Technology Innovations Driving New Construction
Looking Back on 2016 and Looking Forward in 2017 and Beyond

2016 is now in our rearview mirror, and 2017 is well underway. Looking back for a moment on 2016, the Construction Group of Williams Mullen had another good year. During the year, lawyers from the Construction Group were included in The Best Lawyers in America©, Chambers USA, District of Columbia, North Carolina and Virginia “Legal Elite,” and “Super Lawyers,” and US News – Best Lawyers® “Best Law Firms” again included Williams Mullen’s Construction Group in the National – First Tier Ranking for Construction Litigation. Our Group continued to broaden the scope and breadth of our clients and projects for which we provided legal services.

Looking forward in 2017 and beyond, there is a technology revolution driving the construction industry. Such technological advancements as geofencing drones to survey and inspect work, 3D printing, building information modeling, anti-collision software for site equipment, and smart helmets for trade personnel, are just a few of the new technologies. You will read in this newsletter about some of the issues surrounding the use of the geofencing technology and drones.

Equally important, there is a heightened focus within the industry on expanding the pool of skilled trade personnel to operate and maintain the new technologies.

For us, we look forward to helping our clients incorporate the new technologies in their contracts and projects.
Earlier this year, Brad Nowak returned to the firm after a brief hiatus of three years. We are excited to have him back. Brad is a great addition to our P3 team with his extensive experience advising public and private entities throughout the U.S. on structuring, procuring and negotiating public-private partnerships.

“Our P3 team has long excelled on major infrastructure projects such as bridges, tunnels and highways,” Construction Practice Chair Bob Cox said. “With Brad’s return, we not only bolster our P3 practice, we get Brad’s ten plus years of experience assisting clients in the energy and renewable energy industries, particularly with solar, wind, water, wastewater and solid waste projects, and we’re really excited about that.”

The firm’s core group of P3 attorneys and professionals are skilled in crafting and implementing solutions to match public- and private-sector goals, limitations and risk tolerances.

In addition to Brad, the team draws upon the resources of the firm’s Government Relations, Construction, Public Finance, Economic Development, Environmental & Natural Resources, Real Estate, Land Use and Tax practice groups to represent governmental entities, developers, contractors, equity participants and lenders and project operators on public-private partnership projects throughout the U.S.

From the development of sophisticated capital, mezzanine and debt structures, to innovative P3 procurement and financing approaches, to long-term performance-based project operations and maintenance, our team helps clients plan and execute on opportunities where public policy objectives are served by private sector business goals and expertise.

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Knowledge is power, and this is true not only in politics but also in construction. As fast as advances are made in construction materials and methods, we also need to keep pace with information technology, especially given the powerful tools that contractors already have at their disposal. Geofencing is one of those tools that should be considered seriously.

A geofence is a “virtual perimeter” created for a real world area such as a construction site. Industry reports indicate that use of this technology is growing rapidly in the construction industry. It provides real-time data and information to the contractor and provides multiple benefits for a nominal investment, including increased productivity and efficiency which should translate into savings.

The technology to do this has been in use for nearly 20 years. Its applications are widespread and include child location services, the ability to disable or enable firearms to work only in specific locations and the ability to track movements of wildlife in and out of protected areas.

Software systems are available that use either global positioning systems (GPS) or radio frequency identification (RFID) to define and create virtual geographic boundaries. These programs can be set up to “trigger” when a monitored device such as a cell phone; iPad or other electronic device crosses an imaginary set boundary, allowing an administrator to know in real time who or what has entered or left the monitored space.

The use of this technology varies from industry to industry. Retail and transportation industries are well ahead in using software to monitor all monitor- and drive-specific aspects of their business, such as alerting customers to available parking spaces or bargain sales, or monitoring travel times and routes of delivery trucks.

Many geofence applications incorporate Google Earth. This enables the administrator to set the perimeter using a satellite view. Other applications can set perimeters by use of longitude/ latitude or other mapping programs. Some programs even allow the administrator to disable the monitored device under defined criteria. Automatic alerts that can be generated include email, text or other forms of communication and recording.

The administrator can set the radius of the monitored location to almost any size desired. Generally, the larger the area monitored, the less useful the tracked information. Size will depend on what information is sought to be obtained.
Various types of triggers are available. A static trigger is based on the actual position of a device user with respect to a fixed area. One that is dynamic will track a device user in a changing data field. You can also determine location information between multiple devices compared to each other. Geofencing differs from programs that broadcast beacons which trigger actions on a beacon-enabled app on a mobile device but do not pinpoint location on a map.

Just as the advanced use of drones now allows a contractor to see instantly the status of project work from close up to wide angle, the real-time electronic data provided through geofencing software allows instant recording and archiving of essential elements of progress.

Once set up, the virtual fence will automatically monitor and track activities for the entire project duration. The administrator is notified of all that occurs within the fenced area day to day and month to month. The technology has become very affordable. Most contractors supply mobile devices to their project managers, so contractors already have made the hardware investment needed to use the programs.

The digital boundaries that can be set up will monitor more than just the movement of employees in and out of the project site. The data can be collected to prepare detailed and accurate reports of devoted manpower to support a claim of overtime or general conditions costs. It can also be set up to monitor equipment and materials moving into and around the fenced area. The administrator will receive a real-time alert by email or text when equipment has been brought to the site or materials delivered. Equipment that can be tracked and monitored includes portable heaters and generators, mixers, rental equipment, dumpsters and construction trailers.

Some contractors are now using the system to keep track of their fleet of trucks by installing devices on each truck as well as on other construction equipment. The system then provides a timely alert when the truck or back hoe has arrived on site, but also notifies the administrator if the equipment is stolen.

It is clear that there are important benefits to the contractor in tracking materials and equipment and their presence on-site. In addition to tracking stolen property, the system will detect unauthorized use, monitor fuel consumption and thereby contribute to a reduction of idle time.

Knowledge in real time of the actual delivery of materials to the project site is an obvious benefit. A contractor can know immediately when site delivery is made or is imminent, thereby allowing for reduced waiting time. Large orders of steel, glazing or specialty materials can then be monitored upon delivery and storage, allowing for better coordination of planned installation and reduction of idle time.

Contractors involved in site grading can now install GPS grading devices on their heavy equipment to track more accurately and timely the achievement of the proper grade, rather than relying on the age-old method of survey stakes, which are subject to movement and displacement. Estimates are that use of this technology may improve the cut and fill process by as much as tenfold. The GPS device can be installed in the cabin so the operator knows in the field when she has reached final grade. This will translate into reduction in idle time, elimination of re-staking, lower fuel bills and increased efficiency.

Most geofence technology programs are quite flexible in design capabilities and allow a system set up for your projects particular needs. There seems to be no limit to the usefulness of geofencing technology when applied to construction projects. In this competitive marketplace, this technology is a useful addition to the tool box.
INTRODUCTION
The more that technology evolves, the easier it has become for employers of all sizes and across various industries to monitor their employees with tracking technology. Indeed, a 2012 study by technology research firm Aberdeen Group found that 62 percent of companies with “field employees” used GPS to track them. See Andrea Peterson, Some companies are tracking workers with smartphone apps. What could possibly go wrong?, Washington Post (May 14, 2015), available at https://www.washingtonpost.com/news/the-switch/wp/2015/05/14/some-companies-are-tracking-workers-with-smartphone-apps-what-could-possibly-go-wrong/.

Although there are obvious benefits to using tracking technology—improved efficiency, ability to monitor hours and overtime, etc.—such a practice may also implicate privacy and other legal concerns.

Currently there are few legal restrictions on an employer’s ability to use tracking technology during working time. In fact, the U.S. Supreme Court has stated, “ordinarily, an employee consents to significant restrictions in his freedom of movement where necessary for his employment, and few are free to come and go as they please during working hours.” Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602 (1989). However, as discussed in more detail below, legal disputes have arisen nevertheless between employees and employers, especially in cases in which the employer has used more invasive forms of “geotracking” to monitor employees.

USES FOR GEOFENCING AND GEOTRACKING IN THE CONSTRUCTION INDUSTRY
“Geofencing” and “Geotracking” are somewhat recent terms that have arisen to describe various global positioning system (GPS) monitoring techniques. A “geofence” is a virtual boundary created by a software program using GPS or other means to define a geographical area. When employers use geofencing technology, they are simply alerted when an employee enters or exits a particular geographical area. When employers use geofencing technology, they are simply alerted when an employee enters or exits a particular geographical area. When employers use geofencing technology, they are simply alerted when an employee enters or exits a particular geographical area. When employers use geofencing technology, they are simply alerted when an employee enters or exits a particular geographical area. When employers use geofencing technology, they are simply alerted when an employee enters or exits a particular geographical area.
staff in the field or on client visits need more efficient ways to track their employees’ time. One way to accomplish this is by developing and implementing online time tracking platforms that are connected to employees’ phones. Online time and attendance software, for example, can account for an employee’s time based on his or her geographic location. This technology can provide businesses an effective way to manage their workforce, improve time reporting and save on labor costs.

GPS technologies, especially geofencing, can be particularly helpful for employers in the construction industry. Applications are readily available that allow employers to set geofencing parameters, such as creating a geofence around a construction site or other worksite. Using this type of application, employers in the construction industry have a tool to better manage their payroll and timekeeping, since the software will electronically log when an employee is on-site or off-site. This allows the employer to avoid having to rely on self-reported hours and to avoid manually entering hours into the employer’s timekeeping system. It also allows for more accurate and efficient timekeeping. Examples of construction-specific mobile apps that provide this service include Red-Trac and Labor Sync.

Another way that construction companies may use geofencing, in addition to monitoring the location of employees, is to monitor the location of materials and equipment left on-site. The primary benefit of such a use is to improve surveillance of the site and allow more rapid response to suspected criminal activity. If a piece of equipment is moved outside of a geofence, the company is alerted, allowing it to more quickly address issues such as theft and increase the likelihood that the item will be recovered.

However, despite the benefits for employers, these types of practices raise privacy concerns for employees. If an employer can track the location of its employees via their mobile devices, then the employer may theoretically also have access to a wide array of information that is stored on the employees’ mobile devices. Theoretically, the employer may have access to ranges of information regarding its employees’ whereabouts outside of working time, from the stores in which the employees shop, which doctors they go to and when, and even their sleep habits, social media interests and other private information. Businesses have an incentive to use their resources and manage their employees efficiently, but employees are rightfully concerned about their privacy and what information might end up in the hands of a third party.

**LEGAL CONSIDERATIONS**

 Though there have not yet been any significant legal decisions related to GPS monitoring in the construction industry in particular, legal disputes have arisen nevertheless regarding privacy and employer GPS monitoring in other contexts. Many of these cases involve the use of GPS devices in employer-owned vehicles. For the most part, courts and arbitrators have found that an employer’s installation of a GPS system in an employer-owned vehicle does not violate an employee’s privacy right.[1] For instance, in *Elgin v. St. Louis Coca-Cola Bottling Co.*, No. 4:05CV970-DJS (E.D. Mo. Nov. 14, 2005), an employer installed a GPS system in a vehicle that was assigned to an employee for the purposes of investigating cash shortages in vending machines accessible to the employee. Although the employee ultimately was cleared of wrongdoing, when the employee discovered that a GPS had been installed on the vehicle he filed an invasion of privacy claim under state law. In considering the undisclosed use of the GPS device, the court...
found that there was not a substantial intrusion on the employee—as the information revealed nothing more than “highly public information about the van’s location.”

Elgin involved GPS tracking of company-owned vehicles, but other cases have addressed the issue of installing trackers on employee-owned vehicles. In Cunningham v. New York State Dept. of Labor (N.Y. Ct. App. Jun. 27, 2013), the highest state court in New York addressed the issue of whether a warrant must be obtained before the state may attach a GPS tracking device to one of its employees’ personal vehicles. Cunningham was an employee of the state Department of Labor and was under investigation for falsifying time sheets. Without his knowledge, the employer attached a GPS device to his personal car, and his movements were recorded for a month. The data collected indicated that he was in fact falsifying time sheets and eleven charges were brought against him. The court held that attaching a GPS device to a public employee’s car does not require a warrant, reasoning that it was only the car’s location, and not the car itself or its contents, that were being monitored, and that during the time that the car was being used for work purposes the employee had no reasonable expectation of privacy.

Employers contemplating employee GPS monitoring in the construction industry may also need to consider compliance with the National Labor Relations Act (“NLRA”), the federal law that protects employees’ union activities. Under the NLRA, employers are prohibited from engaging in surveillance of protected concerted conduct and are obligated to negotiate issues such as employee surveillance as part of collective bargaining with the union. For those employers with unionized workforces, privacy issues may be a growing concern during the collective bargaining process. Union representatives may resist arrangements granting employers broad rights regarding the use of technology for surveillance purposes and may attempt to renegotiate them, or even bring legal challenges to such arrangements. However, where the terms of the collective bargaining agreement grant wide latitude to the employer to conduct monitoring or surveillance, courts have upheld the legality of employee monitoring through GPS tracking. For instance, in Otis Elevator Co. v. Local 1, Int’l Union of Elevator Constructors (S.D.N.Y. Sept. 23, 2005), a union attempted to undercut an employer’s installation of GPS devices in company-owned vehicles. Both the arbitrator and, subsequently, the federal court concluded that the collective bargaining agreement granted the employer broad permission in implementing and using tracking technology.

CONCLUSION

Despite being relatively new technologies, GPS monitoring techniques such as geofencing and geotracking are being adopted rapidly across a broad array of industries. A tremendous amount of value can be realized through the management of labor costs and monitoring for misconduct or other security concerns. However, employees may be resistant to, and may even challenge, such monitoring due to the privacy implications involved. Even if the employer is able to defend such challenges successfully, legal and collective bargaining disputes can be costly and drawn-out and can negatively affect not only employee morale, but also public relations. Employers choosing to implement a GPS monitoring policy should consider whether they can achieve their objectives with less invasive monitoring, such as geofencing, as opposed to more comprehensive GPS tracking. Regardless of how employers choose to utilize this technology, communication and transparency are paramount to ensure privacy boundaries are respected and the technology is only being used in a purely work-related capacity. Information gathered through monitoring and/or tracking should be limited as much as possible to that information pertaining to work-related activities during working time. Employers in the construction industry should weigh these considerations carefully before implementing a geofencing or geotracking policy, especially where the employer is bound by the terms of a collective bargaining agreement with employees.

Imagine that one of your employees uses his or her iPhone to take some pictures of work being done at a construction site. The employee captures several images that include teenagers sunbathing by a pool on the adjacent property. Several faces can be identified in the picture. Should you be concerned that your employee has violated the privacy of the teenagers? No, because as long as you or the employee did not publish or otherwise distribute the image, a court almost certainly would find that their privacy was not violated. Now, imagine that, instead of using an iPhone, the employee captured the same image of the adjacent property using an unmanned aircraft system (“UAS,” commonly known as drones). In some states, capturing the same image from a drone could be found to have violated the teenagers’ privacy. In addition, under voluntary guidelines recently published by the National Telecommunications and Information Administration (NTIA), a business might also be required take steps to secure and either blur or delete the image.

The reason for this difference is that increased privacy concerns associated with UAS is resulting in a unique legal and regulatory framework with regard to the information that they can collect. For example, several states have passed laws that restrict the collection of images that can identify individuals if they are on private property and if they have not given their consent to being imaged.

**BACKGROUND**

Generally in the U.S., individuals did not have a reasonable expectation of privacy while they were outside, even if they were on private property. For example, in *Dow Chemical Co. v U.S.*, the court found that the Environmental Protection Agency (EPA) did not violate Dow Chemical’s Fourth Amendment rights when it used an airplane, without obtaining a warrant, to collect aerial photographs to inspect the company’s premises under the Clean Air Act. Similarly, in *California v Ciraolo*, the Supreme Court ruled that the data obtained from a plane hired by the police to fly over a private home, again without a warrant, could be used as evidence in a trial.

However, with the rapid growth in UAS being used for both commercial and recreational purposes, lawmakers and regulators across the country have begun to respond to the public’s media-driven privacy concerns. As a
result, in addition to complying with the Federal Aviation Administration’s (FAA’s) regulations regarding safe UAS operations, businesses will also need to determine whether they need to comply with any federal, state and even local laws designed to protect privacy.

**STATUS OF FEDERAL LAW**

Currently, there is no one federal government agency responsible for privacy in the U.S. The Federal Trade Commission (FTC) has played the primary role in protecting consumer online privacy, but thus far it has not tried to assert its limited authority to cover drone operations.³ Some have suggested that the FAA should be responsible for regulating privacy issues associated with UAS. However, in December 2015, the FAA published a Fact Sheet on State and Local Laws that stated in part that “[l]aws traditionally related to state and local police power – including land use, zoning, privacy, trespass, and law enforcement operations – generally are not subject to federal [FAA] regulation. (emphasis added)⁴

In February 2015, the Obama Administration attempted to fill this void at the federal level by issuing a Presidential Memorandum titled, “Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft System[s].” The Presidential Memorandum, which consists of two parts, was an effort by the White House to address the concerns of a very vocal privacy community while also protecting the drone industry from having to comply with a patchwork of 50 (or more) privacy laws.

The first part of the Presidential Memorandum directs each federal agency to develop a policy on data collected from UAS to protect privacy, civil rights and civil liberties. Such policies are to address the collection, use, retention and dissemination of the data. Moreover, although this section does not apply directly to commercial enterprises, it does direct agencies to ensure that federal contractors have adequate training and rules of conduct in place with regard to the use of UAS.

The second part of the Presidential Memorandum pertains to the use of UAS for commercial purposes. It directs the NTIA to bring together stakeholders from industry, academia, and the privacy community to develop voluntary “best practices” for commercial use of UAS. Beginning in August 2015, the NTIA held a series of meetings on the issue, and in May of 2016 it published “Voluntary Best Practices for UAS Privacy, Transparency, and Accountability” (the “Voluntary Best Practices”). The Voluntary Best Practices provides in part that:

> “[w]hen a drone operator anticipates that a drone use may result in collection of covered data, the operator should provide a privacy policy for such data appropriate to the size and complexity of the operator, or incorporate such a policy into an existing privacy policy. The privacy policy should be in place no later than the time of collection and made publicly available.”⁵

“Covered data” means information collected by a UAS that identifies a particular person, such as an image of a face.

Companies are not required to follow the Voluntary Best Practices. But if they choose to do so, they should also:

> establish a process (appropriate to the size and complexity of the operator) for receiving privacy or security concerns, including requests to delete, de-identify or obfuscate the data subject’s covered data. Commercial operators should make this process easily accessible to the public, such as by placing points of contact on a company website.
have a written security policy with respect to the covered data, appropriate to the size and complexity of the operator and the sensitivity of the data;

> make a reasonable effort to regularly monitor systems for breach and data security risks;

> make a reasonable effort to provide security training to employees with access to covered data; and

> make a reasonable effort to permit only authorized individuals to access covered data.

**STATUS AT STATE & LOCAL LEVEL**

Over the past several years, UAS-related legislation has been introduced in almost every state. So far, 32 states have enacted laws addressing UAS issues and an additional five states have adopted resolutions. Many laws restrict the use of UAS by state agencies for law enforcement and regulatory purposes. Others restrict the use of UAS for hunting or make it a crime to operate a drone near critical infrastructure. However, several states that also have passed laws that restrict the use of UAS to collect information about an individual on private property, even if the same information could be collected using other means.

For example, in Florida it is illegal to capture an image of a person with the intent to conduct surveillance in violation of a person’s reasonable expectation of privacy, without his or her written consent. Surveillance is defined as the observation of an individual with sufficient clarity to identify that individual. Moreover, the law provides that a person is presumed to have a reasonable expectation of privacy on his or her property if he or she is not observable by persons located at ground level. Similarly, in North Carolina, a person may not use a drone to conduct surveillance of a person without his or her consent.

Thus far only a few states have passed drone-specific privacy laws, although many expect the privacy community to push for more legislation at the state level given the lack of federal oversight. Some cities also have introduced drone-specific ordinances intended to protect citizens concerns regarding privacy, including bans. In addition, the National League of Cities recently published a model ordinance (the “Model Ordinance”) on UAS that cities can use. The Model Ordinance requires a drone operator to register with a city before operations. In addition, it states that:

”[t]he City Manager may adopt reasonable restrictions on the time, place and manner in which a person may land, launch or otherwise operate an Unmanned Aircraft so as not to interfere with the health, safety, and welfare of City residents.”

**WHAT THIS MEANS FOR BUSINESSES**

As a result of the evolving nature of laws around the data collected by UAS, there are several steps that businesses should take. These include:

> consider using UAS with geofencing that can minimize the collection of data outside of a prescribed area;

> ensure that your drone operators understand the privacy concerns associated with UAS and instruct them to avoid collecting data on persons or properties outside the scope of work;

> when practical, provide notice (signs, flyers, etc.) that a UAS is being used to collect imagery around a certain area; and

> if you are likely to be collecting data that could raise privacy concerns, develop a written policy that outlines how the data should be stored, outlines a reasonable retention period and limits access to the data to employees that have a need.

1. 476 U.S. 227 (1986)
2. 476 US 207 (1986)
3. However it is important to note that the FTC recently held a forum on drones and privacy. See e.g. https://www.ftc.gov/news-events/events-calendar/2016/10/fall-technology-series-drones (accessed on October 17, 2016).
4. FAA Fact Sheet on State and Local Laws https://www.faa.gov/news/updates/?newsid=84369 (accessed on October 17, 2016)
2016: A Busy Year for the Supreme Court of Virginia, Including 2 Significant Decisions for the Construction Industry

BY JOSEPH R. POPE AND ROBERT K. COX

1. William H. Gordon Associates, Inc. v. Heritage Fellowship Church, and A Design Professional’s Duty of Care

In this case, Heritage, a church located in Reston, Virginia, contracted with the Gordon firm to provide engineering services for the site on which the Church’s new sanctuary would be built. The services included designing a storm water management system for the site. The Gordon engineer assigned to the project selected a rain tank system that was relatively new to the industry. Unfortunately, the engineer had no experience with the system and “cut and pasted” the plans and specifications for the rain tank system into the design documents for the project. The engineer admitted at trial that he did not fully understand many aspects of the rain tank specifications and plans.

While installing the rain tank system, the building contractor became concerned that the system was ill-suited for the site and requested additional information. Relying on information that the rain tank vendor provided, the Gordon engineer dismissed the contractor’s concerns. The contractor proceeded to install the rain tank system and then paved over the installation as part of
the construction of a new parking lot. Shortly after that installation and paving, the rain tank and parking lot above it collapsed. The Church sued the general contractor and engineer for the damages caused by the collapse, including the cost to install a new storm water management system.

Following an eight-day bench trial with over 20 witnesses, the trial court ruled that the engineer Gordon breached the duty of care because its engineer merely “cut and pasted” the rain tank’s product specifications into the design without “understand[ing] the specifications.” Despite evidence showing that the contractor did not strictly or fully comply with Gordon’s plans, the trial court concluded that Gordon’s breach of the standard of care was the proximate cause of the collapse.

Gordon appealed the ruling on the narrow ground that the evidence was insufficient to establish that any breach of the professional standard of care proximately caused the rain tank to collapse.

The Supreme Court affirmed the trial court’s ruling on the issue, concluding that there was sufficient evidence to establish that the engineer violated the standard of care and the breach was the proximate cause of the rain tank collapse and the resulting damage. The Court noted that Heritage offered expert testimony that Gordon breached the standard of care by (1) incorporating the manufacturer’s unverified literature into the design, (2) failing to fully understand the design, (3) failing to consider the unusually high water table, (4) failing to provide quality oversight during construction to ensure that the elements of the plan were being verified and executed, and (5) failing to reexamine the original plan when the contractor requested information from the engineer. The Court also found the evidence sufficient to support the trial court’s finding that the breach of the standard of care was the proximate cause of the rain tank collapse.

Design professionals and project owners should note that the Supreme Court’s ruling was closely tied to the particular facts of the case, and, because the appeal was from a bench trial, the trial court’s ruling could not be disturbed so long as there was some evidence in the record to support the judgment. Based on these circumstances, the Court had no difficulty concluding that there was an evidentiary basis for the trial court’s ruling, especially given that the engineer admitted that he did not understand the specifications for the rain tank system, yet he nonetheless “cut and pasted” those specifications into the design documents.

While this case was pending the appeal process, design professionals had expressed concern that the Court might accept the argument of the project owner, Heritage, that Virginia licensed design professionals breach the standard of care if they adopt into their sealed design documents the general plans and specifications for a product prepared by a non-engineer manufacturer. The Virginia Supreme Court neither accepted nor rejected that contention.

2. **Hensel Phelps Construction Company v. Thompson Masonry Contractors, Inc.; No Limitations Protection Against Lawsuits By The Commonwealth**

The second decision, issued in November 2016, arose from a project the general contractor, Hensel Phelps, had completed some 16 years earlier at Virginia Tech. Virginia Tech is a public,
state owned university, and, as such, the University, like other agencies of the Commonwealth, is not subject to any statutory limitations period on claims by the Commonwealth.

The construction at issue in the case, a student health and fitness center, began in 1997 and was substantially complete in 1998, and all work was complete by June 2000. Years after completion, defects were discovered, and Virginia Tech repaired or replaced the defective work at a cost that Virginia Tech claimed to be in excess of $7.0 million. In April 2012, Virginia Tech claimed recovery of its repair and replacement costs against Hensel Phelps. Virginia Tech and Hensel Phelps eventually settled, with Hensel Phelps paying Virginia Tech some $3.0 million. Hensel Phelps then filed a lawsuit against its subcontractors who had performed the defective work, asserting breach of contract and indemnification.

The subcontractors defended on the basis that Hensel Phelps’ lawsuit was long outside Virginia’s five year statute of limitations on contract actions. The trial court agreed with the subcontractors and dismissed Hensel Phelps’ lawsuit.

The subcontractors defended on the basis that Hensel Phelps’ lawsuit was long outside Virginia’s five year statute of limitations on contract actions. The trial court agreed with the subcontractors and dismissed Hensel Phelps’ lawsuit.

The Supreme Court rejected Hensel Phelps’ flow-down argument. The Court reasoned that, under Virginia law (like many other states), a waiver of rights must be shown by proving the party giving up its rights (here the subcontractor) has knowledge of the rights to be waived and intends to give up those rights. Hensel Phelps’ incorporation by reference subcontract clause and generally worded flow-down clause were not sufficient; there being no express statement by the subcontractor waiving its right to rely on the statute of limitations.

As a fall back argument, Hensel Phelps argued that it was entitled to indemnification by the subcontractors. The Court found Hensel Phelps’ express indemnification clause in its subcontracts, however, to be void under Virginia law. The clause included indemnification of Hensel Phelps for any act, error, omission or negligence of Hensel Phelps resulting in damages or losses to Hensel Phelps; thus calling for indemnification for Hensel Phelps’ own negligence, a fatal flaw under Virginia law. When Hensel Phelps turned to other subcontract clauses requiring the subcontractor to indemnify Hensel Phelps, the Court determined those clauses to be ineffective, particularly when it was clear that the parties had expressly otherwise agreed to an indemnification clause, although a clause void under Virginia law.

The take away for general contractors from this second decision is the wisdom of reviewing their “standard” subcontracts before using those “forms” on their next project. Are the terms drafted to obligate the subcontractor(s) to the same extent and for the same time that the general contractor obligated itself to the project owner, is the indemnification clause enforceable under the law applicable to the subcontract, and does the indemnification clause survive termination or close-out of the prime contract?

3. Conclusion

General contractors’ practices and procedures may have been sufficient in the past; but that should not dissuade them from periodically reviewing those practices and procedures and modifying them, if appropriate, to better protect their interests now and in the future.
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Williams Mullen’s Construction Litigation practice received a National First-Tier Ranking in the 2017 U.S. News - Best Lawyers® Best Law Firms list and the Construction practice received a Band 1 Ranking for Virginia in the 2017 edition of Chambers USA.

UPCOMING EVENT
Who’s Got Your Back? Virginia’s Indemnity Laws and Risk Shifting Clauses in Contracts
Speaker: W. Alexander Burnett, Esq.
Live Webinar
July 13
1:00 - 2:30 pm EST
To register, visit www.lorman.com/training/state-indemnity-clause-in-virginia
For questions, call 877-296-2169

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