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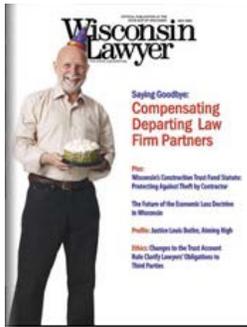
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Wisconsin's Construction Trust Fund Statute: Protecting Against Theft by Contractor

Money paid by a property owner to a contractor on a construction project constitutes a trust fund until all legitimate claims for labor and materials are paid. Misappropriation of the funds is theft by contractor.

Mark Hinkston

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Wisconsin's Construction Trust Fund Statute: Protecting Against Theft by Contractor

Money paid by a property owner to a contractor on a construction project constitutes a trust fund until all legitimate claims for labor and materials are paid. Misappropriation of the funds is theft by contractor, exposing the contractor to criminal penalties and civil claims by property owners and unpaid subcontractors and suppliers.

by *Mark R. Hinkston*



One expects a prime contractor to pay laborers and material suppliers from construction project funds. Yet some contractors fail to do so. Some spend the money for personal reasons. Some juggle the funds between projects or pay debts from the last project. For others, diverting funds may be a last desperate act to stave off insolvency, as they use the money to keep their business afloat.

Construction fund misappropriation affects all project participants. A phone call or lien notice from an unpaid subcontractor may be the first red flag signaling to the owner a prime contractor's construction fund misappropriation. Angry unpaid suppliers also may call. The unhappy owner, already stung by the prime contractor's diversion of funds, is faced with the prospect of having to pay twice to satisfy potential lien claims.

Typically, unpaid subcontractors and suppliers can pursue lien claims or file suit for breach of contract against the prime contractor. Yet some may have waived or lost their lien rights. As for litigation, there is little solace in the Pyrrhic victory of getting a breach of contract judgment against an insolvent contractor, just to have it discharged through bankruptcy. Fortunately, Wisconsin law affords leverage to misappropriation victims above and beyond liens and breach of contract claims.

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Wisconsin's Construction Trust Fund Statute (trust fund statute), set forth in the construction lien law as Wis. Stat. section 779.02(5), safeguards against contractor misappropriation in private construction projects by creating trust funds for the benefit of owners, laborers, and suppliers. (A similar trust fund statute, not the subject of this article, applies to public improvement projects).¹ A contractor's use of the trust funds for any reason other than to pay for labor and materials on the particular project constitutes theft by contractor.





Hinkston

This article gives an overview of the trust fund statute, explores the remedies available to its beneficiaries, and offers practical considerations to project participants who deal with construction trust funds.

Overview

When Wisconsin's construction lien statutes were promulgated in 1849, they contained no restrictions on a contractor's project funds expenditure. Yet it was generally accepted that a contractor had a duty to use project funds to pay its subcontractors and suppliers.² The problem was that a contractor could ignore the duty, squander the money, and incur no criminal liability. In 1913 the Wisconsin Legislature enacted the trust fund statute to stem the injustice caused when subcontractors and suppliers went unpaid. The statute codified the moral obligation, extending to both the owner and to those whose material or labor has entered into the structure, that the compensation paid therefore by the owner should not be misapplied.³

The Trust Fund Statute: Section 779.02(5). The main purpose of the trust fund statute is to ensure payment to labor and material suppliers, thereby protecting the owner from having to pay twice for improvements.⁴ The statute provides that any mortgage proceeds or moneys paid by an owner to a prime contractor or subcontractor for improvements constitute a trust fund in the hands of the prime contractor or subcontractor for payment of all claims due or to become due for labor and materials used on a project. The use of the funds for any other purpose until all bona fide claims have been paid is theft by contractor and punishable under Wis. Stat. section 943.20 (entitled "Theft"). If the prime contractor or subcontractor is a corporation, the misappropriation is deemed theft by the officers, directors, or agents of the corporation who are responsible for the misappropriation.

Although sometimes referred to as the civil theft by contractor statute, the trust fund statute is a criminal statute that affords a civil cause of action.⁵ It creates the crime of theft by contractor, once called the "sophisticated cousin or ordinary embezzlement,"⁶ and is to be harmonized with section 943.20, which is the conduit through which the crime of theft by contractor is prosecuted.

The Criminal Conduit: Section 943.20. Section 943.20, "Theft," penalizes a person who as trustee, having possession or custody of the money of another, intentionally uses, transfers, conceals, or retains possession of such money without the owner's consent, contrary to the trustee's authority, and with intent to convert the money to the trustee's own use or to the use of any other person except the owner. A refusal to deliver the money on demand of the person entitled to receive it, or as required by law, is prima facie evidence of an intent to convert to the trustee's own use. Depending on the amount of misappropriated funds, penalties include fines, imprisonment, or both.⁷

The Trust Fund. Funds do not attain trust fund status until they are actually paid to a prime contractor or a subcontractor.⁸ The funds are not trust funds in anyone else's hands (such as, for example, second-tier subcontractors). It is not necessary for a first-tier subcontractor to receive funds directly from the owner for trust fund duties to be imposed on the subcontractor, because the prime contractor is normally the conduit for payments from an owner to a subcontractor.⁹ Subcontractors and suppliers do not lose their status as trust fund statute beneficiaries if they fail to exercise their lien rights. A party need not have a viable lien claim to qualify as a trust fund beneficiary.¹⁰

When a prime contractor or first-tier subcontractor receives trust funds, a fiduciary relationship is created.¹¹ In its role as a fiduciary, the contractor acts as a conduit to facilitate payment to parties providing labor and materials on the project. Until the claims for labor and materials have been paid (except those that are the subject of a bona fide dispute), the contractor must preserve the trust fund. This means that it cannot use the funds for any purpose other than the payment of claims related to the project. The contractor's personal creditors or creditors on other projects also have no right to the funds. Until all claims are paid, the funds are not subject to creditors' claims¹² and are not part of the contractor's estate in bankruptcy proceedings.¹³

Once the trust fund exists, the funds are to be preserved for claims that are due or will become due. There are no exceptions to the trust fund statute's "hands off" mandate. Because the contractor receiving project funds does not own those funds, the funds are not on loan to the contractor to spend at whim. This means that the contractor cannot use a progress payment from a current project to pay debts from a prior project or to launch a new project.¹⁴ However, a contractor may reimburse itself from trust funds for payments the contractor makes for labor and materials on the project that is the source of the funds.¹⁵

If the money is misappropriated, it is not a defense that the contractor did not personally benefit from the expenditure or that it was spent for business purposes if the business expenditure was unrelated to the project at hand.¹⁶ The fact that a contractor is in dire financial straits and needs the money to stay in business also is not an excuse.¹⁷ In assessing the propriety of an expense, a court will not delve into a contractor's motives or good faith.¹⁸ Even the most charitable or altruistic expenditures are improper if they are unrelated to the project.¹⁹ Regardless of the most optimistic (and likely unannounced) intention to ultimately repay the money, a contractor's repayment of or making of other arrangements with the trust fund beneficiaries will not "cure" the theft.²⁰

Remedies for Theft by Contractor

Construction trust fund beneficiaries have turned to various remedies when the trust fund statute has been violated: 1) civil causes of action against parties responsible for the misappropriation; 2) recoupment claims against corporate shareholders; 3) claims for treble damages premised on Wis. Stat. section 895.80; 4) objections to a debtor's discharge; and 5) restitution in criminal proceedings. A different standard is used in each context to judge the defendant's actions and the amount of recovery.

Civil Cause of Action: Conversion of Trust Funds. The civil cause of action afforded by section 779.02 essentially is one for breach of fiduciary duty, although it also has been referred to as a "civil action for conversion of trust funds."²¹ A plaintiff must prove by a preponderance of the evidence that: 1) the owner purchased labor or materials; 2) the labor or materials were provided; 3) the defendant was paid for the labor or materials by the owner or mortgagee; and 4) the defendant used the trust fund money for a purpose other than to pay for the labor or materials provided.²²

Although the trust fund statute is in essence a criminal statute that provides a civil remedy, it is not necessary to prove criminal intent or intent to defraud to succeed on a claim for misappropriation under the trust fund statute.²³ Because intent and motive are irrelevant, it is not a defense that the defendant acted in good faith or made a mistake. However, if the prime contractor has good cause to refuse to pay, such as if a claim is the subject of a bona fide dispute, there is no breach of fiduciary duty.²⁴

When the contractor is a corporation, then corporate officers, directors, and agents responsible for the misappropriation may be included as defendants. To be considered responsible, it is not necessary that an officer or director be the person who actually takes the affirmative act of misappropriating the funds. Responsibility also can be premised on a failure to act, because an officer or director is presumed to have knowledge of the company's accounting procedures and financial records and has the power and authority to ensure the proper use of funds.²⁵ An officer, director, or agent can be held liable even if he or she received no personal benefit from the misappropriation.²⁶

Recovery on a breach of fiduciary duty claim is limited to the amount of misappropriated funds. Punitive damages may be available in a case of breach of fiduciary duty if the defendant's conduct is egregious or outrageous.²⁷ There is no provision in the statute for the award of attorney fees.

Shareholder Recoupment. Under the trust fund statute, any interested party may bring an action to recover from a corporate contractor's shareholders, and restore to the trust fund, the amount of "such misappropriated moneys which have been received as salary, dividend, loan repayment, capital distribution or otherwise" by the shareholders, regardless of whether the shareholders are responsible for the misappropriation. The statute does not afford a right to recoup wages from a contractor's employees even if the wages were paid from the trust funds for work the employees performed on other projects.

Treble Damages Under Section 895.80. Because breach of fiduciary duty and shareholder recoupment claims under the trust fund statute limit recovery to the amount of misappropriated funds, plaintiffs have turned to broader remedies under other statutes, including Wis. Stat. section 895.80, enacted in 1995. Section 895.80 provides treble damages and attorney fees for those who suffer damage due to certain intentional crimes against property. Theft as referenced in section 943.20 is one of the enumerated crimes.

In 2002, the Wisconsin Supreme Court held in *Tri-Tech Corp. of America v. Americomp Services Inc.*²⁸ that the section 895.80 treble damages remedy applies to a civil theft by contractor claim, because a contractor's misappropriation in violation of the trust fund statute can form the basis of a prosecution for criminal theft by contractor under section 943.20. The court held that to obtain treble damages, a plaintiff must prove both the elements of a civil cause of action under the trust fund statute and the elements of a criminal offense under section 943.20(1)(b), including the requisite criminal intent. However, the civil burden of proof (preponderance of the evidence) applies.

The elements of criminal theft by contractor as laid out by the court are that the defendant: 1) acted as a prime contractor; 2) received money from an owner or mortgagee for an improvement; 3) intentionally used the money for purposes other than paying bona fide claims for labor or materials before paying those claims; 4) had no authority or consent to so use the funds; 5) knew the use was without consent and contrary to the defendant's authority; and 6) used the money with the

intent to convert it to the defendant's own use or the use of another.²⁹

The court noted that the intent required for conviction of the crime of theft by contractor, and thus for the section 895.80 treble damages remedy, is an intent to defraud, described as an "intent to convert such funds to his own use or the use of another."³⁰ The court also noted that section 943.20 provides that a refusal to deliver any money held by a trustee "upon demand of the person entitled to receive it, or as required by law, is prima facie evidence of an intent to convert to his or her own use within the meaning of this paragraph."³¹ The *Tri-Tech* court held that the plaintiff failed to meet its burden, neglecting to even use the statutorily prescribed method of "proof of refusal to pay contractor funds on demand."³²

Some confusion exists as to criminal "intent" in the theft by contractor context. For example, in 1991 the Wisconsin Criminal Jury Instructions Committee deleted the sixth element from the theft by contractor jury instruction (that the defendant must act with an intent to convert the funds to his or her own personal use). The committee believed the sixth element was redundant of the third element (the defendant intentionally used the money for purposes other than the payment of bona fide claims), because to use trust fund money for any purpose other than paying off claimants is "personal use."³³ The deletion also seemed necessary to erase confusion over the inclusion of the phrase "personal use," because one does not have to use the funds for personal reasons or personally benefit from the funds to be convicted of theft by contractor.³⁴ Although the supreme court in *Tri-Tech* referenced the sixth element in its analysis, it did not specifically address that element's deletion from the criminal jury instruction, presumably because it was not asked to do so and did not need to do so because of the plaintiff's total lack of proof.

In claims under section 895.80, if a plaintiff presents evidence of "refusal after demand" - prima facie evidence of the requisite intent - a court will not have to grapple with the somewhat amorphous concepts of "criminal intent" or "intent to defraud." In other cases in which that prima facie evidence is lacking, it is likely that courts will need to clarify the exact intent standard necessary to prove the crime of theft by contractor.

Bankruptcy: Defalcation. Trust fund misappropriation often goes hand-in-hand with contractor insolvency, requiring a claimant to fight in bankruptcy court to save its theft by contractor claim from discharge. Under section 523(a)(4) of the U.S. Bankruptcy Code, a debt may be excepted from discharge if the debt arose out of defalcation in the context of a fiduciary relationship. To establish a section 523(a)(4) defalcation exception, a creditor must prove by a preponderance of the evidence that there is a trust, the debtor was a fiduciary under the trust, and the debtor engaged in fraud or defalcation while acting as a fiduciary.³⁵

Although there is no specific definition of defalcation as applied to the construction trust fund context, the Seventh Circuit Court of Appeals has stated that more than mere negligence, but less than fraud, is required.³⁶ Thus, a mere negligent violation of the trust fund statute would not be per se defalcation.³⁷ This has been interpreted to mean that the violation must entail either bad faith or affirmative misconduct.³⁸ A contractor's knowledge of the trust fund statute and his or her duties under the statute is material in determining whether there has been defalcation.³⁹

Restitution. In criminal proceedings involving a misappropriating contractor, restitution is another avenue of recovery for persons who lose money due to theft by contractor. Generally, restitution is limited to special damages that could be recovered in a civil action against the defendant for the criminal conduct. In a theft by contractor conviction, this will usually involve the actual trust fund amounts misappropriated. Attorney fees recoverable in a civil action under a statutory cost-shifting statute (such as section 895.80) are not an awardable restitution item because they are not "special damages."⁴⁰ A restitution award is not guaranteed, because the burden is on the victim, not the state, to prove his or her loss.⁴¹ Still, restitution should not be overlooked as a potential remedy, primarily because of the strong likelihood that the defendant will make good on the restitution amount ordered by the court.

Practical Considerations for Project Participants

Prime Contractors. Construction fund misappropriation often results from the confluence of three factors: undercapitalization, poor bookkeeping, and a failure to recognize the significance of the trust fund statute. The obvious solution to the financial trap is for the contractor to have sufficient funds or financing to launch the project and then to maintain a sufficient reserve to handle unforeseen circumstances.

Some contractors maintain one general business account. All payments from owners go into the account, and all payments to creditors go out of the account. The mere commingling of funds is not theft by contractor, because the statute does not require that the funds be maintained in a separate bank account. As long as the trust funds can be traced from the owner into the hands of the trustee, commingling does not cause the funds to lose their trust fund status.⁴² Nonetheless, use of a separate trust account is advisable.

Although there also is no requirement that separate journals or ledgers be maintained to account for project funds, a contractor obviously should have an appropriate, well-organized bookkeeping system. Payments should not be based on whatever subcontractor complains the most.⁴³ A contractor also should keep on top of subcontractor invoices. Failure to timely object to a disputable claim (or paying a portion of it without objection) may result in a finding that there is an account stated, depriving the contractor of a potential bona fide dispute defense.⁴⁴ Worse yet, the failure to respond to an invoice could be considered a refusal after demand for payment, which is prima facie evidence of theft. The presumption of theft may arise even if a contractor does not expressly refuse to pay. Silence or inaction in the face of a demand suffices.⁴⁵

Claimant Subcontractors. Prime contractors sometimes will ask subcontractors or suppliers to execute lien waivers on the assurance that payment will be forthcoming once the prime contractor gets paid. Subcontractors should be aware that they are not required to sign a lien waiver before getting paid.⁴⁶ If they do, however, the waiver is valid, and lien rights are lost.⁴⁷ Although as a practical matter it may be common to sign a waiver without getting paid, a subcontractor's refusal to do so is a good stopgap measure to avoid a contractor's misuse of the funds, since lenders generally will not disburse funds if the requisite waivers have not been made.

Claimant Suppliers. Many contractors maintain open accounts with suppliers. An open account generally is an ongoing account based on "running or concurrent dealing between the parties which has not been closed, settled, or stated, and which is kept unclosed with the expectation of further transactions."⁴⁸ Usually, in an open account situation, a payment is applied to one or more debts as the debtor directs. If the debtor gives no directive, the creditor may choose how to apply the payment.⁴⁹ When suppliers are aware that a payment relates to a particular project, they should apply the payment to the debt related to that project. If they do not, they will lose their right to contend that they were victims of theft by contractor.⁵⁰ The prime contractor or a subcontractor using suppliers also has a vested interest in making sure that its payments are allocated to specific projects, because if a supplier receives no directive and applies the payment to the oldest projects, the contractor is exposed to liability for theft by contractor by other trust fund beneficiaries.⁵¹ **Claimants in General: The Importance of Demand and Tracing.** Although in most cases of nonpayment due to misappropriation a claimant will make a demand, there will be cases (such as in *Tri-Tech*) in which a plaintiff fails to recognize the evidentiary value of such a demand. A claimant should always remember that a contractor's refusal to turn over trust funds after demand from a beneficiary is prima facie evidence of an intent to convert.⁵² It is wise to make the demand in writing, although there is no requirement to do so.

To succeed on a theft by contractor claim, a plaintiff must trace payment by an owner to the contractor or subcontractor.⁵³ A plaintiff must first trace the allegedly misappropriated funds from the owner (or mortgagee) to the defendant contractor's hands. The plaintiff must then trace the funds as they leave the contractor's hands to prove the funds were used for purposes unrelated to the project. For owners, it is not enough to base a theft by contractor claim on a hunch that theft occurred because unpaid subcontractors and suppliers remain, even though the owners made full payment of the construction funds.⁵⁴ For unpaid subcontractors or suppliers, it is not enough to assume that, because other subcontractors got paid, theft must have taken place.⁵⁵

A plaintiff's task of tracing the funds and showing their misappropriation often is difficult. Before litigation, a defendant contractor's financial records and records of the owner or mortgagee usually are not readily available to the plaintiff. The plaintiff still has the burden to prove the misappropriation.

Owners. In many cases, especially with large projects, an owner's mortgage lender will be monitoring the project and disbursing project funds from an escrow account. The Uniform Fiduciaries Act (UFA)⁵⁶ applies to situations involving contractors receiving construction trust funds from an owner. Under the UFA an owner and its lender are not responsible for ensuring that the prime contractor properly appropriates or applies the entrusted funds.⁵⁷

It is common practice for lenders or title companies that disburse construction funds to require lien waivers as a condition precedent to disbursing funds. Yet lien waivers alone do not guarantee that all potential lien claimants have indeed been paid, because subcontractors often will sign lien waivers (even though they are not required to do so) when they have not actually been paid.

An owner and its lender or escrow agent may take other actions to minimize the chance that the owner and other trust fund statute beneficiaries do not fall victim to theft by contractor. For example, they should: 1) notify the prime contractor in writing of the contractor's responsibilities under the trust fund statute; 2) review all subcontractor and supplier invoices before payment; 3) demand proof that subcontractors or suppliers signing lien waivers have actually been paid; and 4) request an accounting of how funds on the project have been applied.⁵⁸

When holding funds, an owner should be careful not to allow funds earmarked for a project to be attached by or paid to creditors of any prime contractor or subcontractor on the proposed project. Under Wisconsin law an owner is not required to pay contract funds to a contractor's creditors until claims of subcontractors, laborers, or suppliers on the project "have either been paid in full, matured by notice and filing or expired."⁵⁹ If liens are filed, an owner is compelled to pay a creditor "only what remains due in excess of such liens."⁶⁰

Mortgagees. Construction lenders are protected by a separate trust fund statute that applies to construction mortgage proceeds. The proceeds are a trust fund in the hands of the owner or any contractor or subcontractor receiving such proceeds until all claims for "lienable labor and materials" have been paid.⁶¹ The use of the funds by any of these parties for any other purpose is theft by such owner, contractor, or subcontractor. The statute allows any party aggrieved by such theft to file a complaint with the district attorney in the county in which the premises are located to seek prosecution of the misappropriating party.

Depository Banks. Under the UFA, in dealing with a contractor customer in transactions involving construction trust funds, a bank is not required to inquire whether the contractor is breaching its fiduciary duty.⁶² If there is misappropriation, the bank is not liable to the trust fund beneficiaries for contractor misappropriation unless it has actual knowledge that there is a breach of the contractor's fiduciary duty.⁶³ However, the bank should exercise caution in receiving payment from a contractor fiduciary for any of the contractor's personal debts to the bank, because the bank could face liability if the payment is a breach of the contractor's fiduciary obligations.⁶⁴

Third-party Creditors. Because the trust fund statute's trust obligations expressly apply to only prime contractors or subcontractors receiving funds from the owner, a third party that receives payment in good faith from trust funds has no fiduciary duties as to the funds, which lose their trust fund status on payment to the third party from the prime contractor or subcontractor. Thus, the third party generally will not have to disgorge the funds to the rightful beneficiaries.⁶⁵ However, under the UFA, if the payment is from trust funds and for the contractor debtor's personal debt, the third-party creditor could be liable to the trust fund beneficiaries if it had knowledge that the payment was for the debtor's personal benefit.⁶⁶

Practical Considerations for Attorneys

Attorneys have ethical obligations when representing contractor clients who seek advice in situations involving the disposition of construction trust funds. If an attorney knows that a client is not treating construction funds as trust funds and is commingling those funds with other receipts, the attorney has a duty to investigate the status of the trust funds and the client's appropriation of those funds before giving legal advice as to creditors' claims and business planning. An attorney must explain to a contractor client the ramifications (such as criminal prosecution) of using project trust funds for unrelated expenses without paying subcontractors or other claimants.⁶⁷

Attorneys also may be affected by theft by contractor when they receive payment from a prime contractor client for their fees. An attorney who represents a contractor facing theft by contractor allegations and, in the course of the representation, becomes aware of the contractor's juggling of project funds and propensity for spending project funds for unrelated purposes, may reasonably presume that the money used to pay the attorney fees is coming from the construction trust funds. An attorney, as a personal creditor of the fiduciary contractor, could in fact face liability under the UFA to the trust fund beneficiaries if the client pays the fees with trust funds, because in making the payment the contractor is breaching its fiduciary duties.⁶⁸ In view of this, it is clearly unwise and unethical to accept a fee payment knowing that the funds are the fruits of the crime of theft by contractor.⁶⁹

Conclusion

The Construction Trust Fund Statute "creates an express fiduciary relationship and delineates clear duties, and Wisconsin contractors are charged with knowledge of the law in this area."⁷⁰ Attorneys representing construction project participants should be charged with knowledge of the law as well. Although attorneys cannot always prevent clients from imprudently conducting business, attorneys should not ignore their duty to properly advise their contractor clients as to the ramifications of construction fund misappropriation when presented with red flags signaling that the client may have violated the trust fund statute.

Understanding the many facets of the statute and the theft by contractor concept is essential for attorneys representing construction fund fiduciaries to help prevent theft by contractor claims. A working knowledge of the law also aids attorneys who represent owners and project claimants to help clients be made whole if they fall victim to construction fund misappropriation.

Endnotes

¹Wis. Stat. § 779.16.

²*Pauly v. Keebler*, 175 Wis. 428, 435, 185 N.W. 554 (1921).

³*Id.*

⁴*Kraemer Bros. v. Pulaski State Bank*, 138 Wis. 2d 395, 402-03, 406 N.W.2d 379 (1987).

⁵*State v. Wolter*, 85 Wis. 2d 353, 362, 270 N.W.2d 230 (Ct. App. 1978).

⁶Wis. JI-Criminal 1443 (Theft by Contractor), Comment, note 1.

⁷Wis. Stat. §§ 943.20(3), 939.50(3), 939.51(3). Punishment may range from a fine of \$10,000 or less and imprisonment up to nine months (or both) (for a Class A misdemeanor) to a fine up to \$25,000 or imprisonment not to exceed 10 years (or both) (for a Class G felony, if the amount at issue exceeds \$10,000).

⁸*Visser v. Koenders*, 6 Wis. 2d 535, 537, 95 N.W.2d 363 (1959).

⁹*Kraemer Bros.*, 138 Wis. 2d at 402.

¹⁰*Wisconsin Dairies Coop. v. Citizens Bank*, 160 Wis. 2d 758, 772, 467 N.W.2d 124 (1991).

¹¹*Loehrke v. Wanta Builders Inc.*, 151 Wis. 2d 695, 702-03, n.2, 445 N.W.2d 717 (Ct. App. 1989).

¹²Wis. Stat. section 779.02(5) provides in part: "Until all claims are paid in full, have matured by notice and filing or have expired, such proceeds and moneys shall not be subject to garnishment, execution, levy or attachment."

¹³*See In re Marrs-Winn Co.*, 103 F.3d 584, 589 (7th Cir. 1996).

¹⁴*See State v. Blaisdell*, 85 Wis. 2d 172, 178, 270 N.W.2d 69 (1978) (quoting Prof. Walter Raushenbush: "If a contractor is building several houses and uses a progress payment on the most recent one to pay off the subs on a previous one, that is larceny").

¹⁵*See State v. Sobkowiak*, 173 Wis. 2d 327, 335, 496 N.W.2d 620 (Ct. App. 1992).

¹⁶*See Burmeister Woodwork Co. v. Friedel*, 65 Wis. 2d 293, 298, 222 N.W.2d 647 (1974) (stating there is "no requirement that the corporate officer responsible for the misappropriation of the funds must receive a benefit from his acts before he may be held personally liable").

¹⁷*Id.* at 299 (observing the trial court's remark that the trust fund statute "is not concerned with the financial problems of corporations").

¹⁸*W.H. Major & Sons Inc. v. Krueger*, 124 Wis. 2d 284, 294, n.1, 369 N.W.2d 400 (Ct. App. 1985).

¹⁹*See, e.g., State v. Stepniowski*, 105 Wis. 2d 261, 314 N.W.2d 98 (1982) (admission that contractor used trust funds to make a contribution to the Boy Scouts was sufficient to sustain conviction for theft by contractor).

²⁰*See Sobkowiak*, 173 Wis. 2d at 336 (stating defendant "could not cure his theft by ultimately repaying the funds diverted to his personal use or by satisfying the claims of the laborers and materialmen after his offense was complete").

²¹*Burmeister*, 65 Wis. 2d at 301.

²²*Paulsen Lumber Inc. v. Anderson*, 91 Wis. 2d 692, 695, 283 N.W.2d 580 (1979).

²³*Burmeister*, 65 Wis. 2d at 301.

²⁴*See Loehrke*, 151 Wis. 2d at 704.

²⁵*See Capen Wholesale Inc. v. Probst*, 180 Wis. 2d 354, 369-70, 509 N.W.2d 120 (Ct. App. 1993) (concluding that corporate officer's "acts of omission as well as commission rendered him responsible for the misappropriation").

²⁶*Id.* at 364.

²⁷*See Loehrke*, 151 Wis. 2d at 699.

²⁸2002 WI 88, 254 Wis. 2d 418, 646 N.W.2d 822.

²⁹*Id.* at ¶¶ 26-27.

³⁰*Id.* at ¶ 28.

³¹*Id.* at ¶ 18.

³²*Id.* at ¶ 32.

³³See Wis. JI-Criminal 1443 (1994), Comment, note 7.

³⁴In 1996, in *Sobkowiak*, the court of appeals agreed that the sixth element was redundant and that the third element as specified in the jury instruction is the correct intent element. 173 Wis. 2d at 338. The court concluded that "to establish a violation of sec. 779.02(5), Stats., it is not necessary that the state show beyond a reasonable doubt that the prime contractor intended to permanently deprive laborers and materialmen of compensation. The intent establishing the violation is the intent to use moneys subject to a trust for purposes inconsistent with the trust." *Id.* at 339.

³⁵In *re Eisenberg*, 189 B.R. 725, 730 (E.D. Wis. 1995).

³⁶*Meyer v. Rigdon*, 36 F.3d 1375, 1382-85 (7th Cir. 1994).

³⁷*Id.*

³⁸In *re Koch*, 197 B.R. 654 (E.D. Wis. 1996).

³⁹*Id.*

⁴⁰*State v. Longmire*, 2004 WI App 90, ¶ 34, 272 Wis. 2d 759, 681 N.W.2d 534.

⁴¹The victim of a crime must prove by a preponderance of the evidence "the amount of loss sustained by a victim as a result of a crime." Wis. Stat. § 973.20(14)(a).

⁴²See *Simonson v. Mc Invalle*, 42 Wis. 2d 346, 352, 166 N.W.2d 155 (1969) (stating "[i]n Wisconsin it is well established that when trust funds are commingled with other funds, the trust may be enforced against any part of the commingled fund which can be traced into the hands of a trustee").

⁴³See, e.g., *State v. Hess*, 99 Wis. 2d 22, 36, 298 N.W.2d 111 (Ct. App. 1980) (defendant testified that "the order of payment to the subcontractors was determined by ` whoever was screaming the loudest'").

⁴⁴See, e.g., *Loss Prevention Sys. v. Alpha Omega*, No. 98-2286-FT (Wis. Ct. App. July 6, 1999) (unpublished decision).

⁴⁵See *Hess*, 99 Wis. 2d at 36 (stating "[w]e do not agree that such an express refusal to pay is necessary. The jury could reasonably infer from the repeated requests for payment and defendant's failure to follow through on his promises to pay, that the payment was not only intentionally, but wrongfully withheld").

⁴⁶See Wis. Stat. § 779.05(1) (entitling a potential lien claimant "to refuse to furnish a waiver unless paid in full for the work or material to which the waiver relates"); Wis. Stat. § 779.135 (prohibiting in construction contracts "provisions requiring a contractor, subcontractor or material supplier to waive his or her right to a construction lien or to a claim against a payment bond before he or she has been paid for the labor or materials or both that he or she furnished").

⁴⁷See *Tri-State Mechanical Inc. v. Northland College*, 2004 WI App 100, ¶ 9, 273 Wis. 2d 471, 681 N.W.2d 302 (stating subcontractor "submitted a construction lien waiver notwithstanding the void contract waiver provision. In light of § 779.05(1), [the subcontractor's] construction lien waiver is valid").

⁴⁸*State v. J.C. Penney Co.*, 48 Wis. 2d 125, 146, 179 N.W.2d 641 (1970).

⁴⁹*Lyman Lumber Inc. v. Thompson*, 138 Wis. 2d 124, 127, 405 N.W.2d 708 (Ct. App. 1987).

⁵⁰*Id.* at 129 (stating "[w]hen the source of the funds is known, the identical property rule requires the creditor to apply payments against the debt related to the source of such funds. When payments are made at a job site contemporaneous with the delivery of materials, it is reasonable to infer that the funds were derived from the owner of the project").

⁵¹See *State v. Blaisdell*, 85 Wis. 2d 172, 181, 270 N.W.2d 69 (1978) (the defendants did not designate payment for the particular job and the "jury was entitled to believe that the defendants knew they had a right to designate payment for a specific project, but that they allowed [the trust fund money] to be applied to other obligations that they owed to [the supplier]").

⁵²Wis. Stat. § 943.20(1)(b).

⁵³See *W.H. Major & Sons Inc.*, 124 Wis. 2d at 290.

⁵⁴See *Capital City Sheet Metal Inc. v. Voytovich*, 217 Wis. 2d 683, 689-90, 578 N.W.2d 643 (Ct. App. 1998) (stating "[i]t is true that Capital City did not get paid the full amount of its invoice, but that is not the test under the statute").

⁵⁵See *W.H. Major & Sons Inc.*, 124 Wis. 2d at 292.

⁵⁶Wis. Stat. § 112.01(1)(b) ("Fiduciary" includes a "prime contractor or subcontractor who is a trustee under ch. 779").

⁵⁷Wis. Stat. § 112.01(3).

⁵⁸Although the trust fund statute does not require such an accounting, note that on home improvement projects, a homeowner under certain circumstances may "[d]emand a written accounting" of all payments made to the contractor, detailing how all the payments were used. Wis. Admin. Code § ATCP 110.07(2)(d).

⁵⁹Wis. Stat. § 779.01(5).

⁶⁰*Id.*

⁶¹Wis. Stat. § 706.11(3).

⁶²Wis. Stat. § 112.01(6), (7), (10).

⁶³*Id.*

⁶⁴Wis. Stat. § 112.01(6), (8).

⁶⁵*Kraemer Bros.*, 138 Wis. 2d at 407.

⁶⁶Wis. Stat. § 112.01(6).

⁶⁷In a situation in which the attorney did not do so, he was publicly reprimanded. See *Disciplinary Proceedings Against Winkel*, 217 Wis. 2d 339, 577 N.W.2d 9 (1998).

⁶⁸Wis. Stat. § 112.01(6).

⁶⁹See SCR 20:1.2(d) (a lawyer shall not assist a client "in conduct that the lawyer knows is criminal or fraudulent").

⁷⁰In *re Koch*, 197 B.R. at 658.

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