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PG&E'S BANKRUPTCY – WHAT YOU SHOULD KNOW AND WHAT YOU CAN DO TO PROTECT YOUR RIGHTS

Monday, January 14, 2019, Pacific Gas & Electric Company (PG&E) announced that it intends to file for Chapter 11 bankruptcy within 15 days, raising concerns for contractors who are doing work for or who are owed money by PG&E.

Effect of a Chapter 11 Bankruptcy

In a Chapter 11 bankruptcy, the company remains in business with its operations run by its management team. The purpose of Chapter 11 bankruptcy is to give the company “breathing space” from its creditors while it works out an orderly process to address the debts it owes to its creditors.

On the filing of the bankruptcy case, an automatic stay issues that prevents creditors from taking steps, such as filing suit or attaching bank accounts, to collect amounts that the debtor owes.

Under bankruptcy court rules, the company that files for bankruptcy protection (referred to as the debtor), submits a plan for reorganization to the bankruptcy court for approval. Various creditors can object to the plan. Often the issues are quite technical. It can take a considerable amount of time before a plan is adopted. The plan may call for pre-bankruptcy petition debts to be paid off over time. Some bankruptcy reorganization plans result in distributions many years after the bankruptcy filing. The plan may also call for payment of creditors on a percentage basis if there are not enough funds available to pay off creditors for the full amount of their claims.

Creditors who have security for their claims (such as a lender that has a lien on real estate or on equipment) will have rights as to the property securing the claim as well as to any proceeds from the sale of the property, and can ask for relief from the automatic stay in order to pursue claims against the security. Mechanic's liens can constitute a form of security for purposes of bankruptcy law.

The management of the debtor has the right, like a trustee in a bankruptcy, to assume or reject (cancel) contracts. For example, retail chains like Gymboree or the Gap often file bankruptcy in order to be able to cancel leases for stores that they want to close.

The bankruptcy law allows a "claw back" of payments made to a creditor within 90 days of the bankruptcy filing. The purpose of this claw back is to ensure that creditors who received payments before the bankruptcy do not receive preferential treatment over other creditors who have not been paid. The money that is "clawed back" through the preference process goes into the general bankruptcy estate and is used to fund payments to all creditors in accordance with the debtor's reorganization plan.

There are a number of defenses to a bankruptcy preference claw back claim. For example, a payment made in the ordinary course of business, such as a progress payment on a construction contract that is made in the usual time for processing such payments, would ordinarily not be considered to be a preference. Similarly, if the debtor receives "contemporaneous new value", the payment is not a preference. A payment in connection with settlement of a business dispute, at a discount, in some instances would be considered to be subject to a contemporaneous new value defense. Separately, if the creditor furnishes new value in the form of additional services or goods following payment from the debtor for previous services or goods, such payment, up to the amount of the subsequent new value furnished, is not a preference, provided that the subsequent new services or goods were furnished by the creditor on an unsecured basis and the creditor did not receive payment for the subsequent new services or goods as of the date of the bankruptcy filing.

In PG&E's last bankruptcy in 2001, general creditors were paid in full for their claims (to the extent that the claims were valid), but payment was made several years after the bankruptcy. Victims of the 2016 and 2017 fires most likely will be considered to be general creditors in a bankruptcy, so there is reason to believe that there will be pressure in a PG&E bankruptcy for general creditors to be paid in full for valid claims.

Recommendations

1. For Contractors Doing Work Directly For PG&E

- **Consider whether work can be postponed until after the bankruptcy filing.** Typically, amounts owed for work that is performed post-petition is considered to be an administrative claim that has a higher priority and that is paid more quickly than a general creditor's claim for work performed before the bankruptcy.

- **Make sure to submit invoices in a complete and timely manner for work that already has been performed.** If you receive money before the bankruptcy filing, you may avoid several years of delay or the risk that PG&E will not pay the full amount of allowed claims of general creditors. Although it is possible that a preference claim might be asserted later, depending on the facts of your case, you may have a defense to the preference claim (such as where the bill was paid in the ordinary course).
- **If the work is being performed on private property, make sure that you have served a preliminary notice on the actual owner of the property and on any lender.** Even if you failed to do so previously, serve the preliminary notice now, as it will be effective for work done 20 days prior to the notice and going forward from that date. The bankruptcy automatic stay will not apply to property owned by someone other than the debtor that filed for bankruptcy. It is possible that only the utility company, Pacific Gas and Electric Company, may file for bankruptcy, while the parent holding company, PG&E Corporation, does not. The property may be owned by a nonbankrupt subsidiary of the parent company or by a third party. If the property is owned by a nonbankrupt entity, you could pursue a mechanic's lien claim directly against the property, and the mechanic's lien claim would not be subject to the bankruptcy automatic stay.
- **If you performed work on private property and you are finished with your work, record a mechanic's lien.** If the property is owned by a nonbankrupt entity, you can pursue a mechanic's lien claim directly against the property, and the mechanic's lien claim would not be subject to the bankruptcy automatic stay. Even if the property is owned by the bankrupt debtor, recording a mechanic's lien may give you rights as a secured creditor, which could be helpful in securing faster payment or for a greater amount if general creditors do not receive full payment for their claims. (Note that you cannot record a mechanic's lien until you finish your work; a premature mechanic's lien is void and unenforceable).
- **If you finish work after the bankruptcy, you can and should take prompt action to enforce your lien rights.** If the property is owned by a nonbankrupt entity, including a third party, you can record a lien as you would if there had been no bankruptcy. Even if the owner is the bankrupt debtor, there are procedures for perfecting your lien rights in a bankruptcy; consult a knowledgeable attorney to assist you in the process and to ensure you do not violate the automatic stay. Remember that there are specific time frames for recording a mechanic's lien; generally, a lien must be recorded by a general contractor in direct contract with the owner within 60 days after a notice of completion is recorded, and if there is no notice of completion, within 90 days after the project is completed. To avoid waiving your lien

rights, take action to record a lien or perfect your lien rights well in advance of these deadlines. If you do not have a contract with the actual owner of the property, you would need to record a lien or take action to perfect your lien rights as soon as 30 days after the recording of a notice of completion.

- **Investigate whether there are any bonds.** For example, if you are doing site work for a development, there may be Subdivision Map Act bonds or other security.
- **Once the bankruptcy has been filed, promptly file a claim in the bankruptcy for the amounts you are owed.** The bankruptcy court will establish a deadline for submitting claims, which typically is at least several months after the bankruptcy is commenced. It is important to file a claim in a timely manner. The claim form is relatively simple to fill out, but it is a good idea to consult with a knowledgeable attorney. Typically, you will want to attach copies of your contract and unpaid invoices. Setting up a file with these documents now will save you having to find and copy the documents later.

2. For Contractors Doing Work As A Subcontractor

- **The good news is that a bankruptcy will not affect your rights against the company that hired you as long as that entity is not bankrupt.**
- **Consider whether work can be postponed until after the bankruptcy filing.** Typically, amounts owed for work that is performed post-petition is considered to be an administrative claim that has a higher priority and that is paid more quickly than a general creditor's claim for work performed before the bankruptcy. The sooner you get your invoices to the general contractor, the sooner they can bill PG&E.
- **Make sure to submit invoices in a complete and timely manner for work that already has been performed.** Again, the sooner you get your invoices to the general contractor, the sooner they can bill PG&E.
- **If the work is being performed on private property, make sure that you have served a preliminary notice on the actual owner of the property, the general contractor, and on any lender.** Even if you failed to do so previously, serve the preliminary notice now, as it will be effective for work done 20 days prior to the notice and going forward from that date. The bankruptcy automatic stay will not apply to property owned by someone other than the debtor that filed for bankruptcy. It is possible that only the utility company, Pacific Gas and Electric Company, may file for bankruptcy, while the parent holding company, PG&E Corporation, does not. The property may be owned by a nonbankrupt subsidiary of the parent company or by a third party. If the property is owned by a nonbankrupt entity, you

could pursue a mechanic's lien claim directly against the property, and the mechanic's lien claim would not be subject to the bankruptcy automatic stay.

- **If you performed work on private property and you are finished with your work, record a mechanic's lien.** If the property is owned by a nonbankrupt entity, you can pursue a mechanic's lien claim directly against the property, and the mechanic's lien claim would not be subject to the bankruptcy automatic stay. Even if the property is owned by the bankrupt debtor, recording a mechanic's lien may give you rights as a secured creditor. (Note that you cannot record a mechanic's lien until you finish your work; a premature mechanic's lien is void and unenforceable).
- **If you finish work after the bankruptcy, you can and should take prompt action to enforce your lien rights.** If the property is owned by a nonbankrupt entity, including a third party, you can record a lien as you would if there had been no bankruptcy. Even if the owner is the bankrupt debtor, there are procedures for perfecting your lien rights in a bankruptcy; consult a knowledgeable attorney to assist you in the process and to ensure you do not violate the automatic stay. Remember that there are specific time frames for recording a mechanic's lien; generally, a lien must be recorded by a subcontractor within 30 days after a notice of completion is recorded and if there is no notice of completion, within 90 days after the project is completed. To avoid waiving your lien rights, take action to record a lien or perfect your lien rights well in advance of these deadlines. If you don't have a contract with the actual owner of the property, you would need to record a lien or take action to perfect your lien rights as soon as 30 days after the recording of a notice of completion.
- **Investigate whether there are any bonds or security.** For example, if you are doing site work for a development, there may be Subdivision Map Act bonds or other security. If you are a subcontractor on a project with the City and County of San Francisco, and perform work to support or work around PG&E facilities (see discussion below), you may be able to assert a claim against the general contractor's public works payment bond and file a stop payment notice.
- **Once the bankruptcy has been filed, promptly file a claim in the bankruptcy for the amounts you are owed.** The bankruptcy court will establish a deadline for submitting claims, which typically is at least several months after the bankruptcy is commenced. It is important to file a claim in a timely manner. The claim form is relatively simple to fill out, but it is a good idea to consult with a knowledgeable attorney. Typically, you will want to attach copies of your contract and unpaid invoices. Setting up a file

with these documents now will save you having to find and copy the documents later.

3. For Contractors Doing Work on San Francisco Projects

- **PG&E has an arrangement where contractors working on contracts with the City and County of San Francisco (the “City”) bill PG&E directly** for work performed to support or work around PG&E facilities in the vicinity of underground construction work.
- **Consider whether work can be postponed until after the bankruptcy filing.** Typically, amounts owed for work that is performed post-petition is considered to be an administrative claim that has a higher priority and that is paid more quickly than a general creditor’s claim for work performed before the bankruptcy.
- **Make sure to submit invoices in a complete and timely manner for work that already has been performed.** PG&E’s SAWA team is attempting to process payments in a timely manner before the bankruptcy and to clear up the backlog of invoices submitted by contractors. If you receive money before the bankruptcy filing, you may avoid several years of delay or the risk that PG&E will not pay the full amount of allowed claims of general creditors. Although it is possible that a preference claim might be asserted later, depending on the facts of your case, you may have a defense to the preference claim (such as where the bill was paid in the ordinary course or where you compromised a claim by waiving interest on late payments).
- **Once the bankruptcy has been filed, promptly file a claim in the bankruptcy for the amounts you are owed.** The bankruptcy court will establish a deadline for submitting claims, which typically is at least several months after the bankruptcy is commenced. It is important to file a claim in a timely manner. The claim form is relatively simple to fill out, but it is a good idea to consult with a knowledgeable attorney. Typically, you will want to attach copies of your contract and unpaid invoices. Setting up a file with these documents now will save you having to find and copy the documents later.
- **United Contractors and its counsel have been in contact with the City and the City Attorney’s office regarding PG&E’s payments** for work performed to support or work around PG&E facilities. We intend to explore with the City what actions the City can take to address the problems that a PG&E bankruptcy will create with respect to payment for support and work around work.

Please contact us at (650) 691-2888 if you have any questions or if we can assist you with any of the actions discussed above.