LEGAL FOUNDATIONS

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NORTH CAROLINA UPDATES CONSTRUCTION LIEN STATUTES: H707—LIEN AGENT NOTICE REVISIONS

By: Chad J. Cochran & Nan E. Hannah

The North Carolina Land Title Association (NCLTA) played a large role in the 2012 updates to North Carolina's construction lien statutes, and the NCLTA was again active in shaping 2017 revisions. The 2012 updates benefited title insurance companies by creating a new Lien Agent process. The Lien Agent process was designed to largely remove the issue of a "hidden lien". Title companies sought to eliminate most instances where: (i) a materialman would provide building materials to a job site, (ii) a real estate closing would occur upon the underlying project, (iii) a materialman would lawfully file a mechanic's lien for unpaid project work, and (iv) the materialman would hold a superior title claim due to relation back provisions contained within North Carolina's mechanic's lien statues.

In light of the current state of the law, North Carolina suppliers and laborers are well advised to file Notices of Lien Agent on the construction projects for which they provide labor or materials.

In 2017, what was anticipated to be a "non-construction industry" legislative session in North Carolina, took a turn when the NCLTA again showed interest in addressing North Carolina lien law. The NCLTA prompted the introduction of House Bill 707 seeking to "clean up" some challenges they perceived in the 2012 session's bill creating the Lien Agent process. Specifically, they identified the need to have trades and suppliers note on LiensNC.com when they have received final payment on a project.

The original wording of the legislation was benign, not giving rise to particular comment or concern, but the insertion of the word "shall" changed all that. The "shall" put a burden on subcontractors and suppliers to withdraw their notices to lien agent upon receipt of final payment for a specific project. The bill contained no consequences for failure to take the required action . The law abhors a vacuum such that the National Association of Credit Management (NACM) and other groups immediately interjected themselves into the conversation to avoid the law of unintended consequences. - Continued on Page 2-

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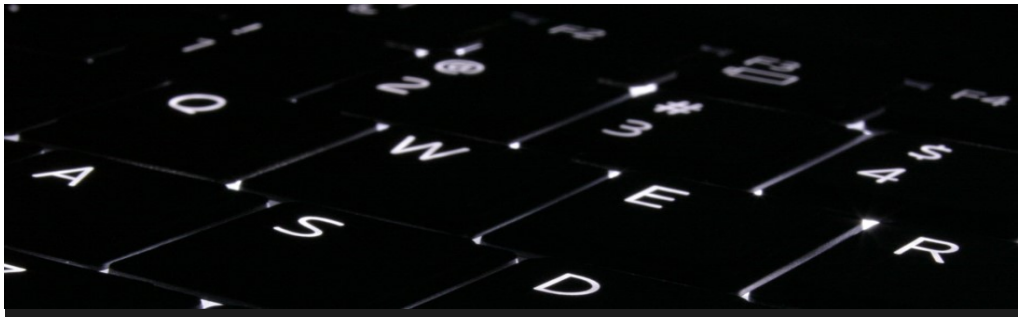


Business Law

CREDIT CARD PROCESSING FEES: WHAT ARE YOUR OPTIONS

By: Nan E. Hannah

For many years, credit card agreements forbade merchants from passing along the cost of accepting credit cards. With airline miles, cash back, and other incentives for consumers to use credit cards, merchants are experiencing ever increasing fees as more and more consumers use cards for even their smallest purchases. Not surprisingly, that led to litigation several years ago. Resolution of that litigation resulted in two new terms and options for merchants in most states.

Let's start with the "most states" comment. Ten states (CA, CO, CT, FL, KS, ME, NY, OK, TX and Puerto Rico [yes, we know that is not a state]) have laws that make surcharges illegal. Those laws are currently under attack as being unconstitutional, so they may disappear in the not too distant future. Except for those states, and recognizing that we are discussing credit cards, not debit cards, the rest of this article gives you some idea of what you may consider as a merchant.

Two definitions are key: (1) Surcharge (or checkout fee) is an additional fee charged at the time of checkout for use of credit cards as opposed to some other form of payment; (2) Convenience Fee is a fee charged for the "privilege" of paying for a product or service using an "alternative payment channel" or method that is not standard for that merchant. An example of a convenience fee is a business which generally handles only cash or checks, but as an accommodation creates a portal for credit card transactions and incurs an added expense by doing so.

For Surcharges: The first thing you will need to have handy is your merchant agreement with the various credit card companies. Those agreements contain provisions which set out how a surcharge may be assessed. Generally, these are flat fees, not percentages of the purchase. A fairly common thread is that you will need to notify the credit card company (Visa, MasterCard, AmEx, Discover, …) a minimum of 30-days in advance of the fee taking effect. You may only collect surcharges on credit cards, not debit or prepaid cards. You must disclose the fee as a "merchant fee" and must post notice (online or in the store) and on the receipt which is generated.

For Convenience Fees: The rules are essentially the same. They are just not governed by the credit card companies since this is not about using the credit card, but rather is about the use of an alternative payment method not usual to the merchant's business model. The key here is that consumers may react poorly to the assessment of a convenience fee. The prime example occurred back in 2011 when these fees were first permitted. Verizon announced a $2.00 per transaction charge for customers using credit cards. There was a massive volume of complaints which resulted in Verizon rescinding its fee. Then there is the question as to when an "alternative payment method" ceases to be alternative? There is no answer to that question, yet.

The bottom line is that accepting payment by credit card comes at a cost for merchants, but it also provides convenience for customers and greater assurance of payment for the merchant. Therefore, there are many elements to be balanced in making a decision on surcharges. Just remember to take the necessary steps if you decide to go that route.

LIEN AGENT (Cont.)

Without stated consequences, it would have been up to creative lawyers to posit to the courts what the legislature intended to be the consequence of failure to withdraw the notice. That was an unacceptable risk.

After extensive discussions and wordsmithing, the current version of H707, which can be found at http://www.ncleg.net/Sessions/2017/Bills/House/PDF/H707v3.pdf, requires the withdrawal of a notice only after a sub or supplier has "confirmed" receipt of final payment. So, until someone waves a flag (requests a final lien waiver or otherwise notifies a sub or supplier that a payment was the final payment) there is no duty to withdraw a claim. It should be noted that the intent of this legislation is to make withdrawing a notice as simple as clicking a box on the page on liensnc.com where you posted your Notice to Lien Agent.

The legislation is not perfect and there are risks to prematurely withdrawing a notice. One benefit of the legislation may well be that the increased cost to owners for designating a lien agent is designed to help fund upgrades to Liensnc.com which may well include the creation of an "archive" such that projects which have been completed can be removed from the main website, thereby de-cluttering the site.

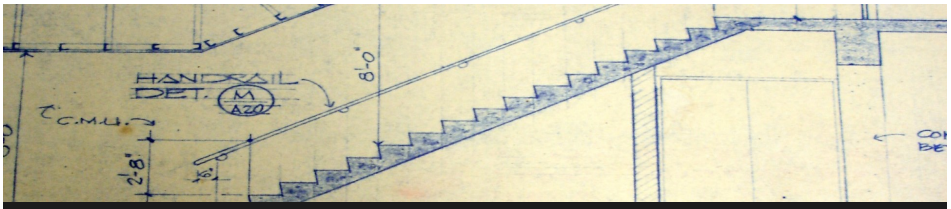
Our law firm regularly conducts client seminars concerning these topics. Please reach out to our office if interested, or if you have questions or comments about H707.

POWER OF ATTORNEY (Cont.)

Article 2 of the Act includes provisions regarding the general and specific authority that a principal may give an agent in a power of attorney, such as authority involving gifting, changing beneficiary designations, real property, tangible personal property, stocks and bonds, banking, taxes, handling claims and litigation, among others. In addition, Article 2 addresses concerns that an agent's authority might be used to dissipate the principal's property or alter the principal's estate plan by listing specific categories of authority that cannot be implied from a grant of general authority—they can only be granted by express language in a POA.

Article 4, entitled “Miscellaneous Provisions”, clarifies the relationship of the Act to other law, giving consideration for the need to promote uniformity of law with other states, and clarifying the effect of pre-existing powers of attorney.

The newly enacted law is designed to clear up what was formerly a confusing area of the law. If you, a family member or someone you know has a POA currently, or is planning on setting one up, it would be a good idea to review the new law, so that the POA can be used as the parties intend.



NC NEW LAWS—2017

NEW YEAR, NEW YOU, AND NEW LAWS.

By: Cody R. Loughridge

As happens every year, as North Carolina puts 2017 in its rear view and turns the calendar to 2018, several new laws have gone into effect. In total, some 20 new laws began affecting North Carolinians as of January 1, 2018. A brief look as some that may affect you:

Session Law 2017-10: Regulatory Reform Act of 2017-2017: Changes include clarification on franchisee \ franchisor employee status, modifications to the North Carolina State Building Code pertaining to private drinking wells, and changes to the North Carolina general contractor licensing application process.

Session Law 2017-90: Veteran-Owned Small Business/Annual Report: Requires the North Carolina Secretary of State to compile summary information about the number of veteran-owned small businesses and the number of service-disabled veteran-owned small businesses reporting in the State of North Carolina. To do so, the annual report form from the Secretary of State will now permit the businesses to voluntarily indicate whether or not they are veteran-owned. The purpose is to “assist the State in documenting the importance and impact of the State’s military population in our communities on our State and local economies”.

Session Law 2017-95: Driver Instruction/Law Enforcement Stops: This law mandates that the driver education curriculum shall now include instruction on law enforcement procedures for traffic stops, which will be developed by the State Highway Patrol, North Carolina Sheriff’s Association, and the North Carolina Association of Chiefs of Police. The new curriculum will provide a description of the actions that a motorist should take during a traffic stop, including “appropriate interactions with law enforcement officers”.

Session Law 2017-130: Building Code Regulatory Reform: The law makes various changes and clarification to the statutes governing the creation and enforcement of building codes including: when or whether certification by a licensed architect or engineer is necessary for components of a North Carolina dwelling, requiring each inspection department to implement a process for informal internal review of inspection decisions made by the department’s inspectors, and changes to the hearing process before code enforcement agencies under the Building Code.

Session Law 2017-153: Uniform Power of Attorney Act: This represents a wholesale change to the laws governing Powers of Attorney in North Carolina. North Carolina has now adopted the Uniform Power of Attorney Act as drafted by the National Conference of Commissioners on Uniform State Laws, albeit with some slight modifications. (See more complete discussion on page 4)

Session Law 2017-214: Electoral Freedom Act of 2017: This law was initially vetoed by Governor Cooper on October 9, 2017, before being overridden by the North Carolina General Assembly on October 17, 2017. This law changes the definition of “political party” in North Carolina by reducing the number of signatures required for the formation of a new political party and for unaffiliated candidates to obtain ballot access eligibility. The law also authorizes the establishment of political parties recognized in a substantial number of states in the prior presidential election and eliminates the judicial primaries for the 2018 general election.

CHANGES TO NORTH CAROLINA'S POWER OF ATTORNEY LAWS HAVE TAKEN EFFECT

By: Paul A. Sheridan

Contract Law

On July 20, 2017, Governor Roy Cooper signed the bill enacting the North Carolina Uniform Power of Attorney Act (the "Act"). The Act repeals much of the older existing law dealing with powers of attorney (POA), and seeks to clarify and add uniformity to POA utilized for most personal business transactions. The Act is modeled upon the Uniform Power of Attorney Act drafted and approved by the National Conference of Commissioners on Uniform State Laws, although it contains numerous tweaks and modifications to the Uniform State Laws. The bill became effective January 1, 2018.

Generally speaking, a POA is a document that allows you to appoint an agent to manage your affairs if you become unable to do so. They are useful when a person cannot handle certain affairs due to other commitments (think travel) or health issues. Selling property (personal and real), managing real estate, personal and family maintenance, and handling business transactions are some of the common matters specified in a durable POA document. This change does not impact healthcare powers of attorney. A reminder that all POAs are not created equal such that it is imperative that you consult an attorney to insure a POA is effective for your purposes.

It is important to understand that, under the previously existing law, a POA had to be filed to be accepted and even then, third parties could question the authority of your agent. The Act amends the North Carolina General Statues by adding Chapter 32C. "Power of Attorney" is defined by § 32C-1-102 as "a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used." In the Act, Article 1 of the Act outlines definitions and general provisions, including applicability, durability, execution, and validity of the power of attorney. A POA created pursuant to Chapter 32C is "durable," meaning it continues in effect unless specifically revoked or otherwise limited. The previous act provided that a POA was not durable unless very specifically set out as such and thereby too often created confusion. –Continued on Page 3-

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