

STATEMENT FROM STUART S. ZISHOLTZ

The Court of Appeals, New York's highest Court, ruled on December 7, 1995 that the pay when paid clauses in construction contracts are illegal and enforceable. For those of you who are not familiar with this type of clause, we will recount the entire history and concept behind it.

The legal aspects of the clause are what we call a "condition precedent" provision in the contract. The clause in the contract usually reads, "Subcontractor agrees that as a condition precedent to payment, payment will not be made to the subcontractor until such time as payment is made by the owner to the general contractor". The words "condition precedent" must be in the contract.

Parenthetically, this same clause is used against the general contractor by an owner where the owner inserts the clause as a condition precedent to paying the general contractor only if and when the owner receives an advance from the lending institution or the financing agency.

The clause has been ruled to be illegal and unenforceable. Therefore, whoever has a condition precedent clause in his contract need not worry about establishing that payment has been made by the owner to the general contractor.

But, do not go away so fast.

There are provisions in many contracts that state that you will get paid within ten days or twenty days after the general contractor gets paid. This is not a "condition precedent" clause.

The ten or twenty day clauses, etc., are legal and enforceable and provide, essentially, the convenience to the paying agent. It is a time frame within which you will get paid.

Contractors might put a clause into the contract saying if you submit your invoices by the 25th of the month, you will be paid by the 10th of the following month. This is a convenience to the contractor. He might get paid on the 10th of the month from the owner, have all of his funds

cleared by the 25th, wants all of his bills in by the 25th so that in fifteen days, he can make payment to you. This is a convenience, not a condition precedent.

A condition precedent puts you on guard and creates a hurdle. It is a situation where the subcontractor must perform everything required of him before he can expect something in return. A time frame is an accommodation to the general contractor. There are no prerequisites that the subcontractor must perform before receiving payment.

A "condition precedent" is not enforceable. A time frame is enforceable.

Never let your lien time run out!

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