

AXLEY

ATTORNEYS

WAPA – 2024: LEGAL PERSPECTIVES AND PRACTICE POINTERS

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TOPICS TO COVER

- Lessons from Industry Errors
- Ethical / Legal – Practice Pointers
- Contract Essentials
- Wisconsin Home Improvement Practices Act
- Managing Liability

LESSONS FROM INDUSTRY

The Obvious – Hoboken, NJ Project

<https://www.youtube.com/watch?v=6RJCvkcTzoU>

LESSONS FROM INDUSTRY

Assure Environmental Compliance



Environmental Compliance

- Four-mile-long Highway Safety Improvement Project near Watertown, MN.
- Failed to install erosion and control and sediment control.
- Missing 1000s of linear feet.
- Storm drain inlets were unprotected.
- Many soil areas were exposed / not stabilized.
- Rapid snow melt and run-off in Spring.
- Sediment laden run-off into a lake, pond, wetland, and 2 streams.
- MPCA required immediate compliance and \$50,000 fine.

Environmental Compliance

Aggregate Industries – Northeast Region,
Inc., Sanctioned by MASS AG



Environmental Compliance

- Asphalt Plant in Suffolk County, MA cited for producing asphalt in violation of its air emissions permit, creating a public nuisance to neighborhood.
- Installed unauthorized equipment on the plant to produce crumb rubber asphalt pavement and then failed to properly operate the plant for 4 months.
- Caused visible emissions of particulate matter and VOCs.
- Released acrid, noxious odors causing respiratory issues for residents up to 3 miles away.
- Plant operators lied and told Mass DEP that they had stopped producing crumb rubber asphalt at start of investigation but actually continued for months thereafter.
- Company assessed a penalty of \$1.45 million, forced to obtain new permit, and to perform extensive upgrades to the plant.

Ethically Challenged #1

- Asphalt Paving Systems, Inc., with offices in FL, NJ, GA, and TN, was found in violation of federal employment laws by subjecting 12 African Americans to race-based discrimination and harassment. This is 2023.
- Racial slurs and racist comments by co-employees and managers.
- Demeaning work conditions, such as work through breaks while white employees watched.
- Forced to relieve themselves outdoors while white employees allowed to use indoor facilities.
- Interfering with attempts of black employees to get hired at alternative employer.
- EEOC filed complaint in Tampa, FL for violations of Civil Rights Act of 1964.

Ethically Challenged #2

- Asphalt Specialists, based in Pontiac, MI, busted for fixing bids and inflating prices.
- A 25-year-old company with 200 employees. Multi-year, multi-million dollar bid rigging scheme. Impacted public and private contracts for public and private roads, driveways, and parking lots.
- Asphalt Specialists conspired with 2 other paving companies to make it look like one company's bid was better than the other's bid, when actually they were all in cahoots with each other. They Coordinated Bids by:
 - An agreed upon loser would submit intentionally low bid, giving false impression of competition.
 - Won \$234 million in contracts through method.

Ethically Challenged #2

(continued)

- Fine of \$6.5 million imposed after prosecution by Federal Attorney General Office, Antitrust Division.
- "Bid-rigging is a particularly difficult crime to detect," per prosecutors. "Given the immense effort that it takes to discover and prosecute bid-riggers like (Asphalt Specialists) an insufficient penalty may embolden would-be offenders, undermining general deterrence."
- Other conspirators also charged and plead guilty, including Owners and Executives.
- Vice President (Coppola) of one conspirator plead guilty in October 2024. Maximum penalty of 10 years in prison and \$1 million fine (could be increased to 2x the gain from the crime and 2x the loss to victims).

Ethically Challenged #3

- West Virginia Paving Inc., Kelly Paving Inc., American Asphalt & Aggregate Inc., and eight related companies conspired to monopolize the State-approved asphalt and paving market, thus reducing competition and maximizing profits at the taxpayers' expense.
- The State of West Virginia and six local governments reached a \$101.35 million settlement with these companies for antitrust violations.
- Allegations: Acquisitions of competitors and/or non-compete agreements were used to unlawfully eliminate competitors and push asphalt prices higher in areas controlled by West Virginia Paving, Inc. and other defendants, when compared to other areas of the state with legitimate competition.

Ethically Challenged #3

(continued)

Penalties

- \$30.35 million up front payment and \$71 million in credits over 7 years.
- One company must give 120 days advance notice of any contemplated acquisitions, mergers, or joint ventures that exceed \$500,000 in a 9-county region.
- Another company if deal exceeds \$1 million in a 16-county region.
- Eliminates existing noncompete clauses.

Contract Essentials

Don't Trivialize the Contracting Process

- Make sure there is a clear description of all the material terms.
- Avoid “handshake” deals or terms.

Know Who You are Contracting With

- Check WDFI website to confirm entity exists.
- Check CCAP for lawsuit history.
- Is signer authorized to bind the company.

Scope of Work

- Have you independently estimated the job?
- Have you allowed for unseen conditions?
- If you are going to rely on subs, what if they don't deliver?

Contract Essentials

(continued)

Payment Terms

- Are you getting a down payment sufficient to bind the customer?
- When are progress payments due?
- What is defined as “substantial completion” entitling you to final payment?

Default

- Preserve lien rights.
- Provide remedies for late payment, including interest.
- Streamline access to court remedies or consider an arbitration clause.

Wisconsin Home Improvement Practices Act Considerations

- Does your Company do Residential Work?
- HIPPA (ATCP 110) requires specific terms in the contract. Failure to include them is a basis for double damages and attorney's fees.
- Required provisions include:
 - Detailed work description.
 - Total price.
 - Begin and end dates and written notice for delay.
 - Statement of guaranty and/or warranty.
 - Lien Waiver Notice – by separate document.

Managing Liability: The Corporate Shield

- Operating through a valid business entity can insulate owners from personal liability.
- In cases where potential damages can exceed insurance coverage and the company's ability to pay, a plaintiff may seek to "pierce the corporate veil" and bring claims directly against owners.
- Companies that fail to maintain their corporate identity are susceptible to veil piercing claims
- Individuals who commit fraud, intentional misconduct and crimes are not protected.

Managing Liability: The Corporate Shield *(continued)*

Maintaining the Corporate Identity

Be sure:

- The company is validly incorporated, in good standing with the state, and is up-to-date on corporate housekeeping, including Annual Meeting Minutes.
- The company is adequately capitalized and insured.
- All business is performed in the corporate name – contracts, insurance, banking, advertising, name on vehicles, etc.
- No commingling of corporate and personal accounts.
- No commingling of corporate and personal assets, like equipment.

Managing Liability: Insurance

- While an obvious hedge against liability, many companies are underinsured - avoid the desire to skimp.
- Work with a reputable commercial insurance agent to review your operations and potential risks.
- Conduct regular reviews and update when operations change.
- Remember liability insurance coverage includes coverage for a legal defense, an under-appreciated but important benefit of insurance.

Managing Liability: Indemnification Agreements

- In appropriate circumstances Indemnity Agreements can provide protection from legal claims.
- An indemnity is a promise by one party to legally defend another from claims and to pay any damages arising from the claim.
- Indemnity Agreements shift risk from one party to another.
- Indemnities are often included in contractor – subcontractor agreements and other contracts where one party may be associated with a project but are not responsible for it and so want to limit their overall exposure.
- Indemnities are only as good as the indemnitor's ability to pay.

Questions?



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