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New Year Message

Happy New Year ConsensusDocs Construction Law Newsletter readers! Our 2018 goal is to continue to bring you the latest in construction law and contract information in one handy and free resource. We are excited to announce that Jones Walker LLP, a law firm serving local, regional, national, and international business interests in a wide range of markets and industries, including construction, has joined our current sponsors: Pepper Hamilton LLP, Smith, Currie & Hancock LLP, and Peckar & Abramson in bringing you the most up-to-date information on construction law.

We look forward to helping you reach your goals in 2018, and continuing to celebrate a decade of bringing the AEC industry together to create standard construction contracts that create a better contractual foundation to build successfully! We will be presenting at a variety of locations in the coming months, see if there is an event near you.

Onward and Upward!
Brian Perlberg
Executive Director and Senior Counsel
ConsensusDocs

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Cross Your T's With Liens, or Risk Everything

William J. Shaughnessy, Esq., Associate, Jones Walker LLP

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If you need a lien to secure payment, take care to cross your “t’s” and dot your “i’s”, or you put that critical financial security at risk. Yes, be warned that most states strictly construe lien laws against the lien claimant. That means even a slight clerical misstep can invalidate a lien and leave you with nothing. There are also a minority of states that have taken a more liberal approach by only requiring reasonable or substantial compliance with statutory lien requirements. This article illustrates the range of outcomes under these varying standards with several recent cases from across the country.

The policy behind strict application of lien statutes is that the statutes are in derogation of common law and can cause serious financial issues for an innocent owner; for that reason, a majority of states have strictly construed the lien statutes in favor of the property owner and against the claimant. The substantial compliance view, on the other hand, relies on the remedial nature of lien laws, to construe liens in favor of the protection of those who provided goods and services to improve the owner’s property.

Always remember that lien laws vary in every state and, regardless of leniency indicated in some of the cases, you should always pursue strict compliance. Understanding the laws of the state where the project is located is pivotal in knowing the steps to take to pursue or defend a lien.

Strict Application to Invalidate Liens

The pitfalls to lien claimants in states that enforce strict application are illustrated by recent cases dealing with failure to use precise statutory wording in the lien and the impact of the many time deadlines often associated with lien claims. In *Prodigy Construction Corporation, Inc. v. Brown Capital Ltd,*[1] *2017 WL 3317537 (Ky. App. 2017)* the Kentucky Court of Appeals held a lien was defective because the contractor simply failed to use the language “subscribed and sworn to” as required by statute. The court noted earlier Kentucky case law that specifically rejected arguments that the lien statutes should be liberally construed for the benefit of lien claimants because the lien laws confer a right in derogation of common law. This decision should serve as a reminder to always reference the specific language in a state’s lien statute and to track that specific language when drafting any lien documents – freelance at your peril.

Georgia also strictly construes lien statutes in favor of the property owner. Georgia lien law allows a lien claimant, who previously signed a lien waiver, to file an affidavit of non-payment which nullifies the lien waiver. But the Georgia statute is very clear that the affidavit of non-payment must be signed within 60 days of the original waiver. In *Bibler Masonry Contractors, Inc. v. J.T. Turner Construction Company, Inc.,*[2] a Georgia court denied a subcontractor’s attempt to enforce after the subcontractor failed to timely file an affidavit of non-payment with the court within 60 days from the date shown on the lien waiver. In that case, the subcontractor signed – and contends it backdated – a lien waiver in anticipation of final payment from the general contractor. However, when the contractor failed to pay, the subcontractor filed an affidavit of non-payment, but did so more than 60 days past the date shown on the lien waiver.

[1] 2017 WL 3317537 (Ky. App. 2017).
[2] 340 Ga. App. 490, 798 S.E.2d 19 (2017).

While the subcontractor argued that the 60 days should run from the day it actually signed the lien waiver, not from the backdated date, the disagreed noting that to read the statute as the subcontractor proposed would give a lien claimant a way to alter the dictated deadlines found in the statute to the detriment of the property owner.

When Substantial Compliance is Good Enough

West Virginia is one of those states that holds contractors only to a "substantial compliance" standard. In *L.A. Pipeline Construction, Inc. v. Glass Bagging Enterprises, Inc.,*[3] the Supreme Court of West Virginia held that the lien claimant's reference to a property owner's address in its lien was sufficient and in substantial compliance with the lien statute, even though the lien did not contain a street address or metes and bounds description of the property where materials had been utilized by the contractor. The unique issue in that case was that the lien related to the construction of a pipeline. The Court recognized that, unlike the construction of a home, building, or bridge, the lien claimant could not know precisely where its materials are being used. Applying the liberal construction standards, the Court sided with the lien claimant's position that a supplier is not required to describe every improvement, lot, or parcel where the materials are used and agreed that anyone conducting a title search on the property where the pipeline traversed would find the mechanic's liens filed on the property.

Florida courts are unique in that they have applied a strict compliance standard on time requirements of the lien statute, but a substantial compliance standard for service requirements. In *Hiller v. Phoenix Associates of South Florida, Inc.*[4], the Florida court strictly applied the statutory time limits and held that a lien was extinguished automatically when the lien claimant failed to commence enforcement against the surety within the statutory timeframe. Applying a more liberal approach, in *Trump Endeavor 12 LLC v. Fernich, Inc.*[5], the Florida Court held that a lien claimant was entitled to enforce its lien against the owner, even though the lien claimant's notice to the owner included the incorrect name of the general contractor. Applying the substantial compliance standard to the notice requirements of the statute, the court based its decision largely on the undisputed facts that the owner had actual, express and timely notice the lien claimant mistakenly named the wrong contractor; that the lien claimant was supplying materials on the project; and that the lien claimant intended to lien the property if payment was not timely made.

Conclusion, Closing Thoughts, and Cautions

Whether a court will apply a strict or a more liberal substantial compliance standard to a lien depends largely on the state where the project is located. Regardless of where the project is located, however, lien claimants should treat all lien filings and requirements as if a court would require strict application of the lien statute, recognizing the standard to be applied by a particular court could go a long way in successfully enforcing a lien and obtaining financial security. The bottom line to receiving lien protection: follow the state process set forth in the statutes, use the state forms or statutory language and be aware of and meet all deadlines. Otherwise, your lien may prove worthless.

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[3] 2016 WL 6304570 (W.Va. 2016).
[4] 189 So. 3d 272 (Fla. 2nd DCA 2016).
[5] 216 So. 3d 704 (Fla. 3d DCA 2017).

Alabama, Arizona, the District of Columbia, Florida, Georgia, Louisiana, Mississippi, New York, and Texas. For more information about Jones Walker LLP please visit **http://www.joneswalker.com/**.

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Why Let Hazardous Materials Cause Unnecessary Delay and Extra Costs

Sarah E. Carson, Of Counsel, Smith, Currie & Hancock LLP

The risk of discovering hazardous materials during construction is well known in the construction industry, as is the risk of mishandling hazardous materials. Such a discovery will, most likely, bring the project to a halt while the hazardous materials are removed or rendered harmless. It may also be necessary to obtain approval of a government agency before work can proceed. Delay and increased project costs will inevitably follow. For both owners and contractors, it is much better to deal with the issue of hazardous waste during initial planning and scheduling when the cost impact can most effectively be minimized. And this can best be accomplished by thoroughly investigating the site before starting work. Which party should be primarily responsible for such an investigation? For projects using ConsensusDocs, it is the owner.

The ConsensusDocs coalition has recently revised and reorganized the hazardous waste provisions in its ConsensusDocs 200 Standard Agreement and General Conditions Between Owner and Constructor. These revisions provide a straight-forward, unambiguous allocation of responsibility for dealing with hazardous waste encountered during a construction project. Simply put, the owner is responsible for testing and removing hazardous waste. The contractor is not obligated to start work until any hazardous waste discovered during the pre-construction investigation has been removed and rendered harmless. If hazardous waste is encountered during construction, the contractor is entitled to stop work in the affected area and is not obligated to resume work without a written mutual agreement that the hazardous material has been removed or rendered safe. At the start of the project, the owner is obligated to provide the contractor with information regarding the presence and nature of hazardous waste at the site, but only to the extent the owner has obtained such information.

The ConsensusDocs contracts do not mandate that the owner investigate its site for hazardous materials. For many greenfield projects, the site may be so clean that searching for hazardous waste would be a waste of time. But for any project location that is not known to be clean, the ConsensusDocs allocation of risk is such that any reasonably prudent owner should feel compelled to do a thorough pre-construction investigation, beginning with a thorough look at the project site.

There are many visible indicators of hazardous waste. For example, stains on the ground and dead or dying vegetation, pipes protruding from the ground, piles of waste materials, and discarded or partially buried metal drums and other containers. Information is also available from the Environmental Protection Agency. EPA maintains an Envirofacts database and a Multisystem Search form on its website that allows a project owner to search multiple environmental databases for facility information, including toxic chemical releases, water discharge permit compliance, hazardous waste handling processes, Superfund status, and air emission estimates. The Envirofacts database can be searched using any combination of the following criteria: facility name, geography, facility industrial classification, or pollutant. In

addition to the EPA, state or local agencies may have information concerning studies, investigations, or enforcement actions related to the project site.

Once a prudent owner has done a thorough pre-construction investigation for the presence of hazardous materials, CD 200 Article 4, paragraph 4.3 requires the owner to share the results of the investigation with the contractor. This provides both parties the optimal opportunity to plan for and attempt to avoid unnecessary delays and extra costs caused by unforeseen hazardous waste.

Smith, Currie & Hancock LLP is a national boutique law firm that has provided sophisticated legal advice and strategic counsel to our construction industry and government contractor clients for fifty years. We pride ourselves on staying current with the most recent trends in the law, whether it be recent court opinions, board decisions, agency regulations, current legislation, or other topics of interest. Smith Currie publishes a newsletter for the industry "Common Sense Contract Law" that is available on our website: **www.SmithCurrie.com**.

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Combatting Arbitration Inefficiency

Richard W. Foltz Jr., Partner, Pepper Hamilton LLP

"Arbitration has been proven to be an effective way to resolve disputes fairly, privately, promptly and economically." So provides the preamble to the Construction Industry Rules of the American Arbitration Association. But construction industry participants have grown wary of arbitrations that are neither prompt nor economical, suffering delays and generating transactional costs that can approach and sometimes surpass those in litigation. The problem is real, and can limit the advantages arbitration brings to dispute resolution in the construction industry.

Arbitration costs and delays can cascade out of control even with skillful and mature counsel on both sides, and an experienced arbitration panel. Experience has shown that two factors can lead to such a result. First, arbitration hearings can proliferate, without an experienced judge to control and limit the evidence, leading to evidentiary hearings of unnecessary length. Second, while most arbitration rules provide for some pre-hearing information exchange, that process can devolve into an excessive discovery program, including binding party depositions along the lines of those provided in Federal Rule 30(b)(6) that can become a burdensome examination of contentions, and expensive exchange of electronically stored information (ESI).

In a recent construction arbitration, protracted hearings and expensive discovery led to attorneys' fees and costs in the millions of dollars, with a prevailing party award that jeopardized the collectability of the ensuing judgment. A more streamlined arbitration would most likely have yielded a better result for both parties. This article examines the source of this problem, and suggests what parties and arbitrators can do at contract formation time, at commencement of the arbitration, and over the course of hearings to ensure a more cost-effective arbitration.

There Should Be Reasonable Limits on the Receipt of Evidence

Many arbitrators believe that because awards can be set aside by the refusal of the panel to receive evidence, the best way to avoid a reversal is to liberally allow all evidence, discovery or delay a party requests. But that posture significantly overreacts to the potential risk of vacation of an otherwise proper award. Taken too far, this can undermine the benefits of arbitration to begin with – a prompt and cost-effective dispute resolution.

Some commentators have fostered this notion. *See* Elkouri & Elkouri, *How Arbitration Works*, 407 (5th Ed. 1999) ("[T]he more serious danger is not that the arbitrator will hear too much irrelevancy, but rather that he will not hear enough of the relevant."); *see also* Cooley, John W. & Steven Lubet, *Arbitration Advocacy*, Second Edition, 124 (NITA 1997) ("Most arbitrators conduct arbitrations with a commonsense notion of what is important to resolve a case. They apply a low threshold for admitting evidence, and they weigh the reliability and importance of the evidence as the hearing continues and issues evolve ... Also, many arbitrators liberally admit evidence in arbitration in order to obviate a later court challenge to their awards based on allegations of unfair preclusion of critical evidence.").

The basis for setting aside an award for failure to receive evidence is in fact quite narrow. Under the Federal Arbitration Act, the "court . . . may make an order vacating the award upon the application of any party to the arbitration…where the arbitrators ***were guilty of misconduct*** in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy" 9 U.S.C.§ 10(a)(3) Section 10(a)(3) "cannot be read, however, to intend that every failure to receive relevant evidence constitutes misconduct which will require the vacation of an arbitrator's award." *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d Cir. 1968). The cases make clear that *vacatur* pursuant to section 10(a)(3) is warranted only where "the arbitrator's refusal to hear proffered testimony 'so affects the rights of a party that it may be said that he was deprived of a fair hearing.'" *Century Indem. Co. v. Certain Underwriters At Lloyds, London*, 584 F.3d 513, 559 (3d Cir. 2009) (citations omitted). "Fundamental fairness" requires that arbitrators provide each party "an adequate opportunity to present its evidence and argument" -- but it does not require arbitrators "to hear all the evidence proffered by a party." *Tempo Shain Corp. v. Bertek, Inc*., 120 F.3d 16 , 20 (2d Cir. 1997) (citation omitted).

Arbitration "Discovery" Should Be Limited

The Rules of the American Arbitration Association guide arbitrators to narrowly tailor information exchange. "The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses." Rule 24(a). The AAA's addendum for large and complex construction matters cautions against wholesale adoption of litigation techniques into arbitration, rather providing for document exchange, depositions as an extraordinary remedy, and limited ESI discovery.

International arbitration bodies, typified by the ICC, are even more circumspect about adopting discovery techniques. "The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute." ICC Art 22 1. The ICC rules do not explicitly provide for any right to information exchange.

While the Federal Arbitration Act does not set out failure to provide for discovery as a specific ground for vacating an award, it has sometimes successfully been asserted where documentary evidence crucial to the fair resolution of a dispute is in the possession of only one party. Courts have held that "[t]he absence of statutory provision for discovery techniques in arbitration proceedings obviously does not negate the affirmative duty of arbitrators to

insure that relevant documentary evidence in the hands of one party is fully and timely made available to the other party. . .. [A] failure to discharge this simple duty would constitute a violation of FAA § 10(a)(3), where a party can show prejudice as a result." *Chevron Transport Corp. v. Astro Vencedor Compania Naviera, S.A.,* 300 F. Supp. 179, 181 (S.D.N.Y. 1969).

The instances in recent years of vacating an arbitration award for failure to receive evidence or permit discovery are rare and present extraordinary facts. For instance, in *Tempo Shain*, a commercial contract arbitration where each party accused the other of fraudulently inducing the contract, the panel denied a continuance when the only witness available to one party with knowledge on the contract negotiations, and the competing fraudulent inducement claims, became unavailable due to a family illness. The arbitrators suggested that the testimony was cumulative, which the district court accepted at face value, confirming the award. But the Second Circuit reversed. “The question on appeal is whether the panel's refusal to continue the hearings to allow [the central witness] to testify amounts to fundamental unfairness and misconduct sufficient to vacate the arbitration award pursuant to section 10(a)(3) of the Act. We believe that it did, and therefore vacate the court's endorsement of the award.” *Tempo Shain*, 120 F.3d at 18.

A finding of prejudice is an independent requirement for vacating an award. For example, in *Chevron Transport Corp. supra,* 300 F. Supp. at 181, in a maritime arbitration, the arbitrators did not order timely production of the port logs, characterized as “perhaps the most important items of documentary evidence in any maritime controversy.” They were only available to one side, who produced only extracts. Full copies were not produced until after the oral hearings were closed, and counsel was faced with having the port logs translated and analyzed during the short time between the close of the hearing and the submission of briefs. While the court made clear that the arbitrators should have ensured the logs were available to both sides, it denied without prejudice the motion to vacate because the allegations of prejudice were conclusory and failed to establish what would have happened had the port logs been disclosed on a timely basis.

Far more common are cases where a losing party in arbitration fails in the argument that misconduct resulted from exclusion of evidence or discovery. Reviewing courts look closely for reasons to confirm awards over such challenges based upon the view that the materials are cumulative, barred by laches, or properly excluded based upon privilege, relevance or materiality. Awards are generally confirmed even though the reviewing court would have found the arbitrator’s legal basis for exclusion to be erroneous.

Possible Solutions

Parties and arbitration panels can help restore the advantages of arbitration for resolving construction disputes. Reasonable limitations on discovery and presentation of evidence would be a large step in that direction. So would worrying more about inefficiency and less about the risk that an award might be vacated.

First, parties can put limitations on discovery and hearing in the arbitration clause, and any other limitations that would make sense under the circumstances. Parties may, of course, "tailor some, even many, features of arbitration by contract," *Hall St. Assocs., LLC v. Mattel, Inc*., 552 U.S. 576 , 586 (2008).).” ConsensusDocs, in the updates published in December 2016, requires parties to opt into AAA Fast track procedures for claims less than $250,000. It is much easier for clients to agree on reasonable limits in the abstract before a dispute arises, than afterward when one or both parties might see a tactical advantage in proliferating proceedings. Wholesale adoption of litigation techniques can be excluded by a properly drafted arbitration clause.

Second, at the outset of a dispute, arbitrators should encourage and parties should accept procedural orders containing strict but fair and reasonable limits on the time and effort that

goes into an arbitration proceeding. Use of time limits, chess clocks, and other known case management tools can be used effectively in the right circumstances. Fostering a culture of efficiency in arbitration should be a shared value in the construction bar.

These efforts can pay dividends in a more streamlined arbitration process. Counsel and clients should work to achieve this result so that arbitration meets its lofty goals of efficient dispute resolution.

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Federal Appeals Court Rules That Lien Claims Filed After A Contractor Files For Bankruptcy Violate Automatic Stay

Scott G. Kearns, Partner, Peckar & Abramson, PC

A recent Federal Appeals Court decision in New Jersey illustrates the importance of timely lien filings in circumstances where a bankruptcy is anticipated.

The Third Circuit Court of Appeals, in *In re Linear Electric Company, Inc.*[6], examined the relationship between New Jersey's Construction Lien Law and the United States Bankruptcy Code ("Code"). The issue before the court was whether a contractor's bankruptcy filing barred later-filed liens by two materials suppliers. The Court held that the post-Petition liens violated the automatic stay, pursuant to Section 362 of the Code.

Suppliers Cooper Electric Supply Co. ("Cooper") and Samson Electrical Supply Co., Inc. ("Samson") furnished electrical materials to contractor Linear Electric Company, Inc. ("Linear") that were incorporated into certain construction projects. Linear owed Cooper and Samson $1,234,100.48 and $142,980.17, respectively.

On July 1, 2015, Linear filed a voluntary Petition under Chapter 11 of the Code. Two weeks later, on July 15, Cooper and Samson filed Construction Lien Claims (the "Liens") against the developments into which Linear incorporated the supplied electrical materials.

Linear immediately filed a motion in the Bankruptcy Court seeking to dismiss Cooper and Samson's post-Petition Liens on the grounds that they violated the automatic stay in

[6] 852 F.3d 313 (3d Cir. 2017).

Bankruptcy. The Bankruptcy Court granted Linear's motion and declared the Liens to be void. On appeal, the District Court affirmed the Bankruptcy Court's decision. On further appeal, the Third Circuit reviewed the legal conclusions of the Bankruptcy Court and District Court.

Cooper and Samson argued on appeal that their Liens did not violate the automatic stay because they attach to the owners' interest in the improved real property and not to any property interest of the contractor.

In rejecting this argument, the Third Circuit held that Cooper and Samson's Liens did not merely attach to the owners' real property interests. They were also asserted against the accounts receivables owed to Linear by the owners. Accounts receivables are estate property pursuant to 11 U.S.C. § 541. Accordingly, any claim against Linear's accounts receivables is a claim against property of the Bankruptcy estate.

The Court further reasoned that, if lien claimants are permitted to pursue liens against estate property while other creditors are subject to the automatic stay, the rights of the latter would be prejudiced and the purpose of the automatic stay rule (preservation of estate property pending a plan of reorganization) would be compromised. Accordingly, the Court held that Cooper and Samson's Liens were filed in violation of the automatic stay.

The Third Circuit notably distinguished its holding in *Linear* from its prior holding in the analogous case, *In re Yobe Electric, Inc.*[7]

In *Yobe*, the court held that a supplier's lien did not violate the automatic stay, despite having been filed after Bankruptcy proceedings were commenced. There, the Third Circuit applied Pennsylvania law, which provides that the filing date of a lien relates back to the date of "visible commencement" of work. Thus, although the lien was filed after the debtor's petition, it was treated as though it had been filed prior to the petition when the lienor visibly commenced work. In contrast, Cooper and Samson's Liens were filed under New Jersey law, which provides that liens are effective as of the date of filing and/or service. Accordingly, their liens do not relate back to a pre-Petition date and, unlike those in *Yobe*, violated the automatic stay.

Thus, the *Linear* decision is instructive in terms of the interplay between federal bankruptcy law and state construction lien law(s). Contractors should consult their attorneys to become familiar with the lien laws of the jurisdictions in which they are working, since every state has a different statutory scheme pertaining to relation back provisions.

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[7] 728 F.2d 207 (3d Cir. 1984).

ConsensusDocs Track at the 99th Annual AGC Convention

ConsensusDocs will have a presence at AGC's 99th Annual Convention, as it hosts three sessions devoted to the most relevant topics surrounding construction contract documents including, but not limited to, the most recent provisions made to our documents and the AIA A201, including:

- ***Insurance Requirements are A Chang'in: New Insurance Requirements in the New AIA A201 and Updates to the ConsensusDocs Insurance Provisions*** – Monday 02/26 (11 a.m. – Noon)

  Description: The AIA A201 2017 General Conditions Document has been rewritten and restructured its insurance requirements in the new edition and created a new Insurance Exhibit A. This will impact how insurance requirements required by Owners and insurance products Contractors must procure (and avoid exclusions). The AGC-endorsed ConsensusDocs also made significant changes in its updated standard documents that among other things now defaults to the Constructor procuring the Builder's Risk Policy, instead of the Owner. Find out what you need to do to comply or alternatively contract negotiation strategies.

  Presenters:
  Bob Majerus, General Counsel, Hensel Phelps
  James O'Connor, Partner, Maslon Law
  David Suchar, Partner, Maslon Law

• ***Your Defective Design is Stuck in my Non-Negligent Means & Methods*** – Monday, 02/26 (1:30 p.m. – 2:30 p.m.)

  Description: Design liability exposure has become one of the most important risks facing builders today. General Contractors are often faced with correcting defective design; performing delegated design (sometimes without clear delegation). This is often mandated without adequate compensation or liability protection. Moreover, previous protections under the *Spearin Doctrine* for change orders to correct defective design plans and specifications is under assault in contracts and in the courts. The line between assessing blame for defective design or negligent means & methods has blurred and this panel will explore how design-assist and more collaborative delivery methods provide solutions to this growing riddle.

  Presenters:
  Kristen Brown, President, Brown Builders
  Bryan Kelley, VP Legal, Howard S. Wright
  Joseph Leone, Partner, Drewry Simmons Vornehm, LLP
  Ryan Lamb, General Counsel, Weitz

• ***Why the New AIA A201 Gets a Failing Grade and How the Updated ConsensusDocs Provide an Alternative*** – Tuesday, 02/27 (9 a.m. – 10 a.m.)

Description: The AIA A201 is the most litigated contract document in construction. Find out the most troubling changes made to the 2017 AIA A201 and contrast this with the AGC-endorsed ConsensusDocs provisions. This session will dissect what the AGC membership absolutely needs to know when forced to use AIA contract documents. As well as, contrast these changes with the alternative provisions from ConsensusDocs to make your contract negotiation better.

Presenters:
Ron Ciotti, Partner, Hinckley, Allen & Snyder LLP
Brian Perlberg, Executive Director & Senior Counsel, AGC of America and ConsensusDocs

Click **here** to find out more about these sessions!

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