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CONSTRUCTION LEGAL EDGE

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ARTICLES CONTAINED IN THIS ISSUE OF THE CLE:

Medical Marijuana Legislation Leaving Employers' Workplace Policies up in Smoke

In May 2016, Governor Tom Wolf signed into law Pennsylvania's medical marijuana legislation that gave individuals the ability to use marijuana to treat qualifying serious mental and physical conditions when prescribed by a physician. This law, while seemingly the latest addition of a growing trend (29 states have legalized the use of medical marijuana within their state, including the District of Columbia), poses severe challenges to construction employers in this state who hope to have drug-free workplaces and worksites, especially considering the law is in conflict with the federal government's prohibition of the use of marijuana.

At the outset, there is no one size fits all approach for an employer where an employee uses marijuana per a valid prescription because state statutes legalizing its use vary drastically in scope and implementation. In some states, employees on the job use of marijuana has been directly prohibited by statute. Other state statutes are silent as to medical marijuana users' employment rights and obligations. As a result, employers often have little guidance as to how to draft their workplace policies or how to respond when an employee has a marijuana prescription.

For example, what if you have an employee who has a valid marijuana prescription and has violated the drug policy you have implemented? This is one of the most factually complex issues facing employers in states where they have passed medical marijuana legislation. Pennsylvania, among other states, prohibits employers from taking any adverse action against an employee solely because the employee has a prescription for medical marijuana. But the Supreme Court of Colorado, one of the most marijuana-friendly states, has ruled employees may be fired for using medical marijuana, even when used off the clock.

Despite the lack of consistency from state to state, all employers are generally free to implement and enforce policies banning marijuana use at work and prohibiting employees from working while impaired, just as employers have been able to restrict on the job consumption of otherwise legal substances such as alcohol. Employers may also have a zero tolerance policy for workers in "safety sensitive" positions as defined by the Drug Free Workplace Act, including positions involving the use of heavy machinery or driving in order to prevent injuries.

For example, the Occupational Safety and Health Administration ("OSHA") is requiring employers to establish a "reasonable procedure" for employees to report work-related injuries and illness. OSHA has stated that "drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use." Most employers have post-accident drug testing that makes up the heart of their safety programs. Going forward, policies must be tailored to account for the trends of federal agencies as they try and catch up to state legislatures.

Another issue confronting employers is whether federal employment statutes, such as the Americans with Disabilities Act ("ADA"), cover employees who legally use medical marijuana under state law. An individual who is currently using illegal drugs is generally not considered a qualified individual with a disability and would not be afforded ADA protections from disability discrimination or require the individual's employer to make reasonable accommodations for a disability. However, some state statutes require employers to make exceptions to workplace policies for medical marijuana use. Legalization of medical marijuana also raises implications for employers covered under the Family Medical Leave Act ("FMLA"). For example, an FMLA eligible employee who requires time off work to use medical marijuana may be entitled to use FMLA leave for that time.

Some steps construction companies can take to ensure that your safety policies are up-to-date and responsive to both federal and state law are:

• Educate team leaders and managers on the obligations under your state's requirements. If you are an employer that must follow federal regulations, ensure that your policies are responsive to the requirements of OSHA, ADA and FMLA;

• Review company drug policies so it is in accordance with your state's specific requirements;

• Ensure managers and leaders in your company know the signs of an employee's possible intoxication and proper documentation of safety-related incidents involving impairment; and

• Consult legal counsel before taking any adverse action against an employee with a marijuana prescription because some states have created new retaliation causes of action for medical marijuana use.


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Sureties May Be Exposed to Attorneys' Fees for Ensuing Litigation

Surety bonds for construction contracts may contain provisions for the recovery of attorneys' fees. If a principal defaults during construction, an obligee may sue the company that issued a performance bond for the costs of completing the work, including the expenditure of attorneys' fees. Whether these attorneys' fees may also include those incurred to litigate the dispute is a matter few courts applying Pennsylvania law have considered. While the language of the bond controls this determination, courts' interpretations have depended on the subject of the suit.

Under Pennsylvania law, a surety will not be exposed to liability for attorneys' fees unless the bond makes "specific mention of the surety obligating itself to pay for attorney's fees..." *J.C. Snavely & Sons, Inc. v. Web M&E, Inc.*, 594 A.2d 333, 336-37 (Pa. Super. 1991). "[I]t is the language of the bond that is determinative of the surety's obligation and not the agreement between the…contractor and his materialman." *Reliance Universal, Inc. of Ohio v. Ernest Renda Contracting Co., Inc.*, 454 A.2d 39, 45 (Pa. Super. 1982). The Third Circuit has noted that "it is always true that when a plaintiff must make expenditures for attorney's fees to recover a debt it will not be made whole unless its fees are also recovered," but this does not permit recovery for litigation fees under a bond providing only for sums "justly due." *Knecht, Inc. v. United Pacific Ins. Co.,* 860 F.2d 74, 80-81 (3d Cir. 1998). Instead, a bond must contain an express authorization for recovery of attorneys' fees in order to obligate a surety for the same. *Knecht*, 860 F.2d at 81.

But where attorneys' fees are explicitly provided for in the bond, Pennsylvania state courts will enforce the provision. *See Com., Dept. of Transp. v. Manor Mines, Inc.*, 565 A.2d 428, 433 (Pa. 1989) (awarding attorneys' fees where the performance bond provided for recovery of "costs of suit, release of errors, without stay of execution and with 5% attorney's fees added for collection….").

Interestingly, the United States District Court for the Eastern District of Pennsylvania has twice considered the award of attorneys' fees incurred in ensuing litigation under a performance bond, with opposite results. In *Chichester School District*, the United States District Court for the Eastern District of Pennsylvania awarded attorneys' fees to the School District, "including those expended in litigation." *N. Am. Specialty Ins. Co. v. Chichester Sch. Dist.*, 158 F.Supp.2d 468, 475 (E.D. Pa. 2001). The bond in *Chichester School District* provided for "[a]dditional legal…costs resulting from the Contractor's Default, and resulting from the actions or failure to act of the Surety…." *Id.* at 472. The court held the School District was entitled to attorneys' fees incurred in litigating its counterclaim because this claim was based on the surety's defective work after takeover of the project. *Id.* at 475. But the court distinguished these awardable fees from fees incurred in litigation that "involved the missteps of the School District alone." *Id*. The language of the bond providing for attorneys' fees "resulting from the actions or failure to act of the Surety…" allowed recovery of only those litigation fees incurred in seeking redress for the surety's breach.

But in *Turner Constr. Co. v. First Indemn. of Am. Ins. Co.*, 829 F.Supp. 752 (E.D. Pa. 1993), the same court held that recoverable costs included only those attorneys' fees that were incurred to complete the work, and not fees incurred in litigation. The bond provided that, "[i]f the costs of completing [the subcontractor's] work exceeded the unpaid balance on the

Subcontract, then … [the subcontractor] was required to reimburse [the general contractor] 'not only [for] the costs of completing the work ... but also [for] all losses, damages, costs and expenses, including legal fees and disbursements sustained, incurred or suffered by reason of or resulting from the Subcontractor's default.'" *Id.* at 759-60. The subcontractor defaulted on its obligations, and the surety refused to pay for completion of the work. The general contractor completed the work, and then sued the surety for recoupment of the costs to complete the work. The general contractor sought attorneys' fees for both costs to complete the work and the costs incurred in suing the surety. The court held that attorneys' fees were recoverable only for those incurred in completing the construction because the lawsuit was caused by the surety's refusal to reimburse for costs of completing the work, and not "from the Subcontractor's default."

The *Chichester School District* and *Turner* decisions, while disparate in result, are reconcilable. In each case, bond language for attorneys' fees specifically required causation or fault of a particular party. These courts relied on the bond language and decided the issue through determining the subject of the lawsuits. Thus, specific attention should be paid to the express provisions of a bond, particularly in considering whether attorneys' fees may be extended to those incurred during the ensuing litigation.

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Drones Will Change the Game in Construction

Drones, or "Unmanned Aerial Vehicles" as the experts call them, have already found a home in the construction industry. As technology improves, these nifty and creative gadgets will be sure to catch on like wildfire across the industry. Construction for the new basketball arena for the Sacramento Kings is using software and drones to monitor lags in progress with the construction. Data is gathered on a daily basis and compared to the architectural design and blueprints to ensure the project is moving along as scheduled. BP uses drones to inspect the Alaska pipeline using infrared cameras to test for hot spots and other infrastructure faults. More locally, in Dayton, Ohio, Woolpert, Inc., a design management firm, is using drones to perform aerial surveying.

Potential uses for drones are truly unlimited:

1. They can be equipped with HD cameras to take photographs and videos for aerial imaging of sites, buildings, and projects. Data can then be used for 3D modeling and site surveying. Laser scanning technology can also be used for modeling.
2. Companies can use drones to monitor progress on construction projects and ensure worker safety.
3. Drones can be used to prevent trespass and other criminal activity on large-scale projects. They offer a low cost form of surveillance.
4. Material and equipment transportation and delivery is an option when cranes are not a viable option. Indeed, unlike cranes, drones have the ability to reach any point in space.
5. Infrared cameras can be used to test materials for defects and flaws, such as water system or chemical leakage.

6. Thermal-imaging camera can detect heat loss, HVAC, and air conditioning problems.
7. Drones can monitor project lighting during all hours of the night, including tough to reach stops at the tops of buildings.
8. Aerial footage offers fantastic marketing material for construction businesses. Companies can even use drone footage to offer clients and customers a "live look" into the status of a project.
9. OSHA could use drones to inspect construction sites. Could you imagine being served an OSHA citation with evidence gathered by drone?

According to Pete Campbell, the safety director of BNBuilders, Inc.: *"We started using drones mostly for generating marketing materials and aerial views of our projects, but in that process we found out that we could use drones for all kinds of things. We could take a close-up aerial photo of a concrete pour, to document the locations of post-tension cables, conduits and rebar built into the concrete. It's relatively difficult to document that without drones, so we were able to take photos with drones, and within minutes photoshop them over as-built plans to determine exactly what is located in the concrete."*

Businesses already exist to fill the needs of the construction world. Companies, including Krespy and Precision Drone, manufacture drones for the agriculture, mining, and construction industries. Navigation equipment manufacturers, including Topcon and Trimble, provide drones for the construction industry, as well.

However, under the current FAA regulations, commercial operation of a drone is not legal. To use a drone for your construction business you must first obtain an exemption under Section 333 of the FAA's Modernization and Reform Act of 2012. Over 3,300 exemptions have been granted for commercial use, and over 450 of those exemptions include use of drones on construction sites.

Have you considered using drones on your next construction project? Don't sit around. Get on the drone bandwagon while you still can!

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Supreme Court Holds That Insureds Need Not Prove Insurance Company's Ill-Will or Motive of Self-Interest for Bad Faith Claims

While construction related claims do not regularly appear in opinions dealing with Pennsylvania's insurance bad faith statute 40 P.S. §8371, courts have found bad faith against insurers in construction related claims and awarded punitive damages. See, e.g., *Corch Const. Co. v. Assurance Co. of America,* 64 Pa. D. & C. 4th 496 (Pa. Com. Pl. Luzerne 2003, *affirmed* 881 A.2d 893 (Table) (Pa. Super. 2005), *appeal denied* 901 A.2d 498 (Table) (Pa. 2006). In that case the court held that Assurance Company of America, acted in bad faith in failing to timely accept the report of the plaintiffs' claim under its builders risk policy and timely investigate and pay this claim when it became undeniably clear from all of the evidence that the plaintiffs suffered a covered loss in involving a partial collapse of part of a medical office building foundation due to the use of defective materials and methods in

construction by the insured's subcontractors.

In *Corch*, the court applied the bad faith test enunciated by the Superior Court in the case of *Terletsky v. Prudential Prop. & Cas. Ins. Co.*, 649 A.2d 680 (Pa. Super. 1994), which states that bad faith exists where (1) the insurer did not have a reasonable basis for denying benefits under the policy and (2) the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim. Bad faith is not defined in Section 8371. Courts have utilized the *Terletsky* test in determining bad faith since the release of that opinion. However, some courts have seized on language in *Terletsky* observing that the *Black's Law Dictionary* definition of bad faith that states:

> For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), **through some motive of self-interest of or ill will**; mere negligence or bad judgment is not bad faith.

Terletsky, 649 A.2d at 688 (quoting *Black's Law Dictionary* 139 (6th ed. 1990) (emphasis added). In the *Corch* case, the court found that the insurer was motivated by self-interest and ill will in the handling of the claim, because it denied coverage despite the fact there was no evidence supporting the denial and obtained an expert report in a transparent effort to support the denial. 64 D. & C. 4th at 515-516. Other courts have used the lack of self-motive or ill-will to find an absence of bad faith.

However, on September 28, 2017, in a health insurance case, the Supreme Court of Pennsylvania held that the self-motive and ill-will language in *Terletsky* was not a requirement for the finding of bad faith, but merely was probative as to the second prong of the *Terletsky* analysis. *Rancosky v. Washington National Ins. Co.,* 170 A.3d 364 (Pa. 2017). Therefore proof of an insurer's motive of self-interest or ill-will, while potentially probative of the second prong, is not a mandatory prerequisite to bad faith recovery under Section 8371. 170 A.3d at 377. Rather, proof of the insurer's knowledge or reckless disregard for its lack of reasonable basis in denying the claim is sufficient for demonstrating bad faith under the second prong. *Id.* Thus insureds will not have to shoulder the added burden to prove an insurer's motive in proving bad faith under Section 8371.

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Managing Another Pervasive Risk

Immersed in the risk business, construction contractor survival is inextricably linked to their ability to recognize, assess and manage risks. If you add in the barrage of economic, legal, tax, and regulatory complexity, we see why contractors become so absorbed in their businesses.

The effort and attention required to manage a construction business and its attendant risks can leave little time and energy to address risks of a personal nature. Preoccupation with business matters often supersedes personal financial objectives and planning. While managing the staggering economic risk to loved ones from their premature demise or disability with appropriate insurance, these business owners may be only tangentially aware of the powerful, omnipresent **correlation of health and wealth.** Specifically, many

underappreciate the threat to their retirement and/or legacy plans that a long-term care (LTC) event could pose.

Following is a look at factors surrounding the clear but not necessarily present peril of one or both spouses requiring LTC at some point in their lives, the range of magnitude such an occurrence may represent, and alternatives for mitigating the risk.

Odds of a person needing LTC at some juncture are all over the place, and resulting statistics often reflect how the question is framed. The "*National Medicare Handbook*" estimates 7 out of 10 in the US will eventually require LTC services (for some period). At a recent Estate Planning Council of Pittsburgh luncheon a leading healthcare actuary and LTC specialist mentioned approximately 1/3 of humans have some form of Alzheimer's gene, with symptoms eventually emerging if we live long enough. When pressed for odds that a LTC insurance policy would pay off, he placed probability of "at least one" of a healthy couple – both 65 needing care for more than 90 days (the standard policy elimination period) - at approximately 57%.

Genworth's June 2017 survey showed the annual median nursing home cost in Pennsylvania exceeded $120,000 and $111,000, respectively, for private and semi-private rooms. At the same 4% compounded rate of inflation experienced over the past five years, those annual costs would grow to $263,000 and $243,000, respectively, in 20 years - when today's 60 - 65-year old's are more likely to require care. The average duration of a nursing home stay is 2.2 and 3.7 years for men and women, respectively; some stays will be briefer and some longer. The actuary conservatively sees 10% of us needing care for five years or longer.

Options for paying for LTC services include self-funding, governmental programs, traditional LTC insurance (LTCi), and hybrid insurance solutions. Self-funding entails consuming personal resources, which can conflict with legacy objectives. The event precipitating a LTC need is often unpredictable, and requires immediate access to illiquid assets. This may necessitate a fire sale and an attendant loss of principal. And so even though wealthy individuals can self-fund, this ability does not necessarily mean they should do so.

The main governmental program paying for LTC is Medic**aid** (welfare for the indigent) – not Medic**are**, since Medicare was not designed to cover LTC needs and, in fact, provides only limited coverage for some post-acute care services under strict eligibility requirements. Presently picking up the tab for 64% of the nation's nursing home residents, the Medicaid system is under enormous fiscal pressure as it buckles under the weight of demographic realities. Forthcoming Federal tax cuts do not figure to bolster solvency.

Elder law practitioners often illuminate a path for less-than-poor "middle class" individuals to legally circumvent entitlement rules. This may be encouraging some to see Medicaid as a viable solution for them. However, for the middle class under age 70 today such **loopholes are likely to be closed** as Medicaid eventually becomes less exploitable. Consider: **PA is the epicenter of "filial responsibility" legal decisions** holding children responsible for parents' healthcare costs. To qualify for Medicaid sans elder law assistance, assets generally can't exceed $2,400 in PA for a single individual, with a $45 monthly needs (income) allowance.

Transferring the risk to a commercial insurer can bring peace of mind at point of claim, as insurance quickly regains money paid into the policy. Long term care insurance (LTCi) can

be an effective alternative, but it can only be purchased while we are still young and healthy enough to qualify.

Tax benefits of group LTCi to business owners can be particularly attractive. Similar to group health insurance, LTCi can result in the "holy trinity" of tax treatment: deductible to the business, no imputed income to the insured employee, and no taxable income upon insured's receipt of benefits. Employees' spouses receive the same tax advantages. [Self-employed and 2% or greater owners of tax conduits may have premium deductibility limited to age eligible premium limits]. Discounted group pricing and executive carve-out arrangement (facilitating legal discrimination) further enhance the economics.

Other insurance solutions beyond traditional LTCi are available in today's marketplace. Briefly, these include insureds accessing life insurance death benefits to fund qualifying LTC needs (via an optional policy rider). **Tax free access to a full life insurance death benefit without dying** can alleviate "use it or lose it" concerns inherent with insurance. Other avenues possibly helping on an underwriting front include certain annuities which can provide a leveraged benefit to pay for qualifying care.

In summary, it pays to be cognizant of personal risks as well as business risks. Just because a LTC event isn't on the immediate horizon does not diminish the peril. Even without considering the potential impact of demographics on demand for services, costs only increase with time. The odds of needing LTC assistance at some point are not remote, relying on Medicaid is ill-advised for most, and burdening loved ones may be the most costly solution of all. The plan for LTC is most effectively addressed well in advance, as President Kennedy's risk management tenet resonates: "repair your roof while the sun is shining."

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Case Note Update on Liquid Concrete Decision

The Spring 2017 issue of the Construction Legal Edge contained an article titled "Is Liquid Concrete Potentially an 'Unreasonably Dangerous' Product for Purposes of a Personal Injury Claim?", and the article advised that the Pennsylvania Superior Court had answered that question in the affirmative.

The name of the case is *High v. Pennsy Supply* (154 A.3d 341). Disagreeing with the Superior Court opinion, Pennsy Supply thereafter filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court, which that Court has now denied (by Order dated September 26, 2017). Therefore, the question of whether wet concrete is an "unreasonably dangerous product," under a design defect or failure to warn theory, remains one potentially for a jury to decide.

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Where In The World?

Construction Mystery: Appearances can be deceiving and this is not where you might first think. It is actually the most authentic Suzhou-style garden outside of China. Nestled within a bustling American city, it offers a window into Chinese culture, history and philosophy. Built by 65 Chinese artisans over ten months, it incorporates over 500 tons of rock and building material and 300 plant species from China. It is a peaceful oasis which engages all senses: visitors feel the intricate rock mosaic pavement as they walk, hear the rippling stream and waterfall, smell the exotic blossoms and enjoy the illusion of standing within a Chinese landscape painting. The architectural features utilize cut-outs, moon doors and elaborate railings to create views within views. This expansiveness can be seen in the Moon Locking Pavilion pictured here. The garden elements are arranged to reflect the yin and yang of nature's harmony. The sky (yang) is reflected in the water that flows through the garden (yin). The branches of the willow (yin) brush gently against the stone boulders (yang). Throughout this serene one-block garden visitors are entranced by all they discover.

Question: What is the name and location of this garden?

Last Issue Answer: The Treasury, Petra, Jordan

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