TRANSACTIONS AND TRIALS

BERMAN AND SABLE NEWSLETTER

Volume 2, Issue 2 April 1999

The new client came to the law office for the first time. "Are you Attorney Smith?" "Yes," answered the attorney. "Do you handle divorce matters?" asked the new client. "Yes," again answered the attorney. "How much do you charge?" asked the client. "$300 for every four questions; you've got one more!" answered the attorney. Although harsh, this bit of humor illustrates the important role that questions play in the legal field. But, without doubt, the most often asked question in the month of March was: "Where is Gonzaga?" We hope this next issue will answer some other pressing questions.

Y2K: What to Say?

By James W. Oliver

In the 1970s, it was "I'M OK –YOU'RE OK!" In the 1980s, it was "I'M NOT OK –YOU'RE NOT OK, BUT THAT'S OK". Today, it is whether your *computer* is OK. On January 1, 2000, will your computer lose its "grip on reality," or is it Y2K compliant? What should you say?

What is it all about?

Many computer programs written in the 1960s through the 1990s only tracked the last two digits of the year and ignored the first two digits. On January 1, 2000, many of these programs will be unable to tell if it is year 2000 or year 1900. In short, a computer, which uses date checking logic, may lose its "grip on reality" and cease to function properly.

Is this problem real?

Yes! The Y2K bug can show up in mainframe computers, mini-computers, personal computers, computer chips and software. It is estimated that it might take as much as $600 billion dollars to correct the problem. Yet, none of the experts can predict exactly what will happen on January 1, 2000. It is clear that some of these computer systems will simply fail.

Why should I care?

Y2K questionnaires are now becoming common place. Banks, insurance companies and vendors are all now using Y2K questionnaires. The Federal Financial Institutions Examination Council has instructed banks to adjust their lending terms and loan review processes to take into account a corporate borrower's Y2K difficulties. In short, how you answer these questionnaires will affect your business.

Any response to a Y2K question must be truthful, forthright and very carefully drafted. A statement that a company is not Y2K compliant could result in a customer or vendor refusing to perform under an existing contract. The doctrine of anticipatory breach of contract permits a party to cease performing under a contract if there is a reasonable likelihood that the other party cannot perform in the future.

A false or reckless statement that a party is Y2K compliant could result in fraud and breach of warranty claims. Statements concerning Y2K compliance made in a contract, during contract

(Continued on page 2)

BERMAN AND SABLE
ATTORNEYS AT LAW

100 Pearl Street
Hartford, Connecticut 06103
Telephone: (860) 527-9699
Telecopier: (860) 527-9077

195 Church Street
New Haven, Connecticut 06510
Telephone: (203) 495-6200
Telecopier: (203) 496-6220

negotiations or during a contract renewal can give rise to claims for breach of contract, breach of warranty and even for fraudulent misrepresentation. The key question to ask is whether the contract was entered into or renewed because of the representations made about Y2K compliance.

Recently, Congress passed the Year 2000 Information and Readiness Disclosure Act which is intended to limit the circumstances under which a Y2K statement will amend or alter an already existing contract. The Act states that a Y2K statement will not amend or alter an already existing contract or warranty unless:

1. The party making the Y2K statement agrees that such statement will amend the terms of the contract or warranty.
2. The Y2K statement was made in conjunction with the formation of the contract or warranty.
3. The contract or warranty expressly provides that it may be amended by a Y2K statement.

Before making a Y2K statement it is critical to determine what effect such a statement will have on an already existing contract or warranty. To be safe a person should consider including a clause in the Y2K statement that expressly excludes its application from already existing contracts.

How do I answer?

Y2K statements should not be stated in absolute terms. "We are Y2K compliant" implies that all hardware and software systems will work on January 1, 2000. "We intend to be Y2K ready" or "We are using all reasonable efforts to be Y2K compliant" are preferable as they will be harder to construe as misrepresentations or warranties.

Remember, whether you are OK with Y2K will depend, in part, on how you currently answer Y2K surveys and questionnaires.

Berman and Sable News

- ***Congratulations to Jim Brault and his wife, Kristine, on the birth of their new baby girl, Sydney Janet, on February 23, 1999.***
- ***The major expansion of our New Haven office is now complete and ready for public viewing.***

CONSTRUCTION

Labor and Materials Payment Bond Claims

By Durwin P. Jones

Connecticut General Statutes ("C.G.S.") Section 49-41 was enacted to guarantee prompt payment to workers and material suppliers (hereinafter the "subcontractors") on public works construction projects. The statute requires each contract for the construction, alteration or repair of any public building or public work, in excess of $50,000, to include a provision that the general contractor must furnish to the state or municipality a bond guaranteeing the payment (the "Payment Bond") to the subcontractors.

C.G.S § 49-42(a) limits the right of action on a Payment Bond to those persons having a direct contractual relationship with: (1) the general contractor (i.e., subcontractors, also known as first tier subcontractors); or (2) the general contractor's subcontractors (i.e., second tier subcontractors or sub-subcontractors). Persons supplying labor or materials to second tier subcontractors (i.e., third tier subcontractors) are typically not proper claimants under the general contractor's Payment Bond.

A claim arises under C.G.S. § 49-42(a) when a subcontractor does not receive **full** payment within 60 days of the following dates or events: (1) the date the subcontractor last furnished labor or materials to the bonded project; (2) the failure of the general contractor to make a payment (monthly or final) to a subcontractor within 30 days after the general contractor has received payment from the state or municipality pursuant to the general contractor's payment requisition submitted to the state or municipality which included the subcontractor's labor or materials; (3) the general contractor's failure to make a progress payment in accordance with the terms of the subcontract; or (4) the date the subcontractor's performance is terminated by the general contractor (each of the foregoing is the "Claim Date").

(Continued on page 3)

After the claim on the Payment Bond accrues, the subcontractor must strictly comply with the deadlines and procedural requirements of C.G.S. § 49-42(a). Pursuant to C.G.S. § 49-42(a), the subcontractor must serve a notice of claim on the surety (bonding company) and a copy on the general contractor within 180 days of the Claim Date. The notice of claim must set forth with substantial accuracy (1) the name of the party to whom the work or materials were furnished; (2) the amount claimed; and (3) a detailed description of the bonded project. The notice of claim should also include the Claim Date, although it is not required by C.G.S. § 49-42(a). The failure to serve the notice of claim on the surety within 180 days of the Claim Date is fatal to recovery on the Payment Bond. The failure to serve a copy of the notice of claim on the general contractor within 180 days of the Claim Date may not be fatal if the subcontractor can prove that the general contractor had prior notice of the subcontractor's intent to make such a claim (e.g., a demand letter). To be safe, the subcontractor should serve its notice of claim on the surety and general contractor immediately after the expiration of the 60-day period following the Claim Date.

Within 90 days after service of the notice of claim, the surety must pay the claim or pay any portion of the claim that is not subject to a good faith dispute, and serve a notice on the subcontractor denying liability on any unpaid portion of the claim. A surety's failure to respond to the notice of claim within 90 days should be treated by the subcontractor as a denial of the claim and the subcontractor should commence an action on the Payment Bond. A surety's complete failure to investigate and respond to a subcontractor's notice of claim may give the subcontractor an additional cause of action against the surety under the Connecticut Unfair Trade Practices Act ("CUTPA"), C.G.S § 42-110a, et. seq.

If the surety serves a notice denying liability or fails to serve such notice within the 90-day period, the subcontractor must commence an action on the Payment Bond in the Connecticut Superior Court within one year of the Claim Date. If the action is not commenced within one year of the Claim Date, the statute of limitations of C.G.S. § 49-42(b) will bar recovery on the Payment Bond. The statute of limitations cannot be waived. In order to avoid a statute of limitations defense, the subcontractor should commence the action immediately after the surety serves a notice denying the subcontractor's claim or the expiration of the 90-day period if no response from the surety has been received.

The action on the Payment Bond must be brought in the judicial district where the general contract is to be performed. However, the parties may waive this requirement or the subcontract may designate a particular court or arbitrator in Connecticut. Choice of law and forum provisions designating any place other than Connecticut are void. C.G.S. § 49-42(a) classifies all Payment Bond claims as privileged for trial assignment and, thus, the case will be tried sooner than most civil cases. C.G.S. § 49-42(a) also allows the court to award attorneys' fees to **either** party if, upon the entire record, it appears that the original claim, the surety's denial of liability, or the defense interposed to the claim is without **substantial basis in law or fact**.

Finally, a subcontractor's failure to recover on a Payment Bond does not prevent it from pursuing other statutory, common law or equitable remedies. C.G.S. § 49-41(a) allows a subcontractor to recover interest at 1% per month and attorneys' fees if it properly serves a claim on the general contractor and the subcontractor proves that it had substantially performed its work under the subcontract. A subcontractor may also bring causes of action for violation of CUTPA, breach of contract, payment for substantial performance, unjust enrichment, payment for value of work performed, enforcement of an equitable lien against unpaid funds held by the owner that are due the general contractor or such other cause of action that the facts may warrant. Notwithstanding the foregoing, a subcontractor should always seek legal advice if it has not received full payment within 60 days of the

Initials to know when conversing with a lawyer. Can you identify them?

PJR; TRO; DIP; ADR; UCC; EBITDA; TPZ; CGS; USC; LLP; UPA; UCONN; CUTPA; FIRREA.

TAX APPEALS

By I. Milton Widem

Assessment of real and personal property under Connecticut law is dictated by statutes enacted by the Connecticut General Assembly. (Title 12 Chapter 203 Connecticut General Statutes)

Thus, tax appeals are controlled by statutes as interpreted by the Connecticut courts.

By statute, each city and town assessor must value each and every piece of real property for the grand list of each year commencing as of October 1 of that year. The assessor must file his grand list by January 30 of the following year unless a 30-day extension is granted by the Connecticut Office of Policy Management (OPM).

Unless there has been a change in structure by way of new construction or demolition, or a change in use such as conversion from commercial to industrial use, the assessor must utilize the valuation set at the last decennial revaluation which until recently, had been conducted once every ten years.

The law was changed in 1995 so that the assessor must undertake a statistical type of revaluation every four years, except at the 12th year, the assessor must undertake a physical revaluation of all real property.

Personal property is revalued on an annual basis.

In the event the property owner seeks to contest the latest revaluation as being excessive and not representing fair market value, an application must be filed by the property owner, or the tenant who actually pays the taxes under its lease, to the respective Board of Assessment Appeals of the town or city where the property is situated by February 20 of the year following the grand list date of October 1 unless the town or city secures an extension of the time table from OPM.

The Board of Assessment Appeals meets at publicly noticed dates in March unless again extended by OPM.

The property owner or tenant must appear either personally or by a properly designated attorney and/or appraiser on his or her behalf.

The Board will conduct a full hearing based upon such evidence as a recent updated appraisal report and such other information as may relate to valuations of said property. The Board is not required to conduct a hearing where the property's assessment is $500,000 or more.

By statute, the owner or tenant may appeal an unsatisfactory Board decision to the Superior Court in the judicial district where the property is situated. This appeal must be perfected within two months from the date of the Board's decision.

The appeal to the court is a completely independent evidentiary trial where the taxpayer must present expert testimony from a qualified Connecticut real estate appraiser and such other expert witnesses as may be required.

The critical issue as to valuation is whether the valuation set by the assessor represents fair market value, which has been generally defined as the most probable price which a property will bring if exposed for sale in the open market, allowing a reasonable time to find a purchaser who buys with knowledge of all uses to which it is adopted or capable of being used, neither buyer nor seller being under abnormal pressure.

The court seeks to determine fair market value by considering all elements affecting value. The court utilizes the three most commonly approved appraisal methods which are:

1. Market data approach which is based on sales of properties comparable to the property under appeal.
2. Capitalization of net income which is based on the capitalization of the net operating income of the property having an income stream.
3. Replacement cost which deals with the physical cost of replacing the property under appeal subject to physical or functional depreciation.

Tax appeals are quite technical in nature and require a sound knowledge of appraisal practices and procedures. Tax appeals also require an understanding of Connecticut statutory and decisional law relating to the valuations of property for tax purposes.

The time limitations are strictly enforced by the courts, and failure to present an appeal to the proper body at the proper time in the proper form will defeat any claim for relief from any assessment which does not represent fair market value.