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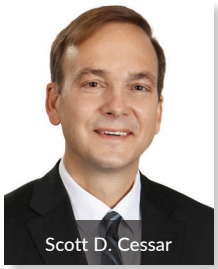
CONSTRUCTION LAW

In This Issue...

The expansion of potential liability of construction managers and consultants


Scott D. Cessar

Over the last decade or so, there has been far more judicial willingness to adopt legal theories that result in an increased risk of exposure to construction managers (CMs) and consultants working on construction projects. This has resulted in a greater likelihood of lawsuits being filed that name CMs and consultants as defendants and a greater likelihood of those lawsuits surviving efforts to have the lawsuits dismissed prior to trial. The consequence of more claims has led to increased costs for legal expenses, for settlements, and for uncompensated personnel time devoted to the defense of the claims.

This expansion of potential liability may be broken into two sets: (1) claims for pure economic loss not arising from property damage or personal injury by parties not in a contractual relationship with a CM or consultant and (2) claims for property damage or personal injury by a party not in a contractual relationship with a CM or consultant.

The first set concerns claims by a contractor against a CM or consultant that its breach of duties owed to the owner on a project and/or its provision of incomplete or inaccurate information on a project, which it knew, or should have

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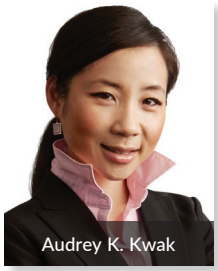
Your company's record retention policy: What to keep and how long to keep it


Audrey K. Kwak

This article is the second in a two-part series regarding document retention policies. The first article (from the Spring 2019 newsletter) explains the importance of such a policy, whether you are an owner, engineer, construction manager, general contractor, or subcontractor. This article contains additional specifics regarding how to determine and set deadlines for document destruction.

Perhaps the most critical component of any effective record retention policy is the establishment of the retention periods to apply to each category of business record generated by your company. The following guide has been compiled from a number of sources, including the Guide of Record Retention Requirements in the Code of Federal Regulations (CFR) (2 CFR § 200.333) (for any federal contracting work), IRS Regulation - 26 CFR 1.6001-1, IRS Publication 583, and others.

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The expansion of potential liability of construction managers and consultants

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reasonably anticipated, would be relied on by the contractor, resulted in damages to the contractor.

For many years, in the great majority of jurisdictions, CMs and construction managers were insulated from such claims by the economic loss rule, which prohibited third parties from asserting negligence claims against parties to recover pure economic losses, not caused by personal injury or property damage, from parties to which they were not in privity of contract.

The economic loss rule, however, has been eroded significantly over the years by the growing judicial adoption of the *Restatement (Second) of Torts* §552 (a),[1] which states that entities in the business of supplying information that they know or should reasonably anticipate will be relied on by third parties may be held responsible for money damages if this information is proven to cause harm to a third party that relied on the information.

The great majority of states have now adopted the *Restatement Second of Torts* §552 (a).

The consequence is that, for example, in Tennessee, a court found that a CM could be held potentially liable to a concrete contractor for money damages based on its allegation that the CM had incorrectly measured and set the bench marks to which the concrete floors were poured. Similarly, in New York, a court held that a CM could be held potentially liable to a contractor for money damages for negligent misrepresentations based on its alleged failure to identify defects in the design documents, because the CM had a duty to review those documents.

The second set concerns claims by injured workers or adjacent property owners against CMs or consultants for damages for personal injury or property damage. Following the *Restatement Second of Torts* §324(a), a CM or consultant may be held liable if it either "gratuitously or for consideration" renders services that it should recognize could cause physical harm and, in rendering such services, fails to exercise reasonable care, which results in harm.

Just about every state has either adopted *Restatement Second of Torts* §324(a) or recognizes the same cause of action based on the common law doctrine of negligent undertaking.

The consequence is that, for example, in the District of Columbia, an environmental consultant was held to be potentially responsible to a worker who claimed injuries due to exposure to contaminated soils, based on the fact that the consultant prepared the environmental assessment report and had an ongoing obligation to monitor air conditions. In another example, in Arizona, a CM was held to be potentially responsible for almost $4 million in property damages caused when a sprinkler system malfunctioned, based on the CM's obligation to supervise the system's installation.

In these cases, the language of the CM and consultant's contracts are closely scrutinized by the courts as to the duties they agreed to undertake, as well as their actual conduct on the project, in determining whether they could be potentially liable such that the case should go to a jury.

A subset of this expansion of liability of CMs and consultants is whether a party may claim that it is an intended third-party beneficiary of the owner's contract with the CM or consultant. Here, courts will scrutinize the owner's contract with the CM or consultant to determine if third parties were entitled to rely on the information provided by the CM or consultant. Thus, in the District of Columbia case discussed above, the environmental consultant was also held to be potentially responsible to the excavation subcontractor for any damages that the injured worker might recover from the excavation subcontractor based on faulty air monitoring, under the theory that the excavation subcontractor was an intended third-party beneficiary of the owner-consultant contract.

In order to protect themselves as best as can be, CMs and consultants should take care in the negotiation and drafting of contracts to not accept broad delegations of duties inconsistent with their actual scope of work. If possible, they should include disclaimers in their contracts as to who may rely on their work product and expressly state that third parties are not intended beneficiaries of those contracts. Although this will not preclude potential liability in all states, it will certainly be useful if the case goes to the jury. In addition, CMs and consultants should consult with their insurance broker to be sure that they have robust coverage in view of the magnitude of their potential liability exposure.

[1] The *Restatement (Second) of Torts* is a legal treatise prepared by the American Law Institute that sets forth principles of American common law as it relates to torts, which are acts or omissions that cause harm to a third party.

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Your company's record retention policy: What to keep and how long to keep it

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Note that these guidelines are only a starting point; you should consult with legal counsel to ensure that your retention periods are consistent with IRS regulations, and other federal, state, and local government retention requirements before finalizing any retention periods. Provided the retention periods are in conformity with all applicable guidelines, as a rule of thumb, set retention periods to the minimum required in order to minimize the risk of unauthorized access to data.

Financial documents	**Retention period**
Bank reconciliations	2 years
Bank statements	3 years
Internal audit reports	3 years
Expense analyses/expense distribution schedules	7 years
Accounts payable ledgers and schedules	7 years
Withholding tax statements	7 years
Checks (for significant payments and purchases)	Permanently
Insurance records, current accident reports, claims, policies, and related documents (both active and expired)	Permanently
Year-end financial statements	Permanently
Audit reports	Permanently
Tax returns and worksheets	Permanently
Company formation/documents regarding general business operations	
Correspondence (including emails)	2 years
Contracts, mortgages, notes, and leases (expired)	7 years
Contracts (still in effect)	Contract period
Correspondence (legal and important matters)	Permanently
Deeds, mortgages, and bills of sale	Permanently
Depreciation schedules	Permanently
Minute books, bylaws, and charter	Permanently
Intellectual property	
Patents and related papers	Permanently
Trademark registrations and copyrights	Permanently
Personnel records	
Employment applications	3 years
Payroll records and summaries	7 years
Personnel files (terminated employees)	7 years
Retirement and pension records	Permanently
Project-specific documents, including drawings and specifications, design/engineering calculations, project diaries, reports, requests for information and responses, meeting minutes, change orders, shop drawings and submittals, progress photographs, field reports, certificates of insurance, emails and other correspondence, desk calendars and daily planners, invoices, and close-out documentation.	As a rule, three years *beyond* the expiration of the statute of repose.

Of course, all of the above time frames may vary for various reasons, including whether your company is a public or private entity, whether you contract with the government, and/or whether your company is for-profit or non-profit. Some additional sources you should consult in connection with finalizing document retention periods include:

- **Federal statutes and regulations:** e.g., the Sarbanes-Oxley Act (SOX); the CFR - Record Retention regulations generally: see www.ecfr.gov/cgi-bin/ECFR?page=browse; and IRS Regulations.
- **State and local laws and/or regulations.** Notably, as of this writing, seven states (Colorado, Georgia, Illinois, Maryland, New Hampshire, Oklahoma, and Texas) have adopted the "Uniform Preservation of Private Business Records Act" or an equivalent law, which provides that whenever a law does not specify a retention period, businesses should keep their records for three years.

Finally, manage your risk by consulting with legal counsel at regular intervals to ensure your retention policies comply with ever-evolving regulations, statutes, and case law.

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You need a data security compliance program (seriously)


Matthew J. Whipple

It seems like every month, there is news of another data breach of sensitive information for millions of individuals. You may remember the 2013 Target data breach, when credit card information for over 100 million customers was stolen during the height of the holiday shopping season. What you may not remember (or did not know) is that Target's systems were compromised because hackers stole network credentials used by an HVAC contractor to remotely connect to Target's network.

You also may not remember the Turner Construction breach in 2016, when employee Social Security numbers were obtained through a fraudulent email scheme. And you likely have not heard of other smaller-scale victims of cyber-crime—the Ohio contractor whose $1.7 million progress payment was rerouted to a foreign bank account or the Texas contractor that was hit with a ransomware attack that shut down servers with documents related to millions of dollars of active construction projects.

Security industry studies are clear that cyber-criminals are not just attacking high-profile retail businesses. Other industries are at risk, with construction companies serving as one of the prime targets. The time-sensitive demands of construction project make contractors a prime target for ransomware. A recent study by IBM pegs the average cost of a data breach for a US-based business as $8.19 million, when factors such as reputational damage, lost business, legal fees, regulatory fines, and remediation costs are taken into account. Having effective compliance and security policies are essential to mitigating the very real risks of cyber-liability. Below are a few considerations for construction-industry businesses.

- **Mapping Your Data.** Construction projects bring together dozens of parties—owners, design professionals, contractors, subcontractors, suppliers, temporary workers, code inspectors. Unlike a software business where all company data may be housed in a central server group, a construction project may have data in dozens of locations—a cloud-based project management system (CoConstruct, Procore, etc.), BIM software maintained by the design professional, hardcopy files sitting in project trailers, a laptop in the project supervisor's truck, emails with a component supplier providing the last round of submittal reviews, smartphones for virtually everyone on-site. Increasingly real-time data is being collected to document project performance—video from drones, GPS tracking of vehicles and deliveries, biometric data from safety vests—which is stored in any number of on-site and off-site locations. A complex project may require the efforts of thousands of individuals, which means Social Security numbers, bank accounts for payroll, and health care information that hackers would love to access.

Construction projects are not just about sticks and bricks. Many projects require the collection and leveraging of massive amounts of documents and data, much of which is confidential, business-sensitive, or "personally identifiable information" under applicable statutes. Understanding what this data is, where it resides, and who has access to it is the first step to developing an effective security program.

- **Reviewing Your Contracts.** Gone are the days when construction contracts were just about scope of work, payment, and schedule. Particularly for large infrastructure and commercial projects, contractors are increasingly being required to meet stringent compliance requirements related to data security and privacy. The protocols often apply not just to personally identifiable information, but also more broadly to confidential information that may be exchanged during the project. Do not gloss over acronyms like NIST, ISO-27001, and GDPR, and do not just sign the pro forma data security rider. Understand the risk you are buying and consider whether a lack of a policy means you are breaching a contract before work even begins.

Equally as important is sharing the risk with others. Data security requirements not only apply to first-tier contractors, but are also being flowed-down to lower-tier subs and suppliers. Know your vendors and subcontractors and make sure to include cyber-security-related provisions in all agreements. If you are an "upstream" party, do your subcontracts adequately ensure that "downstream" parties are following data security protocols? If a hacker accesses your systems because a material supplier was careless with login credentials, does the supplier have the financial resources or insurance coverage to make you whole? A thorough review of contracting practices can help you understand, and improve, the risk profile of a project.

- **Reviewing Your Insurance.** You may know your company's builder's risk, general liability, and completed operations insurance policies, but what about your coverage for cyber-liability? A cyber incident may require forensically examining your servers, retaining counsel to interface with law enforcement or attorneys general and to provide data breach notices to affected individuals, and hiring a public relations firm to manage crisis communications. The escalating costs are obvious. Cyber insurance drastically curtails these costs—a $10,000 deductible can be a drop in the bucket for a significant data breach matter.
- **Not Just Your IT Department's Problem.** A common response to the above concerns is: "IT takes care of this." The IT department is the cornerstone of an effective security program, but it is not sufficient. Compliance is a team sport, which means having a leadership group that prioritizes security as a business risk. It also means training all employees on cyber best practices, including how to recognize threats, respond to problems, and handle sensitive data. Having an incident-response plan can drastically cut down the time it takes to identify and combat an attack. Indeed, the average time it takes to contain a data breach is *months*, not days or weeks. If a ransomware attack shuts down your business's computers for a few days during an active project, the negative impacts on the project schedule can be catastrophic. Time lost is money lost, and prioritizing security for all members of your organization reduces costs in the long run.

When discussing data security, it is easy to sound alarmist. It may also be tempting to dismiss compliance as just another expense, in an industry where competition already means razor-thin margins. Balancing costs and benefits is key, so an effective program requires the input of legal and technical professionals who not only understand data security in the abstract, but also the unique concerns of the construction industry. If you do not have a security plan in effect, reach out to counsel to discuss a program that would be best for your company's unique needs. Seriously.

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That arbitration you participated in may have greater consequences than you anticipated. The effect of an arbitration on other proceedings.


Edgar Alden Dunham, IV

You are the owner of a construction project. There were problems. So, as required by your contract, you commenced an arbitration against your general contractor. Unfortunately for you, things don't go so well for you there either, and the arbitrator denies your claims. All is not lost, you think, I can file actions in court against the subcontractors. They didn't participate in the arbitration, and I couldn't have forced them to participate if I wanted to because I didn't have arbitration agreements with them. So the denial of my claims against the general contractor by the arbitrator doesn't apply to them. I can get a do-over in the court proceeding, right?

Unfortunately for you, it doesn't work that way. Under the legal doctrine of *res judicata* and the companion doctrine of collateral estoppel, your claims against the subcontractors are likely to be dismissed at the outset of the case.

Res judicata is Latin for "the thing has been decided." It is based on the principle that a final judgment of a competent court is final and conclusive unless new material evidence is discovered. It precludes parties, *or those in privity with them*, from re-litigating issues that were or could have been raised in a previous proceeding that resulted in a judgment on the merits. Collateral estoppel precludes a party from re-litigating an issue that was necessary to a judgment on its merits in the prior litigation. For *res judicata* or collateral estoppel to apply, it is fundamental that the party against whom it is being applied had a full and fair opportunity to present its arguments in the underlying proceeding.

Getting back to your problem, the claims you are asserting against the subcontractor are, for all intents and purposes, the same claims that you brought against the general contractor and lost in the arbitration proceeding. You may try and dress them up as tort claims instead of contract claims, but the claims arise out of the same facts, resulted in the same damages, and will require substantially the same proofs. You also had the opportunity to fully and fairly present your claims in the arbitration proceeding. The subcontractors were in privity with the general contractor for purposes of *res judicata* not only because of their subcontracts, but also because the claims are basically the same. Accordingly, *res judicat*a will bar your claims.

Exactly this scenario occurred in a recent Connecticut case, *Girolametti v. Michael Horton Asssociates, Inc.*, 332 *Conn.* 67 (2019). In *Girolametti*, an owner sued subcontractors in court after losing an arbitration against the general contractor. After winding its way through the appellate process, the Supreme Court of Connecticut decided that the subcontractors were entitled to dismissal of the claims on the basis of *res judicata*. The subcontractors had argued that the claims were the same and that they were in privity with the general contractor. The owner argued, among other things, that the claims were different. The Court found that the claims were at heart, the same and that the subcontractors had privity. The Court also found, as a rule of law, that a *subcontractor is deemed to be presumptively in privity* with a general contractor for purposes of *res judicata*. Other courts, including Texas, Massachusetts, California, Rhode Island, and Missouri, have adopted similar presumptions. The Court's holdings were based on the principles of *res judicata* set forth above, as well as the well-settled standard that arbitration awards are entitled to the same deference for *res judicata* purposes as judgments of a court.

So, you decide to change the claims against the subcontractors by more than simply turning contract claims into tort claims. That should work because they are different claims, right? Might work; probably won't. If the claims are basically the same, but merely dressed to look like different claims, the court will likely see through the subterfuge just as the Supreme Court of Connecticut did in *Girolametti*. If the claims are in fact different, but still rely on issues necessary to the arbitration decision, you will be barred from re-litigating those issues under collateral estoppel. Your only real chance is with claims against the subcontractors that you could not have brought against the general contractor. In other words, claims that are uniquely against the subcontractors.

Well, you say, what if I had won against the general contractor? And now I want to pursue additional claims against the subcontractors? What if the decisions on the issues necessary to that arbitration award included findings that would be very helpful to me in my claims against the subcontractors? Are those findings binding against the subcontractors under collateral estoppel? Unfortunately for you, the answer once again is NO. The arbitration findings are not binding against the subcontractors unless the subcontractors had the opportunity to defend against them in the arbitration proceeding. Every party is entitled to present its defense.

The takeaway is that your participation in an arbitration may be held against you by a nonparticipant, but you are not going to be able to hold an arbitrator's award against a nonparticipant. Thus your participation in an arbitration can have an effect on other proceedings, but it will only be to your benefit if the other party in the subsequent proceeding had the opportunity to participate in the arbitration.

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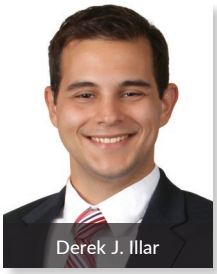
Construction industry employee verification act

The Pennsylvania General Assembly recently passed the Construction Industry Employee Verification Act (Act), which imposes new verification and records retention obligations on employers in the construction industry.


Derek J. Illar

What does the law require?

The Act prohibits covered employers from hiring people without work authorization, requires them to use E-Verify to confirm their newly hired employees' status, and obligates them to retain records from E-Verify.

When is the law effective?

On October 7, 2019, the Act became law, even though Governor Wolfe neither signed it nor vetoed it. Covered employers will need to start complying with the Act on October 6, 2020.

Who must comply?

The Act applies to all employers in the construction industry. The "construction industry" refers to anyone that "engages in the erection, reconstruction, demolition, alteration, modification, custom fabrication, building, assembling, site preparation and repair work or maintenance work done on real property or premises under a contract, including work for a public body or work paid for from public funds." Under the Act, an "employer" is an individual, entity, or organization in the construction industry that transacts business in Pennsylvania and employs at least one person. The Act also applies to staffing companies that supply workers for the construction industry.

Which records need to be kept under the Act?

Employers must keep the results from E-Verify throughout a person's employment or three years from the date of the verification, whichever is longer. Employers should remember that they need to keep the Form I-9 for 3 years from the date on which they hire an employee or 1 year from the date on which they terminate an employee, whichever is longer.

Who enforces the Act?

The Pennsylvania Department of Labor and Industry (DLI) has responsibility for enforcing the Act. If DLI receives a complaint that a covered employer has hired someone without authorization, it can go to that employer's place of business and inspect its records; copy that employer's records; request statements regarding that employer's process to verify employees' work authorization, and interrogate persons about that employer's compliance with the law.

What happens if you do not comply?

The first time that a covered employer violates the Act, it will receive written notice from DLI and will need to terminate the unauthorized employee.

If a covered employer violates the Act again, the Attorney General will initiate an action against it, which can expose the covered employer to probation, suspension of its licenses, or revocation of its licenses, depending on the circumstances.

What is E-Verify?

E-Verify is an online system that permits employers to verify the employment eligibility of their newly hired employees.

How does E-Verify work?

E-Verify works by electronically comparing the information from an employee's Form I-9 with records available to the Social Security Administration and/or Department of Homeland Security to verify the identity and employment eligibility of each newly hired employee.

Is completion of the Form I-9 still necessary?

Absolutely! E-Verify is not a replacement for the Form I-9; rather, it is an additional requirement for employers in the construction industry.

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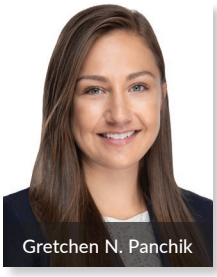
Exculpatory clauses in engineering contracts: Void against public policy in West Virginia


Gretchen N. Panchik

The recent Southern District of West Virginia opinion in the case of *Sanitary Bd. Of Charleston v. Colonial Sur. Co.* has made clear that state-imposed safety standards may not be eradicated by contract despite the presence of an exculpatory provision.

> *Exculpatory clauses that appear to limit or eliminate tort liability will likely not be enforced in West Virginia because of the professional standards imposed by statute on engineers.*

The Sanitary Board of the City of Charleston (Sanitary Board) accepted bids for contracts to replace sewer lines, install house service connections, and perform related work. The Sanitary Board provided prospective bidders with the project design prepared by Burgess & Niple (B&N), the project engineer for the Sanitary Board. Tri-State submitted a bid, which the Sanitary Board accepted, resulting in an agreement for the completion of projects for a contract price of $9,876,186.44.

Tri-State suffered delays in its performance as a result of B&N's "changing and dictating Tri-State's planned manner and method of performance." Tri-State alleged that B&N breached its duties owed to Tri-State and contended that B&N, among other things, failed to adequately and timely review and approve submittals, failed to prepare adequate and accurate drawings, plans, and specifications for use in the project, and failed to recommend payment for materials and work provided.

Tri-State alleged that B&N, as design and project engineer, owed a duty of care to Tri-State to render its services with the ordinary skill, care, and diligence commensurate with that rendered by members of its profession in the same or similar circumstances. As such, Tri-State alleged that these actions or inactions constitute negligence.

Before the court in this opinion was B&N's motion to dismiss the complaint against it because Tri-State failed to establish that B&N owed a duty, citing to the contractual terms that clearly eliminate any such duty. Tri-State responded that the apparent exculpatory clause should not apply because it is void against public policy, and the Court was persuaded. The parties did not dispute that absent the clause at issue, B&N owed a duty to Tri-State. The Court cited to *E. Steel Constructors, Inc. v. City of Salem, W.V.*, where the West Virginia Supreme Court of Appeals found that contractors could file a negligence action against design professionals hired by the same project owner because the parties have a special relationship, imposing a duty of care to render professional services with the ordinary skill, care, and diligence commensurate with that rendered by members of his or her profession in similar circumstances.

The Court reasoned that when a statute imposes a standard of conduct, a clause in an agreement purporting to exempt a party from tort liability to a member of the protected class for the failure to conform to that statutory standard is unenforceable, citing to *Murphy v. N. Am. River Runners, Inc.* 412 S.E.2d 504 (W. Va. 1991). The Court further reasoned that as an engineer, B&N is subject to a state-imposed standard of conduct pursuant to W.Va. Code §30-13-2, which declares engineering a learned profession and defined the practice of engineering. As professionals, engineers are bound by rules of professional responsibility to safeguard life, health, and property, and promote public welfare.

The Court found that B&N, as an engineer authorized to conduct business in West Virginia, is subject to the state-imposed safety standards, which may not be eradicated by contract. The Court further found that the provision eliminating B&N's duty was void against public policy.

The opinion rendered in *Sanitary Bd. Of Charleston v. Colonial Sur. Co.* presents an important takeaway: Exculpatory clauses that appear to limit or eliminate tort liability will likely not be enforced in West Virginia because of the professional standards imposed by statute on engineers.

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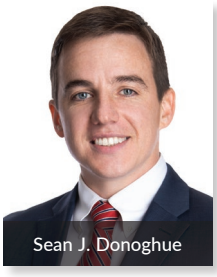
Proof and calculation of damages: Jury verdict method still viable where damages documentation is lacking, but should be a last resort


Sean J. Donoghue

Rustler Construction, Inc. v. District of Columbia, a case out of the District of Columbia (District), provides a lesson on the importance of documenting project delays, additional work, and actual cost data in real time. There, Rustler Construction, Inc., (Rustler) agreed with the District to reconstruct a three-quarter-mile stretch of a six-lane highway in exchange for $5.2M. The project, however, was plagued with problems from the get-go.

Shortly after work began, the District, in an effort to provide enough room for buses to pass through during construction, changed the as-bid plans by narrowing Rustler's work area by nearly seven feet. Consequently, the heavy machinery Rustler planned to use for things like curb installation, paving, and excavating manholes could no longer fit. Instead, the Contractor now had to perform these tasks primarily by hand, an indisputably much more costly and labor-intensive method.

Thereafter, a variety of problems arising from differing site conditions and deficient specifications caused additional work and delays. To name a few, the specifications failed to identify a high-pressure gas line in Rustler's construction path and wrongly identified 41 manholes as "abandoned" when these were, in fact, active.

Based on the additional, unforeseen work, Rustler filed the claim with the District of Columbia Contract Appeals Board (the CAB). The CAB, following a hearing, awarded Rustler only $155K of the more than $1.2M it sought. The CAB rejected Rustler's "overall delay" theory, but relied upon the "jury verdict method" for calculating damages to salvage some of Rustler's claim.

Rustler's Appeal. On appeal from the CAB, Rustler again argued that it was entitled to the full amount claimed based on an "overall delay" theory. The appellate court flatly rejected this argument, holding that Rustler could not recover on a theory of overall delay because it failed to proffer any documentation or other evidence to show that the additional work impacted "critical path" portions of the project, a prerequisite to recovery on an overall delay theory. According to the appellate court, Rustler's updates to the CPM schedule were infrequent and sporadic and, therefore, not reliable "critical path" evidence;

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Proof and calculation of damages: Jury verdict method still viable where damages documentation is lacking, but should be a last resort

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and the proffered expert on this subject, Rustler's owner, was deemed un-credible due to lack of experience in engineering and scheduling.

The District's Cross-Appeal. The District's cross-appeal centered on the application of the jury verdict method. The jury verdict method refers to a variety of techniques, all grounded in equitable considerations, that a court relies on to calculate damages when liability is clear but damages are not. As the appellate court noted, the CAB employed the "most common" such technique to Rustler's claim, which is to "make its own detailed computation of the [price] adjustment, based on all of the data provided by the parties."

The District argued that the CAB erred in relying on the jury verdict method because this method for calculating damages should not apply where the contractor fails to provide actual cost data and cost estimates in support of its claim. The appellate court rejected this argument and affirmed Rustler's award, reasoning that "an absolute ban on the use of the jury verdict method in cases where a contractor has presented substantial evidence, but fails to present actual costs or cost estimates broken down by task, is contrary to the purpose of equitable adjustment." In doing so, the court stressed that this was not a case where the application of the jury verdict method was based on "unrealistic assumptions" that "greatly multiplied an award beyond reason." Nor, the court emphasized, was this a case where doubt existed as to whether the claimant suffered *any* damage. For the court, the clear, albeit inexact, proof of injury alleviated any such concerns.

Takeaways for Contractors and Owners. For contractors, the principal takeaway from this case is the importance of establishing a paper trail of changes and impacts. Rustler's failure to regularly update CPM schedules and provide actual cost data may have caused it to lose upwards of $1M. Updating CPM schedules and cost data in real time as unexpected conditions are encountered or changes occur is no small task, but such diligence is essential to optimal recovery. As this case shows, courts are reluctant to rely on the jury verdict method to calculate damages and, when they do, they do so with great restraint.

For owners facing a claim from a contractor based on differing site conditions and/or deficient specifications, this case highlights the importance of pressing the claimant-contractor to produce actual cost data, cost estimates, and critical-path-impact evidence early in the claims process and in litigation. The contractor-claimant who struggles to produce sufficient documentation in response to such requests will have difficulty proving its damages. On the other hand, the owner who establishes that the claimant-contractor lacks cost data and critical-path-impact evidence can more easily leverage the case for settlement and otherwise position itself for success in arbitration or at trial.

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Construction Law Group NEWS

Victory

Chris Opalinski prevailed in a two-week jury trial in McKean County, PA involving a claim by Bob Cummins Construction, the general contractor, against the Bradford Sanitary Authority, seeking recovery of its contract balance, various extra work claims, and damages for delay. The BSA asserted counterclaims for defective work and liquidated damages for delayed completion. The jury found for Cummins on its contract balance claim and on 11 separate extra work claims. The jury rejected 19 of BSA's 20 counterclaims, awarding BSA only $4,000 on its $3 million counterclaim. The trial court also denied BSA's post-trial motion and awarded Cummins an additional $369,499.90 for interest and attorneys' fees.

Welcome

The Construction Group recently welcomed member **Scott Aftuck** in Boston and associate **Sean Donoghue** in Pittsburgh.

Scott has more than 20 years of experience handling a wide range of civil litigation matters, appeals, and construction law. He provides counsel to public entities, contractors, developers, owners, and sureties on both public and private construction projects involved in complex construction disputes, including claims for delays, disruption and acceleration, labor inefficiencies and lost productivity, change orders, and architectural errors and omissions.

Sean focuses his practice on construction and commercial litigation and has experience representing clients before federal and state courts and arbitration tribunals.

Accolades

Eckert Seamans' Construction Group again received Tier 1 rankings from **U.S. News – Best Lawyers® "Best Law Firms" 2020** in the Pittsburgh metropolitan market, stating that ESCM has a "well respected construction practice" which is "esteemed for its strength in construction disputes and also regularly advises on bidding and procurement, government contracts and regulatory compliance issues. Active in both national and international projects in the infrastructure, energy and leisure sectors."

Chris Opalinski, Scott Cessar, and **Neil O'Brien** were selected individually for inclusion in Chambers USA as notable practitioners. Excerpts from sources follow below:

"**Christopher Opalinski** garners accolades for his litigation skills from peers in the construction community, with one describing him as an 'excellent, tough opponent and a very good lawyer.' Opalinski routinely represents owners, developers, design professionals, contractors and suppliers."

"Group chair and 'excellent lawyer' **Scott Cessar** impresses sources for his 'smart, dedicated and zealous' representation of clients in litigation, mediation and arbitration. He has considerable experience with both public and private projects."

Cornelius O'Brien "represents a wide range of owners, contractors, subcontractors and sureties in the full gamut of construction disputes. He also has strong expertise in relation to arbitration."

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