Downey & Lenkov LLC

Construction Law Newsletter

September 2024

Firm **News**

Welcome to the Team

Please join us in welcoming our new Of Counsel Jennifer Murphy and Associate Jacquelyn Pearce.

With over 30 years of experience, Jennifer specializes in labor and employment law. Her extensive background in employment and commercial litigation includes providing advice and representing employers in various forums such as federal and state courts, the EEOC, the Illinois Department of Human Rights, the Illinois Human Rights Commission, and the United States and Illinois Departments of Labor.

Jacquelyn specializes in insurance defense litigation focusing on defending premises liability, construction, transportation and auto claims and employment matters. Jacquelyn is a determined and insightful litigator who has a keen ear for the concerns and needs of her clients, empowering them to make fully informed decisions regarding direction and strategy.

Werner Sabo Recognized in the 2025 Edition of The Best Lawyers in America

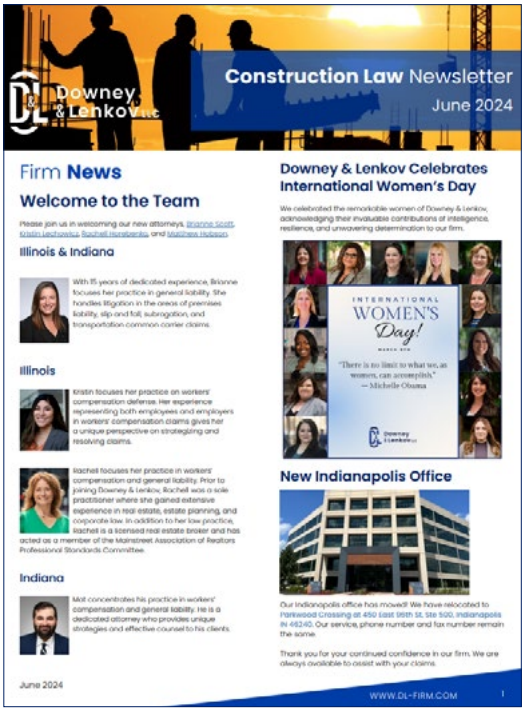
We are pleased to announce that Of Counsel Werner Sabo have been recognized in the 2025 edition of The Best Lawyers in America®.

Werner has received this accolade for his work in Construction Law and Litigation.

The Best Lawyers in America® recognizes individual lawyers with the highest overall feedback from their peers for a specific practice area and geographic region. The methodology is designed to capture, as accurately as possible, the consensus opinion of leading lawyers about the professional abilities of their colleagues.

Please join us in congratulating Werner!

July 2024 Construction Newsletter



In our July 2024 newsletter, we covered firm news, effects of arbitration termination, helpful hints about construction contract clauses, requirements of mechanic's lienand much more.

Join Income Member Margery Newman at the ASA Chicago's Lunch & Learn

Margery Newman will co-present "Killer Contract Clauses" at ASA Chicago's Lunch & Learn on **Thursday, September 19 at 11:45 a.m**. Enjoy a complimentary lunch while staying informed about the latest updates and initiatives in the industry. Don't miss this great event that Downey & Lenkov is proud to sponsor! Register at ASAChicago.org.

Downey & Lenkov Tee Up Support as Proud Sponsors of Multiple Golf Outings

Downey & Lenkov sponsored a foursome at La Rabida's 30th Annual Golf Classic. La Rabida Children's Hospital treats children with chronic or complex needs. More than 250 golfers hit the links to support their patients and families. Capital Member Jeanne Hoffman and Special Counsel Bob Bramlette were both in attendance.

Downey & Lenkov proudly sponsored NIU College of Law's 19th Annual Golf Outing at River Heights Golf Course in DeKalb. Proceeds from the outing will be used for scholarships and other related alumni programs.

Downey & Lenkov was proud to sponsor a hole at the annual Valparaiso Pop Warner Golf Outing. Funds from this outing are used to make sure the football and cheer athletes have safe equipment and also provides financial registration assistance to those athletes in need as every child deserves an opportunity to play sports.

Downey & Lenkov Participates in USLI's October Stronger Together Auction

Downey & Lenkov is proud to participate in USLI's October Together—Stronger Together Silent Auction benefiting Breastcancer.org.

October Together is a month of fundraisers and events where all proceeds benefit Breastcancer.org, a non-profit organization that helps women and their families by providing expert medical information about breast health and breast cancer, as well as peer support through their large online community.

The silent auction features a variety of items donated by companies. This year, Downey & Lenkov donated "Get Cooking - Italian theme".

Upcoming Construction Webinar

Are You Sure You're Covered?

The webinar will address insurance coverage for "bodily injury", including when the claimant is your employee, as well as coverage for "property damage", policy exclusions for certain "property damage" and the exceptions to these exclusions.

11.7.24 | 3:00 PM CDT

Register Here

Legal **Updates**

Construction Negligence in Illinois: Control Neccessary to Establish a General Contractor's Duty of Care for its Subcontractor Acts

By: Frank Swanson

The Illinois Appellate Court of the Second District recently found in favor of a general contractor after a subcontractor's employee was injured while performing work at a job site, *Neisendorf v. Abbey Paving & Sealcoating Co, Inc.*, 2024 IL App (2d) 230209. Plaintiff sued a general contractor alleging premises liability and negligence arising from the general contractor's control of the McHenry County Government Center during storm sewer work involving plaintiff's employer. Ultimately, the Court affirmed Kane County trial court's granting of summary judgment to the general contractor, reasoning that the general contractor did not retain the required amount of control over the "operative" details of plaintiff's employer's work, nor did it have notice of the subject dangerous condition.

The court analyzed plaintiff's claim under Section 414 of the Restatement (Second) of Torts, which applies to claims of construction negligence and dictates the "retained control exception" to the general rules of agency relationships with independent contractors. The court provided that the "retained control exception" operates under the reasoning that where a general contractor retains control over the "operative details" of the work of a subcontractor (or its employees), it should exercise that control with reasonable care. Whether a general contractor has retained sufficient control of the work is a fact-specific inquiry that starts with the operative contracts between any relevant parties.

In other words, general contractors may become vicariously liable for a subcontractor's negligence if the general contractor retains control over the operative details of the work. Alternatively, the general contractor may still be directly liable for injuries, even without retaining operative control, if the general contractor has retained some form of supervisory control of the job site. This direct liability must arise from more than a general contractor's right to inspect work, order changes to specifications, and ensure safety precautions are observed. It is only where the general contractor retained control over the "incidental aspects" of the subcontractor's work that it may be directly liable for its supervisory efforts.

Applying these considerations to plaintiff's lawsuit, the court's analysis was frustrated by the lack of a written contract between the general contractor and plaintiff's employer. The general contractor's contract with McHenry County stated that the general contractor was "solely responsible for and have control over" the means, methods, sequences, procedures and coordination of the work. While the contract also stated that the general contractor was responsible for supervision of safety programs and "shall provide reasonable protection to prevent" injuries to individuals on site, the court observed that the general contractor was not required to designate a safety director or take any certain safety procedures by the contract with McHenry County.

Those findings led the court to conclude that the control retained by the general contractor was the type of general control granted under the standard construction contract and did not create any right for the general contractor to dictate the operative details of plaintiff's employer's work. Moreover, the court provided that even where the general contractor has the right to order work stoppages, such is not sufficient without further control of how the work is performed. The court reasoned that creating such a duty would operate to penalize a general contractor's efforts to promote safety. Thus, Illinois courts will look for a detailed safety plan that affects the subcontractors' means and methods as proof of retained control.

The Neisendorf decision reminds us of the fact-specific, high bar to establish a general contractor's liability for general job-site safety.

Killer Clauses II

By : Margery Newman

At the beginning of a project, the plans and specifications specifically provide sufficient information so that all the stakeholders (owner, architect, general contractor, subcontractor and material suppliers) know what labor and materials are included in the contract price. Often during the construction project, changes to the scope of the work for material substitutions arise and need to be priced out. Changes to the work may also be due to unforeseen conditions such as unexpected underground storage tanks. An owner may also choose to request additional work not contemplated by the original set of plans and specifications. All of these changes affect the budget for the project, and it is, therefore, crucial to price change orders accurately.

The following are examples of site logistics that impact job costs and should be considered when pricing out a change order.

1. Access to the work area – anytime a work site is not easily accessible (muddy, congested) it adds to the cost of bringing materials to the jobsite. If delivery trucks cannot pull up to the construction site and the materials have to be off-loaded away from the construction site, the labor cost increases significantly.

2. Availability of hoisting facilities – if there is no crane or elevator designated for the movement of materials then the trades people have to carry the materials up the stairs. This is an arduous and time-consuming process that causes the construction work to fall behind.

3. Suitable areas for storage – if a trades person has to walk a significant distance to gather up materials, such as lumber conduit, pipes, paint cans, etc. this significantly impacts efficiency. Trades want their material stocked in the area in which they are working.

4. Access to water, toilets, electricity, and lighting – the farther a trades person has to walk to find water or a Porta-Potty the less time is spent doing actual construction work. It is also critical to know in advance who is providing the temporary power or heat, and if there are winter conditions.

5. Trash removal – just like access to water and Porta-Potties, trash containers should be close to where the work is being performed. Having to carry construction waste downstairs or outside the building is time consuming and inefficient.

It is important when pricing a request for a change order that "all" the costs associated with the change be considered. Change orders need to include more than the cost of the item of work added. The amount of extra time it will take to do the additional work must be considered and included as part of the change order. It is not enough to ask for the price of a widget. The price of the widget must also include the time to obtain the widget, how long it will take to get the widget to the jobsite, how long will it take to get the widget to where the trade is working, and what other site impediments exist that will cause additional cost to install the widget.

Terminating Employee with Pending Workers' Compensation Claim

By : Storrs Downey

In the Seventh Circuit Court's decision in *Emerson v. Dart*, No. 23-3029 (7th Cir. 7/26/24), the Court held that for a former employee to establish a potentially viable retaliatory discharge claim they had to present more evidence than just an ongoing active workers' compensation claim at the time the employee was terminated. Further, where such an employee was terminated while off for a work-related injury, this was insufficient alone to establish an inference of a retaliatory motive by the employer.

"That Can't Be Right": Illinois Contractors Must Be Aware of Sureties' Rights Upon Default Under Payment and Performance Bonds

By: Frank Swanson

Upon receiving notice of a potential declaration of default under a Payment and Performance Bond, we often receive questions from clients about what measure of control they can properly assert over a surety's selection of a substitute contractor. The answer is almost none. Yet, the risk of the surety selecting an improper surety, or risking contractual relationships, can be minimized at the contracting stage through simple, clear modifications of the standard A312 Payment and Performance Bond and standard contractual provisions.

Upon a declaration of contractor default, the A312 provides sureties with three different options that it must elect "promptly":

1. Arrange for the defaulted contractor to complete the contract, with the approval of the "owner";

2. Elect to perform the work itself, through its agents or independent contractors; and

3. Seek bids from qualified contractors, with the approval of the "owner."

While seemingly simple, the dynamic nature of construction contracts between parties with different degrees of connection with project owners and/or general contractors creates situations where a surety's substitute contractor election could frustrate the project and render certain contractors in breach with non-parties to the bond.

For Example: A general contractor forces its subcontractor to secure a payment and performance bond. The A312 form does not include the project owner but references the general contractor's contract with the project owner. In the project owner's contract with the general contractor, the project owner has a clear right to deny access to any subcontractor selected by the general contractor. During the project, the subcontractor performs substandard work, prompting the project owner to demand the general contractor declare the subcontractor in default. Upon default, the surety elects option (2) above, but chooses to hire the just-defaulted subcontractor. The project owner, under its contract, objects and attempts to prevent the subcontractor from returning but the surety persists. Considering its contract, the project owner now feels the general contractor has breached the contract.

As the general contractor in this scenario, you are caught between two parties with express contract rights while both seek to use those rights without your input. Who wins and who loses?

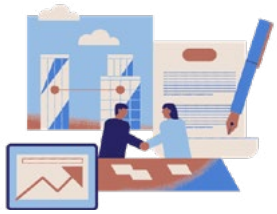
Unequivocally, the surety wins. While Illinois law requires sureties to make their selections in good faith, it provides extreme deference to the surety under the reasoning that it is assuming all liability for the quality of the work thereafter. This is true even where there are legitimate bases to prefer a different contractor. Even moderate attempts by parties to argue or impede a surety's selection are at extreme risk of voiding the bond's coverage completely. In other words, the terms of the bond will win out over contractual provisions, even where the contract is incorporated into the bond.

When considering the surety's rights, it is imperative that the chosen surety's rights over the specific project must be discussed during the contracting stage so that contingencies can be planned for. One option is discussing modifications to the A312 with the surety that eliminates or reduces the sureties' right to elect a previously defaulted subcontractor. In more complex contract schemes, the parties may seek to include contractual provisions between themselves that address potential actions of the surety and modify whether such could constitute a default by the contractor.

There are several potential avenues to prevent the above scenario. Downey & Lenkov is happy to consult with you regarding these options at both the contracting and default stages.

Contracting with a Governmental Body: Extra Work

By: Werber Sabo



What happens if you have a contract with a governmental body such as a county, and extra work is ordered? This was the situation in *Atane Engrs., Architects & Land Surveyors, D.P.C. v. Nassau County,* 2024 N.Y. App. Div. LEXIS 2361 (May 1, 2024). Plaintiff was a design firm that was hired by a New York county to provide construction management services for a new police precinct building. During the work, the parties agreed to an amendment calling for additional work. Later, the county required Plaintiff to perform additional work beyond the contract and the first amendment.

Plaintiff prepared a second amendment to the contract, but that amendment was never authorized by the county legislature or executed by the county executive. When the county refused to pay for the additional work and refused to sign the amendment, Plaintiff sued. The lawsuit asked for mandamus to compel the county to approve the second amendment, and for damages for breach of contract and unjust enrichment.

The trial court dismissed the complaint, and the appellate court affirmed that decision. As to mandamus, the court held that the engineer did not have the right to compel the county to agree to the amendment. Next, Plaintiff lost on the breach of contract count. Since the amendment was never signed, there was no contract that could be breached. Such a contract did not exist. Finally, Plaintiff lost on the third count for unjust enrichment. This is often referred to as a quasi-contract and requires three elements: (1) the Defendant was enriched, (2) at the Plaintiff's expense, and (3) that it is against equity and good conscience to permit the Defendant to retain what is sought to be recovered. For instance,

if a homeowner contracts with a builder to construct a porch and the homeowner then asks the builder to also replace the roof, the contractor can recover its additional costs even if a change order is not signed. This would be unjust enrichment.

However, the rules are different when the owner is a governmental body. There, various laws govern what such a governmental body is authorized to do and how that is to occur. Various cases around the country have stated that even where municipalities have accepted benefits, they will not be held liable under unauthorized agreements. Only if the contracting laws have been followed exactly will the contractor be entitled to be paid for additional work.

What can a contractor or design professional do if faced with a demand for additional work? According to this court, the contractor's option is to withhold his services unless an agreement is executed and approved as the statutes require. Illinois and other states follow the same reasoning. Unless a contractor obtains an executed agreement for additional work and the proper procedures have been followed, the governmental body does not have to pay for such work. This is true for anyone performing work for a governmental body. Careful adherence to statutory requirements is essential.

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**

Storrs Downey, 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

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- **Chicago, IL**
- **Crown Point, IN**
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- **Milwaukee, WL**

Downey & Lenkov LLC