# Insurance, Surety & Liens

**A Newsletter of Division 7 of the ABA Forum on Construction**

**October 2019**

## Message from the Chair

The articles in this newsletter and accompanying back-stories epitomize the value that the Forum and Divisions provide to members. The articles written by Charlie Edwards and Greg Gillis/Michael Galen were subjects of prior Division 7 hot topics. Both hot topics were very well attended, including many Forum members who are active in Divisions other than Division 7. I received unsolicited comments on both hot topics as to how informative they were. These topics will now reach a larger Forum audience through the publication of this newsletter.

The article by Greg and Michael also shows why the Forum and its Divisions continue to grow. Greg has become very involved in Division 7 through membership and as a steering committee member. Greg then recruited Michael to

## California Court Reminds Us of Broad Coverage for Loss of Use of Property

*By: Nelson A.F. Mixon*
*Holden Willits, PLC*

What does a nightclub shooting have to do with construction law? Potentially quite a lot. In the recent California case, *Thee Sombrero, Inc. v. Scottsdale Ins. Co.* 2018 WL 5292072 (Cal. App. 2018), the court held that diminished value of commercial real property was covered "property damage" because the lost ability to sell alcohol on the premises (due to a shooting) amounted to "loss of use of tangible property." In other words, the policy covered the owner's pure economic loss even though nothing about the property was physically injured. This same basic issue is present in many construction claims, and *Thee Sombrero* reminds us of the CGL policy's fairly broad coverage for loss of use of property.

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## In This Issue

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help present the hot topic and write the article. Greg also got a colleague in the Arizona Bar, Nelson Mixon, interested in the Forum. Within a very short period, Nelson has contributed the lead article in the last issue of *Under Construction* "My Building is Evidence? The Line between Repairs and the Spoliation of Evidence" as well as his article in this newsletter. We all know people like Greg who keep the Forum vibrant.

Charlie is an acknowledged leader in insurance coverage issues and we are fortunate to hear his wisdom. Forum leader Greg Cashion was also local counsel for a jury trial verdict that Charlie and his firm won in Nashville.

These articles and back-stories standing alone demonstrate why Forum membership is so worthwhile. That is only part of the story. The Forum and its Divisions also build lifetime friendships. I will encourage everyone who reads this newsletter who is considering getting more involved in the Forum or Division 7 to do so. You will not regret it.

Sam Laurin
Bose McKinney

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**Background on CGL Coverage for Loss of Use.**
For more than 30 years, the standard Insurance Services Office form of commercial general liability insurance has covered "personal injury" or "property damage" caused by an "occurrence." However, the definition of covered "property damage" is quite a bit broader than the everyday use of that phrase, and specifically includes loss of use of property even if the property is not physically injured. Here is the definition of "property damage" from the most recent version of the standard CGL form, CG 00 01 04 13:

> physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
> loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

***Thee Sombrero*: Diminution in Value of Property Not Physically Injured is Covered "Property Damage."**
The facts of *Thee Sombrero* are simple. The property owner owned commercial real estate subject to a conditional use permit that allowed alcohol to be served on the premises. The property was rented to a nightclub. After a shooting at the nightclub, the permit was revoked and a new one issued that did not allow alcohol to be served on the premises. The owner then sued the security company for breach of contract and negligence, and obtained a default judgment for nearly $1 million for the lost value of the commercial property as a result of the loss of the liquor permit. And then the owner sued the security company's insurance company to obtain coverage for the judgment.

The trial court entered summary judgment for the insurer. The appellate court reversed, reasoning loss of use meant "loss of *any* significant use of the premises, not the total loss of all uses" (emphasis in original), and that the owner's lost ability to serve alcohol on the premises qualified as a loss of use of the property. That the owner sought only economic losses (the lost value of the property stemming from the lost ability to sell alcohol) did not weigh against coverage because the policy covered "loss of use of tangible property that is not physically injured."

**Why is a Case About a Nightclub Shooting Important for Construction Lawyers?**

*Thee Sombrero* is an important reminder of the broad coverage available for loss of use of tangible property, which is at issue in many construction claims. Insurance coverage for a construction claim often hinges on

whether there has been covered property damage. Obtaining coverage for the cost to repair defective construction has become increasingly difficult due to court decisions broadly applying the so-called "business risk" exclusions, as well as the proliferation of various endorsements designed to limit or cut off coverage for claims of defective construction. However, many construction claims involve damages for more than just the cost of remedying defective construction. Examples include claims for the diminished value of property due to defective construction or damages (liquidated or otherwise) for delayed construction. Are these claims covered? Maybe.

Cases involving coverage for "loss of use" damages in the construction cases are sparse, but illustrate the potential of available coverage. One of the more prominent cases, *Gibraltar Cas. Co. v. Sargent & Lundy 574* N.E.2d 664, 671-72 (Ill. App. 1990), recognized that "[t]here is loss of use of a new or existing building or other structure where faulty construction causes construction delay and the temporary inability to use the property, and loss of use damages include the cost of correcting the defect." In *Ohio Cas. Ins. Co. v. Bazzi Constr. Co.* 815 F.2d 1146, 1148 (7th Cir. 1987), the court held that a claim for repair costs and a "great loss of time" for a business as a result of structurally unsound steel work qualified as a claim for "property damage." And in *Federated Mut. Ins. Co. v. Concrete Units, Inc.* 363 N.W.2d 751 (Minn. 1985), the court held an owner's claim for additional storage costs and lost profits caused by delay in completion of a grain silo due to defective concrete was a claim for "property damage." On the other hand, in *Phoenix Ins. Co. v. Ed Boland Construction, Inc. 229* F.Supp.3d 1183, 1189 (D. Mont. 2017), the court held that claims for idle equipment due to construction delays did not amount to loss of use because the equipment was simply unused, not *unable* to be used. So the potential coverage for loss of use is plainly not unlimited.

**Closing Thoughts.**

One might not think an insurance coverage case about a nightclub shooting would have much to do with construction law. But *Thee Sombrero* underscores the potentially broad coverage available for loss of use, and that it does not require any actual property damage. Claims for diminished value of a building, inability to use a building, lost functionality, or construction delays that make property unavailable for use have at least the potential to be covered under a CGL policy. The next time you are looking at whether a construction claim may be covered by insurance, consider the loss of use angle.

## Recovering Consequential Damages Under General Liability Policies

*By: Charlie Edwards and Alexandra Robinson French*
*Barnes & Thornburg*

An often-overlooked feature of commercial general liability (CGL) policies is that they provide coverage for damages the insured is legally obligated to pay "because of" bodily injury or property damage. Most courts interpret "because of" broadly to include consequential damages and other damages that, while not themselves property damage, are traceable to covered property damage. While consequential damages are less likely to result from bodily injury, the scope of coverage is the same.

The rule that the standard CGL language providing coverage for damages "because of" property damage includes consequential damages having a causal connection to covered property damage is followed by the majority of courts that have considered the question. As one commentator has noted, "'Because of' can, and should, be read to mean: as a consequence of, on account of, or arising from. Certainly, this is the ordinary and usual meaning of 'because of.'" Scott C. Turner, *Insurance Coverage of Construction Disputes* § 6:22 (2d ed.).

In *Am. Home Assur. Co. v. Libbey-Owens-Ford Co.*, 786 F.2d 22 (1st Cir. 1986), for example, the court addressed the scope of coverage for damages arising from defective windows installed in the John Hancock office building in Boston. The need to replace the windows resulted in various increased construction and operating costs and delayed the occupancy date from April 1, 1973 to June 1, 1975. Hancock sued the window manufacturer, Libbey-Owens-Ford Company (LOF), and others to recover these damages, which included approximately $11 million for the costs of removing and replacing the windows and an additional $88 million of consequential damages.

The First Circuit held that one reasonable interpretation of the "because of" language is that it "provides coverage not only for property damage, but also for consequential damages resulting from property damage." *Id*. at 26. The court further noted that, although the policy would expressly exclude coverage for the $11 million in costs associated with the repair and replacement of LOF's own product, the policy did not exclude Hancock's consequential losses resulting from the breakage of LOF's windows. *Id*. at 27. Accordingly, the court held, "[g]iven that American Home's current policy is at best ambiguous, and at worst clearly applicable to cover LOF's damages, we hold that the policy covers consequential losses stemming from physical injury to LOF's products." *Id*. at 28.

The First Circuit also cautioned the insurance industry that "an insurance company wishing to exclude consequential damages should use specific language to that effect." *Id*. at 26. This caution was issued more than 30 years ago, and the "because of" language continues to appear on CGL policies without any specific exclusion for consequential damages.

While the "because of" language is form language found in the vast majority of CGL policies, some states have interpreted the language more broadly than others. In some states, the case law is not necessarily uniform. In California, for example, insurance companies often cite cases narrowly construing the language. But in *AIU Ins. Co. v. Superior Court*, 51 Cal.3d 807, 814 (1990), the California Supreme Court held that CGL policies cover the costs of reimbursing government agencies and complying with injunctions ordering cleanup under CERCLA, the Superfund statute, and similar statutes. In rejecting the argument that these economic costs were not "because of…property damage," the court held that, "the event precipitating their legal action is contamination of property. The costs that result from such action are therefore incurred 'because of' property damage." *Id*. at 842. A California Court of Appeals recently followed *AIU* in holding that certain delay damages were covered, holding that the "delay constitutes a consequential loss (a loss occasioned by the water intrusion) and as such, is part of the damages NAC must pay 'because of' property damage." *Global Modular, Inc. v. Kadena Pac., Inc*., 15 Cal. App. 5th 127, 145, *review den.* (Dec. 13, 2017).

Most of the California confusion stems from reliance on pre-1973 cases. In 1973, the definition of "property damage" in standard CGL language issued by the Insurance Services Office ("ISO") was revised to specifically include "loss of use of tangible property which has not been physically injured." The prior language had defined property damage as "physical injury to or destruction of tangible property, including loss of its use." *See Gunderson v. Fire Ins. Exch*., 37 Cal. App. 4th 1106, 1115 (1995). Several courts had held that under this earlier language, the loss of use referred only to property that was physically injured or destroyed. *Id*. The 1973 revision makes it clear that the loss of use of property which has not been physically injured also qualifies as property damage.

The California Court of Appeals recently clarified confusion in *Thee Sombrero, Inc. v. Scottsdale Ins. Co*., 2018 WL 5292072 (Cal. Ct. App. Oct. 25, 2018). The case involved a nightclub called El Sombrero that had its use permit modified after a fatal shooting so that it could be operated only as a banquet hall. The owner sued its security service (CES) alleging that its negligence in allowing the shooting had caused economic damages to the club, including a diminution in the value of the club associated with the modified use permit. After obtaining a default judgment in the amount of the diminished value of the club, the club owner sued CES's liability insurer (Scottsdale) for indemnity. The trial court granted summary judgment for Scottsdale, holding that the club's claims were "for an economic loss, rather than for 'property damage' as defined in and covered under the policy." *Id*., at *2.

The California Court of Appeals reversed, holding that the club's loss of use as a nightclub constituted property damage and that the resulting diminished value of the club was damages "because of" that property damage. The Court went so far as to hold that it "defies common sense to argue otherwise." *Id*., at *8. The Court specifically distinguished the earlier California cases interpreting the older definition of property damage. *Id*., at *15-16.

Courts also have found coverage for economic losses that arise "because of" bodily injury. In *Cincinnati Ins. Co. v. H. D. Smith, L.L.C.*, 829 F.3d 771, 774 (7th Cir. 2016), for example, the court addressed coverage for an underlying claim brought by the state of West Virginia against drug distributors for costs incurred by the state as a result of its citizens' addiction to drugs supplied by those companies. *Id*. at 773. The question presented was whether the costs incurred by West Virginia were "because of" bodily injury. *Id*. at 774-75. The Court held they were. *Id*.

The court based its holding on its recognition that a CGL policy "cover[ing] suits seeking damages '*because of* bodily injury'...provides broader coverage than one that covers only damages '*for* bodily injury.'" *Id*. at 774 (original emphasis). The court illustrated the breadth of "because of" in the language at issue by giving the following example:

> *[A]n individual has automobile insurance; the insured individual caused an accident in which another individual became paralyzed; the paralyzed individual sues the insured driver only for the cost of making his house wheelchair accessible, not for his physical injuries. If the insured driver had a policy that only covered damages "for bodily injury" it would be reasonable to conclude that the damages sought in the example do not fall within the insurer's duty. However, if the insurance contract provides for damages "because of bodily injury" then the insurer would have a duty to defend and indemnify in this situation.*

*Id*. (quoting *Medmarc Cas. Ins. Co. v. Avent Am., Inc*., 612 F.3d 607, 616 (7th Cir. 2010)). Only the duty to defend was before the Seventh Circuit, but the district court in the case recently ruled that the Seventh Circuit's opinion compelled the conclusion that a settlement reached by the policyholder was covered as well. *Cincinnati Ins. Co. v. H.D. Smith Wholesale Drug Co*., 2019 WL 4727039, at *13 (C.D. Ill. Sept. 26, 2019).

The types of consequential damages courts have held are covered by the standard "because of" language in CGL policies are various and extensive. The *Turner* treatise, for example, lists the following:

Construction delay and loss of use, liquidated damages for delay, construction impact (i.e., loss of worker efficiency in performing construction work), relocation and storage costs; temporary repairs, diminution in the value of property, later resulting physical injury to other tangible property, the cost to remove and reinstall (or replace) good work in order to access the property damage (often called "rip and tear" damage), the additional repair and reconstruction costs required to bring the building into compliance with the current building code, loss or reduction of production, lost rents, lost profits, increased overhead, environmental response costs under CERCLA and similar statutes, costs incurred for mitigation or prevention of further property damage or bodily injuries, investigation and inspection costs, costs for clean-up and debris removal, costs of notifying adversely affected parties, the insured's indemnity obligations to others (such as to the insured's surety on a performance bond), loss of good will or damage to reputation, and emotional distress.
*Turner*, § 6:22.

The few courts that have upheld denials of coverage for consequential damages have often confused whether the claimed damages *constituted* property damage, with the operative question of whether the damages were *because of* property damage. *See, e.g., Kvaerner N. Am. Constr. Inc. v. Certain Underwriters at Lloyd's London Subscribing to Policy No. 509/DL486507*, 2017 WL 2821691, at *9 (N.D.W. Va. June 28, 2017) ("liquidated damages still must fall under the CGL policy's property damage definition"); *St. Paul Fire & Marine Ins. Co. v. Amsoil, Inc*., 51 F. App'x 602, 604 (8th Cir. 2002) ("economic loss which is not 'property damage' is not covered under a CGL policy"); *Essex Ins. Co. v. Chem. Formula, LLP*, No. 1:CV-05-0364, 2006 WL 5720284, *6 (M.D. Pa. Apr. 7, 2006) ("loss of profits, damage to commercial reputation, and loss of goodwill are not tangible property damage as defined by the policy"). Insurers often adopt this erroneous position in refusing to

cover consequential damages.

The Ninth Circuit recently held that an award of attorneys' fees to the prevailing plaintiff in an underlying lawsuit against a policyholder is covered under the policyholder's CGL policy. *Ass'n of Apartment Owners of Moorings, Inc. v. Dongbu Ins. Co*., 731 F. App'x 713 (9th Cir. 2018) (construing Hawaii law). The court held that "in the context of the policy, the plain meaning of 'damages' encompasses the fees the Bradens incurred to vindicate their claim for water damage to their home, even if those fees are not a measure of that physical damage." *Id*. The court also held that the attorney fee award was "because of" the covered property damage, holding "[t]his phrase, which is undefined, connotes a non-exacting causation requirement whereby any award of damages that flows from covered property damage is covered, unless otherwise excluded." *Id*. Note, however, that other courts have concluded that an award of attorneys' fees against the policyholder constitutes "costs" falling within an insurer's defense obligation, rather than "damages" falling within its indemnity obligation. *See, e.g., Prichard v. Liberty Mutual Ins. Co.*, 84 Cal. App. 4th 890, 911-912 (2000) (attorneys' fees awarded against the policyholder fall within the scope of a carrier's supplementary payments obligation because they are statutorily defined in California as costs, and therefore are not "damages" within the meaning of a CGL policy).

One issue that has not been extensively litigated is whether the determination of what damages are "because of" bodily injury or property damage is a question for the court as a matter of law, or one for the court or jury in its role as the fact-finder. The scope of an insurance company's indemnity obligation (as opposed to its duty to defend, which is broader) often is dependent on the outcome of the underlying case. *See, e.g., United Nat'l Ins. Co. v. Dunbar & Sullivan Dredging Co.*, 953 F.2d 334, 338 (7th Cir. 1992) ("[T]he duty to indemnify must await resolution of the underlying suits."); *Westfield Ins. Co. v. Sheehan Const. Co*., 575 F. Supp. 2d 956, 960 (S.D. Ind. 2006) ("The Plaintiff's duty to indemnify will depend upon the facts and outcome of the underlying Indiana state court action."). Yet many courts deciding the coverage issue also have decided what damages they deem to be "because of" bodily injury or property damage, rather than leaving that issue for determination in the underlying case.

A recent case from Texas, however, separates the legal question of the meaning of "because of" from the factual question of what damages were "because of" bodily injury or property damage. *See Kenyon Int'l. Emergency Srvs., Inc. v. Starr Indem. & Liab. Co*., 2018 WL 6241461, at *4-5 (Tex. App. Nov. 29, 2018). The case involved coverage for emergency services performed by Kenyon for Seaport Airlines after the crash of a Seaport plane, which included setting up a call center, providing first responders and mental health staff, and establishing a welfare support line. Seaport's aviation policy issued by Starr provided coverage for all sums that the insured shall become legally obligated to pay as damages "because of" bodily injury or property damage. After Seaport went bankrupt and failed to pay Kenyon for the services Kenyon performed after the crash, Kenyon sued Starr seeking a declaratory judgment that Starr's policy covered the services and recovery in equitable subrogation.

The court first held that, "[v]iewed in the light most favorable to Kenyon, at least some of the damages Kenyon seeks may include sums Seaport became legally obligated to pay because of bodily injury," and, therefore, covered by the policy. *Id*. at *4. The court then held that "a fact issue [exists] as to whether the reason at least some of the post-crash emergency services were performed — and potentially had to be performed — was bodily injury sustained in the plane crash, or any and all claims related to bodily injury." *Id*. The Court reversed the trial court's summary judgment for Starr and remanded for further proceedings, presumably a trial, on the question of which of the damages sought by Kenyon were "because of" bodily injury. *Id*.

Policyholders should consider it a best practice to scrutinize any argument by an insurance company that consequential damages are not covered because they are not bodily injury or property damage. Where those damages arise "because of" covered bodily injury or property damage, they may well be covered.

# The Intersection of Bankruptcy Preferences and Mechanic's Lien Waivers—A Wrong Turn Can be Costly


*By: Greg Gillis and Michael Galen*
*Sacks Tierney, P.A.*

The impact of a bankruptcy commenced by an owner, general contractor, or subcontractor can result not only in project delays, but can also be costly to the non-bankrupt parties involved in the construction project. A recent case from the U.S. Bankruptcy Court for the Northern District of Texas discusses the potential bankruptcy implications of what is a common occurrence in the construction industry—a contractor signing a lien waiver in exchange for payment from an entity that files for bankruptcy within 90 days of the payment date.

In *In re BFN Operations LLC*, No. 16-32435-BJH, 2019 WL 2387168 (Bankr. N.D. Tex. June 4, 2019), the project lessee, BFN Operations, LLC ("BFN") contracted with PLT Construction Company Inc. ("PLT") to construct a nursery pad storage addition and loading dock on land leased by BFN in North Carolina for a lump sum contract of $470,569. PLT submitted seven invoices totaling $478,760.05. On March 25, 2016, while PLT was owed $290,532.21, PLT signed a "Final Payment Lien Waiver" and was paid in full 60 days later on May 25, 2016.
On June 17, 2016, BFN filed a Chapter 11 bankruptcy petition commencing its bankruptcy case (the "Bankruptcy Case"). The case was later converted to a Chapter 7 bankruptcy case. Two years later, the Chapter 7 trustee in the Bankruptcy Case filed an adversary complaint against PLT to recover the $290,532.21 paid to PLT claiming, among other things, that the payment was a preferential transfer because it was paid within the 90 days prior to the filing of the Bankruptcy Case.

The elements of an avoidable preference under Bankruptcy Code § 547(b) are that the payment: (1) was for the benefit of a creditor; (2) was on account of an antecedent (prior) debt; (3) was made while the debtor was insolvent; (4) was made within 90 days before the bankruptcy case was filed; and (5) enabled the creditor to receive a larger share of the bankruptcy estate than if the transfer had not been made. Only the last element was disputed. PLT argued that the pre-bankruptcy payments did not allow it to receive more than it would have received through a bankruptcy liquidation because under North Carolina law, PLT had an inchoate statutory lien right against BFN's leasehold interest that it would have perfected had it not waived its lien rights in exchange for payment.

Black's Law Dictionary defines the term "inchoate" as "[p]artially completed or imperfectly formed" or "just begun." It defines an "inchoate interest" as "a property interest that has not yet vested." "Inchoate liens" are considered statutory liens that could have been timely perfected under applicable state law had the creditor not been paid. This is an area in which each state's specific lien law intersects with bankruptcy law. North Carolina, like Arizona and many other states, grants an unpaid contractor who has met certain statutory lien prerequisites a period of time to record its mechanic's lien against the real property that benefitted from the contractor's labor performed or materials supplied.

Frequently when a property owner pays a contractor, the owner requires that the contractor execute a "lien waiver" waiving the contractor's rights to a lien against the project for the amount of the payment received. In consideration of the payment, the contractor waives its right to lien for the work performed for which payment was received. Depending on the language of the lien waiver, the waiver is effective upon receipt of the payment in good funds.

This process is effective, unless and until the entity making the payment files for bankruptcy and demands return of the payment(s) as an avoidable preference. The Trustee in the *BNF* Bankruptcy Case argued that although PLT did have an inchoate lien right under North Carolina law for the work it performed, PLT released that right when it signed the Final Payment Lien Waiver. PLT received the payments after signing the waiver, which was within the 90-day preference period. According to the Trustee, because the lien was waived before the payment was made,

*(Continued on page 8)*

*(Continued from page 7)*

PLT no longer had an inchoate lien right at the time of payment and should therefore be left with an unsecured claim in the Bankruptcy Case after avoidance of the payment.

PLT countered that its lien waiver did not become effective until after it was paid in full. If PLT had not been paid by BNF, it could have perfected its inchoate lien. Had perfection occurred, PLT would have been a secured creditor in BNF's Bankruptcy Case, meaning it would have been entitled to payment in full when the debtor liquidated.

The Court agreed with PLT, and found that PLT's waiver of its inchoate lien right was expressly conditioned upon its receipt of the payment. Once the payment was received, PLT's waiver became effective as of the date the waiver was signed.

The Court further held that the existence of an inchoate lien right prevented the Trustee from establishing the fifth preference element—that the payment caused PLT to get a larger share of the estate than it would have received in a liquidation. It reasoned that if courts do not protect holders of statutory lien rights from avoidance, they would face a "Hobson's Choice" between either accepting payment (and risking that it could be avoided if the payor files for bankruptcy), or declining payment in order to perfect their inchoate statutory liens (which is not commercially reasonable). Courts in a majority of the Circuits agree with this analysis and hold that if the creditor could have perfected a lien under state law at the time the payment was made, then the payments are not avoidable. *See Ricotta v. Burns Coal & Bldg. Supply Co.*, 264 F.2d 749 (2d Cir. 1959); *The Official Comm. of Unsecured Creditors of 360Networks (USA), Inc. v. AAF–McQuay, Inc. (In re 360Networks (USA), Inc.)*, 327 B.R. 187 (Bankr. S.D.N.Y. 2005); *Johnson Mem'l Hosp. Inc. v. New England Radiator Works (In re Johnson Mem'l Hospital, Inc.)*, 470 B.R. 119 (Bankr. D. Conn. 2012);*Matter of Alkap, Inc.*, 54 B.R. 151 (Bankr. D.N.J. 1984); *Liquidating Trust v. Mo-Tech Corp. (In re E.D.C. Liquidating, Inc.)*, 2017 WL 499883 (Bankr. N.D. Ohio Feb. 7, 2017); *In re Golfview Developmental Ctr., Inc.*, 309 B.R. 758, 769 (Bankr. N.D. Ill. 2004); *In re Carney*, 396 B.R. 22 (Bankr. N.D. Iowa 2008); *Greenblatt v. Utley*, 240 F.2d 243 (9th Cir.1956); *Hopkins v. Merlins Insulation, LLC (In re Larsen)*, 2008 WL 4498890 (Bankr. D. Idaho 2008) (unpublished); *Bryant v. JCOR Mech., Inc. (In re Electron Corp.)*, 336 B.R. 809 (10th Cir. BAP 2006); *But see, Precision Walls, Inc. v.* Crampton, 196 B.R. 299 (E.D.C.C. 1996); In *re Joseph M. Eaton Builders, Inc.*, 84 B.R. 56 (Bankr. W.D. Pa. 1988).

In sum, counsel should consider whether their client had inchoate lien rights under state law when faced with defending a payment alleged to be preferential. It is also important to be aware of the prevailing law in the jurisdiction in which the dispute arises and whether that jurisdiction follows the majority rule described above. As is illustrated by the BNF Bankruptcy Case, inchoate lien rights may provide strong arguments to a defendant when litigating a preference action in Bankruptcy Court.

## Schedule of Upcoming Division 7 Events:

### Thursday, November 7, 2019

1:00 – 2:00 p.m. EDT Phone: 866-646-6488 and the passcode is 711-487-1942.

## Upcoming Forum Events:

### ABA Forum 2019 Fall Meeting

October 23-25 | Locations: Philadelphia, PA

### ABA Forum 2020 Mid-Winter Meeting

January 22-24, 2020 | Location: Tucson, AZ

### ABA Forum 2020 Trial Academy

March 4-7, 2020| Location: Dallas, TX

# A Message from the Publications Committee

Michael Clark, Chair

I would like to personally thank all of the authors for their time and efforts in contributing to what I hope is enjoyed as an excellent newsletter. Division 7 takes great pride in publishing a top rate newsletter. We are always looking for authors, so if you, or a colleague, have written, or would like to write, an article pertaining to insurance, suretyship or liens, we would love to hear from you. Additionally, the publications committee is always on the look out for people to author articles for the Construction Lawyer or Under Construction.

In short, the Forum provides multiple different opportunities to engage. If you are reading this newsletter, wondering how you can become more involved, just ask. I can always be reached via email mclark@siegfriedrivera.com or phone: 305.460.2964.

Finally, I hope that those reading this email at the Forum meeting in Philadelphia are thoroughly enjoying the time. Congratulation to Lauren Catoe and Tony Lehman for chairing an excellent program!

# Division 7 Member Spotlight

W. Matthew Bryant practices law with the firm of Saul Ewing Arnstein & Lehr LLP in Chicago, IL. He negotiates construction contracts, resolves project payment disputes (including mechanics liens), and represents owners, architects, engineers, contractors, and subcontractors to pursue and defend claims relating to construction defects, mechanics liens, and surety bonds.

Matt writes and presents on many construction-law topics. For example, he co-authored chapters on "Licensing Requirements" and "Public Construction" in the *Illinois Construction Law Manual* (West 2018), and contributed to chapters on "Claims Handling and Dispute Resolution" and "Consolidation and Joinder" in the *THE Construction Contracts Book* (Second Edition) (published by the Forum on Construction Law).

Matt is a member of the American Bar Association, where he participates in the Forum on Construction Law, especially in Division 7 (Insurance Surety & Liens). He also participates in the Chicago Bar Association's Mechanics Lien Subcommittee.

In his free time, Matt plays recreational football and collects vintage posters.

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**INSURANCE, SURETY & LIENS**

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