

Spring 2022

Moss & Barnett Advocate

With the Great Resignation, Comes Great Employer Responsibility

By Megan J. Renslow



Contractual Notice Provisions: Why Timing is Everything

By Jeffrey A. Wieland and Elise R. Radaj



All's Fair in Love and Bankruptcy

By Aylix K. Jensen and Sarah E. Doerr



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Moss & Barnett



With the Great Resignation, Comes Great Employer Responsibility



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Megan is a member of our Litigation team. She assists businesses and individuals with commercial litigation disputes.

Approximately 47 million people voluntarily left their jobs in 2021. These numbers have continued into 2022, with an average of 4 million workers quitting their jobs each month. This unprecedented exodus from the workforce, aptly named “the Great Resignation,” raises numerous legal obligations for employers.

The Final Paycheck

Employers must promptly pay former employees their last paycheck. In Minnesota, employees who quit or resign from their employment are due all earned and unpaid wages and commissions on the next regularly scheduled payday following the employee’s final day of employment.

However, if an employee’s last day of employment is within five calendar days of the next regularly scheduled payday, the employer may delay full payment until the second regularly scheduled payday. Importantly, if the employer elects to defer payment past the first regularly scheduled payday, the employee must nevertheless receive full payment within 20 calendar days following the final day of employment. Employers should be mindful of this 20-day window if the second regularly scheduled payday falls outside of it.

My Employee Still Has Company Equipment, Now What?

With more employees working from home, there is a greater likelihood former employees received company laptops, cellphones, or other equipment necessary for remote work. If an employee quits and retains company property, employers should avoid self-help remedies.

For example, an employer may not withhold a former employee’s final paycheck due to unreturned equipment. Additionally, unless the employer and employee enter into a written agreement that says otherwise, an employer may not deduct the cost of the equipment from the employee’s final paycheck.

In some situations, it may be possible for the employer to pursue the stolen equipment in conciliation court or district court. An employer may also be able to report the employee’s actions as theft. Employers should review their handbooks to establish protocols regarding the return of company property after termination or resignation.

Assigning Additional Duties to Remaining Employees

Carrying on with business as usual may prove difficult if a company is suddenly short-staffed. However, when delegating new duties to remaining employees, employers should be mindful of each employee’s exempt or non-exempt status.

Exempt employees may lose their exempt status if they spend too much time performing duties normally assigned to non-exempt workers. Courts typically examine the “primary duty” of an employee when determining whether the employee is truly exempt. For example, if an exempt employee performs primarily non-managerial tasks, then a court may determine the employee is more properly classified as non-exempt. If an employee loses her exempt status, this creates additional wage and hour obligations for the employer. For this reason, employers must be careful when assigning non-exempt work to an exempt employee.

Conclusion

With knowledge of the potential legal issues implicated by the Great Resignation, employers can better prepare for this new reality. Please contact your employment law attorney at Moss & Barnett for guidance specific to your workplace.



Contractual Notice Provisions: Why Timing Is Everything



Jeffrey A. Wieland

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Jeff practices in Construction Law and Litigation. Licensed in state and federal court in Minnesota and North Dakota, he represents contractors, subcontractors, suppliers, and owners.



Elise R. Radaj

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Elise practices in Construction Law and Litigation. She advises owners, general contractors, and subcontractors on matters such as payment, construction defect, and termination disputes.

Changes happen on every construction project. When these changes occur, contractual notice provisions require contractors to take affirmative steps to preserve a claim for additional time or money related to the project. Contractual notice provisions can vary greatly, and failure to strictly comply with a contractual notice provision can result in a waiver of claims and nonpayment. Notice provisions are intended to give owners the opportunity to decide how to cost-effectively deal with unplanned conditions on a project, but all too frequently they become a technical defense against payment to contractors.

There are various timing, form, and substance considerations to be aware of with notice provisions:

How Soon Must Notice Be Provided?

Understanding the timing of when notice has to be provided is the first step in preserving a claim. Some contracts require notice be provided in as short as a 48-hour window after the event impacting the project occurs. Other contracts allow for 30-day notice. The AIA A201 standard form contract strikes a balance and requires notice of a claim to be provided within 21 days of the event giving rise to the claim or discovery of the claim. Some contracts, particularly on road projects, have multiple levels of notice requirements.

What Type of Notice Is Required?

The form of notice varies depending on the terms of the contract. Many contracts require notice to be provided formally or in writing, but what constitutes “in writing” can vary. Submission via certified mail may be required. Email is not always sufficient for written notice. Discussion of a claim with an owner or general contractor may not satisfy the notice provisions in these circumstances. Certain contracts may require specific information to be submitted with a claim, such as the amount of the claim.

This is yet another potential trap in the claim submission process. Judges and arbitrators can strictly enforce notice provisions with harsh results. A contractor may be denied payment for a legitimate changed condition, of which the owner was fully aware, simply because notice was not provided in the proper form.

Who Receives Notice?

To whom notice must be provided varies depending on the contract. For example, in an AIA contract, notice may need to be provided to the owner, the architect, and the initial decision-maker, as these individuals are defined in the contract. Other contracts may only require submission to the owner or general contractor. The contract should outline the submission process, including the name of the individual or individuals to whom notice must be provided.

Conclusion

The time to become familiar with the contractual notice provisions is not after a claim arises — waiting too long to provide notice can lead to waiver of a claim. Consider having your attorney review your contracts before execution to propose amendments to the notice provisions if they are unduly restrictive or impose obligations that cannot be followed in the field. Being familiar with notice provisions at the beginning of the construction season is a best practice that helps contractors get paid fairly for their work.

If you have questions related to contractual notice provisions, please contact your Moss & Barnett attorney.

We're Proud to Recognize

For over 125 years, our lawyers, paralegals, and professional staff have demonstrated dedication and tenacity in serving the needs of our clients. As we look to the future, our dedication strengthens, as does our appreciation for our clients and our community. Quality legal service is our profession, our business, and our privilege.



Litigation-Banking and Finance "Lawyer of the Year" | 2022

Kevin M. Busch
Lawyer

Awarded by *Best Lawyers*®



Notable Women in Commercial Real Estate | 2022

Jodi L. Johnson
Lawyer

Awarded by *Twin Cities Business*



Notable Women in Banking & Finance | 2022

Elizabeth ("Betsy") Kiernat

Lawyer

Awarded by *Twin Cities Business*



5 Under 40 | 2021

Alex R. Schoepfoerster

Lawyer

Awarded by *St. Cloud Times/LocalIQ*

Zawyer Sports

Moss & Barnett Client



Andy Kaufmann
President and CEO, Zawyer Sports

Moss & Barnett is honored to represent **Andy Kaufmann**, his sports business holding company **Zawyer Sports**, and his portfolio of leading sports businesses. After selling his very successful marine and outdoor survival products company, Andy parlayed his passion for competitive athletics, ability to innovate, and acumen for assembling and leading high performing teams into owning and operating some of the most successful minor league teams in ice hockey and baseball. He is the managing partner of the Jacksonville (FL) Icemen of the ECHL, widely considered one of the best and most impactful minor league hockey teams in the United States. Andy is also CEO of the Community First Igloo, the future practice home of the Icemen and a hub for youth hockey development and excellence in Northeast Florida. He also acquired and operated the Ft. Myers Mighty Mussels, the Florida State League Class A affiliate of the Minnesota Twins, and operated Spring Training for the Twins. Moss & Barnett attorneys Rob Schumann and Brian Schoenborn have represented Zawyer Sports in many transactions and recently assisted Andy in the sale of a controlling interest in the Mussels to Illinois entrepreneur John Martin. Andy maintains a minority interest in the club. Zawyer Sports is also working with Moss & Barnett on developing the expansion Savannah (GA) Ghost Pirates of the ECHL with partners Tim Tebow (Heisman Trophy winner), Myles Jack (Pittsburgh Steelers), and other influential leaders in sports and business. The Ghost Pirates are set to drop the puck this October and are on track to break the ECHL season ticket record.

Four New Lawyers Join Our Team

Leah is a member of Moss & Barnett's Real Estate team, representing clients in a broad range of general real estate and commercial real estate finance transactions. She prepares loan and real estate sale documents, negotiates title insurance coverage, identifies and resolves title and survey issues, and assists with loan modification, partial releases, and easement issues. Prior to joining Moss & Barnett, Leah focused her practice on residential landlord-tenant law and housing policy. Her background also includes work in the mental health field, public health, and early childhood education. Leah received her J.D. from the University of Minnesota Law School and her B.A., *with distinction*, from the University of Iowa.

Leah E. DeGrazia

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Real Estate
Multifamily and Commercial
Real Estate Finance



Sara is a member of Moss & Barnett's Litigation, Construction Law, and Accountant Law teams assisting businesses and individuals as they navigate commercial disputes. Prior to joining Moss & Barnett, Sara defended product liability matters across a wide range of consumer and commercial industries. In law school, she clerked in-house for a multinational aerospace and defense contractor, focusing on international trade compliance. Sara received her J.D., *cum laude*, from the University of Minnesota Law School and her B.A., *summa cum laude*, from Drake University.

Sara E. Filo

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Litigation
Construction Law
Accountant Law



Katie is a member of Moss & Barnett's Energy and Public Utilities team, focusing her practice on representing utility service providers in regulatory proceedings before local, state, and federal regulatory bodies. While in law school, Katie clerked with an energy company and the Minnesota Public Utilities Commission. Prior to joining Moss & Barnett, she was a geologist for the state geological survey, developing maps and models supporting management of Minnesota's land, water, and mineral resources. Katie received her J.D., from the University of Minnesota Law School, her M.S. in Geology from Idaho State University, and her B.A. in Geology from Earlham College.

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Energy and Public Utilities



Maddie is a member of Moss & Barnett's Multifamily and Commercial Real Estate Finance team, focusing her practice on representing lenders who originate and sell loans secured by multifamily real estate projects to secondary market investors, Fannie Mae and Freddie Mac. Within this practice, she conducts title examinations, survey examinations and other due diligence, reviews legal opinions, and prepares loan documents. Prior to joining Moss & Barnett, Maddie clerked at a Twin Cities law firm handling research and due diligence for real estate and general business matters. While completing her undergrad studies at Princeton, Maddie played Division 1 hockey and thereafter worked for the New York Rangers as a Senior Marketing and Community Relations Coordinator. She received her J.D., *magna cum laude*, from Mitchell Hamline School of Law and her B.A. from Princeton University.

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Multifamily and Commercial
Real Estate Finance



Team News

Moss & Barnett Announces New Shareholders: Bradley R. Armstrong, Lindsay L. Case, Maggie H. Garborg, Peter J. Kaiser, John P. Kennedy, and Erik L. Romsaas

Moss & Barnett is pleased to announce that as of January 1, 2022, **Bradley R. Armstrong**, **Lindsay L. Case**, **Maggie H. Garborg**, **Peter J. Kaiser**, **John P. Kennedy**, and **Erik L. Romsaas** have become shareholders in the firm.

Bradley R. Armstrong represents businesses in consumer litigation and advises clients in the financial services industry on compliance and risk management. He has significant experience defending clients against individual and class action claims brought under the Fair Debt Collection Practices Act (FDCPA), the Telephone Consumer Protection Act (TCPA), the Fair Credit Reporting Act (FCRA), and other consumer protection laws. He also represents clients in connection with administrative matters and regulatory actions.



Bradley R. Armstrong

condominiums, HOAs, mixed-use developments, and lease-up and value-add properties. Lindsay structures transactions to meet the needs of sophisticated borrower structures involving joint ventures, tenancies-in-common, 1031 exchanges, and foreign guarantors while offering explanation and guidance to transaction participants.

Maggie H. Garborg is an experienced commercial real estate attorney for national lenders and loan servicers. She represents institutional lenders in the financing of commercial and multifamily housing projects around the country and the sale of loans to secondary market investors such as Fannie Mae and Freddie Mac. She has closed numerous transactions involving complex deal structures, including joint ventures, tenancies-in-common, ground leases, condominiums, phased developments, preferred equity, and investment funds. She also represents national loan servicers in a variety of matters, including loan modifications, assumptions, and transfers of interests.



Maggie H. Garborg



Lindsay L. Case

Lindsay's practice ranges from closing \$1,000,000 supplemental loans to \$100,000,000+ acquisition loans. She has experience with unique deal components such as affordable housing restrictions,

Lindsay L. Case focuses her practice on closing and delivering loans secured by multifamily projects to secondary market investors like Fannie Mae and Freddie Mac. As part of this practice, she prepares and negotiates loan documents, reviews legal opinions, examines title, survey, and other due diligence. Lindsay's



Peter J. Kaiser

Peter J. Kaiser is an experienced securities and emerging company lawyer for the Greater Minnesota business community. He acts as outside general counsel for his clients, with a focus on serving early-stage companies and the entrepreneurs who build them. His background as a securities

John P. Boyle and Jana Aune Deach Re-elected to Moss & Barnett Board of Directors

Moss & Barnett is pleased to announce that **John P. Boyle** and **Jana Aune Deach** were elected to three-year terms as members of the firm's Board of Directors effective January 1, 2022.

John P. Boyle is a member of the firm's Litigation, Employment Law, and Financial Services teams. His practice focuses primarily on the areas of litigation and trial work, particularly commercial dispute resolution, complex business litigation, lender liability defense, shareholder and corporate governance disputes, and real estate and employment litigation.

Jana Aune Deach is a member of the firm's Family Law team. She is a nationally recognized family law practitioner who serves as a compassionate advocate for clients and their children. Jana provides counsel in all areas of family law. She also serves as chair of M&B Cares, the firm's community outreach and philanthropic committee.

John and Jana will each continue practicing law on a full-time basis in addition to handling their management responsibilities. They are joined on the board by co-directors, **Kevin M. Busch**, **Brian T. Grogan**, **Timothy L. Gustin**, and **James J. Vedder**.

lawyer lends itself particularly well to companies selling securities and raising capital to fuel their growth. Peter also represents (and forms) private investment funds, particularly those investing in private companies at the angel or venture capital stage.



John P. Kennedy

John P. Kennedy primarily represents lenders in the financing and refinancing of multifamily housing projects throughout the United States, involving loans that are then sold to secondary market investors such as Fannie Mae and Freddie Mac. He principally focuses his practice on representing lenders in financing transactions under

Freddie Mac's Small Balance Loan (SBL) program. John also has extensive experience in examining real property title and the many contentious issues that may arise in owning or financing real property.

Erik L. Romsaas advises clients on a broad range of corporate, business, and financial matters across multiple industries. He has extensive experience assisting clients with formation, governance, mergers, acquisitions, and restructuring within a number of different industries, including technology, construction, banking, manufacturing, and utilities.



Erik L. Romsaas



John P. Boyle



Jana Aune Deach

Congratulations to these new firm leaders.



All's Fair in Love and Bankruptcy



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Aylix is a member of our Financial Services team. She defends marketplace lenders, collection agencies, creditors, and other businesses in consumer litigation.



Sarah E. Doerr

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Sarah practices in Financial Services and Litigation, focusing on creditors' remedies and creditor-side bankruptcy issues.

Consider the following scenario: You are a creditor who lends \$100,000 to a debtor on an unsecured basis. Ten years later, the debtor repays the \$100,000 loan to you. Shortly thereafter, the debtor files for bankruptcy. You subsequently receive a letter from the debtor's bankruptcy estate demanding the return of the \$100,000 payment, which was made by the debtor within 90 days preceding the debtor's bankruptcy petition date. The letter threatens litigation unless a resolution is reached.

The Bankruptcy Code refers to these pre-bankruptcy payments as "preferential transfers." While it may seem patently unfair, absent a defense, a bankruptcy trustee can recover or "claw back" these payments for the benefit of the bankruptcy estate while you, the creditor, are left holding the proverbial bag.

What is a Preferential Transfer?

Preferential transfers are defined in Section 547 of the Bankruptcy Code. Section 547(b) allows a bankruptcy trustee to "unwind" certain transactions that take place in the 90 days preceding a debtor's bankruptcy filing, the "preference period." The principle underlying the statute is that individual creditors should not receive more than their fair, *pro rata*, share of a debtor's limited assets when a debtor is approaching bankruptcy. A preference

claim allows a bankruptcy trustee to unwind certain transfers of assets a debtor made shortly before the debtor files for bankruptcy and recover those assets for the eventual distribution to *all* creditors.

The rationale for preference avoidance is twofold. First, the Bankruptcy Code seeks to promote equality between similarly situated creditors (e.g., secured creditors, unsecured creditors, bondholders, etc.). Second, the trustee's ability to claw back assets transferred in the months leading up to a bankruptcy disincentivizes creditors from trying to convince a struggling entity to pay it ahead of other creditors.

What is a Savvy Creditor to Do?

Under Section 60(b) of the Bankruptcy Act of 1898, preference recovery required that a creditor receive a transfer with "reasonable cause to believe that the debtor is insolvent." This changed with the enactment of the Bankruptcy Reform Act of 1978. Under today's Bankruptcy Code, if a creditor receives a payment that fits the statutory definition of a preferential payment, the bankruptcy trustee may recover the payment, irrespective of whether the creditor acted with suspicious intent.

This strict liability framework is, in practice, much more nuanced. The Bankruptcy Code provides for a number of defenses that a creditor may invoke to prevent the trustee from clawing back payments made during the preference period. Among the most commonly used is the "ordinary course of business" defense, which prevents a trustee from recovering otherwise preferential payments if the creditor can show the debtor's timing and pattern of payment did not change from the pre-petition *status quo*.

Creditors also often invoke the defense that the transaction was for goods or services immediately received (rather than pursuant to an extension of credit), sometimes termed a "contemporaneous exchange for new value." A creditor may assert a similar defense where the creditor provided the debtor with "subsequent new value" for which it was never paid.

"All's Fair in Love and Bankruptcy" Continued on Page 9

Team Publications

Communication is a key component of our direct style of representation and adds to our value proposition to our clients. Our lawyers are recognized as thought leaders, prominent speakers, commentators, and authors on platforms, venues, and publications across the nation and worldwide. Here are two publications we would like to highlight:

The Debt Collection Drill



John Rossman and **Mike Poncin** have turned their long-running audio blog, *The Debt Collection Drill*, into a videocast series. John and Mike provide sage tips and ongoing intelligence for debt professionals. They review detailed tactics on emerging issues in the credit industry and provide their analysis and solutions

to the challenges the collection industry faces daily. All video and audio from the *The Debt Collection Drill* is available on the Moss & Barnett website.



John Rossman



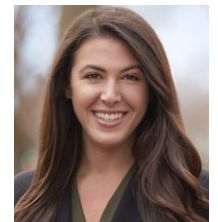
Michael S. Poncin

The new video series is also available on YouTube, and past episodes of *The Debt Collection Drill* audio blog can be found on Apple Podcasts

The Safe Harbor: Debt Collection Law Update by Aylix Jensen



Aylix Jensen offers analysis and insights for the debt collection industry in her monthly newsletter, *The Safe Harbor: Debt Collection Law Update by Aylix Jensen*. This monthly newsletter provides an update of changes and developments in the law that impact the debt collection industry. It highlights new debt collection laws and practices, discusses what these may mean for the collection industry, and provides tips to ensure compliance. All editions of *The Safe Harbor* are found on our website.



Aylix K. Jensen

We provide timely updates and analysis across all the legal disciplines in which we practice. Let us know what interests you by subscribing to our publications at LawMoss.com.

"All's Fair in Love and Bankruptcy" Continued from Page 8

A Preference Demand Is Rarely Cause for Panic

Bankruptcy trustees typically make demands to all recipients of transfers within the 90-day lookback period without considering whether a defense to preference liability exists. Should you receive a demand or a complaint filed in Bankruptcy Court for return of an allegedly preferential payment, please reach out to Moss & Barnett. Our bankruptcy attorneys can quickly determine whether the payments in question are indeed preference payments and which of the statutory defenses are best suited to the facts at hand. These demands and lawsuits can nearly always be settled prior to prolonged litigation.

Moss & Barnett Congratulates Our Lawyers Selected for Inclusion in *The Best Lawyers in America* for 2022

Moss & Barnett is pleased to congratulate our lawyers who have been included in the 2022 edition of *The Best Lawyers in America*® and *Best Lawyers: Ones to Watch*, with special congratulations to Kevin M. Busch, who was named as the 2022 Litigation-Banking and Finance “Lawyer of the Year” in Minneapolis.

Recognition by *Best Lawyers*® is based entirely on peer review. The *Best Lawyers* methodology is designed to capture, as accurately as possible, the consensus opinion of leading lawyers about the professional abilities of their colleagues within the same geographical area and legal practice area. *Best Lawyers: Ones to Watch*, the newest award initiative from *Best Lawyers*, recognizes attorneys who are earlier in their careers for outstanding professional excellence in private practice in the United States. Lawyers being honored as “Lawyer of the Year” are selected based on particularly impressive voting averages received during the exhaustive peer-review assessments *Best Lawyers* conducts with thousands of leading lawyers each year. Receiving this designation reflects the high level of respect a lawyer has earned among other leading lawyers in the same communities and the same practice areas for their abilities, their professionalism, and their integrity.

Best Lawyers: Lawyer of the Year

The Best Lawyers in America



Kevin M. Busch
Litigation-Banking and Finance

Also included in the *Best Lawyers in America* in these practice areas:

Banking and Finance Law, Financial Services Regulation Law, Banking & Financing Litigation, and Securitization and Structured Finance Law



Cindy J. Ackerman
Trusts and Estates



Yuri B. Berndt
Litigation and Controversy-Tax, Tax Law, and Trusts and Estates



Jana Aune Deach
Family Law



Jodi L. Johnson
Real Estate Law



Richard J. Johnson
Administrative / Regulatory Law and Energy Law



Richard J. Kelber
Corporate Law and Mergers and Acquisitions Law



Susan C. Rhode
Family Law and Family Law Mediation



Christopher D. Stall
Business Organizations (including LLCs and Partnerships) and Corporate Law

Best Lawyers: Ones to Watch



James J. Vedder
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Kelly C. Engebretson
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Susan A. King
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Moss & Barnett

Moss & Barnett Named a "Best Law Firm" by *U.S. News – Best Lawyers*® for 2022

We are pleased to announce that, for the 12th consecutive year, Moss & Barnett has been named a "Best Law Firm" by *U.S. News – Best Lawyers*® for 2022



Firms included in the 2022 "Best Law Firms" list are recognized for professional excellence with persistently impressive ratings from clients and peers. Achieving a tiered ranking signals a unique combination of quality law practice and breadth of legal expertise. Ranked firms, presented in tiers, are listed on a national and regional-based scale. Receiving a tier designation reflects the high level of respect a firm has earned among other leading lawyers and clients in the same communities and the same practice areas for their abilities, their professionalism, and their integrity. Moss & Barnett is nationally ranked in two practice areas and regionally ranked in 17 practice areas.

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