



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

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We thank all of you who took the time to attend our June Business Symposium. We hope you enjoyed the speakers and learned some new ideas that can be used in your daily work. Wisconsin approved our program "Credit and Collections in Our Changing Economy" for 6.5 hours of continuing legal education credit and Minnesota 5.5 hours. When reporting MN please reference event code 121970. If you need assistance obtaining continuing credit for credit professionals or would like us to present a topic at your facility please call Naomi Baldwin at 612-339-1421.

now has attorney's admitted in Wisconsin, Minnesota, Ohio, Pennsylvania and Indiana.

Recently we helped a number of clients put in place protective finished product and commodity purchase, and customer agreements which provide the best position possible with respect to product liability, indemnification, pricing and other commercial issues. If you have questions concerning these agreements please call Ann Wilichowski at 612-339-1421.

needs. In many instances this makes scheduling meetings easier, enhances our working relationship and ultimately results in a better work product. For more information about this program please contact Gary Van Domelen at 608- 790-4695.

Successfully navigating software license agreements and IT consulting contracts can be a daunting task especially with a vendor who insists on using their form, but we have developed form agreements for all IT software, hardware and consulting needs. The forms are straightforward and vigorously protect the purchaser. For more information concerning WFJ IT legal support please contact John Schragger at 612-339-1421.

Here are some other recent Business Services Team highlights:

John Schragger was recently admitted to the Pennsylvania Bar. Congratulations to John! With this accomplishment our team

We have expanded our outsourced corporate counsel "on site" program from Wisconsin to Minnesota. As a part of this service our attorneys work on site with our clients at a preferred rate for a half or full day depending on the client's

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WFJ Hosts Business Symposium

On June 13, 2008 the Business Services Team of WFJ hosted its Second Annual Business Symposium at Windows on Minnesota on the 50th floor of the IDS Center in Minneapolis. The Business Symposium was a success as demonstrated by the positive feedback received from the attendees at the conference. We would like to take this

opportunity to share with you an overview of the day.

The Symposium began with a fascinating presentation from Professor John Coleman, PhD. Professor Coleman is a renowned author and speaker who served as an Economist in the International Finance Division of the Board of Governors of

the Federal Reserve System with Alan Greenspan and Ben Bernanke. He gave a captivating speech about the global economy and how, historically, countries grow and develop in different stages and as a result have shaped our global economy today. He discussed the United States' wealth accumulation and service pro-

ductivity and focused on how it was achieved, as well as its significance. Professor Coleman's background and experiences give him a unique scope of knowledge that he shared with us.

He was followed by Hajo C. M. Siemers, Manager Strategic Financial Planning of Trane, a Business of Ingersoll Rand, who discussed the challenges that U.S. companies face when negotiating contracts with companies from other countries. Mr. Siemers used entertaining cultural examples to demonstrate the different types of challenges that companies face when meeting, negotiating and finalizing contracts. Mr. Siemers shared his own global business experiences in negotiating contracts to show practical approaches he used in order to achieve mutually acceptable contracts. Mr. Siemers has been responsible for managing The Trane Company's European accounts receivable with a culturally diverse and geographically dispersed credit team which supports sales in 42 countries. He is currently overseeing the strategic planning process for The Trane Company in the Americas, managing acquisition activities for the region and leading projects in its finance arena.

The morning session ended with an informative presentation by Robert A. Judd. Mr. Judd is a WFJ Shareholder and an attorney with 35 years of commercial litigation and accounts receivable recovery experience with the firm. He discussed managing accounts receivable and related litigation during an economic downturn. He provided examples of preventative measures and legal suggestions to help protect the quality of a firm's receivables. He emphasized the importance of keeping credit applications and guarantees updated if relied upon by a company to extend credit.

The afternoon session of the Symposium was a live, formal interactive mock trial that involved a "lawsuit" brought by a supplier against a general contractor and its surety. Judge Alan W. Falconer, WFJ Chairman, presided over the matter and ruled on many evidence and other litigation issues raised by Mark O. Anderson, WFJ shareholder, as the Plaintiff's Attorney and Brad D. Hauswirth, WFJ shareholder, as the Defendant's Attorney. After testimony was given by the Plaintiff's Witness, Michael J. Dawson, of Petro Energy LLC., and the Defendant's Witness, Patrick L. Rieland, of Rieland

Consulting, LLC, the case was handed to the "Jury," the conference attendees, to deliberate the issues in the case. The Court Bailiff, Ann Wilichowski, watched as the jury deliberated to prevent any unjust activity.

The case addressed important issues such as:

1. The proper form of guarantees;
2. Who should serve as a guarantor;
3. General collection practices to follow; and
4. Evidence issues, including the credibility of witnesses when there is no supporting documentation

Once the "jury" deliberated and brought in their "verdict" there was time for a discussion and Q & A session. After some meaningful discussion, Court was adjourned.

We thank the many clients who attended this event and their participation. We are looking forward to the next Business Symposium and hope you will be able to join us.

WHEN TO RELEASE A MECHANIC'S LIEN AGAINST A NEW RESIDENTIAL PROJECT IN EXCHANGE FOR LESS THAN FULL PAYMENT.

Subcontractors and suppliers who have filed mechanic's lien claims against new residential construction projects are sometimes asked to release their liens for less than full payment. This situation is more common in a down market like the one we are currently experiencing. In the case of new residential construction involving model or "spec" houses, a down market may mean that the project isn't going to sell for an amount close to what the builder anticipated when the builder started the project. As a result,

the builder's profit margin on the job may disappear entirely. If the market is bad enough, the builder may fail to make a profit and be unable to get the construction mortgage and all the mechanic's lien claims paid in full. In this situation, the builder will often ask lien claimants to take a discount because "there isn't enough money to get everyone paid in full" and the builder needs the lien claimant to take a discount in order to close on a sale. This may or may not be true, and a lien claimant will need to do some leg-

work to find out.

After doing some investigation, a lien claimant may discover that the builder's discounted offer doesn't give any weight to the fact that the subcontractor's claim is secured by a mechanic's lien. The builder has a contractual liability to all of its subcontractors, regardless of whether they actually went to the trouble of preserving their mechanic's lien rights. As a result, in soliciting discounts, the builder may treat all subcontractors equally and

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give no weight at all to the fact that some claims are secured by liens while others are not. Just because the builder is trying to line up a voluntary sale doesn't mean that lien claimants should agree to be treated the same as unsecured claimants who failed to protect their lien rights. If the information collected shows that the builder's offer doesn't treat the lien claimant fairly, the lien claimant should use the information as leverage for obtaining more money.

The following are some steps that a lien claimant can take to get a handle on whether a discount on a lien claim is warranted or not:

1. Obtain copy of purchase agreement.

If the builder claims a purchase agreement has already been signed, ask the builder to provide a copy of the signed purchase agreement to you. This should confirm the identity of the buyer, the sale price, and the date of the closing. The lien claimant will want to make sure the sale is on the "up and up", and that the builder isn't simply selling the house to someone associated with the builder in order to shake off lien claims. The builder may consider this confidential information and refuse to provide a copy. At minimum, the builder should provide you with contact information for the title company handling the closing. Contact the closer to confirm that a closing has been scheduled.

2. Order a title report from a local title company to get an idea of what other mortgages and liens have been filed of record. Other parties who have filed mortgages and liens against the property will expect to get paid too. However, parties who haven't filed liens or mortgages may have no right to expect payment, especially lien claimants who have allowed their lien rights to expire. Knowing who isn't entitled to a share of the sale proceeds is as important as knowing who is.

3. Determine priorities of your mechanic's lien relative to other claims, such as construction mortgages, other mechanic's lien claims or other types of liens disclosed in the title report. In the event

of a foreclosure sale, all mortgage holders, mechanic's liens claimants, and other lien holders would be entitled to be paid from the proceeds of a foreclosure sale in a particular order of priority. If you are in the front of the line, you might expect to get paid in full. If you are at the end of the line, you may expect to recover less than the full amount due, if anything at all.

Rules governing the priority of construction mortgages and other types of liens vary from state to state. It is often the case that the construction mortgage against a project has priority over all mechanic's lien claims. However, this is not always the case. In Minnesota, the priority of a mortgage is ordinarily determined by the date the mortgage is filed at the courthouse, which is easily determined. In contrast, under Minnesota law the priority of *all* mechanic's liens is the date that visible improvements to the land started. For example, if the excavator started digging the basement before the date the construction mortgage was filed of record, all mechanic's lien claims (including claims of those who didn't start work until much later in the project) may have priority over the construction mortgage. This situation is the exception and not the rule, but when it happens the lien claimants have tremendous leverage to get paid in full since the mortgage holder has the most to lose in the event of a foreclosure sale.

In states where the priority of mechanic's liens is determined by when the project started, a lien claimant who wasn't on the job at the very beginning may have to do some work to get an idea of when the project started. Call the local building inspector's office to find out when the first building permit for the project was pulled, and when the inspector performed the first inspection. This information will at least give you a ballpark idea of the priority date of the mechanic's lien claims. If it looks like work on the project might have started before the mortgage was filed, more investigation may be warranted. The lien claimant or the lien claimant's attorney may want to contact the construction mortgage lender to request copies of any priority affidavits or

photos collected by the lender at the time the mortgage was filed. Lenders often have these documents prepared for the sole purpose of establishing the priority of the lender's construction mortgage over all mechanic's lien claims.

4. Ask for a copy of the settlement statement prepared by the title company handling the closing. The settlement statement will confirm the sale price and provide a breakdown of how the sale proceeds are to be distributed, including amounts to be paid to mortgages and mechanic's lien claims. Make sure that all mortgage and lien claimants are being treated fairly in relation to the order of priority of their respective claims, and that the builder isn't planning to divert sale proceeds to subcontractors whose lien rights have already expired.

If a lien claimant who is asked to take a discount can't expect to recover more through foreclosure of its lien, taking into account the expense a foreclosure lawsuit entails, then the lien claimant may as well consider releasing the lien for less than full payment. (Note: a lien claimant may want to preserve an unsecured claim against its customer for the unpaid balance of the claim, in which case the lien claimant should take special care with how the lien release document is worded). Knowing what to expect to recover in a foreclosure scenario requires some investigation and analysis, but if enough money is at stake the extra effort may be well worth it. A lien claimant may find that the discount requested by the builder isn't warranted at all, or that the lien claimant has some leverage to try to get significantly more money than is currently on the table.

For more information or questions, please contact William Hennessey at 612-339-1421.

WFJ TO DELIVER PRESENTATIONS AT NACM MEETING

The National Construction Group of the National Association of Credit Management (“NACM”) will hold its Fall Meeting in Downtown Minneapolis on October 15, 16, and 17, 2008. The Group will be headquartered at the Downtown Embassy Suites Hotel for the three day conference.

John Schragar, an attorney with WFJ’s Business Services Team, will be the speaker at a morning session of the conference on Thursday, October 16. Mr. Schragar will speak on the importance of the “Intelligent Use of E-Mail” as a way to avoid disputes and litigation.

WFJ attorneys and WFJ client representatives will present a “mock trial” during the afternoon session on

Thursday, October 16. The mock trial presentation will be a repeat performance of the live, formal interactive mock trial presented by WFJ and client representatives during the afternoon of June 13, 2008, during WFJ’s Second Annual Business Symposium held in Downtown Minneapolis. As noted in the article appearing on page 1 of this newsletter, the mock trial is based on a lawsuit brought by a construction supplier, as plaintiff, against a general contractor and the surety on a payment bond furnished for a public construction project.

Attendees at the WFJ Symposium held in June 2008 served as jurors for the mock trial. In October the attendees at the NACM Meeting will be divided into jury panels and will be given the

opportunity to select a jury foreman, deliberate the issues presented in the case, and render a “verdict” in open court. WFJ is pleased to have the opportunity to present the mock trial event to the NACM group.

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