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Evolution in the Law Is a Right to Repair Act in Pennsylvania's Future?

By: Ronald H. Pollock

Various states have attempted through legislation to reduce litigation and increase constructive engagement in construction projects. One example of this is California's "Right to Repair Act." Under this Act, a homeowner who claims defective residential construction cannot file an action against the builder in court until the homeowner gives notice of the claimed defects to the builder and engages in a non-adversarial pre-litigation procedure. This notice affords the builder an opportunity to repair the defects. If the homeowner files suit without giving the required notice, the builder may obtain a stay of the litigation, pending the pre-litigation process. There are set time limits for the builder to inspect the alleged defects and make an offer to repair them or compensate the homeowner in lieu of repair. If the builder declines to attempt repairs or fails to meet any of the deadlines, the homeowner is released from the requirements of the Act and may file a lawsuit in court. The homeowner, of course, may also file an action against the builder if he is dissatisfied with the repairs. California's law is still being evaluated for its effectiveness. It is an interesting concept, however, presenting issues of widespread interest in the construction industry. As California courts have noted, the recurring theme throughout the legislative history is the hope and expectation that the Act would reduce construction defect litigation. This would lead to a decrease in the cost of insurance and litigation, presumably benefiting all.

We will follow up on this Act and similar initiatives around the country to facilitate discussion of legal improvements in the construction industry.

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Construction and Design Contracts - Doom and Gloom?

By: John J. Sylvanus
Related Industry: Construction

Construction contracts can be 2 pages or 100 pages in length. Whatever the length, the contract itself is but the tip of the iceberg of the obligations and duties which a contractor undertakes. Regardless of how many contracts you or your company have signed, it is likely that all contained language and nuances that have been interpreted differently than you might have anticipated.

What does this language from the 2004 version of the standard AIA A141 construction document mean to you?

As to acts of failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion.

If you are a contractor, it's a get out of jail free clause; however, for anyone else it spells doom and gloom.

This language waives the "discovery rule". No longer is an owner protected against hidden defects that don't manifest themselves until several years have passed. Instead, the owner loses the right to make a claim for hidden defects unless those defects were discovered and reduced to litigation within 2 years of substantial completion. As a contractor, once the 2 years has passed, you are home free, regardless of what happens.

While this clause was a boon to contractors (Note, newer versions of the AIA A141 eliminate this language and instead require that all claims be brought within 10 years of substantial completion, other clauses create dangers and pitfalls in the 52 pages of the most current version of the AIA A201 General Conditions of the Contract for Construction, a commonly used form for this purpose. The design contract is only 40 pages.) These form Agreements and thousands of other pages of similar forms and specially drafted contract provisions have a long history of interpretation by courts. Unfortunately, these decisions are not always consistent, resulting in conflicting questions and meanings far from what you as a non-lawyer might anticipate.

Experience and expertise is necessary in the risk analysis of contracts for design and construction. That process should be a standard procedure. The cost of such a review is miniscule in comparison to the value of the contracted work and the potential loss or cost of resolving disputes.

What kind of dispute resolution provisions are contained in the contract; what happens if a contractor claims another contractor caused delay; what are the liquidated damages and how is communication during construction handled? These are but a few of the matters that should be understood before entering into an agreement relating to construction, but frequently are accepted without question. Failure to know what is contained in your contract, and more importantly, to understand its meaning can be financially devastating.

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Pennsylvania's Online Mechanic's Lien Directory to go Into Effect in 2016

By: Derek P. Dissinger
Related Industry: Construction

Pennsylvania's legislature amended its Mechanic's Lien Law to require the creation of an online construction notices directory where contractors will be required to file notices of furnishing of their services or materials in order to be able to file a mechanic's lien in the event of non-payment for labor or services. The amendment was entered in prior legislative sessions but failed to pass, with various legislators stating that the creation of an online directory was

unduly burdensome to both owners and contractors. Nevertheless, Pennsylvania joined other states like Ohio and Iowa and implemented an online construction notices directory where projects will be registered by owners and contractors will file notices of furnishing and mechanic's lien claims. The directory is slated to be effective by January 1, 2016, although, the legislature could delay implementation.

Following the establishment of the directory, an owner may register a project in excess of $1,500,000 on the online directory. If a project is registered, the owner will be required to conspicuously post a copy of the notice of commencement under the Mechanic's Lien Law at the site of a searchable project before physical work commences on the project. The Notice will include the unique identifying number assigned to the project under the law. Owners and their counsel will then need to ensure that each contract for a searchable project includes written notice to contractors that the contractor's failure to file a Notice of Furnishing under the act will result in the loss of the contractor's lien rights. The form of the notice is included in the law.

Although both owners and contractors have new obligations following the amendment, title companies and banks will appreciate the certainty provided by the act. Bank's counsel and title companies will be able to check the directory of a searchable project to see which contractors have filed notices of furnishing, and will then be able to request verification that those contractors have been paid. Attorneys for developers, contractors, banks and title companies will all need to familiarize themselves with the changes after the directory goes into effect.

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Update on Design Professional Liability

By: Ronald H. Pollock
Related Industry: Construction

Claims against design professionals have changed in Pennsylvania with the decision in Bilt-Rite Contractors, Inc. v. The Architectural Studio. In this case, the Pennsylvania Supreme Court recognized negligent misrepresentation claims against design professionals. A recent Superior Court case further developed the meaning of Bilt-Rite with respect to potential claims asserted against design professionals.

In Gongloff Contracting, LLC v. L. Robert Kimble & Associates, the Superior Court ruled that Plaintiffs no longer need to expressly identify a specific misrepresentation in their pleadings. Under this case, the Plaintiffs need not reference a specific document or other source of information related to the project that contained error. Of course, this lowers the pleading burden on a Plaintiff seeking to bring a misrepresentation claim against designers. While facts will eventually be required along with factual foundation for the claim according to the Court, this ruling may well open the door to more claims against design professionals, at least of the nuisance variety, since it will be difficult to dismiss the claim in its early stages. This potential heightened risk should be taken into account when negotiating contract documents and other allocations of risk.

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