

Developing Undeveloped Property: Despite Recent Limitations on Federal Jurisdiction over Wetlands, You Must Still Do Your Homework

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This year began on an encouraging note for owners of undeveloped property when the United States Supreme Court issued its decision in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Corps of Engineers*, 531 U.S. 159 (2001). In its sharply divided 5 to 4 ruling, the Supreme Court dramatically limited the jurisdiction of the Army Corps of Engineers to regulate the nation's wetlands. The Court ruled that isolated, intrastate, non-navigable ponds, intermittent streams, or wetlands that are not adjacent to, or a tributary of, a navigable waterway are not subject to the "dredge and fill" regulations of §404 of the Clean Water Act ("CWA"), 33 U.S.C. §1344, and, thus, are not subject to the Corps' landfill permitting requirements when an owner or developer wants to fill or dredge such water bodies. Prior to the Court's ruling in *SWANCC*, the Corps had taken the position, under its "Migratory Bird Rule," that if migratory birds used such isolated water bodies, the Corps had jurisdiction to manage these habitats. The Corps had

concluded that Congress intended to regulate these intrastate waters under the CWA and Congress had the power to delegate its authority to the Corps under the Commerce Clause. The Court concluded, however, that Congress had not intended to extend the reach of the CWA over such intrastate waters and that in regulating such bodies the Corps had exceeded its Congressional mandate.

The impact of the Court's decision in *SWANCC* is far-reaching. One estimate of the ruling's effect calculated that the decision removed 30% to 60% of the country's wetlands from the Corps' jurisdiction. See, *The SWANCC Decision and State Regulations of Wetlands*, Jon Kusler, Association of State Wetland Managers, Inc. In the Midwest, the Indiana Department of Environmental Management ("IDEM") estimated that *SWANCC* removed more than 30% of the 800,864 acres of wetlands in Indiana from the permitting requirements of §404 of the CWA. See, Section 401 Water Quality Certification

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Program Response to *SWANCC v. Army Corps of Engineers*, <http://ww.IN.gov/idem/water/planbr/401/SWANCC.html>.

After the Court's publication of *SWANCC*, owners of undeveloped property that contained an isolated water body rejoiced. They believed *SWANCC* removed a substantial barrier to the development of their properties. No longer would they have to petition for a permit from the Corps under §404 of the Clean Water Act before they could fill or dredge isolated wetlands on their properties. No longer would they risk that the Corps would reject a petition, as it had rejected the petition of the Solid Waste Agency of North Cook County, because the proposed project would have an impact upon area-sensitive species that was "unmitigable." 531 U.S. at 165. In short, many owners believed the Court in *SWANCC*, in one fell swoop, had removed a substantial impediment to the development of their properties.

Although the Court's decision in *SWANCC* was sweeping in scope, the euphoria of owners of undeveloped property should be restrained. Owners may not be completely free to fill or dredge the isolated water bodies on their properties but may now have to obtain approval or

authorization from a state or local agency before proceeding with development. Indeed, the Court in *SWANCC* reasoned that the Corps' interpretation of Congressional intent had invaded the states' authority to regulate property rights.

Specifically, the Court wrote that [W]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. [Citations omitted.]

531 U.S. at 172-73.

Fifteen states have exercised their sovereign powers and implemented regulations to protect isolated wetlands. These include Maine, Connecticut, New Hampshire, Rhode Island, Massachusetts, Vermont, New York, New Jersey, Maryland, Virginia, Florida, Minnesota, Michigan, Pennsylvania, and Oregon. See, *SWANCC*

Decision and State Resolution of Wetlands, Jon Kusler, Association of State Wetland Managers, Inc.

The nature and extent of the control these states exercise over isolated wetlands varies. Some regulate isolated wetlands only if they exceed a certain size. Others exempt isolated wetlands from regulation if fill or dredging is conducted in conjunction with certain approved activities such as agriculture or silviculture. Other states regulate isolated wetlands in a cooperative relationship with local authorities. But, regardless of the manner in which these states regulate isolated wetlands within their borders, a property owner who plans to develop such a wetland in these states must be mindful of the state's authority over isolated water bodies. The Supreme Court's decision in no way curtailed state regulatory programs.

The remaining 35 states provide little specific regulatory protection for isolated wetlands. However, even in these states, an owner of property containing isolated wetlands may not be free to develop his property. In some of these states, local governments have adopted wetland protection ordinances which should be reviewed before dredging or filling. And in states in which isolated wetlands are located in coastal areas, those wetlands may be subject to

coastal zone management programs or shoreline zoning statutes designed to protect a shoreline from uncontrolled development. Isolated wetlands or water bodies may not be the focus of such shoreline management regulations, but a landowner would be wise to review those regulations before developing isolated wetlands near a coast.

In addition, states may implement regulatory measures to protect isolated water bodies pursuant to their authority under §401 of the CWA, 33 U.S.C. §1341. Under §401, the states must certify that discharges into waters of the state comply with the CWA before issuing a discharge permit. This program is generally administered under the National Pollutant Discharge Elimination System ("NPDES") program, as provided in §402 of the CWA, 33 U.S.C. §1342. Under this water quality program, a person who discharges a pollutant into surface water must first obtain a NPDES permit from the EPA or the state that has received authority to administer the NPDES program, and the discharge must comply with permit limits.

In Indiana, for instance, IDEM has announced that, with respect to isolated wetlands,

[t]he *SWANCC* decision has no bearing on whether these water bodies are "waters" of

the state subject to state law. *Therefore, isolated water bodies, including isolated wetlands, will not cease to be waters of the state simply because they are no longer waters of the United States.* (Italics in original.)

Memo of Lori F. Kaplan, Commissioner of the Indiana Department of Environmental Management of April 11, 2001, entitled "IDEM Actions Related to *SWANCC* Supreme Court Decision."

To protect these "waters of the state," IDEM has taken the position that all such waters are subject to water quality standards and that "discharges" of dredged or fill matter into an isolated wetland in Indiana are likely to be in violation of IDEM's water quality standards. Finally, IDEM reminded that

Indiana rules prohibit any discharge of a pollutant (which includes dredged or fill material) into waters of the state from a point source discharge (which includes bulldozers and backhoes) unless either the discharger has obtained an NPDES permit or an exclusion applies. One of the current exclusions is for discharges of dredged or fill material into waters of the state that are regulated under section 404 of the CWA. However, this exclusion does not apply to discharges into

waters that are no longer subject to section 404 of the CWA. *Therefore, a discharge of dredged or fill material into isolated water bodies or isolated wetlands is subject to the prohibition on discharging without an NPDES permit.* (Emphasis added.)

SWANCC may have removed hundreds of thousands of acres of undeveloped property from the jurisdiction of the Corps. The decision, however, did not restrict the states' right to regulate isolated wetlands either directly, as part of a wetlands management program, or indirectly, as part of the states' sovereignty over coastal areas. The narrow support the Justices of the Supreme Court gave to the *SWANCC* decision reflects the sharp differences of opinion in our citizenry concerning how to balance the importance of managing wetlands to protect native species and the importance of allowing owners to control their own property. Now more than ever an owner considering development of an isolated wetland would be wise to do homework on the regulatory programs of the state in which property is located. ■

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“Pay When Paid” Clauses: An Important Consideration for General Contractors and Subcontractors

A written agreement between a general contractor and a subcontractor will often contain a "pay when paid" clause. A pay when paid clause is an effective way for a general contractor to protect itself in the event that it is not paid for its work by the project owner. On the other hand, subcontractors should be mindful of such clauses, as they may pose a significant impediment to a subcontractor's rights to obtain payment for its work.

A pay when paid clause generally provides that a general contractor is obligated to pay the subcontractor for its work *only* "when" or "if" the contractor receives payment from the owner. Stated differently, where a pay when paid clause is in the contract between the general contractor and the subcontractor, if the owner does not pay the general contractor for whatever reason, the general contractor is not contractually obligated to pay the subcontractor for its work. Although the effect of these clauses has been widely litigated in other jurisdictions, Illinois courts have only squarely addressed the validity of pay when paid clauses in one instance. See *A.A. Conte, Inc. v. Campbell-Lowrie-Lautermilch Corp.*, 132 Ill. App. 3d 325, 477 N.E.2d 30 (1st Dist. 1985).

In *A.A. Conte*, the Illinois Appellate Court held that pay when paid clauses are enforceable under Illinois law as a valid form of what is known as a "condition precedent." A condition precedent is an event that must occur *before* one party to a contract is obligated to perform his or her obligations pursuant to that contract. See, e.g., *Premier Elec. Constr. Co. v. American Nat'l Bank*, 658 N.E.2d 877, 885 (Ill. App. Ct. 1995). If there is a valid condition precedent in a contract, the party in whose favor the condition exists is not obligated to perform an action required by the contract until the condition has been satisfied. See, e.g., *John J. Calnan Co. v. Talsma Builders, Inc.*, 395 N.E.2d 1076, 1080 (Ill. App. Ct. 1979).

In *A.A. Conte*, the general contractor and the subcontractor entered into a written agreement which stated that the subcontractor would be paid "if payment . . . has been received by [the general contractor] under its general contract [with the owner]." *A.A. Conte*, 477 N.E.2d at 32. After the subcontractor had performed substantial work pursuant to the subcontract, the project owner became insolvent and failed to pay the general contractor. Because the general contractor did not receive payment from the

owner, the general contractor, in reliance on the pay when paid clause, made no payment to the subcontractor. In addition to asserting a mechanics lien against the project, the subcontractor brought an action against the general contractor to recover payment for the work performed under the subcontract.

The general contractor denied that it owed any debt to the subcontractor, arguing that the payment clause in the subcontract was a valid condition precedent—the condition being that the contractor had to receive payment from the owner of the project under the general contract before it was obligated to pay the subcontractor for its work. The Illinois Appellate Court held that the payment clause was an enforceable condition precedent and that because the owner had not paid the contractor, the subcontractor was not entitled to payment from the general contractor. See *id.* at 33.

In holding that the payment clause was a valid condition precedent, the court expressly rejected the subcontractor's argument that the clause created a limitation only as to the timing of payment. See *id.* In other words, the court held that the payment clause did not simply

control *when* the subcontractor was paid by the general contractor—it controlled the subcontractor's *right* to be paid under the subcontract. Based on the unambiguous language in the subcontract, the court strictly enforced the plain language of the agreement, stating that it "may not rewrite a contract to suit one of the parties but must enforce the terms as written." *Id.*

The court in *A.A. Conte* also deemed it significant that the subcontract was entered into by two business entities experienced in the construction industry and that, presumably, the parties had entered into many other contracts of a similar nature in the course of their business. *See id.* Thus, at least one Illinois court decision supports enforcement of pay when paid language in an agreement, despite a harsh result for the subcontractor.

However, other courts have not similarly construed pay when paid clauses. In fact, the highest courts in California and New York have held that any clause purporting to make payment by the owner to the contractor a true condition precedent to the contractor's obligation to pay the subcontractor is unenforceable as contrary to public policy. *See Wm. R. Clarke Corp. v. Safeco Ins. Co. of Am.*, 938 P.2d 372,

374 (Cal. 1997); *West-Fair Elec. Contractors v. Aetna Cas. & Sur. Co.*, 661 N.E.2d 967, 971 (N.Y. 1995). Under California and New York law, such clauses will not prevent a subcontractor from receiving payment under the subcontract in the event of nonpayment by the owner.

Even a federal court applying Illinois law strived to sidestep the harsh results sanctioned by the *A.A. Conte* court. In *Brown & Kerr Inc. v. St. Paul Fire & Marine Insurance Co.*, 940 F. Supp. 1245, 1250 (N.D. Ill. 1996), the court declined to construe a pay when paid clause as a valid condition precedent to the subcontractor's receipt of payment because such a construction would result in a "significant forfeiture" to the subcontractor. The subcontract at issue in *Brown & Kerr* stated that final payment would "be made by the Contractor to the Subcontractor when . . . the Contractor has received final payment from the Customer under the Prime Contract." *Id.* at 1247. When the contractor failed to pay the subcontractor for work completed under the subcontract, the subcontractor brought an action against the contractor's surety to receive payment under the payment bond.

The surety argued that because the contractor was not paid by

the owners, the surety was under no obligation to pay the subcontractor under its bond pursuant to the pay when paid clause in the subcontract. *See id.* at 1248. The court rejected this argument, concluding that the pay when paid clause did not affect the contractor's right to payment under the bond *or* create a valid condition precedent to payment under the subcontract. *See id.* at 1250. Declining to follow *A.A. Conte* and instead relying on the dissenting opinion in that case, the court concluded that the pay when paid clause did not create a condition precedent to payment, but rather it constituted a timing provision requiring the general contractor to pay the subcontractor within a reasonable time. *See id.* at 1250.

The *A.A. Conte* decision does not necessarily mean that a subcontractor facing a pay when paid clause is left without remedy—the subcontractor still may file a mechanics lien. Section 21 of the Illinois Mechanics Lien Act, 770 ILCS 60/21, expressly provides that any subcontract provision conditioning payment from a contractor to a subcontractor upon receipt of payment from the owner is not a defense to a subcontractor's lien claim.

Recent Seventh Circuit Opinion Teaches Important Lessons for Sureties and Replacement Contractors

“Pay When Paid” Clauses

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In short, under current Illinois law, an unambiguous pay when paid clause may block a subcontractor's right to recover in a breach of contract suit against the general contractor. As a result, a general contractor may find the pay when paid clause an effective method of avoiding payment to a subcontractor for work when the owner has not paid the general contractor. A pay when paid clause does not prevent a subcontractor from filing a mechanics lien, but if a subcontractor is concerned about preserving its contract rights, the subcontractor, *before* signing a subcontract presented by the general contractor, should review (or have its attorney review) the subcontract to see if it includes a pay when paid clause. If it does, the subcontractor may want to consider whether it wants to share the risk of owner non-payment. ■

A federal appeals court recently ruled that under both federal and Illinois law a replacement subcontractor hired by a bonding company to complete work on a project was not entitled to assert a claim against the general contractor or the general contractor's bond. Instead, the replacement subcontractor was required to look for payment solely from the surety that hired it to complete the work abandoned by the prior subcontractor. However, in the same case, the appellate court ruled that the *bonding company* which hired the replacement subcontractor, standing in the shoes of the predecessor subcontractor, may sue the general contractor for damages resulting from the general contractor's alleged delays.

In *United States v. Pickus Construction & Equipment Co.*, 249 F.3d 664 (7th Cir. 2001), Pickus hired Metrick Electric as the electrical subcontractor on a Navy construction project, and Metrick supplied the performance bond required under applicable federal law (the Miller Act). When Metrick became insolvent and abandoned its work, Metrick's bonding company hired Aldridge Electric to complete Metrick's work. Aldridge completed the work started by Metrick, and Aldridge was paid for its work by the bonding company.

Upon Aldridge's completion of its work, both Metrick's bonding company and Aldridge sued Pickus (the general contractor) and Pickus's bonding company, claiming that delays attributable to Pickus increased the ultimate cost of Aldridge's completion of the electrical work by \$400,000. The trial court heard evidence regarding Aldridge's increased costs, which Metrick's bonding company and Aldridge attributed to delays that had occurred both before and after Aldridge replaced Metrick. The trial court determined that Aldridge had not suffered damages as a result of any Pickus delays subsequent to the time that Aldridge was hired, and that Aldridge was not entitled to anything more than the amount it had negotiated with Metrick's bonding company, and therefore dismissed the lawsuit.

The court of appeals first noted that the trial court never should have permitted Aldridge to sue Pickus or its bonding company. The court of appeals determined that because Aldridge did not have a contract with Pickus (only Metrick, the predecessor, did) and because Aldridge already had been paid all of the amounts owed to it under its contract with Metrick's bonding company, Aldridge could not even sue Pickus or Pickus's bonding company. *Pickus*, 249 F.3d at

665. (The court of appeals did not address whether Aldridge would have been able to assert a claim against the general contractor if Metrick's bonding company had failed to pay Aldridge.)

The court of appeals continued, noting that the lower court stopped trial after determining that Aldridge was not entitled to recover from Pickus. However, the lower court failed to address whether Metrick's bonding company, which took over the project and therefore stepped into Metrick's shoes *vis-a-vis* Pickus, was entitled to recover damages on account of Pickus's alleged delays, especially delays that pre-dated Aldridge's involvement. The court noted that "Metrick's abandonment of the job neither increases nor reduces Pickus's exposure, which should be evaluated as if Metrick had been the electrical subcontractor from start to finish." *Pickus*, 249 F.3d at 666. The court then remanded the case for a new trial on the issue of Pickus's liability to Metrick's bonding company.

Even though the *Pickus* case involved an unusual fact situation (both the general contractor's and subcontractor's bonds were provided under the Miller Act, the subcontractor attempting to assert the bond claim was a replacement subcontractor, and the replacement subcontractor already had been paid the full contract amount by the surety that hired it), three important

lessons can be learned from *Pickus*:

First, *Pickus* emphasizes the importance of carefully pricing and negotiating the contract under which a surety hires a replacement to complete work abandoned by another contractor. Because (like Aldridge) the replacement may not be entitled to assert a claim against the general contractor or the general contractor's bond, the replacement's sole remedy may be its contract with the surety that hired it to complete the work—work that already had become problematic for its predecessor. The contract between the surety and the replacement therefore should address all issues that might arise during the completion of the project, such as whether the surety will compensate the replacement contractor for project delays or similar matters that might increase the replacement contractor's costs.

Second, the *Pickus* case restates general principles of subrogation. The surety that takes over a project is subrogated to the rights of (steps into the shoes of) the contractor for which it acts as surety, including any claim that contractor has against the owner or general contractor. Thus, if the prior contractor could not complete work within budget due to conduct of the owner or general contractor, the bonding company may seek

compensation from the owner or general contractor.

Third, *Pickus* highlights issues that may arise when a surety hires a replacement contractor but has not reached agreement with the general contractor or owner concerning amounts owed to the predecessor contractor (to whose rights to payment the surety becomes entitled under principles of subrogation). If the cost of completing the subcontractor's work increases due to conduct of the owner or general contractor, the surety will want to be compensated for that increased cost. However, if the surety hires a replacement to complete the work at increased cost and has no agreement with the owner or general contractor as to how much it is owed, the surety risks it will not be able to recover its increased cost. Thus, a surety may (as in *Pickus*) attempt to pass some of the risk of non-payment along to the replacement contractor (in *Pickus*, Aldridge and Metrick's bonding company apparently had an arrangement whereby Aldridge was paid some reduced amount by the surety, and they would share in any recovery from *Pickus*), but all parties are better off if increased costs are negotiated with the general contractor or owner before the replacement contractor begins work. ■

How Much Time Does A Plaintiff Have to File A Lawsuit Involving Construction? It All Depends

Statutes of limitation provide time limits in which a plaintiff must bring a legal claim. These statutes provide a defendant with protection from having to defend against old, stale claims and protects one from the fear that he may be hauled into court at any time for actions or omissions that occurred in the distant past. However, Illinois law provides for different statutes of limitation depending on the type of claim or the type of defendant. When it appears that multiple limitation periods may apply to a case, courts must determine which statute of limitation applies.

For construction disputes, three statutes of limitation are noteworthy. *First*, there is a specialized four-year statute of limitation for tort or contract claims arising out of construction projects brought against "any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property." 735 ILCS 5/13-214(a). *Second*, for claims based on a written contract, a plaintiff must bring a claim within ten years of when he or she knew or should reasonably have known about the claim. 735 ILCS 5/13-206. *Third*, under the Tort Immunity Act, a tort claim against a local government or its employees must be filed within one year from when it is discovered or reasonably should

have been discovered. 745 ILCS 10/8-101.

Parties to litigation often disagree as to what limitation period applies, so courts often are asked to resolve the dispute. Three recent cases decided by the Illinois Appellate Court show what can happen. In *Blinderman Construction Co. v. Metropolitan Water Reclamation District*, 2001 WL 1008458 (Ill. App. Ct., 1st Dist., Sept. 4, 2001), the court, in deciding whether to apply the four-year limit for filing actions arising from construction disputes or the ten-year limit for filing actions arising from a written contract, determined that the four-year limit applies when a contractor sues for extras. However, in *Litchfield Community Unit School District No. 12 v. Specialty Waste Services, Inc.*, 325 Ill. App. 3d 164 2001 WL 1144137 (Ill. App. Ct., 5th Dist., Sept. 25, 2001), the court decided that the longer, ten-year limitation for written contracts, not the four-year construction limitation period, applied when a school district sues on a contract to remove asbestos. Finally, in *Greb v. Forest Preserve District*, 752 N.E.2d 519 (Ill. App. Ct., 1st Dist., 2001), the court held that the one-year limitation period for tort claims against a municipality applies when a motorist sues a city for negligence in maintaining a road construction site.

1. *Blinderman Construction Co. v. Metropolitan Water Reclamation District*

In *Blinderman*, the Metropolitan Water Reclamation District ("the District") hired Blinderman Construction ("Blinderman") in April 1983 to construct a laboratory building. Blinderman completed construction and was paid the contract price but filed suit in 1993 to recover approximately \$3 million allegedly due for extra work done at the request of the District. *Blinderman*, 2001 WL 1008458, *1. The contract between Blinderman and the District provided that the District's engineer could request and pay for "extra work" based on his supervision and management of the construction. *Id.* at *3. Blinderman filed suit within the ten-year limit for actions based on written contracts but outside the four-year limit for contract claims relating to construction projects.

The District moved to dismiss Blinderman's lawsuit, arguing that it was barred by the four-year statute of limitation for construction projects. In response, Blinderman argued that the four-year limitation period did not apply because it was intended only for actions arising from defects in the work, such as cracks in a foundation discovered after construction is completed. *Id.* at *3.

The court rejected Blinderman's argument, noting that the four-year construction statute of

limitation applies if a party's claim concerns an act or failure to act relating to the "design, planning, supervision, observation or management of construction." *Id.* (citing 735 ILCS 13-214(a) (emphasis added)). Because the District and its engineer had the contractual right to supervise and manage construction, including the right to request "extra work," the court reasoned Blinderman's suit for recovering the cost of extra work clearly fell within the four-year statute of limitation. Therefore, the Court dismissed Blinderman's suit.

2. *Litchfield Community Unit School District No. 12 v. Specialty Waste Services, Inc.*

In *Litchfield*, the plaintiff school district hired the defendant, Specialty Waste, to remove asbestos. Eight years after Specialty Waste completed its work, the school district found that ceiling plaster at one of the schools still contained asbestos. The next year the district sued Specialty Waste for breach of contract.

Specialty Waste moved to dismiss the suit, claiming that it was untimely under the four-year construction statute of limitation. The court disagreed, holding that the general ten-year statute of limitation pertaining to written contracts governed. Looking to the type of work performed by the defendant, the court concluded that the removal of asbestos was not work covered by the construction statute of limitation because it was not "improvement in real property," but rather "consisted of nothing more than

ordinary repair and maintenance of an existing structure." *Litchfield*, 2001 WL 1144137, *2. The court determined that asbestos removal was more like patching plaster, painting, or replacing worn carpeting, work that other courts had found to be outside the scope of the statute of limitation for construction contracts. Further, the court determined that, like these other activities, asbestos removal did not substantially enhance the value, beauty, or utility of the property, and, therefore, could not be considered an "improvement to property" under the statute. The court denied Specialty Waste's motion to dismiss.

3. *Greb v. Forest Preserve District*

In *Greb*, the plaintiff was riding his motorcycle on August 28, 1994 through the Forest Preserve District of Cook County on a road that was undergoing construction and repair. While riding through the construction zone, plaintiff drove over some loose stones, skidded, lost control of the motorcycle and collided with one of the construction barricades, injuring himself. On August 28, 1995 plaintiff sued the Forest Preserve District, the State of Illinois, the Illinois Department of Transportation and Cook County. In February 1997, plaintiff amended his complaint to add the City of Chicago as a defendant. *Greb*, 752 N.E.2d at 520. The city filed a motion to dismiss plaintiff's claim, arguing that it was untimely under the Tort Immunity Act's one-year statute of limitation. *Id.* at 520. The trial

court granted the city's motion to dismiss. *Id.*

On appeal, the plaintiff argued that because he was injured due to negligence on a construction site, the four-year statute of limitation governing tort and contract actions relating to construction activities should apply to plaintiff's claim against the city. *Id.* Relying on *Tosado v. Miller*, 720 N.E.2d 1075 (Ill. 1999), the court held that the Tort Immunity Act's one-year statute of limitation governed instead of the four-year limitation period, despite that the accident occurred allegedly because of negligence at a construction site. The court noted that the legislature provided a one-year limitation period in the Tort Immunity Act to protect local governmental entities and their employees by encouraging "early investigation into the claim asserted against the local government," and, therefore, permitting "prompt settlement of meritorious claims and allow[ing] governmental entities to plan their budgets in light of potential liabilities." *Greb*, 752 N.E.2d at 521.

Conclusion

There is a specialized four-year statute of limitation for claims arising out of construction disputes, but, as the above cases illustrate, this limitation period does not apply to every construction case. It is therefore advisable to consult an attorney as soon as the grounds for a possible lawsuit become known to determine which limitation period is applicable. ■

Be Careful What You Say: Allegations of “Bid Rigging” May Be Defamatory

Competitive bidding in the construction industry can be highly stressful and sometimes acrimonious. Nevertheless, those in the industry must be mindful of the need to avoid inaccurate statements about competitors. In a recent case, an Illinois Appellate Court held that the Defendant, president of a lighting manufacturer, may be liable for defamation for alleging that Plaintiff engaged in bid rigging and nepotism by allegedly securing a construction contract for his brother-in-law, one of Defendant's competitors. *Parker v. House O'Lite Corp.*, 2001 WL 968418 (Ill. App. Ct., 1st Dist., Aug. 22, 2001).

In 1994, Cook County received approval to build a new hospital to replace the old Cook County Hospital on the near west side. The County hired a construction manager to oversee the design team responsible for all of the plans and specifications for the new hospital. The design team included an established engineering firm responsible for the mechanical and electrical work, including the lighting design and specifications. Plaintiff was a senior electrical engineer employed by the engineering firm and responsible for the hospital's electrical and lighting design. *Id.* at *1-2.

In January 1998, Plaintiff sent out his lighting specifications for bid. When Defendant, president of a lighting fixture manufacturer that was a potential bidder for the hospital job, reviewed the lighting specifications, she believed they were drawn specifically to favor the Plaintiff's brother-in-law, who allegedly owned and operated one of Defendant's competitors. Defendant brought her concerns to the attention of the construction project manager. After conducting his own investigation, however, the project manager concluded there was no "bid rigging." *Id.* at *2.

Still convinced that Plaintiff had rigged the bid, Defendant pursued the matter further. In January, 1998, she wrote two long letters, one to the project manager and one to the Cook County State's Attorney, detailing her allegations that Plaintiff's specifications were rigged in favor of his brother-in-law. In addition, she sent copies of the letters to several other persons, including a reporter at WBBM-TV in Chicago. *Id.* at *3-5, 12. Based on these letters, Plaintiff sued Defendant for defamation and false light invasion of privacy. The Illinois Appellate Court recently held that Plaintiff is entitled to a jury trial on his claims. *Id.* at *13.

To prove defamation, a plaintiff must show that (1) the defendant made a false statement about him, (2) the defendant published or told the information to a third party, and (3) that publication damaged him. *Id.* at *3, citing *Vickers v. Abbott Labs.*, 719 N.E.2d 1101, 1107 (Ill. App. Ct. 1999). Damages are presumed where, as here, the false statements allege that (a) the plaintiff committed a criminal offense or (b) the plaintiff is unable to perform or lacks integrity in performing the duties of his or her office or employment. *Id.*, citing *Van Horne v. Muller*, 705 N.E.2d 898, 903 (Ill. 1998).

Defendant moved for summary judgment. She argued that she did not defame Plaintiff because the statements she made in her letters were (1) subject to an innocent interpretation, (2) substantially true, and (3) protected by a qualified privilege because the letters related to a matter of public interest—fair bidding on a public construction project. *Id.* at *5. The trial court granted Defendant's motion for summary judgment, finding that her statements in the letters did involve a matter of public interest, and, therefore, she could not be held liable even if they were false. *Id.*

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The Illinois Appellate Court disagreed and sent the case back for a jury trial to determine whether Defendant's bid rigging and nepotism allegations were substantially true and whether she abused the public interest privilege. *Id.* at *8. If the jury were to determine that Defendant's letters are not substantially true, then the jury could also find that Defendant cannot claim the public interest privilege if she "recklessly failed to conduct a proper investigation into whether [Plaintiff] had participated in 'bid-rigging' and 'nepotism,'" and that she recklessly disseminated her letters. *Id.* at *10.

As this case demonstrates, construction industry competitors must be careful not to let the stress of competition cause actions or speech based on emotion rather than fact. False allegations made about competitors or others involved in a construction project may end up costing far more than the loss of a bid. ■

In a recent decision, the Illinois Appellate Court held that a plaintiff waived its right to arbitrate and warned parties to "be careful of what they wish for—they might actually end up getting it." *Schroeder Murchie Laya Assocs. v. 1000 West Lofts, LLC*, 746 N.E.2d 294, 302 (Ill. App. Ct. 2001).

In *1000 West Lofts*, the Plaintiff, Schroeder Murchie Laya ("SML"), brought an action for work it performed pursuant to a contract it had with the Defendant, 1000 West Lofts. *Id.* at 297. Defendant sought to stay the judicial proceedings and to compel arbitration pursuant to the arbitration clause contained in its contract with SML. SML unsuccessfully opposed the Defendant's attempt to compel arbitration. The trial court dismissed SML's complaint without prejudice but granted SML leave to reinstate its complaint if arbitration was not scheduled in 90 days. *Id.*

After 90 days passed without the initiation of arbitration, SML successfully sought to reinstate its complaint. Defendant subsequently answered the complaint and filed a counterclaim. Surprisingly, SML "switched its prior position and moved to compel arbitration and stay proceedings in the trial court

pursuant to the contract." The trial court denied this request. *Id.* at 1092. SML appealed this decision.

On appeal, SML argued that because the issues raised in the counterclaim were sufficiently different from those in its complaint, arbitration should be allowed for the counterclaim issues. The court, though, disagreed. The appellate court noted that though a right to arbitrate is a contractual right that can be waived, Illinois courts "disfavor a finding that a party has waived its right to arbitrate." *Id.* at 300. Nonetheless, the court stated that "in determining whether a party has waived its contractual right to arbitrate, the crucial inquiry is whether the party has acted inconsistently with its right to arbitrate." *Id.* at 301. The court held that "a party that wishes to give up its right to arbitrate some of the contractually arbitrable issues in its complaint has also given up its right to arbitrate similar contractually arbitrable issues raised by the other party." *Id.* at 294. The court found that SML waived its right to arbitrate by engaging in discovery at the trial court level, opposing the Defendant's earlier attempt to compel arbitration, failing to file for arbitration after the initial dismissal, and moving to reinstate the case in the trial

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court. *Id.* at 302. The court concluded that these actions were not the actions of a party intent on retaining its right to arbitrate. *Id.*

Although SML's waiver was clear, less clear actions might also constitute waiver of a party's right to arbitrate. If a party seeks court resolution of certain issues relating to an arbitrable contract, it should heed the advice of the *1000 West Lofts* court to be careful what it wishes—it might end up with court resolution of all issues. ■

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