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American Bar Association
Forum on the Construction Industry

2013 MIDWINTER MEETING

Making Dollars and Sense Of Construction Damages

JANUARY 31 – FEBRUARY 1, 2013

Waldorf Astoria Naples
Naples, FL

SERVING THE CONSTRUCTION INDUSTRY THROUGH EDUCATION, LEADERSHIP, AND FELLOWSHIP
OF CONSTRUCTION LAWYERS

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Dear Colleagues:

Got a great case? Ready to prove that the contract has been breached or a tort committed? Ready to defend that claim? In a construction case, establishing that a firm has been wronged means little unless the wrong is compensated through an award of damages. A construction project gone bad can mean financial disaster to one or more of the parties. It is essential to a construction lawyer's practice to know the ways to maximize a damages award or to defend against one.

During a program lasting a day and a half, the Forum's 2013 Midwinter Meeting will help guide you through the world of construction damages. You will learn the latest legal strategies, the best ways to present your claim through the use of experts, and, perhaps most importantly, the mistakes to avoid. On Thursday, the speakers will address cutting edge issues involving delay damages, the ways to draft contracts to reduce or eliminate damages, how to work with damage consultants for the best results, and the latest and greatest methods for creating graphics to present damages. The day will culminate in a mock trial that puts the damages expert through his paces. You, our audience, will judge – using audience polling methods – which techniques are most successful.

Mid-day will be reserved for presentation by the Forum's substantive divisions, each representing a different area of construction law. These meetings will typically have 40 to 60 participants and will provide attendees a chance to choose from a variety of programs and to network in a more collegial setting.

The second day of the program begins with a diversity breakfast, followed by two workshops which will run concurrently. The first group of workshops will have two presentations. In one, the curtain is pulled back to reveal what is behind industry studies involving lost labor productivity. The second will explore the damage recoveries that may be possible where a contract is terminated for convenience. The next set of workshops examines damages involving "green" (sustainable) projects and alternative and usual remedies when a damages recovery is inadequate. The program concludes with an ethics session addressing what might happen when one goes too far in presenting a damages claim.

Following the program, the beauty of Naples calls us to outdoor events. Join us on the hotel's white sand beach where a sand castle competition will test your building skills. A golf tournament on a championship course and a boating outing through a mangrove forest also beckon. In addition, the resort offers a beautiful pool area, a secluded beach on the gulf, and a spa for pampering of body and soul. Fine restaurants, upscale shopping, a charming old town district and cultural attractions are minutes from the hotel.

So come to Naples this winter. Enjoy the sparkling Gulf of Mexico at a first class resort while attending a great education program!

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Ober|Kaler, Baltimore, MD

John "Buzz" H. Tarlow

Tarlow, Stonecipher & Steele, PLLC, Bozeman, MT

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Carlton Fields PA, Tampa FL

PROGRAM SCHEDULE

Wednesday, January 30, 2013

Noon – 5:00 PM

Onsite Registration Opens

5:30 PM – 6:30 PM

Exhibitor Appreciation Reception

Thursday, January 31, 2013

7:30 AM – 5:00 PM

Registration/Exhibition Open

7:30 AM – 8:30 AM

First Time Attendee & New Member Breakfast

Continental Breakfast

8:30 AM – 8:45 AM

Welcome from the Forum Chair

Opening Remarks and Announcements

8:45 AM – 9:45 AM

Plenary 1

DELAY DAMAGES – What's Hot, What's Not

The session will review the latest legal developments involving delay damages issues. Discussion will include total cost claims, cumulative impact claims, the use of Eichleay and other formulas for extended home office overload, as well as liquidated vs. actual owner damages.

Dennis A. Estis
Greebaum, Rowe, Woodbridge, NJ

Mary Beth Hagan
Hagan & Farrar, PLLC, Murfreesboro, TN

Dorothy E. Terrell
Smith Pachter McWhorter, PLC
Vienna, VA

9:45 AM – 10:45 AM

Plenary 2

CONTRACT DRAFTING TO REDUCE OR ELIMINATE DAMAGES – What are the Limits?

An examination of contract provisions that set, reduce or eliminate damages for breaches of contract. The panel will discuss “No Damages for Delay” clauses, “No Consequential Damages” clauses, liquidated damages clauses, reverse liquidated damages clauses, and clauses that limit claims or liabilities. How are these clauses interpreted and are they always enforced?

Linda Dickhaus Agnant
Casey, Ciklin Lubitz, West Palm Beach, FL

Buck S. Beltzer
Holland & Hart, Denver, CO

Jaimee L. Nardiello
Zetlin & DeChiara, New York, NY

Joseph D. West
Gibson Dunn, Washington, DC

10:45 AM – 11:00 AM

Break

11:00 AM – 12 NOON

Plenary 3

WORKING WITH DAMAGES CONSULTANTS: Ten Steps to Success

What are the best practices in working with experts and how should you deal with your opponent’s experts? Learn the 10 steps to success from retaining the expert, discovery issues, expert reports, Daubert Challenges – fighting junk science, to trial tips.

William E. Franczek
Vandeventer Black, Norfolk, VA

Kenneth P. Metcalfe
Kenrich Group, Washington, DC

Peter J. Torcicollo
Gibbons P.C., Newark, NJ

12:15 PM – 1:30 PM

Lunch

Division Programs

1:30 PM – 1:45 PM

Break

1:45 PM – 2:30 PM

Plenary 4

PREPARATION OF THE DAMAGES EXPERT FOR TRIAL

See the damages expert work with the attorney. Learn dos and don’ts from the pros.

Ray Bash
Polsinelli Shughart, Kansas City MO

Patrick A. McGeehin
FTI Consulting, West Palm Beach, FL

2:30 PM – 3:30 PM

Plenary 5

GRAPHICS FOR DAMAGES PRESENTATIONS – Putting the Pow into Ow

Learn cutting edge strategies that can be used in the presentation of damages through exhibits and technology. Be ready for a “Plan B” if the judge excludes the exhibit or the technology doesn’t work. Finally, hear a discussion of what is demonstrative evidence. Is it “evidence” at all?

Brian W. Bennett
Page, Eichenblatt, Bernbaum & Bennett, Orlando, FL

Michael Boucher
Trial Consulting Services, LLC, Tampa, FL

3:30 PM – 3:45 PM

Break

3:45 PM – 5:00 PM

Plenary 6

MOCK TRIAL – Direct and Cross Examination of the Damages Expert

Watch a reenactment of a damages expert testifying at trial. The audience will be polled to register approval/disapproval at key points. “Real time” results will be discussed and practice pointers will be offered by a jury consultant.

James Adrian
Adrian International, Peoria, IL

Ann Greeley
DecisionQuest, State College, PA

Daniel D. McMillan
Jones Day, Los Angeles, CA

Paul Sandars
Lum, Drasco & Positan, Roseland, NJ

5:00 PM
Announcements

6:00 PM – 8:00 PM
Welcome Reception on the Beach near
Waldorf Astoria Naples

Friday, February 1, 2013

7:30 AM – 8:45 AM
Diversity Breakfast
Continental Breakfast

7:30 AM – 12:30 PM
Registration/Exhibition Open

8:50 AM – 9:00 AM
Opening Remarks & Announcements

9:00 AM – 10:00 AM
Workshop A
THE REALITY BEHIND THE
THEORY OF LOST LABOR
PRODUCTIVITY CLAIMS

This workshop will discuss industry studies involving loss of labor productivity claims. Is there substance to the studies that can withstand scientific scrutiny? How should these studies be used in court or arbitration?

W. Alec Mosely
Hand Arendall, New Orleans, LA

William Ibbs
University of California, Berkeley, CA
The Ibbs Consulting Group

Lee Schumacher
ARCADIS U.S., Inc., Middletown, CT

Paul Stynchcomb
FTI Consulting, Rockville, MD

9:00 AM – 10:00 AM

Workshop B
TERMINATIONS FOR CON-
VENIENCE: You Want Me to Pay You
What?

Learn the differences in recoveries under the various termination for convenience clauses. The workshop will also tackle the thorny issue of whether an owner should pay a contractor a profit for not building the project. How can the clauses be modified to provide a middle ground? The workshop also will discuss how a wrongful termination for convenience is handled.

Ben Patrick
Watt Tieder Hoffar & Fitzgerald, Miami, FL

Stephen M. Seeger
Seeger Faughnan Mendicino, Washington, DC

10:15 AM – 10:15 AM
Break

10:15 AM – 11:15 AM
Workshop C
IT'S NOT EASY BEING "GREEN"

It's a whole new world out there involving "green" (sustainable) building including regulatory requirements, contract mandates, tax incentives and environmental benefits. What's not to like? But when things go wrong, what are the damages that can be suffered? Who is responsible and how can risk be managed through the contract process? Is green construction less safe and more risky? What remedies are there for defective green products?

Christopher W. Cheatham
Cheatham Consulting, LLC, Shawnee Mission, KS

Angela R. Stephens
Stites & Harbison, PLLC, Louisville, KY

10:15 AM – 11:15 AM
Workshop D
WHEN DAMAGES AREN'T ENOUGH

This workshop will examine alternative and unusual remedies in cases when a damages award won't make things right. Included in the discussion will be remedies involving equitable relief, specific performance, injunctions and accountings.

William G. Geisen
Graydon Head & Ritchey, LLP, Ft. Mitchell, KY

Denise Morris Hammond
Wright, Fulford, Orlando, FL

Michael S. McNamara
Pillsbury, Washington, DC

10:15 AM – 11:30 AM

Break

11:30 AM – 12:30 PM

Plenary 7

ETHICS: THROWING IN THE KITCHEN SINK – How Far Can You Go in Presenting Damages in Litigation vs. Mediation?

This workshop will consider what the ethical concerns are in prosecuting or defending damages claims. Does it matter whether the forum is court, arbitration or mediation? When might a damages claim lack a good faith basis such that the claim or lien ends up voided? Or even worse, when might the client or his attorney be liable for damages or sanctions? What practical steps should the attorney take to protect her client or herself?

Kirsten K. Davis
Stetson University College of Law, Gulfport, FL

Patrick J. Poff
Trenam Kemker, Tampa, FL

12:30 PM

Announcements and Closing Remarks

EVENT HIGHLIGHTS

EXHIBIT HALL

Visit the Exhibits! The forum Exhibit Hall brings companies together in one place to fit the unique needs of construction lawyers. The Exhibit Hall will be open Thursday, January 31, 7:30 AM – 5:00 PM and Friday, February 1, 7:30 AM – 12:30 PM. Thanks to all of the exhibitors for their continued support of the Forum!

DIVERSITY BREAKFAST

Friday morning join the Diversity Committee at the Diversity Breakfast Program [_____] with speaker [_____]

WELCOME RECEPTION

Come and join us Thursday evening for the Midwinter Meeting Welcome Reception on the Beach by the Waldorf Astoria Naples. Enjoy great food, drinks and a steel band! All registered attendees receive a free ticket to the Welcome Reception. Guest Tickets are an additional fee and must be paid for during your registration process.

NAPLES AREA ATTRACTIONS

Beaches

The Paradise Coast is famous for its sugar-white sand beaches that stretch from Barefoot_Beach Preserve at the northern tip of Collier County, through the city of Naples, along the four miles of Marco Island's crescent shoreline and into the deserted Ten Thousand Islands region of the Everglades.

Fifth Avenue South Main Street

Explore the many unique boutiques, gift stores, art galleries, restaurants, bars and pubs along Fifth Avenue South, Naples' Main Street. Enjoy free music and entertainment along the street the 2nd Thursday of each month during Evening on Fifth, as well as many other special events.

Third Street South and the Avenues Shopping District

Shop, dine and stroll Third Street South and the Avenues Shopping District, Naples' most romantic and chic shopping area. Historic buildings and exquisite architecture house shops and restaurants offering the essential Naples experience. The district is two blocks from Naples beach and the nightly sunsets.

Naples Botanical Garden

Always in bloom, the garden's tropical location gives guests a year-round choice of themed landscapes from around the world, bringing the diverse flora from locations such as Brazil, Asia, the Caribbean, and Florida to one venue.

Naples Zoo at Caribbean Gardens

The nationally accredited Naples Zoo presents rare fauna and educational displays within a

historic tropical garden founded in 1919. Guests enjoy a variety of wildlife presentation, botanical tours, and a guided cruise past islands of primates.

Everglades National Park

Everglades National Park is the only subtropical wilderness in the U.S. It contains temperate and tropical plant communities, as well as marine and estuarine environments. Take a boat trip from the Gulf Coast Visitor Center to see dolphins, birds and other wildlife.

Big Cypress National Preserve

A 729,000-acre unit of the National Park Service in south Florida. Located in eastern Collier County, it is part of the Everglades ecosystem and a critical watershed for the Ten Thousand Islands area to the southwest. A diverse wild area of cypress swamps, prairies, pinelands, hardwood hammocks and mangrove estuary and is home to a variety of wildlife.

Collier County Museum

The area's flagship history museum traces the area's past from the time of mastodons to millionaires. The main Collier County Museum is located on a five-acre site with historic cottages, native plant garden, logging locomotive, Sherman tank and swamp buggies.

Naples Museum of Art

Located in the Philharmonic Center for the Arts Complex, the Naples Museum of Art is Southwest Florida's only full-scale art museum. Fifteen galleries showcase permanent collections and traveling exhibits.

For more information on area attractions, visit www.paradisecoast.com.

CONFERENCE INFORMATION

1. **Hotel Information:** The conference will be held at Waldorf Astoria Naples; Phone: 888-722-1267. Visit the hotel's website at <http://waldorfastorianaples.com/> for further information.

2. **Hotel Reservations:** The Forum on the Construction Industry has negotiated a special room rate of **\$256** (including resort fee) per single/double room. A 10% sales tax will also apply per night. You may call the hotel directly at **888-722-1267 or 239-594-6321** and mention the ABA Forum on the Construction Industry 2013 Midwinter Meeting. We have reserved a limited block of rooms through **January 8, 2013. You must register for the conference prior to making your hotel reservation.** After this date, and if we are sold out of our block, rooms will be assigned on a space available basis at a rate the hotel chooses. All changes and cancellations to guaranteed hotel reservations must be made with the hotel at least 72 hours before the scheduled day of arrival to avoid a one night's cancellation charge.

3. **Air Travel:** Airfare discounts to ABA meetings are available through ABA Orbitz for Business. To book online, go to www.americanbar.org/travel > click on the Orbitz for Business logo at the top of the page > read the instructions under the Travel Paid by Self box. For

assistance with online or offline reservations using the ABA Orbitz for Business website, call toll free 877-222-4185.

Ground Travel: The Waldorf Astoria Naples is approximately 30 miles or a 40-minute drive from Southwest Florida International Airport (RSW) Airport in Fort Myers. Approximate taxi fare is \$75 each way. For other travel options, please visit www.americanbar.org/groups/construction_industry.

4. **Program Registration:** To register for all programs and events described in this brochure, **we encourage you to register online at www.americanbar.org/groups/construction_industry**. Confirmations will be emailed or faxed to you within 72 hours of registration receipt. In order to be included in the list of program attendees, you **must register by January 4, 2012**. Guest tickets for special events are available for an additional fee. Please see the registration form for price details.

5. **On-Site Check-In:** Beginning Wednesday, January 30, 2013 at 3:00 p.m. – 6:00 p.m., attendees may check in at the ABA registration desk to pick up name badges and course materials.

6. **On-site Registration** is available for those persons who missed the registration deadline. If you plan to register at the door, please call the Forum at 312-988-5579 on or before Friday, January 25, 2013, to confirm that space is still available. Failure to call in advance may preclude admission to a sold out conference. On-site registrants must pay the registration fees by check, money order, Visa, MasterCard, or American Express. **NO** registrations will be accepted without payment.

7. **Tuition and scholarship information:** Tuition includes admission to the program, welcome reception, continental breakfasts, beverage breaks, luncheon, and course materials. The Forum will be providing program materials on CD-ROM only in effort to help “green” the environment. Please contact Bridget Miller at Bridget.Miller@americanbar.org for scholarship information.

8. **Cancellation Policy:** Registrants who are unable to attend the conference will receive a refund less a \$50 administrative fee if written cancellation is received by **January 18, 2013**. Cancellations may be faxed to 312-988-5677. **No refunds will be granted after January 18, 2013**. Substitutions are acceptable, or conference materials will be sent in lieu of a refund after the program. The ABA reserves the right to cancel any programs and assumes no responsibility for personal expenses.

9. **CLE Credit:** ABA programs ordinarily receive CLE credit in AK, AL, AR, AZ, CA, CO, DE, FL, GA, GU, HI, IA, ID, IL, IN, KS, KY, LA, ME, MN, MS, MO, MT, NH, NM, NV, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, VI, WA, WI, WV, and WY. These states sometimes do not approve a program for credit before the program occurs. This transitional program is approved for both newly admitted and experienced attorneys in NY. For more information about CLE accreditation in your state, visit www.americanbar.org/groups/construction_industry or contact Bridget Miller at Bridget.Miller@americanbar.org.

10. **Membership:** To encourage registrants to join the ABA Forum on the Construction Industry, the reduced member's tuition rate will be extended to registrants who join the Forum when they register for the conference. Forum membership dues are \$50 for attorneys/associates and \$5 for law students. Membership in the ABA and one Section is a prerequisite to Forum membership. Please include a separate check (payable to the American Bar Association) for membership dues.

11. **Additional Course Materials:** Materials for all programs may be available for purchase after the conference by calling the ABA Service Center at 1-800-285-2221.

12. **Tax Deduction for Educational Expenses:** In the United States an income tax deduction may be allowed for educational expenses undertaken to maintain or improve professional skills. This includes registration fees, travel, meals and lodging expenses (see Treas. Reg. Sec. 1.162-2) Coughlin v. Commissioner, 203 F.2d 307 (2nd Cir. 1953.)

13. **Americans with Disabilities Act:** If special arrangements are required for disabled individuals to attend this program, please contact the Forum in writing by September 16, 2011 at the American Bar Association, 321 N. Clark Street, Chicago, Illinois, 60654. Fax: 312-988-5677.

15. **Dress:** In keeping with Forum tradition, participants are encouraged to wear business casual attire during the programs and to the special events.

16. **For the latest program information:** Please visit the ABA Forum on the Construction Industry's website: www.americanbar.org/groups/construction_industry. For further information on the city, travel, activities and entertainment options, visit www.paradisecoast.com.

16. **Questions:** If you have questions or require additional conference information, please call 312-988-5579. Fax: 312-988-5677; e-mail: Bridget.Miller@americanbar.org.