SYLLABUS -Construction Law
FIU College of Law -- Spring Semester, 2014

Administrative Matters

The course objective is to study a survey of general construction law issues so that the student may understand the scope of matters handled by the construction law practitioner and become familiar with principles of construction law. Construction law generally involves contracts, suretyship, licensing, insurance, torts, dispute resolution procedures, and statutory issues peculiar to the industry. The course is an elective course.

The instructor is Larry R. Leiby, Esq. Phone: 954-895-9198 or 954-514-0984 e-mail: LEIBY@MKPALAW.COM. Office hours are by appointment, just call.

The required text is the Florida Construction Law Manual, 2013-2014 edition, published by West. The text is also available on Westlaw as part of the Florida Practice series, Volume 8. In addition we will brief and address the cases in the following list, which the students must obtain. There may be additional handouts throughout the term.

There will be a final examination at the end of the term consisting of multiple choice questions.

Attendance and class participation is certainly encouraged. The attendance and punctuality requirements in section 501 of the 2010 Academic Policies and Regulations of the School apply. As in most endeavors, what you get out of something bears a relationship to what you put in it. Adjustments to grades based on class participation will be in accordance with §1004 of the 2010 Academic Policies and Regulations of the School. Downward adjustments may be made for failure to cover an assigned class presentation. Grading standards will be in accordance with §1002 of the 2010 Academic Policies and Regulations of the School.

The first class will be on Thursday, January 9, 2014. The University Drop date for the course will be January 11, 2014.

Class Assignments

1 -- Preparation for Construction

Learning Points:

Introduction to being a construction lawyer

Owner investigation and viewpoint of the Owner in the process

Licensing authority and jurisdiction

Distinction between Contractor License requiring competency and occupational license tax
Effect of arbitrary discretion in licensing
Disciplinary action for contractors

The effect of contracting without a required license

Potential statutory remedies for persons harmed by an unlicensed contractor

Cases:


Florida Home Builders Ass'n v. St. Johns County, 914 So.2d 1035 (Fla. 5th DCA 2005)

Godshalk v. City of Winter Park, 95 So.2d 9 (Fla. 1957)


D&L Harrod, Inc.v. U.S. Precast Corp., 322 So.2d 630 (Fla. 3rd DCA 1975)

Alfred Karram, III, Inc. v. Cantor, 634 So.2d 210 (Fla. 4th DCA 1994)

Earth Trades, Inc. v. T&G Corp., 108 So.3d 580 (Fla. 2013)

In re Hebert, 2011 WL 351667 (Bkrgncy. E.D. La. 2011)


2. -- Codes affecting Construction; Building Permits
Sections 3:1 through 3:3 Florida Construction Law Manual

Learning Points:

Purpose and authority for building permits

Standing to sue with respect to a permit

Issues with code enforcement

Duty to comply with building code and effect of noncompliance

Effect of lack of knowledge of a building code
Effect of O.S.H.A violation in civil case
Discretion to ignore building codes
Effect of Americans with Disabilities Acts

Cases:
Tri County Paving, Inc. v. Ashe County, 281 F.3d 430 (4th Cir. 2002)
Del Risco v. Industrial Affiliates, Ltd., 556 So.2d 1148 (Fla. 3rd DCA 1990)
DiMare & Drews, Inc. v. Kerrigan, 810 So.2d 1066 (Fla. 4th DCA 2002)
Jupiter Inlet Corp. v. Brocard, 546 So.2d 1 (Fla. 4th DCA 1988)
Deck v. City of Toledo, 76 F. Supp. 2d 816 (N. D. Ohio, 1999)
Home Constr. Mgmt., LLC, v. Comet, Inc., 125 So.3d 221 (Fla. 4th DCA 2013)

3 – Bids and Bid Protests

Learning Points:

Distinction between a bid and an invitation to bid or request for proposals
Effect of ambiguous bid documents on the bid
The concept of promissory estoppel in bidding
Forms of bid security
Administrative Bid Protests
Judicial bid protests (Injunction and Mandamus)
What constitutes acceptance of a bid so that a contract is formed
Who has standing to make a bid protest
Bid mistakes where relief may be granted and where relief may not be granted

The concepts of responsive bids and responsible bidders

The grounds and burden of proof in bid protests

When may the awarding governmental authority cancel the bid or toss out the bids

**Cases:**

Hoon v. Pate Const. Co., Inc., 607 So.2d 423 (Fla. 4th DCA 1992)


Robinson Elec. Co., Inc. v. Dade County, 417 So.2d 1032 (Fla. 3rd DCA 1982)

Mississippi Dept. of Rehabilitation Services v. United States, 58 Fed. Cl. 371 (2003)

Housing Authority of City of Fort Pierce v. Foster, 237 So.2d 569 (Fla. 4th DCA 1970)

Wolf Ridge Plastics, Inc. v. Jacksonville Elec. Authority, 388 So.2d 1298 (Fla. 1st DCA 1980)

Department of Transporation v. Ronlee, Inc., 518 So.2d 1326 (Fla. 3rd DCA 1988)

City of Sweetwater v. Solo Const. Corp., 823 So.2d 798 (Fla. 3rd DCA 2002)

Intercontinental Properties, Inc. v. State Dept. of H&RS, 606 So.2d 380 (Fla. 3rd DCA 1992)

Preston Carroll Co., Inc. v. Florida Keys Aqueduct Authority, 400 So.2d 524 (Fla. 3rd DCA 1981)

Emerald Correctional Management v. Bay County Bd. of County Commissioners, 955 So.2d 647 (Fla. 1st DCA 2007)

**4 – Construction Contracts Generally and Prompt Payment Statutes**
**Sections 4:3, 4:7, 6:1, 6:6 – 6:10, 7:1, 7:2, and 16:8, Florida Construction Law Manual**

**Learning Points:**

The making of an express contract

Implied in fact and implied in law contracts

Conditions precedent and conditions subsequent

Conflicting terms
Incorporation by reference

Statutes of Frauds

Illegality of contracts

Awareness of possible required local statutory requirements (Fla. Stats. 558, 713)

Davis-Bacon and local minimum wage rate requirements

Prompt payment statutes – Federal, State, municipal, private

Cases:

Webster Lumber Co. v. Lincoln, 94 Fla. 1097, 115 So. 498 (Fla. 1927)


Burt v. Horn, 97 N.M. 515, 641 P.2d 546 (N. M. App. 1982)

Rite-Way Painting & Plastering, Inc. v. Teto, 582 So.2d 15 (Fla. 2nd DCA 1991)

Argonaut Development Group, Inc. v. SWH Funding Corp., 150 F.Supp.2d 1357 (S. D. Fla. 2001)


Gables I Townhomes, Inc. v. Sunmark Restoration, Inc., 687 So.2d 6 (Fla. 3rd DCA 1996)

Hieb v. Opp, 458 N.W.2d 797 (S.D. 1990)


United States f/u/b/o Glynn v. Capeletti Bros., Inc., 621 F.2d 1309 (5th Cir. 1980)


Commerce Partnership 8098 L.P. v. Equity Contracting Co., Inc., 695 So.2d 383 (Fla. 4th DCA 1997)

5 Design Contracts and Professional Negligence

Learning Points:

Ownership of, or license for, work product

5
Copyright issues

Design Duties – Concept, schematic, design, construction, coordination, procurement - BIM

Duty of administration – observe, guard against defects, not guarantor of contractor performance

Professional Negligence – no limit of liability

First Cost Defense

Implied warranty of constructability

Cases:

Pitts v. Coronado Custom Homes, LLC, 57 Fed. Appx. 313 (9th Cir. 2003)

Oravec v. Sunny Isles Luxury Ventures, LLC, 527 F.3d 1218 (11th Cir. 2008)


Hedia v. McCool, 476 F.2d 1223 (9th Cir. 1973)

Johnson v. Jones, 149 F.3d 494 (6th Cir. 1998)


Shepard v. City of Palatka, 414 So.2d 1077 (Fla. 5th DCA 1981)

Moransais v. Heathman, 744 So.2d 973 (Fla. 1999)

Witt v. La Gorce Country Club, Inc., 35 So.3d 1033 (Fla. 3rd DCA 2010)

Soriano v. Hunton, Shivers, Brady & Associates, 524 So.2d 488 (Fla. 5th DCA 1988)

Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Assocs., 168 So.2d 333 (Fla. 2nd DCA 1964)

6 – Contract Delivery Systems --Construction Management, Design/Build, Design-Bid-Build, Lump Sum, Cost Plus, Design-Build and Operate (often Public private partnerships)
Sections 7:3 – 7:8; 7:48 Florida Construction Law Manual

Learning Points:
Duties of Construction Manager determined by agreement

Construction Manager as owner’s agent and Construction Manager at Risk

Design/Build contracts – sole source of liability

Duty of Contractor to build in accordance with contract plans

Government’s implied warranty of constructability of design plans

No implied warranty of plans from contractor to subcontractors

Required Wage Rates (e.g., Davis Bacon Act)

Changed conditions

No damage for delay clauses

Cases:

Roberts & Schaefer Co. v. Hardaway Co., 152 F.3d 1283 (11th Cir. 1998)


St. Lucie County v. Federal Const. Co., 584 So.2d 122 (Fla. 4th DCA 1991)

Juno Industries, Inc. v. Heery International, 646 So.2d 818 (Fla. 5th DCA 1994)

Baker County Medical Services, Inc. v. Summit Smith L.L.C., Slip Copy, 2008 WL 2245587 (U.S.D.C. M.D.Fla. 2008)


Wood-Hopkins Contracting Co. v. Masonry Contractors, Inc., 235 So.2d 548 (Fla. 1st DCA 1970)


Phillips & Jordan, Inc. v. State, DOT, 602 So.2d 1310 (Fla. 1st DCA 1992)

Irwin & Leighton v. United States, 115 Ct. Cl. 18 (Ct. Cl. 1949)


Marriott Corp. v. Dasta Constr. Co., 26 F.3d 1057 (11th Cir. 1994)


7 – Merger Clauses, Flow Down Clauses, Incorporation by reference, and Payment Clauses

Sections 7:12, 7:13, and 7:9 Florida Construction Law Manual

Learning Points:

Effect of merger language, proposal or prior understandings that conflict with ultimate agreement

Incorporation by reference of other documents into the contract

Conditions to payment

Time of performance / time of the essence or not

When payment is due if not expressly provided

Waiver of conditions

Contingent payment and time of payment clauses

Cases:

Nanci S. Landy, P.A. v. Empire Marble and Granite, Inc., 762 So.2d 954 (Fla. 3rd DCA 2000)

Trinchitella v. D.R.F., Inc., 584 So.2d 35 (Fla. 4th DCA 1991)

Peeples Const. Co., Inc. v. Escoe Green, Inc., 522 So.2d 493 (Fla. 1st DCA 1988)

Chemical Const. Corp. v. Continental Engineering, Ltd., 407 F.2d 989 (5th Cir 1969)


Ill. App. 1990)

(U.S.D.C. S.D. Fla. 2008)

Scott v. Rolling Hills Place Inc., 688 So.2d 937 (Fla. 5th DCA 1996)

Team Land Development, Inc. v. Anzac Contractors, Inc., 811 So.2d 698 (Fla. 3rd DCA 2002)

Snead Const. Corp. v. Langerman, 369 So.2d 591 (Fla. 1st DCA 1978)

Robert F. Wilson, Inc. v. Post-Tensioned Structures, Inc., 522 So.2d 79 (Fla. 3rd DCA 1988)


OBS Co., Inc. v. Pace Const. Corp., 558 So.2d 404 (Fla. 1990)


8 – Changes and Delays
Chapter 13, sections 7:18, and 7:19 Florida Construction Law Manual

Learning Points:

Subsurface conditions and how they may be handled

Owner’s duty to disclose pertinent information to the contractor or designer

Requirement for changes to be in writing and waiver

Burden of proving contract changes

Sovereign immunity by government to defeat changes outside of contract scope

Technical contract language that may affect claims for change

Authority of agents to agree to changes

Actual damages, liquidated damages, and penalties

No damage for delay clauses

Excusable and compensable delays/concurrent delays/non compensable delays

Proof of damages for an incomplete contract

Constructive acceleration

Cases:


Wm. A. Smith Contracting Co. v. United States, 188 Ct. Cl. 1062, 412 F.2d 1325 (Ct. Cl. 1969)
County of Brevard v. Miorelli Engineering, Inc., 703 So.2d 1049 (Fla. 1997)
Southern Gulf Utilities, Inc. v. Boca Ciega Sanitary Dist., 238 So.2d 458 (Fla. 2nd DCA 1970)
Ilgen v. Henderson Properties, Inc., 683 So.2d 513 (Fla. 2nd DCA 1996)
Tuttle/White Constructors, Inc. v. Montgomery Elevator Co., 385 So.2d 98 (Fla. 5th DCA 1980)
Hungerford Const. Co. v. Florida Citrus Exposition, Inc., 410 F.2d 1229 (5th Cir. 1969)

9 – Indemnity, Limit of Liability, and Waiver of Consequential Damages Clauses

Sections 7:20, 7:22, and 7:42, Florida Construction Law Manual

Learning Points:

Common law and contractual indemnity
Duty to defend with indemnity
Potential for statutory limit or requirements for enforceable indemnity
Contractual indemnity for one’s own negligence
Contracts limiting damages
Exculpatory clauses
Waiver of consequential damages

Cases:

Houdaille Ind., Inc. v. Edwards, 374 So.2d 490 (Fla. 1979)
Barton Malow Co. v. Grunau Co., 835 So.2d 1164 (Fla. 2nd DCA 2002)
Pilot Constr. Services, Inc. v. Babe’s Plumbing, Inc., 111 So.3d 955 (Fla. 2nd DCA 2013).
AT & T Information Systems, Inc. v. Enterprises, A.B.C., Inc., 486 So.2d 652 (Fla. 3rd DCA 1986)
Rosenberg v. Cape Coral Plumbing, Inc., 920 So.2d 61 (Fla. 2nd DCA 2005)


National Steel Corp. v. L. G. Wasson Coal Min. Corp., 338 F.2d 565 (7th Cir. 1964)

Atlantic City Assocs., LLC v. Carter & Burgess Consultants, Inc., 2011 WL 1683099 (3rd Cir. 2011)

10 – Termination and Dispute Resolution Procedure

Learning Points:

Termination notice issues

Authority to terminate

Waiver of breach

Damages for wrongful termination

Mediation clauses

Arbitration clauses

Initial dispute resolvers

Waiver of arbitration

Cases:


L.K. Comstock & Co., Inc. v. United Engineers & Constructors Inc., 880 F.2d 219 (9th Cir. 1989)

Avatar Dev. Corp. v. DePani Constr., Inc., 834 So.2d 873 (Fla. 4th DCA 2002)

Seaboard Surety Co. v. U.S. f/u/b/o C. D. G., Inc., 355 F.2d 139 (9th Cir. 1966)

Auchter Co. v. Zagloul, 949 So.2d 1189 (Fla. 1st DCA2007)

HIM Portland, LLC v. DeVito Builders, Inc., 317 F.3d 41 (1st Cir. 2003)

State HRS v. E.D.S. Federal Corp., 631 So.2d 353 (Fla. 1st DCA 1994)
Kemiron Atlantic, Inc. v. Aguakem Intern., Inc., 290 F.3d 1287 (11th Cir. 2002)
Hubbard Const. Co. v. Jacobs Civil, Inc., 969 So.2d 1069 (Fla. 5th DCA 2007)

11 – Damages for Nonperformance

Learning points:
Material vs. immaterial breach
Damages for partial breach
Rescission
Measures of damages for breached construction contract
When the contractor may terminate
Anticipatory breach of contract
Duty to mitigate damages
Unreasonable economic waste effect on damages
Substantial performance doctrine
Splitting causes of action

Cases:
City of Miami Beach v. Carner, 579 So.2d 248 (Fla. 3rd DCA 1991)
Bliss and Laughlin Industries, Inc. v. Malley, 364 So.2d 65 (Fla. 4th DCA 1978)
Specialty Engineering Consultants, Inc. v. Hovstone Props. Fla. LLC, 968 So.2d 580 (Fla. 4th DCAQ 2007)
Lochrane Engineering, Inc. v. Willingham Realgrowth Inv. Fund, Ltd., 552 So.2d 228 (Fla. 5th DCA 1989)


Jackson v. Riley, 427 So.2d 255 (Fla. 5th DCA 1983)


First Nat. Bank of Aberdeen v. Indian Industries, Inc., 600 F.2d 702 (8th Cir. 1979)

 Bass v. Farish, 616 So.2d 1146 (Fla. 4th DCA 1993)


Marshall Const., Ltd. v. Coastal Sheet Metal & Roofing, Inc., 569 So.2d 845 (Fla. 1st DCA 1990)


Twenty-Four Collection, Inc. v. M. Weinbaum Const., Inc., 427 So.2d 1110 (Fla. 3rd DCA 1983)

Russell's Custom Home Repair, Inc. v. O'Donnells Auto Service, 411 So.2d 356 (Fla. 2nd DCA 1982)

Grossman Holdings Ltd. v. Hourihan, 414 So.2d 1037 (Fla. 1982)

Owen Development Corp. v. Molisky, 278 So.2d 299 (Fla. 1st DCA 1973)

Vanater v. Tom Lilly Const., 483 So.2d 506 (Fla. 4th DCA 1986)

Barile Excavating & Pipeline Co., Inc. v. Kendall Properties, Inc., 462 So.2d 1129 (Fla. 4th DCA 1984)

Florida Builders, Inc. v. Stephenson Tile, Inc., 167 So.2d 58 (Fla. 1st DCA 1964)

R. K. Cooper Builders, Inc. v. Free-Lock Ceilings, Inc., 219 So.2d 87 (Fla. 3rd DCA 1969)

Amec Civl, LLC v. State DOT, 41 So.3d 235 (Fla. 1st DCA 2010)

12 – Arbitration


Learning points:

Scope of arbitration agreement

Compelling arbitration

Formality of written arbitration agreement
Federal arbitration act

State arbitration acts

Consolidation of arbitrations

Confirming and Vacating arbitration awards

Rights or duties of third parties to arbitrate

Cases:

Lake Plumbing, Inc. v. Seabreeze Const. Corp., 493 So.2d 1100 (Fla. 2nd DCA 1986)


Raymond James Financial Services, Inc. v. Saidukas, 896 So.2d 707 (Fla. 2005)


Higley South, Inc. v. Park Shore Development Co., Inc., 494 So.2d 227 (Fla. 2nd DCA 1986)


13 – Construction Insurance


Learning Points:

Failure to obtain contractually required insurance

Workers compensation statutory immunity

Workers compensation – statutory employees

Commercial general liability policies – other property

Defective installation by a subcontractor – accident – coverage issue

Equitable contribution and subrogation

Right to defend vs. duty to defend under policy language
Products liability coverage

Completed operations coverage

Builders Risk coverage

Professional liability coverage

Cases:

Federal Ins. Co. v. Hillsborough County f/u/b/o Krauss, 216 So.2d 487 (Fla. 2nd DCA 1968)

Aguilera v. Inservices, Inc., 905 So.2d 84 (Fla. 2005)

Smith v. Larry Rice Const., 730 So.2d 336 (Fla. 1st DCA 1999)

Stone v. Buckley, 132 So.2d 613 (Fla. 2nd DCA 1961)


Auto-Owners Ins. Co. v. Pozzi Window Co., 984 So.2d 1241 (Fla. 2008)

East Florida Hauling, Inc. v. Lexington Ins. Co., 913 So.2d 673 (Fla. 3rd DCA 2005)

Travelers Indemnity Co. v. Milgen Development, Inc., 297 So.2d 845 (Fla. 3rd DCA 1974)


14 – Construction Liens

Sections 8:2, 8:3, 8:9, 8:10, 8:18, 8:21, 8:44, and 10:7, Florida Construction Law Manual

Learning Points:

Liens are a statutory remedy

Procedures vary from state to state

Lien rights vis a vis arbitration

Issues of lien priority and attachment to title

Possible statutory exemptory bonds
Privity and notice

Stop Notice provisions

Lienable services

Liens on condominiums

Lien releases

**Cases:**

Florida Steel Corp. v. Adaptable Developments, Inc., 503 So.2d 1232 (Fla. 1986)


Drilling Service Co. v. Baebler, 484 S.W.2d 1 (Mo. 1972.)

Corporation of President of Latter Day Church of Jesus Christ v. Seymour Elec. Supply Co., 558 So.2d 88 (Fla. 1st DCA 1990)

Harper Lumber & Mfg. Co. v. Teate, 98 Fla. 1055, 125 So. 21 (Fla. 1929)

Florida East Coast Properties, Inc. v. Coastal Const. Products, Inc., 553 So.2d 705 (Fla. 3rd DCA 1989)

Boux v. East Hillsborough Apartments, Inc., 218 So.2d 202 (Fla. 2nd DCA 1969)


Trytek v. Gale Industries, Inc., 3 So.3d 1194 (Fla. 2009)

Graves v. Clega Verde Condominium Ass'n, Inc., 703 So.2d 1109 (Fla. 2nd DCA 1997)

Klein Development v. Ellis K. Phelps & Co., 761 So.2d 441 (Fla. 2nd DCA 2000)

**15 -- Construction Bonds/Suretyship**

**Sections 10:1-10:6, 10:19 and 10:29 Florida Construction Law Manual**

**Learning points:**

The relationship between principal, surety, and obligee
Bid bonds

Payment bonds

Performance bonds

Statutory and common law bonds

Rights and duties of the surety

Cases:


ZP No. 54 Ltd. Partnership v. Fidelity and Deposit Co. of Maryland, 917 So.2d 368 (Fla. 5th DCA 2005)

Federal Ins. Co. v. Southwest Florida Retirement Center, Inc., 707 So.2d 1119 (Fla. 1998)


Hunt Truck Sales & Service, Inc. v. Bonanza Const., Inc., 353 So.2d 612 (Fla. 4th DCA 1977)

Hawaiian Inn of Daytona Beach, Inc. v. Dunn, 342 So.2d 132 (Fla. 1st DCA 1977)

Heritage Ins. Co. of America v. Foster Elec. Co., Inc., 393 So.2d 28 (Fla. 3rd DCA 1981)


16 – International Construction Issues

Learning points:

Note presence of international constructors in Florida – e.g., Balfour-Beatty, Dragados, Odebrecht, OHL, Skanska, etc.

Official language

Choice of law and jurisdiction over contract performance and disputes (Note F.S. 685.101)

Currency (and fluctuation)
Payment Security (lien law, bond, letter of credit, deposit, guaranty, etc.)

Dispute review procedure (note FIDIC, World Bank requirement of use of DRB’s)

International arbitration (Rules, arbitrator selection)

Local governmental regulation – licensing, environmental, permitting and codes, zoning, utilities

Local talent pool and requirements to use local personnel

Security

Sovereign Immunity (governmental entities and Indian tribes)

**Cases and Law Review Article:**


