the construction industry itself. South Florida's construction lawyers are welcoming the "crane" migration once again.

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