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How Well Are You Ramping Up & Protecting Your Marcellus Ops?
Webinar – Tuesday, June 28, 12:15 p.m.

Construction Law Impacts regarding Marcellus Shale Development

Presented by:

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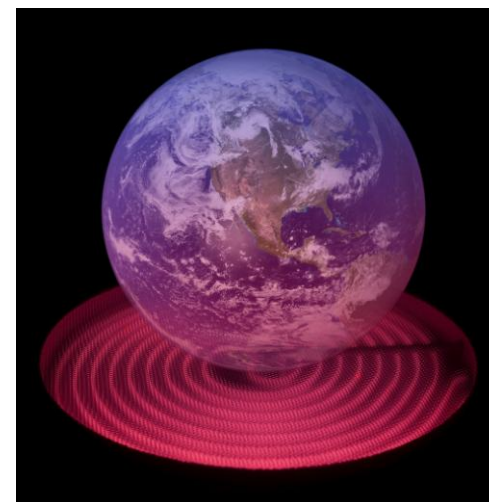
Agenda

- Overview of Marcellus Shale Legal Issues
- Pennsylvania Mechanic's Lien Law
- Contractor and Subcontractor Payment Act
- Differing Site Conditions
- Practice Tips moving forward



Overview of Marcellus Shale Legal Issues

- Environmental Legal Issues
 - Permitting
 - Waste water
- Land Use Legal Issues
 - Infrastructure maintenance
 - Noise regulations
- Corporate Legal Issues
 - Pooling and unitization agreements
- Litigation Issues
 - Lease disputes
 - Well explosion claims
- Construction Law Issues



PA Mechanics' Lien Law

- History of Mechanics' Lien Law.
- Effective January 1, 2007 blanket lien waivers are only permitted for subcontractors on fully bonded projects and for all contractors on residential projects.
- The general contractor cannot agree to a blanket lien waiver on commercial projects.
- Partial lien waivers are permitted on all projects, but only to the extent payment is actually received.
 - Largely served to bring PA in step with the rest of the country.

Question: What is an Improvement?

- The 1901 definition of “improvement” stated:
“[b]e it enacted ... that the words ‘structure or other improvements’ as used in this act, mean any building, bridge, wharf, dock, pier, bulk-head, vault, subway, tramway, toll-road, conduit, tunnel, mine, coal-breaker, flume, pump, screen, tank, derrick, pipeline, aqueduct, reservoir, railroad line; canal, mill race; works for supplying water, heat, light, power, cold air or any other substance furnished to the public; well for the production of gas, oil or other volatile or mineral substance; or other structure or improvement, of whatsoever kind or character the same may be.”

Question: What is an Improvement?

- The 1963 revised definition of “improvement” states (which is the current definition):
improvement “includes any building, structure or other improvement of whatsoever kind or character erected or constructed on land, together with the fixtures and other personal property used in fitting up and equipping the same for the purpose for which it is intended.”

Why the Change in Definition?

- The 1963 Joint State Government Commission report, explained that the detailed enumerations found in the Act of 1901's definition of "improvement" were merely "omitted as unnecessary."
- The Commission concluded that the legislature did not intent to "abridge or enlarge the right to lien" by adopting a more generic definition of "improvement."

Yellow Run Coal Co. v. Yellow Run Energy Co.

- 420 A.2d 690 (Pa. Super. Ct. 1979)
- The Pennsylvania Superior Court determined that strip mining does not constitute an improvement which would serve as a basis for a mechanics' lien.
- In reaching such a conclusion, the court differentiated the operation of strip coal mining from underground coal mining.
- The court heavily relied upon the fact that strip mining only involves the excavation of top soil and coal, whereas underground mining involves the erection and construction of permanent improvements such as “shafts, galleries, tunnels, bulk-heads, lifts and tramways.”

Is a Marcellus Shale Well an “Improvement”?

- The answer is unclear.
- To the extent that the ultimate goal of gas producers is to leave no evidence that a gas well was ever on the property, lien claimants may face an uphill battle in arguing that a deep gas well is an “improvement” which can be lienied.



Contractor & Subcontractor Payment Act

- CASPA, 73 PA. CONS. STAT. §501–516.
- CASPA applies to “construction contracts,” which are defined as “any agreement, whether written or oral, to perform work on any real property located within this Commonwealth.”
- CASPA also states, “Making a contract subject to the laws of another state or requiring that any litigation, arbitration or other dispute resolution process on the contract occur in another state, shall be unenforceable.”

Impact of Application of CASPA

- Owners must pay Contractors “strictly in accordance with terms of the construction contract.”
 - Can withhold for “deficiency items” if notice is given within 7 calendar days of receipt of the invoice.
- Contractors must pay Subcontractors within 14 days of the receipt of payment from the Owner.
 - To benefit from a pay-if-paid clause, the Contractor **MUST** accurately disclose payment due dates from Owner prior to executing the subcontract.

Violations of CASPA

- Interest as per contract (1% per month if not in contract)
- Penalty (1% per month) for any amounts wrongfully withheld
- Attorney's fees "shall be awarded" to the "substantially prevailing party."



Differing Site Conditions

- Generally, in Pennsylvania, “a contractor is presumed, in the absence of an express provision to the contrary, to have assumed the risk of unforeseen contingencies arising during the course of the work....” O'Neill Const. Co. v. City of Philadelphia, 6 A.2d 525, 526-27 (Pa. 1939).
- However, in instances where it is determined to be unreasonable for the contractor to perform prior subsurface tests, Pennsylvania courts have awarded the contractor additional compensation for unforeseen subsurface conditions despite the existence of a contractual clause placing financial responsibility on the contractor.

Reliance on Geotechnical Reports

- Dept. of Transp. v. P. DiMarco & Co., 711 A.2d 1088 (Pa. Commw. Ct. 1998) (concluding a contractor was entitled to recover additional costs incurred due to unforeseen subsurface conditions because pre-bid testing necessary to discover the subsurface condition could not reasonably have been performed by the contractor).
- I.A. Construction Corp. v. Dept. of Transp., 591 A.2d 1146, 1150 (Pa. Commw. Ct. 1991) (holding the determining factor in concluding whether a contractor should have performed subsurface testing is whether it was reasonable to expect a contractor to perform such tests prior to submitting a bid).

Tips Moving Forward

- Deep gas well construction contract preparation and negotiation is KEY
 - Consider using unique contracts (not industry standard contracts)
 - Bargaining position (choice of law issues)
 - Indemnity provisions (insurance)
- Deep gas well subcontracts deserve special consideration
- Be realistic regarding reliance on geotechnical reports

Conclusion

- Questions and Answers
- For post-webinar follow-up
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