

## Breaking news

# Lawyers: Case gives teeth to construction trust law

*Appellate court imposed personal liability on individual for failing to pay subcontractor*

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A recent appeals court decision affirming for the first time an individual can be held liable for not paying subcontractors under the Maryland Construction Trust Law will not disrupt commercial building but might make companies pay closer attention to their bookkeeping, construction lawyers said.

"It finally gives some teeth to the trust fund," said Lou Kozlakowski, a partner with **Wright, Constable & Skeen** LLP in Baltimore. "You should really make sure monies are passed on."

The law, originally passed in 1987, puts money paid by a commercial contractor to a subcontractor into a trust fund, making anyone who has control of the money a trustee and therefore personally responsible if the money is misused. It was amended in 1995 so a subcontractor would not have to prove fraud on the part of a contractor, making it easier for a subcontractor to file suit under the law, said Howard Stevens, Kozlakowski's colleague.

The two lawyers represented **Atlantic Builders Group** Inc., of Rosedale, in its original 2004 lawsuit against **United Aluminum Window Sales & Service** Inc. and manager Keith Walter, both of York, Pa.

Atlantic was named general contractor for a new Abingdon branch of the Harford County Public Library in 2002 and hired United Aluminum as a subcontractor. United Aluminum, in turn, hired two companies for purchasing and installing materials.

When the two companies were not paid by United Aluminum, Atlantic ended up paying them approximately \$146,000 and sued United Aluminum and Walter for breach of contract and violation of the trust fund law.

The judge in Harford County Circuit Court last year awarded Atlantic \$250,000 from United Aluminum, including additional damages. He also awarded Atlantic more than \$146,000 from Walter individually.

Walter alone appealed, arguing in part that Atlantic waived its claim under the trust law as part of the contract. But the Court of Special Appeals held otherwise in its opinion published June 30.

"Simply put, the contract states: 'Nothing contained here in . . . shall create any fiduciary liability or tort liability' (emphasis added), but it does not purport to waive liability for breach of trust existing outside of the contract, such as the Maryland Construction Trust Statute," Judge James R. Eyler wrote.

T. Bruce Hanley, who represents Walter, said his client is considering seeking review by the Court of Appeals.

Hanley, a solo practitioner in Towson, said



Howard Stevens and Lou Kozlakowski of Wright Constable & Skeen convinced the Court of Special Appeals that the Maryland Construction Trust Fund Statute imposed personal liability.

the primary concern is about the amount of damages awarded, noting the two companies were ultimately paid what they were owed.

"Our central issue for the trial court and the appellate court was the measure of damages," he said.

Still, Hanley called the opinion "significant," because case law is scarce on the topic. Kozlakowski and Stevens, in fact, requested the opinion be reported because of the court's finding.

"It punctuates the responsibility of people who control the finances of a company," Hanley said.

### Prior case distinguished

Previous appellate decisions have found individuals in a corporation not liable because corporate law generally does not hold them responsible for a company's debts.

One month earlier, in fact, a different appeals panel found an individual not liable under the trust fund law. In *Selby v. Williams Construction Services*, retired Judge J. Frederick Sharer overturned a Prince George's County Circuit Court ruling against the owner of a concrete company.

"We cannot adopt Williams's position that the statute creates an exception to general corporate limited liability," Sharer wrote. "There is no reasonable construction of the statute that would lead to such a conclusion."

Kozlakowski said there were several differences between the two cases. Selby made personal loans to his company to try to pay subcontractors and was issued only a general invoice from the general

contractor for expenses, whereas United Aluminum was given specific invoices and Walter himself could not account for more than \$124,000 in funds, Kozlakowski said.

Paul S. Sugar, of **Ober | Kaler** in Baltimore, said Walter's case may have been the first in the court's view to meet all the specific requirements of the trust fund law, comparing it to the exact requirements needed in filing a mechanic's lien. Sugar was not involved in either case.

"I suspect the court was going to be very careful," he said, noting the usual rules concerning individual responsibility within corporations.

J. Snowden Stanley, who wrote a guide to construction law for contractors last year, said the two rulings are consistent with each other and with his understanding of the trust law. The *Walter* decision will not interrupt commercial construction in the state, said Stanley, a principal at **Semmes, Bowen & Semmes** in Baltimore. But it does serve as a cautionary story for contractors, most of whom pay their subcontractors what they are owed, he said.

"It's a useful reminder that will be used by careful lawyers and contractors to stay out of trouble in the future," Stanley said.

The reported opinion in *Walter v. Atlantic Builders* (07-218) is available as RecordFax #8-0630-00 (22 pages).