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CONSTRUCTION LAW

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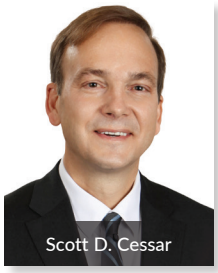
Extending the discovery rule for defects by contract


Scott D. Cessar

Statutes of limitations are set by legislatures of the states to require parties to bring actions within a set period or otherwise the actions are time barred. The length of time varies by state. For example, Pennsylvania has a four-year statute of limitations for breach of contract. By contrast, West Virginia has a 10-year statute of limitations for breach of contract.

Importantly, by common law, many states allow this period to be tolled and to commence from the date of discovery of the breach of the contract. This is known as the discovery rule. Some states also have codified the common law discovery rule by statute in cases of defects on construction projects.

The discovery rule has significance in the construction industry because, although performance of the contract may have ended such that the statute of limitations has expired, the period to file a lawsuit will be deemed to run from when the discovery of the breach occurred. As such, even if the defect is discovered after the expiration of the statute of limitations period, a legal action may not be time barred because the period of the statute does not begin

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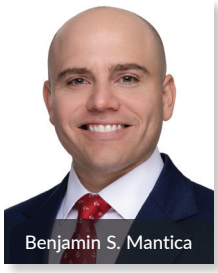
Changing with the times: Major changes to the AAA Construction Arbitration Rules


Benjamin S. Mantica

Committed to streamlining the arbitration process, effective March 1, 2024, the American Arbitration Association (AAA) implemented a number of changes to the Construction Industry Arbitration Rules. The rule changes affected the Fast Track Procedures, the Procedures for Large, Complex Construction Disputes, and the Regular Track Procedures.

Fast Track Procedures

Previously, the Fast Track Procedures applied only to cases where no disclosed claim or counterclaim exceeded $100,000. In an effort to expand access to the Fast Track process, the AAA revised Rule F-1 and increased the ceiling for qualifying for the Fast Track process to cases where no claim or counterclaim exceeds $150,000.

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Extending the discovery rule for defects by contract

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to run until the owner discovered the defect and, in the exercise of reasonable due diligence and investigation, discovered the cause of the defect. Accordingly, if there is water intrusion in a building due to defective construction, the statute of limitations will be tolled until the owner discovers water stains or other signs of water infiltration and had reasonable time to investigate and determine the cause of the problem.

An interesting issue is whether an owner may modify the state's common law or statutory discovery rule by contractual language to lessen the degree of diligence required of owners in investigating and determining the cause of defects. That was the issue in a recent Colorado case, *South Conejos School District RE-10 v. Wold Architects Incorporated*.

In *Conejos*, the school district owner brought suit against its former architect, alleging it was responsible for various defects in the construction of a school building. The contract between the owner and architect contained a very owner-generous definition of when the claim against the architect accrued: when the injured party discovered the defect by way of "detection or knowledge" of a defect "of a substantial or significant nature."

The Colorado statute, consistent with the common law of many states, was far less owner friendly, providing that the statute of limitations began to run when the claimant "discovers or in the exercise of reasonable diligence should have discovered the physical manifestation of a defect in the improvements…."

The architect argued to the court that the owner-friendly contract provision should not be enforced because it was contrary to the Colorado statute and, thus, against public policy.

The Colorado court brushed aside the architect's argument, holding that school district and architect were sophisticated parties free to contract as they desired "based on freedom of contract principles deeply embedded in our jurisprudence."

There are several key takeaways from *Conejos* for construction industry stakeholders.

First, owners should consider including owner-favorable defect discovery terms in their contracts to garner additional time to bring suit for defects that only manifest themselves late.

Second, contractors and design professionals should review defect discovery terms in construction contracts and seek, at least, to limit them to the defect discovery language of the defect statute or of the common law of the state where the project is located. Otherwise, the failure to do so may result in extending the period of time in which contractors and design professionals may be sued for breach of contract arising from an issue on a project completed many years before.

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Changing with the times: Major changes to the AAA Construction Arbitration Rules

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Another notable change to the Fast Track procedures resulted from the combination of Rules F-8 and F-9 into a single rule. First, the new rule indicates that motions are permitted only if a good cause is shown. Additionally, while discovery remains only permitted in extraordinary circumstances, under the revised Rule F-8, a case may now be transferred from Fast Track to Regular Track if discovery is permitted.

Lastly, under Rule F-13, the AAA specified that any award issued will state the arbitrator's position but is not required to provide insight into the arbitrator's reasoning or how the decision was made. If the parties request a reasoned award, an abbreviated opinion, or findings of fact and conclusion of law, the case will be transferred from the Fast Track and the arbitrator is permitted to charge their regular rates.

Large, Complex Construction Disputes

While the AAA didn't make a significant number of changes to the Procedures for Large, Complex Construction Disputes, there was a substantial increase in the threshold for the appointment of a three-arbitrator panel. Previously the threshold for the appointment of a three-arbitrator panel was $1 million. However, to streamline the arbitration of large cases, the threshold for the appointment of a three-arbitrator panel has been increased to $3 million.

Regular Track Procedures

There were several changes to the Regular Track Procedures that demonstrate the AAA's commitment to utilizing technological advances and modernizing the Construction Arbitration Rules. For instance, Rule R-23 states that a Preliminary Management Hearing may now be held via videoconference in addition to by telephone or in person. In a similar vein, Rule R-29 permits all transcription options as opposed to only "stenographic" records, Rule R-44 permits the arbitrator and the parties to use alternative methods of communication or other platforms to exchange information, and Rule R-48 confirms that arbitrators can sign their awards electronically or digitally.

Similar to the changes to the Fast Track Procedures, there were notable changes to the Regular Track Procedures that demonstrate the AAA's effort to make the Construction Arbitration process more efficient and cost-effective. Under the revised procedures the AAA can limit a party's strikes when selecting an arbitrator (R-14), an arbitrator can consider the cost when determining whether to grant leave to a party to file a motion (R-34), and an arbitrator may clarify their awards in addition to addressing any clerical, typographical, technical, or computational errors (R-52).

While it is important to be aware of all of the rule changes, the changes to the rule governing Consolidation and Joinder are the most extensive. Under the revised Rule R-7, the 90-day filing requirement for a request for consolidation or joinder is no longer applicable. A request for consolidation or joinder must occur before the appointment of a Merits Arbitrator. The AAA also distinguished the consolidation and joinder processes under Rule R-7. Rule R-7(a) applies to consolidation and Rule R-7(b) applies to joinder. While the AAA has increased the number of days from 10 to 14 to reply to a consolidation request, the more significant changes were implemented under Rule R-7(b). Notably, if a party requests leave to file a joinder request after the Merits Arbitrator has been appointed, they must not only establish good cause, but now must also establish prejudice if the request was not permitted. Furthermore, whereas the failure to reply to a joinder request was previously considered a denial of the request, a party must now affirmatively object to a joinder request; otherwise, any objection is deemed waived.

The changes implemented by the AAA demonstrate its commitment to ensure the Construction Arbitration process remains efficient and cost-effective. While the purpose of this article is to highlight some of the major changes to the Construction Arbitration Rules, it is important to review all of the recent revisions.

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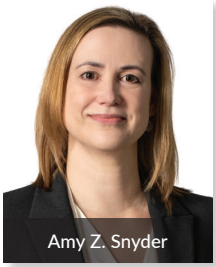
Navigating state and federal laws related to medicinal and recreational marijuana


Amy Z. Snyder

State laws permitting the use of marijuana for medicinal and recreational purposes have proliferated in recent years. On the federal level, however, marijuana is classified as a Schedule I substance under the Controlled Substances Act (CSA), and subject to stringent controls. Change may be on the horizon, though. On April 30, 2024, the Associated Press reported that the Drug Enforcement Agency (DEA) is taking steps to reclassify marijuana as a Schedule III drug.

In order to change marijuana's classification under federal law, the DEA must follow what is typically a lengthy rulemaking process, which includes an opportunity for the public to comment on proposed regulations. Therefore, the timing and impact of any reclassification under federal law remains to be seen. In the meantime, employers must continue to navigate the differing state and federal standards when taking personnel actions involving the use of marijuana.

This is of critical importance in jurisdictions like Pennsylvania, where courts have recognized an implied right of action for employees to bring suit against their employer for alleged violations of the Commonwealth's Medical Marijuana Act (MMA).[1] By planning ahead and developing policies and procedures that synthesize the standards as applied to their business, employers can minimize potential legal liability.

For example, employers in Pennsylvania should be cognizant that the MMA prohibits discharging, refusing to hire, or otherwise discriminating against an employee "solely on the basis of such employee's status as an individual who is certified to use medical marijuana."[2] Therefore, if a candidate discloses during an interview that she holds a medical marijuana card, a hiring manager should avoid a response that suggests the candidate's medical marijuana card alone precludes further consideration of her application. Addressing the Pennsylvania standard in a policy and providing training to managers will equip them to respond appropriately in these types of situations.

An employer's policy should also outline specific conduct that is prohibited in the workplace and the consequences for violating the policy. For instance, employers of drivers who are subject to Federal Motor Carrier Safety Administration (FMSCA) regulations should specify that drivers are prohibited from being on duty and possessing, being under the influence of, or using, a Schedule I substance, including marijuana.[3] In cases where FMCSA regulations do not apply, employers should likewise consider any other applicable laws when defining prohibited workplace conduct. Pennsylvania's MMA, for example, prohibits employees from working with certain chemicals, high-voltage electricity, and other public utilities or performing duties at heights or in confined spaces while under the influence of medical marijuana.[4] The MMA also allows employers to prohibit an employee from working while under the influence of marijuana when doing so could otherwise pose a public health or safety risk.[5] Where applicable, these requirements should be incorporated into an employer's policy along with disciplinary measures that will result from policy violations.

Whether it is an on-duty accident or reasonable suspicion that prompts a drug test, the circumstances often arise quickly and demand immediate attention. When the result of a drug screen is positive for marijuana, having a written policy in place ahead of time that clearly delineates prohibited conduct and outlines the potential consequence for violating the policy is invaluable. A written policy supports informed decision-making under stressful circumstances and evenhanded treatment of employees in personnel decisions. Moreover, if an employee files suit challenging the employer's decision, the policy will also support the employer's legal defense as evidence of a legitimate business reason for its decision.

If you would like assistance with developing drug testing policies tailored to your business, attorneys at Eckert Seamans would be happy to provide assistance.

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[1] See *Palmiter v. Commonwealth Health Systems, Inc.*, 260 A.3d 967 (Pa. Super. Ct. 2021).

[2] 35 P.S. §10231.2103(b)(1).

[3] See 49 CFR 392.4(a)(1).

[4] 35 P.S. §10231.510(1), (2).

[5] Id. at §10231.510, (4).

Recent Construction Law trends related to solar power construction and installation


Jacqueline A. Welch

Soaring demand for solar power as an alternative energy has resulted in tremendous expansion in solar construction and installations on commercial, public, and residential buildings in the past 25 years, especially in the past 5 years or so. The burgeoning adoption of solar as an electricity source appears fueled by keen interest in using alternative energy coupled with government financial incentives designed to make installation more affordable.

> *"The expanding use of solar power to augment the country's electricity supply has understandably captured the enthusiasm of commercial, public, and residential owners across the country."*

As a result, an increasing number of commercial, municipal, and residential property owners are actively considering installing, are in the process of installing, or have already installed solar arrays. In Pennsylvania as an example, Governor Shapiro recently announced a new energy initiative to commit to obtaining 50% of the state's electricity from solar power, through the PULSE Program. See press release here: https://www.governor.pa.gov/?p=6416565. Federal, state, and local incentives for solar power are significant and sometimes include up to 30% reimbursement on installation cost, tax credits and other incentives, and local tax abatement, depending on the type and size of the solar array project.

The types of solar projects are also expanding, such as installations on a variety of types of commercial buildings, public structures including schools, homes, solar farms, utility-scale projects, solar arrays on various types of government-owned land, community solar, and other options. It is an exciting era in the solar power industry, which is poised to grow across the country as well as globally.

When considering whether to install a solar array, the focus is usually initially on two goals: (1) the predicted electrical power cost savings from a solar power system, usually incentivizing the project in the first place, and (2) the cost of the solar installation.

The quality of design and construction and type of installer directly impact the efficacy of these goals of higher electrical cost savings and lower installation cost. Recent review of nationwide litigation indicates the importance of excellent project planning, design, and sound construction, as well as selecting and retaining a solar power partner with expertise, a proven record, and financial integrity.

Highlights of Solar Power Construction Litigation Trends

A quick look at a few cases around the country shows issues arising from alleged poor planning, erroneous design, and faulty construction leading to losses or solar power systems that do not generate anticipated or promised electricity cost savings. While of course the allegations may or may not be accurate, the litigation shows trends in legal issues that sometimes arise in this important and growing economic sector.

Among recent cases this year related to solar installation planning, design, and construction is a recent Pennsylvania case alleging that defendants should have known that pests might destroy the solar system's electrical connections that allegedly resulted in a fire on the roof that destroyed some of the property. More typical solar construction law cases allege defects, and that defendants botched the installation of a solar energy system. In a recent California case for example, defendants are alleged to have failed to complete the solar panel installation in a workmanlike manner and abandoned the project, leaving it in a blighted condition. While many solar cases seem to come from California, they appear on dockets all over the country.

Trends have also shown a number of cases in which property owners retained solar installation firms who failed to return funds when issues arose on projects or did not achieve the anticipated or marketed electricity savings. For example, a recent Kentucky case alleges that defendants misled the plaintiff about the defective solar panel system they sold, allegedly promising that she would see an 80 percent reduction in her electric bill once the system was up and running, which did not happen because the system was never operational.

Solar companies have had to sue customers as well, related to financial or other issues. In a Missouri case, the allegations indicate the plaintiff company extended a line of credit to defendants and were not properly paid, seeking $248,000. Similarly, in a recent Montana case against a city government, the company alleges it completed a solar project but was never paid, seeking $120,000.

The expanding use of solar power to augment the country's electricity supply has understandably captured the enthusiasm of commercial, public, and residential owners across the country. Recent litigation trends in the growing solar industry underscores the importance of good design and quality construction to enhance the probability of electrical cost savings from an efficient system, and thus, greater satisfaction among all parties.

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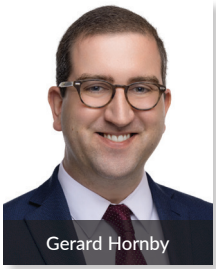
U.S. Department of Transportation overhauls its Disadvantaged Business Enterprise program


Gerard Hornby

My last piece for Eckert Seamans' Construction Newsletter detailed the Department of Labor's major revisions to its Prevailing Wage Rules under the Davis-Bacon Act. This edition takes a look at yet another major restructuring by a federal agency: the Department of Transportation (DOT) and its changes—the first in a decade—to its regulations governing the Disadvantaged Business Enterprise (DBE) program.

Conceived in the 1980s, the DBE program is now a considerable presence in the transportation construction industry. The program is intended to provide opportunities on construction projects for small businesses owned by socially and economically disadvantaged individuals. Who and what qualifies as a DBE and how DBEs can operate within the industry are subject to numerous regulations promulgated by the DOT.

The DOT has issued some significant changes to these regulations in a Final Rule, published on April 9, 2024, and set to take effect on May 9.

Here are some of the key points contractors and owners should be aware of:

- Requires a DBE entity to "have operations in the type of business it seeks to perform before it applies for certification."
- Requires that DBE entities have only one level of ownership above them, i.e, no grandparent companies.
- Requires that the DBE entity "run the show," meaning that they must: be the ultimate decision-maker; be able to make governance decisions without concurrence or consent from non-disadvantaged individuals; hold the highest officer position in the company; have present control of the board of directors; have an overall understanding of the firm's operations to the extent necessary to make managerial decisions; demonstrate a chain of command within the company.
- Requires that the disadvantaged owner of the DBE must independently make the major decisions concerning the firm's prospects and must critically analyze information provided by non-owners.
- Establishes requirements for prompt payment of DBEs, including proactive monitoring and oversight of prime contractors' compliance with prompt payment and retainage requirements.
- Increases the personal net worth cap for DBE owners from $1.32 million to $2.047 million.

Notably, the DOT did not make significant changes to its process for determining whether a DBE is owned by a socially disadvantaged individual. The DOT will continue to use a rebuttable presumption of social disadvantage for certain races and ethnicities. This is despite the fact that the Small Business Administration's similar rebuttable presumption standard was recently held to be unconstitutional by a federal district court. Relatedly, the rebuttable presumption used in the DOT DBE's program is currently being challenged.

There are many more changes contained within the Final Rule, and it is worth reviewing, least of all to ensure compliance. Whether you are a prime contractor, a specialty-service company, or a supplier, the DBE program has numerous benefits. Contractors that are certified or looking to be certified under the DBE program are advised to review these new requirements and contact their attorneys with any questions.

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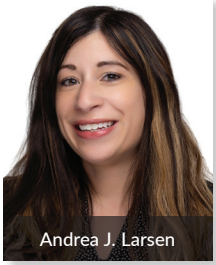
How to Protect Yourself from Claims by Your Subcontractor's Employees


Andrea J. Larsen

One of the most common factual scenarios giving rise to claims and confusion in the construction realm is who is responsible for the claims brought by your subcontractor's injured workers. In order to understand and address this issue it is important to understand the law in the jurisdiction in which you are performing the work. In Pennsylvania, an injured employee may make a workers' compensation claim against his employer, and the employer is granted immunity from tort liability.

> *"... while a general contractor may enjoy immunity from tort liability as a statutory employer, the contractor may be secondarily liable for payment of workers' compensation benefits."*

But what about the general contractor? Can the subcontractor's employee sue the general contractor for negligence? Over a decade ago the Pennsylvania Supreme Court addressed this issue in *Patton v. Worthington Associates, Inc.* The Court reversed the trial court and Superior Court and held that, in certain circumstances, a general contractor at a construction site was not liable for injuries sustained by a worker of a subcontractor. In doing so, the court rejected the argument that has been accepted in other jurisdictions, that in order for the general contractor to assert the statutory employer defense, it must have paid the workers' compensation benefits directly to the injured party.

The recent decision of the Pennsylvania Superior Court in *Yoder v. McCarthy Construction, Inc.*, demonstrates the mechanics and the practical impact of the statutory employer defense. In *Yoder v. McCarthy Construction, Inc.*, the Court reversed a $5.6 million judgment in favor of an injured worker against a general contractor. McCarthy, the general contractor, had entered into a contract to remove and replace a library's roof. McCarthy subcontracted part of the work to Yoder's employer. Yoder sustained critical injuries after he fell through an uncovered hole in the roof of the library while working there as a roofer.

On appeal the Court applied the five-part test established by the Supreme Court in *McDonald v. Levinson Steel Co.*:

1. An employer who is under contract with an owner or one in the position of an owner;
2. Premises occupied by or under the control of such employer;
3. A subcontract made by such employer;
4. Part of the employer's regular business was entrusted to such subcontractor; and
5. An employee of such subcontractor is making the claim.

The Court found McCarthy qualified as a statutory employer, finding that McCarthy both occupied and controlled the job site because it was doing work both on the roof and inside of the library, and it also communicated with the subcontractors to ensure the project's completion and had responsibility for the safety of the job site. Consistent with precedent, the Court reversed the jury's verdict and reinforced the general contractor's right to statutory immunity pursuant to the Act. Additionally, the decision offered a few other important take aways: (1) an entity does not have to be the general contractor at a construction project to qualify as a statutory employer, as long as the five-part test is met, and (2) independent contractors cannot be statutory employees under the Act.

On the other side of the coin, while a general contractor may enjoy immunity from tort liability as a statutory employer, the contractor may be secondarily liable for payment of workers' compensation benefits. Under the Act, a general contractor is secondarily liable for payment of workers' compensation benefits in the event that a subcontractor defaults on payment to an injured worker within their employ. 77 P.S. § 462. As a result, contractors and those who would qualify as statutory employers under the Act should take action to protect themselves from secondary liability. Thus, it is prudent to not only include language in construction contracts requiring subcontractors and other parties to maintain insurance, but additionally contractors should ask for proof of insurance, such as by requiring subcontractors to provide workers' compensation insurance certificates.

Moreover, while the statutory employer defense is a powerful defense, it may not always be available, and a general contractor should not forget the classic risk transfer vehicles that are available to it to address these issues. For example, the general contractor should require that any indemnification provision in the subcontract include language indicating that the subcontractor intends to indemnify the general contractor against claims made by its employees, expressly waiving the employer's immunity through reference to the workers' compensation statute or by specifically referring to claims involving injuries to its employees. See for example *Bester v. Essex Crane Rental*, 619 A.2d 304 (Pa. Super. 1993). Similarly, the insurance requirements should include a requirement that the subcontractor name you as an additional insured on their general liability policies so that you may have coverage under that policy in the event that a subcontractor employee brings a claim against you as the general contractor.

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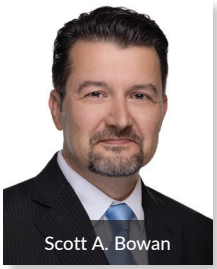
Case law update on an insurer's duty to defend


Scott A. Bowan

It's a familiar maxim, likely known to every insurance coverage lawyer and to many construction lawyers as well: "The duty to defend is broader than the duty to indemnify." A recent insurance coverage decision in the construction context by the United States Court of Appeals for the Eleventh Circuit reminds policyholders how significant that simple legal rule can be.

In *Southern-Owners Insurance Company v. MAC Contractors of Florida, LLC, d.b.a. KJIMS Construction*, the Eleventh Circuit addressed an insurance coverage issue after a general contractor abandoned a home construction project. MAC Contractors of Florida, LLC, d.b.a. KJIMS Construction (KJIMS) was sued by the property's owners after it failed to complete construction. When KJIMS sought coverage from its commercial general liability (CGL) insurer, Southern-Owners Insurance Company (Southern-Owners) took the position that it had no duty to defend KJIMS.

Southern-Owners argued that all of the alleged damages were excluded by the "Particular Part" exclusions and the "Your Work" exclusion in its policy. The "Particular Part" exclusions—which are commonly found as exclusions j(5) and j(6) in most CGL polices, but were numbered as exclusions j(6) and j(7) in the Southern-Owners policy—excluded coverage for property damage to the following:

> (6) That particular part of real property on which any insured or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
>
> (7) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Southern-Owners contended that the "Your Work" exclusion barred coverage for completed operations and the "Particular Part" exclusions barred coverage for damages that occurred during ongoing operations. Consequently, Southern-Owners determined that there was no coverage available under its policy regardless of when the damages occurred.

The parties differed over their interpretations of "that particular part" as used in the exclusions. Southern-Owners argued that, because KJIMS was the general contractor, "these exclusions bar coverage for any property damage at the project site caused by KJIMS or its subcontractors." Southern-Owners relied upon an Eleventh Circuit decision from 2021 regarding the scope of a "Particular Part" exclusion.

KJIMS disagreed and argued that "the exclusions bar coverage for damages only for the distinct part of or unit of the project being worked on, rather than the entire scope of a contractor's work."

The Eleventh Circuit found that, even if its opinion from 2021 applied to the case now before it, that would not relieve Southern-Owners of its duty to defend because that case was decided after the present litigation had begun. The court noted that the law as it existed at the time that a complaint was filed was what mattered in determining whether or not an insurer has a duty to defend. According to the Eleventh Circuit, when KJIMS was sued by the property's owners "there was uncertainty in [Florida] law about the scope of exclusions j(5) and j(6)." Consequently, the court found that Southern-Owners had a duty to defend.

The court's holding serves as a reminder of the potential breadth of an insurer's duty to defend, which, as here, might not be impacted by cases decided after the underlying litigation was commenced. Policyholders throughout the construction industry—from owners to contractors to subcontractors—should remain mindful of this basic insurance coverage principle: "The duty to defend is broader than the duty to indemnify."

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Construction Law Group NEWS

Tim Grieco and **Gerard Hornby** tried a case in a bench trial in the Philadelphia Court of Common Pleas in April. Tim and Gerard represented an architect in a dispute with a developer of a 30-story mixed-use high-rise in Philadelphia. Post-trial submissions are due in June, and closing arguments will be held in July.

In April, **Renardo (Rick) Hicks** presented "Pennsylvania One Call: The Law, How It Is Administered, and Best Practices" to the engineering firm Wade Trim. Rick provided attendees with important information on the Underground Utility Line Protection Act, what it protects, and the duties imposed upon facility owners, service providers, contractors, designers, and others preparing drawings or performing excavation or demolition work. Rick also addressed the parameters for enforcement at the PUC and for fines and penalties for violations of this law.

Chris Opalinski and **Jacob Hanley** recently represented a general contractor in the McKean County Court of Common Pleas during a seven-day jury trial involving a municipal wastewater treatment plant project and claims for breach of contract against a municipal authority. The jury found in our client's favor in connection with 12 of its claims and rejected 11 of the defendant municipal authority's 13 counterclaims.

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