LEGAL FOUNDATIONS

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Politics, Judges, May and November

By: Nan E. Hannah

If you are like most folks this time of year, you have already seen more television ads, heard more on the radio, and had more robo-calls than you can stomach – and the primary election has only just come and gone. We still have the general election to follow. In all the hue and cry over the "big races," it is easy to lose sight of the fact that a number of judicial branch offices are on the ballot. And, who cares about judges anyway? We would suggest that you should care more than you may think. Understanding why you should care comes first as too many people assume the courts do not impact their lives unless someone sues them or they want to sue someone.

Let's start with the Clerk of Superior Court's office. This critical office is up for grabs in contested elections in Wake, Guilford and Mecklenburg, as well as many other counties across the state. What does the Clerk of Superior Court do? This office oversees all filings, criminal and civil, handles estate administration, foreclosures, adoptions, competency hearings, and collects massive amounts of funds in the form of fees, fines, and other payments made through the court system. The Clerk also holds judicial powers but in a number of counties, the Clerk is not a lawyer.

The two trial court levels, District and Superior, have numerous judges running in contested races. The District Court judges hear criminal matters, family law matters including divorces, custody and equitable distribution, and civil matters up to $25,000.00. Superior Court judges hear criminal matters, including appeals from District Court and felonies, as well as civil disputes with amounts at issue in excess of $25,000.00; they also hear appeals of rulings made by administrative agencies and administrative law judges. Candidates for these seats need to be willing to make quick, accurate decisions; they need a thorough understanding of the rules of criminal and civil procedure; the best of these judges have practice experience in more than one practice area as they rotate between civil and criminal courts and face questions of law in every realm imaginable. A good judge exhibits a blend of experience, wisdom, curiosity, maturity, decisiveness and a willingness to learn. These are high pressure, rapid fire positions with high stakes in terms of the outcome. - **Continued on Page Three** -

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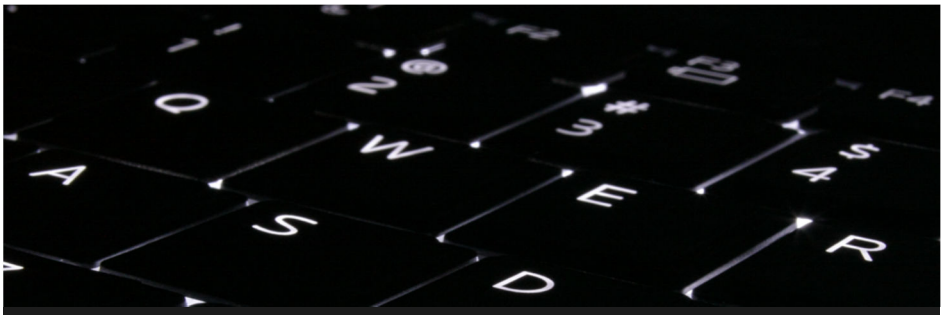

Business Law

Contracts in the Electronic Age

By: Cody R. Loughridge

Acknowledging the changing times back in 2000, Congress first passed the Electronic Signatures in Global and National Commerce Act (also known as "E-Sign") for the purpose of validating electronic contracts and signatures. The federal E-Sign legislation is the body of laws that govern interstate and foreign commerce. Following suit, North Carolina has adopted its own version of electronic signature legislation, the Uniform Electronic Transactions Act (also known as "UETA"). UETA is the collection of laws that permit and govern electronic contracts and signatures between private parties in North Carolina. See North Carolina General Statutes Chapter 66, Article 40.

What Legal Effect is given to Electronic Documents in North Carolina?

UETA allows for the use of electronic documents and electronic signatures where the parties to a transaction agree to use electronic means. Whether parties to the transaction "agree" to conduct a transaction by electronic means is determined from the context and circumstances, including the parties' conduct. When parties do agree (through express agreement or conduct) to conduct a transaction through electronic means, the parties cannot thereafter refute the enforceability of a contract simply because it is electronic. UETA's authorization to utilize electronic contract documents also extends to electronic signatures to contracts, so long as the parties agree. UETA is elective and does not require that any particular documents or signatures be electronic; utilization and protection under UETA is purely elective. In order to be given full legal effect, the records, contracts, or signatures must be able to be retained by the recipient (i.e. printed or stored electronically) and must be able to be accurately reproduced at a later date. If the sender inhibits the ability of a recipient to store or print an electronic contract, the electronic contract is not enforceable against the recipient.

What Types of Contracts or Signatures Can Be Electronic in North Carolina?

UETA permits the use of electronic records and electronic signatures in nearly all transactions where the parties to the transaction agree to the use of electronic documents. Excepted from North Carolina's UETA statute are wills, codicils or testamentary trusts. It also precludes the use of electronic documents related to the cancellation of utility services, notices of default, repossession, foreclosure or eviction, notices of the cancellation of health or life insurance benefits and documents related to the transportation of hazardous materials.

What about Notarized Documents?

In those instances where the transaction requires a notary, acknowledgment, verification or oath, the requirement is satisfied if the electronic signature of the person authorized to perform the notarization or verification, together with all other information required by applicable law, is attached or associated with the signature of record.

When is an Electronic Contract Effectuated?

An electronic document qualifies as "sent" as soon as it is addressed or directed to the recipient (i.e. when an e-mail is sent). The electronic record qualifies as "received" as soon as it enters the information processing system of the recipient, so long as it is in a form that the recipient can receive. This does not mean that the recipient needs to be aware of receipt nor review the document, so long as the parties previously agreed to the use of electronic transactions.

In the end, it is only in rare circumstances that the citizens and businesses of North Carolina are prohibited from conducting their transactions electronically. If you have additional questions relating to the formation and enforceability of electronic contracts or signatures, please contact our office.

Welcome Kendall

HSLC is thrilled that Kendall Rush recently joined the team as a paralegal. Kendall is a ball of energy who is originally from Raleigh, NC, lives in Morrisville, and has worked as a paralegal in Raleigh since 2012. Kendall graduated from Appalachian State University in December 2010, earned a paralegal certificate from Meredith College in May 2012, and became a state certified paralegal in May 2013. Welcome aboard.

Election Cont.

The two appellate courts, the NC Court of Appeals and the NC Supreme Court, are deliberative courts, but also generally courts of last resort. The Supreme Court's decisions are final with a few, very rare, instances where a case could go from there to the United States Supreme Court. In recent years, the NC Supreme Court has taken fewer and fewer cases unanimously decided by the Court of Appeals which makes the COA unanimous decisions final and increases the number of times that the Court of Appeals is the final arbiter of a dispute. These judges do not hear live testimony. They review decisions made at the trial court level and evaluate for errors in the process, the interpretation of the law, and in some cases in evaluation of the facts. These courts require analytical thinkers who are willing to put in the time and effort to research matters and draft thoughtful, thorough opinions. These opinions become the "common law" on which much of our legal system is built. These judges are bound to a large extent by what has been decided before and applying those opinions to current cases so that our society can depend upon consistency in the interpretation of the law. They interpret law and determine the constitutionality of laws.

Judicial races are non-partisan for a reason. A judge should be selected on the basis of his/her demeanor, experience, education, and willingness to set aside all things political and interpret the law based upon the intent of the legislature, the contents of the U.S. and North Carolina Constitutions, and the body of the common law. Politics are an inevitable force in the world, but if injected into the judicial process, they risk damaging the reliability and predictability that are the core functions of the judiciary. Educate yourself before you vote.

Contract Law

Utilizing Contract Negotiation and Formation

By: Paul A. Sheridan

This article is part two of a continuing series identifying key construction clauses. Negotiating and drafting any type of commercial or transactional contract, whether it be an open account agreement or construction contract, is an exercise in risk allocation. In order to allocate that risk, the individual reviewing the agreement must first be able to identify and understand the risks likely to be encountered. The ability to do this effectively, is driven not simply by a familiarity with construction law, but by a fuller understanding of your business operations and the project itself.

Through the process of negotiation and the inherent communication chains created in a negotiation, all participants are better informed at the outset of the project, therefore the contract will likely better serve the parties, and the odds are enhanced that the participants' anticipated benefits and goals from the transaction will be met. As a direct result of time spent at the front end understanding the contract terms and risk allocation, everyone should benefit by the end of a project. Here are a couple of typical clauses found in construction contracts that deserve special attention and focus during the contract negotiation process:

NO DAMAGE FOR DELAY CLAUSE

One of the great risk allocators in the construction industry is the no damage for delay clause. The contractor in bidding the project must carefully examine the contract documents to determine whether or not there is, in fact, a no damage for delay clause contained within the terms of the contract. If there is one, the contractor must bid the contract with knowledge that such a clause exists and it will have the burden of proof to get around the no damage for delay clause. Customarily, this provision provides that while the contractor or subcontractor is not entitled to a claim for delay damages, it will be entitled to an extension of time. Many times the contract will provide that the contractor is entitled to no damage for delay, but, on the other hand, the owner or contractor is entitled to liquidated damages for any delay caused by the contractor or subcontractor.

CONTRACTORS REVIEW OF DOCUMENTS

In general, owners are responsible to contractors for errors and omissions in the construction plans and specifications. As a result, owners frequently seek to insert exculpatory clauses in contracts shifting the risk of defects in the plans and specifications onto contractors or subcontractors. In general, for the exculpatory clause to be enforceable, it must be sufficiently specific so as to put the contractor on notice that he oshould not under any circumstances rely on the accuracy of the plans and specifications to prepare an estimate for the cost of the work to be performed. Many contracts provide that the contractor must inform the owner and seek correction of or clarification of any document deficiencies such as errors, omissions or inconsistencies and to do so prior to proceeding with the work. In the event that the contractor then proceeds recognizing such error, inconsistency or omission and fails to report it to the owner or architect, the contractor will then be responsible should the installation prove defective.

Fourth Circuit Upholds Lien Rights in Bankruptcy

Construction Law

By: Chad J. Cochran

For years, it was common practice in North Carolina to file liens against a construction customer, contractor, or developer who filed bankruptcy rather than pay its subcontractors. In 2009, a pair of judges issued opinions holding that this common practice was unlawful. The ruling shocked construction attorneys throughout the state, and a united legal front ensued. Three years after the initial decisions, United States Bankruptcy Judge Randy Doub issued a separate ruling in the *CSSI* bankruptcy which reached the opposite conclusion and permitted post-bankruptcy mechanic's lien filings. The bank in *CSSI* appealed the ruling and embarked on a course which resulted in a decision by the second highest federal court in the land. Lien claimants prevailed.

Nan E. Hannah represented several lien claimants in the appeal which moved through three levels of federal court, - bankruptcy court, district court, and the court of appeals. The lien claimants consistently argued that post-petition liens do not violate the bankruptcy automatic stay as the lien arises upon first delivery which occurs before a bankruptcy is filed. Alternately, the bank argued that a mechanic's lien arises only at the time it is filed with a public entity and that a post-petition lien filing therefore violates the bankruptcy automatic stay. In the end, the Fourth Circuit Court of Appeals sided with the lien claimants, holding that post-petition mechanic's liens may be filed without violating the automatic stay. The odds of appeal to the United States Supreme Court are very low, so this decision and recent changes to the lien statutes cement the historical practice of the North Carolina construction bar. Post-petition lien filings are allowable by proper lien claimants as the underlying lien rights come into existence upon first performance and are perfected by the serving and filing of the lien with the appropriate public entity.

Translation: Lower tier subcontractors and suppliers who have provided labor and/or materials to a project retain the right to file their lien, even after a contractor or subcontractor files bankruptcy. The decision provides some protection to a lien claimant who waits a bit too long to serve a mechanic's lien. Sooner is still better than later when it comes to filing liens against financially strapped parties, as project funds may flow away from the job until liens are served.

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