Revised 8-20-10

CONSTRUCTION AND THE LAW

FALL 2010– COURSE OUTLINE

I. TIME AND LOCATION

Time: Mondays, 5:30 - 7:20 p.m.
Location: Room A225

II. INSTRUCTORS

Walter J. Sears III
Bradley Arant Boult Cummings LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104
wsears@babc.com
(205) 521-8202

James F. Archibald, III
Bradley Arant Boult Cummings LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104
jarchibald@babc.com
(205) 521-8520

III. GRADING

Your grade will be based on a written essay-type examination at the end of the course. Class participation, or lack thereof, may be considered in determining your final course grade.

IV. COURSE OBJECTIVES

To recognize the variety of legal issues and problems that can confront owners, contractors, subcontractors, and suppliers during the construction process.

To be able to understand and analyze those issues and problems.

To be able to provide reasonably valuable advice and guidance to clients involved in the construction process.

V. COURSE TOPICS AND READING ASSIGNMENTS

Class 1 – August 16, 2010

A. Overview of Course

1. Smith, Currie & Hancock LLP's Common Sense Construction Law (3rd edition).
2. American Institution of Architects contract forms.
3. Additional cases and statutes are listed in this Course Outline.
4. The grade will be based on final exam (essay format).
5. Class participation may improve grade.

B. Overview of Construction Industry and Construction Legal issues

1. The Legal Context of Construction.
2. What Construction Lawyers Do.
3. The Players on a Construction Project.
4. Types of Project Delivery Systems.
5. Pricing Variations and Risk Allocation.

Assignment:

Common Sense Construction Law, Chapters 1 and 2

Class 2 – August 23, 2010

A. Contract Formation

B. Requirements for Entering a Valid Construction Contract

1. Qualified to Transact Business

2. General Contractors License

C. What is the Contract?

1. Bid Documents

2. Contract

3. General Conditions

4. Special Conditions

5. Specifications

a) Design specifications

b) Performance specifications

6. Drawings

D. Contract Interpretation

1. Defined terms

2. Parole Evidence

3. Prior Dealings

4. Custom and Usages in the Industry

E. Implied Obligations

1. Duty to Cooperate

Assignment:

Stephenson Brick Co. v. Bessemer Eng'g & Const. Co., 118 So. 570 (Ala. 1928) (contract formation)

Carlson v. Alabama Power Co., 628 So. 2d 913 (Ala. Civ. App. 1993) (contract formation)

Ala. Code, § 10-2B-15.02

Wallace Construction Co. v. Industrial Boiler Co., 490 So. 2d 1151 (Ala. 1985) (qualification)

Hays Corp. v. Bunge Corp., 777 So. 2d 62 (Ala. 2000) (qualification)

Ala. Code § 34-8-1, -2

J&M Industries v. Hughley Oil Co., 546 So. 2d 367 (Ala. 1989) (licensing)

McNairy v. Sugar Creek Resort, Inc., 576 So. 2d 185 (Ala. 1991) (licensing)

Common Sense Construction Law, Chapter 3 I – 3 III (qualifying to do business)

Common Sense Construction Law, Chapter 5 (contract interpretation)

AIA Contract A101-1997

AIA General Conditions A201-1997

Alabama Soc. for Crippled Children v. Still Const. Co., 309 So. 2d 102 (Ala. 1975) (contract ambiguity)

Commercial Contractors, Inc. v. USF&G Co., 524 F.2d 944 (5th Cir. 1975) (Part IV) (parol evidence)

George A. Fuller Co. v. U.S., 69 F. Supp. 409 (Ct. Cl. 1947) (implied duty to cooperate)

Class 3 – August 30, 2010

A. Competitive Bidding on Public Projects

1. Lowest Responsible and Responsive Bidder
2. Bid Mistakes
3. Bid Protests

Assignment:

Common Sense Construction Law, Chapter 4

Ala. Code § 39-2-1 *et seq.* (public bid laws in Alabama)

Ward Int'l Trucks v. Baldwin Co. Bd. of Ed., 628 So. 2d 572 (Ala. 1993) (bid protest)

Water Works Bd. v. Jones Envt'l Constr., 533 So. 2d 225 (Ala. 1988) (bid mistake)

General Electric Co. v. City of Mobile, 585 So. 2d 1311 (Ala. 1991) (sole source exception)

Anderson v. Fayette County Bd. of Ed., 738 So. 2d 854 (Ala. 1999) (awarding authority's discretion; remedies)

TFT, Inc. v. Warning Systems, Inc., 751 So. 2d 1238 (Ala. 1999)

Class 4 – September 13, 2010

A. Changes Clause

B. Recovery under the Changes Clause

C. Constructive Changes

D. Cardinal Changes

Assignment

Common Sense Construction Law, Chapter 9

AIA General Conditions A201-1997, Article 7 only

Medical Clinic Bd. v. Smelley, 408 So. 2d 1203 (Ala. 1981) (notice of extra work)

York Eng'g v. City of Montgomery, 374 So. 2d 884 (Ala. 1979) (written authorization for extra work)

Allied Mills, Inc. v. St. John, 152 So. 2d 133 (Ala. 1963) (cardinal change)

Commercial Contractors, Inc. v. USF&G Co., 524 F.2d 944 (5th Cir. 1975) (oral change)

Ex parte Coleman, 751 So. 2d 1080 (Ala. 2003) (oral change, waiver of writings clause)

Class 5 – September 20, 2010

A. Payment Clauses

1. Progress Payments
2. Remedies for Nonpayment
3. Retainage
4. Final Payment

B. Substantial Completion

C. Inspection and Acceptance

D. Warranties

1. Express Warranties
2. Implied Warranties
3. Warranty of Plans and Specifications

Assignment:

Common Sense Construction Law, Chapter 12 I – 12 III

AIA General Conditions A201-1997, Articles 3.3.3, 3.5, 4.2.2, 4.2.3, 4.2.6, 4.2.9, 9, 12, 13.5

Ala. Code, § 39-2-12

McFadden v. Ten-T Corp., 529 So. 2d 192 (Ala. 1988) (acceptance)

Dial v. Graves, 351 So. 2d 598 (Ala. 1977) (latent defects)

Huffman-East Dev. v. Summers Electric Supply Co., 263 So. 2d 677 (Ala. 1972) (substantial performance)

United States v. Spearin, 248 U.S. 132 (1918) (implied warranty of specifications)

Commercial Contractors v. Sumar Contractors, 302 So. 2d 88 (Ala. 1974) (defective specifications)

O'Connor v. Scott, 533 So. 2d 241 (Ala. 1988) (caveat emptor)

Cochran v. Keeton, 252 So. 2d 313 (Ala. 1971) (implied warranty of habitability)

Broyles v. Brown Engineering, 151 So. 2d 767 (Ala. 1963) (implied warranty)

K.B.Weygand & Associates v. Deerwood Lake Company, 812 So. 2d 1165 (Ala. 2001) (implied warranty)

Aldridge v. Valley Steel Constr., Inc., 603 So. 2d 981 (Ala. 1992) (following plans and specifications)

Hannah v. Gregg, Bland & Berry, Inc., 840 So. 2d 839 (Ala. 2002) (obviously defective plans and specifications)

Class 6 – September 27, 2010

A. Differing Site Conditions

1. Significance of unforeseen site conditions

2. Liability for increased costs caused by site conditions

3. Contractual risk allocation for added site costs

B. Force Majeure Events and Impossibility

Assignment:

Common Sense Construction Law, Chapter 10

AIA General Conditions A201-1997, Article 4.3.4

Mobile Turnkey Housing, Inc. v. Ceafco, Inc., 321 So. 2d 186 (Ala. 1975) (differing site conditions)

Berkel & Co. Contractors v. Providence Hospital, 454 So. 2d 496 (Ala. 1984) (differing site conditions)

Commercial Contractors, Inc. v. Sumar Contractors, Inc., 302 So. 2d 88 (Ala. 1974) (differing site conditions)

C.F. Halstead v. Dirt. Inc., 320 So. 2d 657 (Ala. 1975) (differing site conditions)

AIA General Conditions A201-1997, Article 8.3.1

Alpine Constr. Co. v. Water Works Board of City of Birmingham, 377 So. 2d 954 (Ala. 1979) (force majeure)

Silverman v. Charmac, Inc., 414 So. 2d 892 (Ala. 1982) (commercial impracticability)

Blount Brothers Corp. v. United States, 872 F.2d 1003 (Fed. Cir. 1985) (commercial impracticability)

Commercial Contractors, Inc. v. USF&G Co., 524 F.2d 944 (5th Cir. 1975) (commercial impracticability)

Class 7 – October 4, 2010 and Class 8 – October 11, 2010

A. Time Requirements

1. Substantial Completion

B. Scheduling Requirements

C. Extensions of Time

1. Excusable and Non-Excusable Delays

2. Compensable and Non-Compensable Delays

D. Causes of Delay

E. Claims Process

1. Key Contract Provisions

F. Damages

1. Contractor

2. Owner

G. Acceleration

Assignment:

Common Sense Construction Law, Chapter 11

AIA General Conditions A201-1997, Article 4.3.7, 3.10

AIA General Conditions A201-1997, Article 8

E.C. Ernst, Inc. v. Manhattan Constr. Co., 551 F.2d 1026 (5th Cir. 1977), cert. denied, 434 U.S. 1067 (1978) (no damages for delay)

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

Commercial Contractors, Inc. v. USF&G, 524 F.2d 944 (5th Cir. 1975) (part V, pp. 951-54) (waiver of notice requirement)

Medical Clinic Bd. v. Smelley, 408 So. 2d 1203 (Ala. 1981) (actual notice)

Class 9 – October 18, 2010

A. Remedies for Breach of Contract

1. Specific Performance
2. Money Damages
3. Limitations on recoverable damages

B. Methods for Pricing Claims

1. Total Cost Method
2. Segregated Cost Method

C. Measurement of Contractor Damages

1. Direct Costs
2. Delay Damages
3. Acceleration Costs
4. Inefficiency

D. Measurement of Owner Damages

1. Direct Damages
2. Consequential Damages
3. Liquidated Damages

Assignment:

Common Sense Construction Law, Chapter 16

AIA General Conditions, A201-1997, Article 4.3.10 (waiver of consequential damages)

Med Plus Properties v. Colcock Constr. Group, 628 So. 2d 370 (Ala. 1993) (damages for breach of contract)

Fox v. Webb, 105 So. 2d 75 (Ala. 1958) (damages – repair costs)

Hubbard Bros. Constr. Co. v. Brackner, 390 So. 2d 648 (Ala. Civ. App. 1980) (damages – diminution in value)

So. Metal Treating v. Goodner, 125 So. 2d 268, 274-76 (Ala. 1960) (consequential damages)

Milton Constr. Co. v. Alabama Highway Dept., 568 So. 2d 784 (Ala. 1990) (liquidated damages)

Class 10 – October 25, 2010

A. Subcontractor Selection

B. Subcontractor Bidding

C. Key Subcontract Provisions

1. Flow-Through Clauses
2. Scope of Work
3. Payment Clauses
4. Termination
5. Directive Power
6. Indemnification

D. Claims and Disputes

1. Duty to Coordinate Subcontractor
2. Responsibility to Owner
3. Subcontractor Claims Against the Prime Contractor
4. Pass-Through Claims Against the Owner
5. Claims Against Third Parties

Assignment:

Ala. Code §§ 8-29-1 to 8 (Prompt Payment Act)

Common Sense Construction Law, Chapter 8, Chapter 4 XV

Drennan v. Star Paving, 333 P.2d 757 (Cal 1958) 5 (subcontractor bid – promissory estoppel)

Federal Insurance Co. v. I. Kruger, Inc., 829 So. 2d 732 (Ala. 2002) (pay when paid clause)

Wayne J. Griffin Elec. v. Dunn Const. Co., 622 So. 2d 314 (Ala. 1993) (release)

George Hyman Constr. Co. v. U.S., 30 Fed. Cl. 170 (1993) (pass-through claims)

AIA General Conditions A201 – 1997 Articles 5, 9.6.2, 9.6.3, 9.6.4, 9.6.7

AIA Contractor-Subcontractor Agreement A401 – 1997

Brown Mechanical Contractors, Inc. v. Centennial Insurance Co., 431 So. 2d 932 (Ala. 1983) (indemnity)

Hartford Accident & Indemnity Co. v. Cochran Plastering Co., Inc., 935 So.2d 462 (Ala. Civ. App. 2006) (pay-when-paid; release not effective)

Tolar Const., LLC v. Kean Elec. Co., Inc., 944 So. 2d 138 (Ala. 2006) (Prompt Payment Act)

Class 11 – November 1, 2010

A. Risk Management through Contractual Disclaimers

B. Risk Management through Indemnity Provisions and Claims

C. Type of Insurance

1. Commercial General Liability (CGL) Insurance

2. Builder's Risk Insurance

D. Subrogation Rights

1. Waiver of Subrogation

Assignment:

AIA General Conditions A201, Articles 11, 3.18, 10.3.3

Common Sense Construction Law, Chapters 13 I, 13 III, 13 IV, 18

Apel Machine & Supply Co. v. J.E. O'Toole Eng. Co., 548 So. 2d 445 (Ala. 1989) (indemnification)

Craig Constr. Co. v. Hendrix, 568 So. 2d 752 (Ala. 1990) (indemnification)

Reliance Ins. Co. v. Gary C. Wyatt, 540 So. 2d 688 (Ala. 1988) (failure to obtain insurance for another)

Commercial Fire Ins. Co. v. Capital City Ins. Co., 8 So. 222 (1886) (builder's risk)

Indust. Risk Insurers v. Garlock Equip. Co., 576 So. 2d 652 (Ala. 1991) (waiver of subrogation)

Class 12 – November 8, 2010

A. Mechanic's Lien Laws

1. Who has lien rights
2. What kind of work supports the right to a lien
3. Full price lien vs. unpaid balance lien
4. Requirements to perfect a lien
   (a) Notice
   (b) Statement of Lien
   (c) Suite
   (d) Judgment
5. Lien priorities
6. Bonding off a lien

B. Sureties and Bonds

1. The parties
2. Bonds governed by general contract law
3. Kinds of bonds
   (a) Bid bonds
   (b) Payment bonds

Assignment:

Common Sense Construction Law, Chapter 3 VI

Ala. Code §§ 35-11-210, 213, 215, 218, 221, 223

Bolvig, Rogers, Sears, Alabama Lien and Bond Law (handout)

Pinecrest Apts. Ltd. v. R. P. McDavid Co., 535 So. 2d 126 (Ala. 1988) (lien rights)

Davis v. Gobble-Fite Lumber Co., 592 So. 2d 202 (Ala. 1991) (full price vs. unpaid balance lien)

Bailey Mortgage Co. v. Gobble-Fite Lumber Co., 565 So. 2d 138 (Ala. 1990) (liens)

Burch v. First Coastal Building Supply, 606 So.2d 146 (Ala.Civ.App. 1992) (unpaid balance lien)

Valley Joist, Inc. v. CVS Corporation, 954 So. 2d 1115 (Ala. Civ. App. 2006) (unpaid balance lien); cert denied

Common Sense Construction Law, Chapter 14

Alabama Code § 39-1-1

Fidelity & Cas. Co. of New York v. Central Bank of Birmingham, 409 So.2d 788 (Ala. 1982) (payment bond surety right of subrogation)

Medical Clinic Bd. v. Smelley, 408 So. 2d 1203, 1206-1208 (Ala. 1981) (public owner liability for failure to require bond)

Ex parte Theresa Lawson, ___ So. 2d ___, 2008 WL 2780780 (Ala., July 2008)

Class 13 – November 15, 2010

A. Sureties and Bonds (cont.)

3. Kinds of Bonds

(c) Performance Bonds

4. The surety's rights and defenses

B. Termination

1. By agreement of the parties

2. Contractual termination

(a) For cause

(b) For convenience

3. Termination by law

4. Termination and subcontractors

Assignment:

Alabama Code § 39-1-1

Common Sense Construction Law, Chapter 15

AIA General Conditions A201-1997, Article 14

Commercial Contractors Ins. v. USF&G, 524 F.2d 944 (5th Cir. 1975) (Part VI, p. 954) (waiver of termination rights)

Watts Const. Co. v. Cullman Co., 382 So. 2d 520 (Ala. 1980) (termination by agreement)

Ex parte Woodward Constr., 627 So. 2d 393 (Ala. 1993) (wrongful termination)

Tolar Const. Co., LLC v. Kean Elec. Co., Inc., 944 So. 2d 138 (Ala. 2006) (wrongful termination damages)

Class 14 – November 22, 2010

A. Arbitration

1. Peculiarities, advantages, disadvantages

2. Enforceability

B. Mediation and Other Forms of Alternative Dispute Resolution

C. Course review and Exam Practice

Assignment:

Common Sense Construction Law, Chapter 21

AIA General Conditions A201-1997, Articles 4.4, 4.5, 4.6

Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.,
460 U.S. 1 (1983)

Allied Bruce Terminix v. Dobson, 115 S.Ct. 834 (1995)