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When Considering Litigation: Prudence is, at times, the Better Part of Valor

The determination made at the trial court level was enough to have all current litigators advising their commercial and industrial clients that well-crafted contracts are the only way to protect yourself from the potential risks that may arise during any type of construction contract.

By **Chris Carmona** | August 23, 2021

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When the economy slows, we see examples of companies being more aggressive in suing each other in an attempt to recoup losses or fill revenue gaps. This is risky business that keeps courts busy and attorneys' offices buzzing. But no matter the pace, the judicial decisions that come from the increased litigation is instructive for interested parties in any industrial sector. Take for example, a recent commercial contracts case out of Harris County in Houston, Texas.

The case, *U.S. Pipeline, Inc. v. Rover Pipeline LLC*, which was heard in the 333rd District Court, by then Judge Daryl Moore, quickly spiraled out of control to the point where the Plaintiff, U.S. Pipeline, was forced to pay Rover's legal fees. Adding insult to U.S. Pipeline's injury, Rover had twice offered to settle before trial – for as much as $55 million. However, as the facts bore out and statutory provisions were invoked, the Court sided with Rover, which ultimately ended up costing U.S. Pipeline millions.

As general counsels and outside attorneys ponder potential litigation, the facts of this case demonstrate the importance of negotiating and crafting contracts that contemplate potential events that may impact the project, define terms and conditions unambiguously, and provide an effective dispute resolution process. The case is also a lesson for contractors in how expensive it can be to cause disruptions through extreme self-help and refusing to take advantage of contractual dispute resolution processes. Additionally, this case sets out how the Courts take seriously pre-trial offers to settle disputes through Rule 167 offers, and how refusal to contemplate these offers will leave you losing, even when you have won.

U.S. Pipeline had been contracted to build out sections of Energy Transfer's Rover Pipeline in Ohio, but as sometimes happens, disputes arose over each parties' respective responsibilities pursuant to their contract. According to court documents, after the parties entered into the dispute resolution process laid out in the contract, U.S. Pipeline turned down multiple settlement offers Energy Transfer tendered to keep U.S. Pipeline working, including one offer of $55 million.

The dispute between the parties revolved, most significantly, around (1) which party was responsible for covering the costs of repairing a right-of-way, resulting in small landslides called "slips", and (2) whether U.S. Pipeline could redefine work that it had already invoiced and been paid for as work that was "in-scope" as "Extra Work," which would entitle it a higher rate of compensation. Notably, the contract's unambiguous and nuanced risk-sharing compensation model clearly defined "in-scope" work and "Extra Work," such that no debate about how to classify the work should have arisen.

With U.S. Pipeline refusing to continue to work the project according to the terms of the contract, Energy Transfer's litigation team which was led by Texas based lawyers, Gregory Cokinos and Rob Naudin of Cokinos Young and co-counseled by Philadelphia based Bruce Ficken and Ray DeLuca of Cozen O'Connor, filed for a declaratory judgment, seeking to enforce what they saw as clearly defined terms of the contract. It was at this point that U.S. Pipeline stopped working altogether, abandoning the job and leaving Energy Transfer with millions of dollars of unfinished and faulty work, completely ignoring a contractual requirement that the contractor "diligently prosecute the Work at all times." As specifically allowed by the contract, Energy Transfer responded to this serious disruption by withholding retainage and certain outstanding invoices in order to cover some of the expenses of completing and repairing U.S. Pipeline's abandoned work.

In response, U.S. Pipeline filed suit against Energy Transfer for alleged breach of contract, adding a variety of additional claims including negligent misrepresentation and fraud. U.S. Pipeline's litigation team was led by Paul Dobrowski of Dobrowski, Larkin & Stafford LLP and co-counseled by Jean Frizzell and Brandon Allen of Reynolds Frizzell LLP. With its original petition for declaratory judgment still pending, Energy Transfer counterclaimed for the cost of completion and repair of the important infrastructure development work U.S. Pipeline had been contracted to do.

Court documents show that despite U.S. Pipeline's extreme and disruptive self-help measures, Energy Transfer continued to try to work collaboratively with the contractor and sought to settle the matter outside of court. Again, U.S. Pipeline rejected Energy Transfer's formal offer, made pursuant to Texas Rule 167, of $28 million, an amount in excess of the retainage and withheld invoices. Instead, they pushed forward, seeking more than $100 million in actual damages, including interest and attorneys' fees, as well as additional punitive damages.

Former Harris County District Judge Daryl L. Moore's verdict, handed down in November 2020, threw out U.S. Pipeline's claims of fraud, promissory estoppel, negligent misrepresentation, unjust enrichment, and quantum meruit, leaving only the breach of contract claim, which awarded U.S. Pipeline a fraction of what they were originally seeking and well below the $28 million that was offered pursuant to the Rule 167 offer. Ultimately, the net award, after having to pay Energy transfer's attorney fees for rejecting the Rule 167 offer, was a significant blow to U.S. Pipeline, and has now forced other potential litigants to take note as to why you may end up losing even if you think you have won.

The Court did require Energy Transfer to pay U.S. Pipeline the retainage and unpaid invoices that, per the contract, Energy Transfer had withheld when U.S. Pipeline abandoned the job and that Energy Transfer readily acknowledged it owed. Additionally, the Court reclassified a small percentage of work as Extra Work, totaling only $1.15 million. Ironically, Energy Transfer had conceded to the Court it would have paid for that work as "Extra Work" had U.S. Pipeline followed the contractual procedures for having work classified as "Extra Work." The remaining $62 million in claimed breach of contract damages was thrown out with the fraud charges, and other tort claims, resulting in a gross award of less than $28 million, before taking into account U.S. Pipeline's disruption of the development of Energy Transfer's Rover Pipeline.

The Court then addressed Energy Transfer's counterclaims for the harm U.S. Pipeline had inflicted by walking off the job. U.S. Pipeline was ordered to pay Energy Transfer $13.7 million for the completion and repair of the contracted work, reducing U.S. Pipeline's award to only $14.1 million – around half of what Energy Transfer had offered in pre-trial negotiations and substantially less than the $55 million Energy Transfer had offered during the contractual dispute resolution.

The refusal to accept Energy Transfer's $28 million offer carried an additional consequence for U.S. Pipeline. Under Texas Rule 167, if a prevailing plaintiff's award is less than 80 percent of what was offered in a settlement offer under the rule, the offering party may be awarded certain litigation fees. Because U.S. Pipeline turned down Energy Transfer's $28 million Rule 167 settlement offer, this meant its $14.1 million was further reduced by $4.13 million in litigation costs incurred by Energy Transfer in its defense against U.S. Pipeline's claims.

U.S. Pipeline could have taken the $55 million and completed the work, but instead chose to take extreme measures by abandoning the job and then refusing to negotiate in good faith (actions it and other contractors should consider carefully or else they risk ending up in the same position as U.S. Pipeline). Instead, this Plaintiff walked out of court with less than $10 million before paying their own litigation costs, a stark reminder that contracts, especially heavily negotiated agreements between sophisticated and experienced parties, are still sacred and will be enforced by the courts. With infrastructure investment a top priority under the Biden administration, this case can serve as a timely example for developers and contractors on industry best practices, and what not to do.

First, when companies contract for goods or services, heavily negotiated, thorough, nuanced, and unambiguous contracts prevent potential disputes and provide less disruptive means of resolving any disputes that do arise. When a breach of contract does occur, that contract should have efficient and appropriate remedies to protect the non-breaching party's interests. Though U.S. Pipeline caused a major disruption for Energy Transfer in this case, the degree of harm was significantly mitigated by the sophisticated contract governing the parties.

Second, when all of the parties governed by a contract are not fully aware of their duties, responsibilities, remedies, and potential consequences of their actions under the contract, they may make decisions that compromise their interests. From management to field personnel, everyone involved should understand exactly what must be done and cannot be done, the ramifications for taking or failing to take certain actions, and what remedies they do have under the contract so that they don't make rash decisions that ultimately cost tens of millions of dollars and delay the projects even further.

And finally, in contracting for complex construction projects, it is important for companies to consult with knowledgeable and experienced experts and lawyers when making decisions. This is especially important when issues arise. Different jurisdictions may have different requirements, policies, and remedies that must be considered. There are nuances of law and policy surrounding construction contract abandonment that are best discussed with qualified experts who can explain the full scope of options, risks, and the variables that should be considered before deciding on any action.

The judge's ruling in the U.S. Pipeline v Rover Pipeline case was eventually appealed. This case ultimately settled while on appeal with the 14th Court of Appeals and the case was jointly dismissed on July 6, 2021. Although, it is not known how the higher courts would have viewed the arguments made by each party, the determination made at the trial court level was enough to have all current litigators advising their commercial and industrial clients that well-crafted contracts are the only way to protect yourself from the potential risks that may arise during any type of construction contract.

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