EJCDC®

ENGINEERS JOINT CONTRACT DOCUMENTS COMMITTEE

RECENT COURT DECISIONS OF RELEVANCE TO CONTRACT DOCUMENTS

February 2022

Hugh Anderson
EJCDC Legal Counsel
608-798-0698
hugh.anderson@aecdocuments.com

The following case summaries and comments are general in nature and should not be taken as legal advice or counsel. The summaries and comments are solely the views of the author based on a preliminary review of the cited cases. The contents of this document do not represent the official position of EJCDC, its sponsoring organizations, or its members, on any topic.

1. **Issue:** Does paying a subcontractor's workers' compensation insurance premiums entitle the general contractor to the exclusive-remedy protections of the workers' compensation statute? *Munoz v. Bulley & Andrews, LLC.* Supreme Court of Illinois (2022).

   Summary: Bulley & Andrews was the general contractor on a project on South Riverside in Chicago. Several years earlier Bulley & Andrews had acquired a company called Takao Nagai Concrete Restoration. Though it was eventually renamed Bulley & Andrews Concrete Restoration (Bulley Concrete), this subsidiary company was operated as a separate entity. The two companies had separate federal tax identification numbers, filed separate state and federal tax returns, and had different company executives and employees.

   On the South Riverside project, Bulley & Andrews used Bulley Concrete for the concrete work on the project. For other subcontractors, Bulley & Andrews entered into written subcontracts; Bulley Concrete performed its scope of work without such a subcontract.

   The plaintiff, Donovan Munoz, was a Bulley Concrete employee. He suffered a back injury while pulling insulating blankets off recently poured concrete on a winter day. Under the exclusive remedy feature of the workers' compensation statute, Munoz was precluded from pursuing any claim against his employer other than recovery of workers' compensation benefits. After recovering approximately $78,000 in workers' compensation, Munoz filed a lawsuit against Bulley & Andrews (the general contractor), the project owner, and the property management company. His claims against Bulley & Andrews included allegations that the general contractor had failed in a duty to assure safe conditions for the subcontractors' workforces; that Bulley & Andrews failed to prevent Bulley Concrete from using unsafe equipment; that the insulating blankets were worn and unfit; and that Bulley & Andrews failed to regulate and limit the hours worked by laborers at the site.

   Bulley & Andrews maintained a workers' compensation policy that covered its own employees and employees of subsidiaries and affiliates, including Bulley Concrete. Bulley & Andrews paid the premiums for this insurance. The policy had a large per-claim deductible, such that Bulley & Andrews had actually directly paid the damages that Munoz was entitled to under the policy.

   In response to the Munoz lawsuit, Bulley & Andrews asserted that it was shielded from the Munoz claims by the exclusive remedy provisions of the workers' compensation statute. Workers' compensation allows workers to obtain prescribed damages without proving the employer's fault; the employer exchanges its common law defenses for immunity to open-ended common law damages claims.

Although Bulley & Andrews was not Munoz's direct employee, it contended that because Bulley Concrete was a wholly owned subsidiary, and Bulley & Andrews had not only paid the policy premiums but also the specific damages that Munoz had collected under the workers' compensation policy, Bulley & Andrews should be entitled to the exclusive remedy protection, in the same manner that Bulley Concrete was protected. In further support of its position, Bulley & Andrews pointed out that its contract with the project owner legally obligated Bulley & Andrews to insure the project, including providing workers' compensation insurance.

The trail court and intermediate appellate court agreed with Bulley & Andrews, dismissing the Munoz lawsuit as to the general contractor. Munoz appealed the case to the Illinois Supreme Court.

Decision: The basic Illinois law regarding the scope of the exclusive remedy shield was reasonably well established: in a 1976 case involving claims by an injured subcontractor employee against a general contractor that had paid worker's compensation benefits, the Illinois Supreme Court had declared that "only an injured worker's direct employer can claim immunity." Further, the court had specifically stated that "immunity does not hinge on the payment of benefits"—rather, "immunity is conferred only on immediate employers of an injured worker."

However, the trial court and intermediate appellate court had noted that the seemingly straightforward rule articulated in 1976 had been complicated by a 2008 decision (*Ioerger v. Halverson Construction Co.*) that based immunity on whether an entity paid workers' compensation benefits to an injured worker pursuant to a preexisting legal obligation. The Bulley trial and appellate courts held that the prime contract with the project owner created such an obligation, thereby conferring immunity on Bulley & Andrews under the rule in the *Ioerger* case.

The Illinois Supreme Court reversed the lower court decisions, holding that the *Ioerger* decision was limited to the special circumstance where immunity was granted to a joint venture partner of the employer. The decision expressly states that an entity that is legally distinct from the immediate employer cannot insulate itself from potential liability by paying workers' compensation premiums or benefits on behalf of the immediate employer.

> To recognize a means by which immunity may be purchased by a general contractor who is not the injured worker's immediate employer would be contrary to the intended purpose of the [workers' comp] act.
> ***

> We reiterate, the Act includes no category granting nonemployers and legally distinct entities the ability to acquire immunity and insulate against liability for negligence by paying workers' compensation insurance premiums or benefits on behalf of an injured worker's direct employer.

Comment: Over the years there has been discussion and commentary about revising the worker's compensation laws for construction such that all employers on a jobsite enjoy immunity from injured worker claims, whether the injured worker is their own employee or the employee of another contractor or subcontractor. Such a revision would be consistent with the idea that a jobsite is analogous to a factory floor, with a comprehensive approach to safety (via the general contractor) and substantial interaction among the various workers—the current practice of allowing claims against the other employers at the site undercuts the advantages of workers' compensation. To this author's knowledge, such proposed revisions have not gained traction.

Although the ruling in the Munoz case appears to be emphatic, there is some uncertainty created by a suggestion in the decision that if there had been a written contract between Bulley & Andrews and Bulley Concrete requiring the general contractor to provide workers' compensation insurance or benefits to Bulley Concrete employees, perhaps Bulley & Andrews would be regarded as an agent of Bulley Concrete and therefore be able to claim immunity, similar to the entitlement of a joint venture partner. This suggestion seems to be in contradiction to the basic holding of the case.

2. **Issue:** Consequences of the project owner changing its commitment to furnish equipment items on a construction project. *BGT Holdings LLC v. United States.* United States Court of Appeals for the Federal Circuit (2020).

   Summary: BGT Holdings entered into a fixed-price contract with the U.S. Navy to construct and deliver a gas turbine generator. In the contract, the Navy agreed to supply certain government furnished equipment (GFE), specifically including an exhaust collector and engine mounts. A few months into the contract, the Navy informed BGT that the Navy would not deliver the exhaust collector and engine mounts unless BGT issued the Navy a "cost savings"—a contract price decrease—for the GFE items. BGT declined to do so.

   The Navy then informed BGT that the GFE items had been reallocated as "fleet assets" and would no longer be furnished to BGT. Because the items were contractually required, BGT went to a private supplier and bought an exhaust collector and engine

mounts for $610,775, and submitted a request for an equitable adjustment for the purchase price of the items. BGT then successfully completed the generator project. The Navy rejected the request for an equitable adjustment.

The contract between BGT and the Navy contained various clauses from the Federal Acquisition Regulation (FAR). Although several FAR and other clauses were at issue in the claim for an equitable adjustment, the most relevant were (1) a FAR clause that indicated with respect to government-furnished equipment that if the government did not deliver the equipment according to schedule, the government's contracting officer was required to "consider an equitable adjustment to the contract" and (2) a similar FAR clause stating that if the government increased, decreased, or withdrew the use of contractually-promised GFE, the contracting officer would "consider an equitable adjustment to the contract." The Navy took the position that these provisions merely required it to consider the contractor's request for an adjustment, and gave the Navy full discretion as to whether to grant the adjustment.

The subsequent lawsuit over the equipment costs reached the U.S. Court of Appeals for the Federal Circuit, the appellate court assigned to government contract disputes.

Decision: The Court of Appeals held that while "the Navy was entitled to withdraw GFE under the government property clause, it was not free to do so without consequence." The Court stated that the Navy's position that it could fail to furnish the items at no cost to the Navy, as long as it "considered" the contractor's request for an adjustment, was not tenable because it "would produce absurd results." According to the Court, the Navy's obligations went beyond merely "thinking over" the contractor's request, and pointed out that it was "dubious, to say the least" that the drafters of the FAR would have envisioned that the government would have an "unfettered right to withdraw promised GFE from a contract without consequences." Therefore, the Court of Appeals ruled that the "shall consider" requirements in the FAR do not give the government absolute discretion, but rather hold the government to a duty of good faith and reasonableness. The Court vacated the dismissal of BGT's claim and directed the lower court (the Claims Court) to determine the entitlement to an equitable adjustment as fair compensation for the Navy's failure to furnish the equipment items.

Comment: The *BGT Holdings* decision does not directly comment on the Navy's tactic of demanding a price reduction for items that the contract had committed the Navy to furnish, and that had already been accounted for in BGT's bid price. Perhaps this conduct would be a factor in the Claims Court's consideration of the Navy's duty of good faith and reasonableness.

The ruling in favor of BGT is certainly correct and equitable, but the FAR wording in question—"shall consider an equitable adjustment"—is not ideal. Other FAR clauses are more direct in their wording, stating, for example, that under certain situations the contracting officer "shall make an equitable adjustment." The FAR is a highly respected set of contract clauses, but this dispute demonstrates that there is room for improvement.

---

3. **Issue:** Denial of commercial general liability insurance coverage for "deconstruction" activities. *Estate of Greenwood v. Montpelier U.S. Insurance Co.* Supreme Court of Mississippi (2021).

Summary: William Greenwood owned a company that was in the business of salvaging lumber, bricks, and other materials from old buildings. As a result of his work dismantling an 1868 building in Vicksburg, Mississippi, adjoining building owners sued Greenwood, complaining that he had damaged their properties. Greenwood's commercial general liability insurer denied coverage. The insurance carrier moved for and obtained summary judgment denying coverage.

The insurance policy at issue contained a "demolition rider" that among other provisions excluded coverage for property damage (a) to any "abutting, adjoining, common or party wall" and (b) arising out of the demolition or wrecking of any building or structure of more than four stories. Although the published decision does not provide full explanation of Greenwood's basis for appeal (probably because the basis was not well developed in the briefing of the case) it appears that the trial judge focused on the second part of the exclusion, specifically referring to "demolition." Greenwood contended that his company's work was not demolition, but rather was properly identified as "deconstruction," and therefore the exclusion did not apply.

The case also examined the potential liability of the insurance agent who sold the policy to Greenwood. According to Greenwood, the agent did know or should have known the nature of Greenwood's business, and failed to provide an appropriate policy. The trial court rejected this claim.

Decision: The Supreme Court of Mississippi affirmed the trial court's dismissal of Greenwood's claim seeking insurance coverage.

As to the demolition rider, the Court held that Greenwood had asserted that his work was deconstruction, not demolition, but had failed to articulate a standard of review or cite any authority in favor of his position. The Court pointed out that the although the trial judge focused on the specific part of the exclusion expressly precluding

coverage for demolition, the plain and unambiguous exclusion of all claims arising from damage to common walls was definitive in barring coverage.

The Court also explained that under Mississippi law (which the Court indicated was consistent with the majority of jurisdictions), insurance agents do not have an affirmative duty to advise buyers of their coverage needs, because the insured is in a better position to assess needs and risks; coverage needs are personal and subjective; and insureds should have the duty of managing their own needs. Insurance agents will be held liable for advice rendered to insureds, subject to the standard of care; however, an insurance agent cannot be held liable for misrepresentations that could have been cured by the insured reading the policy. In this case, reading the policy would have revealed the demolition rider and its various clauses to the insured (Greenwood). As a result, the insurance agent and the insurance company could not be held responsible for any possible misrepresentations regarding demolition.

Comment: This case is a reminder of the importance of reading the provisions of a contract, whether it is an insurance policy or a construction contract. Using standard contract documents makes the task of reading a proposed contract easier, at least for those users who are familiar with the standard terms and conditions.

The Supreme Court indicates that the trial court was persuaded there was no coverage because of the demolition clause in the rider. That clause applied only when the building in question was taller than four stories. Left unstated is whether the 1868 building in question was indeed taller than four stories—if so, a very substantial building for its era.

---

4. **Issue:** Architect's duty to report a claim to its professional liability insurance carrier, after receiving a demand letter that did not make any direct accusations against the architect. *RLI Insurance Co. v. Architrave.* United States District Court (South Carolina) (2021).

   Summary: A Baptist church congregation retained a design-builder to design and construct a new worship center. The design-builder subcontracted design services to Architrave, an architectural firm. Architrave was insured against professional liability by a series of one-year claims-made professional liability policies issued by RLI Insurance Company.

   Three years after the worship center project was completed, the Church sent a demand letter to several entities and individuals associated with the project, including the design-builder, mechanical engineering and construction companies, suppliers of mechanical equipment, and Architrave. The letter outlined problems with the new

facility, including HVAC issues and water intrusion. The Church sent a second similar letter a few months later. Architrave did not report these demand letters to RLI Insurance. A few months later, after a meeting to discuss the problems, the Church filed a lawsuit in which Architrave was named as a defendant. Architrave promptly reported the lawsuit to RLI. RLI later sought a declaratory judgment that it owed no defense or indemnity duty to Architrave because the architect had failed to report the demand letters during the appropriate claims period.

After various procedural maneuvers seeking denial of coverage, RLI filed a motion for summary judgment. The decision under discussion is the district court's written denial of that motion.

Decision: The federal district court's decision denied RLI's motion for summary judgment because a dispute of material fact exists as to whether the Church's initial demand letters amounted to a "Claim alleging a Wrongful Act on the part of Architrave" as such a Claim is defined in the RLI policy. Additional factual context was needed to determine Architrave's role on the project. According to an affidavit submitted by Architrave, it had no role in the design or construction of the HVAC systems, or in civil site work including drainage systems. The affidavit also asserted that at a meeting of project participants, neither the Church representatives nor any other participant alleged any negligent act or omission by Architrave. The letters sent to Architrave likewise did not articulate any culpability on Architrave's part. The Court therefore concluded that based on the information before it, summary judgment in favor of the insurance company was not warranted.

Comment: The decision correctly concludes that not enough is known about Architrave's role to be certain that the demand letters should have been taken by Architrave as "Claims" that needed to be reported. However, in hindsight Architrave took a substantial risk in not reporting the letters to its professional liability carrier. As architect of record, almost any claim involving the worship center could ultimately lead to indirect or direct liability if not properly contested. The experience and resources of an insurance company in protecting its insureds will generally be extremely useful. Instead, time and resources were devoted to a coverage dispute that could have been easily avoided.

---

5. **Issue:** Commercial General Liability insurance carrier's duty to defend a roofing manufacturer in a roof replacement dispute. *Siplast, Incorporated v. Employer's Mutual Casualty Co.* United States Court of Appeals for the Fifth Circuit (2022).

   Summary: In 2012 the Archdiocese of New York purchased a roof membrane system from Siplast, a roofing manufacturer, for installation at a Catholic high school in the Bronx. Siplast guaranteed that the roof membrane system would remain in a watertight condition for 20 years.

   Three years after installation of the new roof the Archdiocese noticed water damage in the ceiling tiles. Siplast attempted to make repairs, but the leaks continued. Siplast admitted there were problems with the roofing, but ultimately informed the Archdiocese that it would not honor the guarantee. A consultant retained by the Archdiocese concluded that "the roofing membrane and system has failed of its essential purpose" and recommended a complete replacement, at an estimated cost of $5,000,000. The Archdiocese sued Siplast, asserting a breach of the guarantee and seeking damages "in excess of $5,000,000."

   Siplast tendered the lawsuit to its commercial general liability insurance carrier, Employers Mutual Casualty Company. The CGL policies provided Siplast with coverage for property damage claims, subject to two major exclusions: (a) the policies excluded coverage for damage to Siplast's products or its work, and (b) the policies excluded coverage for property damage that Siplast was obligated to pay as the result of a contractual assumption of liability (unless Siplast would have had the obligation in the absence of the contract).

   The CGL carrier denied coverage, based in part on the two exclusions. Siplast initiated a coverage lawsuit, and both parties brought motions for summary judgment. The coverage dispute was adjudicated in federal court under Texas insurance law. The district court (Northern District of Texas) held that the insurance carrier did not have a duty to defend Siplast against the Archdiocese's claims. Siplast appealed the decision to the Court of Appeals for the Fifth Circuit.

   Decision: The Court of Appeals reversed the lower court's ruling, holding that the insurance carrier has a duty to defend its insured. The decision was based on an analysis conducted under the "eight corners rule," meaning that the court looks only at the insurance policy and the pleading (complaint) of the third-party claimant to determine whether there is a duty to defend. No other evidence or information is considered. If within the four corners of its pleading the claimant has alleged facts that fall within the scope of coverage, as determined from within the four corners of the policy, then the insurance company must provide a defense to its insured.

As to the "Your Products/Your Work" exclusion, the court explained the test:

> If the complaint alleges damage to and seeks damages for any property that is not the insured's product or directly subject to the insured's work…then the claim falls outside of a "your product/your work" exclusion and the insurer has a duty to defend.***Does the [Archdiocese's complaint against Siplast] contain allegations of damage to property other than Siplast's roof membrane?

The district court had concluded that although the Archdiocese had mentioned other damage, it had not outright made a claim for such damage. The appellate court held that this was too narrow a reading of the Archdiocese complaint. In sifting through the complaint, the court noted an allegation that the high school continued to suffer from leaks and water damage, and expressly stated that Siplast was responsible for "leaks and any damage created thereby." Also, the roof replacement cost was said to be $5,000,000, but the Archdiocese alleged damages of "in excess of" $5,000,000, which the court took to be a reference to damages for the roof itself plus damages for property other than (in excess of) the roof. The Court of Appeals concluded that these various allegations created a clear inference that the damage went beyond flaws in the roof membrane itself to include other property, thus providing a basis for requiring a defense, if no other exclusion applies.

The other exclusion reviewed in the decision is the contractual liability exclusion. The idea of this exclusion is that the insurance company will provide protection for risks that the insured would be subject to regardless of a contractual duty, but not for a voluntary expansion of liability set out in a contract. Within the four corners of the Archdiocese complaint is an allegation that Siplast negligently provided a defective roof membrane. Such an allegation is not dependent on the warranty (guarantee) commitment in the supply contract, and therefore is not an uninsurable voluntary contract commitment.

Based on its examination of the complaint and the insurance policy, the Court of Appeals held that the insurance company has a duty to defend Siplast in the Archdiocese lawsuit.

Comment: Plaintiffs' attorneys in construction defect cases know that it will usually be advantageous for the opposing parties to have insurance coverage—the insurance companies will be "deep pockets" that can contribute to settlement funds and pay judgments. Often plaintiffs' attorneys will craft the complaint to include allegations that help assure insurance coverage. In this case the Archdiocese's complaint against Siplast could have been more explicit in alleging damage to other property (a well

known pathway to coverage)—fortunately for the Archdiocese, Siplast was able to persuade the Court of Appeals to make inferences that were sufficient to sustain a defense requirement.

The case makes the interesting point that the Contractual Liability Exclusion might have applied if the Archdiocese's claims had been made several years later, in reliance on the extended time in which to bring warranty claims (20 years)—arguably a voluntary contractual expansion of liability.

---

6. **Issue:** Engineering firm's duty of care in drinking water case. *In re Flint Water Cases—Bellwether I Cases.* United States District Court (Eastern District of Michigan) (2022).

Summary: The extensive litigation involving the condition of the Flint, Michigan, public water supply includes injury claims by children alleged to have suffered neurocognitive harm because of their exposure to lead in the Flint water. In one of the cases the plaintiffs claim that an engineering firm retained by the city is liable for failing to warn city officials about the dangers posed by the corrosive nature of the water. Complicating the case are questions regarding the engineering firm's scope of services and its knowledge of the Flint water's chemical composition. A recent effort by the engineering firm to exit the case by summary judgment was not successful, meaning that the case will proceed to a jury trial unless settled.

The scope and complexity of the Flint cases, and the ongoing status of the litigation, make it difficult to summarize the cases at this time. A few statements by the U.S. District Court in a recent summary judgment decision give some indication of the duty of care and standard of care issues involved in the cases:

- "It is hardly reasonable to hold the ordinary individual liable for a lapse in due care but immunize professionals from liability to anyone but their employer."

- "[The engineering firm's] argument that it owed no duty to Plaintiffs [children who consumed Flint water] because it did not stand in any relationship to them is also without merit. As has been set forth above, Michigan courts routinely apply the duty to take reasonable care in one's undertakings in cases where there is no relationship between the parties…."

- "[The engineering firm's] undertaking for the City of Flint is sufficient to establish a duty to Plaintiffs because [the firm] is alleged to have

negligently completed that undertaking, and the undertaking—evaluating Flint water quality—was foreseeably related to Plaintiffs' physical safety."

- "Plaintiffs' expert witness opines that any reasonable engineer in [firm's] position would have known that immediate corrosion control was necessary even without the test results the City withheld…."

- "[The engineering firm] contends that even if its undertaking for the City of Flint was sufficient to create a duty to Plaintiffs, and even if the harm to Plaintiffs was foreseeable, a duty should nevertheless not be imposed because public policy militates against it. According to [the firm], imposing a duty of due care in this case would have "far-reaching effects," greatly burden those who provide professional services in the public sector, and amount to imposing "a duty of care that extends to every resident of the United States…."

- "These [the engineering firm's defenses] are remarkable claims. The only duty being imposed in this case is the duty to take reasonable care to avoid foreseeable physical harms. It is hard to see how a duty to do one's job in a reasonably competent way could amount to the great burden [the firm] complains of. There is nothing new or extraordinary about this duty—indeed, as the Court explained in *Lee*, most states impose more expansive duties to prevent harm."

- "According to [the engineering firm], it could not owe the first duty because it could not "force its clients to do anything." While [plaintiffs' expert] opines that [engineering firm] should have "insisted" on the use of corrosion inhibitors, it is clear that he does not mean to imply that [the firm] could force the City of Flint to do so."

- "There is a difference between the suggestion that one consider using corrosion controls to partially resolve discoloration issues with the water, and the urgent warning that a failure to use corrosion inhibitors immediately would result in the widespread lead poisoning of Flint residents."

- "In sum: because [the engineering firm] began an undertaking for the City of Flint, it owed Plaintiffs a duty of due care to avoid foreseeable physical harms."
