



VIEWS & VISIONS

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The Pennsylvania Contractor and Subcontractor Payment Act

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Mellor's 30-plus years of experience in construction law includes contract preparation and negotiation, contract enforcement through litigation or arbitration and dispute avoidance and resolution. He advises clients through every aspect of a construction project, from concept and planning to closeout and warranty claims.

Mellor has worked on numerous projects, ranging from major industrial and utility jobs to highway and bridge work, commercial buildings, schools, hospitals and residential construction. He has also assisted clients in a variety of real estate development issues. He has worked on projects, contracts and disputes in more than 20 states, Canada and Puerto Rico.

An arbitrator on the American Arbitration Association's Construction Mega Project Panel, Mellor also handles industry mediations, both privately and through the U.S. District Court for the Western District of Pennsylvania.

Mellor earned his law degree, *magna cum laude*, from Case Western Reserve University School of Law. He is recognized by *Super Lawyers* and *Best Lawyers in America*® for his work in Construction Law.

Construction touches everything. If your business has a roof, walls or windows, then some contractor built it. If you operate out of a tent, chances are good that the tent was manufactured in a building that some contractor built, and it was probably delivered by truck on a highway that some other contractor constructed. It is difficult to think of any aspect of our lives that is not tied to the construction industry, and usually at a much greater level than we recognize. A healthy construction industry is vitally important to our economic success and viability, and is well worth supporting and protecting.

Anyone who is involved in the construction industry at any level knows there are a multitude of moving parts that must all work together in concert to bring any new hospital, theater, office building, power plant or home to completion. Design, site work, utilities, mechanical, plumbing, electrical, framing and dozens of other components, along with all the associated materials, must come together in an intricate and organized dance to yield the finished product. But none of that is free, and money is the grease that keeps everything moving. If the grease runs out, parts begin to bind up and break. To have a healthy construction industry, contractors, subcontractors and suppliers have to get paid for their work and stay in business.

Generally, money on a construction project must flow from the owner to the contractor to the subcontractors and material suppliers. One of the age-old questions in the construction industry has been "when does the money flow?" An owner understandably doesn't like to pay for something until he can see results. A contractor understandably doesn't want to pay subs and suppliers until the owner has paid the contractor. And it is easy to understand how subcontractors

and suppliers can feel exposed when they've provided labor or materials but won't be paid for them until 30 or 60 days later.

Well-negotiated contracts with the appropriate sticks and carrots are the best way to deal with those concerns on a project-by-project basis. However, recognizing that not every project benefits from well-negotiated contracts, some state legislatures have taken steps to try and protect construction industry participants through legislation. The Pennsylvania Contractor and Subcontractor Payment Act (CASPA) is one such attempt.

Originally enacted in 2007, CASPA imposed payment terms, notice provisions and other protections in an attempt to "level the field" and keep money flowing on construction projects. It also added several big "sticks" to be used against the parties who improperly interfered with the cash flow. Under CASPA, interest at the exceptionally high rate of one percent per month, a previously unheard of "penalty" at the rate of an additional one percent per month and attorneys' fees, could all be imposed against someone who improperly withheld payment. Theoretically, that would keep the money flowing.

CASPA did provide clarity on rights and obligations as to payment on projects, and certainty in business transactions is always a good thing. However, like most well-meaning government intervention, certain aspects of the law left serious questions open, and some argued that it actually created some uncertainty. Over the past 11 years, courts have had an opportunity to address the questions arising from the original enactment of CASPA, and now the Pennsylvania Legislature has weighed in with a substantial amendment that went into effect in late 2018.

The big teeth in CASPA still revolve around the provisions for extra-contractual interest, penalty and attorneys' fees. The first question is *whether* and *when* those big teeth bite. The amendment clearly states that "Unless specifically authorized under this act, parties to a contract **may not waive** a provision of this act by contract or otherwise." The one percent per month interest provision, however, is specifically waivable. Section 4(d) of the original act said that the one percent per month interest charge applies "except as otherwise agreed by the parties," and that provision was not amended. If the parties' contract does not provide for interest on late payments, CASPA's one percent per month still applies.

The one percent per month penalty is theoretically not waivable. "If arbitration or litigation is commenced to recover payment due under this act and it is determined that an owner, contractor or subcontractor has failed to comply with the payment terms of this act, the arbitrator or court shall award, in addition to all other damages due, a penalty equal to one percent per month of the amount that was wrongfully withheld." The earlier version of CASPA provided that an amount was not deemed to be wrongfully withheld to the extent it bore a reasonable relation to the value of any claim held in good faith by the person owing the money. That made it seem a lot like "if you can come up with some decent excuse for not paying, you don't get the penalty applied."

The 2018 amendment tries to fix that problem. CASPA now provides that an amount is not deemed to be wrongfully withheld if: a) the amount bears a reasonable relation to the value of any good faith claim, and b) the person asserting the good faith claim

complies with the payment and notice provisions contained in sections 6 and 11 of the act. Though it always required written notice of the reason payment was being withheld, the 2018 amendments strengthen those provisions by explicitly providing that a failure to timely provide that written notice constitutes a waiver of the basis to withhold payment. The person withholding payment only has 14 days to provide written notice of the reason for withholding, and must pay the undisputed portion of the invoice. If not, the terms of the act invalidate the reason for withholding. It will be interesting to

Another area that the new amendments attempt to address relates to the withholding of retainage. Whether we agree with the concept or not, we're all accustomed to the idea that the people higher up in the payment chain are going to hold some level of retainage on the amount owed to the people further down the chain until the work is substantially complete. Theoretically, this protects the people higher up the chain from potential defects in the labor or materials provided to them by others. Unless it is negotiated up front, retainage can be a big cash flow problem for subcontractors and suppliers who provide the early work to a long-term project. The foundation subcontractor hates to wait for the end of a two-year construction project to collect his 10 percent retainage on work he completed satisfactorily at the very first stage of the job.

The 2018 amendments try to address that concern. Section 9 (a.1) provides that: "Upon reaching substantial completion of its own scope of work, a contractor or subcontractor **may facilitate** the release of retainage on its contract before final completion of the project by posting a maintenance bond with approved surety for 120 percent of the amount of retainage being withheld." This has been interpreted by some as mandatory, but the language really appears to be little more than a suggestion. There does not appear to be any language requiring a contractor to accept the maintenance bond and pay out the subcontractor's retainage. This would seem to make sense, because the contractor has not necessarily received that retainage from the owner at that point.

The amendments also attempt to address concerns over a subcontractor's right to suspend work for non-payment by writing into all subcontracts a non-waivable suspension right. It remains to be seen if



see how courts treat those provisions where the work being disputed is clearly and obviously defective but no written notice was sent.

The original non-waivable provision requiring the award of **reasonable** attorneys' fees to the substantially prevailing party remains unchanged under the 2018 amendments.

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Creating a Center for Healing

Douglas Leech
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Properties and WVU Hospitals, the need for large initial capital requirement is eliminated, while keeping the transaction off-balance sheet for the hospital.

Additionally, Ascension co-wrote a grant with the WVU Department of Behavioral Medicine and Psychiatry and was funded in the amount of \$1,000,000 through the Ryan Brown Treatment Fund provided by the West Virginia Department of Health and Human Resources, Bureau for Behavioral Health and Health Facilities. This grant funding, the P3 and the commitment by WVU Medicine to

provide high quality treatment to West Virginians suffering from SUD, has brought first-class residential treatment to our great state, which was previously only received out of state by those with the ability to pay for such expensive services.

The construction of this facility has involved some great contractors, engineers and architects. What is probably most notable has been the inclusion of Impact Construction on this project, which hires people in recovery from addiction. This facility is already giving back by employing and providing good jobs to people in recovery to build the very facility that will allow for thousands of West Virginians to begin their journey of healing.

While patient motivation and an evidence-based treatment program are

the most important factors in creating positive treatment outcomes, the look and feel of the treatment facility is also critically important. When someone is finally ready to get meaningful help for their addiction, they are “sick and tired of being sick and tired,” and the last place they want to go is to a sterile environment that feels like a medical office with bright overhead fluorescent lights. People more proactively seek treatment when the facility has a dignified, home-like setting in a peaceful and serene location, which is much more conducive to recovery and serenity. With a facility as nice as the new WVU RTC, those entering treatment will immediately feel that someone loved them and cared enough about them to provide such a great center for healing. ❧



The Boy Scouts of America: Building Futures in West Virginia

Jack Furst
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new \$4.1 million headquarters. The Buckskin Council’s H. Bernard Wehrle Sr. Scout Leadership Service Center opened in 2016, serving youth in 39 counties in West Virginia, Kentucky, Virginia and Ohio. Buckskin Council Scout Executive Jeff Purdy said, “It’s enabled us to

expand the services we offer to Scouts and to the community. In fact, we have outside groups using our facilities on a weekly basis.”

The BSA is excited to have found a home for the Summit Bechtel Reserve in the hills of West Virginia. Coal from the site may no longer be fueling the local economy, but the Summit Bechtel Reserve is still an economic powerhouse for the region. We foresee many generations of West Virginians and Scouts benefitting from the innovative programs and facilities created there. ❧



The Pennsylvania Contractor and Subcontractor Payment Act

K. Bradley Mellor
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this amendment will have much impact. Essentially, it requires 30 days’ written notice of failure to receive payment sent to the contractor. Then, if payment is not received in 30 days from that notice, an additional certified mail notice is sent to the owner. If payment isn’t received within 30 days after the certified mail notice, the subcontractor can suspend performance. CASPA does not specifically provide for payment of the type of expenses that often surround a suspension, such as demobilization, remobilization, labor or material cost increases, or site general

conditions. The act also does not provide any specific schedule relief in such situations. It will be interesting to see how courts apply this provision.

Though presumably well intentioned, it is difficult or impossible for a legislature to enact a law or amendment that adequately addresses the concerns and issues of all the owners, contractors, subcontractors and suppliers that the law will affect. The best way to address each party’s individual concerns is to identify and negotiate those concerns before signing a contract. Recognizing that the necessary level of detail and negotiation may not be available to all contractual relationships, the Pennsylvania legislature has tried, with its 2018 amendments to CASPA, to make the overall playing field a little more level. The courts will certainly weigh in on the interpretation of the amendment, and their decisions will help to clarify its application. ❧