CONSTRUCTION IN BRIEF

A Quarterly Publication brought to you by the law firm of Cohen, Seglias, Pallas, Greenhall & Furman, P.C.

Vol. 1. Issue 01 *January/February/March 2002*

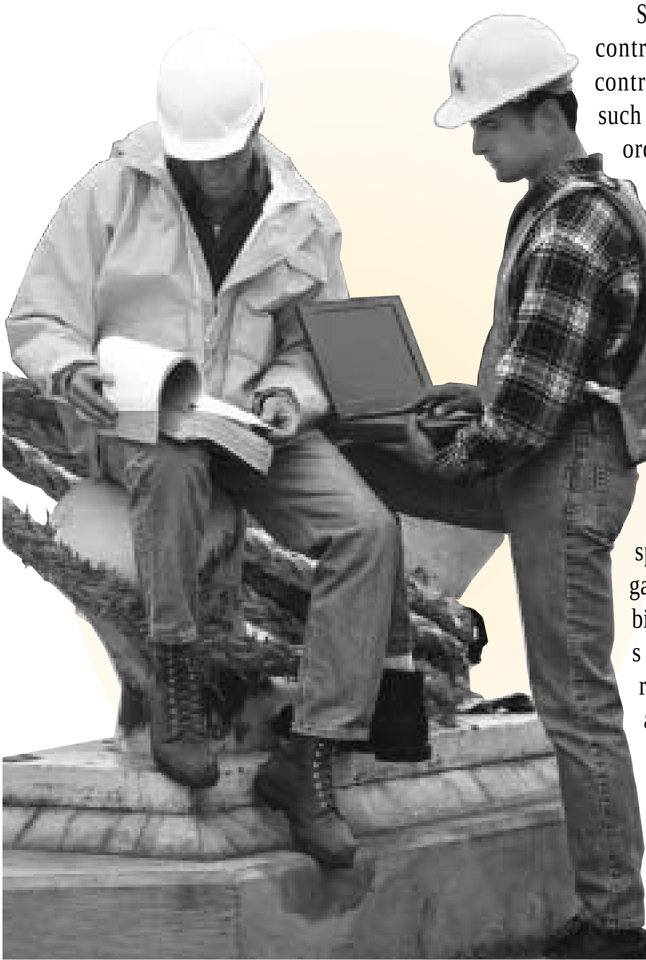
PHILADELPHIA • NEW YORK • NEW JERSEY

Pennsylvania Jobsite Safety: Protecting Yourself From Liability

Have you ever been concerned that you would be sued for somebody else's negligence? If so, then you will be happy to know that the Pennsylvania Supreme Court recently ruled that a contractor can avoid liability in a negligence suit by an injured worker he does not employ by properly delegating responsibility for worker safety to subcontractors. In *Leonard v. Commonwealth of Pennsylvania*, the general contractor entered into a contract with the Pennsylvania Department of Transportation ("PennDOT") to rebuild bridges. The general contractor entered into a subcontract for steel fabrication and erection. The subcontractor then entered into a subcontract for steel erection. An employee of the sub-subcontractor steel erector fell off a bridge and was injured; he had been wearing a safety belt but was not tied-off. There was no safety line in place.

The trial court granted judgement in favor of the defendants, ruling that only the employer (the sub-subcontractor) was responsible for injuries and the Workers' Compensation Act governed those claims.

On appeal, the Pennsylvania Supreme Court considered two questions: First, can a general contractor or subcontractor that is not present at the worksite still be considered in control of the worksite?



Second, can the contractor or subcontractor delegate such a duty to a subordinate subcontractor? The court ruled that only the subcontractor on the site had control over the work where the contracts specifically delegated responsibility. The court specifically rejected the argument that OSHA regulations create liability in a suit brought by an employee. It is important to note, however, that the court did state that the general contractor and subcontractors have joint responsibility under OSHA regulations. Therefore, the general contractor and subcontractor are subject to OSHA's enforcement provisions.

This decision also allows contractors to delegate safety responsibility to the subcontractor actually performing the work and thereby avoid negligence claims by workers. In any event, it presents a good opportunity for contractors to insure that their contracts protect them from liability to the extent possible.

-- Nicole L. Herman, Esq.

A Note From The Editor

Welcome to the first issue of **CONSTRUCTION IN BRIEF**, a quarterly newsletter from Cohen, Seglias, Pallas, Greenhall & Furman, P.C. It is our intent with this publication to bring you information about critical legal developments in the construction industry, along with current information about our law firm.

Inside you'll find an in-depth article on how you can recover home office overhead in the unfortunate event of a stop-work order, valuable advice regarding the change in estate tax laws, a discussion on paying health insurance premiums for ex-employees, and our cover story, an important evaluation on jobsite safety and limiting your company's liability. We hope that you'll find these articles interesting and informative. As always, for a specific legal concern we recommend that you speak with an attorney personally so that you may receive the best advice.

-- Jason A. Copley
Editor, *Construction In Brief*

Cohen, Seglias, Pallas, Greenhall & Furman, P.C.

Providing a full range of construction law services with specialties in labor, employment, real estate, commercial transaction, estates and litigation.

Contributing Attorneys: *Rene David Quinlan, Nicole Herman, J. Kenneth Harris, Marc Furman, John Greenhall*

Editor: *Jason A. Copley* ***Design:*** *High Noon Advertising*

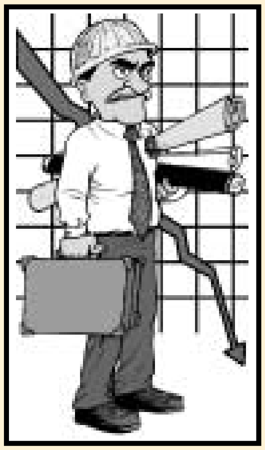
To speak with an attorney regarding a legal concern:

PHILADELPHIA	1515 Market Street, Eleventh Floor	215.564.1700
NEW YORK CITY	342 Madison Avenue, Suite 1820	212.687.7777
HADDON HEIGHTS, NEW JERSEY	2 White Horse Pike	856.310.9901

Website: www.cohenseglias.com ***Email:*** jgreenhall@cohenseglias.com

DAMAGES UPDATE

Recovering Home Office Overhead



Work is progressing well on the project when, without warning, the owner advises everyone at the weekly job meeting that a stop-work order is going to be issued because the design is being changed, or because the shop drawings aren't coordinated between the trades. Sound familiar?

When your work is suspended, you suddenly recognize that you've expended enormous resources in scheduling, planning, and, most importantly, financing a project that was expected to pay for a large portion of your company's fixed home office costs. The owner has told you to stop working, and can't tell you when you'll be able to continue. What damages can you expect to recover in this situation?

The issue was first addressed by the Armed Services Board of Contract Appeals in a 1960 case that is now remembered more as a "formula" than by the name of the case – Eichleay Corporation. Although its application varies from state to state, numerous courts and arbitration panels find that the *Eichleay formula* is the only fair method to calculate unabsorbed home office overhead costs when work on a project is suspended. Essentially, the *Eichleay formula* calculates your daily home office overhead for a particular project by comparing contract billings to total billings.

To understand the *Eichleay formula*, it is important to understand what is meant by unabsorbed home office overhead. "Home office overhead" includes all of the fixed, monthly expenses that your company incurs at its home office, such as rent, accounting and payroll, general insurance, upper level management salaries, utility costs, taxes, and depreciation.

The key to the *Eichleay formula* – that is, what really triggers its application – is when those costs are "unabsorbed." When an owner suspends work for an unknown duration, the income that you expected would pay for your home office overhead costs is no longer available. If the owner can't tell you how long the suspension will last, you can't seek other work in order to replace the loss of income. That's when your overhead costs are "unabsorbed," and when the *Eichleay formula* may assist you – but only if you establish certain conditions.

First, there must be a suspension of work that places you on "standby," and second, you must be unable to take on other work. Being on standby requires that your work be suspended for an unknown duration, and that you're ready to return to work on a moment's notice. The second condition – that you're unable to take on other work – is likely to be challenged by an owner. When a contractor shows that it was unable to take on other work, an owner can challenge that evidence by showing that (1) it was not impractical for the contractor to obtain replacement work, or that (2) the inability to obtain other work was not caused by the suspension.

Although it may be difficult for an owner to demonstrate that it was not impractical for the contractor to take on replacement work, it has the ability to control whether a contractor is on standby, and therefore minimize its liability. For example, where an owner establishes a return-to-work date at the beginning of the suspension, the owner may reduce its liability for unabsorbed home office overhead. Recovery of unabsorbed home office overhead may also be denied if the contractor was unable to obtain replacement work because of difficult economic conditions, or if the contractor was able to reduce its staff, and, therefore, its home office overhead.

Although the *Eichleay formula* may seem complicated, if you keep yourself armed with an understanding of the basic rules and consult with your attorney, you may be able to recover your unabsorbed home office overhead the next time that your work is suspended.

-- Rene David Quinlan, Esq.

WHAT'S NEW?

COHEN, SEGLIAS, PALLAS, GREENHALL & FURMAN

In each issue of *CONSTRUCTION IN BRIEF* we'll update you on the status of our firm. The big news at Cohen, Seglias, Pallas & Greenhall, PC is that we are now **Cohen, Seglias, Pallas, Greenhall & Furman, P.C.** With the addition of our new partner ***Marc Furman***, of counsel ***Steve Silverman*** and associate ***Tom Zipfel***, the firm has combined with a distinguished labor and employment practice, formerly known as Rothenberg, Silverman & Furman, P.C. to better serve our clients. The attorneys at *Cohen Seglias* hope that all of our clients get to meet our new colleagues if they have not already done so.

Cohen Seglias is also excited to announce that senior counsel ***Marian Kornilowicz*** has been made a partner at the firm. Marian is a transactional lawyer with strengths in all business related topics. Practicing since 1980, Marian is a member of the bars of Massachusetts, New York, Pennsylvania, and New Jersey. Marian's knowledge of construction is also served by his degree in engineering sciences from Rensselear Polytechnic Institute.

Cohen Seglias has also elevated two of its most valuable associates to the level of Senior Counsel to the Firm. We are proud to have both ***Robbie Bloom*** and ***Nicole Herman*** carry that title as of January 1, 2002. As Senior Counsel, the partnership looks to them for guidance on numerous issues and values the assistance they will give in running the Firm.

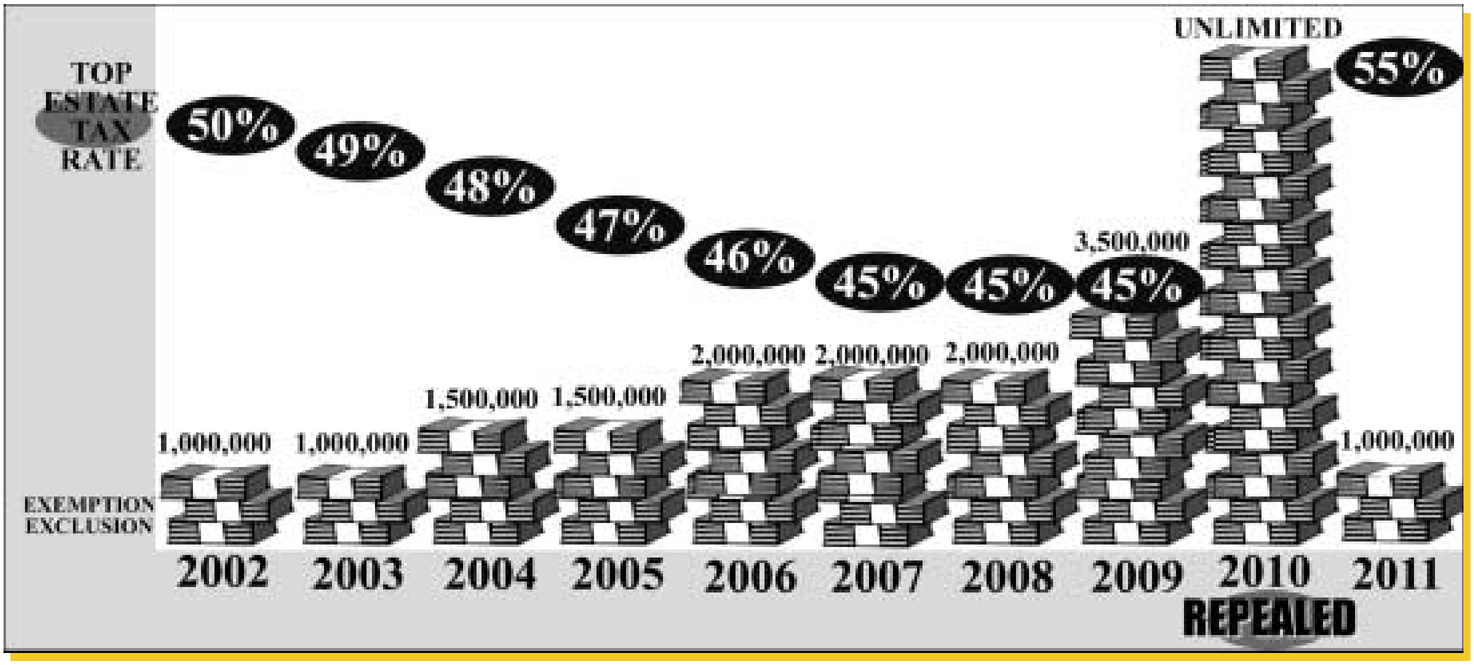
Finally, Cohen Seglias would like to welcome our three newest associates. ***J. Andrew Wallace***, ***Dana B. Ostrovsky*** and ***Jill Alden*** have recently joined the fold. We look forward to having them work with us and our clients.

Shown left to right: (back row) Marc Furman, Marian Kornilowicz, Ed Seglias, George Pallas; (front row) Steve Silverman, Roy Cohen, John Greenhall

Estate Planning Under The New 2002 Laws

In 2010, the Federal Estate Tax law will be repealed. Between now and then, the exclusion amount is gradually increased and the top estate tax rates reduced as described in the table below. However, if new legislation is not adopted between now and 2011, the existing estate/gift tax law will be reinstated with the current tax rates and a $1,000,000 maximum exemption/exclusion amount. This creates certain short-term opportunities, but also creates much long-term uncertainty.

Graphic indicates the declining tax rate percentage and increasing exemption affected by the 2010 repeal



Gift Tax Remains

While the estate tax is to be eliminated, the gift tax will remain, subject to a maximum lifetime exemption of $1,000,000 starting in 2002 and continuing thereafter. During the next 8 years, while the estate tax is gradually phased-out, the gift tax rates will be the same as the estate tax rates. Once the estate tax is repealed, the gift tax rate will be the maximum income tax rate, i.e., 35% in 2010. The annual exclusion for gifts up to $10,000 per donee will remain in effect.

No Step-up in Basis

Currently, inherited property receives a "step-up in basis". This means a beneficiary receives inherited property with an adjusted basis equal to its fair market value at the time of the decedent's death. Under the new law, which eliminates the step-up in basis, only $1,300,000 in appreciation will be sheltered from the capital gains tax, with the potential for an additional $3,000,000 for property passing to a surviving spouse. Consequently, the potential income tax on property which does not get a step-up in basis can create significant complications for the beneficiaries. This means estate plans must consider not only whether estate taxes will be owed but also the income tax consequences of the sale of estate property.

Review Existing Documents

In light of the above changes to the estate/gift tax law, it is important that your existing estate planning documents be reviewed. As an example, many wills/trusts provide for a "credit shelter" or "by-pass" trust which is to be funded with the maximum exclusion amount. Under the new law this amount could be $3,500,000 in 2009 and unlimited if the estate tax is eliminated. If the trust provides for the maximum exclusion amount to go to the surviving children and the balance to the surviving spouse, the increased exclusion amount could result in the surviving spouse receiving nothing or much less than was intended. Conversely, children and other heirs may be receiving much more than was ever anticipated

Potential Conflicts Between Heirs

The repeal of the "step-up" in basis and the $1,300,000.00 cap on the amount of increased basis allocable to inherited assets may create problems. The executor has the discretion to allocate the basis increase among the estate's assets. However, existing wills/trusts do not provide any instructions or guidance for making such allocation. In light of the differing tax consequences that can arise out of the allocation of basis, it may be prudent to consider including specific instructions so that there is some equality/fairness in the allocation of basis among various assets and the beneficiaries that receive those assets.

Lifetime Gifts and Trusts

In the event that the repeal of the estate tax is permanent, gift tax issues will remain. Only the first $1,000,000 in lifetime gifts to non-spouses will be exempt from the gift tax. Gifts in excess of $1,000,000 will be taxed at the highest marginal income tax rate, i.e., 35% in 2010. Until the repeal of the estate tax, the gift tax rates will match the existing estate tax rates. In light of the potential repeal of the estate tax, any planned gifting of assets should be structured so as to avoid payment of gift tax. Consequently, gifting of fractional interests and the use of various types of trusts and family partnerships will become even more significant for inter-generational planning.

With larger sums passing to younger generations, trusts will be more important. Consideration should be given to whether younger beneficiaries are prepared to manage the assets they will inherit. In many cases it may be more appropriate to have those assets held in a trust and managed for the investment and disbursement of trusts assets, distributed to beneficiaries on the attainment of stated goals and objectives, and restricted to trust principal so as to protect trust beneficiaries from the effects of divorce and bad business decisions.

Your existing Wills and Trusts should be carefully reviewed in light of this new legislation. Keep in mind that the estate tax is repealed only for the single year of 2010. Additionally, with the loss of the step-up in basis, inherited assets now carry potential income tax liability that can create tax problems for beneficiaries as severe as the payment of estate tax.

-- *J. Kenneth Harris, Esq., LLM*

THE HIDDEN COST OF DOING BUSINESS: PAYING FOR HEALTH CARE

In a typical week, we usually field at least one telephone call from a client asking the following question:

When can the company stop making health insurance premium payments for an employee who is no longer at work?

As is routine for attorneys, we answer questions only after learning more about the problem. This situation is no different. Before we can properly respond, we must consider the following factors: the number of employees at the company and there lengths of employment; the length of time the employee has been out of work; the reason for this absence; and, the payment of premiums for active employees at the company. These factors bring both the Family and Medical Leave Act (FMLA) and the Consolidated Omnibus Budget Reconciliation Act (COBRA) into consideration.

A sample analysis would go something like this:
Eighteen employees. The employee has been there only 9 months, but he has now been out of work for a year. His absence appeared to be work-related, but we were never really sure. In any case, he is obviously milking it now. We provide payment for the employee only, at 90% of the cost of the premium. The employee pays for any dependent coverage. We have no policy that covers this situation. We thought that we had to pay for his entire health care premium - for both himself and his dependents. I heard this from another contractor who is a member of my club. We haven't tried to get reimbursement from the employee for any of the premiums.

It's been over a year. Now what do we do?

Because there are only 18 employees, the FMLA and COBRA do not apply. In short, and in this particular situation, the answer is governed by the company's internal policy or past practice (if there is no formal policy). As you can imagine, the company will have paid out over $8,000 in benefits to an employee who, by law, may not be entitled to anything! While it may be compassionate to provide some sort of benefit continuation, we have learned that many, if not most, employers provide no set cut-off or rules governing this type of situation.

What would your company do?

Do you have an appropriate policy that covers this type of situation? Do you currently have employees receiving company-provided health insurance coverage, and, if so, under what circumstances?

Take a look at your own policies to see if they provide guidelines for this potential or actual problem. Should you have any questions concerning this somewhat complex issue, we suggest that you consult with counsel.

-- *Marc Furman. Esq.*

Questions regarding a specific legal matter? We recommend you speak with a CohenSeglias attorney.

PHONE: *215-564-1700* **E-mail:** *jgreenhall@cohenseglias.com*