Barley Snyder

Construction Law Update June 2014

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Barley Snyder Opens Maryland Office

We are pleased to announce the opening of our sixth office, located in Hunt Valley, Maryland. Our work in Maryland has been increasing significantly in recent years as many of our clients have established operations across the Mason-Dixon line. With the new office location, attorneys will be more conveniently accessible for those clients on a regular basis.

"This geographic expansion is consistent with the firm's growth plans, which call for increasing work in all of our existing offices, as well as expansion across the region to serve other markets, consistent with our resources and the needs of our clients," said Jeff Lobach, Managing Partner of Barley Snyder.

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Pennsylvania House and Senate Pass Bills to Ease Construction Lending

By: Derek P. Dissinger

Over the past two years following the Pennsylvania Superior Court's decision in Commerce Bank/Harrisburg, N.A. v. Kessler, title insurance agencies and banks have wrestled with how to handle the issue of mechanic's liens and construction financing. Mortgages that finance construction are "open-end" mortgages under Pennsylvania law, meaning mortgages which secure advances made from the bank to the borrower after the mortgage is recorded. Prior to the decision in Kessler, banks and title companies assumed open-end mortgages were always entitled to priority over pre-existing mechanic's liens, regardless of how the proceeds were used. That assumption was provided incorrect in Kessler, where the Superior Court held that "open-end" mortgages were only entitled to priority over mechanic's liens if all of the proceeds went towards hard construction costs or the mortgage was a purchase money mortgage.

Following Kessler, if the borrower already acquired the land and began construction, lenders have had to minimize risk by creating separate loans for hard and soft costs, or requiring developers to use equity to fund soft costs. Title companies have asked contractors to sign indemnity agreements and asked those signing to provide financial information to determine if those agreements were worth anything.

In the current 2013-2014 legislative session, the Senate passed Senate Bill 145 (SB 145) and the Pennsylvania House of Representatives passed House Bill 982 (HB 982), with the stated purpose of preventing subcontractors from filing mechanic's liens on residential properties when the property owner has paid the general contractor. Although this is the advertised purpose of the bills, the bills also quietly make construction lending easier on contractors, title companies and banks, by providing that open-end mortgages are entitled to priority over mechanic's liens if 60% of the loan proceeds are used for eligible "construction costs", which is broadly defined to include both hard costs and soft costs of construction. For example, a $1,000,000 open-end mortgage would receive priority over a mechanic's lien where $200,000 funded soft costs, $400,000 funded hard construction costs, and $400,000 funded the refinance of existing debt.

SB 145 was passed by the Senate on June 12, 2013, where on the Senate floor, the bill's sponsor, Senator Ward, stated the bill "had been worked on for two legislative Sessions and it has the support of the bankers, title insurers, mechanical contractors and the realtors." Senate Bill 145 is currently in the House Labor and Industry Committee. The House of Representatives passed its version of the bill, HB 982, on November 12, 2013 and that bill is currently before the Senate Labor and Industry Committee.

Hopefully, an agreement between the House and Senate can be struck on this issue and legislation will be sent to the Governor's desk, where it will ease construction lending by allowing open-end mortgages to fund hard costs, soft costs, and refinance existing debt, with banks and title companies having the assurance their mortgages will receive their intended priority.

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Contract Immunity Under Statutory Employer Doctrine Reaffirmed

By: Ronald H. Pollock

As parties involved in construction projects which have involved injuries to an employee of a subcontractor are aware, Pennsylvania law grants immunity to general contractors from personal injury lawsuits by injured employees of their subcontractors.

This doctrine is one of longstanding historical precedent in Pennsylvania. A seminal case was decided in 1930 when workers' compensation insurance was still optional, and many subcontractors were very small and lacked the ability to fund disability claims. Based upon this public policy, the Workers' Compensation Act made general contractors liable for compensation if the subcontractor was unable to make those payments.

The workers' compensation law has changed significantly since that time, and all employers are required to maintain insurance. However, the immunity to general contractors remains, and the court has elected to keep the immunity in place, indicating that it is up to the legislature to change the law, not the courts.

As with all immunities, it is certainly beneficial to the general contractor community. There are potentially negative effects to owners or design professionals who may be more subject to suit by a subcontractor's injured worker due to the immunity of the general contractor.

In short, while there was an attempt to change existing law, the status quo remains in effect. Depending on your seat at the construction table, this has differing effects. Please feel free to contact us with any questions as to the impact of this recent decision on your company.

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Risk Busters - Additional Insured Coverage And The Peril of Relying On Certificates of Insurance

By: Matthew M. Hennesy

One way owners and contractors can help manage the risks inherent in a construction project is by requiring that downstream contractors and subcontractors add them as an additional insured under their liability policies. Being added as an additional insured will provide owners and contractors with an additional layer of insurance. Additional insureds should understand the scope of coverage provided by the policy, including the relevant coverage exclusions. While an insurer has a duty to defend and cover claims made against additional insured, it will only do so if those claims are covered (and not subject to an exclusion) by the insurance policy.

Using additional insured language in a contract is only the first step. Owners and contractors must make sure that they are actually added as additional insured. Certificates of insurance will often be provided as evidence that an additional insured has been added to an insurance policy. Certificates of insurance by themselves, however, are inadequate to demonstrate that an owner or contractor has been added to a policy as an additional insured. Owners and contractors that choose to rely solely upon a certificate of insurance to verify their status as an additional insured, are taking a huge risk. Certificates of insurance are often issued by third parties and provide a snapshot of coverage that exists at the time they are issued. They do not identify policy terms, exclusions, or subsequent changes to the policy.

The addition of a company on a certificate of insurance as an additional insured does not make that party an additional insured under the insurance policy. Most certificates of insurance include a disclaimer stating that "this certificate is issued as a matter of information only and confers no rights on the certificate holder," or something similar. Courts have relied on those disclaimers as a basis to totally ignore certificates of insurance when determining whether an owner or contractor is an additional insured under a policy. What matters is who is included on the policy as additional inured. Where the policy and certificate of insurance conflict, the statement of additional insureds on the policy will prevail. When owners and contractors require that their downstream contracting parties include them as additional insured, they verify completion of that contract term by requesting a copy of the policy endorsement making them an additional insured.

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Property Tax Assessments: Should you appeal?

By: Jeremy D. Frey

Do you want to lower your property taxes? Would it surprise you to learn that you could do so at little to no net cost? There may be an opportunity to do exactly this if your property is currently assessed too high. Your property's tax assessment forms the basis for all of your real estate taxes. The assessment, which is different than the appraised value of your property and in most cases does not equal 100 percent of the fair market value of your property, is established by the County once every few years and remains fixed as property values move up and down. So if your assessment is too high (either because it was originally assessed too high or because of a decrease in your property's value), you are paying too much in taxes each year that the assessment remains the same. The assessment will remain the same until the property is changed (improvements are added or removed), the County undergoes a County-wide reassessment, or you file an appeal of your assessment. County-wide reassessments usually occur only once or twice a decade although in some counties, a County-wide reassessment has not occurred in nearly 20 years. If you lower your assessment, you will lower your real estate taxes until the next County-wide reassessment occurs which could be several years. You are entitled to challenge the assessment every year if you believe the assessment is too high. The amount of costs involved in the appeal are often far less than the total savings you will receive if the appeal is successful. In most cases, the only costs are an appraisal of the property and legal fees. However, some Counties, such as Lancaster County and Berks County, have recently instituted filing fees ranging from $25 to $100 to file annual assessment appeals.

To determine whether an appeal is appropriate, you must first estimate what your property is worth. Then, find the common level ratio[1] for your County below:

Adams - 119%
Berks - 78.1%
Lancaster - 80.6%
York - 89.2%
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[1] The common level ratio is used to determine assessments in the years following a County-wide reassessment. In the first two years following the County-wide reassessment, your assessment should equal 100 percent of the fair market value of the property. In all subsequent years, the assessment should equal the common level ratio then in effect multiplied by the fair market value. The common level ratio, which is determined by the state, varies by County and changes in July every year.--

Now multiply your estimated fair market value by the common level ratio. For example, if your property is located in York County and is worth $500,000, multiply $500,000 by .892 and your assessed value should be $446,000. This figure should be close to your assessed value. If it is significantly lower than your assessed value, you may want to consider challenging your assessment. If you are unsure what your assessed value is, check your most recent property tax bill or call your County's assessment office and ask.

Another way to determine if your assessment is too high is to take the assessment and multiply it by the number listed below for the County in which the property is located:

Adams - .84
Berks - 1.28
Lancaster - 1.24
York - 1.12

Again, if your property is located in York County and is assessed at $500,000, you multiply $500,000 by 1.12 and your property is being taxed as though it is worth $560,000. If the figure is higher than what you believe the property is currently worth, it might make sense to appeal your assessment.

So how do you challenge your tax assessment? The process is started by filing an appeal to the County's Board of Assessment Appeals. The Board will review your assessment and determine if it is too high. For a successful appeal, you will most likely need a recent appraisal of the property. If the Board's decision is not satisfactory, you can appeal this decision to the Court of Common Pleas which then determines the fair market value and applies the common level ratio to establish your new assessment.

Keep in mind that any reduction in your assessment will most likely result in tax savings not just in the year in question but in future years as well. While in general you cannot receive a refund for past taxes paid if your assessment is too high, your assessment will be reduced for future years which will save you money. To determine how much savings you could receive, determine your local millage rates and multiply these by the difference between the current assessment and what you believe the assessment should be and you can determine the savings for one year. For example, if the combined millage rates in your municipality (School, County and Municipal millage rates) are 25 mills (or 2.5%), you would save $250 for every $10,000 that you reduce your assessment.

It is important to keep in mind that each County establishes an annual deadline to file assessment appeals. York and Lancaster Counties' annual deadline is August 1st, Berks County's annual deadline is August 15th and Adams County's annual deadline is September 1st.

Barley Snyder has attorneys with experience handling tax assessment appeals throughout Pennsylvania. If you believe your assessment is too high, give us a call to see if we can help lower your assessment and lower your taxes.

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