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ContrACT

Court Transforms General Contractors into Owners' Financiers

MICHAEL F. HIGGINS

If a general contractor advances payment to subcontractors for amounts not yet paid by the project owner, can the general contractor later reimburse itself those advanced funds when it settles claims with the owner? A recent appellate decision¹ concluded that doing so would be a diversion of trust funds in violation of New York Lien Law Article 3-A.

The owner terminated the general contractor causing a payment dispute which involved subcontracted work. The general contractor paid subcontractors for portions of their completed work from the general contractor's own funds. However, the general contractor did not pay the subcontractors in full. Thereafter, the owner and general contractor entered into a settlement. After learning that the general contractor intended to reimburse itself for the payments it had advanced, the subcontractors seeking to enforce liens they had filed commenced an action to enforce the trust and obtained an injunction prohibiting the general contractor from dispersing the settlement funds without further court order, while the parties continued to litigate the validity of the subcontractor's liens.

New York Lien Law Article 3-A requires contractors receiving money from the Owner for the

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The Passing of an Industry Giant

ERNSTROM & DRESTE

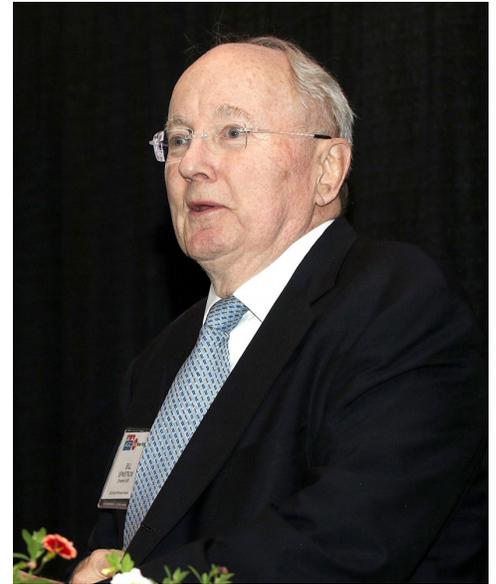
Ernstrom & Dreste, LLP is saddened to announce that our founding member, J. William ("Bill") Ernstrom, passed away on November 28, 2025. Bill was 80 years old. For the last number of years Bill had been residing in Chicago and then in the Lake Geneva, Wisconsin area. Bill maintained that he always wanted to be an attorney. His peers marveled at the level of drive and gusto that he brought to his career as an attorney. He was with the Harris Beach firm for 12 years before forming his own boutique firm in 1985 to concentrate on construction law matters. Thirty-plus years ago that firm grew into the present day Ernstrom & Dreste.

Bill approached his practice and nearly all aspects of life as a challenge to master. Bill was a talented athlete, holding basketball scoring records in college until the three-point line was created. Had that line existed in his era the records may have stood forever. He had a long-standing weekly tennis match with one friend, often wagering a monthly mortgage payment for the winner. Bill ran the New York Marathon in 1979 simply due to the challenge. He was indefatigable in his approach to law and life. He (and we) worked hard and played hard, always with his infectious optimism, humor, and drive. These examples provide a glimpse into Bill's trailblazing life, but those who knew him fully understand that his persona cannot be captured in this small snippet.

Bill was a masterful trial attorney, but also gave back to the construction industry, especially via countless hours in assisting the New York and National Associated General Contractors of America. He presented many seminars while championing the construction industry's positions, including in the development and negotiation of changes to widely used contract documents. Bill received lifetime achievement recognition from both the State and National levels of the AGC, among many other accolades.

Bill's obituary may be found here: <https://www.nelsonfuneralhomes.com/obituaries/James-William-Ernstrom?obld=46515026>

One New York AGC officer aptly stated on Bill's passing that "we lost a giant." We will miss him.



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A Farewell from Todd Braggins

Thirty-two years ago I walked into the offices of Ernstrom & Dreste, LLP, having spent ten years at other law practices. I had no idea what to expect, but as a newlywed, I needed a job. Unbeknownst to me, I was soon to be introduced to something called surety law. Like most of you reading this, my surety career fell into my lap. What transpired over the following years was nothing short of pure serendipity.

I have been blessed with incredible partners, co-workers, mentors, clients, consultants, and ultimately, friends. I learned so much from each of you. More importantly, I now have a network of colleagues and friends that spans the entire country.

The surety industry has been wonderful to me, my firm, and my family. It provided challenges, opportunities, and rewards. I thank each and every one of my colleagues, past and present, for the knowledge, inspiration, and support you provided.

I know that the industry is in good hands because I have had the good fortune to meet so many of our future leaders. You are bright, energetic, and ready to lead this industry as the world around us evolves. Thank you for providing a member of the old guard with the opportunity to become friends with the next generation.

To my more “seasoned” contemporaries, thank you for all our experiences together, especially the camaraderie and laughs. You have equipped me with stories for a lifetime.

I will miss you all, but I leave knowing that somewhere along the line I became the George Bailey of surety (Google it). Until next time....

P.S. My cell number will remain the same, but my new email is tbraggins85@gmail.com. I'd love to hear from you.



New Managing Partner, Brian Streicher (Left) joins E&D's former Managing Partner Todd Braggins (Right) for a round of golf at the National Bond Claims Association's Annual Meeting in Carlsbad, CA in October 2025.

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project to hold those funds in-trust and only use the funds for the costs to improve the property. The law was designed to prevent unscrupulous contractors from stealing the owner's funds and leaving subcontractors without effective recourse. The majority of justices in a 3-2 decision concluded that the settlement funds constituted trust funds under Lien Law Article 3-A, held by the general contractor in its fiduciary capacity to be applied for expenditures arising out of the improvement of real property. The general contractor, the court held, had no authority to reimburse itself first for “costs of the improvements,” except if a balance remained after paying all subcontractors and trust fund beneficiaries. The court reasoned, when a general contractor reimbursed itself from the settlement amounts it was effectively paying its own debts, and not paying for the costs of improvement.

The two-justice dissent framed the question differently – “whether a trustee can apply subsequently received trust assets to reimburse earlier payments that were initially made with nontrust funds toward proper trust purposes.” Believing the answer should be yes, the dissent warned that the majority's decision would discourage general contractors from ever using their own funds to timely pay subcontractors, incentivizing delayed payments until owner payment had been received, if ever received. In doing so, the majority decision undermines the goal of Article 3-A to ensure timely payment to subcontractors and those who have expended labor and materials to improve a property.

A careful contractor might avoid the harsh consequences of this case if lien waivers include language assigning subcontractor lien rights to the general contractor and explicitly permit recovery of any advanced funds. Additionally, when a general contractor is negotiating with a subcontractor under a pay-when-paid subcontract, it may be wise to seek a liquidating agreement that assigns the subcontractor's lien rights to the general contractor.

The ramifications of this ruling will undoubtedly be exacerbated by the familiar *West-Fair* doctrine, under which pay-when-paid clauses can become unenforceable in New York when payments are delayed to subcontractors beyond a reasonable time. General contractors will be forced to become Owner's financiers in the event of a prolonged dispute, because general contractors will not be able to avoid paying subcontractors. Additionally, general contractors will have difficulty recovering these advanced funds in any timely manner because they are prohibited from reimbursing themselves until subcontractors are paid in full. Careful attention to lien releases and liquidating agreements may help avoid or ameliorate these harsh consequences. **E&D**

1 L.C. Whitford Co. Inc. v. Babcock & Wilcox Solar Energy, Inc., 244 AD3d 1552 [3d Dept 2025]

Extra Work Claims Denied Under No Damages for Delay Clause; Prevention Doctrine Inapplicable

CAVAN S. BOYLE

A recent Appellate Division decision serves as a pointed reminder that no damages for delay (“NDFD”) clauses remain formidable barriers to recovery in construction disputes, and that courts will examine the substance of a claim, not merely how it is labeled. In *Henick-Lane, LLC v. Stellar Mgmt. Grp., Inc.*, the court enforced a subcontract’s NDFD clause and unanimously rejected the subcontractor’s attempt to recover delay related costs by characterizing its claims as “extra work.”¹

The action involved eight change order requests submitted by subcontractor Henick-Lane, LLC (“Henick-Lane”) seeking compensation from contractor Stellar Management and related parties (collectively, “Stellar”) for additional costs allegedly caused by project obstructions, disruptions, and changes to Henick-Lane’s work. Stellar moved for summary judgment, arguing that despite characterizing the claims as “extra work,” Henick-Lane’s requests were, in substance, delay claims subject to and barred by the subcontract’s NDFD clause. The trial court agreed and dismissed the claims. Henick-Lane appealed.

In affirming the dismissal, the First Department applied a foundational principle of New York contract law: where contract language is unambiguous, its plain meaning controls. The subcontract provided if Henick-Lane was “obstructed, hindered or delayed” in performing its work, whether “by [Stellar]...or by changes in the Work,” the “sole and exclusive remedy” was an extension of time. The court then turned to whether Henick-Lane’s claims truly sought payment for “extra” work or were merely repackaged delay claims. Emphasizing that labels are not controlling, the court examined the factual predicate of each claim and concluded that the change order requests were grounded in project delays and disruptions. As such, they fell squarely within the clear and undisputed scope of the NDFD clause.

The court next considered whether any of New York’s recognized exceptions to the enforceability of NDFD clauses applied and concluded that none favored Henick-Lane.²

First, the court held that allegations of inept or deficient project administration did not rise to the level of willful, malicious, or bad faith conduct sufficient to vitiate an NDFD clause. Second, because the subcontract expressly contemplated delays arising from the contractor’s acts or omissions—and limited Henick-Lane’s remedy to time extensions—any associated delay related costs were necessarily within the parties’ contemplation and therefore barred. Third, the court rejected Henick-Lane’s argument that Stellar’s alleged failure to provide a crane constituted a breach of a fundamental contractual obligation. The court reiterated that ordinary or “garden variety” breaches do not qualify as fundamental breaches of the type contemplated by *Corinno Civetta*, such as a failure to obtain title to or access to the work site.

Henick-Lane also argued that the prevention doctrine barred Stellar from invoking the NDFD clause. The court rejected this contention, explaining that the prevention doctrine applies to conditions

precedent and prohibits a party from relying on another’s failure to satisfy a condition precedent where that failure was caused by the party seeking enforcement. An NDFD clause, by contrast, is an exculpatory provision allocating the risk of delay between contracting parties and does not implicate conditions precedent to payment. Accordingly, the prevention doctrine was deemed inapplicable.

The *Henick-Lane* decision reaffirms New York’s strict enforcement of a contract’s unambiguous language, including no damages for delay clauses. The decision also highlights the importance of evaluating these provisions at the contract negotiation stage and developing an evidentiary record that fits squarely within the narrow, recognized exceptions, as courts will look beyond how a claim is labeled to determine whether it is, in reality, a barred delay claim. **E&D**

¹ *Henick-Lane, LLC v. Stellar Mgmt. Grp., Inc.*, 242 N.Y.S.3d 587, 588 (1st Dept. 2025).

² The three exceptions, as applied in *Corinno Civetta Construction Corp. v. City of New York*, 67 N.Y.2d 297 (Ct. App. 1986) are delays that are: (1) willful, malicious, or in bad faith; (2) not contemplated by the parties; or (3) constitute a breach of a fundamental contractual obligation.



Brian Streicher (2nd from Right) and Cavan Boyle (2nd from Left) attended the ABA/TIPS Fidelity & Surety Law Committee Midwinter Conference in Washington D.C, January 21-23, 2026 and enjoyed dinner with colleagues at The Bazaar by José Andrés.



925 Clinton Square
Rochester, New York 14604

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Ernstrom & Dreste, LLP also publishes the Fidelity and Surety Reporter. If you would like to receive that publication as well, please contact Jenna Ellis at jellis@ed-llp.com. Copies of *ContrACT Construction Risk Management Reporter* and *The Fidelity and Surety Reporter* can also be obtained at Ernstrom & Dreste, LLP's website (ernstromdreste.com).

This newsletter is intended purely as a resource guide for its readers. It is not intended to provide specific legal advice. Laws vary substantially from state to state. You should always retain and consult knowledgeable counsel with respect to any specific legal inquiries or concerns. No information provided in this newsletter shall create an attorney-client relationship.

FIRM NEWS

Brian Streicher has stepped into the role of Managing Partner at E&D, marking an exciting new chapter for the firm. We are confident in his leadership as he guides our continued growth and success. We also extend our sincere gratitude to Todd Braggins, who retired at the end of 2025 after 32 remarkable years with E&D, serving as Managing Partner since 2012.

Brian Streicher and Michael Higgins attended AGC's Surety Bonding & Construction Risk Management Conference, January 26–28, 2026, at Sunseeker Resort in Charlotte Harbor, FL.

Sean Miller recently joined E&D as a Law Clark. Sean is currently a law student at Syracuse University.

Mike Higgins recently joined the Board of Rochester Accessible Adventures, a nonprofit dedicated to removing barriers in health and wellness by promoting fully inclusive community spaces for people of all abilities and their families.

Brian Streicher was a featured speaker at the Syracuse Surety Association's 2025 Surety Day on November 5, 2025, presenting on the topic "Understanding the Risks of Non-AIA Bond Forms: An Illustration of Standard, Large Public Owner, and Manuscript Bond Forms."

Brian Streicher and Cavan Boyle authored an article entitled "Irreparable Harm and Injunctive Relief: Why Failure to Deposit Collateral is Not Enough" for publication in the National Association of Surety Bond Producers Surety Bond Quarterly, Winter Edition.