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January 2017

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New Updates to ConsensusDocs Contracts to Reflect Today's Industry

Brian Perlberg, Executive Director, ConsensusDocs

In You can't say general contractor without saying the word “contract.”

Construction contracts set the foundation for project teams, but too often, contracts are treated as an afterthought. Most construction contracts are not well understood – or even read!

Standard construction contracts published by industry associations provide a common understanding and offer a best practice baseline for all parties to follow.

Unfortunately, over the years, the balance of most industry standard documents has fragmented. The majority of projects have “unique” – I would say Frankensteinian – contracts with body parts and scars from dead projects, brought back to life after being crudely sewn together to complete a body of (mis)understanding. Sometimes contracts that have been modified even exceed the length of the original standard contract, and at the sacrifice of predictability and fairness.

ConsensusDocs, an unprecedented coalition of leading construction organizations that primarily include Owner and contractor groups, was created nine years ago to forge a better path with fair and best practice contracts. The goal was to improve the industry by, in part, reducing wasteful transactional costs in projects spent on claims and litigation. The coalition has grown from 20 groups to 40 groups, and has a successful track record of projects that don't end up in claims and the courts.

ConsensusDocs has established itself as one of the two most used industry standard documents, with over 2,000 subscribers across the country. These contracts are used often on projects utilizing active and sophisticated Owners, as well as projects in which the builder has a greater role earlier in the projects. When builders are involved early in projects and, thereby, contract forming decisions, such as in Design-Build or Construction Manager at-Risk, ConsensusDocs contracts are more likely to be used.

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The coalition has a five-year revision cycle, and just published the 2016 comprehensive revisions to its Design-Bid-Build prime and subcontract agreements. This article will highlight revisions from this update cycle that are intended to keep ConsensusDocs – and you – ahead of the curve.

This comprehensive update is more of a clarification and refinement than a rewrite. And after getting extensive feedback and evaluation, the risk allocation principles to achieve fair and best practices are kept intact.

The changes that have allowed these documents to stay ahead of the curve mostly relate to changes and updates in the construction insurance market, the impact of technology on projects, and consistency in terminology and placement within the entire family of documents.

Insurance Updates

One of the larger changes was in insurance. No longer does the purchase of builder's risk insurance default to the Owner. While the Owner can opt to buy this policy himself, it has been determined that it is more common and cost effective for the builder to buy this policy and make sure it covers renovation work.

Because of these changes, builders will want to be sure and include their cost in a lump sum price, or modify language to seek a change order to reflect the price. In addition, risk of loss for work done before substantial completion will rest with whoever is charged with procuring the builder's risk policy, which again, will now default to the builder.

Also in the area of insurance is a check-the-box recognition that pollution liability insurance is often required on projects when the project site or the nature of the work raises pollution liability issues. A provision allowing the Owner's self-insurance is being eliminated from the standard contract.

Termination for Convenience

ConsensusDocs will no longer automatically convert an improper "termination for" cause to be considered a termination for convenience. Consequently, an improper "termination for" cause may have larger damages, such as lost profits on work not performed.

Associations involved with the coalition have the opportunity to publish ConsensusDocs Guidebook comments to highlight especially important issues for possible education and modification. Termination for convenience is a topic that AGC is now addressing in its Guidebook comments.

Indemnification

The indemnification section now explicitly covers intentional wrongful acts – in addition to negligence. It would seem strange to be protected if a company acted negligently, but not protected if a rogue employee intentionally sabotaged a project.

Fiduciary Relationship is Stricken

Over the years, some design professionals and insurance stakeholders complained about the possibility of unintentionally creating a fiduciary relationship in the ConsensusDocs 240 Owner and Design Professional Standard Agreement.

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In 2011, language referencing a covenant was stricken. Now, in 2016, language about furthering “others’ interests” is also stricken. As a result, there should be little concern that a fiduciary relationship is being created. Creating a fiduciary relationship would be problematic in that it would require a design professional to put the Owners’ interest above his own, and create extra liability exposure beyond insurance coverage.

The change is another indication that ConsensusDocs is fair to all stakeholders and is not aiming to provide either an advantage or a disadvantage to design professionals. In contrast, design-builders contemplating using an AIA 141 Standard Form of Agreement Between Owner and Design-Builder should be very aware of the fiduciary relationship language that is included in Exhibit A, which is inconsistent with other AIA agreements that involve a design professional.

Dispute Resolution & Mitigation

The ConsensusDocs approach to avoiding and minimizing claims and litigation is a trademark feature, and why ConsensusDocs offers a better way. Also added is an explicit check-the-box approach to mediation that includes JAMS, but creates a default of the American Arbitration Association (AAA) if no boxes are checked.

Bonds and Penal Sum

Based on feedback from the surety industry, a floating penal sum that automatically increases if the contract price increases by more than 10% has been eliminated. The parties are encouraged to coordinate with their sureties on the project if there is significant price creep on a project, which will keep the surety on the loop of changes and the chance to re-underwrite a project without automatically giving approval. It should be noted that additional bond premiums are ultimately collected automatically when contract price goes up.

Clarifications

If you did a straight redline of the old and new additions, you might see hundreds of changes. The majority of changes are editorial in nature for better clarity, brevity, and consistency.

If there were differences between some general language in, say, the Design-Bid-Build and Design-Build language, great care was taken to choose the best worded language, and then have that same language appear in all the equivalent agreements.

In some instances, sections were moved; you can now expect to see contract provision language in similar order across different (project delivery method) families of contract.

I get a consistent feedback that most people want to have very short contracts of no more than two pages. However, unless you want to put the guts of the contract in exhibits or separate general conditions that might conflict, you're not achieving a “meeting of the minds.” Most construction projects, even the smaller dollar ones, still have some complexity that needs to be addressed.

With that caveat, the ConsensusDocs short form documents (ConsensusDocs 205, 245,751) have just been revised and are our most often used documents.

Future Outlook

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In March 2017, ConsensusDocs will publish updates to the 400 Design-Build series and the 500 Construction Manager at-Risk contracts. The updates will be consistent with the highlights covered in this article.

About the author: *Brian Perlberg, Esq. is Executive Director of ConsensusDocs and Senior Counsel for Construction Law for AGC of America. He works in the Washington, D.C. area and can be reached at bperlberg@consensusDocs.org.*

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Empower Your Arbitrator to Allocate or Award Attorney's Fees
Eugene J. Heady, Partner, Smith Currie & Hancock, LLP

Claims and disputes involving construction projects tend to be technically complex and factually intensive. As a result, the resolution of construction claims and disputes can be time consuming and costly. In prosecuting or defending claims, one question that always arises is "*Can I recover my attorneys' fees if I win?*" The traditional "American Rule" is that the winning party—referred to as the "prevailing party"—may not recover attorneys' fees unless recovery is statutorily or contractually authorized via a "fee-shifting" or "prevailing party" attorneys' fees provision. Under the American Rule, each litigant must pay its own attorneys' fees. If there is a statutory or contractual fee-shifting provision in play in a lawsuit then the judge will sort out the respective rights of the litigants. Another question that arises is "*Who sorts out the attorneys' fees issue if I arbitrate my construction claim rather than litigating the claim in a court proceeding?"*

Absent specific statutory authorization or agreement by the parties, the law is unsettled regarding whether arbitrators have the authority to award attorneys' fees. While there is no such prohibition in the Federal Arbitration Act, some states forbid arbitrators to award attorneys' fees unless specifically empowered to do so by the parties' agreement. Accordingly, if your contract contains a prevailing party attorneys' fees provision, which requires the loser to pay fees, then make sure that within the four corners of the arbitration clause itself you expressly authorize the arbitrator to include in the final award an allocation or award of attorneys' fees. Absent such express authority, the arbitrator may leave each party with the responsibility to pay its own attorneys' fees.

Some institutional arbitration rules allow the arbitrators to award attorneys' fees to a prevailing party and some do not. Most institutional arbitration rules, however, permit the parties to provide for an award of attorneys' fees in their arbitration agreement. The American Arbitration Association's Construction Industry Arbitration Rules & Mediation Procedures, as amended and effective July 1, 2015, for example, expressly addresses the award of attorneys' fees. AAA Rule R-48 provides for "an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement." Thus, in an arbitration proceeding under the AAA's Construction Industry Rules, the issue of whether claims for attorneys' fees exist will typically be addressed up front by the arbitrator at the initial Preliminary Management Hearing. The Preliminary Management Hearing is typically conducted by telephone and will be the first time that the parties and/or their attorneys appear before the arbitrator. The arbitrator will want to know (1) whether one or both parties is seeking an award of attorneys' fees, (2) whether the parties' contractual agreement provides for the award of attorneys' fees, and (3) whether either party contends that an award of attorneys' fees is authorized by the law governing the parties' contractual agreement.

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It is important to note that under AAA Rule R-48 there are three ways that a possible award of attorneys' fees can be triggered: (1) if *all* parties have requested an award of attorneys' fees; (2) if an award of attorneys' fees is authorized by the parties' arbitration agreement; or (3) if an award of attorneys' fees is authorized by law. Consider the issues that are raised by AAA Rule R-48.

- **Have the pleadings triggered a possible award of attorneys' fees?** What if the Claimant (the party filing the Demand for Arbitration) requests an award for attorneys' fees where an award of attorneys' fees is not authorized by law and is not expressly authorized by the parties' contractual agreement? If the Respondent (the party answering the Demand for Arbitration) also requests an award of attorneys' fees, the Respondent has effectively empowered the arbitrator to consider and award attorneys' fees. If under this scenario the Respondent does not want to be exposed to an award of attorneys' fees in favor of the Claimant then the Respondent must deliberately avoid requesting an award of attorneys' fees.

- **Has a statute triggered a possible award of attorneys' fees?** Make sure that you are intimately familiar with what law governs the underlying contract. Does the law of the state where the project is located govern? Does the contract contain a choice of law provision designating that the law of some other state shall govern the contract? Does the governing law provide for the recovery of attorneys' fees for all claims that could be brought or just certain types of claims? If there is statutory authority for an award of attorneys' fees then you should be prepared to raise this issue with the arbitrator as early as possible in the proceeding. The arbitrator may ask the parties to provide a memorandum of law outlining the statutory authority for an award of attorneys' fees and the legal basis for the arbitrator's power to award attorneys' fees.

- **Has the contract triggered a possible award of attorneys' fees?** If the underlying contract contains a fee-shifting or prevailing party attorneys' fees provision, consider where in your contract such provision or provisions appear. If the fee-shifting provision is not contained within the four corners of the "arbitration agreement" then you may be faced with an argument that the arbitrator has not been expressly empowered to award attorneys' fees absent some other basis, such as authorization by law or by the competing demands of the Claimant and the Respondent. Thus, if you include a fee-shifting or prevailing party attorneys' fees provision within your contract, it is good practice to include the provision within the body of the arbitration agreement itself or, at a minimum, include within the arbitration agreement a cross-reference to all fee-shifting or prevailing party attorneys' fees provisions that are contained in other sections of the contract.

There are many ways to draft a contract provision that may empower the arbitrator to award or allocate attorneys' fees. ConsensusDocs 200, Standard Agreement and General Conditions Between Owner and Constructor (2011, Revised 2016), for example, contains the following provision: 12.5.3 COSTS The costs of any binding dispute resolution procedures and reasonable attorneys' fees shall be borne by the non-prevailing Party, as determined by the adjudicator of the dispute. The ConsensusDocs Committee appropriately and strategically placed this provision within the four corners of Article 12 DISPUTE MITIGATION AND RESOLUTION. Similarly, the AAA provides the following typical language as a drafting guide: *The arbitrator shall award to the prevailing party, if any, as determined by the arbitrator, all of its costs and fees. "Costs and fees" mean all reasonable pre-award expenses of the arbitration, including the arbitrator's fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees, and attorneys' fees.* Before simply inserting such language into your contracts without further thought, however, it

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is advisable to consult with a seasoned construction lawyer. State law may define "prevailing party" and such definition will likely guide the parties' respective positions regarding how the arbitrator should decide who wins and who recovers attorneys' fees. Absent any statutory guidance, you should consider providing the arbitrator with a detailed definition of "prevailing party" within the four corners of your arbitration provision. Two excellent examples of language that may be used as a guide for drafting a definition of prevailing party can be found in the *ConsensusDocs Guidebook* for *ConsensusDocs 200 – Agreement and General Conditions Between Owner and Constructor (Lump Sum)*, pp. 15-16, August 2013 Ed. The Guidebook can be found at the following location: https://www.consensusdocs.org/Resource_/FileManager/200_Guidebook_05_07_14.pdf. Again, a seasoned construction lawyer will be able to assist you in tailoring or drafting such language to fit your particular needs.

Having the ability to shift responsibility for attorneys' fees to the losing party, whether by statute or contract, can be a powerful motivator in getting the parties to the negotiating table. Thus, one way to help encourage the early settlement of claims is to include a fee-shifting or prevailing party attorneys' fees provision in your construction contracts, subcontracts and purchase orders.

For additional thoughts on what can be done to improve on a standard boilerplate arbitration clause, I suggest that you read the article: *Strategies for Drafting an Effective Arbitration Clause*. Send me an email to gjheady@smithcurrie.com, and I will send you a copy. For additional thoughts on hiring a seasoned construction lawyer, I suggest that you read the article: *Does Your Lawyer Know the Difference Between Cement and Concrete? Points to Consider When Selecting and Hiring a Construction Lawyer*. Send me an email, and I will send you a copy. In the meantime, you should review your standard form contracts, subcontracts, and purchase orders and think about whether a fee-shifting or prevailing party attorneys' fees provision is desirable. If so, make sure that the provision is contained within the "arbitration agreement" itself and that the arbitrator is expressly empowered to make an award of attorneys' fees. You should consult with your construction lawyer to help craft a provision that will be enforceable under the prevailing law and that will meet your unique objectives.

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Managing the Risks of Subcontract Claims
Patrick J. Greene, Jr., Partner, Peckar & Abramson, P.C.

All but the least complex construction projects involve risks associated with uncertainty. Good contract documents anticipate the nature of the probable risks and provide mechanisms for allocating the potential financial consequences among the parties. The best contract documents allocate risks to those best equipped to identify and control their effect and provide clear procedures to resolve any issues derived from such risks in a prompt and efficient manner and to adjust the contract terms as to price and time amicably.

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An important risk contractor's face is subcontractor claims. These may derive from action of the contractor itself or as, is often the case, from the actions of the owner or other entities for whom the owner is responsible (i.e., the designers). In the latter circumstance, the contractor can become liable to the subcontractor for risks that are controlled and created by others.

The goals of the subcontract provisions and management of subcontractor claims should be:

- Avoidance of simultaneous disputes with one or more subcontractors and the owner
- Avoid inconsistent positions vis-à-vis owner and subcontractor
- Preserve/maximize the value of the general contractor’s claims against the owner
- Preserve/maximize the value of subcontractor claims that can be asserted against the owner
- Minimize/eliminate subcontractor claims against the prime contractor that cannot be asserted against the owner
- Defer resolution of any dispute with the subcontractors until the owner/prime contractor dispute is resolved
- Preserve prime contractor claims against the subcontractor
- Avoid subjecting the prime contractor to inconsistent results and conflicting liabilities.

Notably, many jurisdictions find a contractor liable to a subcontractor for changes and extra costs caused by the owner. *See, e.g., St. Paul Dredging Co. v. State*, 259 Minn. 398, 107 N.W.2d 717, 723 (1961); *State Surety Co. v. Lamb Constr. Co.*, 625 P.2d 184, 191 (Wyo. 1981). While other jurisdictions may not hold a contractor directly liable for the actions of the owner, (*See, Triangle Sheet Metal Works, Inc. v James Merritt & Co.*, 79 N.Y.2d 801, 580 N.Y.S.2d 171 (1991)), such jurisdictions may hold a contractor liable when it does not faithfully present and prosecute the subcontractor's pass-through claims against the owner. *See, Rad and D'aprile Inc. v. Arnell Construction, Corp.,* 49 Misc. 3d 189; 12 N.Y.S.3d 812 (N.Y. Sup. 2015).

The consequences that can follow from a failure to effectively manage the risk of subcontractor claims arising from the acts of the owner are exemplified in *Pepper Construction Company v. Palmolive Tower Condominiums,* 59 N.E.3d 41 (Ill. App. 1st 2016), a case that involved multiple arbitrations and trials, including significant litigation over the extent to which a subcontractor who had directly participated in the presentation and arbitration of its claims against the owner was bound by the determinations in the arbitration.

The extent of the contractor's liability for the acts of the owner and others can and should be defined in the subcontract, and the contractor should actively use the subcontract provisions to manage the subcontractor's claims.

The effort to manage the risk of subcontractor claims should begin with a well-crafted subcontract that requires early notice and support from the subcontractor to allow the general contractor to comply with the claim provisions of the general contract. It is essential that any notice periods in the subcontract be of short enough duration to allow the contractor to evaluate the notice and to pass along appropriate – and timely – notice to the Owner. Moreover, a well-constructed subcontract will allow the subcontractor to recover time and additional compensation but limit the subcontractor's right to recovery such that it is equal to the contractor's actual and final recovery against the owner or third party. The subcontract should also contain the subcontractor's agreement to defer or stay any action on its claims pending the resolution of any dispute with the owner or third party and should bind the subcontractor to the results of any such proceeding.

It is not enough to rely upon general incorporation by reference provisions that flow down to the subcontractor the same “obligations, rights and remedies” as are contained in the prime

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contract. Such clauses are usually unclear and insufficiently detailed to provide the general contractor with reliable protection. Courts usually construe such clauses to incorporate the specifications and requirements as to the work to be performed, but may are often interpreted as not incorporating the prime contractor's compensation rights, leading to a potential that the prime contractor will have to pay the subcontractor more than the prime contractor receives for the same work. Moreover, clauses that give the subcontractor the "same rights and remedies" as the general contract are difficult to apply when the dispute provisions of the prime contract do not permit a mechanism for resolving disputes between the subcontractor and the prime contractor and are especially problematic when the prime contract subjects disputes to arbitration or to an administrative tribunal that does not have jurisdiction over subcontractor claims against the contractor. In such circumstances, a court is likely to reject the prime contractor's attempt to restrict the subcontractor's rights and to allow an action by the subcontractor against the prime contractor to proceed without regard to a pending proceeding between the prime contractor and the owner.

Nor is reliance upon a standard pay-when-paid or pay-if-paid clause sufficient protection. Such clauses may not be fully enforced in certain jurisdictions and are usually not specific enough when it comes to claims for additional compensation and time. It is essential that limitations as to pass-through liability be stated in a clause separate from any provisions dealing with payment restrictions to maximize their enforceability.

Once all these provisions are written and agreed it is absolutely essential that the contractor perform its part. The Owner should always be notified promptly and consistently with the contract requirements. Too often the contractor's first instinct is to not provide notice so as to not impair its relationship with the owner. This instinct must be overcome, especially with respect to subcontractor claims for which the owner may bear responsibility. As noted above, many jurisdictions hold the general contractor liable to the subcontractor for the owner's actions and others require the contractor to faithfully present the subcontractor's claims and hold the general contractor liable when it doesn't. In just about every jurisdiction the general contractor who fails to give notice to the owner risks having to pay the subcontractor without any recourse to getting its money back. Such a risk can and should be minimized by compliance with the contract notice and claim provisions in a frank, non-antagonistic and business-like manner.

The risk management professional and/or attorney cannot simply rely on basic legal principals or standard subcontract provisions to promote its client's interest in these circumstances, but must employ a concerted strategy, specialized subcontract provisions and disciplined procedures throughout contract performance.

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Coming Down the Pipeline: Mitigating the Payment Risk in Oil and Gas Construction Through Lien Claims

Joseph T. Imperiale, Partner, Pepper Hamilton LLP

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Jeffrey R. Mullen, Associate, Pepper Hamilton LLP

Since 2015, the oil and gas market has experienced significant distress. Recent reports have tracked at least 114 North American oil and gas producers and 16 midstream companies that have filed for bankruptcy since the beginning of 2015, involving a total of approximately $91.4 billion in cumulative secured and unsecured debt.

Projects throughout the country have been stalled, suspended or terminated. While outfield service companies have felt the pinch, pipeline contractors, subcontractors and suppliers are increasingly faced with the risk of nonpayment.

So how do pipeline contractors, subcontractors and suppliers mitigate this risk of nonpayment?

For subcontractors or suppliers, payment bonds are the best form of protection when facing upstream insolvency. But payment bonds are not required and are often not secured in the private project setting. Nevertheless, subcontractors and suppliers should ask at the outset of the project whether a payment bond has been secured so they are prepared to make a claim if need be.

Making claim in bankruptcy court is another avenue of recovery. While bankruptcy court affords contractors, subcontractors and suppliers the opportunity to make a claim for payment, bankruptcy poses challenges. Once bankruptcy has been filed, contractors, subcontractors and suppliers typically find themselves at the end of a long list of debtors, with rights subordinate to those of lenders and other secured creditors. The best-case scenario is often a recovery of pennies on the dollar.

Mechanics' lien laws offer contractors, subcontractors and suppliers another avenue of recovery. With payment bonds often not secured, and the prospect of diminished returns in bankruptcy court, contractors, subcontractors and suppliers commonly turn to mechanics' liens to secure their right to payment. In general terms, a mechanics' lien affords contractors, subcontractors and suppliers statutory protection from nonpayment for goods or services furnished on certain projects. In the event of nonpayment, a mechanics' lien can be filed against the property on which the project is located. This gives the lien holder an actual interest in the real estate or other property interest that their labor or materials improved. The mechanics' lien must be filed within a particular period of time, and, if the lien is not paid, the lien holder can foreclose upon the lien to obtain payment.

The nature of pipeline, however, poses a unique challenge for parties' making mechanics' lien claims. Mechanics' lien laws in many jurisdictions are drafted to address traditional vertical construction on a single plot of land. Because pipelines snake through miles of public and private property on rights-of-way secured for the pipeline, mechanics' lien laws in many jurisdictions are not equipped to address pipeline construction.

Mechanics' lien laws are jurisdiction-specific and vary widely from state to state. What projects are covered, who is entitled to file a lien, the property interest the lien attaches to, and the process and requirements to perfect a lien depend on the jurisdiction in which the project is located. This is particularly true for pipeline projects. One of the fundamental distinctions between oil and gas development and vertical construction is the nature of the improvement and property interest to which the lien attaches. On most construction projects, the lien attaches to the project owner's real estate. In oil and gas development, however, the project "owner" (*i.e.*, the company constructing the well or pipeline) often has obtained a right-of-way on the property and is not the fee owner. The question of whether a pipeline constitutes a

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lienable improvement for purposes of the state's mechanics' lien law is unsettled in many jurisdictions.

This is the case in Pennsylvania and many other jurisdictions where the general mechanics' lien laws, despite the Marcellus Shale play, do not mention oil and gas projects at all. This presents the question as to whether the installation of the pipeline qualifies as an "improvement" for purposes of the state's general mechanics' lien laws, and whether an easement interest in the land is even subject to a lien.

The statutory language under the Pennsylvania mechanics' lien law defines an "improvement" to include "any building, structure or other improvement of whatsoever kind or character erected or constructed on land, together with the fixtures and other personal property used in fitting up and equipping the same for the purpose for which it is intended." 49 P.S. § 1201(1). The definition is silent as to the specific types of projects that it includes, and the Pennsylvania courts have yet to provide definitive guidance.

In *Yellow Run Coal Co. v. Yellow Run Energy Co*., 420 A.2d 690 (Pa. Super. Ct. 1979), the Pennsylvania Superior Court analyzed whether mining is an improvement to real property under the Pennsylvania mechanics' lien law. In that case, the court drew a distinction between strip mining (which involved only activities associated with the excavation of top soil and coal) and underground mining (which also included the erection and construction of permanent improvements). The court held that strip mining coal and backfilling, unconnected with the construction of a building or other permanent structure, could not be the basis of a mechanics' lien. With respect to pipeline construction, one might argue that, unlike *Yellow Run*, a pipeline includes the erection and construction of permanent improvements and thus is subject to lien. But Pennsylvania courts have not specifically resolved the issue of whether the installation of a pipeline falls within the definition of "improvement" on all projects.

Likewise, while Pennsylvania courts have extended lien rights to the "owner's" leasehold or other equitable interests in the land, the courts have yet to resolve whether this extends to easements secured for the installation of the pipeline.

In other jurisdictions, however, state legislatures have eliminated the uncertainty by enacting specific lien laws addressing oil and gas projects. For example, Ohio's mechanics' lien law includes a separate section that provides for the right to lien upon oil or gas well facilities and pipelines. *See* Ohio Rev. Code Ann. § 1311.021. That section states:

> Every person who performs any labor or work upon or furnishes material for digging, drilling, boring, operating, completing, or repairing, any well drilled or constructed for the production of oil or gas or any injection well which furthers the production of oil and gas or which disposes of waste products generated by oil and gas operations, or for altering, repairing, or constructing any oil derrick, oil tank, or leasehold production pipe line by virtue of a contract, express or implied, with the owner or part owner, or the owner's or part owner's authorized agent, of any oil and gas lease or leasehold estate or, in the event there is no lease or estate, any mineral estate, and every subcontractor, laborer, and material supplier who performs any labor or work or furnishes material to an original contractor or any subcontractor, in carrying forward, performing, or completing the contract, has a lien to secure the payment thereof upon the oil and gas lease or leasehold estate or, in the event there is no lease or estate, any mineral estate, the oil or gas produced therefrom and the

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> proceeds thereof, and upon all material located thereon or used in connection therewith.

Importantly, this section also sets forth a process for actually filing a lien on a pipeline and the security interests that are attached. In the event there is no oil and gas lease to lien against, the statute extends lien rights to the proceeds of the oil and gas produced by the pipeline. Other states, such as Arkansas, Florida, Illinois, Iowa, Michigan, Nebraska, New Mexico, Ohio, Texas and Utah, have taken a similar approach by enacting statutes specifically addressing a contractor, subcontractor or supplier's lien rights in the context of oil and gas development.

Whether a contractor, subcontractor or supplier can rely on mechanics' liens for protection in the event of upstream insolvency depends on the jurisdiction. It is therefore important to understand the mechanics' lien laws and any other applicable statutes in the state where the project is located, as well as how the courts have interpreted those laws.

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Project Case Study

Capstone Bank, Indian Hills Branch, Tuscaloosa, AL

Contract Used:

- ConsensusDocs 510 - Owner and Construction Manager Agreement (Cost of Work with Preconstruction Services Option)

Project Contractor: WAR Construction, Inc.

Project Description: WAR was tasked with coordinating various subcontractors' scopes of work to renovate the existing bank building and add a new drive thru building while…**Read More**

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