



# Riding the E&O Line

The newsletter of the  
Professional Liability Committee

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## Leadership Note

## From the Chair: Appreciating the Wins

By Seth Laver



Practicing law can be hard. For many of us, there are lots of stresses and little fanfare. Lives are not necessarily on the line, but the stakes are still high. Our clients have expectations, often matched only by the pressure we place on ourselves. We seek to develop new business relationships while maintaining our client base. Oh, and we have family, friends, and colleagues, and peers, and volunteer activities that warrant our attention within an all-too-short 24 hours each day. Practicing law is hard.

In the professional liability arena, it is easy to inherit the stresses of our clients, many of whom have worked a lifetime to develop a strong reputation only for a lawsuit to risk deteriorating everything. We are asked to achieve the impossible: to put the rabbit back into the hat by obtaining an efficient and favorable result vindicating our clients. In addition to the everyday expectations required of all professional liability attorneys, it is up to each of us to acknowledge the small victories. Sure, obtaining a defense verdict is terrific but escorting a smiling client out of a heated deposition is also a win. Negotiating a resolution that includes confidentiality and non-disparagement is a win. When your client is certain that you care about their situation and are fighting for them, with them, it is absolutely a win. It is up to each of us to appreciate each of those wins and, although we are not transplanting organs or literally fighting fires, we must understand that we are providing much needed help to professionals who count on us. These less quantifiable wins can make the practice of law not only enjoyable but incredibly satisfying.

Despite the wins, the stresses of our profession are too much for many of our peers, clients, and colleagues. Reportedly, alcohol abuse is significantly higher for attorneys, than in most other professions; one in three practicing attorneys are considered “problem drinkers,” over 25 percent of us suffer from depression, and nearly 20 percent show symptoms of anxiety. Apparently, it is the youngest, greenest attorneys who are most prone to alcohol, which is particularly troubling because it suggests that we are not doing enough to monitor and assist our associates.

The Professional Liability Seminar Planning Committee has nearly completed the planning stages of what we hope to be the most attended year-end seminar yet. We

have taken notice of the difficulties facing our clients and our peers and others, and we hope to develop a seminar that will address and potentially alleviate some of those stresses. We anticipate presentations from experts who will address alcoholism in the legal field and mental health issues facing professional liability attorneys and their clients. Moreover, we hope to provide sessions geared toward general wellness in the professional liability community from the relatively minor step of incorporating risk management steps into everyday practice to eliminate headaches to the gravest of steps to address mental health disorders. Our concept is to present topics that will make your practice easier and more rewarding.

Notably, former New Jersey Governor Chris Christie has agreed to join our list of esteemed panelists to present, “The Addicted Lawyer.” We anticipate that Governor Christie will address the rate of addiction in attorneys as well as opportunities to identify and help clients, colleagues and peers. As always, the committee leadership is proud of the seminar planning, perhaps more so than ever for 2019.

For those who could not attend our recent fly-in meeting in Nashville, you missed a productive and fun event. We strengthened connections while building out the outline, which eventually became the final draft of our seminar brochure. Frankly, the committee fly-in meeting has become a must-attend event.

When faced with the stress of our practice we are each presented with a choice: to dwell on the negative or to focus on and strive for those wins. The [Professional Liability community](#) strives to be a resource for all practitioners who represent professionals. We lean on each other and we benefit from the friendships, advice and counsel that we share from committee members nationwide (and beyond). Join us as we continue to develop new ways of helping each other achieve our professional goals.

On behalf of the entire steering committee, I invite you to join us as we continue to develop and evolve DRI’s Professional Liability Committee. Practicing law is hard. It’s a fact that all of us can recognize, but a burden that too often we feel we’re bearing alone. Making the practice of law a little

bit easier, a little more rewarding, and maybe even a little more fun—that's a labor we can share.

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*liability defense and employment litigation. He represents attorneys, design professionals, and accountants in professional negligence claims. Seth is Chair of DRI's Professional Liability Committee and the editor of Professional Liability Matters, a blog focusing on the professional liability community.*

## Feature Articles

# Pennsylvania Strikes Down Inter-Company Employee No-Hire Provisions and Creates a Majority Viewpoint

By Denis C. Dice and Douglas Fogle



In a case of first impression in the Commonwealth of Pennsylvania, the Pennsylvania intermediate appellate court (Superior Court)

has held that inter-company employee no-hire contracts are void as against public policy.

In *Pittsburgh Logistics Sys. Inc v. BeeMac Trucking, LLC*, 2019 Pa. Super. 13 (Pa. Super. 2019), Pittsburgh Logistics Sys., Inc. (“PLS”), and BeeMac Trucking, LLC (“BeeMac”) entered into a Motor Carriage Services Contract (“MCSC”). Pursuant to the terms of the MCSC, PLS would provide third party logistics to BeeMac, a shipping company, which does non-exclusive business with PLS. The MCSC contained a provision which prohibited BeeMac from directly or indirectly hiring, soliciting for employment, inducing or attempting to induce, any employee of PLS or any of its affiliates to leave their employment with PLS or the affiliate. This prohibition was in place for the duration of the contract, which was self-renewing and for two years post-contract.

While the MCSC was in place, four employees of PLS left PLS and took employment with BeeMac. PLS filed suit against both BeeMac and PLS's former employees seeking an injunction preventing BeeMac from employing any former employees and to prevent BeeMac from soliciting business directly from other entities that had done business with PLS. The trial court refused to grant PLS's injunctive relief to prevent BeeMac's employment of the former PLS employees and PLS appealed.

The trial court determined that a no-hire provision such as the one between PLS and BeeMac had never been the subject of litigation in Pennsylvania in any reported case.

Since this was a case of first impression the court looked to other jurisdictions to provide guidance on this issue.

Similar provisions were found to be void in Wisconsin, *Heyde Cos. v. Dove Healthcare, LLC*, 258 Wis. 2d 28 (Wis. 2002), and California, *VL Sys., Inc. v. Unisen, Inc.*, 152 Cal. App. 4th 708 (Cal. Ct. App. 2007). These cases have held that these provisions are against public policy and believe that these types of no-hire contracts should be void because they essentially force a non-compete agreement on employees of companies without their consent or even their knowledge. If an employer wishes to limit its employees from future competition, this matter should be addressed directly between the employer and the employee not between competing businesses.

Similar provisions were found to be permissible in Alabama, *Ex parte Howell Eng'g & Surveying*, 981 So.2d 413 (Ala. 2006), and Illinois, *H & M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc.*, 805 N.E.2d 1177 (Ill. 2004). The states have held that these types of provisions are permissible as partial restraints of trade and are therefore not against public policy. The key aspect of these cases was that the contracts only prohibited the employees' ability to work with one specific employer and therefore could pursue meaningful employment elsewhere.

The court in PLS also looked at the existing law in Pennsylvania related to non-compete provisions. The court noted that such provisions are disfavored in Pennsylvania and that a non-compete is similar in nature to a no-hire agreement. PLS also had a contract with its employees which prevented them from working for any similar company anywhere in the world. The trial court found this prohibition to be unenforceable as being overbroad,

against public policy, and oppressive. However, the ruling was not appealed herein.

The court indicated that the scope of review for a preliminary injunction is to determine if the trial court's ruling regarding injunctive relief had a sound basis. The Superior Court's review and analysis demonstrated that the trial court's ruling in this matter was reasonably based and accordingly affirmed the order denying injunctive relief as it relates to inter-company employment provisions relating to no-hire of employees.

Employers in jurisdictions which prohibit such no-hire provisions have other ways to protect and their business besides these types of inter-company no-hire provisions. Employers can still have employment agreements containing restrictions related to customer non-solicit provisions and misappropriation of confidential information or trade secret information. They can also have contractual provisions with their employees prohibiting the solicitation of its employees to work elsewhere. Employers seeking to protect its business can employ such contractual prohibitions to adequately safeguard against unwanted activities of its former employees.

At this point in time, it is unclear if there is any kind of emerging trend with respect to the validity of inter-company employee no-hire contracts. In addition to the two approaches indicated above, one Indiana court has signaled that, under Indiana law, the issue may turn on the specific provision is narrowly tailored. *Ens Group v. Franklin Elec. Co.*, 2016 Ind. Cir. LEXIS 51, at \*18 (In. Cir.

Ct. November 15, 2016). Although that court did not rule on the issue, it demonstrates that courts may choose to adopt a middle ground. However, and for the time being, it seems that *Pittsburgh Logistics Sys. Inc v. BeeMac Trucking, LLC* created a tentative majority view of the validity of inter-company employee no-hire contracts.

Employers can also look to their states existing law related to non-compete agreements, if there is no existing case law related to intercompany no-hire agreements. If their state either discourages or prohibits non-compete agreements then an employee considering a no-hire restriction can reasonably assume that an intercompany no-hire provision would also be unenforceable.

PLS has filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. As of the date of this article, the Pennsylvania Supreme Court has not determined whether it will hear the case.

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## Analysis of an Architectural Copyright Claim

By Jason Campbell



The increased demand for retirement community developments and assisted living facility construction projects brought about by an aging population is expected to result in a comparable increase in the number of copyright infringement claims filed against professionals involved in the development and construction of such projects. This article will discuss the threshold elements of proof required for a copyright infringement claim based on architectural works; the extent of copyright protection afforded to architectural works; and the prevailing tests currently used by the federal circuit courts in determining

whether similarities in design will result in a finding of copyright infringement.

### Architectural Works Copyright Act

In 1990, Congress enacted the Architectural Works Copyright Protection Act ("AWCPA"), which afforded "architectural works" special status under the law. 17 U.S.C §101 et. seq. Prior to the enactment of the AWCPA, architectural structures themselves did not receive copyright protection, though plans, blueprints and technical drawings were afforded copyright protection as "pictorial" and "graphic" works. See *Scholz Design, Inc. v. Sard Custom*

*Homes, LLC*, 691 F.3d 182 (2nd Cir. 2012). Accordingly, with the enactment of the AWCPA, architects now have two copyrights- one for the design depicted in the drawings or structures as “architectural work,” and another for the drawings themselves as “pictorial” or “graphic works.” *Id.*

The AWCPA provides the current framework used by federal circuit courts to determine the scope of copyright protection for “architectural works.” “Architectural works” are defined to include architectural plans, drawings, mock-ups, as well as the overall form, composition and arrangement of spaces and elements in the design. “Individual standard features” such as windows, doors, foundations, and stairwells are excluded from the definition of “architectural works” and, accordingly, those features are not deemed to have copyright protection under the AWCPA. See *Sedgewick Homes, LLC v. Stillwater Homes, Inc.*, 2017 U.S. Dist. LEXIS 118751. Moreover, design elements serving purely functional or utilitarian purposes, or necessitated by market demands, building codes, zoning requirements, topography may not be afforded copyright protection based on the courts’ interpretations of “standard features” within the AWCPA. See *Bldg. Graphics, Inc. v. Lennar Corp.*, 866 F. Supp. 2d 530, 537-38 (W.D.N.C. 2011). Additionally, under the *scène à faire* doctrine of copyright law, design elements associated with recognized styles of design or construction, *i.e.* colonial or Victorian houses, will not receive copyright protection. See *Zalewski v. Cicero Builder Dev. Inc.*, 754 F.3d 95 (2nd Cir. 2014).

## Establishing the Copyright Claim

While copyright protection attaches at the time an author creates an original work, it is enforceable only after the author complies with the formalities of registration. A plaintiff who asserts a copyright infringement claim bears the burden of proving both ownership of a valid copyright and “unauthorized copying” of the copyrighted work by the defendant. See *Rottlund Co. v. Pinnacle Corp.*, 452 F.3d 726, 731 (8th Cir. 2006). A certificate of copyright registration establishes prima facie evidence of valid ownership of a copyright. See *United Tel. Co. of Missouri v. Johnson Publishing Co., Inc.*, 855 F.2d 604,607 (8th Cir. 1988).

“Unauthorized copying” may be established by (1) direct evidence, or (2) by indirect evidence that the defendant had access to the copyrighted materials and that the alleged infringing materials are *substantially similar* to the copyrighted materials. See *Rottlund Co.*, *supra*. Direct evidence of unauthorized copying may consist of party admissions, witness accounts of the act of copying, and common errors in the works of the claimant and the defen-

dants. Such evidence is often difficult to establish save for the few occasions where witness testimony or forensic evidence may be available to prove up unauthorized copying. The most common fact scenarios in this regard involve the owner who uses architectural plans beyond the applicable licensure period or where an unauthorized party obtains plans from a repository site or from a contractor or design professional without the consent of the architect.

When direct evidence of unauthorized copying is unavailable, circumstantial evidence of “reasonable means of access” to protected work together with “substantial similarity” between the materials or work can satisfy the initial threshold of proof required for copyright infringement. “Reasonable means of access” is often proven with evidence that architectural plans or design materials were available on the internet or that the alleged infringing party had access to those in possession of plans or design information. Evidence that the defendant visited the jobsite or toured the completed project may also suffice to prove means of access.

## Circuit Courts Tests for Substantial Similarity

Following the enactment of the AWCPA, federal circuit courts have struggled to apply consistent measures for substantial similarity among architectural works. There is currently a split among the circuit courts as to the emphasis to be placed on overall design, originality or uniqueness of design and the extent to which certain unprotected elements of design should be “filtered” out as part of any substantial similarity analysis.

In *Nelson-Salabes, Inc. v. Morningside Holdings Nelson-Salabes, Inc. v. Morningside Dev.*, 284 F.3d 505, (4th Cir. 2002), the Fourth Circuit affirmed the Maryland district court’s finding of copyright infringement in a case involving assisted living facilities with similarly- shaped building footprints, bay window designs and entrances. The district court found that the selection and arrangement of these architectural features were unique and constituted artistic expression worthy of copyright protection. *Id.* In determining whether the designs were substantially similar, the district court focused on the “*total concept and feel*” of the facility designs rather than on perceived minor differences such as the different roofs, edifice materials and windows. *Id.* Accordingly, the Fourth Circuit’s test for substantial similarity focuses on overall architectural design with little emphasis on the uniqueness of the design or “filtering” of individual standard design or functional features that would ordinarily not be worthy of copyright protection.

In *Intervest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914 (11th Cir. 2008), the Eleventh Circuit applied a “classification” or “compilation” test, with an inherently heightened substantial similarity standard. Under this heightened standard, a plaintiff must demonstrate an emphasis on unique overall original design to account for the greater weight that is afforded by the Court to modest amounts of dissimilarity among the works at issue. Under *Intervest, supra*, architectural works are inherently deemed to resemble “compilations,” with minimal contribution by the original author and “thin” copyright protection. *Id.* The trial judge takes on the role of fact finder to separate protected original expression from the non-original elements of a work which are not afforded copyright protection. *Id.* Most architectural copyright claims following the Eleventh Circuit’s test for substantial similarity are disposed of by way of summary judgment.

Finally, the Second Circuit, has implemented an analysis which seeks to initially “filter” out unprotected design ele-

ments before determining whether the plaintiff engaged in “wrongful copying.” In *Zalewski v. Cicero Builder Dev. Inc.*, 754 F.3d 95 (2nd Cir. 2014), the plaintiff alleged that the defendants copied the “overall size, shape, and silhouette of his designs as well as the placement of rooms, windows, doors, closets, stairs, and other architectural features.” *Id.* In affirming summary judgment in favor of the defendants, the Court held that any copying of the plaintiff’s designs extended only to traditional unprotected design elements of the work and therefore there was no wrongful copying and no copyright infringement. *Id.*

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## Attacking Productivity Killers: Revisiting Common Hacks to Make into Habits

By Laura Dean



Everyone has the same 24 hours, 1,440 minutes or 86,400 seconds each day. Even *that* person—the one who gets everything done early and still manages to exercise, spend time with family and go out with friends. While you have undoubtedly seen these tips and tricks before, it never hurts to revisit them again. Here are my top six in fewer than 600 words.

### 1. Take time to manage your time

Planning your day may seem like wasting valuable time during which you could be doing something for a client or for a case. By spending a few minutes each morning or the night before, you can quickly map out the day ahead. This helps prevent losing that dead time between wrapping up one task and switching to the next. And, while planning will not prevent the matter that urgently needs your attention from dropping out of the blue (let me know when you have identified a good trick for preventing those), having an idea of what has to get done will help you switch into

crisis mode without letting something else fall through the cracks.

### 2. Block off your most productive time to advance the ball

I bet you can fill an entire day just answering emails. But, generally, responding to emails, while having some value, is not going to check off the big ticket items on your to-do list—the research, the motions, the briefs, the reports or the evaluations. Those things undoubtedly require a larger chunk of time. So, rather than trying to squeeze these Suburban sized items into a Smart Car space, block off specific times for them. Then, treat these Suburban time blocks like a client meeting, which presumably you would not ignore it to answer a few emails.

### 3. Aim to be early

Better late than never is not a great policy. When calendaring due dates, impose a personal deadline to put things “due” a few days early. If you are the person who, when

they target to be on time will likely be either be on time or late, strive to be early. You will either get things done before or on time.

#### 4. The calendar is your friend not your foe

Use a calendar to organize your day. There are plenty of different calendars, so test drive a few and find what works best for you. The days when you can keep everything in your head are long gone.

#### 5. Schedule personal time and breaks

Work is important, but so is your personal time. Schedule time for family, exercise, friends and life, generally, just like those larger to-dos, business meetings and telephone calls. Also, schedule a break at least every 90 minutes to walk outside or do a few laps around the office to avoid burnout.

#### 6. Just say no

No one likes to say “no.” But, if you never say “no,” you will likely find yourself with more than you can handle, which does not do anyone any good. If you don’t like saying “no,” then try out “no, but.” “No, I cannot do that today, but I can do it next week.” “No, I cannot participate in committee X, but I can do more on committee Y.”

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