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CONSTRUCTION LEGAL EDGE

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Articles contained in this issue of the CLE:

Pennsylvania Home Improvement Consumer Protection Act: New Law Requires July 1, 2009 Registration; Impacts Contracts and More

Starting July 1, 2009, it will not be "business as usual" for Pennsylvania's home improvement contractors. Governor Rendell recently signed into law the "Home Improvement Consumer Protection Act" ("HICPA"), which heralds some sweeping changes for contractors performing home improvement work. Most notably, HICPA requires home improvement contractors to register with the Attorney General's office, Bureau of Consumer Protection, and provide such information as their license number, Social Security number, all prior business names and addresses, and significant partnership/corporation information such as the name and address of each partner. The registering contractor is required to disclose whether they have filed a petition in bankruptcy, or within the last ten years, received a final civil judgment entered against the business that was related to a home improvement transaction. Further they must disclose whether they have committed any fraudulent activity or had their right to work revoked or suspended. The applicant will be required to submit proof of liability insurance covering personal injury in an amount not less than $50,000 and insurance covering property damage also in an amount not less than $50,000. Upon payment of the $50 registration fee, the Bureau will issue to a contractor a registration number, which the contractor is then required to use on all documents including contracts, advertisements, and business cards. Renewal of the registration will be required every two years in order to comply with the Act.

HICPA applies to all home improvement contractors who perform more than $5,000 in annual business directly with consumers. This includes subcontractors or independent contractors who contract with home improvement retailers to provide home improvement services to the retailer's customers. New home builders and building suppliers who do not perform home improvements are exempt.

A "home improvement" is defined in the Act to include the work agreed upon between a contractor and owner costing more than $500, and includes such services designated as "repair, replacement, remodeling, demolition, removal, renovation, installation, alteration, conversion, modernization, improvement, rehabilitation or sandblasting." It further includes items such as the "construction, replacement, installation or improvement of driveways, swimming pools, pool houses, porches, garages, roofs, siding, insulation, solar energy systems, security systems, flooring, patios, fences, gazebos, sheds, cabanas, landscaping, … painting, doors and windows…." It does not include the sale of goods or materials by a seller, who neither arranges to, nor performs any work or labor, in connection with the installation or application of the goods or services. Thus, selling appliances or working on your own property would be exempt.

Perhaps the most immediate impact to home improvement contractors from HICPA will be the need to modify their existing contracts to comply with the requirements of the Act. The Act provides that no home improvement contract shall be ***valid or enforceable against an owner*** unless:

- It is in writing and contains the contractor registration number;
- Is signed by both the owner or his agent and the contractor;
- Contains the entire agreement between the owner and contractor, including attached copies of all required notices;
- Contains the date of the transaction;
- Contains the name, address, and telephone number of the contractor (A post office box shall not be consider an address.);
- Contains the approximate starting date and completion date;
- Includes a description of the work to be performed, the materials to be used, and a set of specifications that cannot be changed without a written change order signed by the owner and contractor;
- Includes the total sales price due under the contract;
- Includes the amount of any down payment, plus any amount advanced for the purchase of special order materials. The amount of the down payment and the cost of the special order materials must be listed separately.
- Includes the names, addresses, and telephone numbers of all subcontractors on the project known at the date of signing the contract;
- Agrees to maintain at least $50,000 of liability insurance covering personal injury at least $50,000 of insurance covering property damage and identifies the current amount of insurance coverage maintained at the time of signing the contract;
- Includes the Bureau's toll-free number from which a caller can obtain information as to whether a contractor is registered with the bureau pursuant to the Act;

- Includes a notice of the owner's right of rescission, providing that the owner has three days in which to rescind the contract from the date of signing.

In addition to the three day right of rescission noted above, the Act provides, under certain circumstances, that a contractor shall be obligated to provide a refund of the amount paid for a home improvement within 10 days of receiving such a request. The Act provides that the refund shall be paid within 10 days of either the acceptance and execution of a return receipt for certified mail containing a written request for a refund, or the refusal to accept the certified mail sent to the contractor's last known address if (1) no substantial portion of the contracted work has been performed at the time of the request and (2) more than 45 days have elapsed since the starting date specified in the written contract.

The Act also dictates the scope, nature, and enforceability of "arbitration clauses" typically contained in the home improvement contract. The Act provides that if the contract contains an arbitration clause, it must meet the following requirements or it may be deemed void by the court upon motion of either party:

- The text of the clause must be in capital letters;
- It must be printed in 12-point boldface type and the arbitration clause must appear on a separate page from the rest of the contract;
- The clause shall contain a separate line for each of the parties to indicate their assent to be bound thereby;
- The clause shall not be effective unless both parties have assented as evidenced by signature and date, which shall be the date the contract was signed;
- The clause shall state clearly whether the decision of the arbitration is binding on the parties or may be appealed to the Court of Common Pleas.
- The clause shall state whether the facts of the dispute, related documents, and decision are confidential.

In addition, the Act provides that if a home improvement contract contains ***any*** of the following clauses it shall be ***voidable by the owner***:

- A hold harmless clause
- A waiver of Federal, State, or local health, life, safety or building code requirements
- A confession of judgment clause
- A waiver of a right to a jury trial
- An assignment of or order for payment of wages
- A provision by which the owner agrees not to assert any claim or defense arising out of the contract
- A provision that the contractor shall be awarded attorney's fees and costs
- A waiver by the owner of the contractor's liability for acts committed in the collection of any payments or the repossession of goods
- A waiver of any rights provided under the Act
- Certain provisions providing for automatic or recurring renewals of the agreement

The new law is intended to protect consumers from disreputable contractors who commit home improvement fraud. Home improvement fraud is broadly defined by the Act. While this offense includes many actions, typically a contractor will be found to have committed home improvement fraud if with intent to defraud or injure anyone or with knowledge that he is facilitating a fraud or injury he: (1) makes a false or misleading statement to induce, encourage, or solicit a person to enter into any written or oral agreement for home improvement services or provision of home improvement materials or to justify an increase in the previously agreed upon price or (2) receives any advance payment for performing home improvement services or providing home improvement materials and fails to perform or provide such services or materials. Fraud may also be found if a contractor misrepresents himself; his materials; damages a person's property with the intent to induce a person to enter into a contract for home improvement services; or publishes false or deceptive advertisements. Any violation of the provisions of the Act shall also be deemed a violation of the Unfair Trade Practices and Consumer Protection Law and therefore an owner shall have the rights provided for under that Law.

Violations of the Act are considered a felony of the third degree if the amount involved exceeds $2,000 or a misdemeanor of the first degree if the amount involved is $2,000 or less. Where the victim is 60 years of age or older, the grading of the offense shall be one grade higher. If a second offense occurs under the Act, it will constitute a felony of the second degree, regardless of the amount of money involved. In addition to the monetary penalties, the court may revoke or suspend a contractor's certificate of registration. If this occurs, a contractor may petition for reinstatement after a period of five (5) years from the date of the suspension or revocation, or as specified in the court's order.

The proponents of the Act hope that it will help legitimate home improvement contractors by discouraging fraudulent businesses. Whether this will be the ultimate result remains to be seen, as the requirements under the Act appear to present significant traps for the unwary contractor who fails to follow the express requirements of HICPA.

Now, more than ever, home improvement contractors **should update** their "standard" **contracts** to ensure that they are in compliance with the Act's many new requirements. For help answering your questions regarding the Pennsylvania Home Improvement Consumer Protection Act, or assisting with the July 1, 2009 registration deadline, or updating your existing construction contracts, you are welcome to contact **Mary G. March** at (610) 696-2460 or e-mail her at MGM@PIETRAGALLO.com.

Following the Money Trail: What the Economic Stimulus Bill Means for the Construction Industry

The American Recovery and Reinvestment Act of 2009, signed into law by President Obama, provides more than $130 billion for construction-related spending. The questions most contractors are asking is, "Who will get the money?" and "Where will it be spent?"

The Stimulus Bill requires that a majority of the $130 billion be obligated by September 30, 2010. Thus far, the proposed spending covers a wide range of projects, including roads, public transportation, federal buildings, and hospitals. It is anticipated that this Bill will give a shot of adrenalin to the ailing construction industry.

Following is a summary of the legislation's significant construction-related spending, categorized by which government agency will be responsible for procurement.

At the Federal level, the Stimulus Bill allocates construction projects to designated Governmental Departments. The construction-dollar breakdown is set forth below:

General Services Administration

- $4.5 billion to convert federal buildings to high-performance green buildings;
- $750 million for the construction, improvement, and operation of federal buildings and U.S. Courthouses;
- $300 million for the construction, improvement, and operation of border stations and land ports of entry.

Army Corps of Engineers

- $2 billion for energy and water development-related projects. At least $200 million of this must be for water-related environmental infrastructure assistance;
- $375 million for Mississippi River and tributaries flood damage reduction projects;
- $2.1 billion for the maintenance, improvement, and operation of existing energy and water development projects.

Department of Defense

- $4.24 billion for the construction, modernization, and improvement of military facilities. This includes the construction and repair of military medical facilities and investments to improve the energy efficiency of existing facilities;
- $2.33 billion for facilities projects, such as child development centers, housing, and other quality of life projects;
- $1.33 billion for the construction of hospitals;
- $1 billion for non-recurring maintenance of veterans' hospitals, including energy projects.

Department of Energy

- $5 billion for home weatherization assistance;
- $4.5 billion to modernize the electricity grid and to enhance the security and reliability of energy infrastructure;
- $6 billion in both defense and non-defense environmental clean-up.

Department of Homeland Security

- $420 million for the construction of U.S. Customs and Border Protection facilities at border points of entry;
- $142 million for the alteration or removal of obstructive bridges. Bidding will be through the U.S. Coast Guard;
- $210 million for the construction, modification, and/or upgrade of non-federal fire stations;
- $200 million for construction and related costs to consolidate the Department of Homeland Security.

Department of the Interior

- $1.334 billion for the construction, reconstruction, decommissioning, and repair of roads, bridges, trails, property, and facilities; for energy efficiency retrofits of existing facilities; and for improvements to schools operated by the Bureau of Indian Affairs.

Department of Health and Human Services

- $1 billion for the construction and renovation of non-federal research facilities;
- $500 million for the construction and renovation of National Institutes of Health buildings and facilities.

Department of Transportation

- $27.5 billion for the construction and reconstruction of highways;
- $1.5 billion in grants for highways, bridges, transit, rail, seaports, and other projects, with the Department of Transportation to choose which projects will be funded;
- $9.3 billion for railroads, including $1.3 billion for Amtrak and high speed rail;
- $1.1 billion in grants for airport improvements;
- $200 million for Federal Aviation Administration infrastructure, including air traffic control centers, terminal radar approach facilities, and navigation and landing equipment.

For infrastructure stimulus money, the Bill sets a goal of using at least 50 per cent of the funds on work that can be started within 120 days of the Bill's signing. For highway and transit funds, the rules are tougher, with a "use it or lose" mandate. If they don't obligate at least 50 per cent of their allotments within 120 days after DOT apportions the money, DOT is to redistribute the unused money to other states.

What does all this "stimulus spending" mean for the Construction Industry in Pennsylvania? Senator Arlen Specter has commented publically that, according to the Pennsylvania Department of Transportation, Pennsylvania could obligate $1.5 billion on 313 shovel-ready highway repair projects. These projects all focus on Pennsylvania's bridge deficiencies, pavement needs, and safety concerns. These projects will create jobs

and achieve meaningful infrastructure improvements. According to Senator Specter, all of the highway infrastructure repairs can be put out to bid within six months, with construction starting shortly thereafter. The Pennsylvania Department of Transportation has also provided Senator Specter with a list of 147 public transportation projects totaling $700 million that, according to transit agencies around the State, are ready to begin.

The Port of Pittsburgh Commission in Pennsylvania has identified over $580 million in shovel-ready project work that could be started in six months, of which $430 million could be completed in two years, and the remaining $150 million could be completed in three years. The largest share of that money would be applied to the Lower Monongahela Improvement Project for Locks and Dams 2-3-4, a project five years behind the original completion date of 2004. Without investment from the economic stimulus, the project will not otherwise be completed until the 2019-2022 period. These river transportation projects would add, or preserve, high-skilled, high-paying jobs for the southwest Pennsylvania region.

For more information, contact **Joseph E. Vaughan** at (610) 696-2460 or e-mail him at JEV@PIETRAGALLO.com.

Public Purpose Exemption from the Mechanic's Lien Law

In a recent Pennsylvania Superior Court decision, Cornerstone Land Development Company of Pittsburgh LLC v. Wadwell Group, a Pennsylvania Partnership and Marshall Township Municipal Sanitary Authority, 2008 PA Super 256; 959 A.2d 1264 (2008), the matter before the court was the appeal of Cornerstone of the order of the Court of Common Pleas of Allegheny County striking its mechanics' lien claim.

Wadwell and "authorized representatives" of Marshall Township Municipal Sanitary Authority (MTMSA) hired Cornerstone for the construction of a sewage pumping station. When Cornerstone was hired, Wadwell owned the construction site, as well as financed the project. Several weeks after Cornerstone began working on the sewage pumping station, Wadwell conveyed the pump station and the land beneath it to MTMSA according to the conditions of a pre-existing agreement.

About six (6) weeks after Wadwell transferred the sewage pumping station and the land beneath it to MTMSA, Cornerstone finished the pump station and demanded payment. Cornerstone was refused payment.

After several months, Cornerstone filed a mechanics' lien claim against the sewage pumping station. Wadwell responded by asserting that the pump station was being used for a public purpose and that no lien could therefore attach to it. MTMSA did the same. The lower court agreed with Wadwell and MTMSA.

The Pennsylvania Superior Court reviewed the trial court's ruling and noted that a section of the Mechanics' Lien Law that states, "No lien shall be allowed for labor or materials furnished for a purely public purpose." *49 P.S. Sec.1303(b),* was the center of the

dispute. Since the sewage pumping station is used for a "purely public purpose," the lower court found Cornerstone's lien could not attach.

Cornerstone raised the following two (2) issues on appeal:

> I. Does the "purely public purpose" exemption from mechanics' lien claims apply when a sewage pump station is constructed on private property by a private developer, who conveys the property to a municipal authority before construction is complete?
>
> II. Does the conveyance of a property before the filing of a mechanics' lien claim destroy the claim when the work is for "erection and construction?"

After reviewing the case law, the Superior Court decided that its inquiry would be narrow and would focus on the use of the pumping station when Cornerstone's lien was filed. The court stated that the Pennsylvania Supreme Court in American Seating Co. v. Philadelphia, 434 Pa. 370, 256 A.2d 599 (1969),

> …offered guidance as to what factors are relevant in deciding whether a use is purely public. These factors include: 1) whether the government or a private entity managed and controlled the attached property when the lien was filed; 2) whether the property was constructed and paid for by a private entity; 3) whether the property was being used to further proprietary motives when the lien was filed; and, most importantly, 4) whether execution on the lien would disrupt an essential public service.

The Cornerstone court observed that MTMSA, not Wadwell, was managing and controlling the sewage pumping station when Cornerstone filed the lien, and that the sewage pumping station was furthering public ends at that time. The court also noted that, although Wadwell did construct the pumping station with its own funds, this factor alone did not warrant disturbing the ruling of the lower court.

After reviewing additional arguments of Cornerstone, the Superior Court decided that, "… the manner in which the pump station was being used when Cornerstone filed its lien exempted the station from attachment. Certainly, if Wadwell still owned the pump station when the lien was filed, Cornerstone's argument would be more persuasive under American Seating."

The Superior Court also noted Cornerstone's argument that the lien was supported by the Public Works Contractors' Bond Law, which can be a remedy for persons not under the protections of the Mechanics' Lien Law. However, the Court found that Cornerstone had waived that issue since it had not been raised previously in the lower court and, therefore, could not be raised on appeal.

In its decision, the Cornerstone court held that (1) because Cornerstone was aware of MTMSA's involvement at the project's beginning, (2) because a mechanics' lien is an

extraordinary remedy, and (3) because Cornerstone has other courses of action available, the lower court's order should be affirmed.

Joseph J. Bosick serves as Chair of the Construction Practice Consortium. For questions, you are welcome to contact Joe Bosick at (412) 263-1828 or e-mail him at JJB@PIETRAGALLO.com.

Whether or Not a Construction Employer Can be Held Liable in "Bystander" Exposure Cases

An ever-increasing trend in toxic tort litigation throughout the country are claims asserted by family members of construction workers that they have been exposed to harmful materials, such as asbestos, as a result of the workers bringing dust from the worksite home in their work clothes.

The question of whether or not an employer can be held liable in these "bystander" exposure cases was recently addressed by the U.S. Court of Appeals for the Sixth Circuit in Martin v. Cincinnati Gas and Electric Company, et al., (2009 WL 188051) (6th Cir. Ct. App.2009). Applying Kentucky law, the Sixth Circuit affirmed the District Court's determination that the injury to the family member was not reasonably foreseeable by the employer.

In Martin, Dennis Martin died from malignant mesothelioma in 2002. His estate subsequently filed suit against various defendants, including his father's employer, Cincinnati Gas and Electric ("CG&E"). The Estate asserted that Mr. Martin developed mesothelioma, in part, as a result of being exposed to asbestos brought home on his father's work clothes during the period of time that his father was employed by CG&E.

From 1951 to 1963, Mr. Martin's father worked on underground power lines for CG&E. This work brought him into contact every month or two with fireproofing that contained asbestos.

While CG&E provided lockers and showers for its employees, Mr. Martin's father would sometimes go directly home without showering or changing. Once home, his father would change and leave his work clothes in the basement laundry room. Testimony in the case indicated that Mr. Martin sometimes sat on his father's lap or hugged him when he was still in his work clothes. There was also testimony that Mr. Martin often played in the basement where the laundry room was located.

The question before the court in Martin was whether or not CG&E owed a duty to Mr. Martin to exercise ordinary care to prevent foreseeable injury to him. To determine this, the court looked at whether CG&E knew, or should have known, the danger of bystander exposure at the time of Mr. Martin's alleged exposure. Finding that CG&E did not know, and could not have known, of the dangers of bystander exposure during the relevant time period, the court ruled that CG&E owed no duty to Mr. Martin.

For more information, contact **Michael Magee** at (412) 263-4377 or e-mail him at MZM@PIETRAGALLO.com.

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