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CONSTRUCTION LEGAL EDGE

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ARTICLES CONTAINED IN THIS ISSUE OF THE CLE:

Are Unions Considered Subcontractors under Pennsylvania's Mechanics' Lien Law?

In the case of *Bricklayers of Western Pennsylvania Combined Funds, Inc. v. Scott's Development Company*, __ A.3d__, (Pa. Super. 2012) that was decided on January 6, 2012, the Superior Court of Pennsylvania held that unions are subcontractors as that term is defined in the Mechanics' Lien Law.

By way of background, a mechanic's lien is the statutory means of securing payment for labor and materials furnished in the improvement of real property. Mechanics' liens are designed to protect contractors from recalcitrant landowners and, likewise, subcontractors from recalcitrant contractors. Pennsylvania's Mechanics' Lien Law can be found at 49 P.S. §§ 1101-1902. Mechanics' liens may be filed by contractors, first tier subcontractors and second tier subcontractors. 49 P.S. § 1301. Lien waivers are generally prohibited with the exception of residential construction projects under $1 million and for subcontractors who are guaranteed payment by contractors in the form of posted payment bonds. 49 P.S. § 1401.

To obtain a mechanics' lien in Pennsylvania, two procedural steps must be fulfilled. First, a mechanics' lien must be filed and perfected pursuant to statute. 49 P.S. § 1501-10. Second, the lien holder must institute an action to enforce the lien pursuant to the Pennsylvania Rules

of Civil Procedure. 49 P.S. § 1701(a). The claim must be filed with the Prothonotary of the County where the construction occurred. The claim must be filed within six months of the day the claimant completes its work.

Under Pennsylvania's Mechanics' Lien Law, only a "contractor" or "subcontractor" is permitted to file a mechanics' lien claim against an owner of property for payment of debts due by the owner to the contractor or by the contractor to any of its subcontractors for labor or materials furnished during a project. 49 P.S. §1301.

The trial court in the *Bricklayers* case concluded that the union members were not "subcontractors" under the Mechanics' Lien Law because the collective bargaining agreements were not traditional subcontractor agreements, and the union members were employees and/or laborers of a contractor.

The Superior Court of Pennsylvania overruled the trial court and concluded "that under the specific facts presented in this case, the unions are subcontractors and given the unique legal relationship that exists between the trustee and the union, the trustee has standing to assert a mechanics' lien claim on behalf of the union."

In the *Bricklayers* case the Union alleged that pursuant to the applicable collective bargaining agreement the general contractor failed to pay $17,072.98 and $24,935.73 relating to health, welfare, retirement, and/or fringe benefits.

The *Bricklayers* decision creates a new class of mechanics' lien claimants and must be considered by owners of projects where union labor is used. The decision also impacts lenders. Owners and lenders should consider requiring labor and material payment bonds from general contractors. Owners and lenders should also consider obtaining affidavits from the union benefit funds whose members are working on the project. The affidavits should have language stating that the contractor or subcontractor is current on making payment of all union fund contributions required under the applicable collective bargaining agreement.

Similarly, general contractors who have agreed to indemnify an owner against any mechanics' lien claims filed by subcontractors should obtain affidavits from the various trade unions working on the project.

The *Bricklayers* case changes the legal landscape. Notwithstanding this change in the law, vigilant and knowledgeable owners, lenders, and contractors can protect themselves.

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Proposed Legislation to Change Mechanics' Liens and Require Contractor Trust Funds

Two pieces of legislation are currently working their way through committee, which if approved, will impact the Mechanic Lien process and provide additional obligations for contractors.

First, **PA House Bill 1602** proposes changes to Pennsylvania's Mechanics' Lien Law which would shorten the time to file a lien from six to four months, and require new filings for subcontractors and owners and/or general contractors. Pursuant to the proposed new regulations, property owners will have the option of filing a "Notice of Commencement" when construction begins. If the Notice is filed, then all subcontractors and suppliers will be required to file a "Notice of Furnishing" to preserve their right to file a mechanics lien. This Notice discloses the estimated price of labor, materials, and tools furnished. If the notice is not filed within 20 days of starting work or providing materials, the subcontractors, contractors or second tier subcontractors can forfeit their lien rights.

Proposed HB 1602 underwent amendment in committee to provide that "A subcontractor shall lose the right to lien with respect to an improvement to a residential property when the owner has paid the full contract price to the contractor." As set forth below, this change is consistent with proposed SB No. 1227 in its intent to shift the onus onto the general contractor and away from the owner when the contract price has been paid by the owner.

The proposed bill has its proponents and detractors. The Pennsylvania Association of Realtors has testified in favor of the bill, arguing that many unsuspecting homeowners find themselves with mechanics' liens placed on their homes by subcontractors who have not been paid by the general contractor. The General Contractors Association of Pennsylvania also supports HB 1602. It is their position that the "simple procedure" set forth in HB 1602, "will let everyone know who is providing goods and/or services and who might potentially be in a position to file a lien if they are not paid in a timely manner." With the filing of the "Notice of Commencement" coupled with the "Notice of Furnishing", contractors and/or owners will be able to ensure that everyone working on the project "gets what they are owed when they are owed it." Other construction trade professionals, such as the Mechanical Contractors Association do not favor HB 1602 and argue that mechanics' liens protect individual craftsmen and provide a statutory security for payment of a debt created by work furnished by the contractor.

On the Senate side, **Senate Bill No. 1227** was introduced on October 20, 2011. This bill, known as the "Contractor Commingling of Funds Held in Trust Act," requires that

funds paid by an owner to a contractor for work performed and/or materials furnished by a subcontractor be held in trust by the contractor, as trustee, for the purpose of paying the subcontractor. The funds are not required to be kept in a separate bank account and can be commingled with other non-trust funds without being subject to civil or criminal penalties. If the "trustee" knowingly uses the funds for any purpose other than to pay the subcontractor, he will be subject to personal liability. Pursuant to SB 1227, a "trustee" is defined as an officer, director, or managing agent of the contractor who has control of, or direction over, the funds.

It is significant to note that SB 1227 does not apply to residential property on which there is or will be a residential building not more than three stories in height, not including the basement, or to home improvement contracts as defined by the Home Improvement Consumer Protection Act.

We will continue to follow these proposed bills and provide an update as they progress through the legislative process. Stay tuned.

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Strategies for Dealing with Workers' Compensation Claims Involving Construction Workers

For workers' compensation claims involving construction workers, many of the traditional strategies utilized to bring the claim to closure are simply not available. Under the PA Workers' Compensation Act, an injured worker is compensated for his loss of earning power, based upon, and compared with his Average Weekly Wage (AWW). The goal in practically every claim is to get the injured worker back to his AWW, and eliminate the employer's responsibility to pay ongoing disability benefits. Many construction workers enjoy a high AWW and this becomes a factor when trying to bring those claims to a conclusion.

In a typical workers compensation case, when an injured employee has been released to perform some type of modified duty work, the employer has several options. The employer can opt to bring that injured worker back to restricted work duties, with the hope that the worker will soon be back to his time of injury position. In the construction setting, it is not always feasible to bring the injured worker back to the job site, or there simply may be no modified work available. There are also union considerations, if the

injured worker is a member of a union hall. The Pennsylvania Supreme Court has held that a job will not be considered available for an employee, if acceptance of that job will jeopardize that employee's union seniority status or other qualitative benefit. *See St. Joe Container Co. v. WCAB (Staroschuck)*, 633 A.2d 128 (Pa. 1993).

If no work is available with the time-of-injury employer, the employer can request that an earning power assessment or labor market survey be conducted. The earning power assessment is performed by a vocational expert (as defined specifically by the Workers' Compensation Act), and demonstrates that work is generally available in the injured workers' usual employment area. The employer could, instead, opt to have the injured worker participate in a vocational interview and have actual job referrals made for the worker, based on his work restrictions, capabilities, and geographic area. Most often, the jobs found through an earning power assessment or job search, are low-paying, entry-level positions. As most construction employees have very high AWWs, these low paying jobs are not very effective in bringing the injured worker back to work at or near his AWW. This creates the obligation on the employer to continue to pay ongoing disability benefits and can significantly lengthen the "life" of a claim.

There are strategies that employers can use in workers' compensation cases, to attempt to mitigate future liabilities. It is imperative to have all of the medical records early in the claim. The sooner the medical information can be obtained, the sooner the determination can be made if efforts can or should be made to bring the injured worker back to work for his time-of-injury employer, if the case should be litigated, or if attempts should made to settle the claim. If the employer is able to offer the injured employer a job at the work site, this can help to eliminate exposure on the case for future benefits, or in some cases, create leverage which can help to resolve the claim all together.

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Green Envy - LEED Litigation Update

The explosion in green building lawsuits has not occurred as predicted by many. The biggest splash in LEED litigation in 2011 did not relate to failure to meet LEED standards, but the premise of the standards themselves. A U.S. district court judge dismissed a suit filed by a design professional and others against the United States Green Building Council, alleging misrepresentation of the accuracy and efficacy of the LEED rating system. The case of *Gifford v. U.S. Green Building Council*, 2011 WL 4343815

(S.D.N.Y. 2011) was filed by an energy cost reduction consultant, an architect, an engineer and a moisture barrier designer/mold remediation specialist in the Southern District of New York. The plaintiffs alleged that the USGBC's promotion of its LEED certification process contains false statements of the energy and money saving aspects of LEED certification, including the statement that LEED certified buildings perform, on average, 25-30% better than non LEED-certified buildings in terms of energy use. The plaintiffs alleged that the alleged false advertising was based on a flawed study, and diverted customers from their businesses to LEED accredited professionals and alleged violations of the Lanham Act, the RICO racketeering statute, the Sherman Anti-Trust Act and New York deceptive trade practices claims, but later dropped the RICO and Sherman claims.

In dismissing the Lanham Act claim, the court held that the plaintiffs lacked standing under the act. Section 43(a) of the Lanham Act creates a statutory tort of false representation of goods or services in commerce. Under the act, any person who uses "any false designation of origin, false or misleading description of fact, or false or misleading representation of fact" that "misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act." 15 U.S.C. § 1125(a).

To have standing to sue under the act, the plaintiff must either be a competitor of the defendant and allege a competitive injury, or must demonstrate a reasonable interest to be protected against the alleged false advertising and a reasonable basis for believing that the interest is likely to be damaged by the alleged false advertising. Citing *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106,111 (2d Cir. 2010). The *Gifford* court held that as Gifford and the other plaintiffs did not compete with USGBC in the certification of green buildings or the accreditation of professionals nor did the USGBC provide clients with advice about energy efficient design, Gifford and the others lacked standing to bring an action against USGBC. The court also reasoned that a customer need not hire LEED-accredited professionals to attain LEED certification and correspondingly a customer who opts for LEED certification can nonetheless hire plaintiffs.

Thus the district court did not reach the merits of the lawsuit, or even the substantive bases for dismissal raised by the USGBC. USGBC in its motion to dismiss had argued that the LEED certification process does not assess the actual environmental performance of any of the structures for which certification is sought or granted, but certifies that they were designed in a way that should result in better performance. The *Gifford* case garnered a lot of attention in construction forums at the time it was filed, but did not pan out as the big challenge to the USGBC heralded at the time of the filing.

In Pennsylvania, a LEED certification issue tangentially reached the Pennsylvania Supreme Court in a bid protest case where a losing bidder alleged, among other things, that the winning electrical contract bidder on the Philadelphia Family Court Building project lacked sufficient experience with LEED certification. *Hampton Technologies, Inc. v. Dept. of General Services*, 22 A.2d 238 (Pa. 2011). The court denied the contractor's petition to stay the department's final determination of the protest of the award of the contract in a per curiam order and did not reach the merits of the argument, although Justice Baer in his dissenting opinion asserted that the contractor should have been granted the stay to allow the court to examine the integrity of the bidding process.

Another tangential LEED case in 2011 involved LEED certification requirements in a purchase order for doors purchased from a supplier on a university dormitory project. The architect's specifications required LEED certification which was included in the purchase order. However the supplier's modified offer differed with the terms of the modified offer in specifically stating that the doors would not contribute to LEED credit. Because the purchase order differed from the modified offer with respect to bargained terms, the court held that the purchase order constituted a counteroffer and not a binding contract. *LaForce, Inc. v. Pioneer General Contractors, Inc.*, 2011 WL 4467762 (Mich App. 2011).

To date, the most reported case involving failure to meet LEED certification was the Maryland case of *Southern Builders, Inc. v. Shaw Development, LLC*, (discussed in prior *CLEs*) which was settled prior to trial and did not provide any green building legal precedent.

In addition to the USGBC LEED certification program, the Green Building Initiative Program utilizes the Green Globes assessment system that was developed in Canada. It is an alternative to LEED and is billed as a less expensive program in verification and assessment, and thus a better fit for smaller projects. After achieving a threshold of at least 35% of the total number of 1,000 points, new and existing commercial buildings can be certified for their environmental achievements and sustainability by pursuing Green Globes certification that assigns a rating of one to four globes. Green Globes are recognized in Pennsylvania and 24 other states. For more information, see www.thegbi.org.

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Employers Must Listen for the Magic Words

The United States Equal Employment Opportunity Commission recently announced that retaliation charges accounted for the highest overall percentage of private sector complaints in fiscal year 2011. Employers, therefore, must be on the lookout for those magic words spoken by an employee that may qualify as a protected activity triggering a subsequent claim of retaliation.

An employee states a claim for retaliation by demonstrating that she (1) engaged in protected activity, (2) suffered an adverse employment action either contemporaneously with or after the protected activity, and (3) there was a causal connection between the protected activity and the adverse employment action. The employer may defeat Plaintiff's claim by showing a legitimate, non-retaliatory reason for the adverse action.

Unquestionably, protected conduct includes the filing of formal charges of discrimination and informal protests of discriminatory activities, including complaints to management. It also includes the expression of support by an employee for a co-worker who has filed a formal charge of discrimination. Protected conduct, however, does not include generalized complaints by an employee to a supervisor or other management team member about unfair treatment. The conduct – if it is to be protected –must convey a protest of discriminatory practices. Therefore, an employee's complaint that a manager treated her unfairly, rudely or is too tough on her, likely will not constitute a protected activity. Similarly, an employee's complaint that he is being treated differently than another employee – with nothing more – is insufficient to constitute a protected activity. The United States Court of Appeals for the Third Circuit recently found in favor of the employer in a retaliation claim because, while the employee complained to her supervisor that she was treating her differently than other employees, the employee failed to provide evidence that she specifically complained that the treatment was based on her race or gender. *See Warfield v. SEPTA*, No. 11-2606, 2012 WL 363062 (3d Cir. Feb. 6, 2012).

When an employee, however, complains that a manager is unfair, rude or more demanding because they are a woman, African-American, or disabled – an employer's radar should be buzzing. It is those complaints of different or unfair treatment tied to a protected classification that generally qualify as protected speech. Therefore, any subsequent adverse employment action taken by the employer may be considered by the employee as retaliation for her protected activity. These subsequent adverse actions may range from a shift change, loss of overtime opportunity, poor

performance evaluation, demotion, or lower pay raise to a termination.

Once the employer hears those magic words, it can minimize its exposure by springing to action. The employee complaint should be investigated carefully and comprehensively and the employee should be informed of the outcome. Being proactive is a sure-fire way to head off a retaliation claim before it is too late.

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PA Expands Two-Disease Rule for Asbestos Claims

In a ruling that will have significant impact on the number of asbestos related claims brought in Pennsylvania and the parties' ability to resolve these claims, the Pennsylvania Supreme Court recently allowed a worker to bring separate lawsuits for more than one malignant disease resulting from the same alleged exposure to asbestos. This ruling is a significant expansion of the "two-disease" or "separate disease" rule that has been in place in Pennsylvania since 1992. Prior to this ruling, it was generally understood in Pennsylvania that a plaintiff could pursue claims for one non-malignancy and one malignancy arising out of the same exposure.

The Plaintiff in *Daley v. A.W. Chesterton, Inc.*, __A.3d__, 2012 WL 555873 (PA 2012) was diagnosed with pulmonary asbestosis and squamous-cell carcinoma of the right lung in 1989. Thereafter, he sued several companies in 1990 seeking compensatory damages for his work related asbestosis and lung cancer. These claims were settled in 1994.

In 2005, Mr. Daley was diagnosed with malignant pleural mesothelioma. He again filed suit against several defendants who were not parties to his 1990 lawsuit. These defendants sought dismissal of the action contending that Pennsylvania's "two-disease" rule prohibited Mr. Daley from bringing an action for a second malignant asbestos-related disease. They further argued that, at the time of the 1990 lawsuit, Pennsylvania had not yet adopted the two-disease rule, and therefore, the requirements of Pennsylvania's single cause of action rule applied.

The Court in *Daley* noted that lung cancer and mesothelioma are the two common

types of asbestos related malignancies with mesothelioma being more rarely diagnosed. The *Daley* Court further noted that the latency period for asbestosis and most lung cancers is 10 to 20 years while the latency period for mesothelioma is 30 to 50 years. It is clear from the Court's opinion that it considers them to be two separate and distinct diseases and that, in the Court's words, "the likelihood of a plaintiff contracting two separate and distinct asbestos-malignancies appears to be remote".

In reaching its ruling, the Supreme Court was forced to address the 1992 decision in *Marinari v. Asbestos Corp., Ltd.*, which adopted the two-disease rule, and its lineage of cases. The Court observed that

> A thoughtful reading of Marinari … reveals that the decision to allow a plaintiff to file one cause [of] action for a nonmalignant asbestos-related disease, and a subsequent cause of action for a malignant asbestos-related disease, arose from a recognition that requiring a plaintiff to seek recovery for all present and future asbestos-related diseases, upon first experiencing symptoms of any asbestos disease, is likely to result in anticipatory lawsuits, protracted litigation, evidentiary hurdles, speculative damages, and excessive or inadequate compensation.

And then went on to say that

> Requiring a plaintiff to seek damages for a potential future diagnosis of mesothelioma at the time he is diagnosed with lung cancer not only imposes nearly insurmountable evidentiary hurdles on the plaintiff, but also may subject a defendant to payment of damages for a serious disease which a vast majority of plaintiffs will not actually develop.

Following this logic, the Court ruled that

> the separate disease rule, as adopted in Pennsylvania, allows a plaintiff to file an action for a malignant asbestos-related disease, even if he previously filed an action for a different malignant asbestos-related disease, provided the second or subsequent action is based on a separate and distinct disease which was not known to plaintiff at the time of his first action, and is filed within the applicable statute of limitations period.

The Court also made clear that "the burden of establishing that a particular asbestos-related malignant disease is 'separate and distinct' from another must be borne by the plaintiff" and noted the relevant factors to be considered may include evidence that the diseases:

- developed by different mechanisms;
- originated in different tissue or organs;
- affected different tissue or organs;
- manifested themselves at different times and by different symptoms;
- progressed at different rates; and
- carried different outcomes.

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