Building Better Outcomes

CONSTRUCTION CLAIMS

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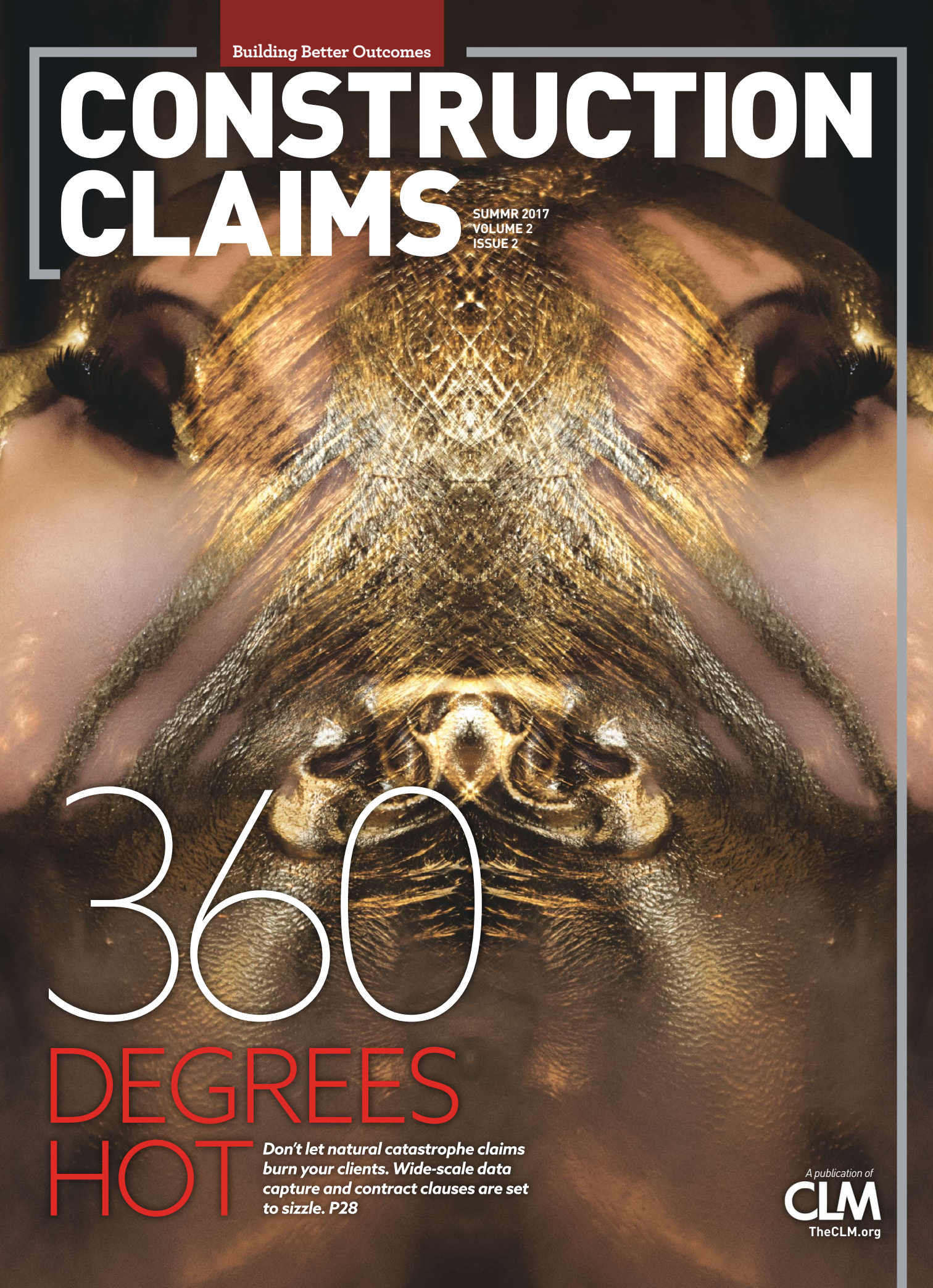

360 DEGREES HOT

Don't let natural catastrophe claims burn your clients. Wide-scale data capture and contract clauses are set to sizzle. P28

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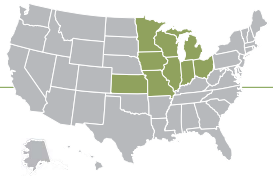

Rulemakers

Ohio Governor Wants State Oversight of Manufactured Homes

Gov. John Kasich wants Ohio's state legislature to move oversight of manufactured homes from the Ohio Manufactured Homes Commission, an industry-based board that reports to the state, to the Ohio Department of Commerce, which houses the Fire Marshal's office. The commission currently trains installers and inspects newly constructed manufactured homes, among other duties. Its board is made up primarily of people in the industry, such as installers, mobile home park operators and manufactured home retailers. They argue they have the needed expertise that Fire Marshal employees don't have.

Kasich says manufactured-home fires occur too often. But fire hydrants are not required in mobile home parks in Ohio, and homes built before 2006 are not required to have fire alarms and smoke detectors. Nonetheless, a 2013 study by the National Fire Protection Association says current manufactured homes have about 40% fewer fires than site-built homes and fewer fire injuries to residents per 100,000 people. Federal codes on manufactured homes have been revised and tightened to include more safety features over the decades, and the Ohio Manufactured Homes Commission says it inspects 100% of installations contractors perform. The commission's licensing application for installers requires proof of workers compensation insurance plus a $25,000 surety bond, a $10,000 surety bond and $300,000 in general liability insurance, or $1 million in general liability insurance. Professional liability insurance is not required.

Immediately Appealable

The Ohio Supreme Court has ruled on appeals of discovery orders that jeopardize attorney-client privilege.

By Andrew Smith

In December, the Ohio Supreme Court in *Burnham v. Cleveland Clinic* issued a ruling, holding that court orders that require a party to disclose discovery information "plausibly alleged" as protected by the attorney-client privilege are immediately appealable. The court reasoned as follows:

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> An order requiring the production of information protected by the attorney-client privilege causes harm and prejudice that inherently cannot be meaningfully or effectively remedied by a later appeal. Thus, a discovery order that is alleged to breach the confidentiality guaranteed by the attorney-client privilege satisfies R.C. 2505.02(B)(4)(b) and is a final, appealable order that is potentially subject to immediate review.

Background of Dispute

In *Burnham*, Darlene Burnham brought a personal injury suit against the Cleveland Clinic and Cleveland Clinic Health System. She allegedly slipped and fell in her sister's hospital room at the clinic after an employee poured liquid on the floor.

During discovery, Burnham requested production of an incident report she learned had been created. However, the clinic alleged the report was not discoverable because it was shielded by various protections, including the attorney-client privilege.

Bad Vibrations Crack Neighbors' Walls

Vibrations from construction and operational light rail are cracking buildings in Minneapolis. Construction near a condo building that was retrofitted from early 20th-century grain elevators cracked the walls of the condo tower. Now the city is permitting light rail to be installed with a shallow tunnel for the trains built on footings just feet away from the condo's structures. Residents demanded a study on the effect of vibrations from the trains, but the city balked over money and the effect a study would have on the environmental plan already approved by the Federal Transit Administration. Other properties have also taken action through legislation, lobbying and, of course, lawsuits. The council in charge of the light rail project has already agreed to pay out $3.5 million to Minnesota Public Radio for light rail vibration in a settlement. In cases of cracks from other construction, the vibrations were lower than what would normally cause damage. The Itasca Consulting Group, an engineering firm that assisted in the earlier case, has been hired to study vibration from the newly slated tracks. ■

Burnham filed a motion to compel discovery of the report. The trial court ordered the clinic to provide Burnham with a privilege log and directed the parties to brief the issue of privilege. Included with the clinic's privilege log, filed under seal, was a copy of the report and an affidavit from the clinic's deputy chief legal officer claiming the report was generated as part of its protocol to notify the clinic's legal department of events that might be the basis for legal action. After reviewing the parties' briefs and the privilege log, the court ordered the clinic to produce the incident report. The clinic then filed an immediate appeal.

The appellate court dismissed the action, finding there was no final, appealable order to review. The appellate court determined the clinic failed to affirmatively establish there would be prejudice resulting from disclosure of the incident report sufficient to justify an interlocutory appeal before the underlying personal injury suit was fully resolved.

Ohio Supreme Court Ruling

The Ohio Supreme Court ultimately concluded, "Because the Clinic raised a colorable claim that its report was protected by the attorney-client privilege, the court's order compelling disclosure of that report was a final, appealable order."

The Supreme Court was clear to point out that information claimed as protected by the work-product privilege may be treated differently. Indeed, "[t]he attorney-client privilege and the attorney-work-product doctrine provide different levels of protection over distinct interests, meaning that orders forcing disclosure in these two types of discovery disputes do not necessarily have the same result that allows an immediate appeal." However, under certain limited circumstances an order mandating disclosure of information arguably protected by the work-product privilege may still be immediately appealable. The court stated:

> But the same guarantee of confidentiality is not at risk with an attorney's work product. Any harm from disclosure would likely relate to the case being litigated, meaning that appellate review would more likely provide appropriate relief. This is not to say that compelling the disclosure of an attorney's work product pursuant to Civ.R. 26(B)(3) would never satisfy R.C. 2505.02(B)(4)(b) and require an interlocutory appeal. But it does not necessarily involve the inherent, extrajudicial harm involved with a breach of the attorney-client privilege.

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Importance for the Insurance Defense Industry

This decision is extremely beneficial in the realm of insurance defense and bad faith litigation, including the often-disputed disclosure of materials, including, among other things, claims files, claim log notes, reserve information, claim handling policies and manuals, underwriting materials, and pre-suit internal reports and investigation reports. Defendants now have the opportunity to immediately appeal adverse discovery court orders concerning these matters.

In Burnham, the Ohio Supreme Court clarified a much-disputed discovery issue. Court orders requiring a party to disclose discovery information "plausibly alleged" to be protected by the attorney-client privilege are, in fact, immediately appealable. Indeed, once "the genie is out of the bottle," the harm is done, justifying an appeal and a second opinion as to such a key privilege determination. This discovery bell "cannot be unrung."

However, a number of questions are still unanswered after the *Burnham* decision:

1. **What degree of showing will be necessary to allege protection by the attorney-client privilege to justify the immediate appeal?** The opinion references the terms of art "colorable claim" and "plausibly alleged." However, the court summarily concluded the report in question was potentially privileged, without detailing this determination.
2. **Although there is an automatic right to appeal an order mandating production of discovery information arguably protected by the attorney-client privilege, what degree of prejudice or harm will be necessary to justify an interlocutory appeal when the attorney-client privilege is not involved?** What if the appeal is based solely on the work-product privilege, statutory immunity, or even a general confidentiality, proprietary or trade secret argument? The court did not rule out these possibilities but did hint it will be extremely difficult to justify an immediate appeal when the attorney-client privilege is not in question. Exactly how difficult remains to be determined. ■

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