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## The Enforceability of “Pay-If-Paid” Provisions Affirmed in New Jersey

On December 7, 2022, the Appellate Division affirmed the New Jersey Superior Court decision in *Jersey Precast v. Tricon Enterprises, Inc. et al.*, finding that the “pay-if-paid” clause in a material supplier’s purchase order with a general contractor was binding and enforceable. While clauses conditioning a general contractor’s obligation to pay its subcontractors on the general contractor’s receipt of payment from the project owner are not unique – this is the first time that a court in New Jersey has affirmed this practice in a published opinion.<sup>1</sup>

### Background

The general contractor, Tricon, sent Jersey Precast its standard form purchase order for the supply of prestressed box beams to fulfill a public improvement contract with Union County. The reverse side of the form purchase order contained standard terms and conditions, and included a pay-if-paid clause drafted by Michael Zicherman, a partner of Peckar & Abramson, P.C. While Jersey Precast provided some draft revisions to the terms and conditions, Tricon never signed the purchase order and the proposed revisions were never accepted. Significantly, Jersey Precast did not attempt to modify the pay-if-paid provision. It later developed that the construction of the project became impossible, and the beams fabricated by Jersey Precast were not used. Tricon invoiced Union County for the cost of the beams, but the County failed to make payment and refused to accept delivery of the beams.

The terms and conditions of the purchase order contained the following pay-if-paid provision:

Vendor understands and agrees that Tricon’s obligation to make any payment to Vendor is subject to, and shall not exist unless and until, Tricon’s receipt of payment on account of Vendor’s [w]ork from the Owner..., the occurrence and satisfaction of which shall be a condition precedent to Tricon’s duty to remit payment.

While there is no statute or published caselaw governing the enforceability of pay-if-paid provisions in New Jersey, the court acknowledged that several states recognize these provisions as valid and enforceable where the language clearly transfers the risk of non-payment from the contractor to the subcontractor. As a basic principle of contract interpretation, terms that are negotiated between sophisticated parties are presumptively deemed to be reasonable and the court will not write a more favorable contract for the parties than they have themselves seen to make fit. With that as a backdrop, the Appellate Division held that the provision, as drafted, was clear, unambiguous, and thus, enforceable.

<sup>1</sup> While this is the first published opinion on this issue in New Jersey, a number of unpublished state court cases and at least one New Jersey federal district court case have indicated their approval of pay-if-paid clauses in construction subcontracts.

## Lessons Learned

### I. Understand the Terms and Memorialize that Understanding in a Signed Contract

The parties to any contract should understand the terms of the agreement and execute the final version of the negotiated agreement, which should include any exhibits and attachments thereto.

The issue before the court in *Jersey Precast* was made significantly more problematic because the purchase order was not clearly accepted by both parties. While modifications to Tricon's boilerplate language were proposed by Jersey Precast (who signed the modified version of the Tricon purchase order), they were not approved or accepted by Tricon, allowing Jersey Precast to argue that the Uniform Commercial Code should govern over the conflicting terms in the parties' unsigned agreement. Ultimately, the court ruled that since the modifications were not made to the pay-if-paid provision, and since the changes did not conflict with that provision, Jersey Precast's argument did not affect the enforceability of the condition precedent.

Given the fast pace of commerce and the proliferation of electronic means of communication, it is not unusual for parties to neglect to sign or retain complete copies of their contract documents. It is recommended that contracting parties always circulate a complete document set, including all exhibits and attachments, with signatures, to ensure that the parties have a final uniform contract agreement.

The lack of clarity in this case over which version of the agreement governed the transaction created room for competing legal interpretations of the situation, thereby complicating the litigation.

### II. Obtain Professional Assistance in Drafting and/or Modifying Pay-If-Paid Provisions

Jersey Precast argued that a pay-if-paid provision can be enforced only when the owner's non-payment is the result of an owner default or insolvency and not when the nonpayment is due to the fault of the general contractor. While the lower court ruled that the provision was silent with respect to situations where the general contractor was at fault, the Appellate Division determined that there was an issue of fact with respect to whether the non-payment was Tricon's fault.

Where the clause is silent on the issue, the court may rule that a pay-if-paid provision is not enforceable to the extent the general contractor is responsible for the Owner's non-payment. However, taking into consideration the Court's analysis of enforcing commercial contracts between sophisticated parties where the terms are unambiguous, it may be beneficial for general contractors to consider including provisions that directly and unambiguously address this issue in their pay-if-paid provisions.

It's worth noting that while this decision confirms the state-of-play in New Jersey, New York courts, with few exceptions, prohibit these provisions as an unenforceable waiver of a subcontractor's statutory lien rights and as a matter of public policy.

## Final Thoughts

For general contractors, this certainly is a positive development since it officially confirms the enforceability of pay-if-paid provisions in New Jersey. Nevertheless, it is important to ensure that your contract terms are clear and unequivocal and that the contract is executed by all parties to the transaction. If you have any questions, please reach out via email to Levi W. Barrett, Esq. at [lbarrett@pecklaw.com](mailto:lbarrett@pecklaw.com) or Michael A. Zicherman, Esq. at [mzicherman@pecklaw.com](mailto:mzicherman@pecklaw.com) or by phone at (201) 343-3434.

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