

Construction Law Update January 2010

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Extension and Expansion of First-Time Homebuyer Credit

By: Maria Di Stravolo Elliott and Ronald H. Pollock

Under the Worker, Homeownership, and Business Assistance Act of 2009, the first-time homebuyer tax credit of \$8,000, which was scheduled to expire after November 30, 2009, has been extended to April 30, 2010, as part of Congress' ongoing efforts to stimulate the housing industry and the economy in general. The tax credit is also expanded to non-first-time homebuyers for a subsequent home purchase, in the maximum amount of \$6,500. To qualify for the tax credit, homebuyers must have lived in their current home for at least 5 of the past 8 years, must enter into a binding contract before May 1, 2010 and close on the purchase before July 1, 2010.. Another perk is that the income threshold for qualifying homebuyers has been raised from \$75,000 for a single purchaser to \$125,000, and from \$125,000 to \$225,000 for a couple. Repayment of this credit is not required unless the homeowner stops using the home as his or her principal residence within 36 months of the purchase date. The credit, however, is not permitted if the purchase price of the home exceeds \$800,000. These tax credit changes apply to purchases occurring after November 30, 2009.

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Chinese-Made Drywall Leads to Corrosion of Pipes and Wires

By: Maria Di Stravolo Elliott and Ronald H. Pollock

Construction projects in the southeastern United States have allegedly experienced large-scale problems as a result of the defective condition of certain drywall imported from China. The U.S. Consumer Product Safety Commission has found a "strong association" between problematic imported Chinese drywall and corrosion of pipes and wires, a

conclusion that may provide legal support for claims. Further, its investigation has found a "possible" link between health problems and higher-than-normal levels of hydrogen sulfite gas emitted from the wall board, coupled with formaldehyde, which is commonly found in new houses. As this connection between the Chinese drywall and health issues is corroborated scientifically, precautions and risk management on the part of homeowners, contractors, suppliers and builders will become imperative. To read full article.

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More Protection to Homeowners With Mechanic's Lien Law Amendment

By: Ronald H. Pollock

A recent amendment to the Pennsylvania Mechanic's Lien Law now provides more homeowner protection. Effective October 11, 2009, the amendment allows waivers of the right to file mechanic's liens by contractors and subcontractors for **all** residential properties without any restrictions on contract price so long as the waivers are filed with the Prothonotary's office prior to commencement of construction. The previous amendment (effective January 1, 2007) made such waivers unenforceable as a matter of public policy if the contract price on the home was \$1 million or more. [Barley previously reported on the January 1, 2007 amendments ([Click HERE to read full article](#))]. A mechanics' lien allows contractors and subcontractors who have not been paid for property improvements to place a lien on the property. A waiver of liens is a written document that prevents the filing of a mechanics' lien claim in the future. The recent amendment also redefines "residential property" to require that the building is no more three stories in height (not including the basement). The waiver of lien rights by a contractor is still against public policy for commercial properties, and such a waiver by a subcontractor is also unenforceable unless the contractor has posted a bond to ensure payment to subcontractors.

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Contractor and Subcontractors Can Recover Post-Judgement Fees and Expenses

By: Maria Di Stravolo Elliott and Ronald H. Pollock

In a case of first impression, the Pennsylvania Superior Court has allowed a contractor to be awarded reasonable attorney's fees and expenses not only to obtain a judgment for unpaid work but also to try to collect on the judgment. In the case of *Zimmerman v. Harrisburg Fudd I, L.P.*, the court broadly interpreted the Pennsylvania Contractor and Subcontractor Payment Act (CASPA) to permit post-judgment collection expenses and fees. Under CASPA, interest, penalties, attorneys' fees and litigation expenses may be imposed on an owner, contractor or subcontractor who fails to make payment. In *Zimmerman*, the defendant owner filed a claim for exemption and an emergency motion when the contractor attempted to collect on its judgment under CASPA. The court recognized that it would be unfair for a contractor or subcontractor to be awarded a judgment but then be required to expend additional legal expenses and fees in order to collect the award due to a "defendant's obstructionist tactics."

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More Changes to AIA Standard Design and Construction Contracts

By: Maria Di Stravolo Elliott and Ronald H. Pollock

The American Institute of Architects (AIA) has released 2009 updates to contracts involving a Construction Manager. The last series of changes to the AIA standard contracts took effect in 2007 when AIA released a newly numbered series for architect-owner agreements (B101 to B107) and made major revisions to the A201 General Terms and Conditions for the Standard Agreement between Owner and Contractor.

The 2009 updates focus on the family of documents involving the Construction Manager, either as adviser or constructor. These documents are given new document numbering schemes. For the agreements involving the Owner and the Construction Manager as Constructor, the new document numbers are shown below:

- A133-2009 (formerly A121 CMc-2003) - Standard Agreement between Owner and Construction Manager with a Guaranteed Maximum Price
- A134-2009 (formerly A131 CMc-2003) - Standard Agreement between Owner and Construction Manager without a Guaranteed Maximum Price

The 2009 documents include changes to correspond to the updated A201-2007 General Terms and Conditions, especially since the 2003 documents referenced the expired 1997 documents. The 2003 documents are set to expire on May 31, 2010.

For the agreements involving the Construction Manager as Advisor, the new major documents numbers are as follows:

- A132-2009 (formerly A101 CMa-1992) - Standard Agreement between Owner and Contractor
- A232-2009 (formerly A201 CMa-1992) - General Conditions for Construction
- B132-2009 (formerly B141 CMa-1992) - Standard Agreement between Owner and Architect
- C132-2009 (formerly B801) - Standard Agreement between Owner and Construction Manager as Adviser

Again, many 2009 changes reflect similar changes made in the corresponding 2007 changes, such as the Initial Decision Maker, the revised dispute resolution provisions, and digital data information. The 1992 documents are set to expire on December 31, 2010.

The AIA has published an FAQ on the 2009 updates, which can be found [HERE](#). In addition, Barley has the AIA licensed software and can assist architects, owners and contractors with their design and construction agreements.

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New EPA Lead Paint Rule for Renovation, Repair and Painting Projects

By: Maria Di Stravolo Elliott and Ronald H. Pollock

The Environmental Protection Agency (EPA) instituted a new rule to take effect on April 2010 that will affect renovation, repair and painting projects on homes and child-occupied facilities built before 1978. Renovation, repair and painting projects typically involve demolition, sanding, scraping and cutting which can disturb lead-based paint

and create harmful lead-based dust and chips. Under the new rule, contractors, subcontractors and landlords who perform such projects must be properly trained and certified and must follow specific work practices (including certain recordkeeping and reporting requirements) to prevent lead contamination. The rule also requires that contractors, subcontractors and landlords provide the EPA pamphlet, **Renovate Right: Important Lead Hazard Information for Families, Child Care Providers, and Schools**, to homeowners and occupants of child-occupied facilities built prior to 1978, including parents and guardians of children that attend such facilities.

Even a small project may be affected by this rule. Projects involving more than six square feet on the inside and more than 20 square feet on the outside, as well as window replacement, fall within the purview of this new rule. Only homeowners who perform their renovations projects on their own homes will not be affected by this new rule. Violators of the new rule are subject to civil and criminal sanctions. EPA has an extensive website detailing the new rule as well as providing the EPA pamphlet at <http://www.epa.gov/lead/pubs/renovation.htm#owners>.

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Pennsylvania Home Improvement Consumer Protection Act Begins

By: Maria Di Stravolo Elliott and Ronald H. Pollock

The Home Improvement Consumer Protection Act is now in effect. All contractors performing "home improvements," broadly defined to encompass almost any form of work involving residential contracting, are required to register with the state and to have written contracts for all such work. The written contracts require specific information and language. The Attorney General's Office of Consumer Protection is responsible for enforcement of the Act. While compliance with the registration requirements has reportedly been solid, follow-through with the contractual requirements is notably lacking, according to the Attorney General's Office. As such, it could be expected that enforcement of the provisions may be stepped up in coming months.

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Green Construction Grow in Popularity

By: Maria Di Stravolo Elliott and Ronald H. Pollock

Contractors are responding to environmental concerns and marketing opportunities by engaging in green construction techniques. Risk management is particularly important when construction is incorporating new methods of work. For example, methods and materials must be reviewed carefully. While most green construction techniques and materials have been tested, some may lack a proven track record or be unfamiliar to contractors. In addition, suppliers, materials and building processes must be carefully documented and reviewed. Green building methods may differ and take longer to learn or carry out, thus requiring special training. These issues and others require careful documentation and assessment of potential risks. Overall, green construction presents tremendous opportunity and if managed properly, a minimal degree of risk.

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