Barley Snyder

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A Gas Pipeline Easement Not In My Backyard!

By: Maria Di Stravolo Elliott

By: Maria Di Stravolo Elliott, Esquire

Today's newspapers in the central Pennsylvania area have been fraught with concerns and questions regarding the construction of the William's gas pipeline running from the Marcellus Shale areas of Pennsylvania to the east coast markets. The pipeline would cross parts of Lancaster County, specifically some of the treasured farmlands of Lancaster.

Some folks are outraged while others may not understand the outrage. Understanding the purpose and construction of utility easements may lessen the rage or at least provide answers as to how these easements affect property.

Utility easements are property rights that allow a utility company such as Williams or UGI or a municipal sewer or water authority to run utility lines through the lands of an owner. Typically, the easements will allow the utility company to construct, maintain, repair and access the lines located on the lands of an owner. The owner still owns the land - the land is simply "subject to" the easement. These easements usually are perpetual in time and are "covenants running with the land", which means that any subsequent property owners of the land with a utility line and easement must abide by the terms of the easement, even though they did not originally sign the easement agreement. The easements are recorded in the Recorder of Deeds Office so that there is public notice to any subsequent purchaser of the property. As a side note, it is important for any purchaser of property to have a title search done on the property to determine whether or not there are any easements recorded against the property and to review the terms of the easement agreement to determine if they are acceptable prior to buying the property.

Most of the time, these easement agreements are negotiated between the land owner and the utility company, with respect to the consideration to be paid for the easement and terms to be included in the easement agreement.

How can a property owner protect themselves in a utility easement? Utility companies have their standard easement

agreements, which typically are written to require the utility company to repair any damages done to the property and return it to its original condition after any construction or maintenance is done. However, an owner can request that the utility company indemnify, defend and hold harmless the property owner from any losses that the owner may sustain as a result of the utility line. For example, an adjoining farmer may sue the owner for damages caused to his crops as a result of the gas pipe bursting. The owner will want the utility company to defend the claim and pay for such damages. The land owner should also require the utility company to provide liability insurance and include the land owner as an additional insured to the policy to ensure the owner that there are funds to defend the claim.

It is imperative to have a legal description and plan to show where the easement will be located on the land and to attach them as exhibits to the easement agreement. An owner wants to avoid giving a "blanket" easement to a utility company, which allows the company to place the line anywhere on the property or access the line from any place on the property. Once the easement area is defined, the easement agreement may also designate a larger area beyond the easement area for construction work, which is typically designated as a temporary construction easement. This temporary easement area and the right to work in this area kicks in only when construction is being done and terminates once construction is complete. An owner should require the utility company to contact the owner each time construction or maintenance work is to be done. Most likely, the company will do that as a standard practice. The owner may want to restrict which roads or driveways the utility company will use to access the easement.

A landowner may also want to reserve certain rights in the easement to use the surface lands even though the lines will run through the land. For example, the landowner may want to reserve the right to continue to farm the lands and to erect fences even though the easement will prohibit construction of improvements within the easement area. Another reservation of rights by the landowner may be to have the right to relocate the easement in the event the owner wants to develop the land. A utility line and easement that runs through the middle of a tract of land can limit its potential for development. The agreement should specify which party will bear the expense of relocating the lines and resurveying the new easement area. Most likely, the utility company will not want to bear the expense of relocating the line; therefore, an owner would be prudent to consider the appropriate location of the line from the very beginning.

A landowner can negotiate to prohibit the transfer or assignment of the easement to another company. If there is no prohibition, then the easement can be assigned to another utility company. Most likely, the company will resist this prohibition since it wants the freedom to assign the easement in the event of a sale of the company. If the landowner cannot prohibit the assignment, then at the very least, the landowner should require that the company notify the owner in writing when the easement agreement has been transferred.

It is also imperative to describe the events of default and what the remedies would be for the non-defaulting party, along with payment of attorney's fees to be paid by the defaulting party. An owner should determine whether or not any cure periods for a default should be given.

If an agreement cannot be reached between the owner and the utility company, then the utility company or authority may use its eminent domain powers (if it has such powers) to condemn the property to obtain the easement, which is done by filing and recording a declaration of taking. An appraisal will then need to be done by the utility company to determine the fair market value for the easement, which will need to be paid to the owner. The landowner can obtain its own appraisal if the owner believes that the appraisal did not appropriately determine the fair market value; if the parties cannot settle on a number based on their respective appraisals, then a court battle can ensue, which can be

costly. Obviously, trying to negotiate with a utility company upfront is beneficial.

Keeping these negotiations in mind may help lessen the worries an owner may have when confronted with the possibility of a utility line running through its lands. If you have any questions regarding these types of easements, feel free to contact one of our real estate attorneys, who regularly negotiate easements on behalf of owners and utility companies and authorities.

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To be (liable) or not to be (liable): That is the question

By: Ronald H. Pollock, Esquire

An indemnity provision in a contract transfers risk from one party to another party. Typically, under an indemnity provision, one party agrees to reimburse the other for losses resulting from a claim brought by a third party.

Indemnity clauses are one of the most negotiated (and litigated) provisions in construction contracts and also one of the least understood. Over the next several newsletters, we will discuss various aspects of indemnity clauses.

There are several issues for parties to be thinking about when negotiating an indemnity clause. For example, owners, dealing with general contractors, want the broadest possible indemnity clause they can negotiate. Parties that are responsible for indemnifying others seek to negotiate either the elimination or the narrowing of an indemnification clause.

There are several key issues as a general rule to be looking for in evaluating an indemnity clause:

• The Duty to Defend: We all know that a large aspect of any claim that is brought is the cost of defense. The responsibility for payment of a claim may not be determined until after years of litigation and thousands of dollars of legal costs. Therefore, it is important that the duty to defend specifically include the cost of defense in an indemnification clause. Obviously, whether a party wishes to be defended or whether it wishes to avoid incurring the expense of defense, the request should be as explicit as possible, otherwise, a general indemnification requirement may not cover this aspect if a claim arises.

• Expert Costs: Similarly, an expert evaluation such an architect, engineer, etc. may or may not be covered by an indemnification clause. Again, this will need to be specified if you are the party that wishes to be indemnified for this cost.

• Enforceability: Indemnity provisions are only as enforceable and effective as the law permits. Therefore, those seeking indemnification do not wish to have indemnification clauses invalidated because they go beyond what may be permitted under the law. Typically language such as "to the fullest extent permitted by law" is an important clause.

• Types of Claims: Those providing indemnification will want to limit indemnity provisions to those claims that would be covered by their commercial general liability insurance policies. These policies generally cover bodily injury or death to a person and/or damage or destruction to property. Those seeking indemnification will often want a broader, more open-ended indemnification provision to include contractual claims as well and to avoid limitations.

• "Caused By" Versus "Arising Out Of": Those wishing to limit their indemnity obligation often want to limit provisions "to the extent caused by" their acts and omissions. The opposite language of "arising out of" the accident or omission

provide a broader indemnification obligation, going beyond a direct cause and effect relationship.

In short, various provisions in an indemnification clause can greatly vary the coverage provided. While "indemnification" has a very specific meaning that most construction professionals understand, the scope of what an indemnification may cover can vary widely based upon the contract language which is selected.

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PA Supreme Court Decision Significantly Impacts the Home Improvement Consumer Protection Act

By: Matthew M. Hennesy, Esquire

The Pennsylvania Supreme Court in late summer declared that the Home Improvement Consumer Protection Act ("HICPA"), which provides a consumer protections above and beyond those set forth in Pennsylvania's Unfair Trade Practices and Consumer Protection, does not prevent contractors from suing homeowners under the theory of quantum meruit or unjust enrichment, even where they fail to adhere to the requirements imposed by the law. While the Pennsylvania legislature passed HICPA to protect homeowners from unscrupulous contractors by imposing contract requirements, the effectiveness of the law as a consumer protection measure has been greatly impacted by court interpretation of its provisions. By interpreting the Act to allow contractors to recover under alternative theories, the Supreme Court has simultaneously limited the Act's ability to protect consumers and relieved contractors of the prospect that they would not be paid at all for their work as a result of failing to comply with one of the many contract requirements imposed by HICPA.

In addition to requiring contractors to register with the state, HICPA set forth mandatory requirements for home improvement contracts. The Act requires that home improvement contracts include, among other things, a description of the work to be performed, materials to be used, and a set of specifications that cannot be changed without a written change order signed by the homeowner and contractors. The law also requires that a compliant contract identify the total sales price due under the contract and including the amount of any down payment required. Under HICPA, no home improvement contract is valid or enforceable unless it complies with all the contract requirements.

One of the most significant aspects of HICPA was the requirement that contractors and owners execute a written change order for changes to the scope or price of work. This is often an area where disputes arise. When homeowners request changes in work or materials used, and are unaware of the full extent of the change in cost that could result, it can easily lead to payment disputes when the work is finally invoiced. Making claims for change work contingent on written change orders between the contractor and homeowner provides homeowners an opportunity to understand the costs associated with changes, but also creates the potential for contractors to not receive payment for work that they performed at the homeowner's request.

The Supreme Court in *Shafer Electric & Construction v. Mantia*, held that where a contractor's failure to comply with HICPA contract requirements only bars breach of contract claims, not unjust enrichment claims. The Court confirmed that HICPA allows contractors to bring suit against homeowners for unjust enrichment based on work performed pursuant to oral and non-compliant contracts. While a breach of contract claim entitles a contractor to recover what he or she expected to gain through the contract, including profit, claims based on unjust enrichment are more limited. Claims in unjust enrichment only allow for the recovery of the reasonable

value of the services rendered as determined by a court after taking evidence on the matter.

The Supreme Court's decision provides some finality and certainty in the post-HICPA landscape. Whereas contractors previously faced the possibility of not having any viable claims against homeowners if their contracts were not HICPA compliant, now they are simply limited to bringing unjust enrichment claims. The Court's decision makes clear that contractors have a way to obtain payment from homeowners. As a result of the Supreme Court's decision allowing unjust enrichment claims without regard for the written contract requirements, the requirement for written change orders is unlikely to have much impact. Failing to obtain written change orders will not prevent a contractor from bringing a claim for payment of the change work performed.

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Sales Tax Exemption in Construction Contracts

By: Timothy P. Malloy, Esquire

In general, construction contractors must pay sales and use tax on the price of all property, materials, supplies and equipment that they install in the performance of a construction contract. The sales and use tax is based on the contractor's price including delivery charges paid, but the contractor cannot charge tax on the construction materials or labor to install the materials. A contractor may regain his sales tax cost but the sales tax cost should not be separately stated on the invoice to the customer.

Pennsylvania law provides some reprieve on the payment of the sales tax for construction contractors who purchase certain items for a government agency or a tax exempt organization. These entities must have a Sales and Use Tax exemption which is proven by a Pennsylvania Exemption certificate (form Rev-1220). Specifically, a contractor is exempt from sales tax if he purchases "building machinery and equipment" for a government agency or a tax-exempt organization. "Building machinery and equipment" is defined as "generation equipment, storage equipment, conditioning equipment, distribution equipment, and termination equipment, whether or not: (a) the item constitutes a fixture or is otherwise affixed to the real estate; (b) damage would be done to the item or its surroundings upon removal; (c) the item is physically located within a real estate structure."

The exemption applies to certain items including but not limited to air conditioning, electrical (not including wire, conduit, receptacle and junction boxes), and plumbing (not including pipes, fittings, pipe supports and hangers) among other things. The exemption will not apply to items such as guardrail posts, underground tanks, and ductwork to name a few.

In order to take advantage of the exemption, the contractor will issue a properly executed exemption certificate to the supplier within sixty days of purchase that contains the following statement: property or services qualify as building machinery and equipment, and will be transferred pursuant to a construction contract to (tax exempt entity) and, if an institution of purely public charity, "holding Sales-Tax exemption #75- (tax exempt number)."

This exemption causes some confusion for contractors because of the uncertainty over what exactly can be purchased without paying the sales tax. If the construction contractor inadvertently paid the sales tax on items that qualify for the exemption, the Pennsylvania Department of Revenue will allow the person who has actually paid the tax to apply for a refund and recover the overpaid tax.

If you have any questions about the sales tax exemption described in this article, please contact Timothy Malloy at (484) 334-8371; tmalloy@barley.com or Maria Elliott at (717) 399-1517; melliott@barley.com.

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2016 H1B Cap Reached - Alternatives to the H-1B Visa Category

By: Silas Ruiz-Steele, Esquire and Becky Munscher, Paralegal

On April 7, 2015, United States Citizenship & Immigration Services (USCIS) announced it received sufficient H-1B petitions to meet the Master's and regular H-1B quotas (or "caps") for Fiscal Year 2016, which begins on October 1, 2015.

Many U.S. employers recruit worldwide for professional talent to fill positions requiring a bachelor's degree or equivalent. H1-B visas have long been the visa of choice for such foreign nationals. But many employers do not realize there are other visa categories that provide options for foreigners to work in the U.S.

The J-1 visa is available to a foreign national under the designation "Exchange Visitor." Individuals who qualify for J-1 status include business trainees, primary and secondary school teachers, college professors, research scholars, and medical residents receiving medical training within the U.S.

Beginning May 26, 2015 USCIS will be extending U.S. employment authorization to certain H-4 spouses of foreign nationals in H-1B status. This change permits spouses in H-4 status to apply for an unrestricted work card provided that the principal H-1B employee: Is the beneficiary of an approved Form I-140, Immigrant Petition for Alien Worker; or Has been granted H-1B status under the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), which permits H-1B employees seeking permanent residency to extend their H-1B status beyond the usual six-years.

An E Visa is available to a foreign national of a country with which the United States maintains a treaty of commerce and navigation, if the foreign national travels to the United States to carry on substantial trade (E-1 treaty trader visa), or to invest substantial capital in a new or existing American business (E-2 investor visa).

The L-1 visa may be an option for those who have worked outside the U.S. for a foreign company affiliated with an American company such as a branch, subsidiary or joint venture. Unlike the H-1B visa, the L-1 does not have a degree requirement. While most L-1 recipients will be educated, the degree need not be in any specific field. The recipient, however, must have "specialized knowledge" regarding how their company functions or have worked abroad as a manager or executive.

An O visa is available to foreign nationals who are extraordinary in the fields of science, arts, education, business, athletics, motion pictures, or television. An O-2 visa is given to support personnel of the primary O visa holder. The petitioning U.S. employer must establish the foreign national's extraordinary ability and that the foreign national will continue working in the qualifying field while in the U.S.

The F-1 Visa allows a foreign national to enter the U.S. to study at an established university or college. F-1 status is valid for the time necessary to complete a full course of study. Upon graduation, many F-1 holders can receive twelve months of work eligibility, called Optional Practical Training (OPT).

Immigration is a patchwork quilt of options. There are often creative alternatives when the most obvious path is unavailable.

For additional information or questions regarding alternatives to the H1-B visa category, please contact Attorney Silas Ruiz-Steele, Chair of the Immigration Section, at 610-898-7153 or sruizsteele@barley.com.

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