Downey & Lenkov LLC

Construction Law Newsletter

September 2025

Firm **News**

Downey & Lenkov Attorneys Recognized as Best Lawyers®

We are pleased to announce that four Downey & Lenkov attorneys have been recognized in the 2026 edition of The Best Lawyers in America®.

- Capital Members Kirsten Kaiser Kus and Michael Milstein received this accolade for Workers' Compensation Law – Employers.
- Of Counsel Werner Sabo received this accolade for Construction Law and Litigation.
- Income Member Timothy Furman has been selected for the 2026 Best Lawyers: Ones to Watch in America list for Workers' Compensation – Employers.

The Best Lawyers in America® honors individual attorneys who receive the highest overall feedback from their peers in specific practice areas and geographic regions.

Real Estate Law Update 2025


Join Of Counsel Samuel Levine and Associate Frank Swanson at the Real Estate Law Update 2025, presented by the ISBA Real Estate Law Section, on 10/29/25 from 10:30 to 11:15 a.m.

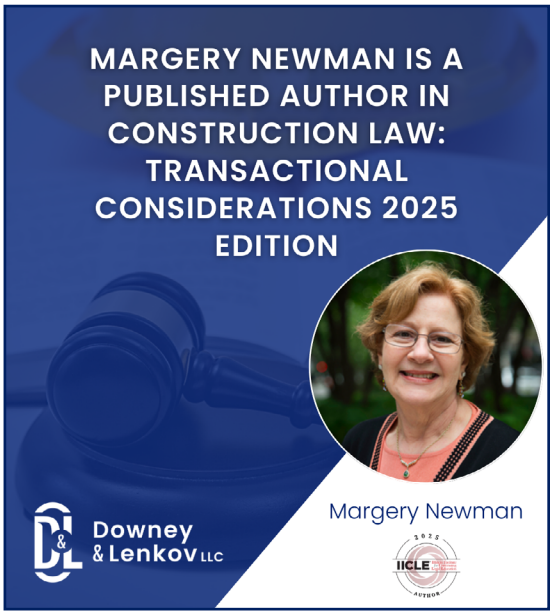
They will present *"Recovering Attorneys' Fees in Real Estate Litigation,"* a review of statutes ranging from the Mechanic's Lien Act to the Deceptive Business Practices Act and more, highlighting when and how attorneys' fees may be recovered.

Registration opens soon on the ISBA website.

Construction Law: Transactional Considerations 2025 Edition

Of Counsel Margery Newman is a published author in the Illinois Institute of Continuing Legal Education (IICLE®) publication, "Construction Law: Transactional Considerations 2025 Edition." This trusted resource has guided Illinois attorneys for over 50 years with user-friendly, comprehensive practice guidance.

You can purchase a copy of Construction Law here.



Construction Law Disputes Handbook 2025 Edition


The 2025 Edition of the IICLE® Construction Law Disputes Handbook is now published, featuring Chapter 3, "*Subcontractor Claims,*" co-authored by Of Counsel Samuel Levine and Associate Frank Swanson.

You can purchase a copy of Construction Law Disputes here.

May 2025 Construction Newsletter

In our May 2025 newsletter, we covered firm news, Tariffs and New Risks in Construction Contracts, Elimination of DEI, What Happens When Projects are Suspended and much more.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Fond Farewell to Capital Member Jeanne Hoffmann

After more than two decades with Downey & Lenkov, Capital Member Jeanne Hoffmann has departed the firm to take on new challenges.

As a trusted colleague, mentor and leader, Jeanne's expertise and dedication made a lasting impact on our firm, colleagues and clients alike. While we will miss her presence, we are deeply grateful for her many contributions and the legacy she leaves behind.

2025 Super Lawyers®

Eleven attorneys at Downey & Lenkov have been recognized by Super Lawyers® as leading practitioners in their fields.

Capital Members Rich Lenkov and Storrs Downey; Income Members Jessica Jackler and Brian Rosenblatt; and Of Counsel Samuel Levine and Margery Newman have been selected to both Leading and Super Lawyer lists.

Read the full press release here.

Super Lawyers

Super Lawyers Rising Stars

Of Counsel Samuel Levine Named Recipient of the 2025 ISBA Newsletter Editors Service Award

Downey & Lenkov Of Counsel Samuel Levine received an Illinois State Bar Association Membership Appreciation award at its Membership Appreciation Reception for his dedicated service as editor of its "Building Knowledge" Construction Law Newsletter.

Among his many contributions, Samuel is a past chair of the ISBA Construction Law Section Council, Commercial Banking, Collections and Bankruptcy Section Council and Real Estate Law Section Council as well as a current member of its legislative committee.

Read full announcement here.

May 2025

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Legal **Updates**

Illinois Appellate Court Finds Fact Questions Preclude Summary Judgment for on Issue of Whether an Employer is a Borrowing Employer under the Workers' Compensation Act's Exclusive Remedy Provision

By: Jeffrey Kehl

In *Tolbert v. Odum Concrete Products, Inc.,* 2025 IL App (5th) 230548-U, the Illinois Appellate Court was asked to review whether a contractor who hires a cement truck operator from a defendant is a borrowing employer under the Workers' Compensation Act. Such that the actions of the operator as a co-employee preclude direct liability for the operator and his principle. After analyzing the facts of record and the established judicial considerations of that very question, the court held that the existence of fact questions precluded summary judgment.

The underlying facts in *Tolbert* are hardly straightforward. Tolbert was an employee of Millstone, a contractor hired to grind and remove a roadway. The grinding operation involved 3 pieces of machinery. First, there was a grinding machine that would crush and cut the concrete. Second, there was a water tank truck that would dispense water onto the working bits of the grinding machine to lubricate and cool the equipment. The process would create concrete slurry. Third, a cement truck moved side-by-side with the grinder and the slurry would be moved into the tank on the cement truck. In a perfect world, the grinder and cement truck worked in tandem. The cement truck would move forward and backward whenever the grinder moved forward and backward.
Millstone contracted Ready Mix to provide cement trucks and operators. On one particular occasion, Ready Mix sent its operator, Roy Rodgers, to the Millstone jobsite. On that occasion, the grinder and Rodgers fell out of sync and Rodgers struck and injured Tolbert. Rodgers had been taking direction from the Millstone foreman before and during the day and it was the foreman who sent Rodgers home after the incident.

Tolbert sued Odum, Ready Mix and Rodgers on the theory that Rodgers was negligent in his operation of the cement truck. Ready Mix filed a third-party complaint against Millstone as the employer of Tolbert. Millstone responded by asserting that it was Tolbert's employer, had paid his workers' compensation benefits, and that its liability was limited to the extent of its workers' compensation exposure. Millstone, after all, paid Ready Mix for the cost of the use of the cement truck and Rodger's time.

This is where the case gets interesting.

Ready Mix argued that under the exclusive remedy provision of the Workers' Compensation Act, Tolbert could not maintain a direct action against Rodgers because Rodgers was a borrowed employee of Millstone. The trial court agreed. Utilizing the developing criteria for determining whether a loaning or borrowing employer is protected by the exclusive remedy provision of the Act, the appellate court concluded that questions of fact regarding the control over Rodgers' work precluded summary judgment.

The Illinois Workers' Compensation Act is intended to provide financial protection to workers for accidental injuries arising out of and in the course of employment. The Act imposes liability on an employer without fault but prohibits the employee from bringing a common-law suit against the employer. *Id.* Section 5(a) of the Act sets out this exclusive remedy:

> No common law or statutory right to recover damages from the employer *** for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act ***.

820 ILCS 305/5(a).

The Act provides protection to workers for accidental workplace injuries by imposing liability on the employer without fault on the employer. In exchange, the injured employee relinquishes any common law or statutory right to recover damages from the employer or co-employees for work-related injuries. This exclusive remedy provision is part of the *quid pro quo* under which an employer assumes liability without fault but is relieved of the prospect of large verdicts for damages.

Not only does the exclusive remedy doctrine apply to direct, general employers, it also applies to *borrowing* employers as well. Following a long line of Illinois cases, the court in *Holten v. Syncreon North America, Inc.*, 2019 IL App (2d) 180537, reaffirmed that the Act "specifically incorporates the borrowed-employee doctrine and extends the immunity of the exclusive-remedy provision to borrowing and loaning employers." *Id.* at ¶ 28.

The linchpin of Ready Mix's argument was that Rodgers was a co-employee of Tolbert because Millstone was the borrowing employer. In determining whether an employer is a borrowing employer under the Act, Illinois courts have consistently looked at who undertook to direct the employee's work, whether the employee worked the same hours as the hours for other employees of the borrowing employer, whether the employee received instruction from the borrowing employer's foreman and was assisted by the borrowing employer's employees, whether the loaning employer's supervisors were present, whether the borrowing employer could start and stop the employee's work and whether the loaning employer relinquished control of its equipment.

In *Tolbert*, the trial court concluded that most of these factors weighed in favor of Millstone being considered the borrowing employer and, therefore, no direct cause of action could be maintained against Rodgers. Because Ready Mix's liability was predicated on Rodgers' negligence only, Ready Mix could not be liable.

The appellate court determined that the case was not so factually clear-cut. The appellate court considered additional facts that precluded summary judgment, including evidence that:

> (1) Rodgers was acting in accordance with the directions given to him by Ready Mix and utilizing the cement truck to fulfill Ready Mix's obligations to Millstone;
>
> (2) He could have stopped the work and told Millstone to request a new driver if there was a safety issue;
>
> (3) He adhered to Ready Mix's policies while operating the vehicle;
>
> (4) His adherence to Millstone's directions during the grinding operation was not an expression of control but merely a coordinated effort;
>
> (5) He was paid by Ready Mix for his work on the day of the incident;
>
> (6) The record was silent as to whether Millstone had the ability to dismiss him from working on the operation;
>
> (7) There was no contract regarding his work on the grinding operation, so the record was silent as to any control that Millstone was given over him during the operation;
>
> (8) Odum and Ready Mix had the right to send any cement truck operator, as there were no terms governing which operators would be sent and whether there was a restriction on Odum's and Ready Mix's ability to substitute;
>
> (9) Rodgers had not even worked for Millstone for a few hours when the plaintiff was injured, so his length of employment was very brief; and
>
> (10) The safety director of Millstone classified Ready Mix and Odum as hired haulers, not subcontractors.

Because of these additional facts, the status of Millstone as the borrowing employer could not be resolved at the summary judgment stage and that the questions need to be resolved by a factfinder at trial and not on a review of a cold appellate record.

Waiver of Consequential Damages in Construction Contracts

By: Werner Sabo

Many construction contracts, including those by the American Institute of Architects, include a waiver of consequential damages. Two recent cases concern this important concept. In *Orlando Health, Inc. v. HKS Architects, Inc.*, 2025 U.S. Dist. LEXIS 132392 (Mid. Dist. Fla. 7/11/25), the architect was hired to design a hospital and supporting departments. The architect, in turn, hired a structural engineer to provide structural engineering services. During construction, various structural defects became obvious, requiring immediate repairs.

When the owner sued the architect to recover the costs of the repairs, the architect brought the engineer into the case, and both parties moved for summary judgment, arguing that all of the damages that the owner sought were consequential damages, which were waived by contract.

AIA Document B101, Agreement between Owner and Architect, includes this provision:

> *§ 8.1.3 The Architect and Owner waive consequential damages for claims, disputes, or other matters in question, arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination of this Agreement, except as specifically provided in Section 9.7.*

The owner argued that the costs to repair several serious structural design errors were no consequential damages, but instead direct damages that were not waived.

The Florida court examined the definition of consequential damages. Such damages are those that do not arise within the scope of the immediate buyer-seller transaction but rather stem from losses incurred by the non-breaching party in its dealings, often with third parties, which were a proximate result of the breach, and which were reasonably foreseeable by the breaching party at the time of contracting. Common forms of consequential damage are lost profits, reputational damage and rental expenses. On the other hand, direct damages are commonly defined as those damages which are the direct, natural, logical and necessary consequences of the injury. Here, the court found that the need for extensive repairs to the hospital did arise within the scope of the immediate transaction. The architect was obligated to provide structural engineering plans for the project, and the need for repairs was caused solely by deficiencies in those plans. Thus, the cost of remediation and repairs is not consequential damages that was waived by the agreement.

Another recent case is *Vista Holdings, LLC v. BSB Design, Inc.,* 2025 U.S. Dist. LEXIS 13488 (WD Va., 7/15/25). After the architect provided initial drawings for the project, the local municipality required a change in the location of sanitary lines. After the architect failed to provide updated plumbing drawings with updated locations, the contractor installed the sanitary lines in the original (wrong) locations and had to remove and reinstall the sanitary lines in the proper location, causing significant delays and additional costs to the project. The owner then sued the architect, seeking damages resulting from the delay, including costs and fees to extend its builders' risk insurance policy, its mortgage insurance premium policy, its HUD loans, the additional monthly interest on its HUD loans, and lost rental revenue. The agreement contained the same waiver of consequential damages provision as in *Orlando*. After bringing the engineer into the lawsuit, the architect filed affirmative defenses that the owner's damages are consequential and are waived by the agreement. After a battle over whether the waiver of consequential damages provision in the A201 General Conditions was incorporated into this contract, the court held that there was no such incorporation. These A201 provisions are more inclusive and presumably would have helped the owner. As it was, the waiver of consequential damages provision quoted above would apply to this case.

The court then reviewed the concept of consequential damages, explaining that there are two broad categories of contract damages: direct damages and consequential damages.

Direct damages flow "naturally" from a breach of contract; *i.e.,* those that, in the ordinary course of human experience, can be expected to result from the breach, and are compensable. Consequential damages, on the other hand, arise from the intervention of "special circumstances" not ordinarily predictable and are compensable only if it is determined that the special circumstances were within the contemplation of the parties to the contract. Whether damages are direct or consequential is a question of law. This determination is not based upon the actual understanding and foreseeability of the parties in a particular situation, but rather, is an objective question of whether the damages "flow ordinarily and expectedly" from a breach of contract, are "ordinarily predictable" under construction industry standards, or can be expected to result from a breach of contract in the ordinary course of human experience.

While it appears that many of the damages sought by the owner in the *Vista* case would be consequential damages, the court put that issue off to a later date, as there had been no discovery in the case that would have helped to flesh out the facts.

Whether to include a waiver of consequential damages provision in a construction contract can have significant implications if something goes wrong. An attorney representing an owner might have a different viewpoint on this issue than one representing the contractor or architect. This becomes even more important if using non-standard agreements or if they are heavily modified. Consultation with a knowledgeable construction attorney who can investigate the requirements of the project is important.

DOL Issues Guidance on Independent Contractor Misclassification Enforcement

By: Jessica Jackler

On 5/1/25, the U.S. Department of Labor (DOL) issued guidance on how employers should determine employee or independent contractor status when enforcing the Fair Labor Standards Act (FLSA).

The DOL is currently reviewing the 2024 Biden-era final rule which is also being challenged in federal court. The 2024 final rule took effect on 3/11/24 and applies a multi-factor "economic realities" test, which made it more likely a worker would be classified as an employee rather than an independent contractor under the FLSA. The test concentrates on whether the worker is economically dependent on the employer, and, if so, the worker would likely be classified as an employee.

While the DOL is reviewing the 2024 final rule and light of the pending legal challenges, DOL investigators have been directed not to apply the 2024 rule's analysis in current enforcement matters. Instead, the DOL will rely on principles outlined in Fact Sheet #13 and by the reinstated Opinion Letter FLSA2019-6, which addresses classification in the context of virtual marketplace platforms. The test that will be applied during this review period focuses on whether the worker is economically dependent on the employer for work or a worker in business for themselves. Several factors should be analyzed and no one factor is considered more important than another.

The following factors should guide the assessment of whether a worker is an employee under the FLSA or an independent contractor in business for themself:

1. Opportunity for profit or loss depending on managerial skill
2. Investments by the worker and the employer
3. Permanence of the work relationship
4. Nature and degree of control
5. Whether the work performed is integral to the employer's business
6. Skill and initiative

Additional factors may be considered if they assist in assessing whether the worker is in business for themself or is economically dependent on the employer for work.

If a worker is an employee under these factors and the employee is performing work that is covered under the FLSA, the employee must be paid not less than the federal minimum wage ($7.25 per hour) and overtime pay that is not less than one and one-half the regular rate of pay for all hours worked over 40 per week unless a relevant exemption applies. The FLSA also has record-keeping requirements, retaliation protections and child labor provisions.

Who We **Are**

Downey & Lenkov LLC is a full-service law firm with offices in Illinois, Indiana and Wisconsin. 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 Best Lawyers®, Leading Lawyers, Super Lawyers®, Rising Stars and AV Preeminent®.

Newsletter **Contributors**

Jeffrey Kehl, Werner Sabo and Jessica Jackler contributed to this newsletter.

As always, the team at Downey & Lenkov is here to help. Whether you have questions, need guidance or are facing a complex challenge, our team is ready to assist.

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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