SCOTT ◆ HOOKLAND LLP

Consider . . .

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DO YOU REALLY WANT TO GIVE BACK THAT MONEY?

Clients sometimes think we are too conservative with our advice about whether to accept a specific form of payment and which form of release to sign. A new court decision re-illustrates why we may give such conservative advice. In re JWJ Contracting Co., Inc., 371 F.3d 1079 (9th Cir. 2004).

Endo Steel was a subcontractor to JWJ Contracting on a public improvement project in Phoenix, Arizona. In exchange for a $194,286 company check, Endo Steel signed an "unconditional release of lien" form (like California, Arizona has four statutory lien waiver forms).

When the company check was returned as "NSF," Endo Steel demanded a cashier's check. It received that check nineteen days after the first one was issued. Approximately sixty days later, JWJ Contracting filed a bankruptcy petition. The bankruptcy trustee then demanded that Endo Steel pay the $194,286 to the trustee.

Other case law (In re Fegert) stands for the rule that releasing a claim against a public works surety provides an exception to the normal rule that payments made within 90 days prior to the bankruptcy may need to be returned to the trustee. This is known as the "contemporaneous exchange for new value" rule. The court in JWJ Contracting, however, said this general rule did not apply due to the NSF check issue.

The court held that, because the check proved to be NSF, then what had been a "contemporaneous exchange" became a "credit transaction." This meant that exception did not apply and, therefore, Endo Steel became obligated to return the $194,286 to the bankruptcy trustee.

The court noted, however, that the subcontractor's argument might have been successful if Endo Steel had not signed an unconditional waiver. By doing so, Endo Steel released its claims, whether or not it received payment.

The lesson to be learned is two-fold. First, read and understand lien waiver forms before you sign them. Second, think long and hard before accepting company checks in exchange for a lien waiver (whether conditional or unconditional). As Endo Steel found out, failing to learn these lessons can be very expensive.

As a final note, the "contemporaneous exchange" rule (in terms of construction lien and bond claims) only applies when the party that files for bankruptcy protection (and is released by the lien waiver) is the project owner. Thus, if the prime contractor files bankruptcy, then a subcontractor who signed a release of its rights to file a lien against the owner cannot avail itself of this rule. While there may be exceptions to that situation, they are fairly rare.

LITIGATION: PART 1 OF A MULTI-PART SERIES

Litigation is something that most attorneys engage in on a regular basis. Sometimes, we may forget that not all of our clients regularly "swim in those waters." This series of articles is intended to cover some of the basic aspects of litigation. There will be seven parts: (1) Demand letters; (2) Preparing a lawsuit; (3) Service of a lawsuit; (4) Default judgments; (5) Discovery; (6) Mediation and arbitration; and (7) Trials.

This issue deals with **Part 1: Demand Letters**.

Prior to initiating litigation, a party wants to make sure that it has maintained a good record of the dispute. Thus, keeping contemporaneous written notes (for example, daily logs) and maintaining copies of all correspondence and documents is an

essential aspect of any lawsuit – and should be a normal business practice even without anticipating litigation.

A demand letter is, in most instances, another pre-litigation step. At a minimum, a demand letter shows that you informed the other party of your concerns and gave them time to address those concerns in a reasonable manner. (This is sometimes called "notice and opportunity to cure.") Of course, if you receive a demand letter, then be sure to respond in a timely manner.

In fact, some situations mandate the use of a demand letter before certain steps can be taken. Some examples are a CCB claim (30-day certified letter), an NSF check (30-day certified letter), a demand for attorney fees under ORS 20.080 and 20.082 (10-day written demand), and Oregon's new "right to cure" law (30-day registered letter). Note that a contract may also mandate the use of demand letters in terms of preserving claims (See our January 2004 issue that discusses the Mike M. Johnson, Inc. v. County of Spokane case).

Also, some of the relevant statutes require inclusion of particular wording in a demand letter. Without that language, the demand letter may be inadequate.

As part of your pre-litigation organization, you should be able to prove that you sent the demand letter and that the other party actually received it. This is why most demand letters are sent via certified mail. And, since some people refuse to pick up their certified mail, sending an additional copy via regular first class mail can bolster your evidence. If the certified mail is returned marked "unclaimed" but the first class mail is not returned by the post office, there is Oregon case law for the proposition that the notice was received.

One question that sometimes arises is whether to show your attorney as a "cc" on the demand letter. Before doing so, however, be sure to obtain your attorney's permission. This is because showing an attorney as a "cc" on a letter gives the impression that the attorney has been retained to be involved in the dispute. When the other side calls the attorney, he may be surprised and unprepared for that call.

In conclusion, demand letters should be a normal part of resolving most disputes. At a minimum, they may result in a direct and immediate resolution. If the matter cannot be resolved, they are an important part of pre-litigation planning.

FIRM NEWS:

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.

ALAN L. MITCHELL will co-present a half-day seminar on December 3, 2004 (in Portland) entitled "2004 Practitioner's Guide to the Oregon Construction Contractors Board." If you would like more information, please contact this office.

MICHAEL J. SCOTT will speak at a January 21, 2005 seminar in Portland for PESI entitled "Complex Construction Disputes." If you would like more information, please contact this office.

ALAN L. MITCHELL will speak at a February 4, 2005 seminar in Portland for Lorman Education Services entitled "The Fundamentals of Construction Contracts in Oregon." Mr. Mitchell will address the topic of "Basic Contract Principles." If you would like a brochure, please contact this office.

RANDOM THOUGHTS:

"Sometimes I think we're the only two lawyers in Washington who trust each other." Elizabeth Dole, speaking to her husband, Senator Robert Dole, also a lawyer.

This newsletter is published quarterly by the law firm of Scott ◆ Hookland LLP for the benefit of its clients and friends and is intended to inform them about legal matters of interest. While this information is meant to be current, we do not promise or guarantee that the information is correct, complete or up-to-date. This information is not intended to and should not be considered to provide legal advice or create an attorney-client relationship. No action should be undertaken in reliance hereon without professional legal counsel.

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