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Whistleblower Claims are Increasing - Beware!

By: Paul A. Sheridan

In the past, many whistleblower claims arose out of simple revenge. A fired or aggrieved employee seeking retribution against his employer for a termination or demotion. Today, however, people are reporting complaints at an ever-increasing rate under a variety of laws and statutes that encourage claims.

The history of whistleblowing law is interesting. Whistleblowing started with the enactment of the False Claims Act, in 1863. It was implemented to catch cheating defense contractors by imposing liability on companies and individuals that were defrauding the government through a system of rewarding a reporting citizen with a percentage of the recovery. Through 1959, the United States had this one whistleblower law. Now, there are 60 or more such state and federal laws on the books imposed by various agencies. The Occupation Safety and Health Administration (OSHA) is the most commonly known agency enforcing whistleblower statutes, but the IRS, SEC, Commodity Futures Trading Commission, and the National Highway Traffic Safety Administration (NHTSA), also have laws on the books.

Why are claims increasing in number? There are a variety of reasons beyond employee revenge. The increasing number of regulations, increased funding of agencies, increasing number of agencies involved and a larger scope of protected areas are increasing employee awareness and willingness to report employer misconduct. There is also an increase in financial incentives to reporting employees. For example, the Motor Vehicle Safety Whistleblower Act allows employees or contractors of a motor vehicle manufacturer, parts supplier or dealership to report violations of federal safety laws and obtain a ten to thirty percent recovery for any sanction over $1 million that the government imposes. The sheer increase in number of complaints has resulted in serious citations, often resulting in prosecution by the Department of Justice. **-Continued on Page 2-**

In This Issue

Business Law

Mergers and Acquisitions: Transactional Forces and Process

By: Chad J. Cochran

Mergers and acquisitions. Investments of capital. Changes of ownership. Merger and acquisition trends track closely to the larger economy. 2015 saw historically high transaction rates. According to Deloitte's Year-End Report, "[2016] started with a thud… But in October, US companies unleashed an unprecedented wave of deals, making it the busiest month ever for domestic M&A." On a local level, our law firm is experiencing an increased rate of corporate transactions. Something is buzzing.

Every deal is unique, but our transactional attorneys find that most deals generally follow larger economic trends. One never knows exactly how these larger trends will impact a given business, yet is it always helpful to revisit the basic steps of a business acquisition or merger:

- I Like You; You Like Me – The different ways people arrive at the idea of a business transaction are fascinating. Networking with friends, business brokers, trade journal advertisements, industry research, etc. People eventually connect. Once they connect, business factors come to the forefront of the relationship. One party is interested in purchasing some portion of an ongoing business. The other party is giving up some degree of business control and expects compensation. If the parties are serious about discussing this dynamic further, they should look deeper into financial aspects of the deal.

- Confidentiality Agreement / Non-Disclosure Agreement – Many potential deals come to fruition. Most do not. Before discussing business information that is not publicly available (e.g., pricing, revenue levels, etc.), the parties should agree to keep any such information private. A simple NDA (non-disclosure agreement) should identify the potential deal that is under consideration and the type of information that is protected from public disclosure.

- Letter of Intent – After reviewing business operations and financials at a high level, the parties generally agree on a purchase price. The purchase price and basic tenets of the deal are spelled out in a letter of intent which the parties sign. The letter of intent is often non-binding, pending the results of the purchaser's due diligence investigation.

- Due Diligence –The potential seller usually makes general representations about the operations and finances of the business. The potential buyer should then investigate deeply. Financials should undergo a thorough review. Operational issues associated with a change in ownership should be identified and discussed (employees, leases, environmental liabilities, inventory, etc.).

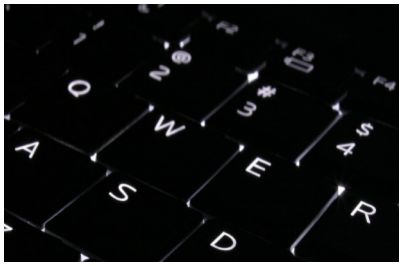
- Purchase Agreement – The parties legally agree to transfer business control. The deal is usually binding at this point. An attorney should prepare the purchase agreement, and each party should understand its contents prior to signing. The agreement will establish the mechanism for transferring the purchase price in exchange for business control. **-Continued on Page 3-**

"Whistleblower" Cont.

What is protected activity under whistleblower acts? The acts generally encourage reporting of illegal activities that relate to fraud and/or endanger the public. If companies or individuals retaliate against the "whistleblower" by any of the following methods, they subject themselves to heavy sanctions: firing or laying off, blacklisting, demoting, denying overtime or promotion, disciplining, denial of benefits, failure to hire or rehire, intimidation/harassment, making threats, reassignment affecting prospects for promotion or reducing pay or hours of an employee.

How does an employer reduce its risk of a whistleblower claim? Understand the laws and regulations relating to the employer's particular specialty, including the identification of governmental agencies that have oversight. Comply with applicable regulations and don't take shortcuts, adequately communicate these regulations to employees and implement compliance in the company practices. Create a work environment which allows employees to communicate openly with their management team without fearing retribution.

If you have additional questions regarding whistleblower complaints, please contact our office.



Mergers Cont.

- Closing – Modern corporate closings are often handled remotely (e-mail signatures, bank wire transfers, etc.) via an attorney's office. If parties to a transaction are local, an in-person closing can still save time. Once the purchase price is paid, the underlying corporate documents of the company are updated to reflect a change in ownership.

- Post-Closing Escrow – The buyer is often motivated to establish a working relationship with the seller to address post-closing business issues. To keep the seller engaged, the parties often agree to set aside a percentage of the purchase price to handle certain post-closing issues (such as working capital reconciliations, unexpected legal claims, etc.). The escrowed funds are usually released to the seller after a negotiated period of time (e.g., 24 months).

Thank you for your interest. Please let us know if our law firm might provide your business with any assistance, 919.859.6840.

Construction Law

Homeowners Recovery Fund: The Last Resort

By: Cody R. Loughridge

"A man's home is his castle". This remains as true today, as when it was first uttered by Sir Edward Coke in the early 17th Century. But what happens when one seeks to build a new castle or improve his existing castle, only to discover he or she has hired a dishonest or deceitful contractor for the work? In North Carolina, the castle-owner may be able to seek remuneration from the North Carolina Homeowners Recovery Fund.

The North Carolina Homeowners Recovery Fund was established by the North Carolina General Assembly in the early 1990s for the purpose of creating a special account, administered by the State Licensing Board for General Contractors, to "reimburse homeowners who have suffered a reimbursable loss in constructing or altering a single-family residential dwelling unit".

The Recovery Fund is funded by fees generated through permitting and inspection. Specifically, when a contractor applies for the issuance of a permit for the construction of any single-family residential dwelling unit, the city or county building inspector is to collect a fee of Ten Dollars ($10.00), Nine ($9.00) of which are forwarded to the Board. The Board is also permitted to accept donations to the Fund.

In order to be eligible for assistance, an applicant, as the owner or former owner of the dwelling in question, must be able to prove that he or she suffered a reimbursable loss which resulted from dishonest or incompetent conduct by a general contractor, or an unlicensed contractor who fraudulently held himself out as a licensed contractor. That alone does not qualify an owner for funds from the Recovery Fund. The applicant must also show that he or she has exhausted all civil remedies against the contractor whose conduct caused the loss and that he or she has obtained a civil judgment against the contractor, which remains unpaid. Only after satisfying the stringent guidelines of Chapter 87-15.8 may an owner file a claim with the North Carolina Homeowners Recovery Fund.

Once the castle-owner has made a claim, and the North Carolina Licensing Board of General Contractors certifies that the conditions precedent to a claim have been met, a file is opened and the claims process is initiated. The contractor in question is then afforded 30 days to respond to the allegations contained in the claim. Once the investigation and assessment by the Board is complete, the Board presents the facts of the claim to the Homeowners Recovery Fund Review Committee, and a hearing is set. At the hearing, the owner appears before a panel of Board members and presents information concerning their claim, the purpose of which is to determine the loss incurred by the owner as a result of the fraudulent or deceitful actions of the contractor. Only specified, remunerable losses are considered by the Board. Costs such as attorneys' fees, punitive damages, or court costs are not considered for any award. Following the conclusion of the hearing, the Board makes a determination of the amount, if any, it will award for the claim. The Board has complete discretion to determine the order, amount, and manner of payment of approved applications, so long as it does not exceed an amount equal to Ten Percent (10%) of the total amount in the Recovery Fund at the time the application is approved by the Board. As opposed to the civil judgment entered against the contractor, the award from the Board comes directly from the Recovery Fund. The Board's decision is final and any such payments from the Recovery Fund, as directed by the Board, are a matter of privilege and not of right.

If you have additional questions regarding the Homeowners Recovery Fund, please contact our office.

E-VERIFY: Are you in compliance?

By: Nan E. Hannah

Construction Law

Earlier this decade, the North Carolina General Assembly adopted the federal E-Verify program operated by the Department of Homeland Security as the primary clearinghouse for confirming workers in the State of North Carolina are in this country legally. The program is designed for use "after hire" and was created as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Once a new employee completes an I-9 (Employment Eligibility Verification Form), the employer can go to the E-Verify website, enter the requisite information and obtain confirmation that the employee is legally in the country and eligible for employment.

To determine whether this process should be used by your company, you need to know the number of people your company employs. The North Carolina General Assembly phased in E-Verify requirements over an 18-month period starting with the largest employers and working down. However, effective July 1, 2013, all employers with 25 or more employees are required to use E-Verify to check work authorization for all new hires. Sanctions begin with what amounts to a warning and opportunity to cure and proceeds through monetary fines which can add up. The North Carolina Department of Labor oversees compliance.

In the construction industry, you may, and probably should, be running into owners and/or general contractors requiring you to execute a document or affidavit stating that your company E-Verifies employees. For federal projects, you should expect to be required to complete a form indicating that your company E-Verifies employees. For state projects, suppliers of equipment and materials are exempt from N.C. Gen. Stat. 143-133.3 which requires E-Verification by contractors and subcontractors for state and local projects. Note, however, that exemption does not exempt you from the overarching requirement if your company has more than 25 employees.

The take-away from this article is to make certain if your company has more than 25 employees, you are undertaking the requisite E-Verify research at the time you hire new employees. While it does not appear that the Department of Labor is hunting for violators, events could conspire to put your business in their cross-hairs. An ounce of prevention...

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