

## 5 Bruner & O'Connor Construction Law § 16:27

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Chapter 16. Governmental Regulation: Licensing and Permitting

### § 16:27. Criminal sanctions

#### References

Given that our criminal justice system is currently overburdened and likely to remain so for some time, it comes as little surprise that prosecution of license violations is not a high priority in most jurisdictions. As previously remarked, civil sanctions are the major deterrent to unlicensed practice. The threat of administrative discipline is also quite real. No jurisdiction relies heavily upon its criminal code to police professional practice. Indeed, one might question whether it makes much sense to criminally prosecute someone for a license violation in those cases where the person's conduct does not also violate some other section of the criminal code.

In connection with their professional activities, contractors, engineers and architects can commit any number of criminal violations which can range from such garden variety acts as theft, embezzlement, mail fraud or wire fraud to more unique criminal violations such as the willful abandonment of a home improvement contract and theft by nonpayment causing the imposition of a mechanics' lien.<sup>1</sup> One might question whether state resources should be employed to prosecute unlicensed construction professionals if their activities do not create injury. Civil sanctions prohibiting such professionals from utilizing the state's judicial system to enforce payment for services rendered would appear to be a sufficient deterrent, particularly when coupled with the licensing board's administrative powers to penalize such professionals.<sup>2</sup>

One might even argue that the criminal penalties available to the state are a cumbersome method by which to regulate unlicensed practice, because the higher burden of proof and greater procedural due process rights attendant to criminal proceedings make policing all the more difficult. This is particularly so where the statutory scheme provides that the defendant must have "knowingly" violated the law before being subject to prosecution.<sup>3</sup> Furthermore, penal licensing statutes are strictly construed.<sup>4</sup>

In one case, the Maryland court of appeals addressed the *mens rea* element of a prosecution for violation of the state's home improvement license statute, which had resulted in imposition of a six-month jail sentence in the trial court.<sup>5</sup> The court rejected the state's argument that violation of the statute was a "strict liability criminal offense," and instead required the state to prove that the contractor knowingly and willfully violated the statute. The contractor was in fact licensed as a lead abatement contractor, was hired to perform lead abatement work, and had no knowledge that he was required to obtain a separate home improvement license for the project in question. The Maryland Court of Appeals reversed the contractor's conviction accordingly.<sup>6</sup>

Even criminal prosecution of deliberate acts designed to evade the licensing laws do not reach uniform results. In *State v. Jenkins*,<sup>7</sup> the qualifying agent of an unlicensed contractor was prosecuted for contracting without a license. The defendant was in the business of building and installing cabinets, countertops and vanities in homes. His normal method of contracting was to split the materials and labor portions of the contracts between two of his companies, materials to be supplied by an unlicensed contractor, and all labor to be performed through a licensed contractor. (Why the defendant chose to contract in this manner was not discussed by the court.<sup>8</sup>) The basis for the state's charge was that on the project

in question, the unlicensed contractor remained responsible for the entire project, even though the licensed contractor was to perform the labor. A majority of the New Mexico Court of Appeals upheld the defendant's conviction, finding that it was supported by substantial evidence.

The dissent, however, concluded that although the defendant's business practices were unorthodox, they did not appear to result from a desire to evade the liabilities of the state's licensing act. The defendant was doing business under two names, at least one of which was licensed, and all this was fully disclosed to the homeowner:

It is undisputed that Home Service Center was a duly licensed contractor, with defendant Sam S. Jenkins as the qualifying party. This was plainly disclosed ... there was no evidence that the defendant sought to insulate himself from the liabilities the Act was designed to impose on him. I would thus conclude that the "evil" the statute was intended to protect against did not encompass the specific facts and circumstances under which defendant and the Walkers [homeowners] entered into the subject contract. I fully realize that defendant's unorthodox procedure and his motives for doing things the way he chose to may be suspect. But his questionable activities did not, in my view, rise to the level of a statutory violation.<sup>9</sup>

Because of the many uncertainties surrounding the criminalizing of unlicensed practice, it is not surprising that one finds limited policing of construction professionals by such means.

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#### Footnotes

- 1 See *Shade v. State*, 306 Md. 372, 509 A.2d 664 (1986) (home improvement contractor was convicted of willful abandonment of home improvement contract); Minn. Stat. Ann. § 514.02 (criminalizing the failure to pay one's subs and suppliers if paid by an owner in instances where the unpaid subs and suppliers lien the owner's property).
- 2 The power to require a defendant convicted of a crime to make restitution to the victim is often quite effective. Yet, in *State v. Wilkinson*, 202 Ariz. 27, 39 P.3d 1131 (2002), the Supreme Court of Arizona held that while homeowners were entitled to restitution from an unlicensed construction contractor in the amount of money paid under contracts where the contractor's offer to act as a licensed contractor directly caused their losses, they were not entitled to restitution in the amount of expense they incurred in repairing the contractor's faulty work, where the contractor's offer to act as a licensed contractor did not directly cause the losses. The court concluded that a trial court may award restitution when and to the extent that the criminal act of contracting without a license directly causes a victim's economic loss.
- 3 See Conn. Gen. Stat. Ann. § 20-297; Cal. Bus. & Prof. Code § 5536; Ariz. Rev. Stat. Ann. § 32-145; Tex. Rev. Civ. Stat. Ann. art. 249a, § 13 (1989). See also *State v. Arkell*, C1-02-856 (Minn. December 31, 2003), reversing C1-02-856 (Minn. Ct. App. March 14, 2003) (overturning the misdemeanor conviction of a home building executive in control of a company responsible for building code violations in residential housing, because the building code violation was not a "strict liability crime" and required proof of *mens rea* intent for conviction to be upheld). See also Berning, *How Managers Face Criminal Penalties Under Public Protection Laws* (September 11, 2000) ("Business people, beware. Although a fundamental conception about criminal law is that a person can be guilty of a crime only if he or she acted in some specified unlawful manner and had the intent to do so, recent legal developments demonstrate that this is not true. Managers and executives can be criminally prosecuted as individuals for the actions of their businesses, even if they neither knew about nor had any role in the crime. Thus, managers can be sentenced to jail time simply for company violations that occurred on their watches. Most of these convictions are based on statutes and regulatory provisions known as "public welfare" legislation, including building codes.).

4 See Maxfield v. Bressler, 38 Ohio L. Abs. 449, 55 N.E.2d 424 (Ct. App. 1st Dist. Hamilton County  
1942); Reisch v. State, 107 Md. App. 464, 668 A.2d 970, 977 (1995).  
See also Central Oklahoma Pipeline, Inc. v. Hawk Field Services, LLC, 2012 Ark. 157, 400 S.W.3d 701  
(2012) (upholding the constitutionality of a criminal misdemeanor statute prohibiting performance of  
construction work without a license, and dismissing the contractor's suit for breach of contract against  
the public owner because the contractor was not licensed).

5 Reisch v. State, 107 Md. App. 464, 668 A.2d 970, 977 (1995).

6 See Reisch v. State, 107 Md. App. 464, 668 A.2d 970, 980 (1995).

7 State v. Jenkins, 108 N.M. 669, 1989-NMCA-044, 777 P.2d 908 (Ct. App. 1989).  
See also Phillips v. Com., 2008 WL 220255 (Va. Ct. App. 2008) (upholding a criminal verdict of  
construction fraud against a contractor who, *inter alia*, fraudulently represented that it had or would  
obtain a Virginia contractor's license); Town of Gilbert Prosecutor's Office v. Downie, 218 Ariz. 466,  
189 P.3d 393 (2008) (criminal conviction of unlicensed contractor required restitution to victims of all  
sums, reduced by the value of the benefit conferred on the homeowner).

8 The majority obviously viewed the defendant's business practices with some suspicion. Even the dissent  
acknowledged "that defendant's unorthodox procedure and his motives for doing things the way he  
chose to may be suspect." State v. Jenkins, 108 N.M. 669, 673, 1989-NMCA-044, 777 P.2d 908 (Ct.  
App. 1989).

9 New Mexico law requires both contractors and subcontractors to be licensed and prohibits  
transferring a license or certificate of qualification from one to another. N.M. Stat. Ann. §§ 60-13-3(A);  
60-13-12(A); 60-13-16(D); 60-13-18(A).

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