

WAGNER, &
FALCONER &
JUDD, Ltd.

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Changes at WFJ

Wagner, Falconer & Judd, Ltd. recently made changes to its officer and management positions. Effective May 1, 2006, Alan W. Falconer, who has been President of the firm since 1991, stepped down as President and was named Chairman of the Board of Directors. In addition, Alan was named as a Vice President of the firm.

At the same time, Michael J. DuPont, who joined the firm as an associate attorney in 1993, was named President of the firm. As President, Mike will oversee management and administration of the firm.

In another change in officer positions, Bradley D. Hauswirth was named a Vice President of the firm.

Robert A. Judd remains as a Vice President and Treasurer of the firm, while Mark O. Anderson remains as a Vice President and Secretary of the firm.

WFJ now has 30 attorneys, with offices in Minneapolis, Milwaukee, and La-Crosse, WI.

Collection Overview: An Attorneys Perspective

Special Points Of Interest

- Importance of Personal Guaranties
- Limitations on Insurance Coverage in Mold Claims
- WI Home Improvement Trade Practices Act.

Current economic conditions make it as important as ever to keep uncollectible accounts at a minimum. A thorough credit application process can enhance the collectibility of accounts.

The life of a new customer account begins with the credit application. A careful and thorough credit application process can help increase the likelihood of payment if it is necessary to turn the account over to an attorney for collection. Credit managers and sales representatives should have some understanding of how lawyers use information obtained during the credit application process in order to collect debts since it highlights the need for obtaining accurate and complete information from new customers.

Credit Applications

In order to reduce write-offs and

assist with legal enforcement of claims, credit application procedures should be thorough and detailed. It is crucial to obtain and verify basic information, clearly establish credit terms, and ensure that the credit application is appropriately filled out and signed.

Obtain and Verify Basic Information:

It is imperative to ascertain the form of business entity used by your new customer. Is the customer a corporation, a partnership, or a sole proprietorship? In general, most businesses are required to register with a state office, usually the secretary of state's office. A quick phone call to the corporations division of the secretary of state's office, or online search of the secretary of state's website, can verify a lot of the information supplied by the new customer

during the credit application process, or highlight holes or inaccuracies in the information supplied by the new customer. The secretary of state's office should be able to confirm the type of entity used by your customer, its registered business address, whether the corporation is in good standing, and possibly the names of the business owners, officers, or agent. If the information obtained from the secretary of state's office doesn't match the information given to you by your customer, find out why. Obtaining accurate information from your customer is a lot easier during the credit application process when the relationship is friendly than it is during the collection process when customers can be somewhat less helpful.

If you are not doing business with an individual, make sure the per-

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son that you are dealing with has authority to act on behalf of your prospective customer. In general, a corporation can only act through an officer (CEO, president, vice president, etc.) but not through lower level employees. You do not want to be in a position where you have to argue about whether the person who placed orders with your company had authority to act on behalf of the entity you thought was your customer, especially if the person you dealt with doesn't have the means to pay.

The type of business entity used by your customer also tells you who is potentially responsible when an account goes bad. The formation of a corporation generally shields its owners, officers and directors from any personal liability in the event the corporation becomes insolvent and is unable to pay its debts. When dealing with a corporation with an unproven track record, you should consider requiring the owner (s), or other interested third parties, to sign a guaranty that renders them personally liable for corporate debts. The use of guaranties is discussed in more detail below.

Other basic information obtained during the credit application process will also assist with the collection process, assuming the information is accurate. Banking information comes in handy when you are forced to sue a customer in order to enforce a claim. A successful lawsuit will result in a judgment in your favor against the customer and any guarantors. However, a judgment is just a piece of paper issued by the court establishing that the debt is owed. The court will not collect the money for you. Your attorney will look for banking information in the credit application, as well as other banking information that you collect during your course of dealing with the customer, in order to identify where the debtor might be keeping money that could be applied toward payment of your judgment. You only want to incur the expense of suing a customer if there is a reasonable likelihood that it will result in getting paid. If you are forced to sue your customer and successfully obtain a judgment, the judgment will give you some authority to seize assets held by banks or other third parties. Getting accurate information on where your customer keeps its money during the credit application process can be a valuable tool when it comes time to enforce a judgment.

Clearly Establish Credit Terms:

Credit terms may be established in a written contract or orally. Generally, all terms should be written and, in some cases, terms may not be enforceable if not specifically agreed to in writing. An established course of dealing and industry standards may also determine the terms of a credit agreement.

Make sure your invoices and statements of ac-

count do not state inconsistent payment terms. Do the names on the invoices match the customer's name and address on the credit application? Do the invoices include terms, such as interest, consistent with the terms in the credit application?

Defining when payment is due is an essential function of the credit application. Creditors often require that payment be made within a specific period of time, such as within 30 days of the sale or "Net 30." This term is important so that it can be determined when a customer is "outside terms" and can be said to be in breach of its credit agreement with you.

Another essential term of a credit agreement is interest. This term requires the customer to pay interest on past due accounts. Interest is governed by statute which restricts the amount of interest that can be charged. Be sure your interest rate is not excessive and in violation of state law. If your interest terms are usurious, the interest term may be unenforceable or the entire contract may be rendered unenforceable.

Credit applications will often have provisions requiring payment of the costs of collection and reasonable attorney fees upon default. The general rule is that attorney fees are not collectible unless this term is agreed to in writing. Reasonable attorney fees provisions can be in both the credit application as well as any guaranties.

Combining the Credit Application with a Personal Guaranty:

An effective tool for reducing the likelihood of write-offs is a built-in personal guaranty combined with the credit application. A personal guaranty can apply to present balances, future advances, or both. Just as in the credit application itself, a guaranty may also include terms for payment of interest, collection costs and reasonable attorney fees.

A personal guaranty from an owner or other interested party can be important even when the corporation is technically solvent but is experiencing financial difficulty. If you have a personal guaranty from an owner, the owner has an incentive to make sure that the corporation pays you before the corporation pays other debts for which the owner is not personally liable. The owner who is personal liable for corporate debts is motivated by self-interest, and understandably wants to reduce or eliminate his own personal exposure if there is any possibility that the corporation will be unable to pay a corporate debt.

A personal guaranty is even more important when the corporation is insolvent and can't pay. If you had the foresight to get a personal

guaranty from an owner or other party, the person who signed the guaranty ("the guarantor") may be the only pocket to turn to for payment if a corporate debt goes bad. Insolvent corporations often just shut their doors and do not file for bankruptcy. There is no organized distribution of assets to unpaid creditors, and creditors are left holding the bag with no one to go after. With a properly drafted personal guaranty from the owner, the owner remains on the hook for your account even if the corporate customer "goes under." The owner could file for bankruptcy in an effort to shake liability on your claim, but bankruptcy can be an unpleasant prospect. The owner may have trouble explaining to the bankruptcy court why he cannot pay you if he is driving a new Lexus and spent last winter sipping pina colodas on a beach in some tropical paradise.

Obtain Appropriate Signatures:

Make sure to clearly identify the person signing the credit application. Also, have the person signing the credit application specify his title next to his signature so it is clear that the signer has authority to bind the customer to the agreement.

When it comes to personal guaranties, again make sure that the person signing signs in their individual capacity and does not purport to be signing only in their capacity as an agent of the corporate customer. The very purpose of the personal guaranty is to allow for you to hold the signer personally liable. An improper signature could require a lawsuit to resolve a dispute concerning enforceability or, even worse, invalidate the guaranty.

Establish a Formal Credit Application Review Process:

Diligence, thoroughness and accuracy are important throughout the management of a credit account. Consider dedicating personnel to a formalized credit application process and after. Designate someone responsible for making sure that all forms are completed and properly signed. Someone should also be responsible for periodic updates/review of existing accounts to ensure that information gathered during the credit application process is still current.

Conclusion

Obtaining and verifying basic information, clearly establishing terms of credit, requiring a personal guaranty, and obtaining appropriate signatures should reduce your company's write-offs. A formal credit application process following these suggestions will maximize your customer's incentive to pay you on time, help establish all parties liable for a debt in the event of nonpayment, avoid legal disputes about whether you are entitled to collect interest or attorney's fees, and identify places where your customer keeps money or other assets in case it becomes necessary to obtain and enforce a judgment.

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MOLD LITIGATION: REDUCING POTENTIAL LIABILITY

Mold litigation has become more prevalent in recent years. Often referred to as the “new asbestos” litigation, lawsuits alleging personal injuries and/or property damage can affect homeowners, commercial property owners, developers, contractors, architects, construction manufacturers and others involved in the construction industry. As the calculation of damages in a mold case can greatly exceed the manner in which damages are otherwise calculated for cases with product defects, it is important to gain familiarity with this trend to limit your company’s potential liability related to mold litigation. The purpose of this article is to highlight a few of the situations where mold litigation may arise, to discuss recent cases in Minnesota and Wisconsin regarding insurance coverage and warranty limitations, and to suggest ways to limit risk.

A mold claim can arise from a variety of sources. In new construction a mold claim may involve allegations of design or construction defect that create suitable conditions for mold growth. If a construction defect allows water to intrude into a building, the resulting mold-related damages are likely to far exceed the actual damages caused by the water ingress. If inadequate ventilation leads to high indoor humidity in such areas as bathrooms, the resulting mold growth and need for mold remediation will greatly exceed the cost to fix the inadequate ventilation. Moreover, plaintiffs can allege a wide variety of causes of action in mold cases. Causes of action in mold litigation are often negligence-based, alleging that a party violated a duty of care of a reasonable and prudent person to prevent mold from causing personal injury and/or property damage to another. Suits have also been brought based on failure to disclose, breaches of contract, and for violating implied or express warranties.

There are several general exclusions that insurance companies have used to deny coverage for mold damage or mold-related injuries. Under the “wear and tear” exclusion, insurers have successfully argued that that property damage caused by mold appears over time and is not the result of an identifiable triggering event. Insurance companies have also successfully argued to exclude mold coverage under “pollution” exclusions arguing that mold is an excludable pollutant. If water ingress is listed as a delineated policy exclusion, insurance companies have argued that the mold contamination that results from the water ingress should also be excluded. In new construction, insurance companies have looked to policy language to deny coverage based upon exclusions for “faulty workmanship, construction or design.” In addition to these general exclusions, insurers now write mold-specific policy exclusions for both residential and commercial policies.

Even though an insurance company may attempt to deny coverage based on multiple applicable exclusions, creative arguments on the part of the policy holder can be successful in asserting coverage. One

line of reasoning is to argue that the mold is an “ensuing loss” related to a covered event. This argument was successful in a recent Minnesota case brought in federal court, in which a homeowner was successful in forcing his insurer to provide coverage. A homeowner sought a declaratory judgment against the insurer regarding property damage, including mold that resulted from an intrusion of rain water. The insurance company sought to exclude coverage based on a mold exclusion in the policy. The Court ruled that the mold exclusion did not apply as the mold contamination was the result of the intrusion of rain water, a covered, non-excluded event. Buscher v. Economy Preview Assurance Company, 2006 WL 268781 (D. Minn. 2006)

Third party insurance coverage related to mold litigation often arises in the context of the sale of residential or commercial real estate. In a typical case, the purchaser learns of the mold infestation at some point in time after the closing and sues the seller for negligent misrepresentation. With both general and mold-specific exclusions that may apply, the insurer is unlikely to admit to coverage. A more likely event is that the insurer may agree to defend subject to a reservation of rights. In such cases, the insurer will likely hire an attorney to defend on the merits of the case, but will also hire a separate attorney to represent the interests of the insurance company which could include seeking a declaratory judgment asking the court to rule that no coverage or duty to defend exists based on the policy exclusions.

Everson v. Lorenz, a recent Wisconsin case that involved allegations of negligent disclosures concerning a flood plain, has applicability to mold litigation. Common residential or commercial general liability policies define an “occurrence” as an “accident, including continuous or repeated exposure to substantially the same general harmful conditions.” during the policy period. The Wisconsin Supreme Court held that a negligent misrepresentation on a real estate condition report was not an “accident” and therefore not an “occurrence.” The court reasoned that the affirmative act of making a misrepresentation was akin to an intentional act (i.e., making a disclosure) and therefore not an accident. Accordingly, the litigation against the seller did not trigger a duty on the insurance company to defend their insured. Everson v. Lorenz, 280 Wis. 2d 1 (WI 2005). Although Everson involved failing to disclose a flood plain, insurance companies in Wisconsin are likely to adopt the court’s reasoning in Everson in cases involving failing to disclose conditions favorable to mold growth.

Camacho v. Todd and Leiser Homes is a recent Minnesota case that illustrates, in the context of new home construction, how a homeowner can be left without recourse in the event of a mold infes-

tion. In Minnesota, a ten year warranty applies to major construction defects due to noncompliance with building standards as set out in §327A.02(1), Minn. Stats. In this case, the homeowner learned of a mold infestation caused by the contractor’s failure to comply with building standards during the 10 year warranty period and sued the contractor and the contractor’s insurer under a construction warranty claim. However, the homeowner was denied recourse as the contractor had filed to dissolve their corporation over two years earlier. The court held that Minnesota’s corporate dissolution statute for corporations ended a contractor’s liability, even if the homeowner is not aware of the construction defect. As the homeowner was not able to maintain a case against the contractor, the homeowner was thereby prevented from maintaining an action against the insurer of the contractor’s corporation. Camacho v. Todd and Leiser Homes, 2005, 706 N.W.2d 49.

As water intrusion and the resulting mold infestation can develop slowly, depending upon the nature of the construction defect, Camacho is a disturbing case because it may impose a significant hardship on homeowners who do not become aware of their cause of action until it is too late for them to take action against the contractor. On a positive note, on May 16th 2006, Governor Pawlenty signed a bill that preserves homeowner warranty claims in the event of a Camacho-like situation.

We recommend a proactive approach to reducing risk associated with mold litigation. Knowing that insurance and warranties no longer offer adequate protection to the significant risks related to mold litigation, it is easier to justify spending time and funds on early remediation efforts. While remediation may not prevent a mold situation from becoming a lawsuit, remediation can also create evidence of compliance with an appropriate standard of care in the event of a negligence-based lawsuit. Individuals and companies in the construction industry should follow the lead of insurance companies and use contractual limitation to offset risk. Properly drafted and executed contractual limitations are well worth the time and effort in terms of saving future litigation costs. In the event that a claim arises and your company engages in significant remediation efforts, a properly drafted and executed release agreement is important to ensure that you receive the liability protection that you are purchasing through your remediation efforts.

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Home Remodeling Projects in Wisconsin – What the Law Requires in Home Improvement Contracts

If you are considering hiring a contractor to undertake a repair, remodeling, landscaping or painting project in your home, you should know about a little known 30 year old Wisconsin law called the Home Improvement Trade Practices Act. This law provides substantial protections and remedies for homeowners against contractors who might engage in misrepresentations or provide shoddy workmanship.

The Act casts a broad net over the types of projects regulated encompassing everything from painting a single room to installing a swimming pool. The Act prohibits a contractor from making false or misleading statements to induce a potential customer. In addition, it specifically sets forth a number of items that must be included in the contract. The legislature clearly understood that many home renovation projects are never reduced to writing which increases the potential for disagreements between the contractor and home-

owner. Accordingly, a home improvement contract in Wisconsin must be memorialized in a written contract containing all the material terms, e.g. the start and completion dates, types of materials to be used, the right to cancel the agreement within a prescribed notice period and a clearly stated price. To be valid and enforceable the contract must be signed by both parties. Finally, the contractor must provide written lien waivers from all contractors, subcontractors and materials suppliers prior to the time final payment is made. This is not an exhaustive list of the requirements of the Act but rather illustrates some of the prerequisites and protections available.

If a contractor fails to include these items the homeowner has substantial remedies available possibly including the right to cancel the agreement and seek the return of the funds advanced for the work or materials. Last, an aggrieved homeowner can receive twice their actual pecuniary loss

and an argument exists that attorney's fees are recoverable. In some instances a district attorney may also pursue criminal penalties and forfeitures. This does not mean that a homeowner can simply terminate a project and pay nothing in exchange if the customer received valuable goods or services, but rather that the Act provides significant leverage to the customer and attempts to "level the playing field" with contractors.

Homeowners should understand they have substantial rights and remedies available under the Act and contractors need to make certain their home improvement contracts and proposals meet with the requirements of the Act to ensure their agreements are enforceable under Wisconsin law.

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