

# Payment Clauses for Subcontractors Vary with States

**Juan A. Franco JD, MSCM and Khalid Siddiqi PHD**

Kennesaw State University  
Marietta, Georgia

The objective of this study was to identify the contingent payment language that subcontractors should be aware of when executing contracts in the North Eastern United States. Data for this study was collected from court cases and statutes to analyze court interpretation of the language contained in contracts. The prime beneficiaries of this study were subcontractors who learned the specific contingency language that affected their potential payments from a contractor not paid by an owner and the varying impact of that language in each state. The results of the study indicated that some states followed a pay-when-paid interpretation others pay-if-paid and still others enacted statutes that deemed such clauses unenforceable as a matter of public policy. States considered in the study included Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island and Vermont.

**Keywords:** pay-when-paid, pay-if-paid, subcontractor, construction contracts, contingent payment clause

## Introduction

A pay-when-paid or pay-if-paid contract clause makes payment contingent upon the occurrence of an event. The typical pay-when-paid and pay-if-paid clause in construction subcontracts makes the subcontractor's payment contingent upon the payment of the general contractor by the owner. These clauses take on one of two forms in subcontract agreements. Some clauses link the timing of the subcontractor's payment to the time owner makes payment. These are called pay-when-paid clauses. Pay-if-paid clauses specify that the owner must pay the contractor in order for the subcontractor to ever receive payment.

Even though most states distinguish between the two types of clauses, a few find that the provisions have the same legal effect. Most state courts have held that contractors cannot indefinitely withhold payment from subcontractors based upon a pay-when-paid clause. Instead, pay-when-paid clauses require a contractor to pay its subcontractors within a reasonable time of the completion of accepted work. In contrast, pay-if-paid clauses often allow contractors to permanently withhold payment from their subcontractors where the owner has failed to pay the contractor. However, most states only enforce pay-if-paid clauses if the contract unambiguously expresses that the parties intended for the subcontractor to be paid only if the contractor is paid.

As states have moved toward protecting the rights of subcontractors, some state courts have decided not to enforce pay if paid provisions. Additionally, a handful of states have enacted legislation that declares such contractual provisions void and against public policy. The objective of this study was to identify the pay-when-paid or pay-if-paid language in construction contracts that best protected payments to subcontractor from general contractor for work performed in the North Eastern United States. The prime beneficiaries of this study were subcontractors doing business in the North East United States who should

be aware of the clauses affecting payment for work properly performed within the scope of the contract. Subcontractors could use the language suggested in this study to better protect their interests.

An analysis of the relevant case law and statutes in Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island and Vermont was performed to suggest a contract language that can best assure payment to the subcontractor when the owner does not pay the general contractor. The case law researched in each state contained construction contract contingency clauses, timing mechanism clauses, pay-when-paid and pay-if-paid clauses.

### **Research Methodology**

Each state's case law and statutes were individually analyzed to determine the prevailing view. The individual state findings were then collectively compared. Statutes pertaining to the enforceability of these clauses were also reviewed. The study strictly focused on the language that would benefit the subcontractor. The results of the study indicated that some states enacted statutes that deemed pay when paid and pay if paid clauses unenforceable as a matter of public policy, while others offered no protection to the subcontractor.

### **Background**

#### *Case Law and Statutes*

##### *Connecticut*

Connecticut courts haven't yet decided whether the pay-when-paid and pay-if-paid clause is a condition precedent to any payment obligation arising on behalf of the general contractor or whether it is merely a timing mechanism. However the Connecticut Supreme Court in *Blakeslee Arpaia Chapman, Inc. v. E.I. Constructors, Inc.*, didn't decide the enforceability of a pay-when-paid clause but stated that there were numerous arguments advanced for not supporting the pay-when-paid clause. Those arguments included: when the clause in the subcontract is not clear and unequivocal, when the clause conflicts with the contract read in its entirety or the parties' intent, when the conduct of the promisor is the cause of the failure to pay, when the clause merely sets the time for payment for the purpose of giving the general contractor reasonable time to obtain funds from the owner, and when the clause is contrary to public policy. (*Blakeslee v. E.I. Constructors*). The subcontract in this case provided that "payment of the approved portion of the Subcontractor's monthly estimate shall be conditioned upon receipt by the Contractor of his payment from the Owner." (*Blakeslee v. E.I. Constructors*).

In another case, a Superior Court found that an engineering and technical services agreement that included the language "subject to payment with all outstanding payments to be paid in full at time of financing of project" was a pay-when-paid clause. (*DeCarlo & Doll, Inc. v. Dilozir*). The Appellate Court held that the language established a time for payment and did not constitute a condition precedent. The payment should have been made in a reasonable time. (*DeCarlo & Doll, Inc. v. Dilozir*).

In the case of *Star Contracting Corp. v. Manway Construction Co.*, the Superior Court held that the language, "In any event, payment will not be made by the Contractor to the Subcontractor until the Owner

has made payment to the Contractor for the work” was a condition precedent. (*Star Contracting Corp. v. Manway Construction Co.*).

The Connecticut Appellate Court recently enforced a contract similar to a contingent payment agreement. In *Suntech of Connecticut, Inc. v. Lawrence Brunoli, Inc.*, 143 Conn. App. 581 (2013), a subcontractor sued a general contractor and lost as the court found the contract provided that the “general contractor had no obligation to pay the claim...unless the department first paid the general contractor” (*Suntech of Connecticut, Inc. v. Lawrence Brunoli, Inc.*).

Most of the recent cases suggest that the enforcement of a contingent payment clause as an absolute defense to payment is difficult in Connecticut. The strongest hope of having a contingent payment clause act as an absolute defense to payment is very express and explicit language unequivocally and absolutely transferring the risk of nonpayment to the subcontractor.

### *Maine*

In Maine, construction contracts typically contain a clause stating payment by the owner to the general contractor is a condition precedent to payment of the subcontractor. Under a pay-if-paid clause, if the owner doesn’t pay the contractor for subcontractor’s work, the contractor doesn’t have to pay the subcontractor. If a pay-if-paid clause is explicitly written, the contractor who has not been paid by owner would likely prevail against the subcontractor.

The Maine Prompt Payment Act governs payment to general contractors, subcontractors, suppliers and design professionals (10 M.R.S.A. sec. 1111). The Act controls the timing of owner and prime contractor payment obligations. Payment obligations are determined by the parties’ respective positions within the contracting chain, be it contractor or subcontractor. The Act penalizes non-payment, late payment and disproportionate withholdings by owners, contractors and subcontractors with downstream obligations. (10 M.R.S.A. sec. 1111).

Generally an owner must, unless otherwise agreed, pay its contractor within 20 days of the end of the billing periods or delivery of the invoice, whichever is later. (10 M.R.S.A. sec. 1113). For the contractors and suppliers not in direct privity of contract with the owner, payment obligations are controlled by statute regardless of contract terms. (10 M.R.S.A. sec. 1113). However, parties that contract directly with the owner can change the statutory payment requirements. *Id.* Although the courts in Maine have not specifically addressed the issue, it is likely that they would enforce such a clause between an owner and a contractor if it were clearly written.

A pay-when-paid clause requires a contractor to pay a subcontractor within a certain time frame once a contractor is paid by the owner. Maine’s Prompt Payment Act language is similar to a pay when paid clause. (10 M.R.S.A. sec. 1113). The Act reads “a contractor is required to pay a subcontractor within seven days of receipt of the progress payment from the owner. (10 M.R.S.A. sec. 1113). Courts in other jurisdictions have treated the pay-when-paid clause as merely providing a reasonable amount of time for payment to the subcontractor after the contractor’s receipt of payment from the owner. (*Framingham Heavy Equip. Co. v. John T. Callahan & Sons, Inc.*). The subcontract requires the contractor to pay the subcontractor “each progress payment within three working days after the Contractor receives payment

from the Owner,” and the General Conditions requires the contractor to “promptly pay each Subcontractor, upon receipt of payment from the Owner, out of the amount paid to the Contractor on account of such Subcontractor's portion of the Work, the amount to which said Subcontractor is entitled.” (Framingham Heavy Equip. Co. v. John T. Callahan & Sons, Inc.). As such, those clauses do not create a condition precedent to the subcontractor’s right to payment.

Although the pay-when-paid clause issue has not been addressed in any known court case, it would likely be treated similarly to the pay-if-paid clause if clearly expressed in writing. In any event, the Prompt Payment Act will govern most payment obligations regardless of the clause.

### *Massachusetts*

Massachusetts courts have not directly upheld pay-if-paid or pay-when-paid clauses, but the courts have acknowledged that such clauses may be valid. (Canam Steel Corp. v. Bowdoin Constr. Corp.). The court acknowledged that pay if paid clauses could be enforced and stated that a clause tying payment to a subcontractor to receipt of payment by the general contractor from the owner is valid if that contingency is clearly stated. (Canam Steel Corp. v. Bowdoin Constr. Corp.). The subcontract contained a clause which read "Receipt of payment by the Contractor shall be a condition precedent to any payment to the Subcontractor hereunder." (Canam Steel Corp. v. Bowdoin Constr. Corp.). The court found such language did not sufficiently create a condition precedent to payment because it was indirect.

Without a clear and concise provision that payment to the subcontractor is contingent upon the contractor receiving payment from the owner, however, pay when paid clauses have been interpreted as providing the contractor with a reasonable amount of time to make payment after the subcontractor completes its work, giving the contractor time to receive moneys from the owner. (Framingham Heavy Equip. Co. v. John T. Callahan & Sons, Inc.); (A.J. Wolfe Co. v. Baltimore Contractors, Inc.). Accordingly, pay-when-paid and pay-if-paid clauses will be interpreted as merely postponing payment to the subcontractor for a reasonable time to allow the contractor to collect payment from the owner, unless receipt of payment is a clear and express condition precedent to payment to the subcontractor.

The Court in the A. J. Wolfe Company case considered language that payments were to be made “...within 10 days after payment of such monthly progress payments...has been received by Baltimore.” (A. J. Wolfe Co. v. Baltimore Contractors, Inc.). The court interpreted that portion of the contract as merely setting the time of payment and not a condition precedent.

In Framingham, the Court stated that for the creation of a condition precedent the contract must clearly state “that payment to the subcontractor is to be directly contingent upon the receipt by the general contractor of payment by the owner.” (Framingham Heavy Equip. Co. v. John T. Callahan & Sons, Inc.).

Mass. Gen Laws Ann. Ch. 30 sec. 39K provides for prompt payment to contractor within 15 days of submission of payment estimate. On public works projects, the awarding authority has 35 days to process and make payment on an invoice. (Mass. Gen. Laws Ann. Ch. 30 sec. 39G). Although this regulation applies to public, not private, contracts, the spirit of the law calls for fairness in payment being made to subcontractors in a reasonable time frame. Also, Mass. Gen. Law C.149, §29E: On private projects worth over \$3,000,000, unless work is defective, pay-if-paid clauses are unenforceable in all general and

subcontracts, except where (a) the owner is insolvent and (b) the party who wishes to invoke pay-if-pay has filed a mechanic's lien before submitting its first requisition and taken all steps necessary to maintain that lien. (Mass. Gen. Law C.149, §29E)

### *New Hampshire*

Pay-if-paid clauses that clearly state payment to a subcontractor is to be made only if the general contractor has been paid are likely enforceable. Courts require specific language such as "if", "on the condition that", "subject to" or "provided" to find that a contract contains a condition precedent. (Holden Eng. and Surveying Inc. v. Pembroke Rd. Realty Trust) Here, there was no such language which would have alerted a party that a condition precedent may exist. In that case the court stated that conditions precedent were not favored and would not be construed as such unless required by the plain language of the agreement. (Holden Eng. and Surveying Inc. v. Pembroke Rd. Realty Trust). New Hampshire has upheld indemnification and limitation of liability clauses, as long as such clauses are narrowly and reasonably written. Similarly, pay if paid clauses should be enforceable in this state. (Seaward Constr. Co. v. City of Rochester).

The New Hampshire Supreme Court decision that is most closely related to the pay-if-paid concept is Seaward Constr. Co. v. City of Rochester. In that case the court stated that in the contract between the city and the contractor, where payment to the contractor was contingent upon the city's receipt of federal funds, that clause was appropriate, as long as the city showed it made a good faith effort to obtain federal funding. By extension, so long as the unpaid general contractor can show a good faith effort to secure payment from the owner, then it also may be entitled to rely on the pay-if-paid clause to deny payment to the subcontractor.

### *New Jersey*

No New Jersey state court case strictly upholding a pay-if-paid contract provision is published. However, the New Jersey U.S. District Court ruled that pay-if-paid clauses in New Jersey are binding and valid defenses to claims for payment. The court in Fixture Specialists, Inc. v. Global Construction, LLC also ruled, in its approval of the pay-if-paid provision, that they do not violate New Jersey's anti waiver of lien statute and that a surety may use such a provision in its defense of a payment bond claim. The subcontract in that case created a condition precedent with the language that the "subcontractor agrees that contractor shall never be obligated to pay subcontractor under any circumstances unless and until funds are in hand received by the contractor in full and that this is a condition precedent to any obligation of contractor and shall not be construed as a time of payment clause." (Fixture Specialists, Inc. v. Global Construction, LLC). Pay-if-paid clauses will be enforced if they unambiguously provide that Contractor's receipt of payment from the owner is an express condition precedent to subcontractor's right to receive payment from the contractor. Fixture Specialists.

In an unpublished decision, the New Jersey Appellate Court held that a pay if paid clause was valid as it unambiguously shifted the risk of non-payment to the subcontractor and clearly stated that if the owner refused to pay for the subcontractor's work, the general contractor was not obligated to pay the subcontractor until the dispute was resolved and the owner made payment. (O.A. Peterson Constr. Inc. v.

Englewood Hosp. & Med. Ctr.). The court, however, precluded the general contractor from asserting the pay-if-paid clause as a defense. (O.A. Peterson Constr. Inc. v. Englewood Hosp. & Med. Ctr.).

In *Seal Tite Corp. v. Ehret, Inc.*, the U.S. District Court for the District of New Jersey held that a pay-when-paid contract clause only defers or delays payment from a general contractor to a subcontractor and does not remove the obligation of the general contractor to pay the subcontractor even though payment by owner has not yet been made. (*Seal Tite Corp. v. Ehret, Inc.*). The court held that a contract must have express language which clearly demonstrates the intention of the parties to shift the risk of nonpayment from the contractor to the owner. (*Seal Tite Corp. v. Ehret, Inc.*). The court in this case was asked to decide whether a contractor is required to pay a subcontractor under a contract containing a pay when paid clause where the contractor did not receive payment from the owner due to bankruptcy. The court found the pay-when-paid clause did not contemplate that the owner's bankruptcy would preclude payment from the contractor to the subcontractor. (*Seal Tite Corp. v. Ehret, Inc.*). The clause was interpreted by the court as establishing only a reasonable time for payment to a subcontractor rather than an absolute precondition to making payment. (*Seal Tite Corp. v. Ehret, Inc.*). In other words, non-payment by the owner did not excuse the general contractor from paying the subcontractor for its work.

In drafting a pay-when-paid clause in New Jersey, several conditions should be inserted. First, appropriate language containing the words "condition precedent" should be used to make sure that the subcontractor understands that payment from the owner is a prerequisite to payment to the subcontractor. Second, the clause should clearly state that the subcontractor agrees to rely on the creditworthiness of the owner and the risk of possible nonpayment. Third, it should address both contract work and extra work, thereby avoiding possible ambiguity in the contract clause.

### *New York*

Pay-if-paid clauses that make the receipt of payment by the general contractor from the owner a condition precedent to the subcontractor's right to payment are generally unenforceable in New York. (*West-Fair Electric Construction v. Aetna Casualty & Surety Co.*). The New York Supreme Court held that pay-if-paid clauses are unenforceable and against public policy because they violate the lien law. (*West-Fair Electric Construction v. Aetna Casualty & Surety Co.*). The Court held that the contractual allocation of the risk of owner nonpayment must be consistent with the public policy that permits laborers and suppliers who improve real property to file mechanics liens. The Lien Law provides that a contract clause that waives the right to file or enforce a valid lien is void and unenforceable. (N.Y. Lien Law sec. 34). The court noted that if a contractor could indefinitely postpone payment to the subcontractor because of an owner's insolvency, the practical effect would be that the sub would never be entitled to enforce its lien, because no payment to the sub would be "due and owing." (*West-Fair Electric Construction v. Aetna Casualty & Surety Co.*). Pay-i-paid clauses are unenforceable in New York. (*Schuler-Haas Electric Corp. v. Aetna Casualty & Surety Co.*). Courts have found that pay when paid clauses do not violate the Lien Law if they simply establish a reasonable time for payment. (*West-Fair Electric Construction v. Aetna Casualty & Surety Co.*).

New York's prompt payment statute establishes a time for payment in private construction contracts. The statute, which went into effect in 2003, requires contractors to pay subcontractors and suppliers within



seven days after the contractor receives payment from owner. (N.Y. Gen. Bus. Law sec. 756-a). As a result, general contractors now bear the risk of an owner's nonpayment. The contractor must ultimately pay the subcontractor even if not paid by the owner.

### *Pennsylvania*

Pennsylvania courts typically do not treat a pay-if-paid clause as a condition precedent to payment unless the language clearly indicates that the parties intended that outcome. (*United Plate Glass Co., Div. of Chromalloy Corp. v. Metal Trims Industry, Inc.*). The courts favor payment to contractors for work actually performed and will interpret pay-if-paid clauses as a timing mechanism rather than a condition precedent to payment, unless the clause expressly and explicitly makes payment to the first party a condition precedent to its obligation to pay the second party. (*United Plate Glass Co., Div. of Chromalloy Corp. v. Metal Trims Industry, Inc.*).

In *C.M. Eichenlaub Co. v. Fidelity & Deposit Co.*, language in the contract that the "Builder shall be under no obligation to make any payments to contractor for materials delivered or for work performed by contractor unless and until Builder is first paid for such materials and work by the owner," was sufficient to express the intent of the parties to unambiguously establish a condition precedent to payment. (*C.M. Eichenlaub Co. v. Fidelity & Deposit Co.*).

The Third Circuit Court of Appeals applying Pennsylvania law has indicated that a pay-if-paid clause will be enforceable under Pennsylvania law, if drafted expressly to make the receipt of payment a condition precedent to its obligation to pay the subcontractor. The court held that Pennsylvania law "recognizes that express language of condition is sufficient to establish a pay-if-paid condition precedent. (*Sloan & Co v. Liberty Mutual Ins. Co.*). The court noted, however, that where certainty as to the existence of the condition precedent is lacking, courts will interpret the provision as a pay-when-paid clause. (*Sloan & Co v. Liberty Mutual Ins. Co.*).

In *Sloan*, the contract contained two subparagraphs. The first provides in relevant part: "Final payment shall be made within thirty days after the last of the following to occur, the occurrence of all of which shall be conditions precedent to such final payment...." That paragraph then listed those conditions precedent, one of which is that "owner shall have accepted the work and made final payment thereunder to contractor." Another condition is that "contractor shall have received final payment from owner for subcontractor's work." (*Sloan & Co v. Liberty Mutual Ins. Co.*). The language created a condition precedent. However, the language in another part of the contract stated that "within six months of the date that final payment is due the subcontractor agrees not to pursue a claim against contractor until the Contractor Dispute Resolution and appeals are completed." (*Sloan & Co v. Liberty Mutual Ins. Co.*). This language created ambiguity and thus created a paid-when-paid clause merely setting a time for payment.

Pay-when-paid clauses are enforceable, but will only control the timing of payments unless the receipt of payment from the owner is expressly made a condition precedent to the obligation to pay the subcontractor. Thus, if the event that was intended to trigger payment does not occur, "some alternative

means will be found to measure the passage of time” until payment must be made notwithstanding nonpayment to the first party. (*Sloan & Co v. Liberty Mutual Ins. Co.*).

While there are no cases directly on point any delay in payment would likely be limited to a reasonable period of time. The Pennsylvania Superior Court has upheld the refusal of a trial court to instruct the jury as to the meaning of the term “reasonable time” as it relates to pay-when-paid or pay-if-paid clauses, where the trial court cited the absence of the term “reasonable time” in the contract, and held that the meaning of the clauses were an issue of fact properly left for the jury. (*Ernst Bock & Sons, Inc. v. Levan Assocs., Inc.*)

The Prompt Pay Act (Senate Bill 324) or contingency pay bill precludes general contractors from relying on contingent payment clauses in certain construction contracts to deny payment to subcontractors for work performed in accordance with the contract. The new law governs the enforceability of such contract provisions.

### *Rhode Island*

There are no published cases in Rhode Island regarding pay-if-paid clauses. However, pursuant to the Restatement (Second) of Contracts sec. 227, pay-when-paid clauses are acceptable. Also, Rhode Island courts frequently turn to the Restatement (Second) of Contracts to fill gaps in state law. (*Gibson v. City of Cranston*). Therefore, it is logical to conclude Rhode Island would uphold a pay-when-paid clause.

In *Rotelli v. Catanzaro*, the disbursement agreement stated that plaintiff was entitled to payment “within seven business days after defendant has been fully paid.” The word “after” typically indicates “that a promise is not to be performed except upon a condition or the happening of a stated event.” (*Rotelli v. Catanzaro*). The court found that language to be explicit enough to create a condition precedent. (*Rotelli v. Catanzaro*).

In *Northern Site Contractors v. SBER Royal Mill, LLC*, the Rhode Island Superior Court held that the pay-when-paid clauses in a subcontractor’s contract were against public policy and unenforceable. The court reasoned that the pay-when-paid clause would bar the taking of any steps for the subcontract to enforce its mechanics lien. (*Northern Site Contractors v. SBER Royal Mill, LLC*).

### *Vermont*

There have been no published court decisions addressing pay-if-paid or pay-when-paid clauses. However, the Vermont Prompt Payment of Construction Invoices Act bars enforcement of a pay-if-paid clause. (Vt. Stat. Ann. Tit. 9 sec 4001-4009). The Act provides that “performance by a subcontractor in accordance with the provisions of its contract shall entitle it to payments from the party with which it contracts.” (Vt. Stat. Ann. Tit. 9 Sec 4003(a)). This would bar enforcement of a pay-if-paid clause, because such a clause creates a circumstance where a subcontractor would not be paid despite having performed the work, namely that circumstance where the owner failed to pay the prime contractor. The state therefore follows a pay-when-paid timing mechanism for payment to subcontractors.



Under the Vermont Prompt Payment of Construction Invoices Act if a contractor has accurately disclosed to a subcontractor, before a subcontract is entered, the due date for receipt of payments from the owner, the contractor may delay payment to the subcontractor until seven days after receipt of payment from the owner. (Vt. Stat. Ann. Tit. 9 sec. 4003(a)). Although, the case law has not addressed the question, in light of the Act's requirement that "performance by a subcontractor in accordance with the provisions of its contract shall entitle it to payment from the party with which it contracts," it is likely that a court would require the contractor to pay a subcontractor within a reasonable time although the contractor had not been paid by the owner.

If the contractor did not disclose to a subcontractor the due date for receipt of payments from the owner, then the contractor is obligated to pay the subcontractor within 20 days after the end of the contractor's billing period with the owner, or 20 days after delivery of the contractor's invoice to the owner, whichever is later. (Vt. Stat. Ann. Tit. 9 sec. 4003(b) and sec. 4002(c)).

### *Paper*

A paper previously published by the current authors entitled Pay-When-Paid/Pay-If-Paid Contract Clause Comparisons Among South Eastern United States, 51<sup>st</sup> ASC Annual International Conference Proceedings (2015), focused on contingent contract language in the South East. (Franco & Siddiqi, 2015). The effectiveness of the contingency language and likely holding of a court in each state was analyzed to propose language that would help ensure payment to the subcontractor. The research revealed the difference between Georgia and the other south eastern states' interpretation of similar contract language and the effect on payment to a subcontractor. Georgia held the minority view in deciding that certain language created payment by owner a condition precedent to the obligation by the general contractor to pay the subcontractor. The other states generally held an opposing view and required very strict language for this condition precedent to arise.

### **Results & Inferences**

In the states of Connecticut, Maine, Massachusetts, New York and Vermont, pay-if-paid clauses are likely unenforceable. In Connecticut, New Hampshire, New Jersey, Pennsylvania and Rhode Island, pay-if-paid clauses will be enforced with clearly contingent language. Absent clear and unambiguous language stating the condition precedent of payment by owner to contractor before payment to subcontractor, payment contingency clauses will be interpreted as timing mechanisms.

Virtually every state however has cases where pay-if-paid clauses have been enforced due to the clearly explicit language assuming the risk of nonpayment. Most of the states have case decisions which seem contradictory to each other and create uncertainty. Few State Supreme Court decisions were found so reliance for conclusions were made on lower court opinions and logical inferences from decisions on cases not directly related to pay-if-paid clauses.

The states in the northeast held that pay-when-paid and pay-if-paid clauses were unenforceable, absent clear and unambiguous language stating the condition precedent of payment by owner to contractor

before payment to subcontractor. The states resolved any ambiguity in favor of the subcontractor. Massachusetts, New York and Vermont have by statute removed the issue from contracts by dictating such language unenforceable as a matter of public policy. Table 1 further clarifies the northeastern states likely positions regarding pay-if-paid and pay-when-paid provisions.

**Table 1**

States where pay-if-paid clauses likely unenforceable	States where pay-if-paid clauses likely enforced
Connecticut- Blakeslee v. E.I. Constructors	Rhode Island- Rotelli v. Catanzaro
Massachusetts- Canam Steel Corp. v. Bowdoin Constr. Corp., Framingham. v. Callahan	New Hampshire- Holden Eng. and Surveying Inc. v. Pembroke Rd. Realty Trust
New York- West-Fair Electric Construction v. Aetna	New Jersey- Fixture Specialists, Inc. v. Global Construction, LLC
Vermont- Vermont Prompt Payment of Construction Invoices Act	Pennsylvania- United Plate Glass Co., Div. of Chromalloy Corp. v. Metal Trims Industry, Inc., Sloan & Co v. Liberty Mutual Ins. Co.
Maine- Maine Prompt Payment Act	

Where the contract contains language such as “payment by owner to contractor is a condition precedent and subcontractor expressly assumes the risk of nonpayment,” any court would likely hold in favor of the contractor. A subcontractor should never sign such an agreement unless willing to assume this risk.

### Conclusion

The present study analyzed the North East region with a focus on subcontractors’ interests in knowing the impact of contingent language in each state. The language interpretation of varying clauses used in contracts was highlighted to demonstrate the effectiveness of certain contingent payment clauses in each state. The language affords the contractor a reasonable amount of time to secure payment while providing the subcontractor with protection against absolute nonpayment.

We see some comparisons between the research performed in the previous paper by the present authors and the current study. The majority of states in the northeast and southeast held that pay-when-paid and pay-if-paid clauses were unenforceable, absent clear and unambiguous language stating the condition precedent of payment by owner to contractor before payment to subcontractor. The majority view resolved any ambiguity in favor of the subcontractor. The minority view, followed in Georgia, resolved any ambiguity in favor of the general contractor. Massachusetts, New York, North Carolina, South Carolina and Vermont have by statute removed the issue from contracts by dictating such language unenforceable as a matter of public policy.

Future research in this area can be performed to include other states to gain a better understanding of the nationwide trend in this area of law. More states appear to be leaning towards enacting legislation to help

resolve these issues. The AIA and other organizations might consider further clarification of contractual provisions in a future convention to provide a clearer understanding of the language that could minimize litigation.

## References

- A.J. Wolfe Co. v. Baltimore Contractors, Inc.*, 255 Mass. App. Ct. 943, 613 N.E. 2d 121 (1969)  
*Blakeslee Arpaia Chapman, Inc. v. E.I. Constructors, Inc.*, 239 Conn. 708, 687 A.2d 506 (1997)  
*Canam Steel Corp. v. Bowdoin Constr. Corp.*, 34 Mass. App. Ct. 943, 613 N.E.2d 121 (1993)  
*C.M. Eichenlaub Co. v. Fidelity & Deposit Co.*, 437 A.2d 965 (Pa. Super. Ct. 1981)  
*DeCarlo & Doll, Inc. v. Dilozer*, 45 Conn. App. 633, 698 A.2d 318 (1997)  
*Ernst Bock & Sons, Inc. v. Levan Assocs., Inc.*, 2009 Pa. Dist. & Cty. Dec. 137 (Bucks Co. June 26, 2009)  
*Fixture Specialists, Inc. v. Global Construction, LLC*, 2009 WL 904031 (D.N.J. Mar. 30, 2009)  
*Framingham Heavy Equip. Co. v. John T. Callahan & Sons, Inc.*, 61 Mass. App. Ct. 171, 807 N.E.2d 851 (2004)  
Franco, J.A. & Siddiqi, K. (2015). Pay-When-Paid/Pay-If-Paid Contract Clause Comparisons Among South Eastern United States, 51<sup>st</sup> ASC Annual International Conference Proceedings  
*Gibson v. City of Cranston*, 37 F.3d 713,736 (1<sup>st</sup> Cir. 1994)  
*Holden Eng. and Surveying Inc. v. Pembroke Rd. Realty Trust*, 628 A.2d 260, 263 (N.H. 1993)  
*Maine Prompt Payment Act* 10 M.R.S.A. sec. 1111 (1997 & Supp. 2004)  
*Maine Prompt Payment Act* 10 M.R.S.A. sec. 1113 (1997 & Supp. 2004)  
*Mass. Gen Laws Ann. Ch. 30 sec. 39K* (2010)  
*Mass. Gen. Laws Ann. Ch. 30 sec. 39G* (2010)  
*Mass. Gen. Law C.149, §29E* (2010)  
*New York. Schuler-Haas Electric Corp. v. Aetna Casualty & Surety Co.*, 49 A.D.2d 60, 371 N.Y.S.2d 207 (4<sup>th</sup> Dep't 1975) aff'd, 40 N.Y.2d 883, 357 N.E.2d 1003, 389 N.Y.S.2d 348 (1976)  
*Northern Site Contractors v. SBER Royal Mill, LLC*, (June 30, 2009)  
*N.Y. Gen. Bus. Law sec. 756-a* (McKinney 2014)  
*N.Y. Lien Law sec. 34* (McKinney 2011)  
*O.A. Peterson Constr. Inc. v. Englewood Hosp. & Med. Ctr.*, 2010 WL 2696758 (N.J. Super. App. Div. 2010)  
*Restatement (Second) of Contracts* sec. 227 (1981)  
*Rotelli v. Catanzaro*, 686 A.2d 91, 94 (R.I. 1996)  
*Seal Tite Corp. v. Ehret, Inc.*, 589 F. Supp. 701 (D.N.J. 1984)  
*Seaward Constr. Co. v. City of Rochester*, 118 N.H. 128 (1978)  
*Sloan & Co v. Liberty Mutual Ins. Co.*, 653 F.3d 175 (3d Cir. 2011)  
*Star Contracting Corp. v. Manway Construction Co.*, 32 Conn. Supp. 64, 337 A. 2d 669 (1973)  
*Suntech of Connecticut, Inc. v. Lawrence Brunoli, Inc.*, 143 Conn. App. 581 (2013)  
*United Plate Glass Co., Div. of Chromalloy Corp. v. Metal Trims Industry, Inc.*, 106 Pa. Commw., 22, 525 A.2d 468, 470-471 (1987)  
*Vermont Prompt Payment of Construction Invoices Act*, Vt. Stat. Ann. Tit. 9 sec 4001-4009  
*Vt. Stat. Ann. Tit. 9 Sec 4003(a)*  
*Vt. Stat. Ann. Tit. 9 sec. 4003(b)*

*Vt. Stat. Ann. Tit. 9 sec. 4002(c)*

*West-Fair Electric Construction v. Aetna Casualty & Surety Co.*, 87 N.Y.2d 148, 661 N.E.2d 967, 638 N.Y.S.2d 394 (1995)