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On the cover

Aruba was the site of the CAWV’s 2012 Midyear Meeting. From February 3 - 8, 2012, members enjoyed a variety of island activities along with business and educational opportunities. Participants left the meeting with new skills and knowledge to enhance their businesses. Business strategy, tax updates, financial industry analysis, legislative insight and workers’ compensation program updates rounded out the event. For full details on the meeting, see page 6.

The Contractors Association of West Virginia is a nonprofit trade organization representing the building, highway, heavy and utility contracting industries in West Virginia. Its services include establishment of a close working liaison with state and federal agencies; worthwhile educational and informational programs; the regular dissemination of pertinent information to its members; strong legislative and media relations; as well as all other activities deemed necessary and proper to promote the general welfare of the construction industry. The CAWV is a certified chapter of the Associated General Contractors of America and the American Road and Transportation Builders Association.

West Virginia Construction News, the official publication of the CAWV since 1937, is published bimonthly. Advertising and editorial deadlines are on the first of the month preceding the month of publication. Material may be reprinted only with the permission of the editor. Advertising and editorial offices are at 2114 Kanawha Boulevard, East, Charleston, WV 25311, telephone (304) 342-1166, Fax (304) 342-1074. Web Site www.cawv.org. Email: cawv@cawv.org. Yearly subscription rate to CAWV members, $7; non-members, $8; single copies, $1.50.

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Informative business sessions and networking opportunities highlighted the 2012 CAWV Midyear Meeting. Nearly 200 members and guests attended this year’s meeting, held February 3 - 8 at the Hyatt Regency Resort in Aruba. The meeting began with a Board of Directors meeting followed by Building, Highway and Utility division meetings.

The General Business Sessions were at capacity as members learned about the CAWV’s partnership program with BrickStreet Insurance, activities at the West Virginia Legislature, 2011/2012 financial market trends, business exit strategies, West Virginians for Better Transportation’s Transportation Day at the Capitol and the building of the Ritz Carlton Aruba.

“It doesn’t get much better than this,” stated CAWV President Gene Thompson, Ahern, a division of Kokosing Construction Company. “The CAWV put together an excellent program to appeal to all facets of the construction industry.”

The General Business Session was opened by Edward Thompson and Tim George, Brown Edwards and Company, Charleston, who presented “Exit Strategies 101.” Their presentation provided the information needed to make business decisions regarding retirement, succession planning and continuity. They also gave participants an update on 2012 tax law changes that will affect the construction industry.

“The goals for a successful exit strategy can vary,” Thompson told members. “For some, it’s to perpetuate the company. For others, it’s to give key employees or family members a chance to own part or all of the business. A goal can also be to generate after tax cash.”

Thompson noted that owners can almost always make liquidation happen while the other alternatives require others to participate. Liquidation likely reflects the hard, current reality of a business’ value. Work in progress and backlogged work are hard to dispose of. There is also zero value for ‘good will,’ he noted.

Members received a detailed assessment of each of the exit strategies, including what considerations must be made when passing on the company to family.

George outlined recent tax updates and business tax issues to meeting attendees. These included Social Security taxes for 2012, independent contractor to employee status, depreciation, new hire retention credit, expanded W-2 reporting for 2012 (Health Care Reform Act), 1099-K reporting, West Virginia Corporate Income and Franchise Tax rates, property tax returns, apprenticeship training tax credits and individual taxes that expire at the end of 2012.

(Both of these presentations, as well as all the 2012 Midyear Meeting presentations, are on the CAWV’s web site at http://www.cawv.org/events/midyear-meeting.html.)
West Virginia contractors learned what it is like to build a five-story, 320-room luxury resort on an island.

“Preparation is the key,” stated Roberto Stipa Tenreiro, vice president of Desarrollos Hotel, who is overseeing the construction of the new Ritz Carlton property on the beach near the Hyatt Hotel.

Desarrollos Hotelco is a Venezuelan construction and development company that has developed various real estate projects in Caracas, Venezuela and the Caribbean, many of them with the Marriott company.

“Working on an island is the hard part,” Stipa commented. “Everything in the project is mostly imported from the United States, Canada, Mexico, Holland and Germany. The taxes and regulations are different for each import, and tracking and accounting for them takes a lot of coordination.”

Language can also be a barrier. In Aruba, the language is Dutch and the local Papiamento. Stipa says his people are trying to learn Papiamento. Other challenges include the beach, sun and hot weather that tourists like but is “a
pain in the neck for construction workers.” Drinking plenty of water and other precautions must be taken.

“Aruba is known for its wind and when the wind kicks up, operating a crane to move things around gets pretty interesting,” he told members. “Traffic and the cost of living also factor into performing a project on this island.”

The $180 million project had a number of hurdles to overcome, including wind surfing enthusiasts and turtles which both used the section of beach the Ritz Carlton will occupy. The economic crisis of 2008 and global recession slowed the development.

“The Aruban Central Bank estimates this project will increase Aruba’s gross domestic product by 1 to 2 percent,” Stipa noted. “About 700 new jobs are being created, 95 percent of which are local. We work Monday through Friday and from 7:00 a.m. to 1:00 p.m. on Saturday.”

CAWV members asked how materials were handled logistically. Stipa explained that Hotelco Aruba places the order to Hotelco Caracas and awaits approval, regardless of whether it’s a $100 item or a $5,000 item. Once approved, Hotelco Aruba places the order to Hotelco Miami which, in turn, contacts, buys, stores and ships the merchandise to Aruba.

“Once the order is placed by Hotelco Aruba, it takes nine to twelve days for the order to arrive at the work site,” Stipa stated. “Three to four days to be approved by Hotelco Caracas, about one day to prepare the paper work and load the merchandise to the container or flat rack, about five to six days for shipment to arrive in Aruba, and one day to go through customs and get to the work site.”

He noted that it is expensive because ships arrive full but leave empty. The company has to pay for a two-way voyage.

The Ritz Carlton will be a five-star resort and will include several dining facilities, spa, two pools, a condominium level and a 24-hour casino. All 320 rooms will face the ocean. Completion is set for October 2013.

RACES TO WATCH
“The House of Delegates is losing 20 pro-business delegates due to retirement or running for other offices,” said Louis Southworth in his annual legislative overview. “These are people that have a lot of institutional knowledge and have been stable supporters of the business community. Some will be very hard to replace. I highly recommend each member make a contribution to HUB/PAC, the CAWV’s political action committee. They will need it.”
Leah and John Gabhart enjoy the island ambiance at the Welcome Night Reception.

Veronica and Buddy McGlothin enjoy the entertainment provided during the reception.

Mike and Kim Davis had a good time at the Midyear Meeting.

Eric and Julie Ramey took time to pose for a photo during the reception.

Peggy and Dave Heeter enjoyed the tropical locale.

Ashton and Chet Rodabaugh got into the island spirit.

Rhonda Evans and Phil Browne enjoy the beach.

Jennifer and Lee Cooperrider pose for a photo during the meeting.

Sandy and Wayne Kee were happy to visit Aruba with the CAWV.

Tanner Foster was pleased to find a starfish on the beach.

Chris and Mary Supcoe take time to enjoy the warm Aruban breeze.

Steve and Shelley Humphrey participate in an island excursion.

A variety of island activities were organized for members, such as snorkeling.

Members enjoyed musical worship provided by local group God’s Sons.

Linda and Tony Anders enjoy the island retreat.

C.R. and Beth Neighborgall pose for a photo prior to the reception.

Patrice, Lindsey and Rick Johnson enjoy the white sand beach.

Brooke and Josh Booth take time to enjoy the island activities.

Isaac, Isaiah and Scott Pierson enjoy the beach with Aliana Harvey.

Ed and Bobbi Phares join Delbert and Stephanie Leatherman and Neil and Nancy Smith.
All 100 members of the House of Delegates are up for election, as well as 17 of the 34 Senate seats. Given that the President’s race tops the ticket, the races for U.S. Senate and Governor will be interesting, he noted.

“President Obama, with his stand on the U.S. EPA, is not very popular in West Virginia,” the Charleston lawyer said. “The Republicans will try to tie Senator Joe Manchin and Governor Earl Ray Tomblin to the Obama Administration while the governor’s office will stress accomplishments in creating jobs and economic development.”

He outlined the state’s budget which, until now, has been stable. Going forward, perhaps not as much.

“With the planned reductions in the Business Franchise Tax and Corporate Net Income Tax, there is an $80 million reduction in revenues,” Southworth stated. “Lottery revenue has been good and other states have not come on line with their casinos as quickly as planned, but the coal market has slowed considerably and the price of natural gas is rapidly declining. The state’s severance tax revenue will take a hit at some point.”

He did point to positives, including a fix to the OPEB (Other Post Employment Benefits) problem which was estimated at $10 billion. An administrative repair shaved the liability to $5 billion and the annual $30 million currently going to repayment of the previous Workers’ Compensation Fund debt through 2016 will be transferred to the OPEB debt.

“West Virginia is the first state to address its OPEB crisis,” Southworth commented. “This should make the state attractive to businesses because...
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other states still have to figure out how they are going to pay off their liabilities. A company will have to factor this into their decision making process when evaluating where to locate. West Virginia, by addressing OPEB, shows we want them here.”

Southworth also discussed issues in this year’s legislative session, including incentives to lure a cracker plant in the state, a possible constitutional amendment to create of the Office of the Lieutenant Governor, a bill to ban texting while driving and funding for the West Virginia Division of Highways.

WORKERS’ COMP PLAN PROVIDING BENEFITS
“The CAWV was BrickStreet’s first association plan,” said Greg Burton, BrickStreet president and CEO, “and it is our best plan. Because of the great work of your members in safety, I am pleased to announce that the new discount is 8.7 percent, up from 7.2 percent last year.”

Since its roll-out in 2009, 109 contractors have joined the CAWV plan, representing over $5.9 million in premiums. These 109 firms have saved over $1,439,833 in their workers’ compensation premiums. Burton said he is glad BrickStreet is involved in the contracting industry and pleased to be associated with the CAWV.

“You are doing a phenonminal job in safety and loss control,” Jeff Benintendi, senior vice president for BrickStreet, told members. “The frequency of workers’ comp claims for every $1 million of payroll continues to fall because of your work. I fully expect another rate reduction in workers’ comp premiums, which we are not seeing in surrounding states. Rates are hardening in other states but not in West Virginia.”

Members were presented with tools they can use to control their workers’ comp costs. The biggest reduction, they learned, comes from getting injured workers back to work as quickly as possible. Allan Williams, head of Safety and Loss Prevention for BrickStreet, outlined the do’s and don’ts in a company’s return-to-work program.

“The right way is to have a written policy, specific job descriptions, modified duty position descriptions, supporting documentation, training and communication,” Williams explained. “The don’ts are: Don’t bring an employee back before they are ready; don’t make claims confrontational and create negative attitudes; don’t keep employees in the dark about benefits and the claims process; don’t eliminate contact with the employee; and don’t push an employee beyond their restrictions.”

Williams said the key to managing a claim is to be in constant contact with the injured employee so they know the company wants them to return as soon as they are capable of doing some type of work. He also said there must be good communications with the claims adjuster.

“After an accident, the employer should be calling BrickStreet while the employee is on the way to the hospital,” he noted. “BrickStreet can be talking with the physician and discussing what type of light duty work the employee can do while recuperating.”

Lisa Teel, director of marketing, walked members through an analysis of a good workers’ comp claim verses a bad one. In April 2010, a worker broke his ankle. The worker had surgery two weeks after the accident and had weight restrictions put on his ankle. The employer had no alternative duty work and did not speak to the worker for six weeks.

Nine months after the claim, the employee got a brace for his ankle but it was the wrong brace and it did more damage. In February 2011, the employer said he would think about providing modified duty. However, the employee had to have another surgery and depression set in.

“It’s been two years and the employee is still not back to work,” Teel commented. “The total cost incurred with this claim was $153,000. Wage replacement was $81,000, medical was $64,500, rehabilitation costs totaled $5,500 and expenses were $2,000.”

She compared this instance to a similar accident in which the employer contacted BrickStreet immediately and the physician released the employee for light duty work the contractor offered. In this case, it was computer work and the employee got cross training on welding.

“The employee was back on the job and he was released to full duty in 20 days,” Teel said. “The cost was $7,400 for medical and $46 for expenses, for a total of $7,446. This is far different from $153,000. This
Greg Burton, BrickStreet Insurance, discussed the financial savings that CAWV members have received by participating in the association's workers' compensation discount program. He also provided statistics showing how the program has impacted safety performance for participating businesses.

proves that having a return-to-work program pays dividends to the employee and the company. If a company with a return-to-work program has less direct workers’ comp per $100 of payroll, that company is going to have more profit, which can be used to compensate good employees, be put into reserves or buy new equipment.”

“I appreciate the commitment from BrickStreet to the CAWV and out industry,” said President Thompson. “I hope our contractor members will consider BrickStreet when deciding on their workers’ compensation program.”

MARCELLUS SHALE DEVELOPMENT
The West Virginia Legislature passed the West Virginia Natural Gas Horizontal Well Control Act which regulates horizontal oil and gas wells as well as promotes the development of West Virginia’s Marcellus Shale gas reserves.

“Shale technology has the potential to remake West Virginia, the nation and the world by providing local, inexpensive energy,” said Tammie Alexander, Steptoe & Johnson, Bridgeport. “Shale gas is a long-term

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economic resource – if we’re smart – and we need to celebrate this opportunity.”

Alexander provided members with an overview of the new legislation and an indepth look at permit fees, water use, wastewater handling, road use agreements and West Virginia Department of Environmental Protection enforcement.

“The highlights of the act include permit application criteria, notice requirements, performance standards, record-keeping and reporting regulations, well location restriction and surface owner compensation requirements,” Alexander explained. “The act applies to natural gas wells drilled using a horizontal drilling method and disturbing three acres or more, or utilizing more than 210,000 gallons of water in any 30-day period.”

She noted a 2010 WVU Bureau of Business and Economic Research study which reported that in 2009, the oil and natural gas industry in West Virginia employed approximately 9,900 individuals and paid over $550 million in wages. The total estimated impact of Marcellus shale development on the West Virginia economy in 2009 was $2.35 billion in business volume, 7,600 jobs and $14.5 million in state taxes.

“It is expected Marcellus development will have a significant impact on the state’s economy through 2015 and beyond,” Alexander said. “The level of growth will depend on many outside influences, including changes in federal and state policies, changes in tax and environmental policies and the market price of natural gas.”

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“What tomorrow may be

David Lanham, chairman of Lanham O’Dell & Company, discussed market trends for 2011 and provided an overview of what the market may do in 2012. He shared how what has been occurring impacts the industry and how to prepare a business to respond proactively in managing investments and securing resources.

Lanham reviewed the long-term trend line of the Dow Jones Industrial Average over the past century and presented a chart showing that the mean regression is not over. He also showed a chart that illustrated consumer confidence is at one of its lowest points ever. Lanham stated that in 2012, and probably well into the next decade, investors will be dealing with the consequences of past actions.

“We must start paying down debt and begin the process of lowering deficit spending,” he quoted one investment advisor as saying.

“Forecasting is one of the most important jobs in the market,” according to Lanham. “It will determine how investors will most likely operate for the remainder of this cycle.”
Kenton, Katelyn, Kristen, Kathryn, C.K. and Paula Meadows enjoyed the beach.

Mikki and Bryan Leatherman enjoyed the warm Aruban weather.

Matt and Kathy Campbell joined Cathy and Bob Brookover.

Brad and Sharlene Wiseman got into the island spirit.

Bruce Meeker and Steve Cvechko joined Neil Smith and Scott Pierson at the meeting.

Tsunami provided entertainment during the reception.

Brian, Stephanie and Lauren Harvey enjoyed the Aruban sunset.

Diana and Lee Samsell were happy to attended the Midyear Meeting.

Brant Moorhead and Lynn Fink were pleased with the tropical locale.

Dave and Diana Heeter made the most of their time on the island.

Ken and Tracy Webb enjoyed the reception.

Jim and Sara Matheny joined Andy Teeter, Lynn Cvechko and Margo Teeter.

Corey Dawson enjoyed time with Lee Snyder and Melinda Dawson.

Sonny and Ellen Johnstone talked with Dan and Doris Flesher.

Jamie and Cathleen Ridgeway enjoyed the Midyear Meeting.

Charlie, Dave, Jayne and Mary Lanham participated in the reception.

Members snorkled at Cura di Tortuga, a natural pool in Aruba formed by volcanic rock.

Isaac and Isaiah Pierson tried their hand as Catamaran captain.

Kevin and Beth Radford enjoyed the Midyear Meeting.

Members enjoyed a variety of island excursions, such as horseback riding on the beach.
DIVISION MEETINGS TACKLE INDUSTRY ISSUES
Members met in their respective occupational division meetings to discuss issues affecting contracting and bidding.

State and federal highway funding was front and center at the Heavy/Highway Division meeting. CAWV President Gene Thompson gave an update on the January 12, 2012 Transportation Day at the Capitol sponsored by West Virginians for Better Transportation and noted over 200 CAWV members attended the event. John Boyle, Mountaineer Contractors Inc. and a WVBT board member, presented the organization’s strategic plan for 2012-2014. He encouraged members to financially support WVBT’s efforts to highlight highway funding needs.

Other items discussed included federal highway reauthorization, Joint Cooperative Committee reports, new EEO and DBE provisions, and the new West Virginia Division of Highways Value Engineering (VE) policy.

Members of the Building Division reviewed the activities of a newly-formed task force with the School Building Authority of West Virginia, called to help the SBA develop future square foot cost allowances for new school construction. The task force joins several segments of the industry to give input on the agency’s square foot cost allowances. The SBA is also looking for information on what issues drive costs up as well as any changes to the SBA’s bidding procedures that would be beneficial for all parties involved. Members also got an update on the activities of the Joint Architects Committee task forces with the state Purchasing Division and the West Virginia National Guard.

The Utility Division reported on a meeting with officials from the state Department of Tax and Revenue to discuss consumer sales tax exemption issues some contractors are having on municipal utility projects. Most Public Service Districts and municipalities do not have direct pay permits that would allow a contractor to buy pipe and other supplies for a project without having to pay the sales tax as outlined in the state code. The tax department, after working with the Joint Utility Committee, updated their forms to allow contractors to buy supplies and use the local Public Service District’s or municipality’s tax ID number.

“Everyone I spoke with thought this was one of our best meetings in years,” said President Thompson. “The business sessions provided good information and the division meetings gave members an opportunity to chart the future course of our association and our industry. Everyone left the meeting with knowledge that we will
find useful in the months and years to come.”

A number of social events and banquets were interspersed with the business sessions to give members an opportunity to network and renew friendships. The Prayer Breakfast, which was the highest attended in years, featured a message titled “Being a Good Neighbor” by Larry Kerr. Musical worship was provided by local group God’s Sons.

Next year’s Midyear Meeting will be held January 25 - 30, 2012 at the Ritz Carlton in Grand Caymans.

Dan Cooperrider and John Boyle updated members of the Heavy/Highway Division on the activities of the newly revitalized CAWV/WVDOH Joint Construction Subcommittee, Joint Cooperative Committee and West Virginians for Better Transportation.

All of the 2012 Midyear Meeting presentations are on the CAWV’s web site at http://www.cawv.org/events/midyear-meeting.html.
Imagine that you, a general contractor on a new hotel and conference center project located in northern West Virginia, encounter large pockets of unsuitable soils that you are directed to remove and replace. You quickly determine that the expense of over-excavating, wasting the unsuitable material, and importing and placing suitable material will more than double project costs. A change order is generally agreed upon to cover the increased scope and cost of the extra work. In the spirit of keeping the project on schedule, the earthwork subcontractor performs the remainder of the work, then demobilizes and moves on to another project.

Subsequently, you complete all work on the project and expect to be paid, yet the owner refuses to pay in full for the “extra” work. The owner takes the position the work was unnecessary and should have been included within the original price for the excavation work. When the earthwork subcontractor demands final payment, you point to the subcontract's “paid-if-paid” clause which provides that the subcontractor is not entitled to payment until you are paid by the owner.

You explain that under the terms of your subcontract with the earthwork subcontractor, you have no obligation to pay this subcontractor unless and until the owner pays you for the subcontractor's work. The next call you receive is from the subcontractor's attorney threatening to sue you or your payment bond surety for the amount the subcontractor is claiming for the extra work.

**PAY-IF-PAID CLAUSES: DEFINITION AND OPERATION**

This scenario illustrates the operation of a “pay-if-paid” clause which refers to a provision in a subcontract that relieves a general contractor from the obligation to pay its subcontractor until the owner pays the general contractor for the subcontractor's work. Beyond simply controlling the timing of payment, a pay-if-paid clause, more importantly, precludes the general contractor from even owing the subcontractor any money until the owner pays him for the subcontractor's work. Such a provision can obviously have a devastating impact on a subcontractor.

There is no specific language that defines or creates a pay-if-paid clause. The essence of such a clause, though, is a statement that the parties agree that the contractor's financial obligation to the subcontractor does not arise until it receives payment from the owner for the subcontractor's work.

Typically, pay-if-paid clauses use phrases such as “condition precedent” or “conditioned upon” in describing the relationship between the owner's payment to the general contractor and the general contractor's duty to pay the subcontractor. Less frequently, but perhaps more effectively, pay-if-paid clauses include language to the effect that the subcontractor has agreed to assume the risk of the owner's non-payment. In the end, a pay-if-paid clause can be created by any language that reflects the subcontractor's agreement that the contractor owes him nothing until after the owner pays the contractor, and that if the owner fails to pay the contractor, the contractor in turn, never owes the subcontractor any money.

Perhaps the best way to understand pay-if-paid clauses is by contrasting them with provisions known as “pay-when-paid” clauses. Those clauses are construed to mean that the contractor does not have to pay the subcontractor until sometime after payment is received from the owner, but do not shift the risk of the owner's insolvency to the subcontractor. In short, a pay-when-paid clause allows the contractor to delay payment to the subcontractor until after payment is received from the owner, but does not relieve the general contractor of his obligation to pay the subcontractor.

Put another way, pay-when-paid clauses do not shift the risk of the owner’s non-payment to the subcontractor. Ultimately, the general contractor must pay the subcontractor for the work the subcontractor performed, even if the owner never pays. Accordingly, a provision in a subcontract that states that the subcontractor is to be paid “provided like payments shall have been made by owner to contractor” constitutes only a pay-when-paid clause, because it does not evidence the parties’ intent to shift the risk that the owner would never pay.
“There is no specific language that defines or creates a pay-if-paid clause. The essence of such a clause, though, is a statement that the parties agree that the contractor's financial obligation to the subcontractor does not arise until it receives payment from the owner for the subcontractor's work. Typically, pay-if-paid clauses use phrases such as “condition precedent” or “conditioned upon” in describing the relationship between the owner's payment to the general contractor and the general contractor's duty to pay the subcontractor.”

From the foregoing comparison, one can see that the fundamental concept underlying pay-if-paid clauses is the subcontractor's assumption of the risk that the owner never pays for his work. It is from that principle that all the negative consequences of pay-if-paid clauses flow. First, because the contractor's obligation to pay is conditioned upon his receipt of payment from the owner, if the owner does not pay, the subcontractor has no breach of contract claim against the contractor for non-payment. Further, the subcontractor cannot prevail against the contractor on a claim for the reasonable value of the work he performed (called a “quantum meruit” claim), because, again, the subcontractor assumed the risk that the owner would not pay the contractor.

Further, a subcontractor probably cannot recover on a mechanic's lien claim against the property on which the subcontractor performs the work for which he is claiming payment because mechanic's liens cannot exist absent an indebtedness arising out of the contractual relationship between a contractor and a subcontractor. Put another way, because the mechanic's lien procedure is a remedy to enable subcontractors, and others, to be able to collect on their accounts receivable, it is not available in circumstances where a pay-if-paid clause applies, because, in effect, the general contractor owes nothing to the subcontractor.

The subcontractor might have a claim against the project owner for unjust enrichment, on the equitable theory that it is unfair to allow the project owner to receive the benefit of the subcontractor's work without paying for it, but such a remedy, even if available, may be of little real value. In all likelihood, the owner's non-payment, which triggered the operation of the pay-if-paid clause in the first place, was the result of the owner's insolvency.

**ENFORCEMENT OF PAY-IF-PAID CLAUSES**

Why do courts enforce pay-if-paid clauses, given their potential for such harsh results? Isn't it the function of courts to protect parties from overreaching and prevent unconscionable results? The short answer is that courts enforce pay-if-paid clauses because they really cannot do otherwise. Pay-if-paid clauses are an example of the risk-shifting function of contracts. Contracts not only outline and memorialize the basic terms of the parties’ agreement with respect to time, payment, and scope, but also assign to one or the other of the parties the risk of the occurrence of various events. In the absence of an explicit assignment of risk, the law, or industry custom, determines which party bears the risk of the occurrence of any particular event.

Once the parties to a contract or subcontract unambiguously assign risk, the courts are bound by the principle of “freedom of contract” to enforce the contract's terms. Freedom of contract refers to the concept that parties are at liberty to decide the terms of the contract between them, without judicial interference. A court cannot and will not concern itself with the fairness or inequity of those terms, or how their application affects the parties. The only limits on the freedom of contract principle are where the terms of the contract violate law or contravene some other, greater public policy. In the construction setting, which involves relatively sophisticated parties in a commercial transaction, the public policy underlying the principle of freedom of contract is paramount, outweighing virtually all other public policy considerations. Consequently, once a court determines that the parties to a construction contract have clearly and unambiguously assigned a risk to one of them, it has little choice but to enforce the contract as written.

Normally, the general contractor, not the subcontractor, bears the risk of the owner's insolvency or failure to pay. Freedom of contract principles, however, allow that risk to be reassigned. A pay-if-paid clause simply shifts that risk onto the subcontractor. As long as there is no doubt that the subcontract actually shifts the risk of non-payment to the subcontractor, a court has little choice but to enforce the contract, even if the risk-shifting turns out to be a bad deal for the subcontractor.

Nonetheless, recognizing their harsh effects, courts have generally been reluctant to enforce pay-if-paid clauses, despite freedom of contract principles. Noting that enforcement of such a clause is mandated only where the language is clear, unequivocal, and unambiguous, courts in various states over the years have refused to enforce such provisions in virtually any instance where the language of the subcontract could be interpreted to be something less than a pay-if-paid clause. Indeed, the history of pay-if-paid clauses reflects that the evolution of those provisions has been guided by the rejection of various efforts to craft a pay-if-paid clause that would pass judicial muster.

The courts in some states have taken an even broader approach, finding that public policy favoring payment of individuals and entities for the work and services they have provided on
construction projects is sufficient to bar enforcement of pay-if-paid clauses, no matter how clearly drafted. As it now stands, the validity and enforceability of a pay-if-paid clause in a subcontract depends not only on the exact wording of that clause, but also the state in which it is drafted and the law that applies to interpretation of the contract.

Pay-if-paid clauses are enforceable in West Virginia. In 2005, the West Virginia Supreme Court of Appeals specifically addressed the issue, and decided that the freedom of contract principles underlying such a clause outweigh the public policy, embodied in the mechanic’s lien laws, favoring payment to subcontractors, materialmen, and construction laborers. In that case, subcontractors on a public project were denied recovery, not only against the contractor with whom they had entered into a subcontract, but also against the surety on the statutory bond required by law to be provided for public works projects. The Supreme Court of Appeals did not address the issue of whether the subcontractors involved could pursue any sort of claim against the public owner, but noted that any such claims against the owner could only be pursued in the West Virginia Court of Claims.

The courts of the states bordering West Virginia also enforce unambiguous, clearly-drafted, pay-if-paid clauses. Both Virginia and Maryland have squarely addressed the issue and decided that such provisions are valid. The courts of Ohio have also indicated that they would enforce a clearly drafted and unambiguous pay-if-paid provision. Similarly, Kentucky courts have long held that pay-if-paid clauses are enforceable if the parties demonstrate in their agreement a clear intent to be bound by such a provision. Pennsylvania, on much the same grounds as West Virginia, will also enforce an unequivocal, unambiguous pay-if-paid clause in a subcontract.

CONCLUSION
Again, pay-if-paid clauses are here to stay. They should not be ignored. Recognizing that fact and dealing with payment situations squarely are the only ways to preserve rights to payment and avoid litigation.

Carl L. Fletcher, Jr., serves in the Charleston office of Bowles Rice and is a member of the firm’s Construction Law Team. Carl has practiced law for 32 years and focuses his practice on construction law and litigation, commercial litigation and lien law. Gene W. Bailey, II, serves in the Charleston office of Bowles Rice and is a member of the firm’s Construction Law Team. Gene has practiced law for 28 years and practices in the areas of construction law, labor and employment law, safety and health and civil litigation.

Bowles Rice is a full service, regional commercial and defense law firm with 130 attorneys and eight offices strategically located in West Virginia, Pennsylvania, Kentucky and Virginia. The firm’s key areas of practice include energy law, banking law, litigation, employers’ liability law, construction law and education law.
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GOVERNOR TOMBLIN THANKS MEMBERS, TIMMONS TOUTS STATE’S POTENTIAL AT STATE MEETING

The people sitting in this room represent thousands of jobs in West Virginia,” Governor Earl Ray Tomblin said to CAWV members attending the State Meeting, held March 21 in conjunction with Expo. “My administration is ready to work with you to improve the state. We are looking at the Department of Transportation and working to ensure an ambitious program to maximize the money available and give West Virginians the biggest bang for their buck.”

The Governor spoke to members, thanking them for creating jobs and building the state’s infrastructure. Throughout the 2012 legislative session, Governor Tomblin has touted increased funding for infrastructure development, and even dedicated a portion of future surplus money to the State Road Fund.

The State Meeting also included an address titled “Shale is a Game Changer” by Jay Timmons, president & CEO of the National Association of Manufacturers, Washington, D.C. The presentation was held in conjunction with the Marcellus to Manufacturing Conference.

"Manufacturing has a tremendous multiplier effect in the economy, more than any other sector," Timmons told the group. "For every dollar invested in manufacturing, $1.35 in spinoff activity occurs."

Timmons, who oversees political strategy, policy development and grassroots efforts for the national trade association, discussed the spinoff manufacturing that occurs as a result of the construction of an ethane cracker. His presentation was held just days after an announcement by Royal Dutch Shell that an ethane cracker plant would be built in Pennsylvania.

"The fact that your state government recognizes the potential for an ethane cracker and shale development is one of the first major steps in attracting companies," Timmons said. "Not only have they recognized it, but they've taken action to provide incentives to bring a cracker to the state. I think you guys are light-years ahead of other states, but it doesn't mean you can stop."

An ethane cracker, like the one being planned in Pennsylvania, has potential to launch a stream of businesses that take advantage of the various materials that can be extracted from shale gas.

Timmons said West Virginia, because it is already working on its business climate, will stand to benefit when the federal government begins to understand its "role to increase competition" in the U.S.

"Having your state government focusing on manufacturing today gives them a head start for what I think is going to be a manufacturing
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“We are pleased representatives of state and federal contracting agencies would attend our meeting,” President Thompson said. “Many of these representatives are responsible for the design, bidding and award of over $1 billion worth of public works contracts annually. We greatly appreciate the work they do day-in and day-out to build and maintain West Virginia’s infrastructure of highways, bridges, schools, water and sewer systems.”

The president not only thanked the state and federal officials for their attendance, but acknowledged the working relationship that has been cultivated throughout the years and the positive influence that has on the construction industry.

“I look around this room and see representatives of nearly every contracting agency,” he said. “The CAWV is unique in its ability to bring contractors together with funding agencies to work for the betterment of the entire state.”

The president discussed the CAWV’s relationship with the WV Division of Highways and Federal Highway Administration, which includes an annual award program, the “Quality Concrete Construction Award.” The program recognizes and rewards superior workmanship and performance, and stimulates competition among contractors, ensuring that quality construction in the highway program remains a focus of the industry to the ultimate benefit of the public.

The 2011 “Quality Concrete Construction” award was presented to Triton Construction Company, Nitro, for their Martinsburg Pedestrian Plaza project. The project included renovating a downtown intersection and parking lots into a modern pedestrian plaza and park. The uniqueness of the project, and its importance to be aesthetically pleasing spurred changes on an almost daily basis. The project contains several shape curvature of exposed aggregate colored sidewalk that had to be poured all at one time.

2011 Concrete Quality Excellence Award judges included Todd Rumbaugh, director of Contract Administration, WV Division of Highways, Mike Mance, cement and concrete unit supervisor, WV Division of Highways, and Bert Buchanan, bridge engineer, Federal Highway Administration.

Following the Concrete awards, Occupational Safety and Health Administration Compliance Assistance Specialist Rich Jeffrey and Safety Committee Chairman Scott Coleman recognized CAWV members for excellence in safety [see related story].

President Thompson, who also serves as chairman of the Scholarship Foundation, presented the 2012 CAWV scholarship award to Christopher Robertson, a junior studying civil engineering at West Virginia University. Robertson accepted a $4,000 check and thanked the association for the award [see related story].

Thompson thanked members for their generous support of the Foundation, which was formed in 1989. Thompson expressed his appreciation and sympathy to the family of Ron Whitney, a long time CAWV member and stanch Scholarship Foundation supporter who recently passed away.

“Ron Whitney was a great supporter of the industry and a wonderful friend,” Thompson said. “Along with many of his association activities, Ron supported the Scholarship Foundation, both in life and in death, as he requested memorial donations be made to the group in his name.”

Whitney was a founding member both Expo and the West Virginia Utility Contractors Association, owner of West Virginia Water and Waste Supply Company, Inc., and a long-time CAWV member.

“The industry has lost an amazing man,” Thompson said. “But, Ron would be proud of the work we are doing. The CAWV is furthering the careers of many young adults, joining members with state and federal officials to enhance the state and having good time while we are working hard.”
When you need help with construction related legal matters, you want a firm that understands the industry and has the know-how and experience required to provide cost-effective solutions. Daniels Law Firm, PLLC focuses on meeting the legal services needs of construction businesses in West Virginia and surrounding states. Our firm represents a broad spectrum of clients, including heavy highway, utility and building contractors, coal mining companies, and construction suppliers. We offer a wide range of services and can handle almost any type of legal problem for our clients. We excel in these and other areas:

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In addition, the firm is engaged in a diversified civil practice and represents clients from all areas of the business community. Daniels Law Firm is a member of the following organizations:

- Contractors Association of West Virginia
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- West Virginia Coal Association
- National Utility Contractors Association
- West Virginia Rural Water Association
- West Virginia Society of Certified Public Accountants
- American Arbitration Association
During this year’s CAWV State Meeting, held March 21, the Safety and Crime Prevention Committee presented the 2011 Safety Awards to members who have exhibited excellence in safety performance and promotion in the workplace. CAWV members submitted their safety information during the winter months. Safety Committee members carefully evaluated each application, sorting out the industry’s safest companies.

Scores are based on a company’s documented safety policies and procedures, commitment and approach to safety and health in the workplace and recorded statistical data for the year. Special marks are given to those companies who offer high quality safety training and demand active employee involvement in their safety process.

Finalists are chosen from the contractor and associate members who achieve an excellent performance rating. Awards were presented to only those members that met of exceeded the program criteria. Safety Committee Chairman Scott Coleman, IVS Hydro, Inc., Waverly, oversaw the selection process. He joined Rich Jeffrey, OSHA compliance assistance specialist, to present each recipient’s award. The 2011 awards program was revitalized with an array of promotional products for each company to select. The Safety Committee also decided to provide each winning company with an awards presentation to their employees honoring their commitment to safety on the job site.

CAWV SAFETY COMMITTEE
Chairman, Scott Coleman, IVS Hydro
Donald Barr, Mountaineer Contractors, Inc.
John Casey, Fox Engineering – Fox Construction
John Coe, Heeter Construction, Inc.
Bobby Cook, Sauls Seismic, Inc.
Charls Cremeans, Crane Edge, LLC
Jeff Dixon, Orders Construction Company, Inc.
Jeremy Dvorcek, Kalkreuth Roofing
C.J. Frum, Kokosing Construction Company
Rick Higginbotham, Freidlander Company
Rob Lafon, Famco, Inc.
Luther Lasure, Dougherty Company, Inc.
Sara Matheney, Safety Caution Equipment Co.
Larry McClintock, Swope Construction Co.
William Shrewsberry, Johnstone & Gabhart, LLP
Tim Spradling, Rover Construction, Inc.
Chandler Swope, Swope Construction Co.
John Zimnnox, Dyno Nobel

Rich Jeffrey, Keith May and Scott Coleman
Rich Jeffrey, Craig Bartholow, Brian Cantrell and Scott Coleman
Rich Jeffrey, Jack Withrow and Scott Coleman
Rich Jeffrey, Steve Scabo and Scott Coleman
Rich Jeffrey, Chad Johnson and Scott Coleman
Rich Jeffrey, Steve Brown, Chad Akers and Scott Coleman
Rich Jeffrey, Jamie Dixon, John Persun and Scott Coleman
Rich Jeffrey, Dennis Elbon and Scott Coleman
All CAWV members are invited and encouraged to participate in the annual program. Applications arrive via email, mail and are available on the association's website. For further details visit www.cawv.org.
The CAWV’s 2012 Scholarship Winner, Christopher Robertson, is no stranger to the demands of the construction industry. The civil engineering student at West Virginia University has worked in heavy/highway construction industry sector since graduating from Preston County high school in 2009. The Scholarship Committee was impressed with his grasp of how to manage both a project and people, and they chose Robertson to receive the top honor from a field of nearly 25 qualified applicants.

Robertson began his career as a shop maintenance employee with Mountaineer Contractors, Inc., Kingwood, in 2009 and was offered an opportunity as a laborer at several job sites. Robertson has since spent every summer working for the company, gaining real world construction experience.

“This past summer I served as foreman on three separate projects ranging from turning lanes and major road widening projects to slip repairs and land reclamation,” he said. “These invaluable field experiences have not only bettered my understanding of the engineering and construction world, but have allowed me to bridge the gap between education and the real life application of the knowledge I have gained. I continuously find myself applying the organizational and leadership skills gained in the field to my educational endeavors.”

Robertson is currently a junior and carries a 3.9 grade point average. He is an active participant in the American Society of Civil Engineer’s annual concrete canoe competition and a member of the Pride of West Virginia, WVU’s drum line.

“Participating in the WVU drum line takes not only musical ability, but the discipline to manage 11 hours of weekly rehearsal, not including game days, while maintaining academic excellence,” he said. “I accredit my success as an honors student in engineering at WVU to the time management skills I have honed while working with Mountaineer Contractors.”

Robertson has worked with Mountaineer Contractors, Inc., in various capacities of increasing difficulty, starting as a shop hand and laborer, progressing to assistant to the site supervisor, and finally, serving as foreman.

In addition to the $5,000 Robertson won, the CAWV Scholarship Foundation distributed $6,000 this year to West Virginia college students pursuing an education and career in construction or engineering. Recipients were selected on the basis of their academic performance,
extracurricular activities, work experience, financial need and interest in a construction industry career. Eligible schools include West Virginia University, West Virginia University Institute of Technology, Marshall University, Fairmont State University and Bluefield State College.

Robertson expressed his thanks to his parents, professors and industry mentors during the CAWV’s State Meeting held March 21, 2012 during Expo.

“I am very thankful to win and I thank all the members of the Contractors Association who contribute to the Scholarship Fund,” the Kingwood native said. “I hope to continue to work in the state of West Virginia as a contractor and practicing engineer. I feel that the construction industry is a vital part of the West Virginia economy, and it is important that my peers and I rise to the challenge of fulfilling the responsibilities of our predecessors in the industry.”

The Foundation presented six other scholarships totaling $6,000. Students receiving scholarship awards were: Charles Meyers, Kory Fox and Ryan Mayo from Marshall University; Randal Blankenship from WVU – Institute of Technology; Brandon Bartlett from Fairmont State University; and James Bowling from Bluefield State College.

“We had a great group of applicants this year,” said Scholarship Foundation Chairman and CAWV President Gene Thompson, Ahern, a division of Kokosing Construction Company. “All of the students we interviewed have impressive transcripts and leadership skills, and many have begun careers within the industry. These kids have committed themselves to educational excellence and each one of them will bring a unique benefit to West Virginia’s construction industry in the years to come.”

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2012 CAWV Scholarship Receipients

**Brandon Bartlett**
Fairmont State University

Brandon Bartlett is a junior studying civil engineering at Fairmont State University. He participates with the school’s concrete canoe competition team, and is eager to spend his summers working in the construction industry.

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**Kory Fox**
Marshall University

Kory Fox is a senior studying safety technology and psychology at Marshall University. Fox has significant leadership experience from his service with the Marine Corps. Following graduation, Fox intends to pursue a safety position in the construction industry.

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**Randal Blankenship**
WVU Institute of Technology

Randal Blankenship is a senior studying civil engineering at WVU Tech. He is interested in pursuing a construction industry engineering position and hopes to remain close to home. Blankenship participates in several engineering competitions.

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**Dennis Mayo**
Marshall University

Dennis Mayo is a sophomore studying civil engineering at Marshall University. Mayo is concurrently working toward becoming a Commissioned Officer in the U.S. Army Reserve and has worked as a firefighter and paramedic. He is interested in building construction and major site development.

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**James Bowling**
Bluefield State College

James Bowling is a sophomore studying civil and architectural engineering technology at Bluefield State College. Bowling, who has grown up in the industry, is hoping to pursue advanced degrees from Virginia Tech before entering the industry.

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**Charles Meyers**
Marshall University

Charles Meyers is a junior studying civil engineering at Marshall University. He is currently working with Neighborgall Construction Company while completing his degree program. Meyers hopes to begin his career as a project manager.
Young Contractors work to “Stop Hunger”

CAWV Young Contractors used nearly 2,000 cans of food to help Covenant House and the American Institute of Architects - WV Chapter “Stop Hunger.” Pictured are Dustin Fisher, Mikhail Sazonov, Shannon Stephens, Erich Reggi, Nate Orders, Robert Williams and Chet Rodabaugh. The CAWV Young Contractors built a variety of stop signals that are routinely used in the construction industry to bring attention to the hunger issue in the Charleston area.

Hunger is no laughing matter, but the CAWV Young Contractors had a great time stopping hunger on March 6 at the Clay Center. The CAWV Young Contractors represented the construction industry in the 2012 Canstruction competition, hosted annually by the American Institute of Architects - WV Chapter and Covenant House.

The group joined together to plan, design and build a 10-foot-tall Stop/Slow Paddle and two traffic barrels titled, “STOP Hunger.” Tomato sauce, refried beans, corn, mixed vegetables and kidney beans were all used to build the structure, which stood at the Clay Center among eight other monolithic structures made entirely from canned foods.

The CAWV Young Contractors sign included nearly 2,000 cans of food and represents the industry’s commitment to support efforts to fight against hunger. A total of 13,000 cans of food were donated to the Covenant House food pantry following the competition.

Covenant House Executive Director Ellen Allen noted that the competition is an important event for the nonprofit organization. The food donated from Canstruction supplies families with food for about three months, she said. Last year, the group served 6,386 people, a number Allen said would reach near 7,000 this year.

“We're seeing an increased demand in food, and a lot of first-time users, including the working poor,” Allen said.

“This event is a significant event to stock our food pantry. It's an integral component of our mission of how we're able to serve more people.”

Construction is a national competition hosted by food pantries and AIA Chapters. Since 1992, the competitions have spread into 200 cities worldwide. West Virginia’s 2012 Canstruction event marks the sixth year that Mountain State architects, engineers, contractors, business groups and students have supported Covenant House’s food pantry.

The CAWV Young Contractors were awarded an Honorable Mention for their “Stop Hunger” exhibit.

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BrooAlexa, Reclaim Company receive SBA awards
CHARLESTON, WV - The West Virginia Small Business Administration honored BrooAlexa, LLC, Charleston, and Reclaim Company, LLC, Fairmont, for their entrepreneurial efforts. BrooAlexa, LLC’s President Gene Brooks, J r., and CEO Frances Brooks were selected as the 2012 Small Business Persons of the Year. Robert James “RJ” Williams, owner of Reclalm Company, LLC, was selected as the 2012 Young Entrepreneur of the Year. Awards will be presented during the WV District Office's Small Business Week Event, being held on Wednesday, May 30.

“The individuals we are honoring on May 30 represent the finest traits of American entrepreneurial spirit and we are proud to recognize their accomplishments,” said Judy McCauley, district director of SBA’s West Virginia Office. For additional information visit www.nationalsmallbusinessweek.com.

CAWV Members Receive NAPA Quality in Construction awards
LANHAM, MD – The National Asphalt Pavement Association (NAPA) announced the winners of its 2011 Quality in Construction Award for excellence in construction of an asphalt pavement. J.F. Allen Company, Buckhannon, received the award for their work on 3.6 miles of U.S. Route 219 in Elkins. The project included shoulder widening, milling and paving. The road features an excellent appearance and the ride quality of the road is supreme. The project also boasts improved safety for the area and was completed in a timely fashion.

Additionally, IA Construction Corporation received the award for milling and overlay of eight miles of I-79 southbound in Butler County, Pennsylvania. The Asphalt Pavement Association of West Virginia is a state chapter of NAPA.

AGC of America names officers
ARLINGTON, VA - AGC of America elected the new officers to lead the trade association for the next year during their annual convention, held March 13-17 in Honolulu, Hawaii. Joseph Jarboe will serve as president of the national association. Jarboe is senior vice president of Maryland-based Clark Construction Group. Paul Diederich will be senior vice president. He's the president of North Dakota-based Industrial Builders. Serving as vice president will be Alan Landes, president and chief operating officer of Missouri-based Herzog Contracting. Rounding out the leadership team is David Hanson, who will serve as treasurer and is senior vice president of Michigan-based Walbridge.

Also at the convention, Richard Smailies, president of FAMCO, Inc., Huntington, was elected as an AGC National Director. He joins Art King, Kanawha Stone, Charles R. Neighborgall III, Neighborgall Construction Company, and Robert Orders Sr. and Robert Orders Jr., Orders Construction Company, as the CAWV’s AGC National Directors.

Brickstreet announces expansion plans
CHARLESTON, WV - BrickStreet Mutual Insurance has announced that they will be opening an office in Charlotte, North Carolina in the fall of 2012 to provide a presence in support of their proposed expansion into several southeastern states. Current plans have this regional office ultimately serving the following states: North Carolina, South Carolina, Tennessee, Georgia and Alabama. The Charlotte office will provide the same BrickStreet 360° services as currently offered for policyholders in West Virginia, Virginia, Kentucky, Illinois and Pennsylvania.

“Our new office will in no way affect the services provided in West Virginia,” said Brickstreet President and CEO, Greg Burton. “Our roots are in West Virginia and this state will always be our home. This expansion is a way to complement, not replace, our headquarters and overall presence in the Mountain State.” The CAWV’s partnership with BrickStreet provides contractor members with a three year loss-ratio of 65% or less a discount on workers’ compensation premiums.

Brown Edwards staff earns Certified Construction Industry Professional designation
CHARLESTON, WV - Brown Edwards & Company has announced three members of its staff have earned the designation of Certified Construction Industry Professional through the Institute of Certified Construction Industry Financial Professionals, Inc., which is associated with the Construction Financial Management Association. Russell Hicks, CPA, Sonny Walker Morris, CPA, and Robert Ryan, CPA, have earned the certification through competency testing in construction accounting and reporting, income recognition methods, budgeting and planning, risk management, taxes, human resources, legal, information technology and joint ventures. Brown Edwards & Company provides accounting and financial services. The company has offices in West Virginia and Virginia.
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ESSROC plants receive Green-Star certification
PARKERSBURG, WV — Thirteen Essroc Ready Mix concrete plants in the Midwest region have been awarded Green-Star certification by the National Ready Mixed Concrete Association (NRMCA). The program audits and certifies ready mixed concrete plants for environmental sustainability. The Essroc Midwest plants that are Green-Star certified include: Charleston, Winfield, Huntington, Wheeling, Parkersburg, New Martinsville and Morgantown; Gallipolis, OH; Braddock, Johnstown, Pittsburgh and State College, PA; and Bluffton, SC.

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Rish Equipment Company names new management team
BLUEFIELD, WV – Rish Equipment Company, Komatsu distributor for Virginia and West Virginia, has announced a new management team. Wesley Burke has been selected as president. He has 29 years of experience in construction and has been with Rish for four years as managing director. He joins J ack Davis II, who will now serve the company as vice president of business analysis. Myron Jones, promoted to CEO, has 15 years of experience as vice president of the company’s mining sales. Dale Hall will serve as vice president and chief operating officer. He has 13 years of experience with Rish and will manage product support. Steve Hamilton has been promoted to vice president / chief financial officer / secretary treasurer. He has been with the company since 1986. Buddy McGlothlin was appointed as vice president of sales, following 18 years
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MEMBERS IN THE NEWS

of experience with Rish and 32 years of experience in mining and industrial sales management. Chip Bohlen will serve as vice president and general manager of the company’s Virginia Operations. Rish Equipment Company was founded in 1932 and operates 12 locations in Virginia, West Virginia and Maryland.

H.C. Nutting now Terracon
CHARLESTON, WV – H.C. Nutting Company has now changed their name to Terracon. In 2007, HCN joined forces with Terracon, expanding a five-office network to a national geotechnical, environmental, construction materials testing and facilities firm with more than 130 offices in 39 states. For further information visit www.terracon.com.

White named Chartered Advisor in Philanthropy
CHARLESTON, WV - Pete White, The White Planning Group, has been awarded the Chartered Advisor in Philanthropy, a professional designation bestowed by The American College, Bryn Mawr, Pennsylvania. The Chartered Advisor in Philanthropy program gives professionals the broad knowledge and skills to help clients and prospective donors reach financial and philanthropic goals. The American College awards the designation to persons who fulfill rigorous education, experience and ethical requirements. The White Planning Group provides a variety of financial services.

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CORRECTION: Funding for the Tygart River railroad bridge in Elkins, as profiled in the January/February issue of WVCN, was provided by a $1.5 million grant administered by the West Virginia Economic Development Authority.
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