



ATLANTA BAR ASSOCIATION

LAWYERS WHO SERVE
Construction Law Section

Summer 2016

Construction Law Newsletter

Official Publication of the Atlanta Bar Association
Construction Law Section

Save the Date!

Mark your calendars for the following
Construction Section Breakfast Events

Details are subject to change. Check your emails
and the Atlanta Bar website for updates.

Wednesday, September 21, 2016
Wednesday, October 26, 2016
Thursday, November 17, 2016
No meeting in December
Wednesday, January 25, 2017
Wednesday, February 22, 2017
Wednesday, March 22, 2017
Wednesday, April 26, 2017
No meeting in May (Spring Social)

SAVE
THE
DATE

Message from the Chair

By Frank Riggs, Chair, Construction Law Section
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Troutman Sanders LLP

With special thanks to David Cook for his good work as the editor, I trust that you will find this Construction Law Section Newsletter informative and useful. As the incoming Chair of the Construction Law Section, I would like to take this opportunity to offer a special thanks to Damon Gunnels, our former Chair, for his outstanding stewardship of the Section during the prior Bar

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year. Also, as the activities of the Construction Law Section resume in September, I encourage you to become an active participant in those activities this year.

I am confident that we will present for you an interesting lineup of monthly breakfast programs, as well as opportunities to renew contacts, or make new friendships, with your fellow construction lawyers in Atlanta. If there are other construction lawyers in your firm who are not members of the Section, or who are not actively participating, please encourage them to join and to take advantage of the many professional and personal benefits offered by the Section. Take note of the dates for upcoming Section breakfast programs and plan to join your fellow construction lawyers for some good food, good fellowship and informative CLE opportunities. I look forward to seeing you at our first such program on September 21.

James K. Bidgood Jr.
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Charles Walker "Chip" Ingraham

(1955-2016)

With much sadness we note the passing on July 23, 2016, of Chip Ingraham, a respected member of our construction law community for more than 35 years.

The chair of the litigation practice of the Atlanta office of Seyfarth Shaw and the co-chair of the firm's national construction law practice, Chip was an excellent construction lawyer with many friends throughout our Section. He will be missed.

Georgia Amends Anti-Indemnity Statute

By David R. Cook

Autry, Hanrahan, Hall & Cook

In its most recent session, the Georgia General Assembly passed HB 943, which amends Georgia's Anti-Indemnity Statute. The amendment expands the Anti-Indemnity Statute beyond construction contracts to include contracts for engineering, architectural, and land surveying services ("A/E Contracts").

Before the amendment, [Georgia's Anti-Indemnity Statute](#) generally prohibited indemnity clauses in construction contracts that required one party (the "Indemnitor") to indemnify another party (the "Indemnatee") if property damage or bodily injury resulted from the Indemnatee's sole negligence. The Supreme Court of Georgia has [broadly interpreted](#) the Anti-Indemnity Statute.

HB 943 adds subpart (c) to the Anti-Indemnity Statute, which states:

[Read entire article](#)

The Eleventh Circuit Reaffirms Validity of Waiver of Consequential Damages Provisions in Contracts

By E. Tyron Brown

Hawkins Parnell Thackston & Young LLP

The Eleventh Circuit Court of Appeals, in *Silverpop Systems, Inc. v. Leading Market Technologies, Inc.*, 2016 U.S. App. LEXIS 196 (11th Cir. January 5, 2016) enforced a contractual waiver of consequential damages provision, thereby reaffirming the validity of such provisions in Georgia.

In that case, the Plaintiff Silverpop Systems, Inc. ("Silverpop") provided digital marketing services to businesses such as the Defendant Leading Market Technologies, Inc. ("LMT"). The parties entered into a service agreement whereby LMT was authorized to access Silverpop's web-based e-mail marketing program and upload digital advertising content and recipient e-mail addresses. The advertising content was then sent to the e-mail addresses. The list of e-mail addresses from LMT was stored on Silverpop's marketing program. Silverpop's program eventually had a list of nearly 1/2 million email addresses from LMT.

[Read entire article](#)

Recent Court of Appeals Ruling Establishes the Breadth of Forum Selection Clauses

By Bianca DiBella, Summer Associate

Troutman Sanders LLP

A recent decision by the Georgia Court of Appeals demonstrates the expansive application of forum selection clauses. Reversing the trial court below, the Court of Appeals in *Cemex Construction Materials Florida, LLC v. LRA Naples, LLC* found that a forum selection clause in one contract governed the dispute even though the case concerned "multiple, interrelated contracts" which did not all contain forum selection clauses.[1]

[1] 334 Ga. App. 415, 415-16 (2015).

[Read entire article](#)

Georgia Court Clarifies Landlord Liability for Construction Defects

By Chadd L.

Reynolds

Autry, Hanrahan, Hall & Cook, LLP

In *Cowart v. Schevitz*,^[1] the Georgia Court of Appeals clarified the instances in which an out-of-possession landlord can be liable in a premises liability claim.

In this case, the plaintiff was leaving a restaurant and injured herself stepping down off of a sidewalk near the bottom of a ramp. The plaintiff filed a premises liability claim against the owner of commercial property (the "landlord") and the operator of the restaurant (who later settled), seeking medical expenses and costs of litigation. An expert testifying on behalf of the plaintiff stated that the ramp was required to have railings pursuant to building codes and, had the railings been installed on the ramp, the plaintiff's fall more than likely would not have occurred. The landlord moved for summary judgment, arguing that as an out-of-possession landlord, his liability to third persons for the use of the property by his tenant was precluded under O.C.G.A. § 44-7-14. The trial court denied the motion without comment, and the owner subsequently appealed.

[1] 335 Ga.App. 715 (2016).

[Read entire article](#)

Supreme Court Clarifies Requirements for Private Parties Bringing a Claim Under the Taxpayer Protection Against False Claims Act

By Thomas Church, Summer Associate

Troutman Sanders LLP

A seemingly straightforward ruling - that the text of a statute means what it says - will have a profound effect on whistleblowers and the taxpaying public's ability to root out fraud. In *McKinney v. Fuciarelli*, the Supreme Court of Georgia interpreted the statutory requirements for bringing suit under the Taxpayer Protection Against False Claims Act ("TPAFCA"), holding that a taxpayer retaliation claim brought under subsection (l) of the TPAFCA must be approved by the Attorney General before being filed. 2016 Ga. LEXIS 313, *1 (2016). Plaintiff

Alfred Fuciarelli, a tenured faculty member at Valdosta State University ("VSU"), briefly served as an assistant vice president and dean of the school. *Id.* at *1. While serving in that administrative capacity, Fuciarelli made several complaints about VSU's "noncompliance with laws, rules, and regulations." *Id.* at *1. When VSU terminated Fuciarelli, Fuciarelli alleged the university terminated him in retaliation for raising the complaints. *Id.* at *1. Accordingly, Fuciarelli brought a claim against the Board of Regents and others seeking damages under subsection (l) the TPAFCA and the Public Employee Whistleblower Retaliation Act. *Id.* at *1-2.

[Read entire article](#)

Royal Capital Development and the Applicability of "Stigma" Damages in Property Damage Claims in Georgia By J.T.

Gallagher

Carlock, Copeland & Stair LLP

Recently, we have noticed owners who are asserting property damage claims in Georgia have aggressively pursued a new theory of damages. It is typical for owners in these claims to seek cost of repair. Owners, however, are now seeking high damage values for "stigma" damages in *addition* to the traditional cost of repair damages to maximize their potential recovery. The cause for this new trend is the Georgia Supreme Court's ruling in *Royal Capital Development, LLC v. Maryland Casualty Company*.^[1]

[1] See *Royal Capital Development, LLC v. Maryland Casualty Company*, 291 Ga. 262 (2012).

[Read entire article](#)

STATE CONTRACTORS, BEWARE THE RISK OF SOVEREIGN IMMUNITY By W. Henry Parkman

Sutherland Asbill & Brennan LLP

In *Georgia Department of Labor v. RTT Associates, Inc.*, S15G1780, 2016 WL 2946376 (May 23, 2016), the Georgia Supreme Court expanded the reach of sovereign immunity in breach of contract cases by holding that the State is immune to claims based on non-written waivers or modifications of written contract terms. The case arose from a written

contractual relationship in which RTT undertook to develop certain computer software for the Georgia Department of Labor. The Georgia Constitution of 1983 plainly waives "the state's defense of sovereign immunity . . . as to any action ex contractu for the breach of any written contract now existing or hereafter entered into by the state or its departments or agencies." *Id.*, *1 The RTT *Associates* Court held, however, that this waiver of sovereign immunity did not extend to any contract extension, oral promise, or other modification based on conduct or non-written statements-at least not when the original contract purported to require that all amendments be in writing.

[Read entire article](#)