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Mold Madness Redux

The construction industry, along with the rest of the country, has been engulfed by stories of toxic mold and news of lawsuits being filed in every jurisdiction concerning that problem. Indeed, those who can profit from the lawsuit furor are encouraging potential plaintiffs

to seek damages for mold exposure from building owners, developers, contractors and insurers.

Some of the settlements and verdicts have been staggering:

- In December 2001, a Texas homeowner settled during trial a mold-related bad-faith lawsuit against his insurer for \$1.5 million (*Blum v. Chubb Custom Insurance Co.*).
- In October 2001, a California homeowners' group settled toxic mold claims against builders and contractors for \$1.3 million (*Club at Wood Ranch v. Roberts Group*).
- In May 2001, the Delaware Supreme Court upheld an award of more than \$1 million to two women whose landlord failed to address leaks causing mold problems in their apartments, resulting in asthma attacks and other

health problems (*New Haverford Partnership v. Stroot*).

- In 2000, a federal jury in California awarded \$500,000 in general damages, and more than \$17 million in punitive damages to a homeowner against an insurer that had declined coverage for mold damage. The trial judge later reduced the award to \$3 million (*Anderson v. Allstate Insurance Co.*).

This represents only a minuscule percentage of the lawsuits that continue to be filed in courts throughout the country on a regular basis. As a result, there has been a proliferation of workshops and seminars for the construction and insurance industries, addressing both how to deal with the mold problem and how to protect one's business from

lawsuits. In addition, legislation related to studying mold, safeguarding consumers and regulating mold remediation has been introduced in more than a dozen states. Still, questions abound as to whether or not mold is the problem that some interested groups have made it out to be.

Mold, a subset of fungi, is found

ILLUSTRATION: LIAM ROBERTS



virtually wherever there is moisture. Since humans emerged from the forests and seas and began living in caves, beneath thatched roofs, in log cabins and in houses built over basements, dwellings have been filled with mold from moisture and water intrusion. The latest building materials and techniques have created

tion of contaminated material and infrastructure repair must be the primary response to fungal contamination in buildings. The simplest and most expedient remediation that properly and safely removes fungal growth from buildings should be used. In all situations, the underlying cause of water accumulation

To be sure, there is no surefire way to stop mold from seeping into structures because mold is a natural occurrence.

conditions where the growth of mold has been enhanced to the point at which indoor levels of mold spores can frequently exceed outdoor levels. This, rightly or wrongly, is the first indication to some experts that remediation must take place. However, an enhanced level of mold indoors does not necessarily mean that people living in that environment are adversely affected.

Nevertheless, as a result of the focus and furor over the issue, efforts have been undertaken by both government and quasi-public agencies to study and address the problem:

- In March 2001, the U.S. Environmental Protection Agency published “Mold Remediation in Schools and Commercial Buildings” to address concerns about indoor exposure to mold, due to the public’s increasing awareness of potential adverse health effects related to mold exposure. That publication is being widely adopted by experts in their analyses of mold in indoor environments, and to support many experts’ recommendations for remediation where indoor mold contamination is discovered.
- In 2000, the New York City Department of Health and Mental Hygiene, Bureau of Environmental and Occupational Disease Epidemiology, published “Guidelines on Assessment and Remediation of Fungi in Indoor Environments,” a publication that addresses health issues, environmental assessment, remediation and hazard communication. The conclusion in the guidelines states:

“In summary, the prompt remedia-

tion must be rectified or the fungal growth will recur. Emphasis should be placed on preventing contamination through proper building maintenance and prompt repair of water damaged areas.”

- More recently, in early 2002, the National Academy of Sciences, Institute of Medicine, began a 15-month project to conduct a comprehensive review of the scientific literature regarding the relationship between damp or moldy indoor environments and the manifestation of adverse health effects, particularly respiratory and allergic symptoms. The review is to focus on the noninfectious health effects of fungi, including allergens, mycotoxins and other biologically active products. In addition, the project committee is to make recommendations and suggest guidelines for public health interventions and for future basic science, clinical and public health research in these areas.

- In a July 2002 statement entitled “State of the Science on Molds and Human Health,” from the U.S. Centers for Disease Control (CDC), and presented to a subcommittee of the U.S. House of Representatives, it was acknowledged that mold can be harmful. However, the CDC statement concludes that linkage between indoor airborne exposure to mold and health effects, such as bleeding from the lung or memory loss, have not been scientifically substantiated.

There are statistics published by the Institute of Medicine that indicate that

20 percent of Americans suffer from allergic rhinitis, while approximately 10 percent of Americans suffer from allergy-related sinusitis, allergy-related asthma, or allergic dermatitis. Other studies indicate that only 14 percent of the population suffer from allergy-related sinusitis, while 10 percent to 12 percent suffer from allergy-related asthma. Since allergies to mold are merely a subset of these percentages, it is possible that only a small percentage of Americans can rightfully claim to

suffer allergic reactions from exposure to mold spores. Nevertheless, it is recognized that exposure

to mold spores can cause irritation to

some people who are not allergic, and can

lead to infections or chronic problems in individuals who are mold-sensitive or immunocompromised.



Preventive Measures

To be sure, there is no surefire way to stop mold from seeping into structures, because mold is a natural occurrence. Therefore, the focus must be on preventing mold from growing and spreading once it permeates the structure.

Traditionally, HEPA filters have been used to scrub the air in buildings in order to clean the air of mold spores and other airborne contaminants. Recently, researchers in Hawaii successfully removed airborne mold spores by circulating air contaminated by mold spores through filters that expose the air to ultraviolet light.

While steps like these are being taken to discover innovative methods of removing mold from contaminated environments, there does not seem to be any consensus as to how to deal with the problem or to what extent the problem needs to be addressed. For this reason, the Association of General Contractors has formed a national task force to study the issue. Peckar & Abramson partner Steve Charney, is serving as vice-chair of the task force, so look forward to further articles and alerts in future issues on efforts to guide the construction community. ❁

Sri Lanka or New York? Put It in the Contract!

Intertec Contracting, et al. v. Turner Steiner International, et al. (2002)

In this case, two groups of corporations were pitted against each other in a dispute that originated in a construction contract to build twin office towers in Sri Lanka, named, with no particular originality, the World Trade Center. The plaintiff group, consisting of affiliated Danish and Gibraltar corporations, was a subcontractor of a Hong Kong general contractor, which was included as one of the defendants. Defendants made a motion to dismiss the complaint based on *forum non conveniens*, a legal doctrine that empowers a court to dismiss an action when it determines that the venue

selected by the plaintiff is so inconvenient that the interests of justice require the case be tried elsewhere.

At issue there was whether the case would be heard in New York, where defendants maintained offices, or Sri Lanka, where the project was located, all of the essential witnesses resided and important documents were maintained, and where the plaintiffs had started an earlier action seeking similar relief against the Hong Kong general contractor and the Sri Lankan developer. While the subcontract provided that Sri Lankan law was to be applied, it was silent as to where any dispute that arose between the

general contractor and subcontractor was to be adjudicated.

Convinced beyond doubt, after carefully balancing all of the appropriate factors, that the interests of justice required dismissal of the action in favor of a Sri Lankan forum, the supreme court of New York granted defendants' motion. The lower court's decision is now on appeal. ❁

EDITOR'S NOTE:

In hindsight, it would appear that the inclusion of a so-called forum selection clause, when the subcontract originally was negotiated, could have obviated the need to litigate the question of where these disputes would be heard. The inclusion of such a clause should be considered in contracts related to overseas projects that involve foreign corporations because litigants all too frequently prefer to resolve their dispute in a U.S. tribunal rather than in a local foreign court.

Contractor's Invoice for 99.99 Percent of Contract Balance Is Not a Final Payment Request

In re U.S. General, Inc., (ASBCA 2000)

The U.S. Navy contracted with U.S. General, Inc. (USG) for demolition of a timber pier and construction of a new pier supported by concrete piles at Point Loma Naval Station in San Diego. During construction, USG sought an equitable adjustment as a result of several instances where concrete pile locations were changed. The navy refused to grant the adjustments. USG submitted a differing site conditions claim, which the navy's contracting officer denied. USG appealed to the Armed Services Board of Contract Appeals (ASBCA). ASBCA denied USG's differing site conditions claim but held that USG was entitled to an equitable adjustment under the contract's "Changes" clause for the net amount of \$4,287. The navy requested that USG submit an invoice and release of claims in order to receive payment for the

award. USG refused in order to preserve its right to pursue other claims.

The contract incorporated the standard Federal Acquisition Regulations clauses, including the "Payments Under Fixed-Price Construction Contract" clause (FAR 52.232-5, April 1989), and the "Prompt Payments For Construction Contracts" clause (FAR 53.232-27). The first provides, in part, that the government shall pay the amount due the contractor after the contractor provides a release of all claims. However, the contractor is allowed to except claims in stated amounts from the release. The second provides, in part, that payments shall be made 14 days after the payment request, after which interest on the payment shall automatically accrue.

After contract completion, but while the differing site condition claim was still pending, USG forwarded an invoice for the full amount remaining, \$9,400. The navy rejected USG's invoice because the final release of claims was missing. USG

resubmitted the invoice but with a changed dollar amount. As explained in its cover letter, USG billed for 99.99 percent (\$9,000) of the final amount, leaving \$400 in the contract to "keep it open" until USG's claims were settled. The navy did not pay this revised invoice. Five months later, USG again submitted a revised invoice for \$9,000, leaving \$400 to keep the contract open. Again, the navy failed to pay. In a recorded telephone conversation, the navy stated that it had not paid the invoice, even as revised, because USG refused to sign a release.

On USG's application for payment and interest on its unpaid invoice, the ASBCA held that the USG invoice for \$9,000, revised to leave \$400 to keep the contract open, was not a request for final payment, and, accordingly, no release was required before payment of the invoice. The navy should have treated the invoice as a progress invoice. Therefore, interest on the unpaid amount was awarded in accordance with the Prompt Payment Act. ❁

How Your Construction Business Can Benefit from Public Relations

Today's smartest, most successful businesses have discovered that professionally planned public relations programs *do* make a difference—especially to the bottom line. Yet many firms still do a half-baked job of promoting themselves,

while others do little or nothing beyond advertising in the yellow pages.

Some firms, so caught up with tangibles, i.e., bricks and mortar, have little time or faith in the intangibles of public relations. Others shun anything that smacks of self-promotion.

Why, they ask, should we even consider professional PR? Simply because in today's supercompetitive marketplace, even the most well-established construction companies can only stay on top by using every marketing tool available. Can your firm afford to do less?

We often hear prospects—usually smaller companies in smaller markets—claim they are so well-known and well-regarded, they don't need a formal PR program.

For them, we offer the paradox of Coca-Cola, arguably the world's best-known brand. Last year, Coke spent nearly \$2 billion to promote its products. If Coke is so well-known, why does it spend so much? Because the moment Coke lets up a couple of hundred million dollars or so, you'll soon find yourself drinking more Pepsi. So just how well-known is your firm?

What PR Is—and Isn't

PR is not "free advertising." A major element of good PR is disseminating legitimate news about your company and its operations to appropriate media as *news*, not as *infotentials* or other paid space or time.

PR is not just spin, or hype. Unfortunately, it can be. Bad PR often emerges from offices of wobbly politicians or defrocked corporate executives. The vast majority of PR is honest and, at the least, well meaning.

PR is not "black art" or psychoanalysis. Too many Ph.Ds with too much time on their hands have created this impression. Indeed, one of the giants of modern corporate public relations—the late Edward Bernays—was a cousin of Freud.

Most of us PR pros consider ourselves practicalists, not psychologists: we define public relations simply as persuading others (hopefully those who are influential) to say or write favorable things about you or your company. And (God forbid!) if you or your firm just happened to do something less than sterling, PR can restore your good reputation.

Many PR professionals have come up through careers in journalism (which makes them faster, more adept writers who claim to understand public opinion better than the next guy). Others, just as good, have graduated from colleges and universities with degrees in mass communications. Most are practical, honest and deliver no-nonsense, achievable results. Even some lawyers make good PR pros: Herb Schmertz, late of Mobil, comes to mind.

PR is not like ordering new phone lines or running 220 to the panel. You don't just plug it in and walk away. If you hire a firm or individual to help promote your business, expect them to demand a realistic chunk of your time and attention. They might appear intrusive, but the best pros want to know as much about your business as you do. It is the only way they can really help.

PR should never be simply a shot in the dark. Any worthwhile PR program should be as ongoing as outside auditing.

PR, even if used by the smallest firm, shouldn't stand alone. Like a complex, well-designed office building, PR is most

effective when practiced in concert with advertising, direct marketing, and other communications elements.

These other elements could include that personal, handwritten note you sent to a prospect last week. Or that appearance you made last month at the Rotary Club. It might be simply the donation of your convenient parking lot so the high school Latin Club can run its charity car wash.

You're Already Doing It

The good news: most of you are already doing many of the elements that make up a successful communications program.

The less-than-good news: you may not have found the right mix. Or measured your efforts. Or you started with the best intentions—sort of like a New Year's resolution—and then fell off the wagon. Worse, you may have already had a bad PR experience, leading you back to doing nothing.

The trick is to find the best blend that you both can do and afford, and then stick to the plan month-by-month.

Here's a punch list of what you should consider in your PR planning:

Start by taking stock; review carefully (and honestly!) what you've done to date.

If you do not have a professional PR person on staff or use a PR firm, consider who has been promoting your business. How much actual time has been devoted? How much money has been spent? Do you have any idea where your new business leads come from? Do you feel you'd have more business if only you had more leads? Or do you have problems closing deals? Do you dread that first face-to-face with the prospect? How's your repeat job rate?

How Does Your Communications Effort Score?

Do you produce and distribute press releases? About what? And to what audiences? How often? Are they effective?

Do they appear in the publications to which you send them?

Do you actively seek to place stories of interest in appropriate media that position your firm as expert in some area of construction? Does this result in published articles that positively describe or include your firm? And result in stories that also can be distributed on their own?

Does your firm publish quarterly newsletters, e-mail attachments or personal letters from the chief executive that periodically update clients, prospects and others important to your success?

Do you advertise? Where? How often? Do you know if your ads are pulling? If so, how do you know that?

Direct sales: Are you regularly sending notes, letters or e-mails to prospects? Are these well-written? Do they draw?

Does your firm have first-class capabilities materials? Are they professionally designed and printed, and up-to-date? Is this material augmented with recent

technique you employ is both within budget and generates results.

Who Does the Work?

You can do it yourself. PR and related elements aren't rocket science. Get a handbook and follow easy-to-understand directions. A word of caution: PR pros can be builders, too. But it takes them longer. To borrow a phrase from the industry, you may not have the "commercial speed" to make this work.

Another disadvantage of doing PR yourself is that tasks are usually relegated to the newest guy in the shop. That PR stuff can often cut into billable hours and thus becomes solely a labor of love—on top of an already full workday.

You can let the pros do it. The trick here is to find that good pro, whether you're hiring an individual or an outside freelancer or a PR firm.

How do you find a good pro? Just like you find any other good supplier, or

did they do what they said they would do, was it on time and within budget? Did it work, and did it help?

There is an important benefit to working with an outside firm over the individual within your firm or a freelancer: you will (or should) benefit from the firm's collective thinking, even if you only interact with a single account executive.

A Word about PR Firms

PR firms come in all sizes and flavors. You don't necessarily need to retain a firm that has direct experience in your industry. In fact, you'll want to think hard about hiring a firm that has an existing client in your industry. Unlike law or accounting, there are no Chinese walls in PR firms. So when that big opportunity to place a positive story in *The New York Times* comes along, does your firm get the nod? Or do the other guys?

Make sure your firm matches up with the firm you retain. Ideally, you should be an important client to the PR firm, but not the biggest account in its shop. If you are in a position to afford a large national or international firm, beware: you may find yourself lost in its bureaucracy. Worse, it'll tend to send over too many whiz kids to work on your account. Often, you'll rarely see a principal after that dazzling new business presentation.

Smaller PR firms usually promise to provide a principal or assign a specified senior executive to service your account, except for routine tasks.

When we first opened our doors more than 30 years ago, monthly retainers were the norm. Today, many firms accept work on a project-by-project basis. Either way, you should seek a long-term relationship. This will work best for both client and firm.

In sum, PR, used within an integrated communications program, is akin to a well-built structure. Tender care and planning, employment of the best subcontractors and use of the best materials can create a structure for the ages. The same applies to a well-founded PR program. 🌟

The good news: most of you are already doing many of the elements that make up a successful communications program.

case histories or problem/solution scenarios that pertain to specific clients?

Do you or the executives charged with marketing your firm have good presentation skills? When that long-sought-after face-to-face presentation begins, do you seize this valuable opportunity? Or strike out too often?

Are you and other key executives active members in the most prestigious professional and social organizations?

Do you or other key executives appear regularly as panelists or speakers before audiences that include appropriate decision makers?

How's that web site coming? Have you kept it sleek, attractive, up-to-date and, most of all, easy to navigate?

This review should help tell you where you are and—where you need to go.

Unlike a mandated stress load spec, there is no single right or wrong way to proceed, except for constant testing. We urge all of our clients to test, test and test some more to ensure every

how you found the best heart surgeon, lawyer or orthopedist: through reputation. Still don't know whom to ask? Call us, and we will gladly advise you.

Some larger firms can afford to hire a full-time pro or staff up a department. A word of caution to those firms that hire only an individual PR pro: within six months, they'll be begging you for more help or seeking to expand their universe.

If you're doing this for the first time, demand to work on a project basis with a professional freelancer or outside firm. Test them, just as you would test the elements as we discussed above. Are they responsive? Do they return calls promptly? Do they bring new ideas to the table on a regular basis? Perhaps most important:



Robert L. Way, a former daily newspaperman, is founder of Way & Wood Inc., an international public relations firm. For more than 30 years, Way has successfully counseled some of the world's best-known companies, including Bank of America, Metropolitan Life, and Statoil, the state oil company of Norway. He can be contacted at (973)744-5051 or at RLWAY@aol.com.

Florida Courts Relax Rules on Discovery of Latent Defects

In Florida, there is a four-year statute of limitations on all actions based upon the design, planning or construction of an improvement to real property. Normally, the four years run

from one of the following: (1) the date of the owner's actual possession; (2) the date of the issuance of a certificate of occupancy; (3) the date of abandonment of construction, if not completed; or (4) the date of completion or termination of the contract between the professional engineer, registered architect or licensed contractor and his or her employer, whichever date is latest. But when the defect is latent, the four-year period runs from the time the defect is discovered, or should have been discovered with the exercise of due diligence. A latent defect is one that is hidden or concealed and could not be discovered by reasonable investigation.

Thus, the deadline to file the lawsuit depends upon when the claimant discovered, or should have discovered, the defect. Recent Florida court decisions, however, have caused some uncertainty as to what has to be discovered for the statute of limitations to begin to run.

Discovery of Damages

In the past, Florida courts presumed discovery or notice of the defect once the claimant discovered damage caused by, or a symptom of, the defect. This is known as the discovery rule. In *Kelley v. School Board of Seminole County*, the school board sued over a leaking roof. The board noticed the problem immediately before or shortly after completion of construction, but did not file the lawsuit until seven years later.

The Florida Supreme Court ruled that the school board had notice of the defect once the board discovered water in the building—even though it may not have known that the roof leaked due to defective construction. The court presumed that the school board had knowledge of the defect, and declared that “when a newly finished roof leaks, it is not only apparent, but obvious, that someone is

at fault.” Thus, the action had to be filed within four years of discovery of the leak, and the school board could not rely on a lack of knowledge of the specific cause of the leak to protect it from the running of the statute of limitations. The

The statute of limitations began to run only after the owner's expert confirmed that the stucco cracked as a result of a construction defect.

court ruled that the board had had a duty to exercise due diligence and investigate the cause of the leak.

However, Florida courts have recently protected owners against the expiration of the statute of limitations where owners can prove lack of specific knowledge that damage was caused by a defect. In two cases, *Performing Arts Center Authority v. Clark* and *Snyder v. Wernecke*, the court distinguished between problems obviously caused by a defect and problems that could have resulted from something other than an actionable defect, i.e., normal wear and tear. In the *Kelley* case, the court found that leaking in a new building was the obvious result of a construction defect such that the statute of limitations ran from the discovery of the leak, even if the owner did not know that the leak was caused by a defect. Knowledge of the defect was implied.

However, the court in *Clark* limited the holding in *Kelley*. According to *Clark*, the statute will not begin to run until the owner actually knows of the defect. Further, the owner's failure to exercise due diligence and investigate will not prejudice its right to file suit after four years.

In *Clark*, the leak was not obviously caused by a construction defect. The owner discovered water on the floor and initially thought the roof was leaking. The roof

contractor determined the leak was due to cracks in the exterior stucco, not the roof. The stucco contractor concurred but said the problem was minor. The owner hired an inspector one and a half years after first discovering the leak. Only then did the owner learn that defects in the stucco exterior caused the cracks which caused the leak. The statute of limitations began to run only after the owner's expert confirmed that the stucco cracked as a result of a construction defect. The court held that since the cracks in the stucco could have been due to causes other than a defect, discovery of the water and the visible cracks in the stucco should not necessarily have put the owner on notice. The owner was not

required to investigate the cause of the cracks and was essentially allowed to rely on its own ignorance to stop the running of the statute of limitations.

Protection Eroding

More recently, in *Snyder*, the court allowed a homeowner to file suit six to seven years after discovering cracks in the foundation. Upon discovery, the homeowner notified the builder, who said the cracks were mere settlement. Five or six years later, the owner hired an inspector who determined that defects in the foundation were causing the cracks. The court held that since the owner did not know that defects in the foundation were causing the cracks, the statute of limitations did not begin to run until the inspector confirmed this fact.

In both cases, the owners' lack of knowledge that property damage was a symptom of, and caused by, construction defects extended the deadline to file suit. These holdings are in conflict with the holding in *Kelley* since it can certainly be argued that the damage in *Clark* and *Snyder* also seemed to be the obvious symptoms of construction defects.

The statute of limitations is a protection for design professionals and contractors against stale claims. With the recent holdings in *Clark* and *Snyder*, this protection may be eroding. ❁

Revisions to New Jersey Prevailing Wage Laws Permit Immediate Suspension of Suspected Violators— Including General Contractors and Principals

Contractors doing business in the New Jersey public works market must familiarize themselves with recent developments concerning enforcement of New Jersey prevailing wage laws. Under regulations issued by the

New Jersey State Department of Labor (DOL) in October 2002, the DOL may immediately suspend a contractor, a general contractor and the principals of both entities from engaging in all public works for suspected violations of New Jersey prevailing wage laws.

Before the new regulations took effect, the commissioner of labor was required to obtain authorization from the state attorney general before issuing an immediate suspension of a contractor for prevailing wage violations. Now the commissioner, on his own, may immediately suspend a suspected violator from bidding on, or engaging in, any public works project in the state. Any pending bid submitted before receipt of the notice becomes a nullity.

Suspended contractors now have only 72 hours to appeal the suspension, in writing; otherwise, the suspension becomes final. If the suspension is challenged, a hearing will take place within seven days, where the contractor has the burden of demonstrating that the sus-

pension should be lifted. The DOL must then issue a written determination within five days of the hearing, upholding, modifying or removing the suspension. Appeals of the commissioner's determination may be taken to an administrative law judge, who will conduct a full evidentiary hearing and who will determine whether the contractor should be debarred for up to three years.

law may also result in suspension or debarment. Since a contractor's history is public record, contractors may be deemed to be on notice that a subcontractor is a persistent violator.

Contractors must bear in mind that suspension or debarment applies to the officers or directors of the contractor, not just the entity itself. Therefore, principals of a suspended or debarred contractor are prohibited from performing any such function for any public works contractor, and any entity employing such a suspended or debarred individual may itself be suspended or debarred. Also, according to judicial interpretation

Suspended contractors now have only 72 hours to appeal the suspension, in writing, otherwise; the suspension becomes final.

Grounds for suspension or debarment include: (1) a history of any previous prevailing wage violations; (2) a history of a prior debarment or penalties imposed in contested matters; and (3) the existence of other outstanding contested matters pending against the contractor. Contracting with a subcontractor that has a history of prior violations of the

of the law, general contractors may be liable for their subcontractors' prevailing wage violations.

To facilitate enforcement of New Jersey prevailing wage laws, in 1999, the New Jersey State Legislature enacted the Contractor Registration Act. The act requires that all public works contractors pay an annual fee **continued on page 8**

California Owners Now Required to Post Payment Bonds for Construction Projects

Effective this year, California property owners who contract for improvements to their property must post payment bonds when the value of the project exceeds \$1 million for non-fee simple owners and \$5 million for fee simple owners.

California Civil Code § 3110.5 requires that owners post the bond to protect the interests of the contractor and its subcontractors when the improvement exceeds \$5 million. If the owner has less than a fee simple interest in the property, such as a

leasehold interest of fewer than 35 years or a sublease, then the requirement applies for work valued at \$1 million or more. The owner must post security equal to 25 percent of the contract price if the work is to be completed in six months, or 15 percent if the work is to be completed in more than six months.

The new law does contain a few exceptions. It does not apply to single-family residences, residential subdivisions, public works or housing developments that qualify under the California Civil

Code §65915. Also, the law does not apply to publicly traded companies and their wholly owned subsidiaries, provided the obligations of the subsidiary are guaranteed by the parent. Where a property has more than one fee simple owner, the statute does not apply to a non-contracting owner.

It is against public policy for an owner to ask the contractor to waive the requirement. In other words, an owner cannot avoid posting the required payment bond, even if a contractor is willing to do so. ❄

Congratulations to Bob Peckar

Bob Peckar was recently honored at the New York Building Congress 2002 Industry Recognition Dinner for his contributions to the organization. More than 1,000 representatives of the building community gathered to honor Bob as well as industry leaders Jack Rudin and Edward Malloy. Bob joined the Building Congress in 1990 as General Counsel and became one of the active leaders of the organization who helped guide it back to a position of prominence and leadership in New York. He was recently honored with the title of General Counsel Emeritus in recognition of his



Bob Peckar receiving his award at the New York Building Congress 2002 Industry Recognition Dinner

steadfast devotion to the interests of the construction industry in New York.

Syska Hennessey Group Chairman and CEO John H. Hennessey III and Turner Construction Senior Vice Presi-

dent Peter J. Davoren presented Bob with the Special Recognition Award for Exceptional Service. Davoren noted, "As General Counsel of the Building Congress for many years, Bob has demonstrated his leadership time and again. In meeting after meeting, I can recall Bob being the one that cut directly to the heart of the matter and built consensus." Hennessey added that "the Building Congress is what it is today in large part due to Bob's efforts."

U.S. Senator Charles E. Schumer, who made a surprise visit at the dinner, told the assembled crowd, "I wanted to stop by and sing the praises of three great men. Each is a builder, not just of buildings but of coalitions, of friendships, of loyalty and of our New York." ☼

continued from page 7 of \$300 and file with the DOL the name, address and ownership interest of each corporate officer or person with a financial interest in the contractor. It also requires the contractor to file any other information deemed relevant or appropriate by the commissioner. The registration fee is specifically earmarked to fund prevailing wage enforcement efforts by the DOL. Violation of the Contractor Registration Act may also serve as a basis for suspension or debarment.

In comparison with New Jersey, New York's debarment rules are less immediate and much more lenient. Generally, a contractor in New York may be debarred only after two final determinations of "willful failure" have been rendered against it, unless a final determination involves the falsification of payroll records or kickback of wages. In those cases, the first determination may result in a five-year debarment.

New York's prevailing wage law does not provide for immediate suspension prior to a final determination. New York prevailing wage laws do, however, provide for immediate, pre-hearing retention of payment to a subcontractor in an amount equal to the suspected underpayment of prevailing wages. A similar provision under California law was recently upheld by the U.S. Supreme Court. ☼

Hot Off the Press

Melinda Gentile, a partner in our Miami office, has recently authored the Florida Chapter of the *State Public Construction Law Source Book*. The *Source Book* is a quick reference guide for practitioners to locate sources in their particular state. It provides access to key decisions, statutes and regulations in every state in the country, as well as in the District of Columbia. Each chapter in the book is written by a local, respected authority and organized identically to allow easy access and comparison of the law between the various states. Among the topics addressed in the book are:

- Architect/Engineer procurement processes
- Authority for nontraditional construction techniques—design/build, multiple primes
- Socioeconomic requirements
- Subcontractor issues such as prompt payment and pass-through claims
- Claims issues
- Dispute resolution
- Statutes of limitation
- Bid protests

Peckar & Abramson Newsletter
Volume XIII, Issue 1, Winter 2003
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Peckar & Abramson, P.C.

Attorneys at Law

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