TRANSACTIONS AND TRIALS

BERMAN AND SABLE NEWSLETTER

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Events in Florida notwithstanding, some lawyers still practice in the other 49 states of the Union, and even managed to prepare Transactions and Trials' year end issue. As always, the articles and information presented are for informational purposes only. Specific questions about legal issues should be directed to, preferably, a single attorney which hopefully will result in a single, "non-hanging door", "non-dimpled", "non-indented", constitutionally "appropriate" response.

THERE AIN'T NO SANITY CLAUS'

By: Michael P. Berman

Most construction professionals know that public project construction contract law (where the state of Connecticut is the owner) is governed by Connecticut General Statutes § 49-41a, *et seq*., which prescribes the duties and obligations of prime contractors and subcontractors engaged in a state of Connecticut project; including who gets paid and when. Public Act No. 99-153 ("PA 99-153") is one of the Connecticut State Legislature's few ventures into the field of private commercial and industrial construction contract law.

This article reviews PA 99-153 and examines the extent to which PA 99-153 can alter many of the standard subcontract clauses traditionally favored by the general contractor.

I. "PAY-WHEN-PAID" CLAUSE

A. Standard Provisions

A typical subcontract agreement drafted by the general contractor, contains a clause stating, in effect, that the subcontractor will get paid for the portion of the subcontractor's work performed to date (progress payment) under certain specified circumstances.

- The subcontractor submits its application for such work;
- The general contractor incorporates the subcontractor's request for payment in the general contractor's application to the owner;
- The owner pays the general contractor for work that includes the installment of the subcontractor's work, and;
- So-many days have elapsed after receipt of the payment by the general contractor from the owner.

The usual number of days can vary from 15 to 30 calendar days after the general contractor receives the owner's payment. The well drafted subcontract contains a clause to the effect that the ***general contractor must receive payment from the owner*** (which includes the subcontractor's portion),

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before the general contractor is required to pay the subcontractor.

Typically, the unpaid subcontractor has no remedy under the subcontract agreement for lack of timely payment by the general contractor aside from common law breach of contract rules. More often than not, the subcontractor does not sue because the subcontractor does not want to pay attorney's fees on an ongoing basis during the life of the subcontract.

B. Statutory Modification

PA 99-153, Section 2, puts some new teeth into the subcontractor's rights for failed or delayed payment by the general contractor. Unfortunately, Section 2 contains some "fuzzy" language at the beginning which states "Unless otherwise agreed by the parties. . . ". ***This provision of the new law requiring prompt payment and providing for remedies if it is breached, therefore, can be lost if the subcontract "provides otherwise".*** Review and analysis of the contract ***before*** it's signed is essential!

Under Section 2, the prime contract must require the general contractor to pay subcontractors and suppliers ***no later than 15 days*** after the general contractor receives a payment from the owner which includes the subcontractor's or supplier's applications or invoices. If the general contractor fails to make payment in time, a procedure is established whereby the general contractor may be ***liable for interest*** on the amount due and owing at the rate of ***1% per month*** and/or may be required to ***place the demanded funds*** (plus interest at 1% per month) in an ***interest bearing escrow account*** in a state bank. Further, ***even if unstated*** in the subcontract agreement, if the ***general contractor refuses to escrow*** the funds and the general contractor is found to have ***unreasonably withheld the payment***, the ***general contractor*** will be ***liable*** to ***pay*** the ***subcontractor's*** reasonable ***attorney's fees***.

II. RETAINAGE

A. Standard Provisions

A well-drafted subcontract agreement provides for a retainage percentage of each progress payment to the subcontractor. Retainage in private contracts ***generally tends to be 10%*** of each progress payment and is usually paid, lump sum, at the end of the contract, 30 days after the general contractor is paid by the owner.

B. Statutory Modification

Section 2 of PA 99-153 limits the retainage to 7½ % of the amount of any progress payment. PA 99-153 is silent, however, as to when the retainage must be paid. Presumably, the retainage, like progress payments, must be paid 15 days after the date that the owner pays the general contractor the retainage which includes the subcontractor's retainage. ***The Act does not allow parties to waive this requirement by agreement.***

III. WITHHOLDING OF FUNDS

A. Standard Provisions

A subcontract agreement prepared by the ***general contractor*** usually permits the general contractor to ***withhold, deduct or set off amounts due the subcontractor even if the subcontractor's progress payment was included in the payment*** from the owner to the general contractor. This clause enables the general contractor to withhold funds in the event the contractor faces the prospect of having to have the subcontract work repaired or completed.

B. Statutory Modification

Sensing the potential for abuse, PA 99-153, Section 2(c) specifically prohibits a general contractor from withholding payment to a subcontractor (or supplier) because of a dispute between the general contractor and another contractor, subcontractor or supplier. This provision would seem to require payment by the general contractor to the subcontractor, under penalties mentioned above (interest, attorney's fees, etc.), even if the general contractor did not receive all the money it requisitioned from the

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owner. ***So long as the payment from the owner to the general contractor includes the money requisitioned by the subcontractor, the subcontractor must be paid. The Act does not provide that the parties can waive this requirement in the contract.***

IV. STATE JURISDICTION

A. Standard Provisions

Many subcontracts prepared by general contractors contain a "state interpretation" clause. Typically, this clause recites that the subcontract will be interpreted in accordance with the laws of the state of "X"; or that any disputes under the subcontract shall be resolved only in courts in the state of "X". ***The state of jurisdiction or law interpretation is usually the state where the general contractor's office is located.***

B. Statutory Modification

Section 5 of PA 99-153 makes such forced jurisdiction or state law interpretation clauses null and void if the construction site is in Connecticut. ***Section 5 provides that if the construction site is in Connecticut, any dispute under the subcontract must be adjudicated in Connecticut, under the laws of Connecticut. The Act specifically renders contrary provisions void and unenforceable.***

IV. CONCLUSION

PA 99-153 is an attempt to level the playing field in contract negotiations between the general contractor and the subcontractor (also, between the

FYI: Kudos are in order for The Connecticut Bar Association, Real Property Section, who donated $10,000 towards a scholarship in

BERMAN AND SABLE NEWS!!!

Welcome to the Firm: Susanne LaPlante and Jacqueline Nezas joined Berman and Sable in December.

News: Berman and Sable was a Co-Sponsor of the Construction Institute "Pushing the Limits - The Overextended Construction Industry in Connecticut" on

THE EVER CHANGING WEB

AN UPDATE ON RECENT CHANGES IN CYBERLAW

By: Alena C. Gfeller

Many of you may remember your first calculator, the one that cost $200.00 and could only add, subtract, multiply and divide. Or, you may remember when you purchased your first VCR, CD player, computer . . . . When did you get your first e-mail address? I am sure it was within the last 10 years! When was the first time you "surfed the net"? As these questions demonstrate, technology is advancing at a rapid rate. As a result, the laws governing technology must be constantly updated to match the pace of change we see almost daily with respect to computing and the Internet.

Ten years ago, the terms "dot com," "web site" and "web surfing" did not exist; at least not as we define them today. The world has adapted to the computing phenomenon known as the "Internet", and now these terms and others like them are used daily. The legal world has also been forced to adapt to the ever changing world of the Internet. Courts have been required to deal with issues involving "e-commerce," "cybersquatting" and "domain name disputes."

This article focuses on certain recent changes in the realm of cyberlaw, but is not to be deemed as complete in any way. Most likely, by the time this article goes to press, new laws will have been enacted to deal with other, new and

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exciting issues which have arisen with respect to the Internet.

(i) Creating Web-Sites and E-Commerce:

On-line purchasing, web-site development, as well as contracting on the Internet, have required courts to decide new, and often novel, legal issues. The advent of e-commerce is another conundrum in the legal arena.

For example, using specific web-sites and/or purchasing items on the web creates contractual obligations for both the user and the service provider. How many times have we blindly "clicked" the **I AGREE** button when asked to review a legal disclaimer on a web site or software? This is called a "click-wrap" agreement. Courts have recently addressed the legitimacy of these agreements and have found them to be both valid and binding. *See*, Hotmail Corp. v. Van Money Pie, Inc., 1998 U.S. Dist. LEXIS 10729 (N.D. Cal., April 16, 1998); CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996); Ticketmaster Corp. v. Tickets.com, Inc., 2000 U.S. Dist. LEXIS 4553 (C.D. Cal, March 27, 2000).

(ii) Domain Name Disputes and Cybersquatting:

Domain name disputes arise when a person or organization "registers" a domain name such as "Coca Cola" when there is no legitimate interest in the name. This "abusive" registration is done in an attempt to ransom the name for money or to interfere with the business of the person whose name it is, i.e. "cybersquatting."

In an attempt to alleviate this somewhat common occurrence, Congress passed a series of laws dealing specifically with these issues. The Anticybersquatting Consumer Protection Act **("ACPA") makes "cybersquatting" illegal.** 15 U. S.C. §1125(d). Similarly, the Uniform Dispute Resolution Policy Act **("UDRP"**) is an arbitration procedure aimed directly at resolving "domain name disputes" and eliminating "cybersquatting."

(iii) Other Recent Changes in Cyberlaw:

The Electronic Signature in Global and National Commerce Act **(The E-Sign Act**), the Uniform Computer Information Transaction Act **("UCITA")** and the Uniform Electronic Transactions Act **("UETA")** comprise three recent changes with respect to the law in cyberspace.

The E-Sign Act was signed into law (via computer) by President Clinton on June 30, 2000 and became effective October 1, 2000. 15 USC §7001, *et seq.* The motivation for the E-Sign Act was that during past years the fifty states passed an array of electronic signature and electronic commerce statutes that fell into three varying models. Some states provided that any type of electronic signature is valid. Other states required that some minimal form of security was required (such as confirmation of the identity of the signer). Still other states validated only digital signatures. The E-Sign Act established national recognition for the validity and enforceability of these types of electronic signatures.

The UETA was adopted by the National Conference of Commissioners on Uniform State Laws **("NCCUSL")** on July 29, 1999. *See also*, 15 USC §7002. The UETA provides that a record, signature, or a contract may not be denied legal effect or enforceability solely because it was created electronically. §7(a) and (b). Finally, the UCITA was approved and recommended for enactment by the NCCUSL at their annual meeting on August 4, 1999. The UCITA recognizes the validity of electronic contracting.

(iv) Conclusion:

Hundreds of legal precedents in this arena are being set daily. There is no-way this short article can apprise our readers of all of the legal changes in