Ed note: *In this issue of LawPRO magazine we debut a new column of succinct, topical practice tips that arise out of claims situations that LawPRO and our defence counsel handle. If you have an idea for a practice tip that you would like to share with members of the profession, please e-mail your tip to the magazine editorial team at: practicepro@lawpro.ca*

Construction liens:

Starting over is not better

The phone rings: Your client needs a construction lien registered ASAP. In the rush to register, you make an error in drafting the claim for lien. Your first instinct -- or that of your law clerk – is to discharge the claim for lien and register a new claim for lien.

Stop – don't do it. Before you take that step, stop and consider the consequences of registration of the discharge. The registration of a discharge of a lien, however it occurs, results in a permanent loss of lien rights which cannot be revived. (see *Southridge Construction Group Inc. v. 667293 Ontario Limited (1992), 2 C..L.R. (2d) 177 affirmed (1993), 2.C.L.R. (2d)184, (Div. Ct.).*

The proper step to take is to register a second claim for lien and obtain a court order "vacating" the first lien and allowing the second claim for lien to proceed. This will ensure that all rights under the registered lien are preserved.

Pauleen Sheps, Claims Counsel Specialist

The fine print in Rule 49

Many lawyers may not be aware of an interesting aspect of Rule 49.

Sometimes, an Offer to Settle from the opposing lawyer will simply set out a figure as the amount the plaintiff is prepared to accept. It will make no reference to costs or interest. One might reasonably assume that if the defendant paid the amount requested, the defendant would then be entitled to a dismissal of the action.

In fact, an offer that is silent on costs, if accepted, permits the plaintiff to then assess costs to the date of acceptance.

Rule 49.07(5) provides that:

> Where an accepted offer to settle does not provide for the disposition of costs, the plaintiff is entitled,
>
> (a) where the offer was made by the defendant, to the plaintiff's costs assessed to the date the plaintiff was served with the offer; or
>
> (b) where the offer was made by the plaintiff, to the plaintiff's costs assessed to the date that the notice of acceptance was served.

This type of offer can be a trap for the unwary. Where a matter has gone to examinations for discovery and is approaching trial one might be tempted to accept such an offer as being an excellent one in the expectation that no costs would be paid, only to find – to one's shock – that costs would then be assessed which dwarf the benefit of having accepted the offer.

courtesy of Michael Kestenberg of Kestenberg Siegal Lipkus LLP