

# Construction Law Section Newsletter



## Construction Law Section Bi-Annual Meeting

Construction Law Section of the State Bar of Nevada invites you to join us for our Semi-Annual Meeting

December 12<sup>th</sup> at noon.

**Locations  
to be announced.**

*General membership issues, and election of board members. Section members and all interested in construction law are welcome.*

We look forward to seeing you there!

## Message from the Chair

It is amazing that we are already headed into Fall and that my year as Chair of this Section is nearing its end. Time has flown by since I was first approached by Paul Matteoni to be an inaugural Board member of the Construction Law Section and I am the first that has succeeded through every position since the Section began in 2009. Once again, a huge thank you goes out to Paul for taking the initiative of bringing our Section into existence in an effort to create a forum for attorneys practicing in the area of Construction Law.

We have been very busy in our early years. Since 2009, we have held several brown bag luncheon events and CLE sessions, published newsletters, held informational legislative sessions, hosted social hours, and sponsored events and presented topics at the Annual Meeting. Through the Board and Section members, we have made great strides in making State Bar members aware of our Section's existence and we have held consistent at 200 members. We are always looking for ways to increase our membership and bring our Section to the forefront.

Our final biannual membership meeting for 2012 will be held on December 12, 2012, the location to be announced. At this meeting, we will elect our incoming Secretary, as well as present the remaining Board members for election to their succeeding positions. Please invite non-member friends and colleagues to join us, as we are always looking to gain more members.

In closing, I would like to thank the Board and Section members for your hard work and dedication to ensure the continued success of our Section. I look forward to seeing you in December.

Andrea Pressler, Chair

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## Be Clear: Your Indemnity May Depend on It.

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*By Caryn Tijsseling and Tara Zimmerman*

The Nevada Supreme Court has recently addressed the issue on the enforceability of indemnity contracts promising indemnification due to another party's negligence.

It is well known that construction contracts carry with them a great deal of risk. Due to the variety of risks that can be encountered on a construction project, construction contracts almost always contain risk transfer clauses. Contractual indemnity is where two parties agree that one party will reimburse the other party for liability resulting from the former's work.<sup>1</sup> Under the construction contract, risk is often transferred to one of the contracting parties through an indemnity agreement. Indemnity agreements are probably the most widely used form of risk transfer between contracting parties used in the construction industry. The scope of an indemnity provision is determined by the contract and subject to the normal rules of contract interpretation.

Since Nevada has not adopted an anti-indemnity statute, parties have great freedom in allocating risk between each other. It is not uncommon for construction contracts to include blanket indemnity

agreements whereby the subcontractor agrees to indemnify and defend the general contractor for any loss arising from the subcontractor's work. Such clauses are used to transfer a variety of risks, including the general contractor's own negligence. An indemnity agreement may attempt to require the subcontractor to indemnify the general contractor for damages arising from the subcontractor's work, even when the general contractor's own negligence is a contributing or sole cause of the loss.

Through recent decisions, the Nevada Supreme Court has made it much more difficult to shift the risk for a party's own negligent acts. Now Nevada law is clear that in order to require indemnity for a general contractor's own negligence this intent must be clearly set forth in the agreement in express and explicit language.

Under Nevada law, indemnity clauses which require one party to reimburse another party for its own negligence must be in writing and expressly and explicitly state this intent. In *George L. Brown Insurance Agency, Inc. v. Star Insurance Company*, the Nevada Supreme Court adopted the majority rule which requires that an insurance contract expressly or explicitly reference the indemnitee's own negligence before an indemnitee may be indemnified for its own negligence.<sup>2</sup>

See Indemnity, pg. 3

Dear Members:

This is a resumption of the Construction Law Section Newsletter, after a short hiatus from publication. We rely on the construction law community to provide content, and thank those that submitted to this edition. Please consider your own areas of expertise and interest, and consider whether you could author something that would be helpful to the other members of the section, or to the construction law community in general.

This newsletter can only be as successful as the Construction Law Society wants it to be. Please do your part and contribute an article, case summary, or note, relevant to some aspect of construction law. I welcome your input and look forward to working with you.

**From the Editor**

Dee J. Golightly, Esq.

## Indemnity (continued from page 1)

The court reasoned that where the indemnification clause does not expressly include indemnity for the indemnitee's own negligence, an indemnification clause 'for any and all liability' will not be sufficient to indemnify the indemnitee for its own negligence.<sup>3</sup> An express or explicit reference to the indemnitee's own negligence is required because the nature of this type of indemnity is so unusual and so drastic, that there can be no presumption that the indemnitor intended to assume this kind of responsibility. The contract must put it beyond doubt by its express language.<sup>4</sup>

Therefore, a contract purporting to indemnify a party against its own negligence must clearly express such an intent in order to be enforceable. Such intent must be expressed in clear and unequivocal terms.

The Court took this analysis a step further in its recent decision in *Reyburn Lawn & Landscape Designers, Inc. v.*

*Plaster Development Co., Inc.*<sup>5</sup> Now, an indemnification clause must explicitly or expressly state that the indemnitor will indemnify the indemnitee for the indemnitee's contributory negligence as well as its own negligence. In *Reyburn*, the Court extended the holding in *Brown* to require express language of indemnification for contributory negligence as well as the sole negligence of the indemnitor.

In *Reyburn*, the court reasoned that contributory negligence is merely a derivative of negligence. Therefore, the distinction between the two forms of negligence does not change the holding that indemnification for any form of the indemnitee's own negligence must be explicitly and unequivocally expressed in the contract.<sup>6</sup>

The question remains how to determine whether a specific clause meets this requirement. To assist in this analysis, the Court in *Brown* went on to provide a framework for the analysis. In *Brown*, the Nevada Supreme Court recognized the express negligence See Indemnity, pg. 4

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## HOLDING OUR BREATH: Hoping not to Turn Fontainebleau

By Leon F. Mead, II, Esq.<sup>1</sup>

I know, I know... Boooooo! Or should I say *Bleuuuuuu!* Even worse. Fine – I'll get to the point.

Seriously, of all the construction cases currently pending before the Nevada Supreme Court, none perhaps will affect more people and impact more construction, lender, title insurance and development firms than *Fontainebleau*.<sup>2</sup> Oral arguments took place on June 6, 2012, and with the case fully briefed, the construction industry in Nevada is holding its collective breath over the decision that they will render. No less than the effectiveness of the Nevada Mechanics Lien Law<sup>3</sup> as a protection to design professionals, construction companies, vendors and employees is at stake.

Those of us who have been practicing construction law in Nevada, especially southern Nevada, in the last few years probably have had some contact with the *Fontainebleau* case. This case concerns that big blue structure dominating the Las Vegas landscape, just across the Las Vegas Strip from the skeleton of the suspended Echelon Resort, down the block from the shuttered Sahara Hotel & Casino, and blocking the view of several floors of the Turnberry Towers. A

beautiful building in the making, about 70% complete,<sup>4</sup> and comes with its own tower crane. After the former developer pumped about \$2 billion dollars into it,<sup>5</sup> the crash of 2008-2009 brought production to a screeching halt when the project lenders decided to stop all funding. Thousands of construction workers lost their jobs.<sup>6</sup> Approximately \$675 million in mechanics liens were recorded against the Project.<sup>7</sup> So what happened?

Essentially, the economy happened. As the Las Vegas construction boom waned with the Nevada economy, the Fontainebleau's consortium of lenders "refused to loan additional amounts under the existing loan commitments."<sup>8</sup> This essentially stopped construction on the Fontainebleau resort project, and left the construction firms working unpaid for approximately 60 days.<sup>9</sup> This led the contractors to record mechanics liens against the Project under NRS 108.226. As a result of the cut off of funds, the project developer filed for bankruptcy protection and reorganization under Chapter 11 of the United States Bankruptcy Code. Using the fact that the developer's home operations were in the state of Florida, the bankruptcy matter was filed in the United States Bankruptcy Court for See Fountainbleau, pg. 5

## Indemnity (continued from page 3)

doctrine. The express negligence doctrine, “provides that a party demanding indemnity from the consequences of its own negligence must express that intent in specific terms.”<sup>7</sup> There are basically three elements of the express negligence doctrine. First, the intent of the parties must be clear. Second, the intent of the parties must be set forth within the four (4) corners of the agreement. Finally, the specific intent of the parties must be expressed in the agreement.

The indemnity clause at issue in *Brown* provided “[Brown] shall defend, indemnify and hold harmless [Star] for any and all damages, losses, liabilities, fines, penalties, costs, and all other expenses reasonably incurred by [Star]”.<sup>8</sup> Because there was no express or explicit reference to [Star’s] negligence, this clause was deemed insufficient to require indemnification for negligence. However, language such as; “regardless of any cause or of any concurrent or contributing fault or negligence of contractor,”<sup>9</sup> has been found sufficient to set forth the intent of the parties that the risk of contributory negligence be indemnified. Similarly, the following language was found sufficient under the express negligence doctrine, “regardless of the sole, joint or concurrent negligence, negligence per se, gross negligence, statutory fault, or strict liability of any member of the contractor group.”<sup>10</sup> The determination of whether a particular clause is sufficient to shift the

risk of negligence must be made on a case-by-case basis with an application of these guidelines outlined by the court.

When reviewing and drafting indemnity provisions, it will be critical to keep in mind these recent clarifications of the Nevada law with regard to indemnity for negligence. If indemnification for negligence is contemplated, the contract itself must explicitly and expressly set forth the intent of the parties that such indemnity is indeed intended. Blanketed language that is often the norm such as “any and all claims” is simply no longer sufficient to cover indemnification for negligence or contributory negligence.

*Caryn Tijsseling is a partner in Lewis and Roca’s Reno office. She works with construction subcontractors to protect their assets and interests and has particular experience securing and enforcing mechanics’ liens. Caryn helps ensure that her clients are in compliance with Nevada statutory requirements and helps them mitigate their risk in all projects. For more information on this topic, please contact Caryn at 775.321.3426 or CTijsseling@LRLaw.com.*

*Tara Zimmerman is an associate in the Litigation Practice Group at Lewis and Roca’s Reno office. Before joining that firm, she was judicial law clerk for Judge James T. Russell in the First Judicial District Court in Carson City, Nevada.*

## Notes

1. *George L. Brown Insurance Agency, Inc. v. Star Insurance Company*, 126 Nev. Adv. Rep. 31, 237 P.3d 92 (2010)
2. *Medallion Dev. V. Converse Consultants*, 113 Nev. 27, 33, 930 P.2d 115, 119 (1997), superseded by statute as stated in *Doctors Company v. Vincent*, 120 Nev. 644, 654, 98 P.3d 681, 688 (2004).
3. *Id.* at 96.
4. *Id.* citing 41 Am. Jur. 2d Indemnity §16 (2005).
5. *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Development Co., Inc.*, 255 P.3d 268 (2011).
6. *Reyburn* at 275
7. *Lehmann v. Har-Con Corp.*, 76 S.W.3d 555, 559-60 (Tex. App. Houston 14<sup>th</sup> Dist. 2002).
8. *Brown* at 97.
9. *B-F-W Const. Co. Inc. v. Garza*, 748 S.W.2d 611, 613 (Tex. App.-Fort Worth, 1988)
10. *ABB Kraftwerke Akkiengesellschaft v. Brownsville Barge & Crane, Inc.*, 115 S.W.3d 287 (Tex. App.-Corpus Christi 2003)

## Fountainbleau (continued from page 3)

the Southern District of Florida, located in Miami.<sup>10</sup>

While a considerable amount of time was spent in arguing over whether Florida was the appropriate venue for the matter, numerous adversary proceedings were filed between the mechanics lien claimants and the lenders, as well as against the debtor to foreclose the mechanics liens. Eventually the debtor was unable to reorganize the project, and all of the assets of the debtor were ordered sold for approximately \$156 million, with the mechanics liens attaching to the net proceeds of the sale.<sup>11</sup> After allowing for incurred administrative and other expenses, this sale amount left approximately \$100 million to be paid to lien claimants, if they had priority to such funds over the lender consortium.<sup>12</sup>

The mechanics lien claimants thought the law was on their side. NRS 108.225 appears to support their arguments.

*Every mortgage or encumbrance imposed upon, or conveyance made of, property affected by the liens provided for in NRS 108.221 to 108.246, inclusive, after the commencement of construction of a work of improvement are subordinate and subject to the liens provided for in NRS 108.221 to 108.246, inclusive, regardless of the date of recording the notices of liens.*<sup>13</sup>

The lender consortium had recorded its deed of trust against the Project on June 7, 2007.<sup>14</sup> But construction had commenced no later than January of 2007.<sup>15</sup> Under any plain reading of NRS 108.225(2), the mechanics lien claimants must have priority to the remaining funds. Even if it was not 100% of the amount they were owed, at least it was something to offset their losses.

Of course, the lender consortium was not going to give up so easily. They filed their own adversary proceeding in the Florida bankruptcy court against the mechanics lien claimants, alleging that they had priority to the funds.<sup>16</sup> The main thrust of their arguments was theories of contractual subordination, equitable subordination and equitable subrogation.<sup>17</sup> Before the Nevada Supreme Court, the lender consortium asserts that there were specific facts that, if

proven at trial, allowed them to circumvent the plan language of NRS 108.225(2) – in preparing the loans and in funding the project, the lenders' money was allegedly used to pay off a prior existing deed of trust.<sup>18</sup> In this situation, the theory of equitable subrogation would allow the lenders to “stand in the shoes” of the previous deed of trust holder, and overtake the mechanics lien priority position.

To support these arguments, the lender consortium noted that the Nevada Supreme Court has approved the use of equitable subrogation in two cases: *Houston v. Bank of America*,<sup>19</sup> and *American Sterling Bank v. Johnny Management Ltd.*<sup>20</sup> Further, the lenders contend that the *Restatement (Third) of Property* likewise supports the use of equitable subrogation in the mechanics lien context<sup>21</sup> in order to:

*“prevent unjust enrichment if the person performing was promised repayment and reasonably expected to receive a security interest in the real estate which the priority of the mortgage being discharged, and if subrogation will not materially prejudice the holders of the intervening interests in the real estate.”*<sup>22</sup>

The lenders urged the Court to reaffirm the doctrine “for reasons that are obvious: fairness, predictability and *stare decisis*.”<sup>23</sup> In addition, the lender consortium asserted that certain written subordination agreements were executed by contractors to induce the lender consortium to agree to the financing. These should not be barred under the provisions of NRS 108.2453 prohibiting written contractual waivers of lien rights except in specific circumstances,<sup>24</sup> and also to allow equitable subordination when a lender replaces an existing deed of trust with a new one.<sup>25</sup>

The mechanics lienholders disagree. They contend that the *Houston* and the *American Sterling* cases are factually distinguishable – in fact they don't even address mechanics lien priority at all. *Houston* allowed equitable subrogation to avoid an intervening *judgment* lien attaching to the property while it was being refinanced.<sup>26</sup> *American Sterling* likewise had nothing to do with a mechanics lien, but rather a priority dispute between different lenders' deeds of trust, and also determined that under

See Fountainbleau, pg. 6

## Fountainbleau (continued from pg. 5)

certain extreme circumstances, equitable subrogation should not apply at all.<sup>27</sup> But even more importantly, Nevada has long adhered to the legal understanding that equitable remedies should not be invoked to avoid the application of a statute.<sup>28</sup> The unambiguous language of NRS 108.225, coupled with the understanding articulated by the Nevada Supreme Court in other cases that the public policy of Nevada is to ensure that contractors get paid, overrides the use of equitable subrogation in the mechanics lien priority context.<sup>29</sup>

In answering the arguments of contractual and equitable subordination, the lienholders indicated that the Legislature in enacting the 2003 changes to NRS 108.221 through 108.246, inclusive, explicitly prohibited a contractual waiver of the rights to mechanics liens absent conformance with NRS 108.2457.<sup>30</sup> Finally, there was no reason to believe that the lender consortium had a reasonable expectation that its deed of trust would replace that of the original lender, because instead of taking an assignment of the original deed of trust, it was extinguished,<sup>31</sup> and as such the new financing could not be considered a “re-financing” which was necessary to support the application of equitable subordination.<sup>32</sup>

As the case has now been fully briefed, argued and

### Notes:

1. Leon F. Mead II, Esq., is a senior Construction Law partner in the Nevada offices of Snell & Wilmer, and a member of the Associated General Contractors, Las Vegas Chapter Board of Directors. He has focused on construction law for the entirety of his 22 year career. He is the author of *Nevada Construction Law*, published by Thompson Reuters/ West, and numerous other articles and notes concerning construction law in Nevada. In a nod to full disclosure, the author was outside construction counsel to Fontainebleau Las Vegas Resort LLC until the company’s bankruptcy filing was converted to a Chapter 7 liquidation. Thereafter, he was retained by the Associated General Contractors, Las Vegas Chapter, Associated General Contractors, Nevada Chapter and others to write and file amicus briefs to the Nevada Supreme Court in the *Fontainebleau* case on which this article is based.

2. *In re: Fontainebleau Las Vegas Holdings LLC*, Case No. 56452. All references to Opening, Responding or Amicus Briefs hereinafter are taken from the pleadings filed in this matter, unless otherwise noted. It should also be observed that the supporting documentation for many of the facts underlying the Answering briefs were taken from various documents submitted by the responding mechanics lien holding parties in a “respondents appendix”, however, upon motion by the appellant lending consortium, the Court sitting *en banc* ordered that appendix stricken from the record. *See In Re: Fontainebleau Las Vegas Holdings LLC*, 127 Nev. Adv. Op. 85 (Dec. 2011). As a result, the facts recited by the lienholder parties and used herein from their briefing materials are not technically included in the record upon which the Supreme Court will render its decision.

3. NRS 108.221 through 108.246, inclusive.

4. Respondents M&M Lienholder’s Answering Brief, pg. 2

5. Approximately \$2.001 billion, principal and interest, was owed to the construction lending consortium on the date that Fontainebleau Las Vegas Holdings LLC filed for bankruptcy protection. Respondents M&M Lienholders Answering Brief, pg. 6.

6. *Outlook for Fontainebleau slides from Bad to Worse*, Las Vegas Sun, June 8, 2009

submitted to the Court, we in the construction industry (and the construction bar is certainly a part of that industry) wait to determine the fate of the Nevada mechanics lien priority statutes. Certainly you, the reader, can be assured that when the decision is released a thorough analysis article will also be published, of which this article is only a summary warm-up to the main event. With property values continuing to remain at historic lows, the value of a mechanics lien remedy is only as good as the free and clear equity on which the mechanics lienholder can claim. Adding a factually based legal analysis to an already existing statute could significantly confuse an ever increasingly complicated statutory scheme – something that the Nevada Supreme Court has tried to avoid for 120 years.<sup>33</sup>

Certainly on all sides of this issue, “the security of the rights to parties with an interest in the property” is going to be affected. We who also serve our duty to stand and wait<sup>34</sup> on the decision of the Court, must do so with bated breath! Surely the *Fontainebleau* decision will have a ripple effect across the State of Nevada and the ability to perform construction projects or obtain construction loans, not to mention title insurance. We anticipate it eagerly....

Hopefully, we will not turn *bleau* in the meantime....

7. See *In re: VCSP LLC*, Nevada Supreme Court Case No: 55351, Amicus Curiae Brief on behalf of Fontainebleau Mechanics and Materialmen's Lien Claimants and Subcontractors Legislative Coalition, LLC, pg. 5, filed June 4, 2010.
- 8 Appellant Lenders' Opening Brief, pg. 5.
9. See *In re: VCSP LLC*, Nevada Supreme Court Case No: 55351, Amicus Curiae Brief on behalf of Fontainebleau Mechanics and Materialmen's Lien Claimants and Subcontractors Legislative Coalition, LLC, pg. 5, filed June 4, 2010.
10. *In re: Fontainebleau Las Vegas, Holdings, LLC, et al.*, USBC Case No. 09-21481-BKC-AJC-4.
11. See *In re: VCSP LLC*, Nevada Supreme Court Case No: 55351, Amicus Curiae Brief on behalf of Fontainebleau Mechanics and Materialmen's Lien Claimants and Subcontractors Legislative Coalition, LLC, pg. 5, filed June 4, 2010.
12. *Id.*
13. NRS 108.225(2).
14. Respondents M&M Lienholders' Answering brief, pg. 6.
15. Respondents M&M Lienholders' Answering brief, pg. 5.
16. Appellant Lenders' Opening Brief, pg. 2.
17. The lender consortium also challenged the individual lienholders on the compliance with the lien statutes themselves (Appellant Lenders' Opening Brief, pg. 3), but this should be of little consequence to the Court's ruling. The factual case has not been tried in the USBC, and the threshold issues of subordination and subrogation are the certified questions before the Nevada Supreme Court. As Justice Hardsy noted during oral arguments on June 6, 2012, however, the Court does have the authority to re-write the questions certified in order to more accurately tailor the question to the law pronounced.
18. Appellant Lenders' Opening Brief, pg. 6. It should be noted that although the lenders attempt to not introduce any facts (such as the amount of the paid off deed of trust) which could sway the Nevada Supreme Court Justices in any way, the use of such facts by the lienholders is critical. The paid off deed of trust was for \$150.7 million. Respondents M&M Lienholders' Answering brief, pg. 7. Under these facts a finding that approves the use of equitable subrogation in the mechanics lien context would wipe out any payment possibility to the lienholders.
19. 119 Nev. 485, 490, 78 P.3d 71, 74 (2003).
20. 126 Nev. Adv. Op. 41, \_\_\_P.3d \_\_\_ (Oct 28, 2010).
21. *Restatement (Third) of Property, Mortgages*, Section 7.6
22. Appellant Lenders' Opening Brief, pg. 6, quoting *Restatement (Third) of Property, Mortgages*, Section 7.6(b)(4).
23. Appellant Lenders' Opening Brief, pg. 7 (emphasis in original).
24. Appellant Lenders' Opening Brief, pg. 9.
25. Appellant Lenders' Opening Brief, pg. 8.
26. Respondent M&M Lienholders Answering Brief, pg. 14.
27. Respondent M&M Lienholders Answering Brief, pg. 16.
28. Respondent M&M Lienholders Answering Brief, pg. 12.
29. Respondent M&M Lienholders Answering Brief, pgs. 11-13, inclusive.
30. Respondent M&M Lienholders Answering Brief, pgs. 27-30, inclusive.
31. At oral argument, this point of extinguishment as opposed to assignment was raised by Justice Gibbons as a confirmation of facts to the lender consortium, who confirmed that the original deed of trust was not assigned as part of the project lending agreement. Nothing more of the issue was discussed at that point.
32. Respondent M&M Lienholders Answering Brief, pgs. 25-27, inclusive.
33. "[Statutory interpretation of mechanics lien statutes] should not be carried to such extremes as serve only to perplex and embarrass a remedy intended to be simple and summary without adding anything to the security of the parties having an interest in the property sought to be charged with the lien." *Maynard v. Ivey*, 21 Nev. 241, 245, 29 P. 1090, \_\_\_ (Nev. 1892).
34. To paraphrase the poem by John Milton, "On His Blindness".