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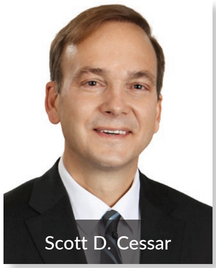
CONSTRUCTION LAW

In This Issue...

Delay claim avoidance and mitigation for equipment suppliers


Scott D. Cessar

Equipment suppliers typically bid projects to multiple general contractors. If successful, the supplier negotiates and enters into a purchase order, prepares and tenders to the general contractor the required submittal for transmittal to the engineer for review, upon approval of the submittal releases the equipment for manufacturing, conducts factory acceptance testing of the equipment, delivers the equipment to the site per the dates provided by the general contractor, supplies installation and start-up services, achieves commissioning, and trains the owner's staff to operate and to maintain the equipment.

This all sounds simple enough in theory; however, in practice, issues routinely arise. Submittal approvals may take considerably longer than expected. Manufacturing delays may occur. Equipment may fail factory acceptance testing. Equipment may arrive damaged or noncompliant with the specifications. The list goes on as to potential delay-causing events.

The result is the not insubstantial risk that, if the project is delayed by such an event, the general contractor will contend that the supplier caused the general contractor to incur additional direct field costs and indirect overhead costs on a day-for-day basis and/or also caused the owner to assess liquidated damages against it for which the supplier is responsible. Such claims, on a large project, may run over $50,000 per day for each day of critical path delay, as contractors attempt to pass off on equipment suppliers the costs for every management and field

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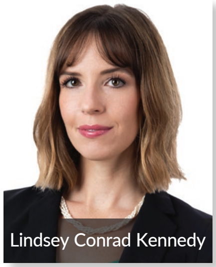
Minimizing employer liability related to COVID-19


Lindsey Conrad Kennedy

One of the many questions on employers' minds is whether they can be held liable for negligence and other related torts if an employee becomes ill or, in the worst case, dies, from COVID-19. Courts are still beginning to grapple with COVID-19-related business liabilities of all types. However, even in the unique work environments of the construction industry, employers that follow the rules will likely have a solid defense to any such claim by an employee.

No matter the industry, most lawsuits by employees against employers for illnesses and damages related to COVID-19 will be barred by the exclusivity provisions of the Workers' Compensation Act. For example, in Pennsylvania, as in many other jurisdictions, an employer's behavior must be sufficiently outrageous to overcome the exclusive remedy provided by the Workers' Compensation Act. Thus, most businesses should be able to rely on their workers' compensation insurance as

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Delay claim avoidance and mitigation for equipment suppliers

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employee on site and their per diem, for all purportedly idled pieces of equipment on site at Blue Book rates, for Porta Johns and trailers, for bonds and insurance, and all with a 15% markup for profit.

This scenario poses a serious dilemma for equipment suppliers. To begin, it would be very difficult for an equipment supplier to be competitive if it were to price in enough contingency to cover such an uncertain and potentially significant cost exposure. For another, when claims do arise, it can also be very difficult for equipment suppliers to refute them. This is because, as opposed to subcontractors who normally have employees on site most days, receive schedule updates, and attend regular project meetings, suppliers usually do not. As such, subcontractors are in a far better position to know the facts of the project and whether there were other concurrent delays, if the claimed delay was on the critical path, or was subject to mitigation or recovery. Most times, suppliers, without post-project, forensic investigation, are left to accept at face value what the general contractor asserts to be the "facts."

What should an equipment supplier do to avoid such claims?

First, during the pre-bid phase, suppliers should perform due diligence on the general contractors as to whether they are litigious and have previously played this game of balancing their books on bad projects on the backs of equipment suppliers and subcontractors. One way to do this is through court filing searches on Lexis/Nexis and other information services. That is not to say that an equipment supplier should not bid general contractors with such a history, but that, if suppliers do, they go into it with eyes wide open, have the A team managing the job, and be extra responsive if problems arise.

Second, at the purchase order stage, the supplier is at its greatest point of leverage. As such, suppliers should put policies in place to limit and cap exposure and enforce those policies in connection with the negotiation of purchase orders. This would include negotiating waivers of liquidated and consequential damages, limitations on the recovery of delay-type damages, and an overall cap on back charges as part of the purchase order. An equipment supplier may lose a job or two as a result, but sometimes the best jobs are the jobs that you do not get.

Third, if delays arise, the equipment supplier needs to be proactive and communicative with the general contractor as to any impacts on the schedule. This is the time to request, if you do not already have it, the overall project schedule and all updates in electronic format and to be copied in on the project meeting minutes. If possible, suppliers should have their local sales representative attend project meetings. Technicians and installers for the equipment supplier who go on site should document the status of the project, even from an anecdotal standpoint, and also document other issues or problems affecting the commissioning of the supplier's equipment, such as, for example, the status of third-party controls systems. Information is critical at this juncture in order to understand and to work to potentially mitigate the problem and also to have the facts in reserve for the future in order to address delay claims.

The reason is that, oftentimes, general contractors will make a claim against an equipment supplier contending the supplier was the sole cause of project delay, but, in reality, there were any number of other concurrent project delays. It may be that the project is not even ready for the start-up of the late-delivered equipment. In either event, the equipment supplier's potential liability for delay damages may be eliminated or greatly reduced. Information is king, and the earlier the equipment supplier is educated, the better it will be able to fend off claims.

Assuming the claim, nonetheless, is formally made and monies withheld under a purchase order, what should the equipment supplier do to mitigate its exposure?

First, the claim should be reviewed internally and, preferably, under the supervision of experienced construction counsel so that all written work product may be protected from future discovery in the event that the dispute goes to litigation. A litigation hold should be issued so that no information is inadvertently destroyed. The collective knowledge of the project team should be memorialized at this point while the facts are most fresh. Preparation of a chronology of events is highly recommended for this reason.

Second, consideration should be given, if the delay claim is for a sufficiently large monetary amount, to engage a claims consultant to review the claim and to prepare a list of documents to be requested from the contractor in order to investigate the merits of the claim. This list will likely include cost reports, schedules, the contract and any change orders (both approved and rejected), project meeting minutes, programmatic project overviews, payment applications, requests for equitable adjustments, and any settlement agreements with owners.

These are all documents that the general contractor will likely be required to turn over in litigation and, if it balks in doing so during the pre-litigation stage, this is a tip-off that the contractor knows that the claim is suspect because, for example, the contractor made claims against other subcontractors and suppliers or the owner for the same period of delay now asserted to be the fault of the supplier or that the contractor's claimed extra costs are inflated.

Third, at the same time, on projects for publicly funded agencies, equipment suppliers should make a request from the owner-agency, under the applicable public records law, for many of the same types of documents requested from the general contractor. Such a request can result in obtaining a treasure trove of information in order to refute a claim, and the surprise factor to the general contractor of the supplier having this information can be immensely helpful to achieving a more expeditious and favorable resolution.

Fourth, if the general contractor is holding contract funds, which is likely, the supplier should consider making a written demand for payment, which, if available in the applicable jurisdiction, also asserts a claim under the state's prompt pay act for penalty interest and attorney fees, if authorized. In addition, suppliers should preserve their payment bond rights by following the claim procedure set forth in the bond.

From experience, following these steps will place the equipment supplier in its best position to negotiate a resolution as favorable and as economical as possible, short of litigation. And, in the event the dispute cannot be successfully resolved without litigation, the energy, the effort, and the cost that the equipment supplier will have expended will be extremely useful once the matter heads to court or arbitration.

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the first line of defense. Of course, workers' compensation insurance generally covers employees only—not self-employed persons such as subcontractors. These individuals (or their employees) may turn to the general contractor to assert a claim if they become ill. This underscores the importance of well-drafted subcontract provisions regarding workers' compensation, indemnity, and the like.

Even for employees, workers' compensation coverage is not a given. In the absence of unique circumstances, a COVID-19 diagnosis would seem unlikely to be considered a work-related injury or disease entitling an employee to workers' compensation benefits, because of the community spread of the virus and the difficulty in proving causation. However, some states have enacted legislation regarding presumptions of coverage or causation related to COVID-19. Of these states, much of this legislation is geared toward first responders and health care workers. Nonetheless, several states, such as New Jersey, have created a rebuttable presumption of workers' compensation coverage for broadly defined groups of "essential" workers, which could include, for example, construction workers.

Despite the protections afforded by workers' compensation insurance, several families of deceased employees have filed negligence, wrongful death, and/or other tort actions against employers, alleging that the employer failed to protect employees from exposure. The construction industry seemingly escaped the initial wave of these lawsuits, as many centered on the meat-packing and large-scale retail industries. However, depending on the fate of these initial claims, the scope of such lawsuits may soon expand.

One such suit against an employer is pending in federal court in the Eastern District of Pennsylvania. *Benjamin v. JBS SA et al.*, No. 2:20-cv-02594 (E.D. Pa.). In *Benjamin*, the employee's family alleged that the employer failed to follow OSHA and CDC guidance related to social distancing and masking, maintained a "work while sick" policy, ramped up workers' shifts to capitalize on increased demand, and failed to require workers to report COVID-19 symptoms. This, they alleged, led to the employee's infection and death. This summer, the employer filed a Motion to Dismiss, arguing, among other things, that the Pennsylvania Workers' Compensation Act's exclusivity provision bars all of the plaintiff's claims, that the Complaint failed to allege any facts showing that the worker contracted the virus at the workplace, and that the negligence-related claims should be dismissed because the Complaint did not allege any facts showing that the employer breached an existing duty to its employees. How the court will rule on these matters, and what that will signal to employees and plaintiffs' lawyers, remains to be seen.

Similar cases are working their way through other courts. [See, e.g., *Evans v. Walmart Inc.*, No. 2020L003938 (Cook County, Ill.).] In at least one recent suit, a federal district court judge in Missouri dismissed a complaint by an employee and nonprofit workers group on the basis that state and federal regulators—not the courts—are best suited to handle complaints about workplace safety issues and compliance with agency guidance. [*Rural Community Workers Alliance v. Smithfield Foods, Inc.*, No. 5:20-cv-06063 (W.D. Mo.).] Given that many construction projects and contractors are highly regulated by the government—whether through OSHA standards, government contracting provisions, etc.—courts could perhaps apply the same principle to construction industry lawsuits.

Of course, the best defense to a COVID-19-related employment claim is a good offense. Employers should stay abreast of the ever-changing federal, state, and local guidance for businesses, including those specifically targeted to the construction industry. For some construction industry employers, this may mean coordinating and collaborating with others—contractors, subcontractors, owners, and, where appropriate, counsel—to ensure safety and minimize the risk of employment claims.

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The pitfalls of litigation to the bitter end


Edgar Alden Dunham, IV

Two recent cases from opposite ends of the country underscore the pitfalls of litigating to the bitter end. There is an old adage that one of the main benefits of settlement is that the parties get what they bargained for, but nobody really knows what they are going to get at a trial. These two cases illustrate the wisdom of that adage.

Lakehill Investments, LLC v. Rushforth Construction Company, Docket No.: 79116-8-1, Court of Appeals, Washington (2020) concerned a rather typical construction dispute between an owner and a construction contractor. The owner filed suit for breach of contract in October 2015 alleging construction defects and delays. The contractor defended, arguing that the defects were the result of non-buildable plans and the delays were largely caused by the owner. The contractor counterclaimed, alleging that the owner had failed to pay it in full.

What was not typical, however, was the scope of the dispute. Before trial, the parties produced more than 1 million documents. They took 59 depositions, and participated in 6 days of mediation. The trial lasted 2 months and the jury heard from two dozen witnesses, one of whom testified for 6-1/2 days. Ultimately, the Court awarded a net award to the contractor of $9,624,695.80, of which more than half ($5 million) was attorneys' fees. The owner appealed and the contractor cross-appealed. The central point of the appeal was three jury instructions that the owner argued were erroneous. The Appellate Court found that one of those instructions was erroneous and prejudicial. The erroneous and prejudicial claim was limited to the owner's defective work claim. On the basis of that error, the Appellate Court reversed and remanded for a new trial.

The damages originally sought by the parties are not set forth in opinion, but the amount of discovery taken and the length of trial alone indicates an expensive legal undertaking. We know from the attorneys fee awarded that the contractor alone spent at least $5 million in legal fees.

Site Enterprises v. NRG Rema, LLC, Docket No. A-1852-18T4 (App Div. 2020) is a New Jersey Appellate Court case concerning enforcement of a construction lien claim involving the demolition of the Werner Generating Station. The general contractor hired the plaintiff to perform demolition work under a lump-sum contract. No schedule of values was provided.

The plaintiff commenced work, but the project was subsequently suspended and then terminated. The plaintiff was not paid and filed a construction lien claim asserting that it had completed 15% of its work. The owner and general contractor refused to pay, and the plaintiff filed an enforcement action.

The defendants argued that in light of the lump-sum nature of the contract and no agreed-upon schedule of values, the plaintiff's figure of 15% completion was speculative and therefore overstated. The defendants produced an expert to substantiate their position. From an owner's perspective, the position does not seem unreasonable.

The plaintiff's expert had worked exclusively for demolition companies as an estimator/project manager for 25 years. He testified that his opinion that the plaintiff had completed 15% of its contract was grounded in his experience as an estimator and his familiarity with the jobsite. He explained at trial his methodology.

The plaintiff also produced the general contractor's *own* project manager, whose daily reports estimated that the plaintiff had completed 16% of its work. The project manager had ceased employment with the general contractor after the project stopped. Although the defendants attacked the daily reports as inaccurate, at trial, the court found that the project manager credibly testified as to how he arrived at the percentage.

The trial court found the lien claim valid and enforced it. Moreover, it assessed the defendants $80,188.26 in attorney fees, consisting of the legal fees that the plaintiff had incurred *from the date it notified the defendants that it had located the project manager and that he would appear at trial to authenticate his daily reports*. The basis of the sanction was the Court's determination that the defendants should have known that their defenses had no basis under the statute once they knew that their own employee was going to appear for the plaintiff and authenticate his daily reports.

Both of these cases involved needless expenditures of money on experts and attorneys that could have been avoided with the application of a little common sense. The defendants in the *Site Enterprises* matter should have folded their tents and negotiated a payoff once they learned that their former employee was going to substantiate the plaintiff's claims. Both of the parties in the *Lakehill* matter spent large amounts on legal fees for a trial that now will have to be redone unless the parties settle now.

The opinion in *Lakehill* makes it clear that the plaintiff there was a contentious litigant. The defendants in *Site Enterprises* clearly held onto their position long past its viability. Both chose not to compromise. Both are paying for that choice now. Sometimes a party has no choice but to continue litigating rather than settling. But the danger there, as illustrated by these two cases, is that unanticipated, and expensive, results can occur.

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If the validity of the underlying agreement is disputed, then the validity of an Agreement to Arbitrate is a question for the court, not the arbitrator


Audrey K. Kwak

A recent decision from the Third Circuit Court of Appeals, *MZM Construction Co. Inc. v. New Jersey Building Laborers' Statewide Benefit Funds*, answers a critical threshold question for parties using arbitration provisions in their agreements: If an agreement delegates authority to an arbitrator to decide if the agreement "exists," what happens when a party disputes the validity of the entire agreement? After a lengthy analysis of U.S. Supreme Court and Third Circuit precedent, the Court ruled that this threshold question cannot go to an arbitrator, but must be answered by a judge.

"To avoid protracted litigation over whether the parties formed a binding agreement to arbitrate in the first instance, parties would be wise to explicitly include provisions agreeing to arbitrate within the central agreement itself."

The Dispute

In 2001, MZM Construction Company (MZM) hired workers from a local labor union for a construction project at the Newark Liberty International Airport. In 2002, MZM signed a one-page, short-form agreement (SFA) with the union. The SFA referenced and incorporated two "collective bargaining agreements or CBAs," but did not include other substantive terms.

One of those two CBAs was unsigned. Under the unsigned CBA, employers like MZM were obligated to contribute to the New Jersey Building Laborers' Statewide Benefits Funds (the Funds) per the applicable trust agreement. Significantly, the unsigned CBA also contained an arbitration provision stating that not only would "questions or grievances involving the interpretation and application of this Agreement" be submitted to arbitration, but also that "[t]he Arbitrator shall have the *authority to decide whether an Agreement exists, where that is in dispute*."

MZM contributed over $500,000 to the Funds for work related to the Airport from 2001–2018. In 2018, the Funds audited MZM's contributions, and asserted that, per the SFA and the CBA, MZM still owed an additional $230,000 in contributions. Relying on the CBA's provision delegating authority to the arbitrator, the Funds scheduled an arbitration.

New Jersey District Court Proceedings

In response to the Funds' scheduling the arbitration, MZM filed a complaint against the Funds in federal court to enjoin the arbitration, and seeking a declaration that MZM was not a signatory to CBA, had no obligation to arbitrate under the CBA, and was not liable to the Funds under the CBA.

Central to MZM's complaint was MZM's assertion that—at the time it signed the SFA—arbitration had not been discussed, and MZM had relied on representations made by a union representative regarding the scope of the SFA that turned out to be inaccurate. MZM also stated it never received copies of either CBA, either before or after signing the SFA. As a result, according to MZM, there had been "fraud in the execution" of the SFA that voided the SFA and the CBAs, and therefore there was no agreement between the parties, let alone any agreement to arbitrate.

The trial court agreed with MZM and enjoined the arbitration, noting the presumption that issues of arbitrability are typically for the court to decide, and that to "overcome this presumption, an arbitration clause must contain clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." In view of MZM's statements questioning the validity of the SFA and CBA, the necessary "clear and unmistakable evidence" was lacking. The Funds appealed.

The Third Circuit's Ruling

On appeal, the Third Circuit affirmed the district court's ruling. Its analysis focused on two lines of arbitration precedent: the 1967 decision *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (creating the severability doctrine, where absent a specific challenge to an arbitration clause, the court must treat the clause as a valid and enforceable agreement and refer any challenges to the container contract to arbitration) and the 2000 Third Circuit decision *Sandvik AB v. Advent International* (holding that section 4 of the Federal Arbitration Act [FAA] "affirmatively requires" a court to decide questions about the existence of an arbitration agreement).

In view of both lines of precedent, the Third Court agreed with the trial court that an arbitrator could not be permitted to decide the existence of the agreement itself, where that disputed agreement formed the basis for the arbitrator's authority. This was because "[o]therwise, arbitrators would be allowed 'to determine their own jurisdiction, something that is not permitted in the federal jurisprudence of arbitration.'" The trial court's decision to enjoin the arbitration was affirmed.

Ramifications of MZM Construction

This decision reiterates the critical need for clear and careful contract drafting. With respect to arbitration specifically, this decision teaches that the parties might not create a binding agreement to arbitrate by merely incorporating or referencing other agreements. Instead, there must be "clear and unmistakable" intent to arbitrate arbitrability in the central agreement itself, rather than in any agreement incorporated into it.

To avoid protracted litigation over whether the parties formed a binding agreement to arbitrate in the first instance, parties would be wise to explicitly include provisions agreeing to arbitrate within the central agreement itself.

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So, a lawsuit is on the horizon...

Sean Donoghue

As certain as death and taxes, documents will need to be exchanged. Here is what you can expect and a few tips for reducing costs and protecting your case.

What will you need to produce?

Discovery is broad, but proportional to the needs (i.e., usually the dollar value) of the case. Cost reports, bid backup, and scheduling information are often at the heart of damages issues in construction disputes. Thus, while it will depend on the nature of the dispute, these items are generally going to have to be produced. In addition, it is no secret by now that electronically stored information (ESI) can be a big part of discovery in litigation, particularly in a document-intensive industry like construction. In addition to electronically stored project files, you can expect that the inboxes of employees who are close to the dispute will need to be searched. How many will depend on the size of the dispute and the number of players involved. Hard-drives and text messages of those employees may also be discoverable.

Cutting down on costs.

Being mindful about discovery is key to cutting down on its costs. Talk to your attorney about what you really need from the other side. If there are only a few players on the other side who are likely to have information, or if you are interested only in information from a specific time period, or if maybe it would make the most sense to, initially anyway, simply request the project file from the other side, be vocal about these things with your attorney. Doing so will help her or him engineer targeted document requests to the other side and help cut down on the documents produced. This, in turn, will cut down on documents that your attorney will need to review and the fees you will incur. In addition, if you are willing to limit the scope of your discovery, your attorney should know, so that s/he could ask opposing counsel if they'd be interested in agreeing to limit the scope of the discovery, generally. Litigation can be expensive, and both sides likely have an interest in cutting down on the time and cost of compiling and reviewing documentation. Lastly, when it comes time for your attorney to review your ESI (or the other side's), you should collaborate with your attorney on key search terms, so that he can search the ESI (and particularly emails) for pertinent information in a more targeted manner. Chances are, you or one of your employees will have a strong sense of what to look for and where to look for it, and you can increase your chance of saving on your attorney's fees if you take the time to share this information with your attorney.

Preserving your information means protecting your case.

Once information is subject to a litigation hold or you reasonably anticipate litigation, the information must not be deleted. The consequences of deleting information after you receive a hold letter or you suspect litigation is likely could be dire. This is not only because lost files might make it more difficult to prosecute or defend your case, but also because deletion of relevant information opens up the door for a court to sanction an offending party's conduct by, among other things, giving the jury an "adverse instruction" (meaning the judge will tell the jury it is entitled to assume that you intentionally destroyed evidence) or limiting the evidence that you are allowed to produce on a particular topic. However paradoxical it may seem, a judge can do this even if s/he does not specifically find the destruction or loss of documents was intentional. There are two key tools to protecting information and avoiding this result. First, you need to consult with IT and your attorney to put into place (or, if you have one and it's been awhile, updating) a document retention policy. Second, once the prospect of litigation arises, you should inform employees who are likely to have information relevant to the case of their obligation to preserve information, advising them not to delete anything pertaining to the matter at issue, including all electronic information and communications. Your attorney likely has a stock preservation letter that you can ask for and distribute to your key employees.

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United States Environmental Protection Agency seeks to tighten dust-lead clearance levels


Scott R. Dismukes


Jessica L. Rosenblatt

> *For the first time in nearly two decades, the United States Environmental Protection Agency (EPA) is proposing a rule that would decrease the amount of lead that can remain in dust on floors and window sills after lead removal activities.*

For the first time in nearly two decades, the United States Environmental Protection Agency (EPA) is proposing a rule that would decrease the amount of lead that can remain in dust on floors and window sills after lead removal activities. The rule will require contractors, schools, daycares, property owners, lessors of residential buildings, lead abatement professionals, and others who conduct lead-based paint activities to achieve the more stringent dust-lead clearance levels prior to building re-occupancy. The change is intended to reduce childhood lead exposure and would apply to certain residential dwellings and facilities occupied by children.

The proposed rule would reduce dust-lead clearance levels (DLCL) from 40 micrograms per square foot (µg/ft2) to 10 µg/ft2 for floors, and from 250 µg/ft2 to 100 µg/ft2 for window sills. EPA has not proposed a change in DLCL for window troughs.

Clearance levels are defined as the maximum amount of lead permitted in dust on a surface following completion of an abatement activity. DLCL are used to determine whether abated buildings are safe and suitable for re-occupancy. The proposed rule clarifies that post-abatement dust-lead levels must be below, not equal to, the revised clearance levels.

Lead exposure affects individuals of all ages but is particularly harmful to young children. Lead in dust is a significant contributor to blood lead levels in children, especially those who live in homes built before 1978, when the federal government banned consumer uses of lead in paint.

EPA established the DLCL and Dust Lead Hazard Standards (DLHS) under the Toxic Substances Control Act (TSCA) in 2001. While DLCL apply after an abatement is conducted, DLHS are limits that provide the basis for inspectors and risk assessors to determine whether lead-based paint (LBP) hazards are present prior to a renovation or abatement activity. In 2019, the EPA revised the DLHS to 10 µg/ft2 for floors and 100 µg/ft2 for window sills, but declined to extend the change to DLCL. The proposed rule would update DLCL to be consistent with the DLHS.

EPA is proposing the rule under Sections 401 and 402 of TSCA. The rule applies to most pre-1978 housing and nonresidential (i.e., public or commercial) properties where children under the age of six spend a significant amount of time, such as child care centers, preschool and kindergarten classrooms, and certain church programs. The rule does not generally apply to zero-bedroom dwellings (where the living area is not separated from the sleeping area) like studios and lofts, nor to housing for the elderly or persons with disabilities. Individuals who perform LBP activities in residences they own and reside in are exempt from the rule unless the residence is also occupied by a person other than the owner or the owner's immediate family while the abatement is being performed, or a child residing in the building has been identified as having an elevated blood lead level.

While the rule does not require property owners to evaluate their properties or perform control activities, it would be triggered upon someone performing an abatement. "Abatement" is defined as "measures designed to permanently eliminate lead-based paint hazards." It includes the removal and containment of LBP, as well as the preparation, cleanup, disposal, and associated post-abatement clearance testing activities.

DLCL apply when treating lead paint hazards of two or more square feet per room, 20 or more square feet on the exterior of a building, or greater than 10 percent of the total surface area of an interior or exterior component with a small surface area. They also apply to any activity that involves window replacement or demolition. Maintenance and repair activities intended to repair, restore, or remodel a dwelling rather than permanently eliminate LBP hazards are not considered an abatement but are still regulated under the DLHS. The proposed rule does not retroactively apply to those who have previously performed post-abatement clearance testing using the original 2001 DLCL.

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Construction Law Group NEWS

Best Lawyers in America©
Members of the Construction group were recognized in the 27th edition of The Best Lawyers in America© and the inaugural edition of Best Lawyers: Ones to Watch.

Scott Cessar received a 2021 The Best Lawyers in America© recognition for Litigation – Construction and was named the Best Lawyers® 2021 Construction "Lawyer of the Year" in Pittsburgh, an honor he also received in 2015 and 2017.

Chris Opalinski received a 2021 The Best Lawyers in America© recognition for Commercial Litigation and Litigation – Construction.

Sean Donoghue received a 2021 Best Lawyers: Ones To Watch recognition for Commercial Litigation.

Super Lawyers
Scott Cessar, Dave McGlone, and **Chris Opalinski** were recently selected for inclusion in the 2020 editions of Pennsylvania and Massachusetts Super Lawyers, respectively, published by Thomson Reuters. The Eckert Seamans group joins the top five percent of lawyers in Pennsylvania and Massachusetts in receiving this honor from their peers and others in the legal industry.

Liquidated damages and force majeure clauses in the COVID-19 pandemic

David M. McGlone

Another treatise involving force majeure. Not shocking; I am far from the first attorney or construction attorney to write about the effect of force majeure clauses on construction contracts. However, let us look closely at its effect on liquidated damages (LDs), since it is such an usual feature of a construction contract.

For a while, it seemed that government-enforced construction project suspensions would be temporary and fleeting. Lawyers, always fans of the theoretical, took to their kitchen table computers and wrote at length about force majeure clauses. However, as I write this in the autumn of 2020, it seems construction and even essential construction may be impacted again by government-enforced suspensions due to health concerns. Otherwise, minor interruptions will aggregate, and balance sheets will generate invoices screaming to be paid.

Lawsuits will be brought and parties will invoke force majeure to avoid the assessment of LDs and assert other excuses to payment and performance.

Architects, owners, and contractors concern themselves with the three measurable dimensions (length, width, height) on the project. Claim attorneys are more philosophical and concern themselves with the fourth dimension: time. This is because time = money. Accordingly, let us focus on the time element (the first and most likely to be affected by COVID work stoppages) of a construction contract and, more specifically, LDs. This will be an Owner's weapon in responding to a payment application.

A valid invocation of force majeure as a defense depends on multiple variables, including, among other things: (1) The breadth and force of government orders are broad enough to deter progress of this scope of the contract; (2) adequate notice of this if required by the contract; and (3) the existence of an otherwise valid force majeure clause, allowing that whole sets of promises within contracts could be avoided.

A valid claim, generally, for LDs to be imposed requires: (1) a reasonable forecast of damages at the time the contract was executed and (2) damages awarded are not grossly disproportionate to what they actually were. Jurisdictions vary, but most touch on these concerns. Common Law would avoid a windfall in these cases.

Other clauses within the contract may conflict with LDs and completely obviate the assessment of them. In Massachusetts, it could be argued that if the magic words "Time is of the essence" appear in the completion date, the time element was not a "material" ("important" part of the contract), and a judge could conceivably fail to assess LDs and hold the party liable for them harmless.

Last, there is the question of fact when proving that the scope of the contractual term encompasses this particular pandemic. This is more of a practical tip. If asked, a judge's or jury's personal experience with this pandemic may be the actual fact that determines whether this is a force majeure-type event.

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