

WHO said it?

On the House-Passed Bill That Protects Employer-Employee Retirement Benefits

The chief executive officer of the Associated General Contractors of America, Stephen E. Sandherr, released the following statement regarding passage in the House of Representatives of a Omnibus Spending bill that includes a series of association-backed reforms designed to allow employers and employees to protect and improve multi-employer retirement programs:

“The House’s wise decision to include a series of multi-employer pension reforms in the broader spending bill will protect retiree benefits, help keep thousands of employers competitive and ensure that the broader economy continues to benefit from the billions of dollars that pension funds invest each year.

“The most important aspect of these new reform measures is that they finally provide employers and employees with the flexibility to voluntarily act to shore up multi-employer retirement plans. Without these new measures, thousands of retirees would likely have been forced to accept the savage cuts to their retirement benefits that come when the Pension Benefit Guarantee Corp. is forced to step in. This is the culmination of three years of joint labor and management cooperation to shore up troubled plans.

“The Senate and President Obama must move quickly to enact these needed reform measures so that thousands of employees and their employers can have the tools needed to protect their hard-earned investments and benefits.”

CDOT briefs

I-70, S.H. 103 Bridge Slated For Mid-January Completion

The Colorado Dept. of Transportation and Mountain Corridor Constructors say that construction of the new bridge over I-70 at Exit 240 near Idaho Springs will be complete the week of Jan. 12.

Construction was temporarily delayed in November due to the accumulation of naturally occurring contaminated groundwater during bridge excavation, but the ability to work directly with the local public works’ sanitary system means dewatering will take less time than originally estimated.

“The contractor has been able to remove and treat the water quicker than anticipated thanks to Idaho Springs issuing a permit that allows the water to be discharged directly into their sewage system,” said Paul Neiman, CDOT project engineer. “Dewatering is expected to be complete the week of December 8.”

Once all water has been removed, the final step of bridge construction will be placement of precast bridge panels and girders that are currently being poured off-site in metro Denver. These will be brought in on large trucks and lifted into place at the end of the month.

When the bridge re-opens next month, travelers on east-bound I-70 will once again be able to take Exit 240 north over the interstate into downtown Idaho Springs.

“Idaho Springs continues to be a supportive partner in the long-term improvements being made along the I-70 Mountain Corridor,” said CDOT Director of Communications Amy Ford. “We anticipate this winter to be as snowy as last year and look forward to travelers taking advantage of the new bridge to access après ski activities in Idaho Springs on their way back from a weekend in the mountains.”

The S.H. 103 Bridge is part of the larger Peak Period Shoulder Lane project, and once completed in the fall of 2015, the PPSL will provide increased mobility by implementing east-bound operational improvements between Empire Junction and Idaho Springs to relieve traffic congestion during periods when traffic volumes are highest. This \$72-million investment is expected to save motorists an average of 30 minutes in travel time. The project is part of CDOT’s comprehensive plan to improve travel in the I-70 Mountain Corridor.

COMMENTARY

Debts From Colorado’s Construction Fund Statute May Now Be Dischargeable in Contractor Bankruptcies

By Steve Mulligan

Having a debt resulting from the violation of the Colorado’s Mechanic’s Lien Trust Fund Statute, commonly known as the Construction Trust Fund Statute, declared non-dischargeable in bankruptcy may now be more difficult due to a 2013 U.S. Supreme Court ruling.

The Construction Trust Fund Statute provides that all funds disbursed to any contractor or subcontractor under any building, construction or remodeling contract or on any construction project shall be held in trust for the payment of the subcontractors, laborer or material suppliers, or laborers who have furnished laborers, materials, services, or labor, who have a lien, or may have a lien, against the property, or who claim, or may claim, against a principal and surety under the provisions of this article and for which such disbursement was made. A person who violates this statute is guilty of theft.



Steve Mulligan

The U.S. Bankruptcy Court for the District of Colorado found that a debtor who did not know about the Construction Trust Fund Statute could not have intentionally violated it.

Contractors or subcontractors often find themselves in financial difficulties and use money paid to them on one project to cover costs for another project or for other purposes. As financial difficulties worsen, the contractors or subcontractors cannot repay the funds from the first project and as a result, the people who had furnished labor, materials or services for the first job remain unpaid even though money had been paid to the contractor to cover such costs in violation of the Construction Trust Fund Statute.

In the event the contractor or subcontractor files bankruptcy, the unpaid party often sues to have the debt to them declared non-dischargeable under 11 U.S.C. § 523(a)(4). That section excepts from discharge debts “for fraud or defalcation while

acting in a fiduciary capacity, embezzlement, or larceny.” To prevail, the plaintiff has to show that an express or technical trust exists, that the debtor owed a fiduciary duty arising from the trust and that the debtor breached the duty by “defalcation.”

The Colorado Trust Fund Statute imposes a statutory trust so the technical trust and fiduciary elements necessary to prevail under Sec. 523(a)(4) are satisfied. The third element, defalcation, could be satisfied by merely showing that the debtor failed to account for funds that had been entrusted to it due to any breach of a fiduciary duty, whether intentional, willful, reckless, or negligent; ignorance of the Construction Trust Fund Statute was no defense.

However, this appears to have changed. In 2013, the U.S. Supreme Court in *Bullock v Bank Champaign*, held that a plaintiff now has to prove that an “intentional wrong” was committed. Following the U.S. Supreme Court’s decision, the U.S. Bankruptcy Court for the District of Colorado found that a debtor who did not know about the Construction Trust Fund Statute could not have intentionally violated it. The court found, therefore, that the debt was dischargeable. (*MacArthur Co. v. Cupit*, Adv. Pro. No. 13-1185 EEB, July 18, 2014).

In *MacArthur*, the debtor was using money received from one project to cover the costs of other projects believing that at some point, business would get better and he would be able to pay the debts of all projects. This did not happen, and the debtor eventually filed for bankruptcy protection. *MacArthur* sued to have its debt declared non-dischargeable because of the debtor’s violation of the Construction Trust Fund Statute. The debtor testified that he did not know about the Construction Trust Fund Statute; testimony the Bankruptcy Court found to be credible.

As a result, applying the *Bullock* standard, the Bankruptcy Court found that the debtor did not knowingly violate the statute and therefore, at least a portion of the debt was dischargeable. Once the debtor became aware of the statute, which he did when he was sued by another supplier, any funds subsequently used in violation of the Construction Trust Fund Statute were found to be non-dischargeable.

This Colorado Bankruptcy Court decision could make it more difficult to have debts arising from the violation of the Colorado Construction Trust Fund Statute declared non-dischargeable in Colorado and perhaps other states as well. Parties to a contract may be able to avoid this adverse result at the contracting stage.

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October Contracts for Future Construction in Pueblo metropolitan area

(in millions of dollars)	2014	2013	% Change
Nonresidential	\$13.6M	\$0.18M	+++
Residential	\$1.5M	\$3.5M	-57
TOTAL CONSTRUCTION	\$15.2M	\$3.7M	+++

Construction starts, year-to-date on a cumulative basis

(in millions of dollars)	2014	2013	% Change
Nonresidential	\$63.5M	\$24.7M	+++
Residential	\$26.5M	\$36.3M	-27
TOTAL CONSTRUCTION	\$90.0M	\$61.0M	47

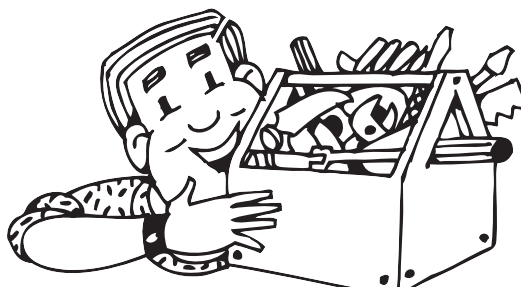
- Nonresidential buildings include commercial, manufacturing, educational, religious, administrative, recreational, hotel, dormitory and other buildings.
- Residential buildings include one- and two-family houses and apartments.

To learn more about Dodge Analytics, contact Tracey McKinney at 800-323-2362 or via e-mail at: tracey.mckinney@mhfi.com.

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