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NEW WEB PAGE

Scott ♦ Hookland LLP has recently updated its web page, www.scott-hookland.com. The updated site includes updates on Oregon and Washington lien and bond claim issues. Also, prior issues of this newsletter are now available on-line and there is a search engine of the posted newsletters.

NEW RESTRICTIONS ON “ADDITIONAL INSURED” PROVISIONS IN CONTRACTS?

Contractors and their insurance carriers should be aware of a recent Oregon Court of Appeals ruling that limited the prime contractor’s claims against its subcontractor’s insurance carrier. In Walsh Construction Co. v. Mutual of Enumclaw, 189 Or App 400 (2003), the court held that a provision requiring the subcontractor to obtain additional liability insurance for the prime contractor was void.

As readers of this newsletter are aware, the issue of “additional insureds” has been growing in importance in recent years. (See *Consider*, October 2002 and January 2003.) In essence, these contractual provisions require the subcontractor to name the prime contractor (and often the owner and other parties) as additional insureds on the subcontractor’s insurance policy.

In recent years, this has become an increasing issue, both for subcontractors whose carriers are being more restrictive in issuing these additional insured endorsements, and for prime contractors who, when faced with a subcontractor who is out of business, can only look to the insurance policies of the defunct subcontractor.

In Walsh, the subcontract included a fairly common provision requiring the subcontractor to name the prime contractor and the owner as additional insureds. When one of the subcontractor’s employees was injured on the job site, he demanded payment from Walsh, the prime contractor. Walsh then

demanded that the subcontractor’s insurance carrier, Mutual of Enumclaw, defend this claim. Enumclaw denied the demand, citing to ORS 30.140, which limits indemnity obligations in construction agreements.

Previously, the Oregon Court of Appeals had held that insurance and indemnity were separate contractual obligations and, therefore, the ORS 30.140 indemnity limitations did not apply to insurance claims. Montgomery Elevator v. Tuality Community Hospital, 101 Or App 299 (1990).

In Walsh, the court found that the language of ORS 30.140 had changed since the time of the Montgomery Elevator decision. After a lengthy analysis of the statutory changes, the Court held that, under the current language, the additional insurance requirements in the subcontract were void as a matter of law.

Because this decision is so recent and because the Oregon Supreme Court has recently decided to review the lower court’s rulings, it is too early to determine all of its consequences. For now, there is a great deal of uncertainty in the area of additional insured provisions in construction contracts. For example, some feel that the decision is limited to its workers compensation and employment context. Others feel that it may have broader application.

Contractors who are concerned about these issues should consult with their insurance carriers. At a minimum, you will want to know whether your insurance policies and certificates meet the various requirements.

On a closing note, it is important to know that the Oregon Supreme Court has agreed to hear the parties’ appeal of this case. We will let you know as soon as the court issues its decision.

MATERIAL SUPPLIER CONSTRUCTION LIEN CLAIMS IN IDAHO

On March 4, 2004, the Idaho Supreme Court decided the validity of a material supplier's construction lien claim in Franklin Building Supply Co. v. Sumpter, Idaho Supreme Court, Docket No. 29822, 2004 Opinion No. 26 (filed March 4, 2004). The court decided when an Idaho construction lien must be recorded, what interest rate applies, and whether the prevailing party on appeal can recover attorney fees.

Franklin Building Supply Co. ("Franklin") furnished materials to Pond Construction, Inc. ("Pond"), the prime contractor constructing a new home for the Sumpters. The city issued a certificate of occupancy on November 27, 1998, and after moving in, the Sumpters prepared a punch list of items needed to complete the home. Beginning on July 2, 1998, and ending on December 16, 1998, Franklin furnished materials to Pond on open account to construct the Sumpters' home. The last delivery (minimal in amount) was a sheet of cedar and a locking door handle, and was used by Pond to complete the punch list items. Franklin recorded its lien on the 90th day after delivering these items.

The Idaho Supreme Court held a lien must be recorded within 90 days of substantial completion of the contract. Further, the court distinguished between strict material suppliers and subcontractors who provide either labor, or labor and materials.

The court reasoned that whether a contract has been substantially completed can be determined from the facts and knowledge of the project status. For an open account material supplier, however, its contract is not substantially completed until the last item is delivered, even if that last item is minimal in amount.

The court concluded those last items were needed to complete the punch list work and, therefore, were needed to complete the contract. Therefore, the court ruled that Franklin's lien was timely recorded.

Franklin argued its lien claim included interest at the 18% per annum rate in the credit

application and agreement signed by Pond. While recognizing the extent of a lien is measured by the amount due the lien claimant on his contract, the court held, without any reasoning, that lack of contract privity between Franklin and the Sumpters precluded use of the contract rate of interest. Therefore, the lien claim accrued interest at the legal rate.

Finally, the court refused to award Franklin the attorney fees it incurred on appeal, even though Franklin prevailed. In doing so, the court relied on previous case law holding that a prevailing lien claimant is entitled to recover only the attorney fees it incurs in the trial court. Thus, it appears prevailing lien claimants will be not awarded the attorney fees they incur on appeal.

Finally, note again that this case law applies only to construction lien claims in Idaho. Oregon and Washington law may differ greatly.

FIRM NEWS:

DOUGLAS R. HOOKLAND will make a presentation as part of an all-day seminar on September 27, 2004 (in Portland) entitled "Strengthening Your Contract Drafting Skills" for the National Business Institute. The other speaker will be Lawrence B. Hunt of Hunt & Associates PC. If you would like a brochure, please contact this office.

DOUGLAS R. HOOKLAND, DOUGLAS L. GALLAGHER and **ALAN L. MITCHELL** will present an all-day seminar on December 9, 2004 (in Portland) entitled "Oregon and Washington Construction Lien and Bond Law." If you would like a brochure, please contact this office.

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