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CONSTRUCTION IN BRIEF

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

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Design: High Noon Advertising

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DESIGN PROFESSIONALS EXPOSED

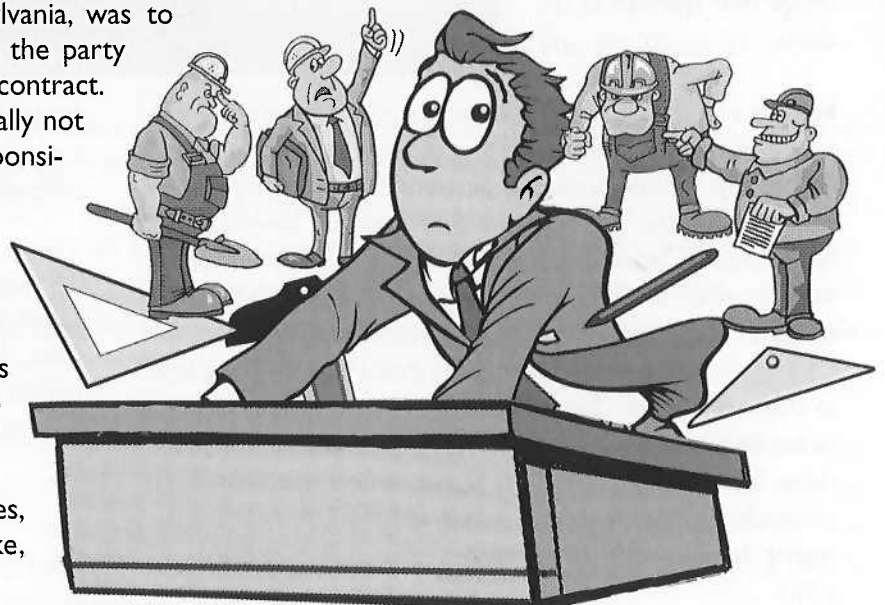
Claims Against Design Professionals Take Hold in Pennsylvania in the Form of a Cause of Action for Negligent Misrepresentation: Understanding the Bilt-Rite Case

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

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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.

