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Construction Law

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Construction Law Group News

The active interference exception to no damage for delay clauses

Scott D. Cessar

No damage for delay clauses, by which a contractor is granted time but no money for critical path schedule delays, are common in construction contracts.

In response to the perceived unfairness of the clauses, many states have developed common law exceptions to enforcement of the clauses in order to allow recovery of damages for delay. Courts have adopted one or more of the following five exceptions: (1) delays due to owner's bad faith or malicious or grossly negligent conduct; (2) uncontemplated delays; (3) delays due to owner's active interference; (4) delays so unreasonable that they constitute an abandonment of the contract; and (5) delays resulting from an owner's breach of a fundamental contract obligation.

Perhaps the most litigated of these exceptions is the active interference exception.

The cases are generally split, with some courts concluding that active interference requires proof of some bad faith or malicious intent, and other courts requiring only that the owner commit some affirmative, willful, intentional act that unreasonably interferes with the contractor's work.

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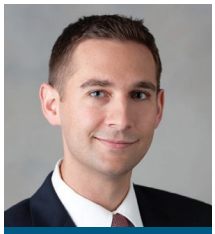
Sikorsky Aircraft Corporation: Court of Appeals changes precedent regarding statute of limitations under Contract Disputes Act



Matthew J. Whipple

Any seasoned practitioner is familiar with the time pressure that comes with a statute of limitations. Nearly every cause of action, in every forum, comes with its own ticking time bomb—days, months, or years—that will detonate if the claim is not filed within the specified period. In the recent decision of *Sikorsky Aircraft Corp. v. United States*, however, the Court of Appeals for the Federal Circuit took measures to reduce the potential impact of the statute of limitations applicable to federal construction disputes.

The Contract Disputes Act (CDA), which applies to most construction claims involving the federal government, provides a well-known six-year statute

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Court strikes down arbitrator-selection provision as "fundamentally unfair"


F. Timothy Grieco

In *Nishimura v. Gentry Homes, Ltd*, the Supreme Court of Hawaii took on a matter of first impression and analyzed the enforceability of an arbitrator-selection provision that was being challenged pre-arbitration in connection with a party's opposition to a motion to compel arbitration. The court adopted the 6th Circuit's "fundamental fairness" standard and held that a party challenging an arbitrator selection provision need not wait until the conclusion of the arbitration proceedings and need not prove actual bias of the arbitrators. According to the court, an arbitrator-selection provision that permits a party or party's agent to exercise unilateral control in selecting an arbitration service or the pool of potential arbitrators is "fundamentally unfair" and thus unenforceable.

In *Nishimura*, the plaintiffs were homeowners that brought a class action against Gentry Homes, Ltd. (Gentry) for the alleged failure to construct plaintiffs' home with adequate wind protection. The Home Builder's Limited Warranty (HBLW) between the parties contained an arbitration provision mandating that all disputes be submitted to binding arbitration. Professional Warranty Service Corporation (PWC) was the company administering the HBLW pursuant to a contract with Gentry and acted on Gentry's "behalf" under the HBLW. The arbitration provision stated that "the arbitration shall be conducted by Construction Arbitration Services, Inc. or such other reputable arbitration service that PWC shall select, *at its sole discretion*, at the time the request for arbitration is submitted." At the time of the parties' dispute, Construction Arbitration Service, Inc. had "permanently exited" the arbitration services business. Consequently, PWC had the sole discretion to select the arbitration service.

Relying upon PWC's relationship with insurance companies and builders as well as the language of the HBLW stating that PWC was acting on Gentry's "behalf," the plaintiffs argued that the arbitration selection provision contained no safeguards against potential bias and that PWC was empowered to choose any arbitration service it wanted, including one with a pro-defense or pro-developer view. Gentry countered that there was no basis under the Federal Arbitration Act (FAA) for a pre-arbitration challenge, as the time to challenge arbitrator partiality is after the issuance of the arbitration award. Gentry also argued that the plaintiffs had shown no evidence that the arbitrator service selected by PWC would be actually biased against the plaintiffs.

> *"According to the court, an arbitrator-selection provision that permits a party or party's agent to exercise unilateral control in selecting an arbitration service or the pool of potential arbitrators is "fundamentally unfair" and thus unenforceable."*

The trial court rejected Gentry's arguments and struck down the arbitrator-selection provision. The trial court ordered that the parties were to attempt to agree on an arbitrator service, and that, if they could not agree, the court would appoint an arbitrator service for the parties. The Intermediate Court of Appeals reversed the trial court's ruling and held the arbitrator-selection provision was enforceable.

In overruling the Intermediate Court of Appeals, the Supreme Court of Hawaii essentially made three key points. First, the court adopted the 6th Circuit's approach under the FAA and ruled that an arbitrator-selection provision must meet a "fundamental fairness" test in order to be enforceable. Second, the court held that a challenge to the fundamental fairness of the arbitrator-selection process need not await until post-award proceedings. Procedural unfairness—unlike claims of potential or actual bias among the arbitrators—may be challenged pre-arbitration in order to ensure that the arbitral forum is an effective substitute for a judicial forum. Third, the court held that "actual bias" need not be proven in a pre-arbitration challenge to an arbitrator-selection provision.

Applying these principles, the court held that the arbitrator-selection provision in the HBLW was fundamentally unfair and unenforceable. The provision—in permitting PWC/Gentry to select the arbitration service in its "sole discretion"—unfairly "granted one party to the arbitration unilateral control over the pool of potential arbitrators" and thus prevented arbitration from being an "effective substitute for a judicial forum because it inherently lacks neutrality."

The *Nishimura* case is notable because it appears to be an expansion of a party's ability to resist arbitration or otherwise attempt to invalidate aspects of a binding arbitration agreement. The court does not explain why it is any more "unfair" for an agreement to call for the selection of a service by one party than it is for an agreement to specify a particular service that one party insisted upon putting in the agreement. It seems that the correct approach would be to analyze the potential or actual bias of the chosen service provider. For example, case law has rebuffed generalized challenges to the American Arbitration Association, but upheld challenges to arbitration service providers that have lucrative contracts with a party to provide arbitration services.

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Take notice of your RISKS

"Incompetence" is not material: Contractor's defective performance failed to excuse owner's noncompliance with pre-termination notice to cure

Audrey K. Kwak

In a recent Pennsylvania federal court decision, a surety in a construction dispute was found to be protected by a 30-day notice-to-cure provision in its principal's construction contract, resulting in the dismissal of the owner's claim against the surety.

The underlying construction project in *Milton Regional Sewer Authority v. Travelers Cas. & Sur. Co. of Am.* involved the demolition of a wastewater treatment pump station and the construction and rehabilitation of associated sewer pipe. The owner, the Milton Regional Sewer Authority (MRSA), engaged Ankiewicz Enterprises, Inc. to serve as contractor; Travelers provided a performance bond on the project. The underlying construction contract provided that, prior to a declaration of default and termination, MRSA had to provide the contractor with 30 days' notice and an opportunity to cure.

Several months into the project, MRSA's engineer sent Ankiewicz a letter notifying Ankiewicz of numerous deficiencies in its performance and of MRSA's intent to declare Ankiewicz in default. Four days later, Ankiewicz responded in writing to the engineer, assuring the Authority of its willingness to cure—which, per the contract, it had 30 days to attempt to do. Before the 30-day cure period had elapsed, however, the engineer sent a letter to Ankiewicz, copying Travelers, advising that the Authority had elected to exercise its rights under the contract and the bond and that it was declaring Ankiewicz in default and was terminating the contract for cause.

When Travelers refused to assume liability for Ankiewicz's defective performance, MRSA filed suit. Travelers filed a motion to dismiss, arguing that because MRSA had not complied with the notice and cure provision in the contract, Travelers' obligations under the bond were not triggered. In response, MRSA argued that Ankiewicz's breaches of the contract were so material that MRSA's failure to comply with the cure provision was justified. To support its argument of materiality, MRSA delineated 27 ways in which Ankiewicz was purportedly in material breach—including by failing to supply sufficient skilled workers, adhere to progress schedule, meet various project milestones, and coordinate road closures and provide traffic maintenance, among other things.

The court disagreed that these defects in performance—even if true—were material. Instead, it appeared to the court that MRSA was merely "exasperated" with Ankiewicz's "perceived incompetence." To the court, Ankiewicz's failings, as alleged by MRSA, were best characterized as simply the poor performance of the contract, and "precisely within the contemplation of the cure provision in the contract."

Thus, the allegations did not describe an egregious or "incurable" breach (such as a quasi-criminal fraud outside the contemplation of the contract) necessary to excuse an owner from allowing a contractor the contractually mandated opportunity to cure.

This decision has been appealed, but at least for now, this case underscores the basic and fundamental principle that courts will hold parties to the terms of the bargains they negotiated. It pays to know, understand and adhere closely to those terms—especially where payment and performance obligations may hang in the balance.

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Actual notice vs. contractual notice: Ohio upholds strict contractual notice requirements

Katherine L. Pomerleau

Most construction contracts contain provisions detailing how contractors are to provide notice to owners regarding delays and extra work, among other issues. In some jurisdictions, a contractor's failure to strictly follow these notice provisions may be excused if an owner had actual notice of the delay or extra work. However, as demonstrated by a recent decision, Ohio requires strict adherence to a contract's notice requirements, regardless of an owner's actual notice.

In *Boone Coleman Construction, Inc. v. Village of Piketon*, Boone Coleman entered into a contract with the Village of Piketon to construct a new traffic signal and retaining wall. The contract contained notice provisions requiring that any requests for an extension of the project's completion date or for adjustments to the contract price must be submitted to the project engineer and to the Village within 30 days of the event giving rise to the claim.

During the project, Boone Coleman ran into some difficulties. Boone Coleman sent several letters to the project engineer requesting extensions of time because of issues with subcontractors and other issues. In addition, Boone Coleman sent three written notices to the engineer regarding approximately $107,000 for additional work performed because of discovered subsurface problems and necessary revisions to the retaining wall and traffic signal. The Village denied Boone Coleman's requests for additional compensation and for an extension and

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Take notice of your risks
(continued)

began assessing contractual liquidated damages of $700 per day as specified in the contract.

When Boone Coleman sued the Village to recover the contract balance and additional compensation, the Ohio Court of Appeals held that Boone Coleman's letters to the project engineer requesting extensions of time and additional compensation violated the contractual notice provisions because they were not also sent to the Village, and that the requests for additional compensation were also not submitted within the proper notice period.

The court rejected Boone Coleman's argument that any failure to strictly comply with the contract's notice requirements was harmless error, since the Village had actual notice of these claims through the notification of the Village's engineer. While an owner's actual notice of project delays or additional work is sometimes sufficient to constitute notice in some jurisdictions, the court upheld Ohio's strict stance that notice provisions in contracts are conditions precedent to a party's recovery of damages for a breach, and that a party must comply with all express contractual notice provisions before it can claim damages.

The court deemed Boone Coleman's requests for extensions of time to be ineffective, and found that the contractor's 397-day delay in completing the project was unjustified, exposing Boone Coleman to liquidated damages totaling $277,900. Fortunately for Boone Coleman, the court ruled that the liquidated damages provision constituted an unenforceable penalty and was therefore unenforceable.

The *Boone Coleman* case emphasizes the importance for contractors and owners alike to become familiar with and closely follow the notice provisions in their construction contracts, especially in Ohio or unfamiliar jurisdictions. Otherwise, they run the risk of being unable to claim damages for delays or additional work.

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Concrete slurry mining shaft

The active interference exception to no damage for delay clauses
(continued)

Those courts that do not require evidence of bad faith for application of the active interference exception generally already recognize the bad faith exception and, thus, decline to give the active interference exception a redundant meaning. Other courts reach the same result, finding that the term "active" does not determine wrongdoing and that the term "interference" does not connote bad faith or other theories based on intent.

In *C&H Electrical v. Town of Bethel*, the Connecticut Supreme Court recently considered the issue of the meaning of the term "active interference." *Bethel* is of particular importance because the contract expressly excluded all exceptions to the no damage for delay clause, except for the active interference exception. Connecticut common law, however, does not recognize an exception to the enforcement of no damage for delay clauses for active interference.

In *Bethel*, the contractor argued that it was not required to show bad faith or gross negligence and the owner argued that it was.

The court held that bad faith or gross negligence was not required to establish active interference, only that the contractor must prove (1) the owner committed an affirmative act that reasonably interfered with the contractor's work and (2) the act was more than a mistake, error in judgment, lack of total effort or lack of diligence.

Although the contractor in *Bethel* won the battle in convincing the court to adopt the less demanding standard, it ultimately lost the war. The contractor claimed that the owner's direction to proceed with its work in remodeling a school when the owner knew there was asbestos abatement work to be done, which ultimately impeded the contractor's progress, along with the owner's failure to coordinate the other contractors' work, constituted active interference.

The court found that the active interference exception did not apply because the owner believed that enough abatement work would be completed in advance so as not to delay the contractor's work. Just because this belief was later proven to be erroneous did not give rise to active interference. As to the alleged failure to coordinate the work of the other contractors, the court found that this was not active interference because the owner had expressly excluded difficulty in coordinating the other contractors due to asbestos abatement as an active interference. The court, thus, found that the trial court had properly dismissed the contractor's claims for delay damages.

Bethel teaches that, in advancing and in defending delay claims, contractors and owners alike must closely review the case law of the jurisdiction to determine which exceptions to the no damage delay clause have been adopted and how they have been applied. They must also closely scrutinize the contract clauses at issue to consider the owner's rights in managing and directing the work, and what the contractor's reasonable expectations should be in view of those contract clauses. This is relevant because, based on those contract clauses, the court in *Bethel* stated that the contractor should have included contingency in its bid for the potential for delay due to the failure of the owner to coordinate the other contractors and, if it did not, the contractor assumed the risk of monetary losses.

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Contract Corner

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No damage for delay clauses

The potential for delay in completion poses a substantial risk to every project budget and schedule. Any delay deprives the owner of the use of the finished project and increases the cost of construction. Contractors are faced with increased home office overhead and extended general conditions costs, wage and material escalation, and potential inefficiencies. All parties must be well-informed regarding contractual risk allocation tools associated with delay, including, among others, schedule and schedule update provisions, acceleration provisions, liquidated damages clauses, notice provisions, price escalation clauses, force majeure clauses and, the focus of this article, "no damage for delay" clauses.

As the name suggests, a no damage for delay clause restricts the right of the contractor to recover delay damages. An example of simplified no damage for delay language may read:

> Contractor shall not be entitled to recover any damage or additional costs associated with any delay to project completion. An extension of the Contract Time shall be the sole and exclusive remedy of the Contractor for any delay in the performance of the Work.

This standard language provides that an extension of time is the contractor's exclusive remedy for delay. While considered a disfavored "exculpatory" clause, a no damage for delay clause is generally enforceable in most jurisdictions, unless the nature or extent of the delay was not reasonably foreseeable at the time of contract execution or the delay was the result of active owner interference or abandonment of the owner's duties and responsibilities. However, the owner must be willing to provide the contractor an extension of time when appropriate, as failure to do so will most likely result in the clause being rendered unenforceable.

Owners should be aware that the inclusion of a no damage for delay clause can lead to pushback on price and/or the contractor's willingness to agree to a liquidated damages clause, as the contractor might balk at shouldering all of the financial risk of a project delay outside of its control. Depending on the parties' respective leverage, the language may be rejected outright. In the alternative, it is a risk allocation tool that can be negotiated in order to share the risk of delay among the parties. For example, the parties could limit the scope of the clause in terms of type of damage not recoverable (i.e., home office overhead) or type of delay for which recovery is not permitted (i.e., delays associated with owner occupancy or permit delays) or limit the period of time during which delay damages can be recovered (i.e., if the project is delayed more than x months).

Owners with bargaining power should push for inclusion of a no damage for delay clause and also language requiring substantiation for any request for an extension of time including, for instance, a supporting schedule analysis, proof of entitlement to the extension, the absence of a concurrent delay, and compliance with contractual notice provisions. It is vitally important for contractors to appreciate the impact of these clauses and account for this risk through their price or other contractual considerations. Subcontractors should make every effort to be aware of any no damage for delay language included in the general contract, especially when the subcontract, as is typically the case, limits the subcontractor's recovery to amounts recovered from the owner.

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New Jersey case impacts contractor claims against architects and no damage for delay clauses

Edgar Alden Dunham, IV

In a recent case by a general contractor against a school board over the architect's administration of the project, the Appellate Division held that the Affidavit of Merit (AOM) by an engineer provided by the contractor was insufficient. The case has implications beyond its limited holding. In New Jersey, a party alleging malpractice by a professional must file an AOM by a professional licensed in the same profession, opining that the professional failed to meet the requisite standard of care of his profession. The requirement is entirely apart from the requirement of producing expert testimony to prove the case at trial.

Architects and engineers have overlapping areas of practice, and claimants have frequently used expert testimony from an engineer to prove that an architect's performance did not met the requisite standard of care. This has been particularly so in administration of construction and scheduling which many would argue do not solely involve architecture.

However, in *Hill International, Inc. v. Atlantic City Board of Education*, Docket no. A-4139-13T3, the Appellate Division found that practice unacceptable. The court reasoned that an architect may not "be evaluated under the standards of another profession, one in which he or she has not secured a license and for which he or she has not subjected himself or herself to the oversight of a different licensing board." Under the same analysis, not only must the AOM be by an architect, but expert testimony at trial for purposes of proving malpractice would also have to be by an architect.

The court noted that exceptions to the requirement would be if the alleged

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New Jersey case impacts contractor claims against architects and no damage for delay clauses

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negligent activity did not involve the exercise of functions within his or her professional role, claims that do not result from malpractice or negligence, or claims that are strictly confined to theories of vicarious liability or agency that do not implicate the standards of care of the profession.

The claims in *Hill International* were primarily delay claims. The court clearly found that the scheduling issues involved the exercise of functions within the architect's professional role. Scheduling claims are often proven by engineering experts and rarely by architects. In the future, if contractors use an engineering expert to prove mistakes in the schedule, they will also need an architect to opine that the mistakes constituted negligence.

This could become particularly important on public projects in New Jersey if there is a no damage for delay clause in the contract. By statute, those claims are enforceable unless the claimant can show that the delay arose because of, among other things, negligence. The same statutes permit the imputation of the architect's negligence (as well as the negligence of others) to the owner (except for the State), thus rendering the clauses unenforceable. The implication of *Hill International* is that a contractor seeking to avoid a no damage for delay clause on a public project will need both an engineer and an architect to provide testimony.

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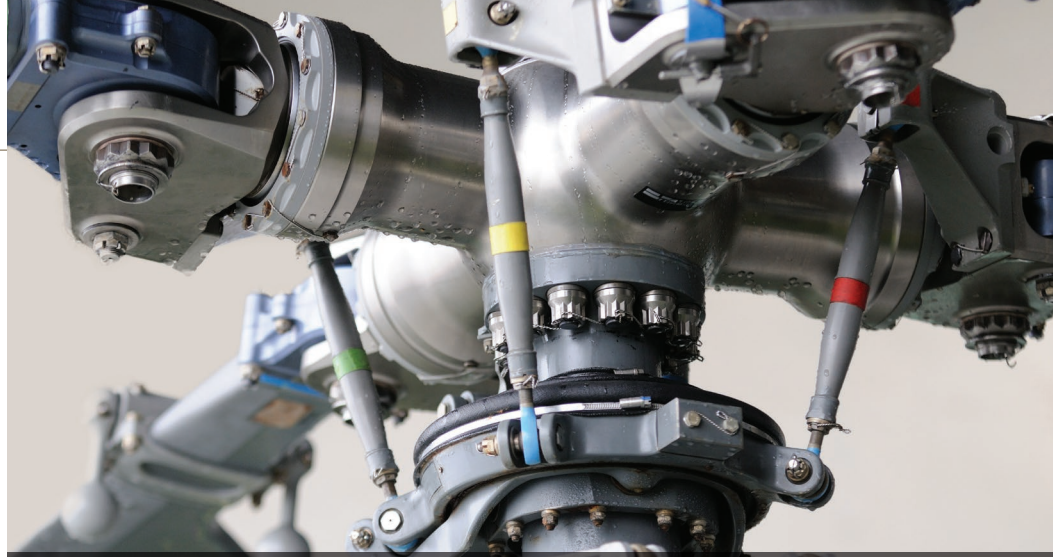

Sikorsky Aircraft Corporation: Court of Appeals changes precedent regarding statute of limitations under Contract Disputes Act

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of limitations. Although six years may seem like a substantial period of time, a long-term contractor could easily become involved in a project taking up most or all of that time. A contractor currently on-site, finishing up year six of a massive project, might find itself in the unenviable position of needing to file a claim related to issues that arose in year one of that project, potentially jeopardizing its relationship with the procuring agency.

To make matters worse, in previous decisions, federal courts held that this statute of limitations was jurisdictional. This meant that the proponent of the claim bore the burden of proof to establish compliance with the six-year threshold, that a court presented with a claim could rule on a statute of limitations question at any time during litigation, including immediately following the filing of a case, and that the six-year period was an absolute time bar. Precedent indicated that even if a contractor and the government had reached a tolling agreement, the contractor might still be out of luck.

The *Sikorsky* decision has turned this jurisprudence on its head. The court addressed a claim by the government against a contractor for failing to follow appropriate Cost Accounting Standards (CAS) in seeking indirect costs. A genuine issue of fact existed as to when the government became aware of the potential CAS violations and, thus, when the CDA's six-year clock began to run.

The court explicitly overruled prior precedent indicating that the statute of limitations was jurisdictional, and held, instead, that the statute was a waivable, affirmative defense. Taking its cue from recent Supreme Court jurisprudence that is critical of so-called "jurisdictional bars" in federal law, the court in *Sikorsky* found that the CDA's statute of limitations does not clearly establish a bright line rule and, thus, is not jurisdictional.

This new precedent will result in several practice changes. First, it is the defendant who bears the burden of proof to demonstrate the statute applies, and if there is a dispute about when a claim accrued, the defendant must affirmatively prove that the claim is barred. As a corollary, if a defendant fails to raise the statutory bar, that defense will be waived. Second, as a practical litigation matter, a statute of limitations defense is unlikely to be decided at the outset of litigation via a motion to dismiss. Instead, it will need to be raised via a motion for summary judgment, or may even need to await a disposition at trial once factual disputes are settled. Finally, although *Sikorsky* did not address this jurisprudence directly, it seems likely that prior decisions invalidating tolling agreements will no longer apply.

The court did not alter the six-year statute of limitations itself, and so potential claimants must still keep that deadline in the back of their minds. In holding that the statute of limitations is not jurisdictional, however, the Court of Appeals reduced some of the more punitive aspects of the statute and made it a little less likely that this ticking time bomb will go off at an inopportune time.

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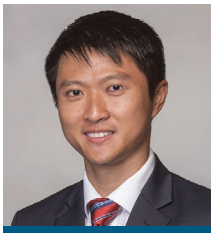
Recovery of attorney fees


George Jiang

Can the good faith refusal by a contractor or owner to pay a demand expose them to liability for the attorney fees under the Pennsylvania Contractor and Subcontractor Payment Act (CSPA)? While acting in good faith may absolve a party from certain statutory interest payments and penalties, a recent Superior Court case held that it is possible to still be on the hook for attorney fees on top of the payment of any damages.

According to the CSPA, "the substantially prevailing party in any proceeding to recover any payment under this act shall be awarded a reasonable attorney fee in an amount to be determined by the court or arbitrator, together with expenses." The broad language of this clause has been the cause of great stress for all parties in a prompt payment dispute, as the provision applies equally to both plaintiffs and defendants. In a development that should bring much-needed clarity to the law, the Pennsylvania Supreme Court accepted a petition to review *Waller Corp. v. Warren Plaza, Inc.*, a case implicating the scope of the CSPA's attorney fees provision. The justices will specifically address whether a good faith refusal to pay a contractor or subcontractor is a factor to be considered by a court when deciding whether to award attorney fees.

This appeal is being brought by the defendant Warren Plaza, which had hired Waller to construct a 15-unit apartment building. At least eight change orders were memorialized during the course of the project; however, two of the change orders were never signed. It was Warren Plaza's position that it did not have to pay for the two unsigned change orders, thus precipitating the lawsuit. Verdict was ultimately rendered in favor of Waller, resulting in an award of $69,904. The trial court declined to award Waller any penalties, determining that Warren Plaza had a good faith basis to withhold payment. Nevertheless, the court granted Waller $78,071 in attorney fees pursuant to the CSPA.

In a 2-1 decision, the Superior Court affirmed the award of attorney fees. In so holding, the majority rejected Warren Plaza's contention that Waller was not a substantially prevailing party in light of the trial court's finding that there was a good faith reason to withhold payment. Instead, the majority specifically held that the fact a party withholds funds in good faith is only relevant to whether the other party is entitled to statutory interest and penalties under the CSPA rather than attorney's fees. Unlike the CSPA's statutory penalty provision, the attorney fee provision does not explicitly provide for a defense in instances where a party withheld payment on the basis of a good faith reason.

The Supreme Court's anticipated ruling on this matter will be of particular importance for parties involved in an ongoing payment dispute that may be headed toward litigation. As demonstrated in *Waller Corp.*, a court could grant attorney fees that are in excess of the amount in dispute even if there was a good faith basis on which to withhold payment. A ruling in favor of Waller could pressure a contractor or owner to pay on a construction contract and sue to recover damages in a subsequent action in order to avoid the CSPA altogether. Parties currently in litigation should also take notice, as a ruling in this matter would impact their relative bargaining positions. A claimant that is confident it would "substantially" prevail at trial can extract a greater settlement value from a defendant if the Supreme Court decides to affirm.

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Do not circumvent DBE requirements


David M. Laigaie

A portion of many public projects must be performed by Disadvantaged Business Enterprises (DBE). Sometimes, DBE requirements can be difficult to fulfill and some contractors cut corners. They use "pass through" DBEs that perform no commercially useful function; they use DBEs that are falsely certified; or they overstate the extent of DBE involvement.

Our advice to anyone thinking about doing this: DON'T! Criminal and civil enforcement of DBE fraud is on the upswing and violators are punished severely.

Criminal Enforcement

Prosecutors across the country are actively pursuing DBE fraud cases. People convicted of such fraud are often sent to prison and fined and can be debarred from participating in federally funded projects.

For example, Environmental Energy Associates (EEA) recently pled guilty relating to its use as a DBE "front" company. EEA entered into several large projects in and around New York City even though it lacked the labor, equipment and money to perform the work. EEA's work was performed by various third parties. EEA's principals were sentenced to six months of home confinement and two years of probation and were ordered to pay over $230,000. In a related case, Skanska USA agreed to pay $19.6 million to avoid being prosecuted for using EEA as a sham DBE on several projects.

In another recent New York case, Walter Bale, the president of a non-DBE, pled guilty to falsely certifying that work done by his company was actually performed by a certified DBE. Bale was sentenced to three years of probation and ordered to pay over $250,000. The president of the DBE was also sentenced to three years of probation.

In Philadelphia, Michael Tulio, the owner of Tulio Landscaping, was convicted in connection with two contracts to replace storm drainpipes. Tulio certified that a percentage of the work would be subcontracted to a DBE hauling firm. Tulio, however, never hired the DBE hauling firm but instead created fraudulent documents to make it look like he did. Tulio was sentenced to 15 months in prison and 24 months of supervised release and ordered to pay a $40,000 fine.

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Do not circumvent DBE requirements (continued)

Civil Enforcement

The Federal False Claims Act rewards people who blow the whistle on companies that defraud the federal government. Whistleblowers—who have already been paid more than $1 billion in cases involving Medicare, Medicaid, the Department of Defense and other federal programs—have now begun to target DBE fraud.

For example, last year, the FBI announced a $12 million settlement of DBE fraud allegations against Chicago-based McHugh Construction. A project manager of a subcontractor to McHugh blew the whistle and was paid more than $2 million. More recently, a whistleblower filed suit alleging that his former employer, TesTech, falsely claimed that it was owned by a minority in order to obtain DBE certification, which led to numerous highway and airport projects. TesTech and its owners agreed to pay nearly $3 million to settle the case. The whistleblower will be paid $562,370 from the settlement.

These cases demonstrate that DBE fraud is a serious matter. To avoid trouble, companies must observe the spirit as well as the letter of the DBE requirements, fully vet all DBEs they intend to use and adopt appropriate DBE compliance policies.

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Construction Law Group NEWS

Chris Opalinski and **Scott Cessar** were selected for inclusion in the 2015 edition of *Pennsylvania Super Lawyers*®, published by Thomson Reuters, and **Audrey Kwak** was selected as a *Rising Star*. All three were recognized within the Construction Litigation category.

Matt Whipple's article "Timing Is Key to Claims on Federal Construction Projects" appeared in *Construction Executive Magazine's "Risk Management"* publication in January.

Chris Opalinski and **Tim Berkebile** authored an article for *Construction Executive Magazine* entitled "Using Flowdown Clauses for Risk Allocation."

Scott Cessar authored an article in the March issue of *Construction Executive Magazine* entitled "Good Faith and Fair Dealing Upheld In Federal Construction Contracts."

Scott Cessar, Audrey Kwak, Tim Berkebile, George Jiang and **Matt Whipple** all had articles published in the Allegheny County Bar Association's Construction Law Section Newsletter.

Tim Grieco and **Matthew Whipple** obtained a hard-fought victory involving attorneys' fee clauses before the Sixth Circuit Court of Appeals. In 2013, Tim won a $1-million-plus award in a breach of contract case tried to a federal jury in the Northern District of Ohio, but the trial court had ruled on summary judgment that the attorneys' fee provision was unenforceable. In a published decision dated January 21, 2015, the Sixth Circuit reversed the trial court's decision on attorneys' fees, clarifying prior precedent and holding that the one-sided or unilateral fee-shifting contract provision—which was negotiated between sophisticated parties—was, in fact, enforceable.

Vincent J. Paluzzi recently closed a forward interest rate hedging or "swap" transaction for a long-term firm client. The swap enabled the client to take advantage of the favorable, low-interest-rate environment to replace the variable rate of interest payable on outstanding bond indebtedness with a 1.815 fixed rate of interest through February 1, 2029. Vince also was asked by the client to assume "General Counsel" duties, and has been designated the responsible attorney for this client.

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