

## Construction Contract Pitfalls

By: *Paul A. Johnson*  
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*Note: This is the second of two articles on construction law issues.*

**B**efore construction begins, it is critical for the contractor and property owner to negotiate, draft, and execute a written contract outlining the responsibilities of both parties. Often the parties do not execute a written contract, and even if a written contract is executed, it often

fails to include many important provisions required by Wisconsin law. The absence of a written contract that complies with certain legal requirements subjects a contractor to potential liability and makes it more difficult to collect for services rendered. The owner may also find it difficult to hold a contractor accountable through litigation if problems arise.

Wisconsin Administrative Code § ATCP 110.05 requires that "home



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improvement contracts” be in writing, be signed by both parties, and include several pieces of information. A home improvement contract is any agreement to construct, install, replace, improve, alter, remodel, or repair a residential property, and is required if a contractor demands payment at any time before the job is completed. Failure to include the required information may result in substantial liability for the contractor. For example, if a written home improvement contract has not been signed by the parties before the work begins, and the contractor later brings a legal action against the property owner, the owner may file a counterclaim against the contractor for failure to provide a written contract. If the owner is successful, the owner is entitled to collect double damages and reasonable attorney fees.

If a home improvement contract is required, the contract must include the following information:

1. Business name and address;
2. Description of the work to be done and the principal products to be used or installed;
3. The total price, including all finance charges to be paid by the buyer;
4. Dates on which the work is to begin and be completed;
5. Statement of any guarantee or warranty along with a copy of the guarantee or warranty;
6. Insurance or some other form of protection for any work done, the terms, conditions, and limitations of that protection, as well as the name and address of the person who is to furnish such protection.

In addition to the information required by ATCP 110, there are several other terms and provisions which are essential to any construction contract. Failure to include any one of these provisions may make determining liability difficult if a dispute arises. Other essential terms and provisions include:

1. **Completion Penalty.** Construction contracts often include a per-day penalty if the project is not completed by the required date. The penalty should be an amount sufficient to provide the contractor with incentive to complete the project on time

and to cover any costs that the owner may incur due to the contractor’s failure to complete the project on time.

2. **Price and Payment Terms.** If the contractor desires periodic payments during the project, then a payment schedule should be established.
3. **Construction Lien Issues.** Certain notice requirements are required in order for a contractor to perfect its lien rights. Owners should also require the contractor to provide lien waivers from any subcontractors or material suppliers before final payment is made.
4. **Plans and Specifications.** Plans and specifications are usually made a part of the contract. A common source of disagreement is the work to be completed for the agreed upon price.
5. **Remedies.** The contract should establish each party’s remedies in case either party breaches the agreement.

A written contract assists contractors and property owners by clearly setting forth each party’s rights and obligations. A complete and detailed contract can also assist you in avoiding time-consuming and costly litigation.

The authors of this article would be happy to assist you in drafting a home improvement contract that will clearly set forth the essential terms and provisions and protect your interests in the event formal litigation is necessary. ■



Paul A. Johnson is a partner with Lathrop & Clark. He practices primarily out of the firm’s Lodi office. His practice focuses on real estate, landlord/tenant and general practice law.



Chris A. Jenny is an associate with Lathrop & Clark whose practice focuses on representing individuals and businesses with all of their planning needs, including estate planning, real estate and small business planning. In addition to practicing in the Madison office, Chris is also a member of the firm’s Poynette office.

# Taming the HIPAA Beast

By: *Joanne Harmon Curry*

**O**n April 14, 2003, new federal rules protecting the privacy of employees' health information take effect. The Health Insurance Portability and Accountability Act (HIPAA) was passed by Congress to improve the efficiency and effectiveness of the health care system. This is a very complex and complicated law that may affect some employers who offer health benefits to their employees. In order to achieve its stated goal, the law standardizes the electronic exchange of health information. However, this sweeping reform includes a counterbalance to the increased ease of transferring health information. The law establishes a privacy rule that requires employers to ensure the protection of employee health information.

Health care providers and health plans are subject to the new privacy rule. A health plan means an individual or group plan that provides, or pays the cost of, medical care. Generally, an employer who sponsors, i.e., makes available, a health plan for its employees and does not administer or self-fund the health plan is not subject to the HIPAA privacy rule. These employers do not have access to protected health information about their employees.

Employment records that are created or maintained by these employers are excluded from the protected health information rules. Employee drug testing provides a useful illustration of health information that may be excluded from the privacy rule. Drug screening test results are protected health information in the hands of a health provider or health plan. However, when an employee authorizes the health provider to share the drug test results with an employer and the test results are placed in the employee's employment record, it is not protected health information under the HIPAA privacy rule. Fitness-for-duty test results are another example of information in an employee file that is excluded from the privacy rule.

Employers who sponsor health plans should

take a "hands-off" approach to the protected health information of their employees in order to avoid becoming a "covered entity" responsible for compliance with this new law. Plan sponsors, however, may still receive summary health information from an insurer for limited purposes, such as obtaining premium bids or modifying the health plan, where no personally identifiable health information is exchanged.

One group of employers that may need to comply with the new rules, however, is employers who provide self-funded group health plans to their employees. When such an employer sponsors such a health plan and performs administrative plan functions, it has access to protected health information about its employees. Because, in most cases, these employers perform both covered and non-covered functions as defined under the HIPAA privacy rule, they will likely be a "hybrid entity." In these circumstances, care must be taken to create "firewalls" and physical security to protect the employees' personally identifiable health information from workforce members who are not involved in performing tasks related to the health plan. This may include restricting access to databases containing protected health information and locked filing cabinets.

Such employers will be required to comply with the HIPAA privacy requirements by (1) providing individuals with rights to review, amend, and receive an accounting of their protected health information, (2) preparing and providing a privacy notice, and (3) complying with the administrative safeguards. This includes special rules affecting, for example, the use and disclosure of the protected health information, appointing a privacy officer, and training members of the workforce with access to the protected health information.

Employers with both self-funded and self-administered health plans must comply with HIPAA requirements because they clearly have access to employees' protected health information. However, the law provides for an exception for small, self-funded, self-administered plans with fewer than 50 participants. These employers will not be required to comply with the HIPAA requirements. Additionally, health plans with annual receipts of \$5 million or less have been

# Notes From The Chair

*John C. Frank, Partnership Chair*

given an extra year to meet the compliance requirements, that is, until April 14, 2004. (The rule defines “receipts” such that any employer who thinks it may fall under this exception should confirm its eligibility by referring to the regulations or checking with an attorney).

Employers who are not “covered entities” under the HIPAA privacy rule will nevertheless feel the effect of the new rule. Employers will be dealing with health care providers when health information is needed about their employees, for example, when obtaining reports from physicians treating employees injured on the job or seeking medical information to substantiate an employee’s leave request under the Family and Medical Leave Act. The new health information rules require that the health provider have an individual’s express written authorization to disclose and use the employee’s protected health information. Additionally, the health provider may disclose only the minimum amount of necessary information to the employer.

Both civil and criminal penalties are provided for enforcement of the law. Criminal penalties include fines up to \$250,000 and 10 years of imprisonment when protected health information is used for commercial advantage, personal gain, or malicious harm. The new HIPAA privacy rule is very complex and often complicated when attempting to determine whether or not an employer must comply with its requirements. Each employer will need to conduct an audit of its business to make an individualized determination of whether the law applies to it. This may require the assistance of your attorney. ■



Joanne’s practice includes general school law, including the No Child Left Behind Act and charter schools, special education law, disability and discrimination law, the HIPAA privacy rule, the family medical leave act, and

litigation. As part of her academic background, she completed a Ph.D. in Special Education from the University of North Carolina-Chapel Hill prior to completing her J.D. from UW Madison.

If you are acquainted with the clients of a law firm, you probably know something about the nature of the law firm itself. In this month’s *Counselor*, we are publishing the first in a series of profiles of clients of our firm. We are proud of our clients, and look forward to presenting the client profiles in this issue and future issues.

Our clients represent a diverse group of business entities and individuals. Our Intellectual Property Team represents a number of national and international corporations seeking to establish and maintain their intellectual property rights. Our School, Municipal, Labor and Employment Law Team represents a large group of school districts and municipalities throughout Wisconsin. Our firm also represents individuals and families engaged in business practices, real estate development, and issues arising from everyday life.

Like our clients and the services we provide them, our attorneys also reflect a diversity of attitudes and backgrounds. We have always thought of the diversity within our firm as being one of the strengths of our firm. One example of the diversity within our firm is the fact that among our partners is a former State Bar President who practiced closely with a now deceased partner who led a challenge to the requirement of mandatory membership of lawyers in the State Bar itself.

Lawyers are sometimes asked to represent unpopular causes and represent clients at a reduced rate or on a pro bono basis. Any single representation does not necessarily reflect the ideas and attitudes of the individual attorney or the firm. However, as a general proposition, we believe that clients with whom we have enjoyed a long-term relationship reflect the values and attitudes of the members of our firm. Accordingly, with our clients’ permission, we are pleased to introduce you to our clients and, by doing so, introduce you to ourselves. ■



John C. Frank has been with Lathrop & Clark for over thirty years. His practice areas currently include estate planning and administration, real estate and tax law.

# Ventures

**Lathrop & Clark** held its 2<sup>nd</sup> Annual School Law Seminar on November 14, 2002. This year the number of topics, and consequently the number of speakers, were expanded to run concurrent sessions, offering something of interest for all 55 registrants. The facilities at the Crowne Plaza-Madison offered a comfortable setting for the yearly event and the comments from the participants reflected that their attendance was worthwhile. Watch for an announcement regarding this year's event (Nov. 2003). ■ **David Rohrer** and **Shannon Day** have authored the School Law Chapter of the State Bar's *Annual Survey of Wisconsin Law* booklet which will be published in April. ■ **Lathrop & Clark** sponsored the ABC's of Alzheimer's and Dementia Workshop Series at Divine Savior Hospital in Portage in March and April 2003. **Jeffrey Clark** spoke to the Workshop on March 29 with respect to the legal and financial planning aspects of dealing with Alzheimer's. Lathrop & Clark is pleased to have been a sponsor of this wonderful workshop in Columbia County. ■ **Mike Julka, Shannon Day, Shana Lewis** and **Mark Herman** presented a collective bargaining update to CESA 4 school district administrators and board members on February 18, 2003, in West Salem, Wisconsin. The presentation included a review of the following topics: recent settlement trends for professional and support staff units in the region; the impact of recent state and federal legislative enactments on collective bargaining; pending litigation before the Wisconsin Employment Relations Commission that will likely affect collective bargaining; and bargaining strategies and goals in the current negotiations environment. ■ On January 29, 2003, **David Rohrer, Joanne Harmon Curry, Shana Lewis, Mark Herman** and **Ann Krummel** presented a seminar to school district administrators on

the topic of student discipline. ■ This spring the **School Law Team** will be presenting seminars at conferences for the following groups: Wisconsin Charter Schools Conference, Wisconsin Association of School Personnel Administrators, the Wisconsin Association of School District Administrators Small Schools Conference, South Central Bargaining Consortium and the Wisconsin Council on the Administration of Special Services. ■ **Frank Sutherland** recently served as a presenter and panel member for the Community Action Coalition's business fundamentals class. ■ **Frank** also served as a presenter for an April 2003 seminar in Madison, Wisconsin, entitled *Foreclosure and Repossession in Wisconsin*. ■ Look for the April edition of the periodical *Corporate Report Wisconsin* for which **Frank** was interviewed regarding an article concerning laws governing electronic signatures. ■ **David Weller** presented Planning for the Credit Shelter Trust in Light of the New Wisconsin Estate Tax, Economic Growth and Tax Relief Reconciliation Act and Related Basis Issues as part of the University of Wisconsin Law School Continuing Legal Education for Wisconsin – 2002 Estate Planning Workshop. ■ **David** also continues to serve as Secretary and Board Member of RFDF, Inc. RFDF is a non-profit corporation that provides assisted living to the elderly and developmentally disabled. ■ On February 19, 2003, **Chris Jenny** taught the "Legal Issues for Small Businesses" class at the Wisconsin Women's Business Initiative Corporation's Start Smart Class. ■ **Jennifer Amundsen** recently competed in the Sixth Annual Sojourner Truth Moot Court Competition held at the National Women Law Students Association Conference in Boston. Her University of Wisconsin team won the overall competition as well as the Best Brief award. ■

# Client Profile: Bayview Foundation – America at its Best

By Donald L. Heaney

In the late 1930s and early 1940s the great American film director, Frank Capra, made motion pictures about how ordinary people could accomplish extraordinary things. Some of the films based on this theme were “Mr. Smith Goes to Washington,” “Meet John Doe,” and “It’s a Wonderful Life.” The moviegoer always left the theater with the warm feeling of how real people could not only make things happen that elitists could not but could even cure the errors of the elitists and make the world a better place.

Bayview Foundation has done all of these remarkable things not on celluloid but in real life in Madison, Wisconsin. When bulldozers plowed under most of the old “bush” neighborhood, it left the triangle formed by Regent Street, West Washington Avenue and Park Street an empty space where a vibrant neighborhood had once existed. A group of ordinary people with roots in the old “bush” met, signed their names to a \$15,000 note and ultimately constructed 102 units of housing for people of low and moderate income. The mortgage on the property was signed in 1971 and will be paid in full in the year 2011. At that time, the property consisting of 102 townhouse apartments will be conveyed to the City of Madison with no financial reward to Bayview or anyone connected with it.

But Bayview is much more than 102 units of housing for people who could not otherwise afford quality housing. It provides a whole set of services to its residents. These include courses such as English as a second language, reading classes for children and adults, mentoring and tutoring for school age children including computer classes, a food distribution program and arts and cultural

projects. The results of the Bayview experiment have been remarkable. Approximately 50% of the people who move out of Bayview (what we call our alumni) move out to go to their own homes and very frequently to rewarding careers.

At the same time, Bayview has become a symbol of how to promote diversity (real diversity in action) and international understanding. The Bayview population includes native African families, black American families, white American families, Vietnamese, Laotian, and Hmong, Chinese, Hispanic and Cambodian families. Every year Bayview sponsors an Ethnic Fest to celebrate the cultural richness of this mixture of Americans with ethnic music and dancing as well as food from around the world. Bayview also sponsors the “Call for Peace, Drum and Dance Company” which is headquartered at Bayview and has played in many countries including Israel, Russia, Germany and Egypt.

One of the great rewards of practicing law is the privilege to serve genuinely good people attempting to do genuinely good things. Lathrop & Clark is proud to provide legal services to Bayview Foundation. ■



Don Heaney is a senior partner at Lathrop & Clark LLP and a past-president of the State Bar of Wisconsin. His practice includes general litigation including business litigation, representation of non-profit entities and mediation and arbitration.

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Designed by Phill Thill Design, Inc.

Printed by Advertisers Press Inc.

Mailed by Accurate Business Service of Madison, Inc.

Letters, comments & questions are welcome. For more information about Lathrop & Clark LLP, visit our website at [www.lathropclark.com](http://www.lathropclark.com)

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