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Construction Law Update



Presented by:
Mark C. Stephenson
John F. Mullen, Sr.

Fabi Construction v. Secretary of Labor (2007)

- **WHAT**: Parking garage collapse during Tropicana construction.
- Concrete subcontractor failed to abate a recognized hazard by failing to place rebar in the concrete columns of exterior wall.
- **HELD**: Sub-contractor's duty extends beyond blindly following shop drawings when the drawings violate industry custom.
- **WHY**: Potential new OSHA duty to know and act on design element beyond following specs.

Tradewinds Environmental Restoration v. St. Tammany Park (2009)

- **WHAT**: Emergency remediation contractor sued owner when owner failed to pay for work.
- **HELD**: The contract was a nullity since the remediation contractor was not licensed in Louisiana and was not entitled to payment.
- **WHY**: May need a state license to enforce contract.

Sanders Construction v. Cerda (2009)

- **WHAT**: GC appealed Labor Commissioner's award of wages to an unlicensed subcontractor's workers.
- **HELD**: California statute prohibiting unlicensed contractors from recovering payment did not bar workers recovering unpaid wages directly from the GC.
- **WHY**: May not need a state license to enforce your contract.

Baugh v. Gale Lim Holdings (2009)

- **What:** Injured employee of sub-contractor sued GC when hurt on site.
- **Held:** GC was not immune from suit by injured sub-contractor's employee because it had no written contract with subcontractor and could not be statutory employer.
- **Why:** You may need a contract to invoke statutory employer status.

United Rentals Northwest, Inc. v. Yearout Mechanical (2009)

- **WHAT**: Contractor's employees killed by rented scissor lift. Lift rental company settled with employee's families. Equipment company sued Contractor for indemnification.
- **HELD**: Certified the question of whether the rental agreement was a "construction contract" under state statute.
 - If so, the Contractor will not pay the rental company.
 - If not, the Contractor must pay the rental company.
- **WHY**: State statutes may nullify your contract language. Know the applicable state law.

Wash. State MLB Stadium v. Huber, Hung & Nichols-Kiewit (2009)

- **What:** Municipal owner of sports stadium's action against contractor seeks costs associated with the repair of the fire protection system.
- **Held:** Six-year Statute of Limitations did not apply in case filed 6 years after SOL expired since the claim was brought "for the benefit of the state" and was exempt from the statute of limitations on contract actions.
- **Why:** Government contracts may negate substantive defenses such as SOL.

Complete Roofing Services v. Doherty, Duggan & Rouse Insurers (2009)

- **WHAT**: GC action alleging sub's insurance agent misrepresented subcontractor's workers' compensation coverage for leased workers.
- **HELD**: Agent provided facially accurate Certificate of Insurance containing disclaimers that policy should be examined and agent was not told of need for coverage. GC action dismissed.
- **WHY**: The small print can create big problems. Fully disclose coverage needs and underlying contract to broker in writing.

E-Verify

- Under ICRA, it's unlawful to hire an unauthorized alien knowingly or to hire without verifying that the individual is unauthorized. *Hoffman Plast. Comp., Inc. v. N.L.R.B.*
- Executive Order 13465, signed in 2008 by President Bush, requires federal contractors to use E-Verify, an web-based database to verify an applicant's right to work in U.S, but was delayed by *Chamber of Comm. v. Napolitano*.
- President Obama implemented E-Verify as of September 8, 2009 by signing Executive Order 12989.

Chamber of Commerce v. Napolitano

August 25, 2009

- **WHAT:** Association of Builders & Contractors of America challenged Executive Order requiring federal contractors to participate in e-verify.
- **HELD:** District of Maryland upheld Executive Order, which went into effect September 8, 2009.
- The Association filed a notice of appeal.
- **WHY:** The Fourth Circuit may modify the reach of e-verify requirements.

Chamber of Commerce v. Napolitano

August 25, 2009

- **OPEN QUESTION**: Does Executive Order apply to federal aid highway program?
- In 2008 Chief Counsel of Federal Highway Administration determined the Order did not apply to federal aid highway program.
- The determination has not been tested in the courts.

Serrano v. Underground Utilities (2009)

- **WHAT**: Immigrant construction workers sued employer for unpaid overtime and prevailing wage.
- One plaintiff used several different social security numbers on various W-4 forms.
- **HELD**: Upheld protective order limiting questions on immigration status unless compelling argument made for admissibility.
- **WHY**: Undocumented status does not provide a defense to employer in actions seeking past wages.

Macedo v. J.D. Posillico (2008)

- **WHAT**: Undocumented worker's claim for lost wages arising out of a construction accident was barred by his violation of the IRCA to obtain employment.
- **HELD**: Although employer has an obligation to verify a potential employee's citizenship status, the alien must also not produce false documents to obtain employment. Claim dismissed.
- **WHY**: Undocumented status may provide a defense in actions for future wage loss.

Withdrawal Liability

- 1,500 multiemployer plans cover 10 million participants.
- 37% of contributing employers are in the Construction Industry – more than any other sector.
- Recent legislation to fix the problem only shows how bad things are.
- **WHY**: MPPAA funds have been underfunded and poorly managed. Huge investment losses are putting them in jeopardy.

The Red Zone

- The 2006 Pension Protection Act puts any plan that is less than 65% funded in the “Red Zone.”
 - In 2007, 11% of plans were in the zone.
 - In 2008, 37% of plans were in the zone
- And the number of Red Zone multiemployer plans keeps rising.
- **WHY**: Bankruptcies, losses, rising numbers of retirees, declining active participants, falling contributions are combining to erode plan funds.

YRC - The “Iceberg” Problem

- What happens when the major contributing employer fails?
- YRC is a major transportation company.
 - Substantially all of its assets are secured by lenders.
 - Has suspended payment of pension contributions.
- It's withdrawal liability to CSPF appears to exceed \$1.75 Bn. and may be uncollectable.
- **Point: Business failures outside the construction industry can affect your withdrawal liability.**

Preserve Benefits and Jobs Act

- PENDING IN CONGRESS
- MULTIEMPLOYER PLANS MUST MEET SOLVENCY TEST TO BE ELIGIBLE FOR RELIEF.
- RECENT LOSSES SPREAD OVER 30 YEARS
- REHABILITATION AND FUNDING IMPROVEMENT PERIODS EXTENDED
- ENCOURAGES RED ZONE FUNDS TO MERGE.

Withdrawal Liability

What you can do

- Ask the multiemployer plan to give you a current calculation of your withdrawal liability.
- Make an educated guess whether a significant increase in your liability is likely in the future.
- Determine who is liable for payment of your withdrawal liability
 - The company?
 - Other trades or businesses under common control?
 - Individuals?
- **GOAL: Know your rights. Have a plan. Be ready**

EMPLOYMENT

- “The EEOC has not seen an increase of this magnitude in charges filed for many years,”
 - Acting EEOC Chairman (2009).
- A record 95,402 claims were filed last year.
- EEOC
 - recovered \$376 million from employers last year
 - filed 290 new lawsuits
 - resolved 339 suits and 81,081 non-litigation claims.
- **WHY: The change of administration has revived EEOC.**

SMART EMPLOYMENT PRACTICES

- Employee handbooks that make clear your company's EEO practices, including how to make a complaint
- Supervisory training
- Specific attention to complaints of sexual and other harassing, unwelcome behavior in the workplace
- Making sure your postings are current and in compliance
- Consulting counsel on a regular basis to make sure that you are up to date

EMPLOYMENT NON-DISCRIMINATION ACT OF 2009

- PENDING IN CONGRESS
- WOULD PROHIBIT EMPLOYMENT DISCRIMINATION ON THE BASIS OF:
 - SEXUAL ORIENTATION OF
 - GENDER IDENTITY
- A NUMBER OF STATES ARE CONSIDERING SIMILAR LAWS, E.G., PENNSYLVANIA.

ARBITRATION FAIRNESS ACT

- PENDING IN CONGRESS
- WOULD AMEND THE FEDERAL ARBITRATION ACT TO MAKE PRE-DISPUTE ARBITRATION AGREEMENTS, SUCH AS THOSE FOUND IN EMPLOYMENT CONTRACTS AND EMPLOYEE HANDBOOKS, UNENFORCEABLE.
- COLLECTIVE BARGAINING AGREEMENT PROVISIONS FOR ARBITRATION NOT AFFECTED.

Of Note:

- Amendments to the Construction Industry Arbitration Rules and Mediation Procedures, effective October 1, 2009
 - In mediation, absent party agreement, locale shall be city nearest to the site of the project.
 - Parties may not call the mediator, the AAA or AAA employees as witnesses in subsequent litigation.

Uhl v. Komatsu Forklift Co. (2008)

- Generally court may review arbitration awards under the Federal Arbitration Act where:
 - award was procured by corruption, fraud, or undue means.
 - evident partiality or corruption in the arbitrators.
 - arbitrators were guilty of misconduct.
 - where the arbitrators exceeded their powers.

Of Note:

- Where contracts do not incorporate FAA, the review of arbitration awards differs by state.

Indemnity and Shifting Risk

- Contract with sub-contractor to hold you harmless for their negligence.
- Remember to check state statutes and case law on indemnification to enforce indemnity clause.

Indemnity and Shifting Risk

- In some states you can contract with sub-contractor to hold you harmless for YOUR negligence if related to scope of job.
- Indemnification provisions must use the correct (“magic”) language.
- Include indemnity language shifting defense costs to the sub-contractor.

Indemnity and Shifting Risk

- Include language limiting recoverable damages to:
 - Amount of contract.
 - Amount of applicable insurance.

Indemnity and Shifting Risk

- Certificates of Insurance
 - Read them.
 - Read and understand underlying policies.
 - Require proof that carrier is on notice and agrees with cert.
 - Give broker underlying contracts.

THANK YOU

**Stay tuned for more
developments...**

John F. Mullen, Sr.

jmullen@nldhlaw.com

T: (215) 358-5154

M: (610) 608-8785

Mark C. Stephenson

mstephenson@nldhlaw.com

T: (215) 358-5175

M: (215) 880-3134

**518 Township Line Road, Suite 300
Blue Bell, PA 19422**