Case Law Updates

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Introduction

- Survey of the decisions that impact roofing.
- Contract provisions and practical analysis

Insurance

Zurich American Ins. Co. v. Infrastructure Engineering, Inc., 2024 IL 130242 (Ill. Sup. Ct.) (Sept. 19, 2024)

- **Facts:** A builder's risk insurer (Zurich) paid for physical damage on a Chicago construction project and then sued a project party (IEI) as **subrogee**. IEI argued Zurich couldn't subrogate because the payment went to a different insured/project participant rather than the owner Zurich claimed to represent. **Subrogation** is a legal principle that allows an **insurance company** (or sometimes another paying party) to **step into the shoes of the person it paid** and pursue recovery from the party that actually caused the loss.
- **Holding:** The Illinois Supreme Court held Zurich could pursue **contractual subrogation;** under the builder's risk policy language, subrogation rights were driven by the **policy terms**, and the owner had an **insurable interest** sufficient to support subrogation.
- **Takeaway: Builder's risk subrogation is real** and it can be driven by **contract language**, not equitable "who got paid" arguments. Contractors should: (1) scrutinize builder's risk subrogation/waiver clauses, (2) confirm waiver-of-subrogation provisions flow down consistently, and (3) avoid assuming "we're all insureds so nobody sues."

Waiver of Subrogation Clause

- **To the fullest extent permitted by Illinois law, Owner, Contractor, and Subcontractor mutually waive all rights against one another, and against their respective agents, employees, officers, directors, members, and subcontractors of any tier, for damages to the extent covered by property insurance, builder's risk insurance, or any other applicable first-party insurance, whether or not such insurance is required by this Agreement, regardless of fault and including claims arising out of negligence, provided that this waiver applies only to the extent of insurance proceeds actually recovered; each party shall cause its applicable insurance policies to be endorsed to waive subrogation rights consistent with this provision, and failure to obtain such endorsement shall not invalidate the waiver but shall constitute a breach of this Agreement, and nothing herein shall be deemed to waive claims for losses not covered by insurance or for willful misconduct or gross negligence to the extent such waiver is prohibited under Illinois law.**

St. Paul Guardian Ins. Co. v. Walsh Constr. Co., No. 23-1662 (7th Cir. Apr. 29, 2024)

Facts: Chicago sued Walsh over weld cracks discovered in steel columns on the O'Hare canopy/curtain wall project. Walsh sought coverage as an additional insured under a subcontractor's CGL program for costs tied to investigating and addressing the defect issues.

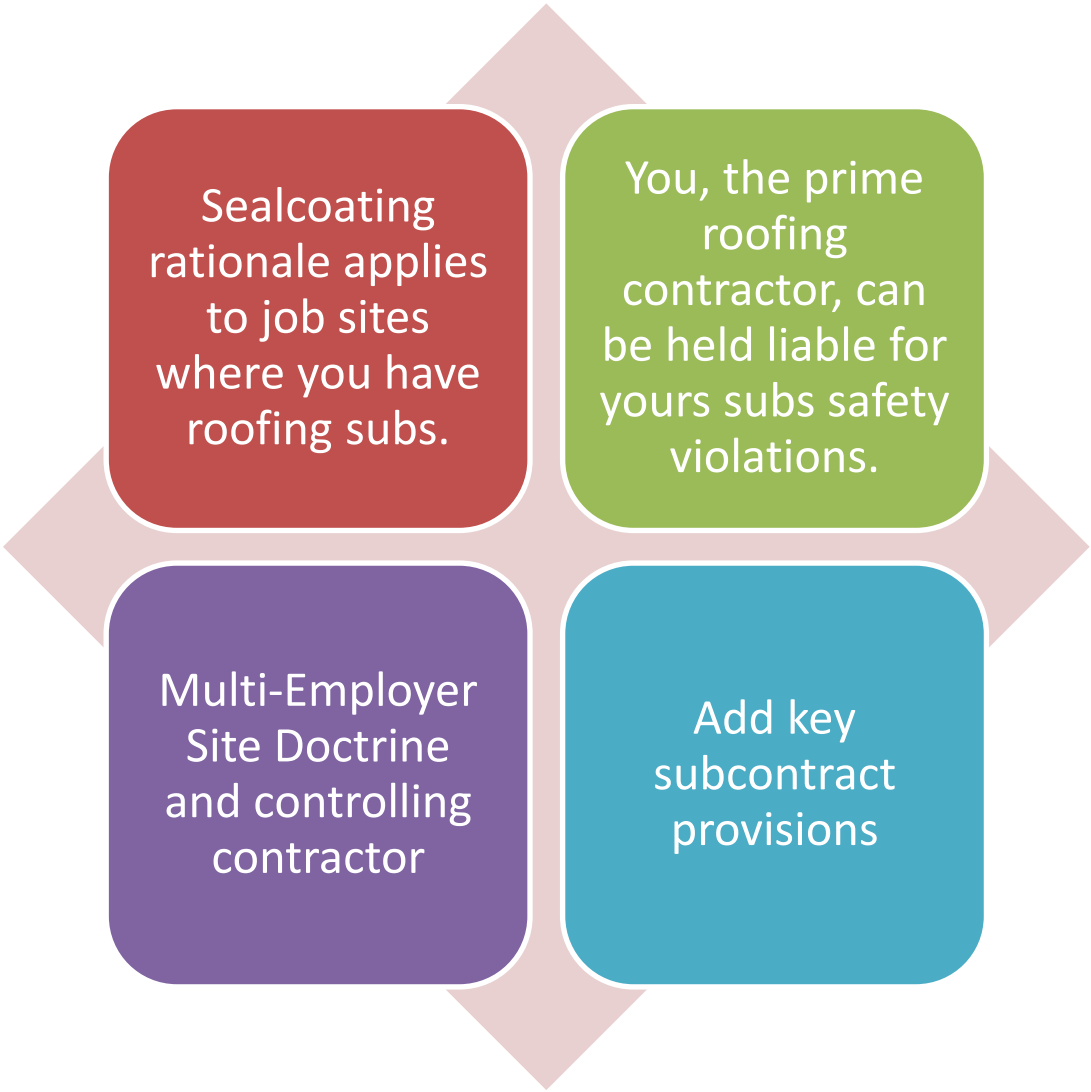
Holding: The Seventh Circuit held the insurers owed no coverage for the claim as presented. The costs aimed at repairing/replacing/retrofitting the named insured's work were treated as economic loss/remediation rather than covered "property damage" caused by an "occurrence" (as argued in that dispute).

Takeaway: For contractors, this is a blunt reminder: CGL is not a warranty. If your risk profile includes retrofit/remediation exposure (common in envelope/roofing/water intrusion disputes), you need (1) tighter upstream indemnity and downstream flow-down, (2) quality-control documentation, and (3) a realistic look at specialty coverage/products. Additional insured status is not enough.

Neisendorf v. Abbey Paving & Sealcoating Co., 2024 IL App (2d) 230209 (July 16, 2024)

- **Facts: A subcontractor's employee was injured when a trench wall collapsed at a county project and sued the general contractor, arguing the GC retained enough control to owe a duty. The trial court granted summary judgment to the GC.**
- **Holding: The appellate court affirmed summary judgment for the GC and stated no duty where the GC did not retain and exercise requisite control over the manner of the subcontractor's work (i.e., general oversight/coordination language wasn't enough by itself).**
- **Takeaway: Illinois courts continue to police the line between coordination and control. GCs should keep contract language and field conduct aligned: safety requirements and scheduling are fine, but avoid directing *means-and-methods* in a way that creates retained-control exposure. Subs should document who controlled sequencing and safety decisions.**

OSHA Multi-Employer Site Doctrine



The Five "Must Have" Contract Safety Provisions

- The Anti-Controlling Contractor Provision
- Reporting Injury, Illness, or Dangerous Conditions Provision
- Indemnification Provisions
- Safety Training and Safety Inspection Responsibility Provision
- The Independent Contractor Provision

The Anti-Controlling Contractor Provision

Subcontractor as Controlling Contractor Provision:

> "Subcontractor understands and acknowledges that Subcontractor shall control and implement all required safety procedures, and that Contractor shall only perform occasional inspections to determine conformance with the plans and specifications for the project. As a result, Contractor shall not be able to ensure Subcontractor (while working for Subcontractor) adherence to safety standards and the OSH Act or applicable state health and safety plans because Contractor cannot reasonably be expected to prevent, detect or abate violative conditions by reason of its limited role on the project. Therefore, Subcontractor shall be solely responsible for controlling safety on the jobsite as it relates to Subcontractor."

Reporting Injury, Illness, or Dangerous Conditions Provision

- Subcontractor is to complete the work in a safe and expeditious manner. The Subcontractor shall take all reasonable safety precautions with respect to his work, shall comply with all safety measures and with all applicable laws, statutes, ordinances, codes, rules, regulations and orders of any public authority, for the safety of persons or property in accordance with the requirements of the Contract Documents. The Subcontractor shall notify the Contractor immediately of any injury to any of the Subcontractor's employees at the site. Subcontractor shall abide by all federal OSHA and state safety and health programs.

Indemnification Provision

To the fullest extent permitted by law, Subcontractor shall indemnify, hold harmless and defend Contractor for all costs, expenses, damages, and liability incurred as a result of the Subcontractor's failure to comply with applicable safety laws, rules, regulations and orders, including without limitation, any state or federal OSHA violation. This provision expressly excludes indemnification for Contractor's negligence and OSHA citations issued to Contractor.

Safety Training and Safety Inspection Responsibilities Provision

At all times while under the control and supervision of the Subcontractor, the employees of Subcontractor shall be required to follow the safety rules, regulations and procedures instituted by Subcontractor, Contractor or any other contractor on the project and shall comply with all safety requirements identified in the Occupational Safety and Health Act of 1970, 28 U.S.C. Section 651 et seq., as amended ("OSH Act") and applicable state health and safety plans. Subcontractor and not Contractor shall be solely responsible for all initial and subsequent safety training of Subcontractor's employees, and Contractor is not responsible for any aspect of Subcontractor's safety training. Subcontractor shall be solely responsible and liable for executing the work in a safe and prudent manner, for establishing safety procedures, for protecting all of the Subcontractor's workers and the public from property damage and/or injury during the performance of work and shall be named as at fault party should incident or violation extend from Subcontractor's work or unsafe practice. Subcontractor shall be specifically responsible and liable for all aspects of its use of the workspace jointly used by different contractors and subcontractors, and Subcontractor acknowledges and agrees that Contractor does not retain supervisory control of such joint use areas for purposes of liability for unsafe conditions.

The Independent Contractor Provision

The parties hereby expressly agree that Subcontractor shall perform under the terms of the Contract Documents as an independent contractor. The Contract Documents shall not render Subcontractor an employee, partner, agent of, or joint venture with Contractor for any purpose. Subcontractor agrees that it will be solely liable for all state and federal taxes and deductions relating to its performance under the terms of the Contract Documents including federal social security payments, state unemployment insurance payments and worker's compensation payments.

Lien Law

Englewood Construction, Inc. v. J.P. McMahon Properties, LLC, 2025 IL App (3d) 240389 (May 29, 2025)

Facts: Contractors recorded a mechanic's lien against property owned by one entity while a related entity with common ownership occupied/used the property; lender (bank) also had an interest. The case dealt with lien rights and priority/party issues in a multi-entity ownership/occupancy structure.

Holding: The appellate court addressed lien enforcement issues arising from entity structure, occupancy, and interests of lenders/other parties under the Mechanics Lien Act (including who must be addressed and how competing interests play out).

Takeaway: "Who is the owner?" isn't a formality. On Illinois projects (especially commercial/REIT/LLC stacks), contractors should: (1) verify the record owner and contracting party, (2) track occupants/affiliates, and (3) calendar lien steps aggressively—because entity layering and lender interests can complicate enforcement fast.

IL Lien Law Basics: Prime Contractor

File lien within 4 months after completion of work to be effective against subsequent property owners.

If the lien is filed after 4 months but before 2 years after completion, it is effective against the original owner. Must seek to enforce within 2 years after completion.

IL Lien Law: Sub Positions

Sub-tier parties on single-family owner-occupied residence must provide notice to the owner within 60 days of start. Illinois sub-tier parties must deliver a Notice of Intent to Lien within 90 days of last day of work.

A lien must be filed within 4 months after completion of work to be effective against subsequent property owners. If filed after 4 months but before 2 years after completion of work, it will be effective against the original owner.

An action to enforce the lien must be filed within 2 years after completion of the work.

All American Construction & Services, Inc. v. Consolidated Management, Inc., 2025 IL App (1st) 241959-U (May 1, 2025)

Facts: Contractor pursued breach of contract and lien foreclosure; owners raised defenses attacking lien compliance and disputed facts but relied largely on pleadings rather than competent counter-affidavits when facing summary judgment-type proof.

Holding: The court emphasized that unsupported denials won't carry the day when a movant supports its position with proper affidavits, the opponent must respond with counteraffidavits, not just a verified answer.

Takeaway: Lien and contract disputes are won (or lost) on proof discipline. Roofing contractors should preserve invoices, change orders, daily logs, and sworn support early because once the case turns into affidavit practice, "we dispute it" is not evidence.

Barnes Electric Construction, Inc. v. Forsythe, 2025 IL App (2d) 240479-U (Sept. 11, 2025)

Facts: Contractor sought payment and lien foreclosure after a residential project dispute; the trial court found billing problems/overstatements and addressed quantum meruit recovery, lien enforceability, and fee requests.

Holding: The appellate court affirmed key trial findings, including denial of lien foreclosure where the record supported findings consistent with constructive fraud/overstatement concerns and contract proof problems, while still analyzing equitable recovery.

Takeaway: Overstated billing can be a lien killer in Illinois. For roofers: keep change orders clean, separate disputed items, and don't "pad" a lien to gain leverage—because the leverage can flip into a credibility/constructive-fraud finding that destroys the lien remedy.

Key Things to Remember with Lien Claims

✔ Verify statutory deadlines – filing, notice, and enforcement dates vary by state.

✔ Confirm proper parties – include owners, GC, lenders as required

✔ Ensure accuracy – property description, claimant info, amounts owed

✔ Preserve contract compliance – follow change order & documentation requirements

✔ Serve notices correctly – method, timing, and recipients matter

✔ Track lien priority – especially against mortgages and other encumbrances

✔ Seek legal guidance early – mistakes can void the lien rights entirely

Hypothetical Case

- **Commercial roofing contractor installs TPO roof for owner in 2022. The total contract price is $436,000.**
- **Owner does not pay roofer $73,000 – change orders and retainage.**
- **Owner has a leak and calls roofer for warranty claim.**

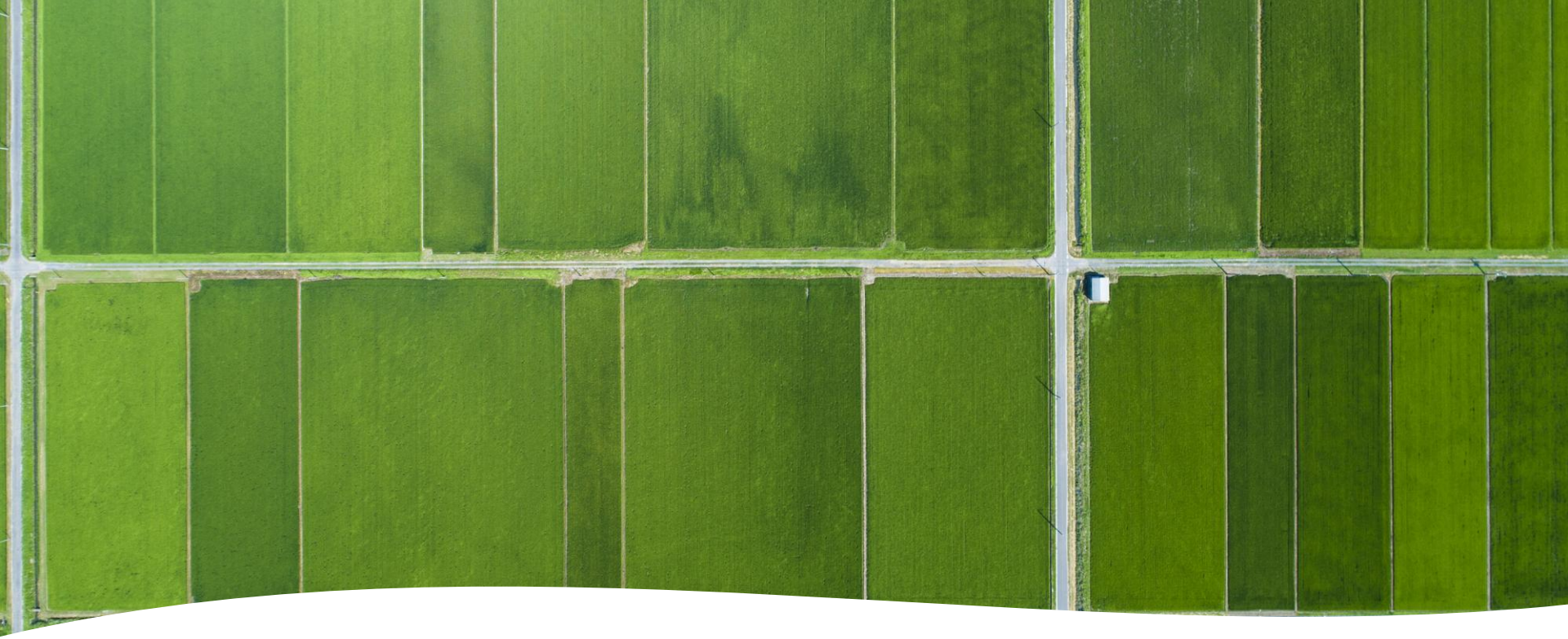
Questions?

- **Should the roofer respond to the warranty call?**
- **The leak causes damage to the interior of the building. Can they make a claim on the roofer's CGL policy?**
- **Can the owner make a performance bond claim?**

White v. Timken Gears & Services, Inc., No. 21 CV 2290 (N.D. Ill. July 17, 2024)

Facts: Employee (sales role; drove a company vehicle and visited customer facilities) was selected for random drug testing under employer's drug-free/zero-tolerance policy. He tested positive for marijuana, went through the employer's "second-chance"/EAP process, and later was terminated after another positive result. He sued under the Illinois Right to Privacy in the Workplace Act (IRPWA), arguing cannabis is a "lawful product" and the employer could not act on off-duty use.

Holding: Summary judgment for the employer. The court held the Cannabis Regulation and Tax Act (CRTA) §10-50 authorizes employers to maintain zero-tolerance/drug-free workplace policies, enforce them through reasonable, nondiscriminatory random testing, and terminate employees for policy violations, so the employee could not maintain an IRPWA claim.



- **Takeaway:** In Illinois, employers can run zero-tolerance programs and random testing if the policy is clearly written, consistently applied, and the testing is reasonable and nondiscriminatory. This is one of the cleanest modern “policy upheld” decisions in Illinois.

Ramirez v. Illinois Workers' Compensation Comm'n, 2025 IL App (1st) 242467WC (Oct. 30, 2025)

Facts: Worker suffered a workplace injury and was sent for a post-accident drug test that came back positive for marijuana. The worker had a medical marijuana card and admitted use the day before, but testified he was not intoxicated at work. Employer/insurer used the positive test to deny Temporary Total Disability/medical and asserted an intoxication defense.

Holding: The court emphasized a critical point under Illinois workers' comp law: a positive marijuana test alone is not enough to prove intoxication/impairment for a denial. Illinois treats cannabis differently than alcohol (no numeric "per se" threshold; requires evidence of impairment). The opinion discusses why marijuana's persistence in the body makes "positive = impaired" a weak inference without more.

Takeaway: For construction employers, this is the big one: if you're denying comp benefits or asserting an intoxication defense, you generally need more than a positive THC result.

Think: observable impairment, accident reconstruction, concentration levels, and/or expert testimony tied to impairment and causation.

Policies should separate "positive test" discipline from "impairment at work" proof, because the legal standards diverge.

Elmer W. Davis, Inc., OSHRC Dkt. No. 22-1210 (ALJ Oct. 11, 2024; final Nov. 1, 2024)

- **Facts: Commercial roofer cited for hoist-area exposure and low-slope fall protection.**
- **Holding: ALJ affirmed §1926.501(b)(3) and (b)(10) items; decision became a final order.**
- **Takeaway: Plan PFAS/guardrails/warning lines for low-slope; control hoist areas; keep daily enforcement logs. Document, document, document.**

Dixon, et al. v. D.R. Horton, Inc., et al., No. C-722407 (19th Jud. Dist. Ct., La.) June 28, 2024

- A Louisiana state court declined to enforce arbitration and delegation provisions contained in residential sales contracts. The dispute stemmed from a class action brought by homeowners alleging construction defects. The builder sought to compel arbitration under clauses that referenced the "AAA Construction Industry Arbitration Rules."
- The court found the clauses unenforceable for three key reasons: the contract referenced "AAA" without defining it or supplying the applicable rules to the homeowners; the delegation clause existed only by incorporation through the AAA rules rather than appearing directly in the agreement; and several contract provisions granted unilateral advantages to the builder, such as the right to terminate, impose liquidated damages, and recover attorney's fees, without offering equivalent rights to the homeowners.

- The court stressed that the homeowners' lack of industry expertise and the absence of clear explanations weighed heavily against enforcement.
- This decision illustrates that in consumer transactions, particularly those involving unsophisticated parties, arbitration and delegation clauses must be explicit, well-explained, and even-handed to withstand judicial scrutiny.
- Reliance on incorporation by reference to external rules without defining terms or providing the rules can undermine enforceability. Builders and contractors should carefully review their form agreements to ensure that dispute resolution provisions are transparent, balanced, and supported by mutual obligations.

Sample Arbitration Provision (Residential Construction Contract)

Arbitration of Disputes
Any dispute, claim, or controversy arising out of or relating to this Agreement, the construction of the residence, or any warranties, shall be resolved by binding arbitration instead of in court. This includes disputes about the interpretation, application, or enforceability of this arbitration provision.

Arbitration Rules and Administration
The arbitration shall be administered by the **American Arbitration Association (AAA)** under its **Construction Industry Arbitration Rules** that are in effect on the date this Agreement is signed. A copy of these Rules is attached to this Agreement as *Exhibit A* and has been provided to the Homeowner for review before signing.

Selection of Arbitrator
The arbitrator shall be a neutral attorney or retired judge experienced in residential construction disputes. Both the Homeowner and the Builder shall participate equally in the selection of the arbitrator, with the AAA assisting if the parties cannot agree.

Delegation of Authority
The arbitrator shall have the authority to decide all issues of arbitrability, including the scope, validity, and enforceability of this arbitration provision.

Location and Costs
The arbitration shall take place in the parish where the residence is located, unless the parties agree otherwise. The Builder and the Homeowner shall share arbitration filing fees and arbitrator compensation equally, except that the arbitrator may reallocate costs or award reasonable attorney's fees as part of the final award in accordance with applicable law.

Mutuality of Obligations
This arbitration provision applies equally to both the Builder and the Homeowner. Either party may require arbitration of any covered dispute. Neither party shall have greater rights than the other in connection with remedies, termination, damages, or attorney's fees under this Agreement.

Preservation of Statutory Rights
This provision does not waive or limit any rights or remedies that cannot lawfully be waived under state/federal law.

Finality of Decision
The arbitrator's award shall be final and binding on both parties and may be entered in any court having jurisdiction.

Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024)

Background: Chevron Doctrine

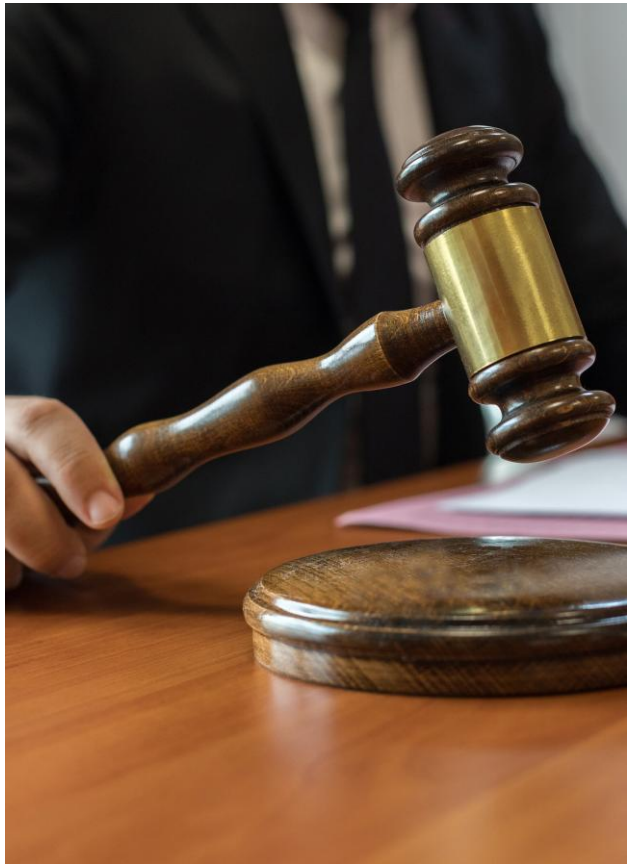
- In *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), the Supreme Court established the **Chevron deference doctrine**.
- Under Chevron, when a statute was ambiguous, courts were required to defer to a federal agency's reasonable interpretation of that statute.
- This rule significantly expanded agency power, as courts generally upheld agency rules and interpretations if they were not "arbitrary or capricious."
- For decades, Chevron was one of the most cited administrative law cases, shaping how courts reviewed federal regulations across industries, including construction, OSHA, EPA, and labor rules.

What Was Being Challenged in Loper Bright?

- *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), arose from a dispute over a NOAA Fisheries rule requiring herring fishing vessels to pay the salaries of federal monitors onboard their boats.
- The fishing companies argued that Congress had never authorized the agency to shift those costs onto the industry.
- Lower courts upheld the rule by applying Chevron, deferring to NOAA's interpretation of the Magnuson–Stevens Fishery Conservation and Management Act.
- The challengers asked the Supreme Court not only to strike down the rule but also to reconsider or overrule *Chevron*.

Holding of Loper Bright

- **On June 28, 2024, the Supreme Court overruled Chevron.**
- **The Court held that courts must exercise independent judgment in interpreting statutes; they cannot defer to agencies simply because a statute is ambiguous.**
- **Agency interpretations may still be considered for their persuasive value, but they are not binding.**
- **This ruling invalidated Chevron's framework and restored primary interpretive authority to the judiciary.**



Impact of Decision

- **Curtails Agency Power:** Federal agencies (OSHA, EPA, DOL, etc.) now face heightened judicial scrutiny. Their rules and enforcement actions will be easier to challenge.
- **Shifts Burden to Congress:** Ambiguities in statutes must now be resolved by courts, not agencies. If Congress wants agencies to have discretion, it must say so explicitly.
- **Construction & Roofing Industry Implications:**
  - Regulations on safety, labor, immigration, and environmental rules will now be open to broader legal challenge.
  - Contractors and trade associations gain new leverage to litigate against costly or unclear regulatory requirements.
  - Expect more lawsuits testing OSHA's new heat rule, multi-employer site liability, EPA emissions rules, and DOL wage determinations.

Trump v. CASA, Inc., No. 24A884, 2025 WL 1773631 (U.S. June 27, 2025)

Background

- On **Inauguration Day (2025),** President Trump signed **Executive Order 14160, "Protecting the Meaning and Value of American Citizenship"**, which attempts to alter how birthright citizenship is treated. The Order identifies certain circumstances under which a person born in the U.S. would *not* be considered a U.S. citizen because they are not "subject to the jurisdiction thereof."
- Multiple lawsuits were filed challenging EO 14160. Plaintiffs included individual citizens (pregnant mothers, etc.), civil-rights / immigrant advocacy organizations (CASA de Maryland, Asylum Seeker Advocacy Project), and several U.S. states.
- District courts in several jurisdictions (Massachusetts, Washington, Maryland, etc.) held that the Executive Order was likely unlawful under both the Citizenship Clause of the Fourteenth Amendment and §201 of the Nationality Act of 1940.
- They issued **preliminary injunctions** to block the Order's enforcement. Notably, many of these injunctions were **universal or nationwide** meaning they prevented the government from enforcing the Order *anywhere in the U.S.*, not just against the plaintiffs.

- The Government sought to stay those injunctions, but the Courts of Appeals denied those stay requests in multiple circuits (1st, 4th, 9th) when asked to limit them to only the plaintiffs.
- The principal question escalated to the U.S. Supreme Court via emergency applications (partial stays), consolidated under *Trump v. CASA, Inc.* (with companion cases *Washington v. Trump* and *New Jersey v. Trump*). The Gov't asked the Supreme Court to hold that those universal injunctions were overbroad, i.e. that district courts lack authority to issue injunctions that protect non-parties nationwide.

Trump v. CASA, Inc., 606 U.S. 831(U.S. June 27, 2025)

The Supreme Court held 6-3 that district courts lack equitable authority to issue orders that bar the federal government from enforcing a statute or policy against non-parties. Injunctive relief must be limited to the plaintiffs before the court unless certified as a class.

The ruling curtails forum-shopping and reduces regulatory whiplash for contractors who operate across state lines.

Effect of Forum Shopping

- **Forum shopping** is the practice of a party deliberately choosing (or attempting to steer litigation toward) the court or jurisdiction that it believes will be most favorable to its case.

How It Works

Parties may try to **file in different states** or **different federal districts** to find a court with favorable precedent.

They may also try to **shift disputes into arbitration or out of arbitration** depending on what benefits them.

In construction disputes, forum shopping often arises in contracts with **venue selection clauses** (e.g., requiring disputes to be litigated in a contractor's "home state").

Why It Matters

Predictability vs. fairness: Courts frown on blatant forum shopping because it undermines fairness and consistency.

Increased costs: Litigating over venue wastes time and resources before the merits of the case are even heard.

Risk for contractors: If a roofing or construction contract does not have a **clear forum-selection clause**, you may end up fighting over jurisdiction rather than the actual dispute.

Example in Construction

- **A roofing contractor based in Florida is sued in Illinois over a project. If the contract did not specify venue, the plaintiff may argue Illinois is proper because the project is there. The contractor, however, may argue Florida courts are more appropriate and favorable.**
- **Assume there is no contract provision that mandates having the case in Illinois?**
- **Who wins?**

Illinois Statute on Construction Contract Venue

- **Citation:** 815 ILCS 665 (Venue — Construction Contracts).
- **Rule:** Any provision in a construction contract, subcontract, or purchase order for an Illinois construction project that **requires litigation, arbitration, or dispute resolution to occur outside Illinois** is **void and unenforceable**.
- **Effect:**
  - If the project is located in Illinois, disputes **must be heard in Illinois** (state or federal court, or arbitration seated in Illinois).
  - This prevents out-of-state general contractors, owners, or suppliers from forcing Illinois subcontractors/contractors to litigate in another state.
- **Policy Rationale:** Protects Illinois contractors and subcontractors from the expense and hardship of being dragged into another state's courts.

Sample Forum Selection Clause

- **Forum Selection.** The parties agree that any legal action, suit, or proceeding arising out of or relating to this Agreement shall be instituted exclusively in the state courts of [County, State] or, if applicable, in the federal courts of the [District Name]. Each party irrevocably submits to the jurisdiction of such courts and waives any objection based on improper venue or forum non conveniens.

V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312 (Aug. 29, 2025)

- **What it's about:** Challenges to President Trump's 2025 "IEEPA" tariffs (broad, global "reciprocal" tariffs).
  Holding: The Federal Circuit held that IEEPA does not authorize imposing broad import tariffs; it affirmed on the merits but stayed its mandate to allow a Supreme Court petition.
  Why it matters for construction: If sustained, it undermines the legal basis for the 2025 emergency-based tariffs that have been pushing up steel/aluminum and other costs across projects; but because the ruling is stayed pending possible Supreme Court review, contractors should treat relief as uncertain in current contracts.

Tariffs and Price Acceleration

- **If there is an increase in the actual cost of the labor or materials charged to the Contractor in excess of 5% subsequent to making this Agreement, the price set forth in this Agreement shall be increased without the need for a written change order or amendment to the contract to reflect the price increase and additional direct cost to the Contractor. Contractor will submit written documentation of the increased charges to the Prime Contractor/Owner upon request. As an additional remedy, if the actual cost of any line item increases more than 10% subsequent to the making of this Agreement, Contractor, at its sole discretion, may terminate the contract for convenience.**

Tariff Surcharge Adjustment

The Contract Sum includes Import Costs (tariffs, antidumping duties, customs fees) in effect as of _____, 2026. If aggregate Import Costs on any shipment increase by more than 5% of the Equipment/Material invoice value, Contractor shall notify Owner in writing within 7 days and may add the excess amount to the next payment application, supported by U.S. Customs entry summaries. Owner may elect to (a) pay the surcharge; (b) furnish tariff-free substitute materials meeting specifications; or (c) terminate the affected work for convenience with payment for completed work pursuant to the Contract Documents. Import-cost decreases in excess of 5% shall be credited to Owner on the next payment application following the decrease.

Force Majeure

- **Any failure or delay by a party in the performance of its obligations under this Subcontract is not a default or breach of the Subcontract or a ground for termination under this Subcontract to the extent the failure or delay is due to elements of nature, Acts of God, acts of war, terrorism, tariffs, riots, revolutions, pandemics, medical emergencies that have resulted in a local, state, or federal state of emergency, Coronavirus (COVID-19) or similar viruses or illnesses requiring quarantine, strikes or other factors beyond the reasonable control of a party (each, a "Force Majeure Event"). The party failing or delaying due to a Force Majeure Event agrees to give notice to the other party which describes the Force Majeure Event and includes a good faith estimate as to the impact of the Force Majeure Event upon its responsibilities under this Subcontract, including, but not limited to, any scheduling changes. However, should any failure to perform or delay in performance due to a Force Majeure Event last longer than thirty (30) days, or should three (3) Force Majeure Events apply to the performance of a party during any calendar year, the party not subject to the Force Majeure Event may terminate this Subcontract by notice to the party subject to the Force Majeure Event.**

Hypothetical Case #1

- A general contractor hires a roofing subcontractor for a school project. The subcontract has a liquidated damages clause of **$5,000 per day** for late completion. The entire roofing contract value is $150,000. Weather delays and late steel delivery (outside roofer's control) push the project 30 days behind. The GC withholds $150,000 in "liquidated damages," wiping out the roofer's entire contract balance. The roofer sues.
- **Audience Question:** Is the liquidated damages clause enforceable?

Hypothetical Case #2

- **Facts:**
  A roofer completes a strip mall project. The GC refuses to pay the roofer's $200,000 balance, pointing to a **"pay-if-paid" clause** in the subcontract. The owner is withholding payment from the GC due to unrelated disputes about landscaping. The roofer files suit for breach of contract. The clause states that **"payment by Owner to Contractor is an express condition precedent to Contractor's obligation to pay Subcontractor."**
- **Audience Question:** Does the roofer get paid?

Hypothetical Case #3

- **Facts:**
  A roofing subcontractor finishes a hotel project. After substantial completion, the owner notices water stains and hires another roofer to perform emergency repairs for $40,000 without notifying the original sub or GC. The owner then deducts that $40,000 from the GC's final payment, and the GC back-charges the roofing sub. The sub insists the owner should have given notice and an opportunity to cure before hiring someone else.
- **Audience Question:** Is the back-charge enforceable?

Hypothetical Case #4

Facts: Roofing Contractor finds unidentified penetrations on a low slope roof system that require flashing. They were not identified on the plans and specifications. After discussion with the GC's project manager, PM says, "Don't worry! We'll take care of you," and asks you to proceed with the work. You submit a change order, but it isn't signed before you start work.

Audience: Does the roofer get paid for the change order work?

Change Order Estoppel Email

- **It is our understanding that you would like us to do _____ which is extra work under the contract and that you have promised to pay for same. We have previously sent you a change order for that work but have not received it back from you. We plan on mobilizing on _____. Therefore, if we don't hear anything to the contrary from you, we plan on moving forward with the work as scheduled. If any of the above is incorrect, please notify us on or before EOB (day before mobilization).**

Questions?

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