



CONSTRUCTive Talk

VOLUME 11 ISSUE 3 CONSTRUCTION LAW COMMITTEE NEWSLETTER, A COMMITTEE OF THE
2016 - 2017 FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION



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Contingency Fees for Construction Liens?

By: Mark Young, Esq., Law Offices of Mark W.S. Young, West Palm Beach, FL

Many construction liens are not large enough to justify paying an attorney hourly, but should an attorney take such cases on a contingency fee? Contingency fee agreements are often used in personal injury cases, and have allowed many parties who could not afford an attorney to gain legal representation. Although they are commonly used for personal injury scenarios, are contingency fee agreements appropriate for construction liens?

There are many risks in contingency fee agreements, about which attor-

neys should become thoroughly knowledgeable before entering into contingency fee agreements. Failure to follow the special requirements of contingency fee agreements can result in an attorney performing the legal work and not being paid. Improper contingency fee agreements can also run afoul of the Rules of Professional Conduct.

Pure Contingency

Unlike personal injury

claims, where the sky could be the proverbial limit, construction liens are for fixed amounts. Hourly attorney fees provide clients with a financial incentive to promptly settle, so an attorney's prior experience with prompt settlements may not be representative of what will occur with a contingency fee agreement. A pure contingency fee agreement as a percentage of the total recovery could encourage a client to take the case to trial for a slight potential increase in the recovery, since much of the at-

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Congratulations!

12 New Attorneys Achieve Board Certification in Construction Law.

Please join us in congratulating the following individuals on passage of the Board Certification Exam.

Jeffrey Bogert, Coral Gables
Gabriel Ben Abba Crafton,
Jacksonville
Jennifer Carmen Gonzalez,
Coral Gables
Patrick Dennis Hinchey,
Jacksonville
Kimberly Cannon Hirschman,
Coral Gables

Jason Jude Quintero, Tampa
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Robert Paul Washington,
Coral Gables
Clay Henderson Whittaker, Pensacola



Contingency Fees for Construction Liens?

By: Mark Young, Esq., Law Offices of Mark W.S. Young, West Palm Beach, FL (continued from page 1)

"There are many risks in contingency fee agreements, about which attorneys should become thoroughly knowledgeable before entering into contingency fee agreements."

tendant risk is borne by the attorney. The attorney should factor the amount of time required to perform a full trial into the decision whether to enter into a contingency fee agreement. As an attorney, your business inventory is your time. Contingency fee agreements can cause clients to not value attorney time as highly as under an hourly fee agreement. The availability of contingency fee arrangements could also encourage a prospective client to inflate her claim in order to entice an attorney to take a case on a contingency fee basis, which could invalidate the entire lien as fraudulent.

Hybrid Arrangements

A reasonable alternative to a full contingency fee would be a hybrid of a percentage of the recovery plus a reduced hourly fee. The agreement should clearly state that the hourly fee is not contingent. The entire fee should still comply with the Rules of Professional Conduct, which require that the fee be reasonable.¹ There are additional requirements of contingency fee agreements in R. Reg. Fla. Bar 4-1.5(f).² The parole evidence rule also applies when reviewing contingency fee agreements.³

Who Advances Expenses?

The contingency fee agreement should clearly state that the client advances litigation expenses, if that is the case.⁴ Contingency fee cases involving property damage or personal injury have additional

requirements and limitations on percentages.⁵

Payment For Withdrawal

If an attorney withdraws from a contingency fee case, it is very difficult to get paid, unless the withdrawal is based on being discharged by the client. An attorney considering a contingency fee should become very familiar with rules of withdrawal and when an attorney is allowed to recover fees.⁶ Quantum meruit attorney fee recovery can be difficult to prove and is limited to the amount in the fee agreement.⁷ A quantum meruit attorney fee award should consider the actual value of the services to the client. Id. The factors listed in R. Reg. Fla. Bar 4-1.5(b) may be a consideration in determining actual value received for the client. A contingency fee attorney should budget the cost of an expert witness to prove the fee, when considering whether to accept a contingency fee case.

Litigation Budget

Before accepting a construction lien case on a contingency, it would be prudent for an attorney to prepare a realistic litigation budget to estimate the amount of time and expenses assuming the construction lien case went to trial. This budget will provide a benchmark to help the attorney make an informed decision on whether the case is right for a contingency fee.

Ethical Considerations

A lawyer should be aware of special requirements of contingency fee agreements. R.

Reg. Fla. Bar 4-1.5(f) (contingency fees). The lawyer must be mindful of complying with R. Reg. Fla. Bar 4-1.8(i) (Acquiring Proprietary Interest in Cause of Action). Personal injury contingency fee agreements have special limitations on contingency fees in Rule 4-1.5. If the lawyer's contingency fee agreement materially violates the Rules, the lawyer may not get paid.

Conclusion

Lawyers should consider the totality of the circumstances before accepting a contingent fee lien case. The long term success of a lawyer's career is often not based on the cases the lawyer accepts, but on the cases that the lawyer declines.

1. R. Reg. Fla. Bar 4-1.5(c).

2. R. Reg. Fla. Bar 4-1.5(f) states, "A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination."

3. R. Reg. Fla. Bar 3-7.6(l).

4. R. Reg. Fla. Bar 4-1.5(f).

5. R. Reg. Fla. Bar 4-1.5(f)(4).

6. "A Primer on Motions to Withdraw and Attorney Liens", The Florida Bar Journal, Jan 2002, Vol. LXXVI, No. 1, page 30.

7. *Rosenberg v. Levin*, 409 So.2d 1016 (Fla. 1982).

Case Law Update

By: Steve Sellers, Esq., Dudley, Sellers and Healy, P.L.,
Tallahassee, FL

- ♦ **Altman Contractors, Inc. v. Crum & Forster Specialty Insurance Company**, 2016 WL 4087782, — F.3d — (11th Cir., Aug. 2, 2016).

The District Court held that a chapter 558 notice unambiguously does not trigger the insurer's duty to defend or indemnify. The Eleventh Circuit is "not as sure" and certified the matter to the Florida Supreme Court.

- ♦ **Great American Insurance Company v. Brewer, et al.**, 2016 WL 3640395 (M.D. Fla., Orlando Div., July 8, 2016).

The trial court granted partial summary judgment to a surety on the indemnitor's defense that section 725.06, Fl. Stat., applies to nullify an indemnity agreement. Section 725.06 does not apply to a surety as plaintiff because it is not an owner of real property, or an architect, engineer, general contractor, subcontractor, sub-subcontractor, or materialman.

- ♦ **Maschmeyer Concrete Company of Florida v. American Southern Insurance Company**, 2016 WL 3746379 (M.D. Fla., Orlando Div., July 12, 2016).

In a section 255.05 payment bond case, the trial court held the surety liable on summary judgment. The contract was for an initial term of one year with a provision to allow the parties to renew the term for up to 60 months. The bond term expressly limited the surety's liability to a single term year that was prior to plaintiff's provision of materials. The trial court found that section 255.05(1)(e) rendered the limitation unenforceable. That statute provides in part that "any provision in [a statutory bond] issued on or after October 1, 2012, . . . which limits or expands the effective duration of the [statutory bond] . . . is unenforceable."

- ♦ **Department of Financial Services, Division of Worker's Compensation v. Soler and Son Roofing, DOAH Case No. 15-7356** (July 19, 2016).

DOAH Case No. 15-7356: Recommended order issued on July 19, 2016. A roofing company was assessed over \$63,000 for having one (1) uninsured worker, with the penalty calculated based on the department's statutory "imputation" that the worker: (1) had been employed for the past two (2) years, and, (2) at the "average weekly wage" of \$841.57 (as determined annually by the Department of Economic Opportunity). Since the evidence showed that the worker earned only \$10 per hour, which was found to rebut the statutory presumption of the "average weekly wage," the Administrative Law Judge determined that the penalty assessment should have been calculated at only \$15,000 (as an alternative to only a \$1,000 fine).

HOWEVER, in addition, even though the company failed to produce payroll records, the ALJ found that the department had failed to prove by "clear and convincing evidence" that the worker had been employed for more than just one (1) day, and rejected the two-year imputation of employment based on a conflict between the statutory provisions of section 440.107(7) (d)1, and Rule 69L-6.028(2). In particular, the ALJ held that the employer's failure to produce business records was not a basis for the department to impute a two-year employment period.

By invalidating this rule, the ALJ then applied the July 1, 2016, effective date change in section 120.57(1)(e), which now provides the authority to invalidate a rule in a 57.105 hearing, and prohibits agency or ALJ action based on an invalid exercise of delegated legislative authority.

Anticipating, based on prior decisions, that the department would attempt to make an Exception to this Conclusion of Law, and override it with a contrary conclusion, the ALJ noted that this area of law (i.e., determination of rules of evidence) may not be in the agency's "substantive jurisdiction" (which, if so, would prevent the agency from overturning the ALJ's "conclusion of law" on this point).

Note: This is a very important decision; however, it's only a "recommended" order, and must now go to the agency to enter a "final" order; accordingly, we will continue to monitor this case for any changes the agency may make in its final order (and for any appellate actions based thereon).

Steve E. Sellers is a partner at Dudley, Sellers and Healy, P.L. in Tallahassee, FL. Steve is Board Certified in Construction Law, Civil Trial, and Business Litigation.

Interested in joining the Construction Law Committee?

It's as easy as 1, 2, 3:

1. Become a member of the Florida Bar.
2. Join the Real Property Probate and Trust Law Section.
3. Email Scott Pence at spence@carltonfields.com advising you would like to join the CLC and provide your contact information.

Editor's Corner:

Do you have an article, case update, or topic you would like to see in Constructive Talk? Submit your article, note, or idea to jsmith@rumberger.com or tbench@rumberger.com.



Jared E. Smith
Tampa
Editor



Timothy N. Bench
Orlando
Assistant Editor

Upcoming Events

Subcommittee Practice-Get On Board!

Interested in getting involved? Contact one of the persons listed below.

ABA Forum Liaison - Cary Wright (cwright@cfjblaw.com)
ADR - Deborah Mastin (deboarhmastin@gmail.com)
Certification Exam - Steve Sellers (dudley@mylicenselaw.com)
Certification Review Course - Deborah Mastin (deborahmastin@gmail.com) and Bryan Rendzio (brendzio@fi-law.com)
CLE Subcommittee - Randy Dow (rdow@boydjen.com)
Construction Law Institute - Sanjay Kurian (skurian@bplegal.com)
Construction Litigation - Neal Sivyer (nsivyer@sbwlegal.com)
Construction Regulation - Fred Dudley (dudley@mylicenselaw.com) and Steve Sellers (steve@dhsattorneys.com)
Construction Transactions - Claramargaret Groover (cgroover@bplegal.com)
Contractor's University - Lee Weintraub (lweintraub@bplegal.com) and Cary Wright (cwright@cfjblaw.com)
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Construction Law Committee Meetings

Join us for our upcoming Construction Law Committee meetings. Benefits of the meetings include .5 hours of CLE each meeting, a timely update on developing case law, statutes and administrative rulings, and informative reports from our subcommittees.

The CLC meetings occur the second Monday of every month beginning promptly at 11:30 a.m. EST. To join, call: (888) 376-5050. Enter PIN number 7542148521 when prompted.

Schedule of Upcoming RPPTL Events

March 16-18, 2017
Construction Law Institute
and Construction Law Certification Review Course
JW Marriot/Ritz Grande Lakes
Orlando, Florida

January 17, 2017
Construction Litigation Subcommittee is putting on a Webinar
entitled "A Water Intrusion Claim"
Stetson Law School
(More information to follow)