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THE LEGAL PAD

Practice of Excellence

Fourth Quarter 2013

A Newsletter of Current Business and Legal Matters

In This Issue:

A Question Employers Can No Longer Ask

By James R. Vann

Effective, December 1, 2013, North Carolina Employers will no longer be allowed to ask potential employees about arrests, criminal charges, or convictions that have been expunged. A recent law which was passed by the North Carolina General Assembly prohibits questions regarding expunged matters both on applications and during interviews. What are expunged matters or records? Expunged records or matters generally include criminal charges which are destroyed or sealed from the state repository and are generally wiped clean from any criminal records of the individual charged. Interesting scenario, what will happen and how will the potential employee handle when a potential employer learns of a former criminal charge from another source and asks about it and then learns that the matter was expunged? Might be a tense moment with the potential employee.

The law was enacted "to clear the public record of any arrest, criminal charge, or conviction that has been expunged so that the person who is entitled to and obtains the expunction may omit reference to the charges or convictions to potential employees". The law allows for an individual to withhold such information and protects he/she from disclosing the records from later use. Employers will still be allowed to ask about arrests, criminal charges, or convictions that have not been expunged and are part of the public record.

What is the penalty for violations of this law? The North Carolina Commissioner of Labor is authorized to investigate and issue a written warning for first time violators. After the written warning, violators may be liable for a civil penalty of up to $500.00 for each additional violation after receipt of the written warning. The law specifically provides that violations of the law cannot be the basis of a civil lawsuit against an employer that asks about expunged records. The amount of the penalty will be based on factors such as the size of the employer's business, whether there is a record of previous violations, the good faith of the person and whether the person who committed the violation knew that his/her conduct was prohibited.

The Importance of a Name

By James A. Beck

One would be hard-pressed to overstate the importance of a name in the business world. The name of a business is its identity. Many names become so valued, or are so valued by the owner, that they are trademarked so nobody else can benefit from the name. In my profession, getting the names of the parties to a lawsuit correct seems basic but is vital to the success of a given case. Similarly, ensuring that your company gets a customer's name correct can be the difference in whether your company gets paid for whatever service or good it provides.

There are several situations that immediately come to mind when considering potential areas where a wrong name can harm a business. Specifically, common problem areas include credit applications and personal guaranties, purchase orders and invoices, and various business contracts. Often times, a customer may not know its precise corporate name, whether the company is a corporation or limited liability company, or if the customer is an individual, the customer may not provide his or her full name. Keeping these issues in mind when entering into contracts and setting up new accounts can help immensely when it comes time to collect a debt or enforce a contract.

At this year's Hot Legal Topics seminar, the importance of names was discussed in the context of the Uniform Commercial Code and the recent revisions to Article 9. (Article 9 of the UCC governs secured transactions, where the seller takes an interest in collateral to secure payment for goods sold on credit.) There was a good discussion among the attendees regarding their companies' procedures for taking on new credit customers and ensuring the customer name is accurate and verified. Some businesses require photo identification, while others do not.

However your business decides to confirm the identity of new customers or the identity of people and companies with whom you do business, it may help to consider the following:

1) Getting a photocopy of a photo ID is acceptable, but it is important to safeguard all of a customer's personal information. Be careful when storing copies of identifying information, social security numbers and data. Be sure to follow your company's written identity theft policies.

2) Make sure the customer provides you with his or her most recent valid identification.

3) Require the customer to provide his or her full name as well as any other name he or she has ever used, including nicknames.

4) Always check with the Secretary of State to confirm the precise identity of any corporate entity.

5) Check with the customer to determine whether any trade names or "dbas" are used.

These tips surely will not solve every problem, but should help with the proper identification of new customers.

We have handled cases where the name of a debtor was, for one reason or another, incorrect. Fortunately, this is not always completely detrimental to the case, and often there are remedial measures that can be taken to resolve these issues. In addition, many of these problems can be resolved before they become problems by communicating with the customer or other party to a contract, then using the resources available to you to confirm the information provided.

At Vann Attorneys, we strive to be careful in accurately asserting claims on behalf of our clients and to be creative in resolving problems that arise at various points during the litigation process. We also enjoy assisting clients at the outset with business planning, contract drafting and review, and even helping clients find debtors, identify them and find out whether they own assets. If you need help confirming a new customer's name, accessing the Secretary of State's corporations database, or checking any other information provided by a potential customer, vendor or partner, it would be our pleasure to serve you.

Claims of Lien in North Carolina

By James R. Vann

With the passing of the new Lien Law in North Carolina in 2012 and 2013, new issues continue to spring up. This is to be expected anytime a new law is passed. We are constantly fielding questions from clients regarding how the law is to be applied.

One question which has been more prevalent than others regards the "Subordination of Liens" form from the North Carolina Land Title Association and is dated March 2013. (It is referred to as Form No. 7, Potential Lien Claimant-Subordination of Lien Claims). Most typically, this form is being circulated to anyone who files a Notice to Lien Agent before the construction loan is finalized. Or, if there is some issue with lending on the real property, this form is being circulated to anyone who has provided labor and/or materials and/or provided Notice to the Lien Agent.

A request for subordination by the bank or title insurance company is common in many circumstances. However, there should be a valid reason for the request for subordination. Subordination is the process whereby one party is allowed to have a higher priority in potentially competing claims. Thus, the title insurance company and/or bank want to be ahead of any other potential claimant who has provided labor and/or materials.

The form which we have identified in this article in and of itself is not a problem. However, there is an indemnification clause in the form which could create an issue for a potential lien claimant. Likewise, we have not seen a fact pattern yet which makes sense for a potential lien claimant to agree to indemnify anyone in relationship to the subordination agreement. We have advised quite a few potential lien claimants to strike out this paragraph when signing the subordination agreement. Each situation can differ on the facts but we encourage suppliers of building products to carefully review the form and ask questions before signing it.

If you have any questions about this form or process, please feel free to contact us.

District Court vs. Small Claims Court – It's Not Just the Amount at Stake

By Joseph A. Davies

In the movie Sliding Doors, the simple act of catching or missing a particular train led the main character's life down two drastically different potential paths. While certainly not as dramatic, a similar divergent path can appear when considering whether to file your claim in small claims court or district court. The recent increase in the maximum amount that can be sought in small claims court may make this decision even more difficult. The ability to file a claim on your own, without an attorney, is certainly appealing. However, there are certain drawbacks that may make the decision harder than it might initially appear. What follows are two tales of the same lawsuit – one filed in small claims court and the other in district court. To make things interesting, we will examine what can happen in small claims court to slow things down and what can happen in district court to do the opposite.

Small Claims Court

After filing in small claims court, the trial is scheduled for some time within the next thirty days. Unfortunately, for the trial to move forward, the defendant must be served in advance. If, for whatever reason, the defendant cannot be served, then the hearing must be postponed. Once the defendant is served, he or she may appear and defend the suit. Even if the defendant does not appear, however, the decision of the small claims court can be appealed to the district court within ten days following the judgment. At that point, the plaintiff must continue the case in district court and will probably need to hire an attorney. Obviously, it can be extremely frustrating to start a lawsuit in small claims court, hoping for a swift conclusion, only to find yourself starting over in district court a few months later.

District Court

Any delay in serving the defendant will obviously also delay the proceedings, but there is no impending hearing date that must be postponed. Once the defendant is served, there are two possible options: he or she will either respond timely or will default. If there is not a timely response, then obtaining a default judgment is ordinarily a quick process. If the defendant responds and essentially admits the allegations, then a judgment based on those admissions takes slightly longer, but can still be relatively fast (of course, these options are also available if the defendant appeals a small claims decision).

There are other factors that obviously come into play as well. One of the most overlooked is that a small claims action can only be started in the county where the defendant is located, while there is often more flexibility in a district court action. The filing fees for small claims court are slightly smaller and, of course, there is the possibility of avoiding paying an attorney. The purpose of this discussion is not to advocate for one court or the other, but only to highlight the possibility that just because a claim can be brought in small claims court does not automatically mean that it should be brought in small claims court.

The Dreaded Preference Action: How Long Until You Are Safe?

By James R. Vann

Receiving a notice that a customer has filed bankruptcy is never a good feeling, especially if that customer has been a large component of your business. The initial shock is generally followed by a feeling of unease regarding all of the recent payments you received from that customer and the knowledge that any payment received in the past 90 days may be taken back. So, how long can it take to receive the dreaded preference claim, one year, two years, longer? Unfortunately, the answer is not that clear.

The current wording of the Bankruptcy Code allows for a preference action to be commenced within either two years after the order for relief has been entered (essentially the date the debtor filed for bankruptcy relief) or an additional one year if a trustee is appointed within the aforementioned two year period. This means that it is very possible for a preference action to be commenced close to three years after you have received notice of a bankruptcy filing!

As scary as this may seem, it may not even be possible for you to know when the statute of limitations has started. The scenario that would lead to this seemingly absurd situation is the subject of a circuit court split. In essence courts are unsure whether the appointment or election of a permanent trustee must occur during the original two year statute of limitations in order to be allowed the one year extension, or whether an interim trustee, who becomes the permanent trustee after the two years, would still be granted the one year extension. To clarify using an example, say a Chapter 11 case is filed on June 1, 2013, and it is converted to a Chapter 7 on May 1, 2015. Normally there would be a two year statute of limitation from June 1, 2013, which a preference action must be commenced. However, if the creditors call for and elect a permanent trustee prior to June 1, 2015, then the trustee is granted an additional one year from his/her appointment to bring a preference action. The confusion comes in when an interim trustee is appointed, let's say, on May 31, 2015, and is judicially appointed as the permanent trustee on August 1, 2015. The majority opinion thus far is that the statute of limitations has run as of June 1, 2015, and no preference action may be commenced thereafter. Some courts however, believe that the trustee should be allowed one year from his/her appointment as interim trustee, meaning that the trustee would have until May 31, 2016, to bring a preference action. This issue has not yet been addressed by North Carolina courts or the Fourth Circuit, so it is unclear which decision will be followed in this jurisdiction.

So, what should you plan for on your books? In the real world preferences tend to settle rather than go to litigation. Two years from the debtor's filing should be an appropriate time to keep a potential preference action on reserve; thereafter, unless a permanent trustee was elected or appointed, the trustee will have a very difficult time asserting the statute of limitations has not run. Also, it is important to remember that the overarching goal of bankruptcy is an equitable treatment of all parties involved. Therefore, you should not feel totally helpless upon receiving a bankruptcy notice or even a preference action, as there are always defenses and ways to fight to keep what you deserve.

We Want You and Your Team To Join our Fast-Paced, Complimentary Webinars

Webinar: Top 10 Issues in Protecting Your Lien Rights in North Carolina Q&A on the impact of the new North Carolina Lien Law
Thursday, December 5, 2013 from 3:00 to 3:45 p.m.

How is this impacting your business? What are you encountering as a construction supplier with the new North Carolina lien law? Submit your questions, experiences, challenges and success stories and we will address them during this fast-paced webinar. - Submit your questions in advance and register online at vannattorneys.com

Webinar: Documentation in Employee Files
Tuesday, December 10, 2013 from 3:00 to 3:30 p.m.

As an Employer, keeping good employment records is a must. What documentation should you have for your employees? What documentation should not be kept? How long do you need to keep the records? These topics and others will be discussed during our webinar. If you have a specific issue or question you would like to be discussed, please email us ahead of time and we will include the Q&A in our discussion.

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