Barley Snyder

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Should My Contracts Contain An Arbitration Clause?

By: Ronald H. Pollock

The parties involved in a contract dispute may find the dispute is resolved in either the court system or alternative dispute resolution, commonly mediation and arbitration. There are potential advantages and disadvantage to both systems of resolution. What is important to note from a practical standpoint is that the parties need to analyze the pros and cons at the time of entering into or drafting the contract. The parties should keep in mind that they have a right to define many of the parameters under which any dispute will be resolved.

For example, would having someone from your industry hear and decide a dispute be important? Would limiting the amount of time consuming and expensive discovery be desirable? Would the location at which a case would be heard matter? All these and more can be dealt with up front in a well-crafted arbitration clause. The bottom line, a thoughtful approach can ensure a fair and responsible outcome to a legal dispute.

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Design Professional Practice Pointer Liability: The Basics

By: John J. Sylvanus

Part 1. The Rise of the Professional Expert

All professionals can be held responsible for damages they cause by practicing their profession negligently. Society and individuals rely on doctors, lawyers, architects and engineers to know what they are doing and to do it right.

What professionals do is based on years of study and practice. It stands outside the realm of the ordinary citizen, juror or judge to understand and evaluate. For this reason courts have long required that someone claiming damages from a professional for "malpractice" prove the error through the use of another professional, the so called expert witness.

Professional experts frequently earn many times what actual design professionals earn, charging for opinions of the "because I say so" variety. Courts and defense counsel have no mechanism to distinguish between real expert testimony and manufactured testimony. If a qualified expert says that the standard in the industry is for a civil engineer designing a sewage treatment plant to design the pumps and other equipment in the plant, it is admissible and the jury will have to sort out the differences between that testimony and the understood in the profession testimony of a real practicing engineer that this is not the case.

Until professional associations address the issue of standards of care, the only serious remedy available you as a professional is through the contracts that affect your performance. If you include equipment to be designed by others, do not assume that everyone will know and accept that it is to be designed by others. Say so explicitly so that no one can later claim that you designed or approved the design.

Be explicit. Instead of agreeing to review shop drawings and submittals in a "reasonable time" set forth the exact time you will need. "Reasonable" is open to interpretation. Always remember that overall, you will spend much more on defense of claims and settlement of claims where you did nothing wrong than you will defending claims for actual errors.

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Do Companies Need To Pay Employees For Their Commute Back From the Construction Worksite At The End Of Th

By: Jill Sebest Welch

Clients often ask whether their employees need to be paid for the time that they spend travelling to and from various construction worksites at the beginning and end of the day. This issue was recently decided in a case we tried before a judge of the Lancaster County Court of Common Pleas in December 2011 on behalf of EZ General Construction, Inc.

The plaintiff in the case, a former employee, worked as a laborer for EZ General Construction, Inc., a general contractor in the construction industry. Plaintiff typically began his day by reporting to the office in the morning and punching in, when he would get the day's assignment, have a cup of coffee and a bite to eat, help load equipment onto the Company work truck, then ride with the crew to the worksite in the work truck. The travel time to these various worksites was generally no more than one hour, and was paid by the Company. At the end of the workday, Plaintiff would typically ride back to the office, punch out, and go home. This was not always the case, though -- on roughly one-third of his workdays, Plaintiff drove himself directly home from the worksite without stopping to punch out. Again, the Company paid Plaintiff for the commute time in the morning from the office to the worksite. However, the Company did not pay for the time Plaintiff spent riding from the worksite back to the office at the end of the day. In fact, important to the case, Plaintiff signed an agreement specifying that the travel time from the worksite back to the office at the end of the day is unpaid.

After Plaintiff left his employment with EZ General Construction, Inc., he filed a lawsuit seeking to recover overtime compensation for the time he spent at the end of the day riding from the worksite back to the office. He argued that he should have been paid for the trip home because (1) he was required to report to the office to punch in and out; (2) the Company work truck that he rode in carried tools and equipment necessary for the job; and (3) on the trip home, the crew occasionally stopped to empty the trash from the truck.

Federal and state wage and hour laws do not require employers to pay employees for normal home to work and work

to home travel. The Portal-to-Portal Act expressly excludes such time from compensation under the Fair Labor Standards Act (FLSA). The Employment Commute Flexibility Act (ECFA) further amended the FLSA, and clarified that an employer may provide a company vehicle to an employee for travel and still take advantage of this rule that home to work and work to home travel is not compensable if (1) *the travel is within the normal commuting area for the employer's business; and (2) there is an agreement between the employer and the employee that the time is not compensable*. Also, pre-shift and post-shift activities that are not "integral and indispensible" to the employee's job -- in other words, activities that are undertaken for the employees' own convenience, that are not required by the employer, and that are not necessary for the performance of the employees' duties for the employer are also generally not compensable.

All of these factors were present in this case, therefore, the Company argued that Plaintiff's travel time from the worksite at the end of the day did not need to be paid following reasons:

- The post-shift trips that Plaintiff argued should have been paid were all within the normal one-hour commuting area of the Company's office.
- Plaintiff signed an agreement that the trip from the worksite back to the office was unpaid.
- The Company did not require Plaintiff to report back to the office at the end of the day to punch out, and, in fact, Plaintiff elected not to return to the office to punch out roughly one-third of the time, without any discipline or adverse employment consequences.
- The carpool to and from the worksite was offered for Plaintiff's convenience, to save wear and tear on his vehicle, and to save gas money, and Plaintiff could choose to drive his own vehicle to and from the worksite instead of riding as a passenger in the work truck.
- Occasionally emptying trash from the work truck on the trip home was not required by the Company and not necessary for the performance of Plaintiff's construction job, and even if it did occur (although the Company's witnesses testified that it did not), emptying trash did not make the whole return trip compensable because it took only a minute or two.

Following trial, the court ruled in favor of EZ General Construction, Inc. and found that, under these facts, Plaintiff was not entitled to be paid overtime compensation for his post-shift commute time.

As this case demonstrates, each situation is unique and the answer to the question turns on several factors, including the nature of the written agreement with employees about paying for commute time, whether the trip is within the "normal commuting distance" of the employer, whether the employee is required to report to the office before and after work, and the extent to which any work is performed before, during, and after the commute. It is therefore important for companies that are considering entering into these types of commuting agreements to consult with counsel in advance.

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Pennsylvania Rejects 2012 International Uniform Construction Codes

By: Maria Di Stravolo Elliott

Pennsylvania has decided not to adopt the 2012 International Building Codes of the International Code Council

("ICC") -- that will be the basic report to the Secretary of Labor & Industry from the Pennsylvania Uniform Construction Code Review and Advisory Council ("RAC"). On January 18, 2012, members of RAC voted 11-5 not to adopt the 2012 ICC codes.

RAC was established by Act 106 of 2008 and consists of 19 members, appointed by the Governor, from various construction industry trades and professions and local government. RAC is charged not only with reviewing the latest triennial ICC code revisions but also with making recommendations to the governor, the General Assembly and the Department of Labor & Industry regarding proposed changes to Act 45, the Pennsylvania Uniform Construction Code Act ("UCC"). Within 12 months of publication of the latest ICC codes, RAC must submit a report to the Secretary of Labor & Industry specifying each code revision to be adopted into the UCC. Within 3 months of receiving the report, the Department must promulgate regulations adopting the ICC codes specified for adoption in the RAC report. Basically, the Department must follow the adoption of the ICC codes as set forth in the RAC report and cannot make any changes. In this case, there will be no change to the UCC, and the 2009 ICC code, as adopted and amended, will remain in place.

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The Bay Strategy And Its Impact On Your Business

By: Michael W. Davis

Back in December of 2004, the Pennsylvania Department of Environmental Protection ("DEP") rolled out its Chesapeake Bay Tributary Strategy ("Bay Strategy") in response to the United States Environmental Protection Agency's directive for all states within the Chesapeake Bay Watershed to develop a comprehensive strategy to reduce storm water, wastewater and industrial discharges to the Bay. While the debate continues as to whether or not the strategy implemented by the DEP will ultimately result in any meaningful improvement to water quality within the Bay, the impact of the DEP's strategy on developers, business owners and municipal authorities in Pennsylvania is unquestioned. Any entity requiring a National Pollutant Discharge Elimination System ("NPDES") permit as part of its construction activities or business operations must now factor in the Bay Strategy and its more stringent effluent requirements (for constituents such as nitrogen, phosphorus and suspended solids) into its plans.

The Bay Strategy and its tightened effluent standards are complicating the process of renewing NPDES permits for existing operations and raising the bar for securing NPDES permits for new discharges. DEP is informing NPDES permit holders that any additional capacity or new discharge must comply with the heightened Bay Strategy effluent discharge standards. This position is particularly challenging for existing NPDES permit holders because even with the implementation of best available technology, some older treatment systems and existing discharge points will not be able to meet the new standards. The bottom line is that developers and business owners are being forced to very critically evaluate upfront the cost and ability of individual projects to meet these tightened discharge standards. This analysis includes, but is not limited to, determining whether a project will: (1) require a new or modified NDPES permit for storm water or wastewater and (2) be served by public sewer and, in turn, if the publicly owned treatment works has sufficient available capacity to service the project. If a development project is to be served by a private treatment system, the cost associated with having a new or upgraded system which meets the Bay Strategy standards also has to be factored into the business model for the project.

Certain aspects of Bay Strategy are still looking for increased momentum. Pennsylvania's Bay Strategy focuses largely on using nutrient trading as a means to reduce agricultural discharges to the Bay while facilitating increased commercial and industrial activity. To date, while some nutrient trading has been occurring, it has not occurred on nearly as widespread and large a scale as initially contemplated or hoped for by the DEP.

As the Bay Strategy continues to evolve and as the more stringent effluent standards and water quality standards take effect, the challenge of meeting these new standards and securing associated NPDES permits will be a meaningful and costly hurdle for developers, business operations and municipal bodies alike.

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