

LEGAL FOUNDATIONS



Living Through a Home Renovation

By: Paul A. Sheridan

A home renovation opens up new opportunities to update and enjoy your house. You are starting a process that will make your house more of a “home”! A major renovation is an investment in the future needs of your family, and hopefully it adds value to one of your biggest investments. After deciding the scope of your project, working through budgets and picking a contractor, perhaps the most difficult aspect of a home renovation is living through the event itself. If it is a large enough project, you may elect to move out during the construction phase, but this adds expense and inconvenience, so most people elect to stay in the house and suffer through!

The construction part of the process should be planned out when picking your contractor, because you’re going to be sharing a lot of time together while the work gets done. Everybody is happy at the time that the contract is signed, but immediately thereafter, you are in conflict with each other. The homeowner tends to look at a project as an invasion of their family’s privacy, as subcontractors come in and out, bringing loads of materials, causing inconvenient systems shutdowns and making a mess. It is tempting for a homeowner to micro-manage the subcontractors and the schedule, wanting to modify and change the scope and selections previously agreed upon. Unlike new construction, where the contractor owns the house until the day of closing, and the prospective home purchaser may walk through on occasion, in a home remodel the homeowner sees everything! In a remodel scenario, the contractor wants to complete the project quickly, efficiently and without interference from the homeowner.

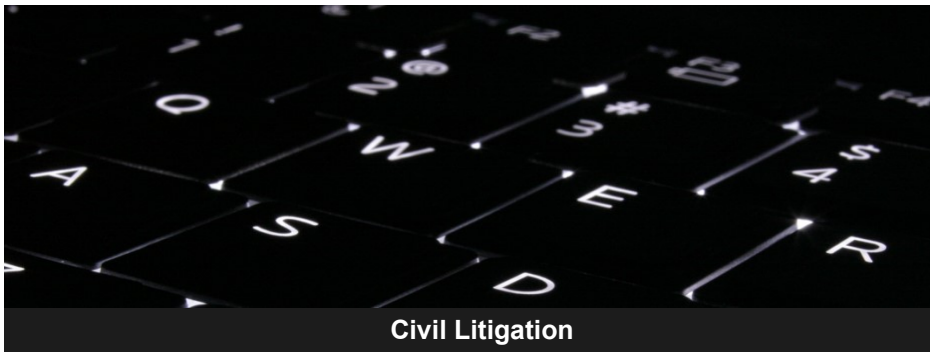
Here are a few suggestions for a smooth project:

1. Have a well thought out contract. Take time in the beginning of the project to work through the potential issues. A good contract has details relating to the scope of project, the scheduling of the project, payment terms **-Continued on Page 2-**



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Civil Litigation

Court Calendaring Conundrum

By: Nan E. Hannah

Ever wonder how a court decides what case to hear, when to hear it and what the hearing is about? The process is somewhat cumbersome and often unpredictable. The general rule of thumb is – if you want it to happen quickly it won't, but if you want to drag anchor and slow things down, then you will find yourself on a calendar almost instantly.

Trying to explain the court calendaring process would be tedious at best and outright boring at worst. Let it stand to reason that the practice within the courthouse occurs via two avenues – any party may request a hearing or trial date by communicating with the Trial Court Administrator (or Coordinator) also known as the TCA for the judicial district handling the case; or the TCA can schedule a hearing or trial on their own volition. The latter occurs often when a TCA feels that a case is languishing and generally is based upon case reviews looking for any large gaps in time in the progression of a case.

In explaining to clients or community groups how cases progress it might be helpful to consider the varying interests. The plaintiff, who started the court process, generally starts off wanting the issue resolved yesterday. The defendant, who was invited to the party, often wants to slow things down unless they feel wrongly invited. The court system is generally "graded" by the legislature based upon its efficiency in dispatching cases, so the court has no dog in the actual fight, but does have an interest in being fair and impartial while moving cases down the road. There is no way of getting around the fact that there are some lawyers in the profession who do not mind dragging a case out for any number of reasons.

So how does this translate for a business interested in having its grievances redressed and then moving on to more productive endeavors? If a matter is unopposed, then the Rules of Civil Procedure control the speed of getting to a judgment. The filing of a Complaint does not start the clock. The clock starts with service of a Summons and Complaint. Thirty days must elapse after service is accomplished before a default can be sought. That clock can be extended thirty additional days simply by a defendant requesting an extension of time (which is there for the asking). If a party files a response, then the ability of a lawyer to guess how long a case might last pretty much is out the window. From that point forward the Rules of Civil Procedure and the TCA hold the greatest sway in guiding the case's path through the system. In recent years, judges have become less willing to continue scheduled hearings and trials without good cause being given – and sometimes even when good cause is given.

Clients should consult with their attorney to determine what strategic decisions can be made and to gain some perspective as to the potential time table for a court case. The lawyer will not have a crystal ball to forecast with any kind of exactness, but can talk you through the process and prospects for a certain set of facts. The key is to realize that once a Complaint is filed with the court and an Answer if filed by a defendant, control of the timing of the case leaves the parties' hands for all intents and purposes. It is a reality of the existing system, no more and no less.

Renovation Cont.

and even has consideration of what happens if there is a conflict between the parties. Breaking up is something that should be contemplated in the beginning. In regards to scope, the more details that can be dealt with in the beginning, the better. Invest in an architect or engineer to have detailed drawings and specifications, and have a thorough list of finish details. How can you set a budget if you have not actually selected the manufacturer of the HVAC system you are installing, or the faucets, sinks, lights, trim work and the myriad of other selections required in a construction project? Discuss the different phases of the project. The homeowner should know ahead of time when different subcontractors have been scheduled. As far as the homeowner slowing things down, nothing slows down a contractor or destroys the sequencing of a construction project more than a delay in picking selections. Pick the final selections before the project starts!

2. Recognize that change orders are inevitable. However, they can be limited if you take time with the first suggestion, above. If there are change orders, they need to be in writing and agreed to between the parties. Recognize that change orders can blow a budget and prolong the construction schedule.

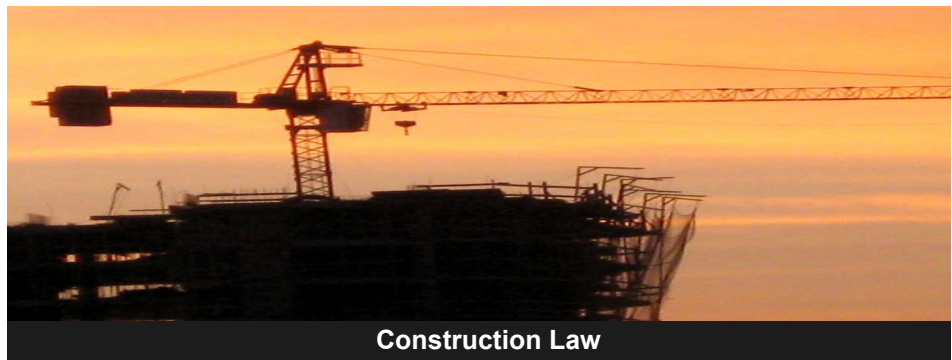
3. Discuss communication with the contractor before the project starts. Too much communication can slow a contractor down and lead to frustration on the part of homeowner when the contractor stops responding. Not enough, and the homeowner is left guessing at what to expect next. Discuss at the beginning the level and methods of communication that keeps all parties happy. Remember, good planning leads to success!

Nan's World Famous Buffalo Chicken Dip Recipe

Enjoy an office favorite!

- 1 lb. chicken breast
- 2 8-oz blocks cream cheese
- 1 bottle Franks Buffalo Sauce
- 1 c. Ranch Dressing
- 2 c. Shredded Cheddar Cheese

- 1. Cook chicken.
- 2. Set aside to cool, then shred.
- 3. Place chicken in skillet with cream cheese and warm until cheese melts.
- 4. Remove from heat, add Buffalo Sauce and stir until blended.
- 5. Add Ranch Dressing and stir until blended.
- 6. Place in greased 9x13 pan and cover with cheese.
- 7. Cover with foil and bake at 350 for 30 minutes or until cheese melts.
- 8. Serve with tortilla chips or veggies.



Unknown Exposure: Liquidated Damages in Construction Contracts

By: Cody R. Loughridge

An oft disputed, and occasionally misunderstood, provision in construction contracts is that of Liquidated Damages (commonly referred to as "LDs"). Generally speaking, Liquidated Damages refer to a sum of money which a party to a contract agrees to pay to the non-breaching party if they break a promise in the contract. In a construction setting, this is most commonly seen in the context of delays on a construction project. Said differently, the parties to the construction contract agree to a certain sum, generally calculated on a daily basis, that a breaching party will pay to the non-breaching party in the event of delay to the project. In theory, LDs provide a means for the parties to a construction contract to avoid expensive litigation in determining the amount of financial damage suffered by the non-breaching party as a result of the delay caused by the breaching party. However, LD clauses are often misapplied, misallocated, or miscalculated, resulting in additional disputes and costs to the parties.

The courts of North Carolina are willing to enforce Liquidated Damage provisions of construction contracts, so long as the liquidated damages to be assessed are not seen as "penalties" to the breaching party. This may seem counterintuitive, in that LDs are the sum that a breaching party pays to a non-breaching party, in the event of breach. However, the actual purpose is not to "punish" a breaching party but rather to establish, up front, the amount needed to reasonably compensate the non-breaching party for losses which it will likely incur as a result of the breach. In determining the enforceability of a Liquidated Damage provision in North Carolina, the Court will apply the following questions:

1) "Whether the damages which the parties reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty" AND

2) "Where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach or is reasonably proportionate to the damages which have actually been caused by the breach".

Because North Carolina courts are willing to enforce Liquidated Damages provisions (presuming the provision survives the two question test above) the parties to a construction contract should give careful thought when preparing or evaluating a LD provision. Things to consider should include: the reasonableness of any liquidated damage amount against the total sum of the contract, any uncertainties which could hinder full performance of contractual duties, the ability to ascertain the specific or actual amount of damage which would result from delay, the flexibility of the construction schedule and critical path, change order procedures as they relate to extensions of time, and the ability to accelerate performance of contractual duties.

If you have questions related to construction contracts or liquidated damage provisions, please feel free to contact our office.

Tax Season: Understanding the I.R.S.

By: Chad J. Cochran

My first job out of law school was situated two blocks from the White House, working in a cubicle for the Internal Revenue Service. I worked as a tax lawyer in the Exempt Organizations Group and reviewed organizations for a determination of tax exempt status. Pretty exciting, right? While working for the IRS was not exactly my childhood dream, it was an interesting job with both some good and bad qualities. There were some smart, hardworking people. There were some lazy people. There were times when I felt like the system was doing some good. There were times when the bureaucracy ground things to a halt. At the end of the day, the IRS is definitely one of a kind.



The IRS is massive. It processes over 200 million tax returns a year, not to mention all of the other reporting and applications it reviews. If you have an issue, it is always important to remember where in the organizational structure you fall. Half the challenge is finding the right person. Roughly 95,000 people work there. The IRS has four divisions: Wage and Investment (headquartered in Atlanta); Large Business and International (Washington DC); Small Business/Self-Employed (Maryland); and Tax-Exempt and Government Entities (Washington DC). If you find the key person, be polite and hope that they take interest in helping you to work through your issue. Red tape is tough. The employee holds the scissors.

If you cannot work things out on the ground level, it is important to understand the mountain of laws and regulations that govern the IRS. Congress passes tax laws which are compiled in the Internal Revenue Code (totaling approximately 3.7 million words). The tax laws are sometimes vague such that the Treasury Department issues further specifics which are contained in the federal tax regulations. The IRS then regularly publishes official tax guidance, such as revenue rulings. These sources provide the answers to the questions of both IRS employees and taxpayers. Hopefully, there is relatively clear guidance in these sources. If not, it can be a mess.

If a disagreement occurs, the IRS has a structure to deal with tax disputes. Attorneys and CPA's are regularly involved. Once the IRS issues its determination, taxpayers who disagree can move through an appeals process. Appeals are first handled through an internal administrative hearing. Further appeals move to the U.S. Tax Court in Washington, DC. (with the possibility of further appeal to the DC Circuit Court of Appeals and US Supreme Court). At the same time, rather than fight for years in court or avoid an IRS collection agent, the IRS allows settlement through an agreement called an Offer in Compromise. If you ever find yourself in this position, seek a fair settlement first and fight the monster only as a last resort.



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