AUGUST 2014

Louisiana Construction Law Update

The ***Construction Law Update*** is published by Baldwin Haspel Burke & Mayer, LLC for the benefit of its clients and others having interest in the construction industry. It includes discussions of Louisiana state and federal court decisions, legislative developments, and tax issues concerning construction-related matters. For further information on the decisions and legislative developments, contact **John Stewart, Jr.** at (504) 585-7846 - jstewart@bhbmlaw.com or **Stuart Richeson** at (504) 585-7839 – sricheson@bhbmlaw.com.

At the end of this newsletter, you will find a section titled *Tax Law Alert*. It contains a snippet from Baldwin Haspel Burke & Mayer's most recent ***Tax Law Alert***, which provides information on updates and changes in tax law on both the state and federal level. To subscribe to BHBM's electronic ***Tax Law Alert***, please visit www.bhbmlaw.com/subscribe. For information on tax-related issues, please contact **Matt Miller** at (504) 585-7867 - mmiller@bhbmlaw.com, or **Andrew Sullivan** at (504) 585-7734 – asullivan@bhbmlaw.com.

For information about the firm, please visit our website at www.bhbmlaw.com.

***

AMENDMENTS TO THE LOUISIANA PUBLIC WORKS ACT

The Louisiana legislature during its 2014 session adopted extensive revisions to the Louisiana Public Works Act and related statutes. The amendments include changes to L.R.S. 38:2211, L.R.S. 38:2212, L.R.S. 38:2212.5, L.R.S. 38:2212.10, L.R.S. 38:2215, L.R.S. 38:2225, and L.R.S. 38:2241. Acts 2014, No. 759. The amendments are effective August 1, 2014.

It is recommended that anyone involved in public works construction in Louisiana review the changes. The Act is available from Baldwin Haspel Burke & Mayer, LLC upon request.

ATTORNEY FEES FOR FAILURE TO MAKE PROGRESSIVE STAGE PAYMENTS

The Louisiana legislature during its 2014 session revised L.R.S. 38:2191 to provide that any public entity failing to make a progressive stage payment within 45 days following receipt of a certified request for payment shall be liable for reasonable attorney fees. The statute already provided for fees for the failure to make final payments within 45 days, and the failure to make

progressive stage payments and final payments without reasonable cause subjects the public entity to a mandamus proceeding to compel payment. The new legislation is effective August 1, 2014. Acts 2014, No. 487.

CONSTRUCTION MANAGEMENT AT RISK

The Louisiana legislature during its 2014 session adopted legislation providing for the use by public entities of the Construction Management at Risk Project delivery method. The method is not to be used for any project estimated to cost less than $25 million. The term Construction Management at Risk is defined to mean a delivery method by which the owner uses a design professional, who is engaged by the owner for professional pre-design or design services, or both and the owner contracts separately with the management contractor to engage in the pre-construction phase. The same management contractor may also provide construction services to build the project. The at risk contractor may assume the risk to construct the project for a guaranteed maximum price without re-procurement. Acts 2014, No. 782. The effective date of the legislation is August 1, 2014.

LICENSE BY THE STATE PLUMBING BOARD NOT NECESSARY IN CERTAIN INSTANCES

The Louisiana legislature during its 2014 session adopted a new statute, L.R.S. 37:1367, which provides that an entity not licensed by the State Plumbing Board, but is properly licensed for municipal and public works utility construction by the State Licensing Board for Contractors, may perform main-line utility construction on private property or undedicated rights-of-way or servitudes, limited to a) gravity sanitary sewer collection lines six inches and larger, including manholes, main lines, wyes and tees, b) sewer force mains four inches and larger, and c) water mains four inches and larger, including fire hydrants, valves, and fittings. The new law does not pertain to gas mains within the boundary lines of any private property or to service lines. The law is effective August 1, 2014. Acts 2014, No. 561.

THE LOUISIANA STATE UNIFORM CONSTRUCTION CODE

The Louisiana legislature during its 2014 session adopted legislation specifically requiring, among other things, that the Louisiana State Uniform Construction Code Council adopt, effective as of January 1, 2016, the International Building Code, Chapter 29 - Plumbing Systems, the International Residential Code, Part VII - Plumbing, and the International Plumbing Code. The Louisiana State Plumbing Code of the State Sanitary Code is null, void and unenforceable as of that date. The legislation provides for amendments to the codes. Acts 2014, No. 836.

RECOVERY SCHOOL DISTRICT

The Louisiana legislature during its 2014 session adopted legislation providing that the Recovery School District shall be required to receive prior approval of the Joint Legislative Committee on the Budget for change orders in excess of $100,000.00 in the aggregate per month for any projects that would be considered a capital expense. Acts 2014, No. 748. The legislation is effective as of June 19, 2014.

READY-MIXED CONCRETE TRUCKS

The Louisiana legislature during its 2014 session extended from July 31, 2014 to July 31, 2016 the current law providing for the assessment of penalties for ready-mixed concrete trucks exceeding their maximum permissible gross weights. Acts 2014, No. 291. The legislation is effective as of August 1, 2014.

OVERHANG FOR TRUCKS AND TRAILERS HAULING HEAVY EQUIPMENT

The Louisiana legislature during its 2014 session revised the current law for yearly permits for vehicles with an overhang to provide the limitations applied to both a front and rear overhang. Acts 2014, No. 49. The legislation is effective as of August 1, 2014.

FORUM SELECTION CLAUSES

The Louisiana Supreme Court recently held that forum selection clauses should be enforced in Louisiana unless the resisting party can clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching, or that enforcement would contravene a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision. *Shelter Mutual Insurance Company v. Rimkus Consulting Group, Inc. of Louisiana*, 2013-1977 (La. 7/1/14), 2014 WL 2937113. The holding must be considered in the context of L.R.S. 9:2779 which declares null and void provisions in construction contracts for both public and private works when one of the parties is domiciled in Louisiana, and the work to be done and the equipment and materials to be supplied involve construction projects in Louisiana, which require disputes arising thereunder to be resolved in a forum outside of Louisiana or requiring their interpretation to be governed by the laws of another jurisdiction. Additionally, L.R.S. 23:921 restricts the use of forum selection clauses in employment contracts.

ARCHITECT ENTITLED TO COMPENSATION

Paul J. Allain, Architect, sued an LLC and two individuals claiming he was retained by them to perform architectural services on their behalf, and that he was not paid for his efforts. The individual defendants denied the allegations, and asserted they were not liable individually because they were acting on behalf of the limited liability company.The trial court found the individuals did not disclose to Allain that they were acting as mandataries for a limited liability company, and they were individually liable for any damages. Further, the trial court determined that although the defendants had retained Allain to perform the architectural services, there was no agreement with regard to the fees. The trial court found that $57,637.50 was reasonable compensation, and awarded that amount. The court of appeal affirmed. *Paul J. Allain, Architect (APAC) v. Tripple B Holding, LLC*, 2013-673 (La.App. 3 Cir. 12/11/13), 128 So.3d 1278.

APPLICABILITY OF TORT VERSUS CONTRACT PRESCRIPTIVE PERIOD

The prescriptive period for a tort is one year, and for an action in contract ten years. The question often arises as to which period is applicable in a contract setting. The Louisiana Fourth Circuit Court of Appeal recently considered the issue in *Gulf Production Company, Inc. v. Petroleum Engineers, Inc.*, 2013-CA-0578 (La.App. 4th Cir. 12/11/13), 2013 WL 6925002, *writ*

denied, 2014-02690 (La. 4/11/14). There, Gulf Production contracted with Petroleum Engineers for Petroleum Engineers to provide engineering services, equipment and labor with respect to the operation of an oil well. The work performed by Petroleum Engineers resulted in a blow-out of the well which became inoperable. Gulf Production sued Petroleum Engineers alleging a breach of contract and a breach by Petroleum Engineers of his duty of workmanlike performance. Petroleum Engineers filed an exception of prescription, representing the one-year period for torts applied. Gulf Production contended the ten-year period for actions in contract applied. The district court granted the exception.

The court of appeal held, in order for Gulf Production to assert a contract claim and the applicability of the prescriptive period for such an action, it was required to plead the violation of a specific provision of the contract that resulted in damages. The fundamental distinction between damages for breach of contract, *ex contractu*, and damages resulting from a tort, *ex delicto*, is that the former flows from the breach of a special obligation contractually assumed by the obligor, and the latter flows from a violation of a general duty owed to all persons. Even if there was a breach of duty arising out of a contractual relationship, without an expressed promise in the contract, the action is *ex delicto*. Here, there was an absence of a direct breach of a contractual provision, and the court found the claims were based in tort, and subject to the one-year prescriptive period. The judgment of the district court granting the exception of prescriptive of Petroleum Engineers was affirmed.

CLAIM FOR INDEMNITY AND L.R.S. 9:2772

Robert Peck, Jr. and Misty B. Peck contracted with Richmar Construction, Inc. to build a new home in Ascension Parish. Richmar completed the home on April 4, 2007, on which date a certificate of occupancy was issued. On April 3, 2012, the Pecks sued Richmar under the New Home Warranty Act for alleged defects in the slab and foundation. On July 12, 2012, within 90 days of service of the demand against Richmar, Richmar filed third party demands against two subcontractors, Glynn Construction Group, LLC and Boudreaux Contractors, LLC, for indemnity. The two subcontractors argued Richmar's claims against them were perempted under the five-year peremptive period of L.R.S. 9:2772. That period begins to run on the date of recorded acceptance of the work by the owner, or if no such acceptance is recorded, from the date of occupancy by the owner. The subcontractors contended that peremptive period began to run on April 4, 2007, the date the certificate of occupancy was issued, and lapsed on April 4, 2012 before the third party demand for indemnity of Richmar was filed. The trial court granted the exception of peremption of the subcontractors. Richmar appealed.

C.C.P. art. 1067 provides that an incidental demand, such as a claim for indemnity, is not barred if it was not barred at the time the main demand was filed and is filed within 90 days of service of the main demand. Here, the claims for indemnity were not barred at the time the main demand was filed, but were barred one day later, and were filed within 90 days of service of the main demand. An amendment to L.R.S. 9:2772 was adopted on August 1, 2012 adding a provision mirroring C.C.P. art. 1067. The amendment was, thus, not effective when peremption accrued on April 4, 2012. It did not, according to the court, apply to the claims at issue.

The court noted L.R.S. 9:2772 expressly provides that the five-year peremptive period shall extend to every demand, whether brought by direct action or for contribution or indemnity or by third party practice. C.C.P. art. 1067, by contrast, is a generalized statute intended to apply to incidental actions not otherwise specifically addressed under the Code of Civil Procedure or Louisiana Revised Statutes. Prior to August 1, 2012, there was no statement in L.R.S. 9:2772

that the legislature intended to incorporate the provisions of art. 1067. Significantly, if C.C.P. art. 1067 already applied to claims brought under L.R.S. 9:2772, there would have been no need for the amendment of the statute to add a similar provision.

The court of appeal held L.R.S. 9:2772 took precedence over the more generalized rule provided by C.C.P. art. 1067, and applied to the claims for indemnity against the subcontractors. The five-year peremptive period began to run on April 4, 2007, and ran by April 4, 2012, before the claims for indemnity were filed against the subcontractors. The claims for indemnity were perempted. The court noted the limitation of its ruling to the narrow facts presented, all of which transpired prior to the effective date of the amendment to L.R.S. 9:2772. It appeared to the court the legislature's addition of the new provision to the statute was intended to avoid the result reached. *Peck v. Richmar Construction, Inc.*, 2013-1170 (La.App. 1 Cir. 2/26/14), 2014 WL 1379181, *writ denied*, 2014-0830 (La. 6/20/14), 2014 WL 2895585.

PEREMPTION

Toby Gardner fell into a tank through an unsecured access opening at a mill owned by International Paper Company (IP) in Mansfield, Louisiana. Gardner died. His widow sued, among others, Kellogg, Brown & Root Services, Inc. (KBR).

KBR contracted with IP for the design and construction of certain portions of the mill. It entered into a subcontract with Stebbins Engineering and Manufacturing Company to design and construct the walls and top of the tank. KBR turned over the tank, including the cover, to IP in 1982. Thereafter, it entered into a series of maintenance agreements whereby it would provide and maintain all facilities necessary for the ample protection of the public and the workers employed at the site. The maintenance agreement at issue was effective from December 12, 2002 to December 31, 2005. The incident occurred on September 28, 2009.

KBR contended the claims against it were perempted under the five-year limitation of L.R.S. 9:2772. It moved for summary judgment. The trial court granted summary judgment. Gardner's widow appealed.

The court of appeal found the maintenance contract did not impose an obligation on KBR to redesign or reconstruct the tank so that it complied with OSHA regulations. Even if KBR assumed such duty, the claim was indistinguishable from a design defect because the construction of the tank with or without guardrails, or the construction of the access opening with or without hinges, directly related to the design of the tank, and any claim relating to a design defect was perempted since more than five years elapsed after KBR turned the tank over to IP. Summary judgment was affirmed. *Gardner v. Craft*, 48,861 (La.App. 2 Cir. 3/5/14), 137 So.3d 69, *writ denied*, 2014-0711 (La. 5/16/14), 2014 WL 2594279.

AMENDMENT TO PEREMPTION STATUTE DOES NOT APPLY TO A CAUSE OF ACTION WHICH ACCRUED PRIOR TO ITS EFFECTIVE DATE

L.R.S. 9:2772 provides the peremptive period for claims against construction contractors. The legislature amended the statute to shorten the peremptive period from seven years to five years. The amendment became effective on August 15, 2013. In the matter before the court, the cause of action of the owner against the contractor accrued on July 24, 2013, before the effective date of the amendment to the statute. The court, distinguishing prior jurisprudence, found the award of an arbitration panel retroactively applying the five-year peremptive period to claims which

vested before the amendment became effective violated the owner's due process rights. The judgment of the arbitration panel was vacated. *Crescent Property Partners, LLC v. American Manufacturers Mutual Insurance Company*, 2013-0661 (La.App. 4 Cir. 2/28/14), 134 So.3d 85.

CONTRACTOR ENTITLED TO DAMAGES FOR IMPROPER AWARD OF A PUBLIC CONTRACT

The City of New Orleans advertised for bids for the Harrison Avenue Streetscape project. Durr Heavy Construction, LLC was awarded the contract, but before the award, Command Construction Industries, LLC protested Durr's bid and sued for injunctive relief prohibiting the award to Durr, and a writ of mandamus to compel the award to Command. Command reserved its rights to seek damages should the contract be improperly awarded.

Durr, in submitting its bid, mistakenly added all of the alternates to its base bid, resulting in a bid higher than that of Command. The day after the bids were opened, Durr, by letter, sought to amend its bid because of a "clerical error," and submitted a revised base bid. The revised base bid eliminated the cost of the alternates, and resulted in a bid lower than that of Command. The bid documents provided that modifications to bids were permitted only before bids were opened; once the bids were opened, modifications were no longer allowed.

The court of appeal held the requirements contained in the public bid law and in a public entity's bid requirements may not be waived. The City was required to consider Durr's bid as it was presented initially. Because the trial court denied Command's request for injunctive relief, the project went forward, and at the time the matter was presented to the court of appeal, that remedy was no longer available. The court of appeal found the contract was improperly awarded to Durr. It remanded the matter to the trial court to consider Command's request for damages. *Command Construction Industries, LLC v. City of New Orleans*, 2013-0525 (La.App. 4Cir. 10/23/13), 126 So.3d 716.

NOTICE REQUIRED BY A MATERIALMAN FOR A CLAIM UNDER THE LPWA

The Louisiana Public Works Act requires that a materialman who has not been paid by a subcontractor must send notice of non-payment to the general contractor and the owner, otherwise any claim under the Act is lost. L.R.S. 38:2242F. The statute states:

> The return receipt indicating that certified mail was properly addressed to the last known address of the general contractor and the owner and deposited in the U.S. mail on or before seventy-five days from the last day of the month in which the material was delivered, regardless of whether the certified mail was actually delivered, refused or unclaimed satisfies the notice provision hereof or no later than the statutory lien period, whichever comes first.

The court of appeal for the first circuit held the requirement applies to each month during which material which is the subject of a claim is delivered. A single notice provided within 75 days from the last delivery is not sufficient. Materials delivered during months for which the 75-day notice was not given are not accorded a claim under the Act. *J. Reed Constructors, Inc. v. Roofing Supply Group, LLC,* 2012-2136 (La.App. 1 Cir. 11/1/13), 135 So.3d 752.

BREACH OF CONTRACT

The City of Shreveport advertised for bids for the renovation and remodeling of a fire maintenance facility. It awarded the contract to A&R General Contractors. A&R subcontracted the mechanical work to Bernhard Mechanical Contractors. Bernhard solicited a proposal from David Akers, d/b/a Air Products Co. for the ventilation system including the vehicle exhaust system. The vehicle exhaust system was to provide for the removal of CO gas from the building while fire trucks were being serviced.

Akers submitted a bid for a system made by Ventaire. The specifications stated that all products must be equal to those made by Nederman. Akers felt the Ventaire system was equal to that manufactured by Nederman. Bernhard apparently agreed. The architect approved it with only two minor corrections. Bernhard told Akers on June 17, 2008 to order the Ventaire system, which it did. On July 14, 2008, the Chief of Fire Maintenance for the City of Shreveport noticed the Ventaire system was involved. Although he testified the specifications used Nederman just for reference, emails suggested he wanted only a Nederman system in the facility. The City's engineer advised Akers he had not yet received the submittal, so it was not approved. The engineer then declared Ventaire lacked prior approval, but testified he was ready to "go with it" until the City's Chief of Fire Maintenance insisted on Nederman. He further testified he advised Akers not to order the Ventaire system. On July 22, 2008, the engineer officially rejected Akers' submittal for the Ventaire system.

Akers sued Bernhard, A&R and the City of Shreveport demanding the full bid amount of $40,773.00, plus interest. The trial court rendered judgment against Bernhard for the amount demanded, less a credit of $3,861.00 for a partial payment, and granted judgment in favor of Bernhard on its third party demand against the City. Bernhard and the City appealed.

The court of appeal first considered the City's argument that an addendum to the specifications required prior approval of Akers' bid using the Ventaire system. It held the Public Works Act requires that an owner may not reject a bid from a different supplier of equipment other than that which might be specified if it is functionally equivalent and basically the same. It held the district court was not plainly wrong in finding the Ventaire product was substantially the same as the Nederman product, and the City had no basis to require prior approval.

As to liability, the court of appeal affirmed judgment against Bernhard and also judgment in favor of Bernhard on its third party demand against the City. *Akers v. Bernhard Mechanical Contractors, Inc.*, 48,871 (La.App. 2 Cir. 4/16/14), 137 So.3d 818.

BREACH OF THE NEW HOME WARRANTY ACT

Jennifer Diane Nunez contracted with Pinnacle Homes, LLC to construct a new home in Cameron Parish, Louisiana. The contract provided that all work would be completed in a workmanlike manner, and would comply with all applicable national, state and local building codes and laws. The Base Flood Elevation required by FEMA was 9.0'. The Advisory Base Elevation required by Cameron Parish was 10.0'. The permit for construction required that the base elevation be 10.0'. The post-construction elevation certificate showed the elevation was 8.66' which was below the FEMA required Base Flood Elevation, the Advisory Base Flood Elevation, and the elevation required by the permit.

Nunez sued Pinnacle and Allen Lenard, its owner. The trial court issued judgment in favor of Nunez and against Pinnacle and Lenard. It awarded damages of $201,600.00 for the cost to elevate the home to the proper elevation, plus interest. Pinnacle and Lenard appealed.

The court of appeal affirmed the award of damages. It also affirmed judgment against Lenard personally, as well as Pinnacle. L.R.S. 12:1320D provides that no member, manager, employee, or agent of a limited liability company is liable in such capacity for a debt, obligation, or liability of a limited liability company. The limitation does not apply, among other things, to fraud and breach of a professional duty or other neglect or wrongful act. The trial court found Lenard, because of his personal involvement and inaction, breached a professional duty or was guilty of a negligent or wrongful act. The court of appeal found there was no manifest error in that conclusion. There was a dissent directed to the issue of Lenard's personal liability. *Nunez v. Pinnacle Homes, LLC*, 2013-1302 (La.App. 3 Cir. 4/2/14), 135 So.3d 1283.

CONTRACTORS CONVICTED OF THEFT AND ATTEMPTED THEFT

George and Carey Rochelle and Doyle and Michelle Duhe hired Mark Richey and Phoenix Home Solutions to construct a fishing camp at Grand Isle, Louisiana. The Rochelles and Duhes paid Richey approximately $55,000.00 and a piling subcontractor approximately $18,000.00. The only work performed was the piling for which a permit had not been obtained. The Jefferson Parish District Attorney filed a bill of information charging Richey with one count of theft in excess of $1,000.00 in violation of L.R.S. 14:67. It amended the bill of information to charge him with theft in excess of $500.00. A jury found Richey guilty of attempted theft of greater than $500.00. The trial court sentenced Richey to three years at hard labor, suspended, and placed him on active probation for five years, subject to the requirement that he make restitution to the victims, and comply with the conditions of his probation, including restitution in an unrelated matter. Richey appealed.

The court of appeal found, based on the evidence at trial, the State proved Richey took money from the Rochelles and Duhes through fraudulent conduct with the intent to permanently deprive them of their money. Richey failed to apply for the proper permits and inspections from the inception of the project, suggesting he did not intend to construct the building. Further, vendors and subcontractors were not paid by Richey for their services, despite Richey invoicing and receiving funds totaling more than $63,000.00 to pay for the work. Still further, Richey began bankruptcy proceedings after the agreement was reached in his personal and business capacities casting doubt on his honesty and ability to repay the funds as he once offered. The court held that a rational trier of fact could have found that Richey had the specific intent to permanently deprive the Rochelles and Duhes of their money by means of fraudulent conduct, practices or representations. The court of appeal found the sentence was illegally excessive since it was imposed under a subsequent amendment to the statute. The excessive sentence was vacated, and the matter remanded to the trial court for resentencing. *State of Louisiana v. Richey*, 2013-228 (La.App. 5 Cir. 10/30/13), 128 So.3d 1143.

In another matter, Gerald Biddy was convicted of theft under L.R.S. 14:67. He was sentenced by the trial court to five years at hard labor with credit for time served. Biddy appealed.

Biddy contracted with Rosemary Coldman to provide architectural and engineering plans, complete the foundation, build the shell, install plumbing, and paint the exterior of Coldman's home. The price for the work was $83,880.00. The work was to begin on July 16, 2007 and be completed by October 16, 2007. Coldman made several payments to Biddy, the last two of

which were paid on July 6, 2007 totaling $5,500.00. Total payments made were $16,065.60. On August 7, 2007, Coldman executed a document authorizing Biddy to act as her agent to obtain the necessary permits while she was away on vacation. She testified that, to her knowledge, Biddy never obtained the requisite paperwork or permits. When she returned from her vacation in mid-September, 2007, no work had been performed.

According to Coldman, Biddy never answered her calls. She sent an email to Biddy requesting that he return her money and any paperwork he obtained. Biddy responded to the email indicating the delay was caused by ongoing negotiations with plumbers, a change order, and his knee surgery. Coldman testified that a meeting was arranged through a mutual acquaintance, but Biddy did not attend the meeting. There was some contradiction in the testimony of Coldman and Biddy, but Biddy admitted photographs of the property did not support $16,000.00 worth of work. He also admitted the work was to be completed by October 16, 2007. Biddy further admitted he was not a licensed contractor, but contended he did not need a license since the cost of the work was below $75,000.00, although the contract exceeded that amount.

The court of appeal held L.R.S. 14:67 is not limited to situations in which a defendant has the intent to defraud at the time he takes possession; it also includes a defendant's misappropriation by fraudulent conduct of what is already in his possession. A defendant can form an intent to steal after taken possession of property through honest means. The fact that Biddy did not intentionally make misrepresentations to Coldman as to his contractor status or otherwise, did not mean that he did not subsequently form an intent to misappropriate the money paid to him by Coldman.

The court of appeal found any conflicting statements as to factual matters related to the weight, not the sufficiency of the evidence. A rational trier of fact could infer, based on Biddy's actions and the surrounding circumstances, that he intended to permanently deprive Coldman of the money owed to her in excess of $500.00. The conviction was affirmed. The matter was remanded to the district court for a ruling on Biddy's outstanding motion to reconsider the sentence. *State of Louisiana v. Biddy*, 2013-0356 (La.App. 4 Cir. 11/20/13), 129 So.3d 768.

PRIVATE WORKS ACT LIEN

Mid-South Plumbing, LLC was hired to perform work at the Magnolia Garden Apartments. Mid-South sent invoices to the apartment's management company totaling $35,177.00, but was only paid $10,000.00. Mid-South filed a lien on June 12, 2002, and on January 29, 2003 sued to recover the balance. It also sought recognition and maintenance of a privilege against the property based on the lien. The sole defendant was the Development Consortium-Shelly Arms, LLC a prior owner of the property. Shelly had no interest in the property at the time the work was performed by Mid-South. In connection with the petition, Mid-South also filed a notice of lis pendens. On March 13, 2003, Mid-South filed an amended petition substituting the correct owner, Cobalt, LLC, as the proper defendant in place of Shelly. Mid-South failed to amend the lien and the notice of lis pendens to name Cobalt as the owner. In September 2004, Cobalt obtained a mortgage in the amount of $2,500,000.00 from First Bank and Trust. As a result of Mid-South's filing error, the public record, at the time the mortgage was executed and recorded, did not reflect the existence of a claim by Mid-South against any property owned by Cobalt. The title attorney handling the loan was unable to locate the lien or notice of lis pendens.

In 2009, Mid-South filed a motion for summary judgment against Cobalt. Cobalt was unrepresented, and did not appear at the hearing. Mid-South erroneously represented to the

trial court that its lien included the identity of the person for whom the contract was performed. The trial court granted Mid-South's motion. The judgment awarded monetary damages and recognized and maintained the lien as valid. Further, it directed the sheriff to execute the lien against the immovable property, and sell the property at a judicial sale in full satisfaction of the judgment. Thereafter, a writ of *fieri facias* issued. The property was seized by the sheriff and scheduled for public auction. First Bank received notice of that action, and filed a petition for a temporary restraining order, preliminary injunction and permanent injunction. The trial court granted the preliminary injunction.

The court of appeal affirmed the judgment of the trial court. It held First Bank did not have the statutorily required notice of the adverse claim asserted by Mid-South against the property. Although Mid-South amended its petition to identify Cobalt as the proper owner of the property, the lien and notice of lis pendens attached to the petition as evidence still failed to identify Cobalt as the owner. *Mid-South Plumbing, LLC v. The Development Consortium-Shelly Arms, LLC*, 2012-1731 (La.App. 4 Cir. 10/23/13), 126 So.3d 732.

TAX LAW ALERT

AT RISK RULES AND CO-GUARANTORS

A Louisiana federal district court recently determined that a member of a limited liability company who co-guaranteed a loan for a company that he owns was only fifty percent (50%) at risk under IRC § 465. *Moreno v. United States*, No. 6:12CV2920, 2014 WL 2112864 (W.D. La. May 19, 2014). As background, IRC § 465 only allows a taxpayer deductions for a business activity to the extent that the taxpayer is economically or actually at risk for the investment in the activity. In *Moreno*, a company (Company A) that Mr. Moreno wholly-owned borrowed money from an unrelated lender to purchase an airplane. The loan was secured by Mr. Moreno and another company that Mr. Moreno owned. Company A leased the aircraft and deducted a large loss. The IRS argued that Mr. Moreno was not at risk for the loan since he was only a co-guarantor.

The district court held that since a co-guarantor could be subject to contribution or reimbursement under state law for up to fifty percent (50%) of the loan upon a default by Company A, the guarantor (Mr. Moreno) was only at risk for fifty percent (50%) of the loan amount. The court was not concerned with the liquidity or security of the co-guarantor at the time of the loan.

IRS ADVISES AGAINST "DUMPING" WORKERS ON HEALTH INSURANCE EXCHANGE

Many employers attempted to shift costs for employee health insurance away from themselves by reimbursing employees for the premiums that employees paid for health insurance. This "dumping" strategy required only that the employer provide its employees with tax-free cash contributions to help pay premiums. However, the Internal Revenue Service ("IRS") released a set of question and answers that reject this idea.

When an employer reimburses employees for health insurance premiums, the arrangement is classified as an "employer payment plan." However, per IRS Notice 2013-54, employer payment plans generally do not include any employer-sponsored arrangements under which a worker

may choose either cash or an after-tax amount as assistance for health coverage. As provided in Notice 2013-54, these group health plans must adhere to "market reform" provisions, which include the "annual dollar limit prohibition" and the "preventive services requirements." In particular, the "annual dollar limit prohibition" requires that a group health plan may not establish any annual limit on the dollar amount of benefits received by any individual, and the "preventive services requirements" mandates that non-grandfathered group health plans provide certain preventive services without imposing any cost-sharing mechanisms (i.e., co-payments) for the services.

The document released by the IRS asserts that employer payment plans fail to satisfy the market reform requirements and cannot be integrated with individual policies to fulfill the market reforms. As a result, these arrangements fail to meet ACA requirements, which may subject employers to a $100 per day (or $36,500 per year) excise tax for each employee who purchases health insurance from the individual marketplace.

CHOICE OF ACCOUNTING METHODS

Section 446(d) allows accounting methods to be chosen at the trade or business level; therefore, when computing taxable income, taxpayers engaged in more than one trade or business may use a different method of accounting for each trade or business. Nevertheless, different methods of accounting may only be used where the taxpayer has two or more trades or businesses that are truly separate and distinct, and if the accounting method adopted for each separate and distinct trade or business clearly reflects the income of that trade or business. Treas. Reg. § 1.446-1(d)(1).

In a recent CCA, the IRS determined that a corporation and its wholly owned disregarded entity subsidiary were separate and distinct trades or businesses for purposes of Section 446(d) where the entities primarily engaged in different activities, had separate books and records, were in different geographical locations, and shared only high-level executive employees. The IRS found that the disregarded entity status of the subsidiary was not determinative as to whether it was a separate and distinct trade or business for purposes of choosing its accounting method.

Contact Us:

Baldwin Haspel Burke & Mayer, LLC

Phone: (504) 569-2900 | Fax: (504) 569-2099

www.bhbmlaw.com | bhbm@bhbmlaw.com