



Erratic Lumber Prices, Force Majeure, and Price Escalation Clauses ***By: Chad J. Cochran***

Construction supply costs generally increase a small amount over time. Yet, sometimes market pressures result in erratic price swings. In 2020, market pressures created huge price swings for a key construction material—wood. Lumber futures started the year just above \$400, rose to nearly \$1000 by mid-September (~150% increase), and now hover in the mid \$500's. As we spent more times in our homes earlier this year, lumber production decreased while home improvement projects increased. Less Lumber; More Projects; Higher Prices; Supply and Demand.

Parties with fixed price contracts suffered from these lumber price increases, leaving projects across the country dangerously unprofitable. Construction companies hope that their contracts provide for increased supply cost compensation in such times. Many contract reviews find that existing contractual language is either silent or inadequate as to price increases in these circumstances. As the construction industry adjusts to quickly changing circumstances, force majeure and price escalation clauses will prove hugely important in existing and future contracts.

Construction companies might assert that they are not bound to perform their contractual scopes without increased compensation due to “force majeure” clauses. “Force Majeure” (French for a “superior force”) means an event that can be neither anticipated nor controlled, including acts of nature (e.g., hurricane) and acts of people (e.g., riots). Well written “force majeure clauses” allocate risk between the contractual parties “if performance becomes impossible or impracticable”. See Black’s Law Dictionary. A worldwide pandemic and the economic consequences almost certainly constitute “force majeure”. As such, construction companies should look to their contractual language to determine how risk is allocated amongst the parties in such circumstances.

Modern fixed priced contracts often include price escalation clauses. Without these clauses, in the event of a price increase, lower tier parties assume a large amount of risk. To avoid such one-sided risk, price escalation clauses are typically structured in one of three ways: (i) immediate increase (baseline prices established as of contract date or bidding; contractors entitled to immediate compensation); (ii) fixed price period (contractor responsible for all increases for a period of time, e.g. 100 days, then additional compensation owed); and (iii) percentage threshold (contractor entitled to compensation after a certain price increase percentage, e.g., 10%).

LEGAL FOUNDATIONS NEWSLETTER



In This Issue

- Force Majeure and Price Escalation Clauses
- What Do Judges Do?
- Payroll Tax Deferral
- Small Claims Procedures



Elections

What Do Judges Do?

By: Nan E. Hannah

Ever wonder what the difference is between a District Court Judge, a Superior Court Judge, a judge on the Court of Appeals, and a Justice on the North Carolina Supreme Court? This November, understanding the distinctions between those courts will be important when you visit the polls. There are three seats on the Supreme Court, five seats on the Court of Appeals, and numerous Superior Court and District Court seats on this November's ballot. With that in mind, a quick civics lesson follows.

District Court: The district court is a local level court that has jurisdiction over civil matters with a claim for damages less than \$25,000.00. This court also handles juvenile matters, family court issues (divorce, custody, equitable distribution, domestic violence), and criminal matters involving misdemeanors and infractions (non-jury). District court also oversees the magistrates (civil: small claims [\$10,000.00 or less], evictions, recovery of personal property and motor vehicle mechanics' liens; criminal: warrants for arrest, set bail, guilty pleas for misdemeanors and infractions [traffic], worthless checks). For most North Carolinians, this is the most likely touch point they will have with the judicial system. Electing judges who know the law, will apply the law, have good common sense and great people skills is important. A breadth of legal experience is helpful because a District Court Judge may be assigned to a court room hearing any of the types of matters listed above. These judges sit only in the judicial district in which they are elected.

Superior Court: The superior court is the next step up in the judicial hierarchy for North Carolina. Judges are elected by specific districts (divisions within the judicial district), but in non-pandemic times may be assigned anywhere in the state. Judges in this court hear civil matters in excess of \$25,000.00 with a jury or as a bench trial. The court handles all felony criminal cases and misdemeanor and infraction cases appealed from the district court's decision. Judges at the superior court level do well with experience at the district court level, but that is not a pre-requisite. Judges at this level need to have a strong educational background, with good reasoning and writing skills. They need to be effective communicators with a broad range of experience and a familiarity with the court room whether as an advocate or a judge. Being decisive is a great quality for any judge, but especially in this court where the next stop is an appellate court. Judges at this level may be asked to address state constitutional issues, so it is imperative that those selected be as apolitical as possible in a state that requires its judicial candidates to list party affiliation. The best judges leave partisan politics in their office when they don their robe, and arrive in the court room impartial and ready to apply the law to the facts.

Court of Appeals: The court of appeals is the intermediate appellate court and the "workhorse" court. This court hears appeals from decisions made by North Carolina administrative agencies and administrative law judges, from district and superior courts (family law, civil and criminal). This court sits in panels of three judges which rotate and shuffle. They decide their cases off a record on appeal which may be thousands of pages long, and the briefs submitted by each party. Certain cases are selected for oral argument which last one-hour (30-minutes a side). The court has specific guidelines as to what it can review – errors of law or legal procedure (it does not decide questions of fact). This is a high-volume court. A judge elected to this court must have exceptional analytical and writing skills. They must be able to communicate clearly both verbally and in writing. Experience as a lawyer is important and it is important for the court as a whole to have a wide variety of experiences and practice areas represented, but it is not as important that each individual judge have a wide-breadth of practice experience. Having a depth of knowledge and an inquisitive nature is more important. Because these judges are elected statewide, involvement in politics is a necessary evil. It is a must that they do not campaign on a platform or providing any suggestion as to how they would decide any issue. A court of appeals judge needs to be able to evaluate the information provided to them, do the necessary research, reach a legal conclusion, and then communicate that decision in a clear and cogent written opinion that will become precedent for judges and lawyers.



Employment Law

Payroll Tax Deferral

By: Zachary N. Layne

If you noticed an increase in your paycheck beginning in mid-September, you're not the only one. As a result of President Trump's August 8th Memorandum for the Secretary of the Treasury, payroll tax, which equates to 6.2% of an employee's pay, is deferred beginning September 1, 2020, and culminating on December 31, 2020. This deferral applies only if wages or compensation are less than \$4,000 for a biweekly period, or in an equivalent amount for other pay schedules. It is important to emphasize that this is simply a deferral rather than forgiveness; the amount deferred will indeed have to be paid at a future date, unless Congress were to step in and approve legislation to forgive the deferred tax.

The result of this Executive Order is that employees are seeing an increase in their paychecks, since 6.2% of an employee's pay that is normally withheld is being deferred. Therefore, paychecks will be elevated until the end of 2020. However, this increase in pay in the short term is not without a decrease in pay over a longer term. Beginning January 1, 2021 and extending until April 30, 2021, taxes deferred from September 1, 2020 until December 31, 2020 must be paid by the employer. If this tax is not paid, interest, penalties, and addition to tax will accumulate as to any tax unpaid by the employer beginning May 1, 2021. Thus, expect to see a decrease in your paycheck during the first few months of 2021. However, some private employers have opted-out of this payroll tax deferral. Therefore, it is important to monitor your paycheck during the month of September to determine whether or not your employer is engaging in payroll tax deferral.

Overall, while it may be necessary to have additional funds as the Coronavirus Pandemic continues, it is important to be aware of the additional taxation that will come as the calendar flips to 2021. Thus, it may be a good idea to store away additional funds, if possible, to account for the increased amounts to be withheld from your paycheck for the first four months of 2021.

- Judges—Continued -

Supreme Court: This is the highest court in North Carolina and, except for the rarest of occasions, the court of last resort. It hears appeals from the Court of Appeals where the Court of Appeals' panel split, plus appeals from the North Carolina Business Court (a specialized version of Superior Court) and appeals from Superior Court panels addressing issues involving the North Carolina Constitution. The Supreme Court may also decide, after considering a petition filed by a party, to hear an appeal from a unanimous decision from the Court of Appeals. This will generally occur if the Supreme Court determines that the Court of Appeals might have erred, or if the issue to be decided is one of such judicial importance that it deserves a hearing and decision from this court. This court can be subject to immense political pressure therefore, it requires justices with exceptional credentials. Educational background matters. Legal experience matters. It is not as much important that a candidate has been a judge before as that they understand a courtroom and the law, and most specifically, the laws of North Carolina. It is interesting to note that some of the most respected justices previously served in the state legislature, so ruling someone out just because they have been politically active would be a mistake. That being said, if the candidate runs on a political platform or stressing party first, that may well be a disqualifier. It is imperative that a judge on this court be able to set political beliefs aside and rule based upon the legal principles and the precedents presented to the court.

The moral of this story – pay attention to the down ballot races in November and do your homework. Decisions by each of these court levels have an impact on your life. And note that federal “hot button” issues are not heard in any of these courts.

Small Claims Matters and North Carolina's New Guide & File

By: Emily Anne Buttrick



Civil Litigation

The legal system can be difficult to navigate, and occasionally it may seem that the costs to pursue a matter may outweigh the benefits. However, if you are owed \$10,000.00 or less, you may wish to represent yourself in Small Claims Court.

Small Claims Court is available in every county in North Carolina. Filing a small claims case previously required that each person filing a case appear at the courthouse and fill out the appropriate paperwork.

However, on August 24, 2020, Chief Justice Cheri Beasley announced a new service that allows attorneys and the public to prepare court documents online. While the Guide & File system is currently only used for select types of cases, the attorneys at Hannah Sheridan & Cochran believe that Guide & File may be most useful for our clients that want to handle small claims cases for money owed without the assistance of an attorney.

The new "Guide & File" system prompts users to answer a series of simple online questions. Based upon the user's answers, Guide & File automatically creates the legal document that can then be printed and filed with the Court either by mail or in person. Currently there is not an option to submit the documents for filing online, but the Guide & File system eliminates the initial need of appearing at the local courthouse to obtain and execute the appropriate forms. Furthermore, the Guide & File system ensures that the forms are legible and properly completed.

Once the documents are filed with the Court and served on the opposing party, you will be given a date to appear before a magistrate judge and have a trial on the issues. If you are successful, the judge will issue an order in your favor and you will be able to initiate the process to collect on your judgment.

For legal advice or questions about legal rights, remedies, or how to collect your judgment, please contact one of the attorneys at Hannah Sheridan & Cochran, LLP.



PLACE
STAMP
HERE

**Hannah Sheridan & Cochran, LLP • 5400 Glenwood Ave., Suite 330, Raleigh, NC 27612
Office: (919) 859-6840 • Fax: (919) 859-6843 • www.hscattorneys.com**