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Only Certain Tier Subcontractors Can Successfully File Mechanics' Liens In Pennsylvania

The right to a Mechanics' Lien is dependent upon the Mechanics' Lien statute. McCarthy v. Reese, 419 Pa. 489, 215 A.2d 257, 258 (1965). The Mechanics' Lien statute permits only contractors and subcontractors to file and obtain judgment on a Mechanics' Lien. 49 P.S. § 1303(a). Both the word "contractor" and the word "subcontractor" are defined in the statute 49 P.S. § 1201(4), (5).

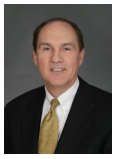
The statute defines "subcontractor" as follows:

> "Subcontractor" means one who, by contract with the contractor, or pursuant to a contract with a subcontractor in direct privity of a contract with a contractor, express or implied, erects, constructs, alters or repairs an improvement or any part thereof; or furnishes labor, skill or superintendence thereto; or supplies or hauls materials, fixtures, machinery or equipment reasonably necessary for and actually used therein; or any or all of the foregoing, whether as superintendent, builder or

> materialman. **The term does not include** an architect or engineer who contracts with a contractor or subcontractor, or a person who contracts with a materialman or **a person who contracts with a subcontractor not in direct privity of a contract with a contractor.**

49 P.S. § 1201(5) (emphasis supplied).

If a person is not a "subcontractor" within the meaning of 49 P.S. § 1201(5), then the person cannot successfully prosecute a Mechanics' Lien claim because the person has no right to relief under the Mechanics' Lien statute. If a subcontractor does not have a contract with the contractor or a subcontractor in direct privity of a contract with a contractor, then the subcontractor cannot successfully file a Mechanics' Lien and pursue a claim under the statute. In other words, only first-tier and second-tier subcontractors are within the statutory definition of "subcontractor." Third-tier or lower subcontractors who are not paid for work on a construction project cannot prevail under the PA Mechanics' Lien statute.



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Pay-If-Paid Contracts: The Power Of A Subordinating Conjunction

Did you know that in the English language, "if" is a subordinating conjunction? Can a two-letter word make a million dollar difference? You bet! Subcontractors are often faced with challenges of calling a contractor regarding an account receivable balance, only to learn that the contractor has not yet been paid by the owner and, therefore, will not be paying the subcontractor. The difference between a "pay-if-paid" contract and a "pay-when-paid" contract might only be two letters, but it can make a dramatic difference in the subcontractors' ability to collect.

This year, the U.S. District Court for the Eastern District of Pennsylvania revisited the topic of "pay-if-paid" contracts in the case of Lydon Millwright Services, Inc. v. Ernest Bock & Sons, Inc., 2013 WL 1890355 (E.D.Pa.). In that case, Bock was the general contractor on a construction project including the installation of a new baggage handling system at the Philadelphia International Airport. Bock entered into a subcontract with Lydon to install the

mechanical portion of the baggage handling system worth well over $1 million. The contract included the following language:

> Payment by Owner to the General Contractor for the work/materials invoiced by the Subcontractor…shall be a condition precedent to General Contractor's obligation to pay Subcontractor…Accordingly, Subcontractor…agrees and understands that it shall bear the risk of non-payment by the Owner and shall be entitled to no compensation from the General Contractor in the event of nonpayment by the Owner for its work/materials.

Although the dispute in Lydon was decided on other grounds, the above language was accepted as a "pay-if-paid" contract. Buy why? Is there magic language that must be used? The Eastern District of Pennsylvania has opined previously on this topic. In Sloan Co. v. Liberty Mutual Insurance Co., 2009 WL 2616715 (E.D.Pa.), the Court went to great lengths to explain the differences between "pay-if-paid" and "pay-when-paid" contracts.

In Sloan, the operative language of the contract at issue read as follows:

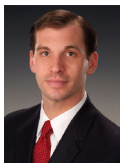
> Final payment [to the Subcontractor] shall be made within thirty (30) days after the last of the following to occur, the occurrence of all of which shall be conditions precedent to such final payment:…(6) Contractor shall have received final payment from the Owner for he Subcontractor's Work…

Liberty Mutual argued that this was a "pay-if-paid" contract, but the District Court found that it was, in fact, a "pay-when-paid" contract because the risk of non-payment by the owner was not shifted to the subcontractor. The U.S. Court of Appeals for the Third Circuit reversed the District Court's decision by holding that although the contract did not include magic language, the contract, when taken as a whole, intended for the risk of non-payment to be shared between the parties. Sloan Co. v. Liberty Mutual Insurance Co., 653 F.3d 175 (3d Cir. 2011).

Contractors, subcontractors, and their counsel should understand the nuances and distinctions of these two types of contracts. The subordinating conjunction "if" can make a world of difference. "Pennsylvania Courts construe contract clauses that condition payment to a contractor on the contractor's receipt of funds from the owner of the project as 'pay-if-paid' clauses that do not require the contractor to pay a subcontractor until the contractor has received those funds from the owner of the project." LBL Skysystems (USA), Inc. v. APG-

America, Inc., 2005 WL 2140240, at *32 (E.D.Pa. Aug. 31, 2005)(citing C.M. Eichenlaub Co. v. Fidelity & Deposit Co., 437 A.2d 965, 967 (Pa. Super. Ct. 1981)). "In contrast, 'pay-when-paid' clauses 'merely create a timing mechanism for a contractor's payments to a subcontractor and do not condition payments to a subcontractor on the contractor's receipt of those payments from the project owner.'" 2005 WL 2140240, at *32 (citing United Plate Glass Co. v. Metal Trims Indus., Inc., 525 A.2d 468 (Pa. Super. Ct. 1987).

"Pay-if-paid" clauses usually include words or phrases such as "condition," "if and only if," or "condition precedent," however, as the Third Circuit made clear in Sloan, the presence or absence of magic words will not always carry the day. When negotiating contracts, contractors and subcontractors should consult knowledgeable counsel to make clear who will bear the risk of non-payment by the owner. "If" might only be a two-letter subordinate conjunction, but it can impact a company's bottom line by a factor of many zeros.



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OSHA Whistleblowers Can Now submit Complaints Online

OHSA has set up an online system for workers to submit retaliation complaints. Previously, workers could call a national 800 number, or call a regional or local office, in addition to filing a written complaint. The new online form prompts the worker to include basic whistleblower complaint information so they can be easily contacted for follow-up. Complaints are automatically routed to the appropriate regional whistleblower investigators. In addition, the complaint form can also be downloaded and submitted to the agency in hard-copy format by fax, mail or hand-delivery.

OSHA enforces the whistleblower provisions of 22 federal statutes protecting employees who report violations of various securities laws, trucking, airline, nuclear power, pipeline, environmental, rail, public transportation, workplace safety and health, and consumer protection laws. Whistleblowers may not be transferred, denied a raise, have their hours reduced, or be fired or punished in any other way because they have exercised any right afforded to them under one of the laws that protect whistleblowers.

An employee who believes that he or she has been retaliated against by an employer in violation of any of the statutes listed in 29 CFR § 24.100(a) may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation. 29 CFR 24.103(a). It

is a violation for any employer to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against any employee because the employee has:

> Commenced a proceeding;
>
> Testified or is about to testify in any such proceeding; or
>
> Assisted or participated, or is about to assist or participate, in any manner in such a proceeding or in any other action to carry out the purposes of such statute.

Once an investigation is concluded and the Assistant Secretary of Labor finds that there is reasonable cause to believe that a violation has occurred, findings shall issue with an order providing relief to the complainant. The order shall include, where appropriate, a requirement that the employer abate the violation; reinstate the complainant to his or her former position, together with the compensation (including back pay), terms, conditions and privileges of the complainant's employment; pay compensatory damages; and, under the Toxic Substances Control Act and the Safe Drinking Water Act, pay exemplary damages, where appropriate. At the complainant's request the order shall also assess against the respondent the complainant's costs and expenses (including attorney's fees) reasonably incurred in connection with the filing of the complaint. 29 CFR §24.105(a)(1).

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Owners and Contractors Should Require Disclosure Of Self-Insured Retentions

Disclosure of self-insured retentions to contracting partners can be a touchy subject. Parties with large self-insured retentions may not be perceived as suitable contracting partners. However, a recent case underscores the need for such disclosure and it reveals some of the problems that can arise if such disclosure does not occur before work begins.

In many transactions, the party with superior bargaining power, like the owner of a construction project, may require its contracting partners, like the general contractor, to purchase insurance for the benefit of the owner. The general contractor, in turn, may impose a similar requirement on its subcontractors. To ensure the success of such a

risk transfer mechanism, the owner or general contractor should attempt to obtain full insurance, covering the first dollar of the loss. However, the insurance program available to the subordinate party, such as a subcontractor, may not provide that level of protection. In hard markets, subcontractors may be forced to use a self-insured retention in order to reduce the cost of the insurance program. For example, if the subcontractor agrees to absorb the first $100,000 of a loss, the cost of that insurance should be significantly less than it would be if the insurance attachment point were lower. In other words, a policy that provides coverage for the first dollar of a loss will be more expensive than one when the insurance "kicks in" at $100,000.

While it is routine for project documents to contain minimum levels of insurance and to require certificates of insurance as evidence of compliance with those requirements, many times the insurance requirements are silent as to whether or not some portion of the mandatory insurance can be satisfied through a self-insured retention. And, adding to the uncertainty, typical certificate of insurance forms contain no blocks where the existence of or amount of a self-insured retention is to be disclosed.

This lack of information can create unanticipated financial risks for the owners and general contractors who bargained for insurance protection through their contracting partners' programs. Please keep in mind that insurance programs having a self-insured retention usually require the named insured to pay the self-insured retention, even when the insurance is provided for the benefit of a third party, such as an owner or general contractor named as an additional insured. So, if the program has a $100,000 retention and the subcontractor cannot afford to pay it, the owner or general contractor may not get the full benefit of the insurance bargain.

In Multicare Health System v. Lexington Insurance Co., 2013 WL 4532248 (9th Cir. August 28, 2013), a medical staffing service contracted to provide a hospital with temporary nurses. The contract required the staffing agency to supply insurance for the hospital's benefit and to furnish a certificate of insurance attesting to the existence of coverage. The certificate stated that the agency had a $5,000,000 liability policy, but it did not say anything about the fact that the policy was subject to a self-insured retention of $1,000,000. The hospital suffered a judgment for $785,000 in a malpractice case. The award was within the retention amount, but the agency went bankrupt and it was unable to pay the retention. The hospital then sued the insurance company claiming that it misrepresented the terms of the policy and that the hospital relied on the certificate to its detriment. The court dismissed the action, and the appellate court upheld that ruling.

The appellate court held that Washington law did not impose any duty on the part of an insurer issuing a certificate of insurance to disclose the existence or amount of a self-insured

retention. The court reasoned that a certificate of insurance is merely evidence of the existence of a policy, the type of policy, dates of coverage and dollar limits of protection. A certificate is not intended to inform the certificate holder of every, or any, limitation on or exclusion from coverage, and the issuer cannot be held liable to the certificate holder for failing to include such information. Further, the certificate form commonly used contains disclaimers that the certificate is informational only and that the policy language will control. The court expressed concern that, if the certificate were required to disclose retentions, exclusions, and the like, it would be transformed into a copy of the policy, and it would lose the value as a succinct statement of the existence of insurance. Further, the court noted, that the hospital could have protected itself somewhat by requesting a copy of the policy.

There are two important lessons to be learned from Multicare v. Lexington. First, insurance requirements contained in project documents should state explicitly whether or not self-insured retentions can make up any part of the contracting partner's required insurance program. Absent such specificity, a subcontractor, for example, could obtain a policy with a high self-insured retention, and the owner or general contractor could lose valuable insurance protection if that subcontractor cannot meet its obligation to fund the retention. Second, because the certificate of insurance will not normally disclose the existence or amount of a retention, the owner or general contractor should follow-up to obtain a copy of the policy before commencement of the work. That way, if there is a self-insured retention, the owner could take appropriate steps to obtain the protection bargained for. For example, the owner or general contractor could insist upon a replacement policy, it could obtain some other protection such as a letter of credit for the amount of the retention, or it could terminate the subcontract.

For additional information regarding insurance requirements and certificates of insurance, please contact Louis C. Long at (412) 263-4395 or LCL@Pietragallo.com.

Preserving Mechanics' And Materialmen's Liens In OH, PA & WV

Often in the construction industry, a project will take a supplier or a subcontractor across state lines. Frequently, residential and commercial construction clients contact us with questions regarding the lien laws in other states where they are supplying work or materials. Not surprisingly, there are subtle variations in preserving one's lien from state to state. Following is a general and cursory overview of how to preserve a mechanic's lien or a materialman's lien in our tri-state area.

Ohio

Before a construction project begins in Ohio, the owner of the property is required to file a Notice of Commencement in the Office of the Recorder in the county where the property is located. A copy of the Notice of Commencement is to be posted at the construction site. O.R.C. 1311.04 sets forth all of the information to be included in the Notice of Commencement.

Any contractor, subcontractor or materialman providing labor or materials to a construction project may file a lien against the property owner for the value of the labor or materials supplied by filing an Affidavit of Mechanic's Lien. However, in order to preserve one's lien, the contractor, subcontractor or materialman, must file a Notice of Furnishing upon the property owner within twenty-one (21) days of the filing of the owner's Notice of Commencement. O.R.C. 1311.05. This puts the property owner on notice that the party supplying the labor or materials may be entitled to a lien against the property. If the Notice of Furnishing is not filed, the lien is lost. Of course, there are exceptions, i.e., home construction contracts or home purchase contracts where the property owner is not required to file a Notice of Commencement. Where the subcontractor or supplier is in direct privity of contract with the property owner, no Notice of Furnishing is required to preserve the subcontractor or material supplier's lien.

In the event that a contractor, subcontractor, or materialman is not paid for labor or materials supplied, he has seventy-five (75) days from the last day of work performed to file an Affidavit of Mechanic's lien. If the project was a single or two family residential dwelling, the time for filing is reduced to sixty (60) days. If the project involves oil and gas leases, an Affidavit of Mechanic's Lien can be filed within one hundred twenty (120) days from the last date or work performed or materials supplied. O.R.C. 1311.06 (B).

Pennsylvania

The Pennsylvania Mechanics' Lien Law Act of 1963, 49 P.S. §§ 1101, et seq., sets forth lien law in Pennsylvania. Only the general contractor, the subcontractor, and those with a direct contract with the subcontractor (sub-subcontractors) have lien rights. Unless one deals directly with the general contractor or the subcontractor, some remote suppliers will have no lien rights. Pennsylvania is a rare jurisdiction where the general contractor is able to waive the lien rights of subcontractors. Subsequent amendments to Act have somewhat limited the enforceability of waivers. Current law provides as follows:

Waiver by Contractor; Effect on Subcontractor

> *(a) GENERAL RULE. – To the extent that lien rights may be validly waived by a contractor or subcontractor under section 401 (a) or where the contractor or subcontractor has posted a bond under section 401(b)(2), a written contract between the owner and a contractor, or a separate written instrument signed by the contractor, which provides that no claim shall be filed by anyone, shall be binding: but the only admissible evidence thereof, as against a subcontractor, shall be proof of actual notice thereof to him before any labor or materials were furnished by him; or proof that such contract or separate written instrument was filed in the office of the prothonotary prior to the commencement of the work upon the ground or within ten (10) days after the execution of the principal contract or not less than ten (10) days prior to the contract with the claimant subcontractor…*
> 49 P.S. §1402

Assuming that the lien has not been waived, the time limit for filing a claim is based on the date of the completion of the work or the delivery of the materials. Regardless of the type of construction project, all claimants have six (6) months from the date of completion or last delivery. 49 P.A. § 1502 (a)(1). One must give the property owner thirty (30) days formal notice of one's intent to file a claim, thus within five (5) months of the date of completion or last delivery of materials. 49 P.A. § 1501 (b). Delivery of the Notice of Intent may be accomplished via first class, registered or certified mail or via sheriff or private process service. The actual claim must be filed with the prothonotary in the county in which the project is located. Written notice of the lien (lawsuit/claim) must be served upon the owner by sheriff within one month of its filing. Failure to do so will result in the loss of the lien. Ultimately, the lien holder must file a complaint to enforce the lien and obtain a judgment within two years of the filing of the claim. 49 P.S. § 1701 (a).

It should be noted that change may be coming to Pennsylvania. Pennsylvania House Bill 473 was passed on September 23, 2013, and has moved to the Senate for consideration. HB 473 seeks to amend the current lien law to create an online State Construction Notices Directory. The proposed law would only be applicable to those projects registered in the Directory by owners. An owner registers his project by filing a Notice of Commencement. If an owner registers a project, all subcontractors and suppliers would be required to file notices of furnishing within twenty (20) days of first providing work or materials to the project in order to preserve their liens. The Directory protects owners by limiting the lien pool, but it will force subcontractors and suppliers to monitor the Directory for notices of commencement to file timely notices of furnishing to perfect their liens.

West Virginia

West Virginia's construction lien laws are codified at Chapter 38, Article 2 of the Official Code of West Virginia of 1931, as amended (the "Code"). It makes distinctions for various types of individuals, from architects to materialmen, and projects, from residential to public works. [This article does not cover public works projects.] A general contractor who has a contract with the owner may claim a lien. A subcontractor does not need a direct contract with the owner in order to file a lien so long as it has a contract with another entity that does have a contract with the owner. 12 W.Va. Code § 38-2-2. Finally, a supplier or a laborer may file a lien if they are not paid for their supplies or work. W.Va. Code §38-2-3 and §38-2-4. Payment to the general contractor does not release the lien of the laborer or supplier even if the general contractor or subcontractor has a contract with the party and has received payment. In West Virginia, the date that the work is initiated or the materials are supplied is the date that the lien attaches to the property. W.Va. Code §38-2-17.

Perfecting a lien in West Virginia is a two-step process. First, a Notice of Lien must be recorded with the county clerk in the county where the project is located and served (legal service) upon the owner within one hundred (100) days from the completion of the work or delivery of supplies. A laborer working for a company must record his lien within ninety (90) days from the date that he last worked for the company or contractor. W.Va. Code §38-2-32. A materialman, laborer, or subcontractor is not required to file Notice upon the owner if he gave the owner preliminary notice before work began or supplies were delivered that payment will be sought from the owner if the claimant is not paid for his work or supplies. W.Va. Code §38-2-20. Second, the lien holder must file suit in the circuit court where the property is located within six months of the recording of the Notice of Lien. If no suit is filed within six months of the recording, the lien is discharged.

For more information, please contact Janet K. Meub at (412) 263-4375 or JKM@Pietragallo.com.

No Intent Required: Environmental Enforcement Under The Solid Waste Management Act

While oil and gas production and all types of construction activities relating thereto continue to increase in the Commonwealth of Pennsylvania, the Commonwealth's recent prosecution of XTO Energy may signal the beginning of a new trend in enforcement of environmental

protection laws against the oil and gas industry, and all contractors working in Pennsylvania. Specifically, the Solid Waste Management Act ("SWMA") provides the Commonwealth with a powerful enforcement tool that all contractors who work in Pennsylvania should both be aware of and prepare for. Accordingly, contractors should understand its reach.

The XTO Energy Prosecution

On September 10, 2013, Pennsylvania Attorney General Kathleen Kane announced that she is prosecuting XTO Energy Inc., a Pennsylvania-based subsidiary of Exxon-Mobil, for criminal charges under the SWMA and the Clean Streams Law, for its fracking-related wastewater spill that occurred at a drill site in Lycoming County in November 2010.

According to the charges, XTO leaked more than 50,000 gallons of toxic wastewater from a Marcellus-Shale gas well onto the ground near the drill site and into a nearby creek. A Pennsylvania Department of Environmental Protection ("DEP") inspector discovered the leak when he heard the sound of running water coming from the back of a 21,000 gallon waste water tank. Upon inspecting the tank, he found that a valve had been left open and was leaking toxic fracking solution on the ground. He also found that several other tanks did not have plugs and were leaking. The water that leaked contained high levels of toxic chemicals including strontium, chloride, bromide, and barium.

Based on these allegations, the U.S. Department of Justice brought a Clean Water Act action against XTO that was resolved in June 2013. To resolve the federal charges, XTO agreed to pay a $100,000 fine and make $20 million worth of upgrades to its waste management systems, yet it did not admit liability. Despite the settlement of the federal charges, the Commonwealth of Pennsylvania chose to pursue criminal charges against XTO under the Clean Streams Law and the SWMA.

While the Commonwealth will have to prove criminal intent to obtain convictions on the Clean Streams Law violations, the SWMA charges do not require any such proof. Instead, the SWMA provides strict criminal liability for the storage, transportation, processing, or disposal of waste unless in compliance with the provisions of the SWMA. Significantly, the SWMA's criminal penalties apply to the corporate officers and management of the violating company.

Given the serious ramifications of the SWMA's strict liability criminal provisions, contractors who perform work or who hire agents to perform work implicated by the SWMA must ensure that they are in compliance with its provisions.

Solid Waste Management Act

The Solid Waste Management Act, 35 P.S. § 6018.606, was enacted in 1980, and regulates most waste materials, including hazardous waste. The SWMA also contains provisions that control the permit process for the storage, transportation, processing, and disposal of waste materials, as well as the associated enforcement procedures.

The SWMA defines "solid waste" as "any waste, including but not limited to municipal, residual, or hazardous wastes, including solid, liquid, semisolid, or contained gaseous materials." Residual waste, or non-hazardous industrial waste, includes waste material produced by industrial, mining, and agricultural operations. The Pennsylvania Department of Environmental Protection ("DEP") rules include linoleum, industrial equipment, piping, storage tanks, gypsum board, rubber, grindings and shavings, and other materials which are routinely used by the construction industry as "residual waste. 35 P.S. § 6018.103. Hazardous waste, for purposes of the SWMA, includes various types of waste which because of their characteristics "may cause or significantly contribute to an increase in mortality or an increase in morbidity" or "pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed, or otherwise managed." 35 P.S. § 6018.103; 25 Pa. Code § 261a.3. Examples of hazardous waste include pesticides, materials containing mercury, and toxic chemical solutions and wastewater.

The SWMA contains numerous offenses for the unlawful management of municipal, residual, or hazardous wastes. For example, Section 6018.610 of the SWMA lists nine unlawful acts which include:

- dumping any solid waste onto the surface of the ground, underground, or water of the Commonwealth…unless permitted by the Commonwealth ;
- constructing a solid waste treatment, storage, or disposal facility without a permit;
- burning solid wastes without a permit;
- storing, collecting, transporting, or disposing of solid waste contrary to the rules, regulations adopted under the act and orders of the DEP
- transporting hazardous waste without a permit;
- transporting any solid waste contrary to regulations, rules,

and orders of the DEP;

- obstructing or hindering an agent of the DEP from performing his/her duties under the Act such as entry and inspection of facilities;

The Act contains even more offenses related to hazardous waste. Section 6018.401 prohibits the storage, transportation, treatment, or disposal of hazardous waste without a permit and Section 6018.403 prohibits the transportation, generation, or storage of hazardous waste unless in compliance with the Act, the rules and regulations of the DEP, and the terms of the contractor's permit.

The Act contains both misdemeanor and felony provisions for violations of its enumerated offenses. Section 606(b), the SWMA's misdemeanor section, is broadly applied and provides liability for any person who violates any provision of the act, any rule or regulation of the department, or any term or condition of any permit. Penalties for the misdemeanor section include fines of between $1,000 and $25,000 for each violation and imprisonment of up to a year. The SWMA's felony provision, which applies to offenses involving hazardous waste, provides penalties between $2,500 and $100,000 per violation and imprisonment between two and ten years. For purposes of the SWMA's criminal provisions, the term "person" specifically includes the officers and directors of the corporation or legal entity that committed the violation. 35 P.S. § 6018.103.

As demonstrated by the plain language of these sections, the Commonwealth does not need to prove that a defendant committed a violation of the SWMA with any level of criminal intent. Instead, the very act of violating the SWMA leads to criminal liability. The amount of criminal penalties can be extremely significant, because for a number of SWMA provisions, a violation is considered to occur each day until the violation is abated. Thus, a contractor who stores hazardous waste in violation of the requirements of Section 401, for example, would have to pay $100,000 for each day of the violation's duration. Furthermore, a Defendant's non-compliant act leads to multiple violations, with penalties for each violation. For instance, a Defendant that leaks residual waste onto the ground may be held liable for violating SWMA provisions as well as various regulations, with misdemeanor penalties for each violation.

Additionally, the statute of limitations for a SWMA action is 20 years from the date the offense is discovered, allowing the Commonwealth to bring a criminal action against a Defendant years after an offense was committed. Overall, the SWMA is an extremely potent statute and violation of its provisions can lead to devastating consequences for both

violating companies and their officers and directors.

Legal Challenges to the SWMA

Over the years, Pennsylvania courts have consistently upheld the SWMA against constitutional challenges.

In Commonwealth v. Parker White Metal Co. 515 A.2d 1358 (Pa. 1986), a metal company charged under the misdemeanor provisions of the SWMA challenged 606(b) as being unconstitutionally vague, violating the Due Process and Equal Protection Clauses, and inappropriately delegating legislative power to the executive branch. The defendant argued that because the language of Section 606(b) was almost identical to the language of Section 606(a), the summary offense provision, that the SWMA gave prosecutors unconstitutional discretion in choosing what penalty to charge a defendant with, without sufficient guidelines. Additionally, the defendant argued that Section 606(b) was unconstitutionally vague for not providing a defendant with sufficient notice of prohibited conduct.

The Pennsylvania Supreme Court rejected all of these arguments and found that Sections 606(a) and 606(b) of the SWMA did not violate the Equal Protection Clause or Due Process Clause and did not inappropriately delegate legislative power to the executive branch. Further, the Court ruled that either section was unconstitutionally vague because the defendant had notice of the conduct prohibited by Section 606(a) and (b) and the type of penalties a defendant would face for violating them. The Court also found that the SWMA did not unconstitutionally delegate legislative power to the executive branch. While the SMA gives prosecutors discretion in how to charge a defendant, the Court found that it provides a sufficient legal framework and adequate standards in light of the purpose of the law. Additionally, conviction under either Section is not automatic - a prosecutor would have to adequately prove the case of either the summary offense or misdemeanor before either penalty would be imposed.

In Baumgardner Oil Co. v. Commonwealth, 606 A.2d 617 (Pa. 1992), the Pennsylvania Supreme Court found that the imposition of strict criminal liability provisions of the SWMA is not unduly harsh or in violation of the Due Process Clause. In that case, an oil company was charged with numerous violations of the SWMA, including a felony under Section 401 for unlawful management of hazardous waste. The company challenged the SWMA's penalties as being unconstitutionally harsh because they imposed strict liability without any criminal intent needed. The Court rejected this argument, finding that the offenses proscribed by the SWMA were public welfare offenses intended to protect the public from

environmental hazards. For this reason, the Court found that a reasonable person would know that the conduct prohibited by the SWMA would be subject to significant regulation due to its threat to health and safety. The Court also found that the penalties imposed by the SWMA were not unconstitutionally harsh because they don't differ significantly from federal strict liability penalties, which have been upheld as constitutional. The Court also found that the SWMA did not violate the due process protections under the Pennsylvania Constitution because it was the intent of the PA General Assembly to impose absolute liability for offenses under the SWMA. Thus, the Court upheld both the misdemeanor and felony provisions as constitutional.

Most recently, in Commonwealth v. Packer, 798 A.2d 192 (Pa. 2002), the Pennsylvania Supreme Court upheld the SWMA conviction of an equipment operator who buried used tires on his employer's property without a permit. In upholding this conviction, the Court found that the SWMA's penalties for unlawfully dumping solid waste apply to all persons involved in such dumping – not merely those required to get a permit. The Court also rejected the defendant's due process argument, finding that imposing strict liability on the defendant did not violate due process.

Overall, Pennsylvania Courts have consistently found that contractors may be held strictly liable for violating the requirements of the SWMA without offending constitutional protections.

Implications for Contractors

Given the serious nature of the SWMA's criminal penalties and the willingness of the Commonwealth to pursue criminal charges against violators, contractors performing work implicated by the SWMA must take every precaution to comply with its requirements.

First, contractors should ensure that their internal policies and procedures provide guidelines on how to handle environmental accidents from a criminal perspective. In addition to the SWMA, there are a number of other federal and state criminal laws dealing with environmental issues.

Additionally, contractors should conduct internal investigations of all potential environmental incidents to determine their criminal exposure and to plan appropriate abatement activities. They should ensure that they have the proper emergency response procedures and equipment

in the event of an environmental emergency such as a spill or an explosion. They should also properly document all waste management, storage, and disposal efforts, which will be critical in the event of a criminal investigation.

Finally, contractors should routinely train their employees and contractors on the proper management, storage, transportation, and disposal of all types of waste, particularly hazardous waste. Because contractors may be held criminally liable under the SWMA for the actions of their agents, contractors should use due diligence in their hiring of employees and subcontractors. Contractors should also inform their employees and agents of the potential criminal implications of failing to follow the proper waste management, storage, transportation, and disposal procedures.

Despite the increased willingness of the Commonwealth to pursue criminal actions against contractors for environmental violations, contractors can limit their liability by educating themselves on the relevant federal and state environmental laws, including the SWMA, and taking steps to ensure that their agents and subcontractors are in compliance. Proper internal procedures and documentation of waste management, as well as appropriate emergency response procedures can help contractors avoid potentially disastrous criminal liability.


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