

## **STATEMENT FROM STUART S. ZISHOLTZ**

In 1995, the Court of Appeals, New York's highest court, found that paid when paid clauses violated New York's public policy and were unenforceable.

In 2006, the Court of Appeals rendered another decision with reference to a "pay if paid" clause. In that case, the plaintiff, a subcontractor was hired by a general contractor, a Florida corporation. The parties agreed that Florida law would govern their contract. Unlike New York, Florida permits "pay if paid" clauses to exist. The question for the Court was whether New York would enforce the "pay if paid" clause even though New York has already found that such a clause is unenforceable.

By a unanimous decision, the New York Court of Appeals held that the parties choice of the law controlled and, therefore, the "pay if paid" clause was enforceable. The Court's logic was that the parties should be free to chart their own contractual course and the courts should not interfere with the parties choice of the law. Thus, even though the clause violated New York public policy, the court refused to interfere with the parties' intent in choosing Florida law.

Since 2006, the New York Courts have continuously followed the law that the paid when paid clause is illegal and unenforceable. However, the 2006 decision continues to be cited when this issue arises in the Courthouse. The general contractor routinely refers to the decision by stating that the parties agreed to the specific terms that payment was contingent on the owner paying the general contractor. So far, the Courts have continued to follow the principle that the clause is illegal and unenforceable.

It imperative that you understand each and every term and condition of your contract. Small nuances such as choice of the law or forum selection clauses could be extremely vital in determining whether you are able to recover any balance due or be able to file a mechanic's lien. Many times, General Contractor's incorporate a paid when paid clause in the contract. Most likely, the clause is unenforceable. Use the clause as leverage to try and negotiate other terms in the contract. Let the General Contractor believe it is enforceable while conceding other terms of the contract.

Never let your lien time run out!!

For a free copy of our pamphlet pertaining to mechanic's liens and payment bond claims, please contact me.

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