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CONSTRUCTION LAW

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Understanding the risk—Business email compromise in the construction industry

Matthew H. Meade

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On Monday morning your accounting team reports to you that they wired $250,000 to a new account used by a longtime subcontractor named Acme Builders. Unfortunately, Acme has no record of receiving the payment. A close review of the email with the wiring instructions shows that it came from joe@acmebuilderz.com not joe@acmebuilders.com. Faced with a substantial potential loss, the company is trying to determine next steps.

Background

Unfortunately, these situations are far too common, especially in the construction industry. The FBI reported that it received 21,489 business email compromise (BEC) complaints similar to the above scenario via its Internet Crime Complaint Center in 2023. These incidents resulted in adjusted losses of $2.9 billion to organizations, an increase from the $2.7 billion in losses reported in 2022. The FBI describes a BEC as a "scam targeting businesses or individuals working with suppliers and/or businesses regularly performing wire transfer payments." BEC scams are

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Pennsylvania issues new permit for discharges of stormwater associated with construction activities

Maegan Stump

The Pennsylvania Department of Environmental Protection (DEP) recently announced the availability of a new National Pollution Discharge Elimination System (NPDES) General Permit for Discharges of Stormwater Associated with Construction Activities (PAG-02). Generally, the PAG-02 is a General NPDES Permit required by DEP for construction activities with earth disturbances greater than or equal to one acre, not including road maintenance activities, timber harvesting, agricultural plowing or tilling, or animal heavy use areas. The new PAG-02 will become effective on December 8, 2024, and expires on December 7, 2029. The existing PAG-02 General Permit that became effective on December 8, 2019, expires on December 7, 2024. Those with existing permits with coverage under the 2019 PAG-02 must submit a Renewal Notice of Intent (NOI) by

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executed by fraudsters who gain access to email accounts and/or other forms of communication, through social engineering or computer intrusions techniques, to conduct unauthorized transfer of funds by redirecting legitimate payments or by creating false pretenses to obtain payment from the victim organization. Since 2021, the FBI has issued warnings regarding increasingly sophisticated BEC incidents targeting construction companies. Construction companies are particularly vulnerable to BECs given the nature of the business transactions, which may involve making sizeable payments to vendors, contractors, or other business partners on an ongoing basis.

Common Attack Technique—Supplier Invoice Fraud

Some of the largest losses associated with BEC incidents arise from supplier invoicing fraud like the Acme scam. To conduct a supplier invoicing fraud BEC, a fraudster will compromise a legitimate email account and identify a planned transaction. This allows the fraudster to observe the billing and payment processes between the organizations. The fraudster will then insert themself into the email chain by impersonating a legitimate party, eventually requesting the payment of fraudulent invoices with "updated" payment instructions to divert the funds.

Fraudsters also target construction organizations by accessing commercial databases to obtain details regarding construction projects across the United States. By obtaining contact information, bidder lists, and project costs, the fraudsters can leverage that information to increase the perceived legitimacy of their fraudulent activity. According to the FBI, fraudsters often register a domain name similar to a target construction company's legitimate domain, ultimately seeking to divert funds meant for the target company. Such schemes are often undetected until the victim construction company begins a collections process related to unpaid bills.

What Can You Do?

The FBI recommends that organizations take measures to protect against BECs, such as adopting two-factor authentication to verify requests for changes in account information, prohibiting automatic forwarding of email to external addresses, training employees to detect suspicious email activities, and verifying that incoming emails match the sender's address. Additionally, if a vendor or business partner requests a change to its usual method of payment via email, the payor should always call a known contact at the requesting business and confirm the changes verbally. Upon discovery of a fraudulent transfer of funds, an organization must act promptly to increase the likelihood of recovery. The victim organization should contact its financial institution and request a recall of the funds immediately and notify the FBI and the U.S. Secret Service. If you have cyber insurance, then the carrier should be notified promptly. Cybersecurity counsel should be engaged as soon as possible to direct a privileged forensic investigation to determine the scope of the incident, to reduce risk of additional losses, and to determine potential legal obligations the organization may have under state and federal law arising from the BEC.

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Pennsylvania issues new permit for discharges of stormwater associated with construction activities

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December 7, 2024, to maintain coverage. The Renewal NOI form and other documents for the new PAG-02 can be found in DEP's eLibrary.

The new PAG-02 has some noteworthy changes from the 2019 PAG-02, including, but not limited to:

1. **Legal Instrument Recording** – In the 2019 PAG-02, permittees were required to record a legal instrument identifying post-construction stormwater management (PCSM) stormwater control measures (SCMs) on properties within 45 days of the permit's issuance. In the new PAG-02, it is required that the legal instrument be recorded, and the recorded documentation be provided to DEP or other delegated authority *before* the scheduling of the required pre-construction meeting. DEP proposed this requirement because permittees were routinely not recording the instrument within 45 days of permit issuance.

   In response to public comments, DEP stated that due to municipal coordination and other administration matters, permittees are not typically prepared for a preconstruction meeting or to commence earth disturbance immediately upon receipt of a permit. However, DEP acknowledged that projects conducted for the benefit of a public utility and other approved projects may be prepared to commence earth disturbance immediately upon issuance of the permit and may still require additional time to provide the recorded instrument.

2. **Confirmation Testing for Infiltration Capacity** – It is required that the permittee complete confirmation testing for infiltration capacity to determine whether the SCMs will infiltrate as designed anytime the area of an infiltration SCM has not been protected, as determined by a licensed professional or DEP/the delegated county conservation district (CCD), and an erosion and sediment best management practice will be converted to a PCSM SCM. Licensed professionals are licensed to practice in PA and include professional engineers, landscape architects, geologists, and land surveyors. DEP has made the confirmation testing requirement effective one year following the effective date of the new PAG-02, which is December 8, 2025. In response to public comments, DEP removed the tolerance range on ponding times or drawdown times when evaluating infiltration SCMs to allow licensed professionals flexibility in determining whether confirmation testing is needed.

"Those with existing permits with coverage under the 2019 PAG-02 must submit a Renewal Notice of Intent (NOI) by December 7, 2024, to maintain coverage."

3. **Co-Permittees** – DEP eliminated the requirement to submit a Co-Permittee Acknowledgement Form for Chapter 102 Permits and the Co-Permittee Liability Release Form noting that the permittee/operator relationship is contractual in nature and does not need to include or involve DEP and/or the delegated CCD.

4. **Residential Impervious** – PCSM Module 2, an attachment to NOIs, will be updated to include a table of impervious surfaces for multi-lot projects, and the permit applicant will be required to include information for each lot in the project site, including: SCMS that will treat stormwater from the lot, the area of the lot, the planned impervious area, the maximum impervious area that could be placed on the lot for the planned SCMs designed, and the maximum impervious area under the local ordinance.

5. **Annual Report** – For the new PAG-02, DEP requires that an annual report be submitted each year by the anniversary of the General Permit's expiration date, December 7, to provide information on the status of the project and construction progress. The intent of the annual report is to update DEP and the delegated CCD, as they are unable to inspect each permitted site every year, and it reinforces the need to submit a Notice of Termination.

6. **Monthly Color Photographs** – In the PAG-02, DEP requires the permittee to take color photographs of all best management practices and PCSM SCMs on the site at least monthly. After comments from the public, DEP does include the option in the PAG-02 to allow the permittee to request written approval for an alternative.

The PAG-02 Fact Sheet contains additional substantive modifications, including, but not limited to, definitions to clarify new terms and terms that have been used in prior versions of PAG-02, and the addition of forms such as the New Property Owner Notification Form and the SCM Construction Certification form.

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The PA One Call Law has been strengthened and renewed

Renardo (Rick) L. Hicks

Legislation to amend and extend the PA Underground Utility Line Protection Law—commonly known as the PA One Call Law—has passed the State Senate (Senator Lisa Baker's S.B. 1237) and the State House of Representatives (Representative Rob Matzie's H.B. 2189) and was signed into law by Governor Josh Shapiro on October 29 and is now Act 127 of 2024. These bills amend the Act of December 10, 1974 (P.L.0852, No.287), which was set to expire on December 31, 2024.

This action by the General Assembly of Pennsylvania ensures the continued protection of Pennsylvanians and the workers who maintain essential underground facilities, and permanently extends the PA One Call Law. The Act also imposes duties upon the owners of facilities, providers of such services, and persons or entities preparing drawings or performing excavation or demolition work. The Act prescribes penalties for its violation and reestablishes the Damage Prevention Committee, administered by the Pennsylvania Public Utility Commission, for compliance orders and the issuance of administrative penalties.

By removing a sunset provision, the General Assembly has ensured that the law will remain in effect indefinitely, avoiding any future lapses in its critical protections.

The full text of the new law can be found at: https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2023&sessInd=0&billBody=S&billTyp=B&billNbr=1237&pn=1950

Eckert Seamans has considerable experience with the PA One Call Law. Renardo (Rick) Hicks, in our Harrisburg Office, is a former Chief Counsel at the Pennsylvania Public Utility Commission with previous legal advisory responsibility for PA One Call administration and enforcement. At Eckert, in addition to representing clients in enforcement matters before the PUC, Hicks presents webinars and in-person presentations on the requirements of the One Call Law, details on how it is administered, and recommendations for best practices to ensure compliance with the Law. In addition, our Legislative counsel, Robert DeSousa, also in our Harrisburg office, is able to provide a detailed report on the legislative process and changes to this important law.

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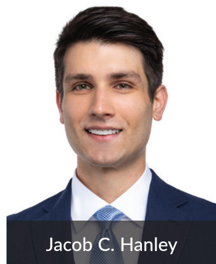
Prompt payment in Pennsylvania and Massachusetts: Compliance and consequences

Scott A. Aftuck


Jacob C. Hanley

"When withholding payment for deficient work, owners must be cognizant of a potentially consequential pitfall—failing to provide contractors with proper notice of a deficiency item."

A. Pennsylvania's Contractor and Subcontractor Act

On nearly every private construction project, circumstances arise that necessitate the owner to withhold all or part of a payment requested by its contractor. These circumstances may include defective work, untimely work, a request for payment that is just plain wrong, or retainage. While owners are undoubtedly entitled to do so, they must proceed with caution and deliberately paper their project records to ensure that their withholding does not run afoul of Pennsylvania's Contractor and Subcontractor Payment Act (CASPA) and to mitigate their potential exposure in litigation involving CASPA.

CASPA is a comprehensive prompt payment statute that applies to payment disputes arising out of contracts executed by owners and contractors in connection with private construction projects. CASPA mandates that owners and contractors pay their respective contractors or subcontractors in strict accordance with the terms of their construction contract. If an owner or contractor fails to do so and litigation is initiated to recover an unpaid sum, CASPA opens the door to imposition of interest, penalty interest, and attorneys' fees for the untimely payment.

While timely payment is mandated by CASPA, the statute provides owners with the authority to withhold payment where the subject request for payment: (1) seeks payment for work that is deficient; (2) contains an inaccuracy, is incomplete, or contains any other defect or impropriety; or (3) is subject to retainage. To avoid incurring penalties under CASPA, owners must ensure that their withholding of any amount in response to a request for payment comports with CASPA's withholding provisions.

Withholding for Deficient Work. Unfortunately, defective work—or work that is just not up to par—routinely arises on construction projects, and owners naturally do not want to pay for it. Section 506 of CASPA permits an owner to withhold payment for deficiency items, which the statute defines as work performed but which the owner, contractor, or inspector will not certify as being completed according to the specifications of a construction contract. Where deficiency items exist on a project, the owner may withhold a reasonable amount for the deficiency. To do so, the owner must notify its contractor of the deficiency item and reason for withholding in writing within 14 calendar days after receiving the request for payment. The owner must thereafter pay its contractor for any item that appears on the request for payment and that the owner deems to have been satisfactorily completed.

When withholding payment for deficient work, owners must be cognizant of a potentially consequential pitfall—failing to provide their contractors with proper notice of a deficiency item. This failure constitutes a waiver of the basis to withhold payment for that deficient work and necessitates payment of the full amount of the request for payment.

Withholding for Errors in Documentation. Owners are additionally often confronted with requests for payment that, for one reason or another, are incorrect. Section 508 of CASPA allows an owner to withhold payment for "errors in documentation," which is defined as a request for payment that is filled out incorrectly or incompletely or contains any other defect or impropriety. Where an owner receives a request for payment containing an error, the owner must give its contractor written notice within 10 working days of the error and pay the correct amount of the request for payment.

Withholding for Retainage. Construction contracts also typically permit owners to withhold amounts that are subject to retainage until the project is certified as complete. Section 509 of CASPA condones this practice so long as it is permitted under the applicable construction contract. However, upon final completion, CASPA requires that the owner release any amount withheld during the performance of the contract and due to its contractor within 30 days after final acceptance of the work—unless the owner is also withholding that amount due to a deficiency item.

If you need assistance complying with CASPA or find yourself in any litigation involving CASPA, you should promptly consult with your construction law attorney. By complying with CASPA's withholding provisions and properly and timely papering project records, owners and contractors can resolve payments disputes before they evolve into litigation and greatly mitigate their potential exposure in any litigation involving CASPA.

B. Massachusetts' Prompt Payment Act

State prompt payment acts set the time frames within which contractors on construction projects must be paid. The purpose of such acts is straightforward—to ensure contractors are paid in a timely manner and to keep projects moving forward. They offer significant protections to subcontractors by ensuring payment without the need to resort to costly legal battles. Two recent cases interpreting the Massachusetts Prompt Payment Act, M. G. L. c. 149, § 29E (the Act) have held that owners and contractors who fail to comply with the Act due so at their own peril.

The Act, which was enacted in 2010, applies to private projects where the contract with the project owner has an original contract price of $3,000,000.00 (excluding projects containing 1-4 dwelling units) and is applicable to all contracts on such projects, including those between lower-tier contractors. Pursuant to the Act, periodic progress payment applications must be submitted within thirty (30) days of the work being performed;

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Prompt payment in Pennsylvania and Massachusetts: Compliance and consequences

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applications must be approved or rejected within fifteen (15) days after submission; and payment must be made within forty-five (45) days after approval. The timelines for approval or rejection of an application are extended by seven (7) days for each tier of contract below the owner. Importantly, rejection of an application in whole or in part must: (1) be in writing; (2) include the factual and contractual basis of the rejection; and (3) be certified as having been made in good faith. An application that is neither approved nor rejected within the applicable time period is deemed approved unless it is subsequently rejected before the date payment is due under the Act. What the Act left unclear are the ramifications if an entity fails to comply with its provisions.

In interpreting the Act, the Massachusetts Appellate courts have held that entities failing to comply with the Act will suffer significant consequences. In *Tocci Building Corporation v. IRIV Partners, LLC*, 101 Mass. App. Ct. 133 (2022), an owner failed to reject seven (7) applications for periodic payment made by the contractor in compliance with the Act and, by operation of law, each became due and payable. Despite its noncompliance with the Act, the owner claimed that it was entitled to withhold payment because the contractor performed defective work, failed to perform certain contractually required work, and submitted fraudulent payment requisitions. The Court disagreed, holding that the owner's failure to provide the factual and contractual basis for the rejection with the requisite good faith certification was fatal to the owner's attempt to withhold the funds, stressing that the requirement for the owner to certify that the rejection was made in good faith was "an essential component of the statute" and could not be ignored. However, the Court held that the owner's claims for breach of contract *had not been waived* by its failure to include them in a proper rejection of the payment applications. The Court was clear: "[w]e do not hold[ ] that the defendants' claims for breach of contract have been waived by their failure to include them in a proper rejection under the statute. A party that . . . makes a periodic payment in response to an application, rather than rejecting it, may nonetheless bring any and all claims it has for breach of contract against the payee and may recoup any money it may be owed. What the statute prohibits . . . is withholding a periodic progress payment in response to an application for it without issuing a timely rejection that complies with the statutory requirements."

The Massachusetts Supreme Judicial Court further elaborated on the holding in *Tocci* in *Business Interiors Floor Covering Business Trust v. Graycor Construction Co.*, 494 Mass. 216 (2024). In *Graycor*, a general contractor failed to approve or reject three applications for payment by a subcontractor and subsequently sought to assert the common law affirmative defense of impossibility of payment. The Court held that common law defenses are not precluded by the Act. However, a contractor that does not comply with the Act must "pay the amount due prior to, or contemporaneous with, the invocation of any common-law defenses in any subsequent proceeding regarding the enforcement of the invoices, as the invoices have been deemed 'approved.'" If payment is not made, said defenses *cannot* be raised. The Court held that failure to comply with the Act must "have meaningful consequences" and that allowing common law defenses to be raised without paying would render the "deemed to be approved" language superfluous, a reading of the Act that "is so repugnant to and inconsistent with the statute that both cannot stand." However, the Court also held that failure to pay did not automatically warrant the entry of separate and final judgment in favor of the aggrieved party. Rather, the Court must engage in a traditional Mass. R. Civ. P. 54(b) analysis prior to the entry of separate and final judgment. This, as the dissent noted, rendered the aggrieved party a Pyrrhic victory, as actual payment of the undisputed funds would be further delayed.

Accordingly, Massachusetts owners and contractors must be aware of and strictly comply with the Act. Otherwise, they will be put in the unenviable position of having to make full payment of the payment applications and seek recoupment while the dispute is determined in a subsequent proceeding.

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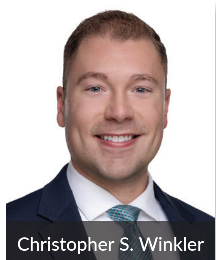
A word of warning to Pennsylvania construction equipment manufacturers


Christopher S. Winkler

Strict products liability is not necessarily at the forefront of one's mind when considering construction-related litigation. To the contrary, and understandably so, most individuals and entities in the construction industry prioritize minimizing their exposure to liability from breach of contract and breach of warranty actions. But for a manufacturer of construction equipment, the potential of facing design defect claims, among others, in the realm of strict products liability is very real.

Such was the case in *Sullivan v. Werner Co.*, 306 A.3d 846 (Pa. 2023), which the Pennsylvania Supreme Court examined within the last year. In *Sullivan*, a scaffold manufacturer faced strict liability design defect claims when the plaintiff, a construction worker, fell from the scaffold platform and suffered injuries. The plaintiff advanced his defect claims under Pennsylvania's risk-utility theory, which asks whether the possibility and seriousness of harm from the product at issue outweighs the burden or cost to the manufacturer in making the product safe. In other words, the plaintiff had to prove that the scaffold's risks outweighed its potential utility to prevail on his defect claim. This test is regularly applied to cases involving complex products in Pennsylvania.

To combat the defect claims, the scaffold manufacturer sought to introduce evidence that it complied with standards promulgated by the Occupational Safety and Health Administration (OSHA) and the American National Standards Institute (ANSI) when designing this equipment. After all, adherence to industry and governmental standards must be enough to show that a product is free of design defects, right?

Not according to the Pennsylvania Supreme Court.

Instead, the court affirmed the trial court's ruling that, in the context of strict products liability cases featuring design defect allegations and a risk-utility theory, a defendant manufacturer cannot introduce evidence that it complied with industry or governmental standards when designing its product to overcome the defect claims. The *Sullivan* court's rationalization for its holding was simple: a design defect case focuses on the product itself. Permitting evidence of standards compliance, according to the court, would "divert[] attention from the product's attributes to both the manufacturer's conduct and whether a standards-issuing organization would consider the product to be free from defects," neither of which are relevant considerations in a risk-utility design defect case.

Accordingly, the Pennsylvania Supreme Court affirmed the holding of the trial court and rejected the manufacturer's attempt to introduce evidence that the scaffold equipment complied with OSHA and ANSI standards to demonstrate the absence of a defect.

Pennsylvania is undoubtedly in the minority of states to preclude admissibility of governmental and industry standards compliance. Even other courts that, like the *Sullivan* court, emphasize focusing on the nature of the product in strict liability design defect claims have still permitted evidence of standards compliance to demonstrate the adequacy of that product's design. *See Kim v. Toyota Motor Co.*, 6 Cal. 5th 21 (2018). Until such time as Pennsylvania alters its position, though, construction equipment manufacturers (as well as manufacturers of all products) should heed the fact that compliance with governmental or industry standards alone will not shield them from liability for possible design defects under Pennsylvania law. Rather, manufacturers should be prepared to take additional precautionary steps in designing and ensuring the safety of their equipment beyond simply complying with the requisite industry or governmental standards.

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Construction Law Group NEWS

Construction Group Accolades

Eckert Seamans' Construction practice group was once again ranked by Best Law Firms® as a Nationally recognized practice in the area of Litigation – Construction for 2025.

Eckert Seamans' attorneys were recognized by Best Lawyers in America for 2025 in Litigation – Construction, including: In Harrisburg, **Bridget Montgomery**; In Pittsburgh, **Scott Cessar, Tim Grieco**, and **Chris Opalinski**; In Princeton, **Robert Zoller**; In Richmond, **Michael Montgomery**; Additionally, **Scott Cessar** was recognized in Pittsburgh as the "Lawyer of the Year."

Chambers and Partners has recognized Eckert Seamans' Construction Group and attorneys **Scott Cessar** and **Chris Opalinski** as leaders in Pennsylvania in the 2024 Chambers USA Guide.

The Construction practice at Eckert Seamans was also recognized in The Legal 500 United States 2024 edition. The guide named the firm among national leaders in the category of Construction (including Construction Litigation) and Member **Scott D. Cessar** as a "Leading Lawyer" for Construction, one of only 20 lawyers across the United States recognized in the category.

Construction News

On May 22, 2024, the United States Court of Appeals for the Third Circuit affirmed a trial award in favor of firm client Allied Erecting and Dismantling, Co. Inc. against United States Steel Corporation—capping off a nearly $6 million total judgment in the case against the country's leading steelmaker. (Case No. 23-1097.) The case involved delay and extra work claims on a number of U.S. Steel projects across the country. U.S. Steel's appeal had sought to challenge the damages calculations at the trial court level, but the Third Circuit rejected that challenge, stating that it had "no trouble concluding that the District Court did not clearly err in its damage calculation." The trial and appellate work was handled by Allied's longtime lawyers **Chris Opalinski** and **Tim Grieco**.

The Construction Group recently welcomed **Christopher Winkler** as a new associate. Chris brings valuable experience to the group and provides guidance and advice on diverse and complex legal issues.

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