

A NEWSLETTER OF CURRENT BUSINESS AND LEGAL MATTERS



Excellence in All We Do (Following the Golden Rule)

By James R. Vann



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Knowing the “why” we do what we do is important for many reasons. The “why” helps set the stage for how we accept responsibility and how we proceed with accomplishing our work.

Our office was formed in September 1993 as a solo practice with one attorney and one administrative assistant/paralegal. When we started the office, our letterhead and logo included a gold line under the firm name. The gold line was intentionally used as a symbol of our commitment to a high standard of performance and reflected our belief to follow the “golden rule”. We wanted to “treat others as we would want to be treated”. Thankfully, our commitment to the “golden rule” has continued and the focus has become even more clear.

Our logo continues to use the gold color as a reflection of our commitment of treating others the way we want to be treated. We also have a commitment

of excellence in our practice of law, service in and to our community and in all we do. We are so serious about this pursuit of excellence that we added the phrase “Practice of Excellence” to our logo several years ago. Even though we are committed to excellence and improvement, we are not perfect. However, we have a strong commitment to excellence. We have a strong commitment to improve what we do and how we do it. This pursuit of excellence starts with “whatever you do, work at it with all your heart, as working for The Lord, not for humans”. We want to get better at what we do each day.

We are grateful for the opportunity to serve our clients. The service we provide is from a deep desire to help others. What a great way to serve others.

Our logo “Practice of Excellence” remains as our goal. We are in pursuit of excellence.



Notice, Notice, Notice: An Explanation for Subs & Suppliers in NC

By James A. Beck



If North Carolina lien law is clear about one thing, it is that notice is the key to protecting one's lien rights. There's a Notice of Contract. There's a Notice of Subcontract. There's a Notice to Lien Agent. There's a Notice of Claim of Lien upon Funds. The recurring theme is most definitely notice. The trick is figuring out how, when and to whom notice must be given. Providing proper notice as required by the statute can be the difference in whether your company gets paid on a project.

One aspect of the lien law that has not changed with the new lien agent legislation is the requirement that a second or third tier subcontractor or supplier serve a Notice of Subcontract upon the contractor. Specifically, if an owner or (general) contractor has posted a Notice of Contract on the project site and filed the Notice with the clerk of court, then a second or third tier subcontractor or supplier cannot enforce a lien on the real property if it does not serve a Notice of Subcontract. Interestingly, there is no stated time period within which the Notice of Subcontract must be served. Of course, the earlier the Notice is served the better, because the sub or supplier then is entitled to receive written notice every time a payment is made to the contractor.

The next notice that is vital to serve is the Notice to Lien Agent. On a project where a lien agent has been designated, a subcontractor (including a supplier) must serve a Notice to Lien Agent on the lien agent within fifteen days af

ter the subcontractor's first furnishing of labor or materials. Many of our clients are struggling with this because their customers and even project owners don't understand the process and believe a lien has been filed. Education is the best solution in this situation. Regardless, the Notice to Lien Agent is an essential aspect of protecting your company's lien rights and there is no way around it.

Both the Notice of Subcontract and Notice to Lien Agent must be "served", but the question of how to serve the notices may arise. The statute provides the answer in each case. It is important, however, when notices are served that a subcontractor or supplier retains confirmation of receipt by the parties being served. Having proof of service is valuable in the event a dispute arises.

While the process of establishing one's right to file a lien at some point in the future may be tedious, excessive and repetitive, it is meant to protect all parties involved. Certainly, it will be more administrative work for everyone in the construction business, but once these initial notices have been taken care of, a subcontractor or supplier should be able to rest assured that its lien rights have been preserved in case it becomes necessary to serve a Notice of Claim of Lien upon Funds and/or file a Claim of Lien on Real Property.



February, A Month To Express Appreciation

By Vann Attorneys



Many of us celebrate Valentine's Day in special ways. What a great time to share love, appreciation and gratitude to the people in our lives.

We are taking the month of February as a time to say a special thank you to our clients for the opportunity to serve you. Thank you for the trust you have placed in us to help you with issues which can be challenging. We are grateful for the opportunity to serve you! We look forward to being of service to you for many years.



Exclusive Use Provisions in Commercial Leases

By Joseph A. Davies

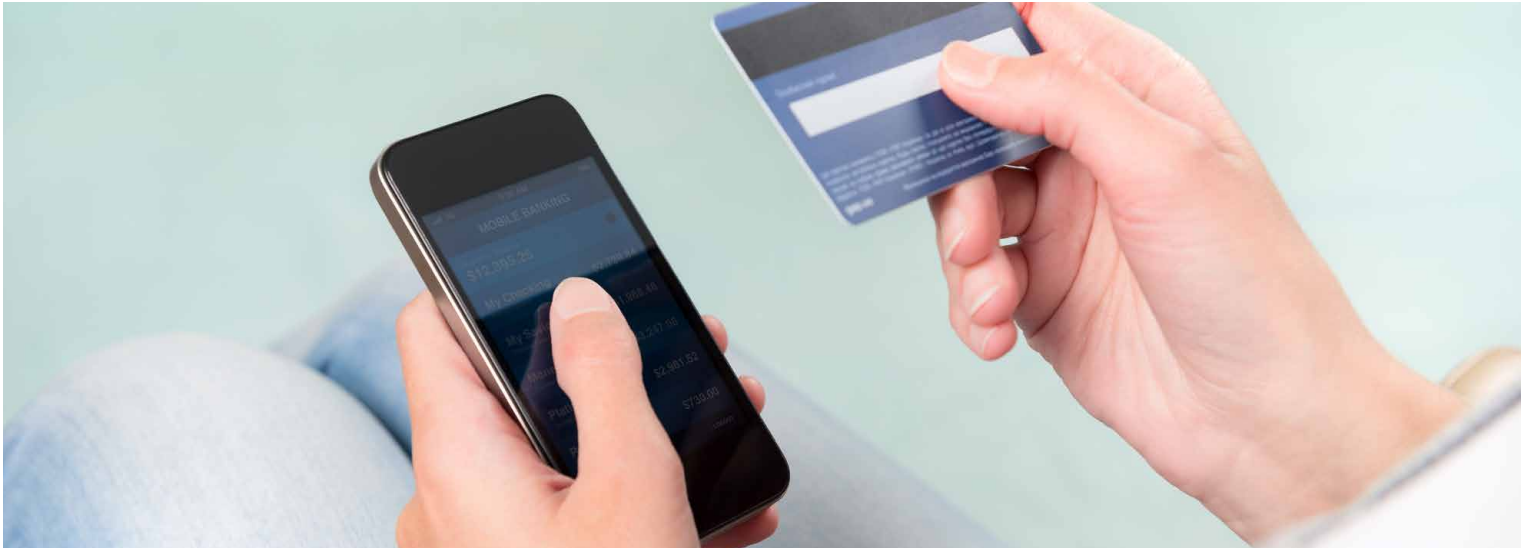
Exclusive use provisions can be a powerful tool in commercial leases, but can also invite dispute if they are not carefully drafted. The idea behind an exclusive use provision is to limit competition for a particular tenant's business. When properly drafted, these provisions can greatly benefit both the landlord and the tenant. The tenant benefits from the protection from competition which makes the investment in the business safer. The landlord can benefit by attracting a diverse but complementary group of tenants in a center, which can increase the value of space within the center. Drafting an exclusive use provision is a balancing act of protecting the tenant's interest while allowing the landlord the flexibility to find other good tenants. For example, consider the difference between an exclusive use provision allowing a particular tenant to be "the only food-service establishment" as opposed to one allowing that same tenant to be the "only full-service casual Italian restaurant".

Even when carefully drafted, however, exclusive use provisions can lead to difficult questions of interpretation, and ultimately even litigation. Does an exclusive use provision allowing one tenant to be the only bakery prevent a nearby coffee shop from offering baked goods? The bakery may very well file a complaint against the coffee shop and the landlord to find out whether a court agrees with its interpretation. This raises another difficult aspect of exclusive use provisions - the measure of damages when one is violated. Lost profits resulting from a competing business can be extremely difficult to prove. Therefore, in many cases, a lease will call for a reduction in rent while the competing business is operating. Of course, the landlord is unlikely to simply agree with a tenant's claim that another tenant is infringing on its exclusive use provision, meaning that a court may have to get involved. Regardless of the difficulties, exclusive use provisions provide a tenant with some assurance that the landlord will not rent the space next door to a competing business which may make those difficulties worthwhile.



Business Bank Accounts: How Safe is Your Money?

By James R. Vann



A growing number of businesses are using online banking. However, most business owners are not aware that, unlike consumer accounts, business bank accounts are afforded little to no legislatively mandated fraud liability protection. Although, some banks offer zero liability fraud protection for their business customers, that protection is not mandatory and may be subject to terms and conditions. Furthermore, business accounts are a prime target for fraudsters because of the higher balances kept in the accounts, as well as the fact it is often easier to trick employees into providing confidential information necessary to make fraudulent transfers, compared to individual consumers. So what can be done to protect your business from being a victim of bank fraud?

The Uniform Commercial Code (UCC) does provide some protection to business bank accounts. Specifically, to avoid liability the bank must have instituted "commercially reasonable" security procedures and follow any written instructions that were timely provided to the bank by the customer. However, what constitutes commercially reasonable is something that is not well defined and has been the subject of a recent opinion by the 1st

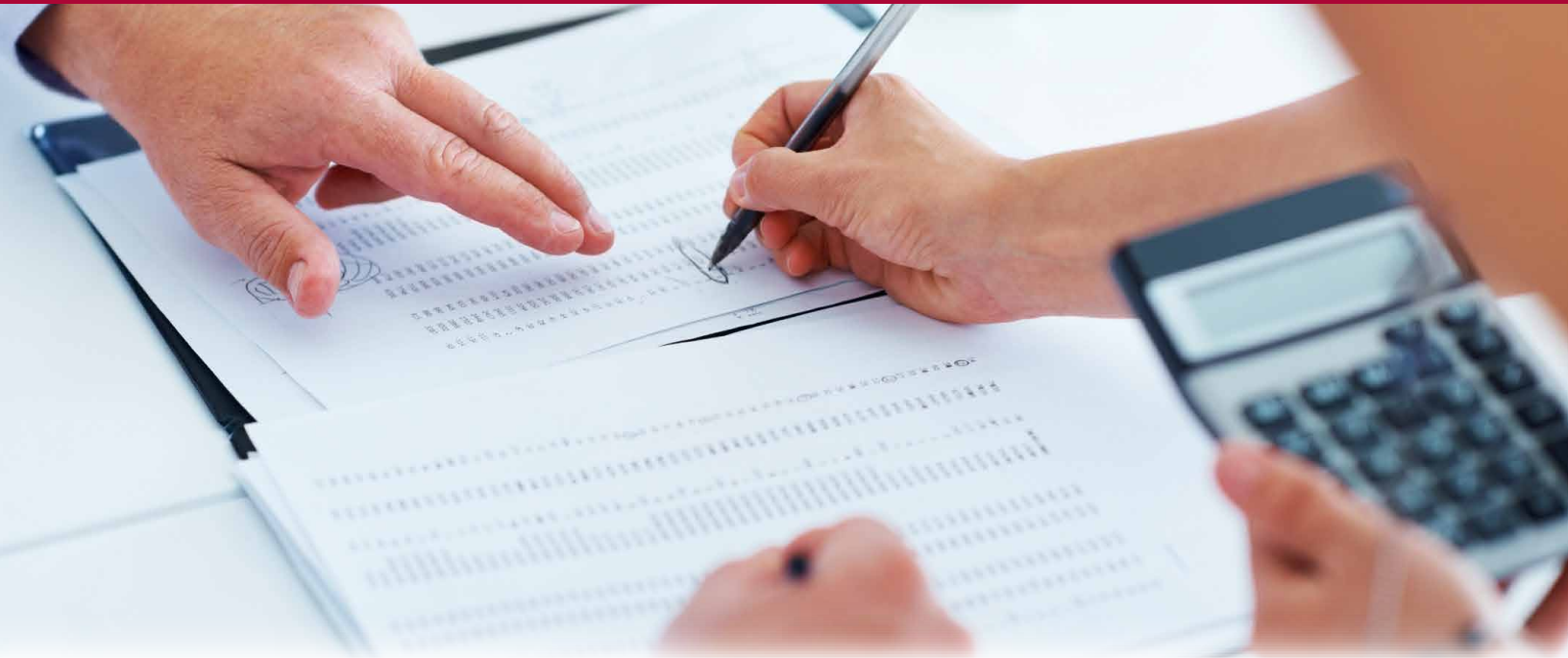
Circuit that has helped clarify but not decide when a bank has fulfilled this obligation. (This is not a case from North Carolina law but it is a case which should be noted.)

Aside from relying on the UCC, the best way to protect your business is to make sure you understand what processes your bank has in place to protect against fraudulent transfers. Many banks offer email alerts and the ability to set extra security prompts when the bank detects unusual account activity, such as a higher than normal transfer to a new entity. Other banks also encourage the use of third party software to protect online access to bank data. Furthermore, if you would like your bank to always perform a specific action, such as calling one of your employees to confirm authorization for transfers over a certain amount, you should provide detailed written instructions to the bank. Also, you should speak with your bank about how best to train your staff to avoid scams from fraudsters. As online banking will continue to grow in popularity, we all need to be even more cautious with access. While these few simple steps may not prevent all fraud, they will certainly help in protecting your business.



Don't Cash That Check! Avoiding Waiver in Landlord-Tenant Situations

By Joseph A. Davies



Waiver is a dangerous issue in any area of contract law, but it can be especially troublesome in North Carolina leases. Consider the following – a tenant owes her landlord \$2000 in past due rent for the months of October and November, and the landlord sues in small claims court for an eviction (a summary ejectment action). Between filing the action on November 20th and the hearing on December 5th, however, the tenant sends him a check for \$200 for December rent. What should the landlord do? Well, unless the lease contains a very specific provision allowing him to accept a partial payment of rent without waiving a breach, he should immediately return that check! For decades, North Carolina courts have considered any acceptance of rent (even partial rent) to be a waiver of the landlord’s right to evict the tenant for any breach the landlord knew about at the time he accepts that rent. This general rule applies to all breaches – whether for violating a prohibition against pets or non-payment of rent. So, even though it may seem strange that a tenant that

owes \$2000 can avoid eviction by paying \$200, that can be the case if the landlord is not careful. And sometimes, even being careful is not enough – there is a case in North Carolina where the landlord gave a check to his attorney to hold until the conclusion of the summary ejectment. The court in that case considered that to be an acceptance of rent, since the landlord did not return the check to the tenant.

The North Carolina legislature has changed this general rule somewhat – a recent law allows a landlord to accept partial rent without waiving the right to evict, but only if there is a specific provision in the lease allowing such a result. Unless you are certain that your lease contains such a provision, the simplest way to avoid a waiver is to return any rent payment to the tenant until after the summary ejectment hearing.



We Want You and Your Team To Join our Upcoming, Complimentary Webinars

Webinar: Nuts & Bolts of Landlord-Tenant Law - How to Avoid the Most Common Mistakes

Tuesday, March 11, 2014 from 3:00 to 3:30 p.m.

Are you a residential landlord, by choice or circumstance? Or are you a commercial tenant with questions about your lease? We will discuss the most common pitfalls for landlords and briefly look at some issues that can arise in commercial leases. Submit your questions in advance and register online at vannattorneys.com

Webinar: Handling Money of Others - Sales Tax, Escheat Property & Cashing Checks

Tuesday, May 13, 2014 from 3:00 to 3:30 p.m.

We will discuss three topics that are always of high interest among our clients: sales tax, escheat property and cashing the checks of customers. What’s the proper way of handling funds of customers that have not been returned to them? What are the North Carolina requirements for handling sales tax issues? What are the rules regarding accord and satisfaction? Submit your questions in advance and register online at vannattorneys.com

