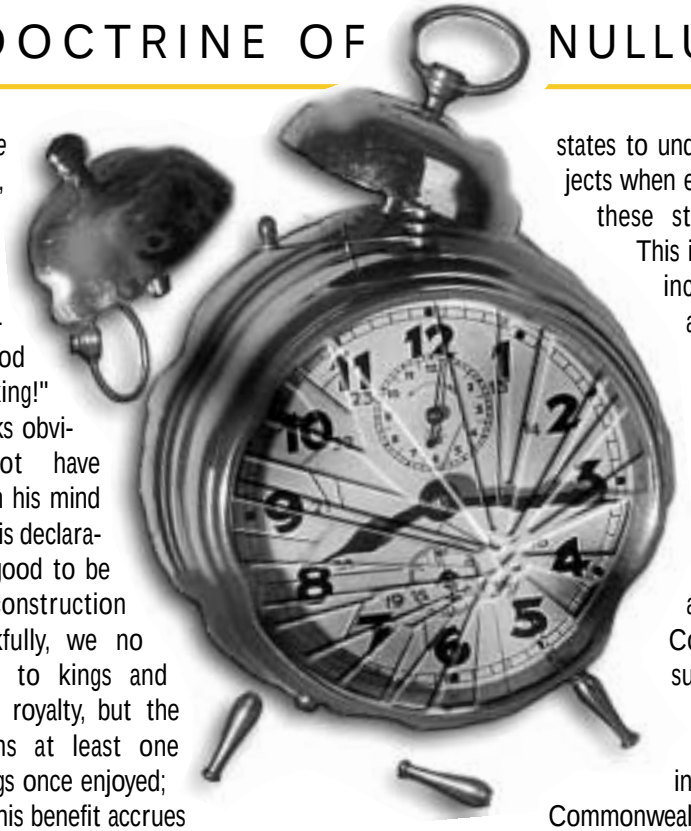
CONSTRUCTION IN BRIEF

Vol. 3 Issue 05 Fall 2005

It's Good To Be King:

THE DOCTRINE OF NULLUM TEMPUS



In *History of the World, Part I*, Mel Brooks repeatedly delivers his famous proclamation, "It's good to be king!" Although Brooks obviously did not have construction on his mind when making this declaration, it is also good to be king in the construction world. Thankfully, we no longer answer to kings and other assorted royalty, but the law still retains at least one benefit that kings once enjoyed; now, however, this benefit accrues to the state. This benefit is in the form of an extended statute of limitations for actions that arise from certain public functions like building schools.

The Latin phrase *nullum tempus occurrit regi*, otherwise known as ***Nullum Tempus***, translates to "time does not run against the king," and it stands for the general legal principle that statutes of limitation may not be applicable to states and state government entities. Under the maxim of *Nullum Tempus*, the passage of time that bars other plaintiffs from bringing suit may not bar the claims of states and other public entities.

The courts of Pennsylvania, New Jersey and Delaware each view *Nullum Tempus* differently, so it is important for contractors doing business in these states to understand the details of projects when entering into contracts with these states and public entities. This is important because it may increase a company's risk and potential liability on a project.

In Pennsylvania, the doctrine of *Nullum Tempus* regularly defeats a defendant's statute of limitations defense against claims of the Commonwealth and its subdivisions. However, Pennsylvania courts do not apply *Nullum Tempus* in all situations. While the Commonwealth itself is always entitled to invoke *Nullum Tempus*, municipalities, counties and other political subdivisions, such as school districts, will only benefit from the doctrine where the cause of action arises out of a governmental activity and the lawsuit is brought for the purpose of enforcing a duty imposed by law.

For instance, Pennsylvania law requires school districts to provide certain athletic facilities for its students. If a school district initiates a lawsuit against a contractor for breach of contract in building the legally-mandated athletic facility, the contractor cannot invoke a statute of limitations defense even if the school district files its claim five years after the project is completed. (The statute of limitations in Pennsylvania is four years for breach of contract).

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CONSTRUCTION IN BRIEF

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How A Flurry of New State Legislation Can Impact Your Business

Harkness Reversed: Non-Attorneys May Again Represent Employers At Unemployment Compensation Hearings

In the Spring Edition of Construction in Brief, we reported that the Commonwealth Court of Pennsylvania had ruled in *Harkness* v. UCBR that a non-attorney who is not an employee may not represent an employer at unemployment compensation hearings. The *Harkness* decision affected many of our clients who had routinely used human resources consultants or other non-attorney contractors to handle unemployment compensation matters.

On June 15, 2005, Governor Ed Rendell signed a bill into law which legislatively reversed *Harkness*. The new law specifically states that "Any party in any proceeding under the [Unemployment Compensation] Act before the department, a referee or the Board may be represented by an attorney or other representative." This means that employers may resume utilizing non-attorney contractors to handle "garden-variety" unemployment compensation matters. Nevertheless, we continue to advise our clients that unemployment compensation cases which involve former employees who have filed other claims -- such as grievances, unfair labor practice charges, or administrative complaints -- should be discussed with and/or handled by legal counsel.

New Jersey's Minimum Wage

Most states, including Pennsylvania and New Jersey, currently have minimum wage rates equal to the federal rate of $5.15. This spring, Acting Governor for the State of New Jersey Richard Codey signed a bill raising the minimum wage rate to $6.15 on October 1, 2005, and $7.15 on October 1, 2006. This new law will directly affect over 200,000 New Jersey workers.

To view the minimum wage rates for all 50 states, visit http://www.dol.gov/esa/minwage/america.htm

New Pennsylvania Law Protects Employers Providing Good Faith Job References

How does your company handle job reference requests? If you are like many of our clients, you have reluctantly succumbed to the fear of being slapped with a defamation lawsuit, and have adopted a "name, rank and serial number" approach. At the same time, you have likely experienced more than a bit of frustration when attempting to obtain relevant, performance-related information from an applicant's former employer.

On June 15, 2005, Governor Rendell signed a bill into law which may -- to only a limited degree -- help facilitate the flow of helpful job reference information. The new law effectively raises the bar for former employees who seek to initiate litigation on the basis of a negative job reference. Under the new law, employers who respond to job reference requests are presumed to have acted in good faith, and are presumed to enjoy immunity from liability.

The immunity afforded to employers under the new law, however. is not absolute. Indeed, although the new law makes it more difficult for a former employee to sue because of a negative job reference, it does not

altogether foreclose that possibility. For example, an employee may be entitled to damages if she can establish that her former employer disclosed information that was false, materially misleading, or protected by contract, common law or statutory right.

As was the case before Governor Rendell signed the new law, we shall continue to advise our clients that providing truthful, performance-related references carries some risk. We suspect that most of our clients will continue to follow the safest road and provide only minimal and relatively unhelpful information when responding to job reference requests. As such, businesses in Pennsylvania will continue to experience frustration when seeking job references.

-- Jonathan Landesman, *Esquire*

MULTI-PRIME CONTRACT PROJECTS:

WHAT SHOULD YOU DO WHEN THE WORK IS NOT PROPERLY COORDINATED?

Everyone has worked on a project where it seems like nobody is in charge and you are left wondering how much time and money is being lost. This scenario is far too common, particularly on multiple prime public projects where it is not always clear who is supposed to coordinate the work, or what you should do if the responsible party fails to coordinate properly the work. The big concern for contractors is that any failure in coordination will cause delays, inefficiencies and ultimately may result in expensive litigation.

Generally, the owner is responsible for coordination because the owner retains the duty and power to invoke contractual rights and remedies needed to compel coordination among the various prime contractors. Prime contractors expect the owner to exercise "supervisory authority" and to enforce cooperation among the other primes. In fact, New Jersey courts have recognized that the owner impliedly assumes a duty to coordinate the work of prime contractors to prevent unreasonable delays on a project. This is known as the "implied duty to coordinate." Based upon this principle, courts have held owners liable for breach of contract for failure to coordinate. An owner has the ability, however, to delegate this implied duty.

Public owners frequently engage a construction manager to coordinate the construction efforts on a project. Even where there is a construction manager on the project, the expectation still remains that the owner will use its contractual power to compel cooperation among primes. If that ability to invoke contractual rights is delegated to a construction manager, then it is logical to assume that the construction manager has the responsibility to coordinate on behalf of the owner. The construction manager in that instance is the agent of the owner.

To discern who has the responsibility to coordinate a project, you must look at whether the owner retained or delegated "control." You must review the terms of the agreement between the owner and construction manager, as well as your the general conditions. You must also consider whether any other party aside from the owner is given the ability to compel the performance of work or invoke the contractual rights of the owner. Telltale signs of delegation are often found in the general conditions which may provide that a construction manager has the right to cause payments to be withheld, or default prime contractors.

In addition to the proper execution of work, prime contractors are also expected to help coordinate the work. Generally, coordination among primes must take place in the field and include communicating about the progression of work and working with other primes to maintain the schedule.

The failure of a prime contractor to coordinate or perform its work according to the contract is a breach of its obligations to the owner, and potentially other primes. While it is apparent that prime contractors cannot control the work of any other prime contractor, in some construction contracts, an intended third-party beneficiary relationship among prime contractors is created. In the multi-prime setting, an intended third party beneficiary relationship would allow one prime contractor to sue another prime contractor, based upon that prime contractor's interference with the work.

For example, if a masonry contractor does not maintain a sufficient work force to complete certain block, he may delay the foundation contractor because it cannot backfill or pour its slabs. In addition, the plumbing contractor cannot place underground sewers as a result of the masonry con-

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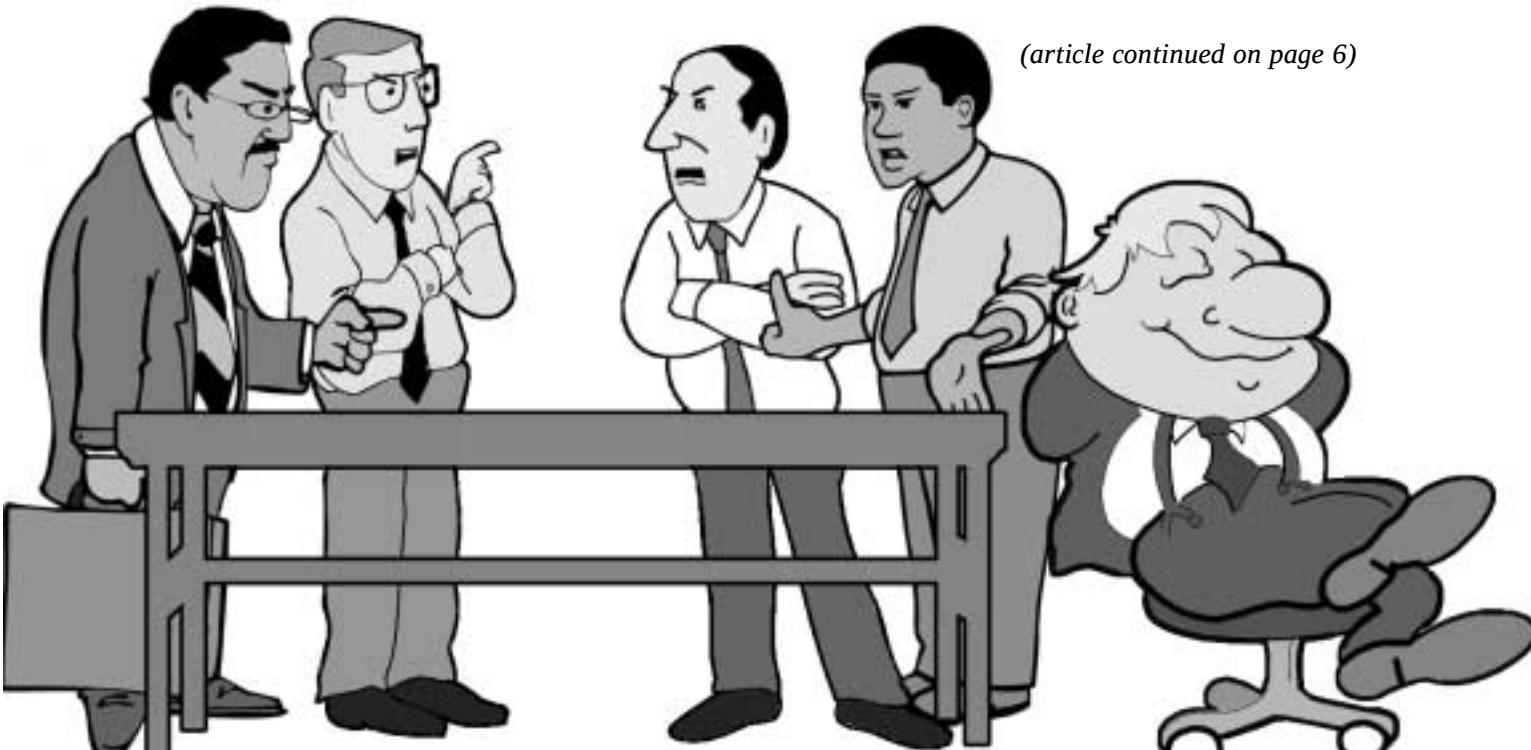

COVER FEATURE STORY
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THE DOCTRINE OF NULLUM TEMPUS

On the other hand, Pennsylvania statutes simply permit school districts to establish libraries for public use. Unlike the provision for athletic facilities, the establishment of public libraries is not mandatory. Therefore, in building a public library, a school district is not satisfying a duty imposed by law and will not benefit from *Nullum Tempus* when bringing suit related to any such construction.

New Jersey has a statute that makes any civil action commenced by New Jersey or any state subdivision subject to a ten-year statute of limitations. As such, the doctrine of *Nullum Tempus* is effectively abolished in New Jersey and replaced with an extended statute of limitations.

Delaware courts look to the legislature to set statutes of limitation for claims brought by the state and state entities. Generally, in Delaware, where the state or a state subdivision brings suit in a governmental capacity, it is not subject to the statute of limitations that would otherwise apply to private parties unless a statute of limitations is imposed upon the state by Delaware's General Assembly.

After adding the term *Nullum Tempus* to his or her vocabulary, a contractor should keep it in mind when entering into contracts with a state or a state entity. It is especially important for contractors in Pennsylvania to be aware of the basis for the project. If the contract is with the Commonwealth, *Nullum Tempus* applies. If it is with a state entity, the contractor must ask, "is the entity required by law to build this project?"

In addition to the increased exposure for their own work, contractors on public projects face increased exposure for breaches of contractual obligations of their subcontractors. This increased exposure results because a contractor contracting directly with a public entity may be out of time to bring a claim against a subcontractor by the time the state initiates a civil action. These contractors, therefore, should carefully review and consider the document retention policies for such projects, the subcontractors they hire, and the length of the obligations owed by the subcontractors.

-- John J. Graham, *Esquire*

WHAT'S NEW

HONORS & ACHIEVEMENTS

Since our last publication, eight of our attorneys have been recognized for excellence in their respective practice areas. All eight have been named "Super Lawyers" by *Philadelphia* Magazine and *New Jersey Monthly* Magazine, where their names appeared in the June 2005 Law & Politics Edition. **Roy S. Cohen, Edward Seglias, George E. Pallas** and **John A. Greenhall** were identified for the second year in a row as "Super Lawyers" in the area of construction litigation. **Marc Furman** was also identified for the second year in a row in the area of labor and employment. The Firm's other recipients included **Marian Kornilowicz, Jason A. Copley**, for construction litigation, and **J. Kenneth Harris**. Congratulations to all!

George E. Pallas was also recently recognized as one of South Jersey's "Top Attorneys" in the area of construction litigation by *SJ Magazine*. In determining who should receive the distinction of "Top Attorney," *SJ Magazine* polled attorneys in South Jersey to find out who they would recommend to a client or prospective client if they were unable to handle that client's case. The top three in each specialty area were named "Top Attorneys."

Jason A. Copley, was recently appointed to serve as Construction Counsel for the Architectural Glass & Metal Association. AGMA is a national organization whose members include glazing contractors, metal fabricators and window suppliers and installers. Jason has been a member of the organization for the last four years.

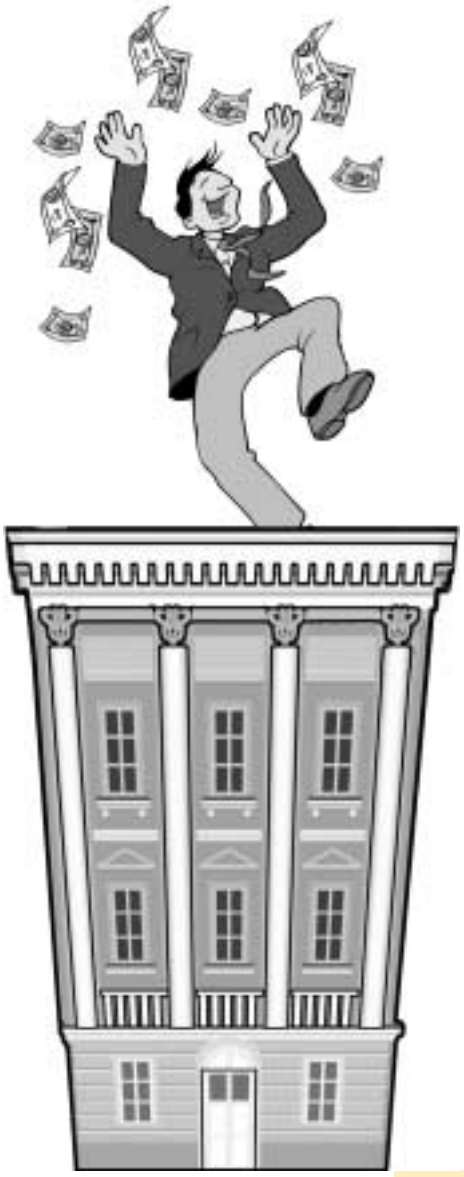
WELCOME NEW ATTORNEYS

Cohen Seglias is happy to announce the addition of six new attorneys: **Ashling Lyons, Robert Ruggieri, Russell Ventura,** and **Stephanie Wisdow** have joined our Construction Litigation Group in Philadelphia; **Douglas Pearson** has joined our Construction Litigation Group in Pittsburgh; and **Wayne Buckwalter** has joined our Business Practice Group in Philadelphia. We warmly welcome all new attorneys to the firm!

-- Edward T. DeLisle, *Esquire*

The Business Practice Group Provides Answers

Historical Easements



Q: ***A client who lives in the historical district inquires about historical easements and potential tax benefits.***

A: A historical easement or a facade easement is a grant or transfer by a property owner of certain rights the owner has in the building and/or land. Typically, the recipient is a not-for-profit organization. The purpose of such an easement is to preserve the exterior appearance of a historical building (or, in the case of a conservation easement, to preserve open land or wildlife habitat). In essence, the owner transfers to the not-for-profit certain development rights to all or a portion of the building or land. Through the grant of easement, these development rights are conveyed (or lost) in perpetuity regardless of any subsequent changes in ownership, property zoning, or economic conditions. However, the building is also protected in perpetuity regardless of any subsequent changes in ownership, property zoning or economic conditions.

As an additional benefit, if the property is located in a designated historical district or is listed in the National Register of Historic Places, the grant of easement to a not-for-profit may be treated as a charitable contribution to the owner's tax returns. Generally speaking, the value of the easement or gift is the diminution of the property's economic value because of the easement, i.e., the difference in the value of the property without the easement and its diminished value because of the easement. This amount may be considered a charitable contribution for tax purposes and, traditionally, this deduction has been between 10% and 15% of the property's value. However, given the cost of documentation, legal fees, the appraisal, and fee to the not-for-profit, a historical easement is generally not economically viable unless the value of the property exceeds $1 million.

Tax Laws In Municipalities

Q: ***Can a contractor be responsible to pay taxes to a municipality in Pennsylvania based on gross receipts for jobs done in the municipality?***

A: Municipalities in Pennsylvania are increasingly passing laws taxing businesses, including contractors, that do business within their limits. These taxes are usually based upon the gross receipts of the work done within the limits of the municipality and can be as much as 3.5% of the gross receipts. "Doing work within" a municipality may include even a single act. As a result, a contractor that builds only one project in a given municipality may be taxed for that single project.

It is important for general contractors and subcontractors alike to review the applicable code of a given municipality before beginning to work there because some municipalities have methods by which the responsibility for payment of the tax can be shifted from the general contractor to the subcontractor.

All general contractors and subcontractors should review the municipal codes where they are doing business to make sure they are aware of this potential additional tax expense and, if possible, address it in their contracts.

-- Marian A. Kornilowicz, *Esquire*

A Note From The Editors

Please look for a formal announcement of our upcoming move of the Philadelphia Office to

United Plaza
30 South 17th Street

We welcome anyone 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 advice. See you next issue!

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

MULTIPLE PRIME CONTRACTORS:

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tractor's lack of manpower. In turn, a mason may be liable to the owner, the foundation contractor and the plumbing contactor for delays and inefficiencies based upon its breach of contract to the owner.

Good documentation of the efforts to handle coordination will go a long way to avoid litigation in a situation where the duty to coordinate is in question. In the event that litigation is necessary, good documentation will provide support for a claim against either the other prime contractor or the owner. For these reasons, daily field reports submitted to the construction manager and other project correspondence should identify delays, the cause of the delays and the party(s) responsible for causing the delay. Aside from daily field reports, project manger and supervisor letters concerning these issues are helpful to paint a picture of what actually occurred on a project. The owner or construction manager must be put on notice that coordination is lacking so they have the opportunity to correct the problem. On multiple prime projects, make sure that coordination problems are dealt with early, so that you have the best opportunity for a successful project.

-- Gaetano Piccirilli, *Esquire*

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

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