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Construction Law

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Construction Law Group News

Waiving claims, one payment application at a time

Three recent decisions—two from Pennsylvania and one from Massachusetts—provide information that every subcontractor and contractor should know about the consequences of signing lien waivers and releases in connection with payment applications.

Sauer Inc. v. Honeywell Building Sol'ns SES Corp.

In *Sauer*, a Pennsylvania federal district court held that lien waivers and releases signed by a subcontractor, Sauer, barred a portion of its claim against the general contractor for delay and inefficiency damages. As required by the subcontract, Sauer had signed lien waivers and affidavits—without modification—in connection with the first 18 of its payment applications. The waivers generally provided that Sauer released all liens and claims relating to work performed up to the date of that payment application. Sauer submitted its 18th payment application (and accompanying lien waiver) on December 20, 2006.

At the close of the project, Sauer sought payment for delay and inefficiency damages

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Notice requirements for construction claims: How to avoid sleepless nights

We regularly meet with contractor clients who will tell us the details of a great claim they want us to handle.

After listening to the first hour of testimonials of how bad some event—not our client's fault—screwed up the job, looking at schedule fragnets and progress photos and being assured that the damages are so rock solid that teams of IRS field auditors could not find an ounce of fat, the topic will turn to the following subject: When and how did we (meaning only the client, of course) give notice of the claim to the owner?

At this point, the most vocal client advocate of the claim will often tell us, in a lowered voice, something like this: "Well, we did not exactly send them a formal letter or anything like that, but they knew. They know; they are expecting this."

The most common reason for not having sent such a formal notice letter is usually a combination of one or more of the following: (1) the claim arose at the beginning of the job, and we did not want to start off on a bad foot; (2) we did not want to jeopardize other pending change orders; (3) we bid other work to them

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Waiving claims, one payment application at a time
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occurring over the course of the project. Honeywell argued that Sauer's claims were barred by the releases it had submitted with its payment applications. In response, Sauer argued that the waivers were not enforceable, and Sauer did not intend for the waivers to act as a release of its claims.

Significantly, however, in connection with its 19th and 20th payment applications, Sauer had crossed out some of the language on the lien waivers and added language preserving its claims. The court reasoned that, by "expressly altering the content of the release language in connection with its nineteenth and twentieth progress payment applications, Sauer implicitly acknowledged that the unaltered release language had contemplated a waiver of the very claims that it was seeking to pursue."

Thus, based on the signed waivers and releases, Sauer was barred from seeking any damages incurred before December 20, 2006, the date that Sauer submitted its 18th payment application—and last unaltered waiver. The court did not, however, bar Sauer's claims based on conduct after that date.

First Gen. Const. Corp., Inc. v. Kasco Const. Co., Inc.

In *First General*, another Pennsylvania federal district court confronted a similar issue. There, the subcontractor, First General, filed suit against general contractor Kasco for extra work that Kasco had allegedly directed First General to perform.

Like the subcontract in *Sauer*, the *First General* subcontract required releases and lien waivers to be submitted with payment applications, the last of which was submitted for work through August 31, 2008. Like the *Sauer* court, the *First General* court enforced the written releases, barring First General's claims for work performed through that date.

> *"What these recent cases teach is that progress payments can come at a cost—but the cost is an avoidable one."*

Josef Gartner USA LP v. Consigli Construction Co., Inc.

In contrast to the conclusions reached by these two Pennsylvania courts is the decision of a Massachusetts federal district court in *Josef Gartner*. The defendants there, joint venturers Consigli Construction and J. F. White Contracting (Consiglo/JFW), subcontracted with Gartner for the design, fabrication and installation of a curtain wall at the Cambridge Public Library.

Unlike the *Sauer* and *First General* subcontracts, the *Gartner* subcontract did not require lien waivers or releases to be submitted with progress payment applications. Instead, payment was contingent only upon Gartner's submission of evidence that "all known indebtedness" connected with the work had been satisfied.

Despite the subcontract's terms, Consigli/JFW required Gartner to submit a "waiver and payment affidavit" releasing "any and all claims, suits, bond claims, liens, and rights of lien for all work, labor, services, equipment or materials furnished or performed in connection with construction" before progress payments would be made. Gartner executed a waiver and payment affidavit each time it submitted a payment application.

As the project progressed, the delayed work of other subcontractors required Gartner to perform its work out of sequence, causing Gartner to submit a time/cost impact claim to Consigli/JFW for those delay costs. When the defendants refused to pay this claim and other proposed change orders, Gartner sued.

Consigli/JFW sought dismissal of Gartner's suit, arguing that the waiver and payment affidavits were general releases that barred claims for any work done prior to the final executed waiver. The court disagreed, finding that the waivers were not a part of the parties' original agreement, because the waiver and payment affidavits that Consigli/JFW required from Gartner were not mentioned in the subcontract.

As a result, the waivers were enforceable only if they were valid modifications to the subcontract, which would require a finding that Gartner had consented to the "modification." The court found there was an issue for trial as to whether Gartner had consented, given that Gartner had repeatedly voiced its intent to seek compensation for delays. As a result, summary judgment to defendants was denied.

What these recent cases teach is that progress payments can come at a cost—but the cost is an avoidable one. Each case emphasizes the commonsense but often overlooked notion that paying close attention to any release language—and speaking up promptly if you disagree—is not only advisable, but critical. It can mean the difference between paid and unpaid damages for delay and extra work.

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Notice requirements for construction claims: How to avoid sleepless nights
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and did not want to hurt our chances on that work; or (4) "that is not how we like to do things."

As attorneys, we strive for order and perfection. We want all i's dotted and t's crossed and everything headed to the goal of 100 percent victory. We lie awake at night, tossing and turning, worrying about some court dismissing our contractor client claims based on a contractual technicality, like notice. (Conversely, when we represent owners, we lose sleep worrying that some court will not accept our masterful argument seeking to enforce a contractual technicality in order to dismiss a contractor claim.)

Faced with this potential contractual pitfall, what steps should contractors and subcontractors, along with the construction attorney, take?

1. Read the contract closely, with particular attention to the terms as to timing of claim notice periods.

2. Research the contemporaneous project records—meeting minutes, submittals, emails, charge order requests, etc.—and identify all items that even tangentially mention or relate to the problem.

3. Prepare a timeline in which the contractual notice period is overlaid atop the dates of the contemporaneous project records where the problem was raised or discussed.

4. Analyze whether, despite the absence of a formal letter citing to the appropriate contractual term, there is good reason to conclude that the owner had constructive notice of the problem and, therefore, a likely claim.

5. In connection with that inquiry, consider whether the owner could claim that the lack of prompt formal notice caused it prejudice. In other words, if the owner had known of the problem earlier, could the owner have taken steps to address the problem and mitigate the costs? Or was this the type of problem that could not have been fixed in any way but the way the contractor ultimately did?

6. Consider whether a more formal notice letter should now be prepared and sent. This letter would cite to, and attempt to bootstrap on, earlier project records, like meeting minutes and emails, and indicate that the letter was being sent to memorialize and consolidate the prior notices.

7. Research the governing state law of the contract to determine the extent to which its courts enforce and uphold claim notice timing provisions in the construction context. The court cases generally fall into two camps: (a) the strict compliance camp and (b) the constructive knowledge/no prejudice camp.

The strict compliance camp holds that the failure to comply with a formal notice provision may well result in the forfeiture of a contractor's claim to time and to money. In particular, courts in Indiana, North Carolina, Kansas and Georgia have issued decisions denying claims for the failure to strictly follow claim notice provisions.

The constructive knowledge/no prejudice camp looks at the situation from a more equitable standpoint. Courts in this camp often ask whether there was some notice to the owner so that the owner should have expected a claim and whether the owner was prejudiced. Courts in Pennsylvania and for the Federal Circuit and for the Federal Court of Claims have issued opinions applying this equitable approach.

> *"Still, there is no certainty whether the client's claim could be subject to dismissal on a technicality."*

Having said that there are two camps, each claim will still rise and fall on its own unique set of facts, and within each camp or state, there exists cases going the other way. In addition, there is never any certainty on how a court will rule. Courts in some states will tend to enforce notice provisions more strictly in favor of public owners as opposed to private owners or less strictly in favor of subcontractors over general contractors.

However, by following these seven steps, contractors and subcontractors, with their attorney, will be able to prepare their claims to better withstand legal challenges based on the failure to provide formal written notice. Still, there is no certainty whether the client's claim could be subject to dismissal on a technicality. And if the owner has competent counsel, the contractor can expect that this notice defense will be routinely advanced in negotiations or with a mediator in order to attempt to discount the value of the claim.

Where does this leave us? If you want to avoid all the work and cost entailed in the seven steps above—and allow you and your attorney to sleep better at night—when you get the hint of a claim, read the claim notice provision and follow it. Remember a notice letter does not have to be unfriendly. A notice letter can be worded nicely, still make the point and be effective in preserving the claim.

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That's a pretty big matzo ball hangin' out there

Third Circuit issues pay-if-paid decision that is highly favorable to general contractors, but is there hope for subcontractors in a footnote?

With its recent decision in *Sloan & Company v. Liberty Mutual Insurance Company*, the Third Circuit issued a holding that addresses multiple aspects of Pennsylvania construction law, including the application of pay-if-paid clauses and the interpretation of liquidation agreements. On all fronts, the court reaches conclusions that are, to put it mildly, pro general contractor (and pro surety) and, to put it candidly, disastrous for subcontractors. If taken at face value, the Third Circuit has endorsed a method of construction contracting that not only permits general contractors to shift the risk of owner nonpayment to subcontractors, but also permits general contractors to settle subcontractor claims for pennies on the dollar. When probed a little deeper, however, the Third Circuit has potentially provided an "out" to subcontractors in a footnote that comes near the end of the decision. As Jerry Seinfeld told George Costanza, that footnote may be a pretty big matzo ball that both contractors and subcontractors should recognize.

In *Sloan*, the court addressed a dispute in which the project owner, Isla of Capri Associates (IOC), retained a general contractor, Shoemaker Construction Company (Shoemaker), to oversee the development of waterfront condominiums in Philadelphia. Shoemaker hired Sloan as its drywall and carpentry subcontractor. At the project's end, IOC failed to pay Shoemaker nearly $6.5 million, claiming that it was insolvent. Five million dollars of that was money due to subcontractors, including over $1 million to Sloan. After pursuing its claim against IOC, Shoemaker concluded that IOC would not be able to pay any judgment and, reasoning that something was better than nothing, entered into a settlement agreement to receive $1 million from IOC. None of that money would be retained by Shoemaker; rather, those funds would be divided proportionally among the subcontractors.

Sloan objected to the settlement and elected to assert a claim on the performance bond issued by Liberty Mutual. Despite the presence of an ostensible "pay-if-paid" provision in the contract, Sloan asserted that the provision did not bar its bond claim. The District Court for the Eastern District of Pennsylvania agreed, but the Third Circuit did not.

The Third Circuit closely examined the terms of the subcontract in light of Pennsylvania law and concluded that the contract contained a series of escalating "overrides." First, it affirmed that under Pennsylvania law, parties may include a "pay-if-paid" provision in a contract, which makes payment by the owner to the general contractor a condition precedent to the general's duty to pay the subcontractor. This is distinct from a "pay-when-paid" provision, which merely establishes a timing mechanism for payment.

The Third Circuit affirmed that the subcontract contained a "pay-if-paid" provision because it explicitly stated payment by the owner was a condition precedent. It noted, however, that there was a temporal "override" to this provision, which stated that Sloan would have a "claim" against Shoemaker in the event that IOC failed to make final payment within six months of project completion. The court noted that such an "override" could soften the strict pay-if-paid provision by allowing the subcontractor to pursue its claim after a certain period of time.

To determine the amount of Sloan's claim, however, the Third Circuit turned to another contract provision, which contained a "liquidating agreement." Such agreements provide a pass-through mechanism pursuant to which the general contractor may assert a subcontractor's claim directly against the project owner. The court found that the liquidating agreement acted as a "super-override," which allowed Shoemaker to prosecute Sloan's nonpayment claim. Even though Sloan was not mentioned in any of Shoemaker's pleadings against IOC, the court held that, functionally, Shoemaker's claim included each of its subcontractor's claims. Therefore, the liquidating agreement, when paired with the pay-if-paid clause, acted as a risk-sharing provision, such that Sloan agreed to bear its proportionate share of the risk of IOC's nonpayment.

Critically, because Shoemaker was prosecuting Sloan's claim, Shoemaker retained the right to settle that claim. Sloan was bound by Shoemaker's decision to settle, so any recovery by Sloan was limited to its *pro rata* share of the settlement proceeds. Sloan could not maintain a claim against Shoemaker for any additional funds, nor could it maintain a claim against the bond, as the subcontract gave Shoemaker the right to settle Sloan's claim, overriding any claim on the bond. This outcome for Sloan was very stringent—essentially, Sloan was forced to accept a significantly reduced settlement without any input into the settlement process.

The opinion is not completely without hope to subcontractors, however. Sloan argued that the Third Circuit's conclusion would be contrary to Pennsylvania's public policy as expressed in its mechanic's lien law. In 2007, Pennsylvania's mechanic's lien law was amended to provide that if a subcontractor is contractually required to waive its right to file a mechanic's lien on the owner's property, the subcontractor must be given the right to assert a claim on a surety bond instead [49 P.S. § 1401(a)(2)(ii)]. Sloan charged that under this statutory provision, it must be given the right to file a claim on the bond. In a footnote at the end of its opinion, the Third Circuit discussed Sloan's argument and concluded that the 2007 amendment went into effect after Sloan's subcontract was formed and, therefore, Sloan could not rely on this statutory provision.

This footnote inevitably raises the question: What about subcontracts that are signed after the 2007 mechanic's lien law amendments? Must a subcontractor be guaranteed the right to maintain a surety bond claim under this law, even in the face of the pay-if-paid and liquidating agreement provisions that were at issue in *Sloan*? The Third Circuit could have directly addressed Sloan's position, but it chose to sidestep the issue. With this footnote, therefore, the Third Circuit may have given subcontractors an escape hatch, and it seems highly likely that the issue will be litigated in the future.

Assuming subsequent decisions follow the main holding of *Sloan* and do not rely on the footnote as a workaround, general contractors and subcontractors should take away several practical tips from the *Sloan* decision:

- First, pay-if-paid clauses are clearly enforceable under Pennsylvania law, and they do not need to include the words "pay-if-paid." Words indicating that payment by the owner is a "condition precedent" are sufficient.

- Second, liquidating agreements are not only enforceable under Pennsylvania law, but they may also give the general contractor the right to settle the subcontractor's claims without its consent. If a liquidating agreement is part of the subcontract, the subcontractor may wish to include protections relating to settlement, such as giving the subcontractor the right to participate in any litigation or requiring subcontractor approval of any settlement.

- Third, if a liquidating agreement is in force, a general contractor may be tempted to take the easy way out and simply settle with the owner to be done with a claim. The Third Circuit noted in several places that the general contractor had expended nearly $3 million in attorney's fees in prosecuting the claim against the owner before it ultimately settled. A general contractor should, therefore, make a good faith effort to obtain the full value of its claim prior to any settlement, or else it could face a less sympathetic court.

Finally, subcontractors should beware that the presence of a bond is not always a guarantee. The subcontract is the primary document that will determine a subcontractor's recovery, and a solvent surety company is useless without a subcontract that provides a path to relief. Indeed, as Sloan learned, a subcontract without adequate protections for the subcontractor is a pretty big matzo ball itself.

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Originality is key in copyright infringement

When it comes to building hotels, many hotel companies have copyrighted prototypical designs that they use for many of their new hotels. But can minor alterations made by architects to prototypical plans be considered "original elements" that the architect can then copyright? How original must an "original element" be?

In *Nova Design Build, Inc. v. Grace Hotels, LLC*, the Seventh Circuit Court of Appeals shed some light on this question. *Nova Design Build* involved the construction of a Holiday Inn Express. Grace Hotels retained Nova's architectural services to supervise the design of the hotel. The parties' agreement specified that, while the architectural designs would remain Nova's intellectual property, Grace would have the right to use Nova's drawings for bidding, permit and construction purposes as long as Grace paid Nova in full.

Nova based its design of the hotel on Grace's copyrighted Holiday Inn Express prototype. To the prototype, Nova then made some additions—an extra floor, a larger meeting area, different closet and door placements in the rooms and different pool, laundry and exercise areas.

As sometimes happens, Grace and Nova had a falling out and ended up parting ways before construction of the Holiday Inn began. Grace refused to pay Nova $28,000 that Nova claimed it was due for the designs, and, eventually, Nova accepted $18,000 from Grace in satisfaction of the alleged debt.

Grace proceeded with its construction of the Holiday Inn using Nova's designs. At the same time, Nova registered a copyright for its designs of the Holiday Inn Express and sued Grace for copyright infringement. Grace in turn claimed that its use of the designs was licensed, since it had paid Nova $18,000 for their use.

While Grace asserted and the district court agreed that Nova had not established a valid copyright of the design drawings, the circuit court disagreed and addressed a different issue. The Seventh Circuit Court found that Nova possessed a valid copyright, but that their copyright had not been infringed by Grace's use of the plans to construct the hotel. The court reiterated the rule that, for a copyright to be infringed, the party alleging an infringement must first identify the elements of the work that are in fact protectable, and, second, ask if those specific elements have been copied. Further, the elements of a copyrighted work that are protectable are those that "possess originality," which means that the elements were "independently created and possess at least some minimal degree of creativity."

Nova's designs were based in large part on the Holiday Inn Express prototype. It was the additions that Nova made to this prototype—the extra floor, the larger meeting area, etc.—that Nova claimed were protectable elements under their copyright. The Seventh Circuit, however, held that these added features were "not enough" to merit copyright protection. The court added that the additions were "devoid of originality," since the additional floor was identical to the floor layout prototype and the other added features were suggested to Nova by Grace. Because the court found no elements of Nova's additions to the Holiday Inn prototype sufficiently original to qualify as protectable elements, the Circuit court agreed with the District court that Nova's claims could not survive summary judgment.

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Owners' claims for subs' defective work: Handling statute of limitations issues

A recent case from the Georgia Court of Appeals demonstrates the potential for statute of limitations problems when an owner sues a contractor for a sub's faulty work and the contractor must decide whether, and if so, when, to sue the sub. In *Saiia Construction, LLC v. Terracon Consultants, LLC*, the owner sued the general contractor for failing to properly construct a retaining wall. After settling with the owner, the contractor sued its consulting engineer for providing negligent advice regarding the wall. The contractor alleged theories of breach of contract (for failing to provide contractual indemnification), common-law indemnification and contribution.

The consulting company argued that all claims were governed by the four-year statute of limitations for malpractice, and therefore the claims were time-barred. The trial court agreed and dismissed the case. Fortunately for the contractor, the Court of Appeals disagreed and found that the contractual indemnification claim was subject to the six-year limitations period for written contracts, and that the other claims fell under a 20-year limitations period. Therefore, the case was reinstated and allowed to proceed.

The contractor's predicament in the *Saiia* case is a familiar one. On the one hand, while the owner's claim is pending, it may not make tactical or financial sense to incur the costs of suing the subcontractor when liability to the owner has not been established and may be hotly contested. It also may make tactical sense to not immediately sue the subcontractor, as this would be an arguable admission of liability that would likely cause the owner to take a tougher stance in any negotiations with the contractor. On the other hand, waiting too long to sue can result in the statute of limitations running out on valid claims against the sub, which almost happened to the contractor in the *Saiia* case. In these circumstances, it is crucial to understand what the potential claims against a sub are, what the applicable statutes of limitations are and when they begin to run.

Pennsylvania's statutes of limitations exemplify the complexities of this situation and the resulting possible dilemmas that can arise. Unless the contract provides otherwise or the "tolling" exception based on the discovery rule applies, the statute of limitations for breach of a construction contract is four years, and it begins to run when the defective work is performed, regardless of whether the owner sues the contractor. As in the *Saiia* case from Georgia, unless a lawsuit is timely commenced against the sub, this period can pass while the owner and contractor are resolving their differences.

In Pennsylvania, again by way of example, the statute of limitations for common law indemnification (as opposed to contractual indemnification) is also four years, although unlike a breach of contract claim, it typically begins to run when the contractor settles a claim or pays a judgment due to the subcontractor's work. Therefore, a common law indemnification claim can often be filed well beyond the time for filing a breach of contract claim. However, relying solely upon a claim for common law indemnification can be a risky proposition. In the construction context, the case law regarding common law indemnification is not extensively developed, and, as a result, the outcome of the claim can be unpredictable. In fact, in many states, if there is an express indemnification provision in the subcontract, the court will not allow a common law indemnification claim to stand. Also, proving the breach of a construction contract is typically more straightforward, because the sub's deficient work usually breaches one or more of the contract's written terms. Therefore, allowing the statute of limitations for breach of contract to run out and attempting to recover under a common law indemnification claim can be highly problematic.

If the subcontractor is an architect, engineer or other professional, as in the *Saiia* case, there is also, in addition to a claim for breach of contract, a potential claim for malpractice/negligence, which claim is generally subject to a shorter statute of limitations—only two years in Pennsylvania and only one year in some states. Notably, in the *Saiia* case, the contractor did not bring a claim for "pure" malpractice, possibly because it had allowed the statute of limitations to expire while litigating with the owner.

Finally, if a performance bond exists, it is also generally subject to a shorter statute of limitations: one year under most of the commonly used bond forms. This period to bring suit under a performance bond may also be further shortened by the notice and cure requirements of the bond intended to protect the surety. However, courts differ over when the filing of an action on a performance bond commences. There is federal case law from Pennsylvania holding that the limitations period begins to run when the contractor knows or should know of a breach of the underlying contract. Thus, an owner's claim would likely be sufficient to start the running of the limitations period. However, these decisions have not been followed by the Pennsylvania state courts. Indeed, there is case law from the Pennsylvania Superior Court holding that the one-year period commences when a bonded contractor refuses to remedy its defective work. Collectively, these cases show that depending on the form of the bond and where a suit is filed, there are critical differences in when a claim on a bond commences, which affects when the limitations period on the bond runs out. Also, bringing a timely claim on a performance bond is especially essential if the sub is not financially able to remedy the defect, and it is very easy to let a year pass by while addressing the owner's claim. Therefore, if a performance bond exists, a contractor must be very careful to not let the typically shortened limitations period expire.

The bottom line is that when a sub's defective work causes an owner to suffer losses, there may be numerous possible claims, each of which may have a different statute of limitations and likelihood of success. The safest policy is to assume that the shortest statute of limitations will apply and to commence a lawsuit against the sub within that time period. Other alternatives are to sue the sub and ask the court to stay that case pending the outcome of the owner's claim, or enter into a "tolling agreement" with the sub pending the outcome of the owner's claims. By correctly analyzing what claims may be brought and the deadline for bringing them, a contractor can preserve all applicable claims and hopefully recover when a sub's work causes damages.

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Third Circuit upholds Pennsylvania state law requiring American-made steel in public works projects

In *Mabey Bridge & Shore, Inc. v. Schoch*, the United States Court of Appeals for the Third Circuit has recently held that the Pennsylvania Steel Products Procurement Act (the Steel Act) is not preempted by federal law or unconstitutional.

Mabey Bridge & Shore, Inc. (Mabey) supplied temporary bridges to contractors for use in public works projects, including projects for the Pennsylvania Department of Transportation (PennDOT), for more than 20 years. In December 2009, Mabey provided a quote for a temporary bridge to a contractor for purposes of a bid on a PennDOT project. The contractor's bid was accepted, and it subcontracted with Mabey to provide the bridge. The bridge specifications were submitted to a PennDOT engineer, who approved the bridge for use on the project.

In April 2010, however, PennDOT notified the contractor that the Steel Act precluded the use of Mabey's temporary bridge because the bridge used foreign steel. Specifically, the Steel Act requires that steel products used or supplied in the performance of a public works contract must be made in the United States, providing that:

> Every public agency shall require that every contract document for the construction, reconstruction, alteration, repair, improvement or maintenance of public works contain a provision that, if any steel products are to be used or supplied in the performance of the contract, only steel products as herein defined shall be used or supplied in the performance of the contract or any subcontracts thereunder. [73 Pa. Cons. Stat. § 1884(a)]

The only statutory exception to the 1978 Act's requirement of American-made steel is where "the head of the public agency, in writing, determines that steel products as herein defined are not produced in the United States in sufficient quantities to meet the requirements of the contract." [Id. at § 1884(b)] As a result of PennDOT's notification, Mabey was forced to cancel four contracts for temporary bridges on PennDOT projects and was prevented from giving quotes to contractors for bids on future projects.

With these facts, Mabey filed suit in the United States District Court for the Middle District of Pennsylvania against Pennsylvania's Secretary of Transportation, seeking a declaration that the Steel Act, as interpreted and enforced by PennDOT, was unconstitutional and requesting a preliminary and permanent injunction enjoining PennDOT from prohibiting the use of Mabey's temporary bridges on its projects. The district court, however, granted the Secretary summary judgment on all of Mabey's claims, to which Mabey appealed.

On its appeal before the Third Circuit, Mabey argued that the Steel Act is preempted by the Buy America Act, 23 U.S.C. § 313, and violates the Commerce Clause, and that PennDOT's actions violated the Contract Clause and the Equal Protection Clause. The appellate court disagreed with each contention.

Initially, the Court of Appeals held that the Steel Act is not preempted by federal law. It explained that although the Buy America Act provides a more extensive set of exceptions to the domestic production requirement than Pennsylvania law, the Buy America Act, together with its implementing regulations, demonstrate a federal legislative and regulatory scheme that takes into account concurrent state legislation in this area, and authorizes the states to impose more stringent requirements on the domestic manufacture of steel products, like the Steel Act.

The Third Circuit then concluded that Mabey's Commerce Clause claim was more or less precluded by the court's 1990 decision in *Trojan Techs., Inc. v. Pennsylvania*, which addressed a similar challenge to the Steel Act. Moreover, regardless of the *Trojan* opinion, the court also concluded that because Congress had plainly authorized restrictions of the kind contained in the Steel Act, the Act was "invulnerable to constitutional attack" under the Commerce Clause.

To Mabey's Contract Clause claim, the Court of Appeals next found that while Mabey could have justifiably believed that its bridges made with foreign steel were acceptable due to its long relationship with PennDOT, PennDOT's change in interpretation of the Steel Act did not violate the Contract Clause. In so finding, the court noted that Mabey had failed to demonstrate a "change in state law" that had impaired its contracts, and further noted that PennDOT's actions interpreted and applied a law that had been in force for over 30 years. This being the case, although the court acknowledged that the decision had "great consequences" for Mabey, the court held that PennDOT's change of direction regarding temporary bridges was not truly a "new rule" and, therefore, its action was not the type of legislative act prohibited by the Contract Clause.

Lastly, to Mabey's final argument, the Third Circuit applied rational basis scrutiny to determine that there was no basis to conclude that PennDOT's application of the Steel Act violated the Equal Protection Clause. To this point, the court found that Mabey had not met its heavy burden of overcoming the presumption of the Steel Act's constitutionality, and surely had not negated every possible justification for PennDOT's distinction between temporary bridges and other temporary items for purposes of allowing an exception to the domestic steel requirement. For example, the court recognized that "temporary bridges are specifically-required items in certain PennDOT projects, whereas scaffolding, trailers and cranes are items that are used or not at the discretion of the contractor." Thus, "[a] state agency could rationally determine that application of domestic steel requirements to items used at the discretion of the contractor is too onerous and difficult to enforce." The appellate court explained that these kind of "fine distinctions" drawn by PennDOT with respect to the Steel Act are "precisely the kind of judgments that the Supreme Court has instructed courts not to second-guess."

Significantly, in light of the foregoing, for the time being, Pennsylvania state law continues to require the use of American-made steel in public works projects, save only where there is insufficient availability of domestic steel products.

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Q & A With David McGlone: New member of the group in the Boston office

Q: Why did you join Eckert Seamans?

McGlone: I was looking for a national platform for my construction practice, a place where the unique and esoteric needs of large contractors and owners could be served comprehensively and efficiently. This gives me a window outside of New England.

Q: What is different about the New England real estate market?

McGlone: Stringent zoning in New England acted as a break during the unbridled development of the real estate boom on the national scene. Consequently, there was not as much overdevelopment and the "bust" was not felt as keenly here, especially in the residential market.

Q: What are the benefits of being a construction litigator in the New England market?

McGlone: Education, medicine, hi-tech and biotech have driven construction in New England during the last 50 years. The level of sophistication of the clients, their projects, of my colleagues and adversaries has sharpened my practice so that I believe I can really add value here and in the rest of the country.

Q: Any special challenges in New England?

McGlone: A long drive off the fairway puts your golf ball into another state in New England. Each state has its own time limits for mechanic's liens and they are perfected in different ways. Until recently, Connecticut allowed prospective lien waivers, but Massachusetts banned them. There are many traps for the unwary attorney. An experienced attorney in the relevant jurisdiction is essential.

Q: Steelers or Patriots?

McGlone: Patriots....and Steelers.

Q: How will your experience and background contribute to the future growth of Eckert Seamans?

McGlone: There is a latent backlog of construction demand resulting from a soft economy in the past few years. Things need to be built. Anecdotally, many of my clients report being busy.

The current expectations in industry reminds me of a group of surfers wondering if the next swell is going to result in a huge breaker they can ride to prosperity. It is now merely a question of how big the breaker is going to be, and many in the industry are waxing their boards in anticipation.

My 21 years of experience places me in the optimum part of my career to efficiently render services to these clients to the benefit of them and Eckert Seamans. I believe that I will be very busy in my niche in the coming years.

Q: What was the biggest surprise in your practice?

McGlone: Over the years my practice migrated from representing general contractors in large industrial projects and heavy highway construction to representing retail development owners. I was surprised to see the amount of "soft costs" (including litigation) a developer or an owner must endure to develop these smaller-scale projects.

Q: What characterizes the players on a construction site in today's market?

McGlone: We are all "survivors" in today's market. The contractors and owners who are still standing had unique business plans that insulated them during the bust in real estate and construction. They are more agile and diverse in serving the various market segments than their predecessors were. They should be able to fully exploit the better market that is coming.

David M. McGlone can be reached at dmcglone@eckertseamans.com

Construction Law Group News

Additions

David M. McGlone joined the Construction Law Group as a Member in the Boston office. David is a first chair trial litigator with over 20 years of experience in federal and superior counts as well as in arbitration proceedings. He handles matters such as acceleration and inefficiency claims, assertion and perfection of mechanic's liens and bond claims, collection, bid protests and claim arbitration, defective plans and specification claims, AIA drafting contracts, direct pay claims and beyond. David earned his J.D. from the New England School of Law and his undergraduate degree from Boston College.

Awards: Super Lawyers®

Several members of the Construction Law Group were named as Super Lawyers for 2012. **Christopher Opalinski** and **Scott Cessar** were selected for inclusion in the *Pennsylvania Super Lawyers* for Construction Litigation; **David McGlone** was selected for inclusion in the *Massachusetts Super Lawyers*; and **Audrey Kwak** was selected for inclusion in the *Pennsylvania Super Lawyers Rising Star*. *Super Lawyers* selects attorneys using a rigorous, multiphase rating process. Peer nominations and evaluations are combined with third-party research. Each candidate is evaluated on 12 indicators of peer recognition and professional achievement.

Speaking for the Firm

Timothy Berkebile gave a presentation entitled "Service Contracts and Risk Management in Construction Projects for Property Managers" at a real estate continuing education seminar hosted by the Building Owners and Managers Association (BOMA) and the Institute of Real Estate Management (IREM) in February.