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Construction Law

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Construction Law Group News

The availability of contractual defenses to sureties in Miller Act payment bond claims

Scott D. Cessar

Consider this not uncommon scenario: On a federal project, a subcontractor, after its work is complete, submits a delay claim to a prime contractor. The prime contractor submits the delay claim to the government, which denies the claim. The prime contractor advises the subcontractor that the government has denied the subcontractor's claim, but that the prime contractor will include the claim in its other claims against the government as per the prime contract's dispute resolution procedures. The prime contractor also tells the subcontractor that, in any event, the claim is denied based on the no damage for delay clause contained in the subcontract.

The subcontractor files suit in federal court against the prime contractor and its surety to recover damages on its delay claim. The subcontractor moves the court to grant summary judgment against only the surety in the subcontractor's favor—meaning judgment for it without a trial—on its

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How does the Tax Cuts and Jobs Act impact your construction business?

Michael J. Herzog

On December 22, 2017, President Trump signed the "Tax Cuts and Jobs Act" (H.R. 1, Pub. L. No. 115-97) (TCJA) which resulted in the most comprehensive update to the Internal Revenue Code (IRC) in more than 30 years! The primary goals of the new tax reform are multifaceted—tax relief for middle class families, simplifying tax reporting and compliance requirements, tax relief for business, especially small businesses, and eliminating special-interest tax breaks and loopholes.

Of primary interest and the focus of this article are the numerous tax incentives aimed at businesses in the construction industry. Below is an overview of these salient tax law changes, which your construction business should consider taking advantage of:

- **Corporation Income Tax Rate Reduction to 21 percent**—previously, corporate income tax was subject to a graduated corporate tax rate structure with the top rate reaching 35 percent.

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Sexual harassment isn't my problem (until it is)

Michael McAuliffe Miller

Article originally published in the January 12, 2018, issue of the Central Penn Business Journal.

Many owners of small- and medium-sized businesses see the news regarding sexual harassment claims from Hollywood and Washington and say, "Thank goodness I don't have those problems." But that's just not true.

No matter how tight the culture among the employees may seem in a locally owned or family business, it takes only one employment situation to throw the carefully planned equilibrium of your office completely off-kilter and create months and years of litigation.

Federal civil rights laws, which prohibit discrimination in employment, include Title VII of the Civil Rights Act (applies to employers with 15 employees), the Age Discrimination in Employment Act (20 employees), and the Americans with Disabilities Act (15 employees). In addition, many states have companion laws that address the same issues and have a lower threshold of coverage (for example, the Pennsylvania Human Relations Act applies to employers of four or more).

Unless you're a company of one, you're probably covered by anti-discrimination laws. If you're covered, you could be liable for the bad acts of your employees, which means you should be considering ways to lessen your liability. Think of it this way: A business owner would do everything necessary and reasonable to reduce workplace injuries in order to reduce the cost of health care and lost time. Why would you treat the potential liability for HR claims differently?

So, what can the small-businessperson do to ensure that he or she has taken the right steps to protect against claims of sexual harassment?

- You need to have an anti-harassment policy. Without a policy, you can be held strictly liable for claims against your company. In other words, without a policy, you will have no defense.
- That policy must be plainly written and must contain an understandable and accessible complaint procedure.
- The policy must be disseminated—employees must receive it and acknowledge receipt.

But wait—you're not done yet. Having a policy and passing it out is helpful to a point, but unless your supervisors are trained on how to address issues arising from your anti-harassment policies, the policy itself will do little good.

Train your supervisors to gather facts and make appropriate reports. You are liable for what your supervisors knew and did not tell you. Many bad sexual harassment cases have arisen from supervisors who fail to report, try to handle it themselves, or promise confidentiality to someone who has made a report to them but asked them to take no action.

- When a complaint is made, take it seriously, no matter who is involved or how unlikely the facts might seem at first. An employer's best defense is that it took prompt remedial action to address any good faith complaints.
- Understand that a person who has made a good faith claim of sexual harassment has engaged in legally protected conduct and cannot be subsequently retaliated against for making a claim, even if those claims are in error. Employees can be completely mistaken about their claims of sexual harassment and still be protected against retaliation (unless they are lying). That means that an individual who reports sexual harassment cannot have the terms and conditions of his or her employment changed because of the report of harassment. Many claims are successfully defended on the harassment claim but lost on the retaliation claim because after the complaint was made, the employee was punished for making a report.

They say that it takes a lifetime to build a reputation and a second to lose it. Change is tough, and there will be employees and supervisors who push back. They will accuse you of changing the culture and making a loose environment overly regimented. Of course, your employees' approval of a looser culture is not a defense to a complicated sexual harassment case when everyone's actions—and the company's culture—will be on trial.

When a sexual harassment claim is made against a company, it can have a massive impact on the people who work there. And the smaller the company, the bigger the impact can be. The best defense that a company has is a good set of predictable, fair—and fairly implemented—employment policies. The rules form your best defense, and every minute invested in devising, disseminating and training regarding these expectations will return value to your company as you avoid the pitfalls and costs of needless litigation.

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Mentor-Protégé Program: A way for small businesses to access the world of federal procurement

Matthew J. Whipple

Every year, federal agencies enter into agreements with private sector contractors that are worth nearly $500 billion. With money on the table that is roughly the equivalent to the GDP of Sweden, it is unsurprising that many large companies do business with the federal government. Further, because federal contracting requires compliance with a dizzying array of statutory and regulatory mandates, it may seem like the barriers to entry to the federal procurement marketplace are too high for small businesses to surmount.

To increase competition and encourage greater diversity among their contractors, federal agencies frequently take steps to give small businesses a leg up. Set-aside projects are common and take many forms, including minority-owned, service-disabled veteran-owned, and women-owned small-business set-asides, as well as set-asides for Historically Underutilized Business Zones. Even where a small business might have an opportunity to compete for a project, however, it may seem too difficult for a company to learn the ins and outs of federal procurement for the first time.

Enter the Mentor-Protégé Program. Although mentor-protégé arrangements have been used in a limited capacity in federal procurement for some time, in 2016 the Small Business Administration introduced a "universal" Mentor-Protégé Program that applies across agencies. The program allows small-business "protégés" who are new to the federal space to partner with larger, more experienced "mentors," with the stated goal of enhancing the capabilities of protégé firms through business development assistance from the mentors.

The program allows larger firms to partner with, and even invest capital into, smaller firms, thereby allowing the large business to compete for small-business contracts that would otherwise be unavailable. In exchange, the established business provides technical, management, financial, or other assistance to the protégé, thereby increasing its capabilities and, ultimately, allowing it to better compete for projects in the future.

Although over a year old, many small businesses are still unfamiliar with the program. If you are a small business that is interested in entering the federal marketplace, or a larger business interested in acting as a mentor, here are a few practical tips to consider:

- **Plan Ahead.** Mentor-Protégé agreements require approval by the Small Business Administration. Although not onerous, the SBA application process is exacting, requiring the protégé to submit a business plan and both parties to submit a "mentor-protégé" agreement, and, typically, a separate joint venture agreement. The SBA has up to 45 days to grant or deny an SBA application, and may require amendment if there are areas of concern or noncompliance. Avoid jeopardizing a project by applying as early as possible.

- **Candidly Assess What Each Party Brings to the Table.** As part of the mentor-protégé agreement, the parties are required to lay out, *inter alia*, how the arrangement will assist the protégé in meeting the business plan goals. Further, if the parties are entering into a joint venture agreement, the parties must comply with 13 CFR § 125.8. Section 125.8 mandates that all joint venture agreements include at least 12 specific provisions, including a requirement that the small-business partner perform at least 40 percent of the joint venture's work and that the small-business partner perform substantive contract work—administrative or ministerial functions are insufficient. The Mentor-Protégé Program is not designed to allow large firms access to small-business projects by using a protégé as a "fig leaf." The SBA will require a candid assessment of the capabilities of, and benefits to, the protégé.

- **Prepare for Ongoing Obligations.** Obtaining approval of a mentor-protégé relationship is simply the beginning. The mentor must provide assistance for at least one year. The protégé must offer periodic reporting to the SBA, detailing the work of the joint venture and how the protégé's work is complying with the program. Both parties must certify each year that they are continuing to comply with the program and to inform the SBA of any changes in their relationship.

- **Protect Yourself.** While the phrase "mentor-protégé" may bring to mind Gershwin's "Someone to Watch Over Me," it is still fundamentally a business relationship. And all business relationships require an honest assessment of risk and appropriate protections. In particular, parties may want to consider building into their contracts provisions related to the preservation of intellectual property, including appropriate nondisclosure provisions, and protection of employees and customers, through appropriate noncompete and non-solicitation provisions.

- **Consider Exit Strategies.** While mentor-protégé relationships can beneficial, they are not meant to be indefinite. As noted above, the stated goal of the program is to allow protégé firms to ultimately compete on their own. The parties should give thought from the outset, therefore, as to the timeline for their relationship. Do the parties envision a one-off project or a series of projects? Is the goal simply to partner in the federal space, or will the parties compete for other projects as well? Does one party bring specialized capabilities to the table, such that they would be a preferred subcontractor going forward? Contemplating the end of the mentor-protégé relationship may allow the parties to best position themselves for that time.

Additionally, despite good intentions, the relationship may not work out as planned. If internal problems arise, a protégé partner that is unable to handle the project on its own may be left at the mercy of the mentor firm. Therefore, consider provisions regarding how conflicts should be addressed and the partnership dissolved, if necessary.

Federal agencies have numerous opportunities for small businesses that are new to the federal marketplace. If you are considering the Mentor-Protégé Program, keep in mind the above tips to maximize your potential for success.

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Liquidated damages provisions in Colorado: Alternatives allowed

Audrey K. Kwak

Are liquidated damages clauses that allow a nonbreaching party to elect an alternative remedy (like lost profits) permissible expressions of private parties' freedom of contract? Or do such alternatives indicate that the parties never intended to liquidate damages, so as to be an invalid penalty?

Turns out, the answer depends on the state. In Colorado, the courts have decided to leave it to the parties. In a recent decision, *Ravenstar, LLC v One Ski Hill Place, LLC* (Sept. 2017), the Colorado Supreme Court refused to invalidate a liquidated damages provision that provided an option to elect actual damages, preferring instead to emphasize Colorado's policy of favoring private parties' freedom of contract.

The Facts

In *Ravenstar*, five Colorado companies and purchasers of condominium units (Ravenstar et al.) sued the developer (One Skill Hill Place [OSHP]), the entity with which they had contracted to purchase the units. At the time of contracting, each purchaser paid OSHP deposits of 15 percent of the purchase price of the unit. The contract provided that, in the event of a default by the purchaser, the seller had the option to either (1) retain the deposit as liquidated damages or, alternatively, (2) recover its actual damages.

The five companies breached their respective agreements with OSHP when they were unable to secure the requisite financing and failed to close. OSHP elected to retain their deposits as liquidated damages. The purchasers filed suit for the return of their deposits, arguing that the liquidated damages clause was invalid and unenforceable.

The Law

In Colorado, a liquidated damages provision can only be enforced where three elements are present: (1) the parties intended to liquidate damages; (2) the amount of liquidated damages (as of the time of contracting) was a reasonable estimate of the presumed actual damages that a breach would cause; and (3) the amount of actual damages that would result from a breach was difficult to ascertain as of the time of contracting. If any element is lacking, the provision would be unenforceable and an invalid penalty.

In *Ravenstar*, the element at issue was the first: Had the parties intended to liquidate damages? The purchasers argued no, and that the fact that the contract allowed the purchaser to pick the alternative option, plaintiff actual damages, was evidence that the parties did not intend to liquidate damages at all.

The Decision

The Colorado Supreme Court disagreed, observing that "[a]n intent to liquidate damages should not be conflated with an intent to liquidate damages as the sole and exclusive remedy." The Court observed that, if desired, the parties could—and should—have "bargain[ed] for liquidated damages as a sole and exclusive remedy." Instead, the parties had expressly agreed to provide the seller with the ability to elect either form of damages in the event of default.

In enforcing the provision as written, the Court emphasized Colorado's strong policy of freedom of contract and pointing out that a contract involves mutually bargained-for duties and risks. Importantly, however, the Court noted that that such a clause may be enforced only if the option itself is exclusive—in other words, the clause must only allow a nonbreaching party to pursue one option, not both. If, on the other hand, both remedies could be pursued, then the provision would be an invalid penalty.

It should be noted that the Colorado Supreme Court's position aligns with the majority rule, but it is not a universal one. For example, courts in Florida and Illinois have held such alternative clauses unenforceable, while decisions from courts in Washington, Maryland, Tennessee, and Washington, D.C., align with that of the *Ravenstar* Court.

The Implications

While courts are split on this issue, *Ravenstar* and decisions from other jurisdictions do convey a single, clear message when it comes to drafting liquidated damages provisions in agreements. Knowing the state of the law of your jurisdiction is nonnegotiable in order to draft an enforceable liquidated damages provision.

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Taking on a New York project? You should be aware of the following statutes

Edgar Alden Dunham, IV

As a contractor taking on projects out of state, you should be aware of locale-specific statutes that can catch you by surprise to your detriment. A few examples of New York laws that could take you unawares are:

"As a contractor taking on projects out of state, you should be aware of locale-specific statutes that can catch you by surprise to your detriment."

The Mechanic's Lien Law

Unlike many other jurisdictions, the New York Mechanic's Lien Law does not require a written contract. The time period within which a subcontractor can file a lien is relatively long—within 8 months of completion for most projects. [See New York Lien Law, Art. 2, §10.] While many states permit a general contractor or owner to seek immediate injunctive relief for an improperly filed lien, New York limits the basis for those applications to issues that are apparent on the face of the lien notice or where the required contents of the lien have not been included, or where the lien has not been filed within the necessary time. [See New York Lien Law, Art. 2, §19.] So be aware, if you have to obtain a bond or pay monies into court to discharge a subcontractor's lien, those funds may be tied up for quite some time.

The Trust Fund Act

All funds received by a general contractor on a public *or a private project* are considered by New York to be held in trust for those further down the contractual claim. [See New York Lien Law Art. 3A, §70 and 71.] Thus, if a general contractor owes money to its subcontractors and has received more money from the owner than it has paid out to the subcontractors, it may be found to be in violation of the Trust Fund Act. For instance, suppose a general contractor has been paid on a number of requisitions, made all required payments to its subcontractors, and paid itself the difference for profit and overhead. All fine so far. Now suppose the owner fails or refuses to pay the general contractor on the next requisition. As a result, the general contractor cannot afford to pay the subcontractors. In that case the subcontractors will have a claim against the general contractor for the funds that the general contractor paid itself out of the previous requisitions for profit and overhead. The general contractor can remedy its liability by paying over that money, if it has it. If the general contractor is unable to pay over the funds, its officers, directors, and agents are guilty of a crime—larceny under the statute. [See NY Lien Law, Art. 3A, §79-A.] There are defenses that can be argued, but the general contractor and its officers, directors, and agents have real exposure.

Many states have trust fund acts that apply to public projects. Fewer have trust fund acts that apply to private projects, and fewer still impose criminal liability on officers, directors, and agents like New York.

The Scaffolding Act

The Scaffolding Act [NY Labor Law, §240] makes owners and general contractors absolutely liable for providing appropriate safety equipment to protect workers from falling or having things fall on them. The statute comes into play if the alleged harm flows directly as a result of gravity. The case law provides that if a plaintiff is in fact injured as a result of inadequate, or deficient, or missing safety equipment, the owner and the contractor are absolutely liable for the injuries, regardless of any contributory or comparative negligence on the plaintiff's part. The statute includes subcontractors under its definition of "contractors."

Because the liability under the Act is absolute, any fall that is attributable in any way to a deficiency or lack of safety equipment will result in liability to the general contractor regardless of whether it controlled jobsite safety or not, and/or provided the safety equipment or not.

To protect itself, a general contractor should:

1) Aggressively control, monitor, and require safety procedures by both its own employees and its subcontractors to reduce the likelihood of injuries from falls or dropped objects.
2) Review proposed subcontractors' safety histories, to reduce the likelihood of hiring unsafe subcontractors.
3) Implement procedures to ensure that subcontractors are safe, qualified contractors.
4) Coordinate with its carrier to ensure that it has sufficient coverage for such claims.
5) Require its subcontractors to carry sufficient commercial general liability coverage naming the contractor and owner as additional insureds with primary coverage.
6) Include indemnification and hold harmless provisions in its subcontracts. Note that those provisions won't provide protection if the contractor itself is determined to be negligent (indemnification agreements that hold the indemnittee harmless for its own negligence, in part or in whole, are considered void and unenforceable in New York. [See NY Gen. Oblig. Law, §5-322.1.]) or if the subcontractor is judgment proof, which is why it is vital that the contractor be named as an additional insured under the subcontractor's policy.

If you are aware of some of the differences between New York and the jurisdictions where you normally operate, you can plan accordingly and make your project a success.

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The availability of contractual defenses to sureties in Miller Act payment bond claims
(continued)

delay claim damages. The surety opposes and interposes two defenses: the no damage for delay clause in the subcontract and the fact that the dispute resolution process between the government and the prime contractor has not been completed.

This was the fact pattern in a recent case in a federal court in Virginia: *United States v. Grimberg*. The subcontractor was Kitchens to Go; the prime contractor was John C. Grimberg Co., Inc.; and the surety that issued the payment bond under the Miller Act to Grimberg was Hartford Accident and Indemnity.

The dispute arose out of Grimberg's work designing and completing improvements on a building at the FBI Academy in Quantico, VA. Kitchens' delay claim was for $686,818 for extended rental and use of Kitchens' temporary kitchen facilities for an additional five months. Grimberg submitted the claim to the government, which denied the claim. While stating that it would submit the claim with its final claim to the government, Grimberg also cited to the no damage for delay clause in its subcontract with Kitchens as a basis for denying the claim. Kitchens filed suit against Grimberg and Hartford.

Kitchens moved the court to rule in its favor as a matter of law against Grimberg's surety, Hartford, arguing that, while the no damage for delay clause may be a contractual impediment to judgment in its favor against Grimberg, under the Miller Act, Hartford was not entitled to rely on that clause to avoid payment on an otherwise valid Miller Act, payment bond claim.

Hartford argued that it was entitled to the contractual protections of the Grimberg-Kitchens's subcontract, namely the no damages for delay clause, and, further, that judgment could not be entered in favor of Kitchens until the ongoing dispute resolution process between Grimberg and the government was complete. In essence, Hartford argued that Congress, when it enacted the Miller Act, "did not intend to extend the liability of the surety beyond that of the contractor."

The court extensively reviewed prior decisions considering the issue and the language of the Miller Act. The court found those past decisions to be unpersuasive because the holdings of those cases were not supported "in the text of the Miller Act, its statutory scheme, purpose or legislative history."

Focusing on the text of the Miller Act and its intended purpose, the court held that the only provision that was a precondition to payment by a surety to an unpaid subcontractor under the Miller Act was the 90-day period from when the subcontractor last worked on the project. As such, the surety could not rely on the no damage for delay clause in the subcontract because, to so find, would be to add "a condition to the action on the payment bond that a subcontractor can only bring a Miller Act claim if the owner has paid the prime contractor for the delays." Such a result, according to the court, "not only contradicts the Miller Act's language but is also inconsistent with the purposes of the Act."

The court made short shrift of Hartford's second argument, namely that payment to Kitchens by Hartford must await completion of the disputes procedure set forth in Grimberg's prime contract with the government incorporated into the subcontract. In rejecting this argument, the court held that "the dispute resolution clause contravenes the purpose of the Miller Act by needlessly delaying the Subcontractor's recovery while denying the Subcontractor a forum in which to adjudicate its rights."

The court, thus, entered judgment on liability for Kitchens and against Hartford, holding that it only remained for Kitchens to prove up its entitlement at trial to the $686,818 in delay costs that it claimed.

Since the Miller Act covers all federal projects, *Grimberg*, thus, is a must read for prime contractors, subcontractors and sureties working on such projects. The holding presents a potentially potent weapon for unpaid subcontractors, and sureties should be cognizant of its ramifications when handling subcontractor claims on federal projects.

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How does the Tax Cuts and Jobs Act impact your construction business?
(continued)

Now, corporate taxable income is taxed at a 21 percent flat rate for C corporations.

- **Depreciation Changes**—in an effort to encourage capital investment in machinery and equipment, the TCJA made sweeping changes to the depreciation rules. First, additional first year/bonus depreciation is now allowed for 100 percent of the cost or adjusted basis of qualifying property acquired after September 27, 2017. This bonus depreciation begins to phase down for years after 2022 therefore CapX purchases should be made before then. Second, used property now qualifies for depreciation deductions. Third, improvements to the interior portion of nonresidential real estate now qualify for a 15-year recovery period (instead of 39 years). Fourth, annual caps on depreciation of passenger vehicles have been raised. Fifth, residential rental property now qualifies for a shortened 30-year alternative depreciation system recovery period.

- **Expensing of Depreciable Assets**—under IRC Sec. 179, businesses may elect to expense (or deduct) the cost of certain qualifying property in one tax year rather than recovering the costs through multiyear depreciation deductions subject to certain limitations (i.e., a $500,000 Section 179 expense for up to $2.0 million of property placed into service). The TCJA significantly increases these limits to a $1.0 million Section 179 expense for up to $2.5 million of assets placed into service. In addition, there is an expansion for certain real property for roofs, built-in heating, HVAC property, fire protection, and alarm systems that can now be expensed under Section 179.

- **Business Interest Limitation**—the TCJA adds a significant change to the traditional deduction for business interest that is paid to finance your business operations. Beginning after 2017, the deduction for business interest is limited to the sum of: (1) business interest income; (2) 30 percent of adjusted taxable income; and (3) the taxpayer's floor plan financing interest. Interest paid on business debts that is not deductible due to the new limitation carries forward indefinitely with certain restrictions for pass-through entities. It is important to note that these new limits do not apply for businesses with average annual gross receipts of $25 million or less.

- **Net Operating Losses (NOL)**—businesses are no longer allowed to carryback a NOL two years and carryforward a NOL 20 years to offset taxable income in such years. Now, an NOL is permitted to be carried forward indefinitely, but only 80 percent of taxable income can be reduced by the NOL.

- **Corporate Alternative Minimum Tax (AMT)**—the TCJA permanently repeals the corporate AMT for corporations in a welcomed effort to simplify tax compliance. When preparing tax returns, businesses no longer need to prepare a second tax calculation known as the AMT that disallowed certain tax incentives and allowances permitted under the regular tax system.

As you can imagine, there are many complexities associated with these new business tax law changes, and some provisions are set to "sunset" or expire after 2025. As such, it is highly recommended that you consult with one of our tax attorneys if you have any questions regarding the impact the new tax reform has on your construction business.

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Program managers may sometimes have a professional duty

Allison L. Ebeck

In an interesting ruling by the United States District Court for the Southern District of Mississippi, a program manager was held to be potentially liable in negligence. Despite language in the defendant's agreement with the project owner that disclaimed liability for its work on the project, the Court found that there was a question of whether the entity was operating as a design professional and had a duty of professional skill and diligence to a third-party contractor.

In *Southern Indus. Contrs., LLC v. Neel-Schaffer, Inc.*, the plaintiff, Southern Industrial Contractors, served as the general contractor for the West Pier Facilities Project in the Port of Gulfport, Mississippi (the Project). Southern Industrial brought both contract and negligence claims against several entities, including the Project's owner, consultants, and engineers, alleging that the defendants failed to provide notice of a large underground debris field at the Project site, causing delay and a significant increase in costs for the Project.

Southern Industrial claimed that one defendant, CH2M Hill, Inc., the program manager and consultant on the Project, had a duty to make sure that the plans, specifications, and bidding documents accurately represented the conditions of the Project site. Southern Industrial claimed that CH2M fell below the standard of care in failing to disclose, warn, and/or provide information in the pre-bid documents necessary to construct the Project and in continuing to conceal information about the underground obstructions. CH2M filed a motion to dismiss, alleging that, *inter alia*, it owed no duty to Southern Industrial, and accordingly, could not sustain liability on the negligence count.

In Mississippi, a "design professional," such as an architect or engineer, has a duty to exercise ordinary professional skill and diligence. Third parties may also rely on a design professional's contractual obligation to a project owner, which would extend the duty to exercise ordinary professional skill and diligence to a contractor who relies upon that party's design to their economic detriment. This duty can be created in one of three ways: (1) by contract; (2) assumed through the party's conduct on the project or through contracts with the project owner; or (3) by common law.

CH2M asserted that its work as a program manager and consultant on the Project was not that of a design professional. In support of this contention, CH2M cited case law from other jurisdictions holding that, generally, many of the considerations that warrant creation of a legal duty on architects and engineers to third parties are not present with program managers.

The District Court examined the extent of CH2M's involvement on the Project. The Court found that per its agreement with the owner, CH2M agreed to provide various forms of support, including an assessment of the Project's adherence to state and federal law and oversight throughout the Project's design, bid, procurement, construction, permitting, and closeout phases. CH2M also was to review plans, specifications, and cost estimates, and provide support in processing proposed change orders.

However, CH2M's agreement also contained some disclaimer language. Specifically, the agreement provided that CH2M was to have no responsibility for the accuracy or sufficiency of the documentation prepared by design professionals, but that it would review the designs and notify the owner of any errors, discrepancies, or inconsistencies. The agreement also specified that any review of constructability, value engineering, or any other review or tasks involving design would not render CH2M liable for the duties of the retained design professionals.

Yet, the presence of this disclaimer language in the agreement was not sufficient to, at least at this stage of trial, shield CH2M from professional negligence liability. The District Court denied the motion to dismiss, finding that whether or not CH2M was considered to be a "design professional" under Mississippi law was unclear. The Court reasoned that despite CH2M's attempt to disclaim liability for any errors in the Project's design, it also appeared to assume some duties to ensure that the designs were accurate and could in fact be constructed. This conflicting information prevented the Court from determining whether CH2M owed a duty to Southern Industrial as a matter of law.

In sum, the scope and extent of activities performed by a program manager may create a duty of professional skill and diligence, upon which a third-party contractor may rely.

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Construction Law Group NEWS

Chris Opalinski and **Scott Cessar** were selected for inclusion as 2018 Pennsylvania Super Lawyers® for their work in construction litigation. Both were also named among the Top 50 Attorneys in Pittsburgh.

Richard Briansky and **Amy Hackett** recently joined the firm's Boston office. Both have extensive experience representing owners, general contractors, subcontractors, suppliers, developers, sureties, and financial institutions in complex construction, real estate, and general commercial disputes.

Articles by **Audrey Kwak** ("Court holds the door open for bad faith claims against sureties") and **David McGlone** ("Court holds the door open for bad faith claims against sureties" and "A Short History of Defective Building Delivery Damages,") appeared in recent issues of Construction Executive Magazine's Risk Management newsletter.

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