

Construction Law Update April 2013

PUBLISHED ON
April 1, 2013

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Construction Dispute Decline in Frequency and Cost A Silver Lining in a Bad Economy?

By: Ronald H. Pollock

A recent study has determined that construction claims reaching the litigation or arbitration stage fell from 2010 to 2011. Further, the value of disputes decreased significantly as well. Indeed, in the United States, the decrease was dramatic, falling from \$64.5 million in 2010 down to \$10.5 million in 2011, which was due to the generally depressed construction market as well as the increased emphasis by project owners and other involved parties to avoid and mitigate disputes. Interestingly, construction disputes lasted 10.6 months in 2011, compared to 9.1 months in 2010. Disputes in the United States took the longest to resolve in comparison with worldwide figures, resolving at 14.4 months (the United Kingdom was the quickest at 8.7 months). Due to some approaches that have been used to reduce the amount and value of disputes, it may be possible to continue this statistical trend even when the industry enjoys an era of increased economic activity. The following are some trends/techniques:

1. Claim Prevention/Risk Management: These include a variety of techniques including contractual provisions and management procedures (prompt schedule of claim reviews, change order processing and change negotiations).
2. Enhanced Project Management: Owners, contractors and others are more focused on decision making bottlenecks and controlling costs. Prompt decisions on issues tend to be the norm more than in the past.
3. Real Time Dispute Resolution: Prompt change order processing and approval ensure lower costs. Many owners and contractors recognize compromising and paying a few dollars during a job to resolve a potential dispute is cheaper than winning at litigation.
4. Technology: New hardware and software allow better documentation. CPM schedules, integrated project management software, and the widespread use of BIM are just a few.
5. Critical Path Method Scheduling: Contractors are planning and scheduling work with greater care, and

monitoring performance to identify issues as they emerge to minimize their impact.

6. Constructability Reviews: These reviews typically assure the design can be built economically and in alignment with the intent of the design. The review of design documents and value engineering studies improve the cost effectiveness of the design. Additionally, the expanding use of building information modeling (BIM) by designers and contractors reduces conflicts before a review is determined. This coordination, when done well, seems to reduce the opportunity for conflict.

In monitoring and attempting to reduce the impact of disputes or potential disputes on your business, it is worth reviewing these various areas to determine if they are helpful to your business

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Risk Busters: Everyday Risk Management Strategies

Businesses and individuals are constantly exposed to legal risks that challenge the ability to achieve goals, or threaten to undermine hard earned achievements. Developing an effective plan for managing legal issues is an important aspect of achieving success and avoiding potentially costly problems. Risk management involves identifying and assessing potential legal issues and taking action to minimize or control the probability or impact of those legal issues.

Risk Management Creates Value

Often times, risk management creates value for businesses because the cost of managing potential legal risks is far less than the cost of inaction. Risk management strategies can reduce the severity of legal issues or reduce the probability that legal issues will arise. The old saying, "an ounce of prevention is worth a pound of cure" is suitable to describe the potential benefits of cost-effective risk management strategies. Too often, however, businesses underestimate the cost of inaction when it comes to managing their legal risks.

Court Room Experience Drives Insight

Identifying legal risks and assessing their probability and potential impact is critically important to all businesses. Barley Snyder's Litigation Group has experience litigating a wide array of matters in numerous courts. Through these experiences, we have gained insight on the legal risks faced by businesses and invaluable understanding of how businesses can best weather the risk of loss and prevail in situations of conflict. Our experience allows us to spot potential legal risks, assess the likelihood and consequences posed by the risks, and develop cost-effective strategies to manage the countless legal risks faced by businesses today.

Winning Strategies

There are three main strategies that help cope with legal risk. First, individuals and businesses can manage their risk by utilizing insurance to transfer or share the risk. Second, individuals and businesses can utilize contractual provisions to limit certain risks or control the manner of resolving disputes. Lastly, individuals and businesses can spot legal issues and tailor their actions to avoid, mitigate, or plan for the identified risks. Future Risk Busters articles will focus in more detail on how businesses can effectively and efficiently utilize the previously mentioned risk management strategies to achieve their goals and avoid costly legal problems.

Barley Snyder's attorneys work with individuals, corporate and institutional clients of all sizes and complexities. Our attorneys work with clients to identify and evaluate areas of potential risk lurking in contract language, insurance coverage, and many other industry specific areas. Barley Snyder's litigation attorneys are aggressive advocates and effective strategists driven to successfully achieve our clients' goals by understanding their legal risks and using our experience and knowledge to prevail in situations of conflict.

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Pennsylvania Supreme Court to Review Recent Decision Allowing Union Benefit Fund to File Mechanics' Lien

By: Matthew M. Hennesy

Mechanics' liens provide a powerful tool for subcontractors and contractors to obtain payment, and therefore pose a significant risk to owners. Pennsylvania's Mechanics' Lien Law allows contractors and subcontractors to lien real estate for labor or materials furnished in the erection, construction, alteration, or repair of a building. The Pennsylvania Supreme Court will review the Superior Court's decision in *Bricklayers of Western Pennsylvania Combined Funds Inc. v. Scotts Development Co.*, which interpreted the definition of "subcontractor" under the mechanics' liens. The case has major implications for both owners and contractors because it represents a potential expansion of the type of entities that are permitted to file mechanics' lien claims.

Bricklayers of Western Pennsylvania Combined Funds Inc. v. Scotts Development Co., revolves around whether union trustees have standing to file a mechanics' lien based on alleged contributions to a fund that pays for union workers' health, welfare, retirement, and other benefits. The general contractor had hired two unions to perform work under a collective bargaining agreement on a property owned by Scott's Development, Inc. After alleging that they failed to receive necessary contributions to a benefits fund, the trustees for the unions filed liens against Scotts. Agreeing that the unions were not "subcontractors" or "contractors," the Court of Common Pleas sustained Scotts objection to the lien based on the unions' lack of standing.

On appeal, the Superior Court determined that since the trustees essentially stood in the shoes of the union members, the trustees could be considered subcontractors under the mechanics' lien law. In a dissenting opinion, Judge Judith Olson argued that because the collective bargaining agreement was not a contract with the individual workers they could not be considered subcontractors, and that the trustees, therefore, lacked standing to file the mechanics' lien claim.

The Superior Court held that the definition of "subcontractor" in the Mechanics' Lien Law was entitled to an expansive interpretation. By stating that "a traditional subcontractor agreement is not a mandatory prerequisite to confer subcontractor' status," the Superior Court's opinion has led to uncertainty about who can be considered a "subcontractor" under the Mechanics' Lien Law. By allowing the trustees of the union to file a mechanics' lien, the Superior Court's decision essentially determined that union members, employees of a subcontractor hired by the general contractor, had standing to assert a lien claim.

The Supreme Court will review the case to determine whether the Mechanics' Lien Law would permit an employee of a contractor to assert a claim as a "subcontractor" and whether the expansive definition of

subcontractor used by the Superior Court was proper. The Supreme Court's decision to review the case will hopefully create greater certainty for both owners and contractors concerning who may properly assert a mechanics' lien claim.

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