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In This Issue:

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RIVERSIDE LAWYER
MAGAZINE

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Mission Statement

Established in 1894

The Riverside County Bar Association, established in 1894 to foster social interaction between the bench and bar, is a professional organization that provides continuing education and offers an arena to resolve various problems that face the justice system and attorneys practicing in Riverside County.

RCBA Mission Statement

The mission of the Riverside County Bar Association is:
To serve our members, our communities, and our legal system.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Public Service Law Corporation (PSLC), Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Inland Empire Chapter of the Federal Bar Association, Mock Trial, State Bar Conference of Delegates, and Bridging the Gap.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of Riverside Lawyer published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Annual Joint Barristers and Riverside Legal Secretaries dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, and other special activities.

Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

MBNA Platinum Plus MasterCard, and optional insurance programs.

Discounted personal disability income and business overhead protection for the attorney and long-term care coverage for the attorney and his or her family.

Riverside Lawyer is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6th day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are $25.00 and single copies are $3.50.

Submission of articles and photographs to Riverside Lawyer will be deemed to be authorization and license by the author to publish the material in Riverside Lawyer.

The material printed in Riverside Lawyer does not necessarily reflect the opinions of the RCBA, the editorial staff, the Publication Committee, or other columnists. Legal issues are not discussed for the purpose of answering specific questions. Independent research of all issues is strongly encouraged.

Calendar

September

18 **Solo & Small Firm Section**
Topic: "Additional Insured Endorsements"
Speaker: Dwight Kealy, Esq.
RCBA Gabbert Gallery - Noon
MCLE

RCBA Annual Installation of Officers Dinner
Mission Inn, Music Room
Social Hour – 5:30 p.m., Glenwood Tavern
Dinner – 6:30 p.m., Music Room

23 **CLE Event**
Civil Procedure Before Trial
Topic: "Law & Motion"
Speaker: Honorable John Vineyard
Lunch courtesy of Esquire Deposition Solutions
RCBA Gabbert Gallery – Noon
RSVP to rcba@riversidecountybar.com
MCLE

24 **Appellate Law Section**
Topic: "Top Ten Tips for Appellate Brief Writing"
Speaker: Dean H. McVay, Esq.
RCBA Gabbert Gallery – Noon
MCLE

25 **Business Law Section**
Topic: "Attorney Brand Management"
Speaker: Bo Bryant
RCBA Gabbert Gallery – Noon
No MCLE

Federal Bar Association
Inland Empire Chapter
Topic: "Voting Rights in the 2014 Elections"
Speakers: Charles Doskow and Justin Levitt
George E. Brown, Jr. Federal Courthouse
Noon – 1:15 p.m.
Information – Sherri Gomez at 951.689.1910

October

7 **24th Annual Red Mass – 6:00 p.m.**
Saint Francis Catholic Church
4268 Lime Street, Riverside

President's Message

by Chad W. Firetag

I am honored to be writing my first President's message to you. In thinking about this organization, I am constantly reminded of the many great past presidents of the Riverside County Bar Association as well as all of the attorneys who make this organization what it is today. The number of men and women who volunteer their time with the RCBA, whether by serving on the RCBA board, chairing a section or committee or simply helping with the many volunteer events we hold every year, is astounding. I am proud to work alongside such professionals who are dedicated to improving the quality of representation throughout Riverside County.

To that end, I want to personally thank Jackie Carey-Wilson as the outgoing president of the Bar. Jackie has worked tirelessly for this community with the singular goal to improve the legal system as a whole. As many of you know, the lack of judicial resources in Riverside has been a problem for many years. Just last year, Jackie and many others from the Bar traveled to Sacramento, sometimes with little more than a day or two notice of a pending bill, to testify before various legislative committees about the drastic needs of Riverside County. Although Riverside County's standing is still perilous, I firmly believe that if not for the work of these individuals the county would be in a much worse state. It is a privilege to succeed Jackie as the RCBA's president.

Writing this message has also given me some time to reflect on my time in the Bar Association. When I first joined the Riverside County Bar Association after working in Orange County at a large law firm, I was immediately introduced to a wonderful group of attorneys and professionals. I remember going to general membership meetings and getting to meet very experienced attorneys and, for the first time in my career, sitting next to and meeting judges. I had certainly never met a judge while practicing in Orange County. It was quickly apparent to me that being a member of the Riverside County Bar Association gave me advantages I never would have had before.

I remember just a few years ago, when Chris Harmon (now newly-appointed Judge Harmon), reflected on the many positive aspects of the Bar and membership in one of his President's Messages. He commented on how the public needs a strong Bar Association because it is lawyers who are usually at the forefronts of social or political change. The beauty of the law is that it is designed to be blind to wealth or status, but in reality, many of us know that is not always the case. It is often the poor and the disenfranchised who are at a disadvantage in our justice system. That is why a strong Bar Association, one committed to equal access to the law, is so vital and important to our system of justice.

It is interesting that this month's topic is Construction Law. I have been predominantly a criminal defense attorney, having worked in private practice for many years and now I am employed as the Assistant Public Defender alongside Steven Harmon, a past president of the RCBA. I must confess I have little experience and/or knowledge of Construction Law or construction in general. (I'm lucky if I don't smash my finger hanging up a picture in my bathroom.)

But without reading too much into the title of this month's magazine topic, although I do not know how to construct anything, I believe that I know the purpose of what it means to construct. Construction is not just the building of structures, it is the bringing together of people. When an architect designs a building, she does not design it for one individual to be left alone; she designs it so that many people can come together for a common purpose. The building itself may be magnificent, but if no one works together within the structure, what good is it?

The goal of the RCBA is to bring us together for the common purpose to serve our members, our community and our legal system. From the desert expanses of the Coachella Valley to downtown Riverside to the vineyards of Temecula, our Bar is certainly scattered over a wide and diverse geographical area. While each area has its own unique issues and needs, we should all work together to construct a county-wide organization that serves our members, the public and the justice system as a whole.

In the upcoming year, my goal is to make sure that the Riverside County Bar Association is as wide and varied as our geography. I want to hear your suggestions as to how we can make this Bar Association the best in the state. Together, I believe that we can and I look forward to serving you as the President in the upcoming year.

Chad Firetag is an Assistant Public Defender for the Law Offices of the Public Defender, Riverside County.

Barristers President's Message

by Scott Talkov

Leadership of the 2014-2015 Barristers

As I begin my second journey as Barristers President, I am reminded of the numerous stories from former Barristers with fond memories of their time in the organization. These stories often share a common theme of the egalitarianism that exists when each young or new attorney is equally the lowest on the legal totem pole.

This year, I am honored to be joined on the Board by diverse and creative young attorneys as we create new memories for our legal community.

Arlene Cordoba is this year's Vice President. An attorney at the Law Offices of Arlene Cordoba, Arlene has practiced since 2008 and served on the Board since 2010. Arlene is a Riverside native and graduate of U.C. Irvine and the University of La Verne College of Law. She is the Director of the Associated Student of UCR Legal Clinic, where she donates her time to answer family law questions from UCR students.

Sara Morgan is the new Treasurer. An attorney at Heiting & Irwin practicing primarily personal injury plaintiff's litigation, Sara has practiced since 2008. Also a Riverside native and U.C. Irvine alum, Sara is a graduate of Chapman University School of Law.

Christopher Marin is now serving as the Secretary. An attorney at the Law Offices of Christopher Marin where his practice focuses on family law, Chris is a 2009 graduate of the University of Southern California School of Law. A Riverside resident, Chris is an outspoken advocate on gender equality.

Erica Alfaro is one of three Members-at-Large. An attorney since 2012, Erica works for the U.S. Attorney's office in Los Angeles where she assists in criminal prosecutions. She is a graduate of the U.C. Davis School of Law.

Eli Underwood is another Member-at-Large. An attorney since 2009, Eli represents landowners in eminent domain litigation with the Hubbard Law Firm in Riverside. A Coachella Valley native and Riverside resident, Eli is a graduate of U.C. Santa Barbara and U.C. Hastings School of Law.

Ben Heston is also a Member-at-Large. Becoming an attorney just hours before the June 2014 Barristers election, Ben practices bankruptcy law at Heston & Heston, Attorneys at Law at its new Riverside office. Yet another U.C. Irvine alum, Ben attended Southwestern University School of Law. Ben lives in Riverside with his wife and newborn son.

These rising stars in the Riverside County Bar Association invite you to attend the next Barristers meeting to network, socialize and learn to improve your law practice. The next Barristers meeting, in conjunction with the Inland Empire Bankruptcy Forum, will be on the topic of bankruptcy law for non-bankruptcy attorneys. We are honored that our panelists will include the Honorable Scott Yun of the United States Bankruptcy Court, Everett Green of the U.S. Trustee's office, Robert Whitmore, Chapter 7 Trustee as well as attorneys Richard Heston and Robert Goe. The meeting will take place on Wednesday, September 17, 2014, from 5:30 p.m. to 7:30 p.m. To find the location and learn more about the Barristers, check out our website at www.riversidebarristers.org.

Scott Talkov is a fifth year attorney at Reid & Hellyer in Riverside where he practices real estate, business and bankruptcy litigation. Scott can be contacted at (951) 682-1771 and stalkov@rhlaw.com.

Kelly Moran

2013-2014 Barristers President

by Jacqueline Carey-Wilson

Kelly Moran served as Barristers President July 2013 to July 2014 and will continue to serve on the Board as the immediate past president. During Ms. Moran's presidency, the Barristers Board organized very interesting and educational legal education programs with such distinguished speakers as District Attorney Paul Zellerbach; Public Defender Steven Harmon; the Honorable Judge Virginia A. Phillips of the United States District Court for the Central District of California; and Diane J. Klein, University of La Verne College of Law.

In addition, the Barristers also launched an "Adopt a High School" program. This program was inspired by the good work of Justice Douglas Miller and the Desert Bar Association. The Adopt a High School program forges a partnership between the RCBA and Arlington High School and includes three main facets: (1) a legal career day during which high school seniors are introduced to individuals who hold various positions in the legal field; (2) a mock law and motion event where attorneys take to the classroom to argue a real civil motion or criminal law issue before an actual judge; and (3) a teach the class lecture series, where attorneys teach lessons on topics being studied in 12th grade Government classes in preparation for the Advanced Placement exams. The Barristers and the RCBA are pleased to be working with Arlington High School teacher, John Costa, and the Honorable Bernard Schwartz on this program.

We congratulate Ms. Moran and the entire Barristers Board on a very successful year.

Jacqueline Carey-Wilson is deputy county counsel with San Bernardino County, the immediate past president of the RCBA, editor of the Riverside Lawyer, and past present of the Federal Bar Association, Inland Empire Chapter.

SB 800 Friend or Foe: The Jury is Still Out

by Stacy Fierman-Cribbs

Background

Senate Bill SB 800 was enacted in 2002 by the California legislature. *Civil Code* §§ 895-945 set forth the specific requirements required to maintain a construction defect action for any newly constructed homes or condominiums sold in California after January 1, 2003.

SB 800 is also known as the "Right to Repair Act" and gives the Builder the right to stay the Owner's action and repair the alleged construction defect. Owners still have the right to sue the Builder for construction defects thereafter but not until one of three events occur: the Builder fails to timely respond to the Owner's complaint per the SB 800 guideline, the right to repair process is completed or the Builder chooses to waive its right to repair altogether.

SB 800 supersedes the 2000 Supreme Court decision of *Aas v. Superior Court* which was previously the benchmark for what was an actionable "construction defect." In sum, Aas held that a construction defect action based in tort could not be pursued absent a showing of damages, to person or property, caused by the alleged defect.

In theory, SB 800 sounds like a fair and equitable way of allowing Builders and their Subcontractors to make repairs and avoid litigation. It has specific "performance" standards for most building components and building systems which, in turn, identifies actionable defects per *C.C.P.* §896 to potentially narrow the "everything including the kitchen sink" mentality that has ruled most defect reports over the last ten to fifteen years. But the question remains: Does SB 800 help or hurt the construction industry and prevent complex litigation in an already overcrowded legal system? The truth of the matter is sometimes it helps and sometimes it does not.

Building Standards

In addition to giving Builders the right to repair, SB 800 establishes "performance standards" for most building systems and components used in new residential construction. These standards are grouped into categories (codified in C.C.P. §896) and include water intrusion, structural issues, soils problems, fire protection, plumbing, sewer, electrical and miscellaneous standards which include hardscape, stucco and exterior concrete, manufactured productions, heating, air conditioning, sound transmission, irrigation, untreated wood posts, fences, paint & stains, roofing materials, landscaping, ceramic tile, ducts and, finally the "catch all" provision. Each standard specifies conformance and/or compliance and the damage/deterioration to be caused by lack of non-conformance.

SB 800 tries to define what constitutes a construction defect and the applicable standards of care for each defect allegation. In theory, if an alleged defect does not fit into one of the construction categories then it is not actionable. However, there are ambiguities within §896 and this leaves room for interpretation as to the standards. For example, §896(b) addresses structural standards and states that:

"Foundations, slabs and sheer wall shall not contain significant cracks or significant vertical displacement, shall not cause the structure to be structurally unsafe and must materially comply with design criteria of applicable building codes, regulations, and ordinances for chemical deterioration/corrosion resistance, earthquake, and wind load resistance at the time of construction."

Our office represented a framing subcontractor in the first SB 800 case to go to a jury. The jury was instructed at the beginning of the case to utilize the SB 800 standards to decide whether or not an alleged defect was actionable pursuant to these standards. The "standards" above left open for interpretation what is a "significant crack" or "significant displacement," what constitutes an "unsafe structure," and how one defines "material compliance" with design criteria of applicable building codes, regulations and ordinances.

These issues were subject to differing testimony by the experts in the case, not to mention the attorneys that argued their application and ultimately, the jurors who had to define each standard to reach their verdict. As much as it may try, SB 800 does not create a finite list for which you can check off line items and deem structural standard has been confirmed with or violated.

Recoverable Damages

If the finder of fact has decided that a standard has been violated and an actionable construction defect is established, then §944 identifies what types of damages are recoverable. Those damages can be measured by one or more of the following:

1. The cost of repair of the defect which has violated a standard;

2. The cost of repair of damage as caused by the Builder's repair of the defect;

3. The cost of repair of damages resulting from the violation of a specific standard;
4. The cost of removing and replacing improper Builder repairs;
5. Relocation and storage expenses necessitated by the repair;
6. Lost revenues if the property at issue is a licensed business;
7. Investigative costs for proven violations; and/or
8. Costs and fees recoverable by contract or entitled to via statute.

Section 944 also specifically states that no other damages for negligence or a breach of contract claims brought by an Owner can be maintained. But while it appears that damages are limited, there remain issues with interpreting these categories.

For example, if shear wall nailing is not in material compliance with the Building Code and constitutes a structural construction defect, how would one calculate the recoverable damages? Typically, the Owner will put forth a cost of repair that includes removal and replacement of every nail and potentially every shear panel on the property at issue. Conversely, the Builder will opine that only a portion of the nailing needs to be removed and replaced and that the shear panels can be re-used. The dollar amounts associated with these costs of repair would deviate significantly. How do you decide what the actual "recoverable" cost should be when you have competing and contrary costs of repair from the Owner and Builder? This difference in opinion in what is necessary for an effective repair, and the cost of same, is subject to interpretation by the finder of fact and does not provide a specific formula for calculation of damages.

Conclusion

Because of the ambiguities that remain and since SB 800 standards have only been tested in a handful of Court proceedings in California the jury is still out on whether or not the Legislature's efforts and intent in enacting SB 800, will be a friend or foe for the construction industry and the litigation of construction defect actions.

Ms. Fierman-Cribbs successfully defended her client in the first SB 800 jury trial. Her efforts helped secure a defense verdict for the developer and a dismissal of her client. This successful result came after a nearly 30 day trial. Her office defends developers, builders, design professional and subcontractors, and acts as corporate counsel for many construction entities. She also specializes in real estate and employment law. Ms. Fierman-Cribbs can be reached at sfc@sfclawyers.com.

Arguing in Favor of Recovery of Damages on a Performance Bond for a Subcontractor's Non-Material Breach of a Construction Contract

by Andrea Rodriguez

In theory, a performance bond protects the contractor in the event of subcontractor default, but what happens when the default does not warrant termination of the subcontract but the bond requires termination? Every contractor who has a contract for a public works project is required to obtain and file a performance bond with the public entity before commencing work.[1] The performance bond "shall guarantee the faithful performance of the contract by the contractor."[2]

The American Institute of Architects Document A312 Performance Bond (the "A312 Performance Bond") is a form performance bond that is commonly used by sureties throughout the country to guarantee performance of a construction contract for a public works project. The A312 Performance Bond can be issued to general contractors to guarantee a subcontractor's performance of a subcontract.[3]

Paragraph 3.2 of the A312 Performance Bond requires that the general contractor terminate the subcontract before the surety's obligation under the bond arises. So what is the contractor to do when the subcontractor defaults on the subcontract, but the default is not material enough to warrant termination of the subcontract?

Most subcontracts specify the circumstances constituting "material defaults" that warrant termination of the subcontract. If the subcontractor's breach does not rise to the level of a material default, the general contractor is precluded from terminating the subcontract. Moreover, a general contractor cannot terminate a construction contract that has been "substantially performed." While that may be true, a subcontractor's breach that does not rise to the level of a "material default," can still cause damage to the general contractor. For example, a general contractor may be damaged by the subcontractor's delay, or it may be damaged if the subcontractor fails to complete punch list items or warranty work after the subcontractor has substantially completed the subcontract.

In these situations, the general contractor is in a difficult positon. It cannot terminate the construction contract because these breaches are not "material." But the A312 Performance Bond clearly states that termination is a condition precedent to recovery under the bond. Meanwhile, the general contractor might be liable to the public entity for delay damages caused by the subcontractor's breach.

California law does not give guidance on the subject, but an argument can be made that the termination requirement is only a condition precedent to the surety's obligation to ensure completion of the construction contract, not to its obligation to indemnify the general contractor for damages caused by the contractor's non-material breach of the subcontract.

Although this issue has not come up in California case law, a court in New York agreed with this argument. In *International Fidelity Insurance Company v. County of Rockland*,[4] the court concluded that the paragraph 3.2 termination requirement did not constitute a condition precedent to the surety's obligation to indemnify the general contractor for delay damages. The court noted that the performance bond guaranteed performance of the construction contract, which was incorporated by reference into the performance bond, and the construction contract provided for recovery of delay damages.[5]

The court stated that its conclusion was logical because "damages for delay in a contractor's performance can be assessed whenever the delay causes damage to the owner, not only when the contractor's performance has been so unsatisfactory that a full declaration of default and termination is necessary or justified."[6] If a full declaration of default is justified, the general contractor can terminate the subcontract and the surety's obligation to ensure completion of the subcontract is triggered. If a full declaration of default is not justified, the termination requirement does not preclude a general contractor from

1 Public Contract Code § 10221.

2 Public Contract Code § 10224.

3 The A312 Performance Bond can also be issued to the public entity to guarantee a general contractor's performance of the primary construction contract. However, for purposes of this article, the focus will be on performance bonds issued to general contractors to guarantee a subcontract.

4 (S.D. New York 2000) 98 F.Supp.2d 400.

5 *Id.* at 436.

6 *Id.* at 436-37.

seeking indemnification from the surety for delay damages.

Courts in other states —including New Jersey, Georgia, and West Virginia —have reached the same conclusion.[7] Although this issue has yet to arise in California, it is likely to do so in the future. A strong argument can be made in favor of California courts also determining that the termination requirement is not a condition precedent to recovery of delay damages.

First, under California statutory law, a performance bond is *required* for a public works project.[8] Second, pursuant to Public Contracts Code § 10224, the performance bond must guarantee *faithful performance* of the subcontract. Given that most subcontracts provide for recovery of delay damages and the A312 Performance Bond incorporates the subcontract by reference, the performance bond should also guarantee damages caused by a subcontractor's delay.

Third, the situation frequently arises that a general contractor is unable to comply with the termination requirement because it does not have grounds to terminate the subcontractor. An interpretation of the termination requirement that would require general contractors to terminate subcontracts before being able to recover delay damages on the performance bond would be against public policy because it would encourage termination of subcontracts for trivial reasons. A wrong decision to terminate on the part of the general contractor would lead to the general contractor breaching the subcontract, which would forfeit its right to any recovery on the performance bond.[9] This results in a catch-22 for the general contractor. If the general contractor does not terminate the subcontract, it cannot satisfy the condition precedent and is unable to recover on the performance bond. However, if the general contractor does terminate the subcontract absent a material default on the part of the subcontractor, the general contractor will have breached the subcontract and is thus precluded from recovering on the performance bond. Such an interpretation would result in no enforcement mechanism for the performance bond's statutory requirement to guarantee faithful performance of the subcontract.

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect . . ."[10] It is well-settled in California that "the law abhors forfeitures."[11] Interpreting the A312 Performance Bond to mean that the paragraph 3.2 termination requirement is not a condition precedent to recovery of delay damages is the only reasonable interpretation that does not encourage breach of the subcontract and avoids forfeiture.

Andrea Rodriguez is an associate at the law firm of Gresham Savage Nolan & Tilden, where she practices business and commercial litigation.

7 *Gloucester City Board of Education v. American Arbitration Association* (N.J. 2000) 333 N.J. Super. 511; *Commercial Cas. Ins. Co. of Georgia v. Maritime Trade Center Builders* (Ga. 2002) 257 Ga.App. 779; *Mid-State Sur. Corp. v. Thrasher Engineering, Inc.* (S.D. West Virginia 2008) 575 F.Supp.2d 731.

8 Public Contract Code § 10221.

9 Paragraph 3 of the A312 Performance Bond states that the surety's obligation under the bond does not arise if the general contractor breaches the subcontract.

10 Civil Code § 1643.

11 *Lamont v. Ball* (1949) 93 Cal.App.2d 291, 294; Civil Code § 1442.

Ovation to Innovation: TEDxRiverside
Coming to the Riverside Fox Theater on October 16, 2014

by Melissa Cushman

On October 16, 2014, the Leadership Riverside Class of 2014 will host an all-day TEDx conference, TEDxRiverside: Ovation for Innovation, at the Historic Riverside Fox Theater in downtown Riverside. Live speakers include a Nobel Prize recipient, a Grammy Award winner, a CEO of a silicon valley company, and a former NFL player, just to name a few.

TED is an annual event that started 30 years ago as a conference where Technology, Entertainment, and Design converged. Over the years it has grown exponentially and expanded past the original TED topics to include science, business, humanities, development, philanthropy, and global issues. Videos of past TED speakers are available on the www.ted.com website for free. In addition to the yearly TED event, TED created TEDx, a similar program that consists of one-time, local, self-organized events that create a TED-like experience.

TEDxRiverside is being hosted by the Leadership Riverside Class of 2014 as its class project, partnered with University of California, Riverside. Leadership Riverside is a 10-month program through the Greater Riverside Chambers of Commerce that each year immerses a different class of local community leaders and decision-makers in Riverside's business, non-profits, government, education, arts, and other areas. The purpose of the program is to build knowledge about the community, create connections, and equip participants with in-depth, personal knowledge and awareness of the critical issues that shape Riverside and help create solutions for the community.

Notables from many walks of life have graduated from the Leadership Riverside program, including a number of prominent area attorneys. Past graduate include: Jeb Brown, Office of the County Counsel (Class of 2005 and head of the Class of 2014 Steering Committee); the Honorable David Bristow of the U.S. District Court Central District of California (Class of 1999); the Honorable Craig Riemer of the Riverside County Superior Court (Class of 2002); the Honorable John Vineyard of the Riverside County Superior Court (Class of 2002); Paul Zellerbach, Riverside County District Attorney (Class of 1996), Michelle Ouellette (Class of 1995), Jack Clarke, Jr. (Class of 1987), and Howard Golds (Class of 2003), of Best Best & Krieger LLP; Ted Stream (Class of 2003); Jamie Wrage (Class of 2009), and Eugene Kim (Class of 2013), Gresham Savage Nolan and Tilden; Jeff Van Wagenen, Office of the Riverside County District Attorney (Class of 2012); Brian Pearcy, Law Offices of Brian C. Pearcy, APC (Class of 1999); Jim Manning, Reid & Hellyer (Class of 1997); Sean Varner, Varner & Brandt, LLP (Class of 2000); Jennifer Guenther, First Carbon Solutions (Class of 2007); Teresa Rhyne, Teresa Rhyne Law Group (Class of 1991); Daniel Hantman (Class of 1997); and many others. The Leadership Riverside Class of 2014 had three attorney members: Robyn Lewis, J. Lewis & Associates, APLC; Joseph Telezinski, O'Connor*Telezinski; and Melissa Cushman, Best Best & Krieger LLP.

The Leadership Riverside 2014 class members have taken to heart what we learned during the program and are seeking to "pay it forward" to the next generation of leaders by inspiring and educating them. With this goal in mind, the class is providing complimentary admission to the TEDxRiverside to nearly 500 local high school students. Leadership Riverside Class of 2014 is excited about its project and what it means for the community, and we would love to see many from the local legal community attend, participate in, and/or sponsor the event. Tickets are available now!

Melissa Cushman is an attorney from Best Best & Krieger LLP and a member of the Leadership Riverside Class of 2014 (best class ever!). For more information about TEDxRiverside, see http://www.tedxriverside.com. For more information about the Leadership Riverside program, which seeks new qualified class members every year (applications are usually due the beginning of July), see http://www.riverside-chamber.com/committees.cfm?cat=leadership.

Construction Projects: Look Out for CEQA!

by Melissa Cushman

So you want to build something. It could be something small, like adding a new bedroom onto your house. It could be something really big, like a new shopping mall or a 5,000-unit housing development. If you are in California and you need approval from a government agency for a permit or other approval for whatever it is you want to build, then the California Environmental Quality Act (CEQA)[1] likely applies, and you should be aware how it might affect you.

CEQA was enacted in 1970 with the twin aims of requiring public agencies to investigate the environmental impacts of actions they were considering approving and to disclose those potential impacts to the public and decision-makers before the action was approved. CEQA does not forbid approval of actions that will result in significant environmental impacts, but it does require analysis and disclosure of a proposed action's potential impacts. And, for projects that will result in potentially significant adverse impacts, CEQA requires public disclosure of why that action is so important or beneficial that it should go forward despite its impacts.

CEQA applies extremely broadly and is applicable to any activity that meets the definition of a "project." So for someone who wants approval to carry out some sort of construction activity, the first question is whether the activity in question qualifies as a "project." A "project" is any activity requiring a discretionary local or state governmental approval, including a license or permit, that has the potential to cause a direct or reasonably foreseeable indirect physical change in the environment.[2] Construction activities are prototypical examples of actions with the potential to change the physical environment, so if the type of construction activity you wish to carry out requires a governmental approval, then CEQA will likely apply.

If CEQA applies to your construction project, what does that mean? The answer depends on what category your project falls into. Certain types of actions have been identified by the California Legislature as so important that, even though CEQA applies to them, they are statutorily exempt from environmental review whether or not they result in significant environmental impacts. There are dozens of categories of "statutory exemptions,"[3] most of which do not apply to construction projects. A few do, however, including: (1) construction projects that are located outside the state of California, (2) immediate repair or replacement of property or facilities damaged during natural disasters, (3) certain types of mass transit projects, (4) residential development projects consistent with approved specific plans, and (5) certain types of affordable or infill housing projects. The most commonly applicable statutory exemption is the ministerial exemption. It applies when the public agency approving the action only applies fixed standards in determining whether the proposed action meets specified criteria and cannot apply personal judgment as to the wisdom or manner of carrying out the project. Certain construction-related approvals may be ministerial. For example, in jurisdictions where public officials are limited to determining whether zoning allows the structure to be built at the requested location, whether the structure meets the requirements of the Uniform Building Code, and whether the application fee has been paid, the building permit is ministerial and no CEQA review needs to be done.[4] However, if a particular jurisdiction affords more discretion to the public official in determining whether to issue a building permit, it is likely discretionary.

Other than the ministerial exemption, most statutory exemptions are rarely applicable because they either involve numerous conditions or are very narrowly drawn. If no statutory exemption applies, the next question is whether a "categorical exemption"[5] does. Categorically exempt projects are those that the Secretary of the Natural Resources Agency has determined *typically* do not have a significant effect on the environment. A few types of categorical exemptions can apply to construction projects, including the categorical exemptions for (1) minor alterations of existing structures, (2) replacement of existing structures, and (3) construction of accessory structures. Constructing a small addition to your house is a fairly common type of activity that would typically not result in significant environmental impacts, and it would likely fall under one of these exemptions, while construction of a 5,000-unit housing development, for example, would not. However, like statutory exemptions,

1 Public Resources Codes section 21000 et seq. and California Code of Regulations, title 14, section 15000 et seq. ("State CEQA Guidelines").

2 Public Resources Code section 21065; State CEQA Guidelines section 15378(a).

3 Many—but not all—statutory exemptions are listed at State CEQA Guidelines section 15261 et seq.

4 In jurisdictions that afford more discretion to the public official than this, the determination may be discretionary and subject to CEQA review. In addition to building permits, certain other over-the-counter permits, including grading permits, are ministerial in some jurisdictions. The exact list of which over-the-counter permits escape CEQA review varies by jurisdiction.

5 Categorical exemptions are listed at State CEQA Guidelines section 15300 et seq.

many categorical exemptions have caveats that limit their applicability. In addition, if unusual circumstances apply to your project such that your project differs from typical projects of the same type, an otherwise applicable categorical exemption might not apply.

If your construction activity is a project and no statutory or categorical exemption applies, a substantive environmental report disclosing and analyzing your project's potential environmental impacts will likely be required. The most common types of environmental reports under CEQA are Negative Declarations, Mitigated Negative Declarations (MNDs), and Environmental Impact Reports (EIRs).[6] A Negative Declaration is appropriate if your project as proposed will not result in any potentially significant environmental impacts. An MND is appropriate if your project as proposed will result in potentially significant environmental impacts, but mitigation measures can be incorporated into the project to reduce all impacts to a level of less than significant. An EIR, the most complex (and, probably, expensive) type of document, is appropriate when your project may result in significant environmental impacts and at least one of those impacts will remain significant even after all feasible mitigation has been incorporated.

6 See State CEQA Guidelines sections 15362, 15369.5, and 15371.

The CEQA process has the benefit of giving the public and agency decision-makers an opportunity to understand, comment on, and potentially change or mitigate a proposed project before it has been approved. However, the CEQA process also has major drawbacks in the added time and expense they require. If a Negative Declaration, MND, or EIR is required for your project, the CEQA process may delay it by months or even years and can cost you additional thousands or hundreds of thousands of dollars. In addition, CEQA gives the public the ability to file litigation against the project. While such litigation is fairly rare, when it does occur it may delay the project for additional years and cost tens or hundreds of thousands of dollars more. For these reasons, people proposing construction projects need to be aware of CEQA and work with the public agency that would approve the project to understand the timing and parameters necessary.

Melissa Cushman is an attorney at the Riverside Office of Best Best & Krieger LLP, Environmental and Natural Resources Department. She specializes in reviewing and litigating construction and other types of projects under CEQA and the federal equivalent of CEQA, the National Environmental Policy Act.

Justice Has Been Delayed

by Robert Rancourt

Justice in Riverside County has been delayed. No, the author is not here wearing his public defender hat waxing philosophically about a particular impediment to resolving a case. Nor is the sore topic of the legislature's recent decision not to authorize only nine out of the 62 new judgeships needed to match the county's burgeoning population growth at issue. Rather, some of our courthouses are bursting at the seams, and much-needed relief has been rescheduled.

It could be worse. Being rescheduled is better than being cancelled or postponed indefinitely. Ask Alpine and Sierra counties, where, in 2011, plans for two new courthouses were cancelled due to budget cuts. See if any sympathy is found in Kern, Los Angeles, Monterey, Placer, and Plumas counties, where, in 2012, seven new courthouse construction projects were delayed indefinitely due to continuing budget constraints. Our three new courthouse construction projects missed the hatchet each time and at least remain in progress!

Banning Justice Center

Initially conceived in 2006 as one of nine "urgently needed" new trial court facilities, the new Banning Justice Center at 311 East Ramsey Street will replace the current Banning Courthouse—built in 1951—at 135 North Alessandro Road, about two blocks west. Citing lack of security, severe overcrowding, poor physical conditions, and reduced access to court services, funding was approved in 2007 and plans were made for a new "Riverside Mid-County Region Courthouse" to be open for business by May 2012.

Of course, the best laid plans often go awry. Land was to be acquired by March 2009, but did not actually occur until November 2009. Construction was scheduled to begin a year later but instead ground broke in February 2012 and construction started the following month. Opening was pushed back to the fall of 2013, then early 2014, and, most recently, to the fall of 2014.

When a lawyer wants to emphasize a photograph's persuasive force in court, the old saying "a picture is worth a thousand words" is often used. The photograph here casts doubt on the likelihood of the courthouse opening this fall. Rather, City of Banning Economic Development Director Bill Manis was quoted last month as saying "[t]he courthouse is 85 percent complete; due to construction delays, we expect it to be open to the public at the beginning of 2015." According to the Judicial Council, the most recent delays involved placement of the architectural concrete and electrical wiring due to the site's remoteness.

When it finally does open, the new Banning Justice Center will be a 68,000-square-foot facility with six courtrooms and corresponding chambers (replacing two courtrooms and a hearing room), 14 central holding cells, three deliberations rooms, 10 clerk's windows, and physical space to accommodate 72 judicial support staff (although about only 45 court staff members are presently planned). Judge Jeffrey Prevost, Commissioner Robert Nagby, and Hearing Officer Judith Fouladi are anticipated to be re-assigned from Riverside to join Judges Jorge Hernandez and Samuel Diaz, Jr., to open the new courthouse. The court's workload will expand to include trials.

Indio Juvenile and Family Courthouse

The familiar reasons of lack of security, severe overcrowding, poor physical conditions, and reduced access to court services again were the impetus for funding a new courthouse in 2009 to replace the current Indio Juvenile Court (built in 1955) and relocate the county's two desert region family law courtrooms to a new court. Planning included accommodation of three new judgeships, hopes of which seem to be dashed at present. Designated "immediate need," land was to be acquired by June 2011, design and plans were to be completed by March 2012, and construction was to start by May 2012 with a completion date of February 2014.

Enter state budget cuts. Over recent years, more than a billion dollars earmarked for courthouse construction have been diverted to the state's General Fund, borrowed for other purposes, or redirected to court operations. Cost reductions were mandated for 41 courthouse construction projects.

A four-acre site next to Indio Juvenile Hall between Oasis Street and Avenue 48 was finalized as planned in 2011. However, while an architect and construction project manager have been selected, the design and planning process saw delays. As of last month's Judicial Council status update and based upon current budget projections, the project is currently proceeding with working drawings, which is the final stage of the design and plans process. Once design and plans are complete, construc-

tion generally takes a year or two, but the current expected completion date is June 2017.

When the new Indio Juvenile and Family Courthouse finally opens, it will have five courtrooms and measure approximately 54,000 square feet. Not only will the court include two juvenile and two family law courtrooms, but a probate court also is slated to occupy the fifth courtroom.

Mid-County Civil Courthouse

Last but not least is a planned replacement for the Hemet Courthouse, which was built in 1969. Another "immediate need" project, current court facilities in Hemet are physically deficient, substandard in size, and overcrowded. Original planning for this new courthouse also intended to accommodate four new judgeships and create an adequate holding facility for accepting criminal trials.

Funding for a planned 116,000-square-foot new mid-county replacement courthouse was approved in 2010. Land was to be acquired by July 2012, preliminary plans were to be done by February 2013, working drawings were scheduled to be completed by January 2014, and construction was to occur in 2014 through 2015 with an anticipated opening date of February 2016.

An architect was selected in 2011, but state budget cuts loomed. The Hemet Courthouse replacement project was re-evaluated to consider leasing space rather than new construction. The idea of a new courthouse prevailed and site acquisition was authorized. Preliminary plans, an early step in the design and plans stage, however, were delayed.

Two sites were considered: One in Menifee at the Menifee Town Center, near Newport and Haun Roads, approximately two blocks from Interstate 215, and another in Hemet on Sherman Road next to the Hemet Civic Center, accessed by Devonshire Avenue or Buena Vista Street. The Menifee location won approval, and the latest update is that the Judicial Council is in negotiations for site purchase with the developer. The Menifee location is preferred for its location, so the Hemet site is now considered a back-up option.

Under current revisions, this new courthouse is scheduled to open by March 2019 and it will not accommodate criminal cases. It will include: Nine ADA-compliant courtrooms (replacing five), jury assembly space, a self-help center, a children's waiting room, family court mediation space, and adequately sized attorney conference waiting rooms. Presently, the nine courtrooms are planned for allocation as four family law courtrooms, three civil courtrooms, one probate courtroom, and one "community" (small claims, unlawful detainer, and traffic) courtroom.

While justice has been delayed in Riverside County, it is still coming, which is a better fate than other counties have met. Last year, citing continuing budget cuts, the Judicial Council added four more courthouse construction projects in Fresno, Los Angeles, Nevada, and Sacramento counties to the "indefinitely delayed" list.

Alas, progress, not perfection. Justice may have been delayed, but not altogether denied.

Bob Rancourt is a Deputy Public Defender with the Law Offices of the Public Defender, County of Riverside, where he has worked for 12 years. He is assigned to the Banning Courthouse, which sparked his interest in new county courthouses. Mr. Rancourt also serves as a judge pro tempore for the court.

Prompt Payment Penalties and Good Faith Disputes

by Stefanie G. Field

Prompt payment penalties in construction contracts are designed to encourage the prompt payment of progress payments and retention to contractors and subcontractors in construction contracts. (See, *FEI Enterprises, Inc. v. Kee Man Yoon* (2011) 194 Cal. App.4th 790, 796.) Which code sections apply to a construction contract will vary depending on the type of project (public vs. private), whether the payment due is a progress payment or retention, and who is making the payment (project owner or the contractor).

Generally, there is a 2% *per month* penalty imposed for any amount wrongfully withheld. (e.g., Civ. Code, § 8800 [private project, progress payment by owner], Civ. Code, § 8818 [private project, retention], Bus. & Prof. Code, § 7108.5 [private and public projects, progress payment by contractor], Pub. Contracts Code, § 7107 [public project, retention], Pub. Contracts Code, § 10262.5 [public project, progress payment by contractor], etc.) In some circumstances, the penalty is only 10% per year. (e.g., Pub. Contracts Code, §§ 20104.50, 10853, 10261.5.)

Because penalty amounts can grow quickly at 2% per month, particularly when the amount in dispute is large, penalties can become a large source of contention and frustrate efforts to resolve disputes between the contracting parties. That does not mean that there are no protections for owners or contractors when there are disputes regarding the amounts owed. To the contrary, there are provisions in the code to account for disputes, typically allowing the project owner or the contractor to withhold up to 150% of the amount in dispute from the progress payment or retention. (e.g., Civ. Code, §§ 8800, 8812, 8814, Bus. & Prof. Code, § 7108.5, Pub. Contracts Code, § 10262.5, etc.) But those provisions typically require the dispute to be "bona fide" or in "good faith."

Needless to say, there is rarely ever any agreement on whether a dispute is bona fide or in good faith, or even how much can be withheld. The relevant code provisions do not provide guidelines for what disputes are bona fide or in good faith, nor do they provide clear guidance on the 150% that can be withheld. There is, however, some guidance that a few courts have provided. For example, the disputing party need not prevail on the claimed dispute for the dispute to be found in good faith or bona fide. (*Denver D. Darling, Inc. v. Controlled Environments Const., Inc.* (2001) 89 Cal. App. 4th 1221, 1241; *El Dorado Irrigation Dist. v. Traylor Bros., Inc.* (E.D.Cal., 2007) 2007 WL 512428, 14.)

There is, however, disagreement among those courts with respect to whether a subjective or objective standard applies to determine whether a dispute is bona fide or in good faith. Thus, in *Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America* (2005) 133 Cal.App.4th 1319, the Court of Appeal, Fourth District, Division 1, concluded that good faith is measured by a subjective standard that could be determined by examining objective circumstantial evidence. (*Id.* at p. 1339-1340.) The court also concluded that the absence of objective evidence of bad faith could support the determination that the dispute was in good faith. (*Id.* at p. 1340.) In contrast, the Court of Appeal, Second District, Division 3, in *FEI Enterprises, Inc. v. Kee Man Yoon*, agreed that the subjective standard may apply in the right circumstances, but rejected the reasoning of *Alpha Mechanical, Heating & Air Conditioning, Inc.* (*FEI Enterprises, Inc., supra*, 194 Cal.App.4th at pp. 804-805.) Instead, the court concluded that an objective standard should generally be applied to determine whether there is a good faith dispute. (*Id*. at p. 805-806.) While these two cases are somewhat contradictory, from the evidence identified in each of them, the availability of objective evidence certainly plays a role in the analysis regardless of whether the subjective or objective standard is applied.

In calculating whether prompt payment penalties are available, consideration should also be given to the amount withheld. Amounts withheld in excess of the amount in good faith dispute will also be subject to prompt payment penalties. In practice, contention also arises as to whether an amount qualifies as in "dispute" for the purposes of the 150% withholding provisions. The only case to address this issue is unpopular with some practitioners. In *Martin Bros. Const., Inc. v. Thompson Pacific Const., Inc.* (2009) 179 Cal. App.4th 1401, 1412, the Court of Appeal noted that the statute "contains no language restricting the word 'dispute' to any particular kind of dispute." The

court then emphasized that in the construction context, the precise nature or subject of dispute could vary widely, and there simply was no language in the statute "that evinces a legislative intent to limit the types of honest dispute that will justify the withholding of retentions." (*Ibid.*) Consequently, the court ultimately *rejected* the subcontractor's argument that a dispute over payment of additional funds pursuant to a change order did not qualify as a "dispute" under section 7107, even though the funds being withheld were admittedly owed. (*Ibid.*) Thus, under this holding, regardless of why there is a disputed amount, 150% of the amount in bona fide/good faith dispute may be withheld.[1] Of course, arguments typically arise with respect to the amount that can be withheld.

In conclusion, the issue of whether prompt payment penalties are available and whether there is a viable defense to them is of importance in any dispute regarding amounts owed under a construction contract. Unfortunately, the issue of prompt payment penalties can subsume the underlying dispute, resulting in costly, time consuming litigation and an unhappy client. There are actions that you can advise your client to undertake to try to avoid a prompt payment situation, or at least severely limit the availability of prompt payment claims. Likewise, there are amendments to the statutory scheme that may also be of aid. But those are topics for another day and a different article.

Stefanie G. Field, a member of the RCBA Publications Committee, is a Senior Counsel with the law firm of Gresham Savage Nolan & Tilden.

1 While there are those who criticize this holding, but there is no contrary appellate court decision. There is currently an appeal pending in *Rio School Dist. v. FTR International, Inc.*, in the Court of Appeal, Second District, case No. B238618, in which the *Martin Bros. Const., Inc.'s* holding is in issue.

California Law Protections for Subcontractors on California Public Works Projects

by Jamie E. Wrage

Attorneys who work with prime contractors or subcontractors on California public works construction projects know that a great deal of time and effort goes into preparing a bid. Often times the expertise of one or more subcontractors is essential to the prime contractor preparing a winning package. At the least, the subcontractors invest their own time and money in preparing their bids to be included in the prime's bid. If the subcontractors are listed on the prime's proposal to the agency as doing a portion of the work, they expect the work to come to them if the prime contractor is successful in receiving an award. In most circumstances, this team work results in the prime contractor awarding the subcontract work to the listed subcontractors, and all is well. But what happens if the prime contractor ultimately gives subcontract work to another entity?

When prime contract bidders use a subcontractor's bid (and often its assistance and expertise) to get a public works award and then shops for lower subcontractor bids after award to increase profits, this is called "bid shopping". The California Legislature long ago took action to cure what it viewed as a serious problem causing harm to the smaller subcontractors and to the state.[1] The law has evolved over the years, and the California Subletting and Subcontracting Fair Practices Act (commonly known as the "Fair Practice Act" or "Listing Law") in the Public Contract Code applies to public works contracting at all levels of government in the state to prevent the practice of bid shopping. The statute is aimed at preventing prime contractors from conducting post-award bid shopping with other subcontractors for the same "portion of the work".[2] This law seeks to protect both the subcontractors and the public agency seeking bids. (*Southern Cal. Acoustics Co. v. C. V. Holder, Inc.* (1969) 71 Cal.2d 719, 725-26.)[3]

The bidding prime contractor must list its subcontractors in its bid. The state agency can investigate and approve the subcontractors proposed by the prime contractor. Until approved by the agency, a subcontractor (whether the original listed or the substitute) may not perform work on the public project. (Pub. Cont. Code § 4107; *E. F. Brady Co. v. M. H. Golden Co.* (1997) 58 Cal. App.4th 182, 190-91.) The Fair Practice Act sets forth the procedures that a prime must follow to substitute or remove a listed subcontractor on California public works construction job (Pub. Cont. Code §§ 4107, 4107.5), and gives aggrieved subcontractors the ability to file a lawsuit for lost profits if improperly replaced (*R.J. Land & Associates Constr. v. Kiewit-Shea* (1999) 69 Cal.App.4th 416, 428). In addition to providing a layer of protection for subcontractors that are listed in a successful bid, the substitution approval process also gives the public agency to the right to learn the identity of and to approve any new substitute subcontractors that are proposed for a project.

Once the bids have been opened, a prime contractor may not substitute any other "person" or "another person" as a subcontractor to replace a listed subcontractor in its bid except "for cause" based upon on one of the express statutory grounds, and subject to the public agency's prior approval of a specifically named substitute, and in compliance with statutory procedures. (Pub. Cont. Code §§ 4107, subds. (a)-(b) & 4106.) Some of the commonly-applied acceptable grounds for "substitution" of a listed subcontractor are if the listed subcontractor fails to execute a written subcontract "for the scope of the work specified in the subcontractor's bid;" fails to provide a bond according to the pre-bid bond requirements issued by the prime contractor; files for bankruptcy; fails to perform the work or fails to perform it adequately; or lacks of a valid contractor's license. There are other possible ways for a prime to substitute, but they are limited

1 The California Legislature found that the practice of bid shopping lead to delay, poor workmanship, lost wages, and insolvencies, and similar public problems. Pub. Cont. Code § 4101; *Valley Crest Landscape, Inc. v. City of Vallejo* (1994) 41 Cal.App.4th 1432, 1439-40.

2 Pub. Cont. Code § 4104(a)(1) & (b) (prime contractor bidders must list subcontractors in their bid and the "portion of the work" to be performed for any amount in excess of $10,000 or more than .5% of the total bid price, whichever is greater). Prime contractor bidders may list only one subcontractor for each "portion of the work". Pub Cont. Code §§ 4106, 4105.

3 There is no equivalent federal law, and so subcontractors who assist in preparing bids on federal public works contracts are much less protected.

to those laid out in the staute. (*E.g.*, Pub. Cont. Code § 4107, subd. (a)(5) [substitution procedures due to a "clerical error"].) And until all the requirements of the statute are met, the prime contractor and the public agency cannot substitute any other subcontractor for a listed subcontractor, nor may the prime contractor permit "anyone other than the original subcontractor listed in the bid" to perform any of the work listed for that subcontractor. (Pub. Cont. Code § 4107, subd. (b); *R.J. Land & Associates Constr., supra*, 69 Cal.App.4th at p. 421.)

Under the Fair Practice Act, all prime contractors must understand when they bid on a public works job for any level of California state government that they must list subcontractors for all portions of the work that they do not intend to self-perform, and the prime must have every intention of using the listed subcontractors. A careful review of the Fair Practice Act procedures should be done before bidding to ensure compliance, and if there is any thought of removing or substituting a subcontractor, all statutory procedures must be followed both to protect the validity of the prime contract and to avoid liability to the listed subcontractor. If in doubt, the prime should get advice from a competent government contracts attorney before taking any action.

Likewise, if a listed subcontractor receives notice from the prime contractor or a public agency of a request to substitute the subcontractor off the job, it must immediately send the public agency a request in writing for a hearing, and be prepared to assert legal defenses and present evidence in opposition to the substitution request at the administrative hearing. (Pub. Cont. Code §§ 4107, subd. (a)(9), 4107.5.) Once again, legal advice at this point is essential to ensuring that all of the subcontractors rights are protected.

Jamie E. Wrage, a long-time member of the Bar Publications Committee, is a Shareholder with the firm of Gresham Savage Nolan & Tilden, practicing business, employment, and appellate litigation.

24th ANNUAL RED MASS

Tuesday, October 7, 2014, at 6:00 p.m.

Saint Francis de Sales Catholic Church
4268 Lime Street, Riverside

The entire legal community and persons of all faiths are invited to attend the 24th Annual Red Mass on Tuesday, October 7, 2014, at 6:00 p.m. The mass will be held at Saint Francis de Sales Catholic Church, which is located at 4268 Lime Street, in downtown Riverside, across from the Court of Appeal. The chief celebrant and homilist will be the Most Reverend Rutilio del Riego, the Auxiliary Bishop of the Diocese of San Bernardino. A dinner reception in the parish hall hosted by the Red Mass Steering Committee will follow the mass.

The Red Mass is a religious celebration in which members of the legal community of all faiths invoke God's blessing and guidance in the administration of justice. All who are involved in the judicial system, including lawyers, judges, legal assistants, court personnel, court reporters, court security officers, and peace officers, are encouraged to attend the Red Mass.

Ralph Hekman Will Be Honored with the Saint Thomas More Award

Ralph Hekman, Esq. will be honored with the Saint Thomas More Award for his extraordinary service and devotion to church, community, and justice. The Saint Thomas More Award is given to an attorney or judge in the community whose professional life is a reflection of his or her faith, who give hope to those in need, who is kind and generous in spirit, and who is an exemplary human beings overall.

The Tradition of the Red Mass

The Red Mass is celebrated each year in Washington, D.C., where Supreme Court justices, members of Congress, and sometimes the President attend at the National Shrine of the Immaculate Conception. Since 1991, the Red Mass has been offered in the Diocese of San Bernardino, which covers both Riverside and San Bernardino Counties. For further information about this event, please contact Jacqueline Carey-Wilson at (909) 387-4334 or Mitchell Norton at (909) 387-5444.

Judicial Profile: Commissioner David E. Gregory

by Sophia H. Choi

It seems appropriate to start this article with a warning. *WARNING: Attorneys, be very well-prepared for your cases as Commissioner David E. Gregory really invests his time in preparing to hear each case and may know your own case better than you*. I think this warning is an accurate reflection of who Commissioner Gregory is on the bench. He is motivated, dedicated, and hard-working, and he sincerely loves being on the bench. As any knowledgeable and well-prepared judicial officer can be, Commissioner Gregory can be very intimidating in the courtroom. However, during my interview with him, it quickly became apparent that he is a sociable, well-liked person, particularly among his colleagues.

Commissioner David E. Gregory

Commissioner Gregory is a native of Southern California. He was born in Torrance and moved to Huntington Beach when he was two years old, where he lived until he was thirteen. He then moved with his father to Cerritos until he reached adulthood. He met the love of his life Tammy when he was in law school as they worked together at Sears in Cerritos. Commissioner Gregory and his wife were not the only Sears couple, however. Sears made it possible for several more couples to meet and marry, with whom Commissioner Gregory and his wife to this day get together with. In 1986, Commissioner Gregory passed the California State Bar Examination, but continued to work at Sears for a little longer. In 1987, his mother purchased a home in Rancho Cucamonga, which he purchased from her. From Rancho Cucamonga, Commissioner Gregory commuted into Orange County, where he worked in Santa Ana at an insurance defense firm Monday through Fridays. He continued to work at Sears in the garden department selling lawn mowers on the weekends, as well as two weeknights from 6 PM to 9 PM. The commissioned sales were great as supplemental income.

Shortly thereafter, Commissioner Gregory's wife found a job at the Riverside Medical Clinic, where she established her career. Commissioner Gregory started working as a solo practitioner in Riverside, and he and his wife commuted together to work. In no time, Commissioner Gregory and his wife established themselves in Riverside County, with two wonderful sons, Christopher and Adam. Christopher serves in the Air Force and is stationed at the March Air Reserve Base, serving a critical role in cybersecurity. Commissioner Gregory loved planes and wanted to be an Air Force pilot, but his "glasses were too thick." However, his son Christopher is living out Commissioner Gregory's childhood dream of serving in the Air Force. His younger son Adam, whose passion for construction was evident since childhood, is very diligent in working in the construction industry. Even as a child, Adam loved playing with his toy lawn mower. Commissioner Gregory was filled with excitement and joy as he spoke about his family, and it became clear to me that he is a great father and husband.

Commissioner Gregory was determined to become an attorney since the third or fourth grade when he went on a field trip to the Westminster courthouse. He could never forget that experience as he was instantly struck by the courtroom. However, he took an adventuresome path out of high school, and it took his parents' attention and discipline to refocus his time and energy to becoming an attorney. Commissioner Gregory's mother never forgot what his eighth grade teacher had told her at a parent-teacher conference. His eighth grade teacher said that she could not "shut him up" or win an argument with him and that Commissioner Gregory would make a great lawyer one day. His eighth grade teacher was right. Commissioner Gregory received an Associate of Arts degree from Cerritos College. He then received his undergraduate degree from Western State University and his Juris Doctorate degree from Western State University College of Law. When Commissioner Gregory puts his mind to things, he can surely accomplish all that he sets his mind to. Even though Commissioner Gregory took the adventuresome path, he nevertheless received his Bar license at the same time as peers his age.

After building up his legal experience practicing at an insurance defense firm in Santa Ana and being a solo practitioner doing primarily business and real estate transactions and litigation, Commissioner Gregory started a law practice on May 2, 1988, with his law school friend, Commissioner Kathleen Jacobs, who is currently also on the bench. Commissioner Gregory served as Pro Tem during his time as a solo practitioner since 1990 in

the Moreno Valley courthouse when it was brand new. The more he did it, the more he liked it because he sincerely loved learning all the different areas of law. He started out by handling small claims, and was then asked to handle unlawful detainer actions, traffic, and then civil and criminal arraignments. He also handled juvenile and probate matters. Every step of the way, he experienced greater fulfillment as he did something new. He undoubtedly had some anxiety, but he recalls that lawyers in his courtroom were patient and professional as Commissioner Gregory started out as Pro Tem.

Throughout his life, people were able to see the potential in him. For instance, that same eighth grade teacher tried to convince Commissioner Gregory to run for student council. When he refused, she decided to just appoint him. Likewise, in his adult years, there were people that encouraged Commissioner Gregory to become a Commissioner, particularly Judge Sharon Waters, Judge Gloria Trask, and retired Judge Elwood Rich. Commissioner Gregory was sworn in on November 7, 2011, and began his career in Indio as a Commissioner. The most encouraging role model in his life, his father, did not live to see Commissioner Gregory being sworn in, but his father, whom Commissioner Gregory described as being "just a good man," would be very proud of his son.

Commissioner Gregory truly thrives to be a good judicial officer. He wants to give the best ruling he can after giving things much thought. Whether it comes from teaching Civil Procedure for ten years at California Southern Law School and being able to explain things or from being a person of detail, Commissioner Gregory is very conscious about being thorough and making good records for his rulings. He and several other judicial officers are now providing tentative rulings to help attorneys prepare for their hearings. He believes that Judge Becky Dugan is the epitome of a good judge and strives to be a judicial officer of such caliber. Commissioner Gregory has a wide range of experience on the bench, having handled nearly all types of cases. He enjoys learning new things and embraces the opportunity to face new challenges as Commissioner. The Riverside bench of judicial officers is a collective group that has each other to depend on, and Commissioner Gregory is grateful that he is on the bench with such great judges and commissioners. He called it a "humbling experience."

Commissioner Gregory loves playing and watching sports, particularly baseball. He enjoys various kinds of music genres, including classic rock and, recently, country. He loves musical theatre. A while back, he told his wife that he and she should do something once a week, at a minimum, to be entertained. He enjoys comedy shows, concerts, playing tennis, and skiing with his wife. He enjoys all types of food, but what came to mind when asked on the spot was a nice, fresh hot dog at a baseball game.

Commissioner Gregory ended the interview with a meaningful message. He said that life is not about what happens to you. Life is about what you *do* with what happens to you. Everyone has a story, but you have the choice with what you will do with that story. You have control over how your life turns out. Commissioner Gregory enjoys life, his family, and his career on the bench. He makes the most of what he has accomplished by putting in his all, whether it is his family or his career.

Sophia H. Choi, a member of the Bar Publications Committee, is a deputy county counsel for the County of Riverside.

MEMBERSHIP

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective September 30, 2014.

Aryan Amid – Law Student, Tarzana

Nnennaya Anyiwo – Sole Practitioner, Murrieta

Roger Arreola (A) – Titan Investigations, Corona

Leslie J. Benjamin – Sole Practitioner, La Quinta

Matthew E. Forsse – Law Offices of Matthew E. Forsse, Riverside

Heather Ann Green (S) – Blumenthal Law Offices, Riverside

Christopher J. Murtagh – Immigration Law Offices of Hadley Bajramovic, Riverside

Trenton Packer – Law Office of Paul Grech, Riverside

Amit Palta – Best Best & Krieger, Ontario

Luz Eliana Phelps – Law Offices of Eliana Phelps, Murrieta

Kimberly D. Rice – The Myers Law Group, Rancho Cucamonga

Alma C. Segovia – Law Student, Corona

Jason V. Steele – Law Student, Ontario

Brandon C. Vaters – Sole Practitioner, Temecula

Gilbert N. Vaters, Jr. – Sole Practitioner, Temecula

(A) – Designates Affiliate Member
(S) – Designates Law Student

Profile of a DRS Mediator: Elliott S. Luchs

by Krista Goodman

Editor's Note: *We at DRS want to introduce you to the mediators on our panel who dedicate their time and legal expertise to help us run our Riverside County public benefit programs. We hope you enjoy the opportunity to read more about this mediator's personal and professional history. We're truly grateful to have Mr. Elliott S. Luchs and his expertise on our Executive Board and on our panel.*

Elliott S. Luchs

"The best thing I can do as your attorney is avoid litigation and keep you out of court," attorney Elliott S. Luchs advises clients when they first walk into his Riverside law office. Luchs has practiced in Riverside for over 36 years.

"There are two ways to approach a case—the law school approach and the practical approach," Luchs explained. "The law school approach says that if there's a breach of contract, let's sue. The practical approach says that if you do sue, it's going to cost you a lot of money and it's going to take a lot of time to get to court."

"Litigation is very expensive, and at the end of the day, you don't know if you're going to win. Even if you do win, you don't know if the other side is going to have any money to pay you."

Raised in the Orange County area, Luchs remembers his first day working in Riverside 36 years ago—June 12, 1978, a Monday. "Most of the attorneys in those days seemed to know each other. If you lived in Riverside, you ran into people you knew all the time," he remembers, "you'd see judges, too, and you could go into court and talk to a judge if you had questions about procedure."

One of the first initiatives Luchs took when he and his wife Connie first moved to the new city was join the Riverside County Bar Association. He's been involved with several RCBA committees since then, including serving as chairperson of the Estate Planning, Probate and Trust Law section and as a panelist for attorney/client fee dispute arbitrations.

Today, he handles matters in the areas of business, construction, real property, probate and trusts at his private practice on Riverside Avenue, The Law Office of Elliott Luchs.

Luchs' experience with alternative dispute resolution (ADR) goes back to when the Riverside County Court first introduced ADR methods to resolve court cases.

"We didn't have 'mediations' back then—we would have voluntary or mandatory settlement conferences," Luchs remembers, "and sometimes the Court would bring in experienced lawyers to act as settlement conference officers."

He first served as a settlement conference officer for the Riverside County Superior Court, later joining the panel for the State of California Court of Appeal Settlement Conference Program. He explained that settlement conference officers were selected from a list of experienced, reputable attorneys in the Riverside County area. Many of the attorneys involved in the program also had experience in the role of a judge pro tempore for the Court, including himself.

"Whenever I advise a client on their case, I step back and try to look at it as if I were the judge or arbitrator. I really believe that serving as a pro tem, and handling these mediations and arbitrations made me a better lawyer later on," he reflected. "Mediations helped me take a more objective view of the dispute."

Luchs' involvement with the RCBA and experience as a settlement conference officer eventually led to his joining the RCBA Dispute Resolution Service, Inc. (DRS) panel after its founding in 1995. Later, he was invited to join the Executive Board, a position in which he's still actively involved with the decision making processes about policy, panelist applications and other matters pertaining to the organization.

He's admitted to practice before the State of California, the U.S. District Court, the U.S. Tax Court and the U.S. Supreme Court.

Before moving to Riverside, Luchs spent his first four and half years of practice with the law firm of Garber, Sokoloff & Van Dyke in Fullerton, where he gained practical experience in a wide range of practice areas.

Luchs knew at a young age that he wanted to become a lawyer. "My father, an engineer, came to me when I

was 17 years old and said, 'Have you ever thought about the law?'" To which, Luchs first responded, "No." Seven years of school sounded like too much time to spend in school, but he soon changed his mind after considering all of the directions he could take his career with a law degree. "I'm the only person I know that, at 17, decided what he wanted to do, did it, and stayed with it."

Luchs went on to earn his Bachelor's degree in history from the University of California at Irvine in 1970, and his Juris Doctorate from the Pepperdine University School of Law in 1973.

One of his proudest childhood memories he remembers to the day, July 17, 1955—the day Disneyland opened in Anaheim. He was just 7 years old. "It was hot, crowded and the asphalt was soft," he recalled. "All I remember is going on the Utopia cars and bumping my head on the steering wheel because that's how small I was. In those days they didn't have the height restrictions."

Luchs and his wife Connie have been married for 38 years. Their son Adam, 33, completed his degree at the University of Hawaii. Adam and his wife still live in the Aloha State. Their daughter Molly, 29, is a graduate from California State University at San Bernardino. Molly and her husband, who serves as a U.S. Marine, will relocate to South Carolina this year. Molly is expecting her first child in February 2015.

For more information about RCBA Dispute Resolution Service, Inc., visit rcbadrs.org or call (951) 682-2132.

Krista Goodman is the public relations coordinator for RCBA Dispute Resolution Service, Inc. She completed her Master of Arts in Strategic Public Relations from the University of Southern California and a Bachelor of Arts in Journalism & Media from California Baptist University.

RIVERSIDE COUNTY LAW LIBRARY INVITES YOU TO ATTEND ITS FREE FALL MCLE EVENT

Riverside County Law Library is pleased to invite all California State Bar Members to attend the first in a series of free fall MCLE events to be held at the Victor Miceli Law Library in downtown Riverside.

Our featured speaker is Daniel W. Skubik, PhD, JD and Professor of Law, Ethics & Humanities at California Baptist University presenting a timely and relevant discussion entitled: *Drones: Legalities, Practicalities, Myths & Facts*. Dr. Skubik will address the question of what constitutes a drone, what regulatory and administrative law regulates their use, and the legal and constitutional implications of their use by government, military, commercial and private non-commercial users.

This special program will be held Tuesday, October 7, from noon until 1:30 p.m. in the reading room of the Victor Miceli Law Library located at 3989 Lemon Street in downtown Riverside. RCLL is a California State Bar Approved MCLE Provider. This program is certified for 1 unit of Participatory Credit. Lunch will be served. Please call 951- 368-0368 to RSVP.

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The website includes bar events calendar, legal research, office tools, and law links.

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The Validation Act: A Trap for the Unwary

by Stefanie G. Field

What is the Validation Act? Why should you care? Well, if you either represent a public entity or you have a client that may take umbrage at a public entity's actions, the Validation Act can play a critical role in determining the validity of the public entity's action. In essence, the Validation Act provides a very short statute of limitations, and some procedural hurdles, for claims involving certain public entity actions -- with a twist. It is codified as Code of Civil Procedure §§ 860-870.5, and entitled to trial preference, pursuant to Code of Civil Procedure § 867.

In simplified terms, under the Validation Act, a public agency can bring suit to obtain a judicial determination regarding the validity of an action it has taken. (Code of Civ. Proc. § 860.) The relevant Code of Civil Procedure sections, however, do not identify which actions qualify. Rather, there are a variety of statutes authorizing the use of validation procedures. (E.g.,. Gov. Code § 53511 [bonds, warrants, contracts, etc.]; Health & Saf. Code, § 33501, subd. (a) [formation of certain special districts]; Gov. Code § 58200 [assessments, bonds, and contracts under the Municipal Improvement Act of 1913, including Proposition 218 challenges, (Streets & Highways Code, § 10601)]; and Gov. Code, § 53359 [bonds or special taxes levied under the Mello-Roos Community Facilities Act of 1982]; Education Code § 15110 [Proposition 39 expenditures].) Most validation proceedings involve issues of public finance.

The statute of limitations on a validation action is generally 60 days, but can be as short as 30 days (e.g. Govt. Code § 53359). This short statute of limitations affects the Validation Statutes' purpose, i.e. "'the acting agency's need to settle promptly all questions about the validity of its action.'" (*Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 842.) Such prompt resolution also achieves the Validation Act's underlying objective of avoiding impairment of a public entity's financial operations and transactions, which can result when there is uncertainty regarding the permissibility of the entity's actions or proposed course of conduct. (*California Commerce Casino, Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1421.)

The "twist" of the Validation Act is that validation proceedings are not limited to public entities. Use of the Validation Act is also open to individuals who wish to test (contest) the propriety of a public entity's action, with such action being commonly called a "reverse validation" suit. (Code of Civ. Proc. § 863; *California Commerce Casino, Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1420.) To bring a reverse validation suit, there are some procedural matters with which an individual must comply, relating naming the parties, preparation of the summons, and service of the summons. (*Id*.) (There is also a harmless error rule, Code of Civil Procedure § 866, with respect to these procedural issues, but there is a lack of clarity in published opinions regarding what errors will be considered harmless.) In addition, *the same short statute of limitations deadline that applies to a public entity's validation action also applies to a reverse validation action*. (Code of Civ. Proc. § 863.)

If the public entity's action is not challenged within this shortened time frame, then the action is considered validated, as a matter of law.

> "Under the statutory scheme, 'an agency may indirectly but effectively 'validate' its action *by doing nothing to validate it*; unless an 'interested person' brings action of his own under section 863 within the 60-day period, the agency's action will become immune from attack whether it is legally valid or not." (*California Commerce Casino, Inc., supra*, 146 Cal.App.4th at p. 1420 [emphasis in original], quoting *City of Ontario v. Superior Court* (1970) 2 Cal.3d 335, 341-342.)

For those not experienced with the validation statutes, their applicability is not always readily apparent, but can be devastating to a claim. For example, in *McLeod v. Vista Unified School District* (2008) 158 Cal.App.4th 1156, the petitioner brought what superficially appeared to be a timely taxpayer waste suit, involving a demand that funds allocated to cancelled school construction projects be returned to the taxpayers. His suit was declared untimely, however, under the Validation Act because the funds in issue were derived from a Proposition 39 bond measure. (*Id*. at 1165.) Similarly, in *Hills for Everyone v. Local Agency Formation Com. (1980)* 105 Cal.App.3d 461, 468, the court held that the Validation Act's time limitations supersede those found in California Environmental Quality Act (CEQA). Consequently, although filed within the CEQA statute of limitations, the CEQA challenge was untimely under the Validation Act. Thus, even where a claim may not seem to fall within the penumbra of the Validation Act, the court will look past the basis for the

challenge and instead will look to the gravamen of the complaint and the nature of the right sued upon to determine whether the Validation Act applies. (*McLeod, supra*, 158 Cal.App.4th at p. 1165; *Hills for Everyone, supra*, 105 Cal.App.3d at p. 468 [nature of the government action, not the basis for the challenge, determines whether the validation Act applies].)

You may ask, "doesn't the public entity have to warn the public that its action is subject to the Validation Act, or at least cite a statute that references the validation statutes?" I would posit that the answer is "no." That argument was raised, and rejected, in *Van de Kamps Coalition v. Los Angeles Community College Dist.*, Second Appellate Dist., Div. 2, Case No. B241970 (April 2014). While the decision was unpublished, it certainly provides guidance on how a court of appeal is likely to view such an argument.

In sum, the Validation Act can be a powerful tool or weapon when its provisions apply to a claim. While the result of its applicability to the unwary may seem harsh, there are strong public policy reasons for its existence. Thus, better to be safe, than sorry, and determine at the outset whether the Validation Act may apply to a public entity's actions that are being challenged.

Stefanie G. Field, a member of the RCBA Publications Committee, is a Senior Counsel with the law firm of Gresham Savage Nolan & Tilden.

SAVE THE DATE

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Conference rooms, small offices and the third floor meeting room at the RCBA building are available for rent on a half-day or full-day basis. Please call for pricing information, and reserve rooms in advance, by contacting Charlene or Lisa at the RCBA office, (951) 682-1015 or rcba@riversidecountybar.com.

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