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Commercial & Complex Litigation

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RECENT CHANGES TO PENNSYLVANIA'S CONTRACTOR AND SUBCONTRACTOR PAYMENT ACT

Originally enacted in 1994, Pennsylvania's Contractor and Subcontractor Payment Act ("CASPA") was intended to address payment issues between owners, contractors, subcontractors, and suppliers. The underlying concept was simple – to keep funds flowing on construction projects for work properly performed, or goods timely delivered, and to permit reasonable withholding of funds when necessary.

Overdue for a refresh as lawyers and their clients found ways around the terms of CASPA, numerous amendments were enacted in the fall of 2018 and now apply to all new projects in Pennsylvania. The new Amendments to CASPA:

- Prohibit waiver of the statute by contract;
- Permit contractors and subcontractors to suspend work for nonpayment;
- Require owners to provide written explanation for funds withheld; and
- Permit contractors and subcontractors to expedite retainage payments by posting a bond at 120% of the amount due.

The first change noted above eliminates previously common attempts to circumvent CASPA by including language in executed construction contracts that waived application of the statute. Now, much like Pennsylvania's prohibition on the use of blanket contractual lien waivers, the terms of CASPA may not be contractually waived.

CASPA also permits contractors and subcontractors to suspend performance of work for nonpayment, provided appropriate notice is given and waiting periods are applied. If payment has not been made within 30 days of the due date, a contractor must provide the project owner with written notice of the nonpayment. Once the notice is sent, the contractor must wait an additional 30 days for payment from the date the notice was sent. After the second 30-day period has lapsed, and assuming no payment has been made, the contractor must then send a 10-day notice of its intent to suspend work. Importantly, subcontractors are also permitted to follow this procedure as to the contractor with whom they have a contract rather than to the owner. As a contract drafting best practice, owners should require general/prime contractors to immediately provide copies of any non-payment notices or notices of intent to suspend work sent by subcontractors or suppliers under CASPA.

Additionally, the CASPA amendments require that, if an owner withholds payment for an alleged deficiency, the

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owner must provide a written explanation setting forth a good faith reason for the withholding within 14 days of receiving an invoice for the work in question. Although many judges have always had this expectation, the amendment makes clear that any amounts withheld must be reasonable. If the owner fails to provide proper notice within the statutory time frame, the owner waives the basis to withhold payment and the invoice must be paid in full. Contractors may also follow the same procedure as to subcontractors. Where the withholding is related solely to an error in documentation, the recipient must notify the sender within 10 days of receipt of the invoice. Once written notice of the error is received, the correct amount due must be paid on the date it is due.

Finally, the amendments require that payment subject to retainage be paid within 30 days of final acceptance of the work. To facilitate release of retainage, a contractor or subcontractor, upon substantial completion of its own work, may post a bond of 120% of the amount withheld in exchange for a release of the funds.

With these revisions, Pennsylvania moves toward a more regulated construction environment that includes traps for unwary owners and additional tools for contractors to use in their efforts to be paid on time—if they follow the details of the statute.

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COULD MARITIME LAW SINK YOUR CASE?

Whether the facts of your case unwind along the banks of the Ohio River or along the shores of the Gulf of Mexico, maritime law could affect your property damage case. Maritime law, also referred to as "admiralty law," is not reserved for swash-buckling pirates on the high seas. Maritime law casts a much broader net, governing the interactions of people and businesses on navigable waters.

Distinct from the law that governs the interactions of landlubbers, maritime law lends complexity to otherwise straightforward commercial disputes that occur on or around water. As such, understanding the application of maritime law to property damage cases will give you an advantage. Will you be able to use maritime law to sink their case? Or, could it sink yours?

The United States Supreme Court fashioned a test for determining whether maritime law applies. If (1) the injury occurs on navigable waters, (2) the general character of the activity giving rise to the incident has a substantial relationship to traditional maritime activity, and (3) the general features of the incident have a potentially disruptive impact on maritime commerce, then maritime law applies.

If maritime law applies, the recoverable property damages are limited to repair costs. A plaintiff cannot recover the property's diminished value and loss of use under maritime law. Due to the limitation on damages, applying maritime law is often favorable to defendants. (There are also limitations on certain personal injury actions due to the application of maritime law.)

However, applying the test is not as easy as it may seem. While determining the incident's location (on navigable waters) and "general character" (traditional maritime activity) is somewhat straightforward, determining whether the incident's "general features" have a "potentially disruptive impact on maritime commerce" is challenging.

For years, courts and litigants have bemoaned this obscure test, expressing frustration with its unpredictability. This is because the test does not require the actual disruption of maritime commerce, but only the potential for disruption if one imagines the "general features" occurring in a busy port. Even then, the incident must pose more than a "fanciful risk."

Litigants are thus left to battle for their preferred description of the "general features" of the incident to ensure that, projected to the busiest of ports, there is "potential" disruption. Because the "general features" are not tethered solely to the facts, but rather a selective description of the features of the incident, litigants have substantial leeway to argue for or against the application of maritime law based on how they choose to describe the incident. As well, courts have latitude to compose their own descriptions.

For example, the United States Supreme Court in *Sisson v. Ruby*, 497 U.S. 358 (1990) considered a docked vessel that caught fire due to a defective washer and dryer on the vessel, resulting in damage to the vessel, neighboring vessels, and the marina. Describing the incident as a "fire" or a fire that only damaged pleasure vessels and the marina was insufficient. Instead, the *Sisson* Court, finding maritime law applied, described the general features as "a fire on a vessel docked at a marina on navigable waters."

The Third Circuit Court of Appeals in *Hargus v. Ferocious & Impetuous, LLC*, 840 F.3d 133, 134 (3d Cir. 2016) involved a captain standing on the beach throwing a plastic coffee cup at a passenger standing on the deck of a vessel anchored in knee-deep water. The passenger subsequently suffered a concussion, pain, and vision impairment. The district court found maritime law applied, describing the incident as "personal injury to the passenger of a

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vessel caused by the captain of the vessel." However, the Third Circuit reversed, and instead described the incident as "throwing a small inert object from land at an individual onboard an anchored vessel." The Third Circuit went on to explain that these general features do not pose a "realistic" threat to maritime commerce.

A final example comes from the Second Circuit Court of Appeals in *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239 (2d Cir. 2014) involving a fistfight on a dock that resulted in one person being knocked into navigable waters. The district court stated the general features as a "fight on a dock" and determined that maritime law applied, because it could have disrupted maritime commerce. But, the Second Circuit selected a different description of the general features stating it as a "physical altercation among recreational visitors on or around a permanent dock surrounded by navigable water." The Second Circuit then concluded that the fistfight did not present a realistic threat to maritime commerce. Maritime law did not apply.

There are many other examples highlighting the struggle for litigants and courts to state the "general features" of the incident. Regardless, it is clear that how the courts ultimately choose to describe the "general features" is determinative of whether maritime law will apply to a specific case.

Federal and state cases both hold distinctive advantages and disadvantages, so it's important to discuss the differences with your attorney. Given the complexities of applying maritime law, it's imperative that you work with an attorney who understands the impact maritime law may have on your property damage case.

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REASONABLE MEASURES FOR PROTECTING TRADE SECRETS UNDER THE DEFEND TRADE SECRETS ACT

On May 11, 2016, Congress enacted the Defend Trade Secrets Act of 2016 (the "DTSA"),[1] initiating a monumental change in trade secret litigation. Heralded as the single biggest development in Intellectual Property law since the America Invents Act,[2] the DTSA created a federal private cause of action for misappropriation of trade secrets.[3] In February 2017, jurors in the Eastern District of Pennsylvania rendered the first ever DTSA jury verdict based on the misappropriation of a particularly lucrative fruit jam recipe.[4] The jurors in that case awarded a total of $2.5 million in damages, including $500,000 allocated to the plaintiff's misappropriation claim under the DTSA.[5] Due to the potential for substantial jury verdicts for misappropriation, your business must understand not only the type of information that qualifies as a trade secret, but also the steps you should take to protect that information.

The DTSA defines a "trade secret" as "all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing."[6] Courts, however, do not afford trade secret protection to all confidential and proprietary information. Under the DTSA, only information that: "(a) the owner has taken reasonable [measures] to keep secret; (b) derives independent economic value, actual or potential, from being kept secret; (c) is not readily ascertainable by proper means; and (d) others who cannot readily access it would obtain economic value from its disclosure or use" qualifies as a protectable trade secret. *PharMerica Corp. v. Sturgeon*, 2018 WL 1367339, at *4 (W.D. Pa. Mar. 16, 2018) (*citing* 18 U.S.C. § 1839(3)).

Although the DTSA does not explicitly outline the "reasonable measures" a plaintiff must take to maintain the secrecy of trade secret information, two recent cases provide clarity on this issue. In *Freedom Med. Inc. v. Whitman*, the United States District Court for the Eastern District of Pennsylvania found that the plaintiff took reasonable measures to keep its price schedules secret by: (i) defining pricing information as confidential; (ii) generally restricting its disclosure; and (iii) utilizing restrictive covenants to prohibit departing employees from taking or using confidential information. *Freedom Med. Inc. v. Whitman*, 343 F. Supp. 3d 509, 519 (E.D. Pa. 2018).

Moreover, in *Magnesita Refractories Co. v. Tianjin New Century Refractories Co.*, the United States District Court for the Middle District of Pennsylvania found that the plaintiff took reasonable steps to protect its trade secrets by: **(i)** requiring all employees to sign and consent to a "Code of Ethics" that defined "confidential information" and prohibited its disclosure to third parties; **(ii)** requiring employees with access to confidential information to execute nondisclosure or secrecy agreements; **(iii)** utilizing secure passwords and tailored "access profiles" to further control each employee's access to trade secrets; **(iv)** prohibiting employees from forwarding confidential information by email without proper labeling and authorization; and **(v)** prohibiting confidential information from being stored on any public portion of the plaintiff's network. *Magnesita Refractories Co. v. Tianjin New Century Refractories Co.*, 2019 WL 1003623, at *10 (M.D. Pa. Feb. 28, 2019).

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Due to the potential for substantial jury verdicts for misappropriation, a business operating in 2019 must consider not only its potential exposure to trade secret litigation, but how it can prevent misappropriation or, at a minimum, reinforce its possible recovery rights through "reasonable measures." The recent decisions in *Freedom Med. Inc. and Magnesita Refractories Co.* provide instructive examples of the steps necessary for obtaining trade secret protection under the DTSA. In addition to being a sound business strategy, taking such "reasonable measures" to protect proprietary information can afford legal protection under the DTSA.

[1] Pub. L. No. 114–153, § 2, 130 Stat. 376 (2016) (codified as amended at 18 U.S.C. § 1831 *et seq.*).

[2] Eric Goldman, *The New 'Defend Trade Secrets Act' Is The Biggest IP Development In Years*, FORBES (Apr. 28, 2016) https://www.forbes.com/sites/ericgoldman/2016/04/28/the-new-defend-trade-secrets-act-is-the-biggest-ip-development-in-years/#3796240e4261.

[3] 18 U.S.C. § 1836(b)(1).

[4] Michael J. Songer and Ali Tehrani, *The First DTSA Verdict: $500,000 for Misappropriation of a Fig Spread Recipe*, CROWELL TRADE SECRETS TRENDS (Apr. 7, 2017) https://www.crowelltradesecretstrends.com/2017/04/the-first-dtsa-verdict-500000-for-misappropriation-of-a-fig-spread-recipe/.

[5] *Id.*

[6] § 1839(3).

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