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CONSTRUCTION IN BRIEF

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PRESERVE YOUR RIGHTS

A LOOK AT PROGRESS and FINAL PAYMENTS

Imagine you are a contractor (general contractor or subcontractor) that is being delayed on a project. You have submitted the required notice to the owner or general contractor documenting the delay, and requesting reimbursement of the costs incurred and an extension of time. The owner has not yet agreed to pay you any additional money or grant an extension of time. In the meantime, the owner wants to make a partial payment for the work previously performed and demands a "Waiver of Liens and Claims." Should you sign it?

By signing a waiver of liens and claims, a contractor may lose its right to make a claim for additional money. In fact, in a recent federal court case, a drywall subcontractor was asked to perform additional work after the project had been delayed for one year. As required by the contract, the drywall subcontractor signed waivers in order to receive partial payment for the additional work. In addition, the drywall subcontractor sent periodic letters explaining that the change orders did not include all the costs that arose from the delay and that it would be seeking additional costs,

which were impossible to quantify until the end of the project. At the end of the project, the drywall subcontractor sued the general contractor, to recover delay damages.

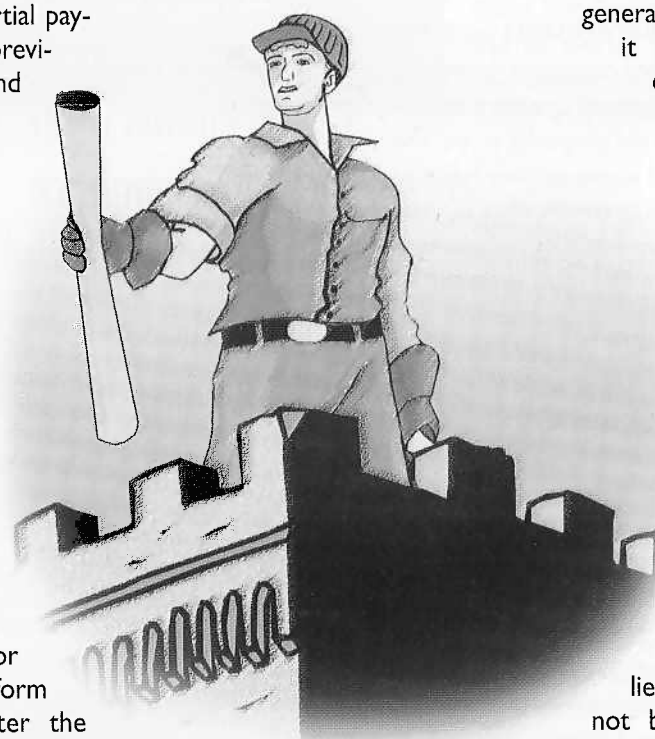
The court found that the drywall subcontractor had waived any claim for additional compensation by signing the waivers. The fact that the subcontractor sent letters to the general contractor notifying it of additional money claimed was immaterial. What the drywall subcontractor had waived could not be recaptured through a letter.

So what is a contractor to do? If you do not sign the waiver of liens and claims, you do not receive the partial payments. If you sign the waiver of liens and claims, you may not be able to pursue a claim for money at the end of the project.

Here are a few helpful suggestions:

- Strike from your contract any obligation to sign a waiver of liens and claims as a condition precedent to the receipt of a partial payment.

(article continued on page 4)





Restrictive Covenants

CAN YOU PROTECT YOUR EMPIRE?

You were more than a bit upset last week when your best sales representative quit to join your biggest competitor. Can you get an injunction to prevent the former employee from taking your customers? It, of course, depends. First of all, unless you can prove that your former employee stole your customer list or other confidential information, an injunction can only be obtained if the employee is bound by an enforceable restrictive covenant. Restrictive covenants generally fall into four categories:

Non-Competition Agreements prohibit an employee from working for a competitor. In order to be enforceable, a non-competition agreement must be reasonably limited in time and geographic scope. This means that a court would almost certainly refuse to enforce a non-competition agreement which says that "Employee shall not during Employee's employment and for a period of five (5) years thereafter, be employed by any Competitor within a radius of 1500 miles from Employer's office." The same agreement may be enforceable if it is limited to six months and 50 miles. Also, a court is far more likely to enforce a non-competition agreement that reasonably defines "competing entities." For example, is "competing entities" defined as "commercial teledata electrical contractors" or "all electrical contractors?"

Non-Solicitation Agreements prohibit an employee from soliciting customers. Non-solicitation agreements must be reasonably limited in time. When drafting non-solicitation agreements, the definition of the "Employer's Customers" must be precise. Does this term include customers for whom the employer has provided services within the past two years (or ten years)? Does it include potential customers?

Anti-Pirating Agreements state that an employee may not, during the employment relationship and for a reasonable period of time thereafter, solicit any other employee to become employed by a competitor.

Confidentiality Agreements prohibit an employee from disclosing confidential information to any unauthorized person. Unlike non-competition, non-solicitation, and anti-pirating agreements, confidentiality agreements need not be limited in time. Significantly, having a written confidentiality agreement allows an employer to select a definition of the term "confidential information" which fits its business. A typical confidentiality agreement may define this term as "(1) information which the employee learns during the course of performing services for employer; (2) the name, contact persons, credit terms, and/or requirements of any customer or potential customer; and (3) information with respect to the rate schedules, procedures, advertising, finances, organization, plans or strategies."

While some restrictive covenant agreements should include all of the above-described agreements, many should not. When preparing a restrictive covenant, employers should first consult with counsel to determine what provisions would be legally enforceable in their situation. Employers must then temper their restrictive covenant "wish lists" in light of industry standards and their employees' or prospective employees' willingness to tolerate restrictions.

Finally, the timing of when a restrictive covenant is signed is absolutely critical. In some states, including Pennsylvania, a restrictive covenant is legally valid only if (1) it is signed at or before the start of the employment relationship; or (2) the employee receives something of value – such as a raise or bonus that the employee would not have otherwise received – at the time the agreement is signed.

Bottom line: if you start thinking about restrictive covenants after your company loses one or more key salespersons, it may be too late.

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