LEGAL FOUNDATIONS

HSLC

The Art (and Implications) of the "Short-Pay"

By: Cody R. Loughridge

Consider the following scenario: Seller claims $100.00 is due for goods provided. Buyer claims that only $75.00 is owed. Buyer then mails a check to Seller for $80.00, marked "paid in full". What are the consequences if the Seller deposits the check? Has the Seller waived its rights to the $20.00 balance by accepting the check? In North Carolina, the answer is likely "yes". But, the North Carolina General Assembly recently passed legislation that may strengthen the Seller's claim to the $20.00 balance, so long as the Seller was proactive in noticing the Buyer.

The legal concept of "accord and satisfaction" is where a separate and secondary agreement is entered into wherein a Creditor/Seller accepts less than is legally due in order to discharge a debt. Once the new agreement (accord) and payment (satisfaction) is made, even though it is for less than the amount owed, the debt is wiped out. Said differently, the acceptance of the lesser amount, and payment thereof, replaces the original obligation. The accord and satisfaction is essentially considered a substitute contract between the Creditor/Seller and the Debtor/Buyer for settlement of the debt for a different amount than allegedly owed. That said, Creditors must be cognizant of attempts by Debtors to utilize this legal concept (intentionally, or otherwise) to discharge debts for lesser amounts. By way of example, a Debtor may attempt to sneak a payment through the Creditor's accounts receivable system for less than the amount owed.

Under the common law (as codified by the Uniform Commercial Code and the State of North Carolina) If a Creditor received a payment for less than the full amount owed, and said payment contained conspicuous language such as "paid in full" indicating that the payment was tendered as full satisfaction of the debt owed, the Creditor could either: 1) reject the check or 2) cash the check and accept the offer of the lesser sum. The Creditor would generally not be able to deposit the check containing the conspicuous language, and then make a claim for the balance. It must be noted that in order for the Debtor to prevail and successfully argue that the balance had been discharged, the Debtor would have to show that the Debtor, in good faith, tendered the check or payment containing the conspicuous language, to settle a bona fide dispute between the parties. **-Continued on Page 2-**

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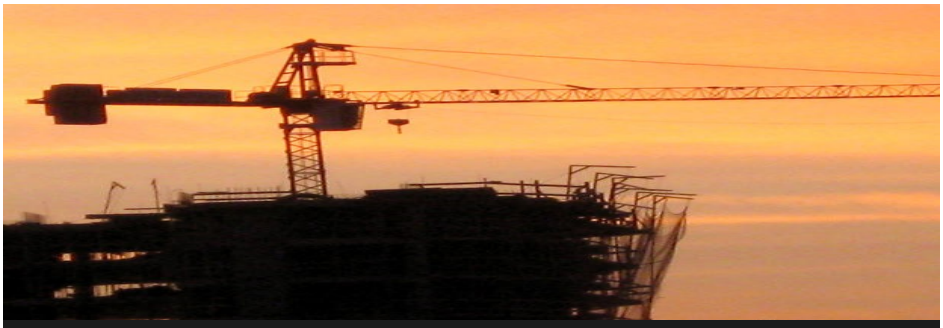


Construction Law

Impact Fees Suffer Another Setback...Is it Good for Developers?

By: Paul A. Sheridan

A series of recent lawsuits that have resulted in the North Carolina Court of Appeals and North Carolina Supreme Court limiting the ability of municipalities to assess impact fees as a part of a zoning ordinance. Impact fees are assessments upon the owners or developers of land made by local governments to recoup some or all of the capital costs of public facilities needed to serve new developments. Impact fees, rather than general tax revenues, are regularly used to finance new roads, utilities, parks, schools, and other public facilities (such as city buildings, fire and police stations) that must be provided to service new development. Many states allow the use of impact fees, and while local governments in North Carolina have the authority to impose fees for a variety of "public enterprise" functions, such as the provision of water and sewer services, this is not a license to charge impact fees to fund all infrastructure deficiencies. Zoning and subdivision statutes also allow regulations to require fees to address specific public facility needs generated by the development, such as internal roads, utilities, parks, and community service facilities. G.S. 153A-341 and 160A-383 grant cities and counties the authority to regulate development "to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements." These statutes provide municipalities authority to implement regulations necessary to assure adequate public facility requirements.

The authority to regulate on the basis of adequacy of public facilities is not, however, the same as authority to impose fees to address inadequacies in facility capacity. In many parts of the country impact fees, rather than general tax revenues, are used to finance the new roads, utilities, fire stations, parks, schools, and other public facilities that must be provided to service new development.

Recent court decisions have established a strong precedent that North Carolina cities and counties lack the statutory authority to impose school impact fees. In *Durham Land Owners Association v. County of Durham*, 177 N.C. App. 629, 630 S.E.2d 200, review denied, 360 N.C. 532, 633 S.E.2d 678 (2006), the court held counties do not have implied authority to impose school impact fees. The court held provision of schools is a general governmental obligation rather that a service provided to an individual for which a fee can be charged.

On August 19, 2016, the North Carolina Supreme Court took it one step further in the *Quality Homes v. Town Carthage*, 2016WL 4410716, case. In the lower court ruling, the Court of Appeals held that the Town of Carthage possessed authority to charge "impact fees" for water and sewer services. **–Continued on Page 3-**

"Short-Pay" Cont.

Recognizing the implications and ramifications for Creditors/ Sellers of potentially and inadvertently waiving claims for payment, the North Carolina General Assembly recently passed Senate Bill 807 which provides the Creditor/Seller the ability to institute safeguards against potential accord and satisfaction waivers. Applicable to negotiable instruments (read: checks) tendered on or after October 1, 2016, a Creditor/ Seller organization can now protect against potential accord and satisfaction issues by, within a reasonable time before the tender of a payment, sending a statement to the Debtor/Buyer that statements related to disputed debts, including any instrument tendered as full satisfaction of a debt, be sent to a specific, designated person, office or place. Then, if the instrument or check is not sent to that designated person, office, or place, the balance is not considered waived. The motivation behind this legislation is to ensure that an organization does not inadvertently waive claims for sums due, by allowing for the specific designation of a person or office in the organization to knowingly accept a payment for a lesser sum.

Based on this new legislation, "best-practices" may now dictate that terms and conditions of sale include the designation of a specific person, office, or place where a buyer/ debtor is to direct any statements related to disputed debts or any instruments tendered as full satisfaction. This would allow the proper vetting of whether or not to accept a payment for less than the amount contractually owed, rather than inadvertently accepting a lesser sum and thereby waiving claims to any balance. If you have any questions regarding accord and satisfaction, or other contractual terms, please contact our office.

Impact Fees Cont.

The town's position was that the General Assembly had authorized it to charge water and sewer impact fees through the public enterprise statutes, which authorized the Town to establish water and sewer systems in the town's discretion and to charge fees for these systems. In reversing the lower court, the Supreme Court found that these statutes empowered the town to charge fees only for the "contemporaneous use of its water and sewer systems", and not fees for future use of these systems, and thus the town lacked "the power to charge for prospective services."

While at first glance these decisions appear to favor a developer seeking to plan a new development, by reducing initial development costs, consider whether these decisions could stifle long term development in smaller municipalities that have not appropriately planned and allocated tax revenues towards infrastructure improvement? Development approval requires the availability of essential public facilities and denial where the project would lead to a degradation of facilities or services.

Judicial Elections 2016

By: Nan E. Hannah

Politics are such a touchy topic that generally non-political organization's newsletters stay far, far away from it. But, what do you do if you are a law firm and the next election includes a number of judicial races the outcomes of which stand to impact your clients for years to come? For this law firm, the answer is to use the newsletter as an avenue to educate readers about what makes a "good" judge and what the readers should do in terms of their own homework before marking your ballot. This firm does not view its role as telling anyone for whom they should vote, but rather, what should impact your decision.

Baldly put, the party of the candidate is the least important guideline for selecting a judge. Fortunately or unfortunately, the North Carolina General Assembly made the decision this year to re-institute party designations in some judicial races. That some will use that as their sole means of deciding is dis-heartening.

So, what should you look for in your judicial candidates?

- Temperment – how they will act on the bench – even keel; firm but with compassion; decisive, tempered with empathy; attentive and curious.

- Experience – Education matters, if a candidate does not reveal when and where they went to college/law school, that should raise a flag; Work Experience – where; what areas of practice, how long, what is their reputation in the legal community – This bullet point is tricky because the schools and majors do not matter in most cases, but can be revealing. Work experience is another area fraught with pitfalls on the surface. There are lots of ways to garner experience and time is but one. A very intelligent/intellectually-gifted person may be "bench ready" early in a career, but most folks need age to acquire wisdom and knowledge. Ask questions of those who have not practiced long but make bold claims of their abilities.

- Work Ethic – North Carolina is blessed with a large number of judges who work incredibly hard. This is not a nine to five job and time on the bench can be deceiving given the amount of research and writing most judges do. Ask questions and look at past history (job and volunteer) to make certain your candidate is willing to put in the time.

- Political party – This may give some indication of the candidate's personal political philosophy and on some hot button legal issues may tell you which line of cases they would follow, but (and this is a huge BUT), if this factor tells you how you think a judge will decide any particular case, then it probably tells you the candidate you do not want to elect. If you find yourself in front of this judge, you want to know that the judge has pledged to be independent from outside influences, fair, unbiased, has no pre-conceived ideas, and will consider only the facts of the case as they are presented and the case law and statutes which are applicable. If either party political philosophy or personal opinion is going to color the outcome, then the candidate has run for the incorrect branch of government and fails the first consideration in this list.

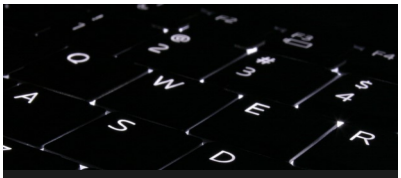
RESOURCES FOR VOTERS:

For trial court judges: http://www.ncbar.org/public-resources/elect-nc-judges/

For all judges: Ask a lawyer or several lawyers.

Charging Orders: A Useful Tool to Collect Money Held in an LLC

By: Chad J. Cochran



Civil Litigation

Sometimes bad things happen to good people. But the reverse is also true. Sometimes dishonest people receive unfair rewards and windfalls. When it comes to the latter situation, North Carolina judgment laws provide a few useful tools: supplemental examinations, execution sales, orders in aid of execution, accounts receivable orders, etc. In response to the debtor who tries to hide assets in a LLC, North Carolina law provides an interesting remedy - the charging order.

When we "win" a lawsuit on behalf of a client, the court often gives us a money judgment (a legal document ordering the payment of money that is owed). The defendant now legally owes the money. If they can pay the judgment, they should. If the debtor cannot pay the judgment, the law provides defendants with a long leash (by way of property exemptions) to continue living their lives. Unfortunately, dishonest defendants often attempt to conceal their assets rather than pay their bills. A common asset concealment tactic is to shield assets inside the structure of a LLC.

If you have a judgment against John Doe and he owns the stock of a corporation, you can move to seize the stock. If you have a judgment against John Doe and he owns a LLC, you cannot seize that LLC ownership interest. Instead, a judgment creditor may pursue a charging order. (See *Herring v. Keasler*, Court of Appeals 2002). N.C. Gen. Stat. § 57C-5-03 allows the court to "charge the membership interest of the member with payment of the judgment with interest." In practice, this language means that the court orders the LLC to stop distributing any money to its owner.

In certain situations, the charging order freeze can hamstring a debtor's finances and force settlement/payment of the underlying debt. If the judgment debtor takes the LLC money anyway (in violation of the charging order), they can be found in contempt of court. I have seen a judgment debtor carried away in handcuffs after violating a charging order. The debtor made a jailhouse call and quickly came up with the money that time.

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