

The Florida Bar: Real Property, Probate and Trust Law Section
Construction Law Committee

Construction Regulation Subcommittee Monthly Report

Month of: May 2011

Appellate Decisions:

Auto-Owners Insurance Company v. American Building Materials, Inc. and KB Home, et. al., 2011 WL 1878236, Case No. 8:10-cv-313-T-24-AEP, issued May 17, 2011: After home builder (KB Homes) was sued by homeowners for damages resulting from the use of Chinese drywall, KB Homes sued its drywall supplier, American Building Materials, Inc. (ABM), to whom Auto-Owners had issued a Commercial Liability Insurance policy. KB Homes also made a claim against this policy, and Auto-Owners brought suit against both KB Homes and ABM seeking a declaration that it had neither a duty to defend nor indemnity in the underlying lawsuit. Held: Under the “property damages” coverages, Auto-Owners was obligated both to defend and to pay indemnity for such damages, since these were not excluded under the “pollution,” “sistership,” or “your products” provisions of the policy. While this opinion makes reference to the MDL in Louisiana involving Chinese drywall products, its ruling is limited just to the facts of the underlying case.

Austin Building Company v. Rago, Ltd. And Federal Insurance Company, Case No. 3D09-3238, filed April 27, 2011: Cross claims by both contractor (Austin) and concrete structural subcontractor (Rago) based on s. 489.128 (unlicensed statute) were resolved by summary judgments in favor of each party (and the surety, who insured both the contractor and the subcontractor). Both judgments were reversed in this appeal based on the court’s retroactive application of the 2009 statutory changes that delete reference to an “local” license, AND on the genuine issue of material fact as to the extent of the contractor’s knowledge of the subcontractor’s unlicensed status, which would have precluded entry of summary judgment on the basis of the parties being *in pari dilecto*. [citing Castro v. Sangles, 637 So. 2d 989 (Fla. 3d DCA 1994) for the application of this doctrine barring relief to a plaintiff who participated in a wrongdoing].

Editor’s Note: This case applied the 2009 changes to s. 489.128 on a retroactive basis, as expressly provided in those changes, without discussion or apparent arguments regarding the constitutionality of such an application as it may have affected the substantive rights of the parties.

Gonzalez v. Florida Department of Financial Services, Case No. 3D10-2686, filed April 13 2011: Respondent licensee’s failure to timely respond to an administrative complaint seeking to revoke his life and health insurance license was held NOT to be excused under the doctrine of “equitable tolling,” since the licensee had not been misled or lulled into inaction; instead, the respondent advised his attorney of an incorrect date of service of the complaint (which was four days after the actual service date), allegedly due to his medical problems, as a result of which the attorney filed the petition for administrative hearing one (1) day beyond the required 21-days.

Editor’s Note: “Equitable tolling” is a well-recognized doctrine that has been applied to administrative law proceedings where the agency has either misled or lulled a respondent regarding the required action, but you will not find it in Chapter 120, Administrative Procedures Act.

Stok & Associates, P. A. v. Citibank, N.A., Case No. 3D10-3078, filed April 6, 2011: Appeal of a non-final, non-appealable lower court order granting Citibank's motion to stay state court proceedings pending arbitration and resolution of a federal proceedings involving the parties, was treated as a Writ of Certiorari, and denied, based on the concurrent jurisdiction of both state and federal courts and the impact of the federal court's determination. This case points out the major difference in the determination of whether a party's participation in the litigation constitutes a waiver of the right to arbitrate, with the federal courts requiring proof of prejudice to the other party that the state courts do not require.

Surtain v. Caprio, et. al., Case No. 4D10-4776, filed April 6, 2011: Contract purchaser had sought rescission of a contract to have a home constructed on property owned by the builder, as well as for unjust enrichment and to impose an equitable lien thereon for improvements allegedly made by the purchaser with builder's consent prior to closing; a notice of lis pendens was recorded by the purchaser, which builder sought to dissolve or strike because it had found another purchaser for the property. Writ of Certiorari was granted and lower court's dissolution of lis pendens without an evidentiary hearing was reversed and remanded for the purpose of holding a hearing to determine whether the facts establish a "fair nexus" between the legal and equitable ownership of the real property and the claims involved in the lawsuit, with the proponents of the lis pendens having the burden of establishing that nexus.

DOAH Orders:

Department of Business and Professional Regulation, Construction Industry Licensing Board v. Jack V. Organo, Case Nos. 11-0244PL and 11-0245PL, Recommended Order was entered on April 13, 2011, for two (2) fines of \$250 each for failure to include notice of recovery fund in construction contracts, and two (2) fines of \$3,000 and \$1,000 each for commencing construction prior to obtaining building permits with two-year and one-year probation periods to run concurrently.

Agency Actions:

A. Business and Professional Regulation.

1. Construction Industry Licensing Board – Chapter 489, Part I, FS and Chapter 61G4 FAC:
 - a. On April 26, 2011, the board received a Petition for Declaratory Statement from Angela Crane, Vogt Power International, seeking the applicability of s. 489.105, F. S., regarding whether an electrical power generation company can contract with a licensed construction company to install, repair, upgrade, heat recovery steam generations (HRSG), boilers, pressure vessels and related ancillary power generation equipment.
 - b. A Petition for Declaratory Statement was filed on March 29, 2011, by Don White, R.A.W. Construction, asking the board for an interpretation of s. 489.105(3), F. S., regarding whether a general contractor is licensed to install a natural gas distribution system or pipelines.

- c. On May 3, 2011, the board filed its order granting the Petition for Variance or Waiver filed by Michael Robitzsch on February 2, 2011, regarding paragraphs 61G4-15.001(2)(a) and (b), conditionally allowing a limited general contractor's license to construct non-habitable structures exceeding four (4) stores.
 - d. On May 3, 2011, the board filed its order granting the Petition for Variance or Waiver filed by Kevin Trenski on February 4, 2011, regarding paragraphs 61G4-15.001(2), conditionally allowing a limited general contractor's license to construct non-habitable structures exceeding four (4) stores.
 - e. A Petition for Declaratory Statement was filed on May 4, 2011, by Putnam County Planning & Development Services, asking whether a permit can be issued to a licensed contractor is licensed to construct a single family accessory building, such as a detached metal carport, on a slab, if it is within the scope of the local license.
 - f. On April 19, 2011, a petition for permanent waiver or variance of Rule 61G4-18.001, was filed by Shelly A. Storves, regarding the continuing education requirements for renewal or reactivation of licensure.
2. Electrical Contracting Licensing Board (includes both electricians and alarm contractors) – Chapter 489, Part II:
- a. A Petition for Variance and Waiver was filed on February 8, 2011, by Rene Suarez, seeking a waiver of Rule 61G6-6.017, FAC, which requires that a passing examination score on any part of the licensure exam is value only for a period of two (2) years from date of exam.
 - b. A Petition for Variance and Waiver was filed on April 4, 2011, by William Glenn Doke, seeking a waiver of Rule 61G6-6.017, FAC, which requires that a passing examination score on any part of the licensure exam is value only for a period of two (2) years from date of exam.
 - c. Received a petition on April 13, 2011, from Matthew F. Hennessy, seeking a variance or waiver of subsection 61G6-5.002(3), 61G6-5.003 an 61G6-5.004, regarding the supporting documents required for certification by examination or endorsement and for initial testing.
3. Board of Architecture and Interior Design – Chapter 481, Part I, FS and 61G1 FAC:
- a. On May 4, 2011, the board granted the petition for variance or waiver filed on December 2, 1010, by Liliana Custy, as to subsection 61G1-22.002(1), requiring an applicant to obtain the diversified interior design experience required by s. 481.209(2), F. S., from the designees listed therein.
 - b. On May 4, 2011, the board granted a Petition for Declaratory Statement filed on January 2, 2011, by Miguel A. Rodriquiz, clarifying the requirements for use of electronic signatures in lieu of physical signatures.

4. Board of Landscape Architecture – Chapter 481, Part II, FS and 61G10 FAC:

(Nothing to report)

5. Board of Professional Engineers – Chapter 471, FS and 61G15 FAC: A petition for variance or waiver of rule 61G15-20.007, FAC, regarding requirements for demonstration of equivalency of general education courses, was filed on December 6, 2010, by Lygia Torres, was denied on April 5, 2011 based on the petitioner's failure to meet the statutory requirements for a variance or waiver.

6. Building Code Administrators and Inspectors Board – Chapter 468, Part XII and 61G19 FAC: Received a Petition for Declaratory Statement from Sandy Robinson and Paul T. Myers regarding a determination of whether a building code official may perform plan review or inspections under a standard license, to be addressed at the board's June 8-10, 2011, meetings in Orlando.

B. Community Affairs: Florida Building Commission¹ – Chapter 553, Part IV and 9N FAC: A petition for variance or waiver of the requirements of 9B-1.030 regarding the insignia and data plate for factory-built schools was granted on March 31, 2011, but restricted to a procedural requirement of the rule, and the timing of the attachment of an insignia to the inspected building.

C. Environmental Protection: To be determined.

D. Health: Water Quality/Septic Tanks – Chapter 381 and 64E FAC: None of the various bills filed for consideration during the 2011 regular legislative session, repealing the inspection and repair requirements enacted in 2010, passed.

E. Financial Services: Workers' Compensation Insurance – Chapter 440 and 69L FAC:

Warning: Insurance carriers and their representative joint underwriter association appear to be now checking for policies or exemptions issued to recently qualified businesses, and filing complaints with DBPR for those who do not have either. While the current licensure application forms purport to require such insurance coverage within thirty (30) days of licensure, there does not appear to be any statutory requirement for WC coverage until a business has a payroll.

Legislative Action: The following construction-related bills passed during the **2011 Regular Legislative Session:**

¹ In the case of all Petitions for Declaratory Statement filed with the Florida Building Commission, which normally meets every other month, the commission requires both a First Reading and a Second Reading at different meetings, with the results that any final action thereon requires at least 74-75 days, depending on the timing of the filing in relationship to the required publication dates for the Friday Florida Administrative Weekly (Wednesday noon deadline for publication 10 days later).

SB 0142 – Negligence:

Defines the terms "accident," "negligence action," and "products liability action." Requires the trier of fact to consider the fault of all persons who contributed to an accident when apportioning damages in a products liability action alleging an enhanced injury. Requires the jury instructions to apportion certain fault in a products liability action. Provides legislative intent to overrule a judicial opinion. Provides a legislative finding that fault should be apportioned among all responsible persons in a products liability action, etc. This bill, retroactively, overrides the Florida Supreme Court decision in *D'Amario v. Ford Motor Company*, 806 So. 2d 424 (Fla. 2001). EFFECTIVE DATE: upon becoming a law

HB 0331 – Firesafety:

Revises rulemaking authority & responsibilities of State Fire Marshal relating to educational & ancillary plants; revises requirements & procedures for inspections of buildings & equipment; abolishes special state firesafety inspector classifications & certifications; provides criteria, procedures, & requirements for special state firesafety inspectors to be certified as firesafety inspectors; provides procedures, criteria, & requirements for inspections of certain charter schools; provides reporting requirements; requires educational institution boards to submit certain facility site plans to certain local governmental entities for review; authorizes such entities to review site plans for compliance with certain provisions of Florida Fire Prevention Code (FFPC); specifies that site plans are not subject to local ordinances or local amendments to FFPC; imposes additional requirements for certain boards relating to construction, renovation, or remodeling of educational facilities. Effective Date: July 1, 2011

HB 0407 - Relating to Residential Building Permits:

Prohibits local enforcing agencies & building code officials or entities from requiring certain inspections of buildings, structures, or real property as condition of issuance of certain residential building permits, subject to exceptions; provides for application; provides for conditional repeal. EFFECTIVE DATE: July 1, 2012 (next year)

SB 0410 - Relating to Impact Fees:

Reenacts a provision relating to the burden of proof required by the government in an action challenging an impact fee. Provides a legislative finding of important state interest. Provides for retroactive operation of the act. Provides for an exception under specified circumstances. EFFECTIVE DATE: upon becoming a law, and shall operate retroactively to July 1, 2009

HB 0701 - Relating to Property Rights:

Shortens notice period for certain actions; revises procedures for determining governmental entity's final decision identifying allowable uses for property; defines what constitutes first application of law or regulation; clarifies waiver of sovereign immunity for liability; provides for prospective application. Effective Date: July 1, 2011

HB 0723 - Relating to Extraterritorial Reciprocity in Workers' Compensation Claims:

Exempts certain employees working in state & employers of such workers from Florida's Workers' Compensation Law under certain conditions; provides requirements for establishment of prima facie evidence that employer carries certain workers' compensation insurance; requires courts to take judicial notice of construction of certain laws; provides requirements for claims made in other states; provides criteria for employees to be considered temporarily in state; provides application. This bill was supported by the Jacksonville Jaguars and other professional sports teams, to prevent

former athletes from filing such claims in other states, such as California, that have more favorable workers' compensation insurance laws. Effective Date: July 1, 2011

HB 0849 - Relating to Building Construction and Inspection:

Exempts rules that adopt federal standards & certain updates of or amendments to Florida Building Code or Florida Fire Prevention Code from requirement that Legislature ratify any rule that has adverse impact or regulatory costs which exceed certain criteria; specifies national codes to form foundation for state building standards & codes; revises provisions for amendment or modification of foundation code; revises criteria for approval by Florida Building Commission of technical amendments to code, etc. This bill also amends Chapter 489, Part I, to add glass and glazing contractors as Division II licensed contractors; in addition, it prohibits Division I contractors from offering or performing any repairs recommended in a home inspection report prepared by that contractor, but allows them until July 1, 2012, to apply for a "grandfathered" home inspectors license. Effective Date: July 1, 2011

SB 0960 - Relating to Liquefied Petroleum Gas Code:

Prohibits the Department of Agriculture and Consumer Services and other state agencies from requiring compliance with certain national standards for liquefied petroleum gas tanks, unless the department or agencies require compliance with a specified edition of the national standards. Provides for future expiration of such requirements. Revises the term "propane" for purposes of the Florida Propane Gas Education, Safety, and Research Act, to incorporate changes to certain national standards in a reference thereto. Similar provisions are also found in HB 0849, described above. EFFECTIVE DATE: July 1, 2011

HB 0985 - Hillsborough County public project bonds:

Defers future repeal of Chapter 2004-414, Laws of Florida, which relates to projects for which payment & performance bonds may be waived for construction of public building, for prosecution & completion of public work, or for repairs on public building or public work when cost of project is at or below certain threshold & contract for construction, completion, or repair is awarded pursuant to economic development program established to encourage local small businesses to participate in county procurement programs. Effective Date: upon becoming a law

SB 1196 - Construction Liens:

Construction Liens; Specifies that a lessor's interest in property is not subject to a construction lien for improvements made by a lessee if certain documents containing specific information and meeting certain criteria are recorded in the official records of the county before the recording of a notice of commencement. Overrides *Everglades Electric Supply, Inc. v. Paraiso Granite, LLC*, 28 So. 3d 235 (Fla. 3rd DCA 2010). Authorizes certain contractors and lienors to demand that a lessor serve verified copies of a lease prohibiting liability for improvements made by a lessee, etc. EFFECTIVE DATE: October 1, 2011

SB 1204 - Joint Legislative Organizations:

Repeals provisions relating to the Office of Program Policy Analysis and Government Accountability, the Joint Administrative Procedures Committee, the Legislative Committee on Intergovernmental Relations, the Joint Legislative Committee on Everglades Oversight, and the Florida Government Accountability Act, which are now incorporated in the Legislative Joint Rules. Repeal provisions relating to creation of a joint select committee to review the findings and

recommendations of the Century Commission for a Sustainable Florida for potential action, etc.
EFFECTIVE DATE: May 5, 2011

HB 1311 - Walton County:

Provides that certain rigid coastal armoring structures constructed during specified time may remain without need to obtain DEP permit; provides conditions. Effective Date: upon becoming a law

SB 2156 - Governmental Reorganization:

Transfers the functions and trust funds of the Agency for Workforce Innovation to other agencies. Transfers the Office of Early Learning Services to the Department of Education. Transfers the Office of Unemployment Compensation to Jobs Florida. Transfers the Office of Workforce Services to Jobs Florida. Transfers the functions and trust funds of the Department of Community Affairs to other agencies, including the Florida Building Commission, retroactively, which is transferred to the Department of Business and Professional Regulation. Transfers the Florida Housing Finance Corporation to Jobs Florida, etc. EFFECTIVE DATE: July 1, 2011

HB 4129 - Residential Property Structural Soundness Evaluation:

Residential Property Structural Soundness Evaluation Grant Program: Deletes obsolete Citizens Property Insurance Corporation residential property structural soundness evaluation grant program. Effective Date: July 1, 2011. Approved by Governor (Chapter 2011-12, Laws of Florida).

HB 7003 - Affordable Housing:

Reenacts provisions of law relating to affordable housing, portions of which were amended, created, or repealed by Chapter 2009-96, Laws of Florida; provides for retroactive operation with respect to such portions. Effective Date: April 27, 2011

HB 7005 - Unemployment Compensation:

Increases number of employer payroll service providers who qualify for access to unemployment tax information; revises provisions relating to statutory construction; requires that individual claiming benefits report certain information & participate in initial skills review; provides exceptions; clarifies "good cause" for voluntarily leaving employment; disqualifies certain person for benefits; reduces amount & revises calculation of number of weeks of claimant's benefit eligibility; revises employer's unemployment compensation contribution rate by certain factors; revises application to conform to changes made by this act; provides employer payment schedule for 2012, 2013, & 2014 contributions; revises allowable forms of evidence in benefit appeals; revises judicial venue for reviewing commission orders; specifies that evidence of mailing agency document is based on date stated on document; revives, readopts, & amends provision relating to temporary extended benefits; provides for retroactive application; establishes temporary state extended benefits for weeks of unemployment; provides for state extended benefits for certain weeks & for periods of high unemployment; provides severability; provides applicability; provides appropriations for purposes of implementation; provides that act fulfills important state interest. Effective Date: upon becoming a law

Respectfully submitted,
May 25, 2011

-end of report-