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Summer 2020

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CONSTRUCTION LAW

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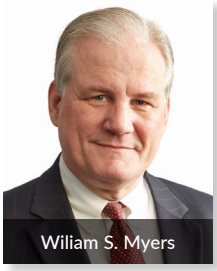
OSHA and COVID-19


Wiliam S. Myers

In the new reality of COVID-19, workplace safety and health present a special challenge, not least because of the elusive nature of the infection. It seems to be everywhere and nowhere at once, and there is no definitive way to combat it or even detect it in the workplace—it's not like measuring the height of a handrail. COVID-19 could be lurking in any worker, from laborer to superintendent, from your own to the subcontractor who is finishing up as you arrive. Fortunately, however, compliance with the OSH Act as it relates to COVID-19 is not as elusive as the infection itself.

Working in the Pandemic

OSHA does not have a specific standard on COVID-19. There have been several failed attempts at legislation to require it, and various business and labor commentators have called for a specific standard. However, OSHA has resisted those calls, opting instead to view COVID-19 through the lens of the "General Duty Clause" of the OSH Act.

The General Duty Clause states that each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." Basically, this is a catchall provision in which OSHA can fit citations for conditions or practices it believes are unsafe but which are not addressed in any of the thousands of pages of specific standards that usually form the basis for citations.

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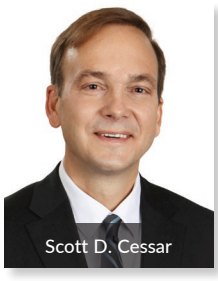
Mediating disputes online via video platform: The future has arrived


Scott D. Cessar

In addition to a full-time construction counseling and litigation practice, I also have an active mediation practice serving as the mediator. With stay-at-home orders and corporate travel restrictions due to the pandemic, but parties wanting to keep the dates of previously scheduled mediations, I found myself in a position where I needed to quickly learn how to conduct a mediation online.

After taking a webinar, watching several tutorials on how to work on Zoom, and practicing with the software, I conducted my first online video mediation last month. The mediation involved a construction dispute between six parties, namely a general contractor, two subcontractors, the carriers for the two subcontractors, the engineer, and the engineer's carrier. All told there were 14 participants located in seven different states.

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OSHA and COVID-19

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For COVID-19 in the construction industry, the benchmark of compliance with the General Duty Clause is the phrase "feasible means to eliminate or materially reduce the hazard." For citations, the benchmark lies in the phrases "steps the employer should have taken to reduce the hazard" and the "feasibility and likely utility" of those steps—both as measured against what a "reasonably prudent employer" in the industry would do.

At bottom, contractors can avoid or defeat a COVID-19 citation by staying abreast of OSHA and CDC guidelines, being aware of what other responsible contractors are doing, and using engineering and administrative controls, and personal protective equipment, accordingly. In view of OSHA's specific construction guidance and its enforcement priorities for COVID-19, discussed further below, this is clearly feasible.

The first step is a *written* pandemic plan for combatting COVID-19 at each jobsite. The clarity offered by the written plan itself, but also the process of preparing it, will yield confidence that the contractor is doing all that reasonably can be done—which in this context is the definition of compliance.

Specific Guidance for Construction

OSHA has issued instructions for all employers entitled "Guidance on Preparing Workplaces for COVID-19," which can be downloaded here. This is comprehensive and very useful, and, if followed, will put any employer in good position to avoid or defeat a General Duty Clause citation. OSHA also issued guidance specifically for construction employers in April, which can be downloaded here and consists mainly of twelve bullet points listing steps contractors can take on the jobsite. In late May, OSHA launched a webpage dedicated to construction safety in the context of COVID-19, which can be found here.

The new website collects information and advice from previous publications and other sources, but organizes it in a way that is specific to construction. It also offers new advice for the construction context. For instance, it describes the four levels of OSHA's familiar Occupational Risk Pyramid as they apply in the construction setting, differentiating indoor and outdoor work, and work that allows social distancing and work that does not.

The new website also gives specific suggestions for engineering and administrative controls, talks about personal protective equipment, and offers advice for employers facing PPE shortages. Finally, the website clarifies how cloth face masks relate to PPE, explaining the difference between those masks and the facepieces required by OSHA's PPE Standard. It also offers advice on selecting and using the cloth masks for employers who use them.

Recordability of COVID-19 Illnesses

Aside from specific worksite safety protocols, construction employers are wondering whether and how to record and report COVID-19 cases that arise among their employees.

OSHA previously had taken the position that contractors and most other employers did NOT have to make a determination of "work-relatedness" for purposes of recording COVID-19 cases on the OSHA 300 Log—unless there was clear evidence available to the employer. The practical upshot was that those employers did not have to record COVID-19 cases at all.

As of May 26, OSHA reversed that position in a new guidance that can be downloaded here. Under the new rule, covered employers must make a determination on job-relatedness when any employee contracts COVID-19. However, in doing so, the employer is not required to prove it is NOT work-related to avoid recording it. Rather, an employer need only determine that it cannot show that it IS work-related (using a "more likely than not" standard). In doing the determination, employers:

> should not be expected to undertake extensive medical inquiries, given employee privacy concerns and most employers' lack of expertise in this area. It is sufficient in most circum-stances for the employer ... (1) to ask the employee how he believes he contracted the COVID-19 illness; (2) while respecting employee privacy, discuss with the employee his work and out-of-work activities that may have led to the COVID-19 illness; and (3) review the employee's work environment for potential ... exposure.

As a practical matter, this is not substantively different from the previous rule, it just requires the procedural step of doing the determination. It is important to document that process and assessment. Also, bear in mind that the other criteria for recordability also must be present (days away from work, and so forth), and if the criteria for *reportability* are present (hospitalization or fatality), OSHA must be notified.

OSHA Enforcement in the Pandemic

The specific on-site measures contractors take, and their approach to recording and reporting, should be informed by OSHA's enforcement priorities in the pandemic. Initially, OSHA said it would focus on workplaces where COVID-19

exposure is high, such as hospitals, and would try to address other COVID-19 cases as Rapid Response Investigations (RRI). An RRI does NOT involve an on-site inspection by OSHA, at least initially, but a letter alerting the employer of a concern and asking the employer to conduct and report on its own investigation.

OSHA updated this position on May 19 to adopt a dual approach. In areas where "community spread ... has significantly decreased," OSHA will return to the inspection policy used prior to the pandemic. However, in areas that are "experiencing sustained [or resurgent] elevated community transmission," OSHA may continue its earlier enforcement priorities. That is, use the RRI process as much as possible outside of "high risk" worksites, such as hospitals.

This updated guidance consists of a detailed internal memo on enforcement procedures and priorities and five attachments, which can be downloaded here. These materials are not directed to employers, but they provide a roadmap of what to expect from OSHA during the remainder of the COVID-19 crisis.

Leniency, Not License

Finally, contractors should be aware of the Executive Order issued by President Trump on May 19, which can be downloaded here. This states that federal enforcement agencies such as OSHA should "decline enforcement against persons and entities that have attempted in reasonable good faith to comply with applicable statutory and regulatory standards."

That is consistent with what OSHA already had published regarding its enforcement priorities and expectations in the midst of the pandemic, discussed above. However, contractors should bear in mind that neither the executive order nor OSHA's published enforcement priorities constitute license to shirk their duties relating to safety and health. Also, any "leniency" reflected in these orders and priorities generally applies to COVID-19 safety measures, not to other safety and health standards.

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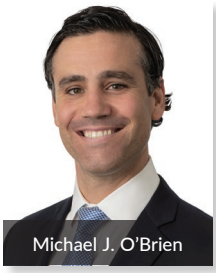
COVID-19 impacts on contractual rights and responsibilities


Michael J. O'Brien

Even as restrictions on businesses begin lifting across the United States, many state and local governments continue to enforce civil orders directing the mandatory shutdown of commercial activity deemed nonessential or non-life-sustaining. In this uncertain economic environment, attorneys should be prepared to counsel construction clients as to the impact the coronavirus may have on their contractual rights and responsibilities, specifically as to whether they or another contracting party may appropriately invoke a force majeure clause to excuse nonperformance.

"Force majeure" is a phrase of French origin, translated literally to mean "superior force." A force majeure clause in contract law is a provision within a contract that releases the parties from their respective obligations in the event that a catastrophic or unexpected occurrence prevents one or more parties from performing the duties and responsibilities contained therein. A force majeure provision seeks to fairly apportion risk in the event performance becomes impossible or impracticable because of an extraordinary event outside the control of the parties and which could not be avoided by exercise of due care. If properly invoked, it may allow for termination or suspension of contractual obligations in some circumstances. Circumstances that warrant the invocation of force majeure may be wars, rioting, social unrest, a catastrophic weather event, or, in some cases, viral outbreak. Importantly, it must be the force majeure event, and not some other factor, which caused nonperformance, and economic hardship is not an excuse for nonperformance. A sample force majeure clause may excuse performance for:

> *Any causes or circumstances beyond the reasonable control and without fault or negligence of the party affected thereby or of its subcontractors or carriers, such as, acts of God, governmental regulation, war, acts of terrorism, weather, floods, fires, viral outbreak, accidents, strikes, major breakdowns of equipment, shortages of carrier's equipment, accidents of navigation, interruptions to transportation, embargoes, order of civil or military authority, or other causes, whether of the same or different nature, existing or future, foreseen or unforeseeable, which wholly or partly prevent the production, processing, shipment and/or loading of the subject goods by Seller, or the receiving, transporting and/or delivery of the goods by any carrier, or the accepting, utilizing and/or unloading of the goods by Buyer, but specifically excluding economic factors alone.*

Industry observers have noted that many form construction contracts, including standard documents prepared by the American Institute of Architects (AIA), do not have specific force majeure clauses. However, it is important to recognize that many of these form contracts do contain excusable delay clauses that can likely be applied to COVID-19-related circumstances, and thus used as a contractual basis to excuse delay and/or nonperformance.

Attorneys and clients should initiate the following review:

1. Identify commercial relationships and projects planned or pending in states or municipalities wherein mandatory shutdown orders remain in effect due to COVID-19-related circumstances;
2. Review any contracts in place and determine whether a force majeure provision or excusable delay/termination clause is included in any or all of the impacted agreements;
3. Determine whether such agreements provide for a 30-, 60-, or 90-day notice period prior to the invocation of a force majeure provision or excusable delay/termination clause; and
4. Evaluate the likelihood of invocation by one or more parties and plan for the probable consequences.

By taking these proactive steps, construction clients can prepare for the effect this outbreak and related government regulations may have on their commercial and legal interests.

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Mediating disputes online via video platform: The future has arrived

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The software enabled me to set up break rooms in advance for each party, and one for me to use if I wanted to bring individuals from different parties together, much like an in-person mediation. After having an opening session with introductions, just like an in-person mediation, I then moved each of the participants into their respective party break rooms and started to mediate the case.

The break rooms were comparable to conference rooms in an office, as the parties' representatives could see one another and could see me when I entered into the break room. Also, when I was not in the break room, they could securely and confidentially talk with one another.

Much like in an in-person mediation where the mediator goes from conference room to conference room, I went from break room to break room working the case, challenging the parties' positions and carrying around and presenting counterarguments. At times, I brought various participants together in my mediator's break room to address factual issues. In the afternoon and at their request, I put the carriers and insureds in separate rooms as we pivoted to discuss the numbers and began an exchange of demands, offers, and counteroffers.

This all went on for nine hours until we reached a settlement contingent on one carrier confirming authority for a number, which was provided to me the next morning.

Here are some takeaways.

First, online mediation will not entirely replace in-person mediation, particularly for larger cases. There will always be a benefit for having people spend the time and money to travel to a location and be required to attend and participate in person. Many cases mediated in person settle late in the day based on the sense of urgency of getting something done in view of the invested capital.

Second, in-person mediation enables a greater ability for the mediator to develop a relationship of trust with the principals of the parties and the adjusters. My first online mediation benefitted in that I knew many of the participants, as I had earlier mediated the dispute between the owner and the general contractor and because I also held video calls in advance of the mediation with those persons I had not mediated with previously. Successful online mediations, I submit, require greater advance communication with the participants, as the video platform is not as conducive as personal interaction to developing trust and confidence with the stakeholders.

Third, online mediations save a tremendous amount of money in travel- and time-related costs. In my case, if not for the pandemic, 14 people would have been traveling to Pittsburgh by car and plane and spending the costs for travel, lodging, and meals and investing an entire extra day of time that could be devoted to other business. Smaller cases involving participants from multiple out-of-town locations, in particular, will greatly benefit from online mediation.

Fourth, many times a case mediated in person does not settle because there is further discovery to be taken or it is simply not ready to settle, and a follow-on mediation will be needed. Those situations are particularly conducive to a follow-on, online mediation where, in some respects, we are picking up where we left off.

Fifth, online mediations offer additional flexibility to bring key stakeholders into the mediation during the mediation by video in a far more meaningful way than doing so by phone. For example, in my online mediation and at my request late in the day, the owner of one of the subcontractors linked in on Zoom and I put him in his company's break room when I felt that his project manager was not appreciating the risk to the company of not making an additional contribution to the settlement.

Sixth, and related to the last point, there will be hybrid in-person and online mediations where some or most of the participants are together in person, and other participants, such as high-level executives, adjusters for carriers, or expert witnesses, are brought into the discussion by online video from the very outset of the mediation. This will save costs and enable more effective mediations.

To close, the advent and use of online mediations has been greatly accelerated due to the pandemic. They are here to stay and they are going to become far more prevalent.

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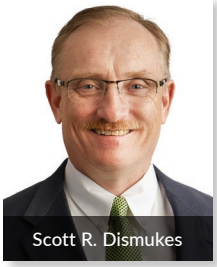
Construction, demolition, and renovation: Asbestos inspections—what may frequently be overlooked can cost you


Scott R. Dismukes

Much is written regarding the environmental regulatory requirements for handling asbestos during demolition and renovation activities. Typically, this information has an initial focus on when to notify the regulatory agencies of the intent to commence either demolition or renovation in excess of threshold amounts. What frequently may not be addressed is the obligation to have a licensed asbestos inspector conduct a thorough asbestos NESHAP inspection prior to commencing any demolition or renovation activities at any facility, regardless of the building's construction date or prior abatement status.

Federal regulations regarding demolition and renovation very clearly state… "prior to the commencement of the demolition or renovation, thoroughly inspect the affected facility or part of the facility where the demolition or renovation operations will occur, for the presence of asbestos." [40 C.F.R. § 61.145(a).]

This initial requirement is understandable since, for regulatory compliance purposes, a thorough asbestos NESHAP inspection informs the owner or operator (i.e., responsible party) whether asbestos is or is not present. The Environmental Protection Agency and associated state and local agencies that regulate asbestos view very seriously this initial requirement. Typically they site two reasons: (1) many commercially available building materials still contain asbestos and (2) within the scope of demolition or renovation, any material not inspected and determined to be asbestos or non-asbestos will be presumed by the enforcement agencies to be asbestos-containing material, subjecting the owner or operator to penalties for any noncompliance.

Federal regulations define demolition to mean wrecking or taking out of any load-supporting structural member of a facility together with any handling operations with the intention of burning of any facility. [40 C.F.R. § 61.141.] Renovation is defined as the altering of a facility or one or more facility components in any way, including the stripping or removal of asbestos from a facility component. A facility component is any part of a facility, including the equipment. The regulations also define "facility" to mean any institutional, commercial, public, industrial, or residential structure, installation, or building.

Owners and operators also need to understand that a typical Phase I Environmental Site Assessment does not constitute a thorough NESHAP inspection by a licensed inspector. In fact, a close reading of many Phase I Reports reveals these reports typically exclude responsibility for, or evaluation of, asbestos.

Many Phase I Reports contain language similar to the following: "Based on the scope of work for this assessment, an Asbestos NESHAP Survey by a licensed asbestos inspector was not conducted. Note: Due to the continued commercial distribution of asbestos-containing building materials, asbestos may be present in some of the building materials. It is recommended that an asbestos inspection be performed in accordance with all applicable federal, state, and local regulatory requirements prior to renovation, demolition, or other activities that cause a material disturbance."

Absent engaging a licensed asbestos inspector to conduct a thorough Asbestos National Emissions Standard Hazardous Air Pollutant Compliance inspection, the county, state, and federal environmental agencies have clearly indicated they are authorized to presume all material within the scope of the work contains asbestos, that the owner/operator initiated and conducted the work in noncompliance with the asbestos NESHAP rules, and they intend to proceed to initiate aggressive enforcement. Note: Agency inspections can be very detailed, resulting in numerous allegations of specific noncompliance, supporting significantly painful penalty demands.

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Strategies for construction lien arbitrations in New Jersey


Edgar Alden Dunham, IV

In New Jersey, part of the process of filing a construction lien on a residential project is an arbitration proceeding in which the arbitrator determines whether the lien claim is sufficiently valid to permit it to be filed and whether any claimed offsets are sufficiently valid to justify requiring the lien claimant to post a bond.

The arbitration does not fully settle the matter of the validity of a lien claim. A claimant will still have to prove its entitlement in an enforcement action at trial; however, the claimant can lose its lien rights at the arbitration. Accordingly, the arbitration should not be taken lightly by either claimants or parties defending against liens.

The following are tips and strategies for both claimants and those defending against liens at the arbitration:

A. Preparation:

1. Before Contract. Use contract language requiring the entity below you in the contract chain to bond off any claims and to hold you harmless and indemnify you.
2. General contractors and subcontractors with existing relationships with bonding companies can make life easier for dealing with liens.
3. If you are a party who may be entitled to a lien, do not agree to payment terms that will conflict with the deadlines for filing liens (90 days for commercial projects, 120 days for residential projects).
4. i) Once work starts: Use partial waivers of lien for all payments and final waivers for final payment.

   ii) Use AIA G702 Application for Payment or equivalent. Key here is following language that the party submitting the payment requisition is swearing to:

   > The undersigned Contractor certifies that to the best of the Contractor's knowledge, information and belief, the work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all payments have been paid by the Contractor for work for which previous Certificates for Payment were issued and payments received from the Owner, and that current payment shown herein is now due.

5. Keep track of your payments so that you know as soon as possible if you have not been timely

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Strategies for construction lien arbitrations in New Jersey

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paid. On residential projects, file your Notice of Unpaid Balance (NUB) as soon as possible to ensure that you will have time for the arbitration before the deadline.

6. After the NUB has been filed:
   i) To the extent that the party filing the NUB is not someone you have a contractual relationship with, exercise your right under your contract to demand that the party you have a contract with bonds off the lien. That takes you out of the case and takes the lien off your properties.
   ii) If the party filing the NUB is someone that you have a contractual relationship with, *you* may wish to bond off the lien anyway. That won't take you out of the case, but it will free up title.
   iii) An alternative to posting a bond is to deposit money with the county clerk. The advantage is that there is no fee and you don't need a relationship with a bonding company. The disadvantage is that it ties up money for an extended period of time.
   iv) If a NUB has been improperly filed, you can either go to court immediately under a summary proceeding or wait for the arbitration. The arbitration will generally be less expensive and just as timely.
   v) If the project is commercial, there is rarely any advantage to be gained by filing a NUB. However, folks nonetheless do it upon occasion.
7. The NUB has been filed, arbitration has been scheduled, and you are still in the matter. Time to look for defenses and any offsets or counterclaims.
   i) Is the contract in writing?
   ii) Was it signed by the party that is claimed to owe the money?
   iii) If it arose out of a change order or any kind of extra, was the change in writing and signed?
   iv) Was the claimed work actually performed?
   v) Was the work or the alleged lack of payment covered by the release language in any of the waivers?
   vi) Did you already pay the person below you in the contractual chain, but above the claimant, for the work?
   vii) Is the NUB itself in conformity with the requirements of the law? (The preferred language is in the statute.)
   viii) Was the NUB properly served?

B. Witnesses/Exhibits

1. The defense must decide whether it believes its proofs sufficient to persuade the arbitrator to dismiss the NUB or whether it will choose to deal with the claim *after* the lien claim is filed and an enforcement action is filed.
2. Whether you are seeking dismissal of the claim or preliminary confirmation of the claim at the arbitration, you now must marshal your witnesses and proofs.
3. Your witnesses will need to be able to explain your defenses or claims and your exhibits. For instance, your witness may need to explain why the work that is the subject of the lien claim was outside of the written contract or was the subject of a lien waiver. You will need to explain all of your defenses and claims, and you will probably need to present multiple exhibits on each defense. The rules of evidence are relaxed, but are not totally ignored. You will still have the burden of proving your defenses. Younger arbitrators often prefer electronic exhibits, while older arbitrators often prefer notebooks. If you use notebooks, consider using a color other than black or white so your notebooks stand out. It also avoids confusion at the hearing.

C. Hearing Time

The time needed for the arbitration hearing will be dependent on the number of participants, the number of issues, and the number of witnesses. Most arbitration hearings are probably no longer than an hour or two. However, the statute contemplates the possibility of multiple hearings, and I have participated in hearings that lasted more than a day.

D. Proofs

Depending on the issues in dispute, most arbitrators will give the parties the opportunity to provide written submissions at the close of the actual hearings. That is usually a good opportunity for you to sum up your positions, set out what the witnesses said that was important, and go through your exhibits and set out what they mean.

E. Conclusion

At the conclusion of the hearings, the arbitrator determines the following:

1. Was the NUB a proper NUB under the statute?
2. Was the NUB properly served?
3. The amount of the contract in question;
4. The validity of the lien claim;
5. The validity of any offsets;
6. The allocation of costs between the parties.

If the arbitrator decides that the NUB was not in the correct form or that it was improperly served, it can be fatal to the claimant because it will be unlikely that it will have time to cure the issue.

If the arbitrator decides that the lien claim is not valid, the claimant loses its claim and cannot go forward.

If the arbitrator decides that the NUB was in order and properly served and that the lien claim is valid, the claimant will have 10 days to file its lien claim.

If the arbitrator decides that the offsets and/or counterclaims are valid, they can require that the claimant post bonds in the amount of 110% of the offset or counterclaim.

The arbitrator's decision is due within 30 days of the demand for arbitration. So there is not much time, and the parties need to act quickly to protect their rights.

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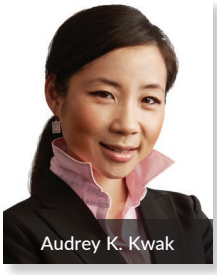
Case Study: When it comes to location, the Federal Arbitration Act preempts the Pennsylvania Contractor and Subcontractor Payment Act


Audrey K. Kwak

Pennsylvania contractors may believe they can rely on the terms of the Pennsylvania Contractor and Subcontractor Payment Act (CASPA) to ensure a Pennsylvania forum for any disputes arising out of construction occurring in Pennsylvania. However, in light of recent precedent, this reliance may be misplaced.

In *Bauguess Elec. Servs. v. Hosp. Builders, Inc.*, Civ. A. No. 20-214, 2020 U.S. Dist. LEXIS 31619 (E.D. Pa. Feb. 25, 2020), the court held that an arbitration provision in a subcontract between Bauguess, as subcontractor, and Hospital Builders, Inc. (HBI), as general contractor, controlled the location of the parties' arbitration and preempted the CASPA (which provides that a contract requiring that any arbitration on the contract "occur in another state [] shall be unenforceable").

The dispute arose out of the construction of a Candlewood Suites Hotel in Chester, Delaware County, Pennsylvania. HBI subcontracted a portion of the electrical work to Bauguess. When HBI failed to pay Bauguess all the monies that Bauguess claimed were due, Bauguess filed a mechanic's lien against the property, as well as a demand for arbitration with the American Arbitration Association (AAA). When Bauguess later filed a state court motion to compel arbitration in Delaware County (the site of the hotel), HBI removed the case to federal court.

HBI disputed Bauguess's contention that Delaware County was the proper forum for the arbitration, arguing instead that the terms of its subcontract with Bauguess required that the arbitration take place in South Dakota. Specifically, the Bauguess subcontract required that: (i) any arbitration be subject to the same terms of HBI's contract with the owner, VB Hospitality (VBH) or (ii) if not specified in the owner/HBI contract, in Aberdeen, South Dakota.

Notably, while these proceedings were ongoing, HBI was also in the middle of an arbitration with VBH pending in South Dakota, which HBI claimed included some of the funds that Bauguess was seeking in its suit against HBI.

The court sided with HBI, noting first that the Federal Arbitration Act (FAA) preempted the CASPA because CASPA's provision conflicted with the FAA's primary purpose: to ensure that private agreements to arbitrate are enforced according to their terms. The court observed that the terms of the arbitration provision in the Bauguess/HBI subcontract clearly required arbitration in South Dakota and, additionally, required a joint arbitration with the owner if any disputes between HBI and VBH involved any dispute between Bauguess and HBI, as was the case. The court enforced the clear terms of the arbitration agreement and required that the arbitration occur in South Dakota.

This decision emphasizes, yet again, the importance of consulting with experienced counsel prior to signing a construction contract. The significance of where a dispute is litigated or arbitrated should not be underestimated—disputes are stressful and costly enough without the added aggravation and business interruptions caused by traveling to distant or unfamiliar forums.

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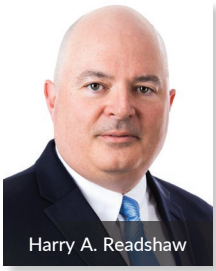
Subchapter 5—Possibly a more affordable option for small businesses and owners to reorganize under Chapter 11 of the Bankruptcy Code


Harry A. Readshaw

In recognition of the fact that the high costs associated with Chapter 11 prevent some businesses and individuals from benefitting from the protections and opportunities of bankruptcy, the Bankruptcy Code was recently amended with the intent to open up Chapter 11 reorganization opportunities to certain businesses and individuals that may otherwise not be able to afford the process. By adding a new subchapter to the Bankruptcy Code, which became effective February 19, 2020, Congress provided a new Chapter 11 bankruptcy option for small businesses and some higher net worth individuals. The new law, currently referred to as "Subchapter 5," is designed to provide a truncated and less costly Chapter 11 reorganization process for businesses and individuals with debts below $2.75 million.

> *"The new law, currently referred to as "Subchapter 5," is designed to provide a truncated and less costly Chapter 11 reorganization process for businesses and individuals with debts below $2.75 million."*

Some of the benefits of Subchapter 5 are the potential to confirm a Chapter 11 Plan without obtaining creditor approval, relaxation of the rules for Chapter 11 administration, and expanded opportunities for individual debtors to exempt property that might otherwise face liquidation. While these and other features may make Subchapter 5 appealing, there are a few new provisions that may detract from the appeal. Specifically, there is a new type of trustee injected into the process, whose duties are not clearly defined. More importantly, there is a lack of clarity with respect to how the new trustee will be compensated, and whether or not the new trustee can hire professionals that would be paid for by the bankruptcy estate. There is also a possibility that debtors may be required to pay more to creditors under Subsection 5 than they would in a traditional Chapter 11 reorganization case. These issues, if not decided by the courts in favor of cost savings, might completely eliminate any net savings of filing under the new provision. Given the intent of the law, it seems likely that courts will limit the ability of the new trustee to charge fees and spend estate assets by hiring expensive professionals, but there will be uncertainty until the courts weigh in on the subject.

Whether or not Subchapter 5 will achieve the goal of truncating and simplifying the Chapter 11 reorganization process for small businesses and individuals is yet to be determined. As with many new laws, it may take some time for the courts to sort out the open questions regarding Subchapter 5. Nonetheless, small businesses and owners that have avoided seeking bankruptcy protection because of the excessive costs may want to seek the guidance of a bankruptcy lawyer to determine if Subchapter 5 could offer a more cost-effective way for them to take advantage of the protections and reorganization opportunities offered by the United States Bankruptcy Code.

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Construction Law Group NEWS

Sean Donoghue will serve a three-year term as a Council Member of the Allegheny County Bar Association Construction Law Section.

Our team has contributed several articles to leading industry publications, including **Scott Cessar** (The Expansion of Potential Liability of Construction Managers and Consultants), **Sean Donoghue** (Proof and Calculation of Damages: Jury Verdict Method Still Viable Where Damages Documentation is Lacking, but Should be a Last Resort), and **Ed Dunham** (The Arbitration you Participated in May Have Greater Consequences than you Considered: The Effect of Arbitration on Other Proceedings) for *Construction Executive Magazine*, **Derek Illar** (How One State is Enforcing E-Verify & How It Could Affect You) for *Construction Business Owner*, and **Audrey Kwak** (Record Retention 101 for Contractors) for *Contractor Magazine*.

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