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## From the "Sales Cooke"...

By Leslie Kusek, Marketing Consultant

While we all guard our time ferociously, I make time to read an e-newsletter from The Sales Cooke. Here are some thoughts on sustainable businesses worth considering...

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## New Tool to Battle Healthcare Costs

By Debra Gervase, PCIA Executive VP Group Benefits 810.224.5278 or [dgervase@pciaonline.com](mailto:dgervase@pciaonline.com).

The increased interest in Health Reimbursement Arrangements (HRA's) is a direct result of the need for employers to combat the rising costs of medical care for employees, while main-

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## PCIA "Gets Personal"

By Tony Preston, PCIA VP Personal Lines 810.224.5267 or [tpreston@pciaonline.com](mailto:tpreston@pciaonline.com)

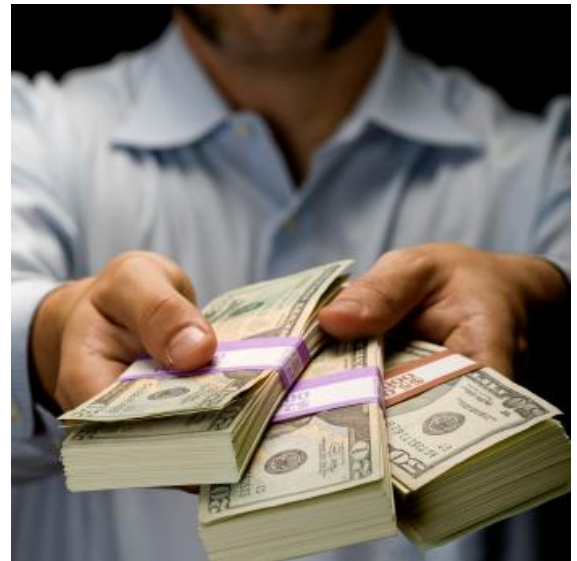
Did you know that PCIA is a specialist in auto and home coverage for your principals and employees? We also strive to keep you informed about risk exposures you may not be aware of. *(see Page 6)*

## Certifying Applications for Payment: A Potential Risk to Design Professionals

**Contributed by:**

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Here's your worst nightmare: you certify a payment application intended to pay a subcontractor for work performed and you end up having to pay because the general contractor failed to do so. Such a situation can arise where the general contractor has no funds or is bankrupt and the owner is protected through its receipt of the sworn statements. The unpaid subcontractor has a potential theory of liability against the design professional unless proper precautions were taken.



In today's economic climate, projects are being run on tight budgets and money is scarce. As a result, many general contractors are accepting projects with smaller profit margins and some are finding themselves in tenuous positions where the money is not flowing down to its subcontractors as required. As a design professional who certifies applications for payment in Illinois, be aware that you may be exposing yourself to poten-

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PROFESSIONAL CONCEPTS  
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## Certifying Applications for Payment

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tial risks unless necessary safeguards are implemented. (As many design professionals in Michigan begin to explore business opportunities in Illinois, please take notice of this potential risk.)

We are aware of a situation in which an Illinois court has interpreted the Mechanics Lien Act to require an architect who certified payment to the general contractor to first “verify” that each subcontractor received prior payments before certifying any future payment applications. It is often not enough to rely upon the sworn statement provided by the general contractor. If the design professional does not verify that the payments have, in fact, previously been made to the subcontractors, the design professional bears the potential risk of being obligated to pay those “unpaid” subcontractors who were not paid by the general contractor.

While the AIA Document B141-1997, Section 2.6.3 *Certification of Payments to the Contractor* provides a contractual defense and protection to the architects in this regard, additional levels of protection should not be overlooked. Specifically, §2.6.3.2 states:

The issuance of a Certificate of Payment shall not be a representation that the Architect has (1) made exhaustive or continuous on-site inspection to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the

Owner to substantiate the Contractor’s right to payment, or (4) ascertained how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

If not using AIA B141, the design professional should certainly incorporate similar language and protection in its contract. While one may certainly argue the rationale for saddling the architect with this additional burden, the reality is that design professionals must be on notice of this novel responsibility and the commensurate risks. ***If not using AIA B141, the design professional should certainly incorporate similar language and protection in its contract.***

Not only should design professionals in Illinois verify that the subcontractors have been paid as reported, it is wise to document such due diligence. To simply rely upon representations made in the sworn statement may apparently not be sufficient. To properly protect itself, the architect should not only gain the sworn statements and lien waivers from each subcontractor and supplier, but should also gain 30-day trailing lien waivers, and verify that the prior payments have, in fact, been made. While undoubtedly this adds an additional time burden and expense for the

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## Certifying Applications for Payment

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design professional, the potential of having to pay countless dollars to unpaid subcontractors is reason enough to perform these added tasks.

Illinois has seen fit to protect owners from having to pay twice for subcontractors who have not been paid as long as the owner follows certain statutory requirements. The courts have relied upon the principle that owners should not be held to pay these subcontractors when the general contractor no longer has the funds, is bankrupt, or is otherwise financially unable to pay the costs. If an owner follows the requirements of requesting and gaining the requisite sworn statements from the general contractor, the owner is protected with respect to all payments made in reliance upon the verified statements or affidavits provided. Capital Plumbing & Heating Supply Co. v Snyder, 2 Ill. App 3d 660; 275 N.E. 2d 663 (4 Dist. 1971). Illinois courts have long held that the legislature intended that the owner should be protected if he used reasonable precautions in following the statutory provisions and had no knowledge or notice of the falsity of a contractor's statement. Berkshire Whse. Co. v Hilger & Co., 268 Ill. 463; 109 NE. 287 (1915). However, at least some Illinois courts have found it justifiable to require the design professional, who certified the payments, to make these payments to the subcontractors if verification of the prior payments was not gained.

Cause for concern is the fact that upon a casual reading of the pertinent statute, and even a more detailed review, it is not self evident that such an exhaustive endeavor would be required of the design professional before signing off on the payment applications. Specifically, § 770 ILCS 60/5 reads in pertinent part:

“...It shall be the duty of the contractor to give the owner, and the duty of the owner to require of the contractor, before the owner or his agent, architect,

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## Healthcare Costs

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taining sound financial and fiscal responsibility for the business at large.

These benefits options have garnered significant interest because they make employees more cognizant of healthcare spending, while providing sufficient medical coverage. HRA's have attracted significant attention recently because they appear a viable option to help employees manage increased exposure generated by higher deductible and out of pocket health insurance plans. This is possible through employer funds that are allocated annually for employees to use for payment of healthcare expenses not covered by insurance, such as deductibles.

HRA is a medical reimbursement plan paid for solely by the employer, and is not funded through voluntary salary reduction of the employee. The employer determines the maximum allowable amount per employee, and employees are reimbursed up to that amount for qualified medical expenses. Any unused portion is retained and carried forward to the next coverage period.

The development of HRA's give all businesses a choice when deciding to adopt a tax-advantaged medical benefits plan that will not only affect employees, but also the business bottom line.

## Integrated Project Delivery

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or superintendent shall pay or cause to be paid to the contractor or to his order any moneys or other consideration due or to become due to the contractor, or make or cause to be made to the contractor any advancement of any moneys or any other consideration, a in writing, under oath or verified by affidavit, of the names and addresses of all parties furnishing labor, services, material, fixtures, apparatus or machinery, forms or form work and the amounts due or to become due to each....”

Because subcontractors are typically not paid at the same time the owner pays the general contractor, it is difficult to gain lien waivers from the subcontractor for the current or pending payment application. It, however, has become the practice in the construction industry to gain and accept “30-day trailing lien waivers” from these subcontractors. A 30-day trailing lien waiver is a waiver gained from a subcontractor which waives its lien rights for the immediately preceding draw request. As a result, the exposure is limited to the amounts paid to the general contractor in the current draw request, which includes the subcontractors’ requests for the current application for payment. With the submitted, current progress draw request, the general contractor delivers a lien waiver for the current application for payment and provides indemnity for the amounts payable to the subcontractors. Obviously, the in-

demnification is only as strong as the viability of the general contractor.

The other two possibilities to provide a level of protection to the design professional are withholding the contractor’s retainage held by the owner and/or providing direct payments and/or joint checks to the subcontractors.

Patently, the best method of protection is to implement protective contractual language and gain and verify sworn statements from the general contractor and procure executed lien waivers from the subcontractors for each and every application for payment. To simply rely upon the submission of a sworn statement exposes the design professional to potential liability for certifying to the owner that payment should be made to the general contractor. The key is knowing the risk and implementing the proper procedures to diminish and avoid this exposure.

*The above material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.*



### ***Can We Be of Assistance?***

*We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. 1.800.969.4041.*

## **Sales Cooke...**

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Successful and sustainable businesses are all built on 4 components:

- **Performance:** Most of us understand this—improving revenues, managing costs and increasing profits all measure performance.
- **People:** Just having good people in place today does not insure long term success. Your business must invest in its people to retain them, and attract new employees for the future.
- **Process:** If people enjoy doing business with your company, and are thrilled with the way your business treats them, chances are your process is pretty good. Do you know what your customers' experience is like? Ask them!
- **Culture:** How well does your organization work together, communicate, collaborate and manage conflict?

As you manage your business and your bottom line, remember the key to your business's success goes beyond the financials.

*For more thoughts from the Sales Cooke, go to [www.SalesCooke.com](http://www.SalesCooke.com).*

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## Dangers of “Going Bare” on Watercraft Coverage



Boat owners typically face large property and liability loss exposures from their boating activities while often going without proper insurance. The following loss scenarios point to the need for specialized boat owners coverage. Remember that many of these loss examples are not covered (or have tough restrictions) under the standard personal auto or homeowners policies.

- Your cruiser collides with a speed boat whose operator fails to yield the right of way, causing extensive damage to your boat. The owner of the speed boat does not have any insurance coverage.
- An expensive bass boat you just purchased is stolen from your home.
- Your 27-foot-long sailboat is damaged by a major hailstorm while docked at the marina.
- Your sport fishing boat is struck by lightning, incapacitating its electrical system.
- Your son's friend is water skiing behind your boat and he falls into the lake, injuring himself, due to the excessive speed of the boat.
- You negligently cause another boat to overturn to avoid a collision.
- Your outboard motor explodes, seriously injuring your next door neighbor.

If you have any watercraft exposures, please call our office for a review of your loss exposures and insurance solutions.

For more information, or to schedule an appointment to discuss personal insurance issues further, contact:  
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