to take, although the majority seemed to think that disclosure of percentages was necessary. The proposed Code of Professional Responsibility now pending before the Illinois Supreme Court would require written consent of the client before a fee-splitting arrangement is allowable. Rule 2-105(a)

Schneiderjon v. Krupa, 162 Ill.App.3d 192, 113 Ill.Dec. 189, 514 N.E.2d 1200 (1987).

TWO DANGEROUS CASES FOR CONSTRUCTION LAWYERS

By Harold I. Levine, Esq.

Lawyers who represent contractors, subcontractors and developers must be aware of two dangerous cases which may haunt both the client and his lawyer.

The first is the case of *Conte v. Campbell, Lowrie, & Lautermilch,* 87 Ill. Dec. 429, 477 N.E.2d 30 (1985), and deals with the question of contingent payments. Before the *Conte* case, Illinois was known as a "reasonable period" state. That is, payment by the owner to the general contractor was not a strict condition precedent to the payment by the general contractor to the subcontractor; thus the subcontractor had to wait a reasonable period of time and then the general contractor was obligated to pay the subcontractor, whether or not it has received payment from the owner. The appellate court in the *Conte* case said that payment by the owner is a strict condition precedent to payment by the general contractor to the subcontractor.

Simply stated, if a subcontractor signs a contract with the contractor in which the contractor says, "I don't have to pay you until I get paid," the subcontractor is stuck. Since, in the author's opinion, 98% of subcontractors do not read or heed their lawyer's advice on contracts for fear of antagonizing the contractor, this is a real problem.

The facts in *Conte* are as follows: Subcontractor, Conte, and contractor, Campbell, had a contract to excavate work at a site for owner. Conte, plaintiff, was paid monthly upon submission of his bills to Campbell. The owner defaulted on the contract and construction work was terminated. The owner was insolvent. Although the contractor submitted a bill to the owner, which included the $83,000 owed to plaintiff, the owner did not pay. Subcontractor filed a mechanic's lien which was found to be inferior to a lien held by another company. Foreclosure on the property ensued, and the subcontractor was not paid. Conte then brought suit against contractor Campbell. Campbell responded with an affirmative defense which set forth Article 18 of the contract between the parties, which included a condition precedent to payment, to-wit: "... and if payment ... has been received by Campbell under its general contract, the subcontractor will be paid...."

Summary judgment was entered on behalf of contractor Campbell. The appellate court stated that defendant correctly stated the rule that failure of the parties to agree to a proper construction of the contract did not render it ambiguous. Intention of the parties is important. And although conditions precedent are not favored by the courts, the plain, unambiguous language in the contract binds the parties. Therefore, since the contract was clear and unambiguous to the appellate court, the parties are bound by it.

A vigorous dissent quoted the Restatement of Contracts and some federal cases with strikingly similar language in a contract to that of the contract in the instant case. Both the Restatement and the Federal Court in *Thos. G. Dyer v. Bishop*, 303 F.2d 655, (6th Cir. 1962), stated that such language is not an example of a condition precedent.

Lawyers should anticipate and not merely react. After you read this, call your subcontractor client, review his contract with the general contractor, bring this to his attention, eliminate the clause so your subcontractor can get paid. If you are asked to review the subcontractor's agreement, look for this clause and protect yourself when your client asks you how you could possibly miss such a critical term which deprived him of payment.

The next time-bomb is the *Ambrose v. Biggs* case. It should be understood that, in Illinois, the mechanic's lien law is part of every contract. Recently, the appellate court in *Ambrose v. Biggs,* 156 Ill.App.3d 514, 108 Ill.Dec. 918, 509 N.E.2d 614 (1897) held that section 5 of the Mechanic's Lien Act (*Ill.Rev.Stat.* c. 82, ¶1, *et seq.*) is applicable to every construction contract between an owner and a contractor. The court reasoned further that section 5 of the Mechanic's Lien Act *imposes a duty on the contractor to give* and the owner to require "a statement in writing, under oath, or verified by affidavit, of the names and addresses of the parties furnishing materials and labor and of the amounts due or to become due to each," before the owner shall be required to pay moneys due to the contractor. The court explained that in the context of a contract claim, an owner is not protected from potential subcontractor's claims unless a proper contractor's statement is provided.

The facts in this case involve a dispute between a contractor and a property owner as to whether the third and final payment of a contract between them was due. The court announced that the issue was whether a contractor could collect damages on a contract claim despite his failure to provide the owners with a sworn contractor's statement. The court noted that an owner in a contract claim is not protected from potential subcontractors' claims unless this statement is provided. The court further noted that the owner's payment of the first two installments due under the contract, even though a sworn statement had not been delivered by the contractor, was ill advised but not a waiver of their right to the court's protection.

What's the big deal? The big deal is that a contract claim was defeated for failure to give a sworn statement, the lien claim was not. How did the court say that the failure to give a sworn statement does not defeat the contract

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but defeats the lien count? The court said:

> In the present case, however, we are concerned with a contract claim. Contrary to a mechanic's lien claim, subcontractors are not necessary parties to a contract claim between an owner and a contractor. As a result, in the context of a contract claim, an owner is not protected from potential subcontractors' claims unless a proper contractor's statement is provided. Consequently, an owner acts at the risk of valid subcontractors' claims when making payment to a contractor without the benefit of a contractor's statement.

The case has serious implications for contractors. Contract claims have been dismissed on the basis of *Ambrose.*

Once again, to avoid problems for yourself and your client, consider a sworn statement in all construction claims not merely lien claims.

LOW PRICE DOES NOT CORRUPT SALE

An appellate court recently held that a trial court may not set aside a deficiency judgment or conduct a hearing to determine the value of property unless there has been an allegation of fraud concerning the judicial sale.

In the present case, when plaintiff-mortgagee foreclosed on the property, defendant-mortgagors still owed $775,197.73 on the promissory note. Plaintiff-mortgagee was the only bidder at the mortgage sale. The property was purchased by plaintiff for $500,000, leaving a deficiency of almost $300,000. Defendants filed a motion to set aside the court's order approving the deficiency, since the land was valued at $700,000. The trial court granted the motion and set a hearing to determine the value of the property. Plaintiff-mortgagee appealed.

Illinois statutory law provides for a deficiency judgment which is equal to the difference between the foreclosure sale price and the amount of the debt. (*Ill.Rev.Stat.* 1985, c. 110, ¶15-112) The statute does not require that the sale price be equal to the value of the property, nor does the value of the property enter into the deficiency calculation. Therefore, the appellate court held that the amount of the original deficiency judgment was proper. The court stated additionally that a foreclosure sale will not be set aside merely because the property was purchased at an inadequate price; there must also be evidence of fraud or mistake in the conduct of the sale.

Illini Federal Savings and Loan Association v. Doering, 162 Ill.App.3d 768, 114 Ill.Dec. 454, 516 N.E.2d 609 (1987).

Editor's Note:

Under the new Illinois Mortgage Foreclosure Law if the property had been residential the owner would have had a special right to redeem the property for 30 days after the sale. To redeem the property the owner must pay the mortgagee the sale price, the additional expenses incurred by the mortgagee and interest from the date the purchase was paid. (*Ill.Rev.Stat.* 1987, c. 110, ¶15-1604.)

TO HEIR IS HUMAN

The Supreme Court of Illinois recently held that the totality of evidence showed that a settlor intended to vest gifts at his wife's death, not at his own, so the doctrine of worthier title was inapplicable. The court also held that the gifts would be distributed on a *per stirpes* basis notwithstanding settlor's use of words "share and share alike" and instructions that the trustee distribute the gifts equally.

The settlor had established trusts under which his wife would enjoy income for life and in which his "heirs" would receive the principal on her death. If the settlor's "heirs" were those surviving at his death, the trust estates would pass under the wills of his two daughters. On the other hand, if the heirs are determined at the time of his wife's death, the trust estates would be divided among the settlor's now-living descendants. These descendants argued that the "heirs" should be those who were surviving at the wife's death, but they disagreed over whether the trust should be divided *per stirpes* or *per capita.*

In explaining its holding, the Supreme Court stated that the primary reason for early vesting of remainders is no longer as important as it formerly was, and that proof by the preponderance of the evidence that the settlor, testator, or donor intended to use the term "heirs" in its non-technical sense is sufficient to delay the vesting of a gift to a time other than at the grantor's death.

continued

HART ELECTED TO AMERICAN LAW INSTITUTE

Richard O. Hart, a lawyer with the firm of Hart and Hart, Benton, and member of the the ATG Board of Directors, was elected to the American Law Institute.

Membership in the Institute consists of lawyers, Justices of the United States Supreme Court and the Chief Justices of the Supreme Courts of each state, judges, law school professors and deans, and other legal scholars.

The purposes of the Institute are educational, and to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific work.

The Institute often conducts seminars with the American Bar Association. Membership in the American Law Institute is limited to 2,000, members are elected for life.