Spring 2020

Breaking Ground Women in Construction

A publication of Benesch Friedlander Coplan & Aronoff LLP's Construction Group

Benesch's Construction Law Webinar Series

In this issue:

Benesch's Construction Law Practice prides itself on being the construction law group that educates the industry. We present nearly 100 seminars each year at industry conferences and meetings to our clients in their offices. Given the impact and pandemic of COVID-19, we are joining many colleges and universities in moving our educational programs online in order to best facilitate learning opportunities for members of the construction industry.

April 2 will begin our webinar series as we more comprehensively address Force Majeure clauses in relation to the current COVID-19 crisis facing our nation as a whole.

The Effects of Substance Abuse on the Construction Industry

Thursday, April 9, 2020 | 12:00 p.m. – 1:00 p.m. ET

Presented by: RICHARD D. KALSON, Partner, Benesch

CLICK HERE to register.

Gender Considerations in Construction - A Primer on Gender-Based Discrimination and Women-Owned Business Enterprise Regulations

Thursday, April 16, 2020 | 12:00 p.m. – 1:00 p.m. ET

Presented by: CHERYL DONAHUE, Associate, Benesch; MARGO WOLF O'DONNELL, Partner, Benesch
SUSAN M. WHITE, Associate, Benesch

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Benesch

Women in Construction

Benesch Breaking Ground

Welcome to Women in Construction, a platform to foster growth and connections for women across all levels of the construction industry.

In 2019, women held only 10.3% of all construction jobs, a drab increase from 9.5% a decade ago. While other industries have seen tremendous growth in the number of positions held by women, construction has remained stagnant, hovering between 9% and 10% since 1995.

The question then turns to why. Why aren't more women flocking to an industry that is in the midst of a labor shortage? Why aren't more women advancing up the leadership ranks in this industry? Studies have shown that women in construction feel held back from advancement because of unconscious gender bias, a lack of role models, a lack of adequate training, discrimination in the workplace, and an aura of exclusion they feel from being left out of the boys club.

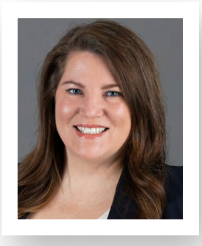
Women in Construction aims to fill in these gaps by offering legal bulletins, training, webinars, networking events, and a forum to foster connections in the construction community, educate one another on ways to perform more efficiently, and provide guidance on operating a successful construction business.

Please enjoy our first newsletter and be sure to register for Benesch's upcoming webinar series. We aim to transition to more female-generated content—please reach out with any questions, topics, or issues you'd like to see covered.

We also invite you to join the dialogue in our LinkedIn group, Benesch-Women in Construction.

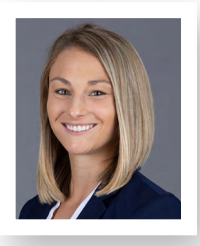
Feel free to share this newsletter and invite other colleagues to join us as well. Together we can do more!

Construction Contract Impacts as a Result of COVID-19: Force Majeure, Impossibility, and Impracticability



Susan White

Allyson Cady



Abby Riffee

In light of the COVID-19 pandemic, excusable delay clauses are at the forefront of everyone's mind. The effects this pandemic has had on the construction industry and supply chains is only just beginning. While only a handful of jurisdictions have drastically limited construction operations, projects across the country are being adversely impacted by labor and material shortages caused by this crisis.

Most construction contracts contain delay clauses, and many include force majeure language, to address which party will bear the risk of delay. *Force majeure* (meaning "superior force") may excuse (or suspend) a party's timely performance of its contractual obligations when unforeseeable circumstances, or a supervening event not within the control of either party, arise; however, its applicability to COVID-19 will depend on the express written terms of the underlying contract. Force majeure clauses will vary drastically from contract to contract, and are traditionally narrowly construed by courts.

Issues arise when the force majeure clause is not specifically defined. If the clause expressly lists pandemics, epidemics, public health emergency, and/or acts of government, then the COVID-19 outbreak may very well excuse performance. More than likely, the phrase "Act of God" may be the only contractual basis for a party seeking to excuse its performance as a result of COVID-19. Such basis is untested and will depend on your jurisdiction. Arguments are being made that COVID-19 is a natural phenomenon and is thus an Act of God. Conversely, a defense against the same is that such pandemic was foreseeable in light of recent health emergencies such as H1N1 and SARS.

The force majeure clause may include a catchall phrase in an attempt to broaden its scope or expand its covered events. A colorable argument that the language "including but not limited to" or "other causes" could be read to imply that COVID-19 should be a covered event under such force majeure clauses. However, under the doctrine of *ejusdem generis* ("of the same kind"), such phrases may not actually encompass all events beyond the contractor's control. If the catchall language follows a list of particular events or other specific language, then only events similar to those listed will fall within the scope of the broader language.

If the force majeure clause includes no other qualification related to health or government functions, then under the contract interpretation rule of *expressio unius est exclusion ulterus* ("express one thing, excludes the other"), no other cause of delay would excuse nonperformance.

Force majeure clauses are not boilerplate, and it's possible your contract may be completely silent on this issue. In these instances, common law will control. There are two doctrines that may excuse a party's contractual performance: the doctrine of impossibility and

the doctrine of impracticability. While often used interchangeably, these doctrines are uniquely yet subtly different.

The doctrine of impossibility can be used as a defense to breach of contract actions to excuse one party's performance regardless of the language of the underlying contract: "where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to an implied condition that, if before the time for performance and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it."[1]

In light of COVID-19, to rely on the doctrine of impossibility, one may not rely solely upon his or her own inability to perform, but must also negate the possibility of performance by others and exhaust all alternative sources of performance in order to objectively prove that performance cannot be done, rather than the subjective standard of "I cannot perform."

The *doctrine of impracticability* has emerged as a modern, broader take on impossibility. In contrast to performance being objectively impossible, the concept of impracticability is viewed as an excuse where performance of the contract is "vitally different" from that originally contemplated by the parties—performance is still possible and the purpose of the contract can still be fulfilled, however, due to a change in circumstances, the performance of the promisor's obligations has become commercially impractical. Impracticability will not excuse performance if another alternative remains open. Further, the party claiming discharge must establish the occurrence of an event, the nonoccurrence of which was a basic assumption of the contract. Finally, the party claiming discharge must show that it did not expressly or impliedly agree to performance in spite of impracticability that would otherwise justify nonperformance.

In the context of COVID-19, impracticability of performance may stem from availability of material and government interference that drastically impacts one's ability to perform. However, note that in a fixed-price contract, a party has expressly assumed the risk of price increases—be that labor costs and/or costs of materials—thus, impracticability may not apply to excuse such performance. Further, a subcontractor's duty to provide and install material for a general contractor will not be excused as a result of its supplier's inability to provide conforming goods where substitute material is available from an alternative supplier.[2]

Key takeaways:

- **Review Your Contracts:** Check your agreements for other clauses that may offer relief, such as emergency clauses, both owner and contractor suspension and termination provisions, and clauses that may provide for time extensions, price escalations, or standby time.
- **Incorporation:** Look for incorporation language in your contract that can be used to invoke and rely on applicable definitions or clauses from the prime contract.
- **Protect Your Claims:** Review all notice requirements, timely respond to notices received by others, and begin contemporaneously documenting all schedule impacts and costs incurred as a result of COVID-19. (Owners need to review loan documents to determine whether corresponding notices need to be sent to their lenders.)
- **Alternatives:** Absent express contract language, look into whether the doctrines of impossibility or impracticability may excuse your timely performance.
- **Insurance:** Don't forget about your insurance contracts; review closely to see if COVID-19 may qualify as an "occurrence" to trigger business disruption coverage.

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[1] *Florida Power & Light Co. v. Westinghouse Elec. Corp.,* 826 F.2d 239, 263 (4th Cir. 1987).

[2] Absent express contractual provisions, the Uniform Commercial Code will govern disputes regarding purchase and supply of material directly between contractors and material supplier. While similar to these common law doctrines, the UCC has its own set of standards that may excuse performance including § 2-615.

Gender-Based Discrimination in the Construction Industry and What Employers Should Be Doing

Susan M. White

In the era of the #MeToo movement, sexual harassment and gender bias are at the forefront of many minds, with employers in all industries struggling to maintain an inclusive culture as a means to maintain a happy workforce and attract top-tier talent.

In January 2015, the U.S. Equal Employment Opportunity Commission (EEOC) impaneled a task force to study harassment in the workplace.[1] During its investigation, the task force found that in FY2015, approximately 28,000 charges alleging harassment had been filed with the EEOC from employees working for private employers, or working for state or local governments.[2] Of those 28,000 charges, 45% of the claims alleged harassment on the basis of their gender.[3]

The construction industry is not insulated from such harassment or discrimination, with many industry personnel believing that the industry has been too slow to confront such issues.[4]

Engineering News Record (ENR) followed in the EEOC's steps and conducted its own survey in 2018.[5] Over the course of six weeks, 1,200 participants from diverse demographics, employer sizes, and industry positions logged their personal experiences with sexual harassment and gender bias in the construction industry. Surprising to some, but maybe not to others, 60% of ENR's respondents reported they had *witnessed* sexual harassment or gender bias in the workplace, and 66% indicated they had personally *experienced* it in the workplace.[6] Of the 66% who reported a personal experience, about half indicated it occurred out on a jobsite, while the other half noted it was experienced in a construction sector workplace.[7]

What is sexual harassment and gender bias?

Sex is a protected class under Title VII of the Civil Rights Act of 1964, and the EEOC defines harassment as a form of employment discrimination that violates Title VII. It is illegal for an employer to harass or discriminate against an employee based on the employee's gender (including pregnancy, childbirth, or related medical conditions), gender identity, gender expression, or sexual orientation. Discrimination or harassment is an act committed to make another feel unwelcomed, uncomfortable, offended, or oppressed. And contrary to belief, it does not have to be motivated by sexual desire, and often is not.

Discrimination is unlawful when (1) it creates an intimidating or offensive work environment or unreasonably interferes with work performance (known as hostile work environment harassment), (2) a job benefit such as a promotion, offer of employment, or continued employment is conditioned on submission to sexual advances or other gender bias (known as quid pro quo harassment), or (3) it is done in retaliation. Employers can be held liable for conduct by management and supervisors, peer to peer, and non-employees (including vendors, suppliers, clients, customers) when the employer fails to take reasonable steps to prevent the harassment.

What should employers be doing about sexual harassment and gender bias?

After an 18-month investigation, a comprehensive report of the EEOC task force's findings was published. Some of the key findings were:

a) Workplace Harassment Remains a Persistent Problem;

b) Workplace Harassment Too Often Goes Unreported;

c) There Is a Compelling Business Case for Stopping and Preventing Harassment;

d) It Starts at the Top—Leadership and Accountability Are Critical; and

e) Training Must Change.[8]

Employers can suffer great liability for sex-based discrimination experienced within their organization when their policies and practices are found to have been insufficient to protect their workforce. Some states also allow personal liability to be asserted against supervisors and high-level officials when certain federal statutes are violated or in egregious situations of pervasive discrimination. Financial liability for EEOC claims and lawsuits, including the cost of any judgments or settlements, and defense costs, account for direct damages that may be incurred; statutory fines and penalties can also be imposed by state and federal governments. Indirect damage is suffered based on loss of productivity of affected employees, increased turnover rates, and decreased workplace morale, along with negative company publicity and reputational harm.

Starting from the top down, all organizations must be proactive to maintain a harassment-free workplace policy, with commitment from all levels of management. They should invest in fostering a culture and environment where discrimination is not tolerated and where employees feel welcome enough to discuss their concerns. This starts with comprehensive companywide policies that are practiced and not just preached. The policies, which should include anti-touching and office dating protocols, should be clearly identified in employee handbooks and routinely discussed in frequent employee training programs mandatory for all levels of employees. The EEOC recommends employers engage in both anti-harassment compliance training as well as civility training to promote respect in the workplace. Both the rules and disciplinary action should be clearly defined by the organization, and the reporting process should be transparent and easily accessible by all levels of employees. An employer's response to a complaint of discrimination is as equally important as its policies; all claims must be thoroughly investigated, and prompt steps should be taken to prevent reoccurrence.

Finally, employers should also give equal attention to both prongs of sex discrimination—the sexual harassment aspect as well as gender bias. Although similar and often grouped together, the two are also vastly different, and it's important that employers offer protections to employees for both. According to the U.S. Bureau of Labor Statistics, women make up only 10% of the construction industry workforce, with nearly 87% of women falling into business, technical, management, or office roles and only 13% in field or trade positions.[9] Though these figures have risen by nearly 85% in the past 30 years, women are still far underrepresented in the construction industry in comparison with the general labor force and that of other industries.[10] Diversity and inclusion training are key components in the construction industry that should be incorporated into every employer's programming, and one's gender (and other protected classifications) should never be factored into any employment decision, including compensation and promotions.

Takeaways:

Sex-based discrimination and harassment is far more prevalent in the workforce than many believe. Employers can no longer remain complacent, as they face high liability for discrimination and/or harassment, which could result in both financial impacts and disruption to business. With proactive measures and fair practices, such issues can easily be avoided. In our discussions with employers, all agree that their people represent their most valuable resource. All employees should be treated with respect and protected from assault and all other forms of harassment.

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[1] **Select Task Force on the Study of Harassment in the Workplace**, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic, June 2016

[2] *Id.*

[3] *Id.*

[4] *#MeToo in Construction: 66% Report Sexual Harassment in ENR Survey*, Debra K. Rubin, Janice L. Tuchman, Mary B. Powers, Eydie Cubarrubia, and Mark Shaw, Octobr 11, 2018

[5] *Id.*

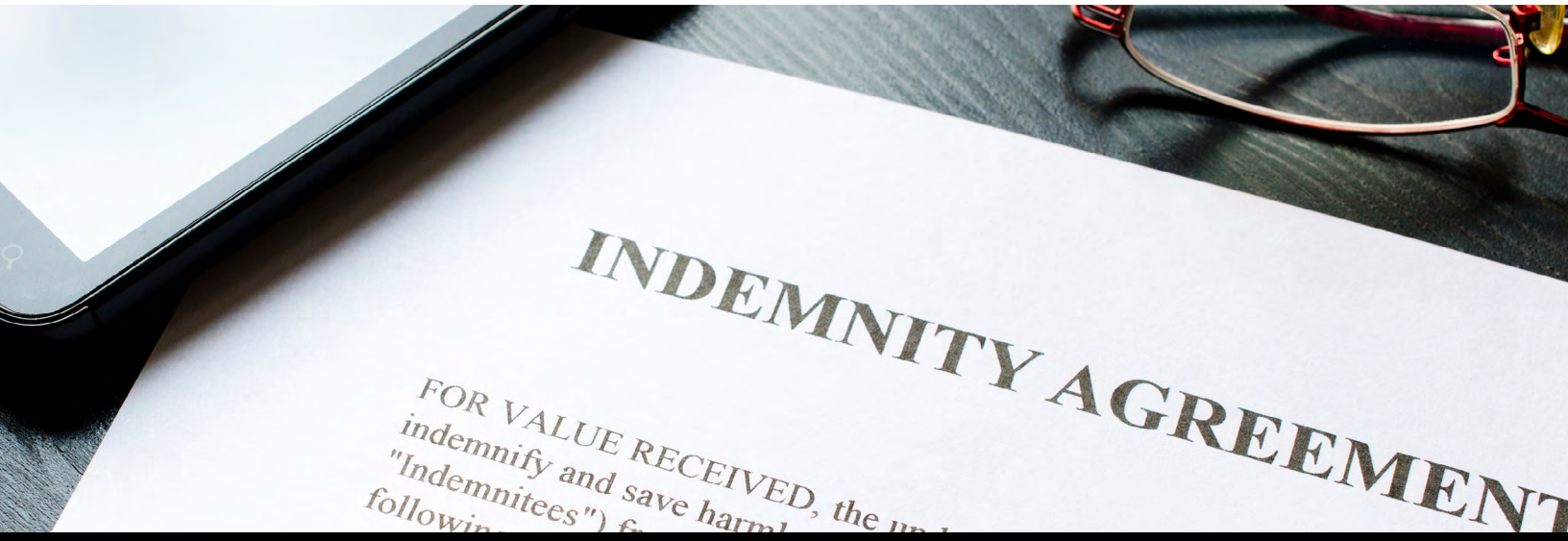
[6] Just under one-third of survey respondents identified as male and nearly 70% of respondents fell within the age range of 31-60 years old. *Id.*

[7] *Id.*

[8] *Id.*

[9] U.S. Bureau of Labor Statistics, Labor Force Statistics from the 2018 Current Population Survey

[10] *Id.*



Indemnity: A Complex Puzzle That Can Be Solved

Susan M. White

Richard D. Kalson

It is essential that you are only agreeing to indemnify those entities or individuals to whom you are contractually liable to indemnify.

The best way to prevent an avoidable claim is to enter into a strong contract. While the reasoning behind some contract provisions, as well as requested revisions to the same, may be glaringly apparent, the significance of some other provisions and the need to revise them are less obvious. Indemnity is one of the most often overlooked and not fully understood contract provisions. However, these provisions could have the largest implication on your risk. The indemnification, or hold harmless, provision of any contract is a key provision that subcontractors and suppliers should be carefully reviewing and zealously negotiating to ensure that a fairly balanced agreement is reached. In recent months there has been a large number of judicial decisions that should guide subcontractors in their subcontract negotiations.

Indemnity in construction agreements shifts the monetary liability for a loss from one party to another. It is imperative that the subcontractor negotiate a contractual reallocation of risk back to the party actually performing the work who is in the best position to control or minimize the risk of harm. By agreeing to indemnify the general contractor, a subcontractor is agreeing to reimburse the general contractor for the damages that may be assessed against it. One main benefit of a properly negotiated indemnity provision is mitigation of the risk of out-of-pocket liability. When a narrowly tailored duty to indemnify is tied only to the extent of the subcontractor's negligence, and is further limited to claims that result in personal injury, death, or property damage, your insurer should slide in and take over, thereby diminishing your risk of out-of-pocket liability.

The additional insured coverage is another piece of the indemnity puzzle that is often overlooked. For the reasons stated above, it is important to make sure that your duty to insure, or your assumed risk, for any additional individuals or entities is tied to your contractual indemnity obligations. This limits the claims for which you can be held liable. Recently, in *Precision Underground Pipe Servs. v. Penn Nat'l Mut. Cas. & Verizon Pa., LLC*, 2019 Pa. Super. Unpub. LEXIS 4486, the court found that even though the subcontractor was not a named defendant in a lawsuit, the subcontractor insurance policy was required to provide coverage for the claim under the additional insured contract provisions of the parties' agreement. The court held, despite the fact that the complaint failed to

set forth any overt allegations of negligence or wrongdoing on the part of the subcontractor, the subcontractor's insurance company was still obligated to defend the general contractor and owner against the subcontractor's employee's claims under the additional insured provision of the agreement. The owner and general contractor both had a duty to protect the injured worker from dangerous or hazardous conditions on site; however, to the extent the injuries were caused by a breach of that duty, the insurance coverage under the subcontractor's additional insured obligation was invoked. The takeaway from this decision is that a subcontractor can be held liable to defend and/or indemnify a higher-tier additional insured, even if the subcontractor's own negligence is not a contributing factor to the damage or loss.

This ties into the recommendation that you should limit your obligation to indemnify only to the extent of your actual negligence. If your indemnification liability is so limited, you may be able to mitigate your risk exposure by proving that the party seeking indemnity was solely at fault for the injury or damage, or was contributorily negligent for the same. This is true as "a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefore." [*Mullen v. Hines 14 Ave. of the Ams. Invs., LLC, 2019 N.Y. Misc. LEXIS 5893.*] Note that some states have enacted anti-indemnity statutes, such as California, Colorado, Kansas, and Oregon, or otherwise have restricted the ability of a lower-tier contractor being held liable to indemnify a higher tier from damage or injury caused solely by the higher tier. However, others states do not have anti-indemnity statutes, and they will enforce a contract provision wherein a subcontractor may held liable to fully indemnify a contractor and/or owner from an injury that was caused solely or almost entirely by the general contractor's negligence. Know your jurisdiction.

It is essential that you are only agreeing to indemnify those entities or individuals to whom you are contractually liable to indemnify. Additionally, be sure that the additional insured are clearly and specifically identified. A New York Federal Court in *United Specialty Ins. Co. v. Lux Maint. & Ren. Corp.*, 2019 U.S. Dist. LEXIS 201805 found that a lower-tier subcontractor and its insurance company were obligated to indemnify various unnamed "owners" of the project. Brend Renovation Corp. (Brend) entered into a contract with Sutton (Sutton) wherein Brend was to provide certain balcony and façade repairs. Sutton was identified in the contract as the owner of the property. Brend then subcontracted certain portions of its work to Lux. Pursuant to the terms of the subcontract agreement, Lux was to procure insurance for additional insureds listed only as "Owner" for any claims arising out of Lux's work. Lux procured insurance on this project from plaintiff USIC. Two separate injuries occurred during Lux's performance of work on the project. The injured parties brought suit against various entities that were the true owners of the real property that was the subject of the project. In fact, Sutton was a trade name, and it did not own any of the real estate despite being identified as the owner on the general contract and subcontract. The true owners then sought indemnification from Lux and its insurer as additional insureds under the subcontract agreement. Lux's insurance carrier brought a declaratory judgment action seeking a finding that it was only liable to indemnify Sutton House Associated as the listed owner of the project, and not the true owners of the property. The Court disagreed and found that USIC was obligated to indemnify and defend all true owners of the real property as additional insureds, as they were the true intended and anticipated parties contemplated under the terms and conditions of the under the agreement when Lux agreed to indemnify the "owner."

Finally, always make sure that your insurance policy contains the proper endorsement and follows your carefully selected additional insured coverage obligations. Additionally, there is no reason to negotiate your indemnity obligations if the indemnification remedies are not held to be the sole or exclusive remedy for recovery for covered claims. This type of limitation can preclude the indemnified party from obtaining a recovery that is over and above applicable insurance limits. Further, it prevents an indemnified party from sidestepping your negotiated indemnity limitations via a broad contractual insurance obligation that allows a party to seek additional recourse or other equitable remedies.

The indemnity provision is not one to be overlooked; rather, use it to your advantage in combination with a proper insurance program and carefully drafted contractual insurance language to provide a fair balance allocation in the shift of risk.

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No Contract, No Problem

In the absence of a contract, a contractor may still be able to recover its increased costs and delay damages from project designers and architects.

Richard D. Kalson

Jonathon Korinko

Often claims for additional money are predicated on the existence of and compliance with a contract pursuant to which a recovery is sought. If, however, a contractor suffers additional costs and delays due to design errors caused by an entity with whom the contractor does not have a contract, then there are some instances in which contractors can seek recovery from designers and architects under a negligence theory. Indeed, a recent opinion from a federal court in Florida permitted contractors to circumvent the absence of a contract and directly pursue negligence claims against the project designers and architects to recover increased costs and delays allegedly incurred by design errors.

In *Suffolk Constr. Co. v. Rodriguez & Quiroga Architects Chartered*, 2018 WL 1335185 (S.D. Fla. Mar. 15, 2018), Suffolk Construction Co., Inc. (Suffolk) was engaged to develop a science museum in Miami, Florida. Suffolk's contract was with the owner only. The owner terminated Suffolk for convenience and contracted directly with Baker Concrete Construction, Inc. (Baker) to complete concrete-related work on the project. Both contractors brought a negligence action against the project's designers and architects, alleging that the design documents were flawed, which caused increased costs and delays to the project. Neither Suffolk nor Baker had any contractual relationship with the architects and designers.

In Florida, a contractor may pursue a designer for negligence so long as the designer created a "foreseeable zone of risk." In other words, a designer has to exercise some control over the contractor or the project by either maintaining a supervisory role or preparing designs that it knows will be relied on by the contractor. Here, the Southern District of Florida found all the project's designers and architects exerted some form of control over Suffolk and Baker. The court found that the prime designers exerted control through their supervisory role on the project, which included determining if Suffolk and Baker complied with the design specifications. The court also found that the lower-tier designers—who only participated in preparing the designs but did not have a supervisory role—also exercised control over Suffolk and Baker. The court reasoned that the lower-tier designers created a foreseeable zone of risk because they knew Suffolk and Baker would rely on the information contained in the design and structural documents that they prepared. Accordingly, Suffolk and Baker were permitted to prosecute claims against all of the project's designers and architects for increased costs and delay damages despite not having a contract with any of them. In ruling, the court also importantly rejected arguments raised by the project's designers and architects regarding Suffolk's and Baker's alleged breach of the notice and claim procedures contained in their respective contracts with the owner.

While every contractor should know and follow the provisions in its contract required to preserve claims, the *Suffolk Constr.* opinion provides a potential avenue of recovery when increased costs and delay damages may otherwise by barred under a contract. Indeed, by pursuing negligence claims against the project's designers and architects, Suffolk and Baker were able to avoid common contractual defenses such as the existence of a no damages for delay clause or a failure to comply with the contractual notice and claim procedures. Therefore, if you find yourself in the unfortunate position of having failed to preserve your claims under the contract, you still may be able to recover those damages from the project's designers.

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The Spearin Doctrine: Providing a Recovery Mechanism for Contractors' Differing Site Condition Claims for 101 Years

Richard D. Kalson

Perhaps the single most important judicial decision that impacts contractors every day is the United States Supreme Court's decision that was issued over 100 years ago in *U.S. v. Spearin*, 248 U.S. 32 (1918). This decision created the judicial rule of law known as the Spearin Doctrine, which provides that the owner warrants the adequacy of the plans and specifications that it provides. If the contractor builds in strict accordance with the plans and specifications and a defect in the construction results that was caused by a deficiency in the plans and specifications, the contractor is not responsible for such construction defects. Furthermore, if the contractor incurs additional costs because of a design defect, it is entitled to be compensated for these costs.

In the ensuing 101 years, two primary types of claims have arisen under the Spearin Doctrine. Type I differing site condition claims allow for a contractor to receive additional compensation where an unforeseen condition is encountered that is not described in the contract documents. A Type I claim is the most typical claim that is made under the Spearin Doctrine. A Type II claim arises when conditions are encountered that vary from what is typically encountered in a given geographic area. A Type II claim is far harder to prove than a Type I claim.

Some recent published judicial opinions illustrate how courts are currently applying the Spearin Doctrine. For example, the Federal Court of Claims recently reaffirmed that "it is well established that when the government provides a contractor with defective specifications, the government is deemed to have breached the implied warranty that satisfactory contract performance will result from adherence to the specifications, and the contractor is entitled to recover all of the costs proximately flowing from the breach...The Compensable costs include, among other things, those attributable to any period of delay resulting from the defective specifications." [*Ultimate Concrete, LLC v. United State*s, 141 Fed. Cl. 463, 481 (2019).] Based upon the following premise, a contractor was entitled to compensation for performing additional excavation and material replacement work due to inaccurate survey information. Making matters worse, the government project owner knew that the survey information that it created and provided to project bidders was inaccurate even before the project was let for bid. The owner then withheld more accurate survey data from the contractor when the contractor identified defects in the design information provided by the owner after it began to perform its work.

A similar result was reached by a Vermont state court in *W.M. Schultz Constr. v. Vt. Agency of Transp.*, 203 A. 3d 1205 (Vt. 2018). In the aforementioned case, a ledge on a bridge construction project was much deeper than anticipated based on the contract documents. The contractor was consequently required to construct a different, more time-consuming, and more expensive cofferdam. Therefore, a Type I differing site condition was found to exist, and the contractor was entitled to additional compensation and an extension of time.

On a less positive note for subcontractors, while Ohio state courts recognize a contractor's right to bring a claim under the Spearin Doctrine against a public owner for differing site conditions and other design errors, a federal court in Ohio recently held that there was not any basis under Ohio law to allow a contractor to bring a Spearin Doctrine claim against a private owner. [*AP Alts, LLC v. Rosendin Elec., Ins.*, 2019 US Dist. Lexis 139084.] While the great majority of courts have recognized the right for contractors to bring a claim under the Spearin Doctrine against private owners, the Ohio court decision must be taken into account by contractors in that state.

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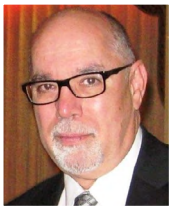
Do You Know What Your CGL Policy Covers? A Recent Court Decision Might Make You Reexamine the Coverage Provided Under Your CGL Policy

Eric B. Kjellander

Richard D. Kalson



Alex Filotti, P.E.

The construction industry has numerous insurance products available to limit or control risk. While many companies take advantage of these policies, either voluntarily or oftentimes as required by contract, few know the extent or limits of these policies. Recently, the United States Court of Appeals for the Sixth Circuit provided some clarity as to the limits for certain insurance coverage.

In the broadest sense, a commercial general liability (CGL) policy provides coverage for damage as a result of bodily injury and property damage. CGL policies typically include both a duty to defend an insured and a duty to indemnify for covered claims.

Background of the Dispute

The Robbins Company is a designer, manufacturer, and supplier of tunnel-boring machines. JCM Northlink, LLC contracted with Robbins to lease one of the machines for a construction project in Seattle, Washington. The contract contained a clause stating that the machine was to be free from all latent defects in materials or workmanship. Two years into the agreement, an internal bearing shattered and the machine stopped working, causing the construction project to be delayed. As a result, JCM terminated its contract with Robbins and filed for arbitration based on Robbins' alleged breach of contract. In its claim, JCM demanded costs associated with the delays in excess of $40 million. The arbitration demand was silent as to any non-contractual damages.

Robbins was insured through a CGL policy issued by Maxum Indem. Co. Fifteen months after the arbitration had been filed, Robbins notified Maxum of the arbitration and sought insurance coverage under the CGL policy. Maxum denied coverage and filed for a declaratory judgment in federal district court, asserting that it had no duty to defend Robbins in the arbitration that exclusively involved an alleged breach of contract.

Analysis

The federal court agreed with Maxum and found no duty to defend Robbins, because JCM's arbitration claim was based on a breach of contract claim. Robbins appealed the lower court's decision to the Sixth Circuit Court of Appeals. While it disagreed with the lower court's reasoning, the Sixth Circuit (the federal appellate court that covers Ohio, Kentucky, Tennessee, and Michigan) agreed with the trial court in holding that Maxum had no duty to defend Robbins in the arbitration.

The court relied upon the language found in CGL policy that the "breach of contract" exclusion indisputably covered JCM's claim. Because the arbitration claim fell within the exclusion, Maxum had no duty to defend. For the first time on appeal, Robbins attempted to introduce new evidence of claimed damage separate and apart from the contractual claims. The court noted that Robbins was in possession of the information prior to the lower court issuing its decision and failed to timely introduce it. As a result, the trial court did not have the benefit of the additional information. The appellate court would not consider the new evidence for the first time on appeal, and Robbins' appeal was denied.

Conclusion

Maxum Indem. Co. v. Robbins Co. serves as an important reminder to industry participants to discuss the extent and limits of their insurance products with their insurance brokers, including the necessary requirements to make a timely claim. Most general liability policies do not include coverage for breach of contract claims. The purpose of insurance is to mitigate and control risk. As a result, it is vital that companies be aware of the specifics of their policies, the price of obtaining additional coverage, and any limitations of such coverage. Additionally, PDCA contractors must be careful not to agree to indemnify another party for breaches of contract that are not covered by insurance. Instead, a contractual indemnity clause must be limited to insured items such as claims for personal injury and property damage.

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Pass this copy of *Women in Construction* on to a colleague, or email **KATIE EGAN** at kegan@beneschlaw.com to add someone to the mailing list.

Contractors and Subcontractors Continue to Squander Claims By Not Properly Preserving Physical Evidence

Richard D. Kalson

Very sophisticated contractors and subcontractors continue to needlessly compromise or even squander claims due to a failure to properly preserve physical evidence. A recent graphic example of this took place on the highly publicized Highway 99 tunnel project in Seattle, Washington. The Washington Department of Transportation (WSDOT) contracted with Seattle Tunnel Partners (STP) to construct an underground bored tunnel in Seattle that was 1.7 miles in length and 57 feet in diameter. During the excavation of the tunnel, STP's boring machine allegedly encountered the steel casing on an abandoned test well, and STP was unable to continue with its progress. WSDOT then sued STP for breach of contract related to the work stoppage. STP filed a countersuit against WSDOT for failing to disclose the abandoned test well. [*Washington Dep't of Transp. v. Seattle Tunnel Partners*, 2019 Wash. App. Lexis 281.]

After STP encountered the steel casing, it stored this critical evidence outdoors on a pallet instead of in a secured warehouse facility. Unfortunately, a nighttime cleanup crew later recycled the steel pipe and also disposed of some boulders that also represented important evidence.

Additionally, a deputy project manager's diary that covered the time period in which the disputed events transpired was also lost.

As a result of this loss of important evidence that presumably should have been favorable to STP and perhaps served as the primary supporting basis for its case, WSDOT moved to dismiss STP $642 million claim. WSDOT argued that STP was contractually obligated to properly preserve the evidence and that it not only failed to do so, but that it concealed its failure from WSDOT for months. While the court refused to dismiss STP's claim, it did enter an adverse inference against STP. An adverse inference is a judicial instruction to the jury that is not favorable to the party that lost the evidence. In this instance, such instructions will include charges such as "By its actions and inactions, STP consciously disregarded the importance of the missing pipe pieces and boulders, in failing to preserve them" and "STP acted in bad faith by concealing from WSDOT that it lost or destroyed the pieces of pipe and the boulders." In this case, what should have been the best pieces of evidence for the contractor were transformed into significant pieces of evidence for the project owner because of the loss of evidence by the contractor. This situation was completely preventable and can be avoided by contractors if proper internal controls are instituted and followed.

Initially, each contractor should go to extreme measures to properly photograph and preserve all boulders and artificial obstructions that it may encounter on the project. This can be accomplished by placing such items in a secure facility or even by turning these materials over to counsel to hold in escrow or to the project owner if allowed by contract.

Secondly, all diaries should be transmitted electronically on a daily or weekly basis (and timely reviewed) in a manner that allows for safe storage. While hard copies of diaries were once lost somewhat routinely as employees traveled from job to job, employer to employer, truck to truck, and house to house, excuses for the losses of diaries were not acceptable in the past and are certainly not acceptable now given modern technology. These losses can further be avoided if a company issues a litigation hold to all employees the moment that a controversy arises on a project. Such a litigation hold should be issued in strict accordance with a uniform company policy for the retention of electronic data and all other records.

Just as in sports, it is difficult enough to beat the opposing team in litigation, even without making avoidable mistakes. Prevailing in a hotly disputed claim can become nearly impossible, if not impossible, if a contractor beats itself by failing to properly preserve critical evidence.

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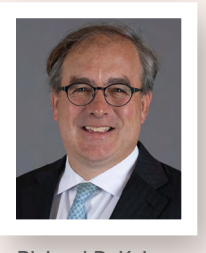
Legal Tips

Losing the Protection of the Corporate Shield: One of the Greatest Risks Facing Any Contractor, Especially Those Who Utilize Union Labor and Face Potential Withdrawal Liability Exposure



Richard D. Kalson

In recent months, courts in states such as Texas, New York, Pennsylvania, North Dakota, Kansas, and Ohio have issued published opinions regarding whether contractors were entitled to corporate protection after they allegedly failed to properly follow corporate protocols and/or used the corporate entity for nefarious purposes. In those instances, when the corporate veil is pierced, the potential personal liability for corporate shareholders and officers is exceptional. Furthermore, corporate entities that are related to the corporation that has had its veil pierced may also be subject to liability. Given the recent spree of acquisitions and consolidations in many industries, it becomes even more imperative that each corporation act as separate entity that is following all corporate regulations. Otherwise, a sister company or an individual shareholder may be ultimately responsible for the alleged debts and actual judgments of a related company.

The following 14 factors are considered by many courts when determining if the corporate form should be discarded, the corporate veil should be pierced, and a shareholder should be liable because the shareholder directed and controlled the corporation and used it for an improper purpose and a "separate personality" between the dominant shareholder and the corporation does not exist.

1. Common ownership
2. Pervasive control
3. Confused intermingling of business assets
4. Insufficient capitalization
5. Nonobservance of corporate formalities
6. Absence of corporate records
7. No payment of dividends
8. Insolvency at the time of the litigated transaction
9. Siphoning away of the corporation's funds by its dominant shareholder
10. Nonfunctioning of officers and directors
11. Use of the corporation for transactions of the dominant shareholders
12. Use of the corporation to justify wrong
13. Use of the corporation to defeat to defeat public convenience
14. Use of the corporation in promoting fraud

Roy v. Ne. Pump & Instrument, Inc., 2019 U.S. Dist. Lexis 99431, *9,10 (E.D. Pa.); citing to *Kraft Power Corp. v. Merrill*, 981 N.E. 2d 671, 681, n. 11 (Mass. 2013); see also *Taszarek v. Lakeview Excavating, Inc.* 2019 ND 168, *6, 7.

While the existence of one or even a few of these corporate deficiencies may not automatically prove to be fatal to a contractor's reliance on the corporate form, they should be enough to cause a corporation to seriously examine and then correct the way that it is being operated before its veil is pierced. For example, in the Roy case in Pennsylvania, Northeast Pump & Instrument's sole owner and shareholder was unable to have a veil piercing claim made against him and his company dismissed when he was compelled to admit that his company did not keep meeting agendas or minutes, did not pay him dividends, and perhaps most conspicuously of all, did not have in its possession a copy of its own articles of incorporation or any other corporate documents because they were allegedly being "held by a former attorney...who is not available and has been disbarred." [*Roy*, at 2,3.]

Furthermore, in a case that should be of exceptional concern to every contractor that has ever utilized union labor, a labor union brought a lawsuit seeking withdrawal liability damages from the Irish corporate owner of a now defunct Kansas corporation that entered a collective bargaining agreement that obligated it to make contributions to an employer retirement fund. The fund also sued the Irish company's fully owned Irish based subsidiary. [*GCIU-Employer Retirement Fund v. Coleridge Fine Arts*, 2019 US Dist Lexis 112484, *1,2.] In the GCIU case, the fund sought $4,454,092.02 in damages for withdrawal liability under ERISA and under the Multiemployer Pension Plan Amendments

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Managing the Unmanageable—Workplace Safety in a Cannabis Revolution

Bob Morgan

Ricard D. Kalson

An issue capturing much attention is the ability of a contractor to regulate, monitor, and address potential marijuana use by its employees, especially in states where medical marijuana use and/or recreational marijuana use may now be legal.

There is certainly no disputing the vast uncharted waters for contractors around the country as they attempt to navigate cannabis laws and regulations that are changing daily. Workplace safety, employee drug testing, and the fluctuating legal status of cannabis are creating uncertainty on safety-sensitive jobsites. How can a contractor protect its employees and worksite while adapting to the increasingly accepted use of cannabis—medical or recreational?

Quickly Evolving Laws

There are now 33 states that have legalized medical cannabis, 10 that have legalized recreational cannabis, and more are soon to come. Many of these state's laws have employer protections for safety-sensitive jobs, and generally allow an employer broad discretion to enact and implement zero-tolerance policies. For example, Arizona allows employers to discipline an employee for possessing or using marijuana on company premises or during work time, even if that employee is authorized to use medical cannabis (A.R.S. Sec. 36-2814(B)). However, note some contradictory case law in states such as Rhode Island (*See Callaghan v. Darlington Fabrics*, C.A. No. P.C. 2014-6680, where an employer was found to have violated the state medical cannabis law for failing to hire a job applicant that had a medical cannabis card and stated she could not pass a drug test) and Connecticut (*Noffsinger v. SSC Niantic Operating Company, LLC*, 2018 WL 4224075, at 1, D. Conn. Sept. 5, 2018, where an employer was found to have violated the state medical cannabis law when refusing to hire a medical cannabis patient who tested positive on a pre-employment drug test).

Notably, the vast majority of cases have ruled in favor of employer discretion regarding whether to discipline or terminate medical cannabis users. Even when anti-discrimination provisions were implicated, courts have consistently left open the possibility for an employer to take action against medical cannabis users in safety sensitive positions (*See Barbuto v. Advantage Sales and Marketing, LLC*, SJC - 12226; July 17, 2017).

On its face, these decisions make sense. There are some industries where workplace drug testing is increasingly rare—such as in the technology sector, where millennial workers are more in-demand, and others where the employer approaches cannabis as a substance scientifically less harmful than alcohol or more dangerous drugs. Yet, safety-sensitive positions such as construction sites, medical facilities, and large warehouses will always require more stringent workplace standards.

Zero-Tolerance Policies and Drug Testing

There are no medical or recreational cannabis states that prohibit employee drug testing. Yet, many include anti-discrimination laws for medical cannabis users. Practically, this means employers should not hire, fire, or discipline applicants or employees solely because they are medical cannabis patients. If a job applicant discloses their status as a medical cannabis patient, generally the employer should not use this status, or the possession of a medical cannabis card, as the reason for the employment decision. Whether the employer may discipline or terminate in the event of a failed drug test is precisely the question raised in *Noffsinger*, and employers should consult with legal counsel in their respective state to ensure compliance.

Safety-Sensitive Positions and Worksites—Protecting Your Business and Your Employees

1. **Reviewing Workplace Policies—** Thoroughly reviewing your workplace policies is the single most important thing you can do to protect your business with regard to cannabis use and employee testing. Look for language that employees can easily understand and follow, and protocols that reflect the nature of the business. Consider whether zero tolerance will be applied to both safety-sensitive positions and those that are not, how post-accident testing will occur, and whether drug testing will be used only upon hiring or throughout employment. If possible, provide access to support for employees with substance abuse problems.

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Losing the Protection of the Corporate Shield: One of the Greatest Risks Facing Any Contractor, Especially Those Who Utilize Union Labor and Face Potential Withdrawal Liability Exposure

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Act of 1980 (MPPAA). The court did not reach the merits of the claim because it was held that the court did not have jurisdiction over the Irish corporation, a defense that will not be available to most corporations. This potential exposure alone should motivate each and every contractor member to immediately assess whether each of its associated entities are properly complying with all corporate formalities and functioning separately.

In conclusion, each and every contractor should regularly evaluate, at least on an annual basis, whether it is properly complying with its corporate obligations. Tasks such as properly conducting corporate meetings and complying with corporate banking requirements while properly documenting the same are very easy to accomplish, but far too often neglected. Creating and maintaining the excellence of an entity's compliance with its corporate obligations is actually quite similar to the constant need for a contractor to maintain and improve upon the excellence of its construction work. If either of these obligations are neglected, the contractor is needlessly assuming considerable risk.

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Managing the Unmanageable—Workplace Safety in a Cannabis Revolution

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2. **Being consistent—**A business should ensure not only consistency in the treatment of suspected substance abuse regardless of the substance, but also consistency in staff training and management enforcement. Inconsistent treatment can quickly become the basis for legal action against an employer.
3. **Protecting the Workplace and Complying with the Law—**Carefully examine the impact of any cannabis impairment at the worksite, and design employee policies that ensure optimal safety for the workplace. Before finalizing new policies and procedures, confer with employment counsel to ensure compliance with state laws and legal decisions.

Although state and federal workplace laws will continue to evolve, employers should expect that workplace safety will continue to be the primary focus when considering how to manage cannabis use by employees. Employer discretion to implement drug testing and zero-tolerance policies will continue in most states, but consult with counsel to ensure strict compliance in these quickly evolving times.

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