



Reduce Risk & Protect Profit

Minimize Exposure While Maximizing Your Gains



SKUFCA LAW

About Skufca Law

- Full service law firm serving business clients
- We serve as outside general counsel to companies in the construction industry
- We routinely handle transactional and litigated matters
- We serve as trusted advisors



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Minimize Company Risk

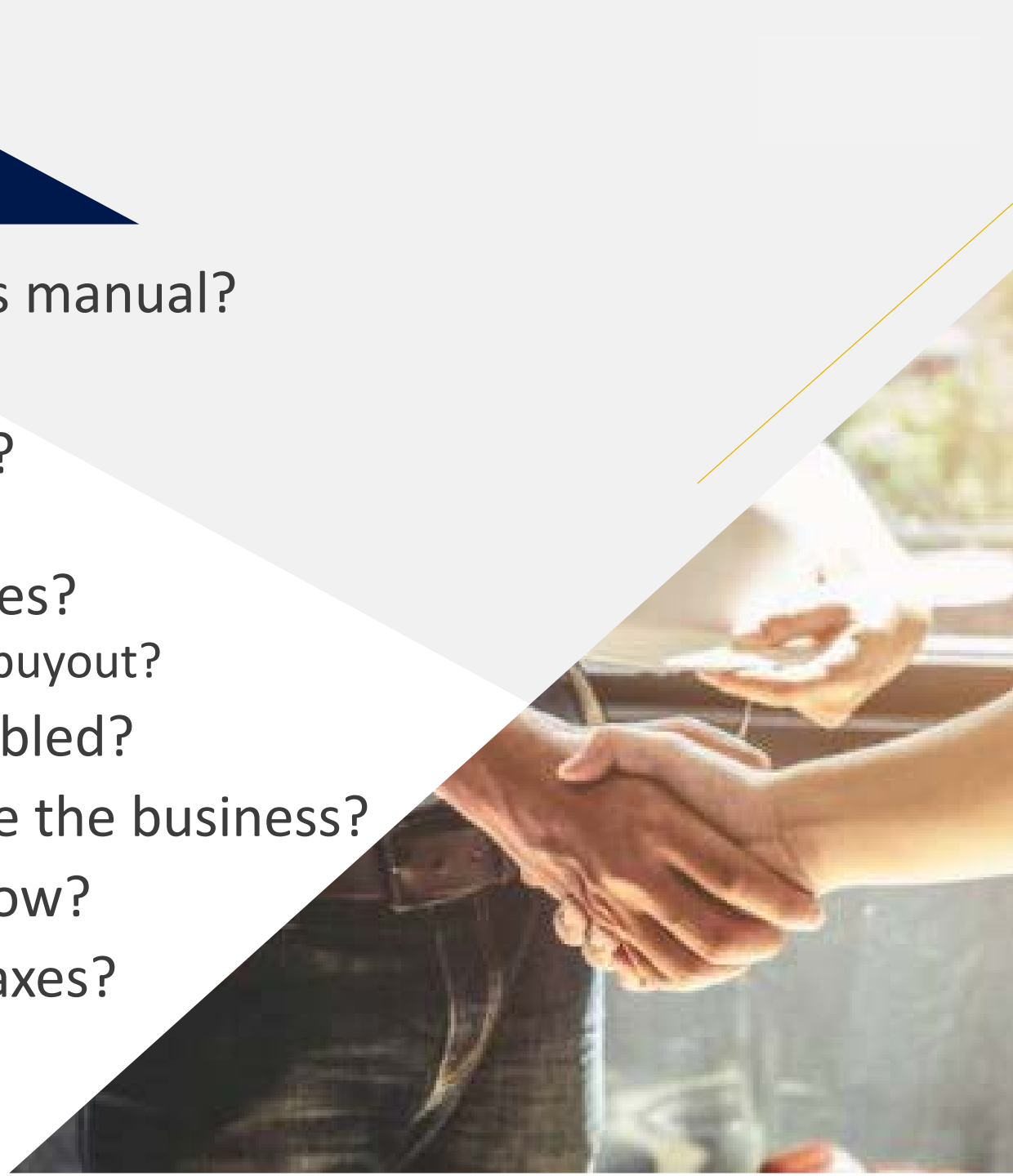
- Risks of Ownership
- Employee Risks
- Intellectual Property Risks
- Licensure Risks
- Exit Risks



Ownership Risks

Does your business have a written owner's manual?

- Is your business required to have one?
- How are disputes among owners settled?
 - In private arbitration?
- What happens if an owner dies or divorces?
 - Considered purchasing insurance to fund a buyout?
- What happens if an owner becomes disabled?
- What happens if an owner wants to leave the business?
- Can new owners/investors be added? How?
- Does your business structure minimize taxes?
 - Taxed as a C Corp, partnership or S Corp?



Ownership Risks

A written Operating Agreement or set of company By-Laws can:

- Minimize the Risk and Impact of Partnership Disputes
 - Owners can choose how disputes are to be resolved *before* any dispute arises
 - Private, confidential arbitration vs. litigation in the Courts
- Minimize the Risk of an Owner Exiting the Business
 - Risks to the Existing Business
 - Non-competition, non-solicitation and non-disclosure requirements
 - Risks to the Existing Owner
 - Fairly valuing the buyout
 - Allowing a timely and orderly exit



Ownership Risks

Why Maintain Corporate Formalities?

- Avoid dissolution of the business
 - Annual Report Filing Requirements
- Avoid Piercing the Corporate Veil/ Alter Ego Liability

Courts can disregard the corporate structure (!) and hold owners personally liable (!!!) for the debts and obligations of the business under certain circumstances.



Ownership Risks

Owner Held Personally Liable Under Commercial Lease Agreement:

In 2006, an individual owner was personally liable (\$115,500) for his company's breach of a commercial lease agreement

- The company had no board of directors
- It was set up with little to no assets
- Rent payments were made by another business owned by the owner (commingling funds)

E. Mkt. St. Square, Inc. v. Tycorp Pizza IV, Inc.,
175 N.C. App. 628, (2006)



Employee Risks

- Minimize Risk When Employee Starts and Leaves
 - Employment Agreement
 - Noncompete, Nondisclosure, and Non-solicitation Clauses
- Employee Manual/Company Policy
 - Minimize Risk of Lawsuits
 - 3.3% of employees in the residential building construction industry experienced a nonfatal occupational injury/illness in 2017

Source: U.S. Dept. of Labor



Intellectual Property Risks

- How to Minimize the Risk of Intellectual Property Infringement
- How to Protect Your Intellectual Property



Intellectual Property Risks

- What is Intellectual Property?
- trademark: any word, phrase, symbol or design or any combination of those items used by a person or business to identify goods made, sold or distributed by them, and to distinguish them from goods made, sold or distributed by others
- service mark: any word, phrase, symbol or design or any combination of those items used by a person or business in the provision or advertising of their services, and to identify and distinguish their services from the services provided by others
- NC registration provides protection in NC for trademarks and service marks (not copyrights or patents: federal govt)
- Federal registration provides nationwide protection



Intellectual Property Risks

Case Study:

- Assume you are “John Smith” and start a new business: “Smith Custom Homes”
- You spend thousands on marketing, creating a logo, setting up your website, building your brand awareness, etc.
- Months or years later you receive a cease and desist letter from “Smith Custom Homes” based out of state demanding that you stop using that name
- What do you do?



Intellectual Property Risks

- Since they operate out of state, there shouldn't be any issues with operating as "Smith Custom Homes", right?
- Wrong: It turns out that they have a federally registered service mark



Intellectual Property Risks

SNYDER CUSTOM HOMES

Word Mark

██████████ CUSTOM HOMES

Goods and Services

IC 037. US 100 103 106. G & S: Building construction services; custom construction of new residential homes; remodeling of homes. FIRST USE: 19960601. FIRST USE IN COMMERCE: 19960601

Standard Characters Claimed

Mark Drawing Code

(4) STANDARD CHARACTER MARK

Serial Number

██████████

Filing Date

November 22, 2019

Current Basis

1A

Original Filing Basis

1A

Owner

(APPLICANT) ██████████ CONSTRUCTION, INC. CORPORATION ██████████

Attorney of Record

██████████

Type of Mark

SERVICE MARK

Register

PRINCIPAL

Live/Dead Indicator

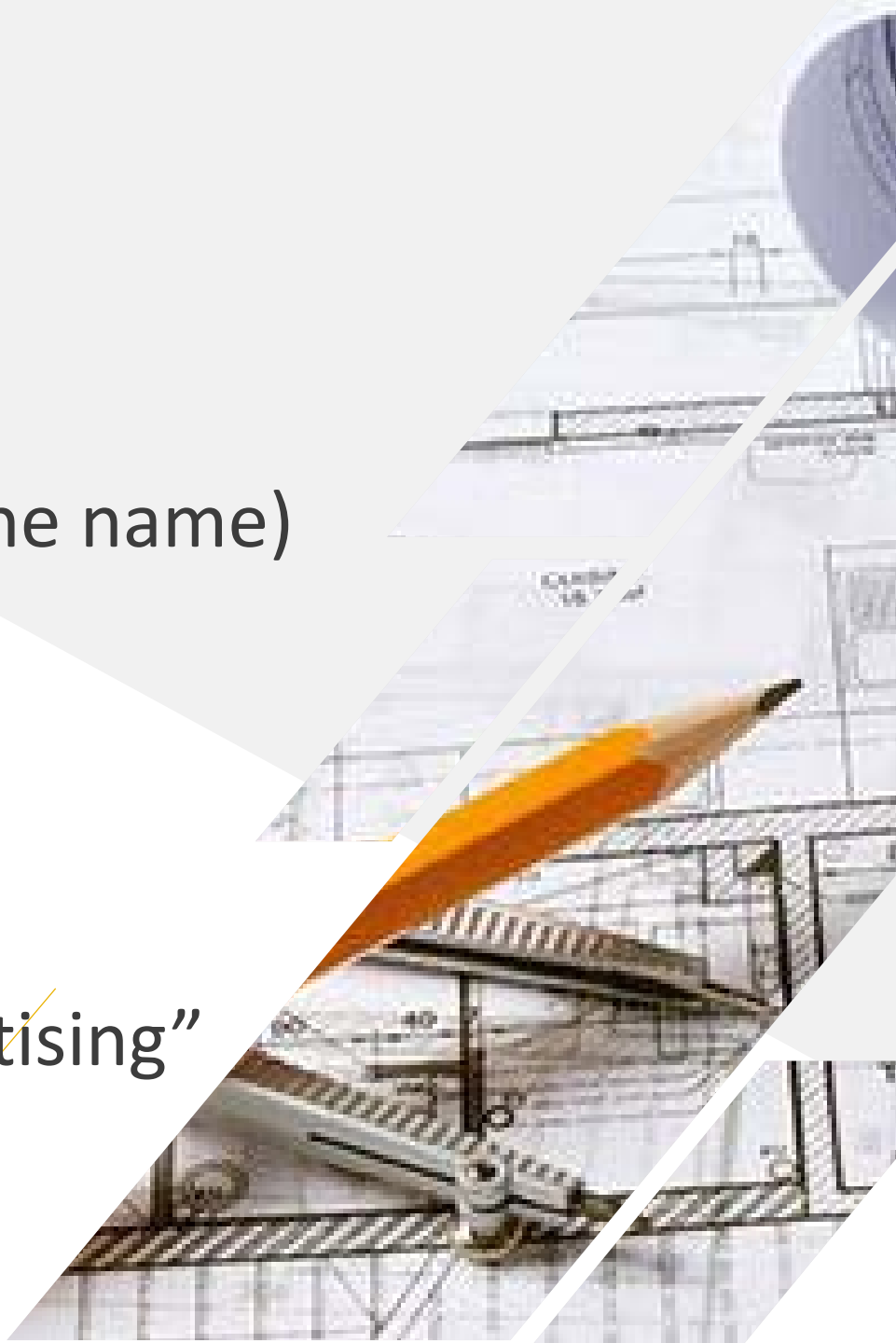
LIVE



Intellectual Property Risks

How Bad Could It Really Be?

- Injunctive Relief (Ordered to stop using the name)
- Paying their court costs
- Paying a “reasonable royalty”
- Paying the lost profits of the registrant
- Paying out a share of your profits
- Possibility of paying for “corrective advertising”
- Possibility of treble damages
- Possibility of paying their attorneys’ fees



Intellectual Property Risks

- Risks like this can show up at anytime
- Not knowing is not a defense
- Public registration of intellectual property in state and federal databases protects the registrant, not the unknowing infringer



Intellectual Property Risks

- Benefits of registering trademark (selling goods) or service mark (selling services):
 - Notice to the public, including competitors, that you own the mark;
 - Upon registration the law will assume you own the mark: increased leverage if you are involved in a dispute or lawsuit
 - Exclusive right to use the mark in North Carolina on or in connection with the goods you produce or the services you provide
 - Can file a lawsuit to protect your mark if someone infringes your mark



Intellectual Property Risks

What do you do if a competitor starts to use a tradename or trademark that is confusingly similar to your business?

- Common law rights
- NC registration rights
- Federal registration rights



License Risks

“Improper Use of License” violations

- When a licensee undertakes projects that require a license in a name that is **different** than the name that appears on the license certificate
- Using a name other than the name that appears on the license certificate violates NC law (N.C.G.S. 87-12) and the Board’s rules (21 NCAC 12A .0209)
- If an individual, corporation, LLC or partnership intends to use a non-legal entity name to conduct all or part of its business bidding or contracting projects \$30,000 or more: file a Certificate of Assumed Name (COAN) and submit it with the application for licensure; or,
- If the unlicensed assumed name is adopted as an additional (Trading As or T/A) name after a license has been issued then the executed COAN should be submitted to the Board before the name being used so the license record can be updated and the name used in a lawful manner.
- Cannot use an assumed name that is the same or similar to one used by another licensee that could cause confusion or mislead the public.



License Risks

Assumed Business Names

If you are operating your business under any other name than the name appearing on your company's founding documents: file an assumed business name certificate

The assumed business name is:

Amazon Fresh

(You may include no more than five

The real name of the person or

Prime Now LLC

SOSID = 1575534

The assumed business name is:

Google Fi

(You may include no more than five (5) a

The real name of the person or entity

Google North America Inc., 1416903

The assumed business name is:

Walmart #01133

(You may include no more than five (5) a

The real name of the person or entity

Wal-Mart Stores East, LP SOSIS: 0613316

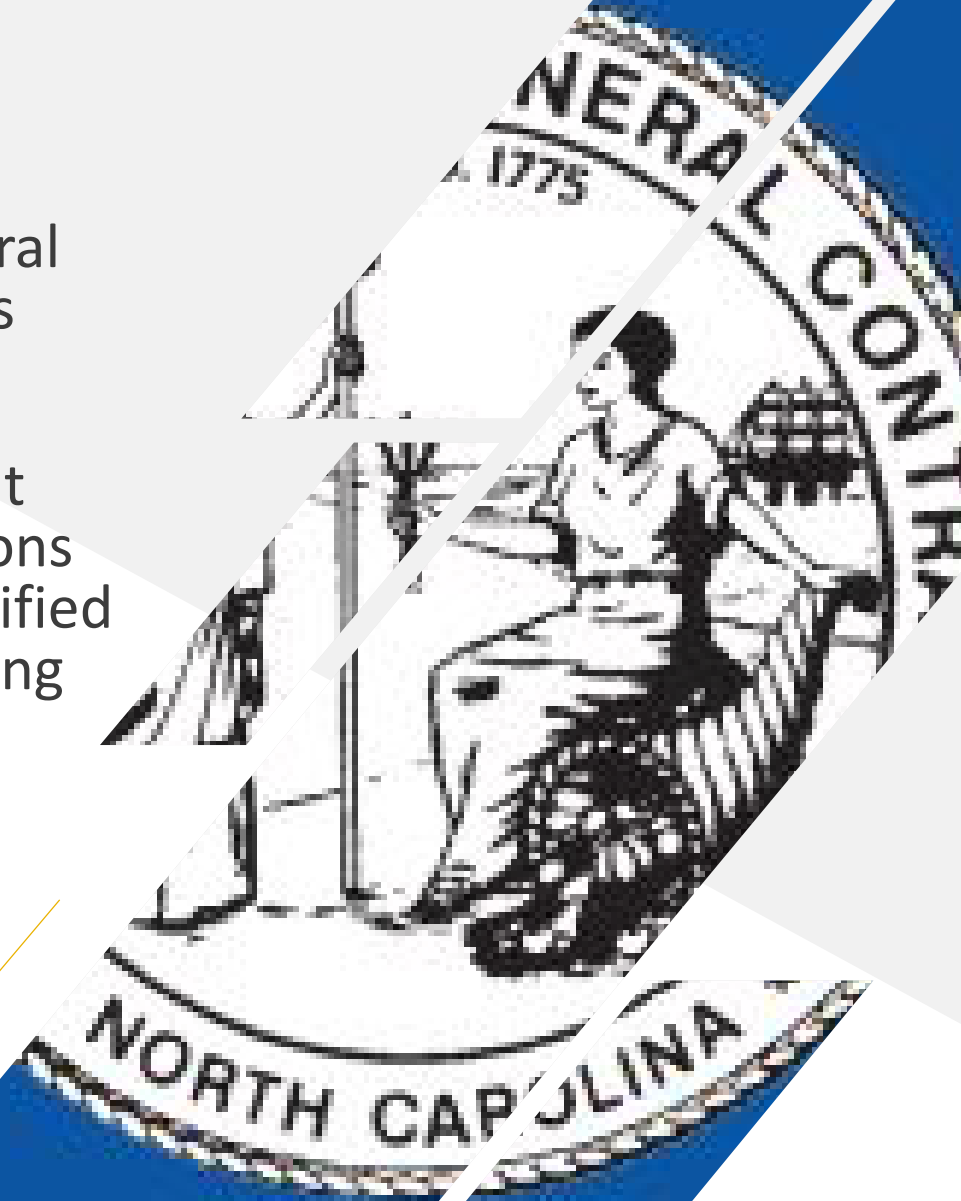
Filing one is cheap, quick and easy



License Risks

Continuing Education (CE)

- The recently passed N.C.G.S. § 87-10.2 requires NC general contractors to complete CE for the 2021 license renewals
- Courses begin: May 2020
- 8 hours of CE must be completed to renew a license by at least one qualifier for licensees in the license classifications of Building, Residential and Unclassified. For the Unclassified license it shall be the qualifier who has passed the Building examination.
- The 8-hour course requirement includes a mandatory 2-hour course produced by the Board with information about changes in the laws and rules and other content applicable to general contracting.
- The remaining 6 hours will be elective courses produced by outside providers, submitted to and approved by the Board.

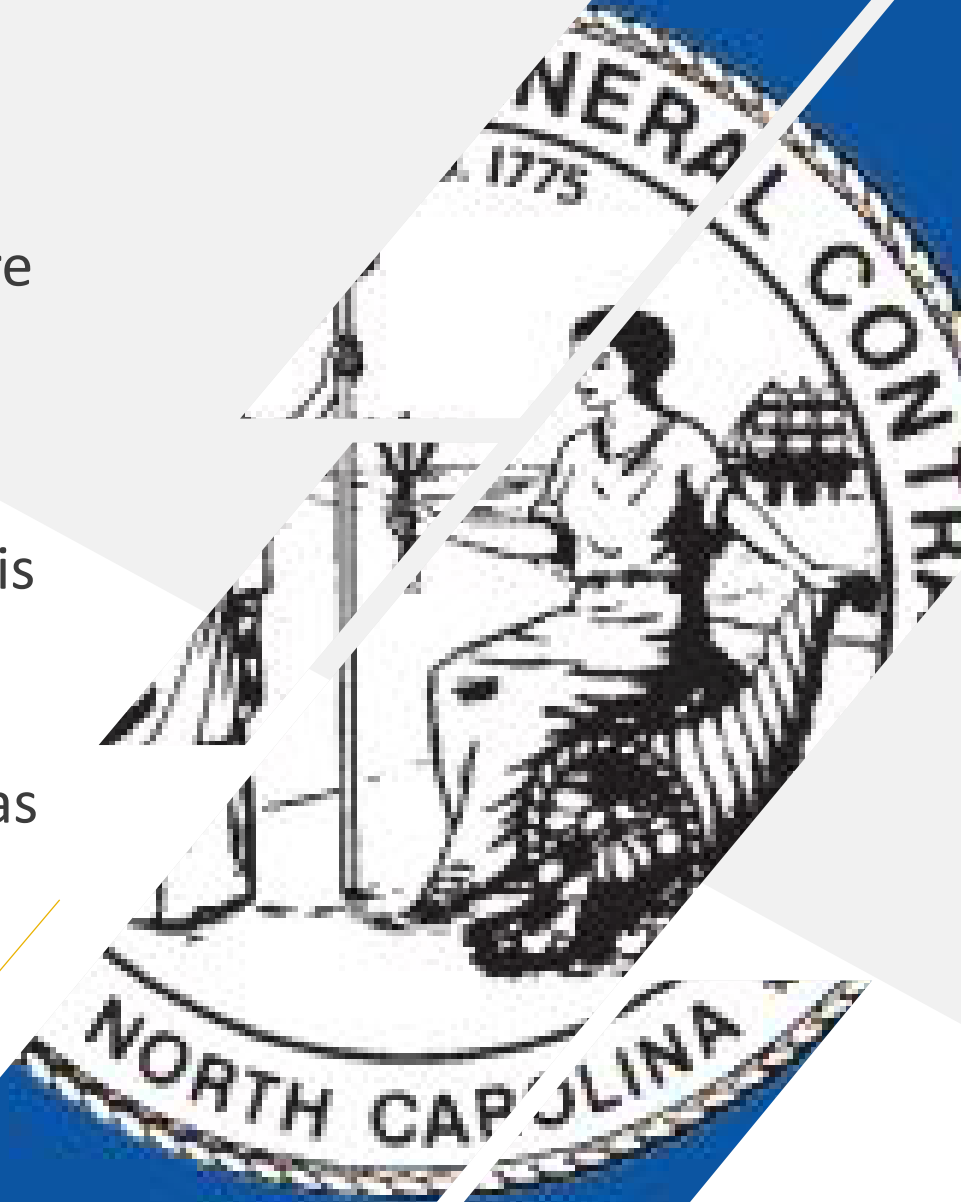


License Risks

Qualifier Issues for Licensees

Since 2018, the Board has investigated dozens of cases where a qualifier for a licensee does not meet all requirements of the laws and rules which define the qualifier's role and responsibilities

- Companies have applied for a license with a qualifier who is not a W-2 employee of that applicant and does not work with the company at least 20 hours per week
- Qualifier paid as an IRS Form 1099 subcontractor and not as a W-2 employee
- During an investigation, the Board will request a copy of a W-2 or a copy of the registered corporate documents which identify corporate officers to provide evidence of a qualifier's status and role with a licensee



Exiting Business Risks

- Sale of Business vs. Asset Purchase
- Tax Consequences of Exiting Business
- Merger and Acquisition Risks





Minimize Project Risk

- Homeowner Contract Risks
- Subcontractor Contract Risks
- Insurance Risks

Homeowner Contract Risks

A gentleman's agreement is an agreement which is not an agreement, made between two persons neither of whom is a gentleman, whereby each expects the other to be strictly bound without himself being bound at all.

- Contract with the Homeowner
 - Create Better Deals and Avoid Disputes
 - Standard Forms
 - Schedule of Values/Scope of Work
 - Change Orders
 - Lien Waivers



Homeowner Contract Risks

CUSTOMER and COMPANY agree that this contract is a private and confidential matter and that the terms and conditions of the contract...shall not be made public, or given to anyone else to make public, INCLUDING THE BETTER BUSINESS BUREAU. Should the CUSTOMER breach this confidentiality clause, the CUSTOMER agrees to pay COMPANY liquidated damages. **THE COMPANY MAY ALSO BE AWARDED ATTORNEY FEES AND COSTS AS REQUESTED BY COMPANY.**

What do you think about including this in your contract?

An HVAC contractor faced a FTC action against it for violating the Consumer Review and Fairness Act passed in 2016

<https://www.ftc.gov/news-events/press-releases/2019/05/ftc-announces-first-actions-exclusively-enforcing-consumer-review>

***This shows up in a Google search for their business!



Subcontractor Contract Risks

- Contract with Subcontractor
 - Create Better Deals and Avoid Disputes
 - Certificates of Insurance
 - Scope of Work
 - Change Orders
 - Partial Lien Waivers
 - Final Lien Waiver and Release



Insurance Risks

Insurance Policies Often Fail to Fully Prevent Business Owner Liability

- Exclusions
 - “Your Work” Exclusion
- Policy Limits
- Lapses in Coverage



Questions?

**EXPERIENCED
PASSIONATE
DEPENDABLE**

Skufca Law is a full-service law firm representing businesses and individuals in the Carolinas.

- Business Law
- Construction Law
- Motorsports Law
- Family Law
- Collaborative Law
- Outside General Counsel



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