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THE CONTRACTING PROFESSIONAL

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TCP's Construction Outlook

Spring is now behind us and with the construction season starting to kick into high gear The Contracting Professional ("TCP") is looking forward to summer. While the economy is far from a return to its pre-crash status, there are some signs of improvement. According to a May 18, 2010 report from the U.S. Department of Housing and Urban Development new privately owned housing permit applications in the Northeast are up 8.6% from April of 2009. Additionally, actual housing starts in the Northeast are up by 66% when compared to the same month in 2009. While the actual number of housing starts this year remain down from their monthly counterparts in 2008, the percentage

increases from 2009 suggests a marked increase in confidence. Unfortunately these positive indicators from the residential market have not yet translated into tangible results in the commercial or



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industrial construction markets. While retail sales and the Consumer Confidence Index are up from the first quarter of 2009, new commercial construction starts continue to decline, albeit at a

slower rate. One hopes that the good news in residential construction and consumer spending are leading indicators for other construction markets, but it is probably too early to predict a full scale turnaround. That being said, a difficult economy on the brink of recovery can be a great time to position your company for growth. With that in mind TCP continues to remain committed to its goal of educating contracting professionals with an eye towards success!

Statutes of Repose: A Real World Application, The I-35 Bridge Collapse

As some of our readers may be aware, there have been some recent developments in one of the largest construction accident cases to occur in recent memory. The case referred to is the August 2007 collapse of the I-35 bridge outside of Minneapolis Minnesota in which 13 people were killed and another 145 were injured. At the time of the collapse construction was being performed on the bridge by a

contractor known as Progressive Contractors. Since the collapse a number of lawsuits have been commenced against Progressive Contractors, URS (the engineering firm that inspected the bridge), and Jacobs Engineering Group (a successor to the original designer of the bridge). In the past several months a number of these lawsuits have settled while others have raised interesting legal questions. For

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Statutes of Repose (Cont.)



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“Subcontractors have filed valid liens that are worth nothing”

The I35 Bridge Collapse



the purposes of this article, the legal issue of interest is the application of statutes of repose to the facts of the bridge collapse.

For those of you unfamiliar with statutes of repose, they are quite similar to their more common counterpart, the statute of limitations. As most people know, a statute of limitations is a time period beyond which a legal proceeding cannot be started. For instance, if someone breaches their contract with another party, the other party has six years from the date of the breach to bring a lawsuit or any

lawsuit brought thereafter will be barred by the statute of limitations. A critical element, however, in the statute of limitations analysis is when the parties “knew or should have known” of the breach of contract. If a breach occurred and one party did not know about it, the statute of limitations does not start running until he learns of the breach or should have learned of it. The “knew or should have known” requirement is a major difference between a statute of limitations and a statute of repose.

The applicable statute of repose in Massachusetts states: An “action of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property, ... shall be commenced only within three years next after the cause of action accrues; provided, however, that in *no event shall such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use;*

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Further Developments in MA Lien Law

In the last issue of “The Contracting Professional” the lead article chronicled a concerning development in the Massachusetts Mechanic’s Lien Law with respect to the ability of subcontractors and material suppliers to protect their right to payment through Mechanic’s Liens. More

specifically, the article identified a line of Massachusetts Superior Court cases that have relied on the “due or to become due” language in the Mechanic’s

Lien statute to find that subcontractors have filed

valid liens that are worth nothing if they file after the general contractor has breached his contract. While this line of cases was already troubling, the “due or to become due” dilemma has continued to gain traction in the three short months since our last issue.

On April 15, 2010 the Worcester County Superior Court rendered a decision in the case of Maverick Constr. Mgmt Servs., Inc. v. Evergrass, Inc. that continues to erode the lien rights of Massachusetts subcontractors and material suppliers. In the Maverick case a general contractor known as

Evergrass, Inc. entered into a contract with an Owner to build an athletic field. In furtherance of that contract Evergrass entered into a subcontract with Maverick Construction. Work proceeded under these contracts and on September 16, 2005 Evergrass turned over a completed athletic field to the Owner for use in a homecoming football game. Maverick Construction never performed any additional work on the project after September 16, 2005. Evergrass apparently performed some additional work on the field as late as October 22, 2005 in an attempt to remedy some defi-

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Vermont Prompt Pay Ruling



A recent Vermont Supreme Court decision has provided some interesting guidance on the application of the Vermont Prompt Pay Act (“PPA”). The PPA requires owners to pay contractors in strict accordance

with the terms of their construction contracts. If the construction contract does not contain a clause governing the terms of payment, the PPA provides that the contractor shall be entitled to invoice the owner for monthly progress payments. If the contractor does invoice the owner for monthly progress payments the PPA states that the owner shall pay the undisputed amounts of such invoices within 20 days of receipt of the invoice. Interest at the rate of 12 percent per year will run on any

late payments by the owner. In the event that there is a dispute between the contractor and owner concerning the work invoiced, the PPA requires the award of attorneys fees and interest to the substantially prevailing party, as determined by a Court of law.

The case of Reed Construction v. Zurn was decided in March of 2010 and addressed several interesting arguments related to the PPA. The case arose out of various agreements between a

There is a six year cutoff date for how long you can be held responsible for your work.

Statute of Repose (Cont.)

or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner.” The highlighted portion of the Massachusetts statute of repose creates a definite cut off date for lawsuits arising out of design, planning, or construction of improvements to real property. There is no reference in this language as to when someone “knew of should have known” that the cause of action accrued. Effectively this means that a contractor cannot be sued for tort damages based on negligent construction if the construction was substantially completed more than six years earlier. A key element of social policy in statutes of repose is that we do not want to hold architects, engineers, and builders responsible for their work for the lifetime of the structure. The lifetime of a structure is too long to keep these contracting professionals on the hook and

we recognize that these people retire and their companies go out of business. Thus, we set a six year cutoff date for how long they can be held responsible for their work.

Now that we have a basic understanding of what statutes of repose are, let’s apply the Massachusetts statute of repose to the Minnesota bridge collapse. In order to do so, let’s take the following as conclusive facts: 1) The original engineering firm of Sverdrup & Parcel was hired to design the I35 Bridge in 1962, 2) Construction on the I35 Bridge was completed in 1967, 3) over the next forty years, through a series of corporate mergers, Sverdrup & Parcel became Jacobs Engineering Group, 4) Jacobs Engineering Group has never had anything to do with the I35 Bridge, 5) Over the same forty year period the State of Minnesota made nu-

merous structural changes to the Bridge and deferred a significant amount of maintenance, 6) Prior to the bridge collapse URS was hired to act as consulting engineer and to suggest repairs to the Bridge, 7) One of the repairs suggested by URS was the replacement of the original gusset plates which were now undersized, 8) the State of Minnesota did not take any action to replace the gusset plates, citing economic considerations, 9) Instead, the State of Minnesota hired Progressive Contractors to resurface the Bridge, 10) Progressive Contractors was in the process of resurfacing the Bridge when it collapsed, 11) Although the added weight of Progressive Contractors construction activities contributed to the collapse, the National Transportation Safety Board found



After 40 Years
of Trouble
Free Service,
the Designer
of the Bridge
is in Court

Statute of Repose (Cont.)

that failure of the gusset plates was the ultimate cause of the collapse.

Shortly after the collapse the State of Minnesota brought a lawsuit against Progressive Contractors, URS, and Jacobs Engineering accusing them of negligent construction, negligence in providing consulting engineering services, and negligent design of the I35 Bridge respectively. Notwithstanding the fact that Progressive Contractors and URS had very little fault in the collapse of the Bridge, both companies settled with the State of Minnesota, paying roughly six million dollars.

After Progressive Contractors and URS settled with the State of Minnesota they added claims to the lawsuit against Jacobs Engineering seeking contribution and indemnification from Jacobs Engineering. Essentially they were asking that Jacobs Engineering pay them back some of the amounts they spent in settling with the State of Minnesota. Since the only connection Jacobs Engineering had to the I35 Bridge was its takeover of Sverdrup & Parcel, Jacobs Engineering sought protection under the applicable statute of repose.

Applying the Massachusetts statute of repose to these facts would result in a crystal clear outcome; Jacobs Engineering would be off the hook. Remember the Massachusetts statute states “in no event shall actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession”. The I35 Bridge was substantially completed and handed over to the State of Minnesota in 1967. Thus, under Massachusetts law Jacobs Engineering was free and clear of that project just six years later in 1973. Given the state of the real facts, this result seems fair considering the Bridge was trouble free for over forty years and Sverdrup & Parcel didn’t even exist when the Bridge collapsed.

Unfortunately, Massachusetts law does not apply to the real life I35 Bridge situation and Jacobs Engineering was not so lucky. Although the State of Minnesota does have a statute of repose, and Jacobs Engineering sought protection under it, the State of Minnesota also has an exclusion to the Statute of Repose. Under Minnesota law the Statute of Repose sets a cut off date of 10 years for all negligence actions,

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VT Prompt Pay (Cont.)

Contractor and Owner to clear land and develop a subdivision in Bakersfield, Vermont. The first invoice submitted by the Contractor was dated January of 2005. The Owner reviewed this bill, made some minor changes, and paid it. The Contractor’s second invoice was not received until June of 2005, roughly six months later. In early August of 2005, the Contractor submitted two additional invoices for work done in June and July. On August 26, 2005 the Owner terminated the Contractor without paying any of the outstanding invoices. The Contractor brought a lawsuit under the PPA and in

January of 2008 was awarded \$101,443.00 consisting of \$36,451.00 in damages, \$27,347.00 in interest, and \$37,647.00 in attorney’s fees. The Owner appealed the decision, raising several questions under the PPA.

One of the Owner’s first arguments was that the PPA should not have applied to this construction contract because the Contractor failed to submit monthly invoices. The Court dismissed this argument stating that the PPA does not require a contractor to submit monthly invoices. The PPA *allows* the contractor to submit monthly invoice, but does not

require it. The Owner’s second argument under the PPA is that the Court could not award attorney’s fees to the *substantially prevailing party* where the Owner had been successful on one of its counterclaims against the Contractor. In dismissing this new argument, the Court stated that it is perfectly reasonable to find the Contractor to be the substantially prevailing party where there were numerous claims and counterclaims in the lawsuit and the Owner only prevailed on one.

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Statute of Repose (Cont.)

but it does not have any cutoff date for contribution or indemnification actions. The result in this case is that although the State of Minnesota could not maintain a lawsuit against Jacobs Engineering for negligence, Progressive Contractors and URS could maintain a lawsuit against Jacobs for contribution and indemnification based on what they paid the State of Minnesota. Thus, the entire public policy for statutes of repose, i.e. that we provide finality to construction professionals once their work on long term projects is complete, was circumvented by the exception to the Minnesota statute of repose. While the author is unsure as to how the Minnesota exception might play out in Massachusetts, it is important to have a general understanding of statutes of repose and analyze the risks associated therewith. One does not want to find themselves in the position of Jacobs Engineering after a long forgotten project has experienced trouble.

VT Prompt Pay (Cont.)

The PPA does not require total victory for one party to be found as the substantially prevailing party.

The final argument of the Owner was that the Court could not award interest and attorney's fees without making a ruling that the Owner acted in bad faith when it withheld payment of certain invoices. In ruling on this argument, the Court stated that nothing in the PPA prevents an owner or contractor from withholding payment in an amount equaling the value of any good faith claims it may have. However, just because an Owner can withhold payment for good faith reasons, does not mean he has to act in bad faith for the PPA to apply. The attorney's fees and interest provisions of the PPA apply unless there is a finding of good faith, not the other way around. The Court went on to uphold the judgment rendered in favor of the Contractor and to award the \$101,443.00 in damages.

Lien Law (Cont.)

ciencies, but at some point after October 22, 2005 the irrigation system and the field itself completely failed. The Owner then sued Evergrass for damages arising from the failure of the field.

On October 14, 2005 Maverick Construction filed a Mechanic's Lien against the project because it had not been paid by Evergrass. At some point well after Maverick Construction had filed its Mechanic's Lien, the Owner of the project prevailed in its claim against Evergrass with an arbitrator finding that Evergrass owed the Owner \$1,005,680.00 for the total failure of the athletic field. Maverick Construction was not a part of the dispute between Evergrass and the Owner. In a totally separate case between Maverick Construction, Evergrass, and the Owner, the Worcester Superior Court ruled that although Maverick Construction did everything necessary to perfect its Mechanic's Lien the Lien was worthless because no money was "due or to become due" from the Owner to Evergrass. The court used the other case and the damages award to the Owner of \$1,005,680 to make this ruling against Maverick Construction.

Although this may not seem like a particularly harsh decision given the fact that the athletic field com-

pletely failed, the underlying theme of the case is the real problem. This case is essentially holding that a subcontractor can file a perfectly good Mechanic's Lien within 30 days of when it last worked on the project and because the General Contractor ultimately screws up the project, albeit months or even years later, the Owner is allowed to go back in time and set off his damages against the General Contractor and the subcontractor's Mechanic's Lien. There was no finding in this case that Maverick Construction did anything wrong, just that once the project failed no more money was due to Evergrass and therefore no money "due or to become due" under the lien law. While this case is not binding precedent in Massachusetts at this time, it does continue to confirm that the Courts of Massachusetts are happy to disregard subcontractor Mechanic's Lien rights in favor of absolving the Owner of any responsibility in choosing a general contractor. In the opinion of the "The Contracting Professional", subcontractors and material suppliers should file Notices of Contract as soon as they receive written contracts and if the Owner objects show him a copy of the Maverick case.