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Summary of Hartford Fire Ins. Co.; Hartford Accident & Indem. Co.; & Richardson Constr., Inc. v. Tr. of the Const. Indus. & Laborers Health & Welfare Trust; Tr. of the Constr. Indus. & Laborers Joint Pension Trust; & Tr. of the Constr. Indus. & Laborers Vacation Tru, 125 Nev. Adv. Op. No. 16

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Nevada Law Journal

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Recommended Citation

Roohani, Elham, "Summary of Hartford Fire Ins. Co.; Hartford Accident & Indem. Co.; & Richardson Constr., Inc. v. Tr. of the Const. Indus. & Laborers Health & Welfare Trust; Tr. of the Constr. Indus. & Laborers Joint Pension Trust; & Tr. of the Constr. Indus. & Laborers Vacation Tru, 125 Nev. Adv. Op. No. 16" (2009). *Nevada Supreme Court Summaries*. 371.
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Hartford Fire Ins. Co.; Hartford Accident & Indem. Co.; & Richardson Constr., Inc. v. Tr. of the Const. Indus. & Laborers Health & Welfare Trust; Tr. of the Constr. Indus. & Laborers Joint Pension Trust; & Tr. of the Constr. Indus. & Laborers Vacation Trust
125 Nev. Adv. Op. No. 16 (May 28, 2009)¹

Corporate Law – Liability for Employee Benefits, ERISA, and Labor Agreements

Summary

Acceptance of the Ninth Circuit’s two certified questions: whether trustees must provide notice to recover on (1) payment bonds against surety and (2) against the general contractor.

Disposition/Outcome

The Court answered the first question in the positive concluding that NRS 399.035 requires a trustee to provide notice of claims to collect claims against the bond. The Court answered the second question in the negative concluding that NRS 608.150 does not require notice of claims to collect claims against the general contractor.

Factual and Procedural History

Richardson, a general contractor, entered into statutorily required bond agreements with Hartford Fire and Hartford Accident (Hartford). The bond agreements made Richardson and Hartford jointly and severally liable. Richardson subcontracted Desert Valley, a party to the Laborer’s Union Agreement. That agreement required Desert Valley to make payments to certain employee benefit trust funds. The trust funds conformed to the Labor Management Relations Act² and ERISA.³ Desert Valley failed to make payments to the trust funds for its employees who worked on Richardson projects.

Trustees for the employees (respondents in this action) filed suit against Desert Valley for the ERISA violations. Desert Valley answered the complaint and thereafter filed for bankruptcy, effectively halting the action for several years. The trustees amended the complaint to include state law claims against Hartford⁴ and Richardson.⁵

In its defense, Hartford argued that the trustees failed to meet a condition precedent to recovery, giving the contractor (Richardson) notice as required by NRS 339.305. The trustees filed an opposition and a motion for summary judgment arguing that because the trustees did not have a direct contractual relationship with Desert Valley, the trustees did not have to give notice to Richardson under the statute. Also, because the federal court entered judgment against Desert Valley, no genuine issues of material fact remained to be resolved. The federal court granted summary judgment in favor of the trustees. Hartford and Richardson appealed. The Ninth Circuit certified two questions to the Nevada Supreme Court. First, to recover under NRS 339.035(1) must trustees comply with notice requirements, even if there is no contractual relationship with the subcontractor? Second, to recover under NRS 608.150 against a contractor

¹ By Elham Roohani

² 29 U.S.C. § 186(c)(5) (2006).

³ 29 U.S.C. § 1002 (2006).

⁴ Claims against Hartford were based on NEV. REV. STAT. § 339.305, allowing claims for unpaid labor and materials costs to be brought against the payment bond.

⁵ Claims against Richardson were based on NEV. REV. STAT. § 608.150, which holds general contractors liable for its subcontractors failure to pay labor and materials costs.

where there is a statutory bond, must trustees comply with notice requirements even if there is not contractual relationship with the subcontractor?

Discussion⁶

NRS 339.305⁷ relates to both certified questions. The statute was modeled after the Miller Act⁸ and as such federal precedent is persuasive.

Standing

As a preliminary matter, the Court held that the trustees had standing to assert claims on behalf of the employees because they were effectively standing in the shoes of the employees. Relying on the plain meaning of the statutory language, the trustees did not perform labor or furnish material, did not have any contractual relationship with Richardson, and were only third party beneficiaries of the labor agreement between Desert Valley and the Labor Union. The Court reasoned that although the third party beneficiary status alone did not confer standing to the trustees, the Supreme Court decision in *Carter*⁹ allows trustees to sue on the bond as assignees of the employee.

Notice to collect from Hartford, the surety company, under NRS 339.035

The Court held that because the trustees represent the employees and stand in the shoes of the employee, they are required, as employees would be, to provide notice to Richardson to recover payment on the bond. Under NRS 339.035(2), claimants who have a relationship with the subcontractor must give notice regarding costs of labor and materials. The Court reasoned that because the statute creates a remedy where none existed before, it is “not unfair” to demand a condition precedent for notice to the subcontractor.¹⁰

Relying on the plain language of the statute, the Court rejected the trustees’ argument that because they did not have a direct contractual relationship, they did not have to give notice. The court rationalized that either the trustees had to give notice to recover, or they had no standing if they did not have to give notice. Similarly, the trustees argued that because they have a unique role to protect the interests of the employees, the court should apply the statute more broadly to them. The Court rejected this argument as well, noting that the factual background in *Lewis* was not analogous to the present situation.¹¹ The Court refused to allow the trustees to bypass an intentionally placed legislative condition precedent.

The trustees also argued that, practically speaking, notice should only be required when there is a direct contractual relationship with the subcontractor. The Court rejected this argument based on previous holdings stressing the importance of notice, and similarly holding that it is

⁶ Several amici curiae briefs were filed with the Court.

⁷ NEV. REV. STAT. § 339.035 states in relevant part: “ 1. . . . any claimant who has performed labor or furnished material in the prosecution of the work provided for in any contract for which a payment bond has been given ... and who has not been paid in full ... may bring an action on such payment bond in his own name to recover any amount due him for such labor or material[.] 2. Any claimant who has a direct contractual relationship with any subcontractor of the contractor who gave such payment bond, but no contractual relationship, express or implied, with such contractor, may bring an action on the payment bond only [if he provided certain written notices of the claim to the contractor.]”

⁸ 40 U.S.C. §§ 270(b)-(c) (1935).

⁹ *United States v. Carter*, 353 U.S. 210, 211-215 (1957).

¹⁰ *Garff v. J.R. Bradley Co.*, 436 P.2d 428, 431 (1968).

¹¹ *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960) (the trustees cited and analogized to *Lewis* in support of their argument).

unjust to absolve trustees from notice requirements. Thus, the trustees' claims against Hartford, a surety, are subject to notice requirements.

Notice to collect from Richardson, under NRS 608.150

Hartford and Richardson argue that if the trustees are not required to give notice under NRS 608.150, then NRS 608.150 conflicts with NRS 339.035 by giving the trustees a loophole around the notice requirement. Hartford and Richardson additionally argue that because the statutes are in conflict, the Court should reconcile the statutes to both require notice. The Court rejected this argument reasoning that the statutes are not in conflict because NRS 339.035 allows recovery on the payment bond and NRS 608.150 allows recovery from the contractor directly. Any indemnification that arises in this case is purely from the agreement between Hartford and Richardson and does not relate to the statutes referenced. Additionally, because the plain language of NRS 608.150 does not require notice, the Court will not impose such a requirement.

Conclusion

NRS 339.035 requires notice to a general contractor regardless of a direct contractual relationship. Trustees are allowed to collect on behalf of the employees and are subject to the same notice standards. NRS 608.150 does not require notice to the contractor to collect under such claims.