Division 5: General Contractors

AMERICAN BAR ASSOCIATION FORUM ON CONSTRUCTION LAW

Message from the Chair

Hello Division 5! It was wonderful to see many of you at the Mid-Winter Meeting in Ft. Myers in January! Once again, the Forum delivered an excellent program, and we shared an amazing dinner at the Veranda Restaurant in Fort Myers with our colleagues from Division 8. I'd like to thank Amy Phillips for arranging the venue for the dinner, and would also like to thank Amy's firm, Thornton Tomasetti, for sponsoring a portion of it. I would also like to thank Robbie MacPherson and Seth Schimmel, the panelists for our Breakfast Program in Ft. Myers: "AC/DC – Actual Costs, Direct or Consequential? On a Highway to Hadley." This was a very educational program about consequential damages and consequential damages waivers in construction contracts, and they both did a great job making the topic interesting (as well as adding some humor to their presentation).

I am pleased to announce that at the Mid-Winter Meeting the Forum's Governing Committee approved a new addition to the Division 5 Steering Committee: Misty Gutierrez. Congratulations Misty and thank you for all your efforts on behalf of Division 5!

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FORUM ON CONSTRUCTION LAW
Building the Best Construction Lawyers

In this Issue:

The Forum's Annual Meeting is just around the corner! It will be held April 11-13, 2018 at the Roosevelt Hotel in New Orleans, LA. It is entitled "Taking Care of Business: A Mini-MBA Program for the Construction Lawyer." Not only will this be another great educational program, also there are lots of fun activities planned in conjunction with the meeting. These include, but are not limited to, a welcome reception at the House of Blues and a parade through the French Quarter with a jazz band (evening of Thursday, April 12th). I hope to see many of you at the Annual Meeting.

On Wednesday April 11, between 3 and 5 p.m., Division 5 will be holding its in-person planning meeting at the Forum's Annual Meeting. Any member may attend the planning meeting with us, but we expect that the Division 5 steering committee and many of the working committee members will attend. If you are on the steering committee or the working committee and will not be able to make it to the meeting on the 11th, please let me know.

On Friday, April 13th there are two Division 5 events planned. First we will be having a breakfast meeting at 8:15 am, co-sponsored by Division 6. Our speaker is Susan Fahey Desmond, an attorney from Jackson Lewis PC. She will be addressing wage and hour issues that Construction Lawyers face and how General Contractors can avoid being considered a joint employer with its subcontractors. Second, Division 5 will be joining Division 8 (International Construction), and Division 11 (Corporate Counsel) for a 7 p.m. dinner at Galatoire's, 209 Bourbon Street, for a Chef's Tasting Menu/Prix-Fixe dinner. Wine for this event is sponsored by Leech Tishman and The Rhodes Group. The cost is $100/person. Please RSVP to Amy Phillips at acphillips@verizon.net. You may pre-pay via PayPal to acphillips@verizon.net. Seating is limited to 60 people, so reserve your spot!

Finally, please make sure to call into our monthly call on March 20, 2018 at 2 p.m. Pacific/5 p.m. EST. David Kirschbaum of Kirschbaum Consulting, LLC has graciously agreed to prepare a presentation for us on "How to Work Effectively and Efficiently with a Cost Expert." The dial in number is 866-646-6488; Access Code 477-023-1272.

General Contractors Must Be Careful Not to Waive a Subcontractor's Partial Release of Claims

By Jeffrey C. Venzie, Esq., Venzie, Phillips & Warshawer, Philadelphia, PA / Wilmington, DE

Subcontracts typically require sub-contractors to execute and submit to the general contractor a partial release of liens and claims form ("Partial Release") as a condition to receipt of a progress payment. While the specific language of the Partial Release form varies from subcontract to subcontract, a properly drafted Partial Release will operate in most jurisdictions as a bar of all claims the subcontractor may have against the general contractor through the period of the application for payment that the Partial Release is being submitted in conjunction with (as long as the subcontractor receives the full amount of that progress payment). These Partial Release forms often allow the subcontractor to reserve any claims that it does not intend to release, however, if the subcontractor does not identify such claims on the form, those claims will be released upon receipt of the progress payment.

This article is not about the enforceability of a Partial Release against a subcontractor. This article assumes the subcontractor has executed a Partial Release that is enforceable by the general contractor as a bar to the subcontractor's claims. The focus of this article is on the contractor's words and/or conduct after the subcontractor executes that enforceable Partial Release. Some of you may be wondering why this would be the subject of an article. The reason is that a contractor holding an otherwise enforceable Partial Release in its hands can waive the release by its words or conduct.

Waiver

In practically every jurisdiction in the United States, "waiver" is defined as "a voluntary and intentional relinquishment or abandonment of a known right" (or a close variation thereof). Generally speaking, a party can relinquish or abandon a known right by an express declaration (an express waiver) or by conduct or language so inconsistent with a purpose to rely on such right as to leave no opportunity for a reasonable inference to the contrary (an implied waiver). There are two cases from the Eastern District of Pennsylvania that illustrate how this waiver issue arises in the context of Partial Releases.

In *Quinn Construction, Inc. v. Skanska USA Building, Inc*., 730 F.Supp.2d 401 (E.D.Pa. 2010), the project was already behind schedule at the time Quinn, the concrete subcontractor, began its work. Skanska, the general contractor, directed Quinn to work overtime to accelerate its work in order to recover lost time in the schedule and Quinn complied. Each month Quinn executed partial release forms with its applications for payment, which contained the following language:

> …[Subcontractor] does hereby…waive, release, and relinquish any claims for additional compensation of any kind, including delay, disruption, interference, or acceleration accruing prior to [the date of the release's execution].

Quinn's $200,000 overtime claim accrued prior to the date of the last partial release that Quinn executed. Quinn eventually filed suit against Skanska to recover its unpaid subcontract balance, along with the overtime and other claims. Skanska filed a motion for partial summary judgment arguing that Quinn's overtime claim was barred by the terms of the partial releases that it executed with each application for payment. In opposition to Skanska's motion, Quinn raised the following facts in support of its position that Skanska acted inconsistently with a purpose to rely on the partial releases to bar Quinn's overtime claim:

- When presented with Quinn's overtime claim, Skanska did not assert that it was barred by the partial releases;
- Skanska failed to indicate that Quinn's claims had been released in the spreadsheet that Skanska and Quinn used to track Quinn's overtime costs; and
- Skanska made many attempts to secure payment of Quinn's overtime wages from the owner.

The district court acknowledged that Skanska was "correct that the plain language of the releases bars Quinn's claims for overtime…." However, the district court held that Skanska was

not entitled to summary judgment based on the partial releases "because a genuine issue of fact exists as to whether Skanska waived enforcement of the release language with respect to Quinn's overtime costs." The court noted that the most significant fact was that Skanska made many attempts to secure payment of Quinn's overtime wages from the owner.

A few years later, the Eastern District of Pennsylvania faced the same issue again in another case, *Lydon Millright Services, Inc. v. Ernest Bock & Sons, Inc.*, 2013 WL 1890355 (E.D.Pa May 7, 2013). Lydon was a subcontractor to Bock, the general contractor, on a Philadelphia International Airport baggage handling system project. Lydon was to install baggage handling equipment delivered in phases by a third-party supplier, G & T Conveyor Company. The Purchase Order between Lydon and Bock required Lydon to submit a partial release form with its monthly applications for payment. Lydon submitted 54 applications for payment to Bock during the project with partial releases without reserving any claims on the partial release forms.

The project experienced numerous delays. Lydon eventually filed suit against Bock for over $1.9 million in delay damages. Bock filed a third-party complaint against the City, G & T and others alleging they caused the delays. Bock moved for summary judgment against Lydon's claims arguing, among other things, that Lydon's claims were barred by the partial releases. Lydon presented the following evidence in support of its position that Bock waived its right to rely on the partial releases:

- After Lydon had been submitting partial releases, Bock suggested to Lydon that they "team up" and "pursue claims jointly" against the other parties on the project;
- Bock also "promised to incorporate" Lydon's delay damages into Bock's claims against the City and others;
- Bock told Lydon that Bock would "take care" of Lydon with respect to Lydon's delay claim;
- When Lydon informed Bock that it was considering suing Bock for delay damages, Bock proposed that Lydon "liquidate" its claims against Bock and "join forces" with Bock in suing the other parties on the project;
- Bock's attorney proposed that Lydon release its claims against Bock and enter into a "liquidating agreement" with Bock by which the they would proceed together against the other parties;
- In Bock's state court declaratory judgment action, Bock sought a declaration that G & T and the City were liable to Bock for any claims that Lydon has against Bock;
- Bock tried to settle with Lydon after Lydon submitted its Request for Equitable Adjustment and its complaint; and
- Prior to Lydon's lawsuit, Bock never informed Lydon that its delay claims were barred by the partial releases.

The court denied Bock's motion finding that a jury could reasonably find from the above evidence that Bock did not intend to rely on the partial releases, or, said another way, a reasonable jury could find that Bock's conduct and actions were inconsistent with an intent to rely on the partial releases as a bar to Lydon's delay claims and, therefore, Bock waived the benefit of those partial releases.

Although these are both Pennsylvania cases, the issue of whether a contractor has waived its right to enforce a Partial Release is not a Pennsylvania law issue. Given that the common law principle of waiver is, for all practical purposes, uniform throughout the jurisdictions of the United States, with the right facts any subcontractor can make the arguments that Quinn and Lydon made in their respective cases, to defeat a contractor's motion for summary judgment seeking to enforce a Partial Release.

The General Contractor's Dilemma: Negotiate or Litigate?

Upon a reading of *Quinn* Construction and *Lydon Millright*, one's instinctual reaction may be that a general contractor holding an enforceable Partial Release from its subcontractor must refrain from any settlement discussions, or even communications, with a subcontractor regarding its claims, other than a flat-out denial citing the Partial Release. However, experienced construction professionals know that the actions of Skanska and Bock recited above are not atypical and stem from sound business judgment and a desire to resolve a dispute with a subcontractor without litigation. That said, is a general contractor forced to choose between: (a) negotiating and/or strategizing with a subcontractor regarding its claims (and possibly waiving its right to rely

on the subcontractor's Partial Release); and (b) outright rejecting a subcontractor's claims on the grounds they are barred by the Partial Release (in order to preserve its right to rely on the Partial Release as a defense to the subcontractor's claims in litigation)? While "Option (a)" may lead to a resolution in which case the Partial Release becomes moot, it also may not, in which case the general contractor may not only find itself in litigation with the subcontractor, but having to litigate the issue of whether its efforts to resolve the subcontractor's claims constitute a waiver of the Partial Release. On the other hand, while "Option (b)" will preserve the general contractor's right to assert the Partial Release as a defense to the subcontractor's claims in litigation, it will also increase the likelihood, if not force, the subcontractor to commence litigation since there were no negotiations or strategic communications about how to prosecute or resolve its claims.

Common sense dictates that there must be a way a general contractor can communicate and negotiate with its subcontractor without waiving its release defense. Since the principle of waiver hinges on establishing that the general contractor, through words and/or conduct, intentionally relinquished or abandoned a known right, it would logically follow that any expressed intention by the general contractor to reserve its right to rely upon, or assert, the Partial Release as a defense to a subcontractor's claims, will contradict, and possibly defeat, an implied waiver argument asserted by the subcontractor. For the general contractor that holds an enforceable Partial Release and decides that it is in its best interest to negotiate with a subcontractor regarding its claims rather than simply rejecting its claims on the grounds that they have been released, in order to negate any implied waiver argument that the subcontractor may assert in future litigation, it would be wise to continually and repeatedly restate its intention—both orally and in writing—to reserve its release defense at each available and appropriate opportunity during the negotiations, even if such negotiations span months or years. This will enable the general contractor in any subsequent litigation with its subcontractor, to at least cite to the numerous expressions of its intent to rely on the Partial Release in opposition to an implied waiver argument asserted by the subcontractor.

The Bottom Line

General contractors need to be cognizant of their words and conduct relative to subcontractor claims if a subcontractor has signed an enforceable Partial Release releasing its claims. Entertaining a subcontractor claim can hand the subcontractor the argument that the general contractor has waived the Partial Release. This may create an additional hurdle for the general contractor that tries to enforce the Partial Release in litigation with its subcontractor in that it may have to refute the subcontractor's waiver argument. It may also reduce or eliminate any chance of dismissing the subcontractor's claims via a motion for summary judgment as was the case in *Quinn* and *Lydon Millright*.

Interesting Note: Federal Rule of Evidence 408

In *Lydon Millright,* Bock argued that Lydon's reliance on the parties' "settlement" communications is barred by Federal Rule of Evidence 408, which precludes the use of "conduct or a statement made during compromise negotiations" about a disputed claim to prove or disprove the validity of the claim. The district court rejected Bock's argument on the grounds that Lydon offered evidence of settlement discussions in order to negate Bock's release defense, not to directly support its underlying breach of contract claim.

About the Author

Jeff Venzie's construction law and litigation practice consists of representing owners, general contractors,

Upcoming Events:

March 20: Monthly Call

"How to Work Effectively and Efficiently with a Cost Expert." by David Kirschbaum

2:00 p.m. PST/5:00 p.m. ESTDial in: 866-646-6488; Access Code: 477-023-1272

Annual Meeting Events:

April 11: Division 5 Steering Committee Meeting

3-5 p.m.

April 13: Division Breakfast

8:15 a.m.

April 13: Division Dinner

7:00 p.m.
Galatoire's Restaurant

RSVP to Amy Phillips at acphillips@verizon.net

See pages 1-2 for details regarding annual meeting events.

Critical Crossroads: "Problem Paths" and How to Find Them

By Wayne DeFlaminis, PE, CFE—HKA

Several years ago, I worked on behalf of an international railway authority on a project that became embroiled in a delay dispute. The project was administered, essentially, as a multiple-prime, design-build contract with the Authority (Owner) under contract with several General Contractors (G/Cs), each responsible for delivering specific, adjoining project segments. As is often the case on "multi-prime" projects, coordination of the work became a central issue of the dispute

The dispute arose after the Owner had requested "immediate, part-time access" to specific areas along the guideway to install, signal-test, and ultimately commission various electrical and security systems before the project was allowed to "go live." One prime G/C, which was responsible to construct and fit-out the stations, was also responsible for overall project scheduling and work coordination—including coordinating with Owner forces. The terms of the Owner's "special request" were documented in a Memorandum of Understanding (MOU) signed by the parties.

In the months before the MOU was signed and for several months thereafter, the G/C submitted monthly project schedules showing on-time completion. But just four months before the project's contract finish date, the schedule updates began slipping drastically—in one case, losing more than a month of time from the previous update. Two months before of the contract finish date, the G/C submitted a five-month delay claim to the Owner.

The claim could be reduced to the following basic allegations:

1. The G/C alleged that the Owner's testing and commissioning work had become delayed by factors beyond its control.

2. The G/C alleged that the Owner's delays, in turn, delayed the G/C's interior finishes, which ultimately consumed the available total float and became critical.

3. The G/C alleged that long-lead-time material deliveries associated with the interior finishes also became delayed as a result of the Owner's "special request." When the G/C updated the schedule to account these forecasted impacts, the project had lost five months of time.

This case brings to light a few of what I call "problem paths"—suspicious critical path scenarios that I'll discuss in today's installment of Critical Crossroads.

Problem Path #1: The "Critical path" Includes Extended Fabrication and Delivery Lead Times

Most folks know that a construction project's duration—both its planned duration and its actual duration—is determined by the project's critical path. Critical path activities typically have the lowest available "total float" of all activities in the schedule. Total float can defined as the difference between when an activity can and must begin (or can and must finish) before it will begin to delay the entire project. Total float is measured in days, or often, in hours.

The immediate difficulty with "critical" fabrication and delivery activities becoming delayed is that the delays are presumably occurring away from the project site at the manufacturer's or vendor's facility. Such "critical" delays oftentimes can be based on faulty or outdated information. Do construction projects actually become delayed by late material fabrication time or delivery? Absolutely. But often, orders can be expedited, alternative sources can be found, and forecasted delivery dates can be improved. "Critical" fabrication and delivery activities should be examined if not challenged and should always be supported by standard business records, such as purchase orders or fabrication status reports, from the vendor or manufacturer.

In my experience, fabrication and delivery delays typically show up as "critical" for a short period then disappear when the schedule is updated never to be seen again. However short-lived, "critical" fabrication and delivery delays can mask ongoing issues with on-site physical construction activities. And for this reason, "critical" fabrication and delivery activities are a potential "problem path" that should be

scrutinized if not challenged by the schedule reviewer.

Problem Path #2: The "Critical path" Includes Administrative and "Soft" Construction Activities

In project scheduling, the distinction can be made between physical construction activities, such as earthwork, foundation construction, and electrical system installation work, and "soft" activities, such as design work, engineering, and administrative activities. A central distinction between physical and "soft" construction activities is that "soft" activities indirectly become part of the finished project.

When the "critical path" includes "soft" activities, or any activity that cannot be directly or easily linked to overall status of construction, the analyst should carefully review subsequent updates—using other contemporaneous records if available—to determine if successor physical construction activities were actually impacted by the aforementioned "soft" construction activity delays. If it is unclear whether successor construction activities were impacted by the "soft" activity delays, then the analysis should review near-critical paths in search of physical activity delays that could more reasonably explain the project's delays.

"Soft" activities also include administrative tasks, site security, subcontract buy-outs and procurement activities, owner design review and approval time, and design activities—as well as, fabrication and delivery lead-times discussed previously.

As with "critical" fabrication and delivery delays, "soft" activity delays can be used to mask more urgent issues to physical construction activities. As a former schedule reviewer for DOT and transit clients, I can state that any administrative activity, such as security detail, being shown on the project's "critical" path would be probable grounds for rejecting the schedule. So remember to be very curious when you come across "soft" activities on the critical paths of your construction projects.

Problem Path #3: The "Critical path" Shows Significant Time Lost from the Previous Update

This is a fairly common occurrence among the construction schedules I evaluate. Assuming that no significant change was made to the project (additional work, changed conditions, etc.), how could a project lose several weeks to *more* than a month of time during the standard monthly updating period—especially when the parties were on site and working? There are many possible answers to this question as there are myriad logic features (lags, constraints, etc.) that can extend the project beyond the length of the update period even as physical work is completed.

But in the aforementioned transit case, the G/C's allegation was that months of time were lost when the impacts of the delayed interior finishes were finally recorded in the schedule. The immediate questions I sought to answer for the client were "*When exactly were the finish activity impacts added to the schedule?*" and "*When did the interior finishes actually begin to the delay the Project?*"

A review of the schedule updates submitted during the months before the claim was filed showed that the interior finishes were impacted not by the Owner's testing delays, but by the aforementioned fabrication and delivery lead-time delays. Further, it became clear that numerous fabrication and delivery lead-time "fragnets" were added to the schedule series reasonably late in the process. It was as if the G/C had suddenly become aware that materials for the interior finishes needed to be fabricated and delivered even though these elements of the project were unrelated to the Owner's testing. Over the next few months, these activities had consumed their available total float and became critical, eventually delaying the project by several months as the G/C claimed.

Assume for the moment that the G/C's alleged fabrication and delivery days were valid. However, just because the delays occurred doesn't mean the G/C was entitled to receive five months of additional contract time! Naturally, the question of whether the G/C had experienced an excusable delay would depend on causation. I began searching for answers to other questions such as: "*When should the G/C have reasonably foreseen the fabrication and delivery impacts and acted accordingly?";* and "*Exactly how did the Owner's part-time access to the MOU areas cause these drastic fabrication and delivery delays?* It turned out the answers to these questions were rather problematic for the G/C and undermined its principal claim allegations.

But getting back to our third "problem path" scenario: Presuming that no work stoppage or other unusual project event occurred, a schedule update that shows a "critical" delay greater than the span of time since the previous update should register an immediate "red flag" because this schedule also calls into question the

veracity of previous updates. In practice, the problem occurs when a contractor attempts to show on-time completion month after month, but suddenly, the "dam breaks" and delays that were minimized in previous updates suddenly become actualized. In this scenario, the accuracy of all affected schedule updates would be questionable—not just the most recent schedule. So once again, be aware of this type of "problem path."

In this installment of Critical Crossroads, I discussed three simple examples of "problem paths" to watch out for in your clients' project schedules. Please check back here, in the ABA Division 5 Newsletter, for future installments Critical Crossroads. Your comments and feedback are always appreciated.

This article is intended for general discussion and does not contain specific advice that is appropriate for any particular situation or project. Actual project information and events were changed to protect client confidentiality.

About the Author

Wayne DeFlaminis, PE, CFE is the Division 5 Diversity Committee Liaison and an Associate Director at HK

DIVISION 5 MONTHLY CONFERENCE CALL PRESENTATION RECAP

The Value and Risks of Drones in Construction

Peter W. Hahn

The feature presentation during Division 5's November meeting focused on the uses, risks, and rewards of drones on construction projects. The presenters were Brenda Radmacher with Gordon & Rees and Michelle Yates and Jonathan Ammon, both of Sundt Construction.

Drone use on construction projects has skyrocketed over the last couple of years. Drones, which used to be a fad technology with units costing several thousand dollars, are now ubiquitous and available for $800 to $2,000 for high-grade commercial units. The drones used on construction projects are equipped with high-definition cameras that can take pictures, temperature measurements, and infrared images and, using software, can produce 3D images, topographic maps, panoramic views, and heat maps. Construction companies use these capabilities for site documentation, to capture as-built progression on a project, to view progress in areas unsafe for humans, and to fact-check issues as they arise. Construction litigators use the drones and their associated technologies for inspections and investigations, to create demonstrable exhibits, and to obtain views of the project for fact or expert use in areas that are otherwise unattainable.

Use of drones—especially in a commercial context on a high activity construction project—carries significant risks. Commercial drones, which can easily weigh ten pounds, can cause serious property or bodily harm if a technology failure or pilot error cause them to crash. Drone use also can invoke privacy concerns, both of the owner whose project is being photographed and of neighboring owners who do not wish their property to be captured as a collateral to the construction-related photographs being taken. For these reasons, drone usage will invariably increase a user's insurance rates.

From a litigation perspective, the data captured by the drones is most likely discoverable and the risk of that data's loss raises spoliation concerns. Further, drones may capture areas protected by confidentiality or non-disclosure agreements, and that information will need to be redacted or otherwise controlled before drone data is released.

Commercial drone usage is regulated by the Federal Aviation Administration and, in particular, FAA Regulation Part 107. The company using the drone must be licensed, as must the drone's pilot. Accordingly, construction companies and project owners wishing to take advantage of this emerging technology must either spend the time obtaining required FAA licenses or hire a licensed subcontractor authorized to operate drones.

The full PowerPoint deck for this presentation is available on Division 5's website.

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