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The Site Report

Construction Law Insights

August 29, 2022

Welcome to the eighth issue of 2022 of *The Site Report*.

We are pleased to announce that 60 of the firm's attorneys were selected by their peers for inclusion on the 2023 Best Lawyers list, 10 were selected as Best Lawyers "Lawyers of the Year," and nine others were selected as Best Lawyers "Ones to Watch." Many attorneys were recognized for their specific construction law focus and related fields of practice.

Recognition by Best Lawyers is based entirely on peer review. Its methodology is designed to capture the consensus opinion of leading lawyers about the professional abilities of their colleagues within the same geographical area and legal practice area. You can learn more by clicking [here](#).

As always, thank you for reading!

[Stephanie U. Eaton](#) - Co-Chair, [Construction Group](#); Vice Chair of Southern Offices, Litigation Department; Editor, *The Site Report*

and

[Julian E. Neiser](#) - Co-Chair, [Construction Group](#); Vice Chair of Northern Offices, Litigation Department

[JCG & Assocs., LLC v. Disaster Am. USA, LLC](#)

"North Carolina general contractor licensing issue highlights unique claims."

Why this is important: North Carolina has been cracking down on general contractor licensing, in particular license borrowing/lending situations in which an unlicensed contractor uses a licensed contractor's license number to secure work and pull permits for jobs. Often, these cases involve the licensing board taking action against the contractor that lent out its license in violation of the North Carolina general contractor licensing statute. This case involves a different scenario. JCG, the licensed contractor, denies any relationship with the unlicensed contractor, Disaster America, and alleges that Disaster America used its name and license number to secure work without JCG knowing or consenting. As a result, JCG is pursuing claims against Disaster America for trademark infringement and unfair and deceptive trade practices. One basis for JCG's claims is that JCG alleges its license number issued by the North Carolina Licensing Board for General Contractors constitutes a common law trademark. This is a unique, creative claim that has not previously been considered. The North Carolina Business Court denied JCG's motion for partial summary judgment on its trademark claim, because it determined there were genuine issues of material fact as to whether JCG's use of the license number qualified it for trademark protection. In doing so, the court expressed severe skepticism that "the number took on the characteristics of a trademark rather than merely those of a license number." This suggests that license numbers could become trademarks, but that it is extremely unlikely. Despite JCG's lack of success, its claims do highlight the potential diversity of claims that can come into play in construction project litigation, and parties should be prepared to defend and pursue unique (and sometimes unorthodox) claims when a project falls apart. --- [Steven C. Hemric](#)

W.Va. Contractors See Construction Boom, Challenges Ahead

"About \$6 billion is coming to West Virginia to improve our infrastructure of roads, water, sewer, broadband, abandoned mine lands, airports - and all of that money will be used to improve the quality of life in West Virginia."

Why this is important: \$6 billion in federal infrastructure funds has lit a fire under West Virginia's construction industry, creating a number of much-needed new projects and expansions. A booming industry brings its own challenges, however—skilled labor remains difficult to find and material prices stubbornly refuse to go down. These issues were kicked off by the pandemic and continue to be exacerbated by local and international problems ranging from weather to warfare. If the construction industry can adapt to meet these challenges (or work around them), one thing is for certain: there is a lot of money on the table for construction in West Virginia right now. --- [James E. Simon](#)

The Top 8 OSHA Fines of Q2 2022

"From April to June 2022, OSHA issued hefty construction-related fines — some close to \$800,000 — for everything from fall hazards to unprotected excavations."

Why this is important: These fines highlight OSHA's focus on trench and elevated work safety and the importance of staying vigilant when it comes to jobsite safety in these areas. Trench collapses and fall-related injuries have been and remain high profile cases in the industry both because of the severity of the injuries and because of OSHA's crackdown on trench protection and fall hazards. The severity of these fines, all exceeding \$200,000 and some being over half a million dollars, also drives home the importance of proper OSHA compliance, appropriate protection of employees, and properly responding to OSHA complaints, inspections, and notices. Having representation available during investigation of OSHA complaints, on-site during a complaint-related inspection, and assisting with responses to notices of violations can help mitigate the impact on your business and ensure you preserve all of your rights to contest complaints and notices of violations. --- [Steven C. Hemric](#)

Report Ties Worker Falls to Company Policies

"In a CPWR survey, researchers found individuals working for subcontractors at the time of a fall are 2.7 times more likely to die compared to those employed by a general contractor."

Why this is important: This terrible statistic is important because injuries and deaths from falls are generally preventable. In fact, this article notes several reasons for fall injuries and deaths that are clearly preventable, such as:

The primary causes of the fall, according to respondents (who could select up to three), included:

- Insufficient or ineffective planning (27.4%)
- Fall protection provided, but not used (21.7%)
- Improper use of fall protection (17.1%)
- Lack of relevant training (14.8%)
- Improper use of access equipment (13.1%)
- Employers not providing fall protection (8.8%)

General contractors and subcontractors on jobs involving heights over 6 feet — which is most vertical construction— need to have early and frequent safety meetings to emphasize required equipment, PPE and inspection of the work area and equipment (such as swing stages or scaffolding) to prevent falls when fall hazards exist. This includes identification of any weather conditions that may require changes or postponement of the work, need for spotters, and safe handling materials and tools while working from heights to prevent slippage or dropping materials on those working below.

This article emphasizes OSHA's requirements of employers to prevent fall hazards:

- Guard floor holes where workers could accidentally fall
- Provide guardrails and toe-boards around elevated, open-sided platforms
- Provide guardrails and toe-boards if a worker could fall into or onto dangerous machines or equipment, regardless of height
- Follow requirements for using gear such as safety harnesses, nets, stair railings and handrails

It is incumbent upon general contractors to make sure their subcontractors have fall protection policies, including any training for using equipment and that those policies and equipment are used, before any individuals begin working at heights. --- [Stephanie U. Eaton](#)

What a Recession Would Look Like for Construction

"Industry experts list eight steps builders can take in order to prepare their businesses for an economic downturn."

Why this is important: Is the United States in a recession? Economists have struggled to answer this question over this past year and in large part have offered an answer familiar to those in the legal industry, i.e. it depends. Construction industry experts have nonetheless chimed in and offered a number of different tactics on how developers and contractors can prepare for an economic downturn:

1. Build what you know. With so much uncertainty already facing those in the construction industry at this moment, now is not the time to take on a project outside the scope of your area of expertise. Venturing into uncharted waters certainly poses a greater risk of costly litigation and a business's bottom line. Developers and contractors can therefore best mitigate this risk by sticking to familiar projects in order to avoid unforeseen pitfalls.
2. Defer large expenses. It goes without saying that businesses facing an economic downturn should preserve as much cash as possible. Avoiding large expenditures can help businesses accomplish this goal and may be done so through meticulous project management. According to Joe Natarelli, construction services leader at Marcum, businesses should keep a close eye on the work-in-progress schedule. Close monitoring of the schedule of jobs can help businesses properly allocate resources and identify project areas where such large expenditures may not be necessary as originally thought or planned for.
3. Avoid layoffs, if possible. Although the U.S. gross domestic product has contracted for two straight quarters, the unemployment rate has largely held steady at a low 3.6 percent. While shedding workers in the event of economic downturn might seem like the most prudent reaction, the current lack of available labor suggests it would be a huge risk as contractors and developers may not be able to rehire quickly when the economy improves. At the very least, contractors and developers should strive to keep their most talented team members according to Anirban Basu, chief economist at Associated Builders and Contractors.
4. Consider civil projects. Yes, contractors and developers should not take on unfamiliar projects per Rule #1 above. However, the recently enacted Bipartisan Infrastructure Law presents a number of opportunities no matter what happens with the economy. Those who believe they have the tools, materials, and manpower necessary should carefully consider federally funded infrastructure projects in order to shore up business if necessary.

While the current economic forecast remains uncertain, contractors and developers would be wise to consider all possible avenues to ensure they are best prepared if or when economist ultimately decide the U.S. is in a recession. --- [Jonathan A. Deasy](#)

[Gaston County Board of Education, v. Shelco, LLC](#)

"A new ruling regarding North Carolina state of limitations and state of repose."

Why this is important: On August 16, 2022, the North Carolina Court of Appeals issued its opinion in *Gaston County Board of Education v. Shelco, LLC, et al.* that may impact the time required to bring legal action in construction cases. North Carolina has both statutes of limitations and a statute of repose that define the time period in which a construction claim may be brought following substantial completion, with the six-year statute of repose being generally the outside time limit by which a claim may be brought. Traditionally, "substantial completion" meant the date on which the project was sufficiently completed for its intended use by the owner. This new opinion analyzed the definition of "substantial completion" in the context of construction projects and opened the door to potentially different triggers for the statute of repose, with "substantial completion" dates on a given project based on the construction party involved in the litigation and when that party's work on the project was completed. This uncertainty arose because the project at issue in the lawsuit involved the owner's claims against a contractor, an engineer, an architect, and a subcontractor.

The Court focused on who the owner hired and for what purpose. A contractor hired for a particular scope of work, as opposed to one hired to complete the entire building, may have the statute of repose run from the completion of its particular scope of work instead of from the time the entire building is complete. Moreover, it may become difficult for construction parties to have a complaint dismissed on a motion to dismiss. That is because the Court further explained that while a plaintiff must prove compliance with the statute of repose, a plaintiff is not required to plead facts to show that its claim was filed within the statute of repose, so that granting a motion to dismiss is only appropriate when a complaint alleges facts that conclusively show that the complaint was not filed within the applicable statute of repose. If a legal issue has arisen on a project on which you have worked that is or is likely to involve litigation, our Construction Practice Group can help you identify the relevant time limits by which the claim needs to be brought and whether, as a contractor, you may have a defense to the claim. ---
[Stephanie U. Eaton](#)

Featured Attorney Profile



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James Simon is a senior attorney located in our Winston-Salem office. He focuses his practice on civil litigation, with particular emphasis on complex commercial litigation. James' experience includes litigating numerous appeals before the Fourth Circuit Court of Appeals and the Supreme Court of Appeals of West Virginia in cases involving breach of contract, arbitration clauses, the Uniform Commercial Code, Constitutional challenges, tax assessment disputes, public-private financing issues, and business zoning matters; representing multinational and regional companies in complex commercial and business litigation; representing construction industry clients in a variety of disputes, including scheduling and delay claims, defect claims, and payment claims; representing clients in litigation involving the constitutionality of legislative and executive actions, substantive due process, procedural due process, equal protection, land use regulations, vested rights, and property tax incentives; counseling clients and defending and prosecuting cases on their behalf in land use disputes, including eminent domain, partition, slander of title, specific performance, and breach of contract actions; representing clients in insurance coverage and bad faith litigation; and defending national and regional companies in deliberate intent, toxic tort, premises, and products liability lawsuits.

James has been named on the Best Lawyers: Ones to Watch list for Appellate Practice, Commercial Litigation, Insurance Law, and Personal Injury - Defendants. He received his B.A., *magna cum laude*, from Pensacola Christian College and his J.D., *magna cum laude*, from Washington and Lee University School of Law. He is admitted to the West Virginia State Bar, the United States Court of Appeals for the Fourth Circuit, and the United States District Courts for the Northern and Southern Districts of West Virginia. His admission to the North Carolina Bar is pending.



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