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on the Subject

April 2006

Homeowners Associations Beware:

How a Storm Door Could Wash Away Certain Contractural Restraints

By Gary R. Long

National Public Radio recently reported that about one in six Americans live in a private homeowners or condo association. That number is increasing every year. The benefits of these associations are obvious – neighborhood aesthetics, increased property values, and functional common areas, to name a few. The drawbacks, however, may not be so apparent.

The associations are, in general, private corporations. As such, they are administered by a small minority of individuals – often a board of directors. Individual homeowners that are adversely affected by the decisions of the homeowners association are often left with little or no recourse. In theory, the homeowners are bound by their contract with the association. If the contract prohibits the conduct in question, there is little room for debate.

A case that is currently making its way through the New Jersey legal system may alter this balance (or imbalance, depending on your point of view) of power. At the center of this legal tempest is a petty, but ironically appropriate, piece of property – a storm door.

In *Committee for a Better Twin Rivers vs. The Twin Rivers Homeowners Association*, the plaintiff-homeowner thought she had approved her new storm door through the architect. Apparently, she was mistaken because the homeowners association informed her that the door was in violation of the association's architectural standards. Rather than modify the design of the storm door, the homeowner appealed the decision to the association and lost.

Undaunted, the homeowner endeavored to win an elected seat on the board of the association. She commenced her campaign by placing signs in her front lawn. The homeowners' association informed her that the signs violated the association's rules and forced her to remove them. Then, in an arguably ill-advised fashion, the president of the homeowners association proceeded to utilize the association's newsletter to publicly criticize the offending homeowner. This set off a legal battle that is still ongoing.

The homeowner has alleged that the association violated, among other things, her right to free speech. The trial court treated the matter as a contract dispute and ruled against the homeowner. On appeal, however, the homeowner won on the grounds that the association is a quasi-governmental entity that must adhere to the standards of due process and free speech. The homeowners association has appealed this ruling to the state's highest court.

This case has the potential to set a precedent that could modify the manner in which homeowners associations conduct their business. If the homeowner prevails, then contractual nature of associations will no longer be the only source of rights among the parties. Homeowners associations will be forced to construct their rules and regulations in the context of fundamental rights of free speech and due process. In essence, homeowners associations will no longer function as corporate entities. Instead, they will be treated more akin to governmental bodies. ■

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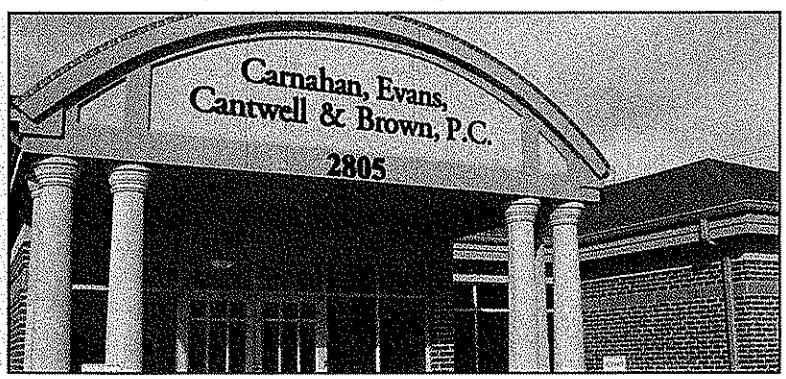


Homeowners & Contractors:

Are You Ready To Hopsotch Your Way To Court?

By J. Craig Preston

So, the homebuyer and homebuilder have a dispute about a construction defect; after August 28, 2005 and RSMo § 431.300 et. seq., now what? A newly-enacted Missouri statute regarding homebuyer and contractor dispute resolution makes suing builders and contractors an art form. The statute creates numerous deadlines and notice provisions that must be strictly adhered to in order to even get to the courthouse steps. For builders and contractors, the statute creates some piece of mind that their buyer will not drag them into court for a leaky faucet.

Who Does The Statute Effect? Homebuilders and contractors must, at the very least, have a basic understanding of the statute in order to reap its benefits, as they could be affected seemingly every time they sign a contract with a homebuyer. The statute also applies to "substantial remodels," meaning remodels in which the total cost exceeds one-half of the assessed value of the residence. Homebuyers, or their lawyers, must also know the intricacies of the statute, as they must be the first to act under the statute, setting the ball into motion.

Why Is The Statute Important? Most importantly, if all of the provisions of the statute are followed, the homeowner is barred from filing a lawsuit immediately. The builder must first provide notice to the buyer regarding the dispute resolution process. From there, if there is a construction defect, the buyer must send the builder written notice of their claim. Within fourteen days of receiving this notice the builder must answer in one of five ways: 1) propose to inspect the home, 2) offer to fix the defect without an inspection, 3) offer to fix part of the defect and settle the remainder, 4) offer a money settlement for the entire defect, including purchasing the home, or 5) dispute the claim and neither offer to remedy nor compromise. If the builder chooses number 5 above, the homeowner can file a lawsuit immediately; otherwise the homebuyer must either accept or reject the offer. If the homebuyer rejects the offer, the parties can proceed to mediation, if either party requests, otherwise the buyer is free to file suit. If the homebuyer accepts any of the offers, the owner must give the builder access to the home during working hours and the builder must complete the repairs within the time stated in the offer. If the homeowner is unhappy with the repairs, then the parties continue to mediation, if either party requests, otherwise the homebuyer can file suit.

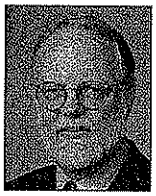
Builders/Contractors – What You Need To Know. Much like the notice required under the mechanics' lien statute, buyers must be given specific notice of the statute and how to proceed with a construction defect claim. A copy of a sample notice is given in RSMo § 431.303. Builders should copy this notice paragraph and place it in their contracts. With the homebuyer being barred from filing suit immediately, builders are given the opportunity to stay out of court, if they walk the straight and narrow path of the statute. Each of the five possible answers to a notice of claim can bring about different time limitations, requirements, advantages and disadvantages. But, builder beware, one tiny slip up in any of the statutory provisions means the homebuyer can file suit immediately.

Homebuyers – What You Need To Know. The most important thing homebuyers with construction disputes must know is that, if they are given notice, and the builder has otherwise complied with the statute, they must use the dispute resolution process provided in the statute. The first step is not filing a lawsuit, but filing a notice of claim with the builder. If you are in a case where you want to file a lawsuit immediately, watch the time restrictions carefully, one little mix up by the builder and you are given the keys to the courthouse. ■

J. Craig Preston is an associate at Carnahan, Evans, Cantwell & Brown, P.C., concentrating his practice in the areas of business litigation and transactions. Craig received his law degree, cum laude, in 2005 from the University of Missouri – Kansas City. Craig can be reached at 417-447-4400 or by e-mail at cpreston@cecb.com.

The Energy Tax Incentives Act of 2005

Tax Breaks for energy-saving devices



By Frank C. Carnahan

The Energy Act provides significant tax breaks for individual homeowners who spend money in 2006 and 2007 to install specific energy-saving devices, and starting in 2006, a new tax credit will be available for the purchase of some hybrid vehicles, as well as the purchase of some other, more exotic "green" vehicles. Businesses that install energy savings equipment will also be entitled to generous energy tax credits or deductions. There is much detail in the provisions that if you are not careful can prevent you from maximizing your savings.

Tax breaks for consumers include:

1. The 30% residential energy efficient property credit for property placed in service in 2006 and 2007, up to an annual maximum credit of:
   a. $2,000 for the purchase and installation of residential solar water heating or for the purchase of photovoltaic equipment for solar electricity (up to $6,666 in expenses apparently including vacation and second homes) and
   b. $500 for each 0.5 kilowatt of fuel cell property capacity (principal residence only).
2. A $500 maximum "lifetime" home improvement energy credit for individuals for non-business energy property (energy-efficient residential exterior doors and windows, insulation, heat pumps, furnaces, central air conditioners and water heaters) installed in 2006 and 2007. Solar equipment and fuel cells are not included in this credit and instead qualify for the 30 percent residential energy efficient property credit).
3. A credit for the purchase or lease of alternative fuel vehicles (new, purchased or leased for taxpayer use and not for resale), equal to the sum of the 4 components below:
   a. qualified fuel cell motor vehicle credit up to $8,000 based on weight class and fuel economy;
   b. advanced lean burn technology motor vehicle credit;
   c. qualified hybrid motor vehicle credit (gross vehicle weight limit of 8,500 pounds rules out a number of SUVs - for that there is a separate business-use hybrid credit), changed from a deduction to a two-part credit:
      - a fuel economy credit from $400 to $2,400, based on fuel savings ranging from 125% to 250% of a base amount calculated compared to 2002 gas vehicles for city driving, and
      - a conservation credit ranging from $250 for savings of at least 1,200 gallons of gasoline to $1,000 for 3,000 gallons;
   d. qualified alternative fuel motor vehicle credit.

A deduction is available for costs associated with an energy-efficient commercial building property placed in service after 2005 and before 2008, up to a maximum $1.80 per square foot of the building, less any prior year deductions, for property which must be:

- depreciable (or amortizable) property;
- installed as part of the interior lighting system, the heating, cooling, ventilation and hot water systems, or the building envelope; and
- installed pursuant to a plan to reduce total annual energy and power costs by 50 percent or more when referenced against a building meeting certain minimum requirements.

Eligible contractors may claim a tax credit of $1,000 or $2,000 for a qualified new energy-efficient home located in the US and acquired from the contractors for use as a residence during 2006 and 2007.

The business investment credit for solar energy property is increased from 10% to 30% for:

- equipment which uses solar energy to generate electricity, to heat or cool a structure, or to provide solar process heat, and
- equipment which uses solar energy to illuminate the inside of a structure using fiber-optic distributed sunlight. Solar energy to heat swimming pools is not eligible. The energy credit for any qualified fuel cell property cannot exceed $500 for each 0.5 kilowatt of capacity.

The Energy Act also adds a new credit for the manufacture of energy-efficient appliances, such as dishwashers, clothes washers and refrigerators. The credit is a part of the general business credit. ■

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"Contract Warriors"

A brief overview of the military's use of contractors on the battlefield

By Gary R. Long

The utilization of private sector expertise and service on the battlefield is not a new concept for the American military. In fact, George Washington outfitted the Continental Army with the help of civilian workers such as medical personnel, transporters, engineers and carpenters. While civilian contractors have a history of service to the armed forces, the nature of their service has changed dramatically over the last two hundred years. The most dramatic change comes in the number of contractors utilized by the military. During the first Gulf War, it is estimated that there was one contractor for every 50 to 100 soldiers. Today, that ratio is closer to one for every ten. Currently, the military relies on contractors for the maintenance of 28 percent of its weapons system, a figure that the current administration would like to see increased to 50 percent. The fact that the Department of Defense has made a policy decision to employ a large number of contractors to perform logistics functions previously assigned to military personnel raises complicated practical and legal concerns. With the Ozarks in the shadow of one of the most active Army bases in the nation, it is important for companies and contractors in this area to understand the legal morass that awaits their employees (in addition to the obvious dangers) should they venture into a theater of conflict.

The legal status of a contractor in countries supporting U.S. forces is governed by a myriad of treaties, international laws and locally negotiated agreements. Most importantly, contractors are governed by a Status of Forces Agreement (SOFA). In general a SOFA is negotiated with every foreign government in which the U.S. military positions troops for any appreciable period of time. Contractors must take care to understand these agreements because they outline their duties and obligations not only to the military but also to the host country. SOFA's often contain provisions relating to working conditions, labor standards, workers' compensation, union agreements and labor contract matters.

Although the U.S. enters into a SOFA with almost every host country, the current operation in Iraq is an exception to this rule. In Iraq, the U.S. military is classified by international law as an occupying force. As such, the U.S. did not negotiate a SOFA with the former government or the current interim government. Instead, the contractors are operating under various "locally negotiated agreements." In general, the contractors remain constricted by the various international laws (e.g., Geneva Protocols) and the Law of Armed Conflict, but the level of constriction is vastly more relaxed than usual. Many in the military are concerned about this lack of control over contractors as they try to build and maintain tenuous relationships with the Iraqi people.

Adding to the concerns of the U.S. is the fact that contractors are not subject to the chain of military command. Even in a military environment, a contractor is governed primarily by the terms and conditions of his or her contract. As such, the contractor cannot be ordered to perform functions outside the scope of their contract. If a contractor refuses to fulfill its obligations, the military is left with little recourse other than suing the contractor for breach. This obviously does little good in a military environment where soldiers depend on contractors for everything from weapons maintenance to food delivery.

In sum, the use of contractors has proven extremely valuable to the U.S. military. Not only has it decreased the cost of war, but it has also provided greater flexibility, technical expertise and focused operations on the battlefield. Companies have also reaped the benefits of this relationship through lucrative contracts. Despite the dangers and concerns related to the use of contractors, it is apparent that the military is convinced that the relationship is necessary for the modern battlefield. As the U.S. continues to find itself stretched thin in various engagements, contractors will find themselves increasingly a part of the military's plans. Companies in the Ozarks would be wise to understand how this relationship is evolving because the opportunities are likely to increase in the coming years.

Rental Equipment and Machinery:

A Recent Change in the Mechanics' Lien Statute

By Gary R. Long

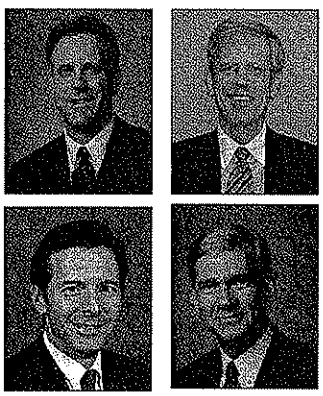
"A fair days' wages for a fair days' work: it is as just a demand as governed men ever made of governing. It is the everlasting right of man."
– Thomas Carlyle, Past & Present

Until last year, this statement did not apply equally to all contractors in the commercial context. The lien statutes in Missouri protected the rights of contractors, suppliers, engineers, architects (among others) who added value to an owner's project, but did nothing to protect those contractors supplying rental equipment and machinery. If rental equipment is used to add value to a project, shouldn't they be afforded the same rights as the contractors?

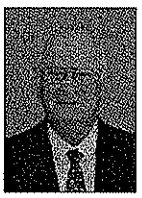
The legislature apparently thought, but only to a certain extent. RSMo § 429.010 was amended to allow the imposition of a mechanics' lien for nonpayment of rental equipment and machinery fees. If a company, contractor, or individual lends equipment or machinery that is utilized in a commercial project, he may now assert a lien on that property if the owner fails to pay and the bill is at least $5,000. Like all other mechanics' and artisans' liens, the statute contains very specific procedures that must be followed in order to assert a valid lien. It is important that you consult the statutes to insure that your rental contracts are up to date to take advantage of this new provision. ■

Special Recognition

Clifford S. Brown, on his installation as the 84th President of the Springfield Metropolitan Bar Association. Cliff's leadership marks the SMBA's 103rd year of service to the legal community. Cliff was also recognized as one of the most distinguished and respected Trust and Estates attorneys in the 2006 edition of *The Best Lawyers in America*. This year marks the 11th consecutive year that Cliff has been recognized in *Best Lawyers*.



C. Bradford Cantwell, *Clifford S. Brown*, *Joseph D. Sheppard III*, and *Thomas D. Peebles*, on their selection by their peers as Missouri-Kansas "Super Lawyers" by *Law & Politics Magazine*. The selection process included sending ballots to 25,000 active lawyers in Missouri and Kansas who have been practicing law for at least five years, as well as a panel review, a good-standing review, and an interview.



Don G. Busch, on his March 23, 2006 presentation at the "Zoning and Land Use in Missouri" seminar. The seminar provided an overview of land use law in Missouri, techniques for writing and interpreting land use codes, an overview of development codes for Stone, Christian and Taney Counties, as well as an understanding of how land use disputes are handled in the courts.

Gary R. Long, on his acceptance to the 2006 Class of Leadership Missouri. Leadership Missouri was founded to identify current and emerging leaders throughout Missouri, enhance their leadership skills and deepen their knowledge of the challenges and opportunities facing Missouri, so they may take an active role in advancing the state for the common good.

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- Franchise
- Mechanics' Liens & Forclosures
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