Post-Corona: Business Trends and Strategies
By: Chad J. Cochran

The pandemic accelerated economic trends and exposed weaknesses. Governments print money, while supply chains are disrupted. Locally, home prices are soaring. A global computer chip shortage could last up to two years. Inflation is becoming reality in our day-to-day lives. Yet, economists predict a period of strong economic activity in the years to come.

As communities reopen and economies rebuild, our post Coronavirus world will spit out winners and losers. How do we best position ourselves? Cash is king. Businesses should manage their cash more carefully than ever. Bubbles and inflation are upon us. Inflationary forces and economic bubbles can quickly tank a company's bottom line, if businesses fail to pay close attention to the cost of material and services (both income and expenses). A working understanding of inflation and economic bubbles is invaluable.

Inflation: a continual rise in the price of good and services. (Merriam-Webster).

The Fed predicts higher sustained inflation than we have seen in several decades – currently 3.4% per year. Although the projected inflation is nowhere near the inflation crisis we experienced in the early 1980's, businesses should update their business models and budgets to anticipate higher price increases than we have experienced in the recent past.

Bubble: a state of booming economic activity that often ends in a sudden collapse. (Merriam-Webster).

Bubbles exist when the market value rises rapidly to exceed the fundamental value. One of the first bubbles occurred in the 1630's with tulips - known as tulipmania. The price for a tulip at its peak went six times the average citizen's annual salary. The price of tulips would be worth fractions soon thereafter. Some investors grew very rich. More speculators grew very poor. Centuries later, history continues to repeat itself.

There are five main parts of a bubble described by economist, Hyman Minsky. First is displacement - when there is a new buzz or concept that is catching everyone's attention. Second is the boom – after slowly rising prices, there is a lot of media attention and fear of missing out, so everyone buys.

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LEGAL FOUNDATIONS NEWSLETTER

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The Intersection of Solar Farms and Liens

By: Nan E. Hannah

As North Carolina sees a resurgence in renewable energy solutions to future energy needs, once again the question of getting paid for labor and materials provided to develop a solar farm arises. Remembering that though there have been tweaks over the years, the last ground up re-build of North Carolina's lien law occurred in 1969, it seems logical that solar farm projects were not contemplated in that statute.

The Challenges. Solar farms often are placed upon land that is not overly suitable for crops. Many solar farms arise out of long-term leases covering large swaths of land. Note the plural use of the word "lease." Experience suggests that most of these "farms" combine the real property of a number of owners to create the tract that is to house the solar panels and the tract that will house the collection and transmission apparatus.

Construction usually involves grading the tract, building gravel roads to allow access to the site from a nearby road, and throughout the site for maintenance and construction vehicles. The panels and necessary wiring are installed throughout the project running to the transmission point, and a building is constructed to handle the conversion and transmission process.

From a mechanic's lien standpoint, the issue generally involves the Claim of Lien on Real Property. Identifying a specific "owner" and a specific parcel that was improved is often difficult. In general, you can expect that there will be a number of fee simple owners of the real property each of whom has leased the real property to an LLC developing the solar farm.

Pursuant to N.C. Gen. Stat. §44A-7, an "owner" is anyone with an interest in the real property improved, so unless the fee simple owners are involved in the improvement, the "owner" is the leaseholder. That then brings N.C.G.S. §44A-9 into play which limits the lien "to the extent of the interest of the owner," i.e. the leasehold interest. Now, take the scope of the project, the number of leases, and try to determine the extent of the lien on each tract of real property which must be based upon the improvement to that real property. It is not impossible, but often pretty close.

In general, the solution we have reached has been to utilize the Notice of Claim of Lien upon Funds giving notice up through the contract chain ending with the leaseholder. This has generally proven successful, but only if the lien is placed on the project while money is still owed for construction. A reminder that a Lien upon Funds sounds in contract and is not date or deadline dependent, but rather faces the simple test as to whether funds remain due and owing down the contract chain at the time the lien is served on the obligor.

For a contractor, subcontractor, or supplier to protect itself on a solar farm project, it is imperative to do your homework on the front end. Know the contract chain, identify whether the farm is on a single tract owned by a single fee simple owner or whether it arises out of a lease or leases, and if so, how many fee simple owners are there.

If you have questions about this article, please reach out to the attorneys at Hannah Sheridan & Cochran LLP.

Intern Spotlight: Introducing Aujay Jhala

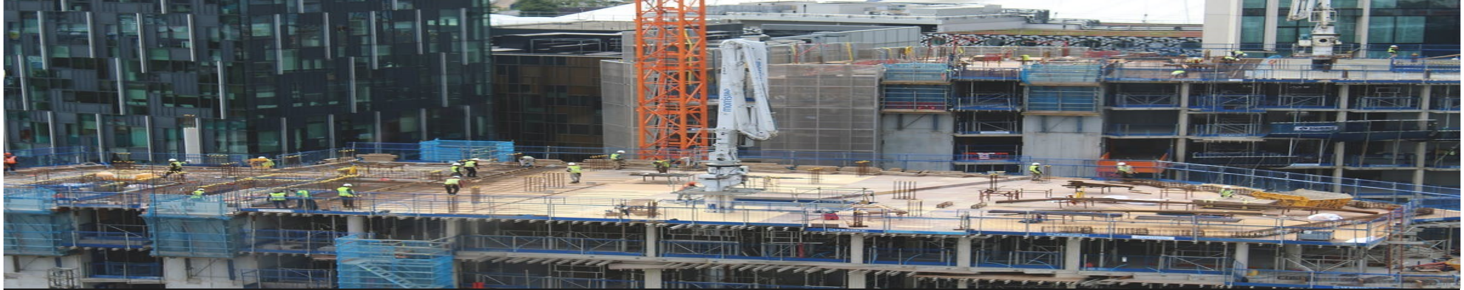
This summer, we are pleased to have Aujay Jhala join our firm as an intern.

Aujay recently completed his 1L year at Campbell University School of Law, and is a graduate of North Carolina State University, where he majored in Biology.

Aujay grew up in Lumberton, NC around his family's business which sparked his interest in business law. Aujay plans to work with small businesses in the near future once he graduates from law school.

When Aujay is not in our office, he enjoys finding any reason to be outdoors and loves to play any sport.

Aujay is a great addition to our team and we are excited about providing him with hands-on legal experience to lay the foundation for his legal career.



Construction Law

Increasing Material Costs and Escalation Clauses

By: Rachel Rogers

The COVID-19 pandemic has had a tremendous impact on many different industries across the world, including the Construction Industry. In particular, the COVID-19 pandemic has affected the supply chain for many construction materials which has caused dramatic increases in pricing of materials. This has caused trouble for contractors and their attempts to stick to project budgets.

To avoid issues of determining which party bears the consequence of delays and increases in pricing, it is crucial to address these points during contract bidding and negotiations. One of the best ways to do this is by including price escalation provisions in your contracts. A price escalation clause is a provision that can be inserted into any contract to provide a way for subcontractors or contractors to recover some of the cost increases that occur over a course of a project under certain circumstances. The three most common types of escalation clauses are: (1) any-increase escalation clauses; (2) threshold escalation clauses; and (3) delay escalation clauses.

Any-increase escalation clauses allow for a contractor or supplier to seek reimbursement for <u>any</u> price increases that occur after the signing of the contract or submission of the bid. The clause can identify certain types of materials that are subject to the clause. Threshold escalation clauses specify that if building materials increase by a <u>certain percentage</u>, then the contractor or supplier may seek reimbursement for the excess cost. Lastly, delay escalation clauses hold a fixed price for a certain amount of time and only allows for reimbursement if there is a <u>delay beyond that fixed amount of time</u>.

Although these are the most common types of escalation clauses, they all can be modified for individualized situations. It is key to protect your business and finances, especially during the uncertainty of Covid-19, and ensure that these variables are anticipated. Price escalation clauses can be very nuanced, so let Hannah Sheridan & Cochran help you navigate the drafting..

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This natural rise in prices is called demand-pull inflation. Third is euphoria – prices are at an all-time high and the belief that there will always be someone willing to pay higher. Fourth is profit-taking – individuals are selling to reap their profits and it is possibly reaching a burst point as more and more sell. Fifth is the panic – once the bubble has a slight puncture everyone is willing to sell at any price they can get and prices drop quickly, the bubble is now gone. (https://www.investopedia.com/articles/stocks/10/5-steps-of-a-bubble.asp).

Skyrocketing lumber prices have rocked the construction industry. It appears the lumber bubble has burst, as lumber futures have consistently fallen for more than a month. Given supply chain disruptions which continue to work through the worldwide economy, business owners should expect to encounter additional price bubbles in the months to come.

As businesses navigate these larger economic trends, strong cash management practices prove more important than ever. We suggest that all of our business clients consider these three tips:

1. Take a close look at your business' collections practices. Develop rigid, yet professional, collection practices to ensure that past due customers receive regular communications about past due balances. Make certain your business practices identify any applicable legal deadlines (e.g., lien or bond claims).

2. Update the pricing structures of your client contracts to accommodate price fluctuations. Price escalation clauses are quickly becoming the norm in industry contracts.

3. Focus on Client Development – While weak businesses will likely fail in the years ahead, winners will also emerge. Take a look at your existing and prospective client base for businesses that are well positioned to succeed in this emerging economy. Pay attention to those relationships, and both sides will likely profit from the return.

Small Business Bankruptcy

By: Zachary N. Layne

Business Law

In February 2020, the Small Business Reorganization Act of 2019 became effective, implementing a new pathway for small businesses to file bankruptcy. Codified in Subchapter V of Chapter 11 of the United States Bankruptcy Code, this subchapter initially applied to small businesses with debts of less than $2,725,625.00. The subchapter allows for a simpler bankruptcy process, a few highlights of which are below:

(1) Arguably the most impactful advantage to filing bankruptcy under Subchapter V is the elimination of the absolute priority rule. The absolute priority rule, which applies in traditional Chapter 11 bankruptcies, provides security for creditors to be paid prior to individuals/ businesses with equity. However, this provision is eliminated in Subchapter V, eliminating a hurdle for small businesses seeking confirmation of their bankruptcy plan. Subchapter V retains certain confirmation provisions of traditional Chapter 11, stating that the plan shall be confirmed so long as the “plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.” 11 U.S.C. §1191(b)

(2) There is a 90-day window to file the plan;

(3) A status conference is to be held within 60-days of filing under Subchapter V; at least two weeks prior to the status conference, a debtor has to file a “report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization.” 11 U.S.C. § 1188(c); and

(4) Only the debtor has the power to file a plan.

In light of the COVID-19 pandemic, the debt limit for a small business to file bankruptcy under Subchapter V of Chapter was increased to $7,500,000.00 for a period of one-year. Given the impact of the COVID-19 pandemic and its remaining impact on small businesses, a recent action by President Biden ensured that the increased debt limit will be effective for an additional year. The COVID-19 Bankruptcy Relief Extension Act was signed by President Biden on March 27, 2021, extending the increased debt limit for a period of one year, through March 27, 2022.

Overall, Subchapter V of Chapter 11 of the United States Bankruptcy Code provides a much more streamlined, efficient process for small businesses to file bankruptcy. Moreover, in light of the increased debt limit, small business that have seen their debts drastically increase during the difficult COVID-19 pandemic may still be able to take advantage of this simpler bankruptcy path.

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