

Ohio Supreme Court clarifies pay-if-paid

October 31, 2014

Reprinted from the Fall 2014 BrickerConstructionLaw.com Newsletter

[Download the complete Fall 2014 BCL](#)

A pay-if-paid provision in a construction subcontract can be a scary thing for a subcontractor or supplier to a contractor with a direct contract with an owner (i.e. prime contractor). If the owner fails to pay the prime contractor, and the pay-if-paid provision is enforceable, the subcontractor or supplier has a big problem.

Pay-if-paid clauses have been around for many years, and it seems every contractor who uses one has settled on its own favored language, usually including some incantation that refers to payment from the owner as a “condition precedent” to the contractor’s obligation to pay its subcontractors, and sometimes adding that the subcontractor acknowledges “assumption of the risk” of an owner’s non-payment. The risk in relying upon a purported pay-if-paid clause is that if a court does not deem it to be a clear and unequivocal statement of the parties’ intent to transfer the risk of an owner’s nonpayment to the subcontractor, then it is deemed a “pay-when-paid” clause, meaning that that payment is due within a reasonable time, no matter what the owner does.

So the question has always been: What magic words are required to create an enforceable pay-if-paid clause in a particular jurisdiction, assuming that the jurisdiction recognizes pay-if-paid clauses at all? (In some states, such as New York and California, the highest courts have refused to recognize the validity of pay-if-paid clauses as a matter of public policy. In Wisconsin, they are unenforceable by statute.)

Ohio now has a clear answer. In *Transtar Electric v. A.E.M. Electric Service Corp.*, the general contractor hired an electrical subcontractor for help in installing a hotel pool. Because the owner failed to make full payment, the general contractor failed to pay the sub for about 30% of the approximately \$143,000 subcontract, which was fully performed. The subcontractor sued the general contractor for payment and the trial court granted summary judgment to the general contractor based on what it held was a valid pay-if-paid provision in the subcontract because it included “condition precedent” language. The Sixth District Court of Appeals overturned the trial court’s decision, deciding that the “condition precedent” language was not sufficiently clear.

The Supreme Court of Ohio accepted the appeal. In its decision, the Court discussed case law on the issue from Ohio and around the country, both at the state of federal level, dating back to 1955. The Court quickly concluded that “condition precedent” language was sufficiently clear to distinguish the pay-if-paid provision from pay-when-paid. The Court was very clear that nothing more was needed, stating in its syllabus:

The use of the term “condition precedent” in the payment provision of a contract between a general contractor and a subcontractor clearly and unequivocally shows the intent of those parties to transfer the risk of the project owner’s nonpayment from the general contractor to the subcontractor.

However, this does not mean that an unpaid subcontractor has no recourse. It can always rely upon its mechanic’s lien rights, that

is, of course, if it has not contracted away its lien rights in a clear and unequivocal way that a court will enforce.

Authors



Doug Shevelow

Partner

Columbus

614.227.4803

dshevelow@bricker.com

Copyright © 2022 Bricker & Eckler LLP. All rights reserved.