

Construction Law

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Outgoing Chair’s Report

By Amber Hardwick – OAC Services, Inc.

Dear Fellow Section Members, I hope you are all staying safe and physically—though not socially—distant as you enjoy the summer. These past few months have been active for the Construction Law Section. The Section’s annual midyear was held on June 12 on the topic of “Alternative Procurement.” As usual, it was well attended and, for the first time ever, it occurred entirely online. The event chairs even managed to host a post-CLE happy hour! Though we converted the event to Zoom in response to the pandemic, its success demonstrated the viability of using a similar platform in the future to diversify CLE speakers—bringing construction law expertise from all over the state for the benefit of the Section. If you are interested in speaking at future events, please reach out to a member of the executive council. In the meantime, please join me in thanking the speakers and event

chairs for demonstrating the ability to pivot in response to these historic circumstances.

We also awarded two law school students for their submissions to the writing competition sponsored by the Construction Law Section. The writing competition subcommittee reported receiving excellent submissions and the two stand-out articles. It is my privilege to announce the first-place award went to Seattle University Law student Raymond Cleaveland,

and second place to University of Washington Law student Shweta Jayawardhau. You can find their submissions in this newsletter. I look forward to the Section continuing its efforts to introduce future lawyers to the field of construction law.

We also held a CLE on Aug. 28, which was co-hosted by our friends in the Clark County Bar Association and the WSBA. The topic of the all-day CLE was “Practicing on the Border: Construction Law in Washington and Oregon.” This CLE



A snapshot of the first-ever ZOOM post-CLE happy hour!

In This Issue

Outgoing Chair’s Report	1
Incoming Chair’s Report.....	2
<i>Conway Construction Company v. City of Puyallup</i>	3
Caselaw Update	3
And the Winners Are...	
Construction Law Section Writing Competition	5

was specifically geared toward construction lawyers engaging in cross-border practice. The event offered a deep dive into the differences between Washington and Oregon construction law including: public improvement projects, liens, bonds, contract

Continues on page 2...

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Outgoing Chair's Report

...continued from page 1

language, OR-OSHA vs. WISHA claims, workers comp, insurance disputes, and the new Oregon Corporate Activities Tax.

The Fall Forum, typically hosted at a recently completed construction project, will be deferred until we can gather in groups again. We are optimistic about our Winter Dinner/Forum, so keep an eye out for more details.

Finally, my term as chair came to an end in September. Commencing on Oct. 1, the new executive committee officers are:

Chair: Brett Hill

Chair-Elect: Colm Nelson

Vice Chair: Jennifer Beyerlein

Treasurer: Seth Millstein

Secretary: Allison Murphy

I have every confidence in the incoming executive council. They will, no doubt, navigate these changing times with aplomb. *It has been an honor to serve the Section these past many years as an officer and chair.*

Thank you. ■

Incoming Chair's Report

By Brett Hill – Ahlers Cressman & Sleight PLLC

I want to thank Amber for her leadership this last year as the chair of the Section. She skillfully guided the Section through our transition to all online council meetings and all online midyear and Vancouver CLEs. The Section did not miss a beat and we continued to have strong attendance and great speakers for the CLEs.

We look forward to this coming year and we are ready to meet the new challenges. We are currently in the planning stages for the Mid-Year CLE for 2021 and that CLE will be focused on timely issues facing construction law practitioners during this ongoing pandemic. We are also looking at refreshing the contract forms that are available on the Section website as well as planning our traveling/road trip CLE and law school writing competition. This will be a great year and we look forward to seeing you at events in 2021 (even if it may be only virtually). I look forward to serving the Section this year as chair and thank you for your continued involvement with the Section. ■

Conway Construction Company v. City of Puyallup

By Seth Millstein – Pillar Law PLLC

On May 4, 2020, Division I issued a published decision in *Conway Construction Company v. City of Puyallup*, No. 80649-I, considering whether a public agency properly terminated its contractor and if not, whether the agency was entitled to a set-off or defective work against the contractor's wrongful termination damages.

Conway Construction Company ("Conway") contracted with the City of Puyallup ("City") to perform public road improvements. The executed contract incorporated various documents, including the WSDOT Standard Specifications for Road, Bridge and Municipal Construction. Twice in March 2016, the City gave Conway notice of suspension and breach of the contract. Conway denied allegations, including defective / uncorrected work and safety violations. Conway therefore did not cure. The City terminated

Conway and withheld payments on March 25, 2016. On April 23, 2016, L&I issued Conway a citation for "serious" safety violations endangering Conway's workers. Conway sued the City, seeking a determination that the default was improper and that it should be declared a termination for public convenience. Conway also claimed breach of contract and unjust enrichment. The trial court found the City breached when it terminated Conway, awarding Conway damages, costs, and fees. The City appealed.

The City argued the trial court erred because:

- The wrong test was used to determine whether termination was proper (*i.e.* for default);
- The contract allowed for offsets for Conway's defective work; and
- The award of attorney fees was improper because a statutory offer of settlement was never tendered.

First, Division I addressed the standard for termination. The City argued the proper test was: (1) whether Conway defaulted, and (2) if so, was the City satisfied with Conway's efforts to remediate. Conway agreed with part 1 of the test, but as to part 2, it argued that the standard was whether or not it neglected or refused to correct the rejected work. Division I looked to paragraph 22 of the contract, which allowed the City to terminate for "good cause," which included "failure to comply with Federal, state or local laws, rules or regulations." Importantly, paragraph 22 was silent about the opportunity to cure prior to effective termination. However, because the contract incorporated WSDOT Standard Specifications, Division I also looked to the general terms of the Standard Specifications. These allowed for termination under a variety of different acts (or omissions), and then required notice and the opportunity to cure "to the satisfaction of the Contracting Agency." In the event of a conflict between the contract and the Standard Specifications, the contract stated that the contract governed. The City argued that, because there was a conflict between paragraph 22 of the contract and the Standard Specifications, once Conway violated a safety regulation, the contract allowed it to terminate without the opportunity to cure under the Standard Specifications.

Division I disagreed. First, using

Caselaw Update:

State Construction, Inc. v. Hartford Fire Ins. Co

By Athan E. Tramountanas – Ogden Murphy Wallace PLLC

Editor's Note: An article appeared in the last edition of this newsletter about *State Construction, Inc. v. Hartford Fire Ins. Co*, No. 78753-5-I. Seth Millstein of Pillar Law PLLC, our intrepid and underpaid reporter, promised to keep readers apprised of developments. True to his word, he submitted the following:

On July 8, 2020 the Washington Supreme Court unanimously denied State Construction's petition for review, and awarded reasonable attorney fees and costs, to be determined, pursuant to RAP 18.1 to Respondent Hartford Fire Insurance Company. ■

Conway Construction Company v. City of Puyallup

...continued from page 3

the objective manifestation theory of contracts, Division I found there was no conflict as the City contended. While it is true that paragraph 22 was silent about the termination procedure, this does not conflict with the opportunity to cure under the Standard Specifications, which Division I described as a “supplement” to paragraph 22. Further, the City appeared to be aware of this interplay. In its notices and correspondence with Conway, the City referenced the Standard Specifications. “Only in litigation did the City discover a conflict.”

The next question, in this first part of its analysis, required Division I to review what constituted “justification” for termination. Here, the court relied on a Federal case, *Lisbon Contractors, Inc. v. US*, 828 F.2d 759, 765 (Fed. Cir. 1987), which held that, where the government is a party, the government has the burden of proving whether termination of a contract for default was justified.” The trial court found the City was *unjustified* because Conway addressed the safety issues when it worked directly with L&I. The court found that Conway “cured by the end of the suspension period.” Any breach was therefore resolved.

Second, Division I examined whether the City was entitled to a set-off for defective work. This is the most interesting part of the case. The City argued that, even if it terminated for convenience, it is

contractually permitted to “set-off for defective work.” The court disagreed, reading the relevant contract provision narrowly to prevent set-off (*i.e.* whether the contract was partially terminated or entirely terminated as it was here). Importantly, Division I agreed that “[n]o Washington case law addresses whether a breaching party is entitled to a set-off when it did not give the other non-breaching party an opportunity to cure alleged defects.” Therefore, the court chose to follow an Oregon case, *Shelter Products, Inc. v. Steelwool Construction, Inc.* 257 Or. App. 382, 402, 307 P.3d 449 (2013). *Shelter Products* “held that the breaching party is *not* entitled to set-off for allegedly defective work, where the breaching party did not provide notice of defects and opportunity to inspect, cure or complete its work.”

Finally, Division I addressed the issue of attorney fees, which the trial court awarded to Conway. Division I disagreed. Neither party presented a formal offer under RCW 39.04.240, which applies RCW 4.84.250—other than the dollar amounts—to set up the same scheme for offers of settlement on the adverse party not less than 30 days and not more than 120 days after completion of service and filing. Here, Conway did not present a formal settlement offer. Even though the contract contained a prevailing party attorney fees clause, Division I held it could not recover attorney fees. Division I

looked to legislative intent, and held that any contract provision that waives the government entity’s right to receive an early settlement offer, before being exposed to an attorney fee claim, is void. Conway’s failure to make a timely settlement offer meant it was *not* the prevailing party for the purposes of recovering attorney fees.

Discussion

Conway raises several practical points. First, practitioners must keep in mind that courts (at least Division I) will not look fondly on a failure to allow for a cure of defective work in the public works context. Though Division I never mentioned “fairness,” this seems to be the underlying—and unstated—theme of the case. The essential point was that it was not “fair” for the City to terminate without allowing the contractor an opportunity to cure. Division I then allowed the rest of its opinion (other than the denial of attorney fees) to flow around this theme. Including the second point: the City could not offset damages for defective work. Basically, if one party terminates and is *wrong* about its decision, the consequences can be harsh (*i.e.* no off-set). Though Division I never referenced *Parsons Supply Inc. v. Smith*, 22 Wn. App 520, 523 (1979), a private works case, the theme is extremely similar: the breaching party cannot demand performance from the non-breaching party. In *Conway*, this point was extended to

Continues on page 5...

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Conway Construction Company v. City of Puyallup

...continued from page 4

a denial of set-off. The *Conway* court therefore broadened the general rule, by pointing to Oregon law in denying set-off to reduce the breaching party's tab for damages.

The attorney fee issue seemed to cut in the exact opposite direction of "fairness" to the "wronged" party. This was surprising. It created a harsh result for Conway, making two things clear for practitioners. First, pay extremely close attention to fee provisions in public works cases. Second, though it's not always easy, you must examine realistic ranges *early* in public works cases and submit a timely offer. If you fail to do so, not even the contract will protect you. ■

And the Winners Are...

THE FOLLOWING ARTICLES were winners of the 2020 WSBA Construction Law Section writing competition. The Section invited interested 2L and 3L students from the three Washington law schools to write on a pre-selected construction law topic. Seth Millstein chaired the competition committee with help from others in the Section. First place went to **Raymond Cleaveland**, a (now) 3L at Seattle University School of Law, who received a \$2,500 award. Second place went to **Shweta Jayawardhan**, a (now) 3L at University of Washington School of Law, with a \$1,000 award. More valuable than money, of course, is that both entries are published below in this venerable newsletter. *Thanks to Seth for his hard work and congratulations to Raymond and Shweta!*

1st
Place

Enforceability of a "Pay-if-Paid" Clause

By Raymond Cleaveland, 3L at Seattle University School of Law

IS A "PAY-IF-PAID" conditional payment clause between a prime contractor and a subcontractor on a private commercial project enforceable in Washington? If it is, can the subcontractor record and foreclose a mechanic's lien against the owner's property? The first question deals with the prime's liability to the subcontractor, while the second asks whether the subcontractor can recover from the owner. This essay suggests that Washington courts would probably attempt to balance the equities to obtain a just result for the subcontractor, enforcing a valid contractual clause while preventing the owner's unjust enrichment.

Pay-if-Paid Clauses in Washington

A true "pay-if-paid" clause in a construction contract establishes a condition precedent to payment: the prime contractor will pay a subcontractor for work if and only if the prime collects payment from the owner.¹ Due to the severe consequences of such a provision, courts require exacting and unambiguous language in the payment clause before concluding that the parties freely chose to contractually allocate risk in that way.² Following the Sixth Circuit's lead in *Thomas J. Dyer Co. v. Bishop International Engineering Co.*—the seminal case in this matter—courts have generally interpreted most contingent payment clauses as

Continues on page 6...

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Enforceability of a “Pay-if-Paid” Clause by Raymond Cleaveland

Continued from page 5

“pay-when-paid” rather than “pay-if-paid.”³ As Bruner and O’Connor note, “[u]nless drafted with excruciating clarity, many courts will simply interpret [conditional payment] provisions as granting the general contractor additional time in which to make payment [i.e., pay-when-paid] rather than relieving it of the obligation entirely [i.e., pay-if-paid].”⁴ The distinction between the two is consequential: valid pay-if-paid provisions rarely survive a defendant’s motion for summary judgment, meaning a bankrupted subcontractor will neither get his day in court nor his check in the mail.⁵

No Washington statute addresses either type of contingent payment clause.⁶ The leading appellate decision in this matter is *Amelco Electric v. Donald M. Drake Co.*⁷ The Drake Company was the prime contractor first hired to build Seattle’s Kingdome. After pouring tons of concrete and millions of dollars into the project, a cost-overrun albatross hung low around Drake’s neck.⁸ On Dec. 10, 1974, two years into the project, King County Executive John D. Spellman fired Drake. Three days later, Drake in turn canceled its \$1.3-million subcontract with Amelco Electric.⁹ In refusing to pay the contract’s \$162,000 balance, Drake cited the following “pay-if-paid” contingent payment clause: “Contractor shall be liable to Subcontractor only for the reasonable value of Subcontractor’s work completed to the extent that Contractor has received payment for said work from Owner.”¹⁰ Amelco sued. Relying on *Dyer*, the *Amelco* court held the clause to mean “pay-when-paid” rather than “pay-if-paid”—it merely afforded Drake a reasonable period of time to collect from the owner and make Amelco whole.¹¹ The court, however, did not discount the possibility that a more precisely worded contractual clause could have yielded a different result: “[W]here a contract clearly shows the intent to create an express condition precedent, the court will enforce the contract in accordance with the parties’ intent ... [and] not look beyond the four corners of the written instrument.”¹² *Amelco* is still good law. Absent express and clear language in a contingent payment clause, Washington courts will default to requiring payment within a reasonable period of time, *namely* pay-when-paid. But make no mistake, valid pay-if-paid clauses are indeed enforceable in Washington.

(In this hypothetical, the actual wording of the clause is not given; as described in the fact pattern, it

would likely be construed as pay-when-paid under *Amelco*, but since it also says that the pay-if-paid clause is “valid,” I assume for the remainder of this discussion that the clause expressly created the requisite condition precedent. In this regard, the prime’s chief affirmative defense is an enforceable contract with a valid conditional payment clause. The prime’s motion for summary judgment or dismissal with prejudice will probably be granted.)

It is likely that the subcontractor could eventually make a claim of restitution (quasi-contract) against the owner for unjust enrichment, but that might be a dry well if the owner is truly bankrupt. The other path available to the subcontractor is to record and foreclose a lien. The following section will consider whether a valid paid-if-paid clause operates as a waiver of a subcontractor’s lien rights.

Liens

A mechanic’s or materialman’s lien—also called a “construction lien” more generally—is a creature of statute, derogating from the common law.¹³ Enacted to bolster the construction industry, lien statutes provide a safety net for contractors, subcontractors, laborers, suppliers, or certain other construction professionals in the event of nonpayment.¹⁴ Lien statutes allow these professionals to secure a financial interest in the owner’s real property (both improvements and underlying land) as a means of eventual recovery after foreclosure and sale.¹⁵ The action to foreclose the lien is a *quasi in rem* proceeding in which the *res* is the liened property.¹⁶ Washington’s lien statute, most recently revised during the 1991 legislative session, assures construction professionals of “a lien upon the [property’s] improvement for the contract price of labor, professional services, materials or equipment furnished at the instance of the owner.”¹⁷

While construction liens offer prime and subcontractors a powerful means of protection, they are not impervious to legal challenges. One possible defense is the owner’s lack of contractual privity with the subcontractor, but that usually does not defeat a mechanic’s lien claim.¹⁸ However, the affirmative defense that the owner could raise that is most germane to our discussion of pay-if-paid clauses (and most likely

Continueds on page 7...

Enforceability of a “Pay-if-Paid” Clause by Raymond Cleaveland

Continued from page 6

to succeed) is the potential absence of underlying debt. In the unhappy scenario where a pay-if-paid condition precedent obtains, the subcontractor has no contractual right to payment from the prime, and the prime is no longer indebted to the sub. With a pay-if-paid clause, the subcontractor explicitly contracts away the right to be paid, arguably resulting in a de facto lien waiver. Why? As Karl F. Oles and Bart W. Reed put it, “[a] construction lien secures collection of a debt. If no debt exists, there is nothing to secure.”¹⁹ The Washington lien statute corroborates this reasoning. In order to validly record a construction lien, the statute requires that “the name of the person *indebted* to the claimant” be stated as well as the “principal amount for which the lien claim is filed.”²⁰ And the statute also requires a lien to be unconditionally released after the *debt* has been paid.²¹ A validly invoked pay-if-paid clause, therefore, would appear to vitiate the subcontractor’s lien rights. The California Supreme Court has acknowledged as much. In *Wm. R. Clarke Corp. v. Safeco Ins.*, that court conceded that a pay-if-paid provision is a substantive waiver of mechanic’s lien rights, having the same practical effect as if the claimant had expressly waived them.²² New York’s high court went further, holding that even pay-when-paid clauses constitute a forcible waiver of mechanic’s lien rights.²³

In *Clarke*, the California Supreme Court invoked public policy to offer subcontractors an escape from the pay-if-paid blind alley: “[P]ay if paid provisions ... are contrary to the public policy of this state and therefore unenforceable because they effect an impermissible indirect waiver or forfeiture of the subcontractors’ constitutionally protected mechanic’s lien rights.”²⁴ Like California, the New York and Nevada high courts have also held that pay-if-paid clauses are void *ab initio* on identical public policy grounds,²⁵ while North Carolina and Wisconsin have done the same by statute.²⁶ No Washington court or statute has similarly invoked public policy to obviate pay-if-paid clauses in the name of protecting lien rights.²⁷ So, does a valid pay-if-paid clause defeat a subcontractor’s right to record a lien in Washington? Probably not.

The existence of a debt is a necessary condition for the valid foreclosure of a mechanic’s lien, but it is not a sufficient condition. For a subcontractor on the losing end of a pay-if-paid clause, there may be no debt *contractually*, but financially—speaking in terms of real

dollars and cents—there absolutely is. Furthermore, the statute implies that the subcontractor’s right to record a lien is derived not from the existence of the debt, but from the existence of a valid contract, executed before the work began, and fulfilled (even partially) by rendering the agreed-upon services: “any person furnishing [services] shall have a lien upon the improvement for the contract price.”²⁸

The longstanding rule for lien statutes is that they be construed strictly because they derogate from the common law.²⁹ However, the Washington State Legislature specifically decreed in RCW 60.04.900 that the current lien statute is “to be liberally construed to provide security for all parties intended to be protected by their provisions.” The Washington Supreme Court clarified in *Williams v. Athletic Field, Inc.* that both rules apply when courts construe the mechanic’s lien statute: strict construction is applied to procedural and substantive matters (notice requirements, whether or not the work is truly an “improvement” per RCW 60.04.021), while liberal construction is applied to the parties “intended to be protected” by the statute.³⁰ Under that liberal construction rubric, courts should recognize that the legislature intended to afford the remedy of a mechanic’s lien to “any person” who meets the other requirements of .021.³¹ As the state Supreme Court noted as recently as 2018, “[c]onstruction lien statutes such as chapter 60.04 RCW were enacted to create a cause of action and remedy ... [T]he statute is construed liberally to protect persons who fall within its provisions.”³² In this sense, a Washington court would likely engage in an equity-balancing analysis: a subcontractor who is denied rightful payment for services rendered due to the infelicitous combination of an insolvent owner and an unforgiving contractual clause ought to fall within the statute’s protection, notwithstanding lack of contractual debt.

The Washington lien statute is not antithetical to a freely bargained contract allocating risk between the parties, but denying a subcontractor’s lien rights after devastating economic loss would be antithetical to the statute’s liberal construction provision and its remedial purpose. The subcontractor did not bargain for bankruptcy, and the lien statute clearly affords him a fallback. Yes, “pay-if-paid” was the deal struck—the

Continues on page 8...

Enforceability of a "Pay-if-Paid" Clause by Raymond Cleaveland

Continued from page 7

prime contractor may be off the hook, but the owner is not. A lien should be recorded and foreclosed against his property for the contract price. ■

- 1 Statutes Adopted for Protection of the Parties: Statutes Protecting Subcontractors, 8 Williston on Contracts § 19:59 (4th ed.).
- 2 *Id.*; Pay-if-Paid vs. Pay-when-Paid in Construction Contracts, Practical Law Practice Note 9-604-7025.
- 3 303 F.2d 655, 661 (6th Cir. 1962).
- 4 Conditional payment provisions, 6 Bruner & O'Connor Construction Law § 19:57.
- 5 William M. Hill & Mary-Beth McCormack, "Pay-If-Paid Clauses: Freedom of Contract or Protecting the Subcontractor from Itself?", *Constr. Law.*, 27 (Winter 2011).
- 6 Douglas S. Oles, Washington, *Constr. Law.*, 24 (Fall 2004).
- 7 20 Wn. App. 899 (1978).
- 8 See Les Ledbetter, "Seattle Stadium Suit a Legal Test on Cost Overruns," *The New York Times*, Dec. 5, 1977 at 18, www.nytimes.com/1977/12/05/archives/seattle-stadium-suit-a-legal-test-on-cost-overruns.html.
- 9 *Amelco*, 20 Wn. App. at 901.
- 10 *Id.*
- 11 *Id.* at 902-03.
- 12 *Id.* at 901, 902.
- 13 Karl F. Oles & Bart W. Reed, Construction Liens in Washington, Ch. 2 at 3 (2019) www.stoel.com/getmedia/58675d78-ccac-4a14-b961-a6507c766501/The_Construction_Lien_In_Washington [hereinafter Liens in Washington].
- 14 *Id.*, Ch. 1 at 3; Construction Liens in Practice (WA), Practical Law Practice Note w-016-8986.
- 15 Liens in Washington *supra* note 13 Ch. 1 at 3.
- 16 Diversified Wood Recycling, Inc. v. Johnson, 161 Wn. App. 891, 902 (2011) ("It is the filing of a lien claim that actually encumbers the property made subject to the lien.")
- 17 RCW 60.04.021.
- 18 *E.g.*, F.T. Crowe & Co. v. Adkinson Const. Co., 67 Wash. 420, 424 (1912).
- 19 Liens in Washington, *supra* note 13 ch. 6 at 1; See also *W.-Fair Elec. Contractors v. Aetna Cas. & Sur. Co.*, 87 N.Y.2d 148, 158 (1995) (holding that "'mechanics' liens may not be enforced until a debt becomes due and payable.")
- 20 RCW 60.04.091(1)(c), (f). Emphasis added.
- 21 RCW 60.04.071.
- 22 15 Cal. 4th 882, 890 (1997).
- 23 *W.-Fair Elec. Contractors*, 87 N.Y.2d at 158.
- 24 *Wm. R. Clarke*, 15 Cal. 4th at 890.
- 25 *W.-Fair Elec. Contractors*, 87 N.Y.2d at 158; *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1117-18, (2008); but see *MidAmerica Constr. Mgmt., Inc. v. MasTec N. Am., Inc.*, 436 F.3d 1257, 1266 (10th Cir. 2006) (holding that same not true in New Mexico because that state does not have an express anti-waiver provision in its mechanic's lien laws denoting such a public policy preference).
- 26 N.C. Gen. Stat. § 22C-2; Wis. Stat. Ann § 779.135(1). Illinois, Maryland, and Missouri have also statutorily limited pay-if-paid clauses while holding short of their outright prohibition. See 770 Ill. Comp. Stat. Ann. 60/21; Md. Code Ann., Real Prop. § 9-113(b), (c); Mo. Ann. Stat. § 431.183.
- 27 As in New Mexico (see *MidAmerica Constr. Mgmt.*, *supra* note 25), Washington's lien statute has no express anti-waiver provision. Oles and Reed suggest that lien rights cannot be waived prospectively but could be released before work begins for consideration. No Washington case law addresses the question. Liens in Washington, *supra* note 13 ch. 6 at 7.
- 28 RCW 60.04.021.
- 29 *Tsutakawa v. Kumamoto*, 53 Wash. 231 (1909).
- 30 Liens in Washington, *supra* note 13 ch. 1 at 3-4; See *Williams v. Athletic Field, Inc.*, 172 Wn.2d 683, 697 (2011).
- 31 *Williams*, 172 Wn.2d at 697.
- 32 *Inland Empire Dry Wall Supply Co. v. W. Sur. Co.* (Bond No. 58717161), 189 Wn.2d 840, 844 (2018).

Your Input Is Needed!

The Construction Law Section newsletter works best when Section members actively participate.

We welcome your articles, case notes, comments, and suggestions concerning new developments in public procurement and private construction law. Please direct inquiries and submit materials for publication to:

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Enforceability of a "Pay-if-Paid" Clause

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ISSUE AND BRIEF ANSWER

WHERE A SUBCONTRACT contains a pay-if-paid clause and the subcontractor performed the contract but the owner did not pay the prime, does the subcontractor have a supportable claim of lien on the project for the subcontract price?

Yes. The subcontractor likely has a supportable claim of lien against the owner's property because a pay-if-paid clause in the subcontractor's contract with the general contractor (GC) does not diminish the subcontractor's statutory lien rights under RCW 60.04. The statute establishes liens for labor furnished under a contract, not for payment due under a contract.

FACTS

The subcontractor entered a subcontract with the GC for a project on the owner's property. The subcontract contains a valid "pay-if-paid" clause. The subcontractor completed performance of the contract. The owner did not pay the prime for the work and, consequently, the prime did not pay the subcontractor. The subcontractor records a claim of lien on the project within the statutory window of 90 days from completing work.

ANALYSIS

I. The subcontractor has a statutory Mechanics' and Materialmen's lien on the project property.

Under RCW 60.04.021:

"Except as provided in RCW 60.04.031, any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner."

"A lien statute must be strictly construed to determine whether the lien attaches, and its benefits will be extended only to those who clearly come within the statute's terms." *Pac. Indus., Inc. v. Singh*, 120 Wash. App. 1, 6 (2003). This rule is strict as to what work and individuals fall within the statute, but liberal as

to whether those individuals have a supportable lien claim. RCW 60.04.900; *Williams v. Athletic Field, Inc.*, 172 Wash. 2d 683, 697, (2011). Construction labor by a subcontractor falls under protection of the lien statute if the subcontract is with a licensed or registered contractor and the subcontractor performed lienable work on an improvement. *Id.*; RCW 60.04.011(1). If the GC is "registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW" and the subcontractor's work is lienable work on an improvement, the subcontractor has a statutory right to a lien on the property. RCW 60.04.041.

The lien statute broadly defines lienable work covered by the statute.

"Furnishing labor, professional services, materials, or equipment" means the performance of any labor or professional services, the contribution owed to any employee benefit plan on account of any labor, the provision of any supplies or materials, and the renting, leasing, or otherwise supplying of equipment for the improvement of real property." RCW 60.04.011(4).

The improvement requirement does not solely mean buildings, but rather encompasses:

"(a) Constructing, altering, repairing, remodeling, demolishing, clearing, grading, or filling in, of, to, or upon any real property or street or road in front of or adjoining the same; (b) planting of trees, vines, shrubs, plants, hedges, or lawns, or providing other landscaping materials on any real property." RCW 60.04.011(5).

While the statutory language is broad, courts strictly construe the requirement. *See McAndrews Grp., Ltd., Inc. v. Ehmke*, 121 Wash. App. 759, 90 P.3d 1123 (2004) (staking and marking of property did not constitute labor to an improvement for purposes of mechanic's lien statute); *Colorado Structures v. Blue Mountain Plaza*, 159 Wn. App. 654 (2011) (drilling to test ground and groundwater did not satisfy improvement requirement); *see also Henifin Constr., LLC v. Keystone Constructors*,

Continues on page 10...

Enforceability of a "Pay-if-Paid" Clause by Shweta Jayawardham

Continued from page 9

G.W., 136 Wn. App. 268 (2006) (removing soil and replacing with new soil matter satisfied improvement requirement). If labor's "resulting improvements will be permanently affixed to or part of the realty," the requirement is likely met. *Colorado Structures*, 159 Wash. App. at 663.

If an owner is not obligated to pay a prime contractor, that does not defeat the lien right of a subcontractor who contracted with a prime contractor. *Kean v. Thomas B. Watson Co.*, 149 Wn. 424, 431 (1928) (prime contractor breached contract with property owner to construct a well, laborers contracted with prime contractor and fulfilled contract, laborers had lien on property for their contract price regardless of owner and prime's contract dispute).

"Contract price" means the amount agreed upon by the contracting parties, or if no amount is agreed upon, then the customary and reasonable charge therefore." RCW 60.04.011(2).

More facts regarding the subcontractor's work are necessary to determine whether the work is lienable work covered by the lien statute. Given the broad definition of covered lienable work and improvements, the subcontractor's contract, absent pay-if-paid considerations, is likely covered by the lien statute.

II. The subcontract's pay-if-paid clause does not diminish the subcontractor's lien claim.

Pay-if-paid clauses make payment by the project owner to the prime contractor a condition precedent to payment to the subcontractor. They are barred in many states. Washington courts have not directly addressed the enforceability of pay-if-paid clauses. *Cf. W. States Paving Co. v. Pease & Sons, Inc.*, 132 Wn. App. 1034 (2006) (recognized existence of pay-if-paid clause in contract, but did not address validity because claim was time barred). A valid pay-if-paid clause in Washington must include explicit language stating the condition precedent. *Amelco Elec. v. Donald M. Drake Co.*, 20 Wash. App. 899 (1978).

In *Amelco*, the Court of Appeals interpreted ambiguous contract language which stated the prime "Contractor shall be liable to Subcontractor only for the reasonable value of Subcontractor's work completed to the extent that Contractor has received payment for said work from Owner." *Amelco Elec.*, 20 Wash. App. at 901. The court found this language did not create a

condition precedent to payment. *Id.* at 903. Rather, "it postponed payment for a reasonable period of time after the work was completed, during which [Prime] was afforded an opportunity to obtain from [Owner] the funds necessary to pay [Sub]." *Id.* Such clause is known as a pay-when-paid clause. The court further states that a contract construction that "require[s] the subcontractor to wait to be paid for an indefinite period of time until the prime contractor has been paid by the owner, which may never occur" is a "patently unreasonable" construction. *Id.*

Amelco suggests Washington courts may not look favorably upon pay-if-paid clauses because they will not interpret a contract to include such a clause without express condition precedent language. Further, the court found a condition precedent construction would be unreasonable.

RCW 60.04.900 places a mandate on courts that provisions of the lien statute "are to be liberally construed to provide security for all parties intended to be protected by their provisions." This provision, when paired with *Amelco*, suggests that statutory lien rights would trump a pay-if-paid clause because courts must liberally construe the statute to protect contractors who fall within its scope.

Unlike the contract in *Amelco*, the subcontractor's contract includes an express condition precedent clause. The *Amelco* court did not need to address the enforceability of pay-if-paid clauses because it found the contract did not contain such a clause. *Amelco* therefore does not bar enforcement of the clause in this contract.

A pay-if-paid clause governs the contract between the subcontractor and the prime. There is no contract between the subcontractor and the owner. A statutory lien attaches to the owner's property, not to any property owned by the prime. The pay-if-paid clause should therefore not govern the subcontractor's lien claim on the owner's property. This is true regardless of whether Washington courts will uphold pay-if-paid clauses.

III. The owner will challenge the underlying debt and contract as to dispute lien.

To dispute the lien, first, the owner may challenge the underlying debt. The owner may argue that no debt

Continues on page 11...

Enforceability of a "Pay-if-Paid" Clause by Shweta Jayawardham

Continued from page 10

exists because given the condition precedent was not met, no payment is owed. "A lien is an encumbrance on property to secure payment of a debt." *S.D. Deacon Corp. of Washington v. Gaston Bros. Excavating*, 150 Wash. App. 87, 89 (2009). In theory, without a debt there can be no lien.

While this argument may serve as a defense to a common law lien, construction liens are statutory liens and the argument is inconsistent with the statute language. *Cf. Pac. Indus., Inc.*, 120 Wash. App. at 6 ("[s]tatutory liens are in derogation of common law"). The statute states a person has a lien "for the contract price of labor ... furnished at the instance of the owner, or the agent or construction agent of the owner." RCW 60.04.021. The lien is for labor furnished, not for payment due under a contract.

Second, the owner may also argue in defense that it did not contract with the subcontractor and therefore the subcontractor cannot recover from him or her. The owner is unlikely to prevail on this argument. "[A]ll subcontractors that contract to work on a project fall within the definition of construction agent in RCW 60.04.011(1)." *Guillen v. Pearson*, 195 Wash. App. 464, 473 (2016). The owner accordingly may not shield the property from subcontractors.

Third, the owner may argue that the lien claim is frivolous because no payment is due under the contract. RCW 60.04.081 provides that an owner may challenge a lien if it is "frivolous and made without reasonable cause, or clearly excessive." "To be frivolous, a lien must be improperly filed beyond legitimate dispute." *Gray v. Bourgette Const.*, 160 Wash. App. 334, 342 (2011). The owner is unlikely to satisfy this high burden as there is legitimate dispute to support the subcontractor's claim.

Lastly, if a court upholds the pay-if-paid clause, the GC will be able to use the clause to deny breach and payment. The lien is on the owner's property, not on any property of the GC. Because the condition precedent was not met, the GC will not owe the subcontractor. This does not affect the subcontractor's lien on the owner's property.

CONCLUSION

The subcontractor's lien claim on the owner's property is separate from its contract with the GC. The lien statute in effect protects subcontractors from non-payment from condition precedent contracts. RCW 60.04.021 establishes liens for labor furnished

under a contract, not for payment due under a contract. This distinction protects the subcontractor's lien rights. The subcontractor likely has a supportable lien claim on the owner's property arising from RCW 60.04. ■

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