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Tesser & Cohen
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Whether a client is a large corporation or an individual, Tesser & Cohen offers personal, quality service, for cost effective fees. Our client base is as diverse as the services we offer, representing contractors, design professionals, and owners with construction related concerns. Services include experience in negotiation and drafting construction contracts, construction litigation, arbitration and alternative dispute resolution (ADR). If you would like more information, please call or email us. You can also visit our website at www.tessercohen.com.

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THE PROMPT PAYMENT ACT — CONTINUED FROM PAGE 18

The terms by which subcontractors and sub-subcontractors obtain relief are limited further. There is no 'deemed accepted' provision for subs. Instead, acceptance of the work occurs when the general contractor, owner or owner's representative actually accepts and/or certifies the work. Payment is late, and thus in violation of the Act, if not made within 10 days of acceptance of the work and the contractor's receipt of the money from the owner. Therefore, subs are protected from unscrupulous contractors who refuse to pay for work the owner has accepted, but have no statutory protection from an owner who refuses to accept the work in order to avoid payment.

The prevailing party in claims arising from this Act is entitled to reimbursement of its reasonable attorneys' fees. Nowhere in the language of the Act, however, is the entitlement to attorneys' fees limited to the unpaid contractor. Therefore, while a meritorious claim under the Act may be subsidized by the non-paying party, a failed claim may leave the contractor with a bill for the owner's attorneys' fees.

The Prompt Payment Act is a strong tool for dealing with unjustified non-payment, but will not automatically provide an unpaid contractor relief. Instead, the Act mainly supplements the contractor's existing rights by providing interest and attorneys' fees for those cases in which there was no legal justification for non-payment. However, as a precautionary measure, an owner (or owner's representative) should immediately dispute in writing any billing it feels is unwarranted.

[Fn1] The ability to suspend performance does not apply to certain transportation projects receiving federal funding. N.J.S.A. 2A:30A-2(d).

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Legislative Alert

NEW JERSEY PRICE ESCALATION STATUTE BECOMES LAW

Effective January 12, 2010, a new law was enacted that impacts the Local Public Contracts Law. It includes a provision for asphalt and fuel price escalation. The legislation attempts to resolve a long standing problem that exists due to extreme price fluctuations for the supply of oil during certain periods of shortage.

Any bid specifications prepared under the Local Public Contracts Law that includes the use of 1,000 or more tons of hot mixed asphalt shall include a pay item for any asphalt price adjustment reflecting changes in the cost of asphalt cement. Similar legislation applies for a fuel price adjustment.

This legislation is particularly important to utility and site work contractors that typically have asphalt restoration as part of their work. The UTCA was instrumental in having the legislation passed as a majority of their contractors are often hit by fuel and asphalt price fluctuations. This is especially so during periods of oil shortages and supply interruptions worldwide, where prices have been known to increase upwards of 300%.

The legislation is effective May 1, 2010.

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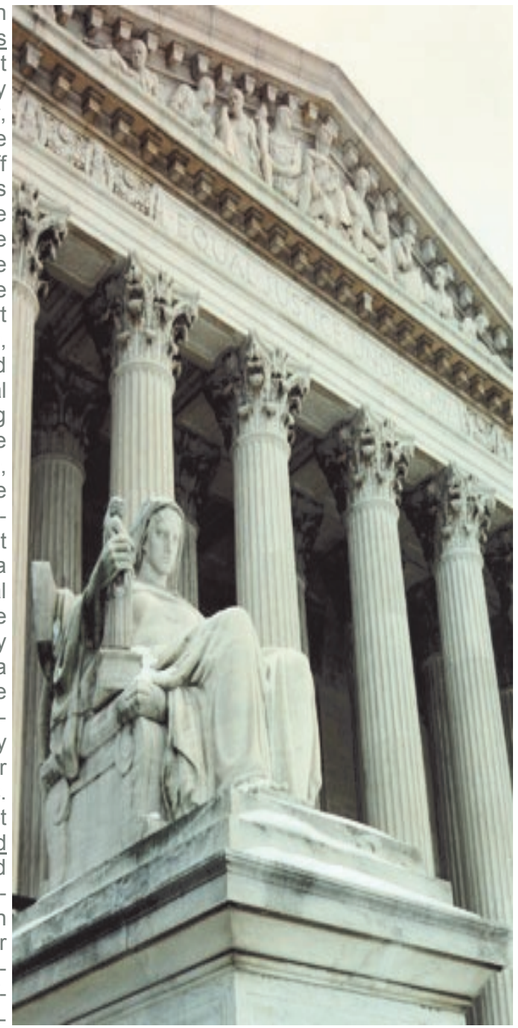

party defendant in the Highland Lakes case contended that the ruling would only prolong discovery, and argued that the third party plaintiff should defer its claim against the professional until the conclusion of the litigation with the Plaintiff. The Court rejected this idea, finding that it would result in piecemeal litigation running afoul of the entire controversy doctrine, and would require the defendant to participate in at least two litigations over a period of several years. Instead, the Court apparently embraced an idea that a singular case that may have extended di-scovery periods is better than two cases. There is no doubt that the Highland Lakes ruling will lead to even more complicated issues, such as arguments over whether plaintiff provided evidence sufficient to require de-ird party claims. What makes the Highland Lakes ruling both manageable and sustainable is the Court's Ferreira decision, which invoked hands on, active case management for affidavit of merit cases. To the extent case management conferences involve substantive discussions on the causes of action as they relate to the progress of discovery, the complicating factors of the affidavit of merit statute may be effectitively avoided. In any situation, the Supreme Court's last words in Ferreira should be heeded: "Diligence and attentiveness in the practice of law will spare plaintiffs' attorneys from later seeking an equitable remedy that may not be available. Those members of the plaintiffs' bar who follow the simple dictates of the statute will find no impediment to championing the causes of their clients."

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CONSTRUCTION MANAGER LIABILITY — CONTINUED FROM PAGE 17

5. The moral blame attached to defendant's conduct.
6. The policy of preventing future harm.

General contractors may ask for an application of these six factors to reach a determination that a construction manager has a duty to a general contractor based on its contractual responsibilities (i.e. to coordinate the work of the participants of the project). Construction managers will certainly argue that design professionals are distinguishable by the fact that they, as licensed professionals, are held to a higher standard.

Factors similar to those relied upon by the Rogers court have been the basis for multiple cases in other jurisdictions finding that construction managers and architects have a duty to the contractors on a construction project. New York courts have explicitly found that a construction manager required by contract with the Owner to "manage,, supervise, and inspect the construction owes a duty of care which inures to the benefit of the contractors on a project because "they are members of a limited class whose reliance upon the project manager's ability is clearly foreseeable". James McKinney & Son, Inc. v. Lake Placid 1980 Olympic Games, Inc., 92 A.D.2d 991, 993 (3rd Dep't, 1983).

Relying upon the concept of foreseeability, courts in Connecticut have found also that a construction manager owes a duty to contractors and can be liable for the reasonably foreseeable consequences of its failure to exercise care, skill and diligence. Insurance Co. of North America v. Town of Manchester, 17 F.Supp.2d 81 (D.C.Conn.). "The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised….The test is, would the ordinary man in the defendant's position, knowing what he knows or should have known, anticipate that harm of the general nature of that suffered was likely to result?" Id. at p.84 (citations omitted). The Connecticut court noted that "the majority of jurisdictions that have addressed the issue have concluded that the absence of privity will not bar a negligence action by one construction professional against another for economic losses, where reliance by the plaintiff was reasonably foreseeable." Id. at 82.

Conclusion

There is no precedential case law in New Jersey allowing a general contractor to sue a construction manager under the theory of negligence in the absence of contractual privity. Established arguments can be offered in support of each side. Given the frequency of this factual scenario and the impact of an adjudication of this issue, the construction industry eagerly awaits guidance from the courts. Until then construction managers will continue to attempt to protect themselves contractually while general contractors will continue to make the strategic decision of whether or not to join the construction manager as a direct defendant in a lawsuit.

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NJ SUPREME COURT RESOLVES QUESTIONS SURROUNDING AFFIDAVIT OF MERIT INDEMNIFICATION CLAIMS

BY: STEPHEN WINKLES

It is quite possible that the Affidavit of Merit Statute, N.J.S.A. 2A:53A-26 to 29, has or will cause almost as many professional malpractice claims as it has dismissed. Given the current state of New Jersey's courts' differing interpretations of the statute, there will certainly be more unnecessary litigation than the legislature intended. The affidavit of merit statute requires all claimants in "a malpractice action to serve on a defendant within 120 days of receipt of the answer, an expert's sworn statement attesting that there exists a 'reasonable probability' that the professional's conduct fell below acceptable standards." The statute is meant to weed out unsubstantiated claims by requiring plaintiffs to prove that the defendant's conduct fell below acceptable standards. Ferreira v. Rancocas Orthopedic Associates, 178 N.J. 144 (2003). Absent extraordinary circumstances, failure to comply is deemed a failure to state a cause of action and requires dismissal of the complaint with prejudice.

In Ferreira, a case involving a medical malpractice claim, plaintiff obtained an affidavit of merit 10 days after the answer was filed, but because of a law office filing error, the affidavit of merit was not timely served. After the affidavit of merit was served on Defendant's counsel, a motion to dismiss was filed for failure to comply with the affidavit of merit statute. Refusing to dismiss the action, the Supreme Court reasoned that although the affidavit was provided outside the statutory time frame, it was provided before the motion to dismiss was filed. In such a situation, the defendants were precluded from filing the motion.

The Ferreira decision also set what many lower courts and attorneys believe to be new guidelines on when motions to dismiss are permitted due to failure to comply with the affidavit of merit statue. The Supreme Court's opinion stated that the statute is "not intended to reward defendants who wait for a default before requesting that the plaintiff turn over the affidavit of merit." Finding that the service and substance of Affidavits of Merit are essentially discovery related issues, the court proposed that an accelerated case management conference be held within ninety days of the service of an answer in all malpractice actions.

As the Appellate Division grapples with the effect of trial courts not holding an accelerated case management conference, or "Ferreira Conference, (see the decisions issued in Saunders v. Capital Health System, 398 N.J. Super. 500 (App. Div. 2008) and Paragon Contractors, Inc. v. Peachtree Condominium Association, *et al.*, 406 N.J. Super. 568 (App. Div. 2009)) the Supreme Court moved on to other questions posed by the affidavit of merit statute, and attempted to further clarify the statute in the recent case of Highland Lakes Country Club and Community Association v. Nicastro, 2009 N.J. Lexis 1291.

The Highland Lakes case resolves an issue relating to the affidavit of merit statute's application to third

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party indemnification claims, and also addresses the entire controversy doctrine as it applies to third party professional negligence claims. After years of debate among jurists, on December 8, 2009 the New Jersey Supreme Court took a nuanced approach in ruling that third-party indemnification claims against professionals may be subject to the Act, but only after a professional-negligence claim accrues. Whether an affidavit of merit is required for indemnification and contribution claims against professionals is a difficult and much litigated issue: an issue where many courts reached different conclusions.

The statute itself appears to require an affidavit of merit for any claim implicating professional negligence, not excluding claims of indemnification and contribution. But such a requirement can be puzzling when the claims are derivative or are third party claims.

For instance, a defendant architect who is accused of preparing improper plans and specifications may have relied on information provided to it by a licensed engineer. However, the architect, in defending against Plaintiff's claims, asserts that the plans are not deficient. The architect is in a difficult situation: if the architect files an indemnification and contribution claim against the engineer, the affidavit of merit statute appears to require the architect to take a further step and obtain an affidavit of merit stating that a reasonable probability exists that the care, skill or knowledge exercised in the engineer's work fell outside acceptable professional standards. For the architect defending the lawsuit, providing the affidavit of merit serves only to substantiate Plaintiff's claims, which may not yet be established. The architect's provision of the affidavit of merit prior to Plaintiff establishing a prima facie case would be premature and potentially damaging to the defense. On the other hand, failing to file the affidavit of merit could lead to a prejudicial dismissal of the indemnification and contribution claims. Failing to file indemnification and contribution claims against the engineer could cause entire controversy arguments to the extent the architect sues the engineer in a later lawsuit. Attempting to resolve these types of issues, the Supreme Court's Highland Lakes decision embraced the Appellate Division decision from which the case was appealed. The Court evaluated a scenario where neighbors disputed a boundary between the parties' property. The defendant owner filed a third party complaint against the surveyor for indemnification and contribution. Because the owners' claims against the surveyor were contingent on the neighbor's proof that the boundary line on the survey was incorrect, the Supreme Court ruled that the affidavit of merit statute's application to the third party claim was premature because third-party plaintiffs could not yet show they were damaged by the professional firm's malpractice. In order to require the defendant to file an affidavit of merit, the plaintiff needed to first establish that the boundary line on the survey was incorrect. The ruling delays the need for affidavits of merit on indemnification and contribution claims until the plaintiff itself is able to make an initial showing of liability, taking pressure off of the defendant to involuntarily support a plaintiff's claim.

While this arrangement may resolve some problems for the defendant, it raises other problems relating to the completion of discovery. The third

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THE PROMPT PAYMENT ACT: A POWERFUL TOOL FOR COLLECTING MONEY...WITH CAVEATS

BY: JONATHAN BERNSTEIN

The Prompt Payment Act, N.J.S.A. 2A:30A-2, ("the Act") can be a powerful tool for prime contractors and lower tier contractors in their efforts to collect payment from an owner or senior contractor. The Act provides an aggrieved contractor with significant rights, which can be powerful tools in obtaining payment from a delinquent owner. However, there are many caveats to the Act, which is often misunderstood. This article explains what protection the Act provides, and what the caveats are.

Prior to the 2006 amendments, the Act provided more limited protections than it does today. Under the old law, a subcontractor or sub-subcontractor was entitled to interest at the prime rate plus 1% should the senior contractor fail to make payment in a timely manner. In order for an aggrieved subcontractor to collect interest under the Act, its work had to be accepted by the general contractor or owner. Despite the pre-amendment Act's severe limitations, it managed to somewhat ameliorate the impact of unjustifiable non-payment by senior contractors.

The amended Act, which has greatly expanded the protections afforded unpaid contractors, is applicable to most contracts entered into after September 1, 2006. The new provisions of the Act significantly alter the relationship between the general contractor and the owner by not only including the general contractor as a protected party under the Act, but also by providing that the general contractor's billing may be deemed accepted if not objected to, in writing, by the owner or its agents. The new provisions of the Act also lessen the burden of maintaining an action to collect unpaid monies as the prevailing party is now entitled to its attorneys' fees. It is important for today's owners and contractors to understand both the powers and limitations of the Act. Uncontested billing from a prime contractor is deemed accepted if the owner, or its representative, does not object in writing within 20 days of receipt of the invoice. The owner violates the Act, and is subject to penalties, including interest at the prime rate plus 1% and attorneys' fees, if it does not pay accepted billing within 30 days of receipt of the invoice.

Moreover, a prime contractor, subcontractor, or sub-subcontractor may suspend performance for non-payment upon seven days written notice if the owner or senior contractor:

1. has not paid for accepted work in violation of the Act; and
2. has not provided a written statement of the amount withheld and the reason for such withholding; and
3. has not made a good faith effort to resolve the payment dispute [Fn1]

There are limitations to the Act's scope and severity. First, an aggrieved contractor can only successfully pursue a claim for work "performed in accordance with the terms of a contract[.]" N.J.S.A 2A:30A-2. If the work is done incorrectly, the Act no longer applies. Further, when dealing with public owners, the 'deemed accepted' provision is restrained if the public owner is required to vote on authorizations for periodic payments, final payment or retainage monies. In such a case, the amount due may be approved and certified at the next scheduled public meeting of the entity's governing body, and then paid during the entity's subsequent payment cycle, provided this exception was defined in the bid specifications and contract documents.

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LATEST AAA RULES FOR THE CONSTRUCTION INDUSTRY ARBITRATION & MEDIATION PROCEEDINGS

BY: LEE M. TESSER

BY LEE M. TESSER

On October 1, 2009, the American Arbitration Association (AAA) enacted revised rules for its Construction Industry Arbitration and Mediation proceedings. Several that are noteworthy are as follows:

- R-7 - The AAA has created a special panel of arbitrators familiar with consolidation and joinder disputes to hear requests for consolidation of separate arbitrations. Basically, if a party believes that separate arbitration proceedings should be consolidated into one, the AAA will appoint a R-7 arbitrator to hear the dispute and make a decision with regard to that request. The R-7 arbitrator cannot serve as an arbitrator in the consolidated arbitration proceeding. In the construction arena, this is an important change as it is often the case that several arbitrations may be proceeding simultaneously involving Owner/GC; GC/Sub; and/or Owner/Architect.

- R-10 - An arbitrator may serve as a mediator during an arbitration proceeding so long as it is requested by all the parties and the arbitrator consents to do so. Also, unless the parties agree otherwise or by decision of the arbitrator, an arbitration proceeding is not stayed during the pendency of the mediation.

- R-36 - Interim Measures: While not a significant change, it is important to note that an arbitrator under the AAA Rules has the authority to "take whatever interim measures he or she deems necessary, *including injunctive relief* and measures for the protection and conservation of property and disposition of perishable goods. Such interim measures may be taken in the form of an Interim Award and the arbitrator may require security for the cost of such measures". Paragraph D was added to allow the arbitrator to apportion costs in either the Interim Award or Final Award associated with the application for any interim relief.

- R-56 - Remedies for Non Payment: The failure of a party to properly pay the arbitrator's compensation has long been a problem. The AAA, in an effort to ensure that each party fulfills its payment obligations, has amended the rule to add Paragraph D, which states that "the arbitrator may suspend the arbitration if full payments have not been received." Further, if the fees remain unpaid after a determination to suspend an arbitration due to nonpayment, the arbitrator has the authority to terminate the proceedings. Such an order shall be in writing and signed by the arbitrator.

The AAA continues to make efforts to improve its administration of arbitrations to the benefit of the parties. One excellent example is the AAA's enactment of its "Fast Track Procedures". Under these rules, claims under $75,000.00 will receive an arbitrator, hearing, and a binding decision within sixty (60) days of the initial conference call. Compared to the Court system, that is a pretty good deal.

CONSTRUCTION MANAGER LIABILITY IN TORT? THE INDUSTRY AWAITS AN ANSWER

BY: STEVEN COHEN & GARY STRONG

Introduction

The question of liability between general contractors and construction managers has existed since construction managers were introduced into project delivery systems. Each participant in a construction project has one or more contractual relationships, each of which identifies its contractual rights and duties. Typically, the construction manager and general contractor have no contractual relationship. While construction managers certainly play a role in each participant's work, the recurring issue is whether a construction manager has a common law duty to the various participants in the construction process. Although the question is common, the issue has not been definitively ruled on by the New Jersey courts.

When a construction manager is hired by a project owner to act as its agent or advisor, it typically does not enter into contracts with the general contractor, prime contractors or design consultants. Rather, it might be hired by an owner to assist in scheduling, cost control, construction and pre-construction project management, the bidding process and coordination.[Fn1] Construction projects are known for their contractual pyramids. In claims for unjust enrichment on a construction project, the prevailing law in the State of New Jersey is that one cannot look beyond the party with whom it has privity for liability because the courts have held that such a process would wreak havoc on the construction industry.

Similarly, in recognition of the interplay among the many participants of each project delivery system, most construction contracts specifically preclude the possibility of the creation of any third party beneficiary rights. Under ideal conditions on a construction project, even though the general contractor and construction manager do not have a contract, they will attempt to properly coordinate with each other to complete the project in a timely manner. However, where the construction process fails, a general contractor may believe that the construction manager, which it relied on for coordination or scheduling, is more to blame than the owner with whom it has contractual privity. The use of construction managers is becoming more commonplace. Where the duties of the parties are contractually created and no third party beneficiary rights exist, the question that is resonating throughout the industry is whether a construction manager can be held liable to a general contractor when there is no contractual privity for failing to perform its obligations.

Elements of Negligence

Absent contractual privity, a general contractor that desires to assert a cause of action against a construction manager must rely on principles of negligence. The three elements of a cause of action in negligence are (1) a duty of care owed by defendant to plaintiff; (2) a breach of that duty by defendant; and (3) an injury to plaintiff proximately caused by defendant's breach. Under New Jersey law, a tort remedy cannot arise from a contractual relationship unless the breaching party owes an independent duty imposed by law. Saltiel v. GSI Consultants, Inc. 170 N.J. 297 (2002).

Economic Loss Doctrine

The New Jersey Supreme Court endorses what is commonly referred to as the 'economic loss doctrine.' Alloway v. General Marine Indus., 149 N.J. 620 (1997). The economic loss doctrine stands for

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[Fn1] Construction Law Handbook, Cushman & Myers at p. 348.

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the proposition that "an independent tort action is not cognizable where there is no duty owed to Plaintiff other than the duty arising out of the contract itself." Sylvan Learning Systems v. Gordan, 135 F. Supp. 2d 529, 547 (D.N.J 2000) (quoting Stewart Title Guar. Co. v. Greenlands Realty, LLC, 58 F.Supp. 587, 597 (D.N.J. 1999)). This doctrine is supported by the belief that tort principles are better suited to resolve claims for personal injuries and damages to property, while contract principles are more appropriate for claims of economic damages resulting from the use of the product itself. Simply put, the Economic Loss Doctrine is used to argue that someone not in privity with the person being sued can sue for negligence when there is a personal injury or property damage but not for monetary damages for which there is contractual redress.

While this doctrine arose in the field of products liability, its application has been significantly expanded. In Sylvan Learning Systems, an insurance agent fraudulently overcharged the insured. Sylvan, the insured, wanted to pursue a claim against Chubb, the insurance company, for its negligence in failing to supervise the insurance agent. The District Court refused to ignore the contractual chain, finding that a negligence claim would require an independent claim that does not arise from the contract at issue.

Construction managers are sure to argue that a general contractor's claim against a construction manager must fail under the tenets of the Economic Loss Doctrine, due to the lack of privity between them and the availability of contractual recourse for its purely economic loss.

By definition, construction management involves a large amount of oversight and coordination of the many participants in complex construction projects. While the construction manager will rely on the Economic Loss Doctrine to exonerate itself from liability for negligence, a general contractor will argue that the construction manager has an independent duty to it to perform its work properly. There are currently no reported cases in the State of New Jersey to support such a duty. In the seminal case of Conforti & Eisele, Inc. v. John C. Morris Associates, 175 N.J. Super. 341, (Law Div. 1980), aff'd, 199 N.J. Super. 498, (App. Div. 1985), the Appellate Division examined the issue of whether a licensed design professional can be liable in tort to a contractor who has suffered economic damage as a result of the design professional's negligence in the absence of contractual privity. Although Conforti is widely recognized as having held that there is an independent duty for design professionals, the fact is that the duty of the licensed design professional, as well as all other elements of negligence, were stipulated by the parties and no judicial determination was needed on the issue of whether a duty exists.

Nonetheless, the Conforti decision is illustrative of the argument that can be made for an independent duty of a construction manager. In reaching its decision, the Conforti court cited the factors relied upon by the Federal District Court in the case of U.S v. Rogers & Rogers, 161 F.Supp. 132 (S.D. Cal., 1958) to support its determination that an architect had liability for negligence. The six Rogers factors are:

1. The extent to which the transaction was intended to affect the plaintiff.
2. The foreseeability of harm to him.
3. The degree of certainty that the plaintiff suffered injury.
4. The closeness of the connection between defendant's conduct and the injury suffered.

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NEW EPA LEAD, RENOVATION AND PAINTING PROGRAM REGULATIONS EFFECTIVE IN APRIL, 2010

BY JOHN LAVIN

On April 22, 2010, the Lead; Renovation, Repair, and Painting Program (the "Program") promulgated by the United States Environmental Protection Agency (the "EPA") goes into effect and may have significant impact on your business.

Promulgated by the EPA under the Toxic Substances Control Act, this new regulation requires all contractors that perform renovations which could disturb lead based paints in virtually all homes constructed prior to 1978 be certified by the EPA. It is estimated that more than 50% of all US homes built prior to 1978 contain lead based paints and will therefore fall under the Program. This Federal regulation impacts all New Jersey contractors that perform renovations and other improvements to both homes and many commercial buildings. The Program specifically targets residential remodelers, electrical, demolition, pluming & heating, HVAC and HVACR contractors, finish carpenters, painters and residential property managers.

HOW DOES THIS AFFECT YOU?

Your employees must be certified by the EPA by April 22, 2010 or you may face staggering daily fines of **up to $37,500.00** for working in lead contaminated homes and buildings.

Each field employee must obtain certification by attending an 8 hour course at an estimated cost of $200.00 per employee.

The cost for a five-year certification is $300.00.

The EPA estimates a cost increase of $8.00 - $167.00 for most interior jobs.

New Jersey has opted out of acting as the enforcement agency of the Program adopted by the EPA, so enforcement is done at the federal level.

Local building departments and construction officials have no authority to enforce the Program and cannot deny permits or issue fines based upon a lack of certification.

Tesser & Cohen Opens Morris County, New Jersey Office

To meet Western New Jersey's growing need for construction related services, Tesser & Cohen opened an office in Morris County. Joining the firm will be Mark A. Blount and John J. Lavin, formerly with Coppel, Laughlin, Blount and Lavin. This move deepens the level of Tesser & Cohen's service for clients in Western New Jersey, providing them with a dynamic, cohesive and talented group of attorneys.

Mark A. Blount, Esq., is a former President of the Morris County Bar Association. Mr. Blount concentrates his practice on residential and commercial land use and zoning matters ranging from major commercial site plans to residential variance applications. He has represented owners, developers, construction managers and municipalities in all aspects of land development - from land acquisition and financing through the site plan, subdivision or variance approvals process to the ultimate lease or sale of the approved projects. He also handles appeals and litigation relating to the approvals process. Mr. Blount has extensive experience in corporate and commercial transactions as well as complex civil litigation.

Mr. Blount is admitted to the Supreme Court of the United States, the United States District Court for the District of New Jersey, the Supreme Court of New Jersey and the Supreme Court of Pennsylvania. Mr. Blount is a member of the New Jersey State Bar Association and the past President of the Morris County Bar Foundation.

Mr. Blount graduated from the University of Vermont with a Bachelor of Arts degree in political science and received his Juris Doctor degree from Villanova University School of Law.

John J. Lavin, Esq. was trained as a construction lawyer at Tesser & Cohen before joining a Morris County Firm and chairing its construction law department. The opening of Tesser & Cohen's Morris County office marks Mr. Lavin's return to Tesser & Cohen. Mr. Lavin has extensive experience in representing contractors, design professionals and owners in all phases of the construction process. As a compliment to his experience as a construction attorney, Mr. Lavin possesses the practical knowledge of an experienced tradesman as he grew up in a construction family and worked as an electrician while attending college and law school. His practice is devoted to construction law with a strong focus on construction litigation.

Mr. Lavin is admitted to the Supreme Court of the United States, the United States Court of Federal Claims, the United States District Court for the District of New Jersey, and the Supreme Court of the State of New Jersey. Recently, Mr. Lavin successfully challenged the New Jersey Department of Community Affairs' wrongful assertion of jurisdiction over rock climbing gyms throughout the state in New Jersey Rock Gym v. New Jersey Department of Community Affairs, *et al*, Docket No: ESX-L-0879-05.

Mr. Lavin authored the article "Navigating a Construction Contract Claim Against the Federal Government" and is a frequent speaker on many topics relating to construction law. He graduated from King's College with a Bachelor of Arts degree in political science. Later Mr. Lavin attended the Quinnipiac University School of Law and earned his Juris Doctor. Currently, Mr. Lavin serves as co-secretary of the New Jersey Bar Association's Construction Law Section.

With the addition of the Morris County, New Jersey Office, Tesser & Cohen now has three offices: two in New Jersey and one in New York City.

AMENDMENT TO CONSTRUCTION LIEN LAW WOULD PROVIDE UNIONS WITH LIEN RIGHTS

While unions may be a powerful force in construction, one of the rights that they were never afforded was the right to lien a project. Liens on construction projects are limited to the value of the labor or materials that are provided to the improve the site.

Since unions themselves do not provide labor or materials that are incorporated into the project, there appears to be no basis for a union to assert a lien on a property for unpaid benefits.

While unions have attempted to place liens on properties, they run the risk of a judge declaring the lien wrongfully filed. When a lien is wrongfully filed, the court can award attorneys fees to the property owner.

Unions have argued that they can file liens for unpaid benefits on behalf of laborers, but even that argument is not supported by the current state of the law.

To date, there has been no statutory authority which would provide unions with the ability to file liens for unpaid benefits on construction projects, but all of that may change.

On February 8, 2010, Bill No. A2050 was introduced to the New Jersey legislature which may expand lien rights to unions and construction workers.

Under the "Construction Lien Law" as currently constituted, only a contractor, subcontractor or supplier may file a construction lien against the owner of real property.

The amendment to the Construction Lien Law would permit any contractor, subcontractor, supplier or construction worker who provides work, services, material or equipment pursuant to a contract, *including a collective bargaining agreement between a labor organization and a contractor or subcontractor in direct privity of contract with the owner,* to file a claim.

In short, this bill would grant workers and unions the right to recover delinquent wages and benefits and would permit them to file a lien against the owner of real property.

Upcoming Seminars & Events

OPEN FORUMS

On a monthly basis, Tesser & Cohen conducts "Open Forums." The Open Forums are a venue for clients and non-clients to discuss specific issues and events in the construction industry. Tesser & Cohen hosts the monthly event, and an attorney from the firm moderates the discussion. For more information on the next open forum, please contact our office.

SEMINARS

The attorneys at Tesser & Cohen give frequent seminars on legal issues currently confronting the construction industry. Tesser & Cohen provides annual seminars on certain topics, such as the *Construction Lien Law Update,* presented by the New Jersey Bar Association. Upcoming seminars include *Public Contracts & Procurement Regulations*, *What to do When Construction Projects Go Bad*, and *Construction Law Basics.* Please contact our offices if you are interested in attending a seminar or would like more information.

NEW YORK CITY ENERGY CONSERVATION CODE EXPANDS ENERGY EFFICIENCY REGULATIONS TO ALL CONSTRUCTION

BY STEPHEN WINKLES

On December 9, 2009, the New York City Council enacted green retrofit legislation. The new laws will affect owners of buildings over 50,000 square feet in the New York metropolitan area. For those owners, the "Greener, Greater Buildings Plan" means more stringent energy code standards, mandatory energy and water use audits, and required energy efficiency retrofits. What is surprising about the legislation is just how far and wide reaching it is. This article explains the purpose and effect of the law, to whom it applies, and why owners and contractors should pay attention.

The New York City Energy Conservation Code (NYCECC) is applicable to all building types in New York City except State or National Register of Historic Places designations or Landmarks Preservation Commission designations. Prior to the enactment of the NYCECC, renovations of less than 50% of a building system or subsystem were exempt from energy efficiency requirements. That exception is no longer in effect. The NYCECC now applies not only to new construction, but also applies to **all** additions, alterations, renovations, and repairs. If a building is only performing alterations on portions of the building, the sections

of the building not being altered do not need to be upgraded to meet the NYCECC. Note that even small renovations must meet the energy code.

The NYCECC becomes effective on July 1, 2010. All buildings that submit building approval plans to the New York City Department of Buildings (DOB) on or after July 1, 2010 will be subject to the NYCECC. After that date, applications for building permits must comply with the NYCECC. The documentation required to obtain building approval is as follows: a certification by a design professional, an energy analysis, and data supporting conformance to the energy analysis. All components important to energy efficiency must be part of submitted plans.

With these new laws comes added expense, and building owners may find themselves hiring additional consultants to assist them in ensuring that the construction plans comply with the NYCECC's new requirements. Any owner performing construction work in NYC after July 1, 2010 should ensure that its architect, contractors and other consultants have a full working knowledge of every aspect of the NYCECC, and that the building plans are in full compliance with the new law.

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IS THE ARBITRATION CLAUSE IN YOUR RESIDENTIAL CONTRACT OBSOLETE?

BY GINA A. MAKOUJY

In our prior Newsletters, we pointed out some of the benefits of alternative dispute resolution in the construction arena. Arbitration is often the dispute resolution mechanism of choice in the construction industry, as it is a cost-effective alternative to litigation, usually faster than litigation, and the parties can select an arbitrator with expertise in the construction field, which is not an option in court.

If you are contracting directly with homeowners, you should be aware that the Arbitration Clause which has served you on past projects may now be obsolete. Even the standard AIA arbitration provision may not get you where you want to be if a dispute arises and the homeowner makes "statutory" claims against you based upon the Consumer Fraud Act or New Jersey's Home Improvement Act. New York has similar provisions in its statues and in the City's regulations on home improvement contractors. Recently, New Jersey courts have refused to enforce arbitration clauses which fail to provide explicit notice to the homeowner that so-called "statutory" claims will be arbitrated.

For example, you contract for $20,000.00 worth of roof repairs, and you complete your work. The homeowner does not pay you your final payment of $3,500.00. Your contract

includes a clause which says all disputes arising from the contract will be arbitrated, and you file a claim in arbitration to collect your money. You are served with a copy of a complaint which the homeowner has filed with the court, alleging that you breached your contract and violated the Consumer Fraud Act. The homeowner is seeking a refund of amounts paid to you, treble damages, attorney's fees, and other costs, and files a motion to force you to stop the arbitration. Chances are good that, based upon the alleged statutory violations, the court will side with the homeowner and the entire dispute will end up in court.

You should know that the Home Improvement Practices Regulations which are part of the Consumer Fraud Act make it a per se violation of the Act to do such seemingly innocuous things as enter into a home renovation contract that does not include a completion date or agree to a change in the work that is not contained in a signed written document. But even if you have valid legal defenses to the Consumer Fraud Act or other statutory claims of the homeowner, you will be forced to present those defenses in court rather than in arbitration unless the wording of your arbitration clause satisfies recent court decisions.

While there is no “sure thing” our courts have provided some fairly specific guidelines for contract language which, based upon the current state of the law, can go a long way to provide that future disputes arising from residential renovation contracts are decided in an arbitration forum, rather that in court.

Practice Areas

Tesser & Cohen
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CONSTRUCTION LAW

Tesser & Cohen's practice centers on its specialization in the multi-faceted field of construction law. Representing clients in the construction business is a field of legal practice that has grown significantly in the past 25 years and requires an understanding of each phase of the construction practice.

Tesser & Cohen has a broad range of experience in representing public and private owners, contractors, subcontractors, design professionals, and developers during the planning and design phase, financing, contract negotiation, dispute resolution, and litigation.

We represent clients on projects of all sizes and complexities, public and private, from residential developments to high-rise corporate buildings, shopping centers, and other commercial, industrial, and retail projects.

Practicing extensively in both New York and New Jersey, Tesser & Cohen keeps abreast of evolving case law and changing statutes, including the lien laws in both states. A thorough understanding of the construction lien law allows us to offer contractors, subcontractors, and suppliers who have provided labor and materials with the security that often eludes them.

Tesser & Cohen is accustomed to handling bid protests on public projects, which involves expedited court proceedings, requiring specialized knowledge and experience. Construction claims generally present legal issues that we are uniquely qualified to address. Tesser & Cohen devotes daily attention to the constantly evolving field of construction law, allowing us to remain current with recent court decisions, legislative enactments, and legal trends, all of which translate into effective advocacy on behalf of our clients.

Commercial Transactions

Tesser & Cohen has a broad range of experience in representing public and private owners, contractors, subcontractors, design professionals, and developers during the planning and design phase, financing, contract negotiation, dispute resolution, and litigation. We represent clients on projects of all sizes and complexities, public and private, from residential developments to high-rise corporate buildings, shopping centers, and other commercial, industrial, and retail projects.

Surety/Insurance Law

Our expertise in the growing field of Insurance and Surety Law has led many of our clients to success. We represent employers and brokers as well as insurance companies in disputes. Tesser & Cohen also represents sureties in construction disputes, and provides advice to sureties regarding bond claims. We have the ability to analyze insurance company and internal company audits in order to facilitate settlements or represent our clients in court or administrative hearings.

Business Development

Tesser & Cohen assists clients in business formations, lease negotiations, purchase or sale of businesses, joint venture agreements, and corporate development. As the technical revolution transforms the business landscape of the 21st Century, we will continue to provide clients with the technical expertise and common sense to maintain profitability.

Mediation/Arbitration Services

With attorneys certified as mediators and arbitrators, Tesser & Cohen is able to provide professional and experienced dispute resolution services.

Steven Cohen is a mediator certified by the New Jersey Supreme Court, and has successfully mediated numerous disputes.

Lee Tesser is an American Arbitration Association arbitrator, the largest dispute resolution organization in the United States.