# Change Order

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## The Chair's Comments

Robert Meynardie

***It is mid-winter and also,*** therefore, halfway through the bar year. At this point in the year, the lien law committee continues its hard work, the CLE committee is gearing up for the February CLE and planning our 25th Anniversary, the work on a new edition of the Deskbook is just beginning, and obviously the newsletter committee has been hard at work getting this issue published. In other words, the many dedicated members of this section continue to achieve our core missions and more.

I hope you all have marked your calendars for the excellently-timed CLE scheduled for Feb. 23, 2012 at the Bar Center dealing with bankruptcy issues. If you are allocating CLE dollars like most of us, please keep in mind our 25th Anniversary celebration scheduled in conjunction with our Annual Meeting on September 28 and 29, 2012 in Concord.

As I have mentioned in my previous column and in every council meeting this term, I am deeply grateful for the dedicated service of the members of the council and committee chairs, past and present. Although I look at the dedicated few as a great blessing, I am also concerned that we rely too heavily on these dedicated few. If you are not one of these dedicated few, we need you.

There are so many opportunities to serve. Do you want to be published? Write an article of interest for the Change Order. Does your practice represent a specific segment of the industry that would benefit from your participation on an existing or new liaison group? Do you have ideas for CLEs or Deskbook chapters? Do you want to help with a service project? After serving on various committees, speaking at seminars, and writing for the Change Order and the Deskbook, I have no difficulty

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# Greener Pastures for Delay Claims?

## Court of Appeals Holds That "No Damages for Delay" Clauses Don't Necessarily Bar Claims for Equitable Adjustment

***By Matthew C. Bouchard***

***Time is money.*** Sure, it's an overused cliché. But as construction industry participants know better than just about anyone else, there's a whole lot of truth in those three simple words. When projects run late, completion costs invariably rise, frequently resulting in the assertion of delay claims – and counterclaims, third-party claims, cross-claims, etc.

So-called "no damages for delay" clauses seek to manage loss exposure arising from delay by limiting a contractor's remedy for delay to a time extension only. A typical "no damages for delay" clause might read as follows:

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**Change Order**

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# Comments, *continued from page 1*

assuring you that the benefits of getting involved with the section far outweigh the time commitment. If you want to serve one of our committees or otherwise get involved please contact me at ***bob@mnlaw-nc.com***.

I also believe it is important to recognize the relationship we have with the ABA Forum on the Construction Industry. As I hope you know, one of our members, Jim Schenck, is the current chair of the Forum. What you may not know is that Jim is not the first North Carolina lawyer to chair the forum as he follows his partner, Holt Gwyn (1999-2000), in that office. In addition, both David Senter (2004-2007) and Harper Heckman (current) have or are serving on the Forum's Governing Committee. With this long and distinguished history I encourage you to get involved with the Forum and, if you can, plan to attend its Annual Meeting at the Bellagio in Las Vegas April 26-28.

Finally, as a service to our section, I would like to make available the names of our members who are certified civil court mediators and have construction law experience. If you fit this profile and are interested in mediating construction disputes please send your contact information and an expression of interest to David Layton (***dlayton@gastonlegal.com***), who is collecting names for publication to our section. Once we have collected this information we will make it available through our website or elsewhere.

Hope to see you all at the February CLE. •

***Bob Meynardie*** is a founding member of Meynardie & Nanney, PLLC, where he represents owners, contractors, and design professionals in disputes ranging from design, construction, and material defects to lost productivity and delays. Bob has been a state court certified mediator since 1999 and currently serves on the AAA's National Roster of Arbitrators and Panel of Mediators.

# Remembering Cynthia O'Neal

We are sad to report that on January 25, 2012, our friend and colleague Cynthia O'Neal suddenly and unexpectedly passed away. At the time of her death, Cynthia was serving as General Counsel for the Lieutenant Governor. She was a native of Zebulon and a proud graduate of Duke University and Duke law school. She then clerked for Chief Justice Parker and entered private practice with Smith Helms Mulliss & Moore in Raleigh. She later joined two of her former Smith Helms colleagues with Taylor Penry Rash & Riemann, where much of her practice focused on construction law. She was active in the industry, serving on the Council of this section, on the Board of the United Minority Contractors, with the local chapter of Women in Construction, with Triangle Commercial Real Estate Women, and many other Bar and industry groups. She was active in her church and community, and was the pride and joy of her parents. Cynthia was a kind and gentle soul and we will all miss her.

Please join her memorial service on Friday, Feb. 3, 2012, at 11:00 a.m. at First Baptist Church of Raleigh (101 South Wilmington Street, Raleigh). The Cynthia O'Neal Memorial Scholarship Fund has been established with the N.C. Center for Women in Public Service, P.O. Box 27421, Raleigh, NC 27611. I hope you will consider sending a gift to keep Cynthia's spirit alive. •

# Greener Pastures, *continued from page 1*

> The Owner shall not be liable to the Contractor and/or any Subcontractor for claims or damages of any nature caused by or arising out of delays. The sole remedy against the Owner for delays shall be the allowance of additional time for completion of the Work, the amount of which shall be subject to the claims procedure set forth in the General Conditions.
>
> ~ Werner Sabo, *Legal Guide to AIA Documents* (5th ed. 2008)

Such clauses are not always enforceable in North Carolina. Pursuant to N.C.G.S. § 143-134.3, the North Carolina Legislature has prohibited the enforcement of such clauses in contracts between public owners and prime contractors where the delays are caused "solely by the owner[.]" Other than that statutory prohibition, however, such clauses are likely to be given effect in contracts between sophisticated contracting entities, at least in the absence of one or more applicable exceptions to enforcement (a topic that is beyond the scope of this article).

Assuming the enforceability of a "no damages for delay" clause, what is the breadth of such provisions under North Carolina law? Asked differently, what types of claims seek "delay damages" that are barred under an enforceable "no damages for delay" clause? And what types of claims might survive a "no damages for delay" provision? Answers to those questions began coming into focus recently with the North Carolina Court of Appeals' decision in **Southern Seeding Service, Inc. v. W.C. English, Inc.**, No. COA11–381, 2011 WL 6039951 (Dec. 6, 2011), in which the Court of Appeals held that that a "no damages for delay" clause *did not* defeat a separate equitable adjustment provision appearing in the same contract.

## *Sowing the Seeds of Discontent*

The written contract in question was a sub-subcontract between W.C. English, Inc. ("English"), a grading subcontractor, and Southern Seeding Service, Inc. ("Southern Seeding"), a second-tier grassing subcontractor, on a highway project for the North Carolina Department of Transportation ("N.C. DOT") for which APAC-Atlantic, Inc. ("APAC") served as general contractor. The sub-subcontract contained the following "no damages for delay" clause:

> Should [sub-subcontractor], without fault or neglect on its own part, be delayed in the commencement, prosecution, or completion of the Work by the fault or neglect of [subcontractor], [sub-subcontractor] shall be entitled to a reasonable extension of time, only. . . . In no event shall [sub-subcontractor] be entitled to compensation or damages for any delay in the commencement, prosecution, or completion of the Work except to the extent that [subcontractor] shall receive such compensation or damages from Owner or other third party.

It also contained the following equitable adjustment provision:

> Unit prices herein quoted are based upon the assumption that the contract will be completed within time as specified in the specifications at the time of bidding. Should our work be delayed beyond said time without fault on our part, unit prices herein quoted shall be equitably adjusted to compensate us for increased cost.
>
> **Southern Seeding**, 2011 WL 6039951, at *2.

## *The Dispute Germinates*

Neither the appellate decision nor the case's appellate record discloses what precisely caused the delays for which Southern Seeding sought an adjustment to its labor and material unit prices. The "Findings of Fact" recited in the Judgment from which Southern Seeding appealed (found by the author in the online Record on Appeal available at ***www.ncappellatecourts.org***) state that "there were multiple causes for delays" on the project, that Southern Seeding "contends its work was delayed because of English's failings," but that the trial court "cannot conclude that English was solely at fault." What is clear from the Findings of Fact is that counsel for Southern Seeding and for English stipulated during the jury-waived trial that "Southern Seeding was not responsible for any of the delays to its work." Neither the appellate decision nor the Record on Appeal provides insights about the efforts made by English, if any, to recover delay damages from APAC.

## *The Claim Is Scorched, But Then Watered & Revived*

In any event, the trial court ultimately found that English had no contractual remedy against APAC to receive an adjustment in unit prices on account of delay, and that as a result, the "no damages for delay" clause in the sub-subcontract precluded Southern Seeding from receiving an equitable adjustment in its unit prices from English.

On appeal, the Court of Appeals endeavored to construe the sub-subcontract as a whole, gleaning the intention of the parties from "the entire instrument" and not from "detached portions." (citations omitted). It noted that construction contracts contain clauses with terms of art unique to the construction industry, and cited the "no damages for delay" and "equitable adjustment" terms set forth in the sub-subcontract as two such terms of art. It then engaged in an analysis of the risks allocated by each term.

With respect to the "no damages for delay" provision, the Court of Appeals relied on **Bolton Corp. v. TA. Loving Co.**, 94 N.C. App. 392, 404, 380 S.E.2d 796, 804 (1989) for the proposition that "delay damages" include general conditions expenses, "that is, the cost of keeping tools and equipment on the site for the extended period." "An equitable adjustment clause, on the other hand, allocates the risk of increased costs should unforeseen circumstances present 'conditions which significantly differ from those indicated to exist in the

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# Greener Pastures, *continued from page 3*

contract.'"(quoting **S.J. Groves & Sons & Co. v. State**, 50 N.C. App. 1, 59, 273 S.E.2d 465, 495 (1980)). The Court of Appeals found that "[t]hese clauses allocated two distinct risks," that "the trial court's blending of these separate provisions fail[ed] to give effect to the contract as a whole," and that Southern Seeding was not "foreclosed from an equitable adjustment under [the equitable adjustment clause] simply because it was foreclosed from delay damages under the [no damages for delay clause]." Accordingly, the Court of Appeals held that the plain language of the equitable adjustment clause permitted recovery for "market driven cost increases associated with material and labor costs," and that the "no damages for delay clause" did nothing to negate such recovery. **Southern Seeding**, 2011 WL 6039951, at *3-5.

### *Impact on the Construction Law Landscape*

Is the Court of Appeal's rationale sound, or just splitting hairs? On the one hand, the delays that resulted in increased material and labor unit prices for Southern Seeding were, by stipulation of the parties, completely outside of Southern Seeding's control. The parties' written contract expressly contemplated higher unit prices in the event Southern Seeding's work was delayed "without fault" by Southern Seeding. Further, this equitable adjustment provision neither incorporated the "no damages for delay" clause by reference nor contained any requirement that English have a contractual remedy for increased unit prices against APAC before Southern Seeding could recover the same against English. Under this view, allowing recovery under the equitable adjustment clause arguably gave full force and effect to all of the sub-subcontract's provisions and fulfilled the expectations of the parties at the time of bargaining.

On the other hand, logic dictates that if one were to classify increased unit prices arising from extended performance as "delay damages," then an otherwise enforceable "no damages for delay" clause should apply to claims for such increases. Indeed, at least one jurisdiction has held in recent years that claims for equitable adjustment are, in fact, claims for "delay damages," and therefore subject to the reach of a "no damages for delay" clause. **Nova Cas. Co. v. Liberty Mut. Ins. Co.**, 540 F. Supp. 2d 476, 483 (S.D.N.Y. 2008) (it was "obvious" to the court that plaintiff's equitable adjustment claim, covering loss of productivity, materials escalation, labor escalation, extended field overhead and extended equipment rental, was "really just a masked 'damages for delay' claim").

In **Southern Seeding**, however, the Court of Appeals took precisely the opposite approach, assiduously avoiding classifying price escalation claims as "delay damages." Indeed, it arguably went a step further, confining "delay damages" to extended general conditions and stating in dicta that "our courts have consistently distinguished delay damages from damages incurred for increased costs arising out of the same delay circumstances." **Southern Seeding**, 2011 WL 6039951, at *4. An expansive reading of that language suggests that it shouldn't matter whether or not a contract containing a "no damages for delay" clause also contains an equitable adjustment clause: if price escalation claims are separate and distinct from claims for "delay damages," then such claims cannot logically be circumscribed by "no damage for delay" clauses. Should future appellate decisions continue to sharpen the distinction between how hard costs arising from delay (e.g., increased labor and material costs) and soft costs arising from delay (e.g., time-sensitive damages such as extended general conditions) are treated under "no damages for delay" clauses, critics of the opinion are likely to consider it the storm that began significantly eroding the efficacy of bargained-for limitations on delay damage recovery.

Only time – and fresh disputes about money – will tell. In the interim, the following practical pointers should be kept in mind by the construction law practitioner engaged in contract drafting and negotiation efforts:

- A party seeking to contractually limit the recovery of delay damages by the participant directly under it in the contractual chain should expressly include price escalation claims within the scope of the "no damages for delay" clause.

- A party seeking to avoid contractual limitations to delay damage recovery and who has sufficient leverage should attempt to preserve all rights by eliminating a "no damages for delay" clause through negotiation.

- Alternatively, and assuming the party above is unwilling to eliminate the clause, a party seeking to retain the broadest possible rights should negotiate for the inclusion of an equitable adjustment clause covering potential labor, material and equipment price increases arising from delays beyond that party's control. •

***Matt Bouchard*** is a partner with the law firm of Lewis & Roberts, P.L.L.C. in Raleigh. This article is adapted from a post about the **Southern Seeding** decision appearing on his construction blawg, "N.C. Construction Law, Policy & News," which can be found at ***www.nc-construction-law.com***.

# No Chapter 44A Liens Available for Work Performed Pursuant to Contract Implied-in-Law or Quantum Meruit

***By Julie W. Hampton***

In August of last year, the North Carolina Court of Appeals, in **Waters Edge Builders, LLC v. Longa**, held that a Chapter 44A materialman's lien was not an available remedy for a contractor who performed work under an implied-in-law contract. The court held that where the underlying theory of the contractor's recovery is quantum meruit, no materialman's lien exists.

In **Water's Edge Builders, LLC v. Longa**, the plaintiff constructed a staircase and made renovations to a home owned by Defendants Longa, at their request. A dispute arose as to the amount of the final payment to be made to the plaintiff. Plaintiff ultimately filed a Chapter 44A materialman's lien and a lawsuit against defendants. The trial court awarded Plaintiff $5,000 against defendants under a theory of implied-in-law contract or quantum meruit. The trial court also granted plaintiff's lien against defendants' property and awarded $8,625.00 in attorney's fees pursuant to N.C.G.S. § 44A-35 because defendants had unjustifiably refused to settle the matter.

There were four issues raised on appeal: whether the trial court erred in (1) enforcing the claim of lien; (2) granting plaintiff attorney's fees; (3) awarding recovery on the theory of quantum meruit; and (4) concluding that no unilateral contract existed between the parties. The Court of Appeals decided for the defendants with respect to the claim of lien and attorney's fees, reversing the trial court's imposition of the lien on the real property and award of attorney's fees under N.C.G.S. § 44A-35, but upheld the quantum meruit recovery of $5,000, determining that there was sufficient evidence to show that the agreement was not unilateral.

Perhaps, the most striking part of the decision is the determination that a claim of lien cannot exist absent an express contract or contract implied-in-fact. Judge Bryant, writing for the Court of Appeals' panel, distinguished the quantum meruit cause of action from an express or implied-in-fact contract action, where an agreement exists as to the amount and manner of work performed and payment. "A contract implied-in-law is nothing more than a term of art used to express an equitable remedy used by the court to prevent unjust enrichment. To establish a valid claim of lien under section 44A-8, an enforceable contract must exist between the parties." **Water's Edge Builders, LLC v. Longa**, 715 S.E.2d 193, 196 (N.C. App. 2011).

Section 44A-8 of the North Carolina General Statutes provides that "[a]ny person who performs or furnishes labor or professional design or surveying services or furnishes materials or furnishes rental equipment pursuant to a contract, either *express or implied*, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a right to file a claim of lien on real property on the real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished or equipment rented pursuant to the contract." (emphasis added). As a result of the statutory language acknowledging implied contracts, most contractors believed they were protected for work performed pursuant to either an express contract or implied contract, regardless of whether the contract was implied in law or in fact. After all, the lien statute is, as the opinion acknowledges, "remedial . . . [and] must be construed broadly in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be obtained." **Water's Edge Builders, LLC** at 195 (quoting **Carolina Bldg. Servs.' Windows & Doors, Inc. v. Boardwalk, LLC**, 362 N.C. 262, 264, 658 S.E.2d 924, 926 (2008)).

This case provides some old and new lessons for construction lawyers and their clients. Clients should be reminded to document the specifics of their contracts with owners in writing, and avoid this issue in its entirety. If a court cannot determine the parameters of a contractor's agreement, a client may be limited to quantum meruit recovery and consequently, left without the power of the materialman's lien. Construction lawyers should also consider adding an "implied-in-fact" contract claim in addition to the more commonly plead alternative claim of quantum meruit, in order to salvage the lien rights for the contractor. •

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# Liens, Leases and Loopholes

## Complex Development Agreement Eliminates Subcontractor's Lien Rights

***By Gregory Shelton***

In the current unfavorable economic climate, the ability to assert lien rights can determine economic life or death for those who furnish labor or materials to construction projects. On the other side of the equation, developers and owners are taking matters into their own hands to avoid costly and disruptive liens. For example, owners are more closely monitoring downstream payments, strictly enforcing lien waiver requirements, and communicating directly with first, second, and third tier subs and suppliers as the project progresses.

While these risk-mitigation techniques are easy to implement, owners desiring even more protection from liens are structuring development deals to take advantage of loopholes or weaknesses in North Carolina's mechanic's lien law. In **Pete Wall Plumbing Co., Inc. v. Sandra Anderson Builders, Inc.**, 2011 N.C. App. LEXIS 1889 (Sept. 6, 2011), the Greensboro Housing Authority (the "Housing Authority"), a quasi-governmental entity, employed a series of lease agreements to successfully eradicate lien rights for the subcontractors and suppliers involved in the construction of six low-income homes.

**Elimination of the Lienable Interest.** A lien is valid only to the extent of the interest of the owner. N.C.G.S. § 44A-9. An "owner" for purposes of Chapter 44A "is a person who has an interest in the real property improved and for whom an improvement is made and who ordered the improvement to be made." N.C.G.S. § 44A-7(3). When the owner of the land orders the improvements, liens usually provide sufficient security to the lien claimant for the labor or materials furnished to the project. On tenant upfit projects, however, the property lien is often considered worthless because the lien reaches only the lessee's leasehold estate.

In **Pete Wall**, the Housing Authority proposed to build single-family homes as part of the Willow Oaks revitalization project in Guilford County. The Housing Authority, owner of the property, leased 120 lots to a developer, Willow Oaks Development, LLC ("Willow Oaks"), under a Ground Lease (referred to in the lease documents as the "Master Ground Lease"). Willow Oaks, in turn, subleased the lots in a series of Ground Subleases to Sandra Anderson Builders, Inc. ("SAB"). The Ground Subleases required SAB to construct single-family homes on the lots in compliance with approved architectural standards and guidelines and consistent with the Master Ground Lease. SAB and Willow Oaks further agreed that SAB would be the owner of the improvements during the lease term. Upon completion of the improvements, SAB was required to sell the improvements to a home buyer "in accordance with the provisions set forth in the Master Lease." The Ground Subleases required SAB to pay rent of $1 per lot for the term of the lease.

Carolina Bank financed the construction of the homes. SAB, as borrower, executed a deed of trust in favor of Carolina Bank, as lender, secured by SAB's ownership interest in the improvements. As part of the loan arrangement, the Housing Authority, Willow Oaks, SAB, and Carolina Bank entered into a "Multiparty Agreement" for each lot whereby the Housing Authority and Willow Oaks agreed to subordinate their interests in the properties to Carolina Bank's deeds of trust in SAB's subleasehold interests.

When a property was sold to a home buyer, SAB and the Housing Authority executed and delivered a general warranty deed wherein the Housing Authority conveyed the real property and SAB conveyed the improvements. Each deed released the property being sold from the Master Ground Lease and its respective Ground Sublease and Multiparty Agreement. Each deed also contained a clause terminating the Ground Lease, Ground Sublease, and Multiparty Agreement with respect to the property conveyed in the deed. These provisions ensured that the buyer took title free and clear of any claims or encumbrances.

**The Lien Claims.** Pete Wall Plumbing Co., Inc. ("Pete Wall") delivered plumbing materials and services to SAB for six Willow Oaks homes between January 2008 and July 2008. Pete Wall asserted liens upon the funds and property for each of the six homes to collect $18,576.12. By the time Pete Wall served the interested parties with liens on the contract funds and properties, four of the six properties had already been conveyed by SAB and the Housing Authority to home buyers, and the two unsold properties were subject to Carolina Bank's priority interest in foreclosure.

Pete Wall filed a lawsuit to enforce its liens. After a series of hearings, the trial court issued an order stating in conclusory fashion that the liens were invalid and ordering that the liens be discharged. After additional motions and hearings, the trial court dismissed Pete Wall's claims against the Housing Authority, Willow Oaks, and the homeowners. Pete Wall obtained summary judgment, by consent, against SAB, and the trial court entered final judgment after a trial was conducted on Pete Wall's guaranty claim against SAB's principal.

Pete Wall appealed the trial court's order discharging the liens. In a lengthy but unpublished opinion, the Court of Appeals affirmed the trial court's decision to discharge the liens, holding that SAB's leasehold interest under the Subleases terminated before Pete Wall commenced lien enforcement proceedings. "Since our statutes only provide plaintiff with a claim of lien to the extent of an owner's interest in the property," stated the court, "plaintiff possessed no statutory protection in the private owners' properties after SAB's interest in each property was terminated." The court recognized that the security afforded by claims of lien on leasehold interests was "almost theoretical" given the time required to judicially enforce the lien. The court was not overly sympathetic to Pete Wall, observing that SAB's

interest in the properties was a matter of public record and that it was, therefore, Pete Wall's decision "to furnish materials to an entity with only a time-limited interest in the properties."

In his concurring opinion, Judge Steelman agreed with the Court of Appeals' technical application of the law, but expressed concern about the use of complex real estate agreements to "effectively eviscerate the constitutionally protected lien rights of laborers and materialmen." Judge Steelman noted that the complex agreements were designed to achieve the construction of homes while eliminating the possibility of liens ever attaching to the lots, and that increasingly complex real estate deals employed by owners "make it virtually impossible for a supplier of labor or materials to protect themselves under our lien laws."

**Complexity, Reliability, and Morality.** The **Pete Wall** decision will be attacked and defended by the various constituencies on legal and moral grounds. From the owner's perspective, good business practice dictates that deals be structured to reduce or eliminate risk. From this viewpoint, the Willow Oaks' agreements compare to tax shelters, limited purpose LLCs, and trusts. The unpaid contractor, subcontractor, or supplier, however, may see such agreements as schemes designed to leave them holding the bag if the flow of money upstream is interrupted.

The tension between these viewpoints is most evident in the concurrence, where Judge Steelman reluctantly concludes that the various Willow Oaks agreements, though enforceable in a strict legal sense, impair the right of suppliers of laborers and materials to an "adequate lien" mandated by Article X, section 3 of the North Carolina Constitution. Judge Steelman offers as a possible solution deeming the owner, lessee, and sublessee to be joint venturers, and invites the General Assembly to revise the lien law "to prevent this unjust result." Judge Steelman's concurrence, which can just as easily be read as a pragmatic dissent, reveals an unmistakable judicial queasiness in permitting lien rights to be papered into oblivion.

Judge Steelman's joint venture theory brings to mind Dutch computer scientist Edsger Dijkstra's observation that "simplicity is prerequisite for reliability." The legal steps required to transform a construction contract into a series of leases introduces a complexity not present in standard project delivery methods. An owner or developer should be aware of the possible consequences before altering the natural order. Had the Court of Appeals held that the Housing Authority, Willow Oaks, and SAB were joint venture partners, Pete Wall could then assert its contract claim against any or all of the partners. Dead lien rights would thus return to haunt the Housing Authority and Willow Oaks in another form.

**Square Pegs, Round Holes, and Inkblots.** In **Pete Wall**, the Court of Appeals held that SAB fit the definition of "owner" under Section 44A-9 because SAB owned an interest in the property, and also fit the definition of "contractor" under Section 44A-17, because the Ground Sublease obligated SAB to make improvements. Section 44A-17 defines "contractor" as the person who contracts with an owner to improve real property.

The court's analysis starts too far down the privity chain. Returning to the definition of "owner" under Section 44A-9, the Housing Authority may well have ordered the improvements in the Master Ground Lease. If the Master Ground Lease obligated Willow Oaks to improve the property, then Willow Oaks, whether licensed or not, becomes the general contractor under Section 44A-17. Under this scenario, SAB and Pete Wall assume the role of first-tier and second-tier subcontractor, respectively.

The true roles of the parties are difficult to determine because the Master Ground Lease between the Housing Authority and Willow Oaks is not part of the record on appeal. In their appellate briefs and in the trial court proceedings, the parties refer to the recorded "Memorandum of Lease," a cursory document identifying the Master Ground Lease by reference. Without the Master Ground Lease, which by all accounts contains the central and defining obligations of the parties, we are left to imagine the possible arguments available to a lien claimant in Pete Wall's shoes.

A development agreement that ventures too far into the vanguard becomes a sort of contractual Rorschach test for litigants and the court. As illustrated above, one litigant's "owner" is another litigant's "contractor." One litigant's lessor is a judge's joint venture partner. The competing interpretations may face attack based on other project documents, the conduct of the parties, or inconsistent positions taken in the case. For example, the defendants/appellees in **Pete Wall** contended that liens filed against two unsold lots were invalid under the line of cases prohibiting liens on public buildings, such as schools and courthouses. In so arguing, the defendants/appellees characterized Willow Oaks as a public construction project and the Housing Authority as owner of the property. The court did not address this particular argument, but the characterizations could be used to support an argument that the Housing Authority was the owner of the project under Chapter 44A.

As a risk management strategy, the potential benefits of lien-proofing projects must be weighed against the cost. The legal fees and expenses required to defeat Pete Wall's liens likely exceeded the $18,576.12 combined lien claims. We do not know whether the defendants avoided other liens using the regime. In most cases, the owner is best served by monitoring the flow of money downstream, obtaining lien waivers before releasing periodic payments, and maintaining an open line of communication with subcontractors and suppliers.

Owners and developers may regard the Pete Wall decision as a green light for Rube Goldberg-type real estate transactions designed to eliminate the possibility of any lien ever attaching to their property. Owners and developers considering this approach should also remember that altering the natural order may result in unforeseeable adverse consequences. Although the plan worked as intended in Pete Wall, the lien defendants in that case included innocent purchasers of low income housing. Furthermore, the Court of Appeals opted not to publish this otherwise remarkable decision. For potential lien claimants (contractors, subs, suppliers, laborers, and design professionals), the decision highlights the ever-increasing importance of due diligence before starting work. ●

***Gregory L. Shelton*** is a member of the Litigation Practice Group at Horack, Talley, Pharr & Lowndes, P.A. He is managing editor of the North Carolina Construction Law Deskbook and author of the blog ***www.ConstructionLawCarolinas.com***. He can be contacted at ***GShelton@horacktalley.com***.

LIVE and WEBCAST PROGRAM
Thursday, Feb. 23
NC Bar Center
Cary

CLE Credit: 6.0 Hours, includes 1.0 Substance Abuse/Mental Health
Registration: 8:15–8:55 a.m.
Program: 8:55 a.m.–4:15 p.m.

# Construction Law Issues in the Bankruptcy Arena: Competing Claims and Interests under Federal and North Carolina Law

NC Bar Center • 8000 Weston Parkway • Cary

Planned by the NCBA Construction Law Section

Practicing construction law has never been more challenging than in today's down economy. Struggling construction companies are competing for fewer projects, cash poor or insolvent owners are fighting off lien claims, and sureties are being called upon to honor payment and performance bonds that historically involved relatively little risk.

This program:

- Equips construction lawyers with a basic understanding of bankruptcy to enable you to advise and protect your client when their construction project intersects in some way with a bankruptcy.
- Is aimed toward a broad base of the construction bar.
- Addresses construction specific bankruptcy issues that can and do arise when your client is either a debtor or a creditor in the bankruptcy.

## Agenda Topics

**Refresher on Bankruptcy Code and Bankruptcy Process** • *Diana Penegar Furr,* Poyner & Spruill LLP, Charlotte and *Glenn Thompson,* Hamilton Stephens Steele & Martin PLLC, Charlotte

**Effects of Bankruptcy: Perspective of the Contractor and Subcontractors/Suppliers** • *B. David Carson,* Johnston Allison & Hord PA, Charlotte and *Kenneth T. Lautenschlager,* Johnston Allison & Hord PA, Charlotte

**Effects of Bankruptcy: Perspective of the Private Owner/Developer** • *Travis "Tom" W. Moon,* Moon Wright & Houston PLLC, Charlotte and *C. Richard Rayburn Jr.,* Rayburn Cooper & Durham PA, Charlotte

**Effects of Bankruptcy: Perspective of the Surety** • *C. Hamilton Jarrett,* Conner Gwyn Schenck PLLC, Raleigh

**Construction Law in Bankruptcy Court: View from the Bench** • *Chief Judge Randy D. Doub,* United States Bankruptcy Court, Eastern District of North Carolina

**†When Your Life is Not Enough: Mood-altering Chemicals – From Risk to Recovery** • *Al J. Mooney III, MD, FAAFP, ABAM,* Cary

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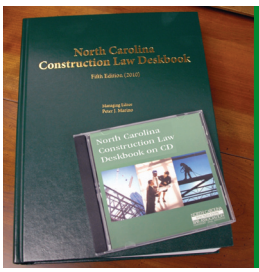


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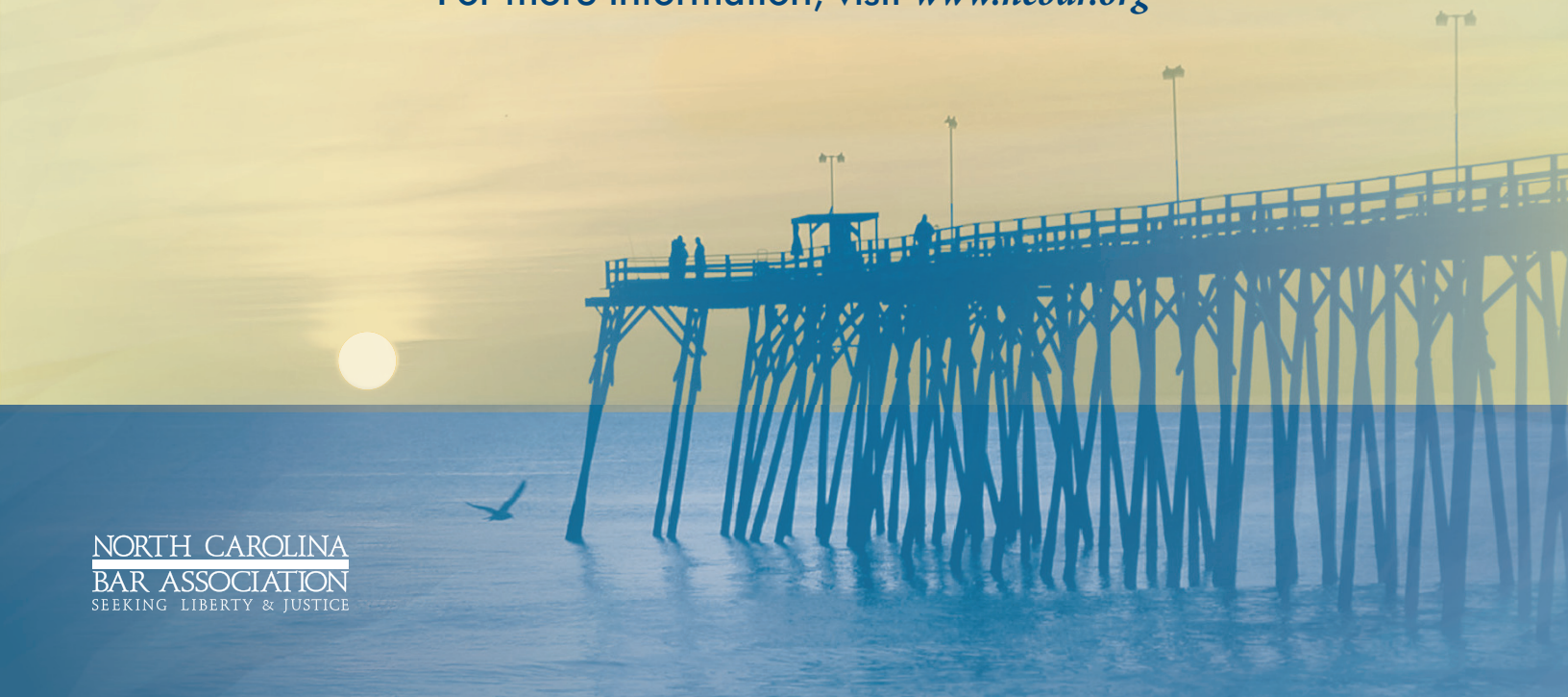

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