

# New twist on the wheelbarrow

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**Rick Shapiro** (right) developed a new compact wheelbarrow (model shown at one-third size) that folds up and can hang on a wall or fit in a vehicle trunk. The product's parts ship fully assembled right inside the wheelbarrow, and the user simply slides the assembly onto the underside.

One of Stites & Harbison's Registered U.S. Patent Attorneys, **Ross Hunt**, has secured patent protection for many of Mr. Shapiro's folding wheel designs. For more information go to [www.pancakewheel.com](http://www.pancakewheel.com).

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## Learn more about using AIA contracts in Kentucky

Stites & Harbison construction attorneys **Buck Hinkle** and **Matt Gillies** will present in-depth information on dealing with American Institute of Architects documents during a full-day seminar, March 9, in Lexington, Ky. For more information, go to [www.lorman.com](http://www.lorman.com). Hinkle is a past chair of the American Bar Association Forum on the Construction Industry and a Fellow of the American College of Construction Lawyers.



*Buck Hinkle*



*Matt Gillies*

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BY DAN DOUGLASS AND JOE HARDESTY, STITES &amp; HARBISON

## Who should pay for arbitration?

Arbitration has long been a popular method of resolving disputes in the construction industry. Arbitrators familiar with construction issues can resolve disputes faster, cheaper and more satisfactorily than courtroom litigation. However, arbitration involves filing fees and other expenses, and parties have challenged the enforceability of contractual arbitration clauses on that basis.

In a recent Texas case, a supplier sought to avoid binding arbitration under a contract clause because it could not afford the filing fees and other costs of arbitration. *Pro Tech Industries, Inc. v. URS Corp.*, 377 F.3d 868 (8th Cir. 2004). The supplier argued that it was no longer in a position to afford arbitration, rendering the arbitration agreement unconscionable under Texas law. The federal court disagreed and required the parties to go to binding arbitration.

The court recognized the strong federal policy favoring arbitration. The court also found that the agreement to arbitrate between two commercial entities was not so one-sided at the time the contract was made as to be unconscionable under Texas law. Therefore, the arbitration clause was enforceable.

Sometimes disputes between an individual and a corporation can have a different result. A recent California case addressed the question of arbitration between a homeowner and his contractor and architect on a large residential project. *Francis v. Westlan Construction, Inc.*, 2004 Cal.App. LEXIS 5272 (2004).

The California court found that requiring a homeowner to pay extremely large filing fees could inhibit or prevent resolution of claims against the contractor and architect. To avoid this inequity, the court concluded that the contractor and architect could bear the burden of paying the unusually high fees or could waive arbitration.



Dan Douglass

## What does your insurance really cover?

Insurance can be an important source of funds in resolving problems and disputes on construction projects. It is not always easy, however, to determine whether a claim or event is covered under the terms of a policy. And the result can vary from state to state, as indicated by two recent cases from South Carolina and Georgia. *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 2004 S.C. LEXIS 190 (S.C. 2004); *Sawhorse, Inc. v. Southern Guaranty Ins. Co. of Ga.*, 2004 Ga.App. LEXIS 1034 (Ga.App. 2004).

In the South Carolina case, a contractor on a road construction project was sued for premature road deterioration. The contractor settled the lawsuit and sought coverage for the damages under its CGL policy. The court decided that the damage was caused by negligent or faulty workmanship and did not fall within the definition of an "occurrence" under the policy. Therefore, no insurance payment was made.

In the Georgia case, a contractor on a remodeling project sought coverage under its CGL policy for damage to the work itself and to the preexisting structure due to defective workmanship. The court found that a faulty workmanship claim could fall within the definition of an "occurrence" under the policy. The court found that damage to the work itself was not covered, but damage to the



Joe Hardesty

preexisting structure could be covered by the CGL policy.

The lesson? The availability of coverage varies. So, understand all of your facts, the different types of property damage and the state law being applied.

## License loaning liability

A number of states have licensing requirements for general contractors and specialty contractors. A recent case in Florida illustrates the trouble that can result from running afoul of license statutes. *RTM General Contractors, Inc. v. GW Riverwalk, LLC*, 2004 Fla.App. LEXIS 12123 (2nd Dist. Ct. App. 2004).

Riverwalk, a developer, contracted with RTM as general contractor to perform renovations on Riverwalk's property. Disputes arose, and RTM filed a substantial lien against the property. It was determined, however, that RTM did not perform any of the construction work and instead allowed another entity to use RTM's construction license to perform the work. The entity performing the work was not properly licensed in Florida at the time.

RTM was, therefore, found in violation of the Florida licensing statute. As a result, RTM's contract with Riverwalk was void and unenforceable and did not provide a basis for RTM to pursue its claim for payment. In addition, RTM's lien was unenforceable and was deemed

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## Employer neutrality – A union's best organizing tool

BY IVAN H. RICH, STITES & HARBISON

The single most-effective action an employer can take to avoid a union is to make clear its opposition to any union-organizing effort. The law specifically allows employers to take such a stand.

The core of organized labor's new organizing strategy is to eliminate employer opposition. Union organizers try to obtain an agreement not to oppose them by using a variety of pressure tactics. These activities include media appeals, political contributions, picketing, soliciting customers, lenders or suppliers, complaints to government regulatory agencies and demands through an established bargaining relationship at other locations.

In the construction industry, neutrality is sometimes imposed on non-union contractors through project agreements, local government regulations or owner requirements. Union representatives are often guaranteed access to employees on the job where they can solicit union authorization cards.

Such neutrality requirements are usually combined with a "card check" where an employer must deal with a union when a majority of its employees sign union authorization cards. This procedure bypasses a secret ballot, government-conducted election in which employees can actually vote on whether they want a union.

Contractors should carefully examine bid documents and local government regulations to see if a project is subject to a neutrality requirement. Lawful, preventive measures are important to avoid having a union neither you nor your employees want.

*For more information about unions, contact Ivan Rich in Stites & Harbison's Louisville office at 502/681-0514 or [irich@stites.com](mailto:irich@stites.com).*



Ivan Rich

### ON the JOB

#### News about Stites & Harbison lawyers

For the second time, **Julian Bibb** was named to the "Williamson 25" by the *Nashville Business Journal* and Williamson Works. The Williamson 25 spotlights who and what make Williamson Co. (Tenn.) one of the region's economic engines.

American College of Real Estate Lawyers elected **Barry Hines** to its membership. He joins ACREL members **Fred Joseph** and **Tom Meng**, also of Stites & Harbison, to comprise 25 percent of the Kentucky attorneys who are members of this, the nation's top real estate group.

The Center for Women & Families honored Stites & Harbison with its Mary D. Rudd Volunteer Service Award. Fifteen of the firm's attorneys donate many hours of their time providing free legal services to victims of domestic violence.

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Julian Bibb



Barry Hines



Fred Joseph



Tom Meng

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## Historic inn undergoes renovation

Renovation of the historic Biltmore Inn was accomplished with the help of **Precision Walls, Inc.** (*precisionwalls.com*). Precision Walls is one of the largest specialty contractors in the Southeast. With a home base in Raleigh, N.C., the company has 1,200 employees and locations throughout the region. Stites & Harbison attorney Joe Hardesty nails down legal issues for the company.



### MEANS and METHODS — continued from page 2

to be fraudulent because it willfully included amounts not owed to RTM.

RTM not only lost its contract claim and lien rights, but also was found liable to Riverwalk for damages in the amount of the improper lien. Let this be a warning to contractors. Pay attention to each state's licensing statutes.

### POSTINGS — continued from page 3

Bankruptcy attorney **Elizabeth Thompson** graduated from Leadership Kentucky, Nashville-based immigration attorney **Mabel Arroyo** is a member of Leadership Franklin, and **Jim Worthington**, trusts and estates attorney, has been invited to join

the Kentuckiana Works Executive Committee, a Louisville-area workforce investment board.

Business litigation attorneys **Scott Barber** and **Ben Crittenden** have joined Stites & Harbison. Mr. Barber is working in the firm's Louisville office and Mr. Crittenden is in the Frankfort office.



Elizabeth Thompson



Mabel Arroyo



Jim Worthington



Scott Barber



Ben Crittenden

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