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A NEWSLETTER OF CURRENT BUSINESS AND LEGAL MATTERS

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Legislative Changes to North Carolina Bond Law

By Mary Helen Prince

For years, contractors, subcontractors and suppliers have debated who is at fault each time a payment bond is asserted and a contractor finds itself paying a second time for work performed and materials supplied. Usually, the real answer is hardly anyone is to blame (though a subcontractor who failed to pay its suppliers probably is at fault in this scenario). But more often than not, the problem can be simplified to a failure of communication up and down the lien chain. To remedy this, the proposed changes to Article 3 of Chapter 44A provide an opportunity for improved communications and hopefully more consistent payments to all in the chain. That being said, suppliers and subcontractors need to pay special attention because they now have steps to follow which have not previously existed and which can cut off or reduce their rights to claim on a payment bond if not followed in a timely manner.

For those who do know, during the North Carolina General Assembly's "Short Session," North Carolina's Lien Law Statutes were heavily scrutinized. Following this in-depth examination, the legislature passed two different yet highly significant bills that could potentially have a great impact on the construction industry as a whole. The bills concerned both Article 2 of 44A which discusses liens and Article 3 of 44A which concerns bond claims. More specifically, the bills change the ways in which subcontractors and suppliers protect their rights under either North Carolina's lien or payment bond statutes. To increase understanding of these bills' implemented changes, the following paragraphs will offer an in depth look at the revisions to Article 3 of Chapter 44A, specifically N.C.G.S. 44A-27, or the payment bond statutes.

As it currently stands, 44A-27 contains no pre notice provision for subcontractors and suppliers. Starting January 1, 2013; however, the revised changes will take effect, and 44A-27(b) will provide that first, second, or third tier subcontractors must give written notice of a claim on payment bonds within 120 days of the last day of performance. While this section of the statute is no different than the current law, the revisions state that contractors must furnish a copy of the payment bond required by Article 3 within seven calendar days in response to a written calendar request served by any claimant in accordance with the provisions of subsection (c) of Article 3. What's more, the revised language provides that subject to subsection (e) of Article 3, unless the contractor has failed to satisfy its obligation to timely furnish a copy of the payment bond to a claimant upon proper request by the claimant, the claim of such a claimant shall not include labor or materials provided more than 75 days prior to the claimant's service, in according with subsections (c) and (d) of the section, of written notice of public subcontract to the contractor.

So what does this mean? Essentially, this altered

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Legislative Changes to North Carolina Bond Law (cont.)

By Mary Helen Prince

provision states two new and important things. First, that the contractor must provide a copy of the payment bond within seven days of receiving a written request from the subcontractor or supplier. Second, the subcontractor or supplier must then provide a Notice of Public Subcontract to the contractor within 75 days; however, the sooner the better. And if notice is not timely provided, then the "look back" period for recovery is 75 days.

Another significant revision to 44A-27 that will soon take effect concerns subsection (c) of the statute. According to the legislative changes, the notice required by and any requests for copies of payment bonds referenced in subsection (b) shall be served by: (1) certified mail; or (2) signature confirmation as provided by the United States Postal Service, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business; or (3) to such agent identified in the contractor's project statement referenced in subdivision (1) of subsection (f) of Article 3; or (4) served in any manner provided by law for the service of summons. In essence, this means the provision is now requiring people to use signature confirmation or certified mail in order to prove date of delivery to the contractor.

The change to subsection (d) of 44A-27 provides that a form for the "Notice of Public Subcontract" has been created which must be followed in order for the notice to be considered accurate. This newly revised Notice of Public Subcontract must, according to the statutory language, now include: (1) the name and address of the subcontractor giving notice; (2) a general description of the real property on which the labor was or is to be performed or the material was or is to be furnished (street address, tax map lot and block number, reference to the recorded instrument, or any description that reasonably identified the real property); (3) a general description of the subcontractor's contract, including the names and addresses of the parties thereto; and finally (4) a general description of the labor and material performed and furnished thereunder.

In terms of 44A-27's subsection (e), the revised statute now provides that there is no notice requirement if the total of the claim equals $20,000 or less. Generally speaking, this implies that there will be a safety net in place. Thus, for smaller claims, no notice is required. Likewise, if you blow off the required notice provision, you can claim up to $20,000.00 without pre-notice.

With regards to 44A-27(f), this subsection now addresses the notice requirements from contractor to first tier subcontractor. Essentially, this section now requires contactors to provide necessary information to the first tier subcontractor. According to the revised statute, the following is required in the notice from contractor to subcontractor: (1) the name of the project; (2) the physical address of the project; (3) the name of the contracting body; (4) the name of the contractor; (5) the name, phone number, and mailing address of an agent authorized by the contractor to accept service of the requests for payment bond, the notice of public subcontract, and the notice of claim on payment bond referenced in subsection (b); and (6) the name and address of the principal place of business of the surety the payment bond required by GS 44A-26(a) for the construction contract.

In subsection (2) of 44A-27(e), the revised lien law reads that each subcontractor shall provide each subcontractor that it engages to perform labor or furnish materials in the performance of the construction contract a copy of the contractor's project statement. What this means is that the first tier subcontractor is required to provide notice to the second tier subcontractor, who then must provide notice to the third tier subcontractor.

The last revision worth discussing is that of 44A-27(e)(3). This provision states that no agreement entered into between a contractor and a subcontractor or between a subcontractor and its subcontractor shall be enforceable against the lower tier party until the contractor's project statement has been provided to the lower tier party. An example which illustrates this provision's meaning is the following: a roofer entered into a contract for a supplier to supply him materials worth $60,000.00. According to 44A-27(e)(3), the supplier does not have to deliver and cannot be punished for failing to deliver the materials until the roofer provides the contractor's project statement so that the supplier can give the requisite notice to protect itself.

As you can see from what is set out above, the changes to 44A, more specifically 44A-27 will be significant and will require careful study by those in the construction industry. Vann & Sheridan will offer educational opportunities prior to January 1, 2013 (when the revisions will become active), and April 1, 2013. Stay tuned to www.vannattorneys.com for all updates on the dates and times of these presentations.

New Legislation Impacting Businesses

By James Beck

If you attended Vann & Sheridan's Hot Legal Topics this year, you hopefully gained some information regarding some new laws recently passed and currently under consideration that may impact businesses. Given the state of our economy, Congress is continuously searching for ways to turn things around. In that regard, there are some interesting new laws that could be voted on soon that may positively or negatively impact your business. In addition, depending on the outcome of November's election, the healthcare law could be weakened, strengthened or repealed. Regardless of how all of this plays out, it is beneficial for business owners and managers to be aware of potential opportunities and pitfalls associated with changes in the law.

One bill expected to be passed and signed into law is the Global Investment in American Jobs Act. This is a bipartisan bill with support from the U.S. Chamber of Commerce. As such, it is considered beneficial to businesses. It seeks to increase awareness of the benefits of doing business in America and encourage global investment here. The goal is to bolster private investment in the economy and add jobs. The bill directs "the Secretary of Commerce, in coordination with the heads of other relevant Federal departments and agencies, to produce a report on enhancing the competitiveness of the United States in attracting foreign direct investment, and for other purposes." The bill also calls for a review of federal policies on foreign investment and for recommendations on how to make the United States more competitive. Small business would certainly see a positive impact from investment in the economy by foreign companies.

Another perhaps more controversial bill affecting business is the Coal Miner Employment and Domestic Energy Infrastructure Act. Its main purpose is to reduce the regulatory constraints on energy and manufacturing. While there is no coal mining in North Carolina, businesses would nevertheless be impacted by this law, if passed. The bill calls for a decrease in the authority of the government, including the Environmental Protection Agency, to regulate energy producers and manufacturers. The end goal is of course to encourage American independence with respect to energy and to increase domestic manufacturing of goods. Obviously, this is another attempt to strengthen the economy, which most business owners would support. On the negative side, the bill would be surely be strongly opposed by environmentalists.

Finally, the STEM Jobs Act of 2012 is under consideration. This bill seeks to make it easier for employers to hire foreign graduates of American universities with advanced degrees in certain fields. According the summary provided by the House Committee on the Judiciary:

"The STEM Jobs Act (H.R. 6429) eliminates the diversity visa lottery and reallocates up to 55,000 green cards a year to the top foreign graduates of U.S. universities with STEM doctorates. Any remaining green cards are then made available to foreign graduates with master's degrees in STEM fields."

Another business-friendly law, this improves the talent pool and helps businesses hire the people best suited for the job.

At Vann & Sheridan, we believe it is part of our job to educate our clients on the current legal issues and potential challenges and opportunities inherent in any changes in the law that could impact them, directly or indirectly. If you or your business need help understanding the implications of recently enacted laws or pending legislation, please contact us and we will be glad to assist you.

Employers Dealing With Social Media and Mobile Devices at Work

By James R. Vann

There is no doubt companies are facing real questions regarding how to handle the usage of social media in the workplace and usage of mobile devices at work by their employees.

Social Media in the Workplace

Many businesses and business owners are dealing with multiple questions regarding the use of social media at work. Should they allow it, if so to what extent? Can this be a benefit for the business or could it create some potential problems? Many businesses question whether they can use social media for decisions on hiring, firing and any discipline issues with current employees? Can a business limit the use of social media?

Setting Policies for Using Social Media

Most employees either already have a social media profile or will have one soon. It is almost inevitable. According to one recent survey, 55% of Americans age 45-54 have a social media profile. Another recent statistic is that 66% of online adults use social media sites to some degree. If your business does not have a policy regarding the usage of social media, it would be wise to establish such a policy in the near future.

Establishing a policy for social media usage will require special thought given your business and industry. Some industries and businesses totally limit and block out all social media websites from being accessed from business related computers. While other businesses give full access to such resources. As we all know, balancing the need, benefit and risk is inherit in business.

A social media policy should address a number of factors. One factor to address is having employees who use social media for personal purposes and those who use social media on behalf of the business. For personal purposes, many businesses require that employees keep separate their personal information and that of the business. Also, the employee should use their personal email account to set up the social media profile and not their business related email. Businesses should also limit the use of their trademarks, logos and intellectual property unless agreed to in writing. Businesses should also protect confidential information which they maintain.

Businesses should also take the needed steps to protect their ownership over the information, data and content of the postings of their employees which is created on behalf of the business. There are a number of other factors to consider but these are a few of the most prevalent ones to think about.

Creating a policy will certainly protect your business providing the policy is set up properly. There are a large number of circumstances to consider. If you have questions, please free to contact us.

How Receiverships Work in North Carolina

By James R. Vann

Most business people and business owners have experienced issues associated with bankruptcy court. For many businesses which extend credit to their customers, they may find themselves involved as a creditor to a customer in bankruptcy. Certainly, learning the ins and outs of bankruptcy court as a creditor can be a challenging experience.

There is another process and procedure which is similar to bankruptcy which is called "Receivership". Receivership is a state court process which provides an orderly process to preserve assets, prevent preferences, and to assure the equitable distribution of an insolvent debtor's assets. Sometimes, a receiver may be appointed to preserve a specific property that is the subject of litigation or subject to being collateral for a debt, or to enforce a decree of a court of equity.

When Might A Receiver Be Appointed?

If an individual, partnership, or corporation is in financial distress, a receiver may be appointed upon application by one or more creditors. Although there is statutory authority for appointment of receivers, the court's power to appoint a receiver is not limited to these provisions. Courts of equity have inherent power to appoint a receiver. In North Carolina, receivers may be appointed by both the district and superior courts. Any judge having authority to grant restraining orders and injunctions has jurisdiction to appoint receivers, though only superior court judges may appoint corporate receivers. If a creditor is concerned about the long term financial stability of a customer/debtor and the customer/debtor is financially in trouble, seeking to have the debtor and the debtor's assets placed into Receivership could be a possibility.

State law provides that a Receiver may be appointed in the following circumstances:

1. Before a creditor obtains a judgment, if the creditor establishes that they have an apparent right to the property and that the property is in danger of being lost or materially injured;
2. If a judgment has already been rendered, a receiver may be appointed to effectuate the judgment;
3. To preserve property pending appeal or to dispose of property when an execution is returned unsatisfied and the debtor refuses to satisfy the judgment;
4. To preserve property within the state owned by foreign corporations; and
5. If the creditor is seeking restitution for violation of the North Carolina Unfair Trade Act.

The Insolvency Test

The word insolvent is used in the receivership statutes as a criterion for the appointment of a receiver. North Carolina's test for insolvency is "whether or not the entire assets of the person or entity in question equal or exceed in value the total indebtedness of such person or entity." This is essentially the same definition used by the Federal Bankruptcy Reform Act.

Even if one is unable to establish that a debtor is actually insolvent, a receiver still may be appointed if the creditor can show that a danger of insolvency exists. Therefore, in North Carolina, one who seeks appointment of a receiver need not satisfy the test for insolvency so long as they can establish facts sufficient to indicate a danger of insolvency.

Procedure for Obtaining Appointment of a Receiver

A prerequisite to the appointment of a receiver is the filing of a lawsuit. This may be a lawsuit by a creditor who has an unsatisfied judgment or can produce the written admission of a corporation that it cannot pay its debts. It may also be an action in which one or more creditors seek to have the court take charge of the debtor's property, ascertain the debts, and apply the funds to the payment of all creditors according to their rights. After the principal action has been commenced by issuing a summons and filing a complaint, the plaintiff may then apply to a judge for an order appointing a receiver.

The judge hears the application for receivership and may order appointment of the receiver after notice to the parties. If the judge determines that receivership is justified, the Judge then decides whom to appoint as receiver. In addition to individuals, both corporations and banks may act as receivers. The courts will usually not appoint any person interested in the controversy, and the appointment of one involved in the action, such as an attorney for one party, is discouraged.

In fact, the North Carolina State Bar has held that it is unethical for an attorney both to serve as a receiver and to represent the judgment creditor. This holding is a reflection that the receiver is an officer of the court and does not directly represent the interest of either party; the judgment creditor's attorney must act as an advocate for his client. Finally, the judge is not limited to the appointment of a single receiver.

Powers and Duties of the Receiver

The receiver in North Carolina is given specific powers by statute and case law so the Receiver may properly control, preserve, and settle the property and assets of the insolvent debtor. Before assuming these powers, however, the receiver must post a bond, conditioned upon the faithful discharge of their duties, in an amount fixed by the appointing judge. After posting bond, the receiver can take into possession all assets of the insolvent debtor. The receiver's title, however, extends only to the property located within North Carolina. To reach assets located outside this state, creditors can seek attachment or obtain receivership there.

Conclusion

Receivership can be a very effective way to preserve and distribute assets of an insolvent business. It can be a very effective tool for creditor's in an effort to collect past due accounts and preserve and protect assets from being wasted by the debtor. If you have any questions, please feel free to contact us.

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