

Construction Law Update July 2011

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Practice Pointer

By: Maria Di Stravolo Elliott

When reviewing your construction contract (whether you are an owner or a builder), be sure to have your insurance agent review the insurance requirements, as well as the indemnification and waiver of subrogation provisions of the contract. Ask your agent to confirm that your insurance policies meet the coverage limits listed in the contract. Otherwise, you may need to modify the contract or adjust your policies if the other party insists on the limits, which could incur additional costs for you. If your policy does not cover all the requirements in the indemnification clause, then you may have to pay out of your own pocket any damages related to a third-party lawsuit filed against your contractor or owner, as the case may be. Also, with respect to a waiver of subrogation provision, you will want to make sure that your insurance company is willing to waive its rights to go against the person or company at fault. Most insurance companies will waive their subrogation rights.

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Pennsylvania's Mortgage Licensing Act: Private Residential Mortgages Limited to Just Immediate Family Members

By: Sarah Yocum Rider

In 2008, the Pennsylvania legislature passed the Mortgage Licensing Act (the "Act"), which was subsequently amended in 2009 and 2010. The Act prohibits individuals and entities from engaging in the residential mortgage loan business without being licensed under the Act. This means that individuals or entities cannot make loans and take back mortgages on residential real estate (real property upon which is constructed or intended to be constructed as a dwelling), unless the lender obtains a mortgage lender license. Violations of the Act may result in fines up to \$10,000 for each offense.

The Act includes certain limited exceptions to this general prohibition, most notably, an exception permitting an individual to lend money to a member of the lender's immediate family and take back a residential mortgage.

"Immediate Family" is defined under the Act as a parent, spouse, child, brother or sister (but does not include other family members, including grandparents and grandchildren). It is important to note that the Act does not apply to loans for business or commercial purposes or properties.

A common practice, particularly in the current real estate market, is for a seller of a residential property to finance a portion of the purchase price and take back a residential mortgage on the property. The Act has been interpreted by the Pennsylvania Department of Banking to prohibit these "private money mortgages," unless the borrower and lender are "immediate family members" as defined under the Act.

A seller or builder of residential property has other options available to assist a buyer in the purchase of their property. For example, the seller/builder and buyer may enter into a lease-purchase agreement or an installment sale agreement arrangement. The primary difference between these arrangements and the private money mortgage (to take them outside of the purview of the Act) is that title to the residential property does not transfer to the buyer and the seller does not take back the residential property as collateral during the term of the lease or installment sale agreement.

We will continue to monitor legislative developments in this area. If you have questions, feel free to contact Sarah or any other member of the Real Estate or Construction Law Groups.

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Insurance and Indemnity Provisions may Reduce the Cost of Construction Accidents

By: Ronald H. Pollock

Jobsite accidents are personally and economically costly. While everything may be done to avoid accidents, they will never be eliminated entirely. The claims process and possible litigation is expensive even if the case is successfully defended. The company can protect itself by writing strong indemnity and insurance provisions into its contracts. There are several areas to keep in mind when drafting these provisions.

A.) Specifically review "boilerplate" insurance and indemnity provisions. Boilerplate, or contract provisions simply transferred automatically from contract to contract without modification, may have gaps or not be applicable to certain situations that may be relevant to a particular job site. Likewise, relying on another party to indemnify your company or name your company as an additional insured must be appropriately detailed or it may fail when it is needed most.

B.) Insurance policy renewals should be tracked diligently, through a docket system for reminding appropriate parties of the need for renewal.

C.) In a related item, keep documentation to confirm coverage is in place, particularly if relying on another party to have insurance. Certificates of Insurance can be inadequate or not detailed, so actual policy declarations should be reviewed.

D.) Finally, an insurance broker/contractor/attorney partnership can coordinate these issues to avoid expensive exposure.

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Update on Residential Sprinkler Requirement

By: Maria Di Stravolo Elliott

With the signing of the House Bill No. 377 by Governor Tom Corbett, the requirement of installing automatic fire sprinklers in one-family and two-family homes pursuant to the 2009 International Residence Code (and future revisions) has been eliminated. The sprinkler requirements, however, are still required for new townhome construction. To protect owners, the sections of the Bill dealing with sprinklers (now codified at 35 P.S. 7210.901(g)) do require builders of such homes to do the following at or before the time of entering into the purchase contract:

- Offer to the buyer the option to install or equip, at the buyer's expense, an automatic fire sprinkler system in home pursuant to the 2009 International Residential Code;
- Provide the buyer with information which explains the initial and ongoing cost of installing and equipping an automatic fire sprinkler system in the home; and
- Provide the buyer with information, as made available by the State Fire Commissioner on the agency's website, on the possible benefits of installing an automatic sprinkler system.

If the buyer chooses not to have a sprinkler system, then the home will still have some fire protection. The floor assembly of the home will need to be fire-resistance rated with a 1/2 -inch gypsum wallboard membrane, 5/8 -inch wood structural panel membrane, or equivalent, on the underside of the floor framing member. (see 35 P.S. 7210.901(h)).

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Does your insurance cover exposure from design build jobs?

By: Ronald H. Pollock

The design - build approach can be advantageous for a project owner as well as the contractor. The relationships do require the contractor to assume the responsibility for the design contract. As a result, contractors must confirm that their insurance scheme protects them from exposure that may result from this liability.

There are several ways to deal with this exposure. First, the designer's professional liability policy can be used to protect the contractor. Second, the contractor's general and umbrella liability policies, while typically excluding professional liability, can be helpful if the contractor can obtain a professional liability policy with coverage for defined professional services. This definition should be reviewed carefully to ensure design - build exposure is protected.

Prior to bidding, it is critical to ensure a contractor's insurance program provides protection for added design responsibility. This is important to the project owner and designer as well since a failure to adequately insure against possible risk may affect all parties to the project.

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