

# Construction Law

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## Chair's Report

By Athan Tramountanas – Short Cressman PLLC

Happy New Year! I hope all section members were able to relax and enjoy themselves over the holiday season. It was good to see so many members at the November 8 Fall Forum. This was a popular and educational event, where we learned about the newly revised AIA Contract Documents while enjoying a hosted happy hour. It is our hope to have similarly well-attended events for section members throughout the year. Now that we are solidly into the new year (and hopefully all used to writing "2018"), I want to share with you what is in the works for the Construction Law Section.

Our next event is our annual Winter Dinner / CLE, which will be held on March 1 at Cutter's Crabhouse in Seattle. This is the fifth year that Bob Olson has organized this fun event. It is something to look forward to and should not be missed. This year, Dr. Carrie Sturts Dossick of the University of Washington Department of Construction Management will be on hand to give a nuts-and-bolts overview and demonstration of BIM software for CLE credit (approval pending). Be sure to show up on time for the cocktail hour, sponsored by NAEGELI Deposition and Trial.

In April, the Section will hold a Construction Law CLE in the Tri Cities, in conjunction with the Benton Franklin Legal Aid Society. We are tentatively scheduled for April 27 at the United Way Facility, but more concrete details will follow.

On June 8, the Section will hold its annual Midyear meeting and CLE at the WSBA offices in Seattle. During the meeting, we will update the membership on the status of our *Construction Law Deskbook* and discuss specific chapters and substantive areas of law for CLE credit. We will also have a judges panel, which is always a popular and lively discussion.

Thanks to everyone for participating in the Section and attending its events. Please feel free to contact me at any time with ideas for new events or initiatives for the Section.

### UPCOMING EVENTS

<b>Dinner Meeting &amp; CLE</b>	March 1, 2018 (5:30 at Cutter's Crabhouse, Seattle)
<b>Spring CLE</b>	April 27, 2018 (9:00 am, United Way Center, Kennewick, WA)
<b>Midyear Meeting &amp; CLE</b>	June 8, 2018 (WSBA Offices, Seattle)

## Annual Dinner Meeting and CLE

By Bob Olson – Schlemlein Fick & Scruggs

The Section is proud to announce its Fifth Annual Dinner Meeting and CLE:

Thursday, March 1, 2018  
Cutter's Crabhouse  
2001 Western Ave., Seattle, WA  
5:30 to 8:30 p.m.

The event will feature a hosted reception followed by dinner and a CLE presentation (approval pending for one hour of CLE credit).

Look for details and a notice from the Bar Association in early February to sign up. We anticipate the cost will be only \$50, a great value. Save the date now. Space will be limited and in past years we reached capacity quickly.

The topic of our CLE presentation is -- **What is BIM and why should construction lawyers care about it?**

We are fortunate to have an expert on this current topic available to explain what Building Information Modeling (BIM) is, its history and current uses, what owners are specifying, how it is prepared, and projections on future use.

Dr. Carrie Sturts Dossick is a professor of Construction Management at the University of Washington, College of Built Environment, and Executive Director of the Center for Education and Research in Construction (CERC). She has a Ph.D. in civil engineering from Columbia University and is also a professional engineer who spent four years as a consulting engineer before joining the UW faculty in 2005. She has focused her career on researching, authoring and lecturing on BIM

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ANNUAL DINNER  
MEETING AND CLE  
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and related topics. Dr. Dossick will be joined by one of her Ph.D. students, Hamid Abdirad, who has first-hand knowledge and experience with using BIM.

Together, they will present an informative slideshow with illustrative slides on the various uses of BIM and a demonstration on how it is prepared. Most importantly for our audience, they will address why knowledge of BIM is important for construction lawyers.

We look forward to seeing you at this annual event.

## WASHINGTON STATE BAR ASSOCIATION

# UPCOMING WSBA CONFERENCES AROUND THE STATE

**April 27, 2018**  
*Senior Lawyers Section  
Annual Conference*  
Seattle Airport Marriott,  
SeaTac

**May 10-12, 2018**  
*Environmental and Land  
Use Law Section Midyear  
Conference*  
Suncadia, Cle Elum

**June 8-10, 2018**  
*Real Property, Probate  
and Trust Section Midyear  
Conference*  
Suncadia, Cle Elum

**June 29-July 1, 2018**  
*Family Law Section Midyear  
Conference*  
Semiahmoo Resort, Blaine

**September 21-22, 2018**  
*Solo and Small  
Firm Conference*  
Lynnwood Convention  
Center, Lynnwood

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## Ninth Circuit Rules Settling a Non-CERCLA Environmental Claim Can Trigger the Time Period to Bring a CERCLA Contribution Claim

By Mike Nesteroff – Lane Powell PC

Under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) a responsible party that settles with the government via a consent decree to clean up or pay for remediation has three years to pursue CERCLA contribution claims against other non-settling responsible parties. It has been less than clear whether this three-year period is triggered by a settlement with the Environmental Protection Agency (EPA) under another federal statute, such as the Resource Conservation and Recovery Act (RCRA) — or with a state agency, for example under the Washington Model Toxics Control Act (MTCA) or the Oregon Hazardous Waste and Hazardous Materials statute. A new Ninth Circuit decision, *Asarco LLC v. Atlantic Richfield Company*, has answered the question by holding that a settlement with a state or federal agency under another environmental law besides CERCLA can start the running of the three-year time limit for a contribution claim, provided the agreement requires a party incur response costs and resolves that party's liability to the government.

In *Asarco*, the question was whether a 1998 RCRA consent decree by Asarco or a 2009 CERCLA consent decree, both involving the company's smelter in East Helena, Montana, triggered Asarco's right to seek contribution against other responsible parties under CERCLA § 113(f)(3)(B). In 2012, Asarco sued Atlantic Richfield for contribution, but the U.S. District Court in Montana dismissed the case because more than three years had elapsed since the 1998 RCRA settlement. The Ninth Circuit reversed and held that 1) § 113(f)(3)(B) does not limit the necessary predicate for a contribution action to CERCLA settlements; 2) the 1998 RCRA agreement required Asarco to pay response costs, but 3) the 1998 RCRA agreement did not trigger the three-year period for Asarco to bring a claim because it did not resolve Asarco's liability to the government. Thus, it was not until the 2009 CERCLA settlement, when Asarco did resolve its liability to the government, that the three-year period to bring a contribution action began to run.

The two key issues were whether a non-CERCLA settlement can trigger the contribution right, and what constitutes

“resolving liability to the government.” On the first issue, the Ninth Circuit aligned with the Third Circuit, which had ruled in 2013 that a consent decree under Pennsylvania's state environmental statutes was sufficient to start the three-year period running in which to bring a CERCLA contribution claim. This differs from the approach taken by the Second Circuit, which held in 2005 that § 113(f)(3)(B) creates a contribution right only when liability for CERCLA claims is resolved.

On the second issue, whether a settlement resolves a party's liability to the government, some cases have held that there is no resolution of liability when a consent decree reserves the right of the environmental regulatory agency to bring an enforcement action and conditions a covenant not to sue on a party's satisfactory performance of their obligations. The Ninth Circuit in *Asarco* ruled that a settlement agreement must determine a responsible party's compliance obligations “with certainty and finality for at least some of its response actions or costs as set forth in the agreement.” A right by the government to enforce compliance or condition a release from liability on performance does not undermine the certainty or finality of the resolution. Nor would a settling party's refusal to concede liability bar a determination of finality.

In the case of *Asarco*, the court said that the 1998 RCRA decree did not release the company from response costs, only civil penalties, and it contained numerous references to Asarco's continued legal exposure. The court said: “Simply put, the 1998 RCRA Decree did not just leave open some of the United States' enforcement options, it preserved all of them. Because the Decree did not settle definitively any of Asarco's response obligations, it did not ‘resolve [Asarco's] liability.’”

The takeaway from the Ninth Circuit's decision is that any environmental settlement with a government agency, whether it arises under CERCLA, RCRA, or a state environmental statute, can start the running of the three-year period for bringing a CERCLA § 113(f)(3)(B) contribution claim against a non-settling party. While the determination is on a case-by-case basis, the more the language of the agreement points to “certainty and finality,” the more likely it is that the settlement will trigger the limitations period.

## Utility Contractor Held Responsible for Damaged Underground Electrical Line

By Brett Hill – Ahlers Cressman & Sleight PLLC

The Washington Court of Appeals, in *Titan Earthwork v. Federal Way*, 200 Wn. App. 746, 403 P.3d 884 (2017), recently addressed an excavation contractor's responsibilities under the Underground Utilities Damage Prevention Act (UUDPA), RCW 19.122. That statute was enacted in 2011 and imposed certain statutory duties on parties involved with projects requiring excavation.

In this case, Titan Earthworks, LLC contracted with the City of Federal Way to perform certain street improvements including installation of a new traffic signal. During the process of excavating for the traffic signal, Titan drilled into an energized underground Puget Sound Energy power line. PSE sought damages from Titan and Titan sued the City of Federal Way.

Before putting the project out to bid, the City had its design team identify potential utility conflicts at the proposed location for the new traffic signal. The City identified the PSE lines and contacted it to consider moving its power lines. There were two groups of lines that were identified in the excavation area by PSE. The northern group was 5 to 6 feet below grade, but the southern group was only 4 to 4 ½ feet below grade. PSE's contractor told the City that it could accommodate the design plans by moving the lines in the southern group only. In April of 2013, PSE's contractor moved the power line in the southern group only.

Also in April 2013, the City put the project out to bid. Titan was the low bidder and it entered into a contract with the City to perform the work. The contract specified Titan was responsible for locating underground utilities in compliance with the one call locator requirements. Notably, the City's plans showed the location of both the southern and northern grouping of powerline conduits despite the fact the southern grouping had been relocated. Titan and the City, along with Titan's subcontractor, had a preconstruction meeting in May of 2013. At this meeting, the City represented to Titan that "[PSE] has relocated [its] below ground utilities for this project prior to beginning the work." This statement was incorrect because the northern lines had not been relocated by PSE.

At that time, the PSE trench was open, but the deeper northern group of lines was still covered. Titan and its subcontractor (TSI) did not and could not see the northern

lines. In July 2013, Titan and TSI requested an underground utility locate, which located the northern and southern lines. Titan's subcontractor initially used a vactor (vacuum) to excavate the signal pole base. However, once they reached the shallower depth of the southern conduit, they switched to a three-foot wide auger. The three-foot wide auger then struck the northern group of utility lines.

The Court of Appeals first held that the northern and southern group of lines were properly marked. There is some dispute whether that was the case because the southern group was marked on the steel plates which were then moved. However, the lines were re-marked before the excavation occurred. As to whether the City was nonetheless still liable, the court first noted that the UUDPA required the City to "indicate in the bid or contract documents the existence of underground facilities known by the project owner to be located within the proposed excavation area." The court held that the City complied with that requirement. The court held that the duties of Titan were to determine the location of the underground facilities that had been marked and to plan the excavation to avoid damage or minimize interference with the underground utilities. The statute assigns liability to any party who fails to comply with its responsibilities under the UUDPA. As a result, the court held that Titan was responsible for the PSE damages and the City was not liable.

*Comment: The interesting part about this case is the timing of when everything occurred, which caused the apparent confusion to Titan. It is correct that the City's plans show the location of both the southern and northern grouping of powerline conduits, but those plans appear to be inconsistent with what the City had represented to Titan during the preconstruction meeting in May of 2013. Titan may have believed that the representations of the City representatives during this meeting, which occurred after the PSE lines were relocated, was better information than the plans that were issued by the City prior to the PSE relocate. The takeaway from all of this for utility contractors is that you should not rely upon the oral statements of Owner representatives that conflict with either the plans issued by the Owner or the markings that are done by the utility locate services.*



## Division One Considers Internet Reviews of Contractors and Defamation

By Athan Tramountanas – Short Cressman PLLC

In December, Division One considered whether poor reviews of a contractor on the internet gave rise to claims of defamation, and upheld summary judgment dismissal of the defamation claims. In the unpublished case of *Valdeman v. Martin*, No. 75849-7-I, 2017 Wash. App. LEXIS 2805, at \*2 (Ct. App. Dec. 11, 2017), a customer initially sent its residential remodel contractor an email with laudatory comments: “I love my remodeled place!! You and your team did a fantastic job! BRAVO!” Things went downhill from there.

The customer learned that an employee of the contractor was a Level II sex offender. The customer proceeded to post online reviews of the contractor on Angie’s List, online blog forums, and Yelp!. Portions of these reviews directly addressed the sex offender employee: “Nothing happened to me thank goodness,” “Reprehensible that a female business owner would knowingly give a convicted sex offender a position where he would be entering peoples’ homes – homes that could have children in them,” and “Upset me that a woman owner of a company was knowingly employing a sex offender.” Other portions address the customer’s experience: “my experience with this company was awful,” “If I could give a zero rating I would,” “lacking in the areas of customer service, honesty, and integrity,” and “dishonest, manipulative and deceitful.” The contractor sued for various claims of defamation and tortious interference with a business expectancy.

The court set out the four elements of defamation: falsity, an unprivileged communication, fault, and damages. Addressing the “falsity” element, the court noted that, if “the statement is substantially true,” or “the gist of the story, the

portion that carried ‘sting’ is true,” the statement is not false. Here, the court looked at the reviews discussing the sex offender employee – because the portions of these statements that carried the “sting” were true, they were not actionable defamation.

Addressing the “unprivileged” element, the court considers a three part test – a court should consider (1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies undisclosed facts. Looking at the reviews discussing the customer’s experience, the court noted that people expect to find statements of opinion on internet review sites. The audience looking for these reviews in particular would be looking for input on the contractor’s performance – both good and bad. Finally, the court noted that the reviews were subjective determinations and did not imply undisclosed facts. Accordingly, the court held the experience comments were also not actionable defamation.

The contractor also brought a tortious interference with business expectancy claim. The elements of a tortious interference claim are (1) the existence of a valid business expectancy, (2) that defendant had knowledge of that expectancy, (3) an intentional interference inducing or causing a breach or termination of the expectancy, (4) that defendant interfered for an improper purpose or used improper means, and (5) resultant damage. Here, the contractor did not offer evidence that the customer’s statements interfered with any business expectancy or caused any specific damage, so the court held that dismissal was proper.

This is a publication of a section of the Washington State Bar Association. All opinions and comments in this publication represent the views of the authors and do not necessarily have the endorsement of the WSBA or its officers or agents.

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### Your Input Is Needed!

The Construction Law Section newsletter works best when Section members actively participate. We welcome your articles, case notes, comments, and suggestions concerning new developments in public procurement and private construction law. Please direct inquiries and submit materials for publication to:

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## 2018 Construction Law Section Membership Form

January 1, 2018 – December 30, 2018

- Voting Membership: I am an active WSBA member. Please enroll me as a voting member. My \$25 annual dues are enclosed.
- Non-voting membership: I am not an active WSBA member. Please enroll me as a subscriber member so I can participate and receive your informational newsletter. My \$25 is enclosed.

Name \_\_\_\_\_

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