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Bradley Arant Boult Cummings LLP

CONSTRUCTION AND PROCUREMENT LAW NEWSLETTER

INSIDE THIS ISSUE

PRACTICAL CONSIDERATIONS FOR NAVIGATING TARIFF RISK ON CONSTRUCTION PROJECTS

Monica Wilson Dozier & Amandeep S. Kahlon

As the second Trump administration begins, developers, contractors, subcontractors and suppliers are evaluating the extent of the construction industry's international ties – and contractual exposure to potential tariff increases. While President Trump has indicated an intent to impose or increase tariffs, much uncertainty remains concerning the products, goods, and countries that may be impacted as well as the timing of any such tariffs.

This uncertainty leaves many in the construction industry concerned, and both upstream and downstream parties are carefully negotiating contractual risk of changes in tariffs. Broadly speaking, tariffs are typically considered import (or export) taxes imposed on goods and services imported from another country (or exported). In the United States, Congress has the power to set tariffs, but importantly, the president can also impose tariffs under specific laws (most notably in recent years, the Trade Act of 1974), citing unfair trade practices or national security.

Many different contractual provisions may be impacted by the introduction of new tariffs: tax provisions, force majeure provisions, change in law provisions, and price escalation provisions, for example. Procurement contracts routinely rely on Incoterms, which allocate tariff risk to either buyer or seller depending on the selected Incoterm. Negotiating an appropriate allocation of risk of changing tariffs can be as much an art as science and requires consideration of how tariffs are administered and their effects on the market. Consider, for example, the following:

Tariffs are paid by the importer of record to U.S. Customs & Border Protection. If a contractual party is not the importer of record, such party will not be directly liable for payment of tariffs.

BRADLEY LAWYER ACTIVITIES AND NEWS

Bradley is pleased to announce that the firm has been named the "Law Firm of the Year" in the area of Construction Law in the 2025 edition of *Best Law Firms*. This marks the fifth time since 2018 that Bradley has earned a "Law Firm of the Year" award for its Construction Practice Group, including three awards in the area of Construction Law in 2018, 2020 and 2022 and one award in the area of Litigation – Construction in 2023.
Bradley also earned Tier 1 metropolitan rankings for Construction Law in Atlanta, Birmingham, Charlotte, Houston, Jackson, Nashville, Tampa, and Washington, D.C.

Bradley is pleased to announce that Birmingham partner David Pugh was elected as the 2025 National Chair of the Associated Builders and Contractors (ABC) National Board of Directors. He was elected to the one-year term at the ABC's annual Leadership Institute meeting held November 12-14 in Scottsdale, Arizona and will serve beginning January 1, 2025.

Ryan Beaver was named to *Business North Carolina's* Legal Elite 2025.

Ian Faria, Jon Paul Hoelscher and Sydney Warren are scheduled to present at the 36th Annual Construction Law Conference, March 6 & 7, 2025 in San Antonio, TX.

On November 7, Lee-Ann Brown led a session on construction contract strategies at the 45th Annual Construction Law Seminar held by the VA State Bar.

Ron Espinal presented at a Construction Law seminar hosted by Stetson Business Law Society on November 20.

Brian Rowlson was re-certified by the Florida Bar in the area of Construction Law.

On December 3, Jim Archibald, Carly Miller, and Alex Thrasher presented at the Alabama State Bar's 11th Annual Construction Industry Summit on "Termination of Construction Contracts for Default: Legal Issues, Options, and Pitfalls."

Instead, tariffs raise the ultimate cost of goods or services because importers increase their price to buyers to account for the tariffs.

Tariffs also tend to indirectly increase the cost of goods or services related or equivalent to the goods or services subject to tariffs by raising demand for domestic or non-affected substitute goods or services.

Some goods and services are higher risk than others (e.g., goods originating from China, and potentially in a second Trump administration, goods originating from Canada and Mexico). Understanding the extent of the international reach of a construction project's supply chain may assist in evaluating exposure and negotiating appropriate relief from imposition of new or increased tariffs.

Having a working knowledge of how tariffs are implemented and their impacts on related markets is important to assessing and mitigating contractual risk. Parties to a construction contract may have different methods for managing tariff impacts. A supplier may choose to source goods from less risky countries, even if the cost of such goods is incrementally higher than their Chinese equivalent in the short term. A buyer may choose to enter into a master supply agreement, allowing the buyer to set a long-term fixed price on a guaranteed volume of goods that in turn permits the seller to better forecast its demand and supply chain. Many developers and contractors may negotiate shared risk of changed tariffs, establishing a change order threshold or cost-sharing ratio. Ultimately, those who consider and carefully negotiate provisions addressing changes in tariffs will be better prepared to face and manage their economic impact.

NORTH CAROLINA FEDERAL COURT'S RECENT RULING ON ENGINEERING EXPERT TESTIMONY COULD IMPACT CONSTRUCTION LITIGATION STRATEGY: KEY TAKEAWAYS

Ethan Sanders

A recent North Carolina federal court decision, *Nutt v. Ritter*, addressed whether providing expert reports and testimony constituted the practice of engineering and required licensure under North Carolina law.

The plaintiff, Wayne Nutt, was a practicing chemical engineer from 1967 to 2013, but never obtained a professional engineering license due to his work qualifying for an industrial exception under North Carolina law. When a group of homeowners initiated a lawsuit alleging that a stormwater management system had been negligently designed and as a result, flooded during Hurricane Florence, Nutt was retained to prepare a report and offer expert testimony. However, after he testified, the North Carolina Board of Examiners for Engineers and Surveyors informed him that he had violated North Carolina licensing laws and could be charged for a misdemeanor.

The Court disagreed, finding that Nutt had prepared a detailed and thorough report based on his engineering expertise, but North Carolina's licensing requirements when applied (1) "to unlicensed expert testimony requiring engineering knowledge" and (2)to "expert engineering reports" more broadly, is unconstitutional. Specifically, Nutt's expert report and related testimony was "plainly protected activity" under the First Amendment, and therefore the licensing laws required "strict scrutiny" to survive a constitutional challenge. The licensing law when applied to expert testimony and reports failed to pass that high bar, as the Board failed to "demonstrate the link between the ban [on unlicensed engineering] and its interest in promoting the public welfare and safeguarding property."

While this case did not address whether an unlicensed engineer was qualified to provide expert testimony under the applicable Rules of Evidence, litigators and licensing boards alike should be aware of this development.

INSURANCE AGENTS BE VIGILANT, YOU MAY BE ON THE HOOK EVEN WITHOUT A DIRECT CONTRACTUAL RELATIONSHIP

Peter Angelov and Kyle M. Doiron

In a recent Supreme Court of Montana decision, *TCF Enters., Inc. v. Rames, Inc.*, a general contractor contracted with a subcontractor to perform surveying and subsurface soils investigation for a condominium project. As is often the case, the subcontractor was required pursuant to the contract documents to name the general contractor as an additional insured on its commercial general liability policy.

The subcontractor contacted its insurance agent identifying the coverage needed and requested a certificate of insurance demonstrating the same that it could share with the general contractor. The insurance agent provided a certificate of insurance demonstrating the necessary coverage, but the agency did not in fact procure the necessary schedule endorsement or otherwise actually include the general contractor as an additional insured on the subcontractor's policy.

Subsequently, the developer of the condominium project sued the general contractor for negligence after the building settled more than four inches due to inaccurate measurements and calculations by the subcontractor. The general contractor sought coverage from the carrier which provided liability coverage to the subcontractor, but the carrier refused, taking the position that the general contractor was not an additional insured on the subcontractor's policy and that the professional services exclusion applied to bar coverage.

The general contractor eventually paid $2.2 million to repair the condominium building and then sued the subcontractor's insurance agency. The lower court judge found at summary judgment that the insurance agency breached its duty of care by failing to procure the requested additional coverage for the general contractor and found that this failure was material as the professional services exclusion did not exclude coverage for defense and indemnification. The jury then concluded that the insurance agency was liable for over $1 million to the general contractor (the minimum policy limit required by the general contract for which the subcontractor requested the general contractor be added as an additional insured on).

The insurance agency then sought review from the Montana Supreme Court, which unanimously affirmed the $1 million verdict.

While of course this case is not binding on most of the country, it offers two key take aways for the broader industry. First, the certificate of insurance can be manipulated without actual coverage in place, upstream parties should ask to see the actual endorsements from the insurer to confirm the coverage. And second, an upstream party named as an additional insured on a certificate of insurance but not properly added to the subcontractor's policy, may have a cause of action against the downstream party's insurance agency for negligence even though they are not clients of that agency.

SOLAR INDUSTRY GROUP RELEASES NEW STANDARD FOR SOLAR SUPPLY CHAIN TRANSPARENCY

Monica Wilson Dozier & Amandeep S. Kahlon

The Solar Energy Industries Association (SEIA), a leading solar industry group, recently published a new supply chain traceability standard, Standard 101, for public comment. The standard is intended to provide "a rubric that manufacturers and importers can follow to trace product origins from raw materials to finished goods." With Standard 101, SEIA seeks to create a foundation for ethical operations throughout the solar supply chain.

As purchasers in the industry know, over the past several years the federal government has increased scrutiny of renewable energy equipment imported from China and certain other nations. We blogged about the Uyghur Force Labor Prevention Act (UFLPA) here and here. Compliance with the UFLPA has been a focal point of the industry's development of supply chain traceability protocols, and Standard 101 is the latest effort by the industry to create a comprehensive and practical guide to compliance with the UFLPA and other import controls and restrictions on solar products.

Standard 101 will be open for public comment through November 4, 2024. Some highlights of the proposed standard include:

- Organizations should identify high-risk suppliers, including sub-tier suppliers, and high-risk materials and components based on their assessment of forced labor risk in the supply chain. Publicly available resources such as the UFLPA Entity List and List of Goods Produced by Child Labor and Force Labor can assist in this process.

- Standard 101 also outlines how companies can implement traceability programs by mapping the supply chain and collecting traceability documentation for each component down to the raw material.
- The appendices provide more detail on considerations for supply chain traceability and what actual implementation of traceability programs looks like. Appendix C, for example, details how an organization can conduct risk-based forced labor due diligence and includes the specific documents and other information that should be collected and reviewed from suppliers and manufacturers of PV modules and batteries.
- At Bradley, we frequently advise clients on the development of supply chain compliance policies, including how to navigate issues when, for example, a supplier fails a traceability audit, or new laws or regulations threaten the viability of a supplier on future projects. While implementation of a traceability program consistent with Standard 101 is not a guarantee that a company will be compliant with all relevant laws, it is a welcome addition to the renewable energy industry's tool belt and is likely to become a regularly referenced standard in various development and project agreements.
- If you procure solar energy equipment (e.g., modules, inverters, etc.) or other renewable energy equipment (batteries, turbines, etc.), we recommend you have a supply chain compliance policy that includes a traceability program. The trend over the last several years has been for more — not less — regulation of imports into the U.S., and by failing to have reliable supply chain processes, you may risk the embargo of critical equipment and/or fines or other financial penalties.

IT'S GETTING HOT IN HERE: OSHA PROPOSES NEW HEAT HAZARD RULES

Jared B. Caplan and Anne R. Yuengert

Did you know that OSHA does not currently have a specific standard covering heat stress hazards? Rather, OSHA uses the General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health Act, to impose requirements related to heat stress. OSHA reports that between 1986 and 2023 it has issued at least 348 hazardous heat-related citations under the General Duty Clause. Of these citations, 85 were issued between 1986-2000.

However, on August 30, 2024, OSHA published a Notice of Proposed Rulemaking for *Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings*. The proposed standard would apply to all employers conducting outdoor and indoor work in all general industry, construction, maritime, and agriculture sectors where OSHA has jurisdiction. The standard would require employers to create a plan to evaluate and control heat hazards in their workplace to prevent and reduce the number of occupational injuries, illnesses, and fatalities caused by exposure to hazardous heat.

Further, under the proposed standard, the initial heat trigger is 80°F. At or above this temperature, employers would have to implement controls such as:

1. cold drinking water;
2. break area(s) for indoor and outdoor worksites;
3. acclimatization of new and returning employees;
4. rest breaks if needed to prevent overheating; and
5. effective communication with employees throughout the workday.

Under the proposed standard, the high heat trigger is 90°F. At or above this temperature, employers would have to implement additional controls such as:

1. required rest breaks;
2. observation for signs and symptoms;
3. hazard alerts; and
4. warning signs for excessively high heat areas.

The comment period on this proposed standard is open until December 30, 2024. The proposed standard is available on the Federal Register website. As OSHA continues to evolve its standards to protect workers, it's crucial for employers to stay informed and proactive in managing workplace safety.

SAFETY MOMENT FOR THE CONSTRUCTION INDUSTRY

Katherine Griffin

In December 2024, the Department of Labor announced that OSHA finalized revisions to its personal protective equipment ("PPE") standards and requirements contained in 29 C.F.R. § 1926.95(c). Effective beginning January 13, 2025, the new language specifies that not only do employers need to ensure that their PPE is "of safe design and construction for the work to be performed," but also that employers must "ensure that [the PPE] properly fits each affected employee." § 1926.95(c) (emphasis added). Guidance from OSHA additionally clarifies that "properly fits" means that "the PPE is the appropriate size to provide an employee with the necessary protection from hazards and does not create additional safety and health hazards arising from being either too small or too large." These revisions respond to concerns regarding construction workers with smaller and larger body types that do not fit standard-size PPE, who, when forced to wear ill-fitting PPE, have faced serious hazards and injuries.

Because OSHA has historically interpreted § 1926.95(c) as requiring properly fitting PPE, this December 2024 revision merely makes explicit and clarifies that employers have an affirmative obligation to ensure that their employees are protected by PPE in varying sizes for maximum effectiveness. After all, oversized or undersized PPE can fail to protect workers from existing workplace hazards, and can even create additional hazards (for example, loose-fitting gloves becoming caught in machinery). Further, employees who are forced to wear uncomfortable PPE may choose to disregard the PPE altogether, exposing them to hazard. In other words, "one size fits all" PPE is rarely the most effective way to protect workers in the construction industry. Some of the most common ill-fitting PPE items that commentators discussing the revisions highlighted included gloves, pants, waders, and fall protection harnesses. To comply with § 1926.95(c) and to foster a safe and inclusive working environment, employers in the construction industry are encouraged to audit their current PPE materials, ensure a wide variety of sizes are available, solicit feedback from employees regarding PPE sizes/fit, and implement procedures to document that the PPE is properly fitting.

COURT SEPARATES FACTS FROM FICTION: LACK OF SUPPORTING PROJECT DOCUMENTS DOOMS CONTRACTOR

Douglas L. Patin & Sabah Petrov

A recent decision from the U.S. District Court for the Southern District of Florida demonstrates how facts supported by documents generated during the project can be vital to prime contractor/subcontractor disputes. In *Berkley Ins. Co. v. Suffolk Constr. Co*., No. 19-23059-CV, 2024 WL 3631226 (S.D. Fla. July 22, 2024), following a two-week bench trial on a breach of contract claim, the court issued a decision holding that the prime contractor's mismanagement of the project ultimately caused the project's overall delay entitling the subcontractor to recover its damages.

This case involved a dispute between a prime contractor, Suffolk Construction Co., its drywall subcontractor, Titus Construction Group, Inc., and Titus' surety, Berkley Insurance Company, regarding a mixed-use real estate development project located in Miami, Florida. The parties blamed each other for the delays impacting the project's substantial completion date, which ultimately slipped by 17 months.

Central to this delay dispute was identifying the controlling construction schedule for the project. The construction schedule attached to Titus' subcontract set the substantial completion date for January 31, 2018. Suffolk alleged that the owner extended the substantial completion date to March 12, 2018, and, during trial, Suffolk referenced "look-ahead" schedules in support of this extended completion date. The court wasn't buying it. In fact, the court noted that no witness was able to show these "look-ahead" schedules were produced or maintained during the project, and Suffolk could not show that these schedules were ever uploaded to the project's document management system, Procore. Moreover, because the subcontract required that all amendments must be confirmed in writing or agreed to by the parties, this "ghost schedule" relied upon by Suffolk was not controlling.

With respect to the delays caused by Suffolk, the court found that Titus' and Berkley's recounting of the events was supported by the evidence and its testimony persuasive. In reviewing the evidence, the court determined that Suffolk's handling of the project materially breached the terms of the subcontract. According to the court, Suffolk failed to coordinate trades and prepare each floor to allow Titus to complete its work timely and efficiently. Suffolk also directed Titus to jump from floor-to-floor exacerbating impacts to Titus' productivity. As the court noted, "the workflow devolved from a hoped-for orderly process to demands for piecemeal work all over the building." At one point during the project, Titus was spread out over 21 floors. Suffolk also admitted in internal emails that it disrupted and delayed Titus' work.

The facts of an analogous case in Massachusetts involving Suffolk and another subcontractor on a separate project also helped persuade the court in finding for Titus and Berkley. The case, *Cent. Ceilings, Inc. v. Suffolk Constr. Co., Inc.*, 91 Mass. App. Ct. 231 (2017), addressed a dispute between Suffolk and Central Ceilings, its framing and drywall subcontractor on a different project. The court noted that the Massachusetts case involved "nearly identical facts" to those before the court. In *Cent. Ceilings*, Suffolk similarly failed to coordinate the work of its trades and forced its subcontractor to work out of sequence. Based, in part, on Suffolk's troubling history with this other subcontractor, the court concluded that Suffolk had breached its subcontract with Titus by failing to coordinate other trades, directing Titus to perform work out of sequence, and inadequately managing access to the project. The court awarded Titus and Berkley approximately $4.1 million for the unpaid subcontract balance and lost productivity damages.

In reaching its conclusion, the court also rejected Suffolk's various contractual and legal defenses. The court refused to apply the contract's "no damage for delay" clause because Suffolk actively interfered with Titus' work by failing to, for example, prepare floors for Titus to proceed with its work sequentially and mismanaging other trades that then damaged Titus' work. Likewise, the court refused to strictly apply the contract's formal notice requirements. The court found that Titus adequately preserved its claims through dozens of informal email communications and PCO submittals that kept Suffolk informed of Titus' pending claims. Finally, in declining to apply lien releases to bar Titus' claims, the court concluded that the releases, while limiting Titus' right to claim a lien, did not extinguish Titus' right to pursue causes of action arising out of the subcontract.

This case highlights the importance of project documentation in construction disputes. Here, Suffolk could not support its factual arguments with schedules and other project documentation. Suffolk's own internal records often contradicted the testimony and evidence it presented at trial. Further, Suffolk was unable to convince the court to enforce its technical contract defenses against Titus' claims. Suffolk's lack of a compelling factual narrative or strong legal arguments resulted in a bad day for the contractor.

MERELY COPYING IN-HOUSE COUNSEL DOES NOT NECESSARILY ESTABLISH ATTORNEY-CLIENT PRIVILEGE

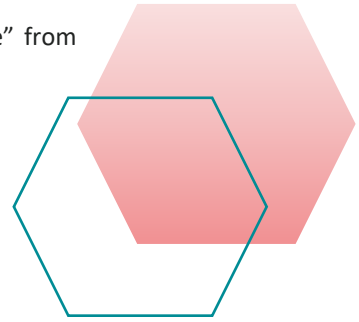
Jim Archibald

Businesses who employ in-house attorneys frequently assume that copying their lawyer on internal communications shields the communications from discovery because of the attorney-client privilege. In 1981, the U.S. Supreme Court articulated the rule that the attorney-client privilege protects communications (a) between attorneys and clients (b) that are maintained in confidence and (c) that were made for the purpose of obtaining or providing legal advice (see *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). The *Upjohn* court made it clear that the privilege applies not only to the lawyer's communications that convey legal advice, but also to the client's "giving of information to the lawyer to enable [the lawyer] to give sound and informed advice." Based on this rule, confidential communications between a lawyer and client may NOT be protected by the attorney-client privilege if the communication is NOT made for the purpose of obtaining or providing legal advice.

A recent order from the United States District Court for the Western District of Washington at Seattle illustrates this point and underscores the limits of the attorney-client privilege in protecting communications between in-house counsel and business people about matters that go beyond legal advice. In *Garner v. Amazon.com*, 2:21-cv-00750-RSL (W.D. Wash. Sept. 23, 2024), a class action alleging that Amazon recorded private conversations through Alexa devices without consent, Amazon attempted to "claw back" over 1,000 documents that it claimed were protected by the attorney-client privilege and inadvertently produced. In response to Amazon's claw back, the plaintiffs requested an *in camera* hearing with the court to review the documents. Following the hearing, the court ordered Amazon to produce all or significant portions of approximately 80% of the documents it attempted to claw back.

In determining where the attorney-client privilege applies, the court distinguished "operational advice" from "legal advice" as follows:

> …a document whose overwhelming purpose is to seek operational, business, or strategic advice from non-legal professionals (or to summarize operational, business, or strategic issues facing the corporation) cannot be shielded from discovery simply by sharing it with an attorney with an open-ended invitation to chime in if he or she saw anything of interest. To hold otherwise would effectively cloak with the privilege any operational document shared with an attorney.



Based on this analysis, adding a lawyer to an internal email communication about business, operational or strategic issues would not establish attorney-client privilege protection, even if the lawyer is invited to comment with his or her advice. Indeed, the court explained "if the withheld document was reviewed, edited, or commented on by an attorney but reveals only business advice or publicly available information, the privilege does not apply."

The court allowed Amazon to redact portions of documents where in-house counsel was in fact providing legal advice. According to the court, "[r]edactions will be permitted, but they must be limited to text that reveals the nature of a request for legal advice or the advice provided." To support such a redaction, the court advised Amazon that it must "make a clear showing that a primary purpose of the communication was to request or provide legal advice."

While this case involves a consumer protection class action complaint, the analysis behind the rulings could apply just as well to owners, contractors and engineers involved on a construction project. Consider these two statements that might be made in an email communication to the estimating team by a general contractor's in-house attorney: (1) "under applicable law, a no damage for delay clause is enforceable,

with only limited exceptions"; (2) "because the contract contains a no damage for delay clause, we should add extra contingency to our bid." The *Garner* court likely would find that the first statement is protected by the attorney-client privilege, but the second statement is a much closer call. It is possible that the court might conclude that the second statement offers "business" or "operational" advice that is discoverable.

Similarly, lawyers should choose their words carefully. The preface to a piece of advice might color a court's decision about whether the advice is privileged. For example, if the advice follows a statement like "this advice is based on my legal review of the contract," a court may be more inclined to find that the attorney-client privilege applies. On the other hand, the same advice might be viewed as "business" or "operational" advice if the in-house lawyer couches the advice as "the best way to cut our losses" or "the best strategy to exert our leverage during the negotiations." To be clear, widespread labeling of documents as "privileged and confidential" likely does not help establish attorney-client privilege. Indeed, the *Garner* court called out Amazon for seemingly having "a policy of marking documents as 'privileged and confidential' because they touch on sensitive subjects, such as consumer privacy, not because they request or reflect legal advice." Nonetheless, subtle choices about how to present advice to a client might be instrumental in establishing that the advice is protected "legal" advice.

While the *Garner* court's narrow view of the attorney-client privilege may differ from the broad protection that many non-lawyer clients expect whenever they "copy their lawyer" on their internal communications, the *Garner* decision reflects the kinds of rulings that judges often make following *in camera* reviews of allegedly privileged documents. Clients almost always believe that the attorney-client privilege is much broader than it really is, and it is important for lawyers to remind their clients regularly that adding the lawyer as a "cc" does not automatically protect their communications from discovery. Likewise, lawyers should be intentional about recognizing when they are providing "legal" advice and when they are providing "business" advice, and any "business" advice should be offered with the expectation that it might be discoverable.

NOTE FROM THE EDITORS

Carly Miller and Kyle M. Doiron

As we step into 2025, we take a moment to reflect on the milestones and achievements that shaped the past year. To our valued clients, we extend our deepest gratitude for your unwavering trust and partnership, which have been instrumental in achieving the accomplishments we proudly celebrate today. Your confidence in our legal expertise allows us to consistently strive for excellence and deliver impactful results. Thank you for being a vital part of our success. This list is a reminder that even though the year has ended, our mission has not. Our intention for 2025 is the same as every year before: Remain client focused, committed to quality, and driven by results. We look forward to reconnecting with you in the new year, energized by the opportunities ahead. Wishing you a prosperous and successful year!