Attorneys at Law Since 1932

WFJ
WAGNER, FALCONER & JUDD, LTD.
Attorneys at Law Since 1932

Fall 2006

Volume 1
Issue 4

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National Customer Service Week

WFJ celebrated National Customer Service Week during the week of October 2nd-6th, 2006. This celebration has become an annual Fall tradition at WFJ. The week-long event is geared to celebrate and recognize the hard work, dedication and client-focused attitudes of the WFJ attorneys and staff members.

WFJ, formed in 1932, now is in its 74th year of operation, with offices in Minneapolis, Milwaukee, and La-Crosse, WI. The activities of NCS Week involved all three offices, and included special breakfasts and lunches, with contests, special promotions, and prizes.

WFJ used the events of NCS Week to focus on the firm-wide commitment to loyalty and service for all of the firm's clients.

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Common Carrier Liability

Damaged goods are an unfortunate but all too common situation for those in the trucking industry and one that can cost companies significant expense. Shippers frequently file claims against carriers when their goods are damaged in interstate transit. As such, a shipper must understand its rights when cargo is damaged and what legal remedies may be available. Likewise, a common carrier needs to recognize its potential exposure.

The Carmack Amendment, 49 U.S.C. § 14706 governs a motor carrier's liability and serves as a shipper's exclusive remedy for damage to goods while in transit. It permits a shipper to recover "the actual loss or injury to the property" from the liable carrier. In order to establish a prima facie case against a motor carrier, a shipper must prove: (1) that the goods were delivered to the carrier in good condition; (2) that the goods were damaged before they reached their final destination and (3) the amount of damages sustained.

Although the Carmack Amendment carries with it a presumption of liability against the carrier, it is important for a shipper to realize that it must take steps to protect its potential claim for damages. A shipper is required to make a claim in writing to the carrier for *every* loss, that identifies the specific shipment involved, alleges that the carrier is liable for the loss and sets forth a tangible claim for damages. The timeframe for filing a claim can vary, but a carrier can require that a shipper make all claims in writing within nine months after the date of loss. For this reason, it is crucial that shippers maintain detailed, organized records and keep apprised of the deadline to assert a claim.

Common carriers may be

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interested to learn that while Carmack provides a remedy under Federal law, it precludes a shipper from bringing a state law claim for breach of contract, negligence, bad-faith, or deceptive trade practices arising out of damage to goods caused by the interstate shipment of goods by a common carrier. In fact, one of the purposes of the Carmack Amendment was to provide uniformity to common carrier liability and afford the involved carrier the ability to anticipate potential exposure, liability and damages. Carmack also allows a carrier to limit its liability by establishing transport rates whereby a carrier's amount of liability is limited to the value declared by the shipper. There are specific steps a common carrier must take to limit its liability and it is recommended that a motor carrier seek the counsel of an experienced attorney if it intends to do so.

Damaged goods during transit are inevitable. Shippers need systems in place to effectively handle, file and monitor claims and carriers should take steps to cap liability at a certain dollar figure in the event cargo is damaged en route. It is recommended that both shippers and common carriers consult with an experienced attorney to best protect their competing interests.

The Personal Guarantee: To Sign or Not to Sign?

A personal guarantee is a written agreement, signed by a person other than the named borrower, which causes the signing party to be liable for any deficiencies on a specific loan or extension of credit. A personal guarantee means that the guarantor is personally liable for the debt even if the business is incorporated. It is important to understand what a personal guarantee is and how to tailor a personal guarantee to particular situations..

Securing an obligation to collateral is an important step in the credit extension process. The choice of collateral is important as well. Appreciable property such as real estate is a good choice for collateral. The risk associated with making a loan or extending credit is related to the value the collateral maintains over the length of time of repayment. In addition to any collateral that secures an obligation, a party extending credit can request a personal guarantee.

A personal guarantee may relate to a specific transaction or be open-ended and apply to future transactions. Personal guarantees are typically joint and several, which means that both the guarantor and the named borrower are liable. A good business practice is to ensure that the individual signing the personal guarantee is a principal, manager, or director of the business. This individual presumably has knowledge of the debt and hopefully will take steps to insure that the company, the primary debtor, pays the debt. In addition, a personal guarantee can be executed by more than one person, thereby providing more resources for securing repayment.

The personal guarantee should include the personal information of the guarantor. Beyond the name and address of the guarantor, it is important to confirm that the guarantor is signing in his or her individual capacity and **not** as an officer of the corporation. Ensuring that the signature block is clear and sets out an individual obligation will increase the likelihood that a court will enforce the guarantee.

The scope of a personal guarantee should be tailored to fit the circumstances of the transaction. For example, is credit being extended to a business with an established credit history or to a newer business? Is the personal guarantee limited to a specific percentage or amount, or is it limited only by the amount of credit extended? The agreement should identify the manner in which the guarantor can terminate the personal guarantee. Some provisions to consider are whether the notice must be in writing, the exact address where the notice should be delivered, and how that notice should be delivered (e.g. certified mail, return-receipt requested).

Looking at personal guarantees from the reverse angle, we recommend that legal advice be sought prior to signing any personal guarantee. As a personal guarantee equates to voluntarily removing liability protection with regard to the party to whom the guarantee is offered, signing a personal guarantee is an important decision that should not be taken without adequate forethought and counsel. Often through negotiations, a lender can be convinced that a personal guarantee is not necessary in that the borrower has sufficient collateral to secure the obligation. Alternatively, through negotiations the terms of the guarantee can be improved. For example, a personal guarantee can be limited to a percentage of the loan or a specific dollar amount. Another restriction is to draft the guarantee such that it terminates automatically once the debt or liability has been satisfied and does not renew upon the extension of additional credit.

Understanding how personal guarantees operate is important to effective account receivable management and protecting personal assets.

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Amendments to Pennsylvania's Mechanic's Lien Law to Take Effect On January 1st 2007

Amendments to Pennsylvania's lien law ("the Amendments") will go into effect on January 1, 2007. This article summarizes how the Amendments will affect mechanic's lien claims on commercial projects. *(Note: This article does not address how the Amendments apply to mechanic's lien claims on private, residential projects. If you have questions about a residential project, please contact our office for additional information).*

1.**Right to a lien claim extended to persons who have a contract with a subcontractor of the general contractor.**

Under existing law, a person who furnishes labor or material for improvements to real property in Pennsylvania is entitled to assert a mechanic's lien claim only if the person has a contract with the owner or with the general contractor. A person who has a contract with a subcontractor or anyone else farther down the contract chain is currently not entitled to assert a lien.

Under the Amendments, a person who has a contract with a subcontractor in direct privity of contract with the general contractor will be entitled to assert a mechanic's lien.

2.**Lien waivers given by a contractor or subcontractor on commercial projects are void as against public policy in certain situations.**

Under the Amendments, a lien waiver given by a general contractor on a commercial project is void as against public policy, unless given in consideration for payment. Similarly, a lien waiver given by a subcontractor on a commercial project is void as against public policy, unless (1) the lien waiver is given in consideration for payment for labor or materials furnished, or (2) the contractor has posted a payment bond guaranteeing payment for labor and materials provided by subcontractors.

Under existing law, the owner and general contractor are entitled to set up a "no-lien" agreement between themselves that prevents subcontractors and suppliers from asserting mechanic's liens. Under the Amendments, such "no-lien" agreements are only enforceable if the general contractor has furnished a payment bond for the protection of unpaid subcontractors and suppliers who otherwise would be entitled to assert liens.

3.**Preliminary notice requirement eliminated.**

Under existing law, unless a lien claimant has a contract with the owner, the lien claimant could be required to serve a preliminary notice on the owner if the project is considered to be "alteration and repair" rather than "erection and construction."

Under the Amendments, the preliminary notice requirement has been completely eliminated.

4.**Deadline to file mechanic's lien claim.**

Under the existing lien law, a lien claimant must file its mechanic's lien claim at the courthouse within four (4) months after the "last date" the lien claimant furnished labor or material.

Under the Amendments, the lien filing deadline has been extended from four (4) months to six (6) months.

WFJ has extensive experience assisting clients with the enforcement of mechanic's lien and payment bond claims throughout the United States, Canada and abroad. If you have questions about Pennsylvania's lien law, or mechanic's lien or payment bond remedies available in other jurisdictions, please contact our office for more information.

Terms and Conditions of Sale – Thinking Strategically

What are your company's processes with regard to contract review and ensuring that your terms and conditions of sale will control in the event of a dispute? A proactive approach to your company's terms and conditions of sale gives your company a strategic advantage should a dispute arise. First, by writing favorable terms you can protect your accounts receivables and shorten your payment cycle. Second, favorable contractual terms can help your company reduce its exposure to potential liabilities. The purpose of this article is to raise awareness of the importance of thinking strategically about terms and conditions and the sales process.

Terms that can shorten your collection cycle are terms that make it more expensive or cumbersome for a customer to dispute an invoice. These include choice of jurisdiction/venue, assessing costs of collection, and assessing actual attorney fees. If you are engaged in business on a national scale, forcing a customer to come to your home state to litigate a dispute can in itself cause the customer to pay. Reminding a debtor about an attorney's fee clause in a contract can often lead to an expedited resolution of a dispute.

Favorable terms and conditions can limit the exposure of your company. Any indemnification your company decides to offer in its standard terms and conditions should be reviewed in light of remedies that a customer has against the company regardless of the contract. For example, strict liability typically attaches to a com-

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pany when harm is caused by a defective product. In such cases, offering indemnification for the harm a product may cause does not put the company in a less strategic position, but can be presented as a benefit to your customers. In cases where your company is offering indemnification for acts of negligence, adding the modifier "gross" to "negligence" will substantially diminish the type of actions for which your company could be held accountable. Limiting liability to avoid consequential damages and putting an overall cap on damages are also excellent ways to limit your company's exposure to risk.

In addition to looking at your company's terms and conditions, taking a critical look at your internal processes is important. Ask yourself this question – "when is the contract formed"? If the contract is formed by a series of writings such as a purchase order submitted subsequent to a credit application, are all of the material terms and conditions of the contract in the initial credit agreement? If a term is deemed to be material, such as a warranty disclaimer, the general rule under the Uniform Commercial Code ("UCC") is that the term needs to be in the papers that constitute the formation of the contract. Waiting to put a warranty disclaimer on the back of an invoice can render that term unenforceable under the UCC.

The UCC "Battle of the Forms" occurs when two companies exchange contract documents with different terms and conditions, usually on pre-printed forms. An acceptance or written confirmation that indicates the seller's intention to enter into a contractual relationship will serve as effective acceptance provided that the communication is sent within a reasonable time, even if the acceptance is made pursuant to different terms and conditions. Under the UCC's "knock out rule" conflicting terms between the forms of the offeror and the offeree are dropped. If a seller has language stating in its order acknowledgement form that acceptance is expressly conditional upon the buyer accepting the seller's terms, then a contract will not be formed by the exchange of "paper." If product is nevertheless shipped, the contract will be based upon the conduct of the parties. In either case, the UCC "fills in" the missing gaps in the contract. Although customer disputes may be infrequent, knowing what terms will govern in the event of a dispute is important.

By thinking strategically about your contracts and the sales process, you can maximize profits and minimize exposure for your company. Becoming familiar with the logistics of contract formation is the first step in forming an internal policy to ensure that your contract terms control in the event of a dispute.

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