CONSTRUCTION AND THE LAW
FALL 2013—COURSE OUTLINE (2D REVISION)

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. COURSE OBJECTIVES

To recognize the variety of legal issues, problems, and practical business risks
that can confront your clients (owners, contractors, subcontractors, and suppliers) during
the construction process.

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

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

IV. GRADING

Your grade will be based on a written essay-type examination at the end of the
course. The grade on the exam will count as 80% of your final grade. For the other 20%,
you will write a practical, client-oriented summary of a case in which you will explain to
your client what the case is about, what the court decided, and why it is important to your
client’s business. You will select the case, subject to our approval. We’ll give you
samples of what we are looking for. The summary will be due November 18, 2013.

Class participation may be considered in determining your final course grade.
V. COURSE TOPICS AND READING ASSIGNMENTS

Class 1 – August 19, 2013

A. Overview of Course


2. American Institution of Architects and Consensusdocs 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 26, 2013

A. What is a construction contract?

Assignment:


   Read this case carefully. Think about what may have happened on this project that the court does not tell us about. As a practical matter, what could the parties have done to avoid this result? If you were the lawyer for the owner or the contractor during this project, what advice would you have given to your client?

2. Familiarize yourself with the contents and structure of these two commonly used form contracts:

   a. Consensusdocs 200, Standard Agreement and General Conditions Between Owner and Contractor (where the Contract Price is a Lump Sum).

   b. American Institute of Architects (“AIA”) A101-2007, Standard Form of Agreement Between Owner and Contractor where the basis of payment is a Stipulated Sum, and

   c. AIA A201-2007, General Conditions of the Contract for Construction.

   (These three documents are on the disk at the inside back cover of Common Sense Construction Law.)

   These contract documents have evolved over many years in response to the risks, problems, and issues that typically can arise on a construction project. You don’t have to read every word of these contracts for this class, but at least page through them and consider the matters addressed. We will be coming back to these contracts frequently in this course.
Class 3 – September 9, 2013

A. Changes Clause
   1. Recovery under the Changes Clause
   2. Constructive Changes

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

Assignment

Common Sense Construction Law: Chapter 9, I-V

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

Mobile Turnkey Housing, Inc. v. Ceafco, Inc., 321 So.2d 186 ( Ala. 1975)
Class 4 – September 16, 2013

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; Chapter 9 VIII
Berkel & Co. Contractors v. Providence Hospital, 454 So. 2d 496 (Ala. 1984) (differing site conditions)
Alpine Constr. Co. v. Water Works Board of City of Birmingham, 377 So. 2d 954 (Ala. 1979) (force majeure)
Class 5 – September 23, 2013

A. Acceptance
   1. Inspection
   2. Substantial Completion
   3. Final Completion
   4. Accepted work doctrine

B. Warranties and Implied Obligations
   1. Express Warranties
   2. Implied Warranties
      a. Warranty of Plans and Specifications
   3. Duty not to Hinder/Duty to Cooperate

Assignment:

Common Sense Construction Law: Chapter 12 I-III
Hosea O. Weaver and Sons, Inc. v. Balch, Ala. Sup. Ct., 6/28/13 (accepted work doctrine)

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


Class 6 – September 30, 2013

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

The Lemoine Company of Alabama, LLC v. HLH Constructors, Inc., 62 So.3d 10920 (Ala. 2010) (pay if paid)


Class 7 – October 7, 2013

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 I-VI, IX, XI, XIII-XV

Ala. Code § 39-2-1 et seq. (public bid laws in Alabama); 39-5-1 et seq. (bid protests)

White v. McDonald Ford Tractor Co., 248 So. 2d 121 (Ala. 1971) (awarding authority discretion; sole source)


Class 8 – October 14, 2013 and Class 9 – October 21, 2013

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
   2. No Damage for Delay

F. Acceleration

Assignment:

Common Sense Construction Law: Chapter 11

Marriott Corp. v. Dasta Construction Co., 26 F.3d 1057 (11th Cir. 1994)
Class 10 – October 22, 2013

A. Remedies for Breach of Contract
   1. Specific Performance
   2. Money Damages
   3. Limitations on recoverable damages

B. Measurement of Contractor Damages
   1. Direct Costs
   2. Delay Damages
   3. Acceleration Costs
   4. Inefficiency

C. Methods for Pricing Claims
   1. Total Cost Method
   2. Segregated Cost Method

D. Measurement of Owner Damages
   1. Direct Damages
   2. Consequential Damages
   3. Liquidated Damages

Assignment:

Common Sense Construction Law: Chapter 16


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

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

New Pueblo Constructors, Inc. v. State of Arizona, 696 P.2d 185 (Ariz. 1985) (read through the beginning of Section I of the opinion to understand the facts. Read Section III on The Measure of Damages.)
Class 11 – November 4, 2013

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:

Common Sense Construction Law: Chapters 13 I, III, IV; 18 I-VI


Class 12 – November 7, 2013

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. Payment Bonds
   1. The parties
   2. Alabama little Miller Act
   3. The surety’s rights and defenses

Assignment:

Common Sense Construction Law: Chapter 3 VI


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

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


Common Sense Construction Law: Chapter 14

Alabama Code § 39-1-1
AIA A312 – 2010 Payment Bond

Class 13 – November 18, 2013

A. Performance Bonds
   1. Parties
   2. Alabama little Miller Act
   3. 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:

Common Sense Construction Law: Chapters 15

AIA A312 – 2010 Performance Bond

Alabama Code § 39-1-1


Qwestar Builders, Inc. v. CB Flooring, LLC, 978 A.2d 651 (Md. 2009) (read the relevant subcontract provisions at the beginning of the opinion. Section I on p. 663 begins with a detailed discussion of the genesis and history of termination for convenience clauses in government contracts. You don’t have to read that unless you are interested. Do read the analysis of such clauses in private contracts starting on the bottom of p. 668 to the end of Section I).
Class 14 – November 25, 2013

A. Arbitration
   1. Peculiarities, advantages, disadvantages
   2. Enforceability

B. Mediation and Other Forms of Alternative Dispute Resolution

C. Exam Review – sample questions

Assignment:

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