



**RECENT COURT DECISIONS OF RELEVANCE
TO CONTRACT DOCUMENTS**

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1. **Issue:** Ancient legal doctrine allows state to proceed with lawsuit despite statute of limitations and statute of repose. *State of Connecticut v. Lombardo Brothers Mason Contractors, Inc.*, Supreme Court of Connecticut (2012).

Summary: University of Connecticut law school library was designed and built in the 1990s. From the start it was plagued by water intrusion problems, which forensic engineers ultimately attributed to defects in design and construction. In 2008, long after the expiration of the applicable statutes of limitations and repose, and after incurring \$15 MM in repair costs, the state finally filed a lawsuit, naming the construction manager, design firms, contractors, and others as defendants.

The trial court granted summary judgment to the defendants, holding that the applicable statutes of limitations and the Connecticut statute of repose for construction claims had expired. The state argued that the case should be governed by the doctrine of “*nullum tempus occurrit regi*” — “no time runs against the king.” This doctrine exempts states from the operation of statutes of limitations and repose; it is philosophically similar to the doctrine of sovereign immunity. Under both doctrines the interests of the state take precedence over those of ordinary citizens or entities. The defendants persuaded the trial court that the doctrine of *nullum tempus* had never entered the common law of Connecticut, and furthermore some of the contracts contained express provisions citing the statute of repose, thus the state had in effective waived its rights under the *nullum tempus* doctrine, if such even existed.

Decision: The Supreme Court of Connecticut reversed the trial court, holding that the *nullum tempus* doctrine is in full force in Connecticut. The court reviewed the history of the doctrine, noting that under English law the king was presumed to be occupied by the weighty burdens of governing. It would be unfair to the king if claims could be brought against him because of errors by his officials—hence the shield of sovereign immunity—and also unfair to him if he were thwarted in pursuing his own claims by the negligence of his officials in enforcing the Crown’s rights—hence the sword of *nullum tempus*. These royal privileges were inherited by the American states and the federal government after independence, with vindication of public rights and the public purse as the ultimate goals. The court cited an 1888 Connecticut case applying *nullum tempus* to sustain a government claim, and also more recent decisions from various appellate courts around the United States; and further made the point that the common law in this country includes “the ancient unwritten law of England.” As to waiver, only the legislature may waive fundamental government rights, not a contracting officer.

Comment: Yet another peril of public sector work. Congress and some state legislatures have expressly made public entities subject to repose/limitation statutes to avoid results such as those in Connecticut.

2. **Issue:** Stale claims allowed by legislative decree. *In re: Individual 35W Bridge Litigation*, Supreme Court of Minnesota (2011).

Summary: After the tragic collapse of the Interstate 35 W Bridge across the Mississippi River in Minneapolis, the Minnesota legislature set up a victim compensation program and enacted the following statute:

Notwithstanding any statutory or common law to the contrary, the state is entitled to recover from any third party...any payments made from the emergency relief fund...to the extent the third party caused or contributed to the catastrophe.

Jacobs Engineering (as successor to Sverdrup) was among the “third parties” that the state pursued. Sverdrup had designed the bridge in the 1960s. In the meantime, the state had passed statutes of repose to cut off stale construction and design-related claims. Jacobs argued that its (Sverdrup’s) exposure had been extinguished in 1982 by the close of the statute of repose.

Jacobs’ first argument was that the recent 35W statute could not have a retroactive application that would revive the state’s rights against the firm; statutes do not typically apply retroactively. Jacobs also contended that applying the statute retroactively would be a violation of Jacobs’ constitutional due process rights.

Decision: The Minnesota Supreme Court held that the language of the statute “clearly and manifestly” indicated a legislative intent that the compensation statute apply retroactively. The court reviewed other decisions interpreting similar “Notwithstanding...” clauses to reach this opinion.

The court agreed with Jacobs’ assertion that when the statute of repose period ended in 1982, Jacobs (Sverdrup) had obtained a protectable property interest. Such an interest is entitled to due process protection. However, the court stated that such protection is not absolute, and must be balanced against the state’s legitimate interests. Though perhaps economically unfair to Jacobs to revive its exposure to liability, the 35W statute was narrowly limited to fundamentally responsible parties, and rationally related to protection of a legitimate state interest.

Comment: It is not clear from the decision whether the statute also trumps any contractual provisions that might benefit Jacobs, such as a limitation of liability.

3. **Issue:** Owner's withholding of geotechnical information; effect of site condition disclaimers. *Granite Construction Co. v. Texas Dept. of Transportation*, Court of Appeals of Texas (2012).

Summary: Public toll road construction project traversing the Edwards Aquifer Recharge Zone, a geological formation known to have highly varied subsurface conditions and extensive groundwater. Subcontractor ATS was engaged to drill foundation shafts for abutments and bridges, and fill the shafts with reinforced concrete. The DOT provided bidders with selected excerpts from a geotechnical report (boring logs), required bidders to examine the site and make their own conclusions regarding the character, nature, and quantity of the work to be performed, and disclaimed the reliability of the information it had provided.

Actual conditions proved to be tougher than ATS anticipated, resulting in 238 rig days vs. 81 estimated, and in the need to use the more expensive casing method of installing the concrete. ATS's differing site condition claim was reviewed by the DOT's engineer, who had final, conclusive, and binding authority to decide claims. He decided against ATS.

Decision: The court of appeals deferred to the DOT's engineer, and therefore reviewed the case only to look for fraud, misconduct, or gross error. The court held that in Texas a requirement to examine the site, coupled with a disclaimer of the reliability of the factual information provided, "precludes contractor from maintaining a claim for varying site conditions." Such disclaimers also excused the owner from any responsibility to disclose the geotechnical report content that it had withheld. Moreover, the court held that there was no warranty that the contract documents were free from defects. Finally, requiring the more expensive casing method was a logical response to caving of the drilled shafts.

Comment: This decision is harsh and not typical of DSC decisions. It also appears to deny that the Spearin doctrine applies in Texas. Withholding relevant site information has been discredited in most jurisdictions, and the notion that the disclaimers negate the operation of the DSC clause that they appear in is extreme.

The EJCDC documents require that known site reports be provided to bidders, and presume that at least some factual site information will be classified as worthy of reliance. The documents do contain disclaimers, and in some jurisdictions these will have considerable force.

Deference to the decisions of a state agency is a common legal principle, but it does not typically apply to contractual decisions where the state is one of the parties.

4. **Issues:** No damages for delay clause; contractor's release of claim. *Port of Houston Authority of Harris County v. Zachry Construction Corporation*, Court of Appeals of Texas (2012).

Summary: Zachry contracted to construct a wharf and conduct dredging activities. Some of the main activities included construction of freeze walls that would allow the contractor to work "in the dry." According to the contractor, the owner hindered and interfered in Zachry's progress in various respects, and ultimately forced Zachry to work "in the wet."

During construction the owner began assessing and withholding liquidated damages from the contractor, for late completion. At the same time, the contractor would submit progress payment applications for work that it completed, accompanied by required forms that stated that the contractor had been paid "all sums owing" and had no further claims for Work completed. The contractor contended that it had understood these forms to be lien waivers, since the forms were entitled "Affidavit and Partial Release of Lien."

The two parties were at "all out war" for three years, including a three month long jury trial. The jury decided in the contractor's favor on most issues, resulting in an \$18 MM verdict against the Port Authority.

Decision: The appellate court reversed the jury's findings. The contract had contained a very explicit no damages for delay clause. The clause expressly applied even in cases in which the owner itself hindered or interfered with contractor's progress. The court ruled that such clauses are enforceable and that no exception was applicable.

The court also agreed with the Port Authority's position that even if liquidated damages had been wrongly imposed, the waivers that Zachry repeatedly executed relieved the Port of any duty to release some \$2 MM in withheld liquidated damages.

Finally, the court enforced a prevailing party legal fees clause, awarding the Port legal fees of more than \$10,590,000.

Comment: The no damages for delay clause was severe; most such clauses, including EJCDC's, apply only to delays caused by force majeure events or third parties, not to the owner's or its A/E's interference. The clause here was very clear (typed in part in CAPITAL LETTERS), and its enforcement was fair. More troubling is the ruling on the waivers. The wording of the waivers did extend beyond liens, but by agreeing that no more was owed on the completed work, surely the contractor was not waiving its right to contest unjustified withholdings.

5. **Issue:** Application of construction contract arbitration clause to design engineers and construction manager. *PC Construction Co. v. City of Salisbury*, United States District Court for the District of Maryland (2012).

Summary: The City of Salisbury, Md., entered into separate contracts with an engineering firm, a construction manager, and a construction contractor, relating to a wastewater treatment plant project. After project completion the City sued the three firms, and the contractor's surety, in state court, alleging design defects and plant performance failures. The contractor and its surety petitioned the federal court to compel the dispute to be arbitrated, citing the federal statute strongly favoring arbitration of disputes.

The construction contract required that any contractor claims be submitted to a dispute review board for final adjudication. The CM and design contracts did not contain arbitration clauses, and the project contracts did not include joinder provisions (in which the parties agree to participate in a joint arbitration proceeding).

Decision: The federal court reviewed the construction contract's "arbitration" clause—as noted, actually a dispute review board clause, but correctly treated as functionally the same—and the claims provisions. Although sloppily drafted by cobbling together various AIA and other standard provisions, and containing an inadvertent reference to "the parties" where the word "contractor" was intended, the court concluded that the arbitration (DRB) clause was a one way street that applied to contractor claims only. The claims in the state lawsuit were owner claims, and thus not subject to arbitration (DRB).

The federal court noted that nonparties that would otherwise not be subject to an arbitration clause may be subject if they have availed themselves of the benefits of other provisions of the subject contract. However, in this case the court declined to analyze whether the engineering firm and construction manager had somehow benefited from the construction contract, because in the end only contractor claims were subject to the DRB.

Comment: We have drafted dispute resolution clauses that are consistent and coordinated. Hopefully users would not need to litigate the meaning of the clauses.

It is of interest that the construction contract contained a dispute review board provision. Such boards have been successful in reducing or managing claims on large infrastructure projects. In many cases the DRB decisions are not final and binding, but apparently they were on this project.

6. **Issues:** Responsibility of city to pay engineering firm for additional services. *Patrick Engineering, Inc. v. City of Naperville*, Supreme Court of Illinois (2012).

Summary: Agreement between city and engineering firm for stormwater needs analysis and data collection. Agreement specifically stated that additional services must be authorized by city in writing, and contained detailed procedures that the engineering firm was to follow with respect to “verbal” requests from the city for additional services.

Soon after the project commenced city employees and the engineering firm began discussing additional services. Some of the exchanges were in writing, but were conditional, and not made by high level city officials. Eventually the engineering firm became frustrated by lack of payment for services rendered, and terminated its work. A lawsuit to recover fees (approximately \$300,000) followed, based on the firm’s contention that the city was “equitably estopped” from avoiding the responsibility to pay the fees. The case ultimately reached the Illinois Supreme Court.

Decision: The Illinois Supreme Court opined that “when public revenues are at stake, estoppel is especially disfavored.” The court noted that the contract clause had been drafted to avoid the very situation that the engineering firm had brought before the court, and that the firm had ignored the contract clause’s terms. The court also held that from a procedural standpoint, any party claiming equitable estoppel must plead **specific facts** that show (a) an affirmative act by the municipality or an official with express authority to bind the city, and (b) reasonable reliance by the claimant, inducing the claimant to detrimentally change its position. Who, what, when, where. The engineering firm’s court pleadings did not specify facts regarding either point. The court was plainly troubled by the vagueness of the firm’s contentions.

Comment: The EJCDC engineering services documents require written authorization for most non-emergency additional services. These situations can be difficult when a governmental or corporate official purports to have more authority than he/she really has. There is no excuse, however, for ignoring contractual procedures and failing to establish who is actually authorized to make city commitments.

7. **Issue:** Limited benefit of additional insured status under commercial general liability (CGL) insurance policy; subcontractor's duty to indemnify. *Engineering and Construction innovations, Inc. v. L.H. Bolduc Co., Inc.*, Supreme Court of Minnesota (2013).

Summary: Contract to install a lift station and access structures at points along a newly constructed sewer pipeline in Hugo, Minnesota. Contractor ECI retained subcontractor Bolduc to drive sheet cofferdams at locations to be specified by ECI. The subcontract contained a requirement that ECI be named as an additional insured under the sub's commercial general liability policy. The subcontract also featured a broad indemnification commitment, which was required to be supported by insurance.

During construction Bolduc, the sub, drove a sheet into the pipeline, causing \$235,000 in damage. Bolduc drove the sheet where it was directed to drive it by ECI. Based on the subcontract provisions, ECI sought reimbursement of its repair expenditures from Bolduc, and as an additional insured, from Bolduc's CGL insurer. After a three-day trial, the jury found that Bolduc was not negligent. (No determination was made as to ECI's negligence.) An appellate court determined that Bolduc's insurer nonetheless was obligated to provide coverage to ECI as an additional insured, and that Bolduc was obligated to indemnify ECI regardless of fault. The case then progressed to the Minnesota Supreme Court.

Decision: A. The Supreme Court held that there is coverage for ECI as an additional insured only in the case of ECI's vicarious liability for Bolduc's negligent acts or omissions. Because Bolduc was cleared of negligence by the jury, Bolduc itself was not liable, and therefore ECI was not vicariously liable. "The meaning of the additional insured endorsement is that it limits coverage to those instances in which the acts or omissions (i.e. negligence) of Bolduc leads to ECI's liability." ECI's negligence, or lack of negligence, was irrelevant to insurance coverage under the sub's CGL policy.

B. Minnesota has an anti-indemnity statute. Indemnities in construction contracts are enforceable only to the extent of the indemnifying party's own negligence or breach of contract, with certain insurance-related exceptions. Because Bolduc was not negligent or in breach of contract for the pipeline damage, a contractual obligation to indemnify ECI would violate the anti-indemnity statute.

Comment: A. Note the important point that being an additional insured does not provide coverage for the additional insured's own independent acts or omissions. Those might have been covered here by ECI's own CGL policy; that is not discussed in the case. B. EJCDC's indemnity clauses do not violate statutes like Minnesota's.

8. **Issue:** Enforcement of pay-if-paid clause. *BMD Contractors, Inc. v. Fidelity and Deposit Company of Maryland*, United States Court of Appeals, Seventh Circuit. (2012).

Summary: Construction of a manufacturing facility in Indiana. Industrial Power was a subcontractor, and BMD a lower-tier sub. The facility owner filed for bankruptcy while money was owed to the general contractor; the general failed to pay its subs, including Industrial Power; Industrial Power refused to pay BMD.

The sub-subcontract stated that Industrial Power's receipt of payment from above was a "condition precedent" to BMD's right to payment from Industrial Power. BMD argued this should be interpreted as a "pay-when-paid" provision, not "pay-if-paid." BMD also challenged the clause as being in violation of public policy in Indiana.

Decision: The federal district court and Seventh Circuit concluded that the clause is an enforceable pay-if-paid clause. The clause's "condition precedent" wording was definitive, as in other jurisdictions. In some cases such clauses are accompanied by explanatory "transfer of risk" wording, in which the parties expressly acknowledge that the risk of owner non-payment is being transferred to the lower-tier party, but the court held that such wording was not necessary to establish pay-if-paid.

The Seventh Circuit held that Indiana law favored freedom of contract, extending the "utmost liberty" to enter into enforceable contracts. No countervailing right could be identified to justify the contention that the pay-if-paid contract clause violated public policy.

Comment: The new EJCDC construction subcontract contains a "pay-when-paid" clause. The Engineering series subagreements give the drafter several options, including both a pay-if-paid clause and a pay-when-paid clause.

Note that the court's decision clarified that the payment bond surety's duty to pay was defined by the principal's duty to pay. The pay-if-paid provision protected the surety from any obligation to BMD.