Downey & Lenkov LLC

Construction Law Newsletter

March 2024

Firm **News**

Downey & Lenkov has Been Named in the 2024 Best Law Firms® Ranking – Tier 1 in Construction Law

We're excited to share that Downey & Lenkov has been named in the 2024 Best Law Firms® rankings by Best Lawyers®. This year, we were selected as Tier 1 in Construction Law both nationally and regionally. Additionally, we've been ranked nationally and regionally for Construction Litigation and Workers' Compensation.

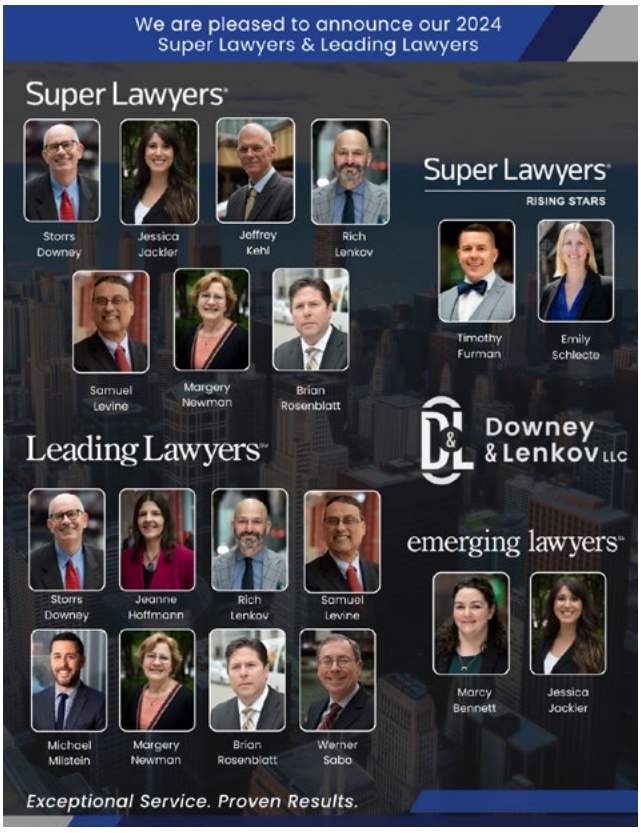
We appreciate the recognition and are thankful for the support! To view details about our rankings, visit our profile here.

Downey & Lenkov Attorneys Selected to Super Lawyers and Leading Lawyers

Nine attorneys at Downey & Lenkov have been recognized by Super Lawyers® as leading practitioners in their fields. Ten attorneys have also been selected for Leading Lawyers' 2024 rankings.

Capital Members Rich Lenkov and Storrs Downey; Income Members Margery Newman and Brian Rosenblatt; Associate Jessica Jacker; and Of Counsel Samuel Levine have been selected on both esteemed lists.

Read the full article here.



Downey & Lenkov LLC

Margery Newman Presented at the Chicago Bar Association

On December 14 Income Member, Margery Newman copresented "Killer Contract Clauses" at the Chicago Bar Association. The seminar covered mechanics liens and construction claims, providing an analysis of how to prosecute and defend such claims and manage them in arbitration effectively.

Samuel Levine Presented at the ISBA Construction Law Section

On January 24 Of Counsel, Samuel Levine presented at the Illinois State Bar Association (ISBA) Construction Law Section Two-Part Online Program. The event focused on the topic – "Single-Family Residential Construction: The Owner's Perspective" in construction law.

Samuel Levine Co-presented at the Lake County Bar Association Debtor/creditor Committee Meeting

Of Counsel Samuel Levine, co-presented "Lien Cuisine; Perfecting and Enforcing Mechanics Liens" at the Lake County Bar Association debtor/creditor committee meeting on March 21.

Samuel covered the process of perfecting and enforcing a mechanics lien, the priorities among mechanics lien claimants and mortgagees, and the enforcement of mechanics liens in the face of bankruptcy.

Upcoming **Webinar**

Join Capital Member Jeanne Hoffmann, Income Member Margery Newman, Of Counsel Samuel Levine and Associate Frank Swanson as they provide the ins and outs of mechanics liens.

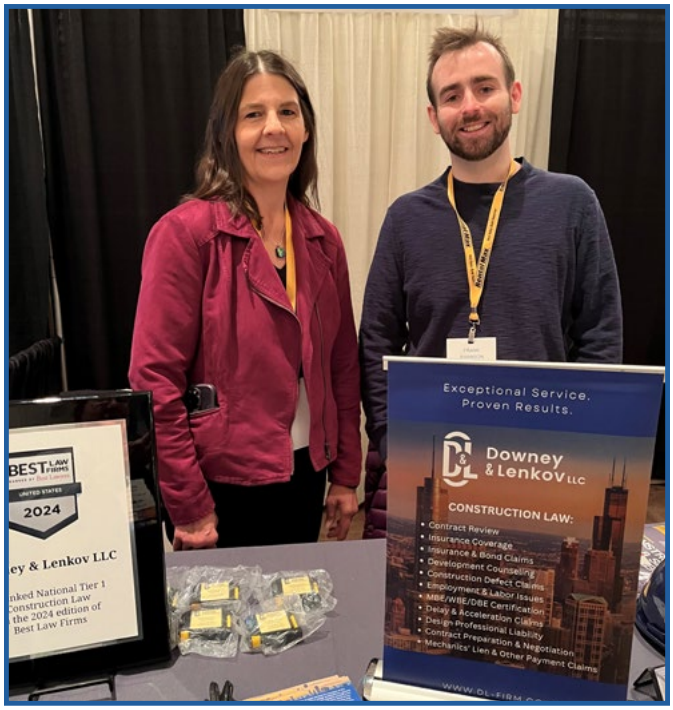
This webinar will reveal how to perfect and enforce mechanics lien claims. It will also explain proper procedures to obtain payment of a claim and how to recognize defenses to mechanics lien claims.

This will be an interactive session, so please be sure to bring your questions.

Register Here

Downey & Lenkov Exhibits at the ASA Construction Expo

Capital Member, Jeanne Hoffmann, Income Member Margery Newman, and Associate Frank Swanson attended the ASA Construction Expo on March 5th in Chicago. The annual Expo & Safety Conference offers networking and business opportunities to construction professionals for over 30 years.



Legal **Updates**

Illinois Supreme Court Revisits and Reverses Position on CGL Coverage Analysis in Construction Cases

By: Jeanne Hoffmann

The Illinois Supreme Court recently issued its opinion in *Acuity v. M/I Homes of Chi., LLC*, 2023 IL 129087, taking a full about-face from Illinois precedent on the issue of whether CGL coverage for "property" damage" caused by an "occurrence" can be found if the only damage alleged to have occurred is to the construction project itself.

A long line of Illinois Appellate Court cases stemming from the Illinois Supreme Court's 2001 decision in *Traveler's Insurance Co. v. Eljer Manufacturing* (finding that ""physical injury" does not include intangible damage to property, such as economic loss"), routinely held that the CGL insuring agreement's initial grant of coverage for "property damage" is not met if the only property

allegedly damaged is the contractor's own work/the project itself. The same line of cases also held that such damage to the building or project itself was not caused by an "occurrence" or accident as defined by the CGL policy, because it was the natural consequence of faulty workmanship.

The court in *M/I Homes of Chi, LLC* rejected these prior decisions for having inserted in their coverage analysis considerations extraneous to the policy language itself:

> We hold that the parties' premise—that there could be no 'property damage' caused by an 'occurrence' under the policy unless the underlying complaint alleged property damage to something beyond the townhome construction project—is erroneous; it is not grounded in the language of the initial grant of coverage in the insuring agreement. To the extent that prior appellate court cases relied upon considerations outside the scope of the insuring agreement's express language, that analysis, which is not tied to the language of the policy, should no longer be relied upon.

Noting that these prior courts ignored the fact that their way of analyzing faulty construction in the context of "property damage" caused by an "occurrence" made the policy exclusions for "property damage" to "your product" and "your work" superfluous,

the court in *M/I Homes of Chi, LLC* recognized that its reversal on the analysis that is to be applied to the CGL policy's basic insuring agreement may not ultimately result in a different outcome on coverage. After holding that the allegations in the underlying complaint sufficiently fell within the initial grant of coverage requirement that there be "property damage" caused by an "occurrence", the court remanded the case to the circuit court for further consideration of whether the exclusions in the CGL policy barred coverage and thus the duty to defend.

U.S. Department of Labor Issues Final Version of Rule Governing Independent Contractor Classifications

By: Frank Swanson

The American economy has experienced a drastic increase in the number of workers who earn their primary or secondary incomes through work as an independent, freelance, or gig contractors. In consideration of this expansion, the U.S. Department of Labor ("DOL") has long issued rules regarding the interpretation of independent contractor status under the Fair Labor Standards Act ("FLSA") with the hopes of providing clarity to employers, workers, administrative agencies, and courts.

On March 11, 2024, the DOL's new independent contractor classification rule, or "Employee or Independent Contractor Classification Under the Fair Labor Standards Act" (1234-AA43) (the "Rule") becomes effective. The Rule's purpose is to resolve increased issues associated with the misclassification of employees as independent contractors and the potential denial of minimum wage, overtime pay

and other protections as a result of the independent contractor classification. The primary concern to employers is the DOL's new six-factor "Economic Realities Test" which lists six, non-outcome determinative contexts any employer/employee relationship will be judged by:

1. Workers' Opportunity for Profit or Loss Based on Managerial Skill;

2. The Extent of Investment by Worker and Potential Employer;

3. Degree of Permanence of the Relationship;

4. Nature and Degree of Potential Employer's Control;

5. The Extent to Which the Work Performed is Integral to Potential Employer's Business;

6. Degree of Worker's Skills and Contribution to Business-like Initiative;

With its issuance of the Rule, the DOL has advised all employers to reevaluate the nature of their relationship with any worker, whether arguably an independent contractor or not, to determine if the new "Economic Realities Test" may apply to reclassify them. For more information, please view the DOL's "Small Entity Compliance Guide."

Venue Selection in Construction Arbitration and Obtaining Testimony from Remote Witnesses

By : Werner Sabo

A federal court in California took on the issue of arbitration venue and subpoenas of witnesses in remote locations. This issue arises in arbitrations when a witness is located far from the arbitration location. When the witness is located nearby, they can be compelled to testify by the issuance of a subpoena. If the person summoned refuses to comply, the statute gives the district court the power to compel the person's attendance before the arbitrator.

A problem arises for remote witnesses. The Federal Arbitration Act (FAA) does not authorize a nationwide process of service. Section 7 of the FAA requires that subpoenas are enforced in the district in which the arbitrators sit. In *Vallco Prop. Owner, LLC v. Am. Arbitration Ass'n,* Federal Rule of Civil Procedure 45(c) defines the "place of compliance" for subpoenas and the geographical scope of a federal court's power to compel a witness to testify at a trial or other proceeding and that Rule imposes a 100-mile limitation. This means that a person cannot be required to attend a trial or hearing that is located more than 100 miles from their residence, place of employment, or where they regularly conduct in-person business.

In *Vallco*, the arbitration was to take place in New York. Several "essential witnesses" were located in California and were unwilling to appear at the arbitration. The case arose out of a dispute between an owner, Vallco, and an architect, RVA. The owner was a developer located in California and the architect was located in New York. The parties used a standard AIA B101-2007 document for the design and development of a property in California.

The AIA agreement did not fix a locale for arbitration but stated that the arbitration "shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of this Agreement." Construction Industry Arbitration Rule 12 provides that arbitration agreements that are "silent" as to locale designation "shall be the city nearest to the site of the project in dispute , as determined by the AAA, subject to the power of the arbitrator to finally determine the locale within 14 calendar days after the date of the preliminary hearing. The arbitrators issued a decision confirming the locale of the hearing as New York. Following this decision, the owner moved for a temporary restraining order in federal court in California.

The court first addressed the owner's argument that the arbitration panel had no authority to set locale in New York. The owners argued that arbitrators could only choose a locale that is "nearest" to the site of the project, meaning somewhere in California and not New York. The court held that this was a matter of the arbitrators' interpretation and application of the applicable rules. Generally, a court cannot disturb an arbitrator's interpretation of an AAA rule when the arbitrator is acting within the scope of its authority. The court declined to do so.

The second issue raised by the owner regarded inconvenience and financial harm based on the fact that many of the witnesses were located in California. This, according to the court, did not warrant judicial intervention mid-arbitration.

The owner's final argument was that it would be irreparably harmed because the AAA lacked the power to subpoena

nonparty out-of-state witnesses. The court conceded that the owner's concern was not unfounded. The court looked at several ways in which the sought-after testimony might be obtained. One would be to have subpoenas issued that compel the witness to appear in California. These could be compelled by a California court if necessary. This would require the arbitrators to travel to California to hear witnesses' testimonies. The court held that this means that the owner was not entirely without a remedy, and it was speculative to say the arbitrators would not travel to California to hear non-party testimony.

The court denied the owner's application for a temporary restraining order. One lesson to take away is to set a location for any arbitration in the agreement itself, and not just depend on the rules of the arbitration provider.

A Comparison of the Illinois Public and Private Prompt Payment Acts

By: Margery Newman

Illinois has two prompt payment acts that apply to the construction industry. The first is the State Prompt Payment Act, which applies to any State official, or agency authorized to provide payments from State funds for "goods or services furnished to the State". Under the Public Act, any "proper bill or invoice" for construction work must be paid within 90 days of receipt. If payment is not issued within this ninety (90) day period, an interest penalty of 1.0% per month (12% per *annum*) of the amount approved but unpaid is to be added for each month (or a fraction thereof) to the amount owed until final payment is made.

The thirty (30) day period for payment begins when a bill/invoice has been "submitted". The state agency must give notice no later than thirty days after the bill/ invoice is first submitted that it contains a defect making the state agency unable to process the payment request. The notice must identify the defect and any additional information necessary to correct the defect. Additionally, if one or more items on a construction-related bill/ invoice are disapproved, but not in its entirety, then that portion of the bill/invoice that is not disapproved, must be paid.

Once the general contractor receives payment from the state agency, it must pay its subcontractor within ten (10) business days or fifteen (15) calendar days, whichever occurs earlier. Interest on a delayed payment to a subcontractor is also set at 2% per month (24% per annum). Subcontractors who fail to pay their suppliers within ten (10) business days or fifteen (15) calendar days of being paid are also liable for the payment of interest.

The second prompt payment act is the Private Construction Prompt Payment Act, which went into effect on August 31, 2007, and covers all private construction contracts, except those involving single-family residences or multi-family residences of less than 12 units.

Under the Private Construction Prompt Payment Act, the owner must approve or reject a pay application within 25 days of its receipt. Additionally, the payment application is deemed approved if the owner takes no action within this 25-day period. If the owner approves the pay application, payment must be made by the owner within 15 days of the approval. If the owner rejects a pay application, the owner must provide a written statement of the amount withheld and the reasons for withholding payment of money within the original 25-day period. Furthermore, the owner must only withhold the reasonable value of the work "not in accordance with the contract." All other payments must be made.

Once payment is received by the general contractor from the account owner of a payment applicant, then the general contractor must pay each of its subcontractors within 15 days of receipt of payment. In the event the general contractor fails to pay the subcontractor within that 15-day period, the subcontractor may suspend work after providing seven (7) days written notice and seek ten percent (10%) interest on the unpaid money.

What does this mean for contractors and subcontractors?

1. The contractor may not withhold any more retention from a subcontractor than the owner is withholding on account of that subcontractor (i.e., the contractor must pay everything it receives on account of that subcontractor).

2. If a contractor discovers nonconforming work or any other reason for withholding money from a subcontractor, the contractor must not draw that money from the owner, or if it has already drawn and received the money, the contractor must return the disputed money to the owner.

3. The contractor should be very hesitant to set off money that it receives on one contract owed to a subcontractor against the subcontractor's debt on another subcontract.

4. Even though the Private Act permits a subcontractor to stop work, this is a drastic step and should only be used sparingly and with consultation with a construction attorney.

Downey & Lenkov Welcomes New Attorneys

Please join us in welcoming our new attorneys Mary Yong, David Ryan, Donn LaHaie and Kealia Hollingsworth.

Illinois

Mary has extensive experience in general insurance defense matters, including property, casualty, product liability and transportation claims. Mary represents clients in both state and federal courts from pre-litigation to trial.

David is a highly respected lawyer with over 30 years of experience in handling complex and valuable cases across the nation. He specializes in defending clients in personal injury, transportation, medical malpractice, legal malpractice, construction defect, and insurance coverage cases.

Donn returns to the firm as a seasoned attorney concentrating in workers' compensation. Over the last 20 years, he has successfully resolved hundreds of complex workers' compensation claims involving thirdparty action claims, product liability, automobile accidents, construction disputes, slip and falls and other catastrophic incidents.

Indiana

Kealia concentrates her practice in workers' compensation defense. She works hard to ensure that her clients are aware and wellinformed throughout the litigation of their claim. Kealia also has experience as a Deputy Prosecuting Attorney with the Marion County Prosecutor's Office.

Who We Are

Downey & Lenkov LLC is a full-service law firm with offices in Illinois and Indiana. Our expertise spans across several practice areas, providing transactional, regulatory and business solutions for clients across the nation. The firm's continued growth is a result of an aggressive, results-oriented approach. Unlike larger law firms however, we do not face massive overhead and are able to charge more reasonable rates that both small and larger employers can more readily afford.

We evolve with our clients, representing Fortune 500 and small companies alike in all types of disputes. Downey & Lenkov is a team of experienced, proactive and conscientious attorneys that have been named Leading Lawyers, Super Lawyers, Rising Stars and AV Preeminent

Newsletter **Contributors**

Jeanne Hoffmann, Margery Newman, Werner Sabo, and Frank Swanson contributed to this newsletter.

View more information on our

Construction Law practice

Our other practices Include:

- Appellate Law
- Business Law
- Condominium Law
- Entertainment Law
- General Liability
- Healthcare Law
- Insurance Law
- Intellectual Property
- Labor & Employment Law
- Products Liability
- Professional Liability
- Real Estate
- Workers' Compensation