STIMMEL, STIMMEL & SMITH QUARTERLY NEWSLETTER

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What's New

With the start of a new quarter here at Stimmel, Stimmel and Smith, we have purchased a new accounting program. PCLaw is a windows based legal accounting program which integrates time entry and accounting into one package. Your new invoices will have a fresh new look and be easier to read.

If you have any questions or concerns after reviewing your new invoices, which will arrive during the first week of May, 2001, contact Paul M. Ng, our Office Manager at (415) 392-2018 Ext. 103 or via e-mail at: png@stimmel-law.com.

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JUSTICE REVEALED

Global Litigation: Don't Wait For It . . . It's Here

While the Dot Com and technology markets are presently contracting, global commerce continues to expand and become increasingly complex. The advent of the Internet has not sparked e-retail as was once believed, but it has dramatically affected how businesses do business with each other, and especially how we do business with people we have never met. We appear to have irrationally assigned accountability to any business with a moderately sophisticated Web Site, no matter what country that business is tied to. We absurdly trust the information on the Web Site, including promises that they will be responsible, and that the product is as they claim. But what we forget is that other countries have different laws, often less stringent than those of the United States, which do not conform to the so-called American Business Ethic. Despite what we may want to believe, the laws of the United States are not internationally recognized, and American businesses must carefully protect their interests by understanding the true rules of the game.

There are already complex international treaties relating to business and commerce from intellectual property (i.e. trademarks) to sales of goods, including those related to disputes (i.e. limitations on the time permitted to bring a civil action arising from the international sales of goods, and enforcement of foreign arbitration awards). Navigating through American Federal, State and Local law is trying enough, but now businesses must factor in the foreign laws of whomever they are transacting business with, and if and how an international convention may or may not apply. Engaging in international business transactions is very alluring, but there is a crocodile in the swamp, so be very careful where you step.

For example, assume you are dealing with a Brazilian company with an impressive English Language Web Site, and by contract it agrees to be bound by California law and arbitration. That sounds great, doesn't it? So a dispute occurs: you file for arbitration in foggy San Francisco; the Brazilian company does not bother to respond, which is frustrating at first, but ultimately means you will win; you obtain a judgment; and now you want to enforce the judgment. The problem is that the Brazilian company is without assets to seize in the United States. You think to yourself, "So what, it agreed to submit to California arbitration, I'll enforce this judgment in Brasil where I know they have assets." Right? Wrong, Brasil is not a part of the international "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," so no matter what the Brazilian company agreed to, or stated on its Web Site, enforcing your California judgment is unlikely. [Please note that at great risk to offending our clients from Brasil (and I spell Brasil with an "s" out of my great respect), the above example used Brasil solely for illustrative purposes . . . even though Brasil is not a signatory to the above convention, and Uzbekistan is!]

The above noted convention regarding the enforcement of arbitral awards is an important document that has greatly enhanced the comfort level of many of our clients, as we are sticklers for strong arbitration clauses in all our contracts. However, even conventions with the best intentions have very subtle pitfalls. For example, China has limited the application of this convention to those disputes (whether contractual or not) "which are considered as commercial under the national law of the People's Republic of China." What is "commercial" to China? In the interest of brevity, I will just say it does not mean the same thing it means in the United States.

Now the world's legal and business communities are putting their heads together again in an attempt to centralize and bring conformity to court judgments (as opposed to just arbitration). Some time in 2003, forty-seven countries are expected to formalize the "Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters." Conformity among foreign judgments in civil and commercial matters will be very important to try to level the playing field

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for American businesses. American courts already liberally enforce foreign judgments against American businesses. However, there has been very little reciprocity from other countries. The importance of this proposed treaty cannot be understated, but it will be limited to the signatories, and a whole host of exceptions and limitations will apply. For example, for a foreign civil court judgment arising from a commercial contract to be enforceable, the litigation would have to be where the contract was performed, irrespective of whether the parties agreed to a California choice of law and venue provision. By contrast, under the foreign arbitration convention, awards are enforceable from any country agreed to by the parties in the contract. Further, foreign judgments relating to intellectual property are only enforceable if the litigation was in the country of the disputed registration.

So, will international business transactions get simpler in the future? Yes, but certainly not in the near future. As noted, the new Hague convention relating to enforcement of foreign civil and commercial judgments will not be here until 2003 at the earliest, and that will only confuse matters more. American businesses need to pro-actively think about how they will deal with this new convention and those already in existence. A company's success in accessing the vast international market will be determined by how well it can adapt to the benefits and limitations of the various international treaties. And, even when one understands the broad strokes of a treaty, remember, the devil is in the details. Unless, of course, you already know what the People's Republic of China's legal definition of "commercial" is.

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SPOTLIGHT

Certain legislation passed last year, effective as of January 1, 2001, which change the employment discrimination landscape in California in several significant aspects. Employers should take note of the following changes in disability discrimination and sexual harassment law.

Sexual Harassment

Assembly Bill 1856 for the first time imposes personal liability on non-supervisory personnel for prohibited sexual harassment of a co-worker. This amendment to the California Fair Employment and Housing Act (FEHA) overturns prior California case law which insulated a non-supervisorial employee from personal liability for harassment. While this new law may appear, at first glance, to favor employers by spreading the liability for harassment, it has the potential to increase litigation by permitting suit against the offending employee, even if he or she were disciplined by the employer. Under the Labor Code, the employer may be required to indemnify the employee for defense costs.

Disability Discrimination

AB 2222 expands the definition of physical and mental disability under California law and increases an employer's obligations to applicants and employees with known disabilities. Now, under FEHA, a physical or mental disability includes one that *limits* major life activity. California law had previously conformed with the parallel federal law, the Americans with Disabilities Act (ADA) which defined a qualifying disability as one which *substantially limits* one or more major life activities. Eliminating the word "substantially" from the California law will make it considerably easier for California employees and applicants to establish a disability so as to qualify for reasonable accommodation from the employer.

The amendments to FEHA also go beyond federal protection by expressly providing that corrective measures, such as medication or eye glasses, may not be taken into consideration when determining whether an individual has a qualifying disability.

Another significant change imposes upon employers the obligation to, "engage in a timely, good faith, interactive process to determine effective, reasonable accommodations, if any, at the request of an employee or applicant with a known disability." Put simply, failure to discuss possible reasonable accommodations with an employee or applicant for employment as soon as the disability becomes known could subject the employer to liability.

If you have an employment situation which you believe may be impacted by one of these new enactments, please consult our office for further information.

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If a lawyer and an IRS agent were both drowning, and you could only save one of them, would you go to lunch or read the paper?

"When there are too many policemen, there can be no liberty;
When there are too many soldiers, there can be no peace;
When there are too many lawyers, there can be no justice."
-- Lin Yutang

WATCH OUT FOR

THE ECONOMY'S EFFECT ON THE CONSTRUCTION INDUSTRY

Over the past few years, the Internet industry's predicted never-ending growth led to individual and/or corporate debt beyond the true means of many Bay Area residents or corporations. As we read of the downturn in the stock market and layoffs at Internet companies, many contractors, subcontractors and suppliers are also faced with the consequences of a declining economy. While most of us have accepted the risks of the stock market as a component of investing and security in employment as a thing of the past, most of us, including those in the construction industry, have not faced the possibility of not being paid for performance of our obligations.

So what do you do when faced with non-payment of your bills? Luckily for you, there are statutory recovery schemes in place specifically designed to address these payment problems: 1) the stop notice; 2) the payment bond; and 3) the mechanic's lien. Each of these methods provides a security for payment that is not typically present in basic contract lawsuits and, thus, are the preferred recovery methods in the construction industry (especially since stop notice and payment bond claims also permit recovery of attorneys' fees to the prevailing party). However, to obtain the benefits of these recovery methods, one must adhere to the strict time restrictions placed on these remedies. While a more detailed discussion of these recovery methods is available on our web site, the following provides a simple time line checklist for these statutory remedies to ensure that payment can be recovered:

The Checklist

1. Serve a 20-day preliminary notice within 20 days of providing labor/materials to the job site. If not served within the first 20 days, serve the notice now so that it can be used as a basis for recovering for the labor/materials provided within 20 days prior to the service.
2. Record a Mechanic's Lien or serve a Stop Notice within ninety (90) days of completion of the project. However, if a Notice of Completion or Cessation was recorded, you must record the lien or serve the Stop Notice within sixty (60) days thereafter if you're the general contractor or thirty (30) days if you are a subcontractor or material supplier.
3. File suit on the Mechanic's Lien or Stop Notice. For a Mechanic's Lien, you must file suit within ninety (90) days after the date the lien was recorded. For stop notice claims, you must file suit within ninety (90) days of the expiration of the period in which stop notices are allowed to be served. For example, where no notice of completion was recorded, you have essentially 180 days to file suit.

There are much more specific guidelines for service, recordation and/or contents of each of the above requirements that should be reviewed with your counsel to ensure compliance and the viability of your recovery for your claim. If you are not familiar with these requirements or the above forms, please review our web site or contact us directly to receive our construction recovery guideline pamphlet.

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F.Y.I.

DOING BUSINESS ON THE WEB... OR HOW MOST OF YOU ARE ALREADY DOING BUSINESS IN BOSNIA, NIGERIA, BANGLADESH, CHINA, IRAQ, AND ANY PLACE YOU CAN NAME

So, here's the scenario: You have a web site, made in California where you are located, and someone in Russia checks it out, orders some high tech gadget you sell and does so by filling in your form and giving a credit card number over the web. You ship it to the customer's warehouse in Germany where it is exported to their customer in Iran.

Done all the time, right? But then you get a call from the FBI asking how you can sell prohibited high tech equipment to Iran. While you are stuttering to them, an e-mail comes in from the German police saying that in selling the product you have violated local German laws about labeling as well as exporting to a prohibited country, but you don't have time to think about the Germans because the next e-mail is from Iran and they want to order direct from you another thousand of the products and have already filled in their credit card number.

So...which country has control of this transaction? Which laws apply to you? How can you be held accountable to Germany and its local law if you have never been there? Can you now sell your products over the web to Iran since you haven't left your own office in San Francisco?
Perhaps you should open an office in Canada and ship from there?

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Time for some basic lessons:

Lesson #1: When you are on the web you are everywhere...every country in the world. When you ask for business on the web, are you therefore engaged in business there and subject to their laws? Depends...on whether they can order product from you over the web. If only they get information from you, you are not usually "engaged in business" in that locale and probably NOT subject to their laws just by having the web site. **BUT, if they can order from you on the web, you probably are**...so, German law may be imposed on you even if you never left the Bay Area!

Lesson #2: Most countries, including the USA, have strict laws about who can sell what to whom ...and those laws apply to the web. You are subject to US laws if an office is here even if your web site is read elsewhere. You must conform to US law in all your sales and that includes sales which you have reason to believe are going to illegal destinations.

Lesson #3: The law is far behind technology in this area. Most nations do not have any laws about the web, most nations do not have laws protecting consumers, and most nations will try to find some way to get jurisdiction over your transaction...and your taxes. If you sell over the web you need to take numerous precautions or you may find yourself facing multi-jurisdictional restrictions that will make you very unhappy very quickly.

Check our website and the Justice Revealed section for more articles on this topic.

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A true story:

A convicted con man was recently found to be impersonating a lawyer in New York City. To which one judge remarked, "I should have suspected he wasn't a lawyer. He was always so punctual and polite."

DISCLAIMER: *These Articles are intended to give the reader a general description of certain areas of the law. Legal advice is necessary to apply these legal concepts to your particular situation.* ***The reader should obtain competent legal advice before relying on the Articles.***

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