

24TH ANNUAL CONSTRUCTION LAW CONFERENCE



MARCH 3 & 4, 2011
THE WESTIN LA CANTERA RESORT
SAN ANTONIO, TEXAS

Sponsored by:

**The Construction Law Section
of the State Bar of Texas**

in cooperation with

The Texas Institute of Continuing Legal Education

24TH ANNUAL CONSTRUCTION LAW CONFERENCE

March 3 & 4, 2011 ♦ The Westin La Cantera Resort ♦ 16641 La Cantera Parkway ♦ San Antonio, Texas 78256

WEDNESDAY, MARCH 2, 2011

- 12:30 **GOLF TOURNAMENT** – Shot Gun Start
The Resort Course on the grounds of The Westin La Cantera Resort
- 6:30 **RECEPTION** – In cooperation with the Young Lawyers Council of the Construction Law Section – Sponsored by Synergen Consulting

THURSDAY, MARCH 3, 2011

PRESIDING OFFICER: William B. Short, Jr., Dallas

- 8:00 **LATE REGISTRATION** – Ballroom Foyer, Westin La Cantera Resort, 16641 La Cantera Pkwy., San Antonio, TX 78256, (210) 558-6500
- 8:00 **CONTINENTAL BREAKFAST**
- 8:50 **WELCOME ON BEHALF OF THE CONSTRUCTION LAW SECTION**
James R. Old, Jr., Beaumont
- 9:00 **CASE LAW UPDATE** – Recent case law and other developments impacting the construction industry.
Gregory M. Cokinos, Houston
- 9:45 **AN OVERVIEW OF TEXAS CERTIFICATE OF MERIT LAW** – Texas Civil Practice & Remedies Code Section 150.002, which requires plaintiffs to file certificates of merit in proceedings that seek damages arising out of professional services provided by architects, engineers, landscape architects and land surveyors, was ostensibly enacted to prevent meritless claims. Among other requirements to be addressed, certificates must include an affidavit from a peer third-party professional that sets forth any alleged negligence and the factual basis for it. However, as cases to be discussed demonstrate, application of the statute has resulted in conflicting appellate court decisions and potentially unintended consequences, about which practitioners who prosecute or defend against claims within its scope should be aware.
Seth A. Russell, Houston
- 10:15 **BREAK** – Sponsored by Nelson Architectural Engineers, Inc.
- 10:30 **TIPS FOR NOT GETTING IN TOO DEEP** – What to do to protect you and your law firm from the client who can't (or won't) pay your legal fees, within ethical bounds.
Thomas H. Watkins, Austin
- 11:00 **NEGOTIATING THE CONSTRUCTION MANAGER AT RISK CONTRACT** – The competing interests of contractor, owner, and lender make this a challenging endeavor. Sample clauses and changes will be examined, along with a few you won't believe actually made it into a signed contract.
David D. Peden, Jr., Houston
- 11:45 **SOVEREIGN IMMUNITY** – Is it fascism? Is it socialism? We know that Joe Canterbury hates it. Whatever it is, Sovereign Immunity is alive and well in Texas, long after most states have banished this strange and archaic doctrine. The Texas legislature has provided what it figures is a remedy, but how effective is it? School construction is booming. What remedies exist? We will explore where Sovereign Immunity has wandered over the last ten years.
George C. Baldwin, Austin
- 12:15 **LUNCHEON** – *Tickets available for \$25 each.*
Topic: IMPAIRED LAWYER – This presentation will cover the types of mental health and addiction problems that the stress of legal practice can cause, the ethical issues faced by lawyers who deal with these problems, and the services offered by the State Bar to help its members recover from these illnesses
Theodore Weiss, Houston
- 1:30 **CONSTRUCTION LENDING: WHAT HAPPENS WHEN THE MONEY STOPS?** – Construction lending is the lifeblood of a typical

construction project. When the lender cuts off the funding, for whatever reason, the results can be catastrophic for everyone down the construction chain. What are the strategies a lender may employ for protecting its investment when the owner runs out of money and for keeping the project going or cutting its losses by shutting down the project, with minimal financial risk to the lender? At the same time, what rights do contractors and their subcontractors have to resist those efforts and to put the lender at risk for cutting off the flow of credit? The presentation will cover typical "Consent and Subordination" agreements between lenders and contractors, as well as agreements following default and possible lender liability actions.

Michael F. Albers, Dallas

- 2:15 **COPYRIGHT PROTECTION OF DESIGN** – Can an architect have copyright protection for a standard 3 bedroom house, a routine elementary school, or a strip shopping center? How is copyright protection acquired and what is actually protected? How far does it extend? What is the exposure to builders, buyers or sellers if there is an infringement? General concepts and specific scenarios will be explored in a point-counter-point presentation.
Charles M. Hosch, Dallas
William D. Raman, Austin
- 3:00 **BREAK** – Demand Construction Services, Inc.
- 3:15 **NEW GREEN PITFALLS IN YOUR OLD CONSTRUCTION CONTRACTS** – With billions of dollars of environmentally friendly "green" construction projects being built annually contractors and their lawyers must understand and address the unique contract issues and liability that engaging in a green project creates. This presentation will discuss green building and potential owner, contractor and design team liability. Important construction contract provisions will be addressed in the context of a green project. The goal of this presentation is to enable clients and their attorneys to better understand how to proactively draft their contracts and subcontracts.
Jason C. Spencer, Austin
- 3:45 **BID PROTESTS** – Do state and local governmental entities mean what they say and say what they mean in construction services delivery systems? What do you do when they don't?
William W. Sommers, San Antonio
- 4:15 **PREVAILING PARTY: SEGREGATION OF ATTORNEYS' FEES – WHEN WINNERS ARE LOSERS** – This session will address the allocation of attorneys' fees between causes of action and between affirmative and defensive claims; the factors that go into determining which party is the prevailing party; and how the award of attorneys' fees is impacted by the Texas Government Code, the Texas Local Government Code, offers of settlement, tenders, and the RCLA. The presentation will be made from the perspective of a Texas District Court Judge.
Honorable Kyle Carter, Houston
- 4:45 **FEDERAL PROCUREMENT LAW FOR THE TEXAS CONSTRUCTION LAWYER** – The repository of Federal Procurement Law relating to construction is vast and very well developed in comparison to Texas Construction law. Over the years, a number of federal procurement principles have been discussed, adopted and/or applied by Texas Courts. Included among those are the Eichley formula, the Spearin Doctrine and subcontractor pass-through claims. This presentation will identify a variety of other well-established federal procurement principles and how those may be used for the benefit of the Texas Construction Lawyer.
Paul H. Sanderford, Temple
- 5:15 **RECEPTION** – Sponsored by Rimkus Consulting Group, Inc.

FRIDAY, MARCH 4, 2011

- 8:00 **CONTINENTAL BREAKFAST**
- 8:30 **LEGISLATIVE UPDATE** – An update on the construction related bills filed (to date) in the 82nd Regular Legislative Session, as well as a discussion of the anticipated construction related issues that are likely to be addressed.
Robert C. Bass, Jr., Austin
- 9:00 **INDEMNITY STAKE HOLDERS DEBATE** – Once again, the Legislature will be asked to address the dicey issue of limitations on broad and intermediate form contractual indemnity clauses and additional insured endorsements required in construction contracts. Hear from the attorneys representing the stakeholders in the proposed legislation who will explain what the Legislature is being asked to do and how the construction industry will be impacted by any legislative action. Also, hear an explanation of how indemnity legislation currently works in the oil and gas industry and why that "knock-for-knock" indemnity might work for certain types of construction projects.
Moderator: Robert C. Bass, Jr., Austin
Panelists: Christopher W. Martin, Houston
Carina Ohara, Houston
Richard Gary Thomas, Dallas
- 9:45 **TXDOT: THE ROAD GOES ON FOREVER AND THE CLAIMS PROCESS NEVER ENDS** – This session covers a practical roadmap to navigating the complicated and pothole-ridden highway from preparing to file a claim, through the claims committee hearing, to the ultimate destination of a contested case hearing at SOAH. Practical strategies for holding on to a win at SOAH during appeals at the District Court and Third Court of Appeals will also be addressed.
Brian Keith Carroll, Temple
- 10:15 **BREAK** – Sponsored by McCullough & Associates
- 10:30 **PRACTICAL & ETHICAL CONSIDERATIONS IN MULTI-PARTY CONSTRUCTION DEFECT LITIGATION** – When large projects go awry, it is often the case that multiple trades and design professionals get joined in the ensuing litigation. Multi-defendant cases pose both practical and ethical challenges for counsel charged with defending those parties. This presentation will analyze the ethical rules governing common scenarios which arise in such cases, as well as practical strategies for protecting the client.
David Vandiver Wilson II, Houston
- 11:15 **INSURANCE LAW UPDATE: THE GOOD, THE BAD, AND THE UGLY** – This session will cover major developments in insurance law with a focus on case law relating to the construction industry.
Lee H. Shidlofsky, Austin
- 12:00 **LUNCHEON** – *Tickets available for \$26 each.*
Topic: VOIR DOIR IN A CONSTRUCTION CASE – A review of the rules and standard techniques in voir doir with a discussion of how voir doir can be customized to apply to construction litigation.
E. Link Beck, El Paso
- 1:15 **ANATOMY OF A COMPLEX CONSTRUCTION ARBITRATION** – A panel of arbitrators will discuss issues associated with complex arbitration matters including, joinder, limitations on discovery, dispositive motions, challenges to expert testimony, damages, limitation of liability clauses, and requests for continuance.
William K. Andrews, Houston
Allison J. Snyder, Houston
Stephen K. Yungblut, Arlington
- 2:00 **THE USE OF EXPERTS IN CONSTRUCTION LITIGATION: THE TITLE MAY MAKE YOU SLEEPY, BUT THE SUBJECT MATTER WILL KEEP YOU UP AT NIGHT** – An analysis of State and Federal law concerning the use of experts

HOTEL INFORMATION

24th ANNUAL CONSTRUCTION LAW CONFERENCE March 3 & 4, 2011

The Westin La Cantera Resort • 16641 La Cantera Parkway • San Antonio, TX 78256

A special block of rooms has been reserved at The Westin La Cantera Resort at the special rate of \$209 for single/double. The hotel will release all unused rooms on the **CUTOFF DATE of FEBRUARY 1, 2011**. When contacting the hotel you must identify yourself as a participant with this conference in order to obtain the special rate in our room block. **Please call the hotel directly at 210/558-6500 to make your reservation.** We recommend that you make your reservations immediately if you plan to attend this course.

REGISTRATION FORM

Mail to: Texas Institute of Continuing Legal Education
24th Annual Construction Law Conference
P.O. Box 4646
Austin, Texas 78765-4646

Online at: www.clesolutions.com

Fax Form to: 512/451-2911 (must be accompanied by American Express, Visa or Mastercard Information)
or Phone: 512/451-6960

Please register me for the conference as follows:

- Regular Pre-Registration Fee (due by 5 p.m. February 18).....\$500.00
- Pre-Registration for Construction Law Section Members.....\$450.00
(due by 5 p.m. February 18)
- Registration *after 5 p.m. February 18 & before 5 p.m. February 25*.....\$+50.00
- Registration *after 5 p.m. February 25* and at the door.....\$+100.00
- Construction Law Section Dues (eligible for the member registration fee)..... \$ 30.00
- ___ Thursday Luncheon Tickets at \$25.00 each.....\$ _____
- ___ Friday Luncheon Tickets at \$26.00 each.....\$ _____

- I will play in the Golf Tournament on Wednesday, March 2, 2011
Green Fee (includes range balls and shared cart).....\$155.00
My handicap is _____. **Required**

Conference Materials: Choose ONE

Registrants have the option of choosing between electronic or printed versions of the conference materials. Please choose one option below. If you would like to receive both the USB and printed materials, an additional \$54.13 must be included with your registration.

- USB Version (includes hard copies of PowerPoint presentations for note-taking.)
- Printed Version (3-Ring Binder)
- Both USB & Printed Version at \$50 + .0825 tax.....\$54.13

I cannot attend the conference. Please forward the following:

- Audio CDs & course materials (USB *or* Printed) at \$450 + .0825 tax.....\$487.13
- Course materials only (USB *or* Printed) at \$180 + .0825.....\$194.85

TOTAL ENCLOSED.....\$ _____

No refunds after 5:00 p.m. Friday, February 25, 2011. Cancellation policy on back cover. (Call for Government and Student Discount Information)

Name _____

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Make Check Payable to: Texas Institute of Continuing Legal Education

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Security Code: (3 digit code on MC/Visa, 4 digit code on AmEx): _____

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Authorized Signature _____

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in construction litigation, including, when expert testimony is required and/or allowed, the various types of construction experts, designations, reports and disqualification.

Scott Griffith, Dallas

2:30 **SCHEDULING: TRYING A CASE** – The nuts and bolts of presenting a delay claim to an arbitration panel, with a focus on using the witnesses, the schedule and supporting documents to prove a delay occurred, the party responsible for the delay, and the damages incurred as a result of the delay.

Barry Stephen Rabon, League City

3:00 **BREAK**

3:15 **E.I.F.S. AFTER K-2: ENFORCING INDEMNITY FOR SELLERS IN PRODUCTS LIABILITY ACTION** – In the 2010 case of *Fresh Coat, Inc. v. K-2, Inc.*, the Texas Supreme Court answered two simple questions: (1) Is stucco a product?, and (2) Is the contractor that installs it a seller? By answering YES to both questions, the Court greatly increased the indemnity exposure of manufacturer defendants under Chapter 82 Texas Civil Practice and Remedies Code. This presentation will review what you should know about this new law and how you can use it when you represent plaintiffs and defendants.

William B. Westcott, Houston

3:45 **PROCEED WITH CAUTION: LIABILITY FOR INVALID LIENS** – Filing an invalid lien can turn a claimant (or its lawyer) into a defendant. Learn about recent developments in the common law and the recently revised Texas statute governing fraudulent liens, with emphasis on strategic use of the statute.

Brian R. Gaudet, League City

4:15 **ADJOURN**

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Ethics



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Cover Art — "Butte South of Alpine" is an original by Byron Fullerton from Austin, Texas.

Special Accommodations — If special arrangements are required for a person with a disability to attend this program, please contact us at 512/451-6960.

Visit Our Website — Visit the Construction Law Section's website at www.constructionlawsection.org for information on how to join the Section and access past conference papers.

Pre-Registration — To ensure sufficient materials are available for all attendees, pre-registration is strongly encouraged. Late registration is subject to additional fees.

Online Registration — Visit www.clesolutions.com to register online using a Visa, MasterCard or American Express.

Registration by Telephone — You may register by telephone by calling 512/451-6960 or by fax 512/451-2911. Faxed and phone-in registrations require an AMERICAN EXPRESS, VISA or MASTERCARD number, expiration date and security code.

Cancellations and Refunds — Refunds, less a \$50.00 processing fee, will be given to registrants who cancel by 5:00 p.m. on the Friday preceding the conference. No refunds will be granted thereafter. Course materials and audio CDs will automatically be mailed to prepaid registrants who did not receive a refund and were not able to attend.

2011 PLANNING COMMITTEE

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This course has been approved for 14.50 hours credit (including 1.75 hours ethics) which will apply toward MCLE, the College of the State Bar of Texas and the Texas Board of Legal Specialization in the fields of Real Estate Law and Civil Trial Law. You must attend all sessions to receive full credit. MCLE credit is available in other states. Please let us know your needs when you register.

CPAs may obtain 17.40 hours of CPE credit toward licensing with the Texas State Board of Public Accountancy. Sponsor No. 6867.

The Texas Institute of CLE is an accredited sponsor with the Texas Department of Insurance. An application has been filed for approval of 14.50 hours of General credit (all license types) and 1.75 hours ethics. This course is eligible for MCE credit through the Texas Real Estate Commission.



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