Sometimes You Get Away with Unwritten Contracts

One area where the distinction between written versus unwritten agreements makes a difference is in the calculation of the statute of limitations, points out **Christopher G. Hill** in his **Construction Law Musings** blog.

Virginia's 5- year statute of limitations for written contracts – compared to the 3-year statute unwritten contracts – came into play in *M&C Hauling & Constr. Inc. v. Wilbur Hale* in the Fairfax, Virginia Circuit Court.

M&C provided hauling services to the defendant through a subcontract with Hauling Unlimited. No separate written contract between M&C and Hauling Unlimited or Hale existed. Hauling Unlimited filed a plea in bar to have the matter dismissed as being brought beyond the 3-year statute and argued that no signed or other written contract existed.

"The Court determined that Hauling Unlimited and Mr. Hale assented to M&C's terms and did not insist on a signature to make their contract a written one," writes Hill.

Read the article.

Has the Government 'Waived' Goodbye to Strict Compliance with Your Contract Specifications?

A recent Armed Services Board of Contract Appeals decision confirmed that waiver defenses can defeat government demands for strict compliance with contract requirements, reports **Cohen Seglias Pallas Greenhall & Furman**.

Authors **Maria L. Panichelli** and **Alissandra D. Young** explain that the Board found in *Appeal of American West Construction, LLC* that the U.S. Army Corps of Engineers had effectively waived the right to enforce a construction contract specification.

"This meant that the government could not recover from the contractor the difference in the price it paid for the original specification and the lower amount spent by the contractor to perform the deviation," they write. "In a world where the government often has the right to strictly enforce contract requirements and hold contractors financially responsible for any deviation, this decision is a big win for construction contractors."

Read the article.

Fixed-Price Contracts Are Simple – Or Are They?

A **podcast** posted by Pepper Hamilton discusses the definition of fixed-price contracts and cases in which the audit provision in the contract has been unsuccessfully used to assert claims for reimbursement and False Claims Act liability.

"Fixed-price contracts are well-known among contractors," the firm says on its website. "These agreements seem simple – they do not allow the contract price to be modified after the award unless the parties expressly agree. But is it really that simple? In reality, there is very little case law guiding the practical approach to these types of contracts."

In the podcast, **Marion Hack**, a partner in Pepper's Construction Practice Group, discusses these types of contracts.

Listen to the podcast.

Eliminating the Surprise

Factor from Construction Contracts: Tips for Owners and Developers

On construction projects, owners and developers often are familiar with standard contract language and provisions, but the industry is continually evolving, according to a **paper published** by Zetlin & De Chiara LLP.

The paper discusses 10 key contract provisions and tips to help parties avoid pitfalls.

Those areas include scope of work, compliance with schedule, meeting the owner's target for the budget, contingency, changes in the work, indemnification, insurance, dispute resolution, general conditions, and subcontract issues.

Read the article.

Progress Payments: What to Do When the Money Stops

Trickling In

A post on the **Faegre Baker Daniels** website asks the question: What does a contractor do when the owner stops making progress payments?

The contractor has two options: it can either continue to perform the work or cease the work, neither of which is a perfect solution.

“The owner’s failure to pay progress payments that are ‘clearly due and owing’ generally entitles the contractor to stop work until the progress payment is made. While this rule seems clear, it is not that simple,” according to the post.

The contractor should look to its contract with the owner to find answers to two questions: Does the contract require the contractor to take a certain action? And, is payment”clearly due and owning?”

Read the article.

Fifth Circuit Allows Non-Signatories to Enforce Arbitration Agreement

The Fifth Circuit has affirmed an order compelling arbitration, despite the fact that the parties seeking to

compel arbitration were not signatories to the relevant arbitration agreement, according to a post on Carlton Fields' **Reinsurance Post**.

Jason Brost explained that the case involved a real estate sale contract that contained an arbitration agreement under which the parties agreed to arbitrate any disputes "in accordance with the Comprehensive Arbitration Rules and Procedures administered by J●A●M●S/Endispute."

The plaintiff claimed that the defendants in the case induced the buyer to enter into the 1998 agreement based on the false premise that he would get a properly constructed home. The defendants, who were non-signatories to the agreement, moved that the arbitration clause be enforced.

The appellate court found for the defendants.

Read the article.

Avoid Prejudgment Interest By Expressly Saying So in the Contract

Striking an interest provision from a draft subcontract wasn't enough to keep a party to the agreement from being required to pay interest, according to a review of a Missouri case by **Jane Fox Lehman** in Pepper Hamilton's **Constructlaw** blog.

When the general contractor later failed to pay the subcontractor, the sub sued and won a verdict that included prejudgment interest at the rate of 9 percent pursuant to Missouri law. The general contractor appealed.

Lehman explains the outcome: "The court held that it could not consider the stricken interest provision because it was extrinsic evidence. 'The rationale,' it explained, 'is that the writing excised from the agreement, whether by way of striking, erasing, or simply transferring the agreement to a new piece of paper without the stricken language, is not part of the agreement between the parties.'"

Because the parties had failed to reach an express agreement on an interest rate, the trial court's ruling was upheld.

Read the article.

Top AIA A201 Construction Contract Changes: A Handy Cheat-Sheet

In a post at **Construction Law Musings**, **Melissa Dewey Brumback** writes about updates to the American Institute of Architects standard form contract documents.

Dewey, a construction law attorney with **Ragsdale Liggett** in Raleigh, North Carolina, discusses the top 10 changes.

Those changes include differing site conditions, owner's right to carry out the work, direct communication between the owner and contractor, contractor's means and methods, notice provisions, notice related to evidence of owner's financial arrangements, liquidated damages, dates of commencement and substantial completion, termination for convenience, digital data, and insurance

Read the article.

Pay IF Paid: It Means What it Says

"Pay when paid" clauses are common in the construction industry, according to **Bradley Arant Boult Cummings**, but courts generally disfavor conditions precedent (an event that must occur before another party's performance is due) and will not observe their existence unless they are unambiguously laid out in the contract.

The article, published by JD Supra, states that "subcontractors and general contractors should be aware that if language in a contract clearly establishes that the prime

contractor is only obligated to pay the subcontractor if the owner pays the prime contractor for that work, and the contract states that the subcontractor is taking the risk of the owner's potential insolvency, then courts are likely to enforce the contract as written—condition precedent and all. This language establishes what is known as a pay ***if*** paid clause."

Read the article.

The Storm After the Storm: Restoration Contracts

An article in Gray Reed & McGraw's **Texas Construction Law Blog** offers some steps cleaning and restoration professionals can take in an effort to minimize the damage from a payment dispute with a client after a natural disaster.

Authors **Russell Jumper** and **Tim Fandrey** point out the importance of having a form agreement specific to natural disaster mitigation and remediation ahead of time.

Other points discussed in the article are the agreed scope of the project, making sure insurance proceeds go to the contractor, keeping the client or insurer from taking an estimate to a competitor, and being prepared for litigation.

Read the article.

Long-Running Construction Defect Fight in Texas Ends With Defense Win

A decade-long construction defect battle involving a South Padre Island, Texas, luxury condominium complex damaged during Hurricane Dolly **has been resolved** in a take-nothing defense win secured by attorneys of the West Mermis law firm for the general contractor, G.T. Leach Builders.

The condominium developer, Sapphire, initially sued its insurance brokers for negligence for allowing the builder's risk insurance policy to expire, leading to claims for extensive damage to the Sapphire condominium project from the 2008 storm. Nearly three years later, G.T. Leach and several of its subcontractors were added to the $30 million lawsuit.

The trial team, led by Lawrence J. West, presented evidence proving that the developer's allegations of multiple breach of contract claims were unsupported, according to the firm. They demonstrated that the contract contained express provisions that prevented the Developer from recovering the $30 million it was demanding.

Read details of the case.

Do Architects and Engineers Owe a Legal Duty to Non-Contracting Parties?

A recent unpublished Michigan Court of Appeals opinion provides some guidance with respect to the architect's and engineer's common law duty when processing pay applications, according to **a post** on the website of Clark Hill.

Jeffrey M. Gallant and **Scott D. Garbo** explain that the court held that the owner of a construction project could not maintain a professional negligence claim against the architect for failing to adequately review payment applications.

"While you may only have a contract with one of many project participants, Michigan courts continue to elaborate on the potential obligations owed to all other participants, including architects, engineers, contractors, subcontractors, owners, and lenders," they write.

Read the article.

Claim of Fraudulent Inducement of a Construction Contract Does Not Invalidate Arbitration Clause

Pepper Hamilton LLP's **Constructlaw blog** discusses an Ohio case in which a plaintiff sued a building company and attempted to have the arbitration clause in a construction contract declared unenforceable.

The contract identified the builder in the case by a name that was a fictitious name for a similarly named company and was not registered with the Ohio secretary of state, writes **Emily D. Anderson**. The trial court denied plaintiffs' motion to invalidate the arbitration clause.

The appellate court agreed with the trial court, observing that the builder did not initiate the action but was merely defending it.

Read the article.

Defense Scores Arbitration Win in Long-Running Construction Defect Fight in Texas

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In a release, the firm said G.T. Leach sought to enforce the arbitration provision of its contract, with appeals ultimately progressing to the Texas Supreme Court. The company was represented by attorneys from Houston-based West Mermis, which routinely handles construction and contract disputes, products liability and general business matters.

The release continues:

> The Texas Supreme Court's decision in *G.T. Leach Builders, LLC vs. Sapphire VP LP*, 458 S.W.3d 502 (Tex. 2015), which sent the dispute to arbitration, stands as a landmark opinion now routinely cited in similar cases.
>
> After settling with all other parties, Sapphire entered into arbitration with G.T. Leach in 2017. During the proceedings, the defense team, led by West Mermis name partner Lawrence

J. West, provided evidence refuting multiple breach of contract claims and challenging factual allegations.

“Despite claims to the contrary, the Sapphire project had not been completed when Dolly made shore. It was imperative to show the arbitrator that our client acted reasonably and responsibly,” said Mr. West. “It was an exceptionally complex case that had endured a number of detours, but we are pleased to have secured the decisive win G.T. Leach deserved and that this chapter can finally be closed.”

Also representing G.T. Leach were West Mermis attorneys Justin W. Safady and Stephen A. Dwyer.

Defend, Indemnify, Hold Harmless – What This Contract Language Means for A/E Professionals

J. Brandon Sieg of **Vandeventer Black LLP** addresses the question of what is meant when a contract requires an architect or engineer to “defend, indemnify, and hold harmless” the project owner for specific (or not so specific) types of claims that might arise in the future.

Regarding duty to defend, he explains that: “If you agree to similar language in your design contract, then you are agreeing to hire the project owner’s lawyer to defend a

lawsuit filed against the project owner."

He also covers responsibilities that go with indemnification and "hold harmless."

Read the article.

The Importance of Attention to Risk Allocation Provisions in Contracts

A recent Indiana Court of Appeals decision illustrates the importance of having an overall risk allocation strategy in contracts where appropriate, and paying close attention to the language used to express that strategy, writes **Christian Jones** of Barnes & Thornburg.

In **the post** on the firm BT Policyholder Protection Blog, Jones writes that this is particularly when multiple contracts and parties are involved.

"This case illustrates the difficulty of coordinating risk allocation language across multiple contracts. [The insurer] might have attempted to pursue subrogation claims under any circumstances, but it seems possible that litigation might have been avoided if all of the contracts at issue had contained their own express waiver of subrogation clauses"

Jones explains.

Read the article.

A Case Against One-Size-Fits-All Construction Contracts

Form documents published by the American Institute of Architects can sometimes be a one-size-fits-all approach often does not adequately protect the developer when issues arise on a construction project, according to **a post** on the website of King & Spalding.

Robert B. Garner and Peter A. Berg write that of the biggest problems a developer faces in using the AIA forms is selecting the proper form for its project.

“One of the biggest problems a developer faces in using the AIA forms is selecting the proper form for its project,” they explain.

“Without careful thought and modification to standard forms, developers can find themselves in a difficult position in a delayed and over-budget project, even if developers signed a contract with a ‘guaranteed maximum price.’ Project development requires detailed attention to all aspects of your latest construction agreement,” the authors write.

Read the article.

How to Build a Solid Contractual Risk-Transfer Program

The use of subcontractors helps to ensure construction projects are completed in a timely and efficient manner, but it also creates a wide range of contractual risks, cautions Tommy Williams, USI Uniondale vice president, in **an article** for Property Casualty 360°.

"Without a properly structured risk-transfer program, a general contractor (GC), owner or property manager would assume financial responsibility unnecessarily for losses caused by a third party, who is contractually obligated to control or prevent those losses. The financial impact could be significant – more so in certain jurisdictions," he explains.

His article discusses the basics of contractual risk transfer, common subcontractor policy exclusions, and the need for expert advice.

Read the article.

Farrell Fritz Welcomes Jay Sawczak, Construction Law Associate

Jay Sawczak has joined Farrell Fritz’ commercial litigation practice group as an associate. He concentrates his practice in construction law.

Prior to joining Farrell Fritz, Sawczaks, a Hoboken, NJ resident, was general counsel at JRM Construction Management, LLC in New York, NY. He was general counsel and a contract negotiation associate at Ocean Pacific Interiors (New York). He also worked at the Community and Transactional Legal Clinic (Newark, NJ).

Sawczak is admitted in New York State.

He earned his J.D. from Rutgers Law School and his B.S. from the University of Vermont.

Business With a Friend: Lessons from a Liftboat Contract

Charles Sartain, a partner in Gray Reed, uses a recent 5th Circuit ruling on a liftboat construction contract to illustrate his advice on how to administer and perform a contract, especially one with a friend.

Writing in the firm's **Energy & the Law** blog, he discusses *Semco, LLC v. The Grand, LTD*. The case involves a $15.9 million contract between long-time friends to construct a liftboat, a construction project that involved numerous change orders.

"At some point, the parties 'got away from the change order program' and informal requests were approved by email or orally," Sartain explains. Then allegations of fraud were raised.

Read the article.

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