

A NEWSLETTER OF CURRENT BUSINESS AND LEGAL MATTERS



Planning for Business Success in 2015

By James A. "Jim" Beck



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Is your company ready for 2015? It may be useful to understand some of the legal developments that provide opportunity for your business to grow and thrive this year, as well as those that have a potentially negative impact.

Ban on Privilege Taxes

Most businesses must pay a local privilege tax each year in order to do business. However, the North Carolina legislature repealed local governments' authority to levy such taxes. The ban on privilege taxes is effective July 1, 2015.

Energy Modernization Act

North Carolina has implemented new laws concerning energy exploration, development and production which may lead to opportunities for your business to expand into this new market. The legislature hopes to stimulate energy development in the state and has changed some regulations, potentially making the permitting process simpler and more effective. In addition, the new statute calls for studies on the impact of such activities.

Obamacare Requirements

Beginning in 2015, new Health Care Reform Act insurance coverage requirements go into effect. If your business has 100 or more full-time employees, it will be subject to the requirements. Specifically, such employers must offer health insurance or face a financial penalty. In certain situations, the law applies to employers of at least 50 employees as well. Be aware of these regulations

so that you can avoid taking an unexpected financial hit in 2015.

Minimum Wage Exec Order

President Obama issued an executive order concerning minimum wage that becomes effective January 1, 2015. Most of our clients in the construction industry (and many in other industries as well) will be directly affected by the order. Federal contractors and subcontractors - i.e. anyone working on a federal contract - must pay at least 10.10 per hour. This wage requirement will increase annually.

Business Basics

The new year represents a good time to make sure your corporation or limited liability company is up to date with all the required filings and formalities, and that all of your contracts are in good shape. Did you hold an annual meeting in 2014? Do any agreements expire in 2015? Are there any issues that need to be resolved among the owners of your business? These are just a few things to consider as you head into the new year.

Many of us make resolutions to improve ourselves over the next twelve months, and we should do the same with respect to our businesses. If we can assist with this process in any way, or help you understand any of the new laws and regulations affecting your business, please let us know. We hope 2015 is a great year for all of our clients!



Usury in Credit Applications: A Hidden Danger

By James R. Vann



Credit applications are binding contracts and they are an “evidence of indebtedness” therefore subject to the North Carolina statutes relating to “interest.” Specifically, North Carolina General Statute §24-11(a) provides that:

On the extension of credit under an open-end credit or similar plan (including revolving credit card plans, and revolving charge accounts, but excluding any loan made directly by a lender under a check loan, check credit or other such plan) under which no service charge shall be imposed upon the consumer or debtor if the account is paid in full within 25 days from the billing date, but upon which there may be imposed an annual charge not to exceed twenty-four dollars (\$24.00), there may be charged and collected interest, finance charges or other fees at a rate in the aggregate not to exceed one and one-half percent (1 1/2%) per month computed on the unpaid portion of the balance of the previous month less payments or credit within the billing cycle or the average daily balance outstanding during the current billing period.”

This may be one of the more clearly written, unequivocal statutes in the North Carolina General Statutes.

The courts in North Carolina have interpreted N.C. Gen. Stat. §24-11(a) consistently finding that it is intended to apply to commercial accounts as well as consumer accounts and that any interest charged in excess of the statutorily authorized 1 1/2 percent (18% A.P.R.) is usurious. The penalty is statutorily established in N.C. Gen. Stat. §24-2 as forfeiture of all interest claimed or collected on the account. This is not merely a reduction from say 2% to 1 1/2%, but the loss of the right to collect any interest on the account.

So, what is usury and how do you know if your business is violating the statute?

“[A]ny charges made against [a borrower] in excess of the lawful rate of interest, whether called fines, charges, dues or interest are, in fact, interest and usurious.” *Hollowell v. B. & L. Association*, 120 N.C. 286 (1897). Note that this is not a new interpretation of the law. This is an area of the law that is well settled and which changes very little year to year.

For a debtor to prove usury, they must prove that there was “a loan or a forbearance of the collection of money (an open account fits this definition), an understanding that the money owed will be paid, payment or an agreement to pay interest at a rate greater than allowed by law, and the lender’s corrupt

intent to receive more in interest than the legal rate permits for use of the money loaned.” *Auto Supply v. Vick*, 303 N.C. 30 (1968).

None of our clients would ever have a “corrupt intent,” would they? Well, if the credit application, invoices, delivery tickets, or statements have on their face that the interest which may be charged is in excess of 1 1/2%, then the “corrupt intent” is proven and irrefutable.

Most businesses which provide open account or other credit services are well aware of this statute. Many businesses operating regionally or nationwide face the dilemma of trying to create a single credit application which will be applicable to the laws of multiple jurisdictions. Some simply utilize the laws of the state in which their home office is located hoping that will work wherever they have offices. Others pick the lowest common denominator and use that – no one ever was charged with usury for charging less than the maximum amount allowed by law. Some have paragraphs in their applications which set out the applicable rate for each state in which they operate. And many use a generic “interest at the maximum amount allowed by law.” Picking the law of the home office and hoping that will work would not be our recommendation.

It is imperative that businesses operating in North Carolina take two steps. First, review your credit application and other open account related documents to make sure that they do not establish that the service charges are greater than 1 1/2% per month. Second, make sure that the software which computes interest on the account is not computing at a rate higher than 1 1/2% per month.

The fear is that, though the initial penalty is limited to the loss of all interest due on the account, repeated appearances in the courts with this issue being raised could result in an enterprising lawyer establishing a pattern or practice and seeking treble or punitive damages for unfair trade practices or a violation of federal fair credit laws. The “fix” is too easy to run this risk.

If you have questions about the terms and conditions contained in your credit applications, invoices or statements, have a lawyer review the documents to ensure that you are in compliance with the laws of the states in which your business operates.



Review Your Forms!

By Joseph A. "Joe" Davies

The start of a new year is an excellent time to review many of your business's policies, practices, and goals. One matter that should not be overlooked is to review your form agreements. The use of form contracts, credit-applications, and other documents obviously saves time and avoids the process of reinventing the wheel over and over again for similar transactions. However, using old forms that have not been updated or using forms in a new or different context can lead to significant problems. Here are just a few examples:

Out of State Forms

If your business deals primarily in just one state, this is probably not an issue. However, be careful if you use a form that was designed for use in one state in a different location, because what may be perfectly legal in one state may not be across the country, or even in a neighboring state. One area where this is particularly true is employment agreements and, more specifically, non-competition agreements. In California, non-competition agreements are completely unenforceable, while in other parts of the country, including North Carolina, they may be enforced but only if it restricts competition in a reasonable manner. Another situation that arises is in interest charges on past due accounts – North Carolina limits that amount of interest that may be charged to 18 percent annually, and has specific statutes that could lead to forfeiture of all interest if more than that amount is charged. Other states may allow higher

rates of interest, and if your form is based on that state's law, you may run into trouble in other states like North Carolina.

Out of Date Forms

The temptation to stick with a form that has served your business well for a long time is understandable, but changing laws and other circumstances require that you at least review your form from time to time. A recent example is in the leasing context – for years, North Carolina courts considered acceptance of partial rent as a waiver of the right to evict for any then-existing breaches, including the failure to pay rent. The legislature recently added a statute that alters this general rule, but only if there is a specific provision to that effect in the lease. Anyone that has simply continued using an old form is missing the opportunity to take advantage of this change in the legal landscape. Other aspects of your form contracts may need to be updated because of changing business practices or other things that are simply not covered under your existing form.

It's a good idea to review your forms regularly to make sure they remain useful and effective for your business and remain current with the changing environment. Please feel free to contact us if you would like us to review the forms you are using now.



Webinar: Using Unmanned Aircraft (Drones) in Business Thursday, January 15, 2015 from 3:00 - 3:30 p.m.



We hope you will join us on Thursday, January 15, 2015 from 3:00 to 3:30 p.m. as we present our latest webinar:

Using Unmanned Aircraft (Drones) in Business

What new laws and/or regulations do you need to be aware of to use an unmanned aircraft for commercial purposes in North Carolina? How will FAA regulations impact your company? This has been a popular topic for our clients and guests. We will be discussing new unmanned aircraft laws enacted that may impact your business.

Register online at vannattorneys.com
Webinar ID: 118-914-947



What Assets Are Available to Satisfy a Judgment for Money Owed?

By James R. Vann



Once a judgment is obtained for money owed, the work begins on locating assets or property to satisfy the judgment. Locating the property or assets to satisfy the judgment takes experience, patience and persistence. The judgment creditor must also consider whether the individual debtor has property or assets which are exempt from satisfying the judgment. Exempt property of the individual debtor is property which is relieved from being used to satisfy the debtor's judgment. Incorporated businesses do not have the protection of exempt property. Thus, all property owned by an incorporated business is available to a creditor to satisfy a judgment for the most part.

Brief Overview of Exempt Property

Most states have laws which protect a debtor to some extent from becoming totally penniless. These statutes often allow the debtor to exempt or save a portion of their assets from being sold to satisfy the debtor's judgment. North Carolina has laws to protect specific property for an individual debtor. The types of property that are exempt from Execution are: specific dollar amount in real property used as a primary residence or a burial plot, an amount for dependents, an amount for a vehicle and household furnishings, household goods, clothing, appliances and other similar property used for household purposes

Debtor's Responsibility to Assert Exemptions

The debtor's exempt property is protected only if the debtor claims the prescribed property as free from execution. Once a judgment is obtained against an individual, the creditor must send a notice to the debtor in order to allow the debtor the right to claim certain property exempt from the reach of the

creditor. If the debtor fails to timely provide such notice, the debtor will have waived their right to save such property from execution and all such property will be available to use to satisfy the judgment.

Exempt Property Not Applicable to Incorporated Businesses

The statutes which protect assets and property from creditors only applies to assets or property owned by individual debtors. If a debtor is an incorporated business or partnership, the business or partnership may not exempt property from the reach of a creditor. Thus, if an incorporated business or partnership has property or assets, for the most part, those assets are available to satisfy the judgment. For example, if the business has real property, vehicles, equipment, bank accounts or any other assets, those assets are available to satisfy the judgment.

Summary

Please remember that just because the debtor may claim certain property as exempt from the creditor's use to satisfy the judgment, the creditor still has leverage in satisfying the judgment. Only individual debtors may exempt property from execution. Incorporated businesses do not have the protection of exempt property thus a creditor can use most all of a business's assets to satisfy a judgment. Remember to look for leverage against the debtor and be persistent. Many creditors unrealistically believe collecting on a judgment is too difficult or costly. Satisfying a judgment often times takes relentless thought, effort and experience and it can happen. If you have questions regarding collecting on a judgment, please feel free to call us.