

Wisconsin Chapter, N.E.C.A. E-Newsletter

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FROM THE DESK OF ATTORNEY RANDY ANDERSEN: TRUST FUNDS AND THE THEFT BY CONTRACTOR STATUTE

On July 26, 2016, the Wisconsin Court of Appeals issued a decision addressing the Wisconsin trust fund/theft by contractor statute in the case of St. Croix Regional Medical Center v. Keller. St. Croix Regional Medical Center hired Keller Construction as the general contractor for a hospital addition project. The project involved multiple draw requests. The first 12 draw requests were paid and Keller Construction paid its subcontractors consistent with the itemization presented for each draw request. The 13th draw request was rejected, and the project proceeded to arbitration. The arbitrator awarded Keller Construction the balance owed for draw request number 13 together with additional amounts, but also determined that the owner was entitled to a \$200,000.00 credit to fix an air handling system, and a \$111,163.53 credit for payments made directly by the owner to subcontractors. The net amount awarded to Keller Construction in the arbitration was \$9,132.29. Keller Construction was ordered in the arbitration to pay its subcontractors and suppliers. Keller Construction failed to pay four of its subcontractors, claiming that it wasn't paid the money owed to the subcontractors, and there was no money available for them.

The issue in the case was whether Keller Construction was guilty of theft by contractor, due to its failure to pay its subcontractors. Keller Construction argued that because draw request number 13 was not paid, theft by contractor did not occur because it was not guilty of diverting funds which should have been available to pay the subcontractors. The Court rejected Keller Construction's arguments, noting that it received more than \$4.4 million in payments during the course of the project, of which approximately \$1.2 million was retained by Keller Construction. The Court of Appeals affirmed the trial court's ruling that theft by contractor had occurred. Keller Construction and one of its principal owners were held responsible, and they were ordered to pay treble damages (three times the amount claimed) for violation of the trust fund statute.

The case is noteworthy, because it indicates that a contractor cannot use any of the funds it receives for other purposes, until all claims (such as amounts owed subcontractors and material suppliers) have been paid in full.

The decision in St. Croix v. Keller will be helpful to subcontractors trying to recover payment from general contractors, where the general contractor receives payment from the owner but fails to pay the subcontractors. St. Croix v. Keller demonstrates that under Wisconsin law, a general contractor faces a significant penalty for using construction proceeds for other purposes before the subcontractors and material subcontractors are paid in full. St. Croix v. Keller also demonstrates that the courts are willing to hold the principal owners of a contractor personally liable for violations of the trust fund statute.

Subcontractors can also be held liable for violation of the trust fund/theft by contractor statute. In the case of Kraemer Brothers v. Pulaski Bank (decided in 1987), the Wisconsin Supreme Court held a subcontractor liable under the trust fund statute when the subcontractor failed to pay its own suppliers, after receiving payment from the prime contractor.



**2017 Winter Meeting Registration due
Friday, December 23, 2016!**

Wisconsin Chapter Holiday Office Hours
Friday, December 16, 2016—Closed 12-2pm
(Staff Holiday Lunch)
Monday, December 26, 2016—Closed
Monday, January 2, 2017—Closed

Division Holiday Parties

- * **Kenosha/Racine**
December 10th @ Twin Oaks Country Inn
- * **Fox Valley & Northeast**
December 14th @ The Automobile Gallery

