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Building Knowledge

The newsletter of the Illinois State Bar Association's Section on Construction Law

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Editor's Note

BY SAMUEL H. LEVINE

The failures of Silicon Valley BankRepublic Bank and Signature Bank have a significant impact on the construction industry as well as the banking industry. Both segments of the economy are intertwined. Craig Penrose writes about bank failures and construction issues. Craig is senior counsel at Laurie & Brennan. He focuses his practice in the areas of complex commercial business disputes and construction litigation.

Adam Whiteman writes about recovery under a theory of quantum meruit. It provides a vehicle for recovery in the absence of a contract. One of my

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Bank Failures and Construction Issues: What Every Construction Contractor Needs to Understand About FDIC Receivership

BY CRAIG PENROSE

Mark Twain once said that "history never repeats itself, but it does often rhyme." So is the case with the recent failures of Silicon Valley Bank (SVB) and Signature Bank. These two banks may (or may not) be the "canaries in the coal mine" foreboding widespread bank failures akin to what was observed in the 1980s, and then again in the last decade. While it seems recent "bailouts" may have staved off a larger banking disaster this time around, here's what every construction contractor needs to know about the authority of Federal Deposit Insurance Corporation ("FDIC") in the bank failure process and how those failures

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Editor's Note

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mentors refers to quantum meruit as the "writ of pity." However, it can be an effective remedy for recovery. Adam is the incoming chair of the Construction Law Section Council. He concentrates his practice on commercial collection litigation and real estate law.

Don't forget the Construction Law Webinar "Deconstructing the Arbitration Process: How to Arbitrate a Residential Construction Dispute" scheduled for May 18, 2023, at 12:30pm. Arbitrators and Construction Law Section Council members Lisa Curcio(Ret.), Margery Newman, Adam Whiteman, Randall Rapp, David Arena, and Samuel Levine will present an interactive program on arbitrating a residential construction dispute. Please consult the CLE page on the ISBA website. ■

Bank Failures and Construction Issues: What Every Construction Contractor Needs to Understand About FDIC Receivership

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can potentially affect the construction process, particularly concerning letters of credit and construction loans.

What You Should Understand About the FDIC

At the outset, a bank failure is different from other corporate types of failures. While the insolvency and follow on bankruptcy protection for individuals and most business entities is covered under the provisions of the Federal Bankruptcy Code, the insolvency of banks is not. See 11 U.S.C. § 109(b)(2). The insolvency of a bank is specifically exempted from the Bankruptcy Code, and is governed by the Federal Deposit Insurance Act ("FDI Act"), as amended by The Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). See generally, 12 U.S.C. §§ 1811-1835

As a practical matter, bank insolvencies are treated differently than other types of bankruptcies due to the importance of banks in the economy. Simply stated, the failure of any bank (but especially a large one) can damage the economy and undermine public confidence more acutely than the failure of almost any other comparably sized private business.

Almost 20 years ago, the FDIC Inspector General outlined the three major reasons for bank failures: (1) inadequate corporate governance; (2) weak risk management; and (3) lack of risk diversification/lending concentrations. See generally, Stanley V. Ragalevsky and Sarah J Ricardi, *Anatomy of a Bank Failure*, The Banking Law Journal (Dec. 2009). Banks are also subject to continuing government supervision through various examinations in regular course by state chartering authorities, or the Comptroller of the Currency, and back up examination supervision by the FDIC and the Federal Reserve. The actual decision to close a bank is usually made by the primary regulator, whether that chartering authority is federal or state.

The FDIC has also published and made publicly available a Resolutions Handbook that provides an easy-to-understand overview of the entire process, from the notification to the FDIC of a potential failure, to the FDIC's attempts to market the troubled bank for a Purchase and Assumption Agreement, to the various "hats" worn by the FDIC as the deposit insurer upon failure, and the FDIC's receiver activities.

In reference to the specific statutory provisions outlining the scope of the FDIC as a receiver, the FDIC typically is appointed as receiver of the failed insured depository institution. 12 U.S.C. § 1821(c). As receiver, the FDIC is authorized to pay claims against the financial institution in accordance with specified procedures. See 12 U.S.C.

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§ 1821(d)(3)-(13). Section 1821(d)(11) requires the FDIC as receiver to pay claims (other than secured claims to the extent of such security) with "amounts realized from the liquidation or other resolution of any insured depository institution" in a specified order of priority. 12 U.S.C. § 1821(d)(11). "Administrative expenses of the receiver" are paid first, deposit liabilities next, and general creditors and other claimants last. 12 U.S.C. § 1821(d)(11)(A). To the extent that the priority scheme set out in Section 1821(d)(11)(A) is inconsistent with state law, Section 1821(d)(11)(A) prevails. See 12 U.S.C. § 1821(d)(11)(B)(i).

The FDI Act and FIRREA also provides the FDIC as receiver various "super powers" similar to a bankruptcy trustee's powers. Section 1821(e) authorizes the FDIC as receiver to repudiate contracts entered into by a failed bank (including even employment contracts), which the receiver determines to be burdensome and detrimental to the orderly liquidation of the bank. 12 U.S.C. § 1821(e)(1). Furthermore, "the liability of the… receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1)" is "(i) limited to actual direct compensatory damages; and (ii) determined as of * * * the date of the appointment of the * * * receiver." 12 U.S.C. § 1821(e)(3)(A).

While repudiation of the contract by the FDIC relieves the receiver of its obligation to fulfill the contract, "the repudiation is treated as a breach of contract that gives rise to an ordinary contract claim for damages, if any." *Howell v. FDIC*, 986 F.2d 569, 571 (1st Cir. 1993); see *Resolution Trust Corp. v. Mgmt., Inc.,* 25 F.3d 627, 631 (8th Cir.1994). As noted above, the types of damages recoverable against the FDIC are significantly limited under FIRREA. *Lawson v. FDIC*, 3 F.3d 11, 15 (1st Cir. 1993); *Howell*, 986 F.2d at 572. In sum, the FDIC is liable only for actual direct compensatory damages determined as of the date of its appointment as receiver. 12 U.S.C. § 1821(e)(3)(A). Compensable damages under the statute specifically do not include: "(i) punitive or exemplary damages; (ii) damages for lost profits or opportunity; or (iii) damages for pain and suffering." 12 U.S.C. § 1821(e)(3)(B).

Section 1821(i) specifies how claims against the receiver shall be valued. As relevant here, it provides that "[t]he maximum liability of the [FDIC] acting as receiver or in any other capacity, to any person having a claim against the receiver or the insured depository institution for which such receiver is appointed shall equal the amount such claimant would have received if the [FDIC] had liquidated the assets and liabilities of such institution." 12 U.S.C. § 1821(i)(2).

What Happens to My Loans and Letters of Credit if the Issuing Bank Fails?

Letters of credit are often utilized in construction projects, either as a type of security for the issuance of a performance or payment bond, or in place of a bond (due to its often times cheaper costs), or even as a substitute for retainage. While a letter of credit does not fit exactly under the definition of contract, various courts have held that a letter of credit is still considered a "contract" that can be repudiated by the FDIC as receiver. *See Lexon Insurance Company Inc., v. FDIC*, 7 F. 4th 315, 324 (11th Cir. 2021); *Granite Re, Inc. v National Credit Union Administration Board*, 956 F.3d 1041, 1045 (8th Cir. 2020) (construing identical term under Federal Credit Union Act); *Del E. Webb McQueen Dev. Corp. v. RTC*, 69 F.3d 355, 358 (9th Cir. 1995); *Credit Life Ins. Co. v. FDIC,* 870 F. Supp. 417, 426 (N.D.H. 1995). Likewise, a construction loan is clearly a contract that the FDIC can repudiate under Section 1821(e).

The FDIC has also published "A Borrower's Guide to an FDIC Insured Bank Failure" and has this to say about the status of construction loans and other credit lines on bank failure: "When the FDIC is appointed receiver, it immediately begins analyzing loans that require special attention, such as unfunded and partially funded lines of credit, and construction and development loans. The role of receiver generally ***precludes continuing the lending operations*** of a failed bank; however, the FDIC will consider advancing funds if it determines an advance is in the best interest of the receivership, such as to protect or enhance collateral, or to ensure maximum recovery to the receivership." (emphasis added). Thus, a stakeholder in a construction project can "almost always" count on a construction loan or letter of credit being repudiated by the Receiver.

Under Section 1821(e)(2), the FDIC is required to repudiate any contract within a reasonable period of time. Whether a delay is reasonable depends on the facts and circumstances of the individual case. *Lexon*, 7 F.4th at 324 (citing *Bldg. Four Shady Oaks Mgmt. L.P. v. FDIC*, 504 F. App'x 292, 295 (5th Cir. 2012) (citing *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994)). The length of the delay is one, but not the only, factor. *Id.* A court can also consider whether the holder of the contract or lease suffered any prejudice from the delay, whether the FDIC acted in bad faith, and whether there were legitimate reasons for the delay. *Id.* (citing *Resol. Tr. Corp. v. CedarMinn Bldg. Ltd. P'ship*, 956 F.2d 1446, 1455 (8th Cir. 1992) (considering prejudice a central factor in the reasonableness analysis); *BKWSpokane LLC v. FDIC*, 12 F. Supp. 3d 1331, 1340 (E.D. Wash. 2014) aff'd, 663 F. App'x 524, 526–27 ("Courts have looked to various factors ... including evidence of the receiver's bad faith, prejudice to the non-repudiating party caused by the delay, and whether delay was needless or stemmed from legitimate reasons."). As far as what an unreasonable delay will be, the FDIC will be granted wide latitude. In *Lexon*, a delay of 153 days—or approximately 5 months—from FDIC appointment to repudiation was still considered reasonable.

What Happens if the Bank Repudiates My Loan or Letter of Credit?

Often repudiation can set in motion a sequence of events that can go from bad to worse. It is beyond dispute that general contractors as well as subcontractors of every tier will likely have unpaid retention amounts and that many may also have amounts owed for work performed since the prior construction draw and failure. In order to protect themselves, the contractors, subcontractors, and suppliers will, in all likelihood, all have to file mechanics' liens within the requisite statutory period once the funding is cut off. This means that if the receivership continues, even with cooperating contractors and subcontractors,

those mechanic's liens will at some point turn into lawsuits, as each claimant is required to file suit within the statutory period to preserve its lien. With further disbursement of funds "drying up" to continue paying for past and future work, numerous subcontractors pulling off the job is a possible scenario.

Even as the FDIC can unilaterally elect to stop disbursements under a construction loan, a bank receivership does ***not*** relieve a borrower from having to comply with its current loan covenants and obligations, one of which will undoubtedly require bonding over or paying off all mechanic's liens. Unfortunately, for many borrowers, that is hard to do without construction loan funds. In addition, once lawsuits to enforce liens are filed, the borrower will need lawyers to answer complaints and litigate the cases to prevent foreclosure of the mechanic's liens. Those lawsuits are likely additional violations of loan covenants. And while all of this is unfolding, a borrower attempting to find alternative financing would seem a tall order.

Contractors who find their construction loans or letters of credit repudiated by a receiver of a failed bank are not without recourse. The notice of repudiation is also important as it requires a claimant to make an administrative claim. FIRREA establishes an administrative process through which claims against a failed bank or the FDIC as receiver must first be submitted. 12 U.S.C § 1821(d)(3)-(13). This is not an optional procedure, as failure to exhaust these administrative remedies divests a court of jurisdiction to hear the claims. 12 U.S.C. § 1821(d)(13)(D)(i). "FIRREA is strict in its demand that claimants first obtain an administrative determination." *Office & Prof'l Emps. Int'l Union, Local 2 v. FDIC*, 962 F.2d 63, 65 (D.C. Cir. 1992).

FIRREA sets forth the procedure for the review and payment of a claim by the FDIC after a claim referenced above is submitted. Under 12 U.S.C. § 1821(d)(3)(B)(i), the FDIC is required to provide notice to creditors to present their claims within 90 days. Pursuant to FIRREA, "any claim against a failed bank must be submitted as an administrative claim before it may become grounds for a lawsuit." *Silva Bros. Investment, Inc. v. FDIC*, 894 F. Supp. 42, 44 (D. Mass. 1995). The requirement for submitting an administrative claim under FIRREA applies to all claims "seeking payment from the assets of the affected institution; all suits seeking satisfaction from those assets; and all actions for the determination of rights vis-a-vis those assets." *Marquis v. FDIC,* 965 F.2d 1148, 1152 (1st Cir. 1992).

The FDIC then has 180 days from the date a claim is filed to allow or disallow the claim. 12 U.S.C. § 1821(d)(5)(A)(ii). Sections 1821(d)(13)(D) and 1821(d)(6)(A) provide that during the 180–day period in which the FDIC decides whether to allow or disallow a claim, the court does not have jurisdiction over: "(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or (ii) any claim relating to any act or omission of such institution or the Corporation as receiver." *Id.* 12 U.S.C. § 1821(d)(13)(D).

Once the FDIC disallows a claim or the 180–day period expires, the claimant may seek administrative review "'or file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district court of the United States for the district within which the depository institution's principal place of business is located." *Id.* 12 U.S.C. § 1821(d)(6)(A).

Can I Sue the FDIC for Money Damages?

Although a repudiation of a letter of credit or a construction loan is clearly a breach of contract, recovery is only permitted if the damages are "fixed and determined" on the date of the FDIC's appointment as receiver. 12 U.S.C. § 1821(e)(3)(B). While several cases had previously held that if the contract had not been repudiated as of the date of appointment, there were no damages, that theory does not appear to be the majority view.

Rather, although superficially such reasoning appears consistent with § 1821(e), courts have held this argument conflicts with the statutory intent of FIRREA to allow claims for contracts in force prior to insolvency. [The FDIC's] reasoning could be extended to deny any contractual claim arising from repudiation. Such claims are always contingent on the date of insolvency because the receiver cannot repudiate a contract until after it is appointed. *Citibank (South Dakota), N.A. v. F.D.I.C.*, 827 F. Supp. 789, 791 (D.D.C. 1993). Damages are fixed and determined on the date of receivership where "the contractual right at issue vested prior to the appointment of the FDIC as receiver." *Id.*; see also *Nashville Lodging Co. v. RTC*, 59 F.3d 2236, 244 (D.C. Cir. 1995) ("[W]hether the ... rights were sufficiently vested [is determined by] the present value of the right ... as of the date the receiver took over.").

A contractual right is sufficiently vested where "the insolvent bank's promise was 'binding and enforceable under contract law' "at the time of the appointment of the receiver. *Id.*; see *Office & Prof'l Employees Int'l Union, Local 2 v. FDIC*, 27 F.3d 598, 602 (D.C. Cir. 1994). Therefore, as long as the contractual right existed on the date of receivership, the liability is "sufficiently 'fixed and certain' to be provable against the FDIC at the moment the FDIC became the receiver."*1 Navarro v. FDIC*, 371 F.3d 979, 982 (7th Cir. 2004) (quoting *Soriero v. FDIC*, 887 F. Supp. 103, 106 (E.D. Pa. 1995)); *McMillian v. FDIC*, 81 F.3d 1041, 1050 (11th Cir. 1996).

I Prevailed Against the FDIC—So My Check Is in the Mail Right? Well, Not Really

Even if the claimant prevails in its lawsuit after the administrative process, its victory will very likely be hollow. In *Battista v. Federal Deposit Insurance Corp*., in applying § 1821(d)(10)(A), (d)(11)(A), and (i)(2), the Ninth Circuit Court of Appeals held claims for contract repudiation damages under § 1821(e) are subject to the distribution priority of § 1821(d)(11) and may be paid with receivership certificates, as opposed to cash. 195 F.3d 1113, 1121 (9th Cir. 1999).

Pursuant to § 1821(i)(2), a claimant is entitled to only a pro rata share of the failed bank's liquidated assets to satisfy its money

judgment for repudiation damages. The Court in *Battista* further noted that "[t]o require the FDIC to pay certain creditors in cash would allow those creditors to 'jump the line,' recovering more than their pro rata share of the liquidated assets, if the financial institution's debts exceed its assets." 195 F.3d at 1116.

There is no question that the FDIC may pay creditors with receiver's certificates instead of with cash. *RTC v. Titan Fin. Corp*., 36 F.3d 891, 892 (9th Cir.1994). Section 1821(d)(10)(A) authorizes the FDIC, as receiver, to "pay creditor claims ... in such manner and amounts as are authorized under this chapter." In *Titan*, we reasoned that the FDIC may use receiver's certificates as its manner of payment because requiring cash payments would subvert the comprehensive scheme of FIRREA, including § 1821(i)(2)'s limitation on an unsecured general creditor's claim to only a pro rata share of the proceeds from the liquidation of the financial institution's assets. *See Titan,* 36 F.3d at 892 (citing *Franklin Bank v. FDIC*, 850 F. Supp. 845 (N.D. Cal. 1994)). To require the FDIC to pay certain creditors in cash would allow those creditors to "jump the line," recovering more than their pro rata share of the liquidated assets, if the financial institution's debts exceed its assets. *Id*. (quoting *Franklin Bank*, 850 F. Supp. at 849).

What this means as a practical matter is that even if the FDIC denied a timely administrative claim, and even if a claimant brought suit and demonstrated actual damages as fixed, and even if claim prevailed in a lawsuit with a judgment, in return the claimant will receive no cash, but a FDIC Receiver Certificate.

12 U.S.C. § 1821(d)(11) provides for statutory preference of claims, and unsecured claims against the receiver are far down the list. The FDIC's Resolutions Handbook has this to say: "Inasmuch as most liabilities of a failed institution are deposit liabilities, the practical effect of deposit preference in most situations is to eliminate any recovery for unsecured general creditors." Thus, in most circumstances a receiver certificate is suitable for framing, but not much else.

One Final FDIC "Secret Weapon"—The Prudential Mootness Argument

Even if all the above comes to pass, the FDIC has a less well publicized secret weapon—the prudential mootness motion. Federal courts lack subject matter jurisdiction to hear claims that are moot. *United States v. Philip Morris USA, Inc.,* 566 F.3d 1095, 1135 (D.C. Cir. 2009). There are two species of mootness: Article III mootness and prudential mootness. Prudential mootness is appropriate where "a controversy, not actually moot, is so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant." *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1019 (D.C. Cir. 1991) ("Where it is so unlikely that the court's grant of [remedy] will actually relieve the injury, the doctrine of prudential mootness—a facet of equity—comes into play."). The test is whether a favorable judgment "will provide a real measure of redress." *Foretich v. United States*, 351 F.3d 1198, 1216 (D.C. Cir.2003).

Often times, the FDIC will publish what it calls a Determination of Insufficient Assets concerning a failed bank (typically in the Federal Register) indicating after administrative expenses and depositor liability, nothing is left to pay unsecured claims. Cases have held that this determination forecloses the possibility for recovery for a general unsecured creditor and thus the case is prudentially moot and subject to dismissal. See 12 U.S.C. § 1821(i)(2) (setting the maximum liability of FDIC in any capacity as the amount equal to the amount the claimant would have received if it liquidated the bank's assets and liabilities); See *Henrichs v. Valley View Dev*., 474 F.3d 609, 615 (9th Cir. 2007) (dismissing claims against FDIC as receiver where no assets remained in receivership to satisfy the plaintiff's claims, rendering the claims moot); *FDIC v. Kooyomjian*, 220 F.3d 10, 15 (1st Cir. 2000) (holding that claims against the FDIC as receiver failed to satisfy the case or controversy requirement where "[t]he FDIC's worthlessness determination ... preclude[d] any relief for [claimants] even i[f] they were successful ... and obtained favorable judgment"); *281–300 Joint Venture v. Onion,* 938 F.2d 35, 38 (5th Cir. 1991) (dismissing "on prudential grounds" where "there will never be any assets with which to satisfy a judgment"); *Boone v. IndyMac Bank, F.S.B.,* No. CV 09–10750 SJO (CWx), 2010 WL 7405439, at *3 (C.D. Cal. Dec. 14, 2010) ("Because any legal relief available to Plaintiff would be a general unsecured claim, the Worthlessness Determination prevents this Court from effectively remedying Plaintiff's legal claims as no funds are available to pay such claims."). Claimants are often unaware of this "secret weapon."

So Am I Completely Out of Luck if My Bank Fails?

When Silicon Valley Bank failed, the FDIC was appointed receiver and the Silicon Valley Bridge Bank was chartered to be run by the FDIC, under authority of the Comptroller of the Currency. The Bridge Bank indicated on its website that it was assuming ***all the assets*** and honoring ***all commitments***. On March 27, 2023, First Citizen Bank purchased the deposits, and some, but not all, of the assets of the Bridge Bank under a loss sharing agreement. Potentially, at least, none of the assets are currently being repudiated. Perhaps this is simply because the bulk of the loans are not real estate or construction type loans. So the failures compared to the prior bank failure history is similar, but different.

In this version of a bank failure, the Federal Reserve has also formed a new Banking Term Funding Program to "loan" additional funds to a bank to increase liquidity. The take way so far appears to possibly be that even though the deck may seem stacked overwhelmingly in favor of the FDIC, there are advantages the government may elect to use in the future if more banks fail. Whether any of this will come to pass is anyone's guess.■

You Get What You Deserve

BY ADAM WHITEMAN

"You get what you deserve." We have all heard this phrase used. Most commonly, it has a negative connotation. When you do something wrong, "you get what you deserve." But when expressed in Latin, the phrase presents a different coloring. The term *quantum meruit* means "as much as he deserves." It is an expression that describes the amount that could be awarded on a contract implied in law (also called a quasi-contract) and is based on the reasonable value of the services performed. Quantum meruit can be pursued as an equitable remedy to provide restitution for unjust enrichment. It is often pleaded as an alternative claim in a breach-of-contract case so that the plaintiff may recover even if the contract is unenforceable or there is no contract.

An interesting application of this principle can be found in the case of *Restore Construction Co., Inc. v. The Board of Education of Proviso Township High Schools, 2019 IL App (1st) 181580 (June 28, 2019)*.

In *Restore Construction Co. v. Board of Education of Proviso Township High Schools District 209* (*supra*), the plaintiffs provided restoration services after a district high school was damaged by fire. The plaintiffs completed $7,271,000 worth of work pursuant to two separate agreements but were paid only $5,816,223.08. The school district refused to pay the outstanding balance of $1,428,553.90 claiming that the agreements were never properly voted on and approved by the school board. The plaintiffs brought a suit which stated counts asserting *quantum meruit* as a basis to recover for the value of the work performed. The school district moved to dismiss plaintiff's *quantum meruit* counts, arguing that a school district cannot be held liable under a theory of *quantum meruit* when the contracts purporting to bind the district were void *ab initio*. The trial court granted the school district's motion to dismiss the complaint, but the appellate reversed.

The issue, according to the appellate court, was "not whether the Proviso Board can be held liable under a void contract, but whether the principles that preclude the enforcement of a void contract also preclude the application of *quantum meruit*." *Id.* at ¶ 34. According to the court, the term *quantum meruit* means "as much as he deserves and is an expression that describes the extent of liability on a contract implied in law (also called a quasi-contract)" *Id.* at ¶ 28. The court noted that "Illinois courts have held governmental units, like a school district, liable on contracts implied in law even where proper contractual forms were not followed." *Id.* at ¶ 37. Citing authority, the court explained that "A contract implied in law is one in which no actual agreement exists between parties, but a duty to pay a reasonable value is imposed upon the recipient of service or goods to prevent unjust enrichment." *Id.* at ¶ 39. Since the Proviso Board did not dispute that it accepted all of plaintiffs' service without objection, it would be unjust to allow it to retain said services without paying reasonable value for them.

In order to recover under a theory of *quantum meruit*, a plaintiff must prove that: "(1) it performed a service to the benefit of the defendant, (2) it did not perform the service gratuitously, (3) defendant accepted the service, and (4) no contract existed to prescribe payment for the service." *Id.* at ¶ 43. The court determined that plaintiffs plead facts establishing these four elements. That the agreements were void *ab initio* was not determined to be a bar to relief, but rather, an allegation satisfying the fourth element of the pleading standard—i.e., that no contract existed to prescribe payment for the service.

The lesson is, don't give up. It must have been quite frustrating for the plaintiffs in this case to have obtained agreements signed by persons purportedly acting on behalf of the school district, to have performed over $7 million worth of work, to have gotten paid for almost $6 million worth of said work only to learn that the last $1.4 million would not be paid because the contracts were not voted on and approved by the school board. Should they have known better when dealing with a governmental entity that proper ratification procedures should be followed? Possibly. But the opinion also notes that plaintiffs were asked to provide "emergency mitigation services to the District" and they were advised that "the District would approve a contract…to mitigate and remediate damage from the fire." The plaintiffs thereafter "provided emergency mitigation services."

In the end, the plaintiffs were permitted to go forward with their suit seeking to recover the fair value of their services, and the school district was not permitted to use a procedural technicality as a way of evading their financial responsibilities. It seems like both parties in this case got what they deserved. ■

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