2014 | VOLUME 2

Construction In Brief

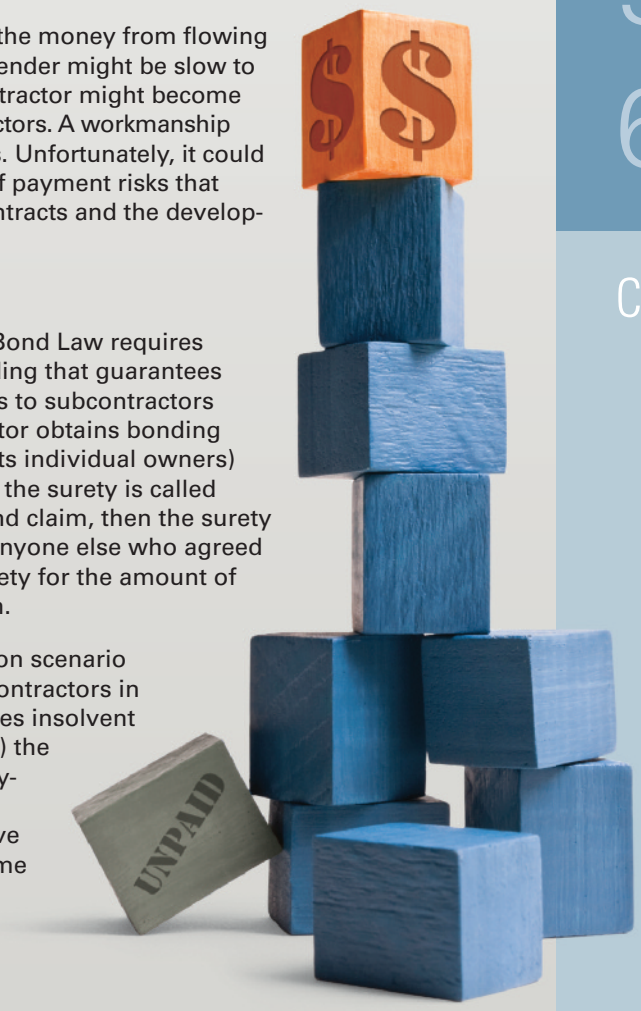
A quarterly publication brought to you by COHEN SEGLIAS PALLAS GREENHALL & FURMAN PC

Supreme Court of PA Affects Landscape for Bonded Projects: Just How Safe is the Safe Harbor Provision?

By Jason A. Copley and Daniel E. Fierstein

Ask most subcontractors and suppliers their biggest concern on a project and they will probably tell you it is (not surprisingly) getting paid. The concern is a valid one. Standing in the way of a material supplier's payment, for instance, could be several tiers of contract payments from the owner to the general contractor to the subcontractor and all the way down to the material suppliers.

The stumbling blocks that could prevent the money from flowing down the contractual chain are many. A lender might be slow to release project funds to the owner. A contractor might become insolvent and unable to pay its subcontractors. A workmanship issue might hold up the payment process. Unfortunately, it could be just about anything. It is these kinds of payment risks that shape the negotiation of construction contracts and the development of laws that deal with these risks.



Pennsylvania Bond Law

For public projects in Pennsylvania, the Bond Law requires general contractors (GCs) to obtain bonding that guarantees the performance of the GC and payments to subcontractors and suppliers. Normally, when a contractor obtains bonding from a surety, the contractor (and often its individual owners) indemnifies the surety. In other words, if the surety is called upon to pay off a supplier's payment bond claim, then the surety may later call upon the contractor (and anyone else who agreed to indemnify the surety) to repay the surety for the amount of payment made to resolve the bond claim.

So what happens in the not-so-uncommon scenario in which (1) the GC pays each of its subcontractors in full, (2) one of the subcontractors becomes insolvent and fails to pay its supplier in full, and (3) the supplier files a claim against the GC's payment bond? If the surety pays that claim and then pursues the GC, the GC will have been called upon to pay twice for the same work. To some, particularly GCs, this fate probably seems unfair.

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Contributors:

What's New

Brief Note:

Summer is here and along with it sunscreen, beaches, and BBQs! With more new faces at the Firm, four summer associates, new volunteer opportunities, and an exciting office move—we've got lots of news to share. Enjoy the 2014 Second Edition of Construction in Brief!

Ashling
Co-Editor-in-Chief

Kate
Co-Editor-in-Chief

Jennifer
Associate Editor

By Kerstin Isaacs

New Faces

Welcome to new Associates **Jason Lawrence** and **Justin Williams**! Jason is part of the Firm's Construction Practice Group and a graduate of the University of Chicago School of Law and a proud summa cum laude graduate of the University of Pittsburgh. Jason joins the Pittsburgh team led by partner Lisa Wampler.

Justin Williams has joined the Firm's Federal Contracting Group in Philadelphia. Justin is a magna cum laude graduate of Cornell Law School, and Penn State University.

The Firm is delighted to welcome our four summer associates: **Kayleen Egan**, **Gary Repke**, **Jacqueline Ryan**, and **Katherine Tohanczyn**.

We're proud to announce our support for Habitat for Humanity

Cohen Seglias shares Habitat's commitment to eliminate poverty housing through building safe, sustainable, and affordable homes in partnership with low income families. This year, the Firm is donating $10,000 as well as two volunteer build days when Cohen Seglias attorneys, staff, and clients work together to help families achieve the dream of homeownership. The Firm is also participating in Habitat's ReStore program, which accepts useful furniture and office equipment donation. We are excited about our volunteer efforts and we are looking forward to helping Habitat for Humanity Build-to-Succeed throughout the year. If you are interested in supporting our efforts, please consider donating construction materials or gently used furniture and appliances to ReStore.

Awards

Chambers® has ranked Cohen Seglias and Roy Cohen as 2014 Leaders in the Field of Construction. Marc Furman was also recognized by ***Chambers***® as a Leader in the Field of Labor & Employment again for 2014.

Chambers & Partners have been publishing their guides to the legal profession since 1990, providing independent rankings and editorial commentary. The guides are designed to reflect market opinion, ranking lawyers, law firms and practice areas based on significant independent research and reputation among peers and clients. They are not paid listings.

We're Growing—So We Moved Our Pittsburgh Office

On March 31, 2014, we moved into our new larger Pittsburgh space at 525 William Penn Place—prized for its central location and beautiful views. Our new modern office space consists of 10 offices, two conference rooms, and 6,340 square feet of space. We are excited to be renewing our commitment to Pittsburgh!

Out and About

John Greenhall, **Lisa Wampler**, and **Lori Wisniewski Azzara** were photographed at the Master Builders' Association of Western PA Evening of Excellence!

For questions, please contact Kerstin Isaacs at kisaacs@cohenseglias.com or (215) 564-1700.

Supreme Court of PA Affects Landscape for Bonded Projects

Continued from Page 1…

By Jason A. Copley and Daniel E. Fierstein

In Pennsylvania, the legislature passed a provision of the Procurement Code that protects GCs and sureties from this fate. It is commonly referred to as the "Safe Harbor Provision," and it reads as follows:

> Once a contractor has made payment to the subcontractor according to the provisions of this subchapter, future claims for payment against the contractor or the contractor's surety by parties owed payment from the subcontractor which has been paid shall be barred.

The Safe Harbor Provision is a classic example of how legislators try to balance the risk of nonpayment on public construction projects. On the one hand, the Bond Law provides protection to subcontractors and suppliers by requiring a payment bond to be in place. On the other hand, the Procurement Code's Safe Harbor Provision provides protection to sureties and GCs when the GC has paid its subcontractor in full. These two statutory provisions and the conflicting interests they seek to protect were front and center in the recent case of *Berks Products Corp. v. Arch Insurance Co.* (*Berks*).

Berks

In *Berks*, Arch Insurance Co. (Arch) issued a payment bond for the GC on a public school project for the Wilson Area School District (the Project). The payment bond included the following language that ultimately determined the outcome of the case:

> [T]he terms and conditions of this Bond are and shall be that if the [GC] and any subcontractor of the [GC] to whom any portion of the work under the Agreement shall be subcontracted, and if all assignees of the [GC] and of any such subcontractor, promptly shall pay or shall cause to be paid, in full, all money which may be due any claimant supplying labor or materials in the protection and performance of the work in accordance with the Agreement and in accordance with the Contract Documents…for material furnished or labor supplies or labor performed, then this Bond shall be void; otherwise, the Bond shall be and shall remain in force and effect.

In much simpler terms, this language says that the payment bond will no longer remain in effect if the GC and its subcontractor have paid all monies due and owing under their respective contracts/subcontracts.

The Safe Harbor Provision says something altogether different. The Safe Harbor Provision says that a payment bond claim will not be permitted if the GC has paid its subcontractor in full (regardless of whether the subcontractor paid its suppliers). In *Berks*, the Commonwealth Court of Pennsylvania compared the language in the bond with the language in the Safe Harbor Provision and decided (1) the language in the bond was inconsistent with the Safe Harbor Provision and (2) the language in the bond waived the language in the Safe Harbor Provision. In other words, the Safe Harbor Provision did not protect Arch because the specific language of this payment bond said that payment was required by GC and the subcontractor for Arch to escape a payment bond claim from the supplier.

Life after *Berks*

Now that the Supreme Court has decided not to take Arch's appeal, the *Berks'* decision will likely receive mixed reviews throughout the industry that include groans from sureties and cheers from lower-tier subcontractors/suppliers.

Although we expect sureties doing business in Pennsylvania will re-examine and revise the language in their payment bonds to make sure it does not resemble the payment bond at issue in *Berks*, there are likely similarly-worded payment bonds in effect for ongoing construction projects that cannot be modified and through which sureties could have the type of exposure Arch had in *Berks*. Also, if *Berks* creates a perception that the Safe Harbor Provision is under attack, it could increase the cost to provide bonding, which may be passed on to owners.

In addition to the effect *Berks* will have on sureties, it is also likely to affect GCs, subcontractors, and suppliers. We expect suppliers will use *Berks* as authority to support future bond claims where the GC has paid its subcontractor in full but the subcontractor had not passed down payment. We expect GCs will become more vigilant in confirming that payments make their way down the contractual chain by way of verifications, releases, joint check agreements, and/or bonding requirements for their subcontractors.

Life after *Berks* will be complicated and interesting, and we will continue to report how it affects each tier of the construction industry.

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The Importance of Reviewing Bond and Contract Language on Public Projects

By Lisa A. Wampler and Jason R. Lawrence

Prime, or general, contractors working on public projects in the Commonwealth of Pennsylvania, whether state or federal, are required to post performance and payment bonds. Such bonds protect the owner against liens placed by subcontractors for nonpayment and ensure the performance of the prime contractor. Most importantly for subcontractors, the bonds provide an alternative source of payment if they are not paid.

However, the existence of a payment bond on public projects does not guarantee payment for subcontractors. One significant obstacle to a subcontractor making a claim on a bond on a public project is a valid and enforceable "pay if paid" clause in its contract with the upper-tier contractor. While such clauses have been less of an obstacle to a subcontractor's recovery on payment bonds at the federal level than at the state level, it is important to review both the subcontract language and bond language on any public project before entering into a contract.

Federal projects

The Miller Act requires general contractors, entering into a contract of $100,000 or more with the federal government, to post payment and performance bonds. Federal courts, to date, have treated subcontractors' payment bond claims on bonds issued under the "Miller Act" favorably, even if the subcontract contained a "pay if paid" clause. However, in issuing decisions supporting the subcontractor's ability to make a payment bond claim, federal courts have cautioned that explicit language requiring the subcontractor to waive its rights under the Miller Act, if contained in the subcontract and the bond, could allow the surety to assert the contractor's "pay if paid" clause as a valid defense. Thus, it is important to thoroughly review the subcontract and bond prior to entering into the contract to determine if the contract language requires a subcontractor to waive protections otherwise available under the Miller Act.

> Payment bonds are undoubtedly an important protection for subcontractors providing labor and materials on public projects.

State projects

State courts (and federal courts applying state law in cases where the federal court has diversity jurisdiction) have not consistently favored subcontractors' bond claims on public projects and have allowed sureties to assert "pay if paid" clauses as a defense to paying on the payment bond. Thus, it is important for subcontractors, before entering into the subcontract, to consider things like:

- Whether the subcontract has a "pay if paid" clause and whether that state will enforce such a clause;
- If courts in that state have considered whether sureties may assert a valid "pay if paid" clause as a defense to a bond claim on a public project; and
- Any known history of the owner and/or prime contractor in making full and timely payments and the associated risks and costs of non-payment.

Payment bonds are undoubtedly an important protection for subcontractors providing labor and materials on public projects. However, they are not a guaranteed source of protection. Working with legal professionals to review your contract documents and applicable law before entering into subcontracts on public projects can allow you to assess the risks of nonpayment before committing to a project.

Lisa is a partner with the Firm, and Jason is an associate, both practicing in the Construction Practice Group. They can be reached at 412.434.5530, or lwampler@cohenseglias.com or jlawrence@cohenseglias.com.

Can They Sue Me for That?

Marc Furman, Cohen Seglias
Chair of the Labor & Employment Practice Group

The employment landscape can be hard to navigate without the right toolset. Attorneys in our Labor & Employment group are constantly being asked, "Can my employee sue me for…?" Asking the question after an employee files a claim is too late. A preventative approach is the best way to defend your company against lawsuits. In this quiz we cover three issues that frequently surprise businesses.

Social Media Dangers

After an employee had a particularly bad day at work and was disciplined by his supervisor for poor work performance, the employee goes home and posts on his Facebook page:

"The administrative assistants have BANDED TOGETHER — one and all agree that the management of ACME CORP are a bunch of PENNY PINCHING JERKS WHO NEVER GIVE RAISES AND KEEP THE FRUITS OF OUR HARD WORK!"

After discovery of the Facebook posting, the employee is terminated the next day.

Can my employee sue me for that?

Bullying in the Workplace

A female minority employee works as an administrative assistant for an especially valued and effective executive. The executive is notoriously difficult to work for because of his mood swings, coarse language, verbal abuse and intimidating conduct. After one too many instances of suffering the brunt of the executive's wrath, the female minority employee quits her job, files for unemployment compensation benefits, and sues for harassment and a hostile work environment.

Can my employee sue me for that?

Unintended Employment Agreement

A construction management firm routinely engages individuals to work for its clients' long-term projects. The company hires a consultant and provides an Offer Letter regarding the terms and conditions of the position. The consultant works for four months and the underlying project is discontinued for an indefinite time as a result of unforeseen zoning and utility issues that the company's client encounters. The consultant sues the company for breach of contract and claims that they owe him his full salary and benefits for 3 years, contending that his Offer Letter was an Employment Contract for a term.

Can my consultant sue me for that?

Answers on Page 7…

Q&A with Jennifer Horn

Jennifer is a trial attorney who focuses her practice in the areas of construction, commercial litigation, and real estate. She has spearheaded numerous successes in multiple state and federal jurisdictions. Jennifer also serves as Managing Editor of the Firm's construction blog.

Q: What was your reaction to being promoted to Partner at Cohen Seglias?

A: Achieving partner is an important benchmark for any attorney. For me, it signifies the achievement at a professional level that has always been a personal goal and it is an appreciated recognition from my peers. It is an exciting time and, as a Partner, I look forward to being part of the continued growth and success of Cohen Seglias.

Q: You have appeared in various appellate and trial courts in construction matters throughout the Mid-Atlantic region. How does construction law practice differ from state to state?

A: As a licensed practitioner in Pennsylvania, New Jersey, the District of Columbia, and Maryland, I have had the good fortune to be exposed to many different judicial styles and practices. Although similarities are evident, I am amazed at the distinct differences in construction laws and applicable statutes apparent in even neighboring states. The procedures for defending against and bringing mechanic's lien claims, for example, vary greatly. Also, the force and effect of certain states' payment act statutes differ. Most importantly, the exposure to different jurisdictions has given me a unique perspective and wealth of information to draw upon when drafting construction contracts.

Q: Not only do you spend a lot of time working for your clients, you are also very active in the regional construction community. What have you learned about spending the extra time, actively reaching out, networking, and volunteering with so many different construction organizations?

A: Certainly, networking events are an excellent way to introduce Cohen Seglias to prospective clients. Active participation in the construction industry, through networking or volunteering, has been the best way for me to understand what really matters to our clients. As counselors, we need to know what is affecting our clients today, and what challenges they may face in the future. Construction technologies and techniques change constantly and rapidly from factors such as environmental legislation, material availability and advancements in building science. Events and volunteerism provide candid opportunities to hear first-hand from contractors and construction professionals about the ever-changing aspects of the construction industry and how they are dealing with their projects and the constraints of the construction industry. This insight is invaluable to my understanding of our clients' needs and my industry knowledge. Effectively managing changes in the construction industry is increasingly important to our clients' success. Of course, networking events are not always business — many times I just enjoy connecting with clients and good conversation.

Jennifer is a Partner in the Construction Practice Group. She can be reached at (215) 564-1700 and jhorn@cohenseglias.com.

Negative Online Reviews—
Free Speech or Defamation?

By Jennifer M. Horn and Wendy R. Bennett

Business review websites such as Angie's List or Yelp are increasingly a venue for anonymous posters to wreak havoc on the reputations of contractors and other businesses with negative and often defamatory reviews. Although these venues seem safe and anonymous, Internet posters should be aware of the sometimes harsh legal consequences of their reviews. If posts are untrue, a contractor or business that finds itself the target of online reviews may be able to successfully sue the poster for defamation. However, because the laws governing defamation actions vary from jurisdiction to jurisdiction, you should consult an attorney to identify the avenues of redress available should you discover that your company is a target of a potentially defamatory online review.

Defamation is generally defined as false statements of fact; whereas, comments that are clearly and solely composed of opinions are not considered defamatory and are generally constitutionally protected. In most cases, a claim for defamation arises when an individual intentionally publishes a false statement resulting in some harm to the subject of the statement.

Statutes, court procedures and case law protecting both anonymous online posters, as well as the targets of their defamatory posts, vary widely from state to state and, given the ubiquitous nature of the Internet, comments posted by an individual in one location may give rise to a legal action elsewhere. New Jersey, Pennsylvania, Maryland, Delaware and Virginia have adopted laws defining procedures that parties must follow to subpoena identifying information about anonymous Internet posters. Although these procedures vary from state to state, generally these laws require a party seeking a poster's information to provide advance notice that the poster's identification is being sought and confirm that: (a) there is a good faith basis for requesting the identification — sometimes requiring identification of the statement(s) that are allegedly defamatory; (b) the information is necessary to advance the defamation or similar case; (c) other reasonable efforts have been taken to identify the poster; and (d) the individual or entity to whom the subpoena is directed is likely to have access to the information requested.

The laws also require the recipient of the subpoena to provide advance notice to the anonymous poster whose identity is being sought so that the anonymous individual may object to disclosure of the information. Some states require that a party support the request with sufficient facts to demonstrate that the defamation action is likely to succeed on its merits. Finally, in some states, courts are required to balance the anonymous poster's constitutional right to anonymous speech with the party's right to seek redress from the poster for damages stemming from defamatory remarks. Therefore, while courts have endeavored to generally protect anonymous Internet posters' first amendment rights, in the case of clearly defamatory comments, the hurdles to unmask the anonymous poster can be overcome.

In the case of *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, the Commonwealth of Virginia recognized the right of a party who has brought a defamation suit to ascertain the identity of an anonymous online poster and has specifically enacted legislation to govern the process of obtaining such information. Hadeed filed a defamation lawsuit against the authors of critical posts against the company, naming the defendants in the lawsuit "John Does" because the posters' true identities could not be determined by their Yelp usernames. During the course of that lawsuit, Hadeed served a subpoena upon the popular business review website, Yelp, requesting the identity of the "John Doe" defendants (i.e.: the posters of negative comments about the company). Yelp objected to the subpoena and refused to provide the posters' identifying information to Hadeed for use in its defamation case. Accordingly, Hadeed asked the court to issue an order enforcing the subpoena. Yelp still refused to comply with the subpoena; so, the court held Yelp in contempt of court and assessed monetary sanctions against Yelp for its refusal to provide the subpoenaed information. Yelp subsequently appealed the court's order, contempt charge and sanctions arguing that the first amendment protected the website's users' anonymity and anonymous speech. However, the Virginia Court of Appeals upheld the lower court's decision and determined that the freedom to speak with anonymity is not absolute, that defamatory speech is not constitutionally protected and subsequently ordered Yelp to produce the identity of the anonymous posters.

Subsequently, in *Dietz Development, LLC v. Perez*, a Virginia homeowner posted defamatory statements about a residential

contractor on the popular business-rating website — Angie's List. The contractor responded to the post with similarly defamatory comments about the homeowner and filed a defamation suit claiming $750,000 in lost reputation and business contracts. After a year of litigation in a Virginia Circuit court and a week-long trial, a jury determined that both the homeowner and contractor had both defamed each other; accordingly, neither side was awarded any money.

As more of these types of cases go to trial, awards of monetary damages for anonymous defamatory online posts are inevitable. Moreover, based upon the logic and developing case law upon which the Virginia courts have based their decisions, subpoenas such as those in the Yelp and Dietz cases may very well be upheld in neighboring states.

Accordingly, contractors should be cautious when posting reviews of a client or competitors, or responding negatively to a review initially directed at them. While reviews that are opinion based are not necessarily actionable, those containing untruthful allegations may be subject to a defamation claim.

Should you find that you or your company has been the target of anonymous and potentially defamatory remarks, resist the urge to strike back and, instead, engage an attorney who can: (1) carefully review, document and preserve the negative reviews as evidence; (2) negotiate with website providers to remove the post(s) and aid in identifying the anonymous online poster. Moreover, you should instruct your employees not to post negative reviews of clients or competitors, or respond to negative reviews, such that the posts may be construed to represent your company's position. Finally, before pursuing a defamation claim, you should consider and weigh the effect of the negative review on your business versus any potential negative publicity associated with pursuing a previous client or competitor in court.

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Can They Sue Me for That? THE ANSWERS

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Social Media Dangers

Answer: Yes

In his Facebook entry, he has said the "magic words" to wrap himself in the protection of Section 7 rights under the National Labor Relations Act ("NLRA"). Specifically, the employee claims that his termination was unlawful and in violation of the NLRA because he engaged in "protected concerted activity" for the "mutual aid and protection" of himself and his co-workers. Of course, an NLRB unfair labor practice charge investigation will disclose whether the employee truly "banded together" with other employees or whether he was complaining about his own perceived mistreatment.

Bullying in the Workplace

Answer: Maybe

There is no law to protect employees against "Bullying in the Workplace." Title VII (of the Civil Rights Act of 1964) prohibits discrimination and harassment based on protected classifications, e.g., race, sex, color, national origin. However — Title VII does not create a "code of civility" for the workplace. There is no "protected classification" that safeguards employees against being victims of "general" bullying in the workplace. The female, minority employee could state a case for harassment only if she claimed it was on the basis of sex or race. She cannot sue only on the basis that her boss is a bully. Of course, she might still be eligible for unemployment compensation if the unemployment compensation office believes that she quit her job for a cause of a "necessitous and compelling reason."

Unintended Employment Agreement

Answer: It depends

If the Company provides a confusing Offer Letter, the letter can be construed to have formed an Employment Agreement for a specific term. The language of the Offer Letter will be construed against the company if the company drafted it. If the company failed to follow the law, a poorly drafted Offer Letter may be construed to have formed an Employment Agreement. The best course of action is to always include explicit disclaimer language such as "an Employment Contract is not being formed" and "the Employee is employed At-Will." Even better yet, don't play lawyer. Have your Offer Letter reviewed by experienced counsel.

Employment and labor law cases have almost doubled since 1990. Be prepared with the appropriate workplace documents and handbooks. Your business' best offense to liability is a good defense.

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Cohen Seglias Pallas Greenhall & Furman PC has deep roots in the Mid-Atlantic region and a long-standing reputation for putting the interests and needs of our clients first. The Firm advises and counsels businesses and individuals in a broad range of legal services.

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