

Generals must act quickly when trust funds file liens

■ Prime contractors should file suit in state court to avoid federal court, which is friendlier toward employee benefit trust funds.

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HERE'S SOME GOOD NEWS for general contractors: Washington law continues to protect you from claims by employee benefit trust funds against your payment bond or retainage fund when your subcontractors fail to pay their trust fund contributions.

In 1994, in *Puget Sound Electrical Workers Health & Welfare Trust Fund v. Merit Co.*, the state Supreme Court ruled that the employee benefit trust funds that are owed contributions by subcontractors do not have rights against a general contractor's bond or retainage. Then, in 2000 in *IBEW Local No. 46 v. Trig Electric Construction Co.*, the

Supreme Court reaffirmed its ruling that these trusts do not have the right to come after general contractors for any unpaid amounts.

Recently, these trusts geared up in an effort to get the Supreme Court to overturn its previous two decisions and allow for trust funds to go after general contractors' bonds and retainage funds for unpaid amounts. In the case of *Berschauer/Phillips Construction Co.*

v. Masonry Security Plan of Washington, employee benefit trust funds (the Mason Trusts) filed liens against Berschauer/Phillips' bond and retainage for amounts that a subcontractor apparently had not paid.

Rather than simply allow the Mason Trusts to bulldoze it, Berschauer/Phillips fought back. Upon receiving notices of claims of lien against its payment bond and retainage funds by the Mason Trusts, Berschauer/Phillips sued the Mason Trusts in a state Superior Court, asking the court to declare the claims legally invalid.

The trial court granted Berschauer/Phillips' request. The Mason Trusts then appealed, and the state Court of Appeals quickly affirmed the trial court's ruling.

At this point, the Mason Trusts decided to try and put the issue before the state Supreme Court for the third time in 14 years.

Because the state Supreme Court is not required to hear any cases but rather chooses which cases it deems worthy of review, Berschauer/Phillips fought to keep the case out of the Supreme Court. These efforts were successful. The Supreme Court recently declined

to review the case, and in doing such erased any doubt that Merit and Trig will continue to be the law in Washington state.

This was a great win for general contractors because it means that state law continues to protect them and their payments bonds.

In terms of what this means in everyday practice, general contractors should continue to closely monitor whether employee benefit trust funds are filing notices of lien claims against their payment bonds and retainage funds. Upon receipt of a lien claim, a general contractor should immediately contact its attorney to determine whether to immediately initiate a lawsuit in state court rather than allow the trusts to initiate a lawsuit in federal court.

If given the opportunity, the trusts may try to sue the general contractor and its bond and retainage fund in federal court because the law in federal court is far friendlier to the trusts. The trusts know that if they have to litigate in state court, they are likely to lose because of the Supreme Court's decisions in Merit and Trig, as well as the recent decision not to readdress the holdings of those earlier decisions.

So, general contractors continue to be protected under state law in lawsuits by employee benefit trusts for unpaid amounts, but to benefit from these protections the general contractors must make sure that the lawsuits are fought in state court. The best way to ensure this is to act quickly.

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