CONSTRUCTION IN BRIEF

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CONSTRUCTION IN BRIEF

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DESIGN PROFESSIONALS EXPOSED

Claims Against Design Professionals Take Hold in Pennsylvania in the Form of a Cause of Action for Negligent Misrepresentation: Understanding the Bilt-Rite Case

It happens to contractors every day: while working on a project, they encounter errors or omissions in plans, specifications, or drawings (the "design documents") prepared by the architect or engineer. These deviations can range from a minor dimensional discrepancy in an architectural feature to an erroneous load calculation for a support member. As is typical, you relied upon the accuracy of the erroneous design documents in planning and performing your work. Now you are suffering the predictable consequences of these errors and omissions, including added work, disruptions, inefficiencies and delays, and, of course, an increase in the cost to perform your work.

To add insult to injury, your traditional limited recourse for recovering these "economic" damages, at least for a project constructed in Pennsylvania, was to pursue a claim against the party with whom you had a contract. This, of course, is typically not the party primarily responsible for the errors or omissions, i.e., the project engineer or architect. This limited recourse is referred to as the "Economic Loss Doctrine." In the context of a construction project, application of this rule could, at times, be unreasonable. Take, for example, the scenario where a general contractor incurs delays and disruptions due to design errors, and the owner files for bankruptcy during the course of the project. In making its claim, the general contractor was likely relegated to pursuing whatever lien rights, if any, it had not previously waived pursuant to the contract, or getting in line as an unsecured creditor of a potentially valueless estate. Meanwhile, the culpable design professional, together with its multi-million dollar malpractice insurance policy, was able to avoid responsibility directly to the general contractor by arguing application of the Economic Loss Doctrine.

A recent legal development, however, has virtually eliminated the obstacles that the Economic Loss Doctrine presented to a contractor. On January 19, 2005, the Supreme Court of

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LABOR & EMPLOYMENT LAW UPDATE

Everyone knows that staying ahead of the competition is a difficult task for any business. Staying current with rapidly changing employment laws can be just as daunting. This update will help keep you current on recent developments in labor and employment law.

UNEMPLOYMENT COMPENSATION DECISION

All employers have dealt with unemployment compensation ("UC") claims. On February 3, 2005, the landscape for defending such claims shifted dramatically.

Until now, many employers hired companies or human resource consultants to defend them at UC hearings. However, the Commonwealth Court of Pennsylvania recently decided that, contrary to established practice, a non-attorney who is not an employee can no longer represent an employer at UC hearings because a non-attorney/non-employee would be engaging in the "unauthorized practice of law."

For many employers, this decision directly changes how they are defending UC claims. Employers who engage consultants or defend claims themselves may be forced to change their approach to UC claims.

Recently, a client called while in the middle of a UC hearing because the Referee refused to allow him to cross-examine the Claimant. In addition, the Referee precluded the client from doing anything to assert its case other than telling the Referee why UC benefits should not be awarded. Interestingly, the client was not only an employee but also the owner of the Company. Obviously, he did not fall into the category of a "non-attorney/non-employee." It appears from the Commonwealth Court's decision that he should have been permitted to cross-examine the Claimant. Unfortunately, the Referee took the recent decision to an extreme by not allowing the client to defend the claim. To avoid this outcome, you should confirm your intention to personally defend a UC claim in writing with the Referee before the hearing date. An appropriately worded letter to the Referee should suffice.

NEW FMLA REGULATIONS

As most of you know, the Department of Labor ("DOL") issued new regulations on the FLSA in August 2004. Slightly less well known is that the DOL is currently in the process of revising the Family Medical Leave Act ("FMLA") regulations. The new FMLA regulations are expected to be issued this Spring. Every employer covered by the FMLA will need to become familiar with the new regulations, and make adjustments to their current written policies.

DRUG TESTING AND THE FMLA

In an opinion letter issued in October 2004, the DOL confirmed that an employee who is returning from FMLA - qualifying leave may be required to undergo drug testing. In fact, the opinion letter explains that an employee who refuses to submit to a drug test can be treated as insubordinate. Of course, when disciplining an employee in a situation such as this, you should always follow a well written and uniformly applied drug and alcohol policy.

As you can see from just these recent developments, it is critical in today's business climate to have clearly written policies and procedures. It is equally critical to implement those policies in a fair and even-handed matter. A good defense against frivolous lawsuits is to have your attorney draft the needed policies.

-- Thomas C. Zipfel, *Esquire*

What's New

COHEN SEGLIAS OPENS HARRISBURG OFFICE

Cohen Seglias is proud to announce that it has opened an office in Harrisburg. This office will allow us to better serve our growing client base in all of Central Pennsylvania. **Jason A. Copley** is serving as the resident partner in the office, and will continue to maintain a presence in Philadelphia. Senior Counsel **Herman "Bucky" Cardoni** will also work out of the new office. The office is located in the Payne Shoemaker Building at 240 N. Third Street. **Cohen Seglias** looks forward to continuing to serve the Central Pennsylvania construction community for many years.

WELCOME NEW ATTORNEYS

Kevin Watson

We are also proud to welcome attorney **Kevin Watson** to the **Cohen Seglias** family. Kevin was a partner at a law firm in suburban Philadelphia, where he specialized in representing contractors and design professionals. Kevin has a breadth of experience in litigating, arbitrating and mediating construction-related matters and will play an important role in our Construction Litigation Group. Joining **Cohen Seglias** in our Business Practice Group is associate **Alexander F. Barth**. Alex comes to us from a firm in Media where he practiced general litigation and real estate matters. He is admitted to practice in Pennsylvania and New Jersey.

HONORS & ACHIEVEMENTS

Our attorneys continue to participate in construction organizations. **Ed DeLisle** was recently appointed the Chairperson of the Governmental Relations Committee for the Pennsylvania Utility Contractor's Association. Ed will help PUCA members stay current with legal issues that impact their businesses.

Edward T. DeLisle

Thomas C. Zipfel

Thomas C. Zipfel was recently named as a "40 Under 40" honoree by the Philadelphia Business Journal. The award is given to 40 professionals under the age of 40, who exhibit both professional excellence and a commitment to their community. In addition to the great work that Tom has done for the Labor and Employment Group, he has also devoted a tremendous amount of time performing pro bono work for Support Center for Child Advocates, which represents the interests of abused and neglected children.

-- Edward T. DeLisle, *Esquire*

DESIGN PROFESSIONALS EXPOSED

COVER FEATURE STORY

-- continued from page 1 --

Pennsylvania effectively abolished the doctrine as it applies to contractors' construction claims against design professionals for economic losses arising out of defects in design documents. In the case of *Bilt-Rite Contractors, Inc. v. The Architectural Studio*, the Supreme Court of Pennsylvania reviewed the claim of a general contractor who relied upon representations in a project specification that a curtain wall system could be constructed using "normal and reasonable" construction means and methods. The general contractor suffered significant increased costs when it turned out that the means and methods needed to construct the system were far more specialized and costly than what was anticipated as being "normal and reasonable." In a landmark decision, the court expressly rejected prior case law adopting the Economic Loss Doctrine, and held that the general contractor could recover from the project architect directly for these economic losses, notwithstanding the absence of a contract.

The significance of the *Bilt-Rite* case cannot be overstated. By effectively banishing a decades old rule of law, the Supreme Court of Pennsylvania sent a clear and resounding message that architects and engineers (and perhaps construction managers and schedulers) are fully responsible to not only their clients, but also to contractors, subcontractors and suppliers for their errors and omissions.

So the next time you find yourself reeling from impacts due to mistakes in project plans and specifications, make sure you include not only your contracting party, but also the design professional in your claims.

-- Kevin Watson, *Esquire*

NOTICE

Effective March 10, 2005, all employers must post a new workplace poster regarding military leave. This notification requirement was signed into law by President Bush as part of a bill amending the Uniformed Services Employment and Reemployment Rights Act of 1994.

CONTRACTOR LIABILITY: When Does It End?

What is the Statute of Repose?

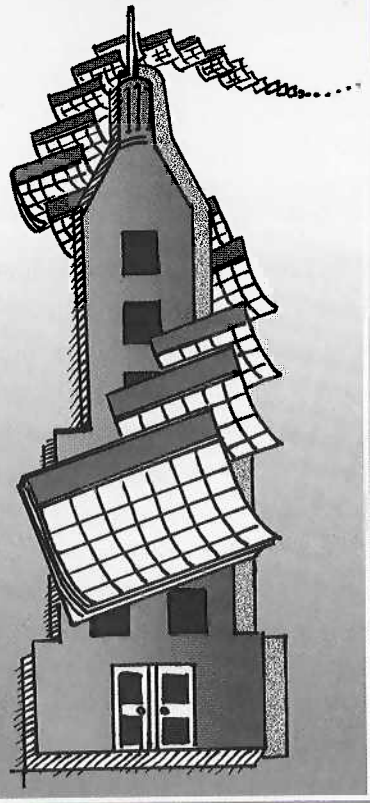
Imagine you are a contractor 11 years removed from the completion of a project. You have shipped your files off-site or simply disposed of them. Like many, your memory is fading just a bit, when one day, you are served with a lawsuit related to the 11 year old project. Someone is claiming they have been injured on the property, and they are pointing the finger at you. How is it that after all of this time you can be sued?

The answer is the "Statute of Repose". In Pennsylvania, the statute creates a twelve (12) year limit from completion of a construction project for certain types of claims. In New Jersey, the Statute is ten (10) years.

That being said, the statutes do not create an unrestricted right to bring any lawsuit against a contractor, architect or engineer for ten (10) or twelve (12) years after they complete a project. Rather, the statutes are limited to certain types of parties and cases. First, the statutes apply to suits against those who perform or provide design, planning, supervision, or observation of construction services, or the construction of any improvement to real property. Second, the statutes only apply to cases in which deficiencies in the design, planning, supervision or observation of construction or construction of the project lead to injury or wrongful death to a person, real property or personal property. Actions for contribution or indemnity related to these injuries are also included.

In Pennsylvania, there are also further limitations in the Statute. First, injury or wrongful death actions that occur between the 10th and 12th year of repose can be filed no later than 14 years after the completion of the construction. Second, the Statute cannot be asserted as a defense by a person in "actual possession" or "control" of the property in an action for injury or wrongful death. As such, the owner of a shopping mall cannot use the statute to defend a wrongful death action arising from a construction or design defect after the statutory period, while the contractor can.

"Imagine you are 11 Years Removed from the Completion of a Project..."



Now that you understand that your business has potential liability long after your work has been complete, what can you do about it? First, you should review your document retention policy to determine if certain records should be kept until your exposure under the applicable statute has lapsed. For example, a concrete contractor in Pennsylvania should consider maintaining slag testing results for twelve years, while a window manufacturer may want to keep wind load test data. Second, contractors should understand that they are essentially warrantying their work to all persons that use the premises they have constructed during the statute period. This means that contractors should review their practices to insure that they are complying with the standard of care governing their work. This will help eliminate your exposure to claims that you were negligent when you installed your work. Finally, you should meet with your insurance agent to determine if your insurance coverage will protect your company from these types of claims in the future or if you should purchase different coverage that would provide the desired protection.

-- Gaetano P. Piccirilli, *Esquire*

THE BUSINESS PRACTICE GROUP PROVIDES ANSWERS

TAXABLE GIFTS

Q: ***A client states that she would like to pay off her children's debts, taxes, and other obligations by giving an annual gift to each child as part of an effort to reduce the size of her estate and reduce the Federal Estate Tax at her death. Would this be considered a taxable gift to the client?***

A: You can give any person, related or not, as much as $11,000 per year without any gift tax consequences. This dollar amount is known as the annual exclusion. If you are married, the amount that can be given to each person doubles to $22,000 since the person receiving the gift can receive $11,000 from each spouse. Gifts can be in the form of cash, stocks, bonds, real estate, payment of obligations, or anything else of value.

In addition, you have a one million dollar lifetime exemption, which is the amount each person can give away during his or her lifetime without having to pay gift or estate taxes. To the extent a gift exceeds $11,000, you will use up part of your lifetime exemption. By way of example, if you give one of your children $50,000 this year, you can exclude the first $11,000 under the annual exclusion, and the other $39,000 will be subtracted from you lifetime exemption, leaving a remaining lifetime exemption of $961,000. In addition, if you give away more than $11,000 in a year to an individual, you will have to file a Federal Gift Tax Return to report the gift.

Keep in mind that unless you give away your entire estate, there may still be some federal estate tax to be paid. Also, certain states impose estate and inheritance taxes. Planning the disposition of your assets under a trust or a will, in conjunction with a gifting program, will often be a better approach.

"...you have a one million dollar lifetime exemption..."

JUDGMENTS BY CONFESSION

Q: ***A judgment by confession was just entered against you, what is it and what can you do about it?***

A: The Commonwealth of Pennsylvania is one of the few states with a wide-spread practice that allows parties to a contract to voluntarily and knowingly agree that, in the event of default, a judgment may be entered against the defaulting party without litigation. For example, loan documents in Pennsylvania typically contain provisions that allow the lender to confess judgment for the full amount of the indebtedness, including accrued interest, costs and attorneys' fees, in the event the borrower defaults. Unlike a typical lawsuit, in which a plaintiff may litigate for years to obtain a judgment, the confession of judgment provisions allow a creditor to obtain a judgment immediately to shift effectively the burden to the debtor to show why the judgment was improper and should be removed. The good news is that, because of constitutional implications, a creditor must strictly follow the rules governing confessed judgments or the judgment will be stricken and the case tried in a traditional fashion.

If a judgment by confession is entered against you, you should immediately forward the document to counsel because a petition to open or strike the judgment must generally be filed within 30 days of service in order to challenge successfully the judgment. During the first 30 days, the creditor generally may not execute on the judgment. Often, when a timely petition to open or strike is filed within these 30 days and meritorious defenses are raised, the court will continue to stay execution pending the final determination on the merits. However, attempting to challenge a judgment outside the 30-day period is substantially more difficult. As such, it is imperative that you react immediately after being served with a judgment by confession.

-- Marian A. Kornilowicz, *Esquire*

New Penalties for Fax Violations

As of July 1, 2005, the Telephone Consumer Protection Act ("TCPA") will allow the recipient of an unsolicited facsimile advertisement to maintain a private cause of action against the sender. The TCPA will enable the fax recipient to recover a penalty of up to $500 per fax. In addition, the FCC may impose a fine of up to $11,000 per violation. This prohibition of faxed advertisements applies to consumer solicitations as well as business to business transmissions.

Going forward, individuals or businesses who intend to send advertisements via fax must first obtain a recipient's express written consent to receive such advertisements. These consent forms cannot be obtained via facsimile and should be maintained in a file at the sender's office.

Despite the announced effective date, some jurisdictions have already imposed penalties on businesses that have violated the TCPA.

-- John J. Graham, *Esquire*

A Note From The Editors

Welcome to the Spring 2005 Edition of ***Construction in Brief***. There have been many developments in the law recently that impact the rights and responsibilities of contractors and employers.

As such, this edition includes an explanation of a new cause of action contractors may pursue against architects and engineers. Changes in employment law that impact the way that all employers should conduct business are also discussed. Finally, this edition includes an explanation of a contractor's responsibility for injuries to people and property that may occur many years after the contractor has completed its work.

Please feel free to submit suggestions for future articles that may be of interest to you, either by regular mail or e-mail at: ***jcopley@cohenseglias.com***.

As always, if you have a specific legal concern, we recommend that you consult with counsel so that you may receive the best possible advice. See you next issue.

-- Jason A. Copley, *Esquire*
-- Janet L.Treiman, *Esquire*
Editors, *Construction In Brief*

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