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Construction Law

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Construction Law Group News

Dispute resolution clauses: Do some A/Es put their interests over their client's interests?

Scott D. Cessar

Architects and engineers (A/Es) regularly prepare the contract documents for projects starting with the contract between the A/E and the owner and following on with the contract documents between the owner and the prime contractor.

It is an all-too-common occurrence that, in doing so, the A/E will include a mandatory arbitration provision in its contract with the owner compelling that all claims and controversies between the A/E and the owner be heard in arbitration. Conversely, in preparing the project contract documents, the same A/E will include a dispute resolution clause that requires that claims and controversies between the contractor and the owner be heard in court.

The consequence of these inconsistent dispute resolution forums, however, is, barring some state law statute or court decision otherwise, to place the owner in the entirely untenable position that, if a claim arises where the A/E and the contractor are both arguably at fault, the owner will have

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Your company's project record retention policy: What every contractor (and engineer, and owner) needs to know

Audrey K. Kwak

There is no disputing that construction is a document-intensive industry. On every project, countless voluminous records are generated: contracts, specifications, daily reports, schedules, requests for information, change orders, emails, and so on. Once a project is complete, the inevitable question arises as to how long (or if) these papers should be kept. Do electronic copies suffice? Or do you need the original paper versions?

Every company should have a comprehensive, carefully considered record retention policy, drafted in conjunction with input from human resources, information technologies, operations management, and legal counsel. The following is an industry-specific guide to creating a record retention policy, specific to project records, suitable for you.

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Dispute resolution clauses: Do some A/Es put their interests over their client's interests?
(continued)

to choose whether to pursue one party to the exclusion of the other party, to pursue both parties at the same time in different forums, or to pursue one party and then, when that proceeding is complete, pursue the other party.

The ramifications to the owner are palpably unfair. If the owner pursues one party to the exclusion of the other party, the party against whom it is claiming will assert in arbitration or court that the other party is at fault. This is known as "trying the empty chair." If the owner simultaneously files an arbitration against the A/E and a court action against the contractor, the owner will find itself in the same "empty chair" dilemma and will also be incurring twice the cost and expense. If the owner pursues one party and then, if the result is not satisfactory, opts to pursue the other party, it will be faced with the argument of advancing inconsistent positions, the "empty chair" defense, and will also incur twice the cost and expense.

In many such situations of inconsistent dispute resolution clauses, the owner will choose to solely pursue the contractor because: (a) it likely has a closer relationship with the A/E; (b) the A/E will be advocating that the claim is due solely to the contractor's fault; (c) the A/E will assert to the owner that it has a high deductible on its errors and omissions insurance policy and both the A/E and its carrier will vigorously fight the claim; and (d) the owner will not want to be litigating on two fronts with the attendant double cost and expense.

This situation is why the practice of some A/Es in drafting contracts with inconsistent dispute resolution clauses puts the A/E's interests over the interests of its client-owner, as it acts as a *de facto* limitation of A/E liability.

Client-owners must be cognizant of this risk at the very outset of the project when the client and A/E are in the "honeymoon" phase of the project and the A/E presents its contract to the owner. Owners should immediately reject an arbitration clause in a proposed A/E contract that provides for arbitration, but does not allow for consolidation or joinder of other claims and parties to the arbitration. If the owner is agreeable to arbitration with the A/E on those terms, it should include a clause in the A/E contract that requires the A/E to include a term in the contract documents providing that the contractor will be bound to an identical arbitration clause that allows for consolidation or joinder of other claims and parties. Further, when the contract documents are issued, the owner should confirm that the clause has been included in the contract with the contractor. In this way, the owner will retain the right to bring claims against both the A/E and the contractor in the same arbitration forum.

If the A/E is resistant to these requested modifications to the dispute resolution clause of its contract with the owner, then the owner should immediately find a new A/E.

The best and most proactive approach for an owner as to dispute resolution would be for the owner to draft its own dispute resolution clause for incorporation in the A/E contract and the contract with the contractor that provides for consolidation or joinder of claims and parties and that, if a claim arises, the owner shall have the sole right to elect between arbitration or court as the chosen forum. The identical clause should be included in the contract between the owner and the contractor. In just about every state where courts have considered such clauses in arm's length, commercial transactions, such clauses have been upheld as enforceable.

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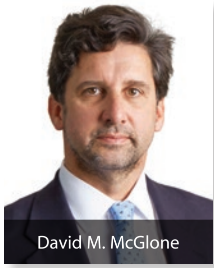
New construction contract standards in Massachusetts


David M. McGlone

Construction contracts are arguably more important than other contracts because they guarantee the health and safety of all potential occupants of a building. But, they have always been fundamentally different from standard commercial contracts.

So, when a construction case makes it to the call of the trial list, it is like the judge is being thrown a knuckleball after seeing a hundred fastballs. Construction contracts are a different creature than standard commercial contracts, sometimes with the intent that is counterintuitive to a judge.

You could even speculate that one of the reasons construction contracts often have an arbitration clause is because judges just do not understand how things should work under a construction contract. In the interest of enforcing the parties' original intent, it needs to be referred to an industry person for consistent judgment.

Recently, a Massachusetts Court eliminated one of the idiomatic features of its construction law jurisprudence. Formerly, in Massachusetts, a contractor could not recover on the contract itself without showing complete and strict performance of all its terms.

Recently, using this rule, a trial judge nullified a multimillion-dollar claim brought by a contractor laying fiber optic cable when it falsely certified that its subcontractors had been paid. This would seem a serious breach. However, no subcontractor ever brought a claim. Moreover, the misguided agenda of the contractor in falsifying certification resulted in no damages to the owner.

The trial judge also ruled there could be no *quantum meruit* (the value of services rendered) recovery for the contractor, foreclosing any compensation.

Therefore, the resulting dismissal of the claim resulted in a multimillion-dollar windfall to the owner. In *GFS Technology LLC. v. Massachusetts Technology Park Corporation*, the Supreme Judicial Court in Massachusetts (SJC) decided that this old rule of construction law had to be superseded to prevent injustice. With no apologies to the past or construction lawyers, the SJC ruled that an off-contract *quantum meruit* recovery could still be had by the contractor as long as the breach was not one concerning "actual design and construction of the project."

It is notable that only a *quantum meruit* claim was revived by SJC. If the Massachusetts ruling was applied to other states, it would mean different things. In some jurisdictions, *quantum meruit* is a recovery of the value of services *rendered by the contractor* (what it cost the contractor). In others, it is merely the *value added to the property* (what the property is valued at now minus what it was valued at before the contractor entered). These can be wildly different numbers, and both can be the same or wildly different numbers than the profit gained by a full contractual recovery.

Notwithstanding, the deterrent to contractual misbehavior still exists in Massachusetts, if a bit muted.

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Pennsylvania's Right to Know Law and "confidential settlement" agreements with public agencies

Amy Mathieu

Settlement agreements are encouraged as a matter of public policy because they promote the amicable resolution of disputes. Generally, parties are free to include any terms they desire in settlement agreements, including confidentiality clauses that prohibit the parties from discussing the terms of the agreement with third parties and even disclosing the agreement itself. However, Pennsylvania's Right to Know Law prohibits public agencies from entering confidentiality agreements. This prohibition cannot be circumvented in the interest of reaching a resolution of the case. In certain circumstances, this constraint may create an impediment so large that parties cannot overcome it.

The purpose of Pennsylvania's Right to Know Law (RTKL) is to "keep open the doors of the government, to prohibit secrets, to scrutinize the actions of public officials and to make public officials accountable in their use of public funds." In furtherance of that purpose, the RTKL creates a presumption that settlement agreements involving public entities must be matters of public record and subject to public disclosure. Thus, courts have found that public agencies cannot shield the terms of a settlement agreement from the public through a confidentiality agreement. As a result, public agencies are prohibited from entering into confidential clauses within settlement agreements with contractors, or any other opposing party.

In certain circumstances, the inability to enter a confidentiality clause into a settlement agreement may be a "deal breaker." In fact, even if the public entity signs an agreement with a confidentiality clause, the clause likely, ultimately may well be held to be unenforceable. Courts have recognized that the RTKL may hinder the ability of government agencies and those that contract with government agencies to reach settlement. However, courts have found the people's right to know outweighs this possible hindrance.

In summation, both government agencies and entities that regularly contract with government agencies must be aware of the RTKL's limitation before entering settlement negotiations. Even if both parties assent to a strict confidentiality clause, that clause will not be enforceable as a result of Pennsylvania's strong public interest in disclosure.

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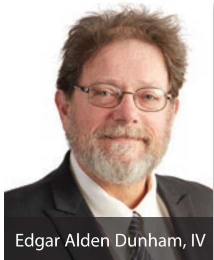
Controlled insurance programs on construction projects


Edgar Alden Dunham, IV

Controlled insurance programs, sometimes called "WRAPs" or "CIPs," have been around for years. But while their use in the past was generally limited to very large projects, now they are being utilized much more widely on projects of much more moderate size. The purpose of this article is to acquaint developers and contractors who have not had any experience with a WRAP or a CIP with what to expect if they encounter one.

CIP stands for controlled insurance program. CIPs are generally project-specific insurance programs typically combining general liability and workers compensation insurance. The two types of CIPS are OCIPs and CCIPs. A CIP can be owner controlled, in which case it is called an OCIP, or it can be contractor controlled, in which case it is called a CCIP. The purpose of the CIP, in either case, is to lower the cost of a project by avoiding the expense of each participant bringing the cost of its own insurance to its price to do the work.

Under a typical CIP, the owner, the general contractor, and the participating subcontractors will all be covered under the CIP. At the same time, those covered will not be covered under their regular insurance policies for work on the project covered by the CIP, thus entitling the participants to reductions on their regular policies. Because they will not have the normal expense of their regular insurance, the bids or negotiated prices from the general contractor and the participating subcontractors will be correspondingly lower than they would otherwise be if those entities were supplying their own insurance. By combining all of the coverage, economies of scale lower the ultimate cost of the premium and reduce the likelihood of litigation over insurance coverage. The lower bids and the lower ultimate cost of the insurance result in a lower overall cost to the project.

CIPs are high-deductible plans, with a loss reserve based on the estimated number of likely claims. Premiums can change over the life of a project depending upon the number of persons actually working and other similar factors. The loss reserve is the maximum amount the purchaser can be held liable for. The estimate for the loss reserve takes into account the size and duration of the project as well as its type and the claims history of the parties involved. If, at the end of a project, the dollar value of the claims on the project is less than what was estimated and there is an amount left in the loss reserve (the "savings"), it is returned to the party that funded the loss reserve. Because an emphasis on safe construction practices can substantially lower the likelihood of accidents and injuries, and the general contractor or construction manager is typically in the best position to establish and enforce the use of safe construction practices on a project, it is not unusual to have a savings bonus arrangement, where the savings are divided between the owner and the party implementing the CIP in order to incentivize safe construction practices.

The advantage of a CIP is the ultimate reduction in overall cost to the owner, which is achieved through the lower bids for work that do not include separate insurance costs for each bidder and the economies of scale achieved by having all of the insurance under one policy. A secondary benefit is fewer legal battles over whose carrier is covering any personal injury or worker compensation claims that may arise. Finally, projects that include a bonus provision will likely have fewer injuries because of the incentive to avoid claims.

The disadvantage of a CIP, particularly to a subcontractor, is the administrative burden. Subcontractors need to alert their own carriers that they will not be covered under their regular policies when working on a CIP project. There are usually other administrative hurdles as well. Typically, contractors' workers may have to take drug tests and register with a CIP administrator before being permitted on the job. They may be required to take physicals or even be subjected to background checks. On the other hand, they will typically be entitled to refunds on their regular policies for the time and effort spent on CIP projects.

At the end of the day, whether a CIP project is good for you or not is open to debate, but CIPs are becoming much more commonly used in construction, and contractors, developers, and owners should know about them.

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A (not so) simple plan: Latest changes to limitations on subcontracting for federal small business contractors

Matthew J. Whipple

In February of 2019, comments were closed on a proposed revision to the Federal Acquisition Regulations (FAR) related to limitations on subcontracting for small-business contractors. Once finalized, the revisions will bring closure to a process that began in 2013. The stated goal of the revisions is to streamline guidelines for permissible subcontracting, but neither the process to arrive at the rule nor the final result are quite as simple as planned.

For years, the FAR has placed limits on how much work may be subcontracted by a small business performing under a federal contract. Agencies make a concerted effort to invite small businesses into the federal marketplace through preferential contract solicitations and do not want large companies to obtain these contracts through the back door, by having a small business serve as the ostensible contractor and then subcontracting the substantive work. Simultaneously, the government does not want to burden small businesses with unreasonable performance expectations, as there may be a legitimate need to subcontract aspects of the work.

Until recently, the permissible subcontracting line was fuzzy. A small-business prime was required to perform 50% of the work for service and supply contracts and 85% of the work for construction contracts. How that 50% (or 85%) was calculated, however, could vary. Depending on the type of contract, a contractor might be required to track performance costs for personnel and manufacturing, to exclude certain cost pools (such as material costs), and ultimately to arrive at number that may only be tangentially related to how much work the contractor actually performed.

As a result, a new, simpler calculation was established, first in 2013, through changes to the National Defense Authorization Act, and again in 2016, through revisions to the Small Business Administration's regulations. Rather than tracking costs of labor or goods, the relevant consideration became how much of the prime contract amount remained with the contractor. If 50% or more of the contract balance stayed with the prime contractor, it was in compliance, and no further showing needed to be made. Further, the SBA regulations provide that if a contractor subcontracts with a similarly situated business, that subcontracting does not count toward the applicable threshold. For example, if a minority-owned small business prime pays 60% of the contract value to another minority-owned small business subcontractor, those funds are excluded from consideration.

The change is meant to simplify, and it certainly makes assessing compliance easier to determine. Depending on the industry and contract, however, the new threshold may have unintended complications. In particular, certain small businesses may provide a core service to an agency, but must necessarily rely on ancillary goods or services that can only be obtained from non-small businesses. The ancillary items may represent a large portion of the total costs of the contract. Under the prior regime, those costs might be able to be excluded from the subcontracting calculus, but under the new framework, the overriding question is how much money the contractor retains. In some situation, it might be virtually impossible for a small business to meet its subcontracting targets.

A further complicating factor is timing. The SBA regulations went into effect in 2016, but the FAR, which actually governs the terms of federal contracts, was not correspondingly amended. Contractors were left to guess as to which framework should apply. Certain contracting officers took the position that the old regime needed to apply until any FAR changes went into effect. Conversely, certain Board of Appeals decisions simply assumed the SBA standards applied even though they were not made a part of the FAR.

In late 2018, changes to the FAR establishing the new thresholds were finally proposed. As of the writing of this article, the comment period has closed, but the new regulation has not gone into effect.

Even if the changes are adopted, however, the fit between the FAR and the SBA regulations is imperfect. The FAR does not simply adopt the SBA framework, but instead writes its own. If the SBA regulations change, the FAR will not update automatically. Indeed, the SBA recently proposed further reforms to subcontracting limits, including exclusions for certain types of subcontracting, such as cloud-based computing contracts, but these exclusions would not be matched by the FAR. Additionally, the SBA regulations address certain items that the FAR update does not, such as the time period for measuring compliance with the subcontracting limitations. How contracting officers will reconcile discrepancies remains to be seen.

A further layer of complexity is that some agencies decided not to wait for the FAR to change. In particular, the Department of Veterans Affairs and the Department of Defense have already issued class deviations—an organization-wide directive that permits contracts to vary from FAR mandates—that seek to put into effect the new thresholds. These deviations are already in effect for solicitations in the first quarter of 2019. Although addressing the same basic issue, the deviations do not exactly mirror the SBA guidelines, and may not match precisely with the final FAR rule. Any differences could present problems, particularly for long-term contracts, where perhaps an old framework was in effect at the time of solicitation, but new guidelines are in place when an option period might be exercised.

Contractors, therefore, may still be in limbo regarding some of the finer details of their subcontracting plans. If you are a small business that has not yet had to deal with these changes, now is the time to review your typical subcontracting practice to make sure it complies with the new formula. You may find that meeting the threshold is simple and straightforward. If the new formula presents unexpected issues, consider reaching out to counsel to discuss strategies to ensure that your business model continues to succeed.

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What's in a name? Trademark considerations when using your name as your brand

Candace Lynn Bell

In choosing a mark or brand that incorporates the full name or last name, or even the signature of the founder or owner, however, a company may face a refusal of registration based on either or both of two specific statutory provisions relating to marks of this nature.

Many construction companies, engineering firms, and contractors use the full name or last name, or even the signature, of their founder or owner as the company's trade name, trademark, or brand. It makes perfect sense to do so. The founder or the owner is or was the individual driving the business and its growth. In choosing a mark or brand that incorporates the full name or last name, or even the signature of the founder or owner, however, a company may face a refusal of registration based on either or both of two specific statutory provisions relating to marks of this nature.

Consent of a Particular Living Individual

Under the United States trademark statue, the Lanham Act:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it … (c) **Consists of or compromises a name, portrait, or signature identifying a particular living individual except by his written consent** . . . . 15 U.S.C. §1052 **(emphasis added)**.

When the mark of a construction company, engineering firm, or contractor includes the name of the entity's founder or owner, the applicant should be prepared to possibly face an inquiry during the examination process as to whether or not the name refers to a particular living individual and if it does, whether or not that individual is connected to the company. If the name does refer to a particular living individual and the public would connect the person to the company, consent of that individual will be required in order to register the mark. *TMEP §1206*.

An applicant can address this issue in the initial application filing by indicating whether or not the name refers to a particular living individual. If the individual is no longer living, the applicant can disclose that information as well. The applicant can also disclose that consent to registration has been given by the particular living individual.

Refusal on Basis of "Primarily Merely a Surname"

Under the United States trademark statue, the Lanham Act:

No trademark by which the goods of the applicant may be distinguished from the good of others shall be refused registration on the principal register on account of its nature **unless** it … (e) Consists of a mark which … (4) is **primarily merely a surname**. 15 U.S.C. §1052 **(emphasis added)**.

When the mark of a construction company, engineering firm, or contractor includes the last name of the entity's founder or owner, the applicant should be prepared for the possibility of an initial refusal of registration based on the ground that the primary significance or overall commercial impression of the mark, as a whole, to the purchasing public is "primarily merely a surname" :*In re Hutchinson Tech Inc., 852 F.2d 552, 554, 7 USPQ2d 1490, 1492 (Fed. Cir. 1988), see also TMEP §1211*.

In light of this provision of the statute, a construction company, engineering firm, or contractor can proactively add additional words and/or designs to the last name to create a mark that has an overall commercial impression that is more than just a last name. Which additional words and/or designs would be effective in changing the overall commercial impression of the mark should be assessed on a case-by-case basis, but generally, the less descriptive and the more distinctive, the better. This "mark with more" would then be the subject of the application for registration. Nevertheless, the applicant should still be prepared to argue why the mark's impression is something more than just merely a surname, since that determination can be quite subjective under the case law. *TMEP §1211(b)*

There are also a number of arguments related to the surname itself that the applicant can make to try to overcome the determination that the mark is **"primarily merely a surname,"** including, to the extent possible given the particular surname:

- The surname is rare based on evidence from phone books and census data to show that very few people have that surname;
- The surname has recognized meanings other than as a surname, such as the name "BELL," which is also a common noun; and
- The surname also has a well-known geographic meaning, such as FAIRBANKS.

One further type of argument that can be made is that the mark has "acquired distinctiveness" with respect to the applicant's goods and services. Prior registrations and five years of use of the mark can be evidence to show "acquired distinctiveness." Other types of evidence can include advertising expenditures, consumer affidavits, and surveys and should be assessed on a case-by-case basis.

Lastly, if the examining attorney still refuses registration on the ground the mark is **"primarily merely a surname,"** assuming the mark is in use, the applicant could amend the application to registration on the Supplemental Register instead of the Principal Register. The benefits are different between the two registers, but the applicant will still have a federal registration.

By being prepared, in advance to address these two possible hurdles, construction companies, engineering firms and contractors can make the best possible case for registration of their mark.

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Your company's project record retention policy: What every contractor (and engineer, and owner) needs to know

(continued)

Why a record retention policy is important

An effective document retention policy is essential to defending against a claim for liability arising from a project (or prosecuting your own), whether the claim is for delay damages, defective work, negligence, or otherwise. Claims may not arise until years after the project is over. Having a clear documented record of how the project progressed is vital, especially if employees or other witnesses are unavailable, or have simply forgotten what happened and when.

How long to keep records

Determining how long to keep records is the first step to creating an effective policy. Two jurisdiction-specific laws provide guidelines to formulating appropriate retention periods: statutes of limitations and statutes of repose.

Statutes of limitations are time periods that limit when a party can sue. Generally speaking, they run from the date a defect has been discovered or an injury occurred. Since that date could occur long after the work has been completed, exposure to a claim arising from a project could, theoretically, last into perpetuity.

Statutes of repose were adopted to remedy this uncertainty. Unlike statutes of limitations, statutes of repose *definitively* bar claims after a set period of time, regardless of when a defect is discovered or an injury occurs. Most statutes of repose run from the date of substantial or final completion, though some statutes use other trigger dates (including written acceptance or occupancy). Most states (as of this writing, 46) have an applicable statute of repose, which range from four to fifteen years. For example, Massachusetts has a 6-year statute; New Jersey, Ohio and West Virginia have 10-year statutes; Pennsylvania has a 12-year statute.

As a rule, project-specific records should be kept three years *beyond* the expiration of the statute of repose.

Other laws and regulations will govern how long to retain ordinary business records: records relating to corporate structure, capital and fixed assets, accounting records, bank statements, salary records, and personnel records, and others. That is beyond the scope of this article; guidelines for how long to retain such records will follow in a subsequent newsletter.

A thorough, thoughtful record retention policy is no small feat, but it is an essential component of every responsible company's risk management arsenal. Equally important, regularly review and update your policy, as legal requirements and technologies evolve and change. Finally, given the possible legal consequences of a weak or inadequate policy, it is prudent to consult with legal counsel in drafting or updating your record retention policy.

What project records to keep and policy guidelines

Deciding what to keep is as important as deciding how long to keep it. No company can (or should) keep every record generated in connection with a project. While every company's retention policy will be different, the following are some ground rules for an effective project retention policy to use as a starting point.

1. Retain the following categories of documents for every project: contracts and purchase orders, drawings and specifications, design/engineering calculations, project diaries, reports, requests for information and responses, meeting minutes, change orders, iterations of shop drawings and submittals, progress photographs, field reports, certificates of insurance, emails and other correspondence, desk calendars and daily planners, and close-out documentation.
2. As a general rule, destroy drafts or "working" documents as soon as a document is finalized. Retain only final versions to minimize confusion.
3. To cut down on the volume of records to be stored, scan in and retain electronic versions, which are adequate for evidentiary purposes. *See* Federal Rules of Evidence 1003-1004 and state law counterparts. Note that paper copies may need to be retained if highly sensitive or classified information is implicated by the project—legal counsel should be consulted if this is a concern.
4. Archive electronic records on an appropriate storage medium. Consider keeping a backup copy off-site. If multiple copies are maintained, ensure that both copies are destroyed simultaneously.
5. Ensure that the policy addresses the preservation of records and suspension of any destruction in the event of imminent or ongoing litigation. Destroying pertinent documents when a dispute is ongoing or even imminent can expose you to sanctions for spoliation (destruction) of evidence, and the consequences for doing so can be severe.
6. Destroy records timely, consistent with the prescribed schedule. Maintain a comprehensive destruction log, sorted by subject, noting date and manner of destruction. Shred paper records. Destroy electronic records in consultation with qualified IT experts; simply "deleting" an electronic file rarely permanently destroys that data.
7. Distribute the policy to all employees. Obtain signed acknowledgements indicating receipt and review of the policy.
8. Abide by this policy and enforce it consistently, with respect to every project. This is the only way to ensure that destruction of records can be defended if, at some point in the future, those records appear to be relevant to a dispute.

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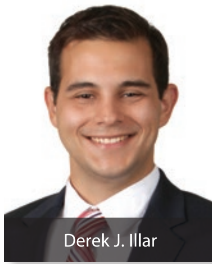
News on Pennsylvania's Construction Workplace Misclassification Act


Derek J. Illar

The Pennsylvania Construction Workplace Misclassification Act (CWMA) prohibits employers from improperly classifying their workers as independent contractors, not employees, to avoid their obligation to provide workers' compensation benefits.

In *Dep't of Labor & Indus.,Uninsured Emp'rs Guar. Fund v. W.C.A.B.(Lin and Eastern Taste)*, the Supreme Court of Pennsylvania recently ruled that the CWMA is applicable only where a putative employer is in the business of construction.

In that matter, Eastern Taste, a restaurant, hired Lin to perform remodeling work. Lin was not to work there after the remodeling. He had no written contract with Eastern Taste and the business agreed to pay him on a *per diem* basis. Lin, who had 15 years of remodeling experience, worked without direction. While repairing a chimney, he fell from a beam and injured his spinal cord, causing him to become paraplegic. Lin thereafter requested workers' compensation benefits from Eastern Taste and then the Uninsured Employer Guaranty Fund (Fund) because the restaurant did not have any workers' compensation insurance.

The Workers' Compensation Judge (WCJ) denied Lin's request for benefits because he failed to establish that he was Eastern Taste's employee. In reaching this decision, the WCJ found that Lin did not conduct his work in the regular course of Eastern Taste's business and his work was causal. The WCJ, furthermore, noted that the CWMA was not applicable because Eastern Taste "is a restaurant in the restaurant business and not in the construction business."

Lin thereafter filed an appeal. The Workers' Compensation Appeal Board (Board) reversed the WCJ's decision because Lin's work was not causal and he was Eastern Taste's employee. It, however, did not consider whether the CWMA was applicable because it based its decision on the Workers' Compensation Act's general definition of an employee.

The Fund subsequently appealed the Board's decision. On appeal, the Commonwealth Court reversed the Board because Lin was an independent contractor, not an employee. It reached this conclusion because: Eastern Taste did not control the manner in which Lin completed his work; it hired Lin to perform remodeling work, not to work in the restaurant; it was not in the construction business; and Lin used his own tools. The Commonwealth Court, furthermore, ruled that the CWMA was inapplicable because only businesses in the "construction industry" fall within its purview. It noted that the construction activity must be analyzed and considered in the context of the purported employer's industry, and, in this particular instance, Eastern Taste was in the restaurant business, not the construction business.

Lin appealed the Commonwealth Court's decision to the Supreme Court. On appeal, he argued that the CWMA should be applicable based on the nature of the work that one performs for an employer, not the nature of the employer's business. The Fund, however, asserted that the legislature only sought to remedy the issue of construction businesses misclassifying their workers through the passage of the CWMA.

In affirming the Commonwealth Court's decision, the Supreme Court ruled that "the CWMA is inapplicable where the putative employer is not in the business of construction." The Justices noted that Lin's position could cause absurd and unreasonable results, such as making homeowners liable for workers' compensation benefits when they want to remodel their kitchens and they hire electricians, plumbers, painters, or other contractors as independent contractors who then hurt themselves.

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Construction Law Group NEWS

Eckert Seamans' work in construction law and litigation again received Tier 1 rankings in the Pittsburgh metropolitan market by U.S. News – Best Lawyers®.

Eckert Seamans dominated the January/February 2019 issue of Construction Executive Magazine, which included articles by **Candace Lynn Bell** (A Primer on Trademarks for the Construction Industry), **Ed Dunham** (Bid Protests on Public Projects Where Price is Not the Deciding Factor Are an Uphill Battle), and **Matt Whipple** (Project Delay, Now and Later; New Decision Affirms Contractors May Not Need to Wait to Assert Delay Claims).

Scott Cessar presented an Allegheny County Bar Association CLE titled "Tips for Trying Construction Cases in Arbitration and in Court" in December 2018.

Chris Opalinski and **Scott Cessar** were selected for inclusion as 2019 Pennsylvania Super Lawyers® for their work in construction litigation.

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