

**INDIVIDUAL STATE'S POSITIONS ON CONDITIONAL
PAYMENT CLAUSES IN CONSTRUCTION SUBCONTRACTS**

TE	RULE	CASE NAME	CONTRACT LANGUAGE	HOLDING	STATUTES
ama	Majority ¹	<u>Crass v. Scruggs</u> , 115 Ala. 258, 22 So. 81 (1897).	"Payments based on engineer's estimates, and to be made on the 15th of each month, or as soon thereafter as said railroad company pays or causes to be paid the said J. T. Crass."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
ka	Minority ²	<u>Industrial Indem. Co. v. Wick Constr. Co.</u> , 680 P. 2d 1100 (Alaska 1984).	"Final payment shall be made within five days after CONTRACTOR has received his final or complete payment involving SUBCONTRACTOR'S portion of work."	Clause enforced as creating a valid condition precedent to payment. Because the contractor was not required to pay the subcontractor unless and until the owner paid it, interest did not begin to accrue until the owner paid the contractor.	
ona	Majority	<u>Pioneer Roofing Co. v. Mardian Constr. Co.</u> , 152 Ariz. 455, 733 P.2d 652 (1986). <u>Watson Constr. Co. v. Reppel Steel & Supply Co.</u> , 123 Ariz. 138, 598 P.2d 116 (1979).	"Contractor shall not, however, be liable for a greater sum than Contractor obtains from the Owner for such additional work . . . and the recovery by Subcontractor for such work shall be conditioned upon a prior recovery therefor by Contractor from the Owner." "THE CONTRACTOR AGREES . . . to pay the Sub-Contractor, promptly upon receipt thereof from the Owner, the amount received by the Contractor on account of the Sub-Contractor's work to the extent of the Sub-Contractor's interest therein At all times subcontractor shall be paid to the extent that the contractor has been paid on his account."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor. Court looked for language specifying payment to be made "exclusively" or "only" from a particular area. ". . . [P]rovisions such as those found in the subcontracts in question do not create a condition precedent in the absence of additional language which clearly shows that the payments were to be made "exclusively" or "only" from the specified fund and no other."	
ona (Cont.)		<u>Darrell T. Stuart Contractor of Arizona v. J.A. Bridges and Rust-Proofing, Inc.</u> , 2 Ariz. App. 63, 406 P.2d 413 (1965).	"The contractor shall pay the . . . subcontractor's pay estimate within ten days after receipt of payment by the Contractor"	"If the defendant did not receive all of its money from the contractor, the defendant nevertheless remained indebted to the [subcontractors] and the [subcontractors] were entitled to payment within a reasonable period of time following the completion of the performance of their contract obligation."	

or purposes of this handout, the majority rule is that, unless the parties explicitly and unambiguously provide otherwise, a general contractor must pay a subcontractor within a "reasonable" after the subcontractor completes its work, regardless of whether the owner has paid the general contractor for the work.

or purposes of this handout, the minority rule is that contract language which provides that payment is due after receipt thereof from the owner, is an enforceable conditional payment se and shifts the risk of owner nonpayment to a subcontractor.

insas	Majority	<u>Trinity Universal Ins. Co. v. Smithwick</u> , 222 F.2d 16 (8th Cir. 1955), cert. denied, 350 U.S. 837, 100 L.Ed 747, 76 S.Ct. 74 (1955).	Exact contract language not given in case.	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
ornia	Clause void as against public policy	<u>William R. Clark Corp. v. Safeco Ins. Co.</u> , 15 Cal. 4th 882, 64 Cal. Rptr. 2d 578, 938 P.2d 372 (1997).	“Receipt of funds by Contractor from Owner is a condition precedent to the Contractor’s obligation to pay Subcontractor under this Agreement, regardless of the reason for Owner’s nonpayment, whether attributable to the fault of the Owner, Contractor, Subcontractor or due to any other cause. Subcontractor shall assume the risk that if [sic] the Owner does not, for any reason . . . pay Contractor money owing to it for the work provided by Subcontractor. Accordingly, Subcontractor agrees that: 1. Contractor shall have no obligation, legal, equitable or otherwise, to pay Subcontractor for Work performed by Subcontractor. Furthermore, in the event Contractor is never paid by Owner for Subcontractor’s Work, then Subcontractor shall forever be barred from making, and hereby waives, in perpetuity, any claim against Contractor therefore. . . .”	Condition precedent payment clauses are not enforceable in California. The clauses are against public policy because they amount to a waiver of mechanic’s lien rights. In California, mechanic’s lien rights can only be waived under certain circumstances. Neither the general contractor nor its payment bond surety could rely on the clause.	
rado	no cases - related case indicates	<u>Mularz v. Greater Park City Co.</u> , 623 F.2d 139 (10th Cir. 1980).	Architect to be paid final 20% of fee after completion of bidding and negotiations phase.	“An intent to create a condition [precedent] in a contract must appear expressly or by clear implication . . . [S]uch rule of construction is founded on a policy of avoiding, if possible,	

rado (Cont.)	application of quasi-majority rule			<p>forfeitures It is logical to infer that [the architect's] agreement to defer the balance of his fee until the time that the construction financing became available was made as an accommodation to [the owner]. It was made in anticipation of the bidding and negotiation phase being carried out. There is not the slightest indication that [the architect] intended to risk a portion of his fee on the non-occurrence of events over which he had no control [W]here, as here, a debt constitutes an absolute rather than a contingent liability, and payment was agreed to be made on occurrence of an event which does not occur, payment must be made within a reasonable time The clause regarding payment was indeed facially ambiguous, and the trial court was correct in its ruling as to the admissibility of parol evidence."</p>	
necticut	Majority	<p><u>Star Contracting Corp. v. Manway Constr. Co.</u>, 32 Conn. Supp. 64, 337 A.2d 669 (1973).</p> <p>Related case: <u>Blakeslee Arpaia Chapman, Inc. v. El Constructors, Inc.</u>, 239 Conn. 708, 687 A.2d 506 (1997).</p>	<p>"Partial payments by the Contractor to the Subcontractor hereunder shall be made only at such time or times as payments made by the Owner to the Contractor shall include work completed by the Subcontractor, and then only in the ratio that work performed by the Subcontractor bears to all work to be done by him under this subcontract or the extent that the Contractor has received payment for such work, whichever is the lesser. . . . payment will not be made . . . until the Owner has made payment to the Contractor for the work."</p> <p>"[P]ayment of the approved portion of the Subcontractor's monthly estimate shall be conditioned upon receipt by the Contractor of his payment from the Owner."</p>	<p>Clause enforced as creating a valid condition precedent to payment. The contractor was not required to pay the subcontractor unless and until the owner paid the contractor. Subcontractor must allege that the condition precedent is fulfilled in order to recover from surety.</p> <p>Even if language constituted a condition precedent, that condition was satisfied. The general contractor was paid less money than it sought, but was nonetheless required to pay the subcontractor the entirety of the amounts owed to it: "[The general contractor] was paid</p>	

necticut (Cont.)				for the work performed by the [subcontractor], albeit based on a different schedule of values than those agreed to by the [subcontractor] and [general contractor] in the subcontract. Although the project engineer for [the Owner] disallowed some of the value for the work performed, it is the subcontractual value that the [subcontractor] and [the general contractor] placed on the work performed that controls.”	
ware	Majority	<u>Acierno v. Worthy Bros. Pipeline Corp.</u> , 1996 Del. Super. LEXIS 347 (1996), <u>aff’d</u> , 693 A.2d 1066 (Del. 1997).	<p>“Final Payment . . . shall be made . . . when the Subcontractor’s work is completed. If an Architect and/or Engineer represents the Owner for the work and if the agreement between the Prime Contractor and/or Owner and/or Architect provides . . . that the Prime Contractor must receive payment from the Owner prior to paying the Subcontractor, neither the certificates of payment nor prior payment to the Subcontractor and final payment to the Subcontractor shall be made on demand by the Subcontractor.”</p> <p>On the front of the contract, the subcontractor’s representative had written: “Payment schedule: 30 day draws upon payment from Owner with 10% retainage till (sic) release & payment from Owner.”</p>	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
ict of Columbia	Majority	<u>Urban Masonry Corp. v. N&N Contractors, Inc.</u> , 676 A.2d. 26 (D.C. 1996).	<p>“1(a) Payments will be made to the Subcontractor promptly as they are received. Receipt of payment by Contractor shall be a condition precedent to payment being owed to Subcontractor</p> <p>1(e) Invoices for work performed by Subcontractor will be paid within five (5) days after receipt of the corresponding payment from General Contractor. . . . Late payments shall bear an interest at the rate of ten percent (10%) per annum”</p>	Although the court noted that it would normally enforce the clause as creating a valid condition precedent to payment, it refused to do so in this case because the contractor had failed to defend the subcontractor’s interests in settlement negotiations with the owner. The court held that the contractor may only assert the pay-when-paid clause as a defense if it has not done anything to hinder the satisfaction of the condition precedent.	

Conditional Payment Clauses

da	Majority	<p><u>OBS Co. v. Pace Constr. Co.</u>, 558 So.2d 404 (Fla. 1990).</p> <p><u>Peacock Constr. Co. v. Modern Air Conditioning</u>, 353 So.2d 840 (Fla., 1977).</p>	<p>“ . . . Final Payment shall not become due unless and until the following conditions precedent to Final Payment have been satisfied receipt of Final Payment for Subcontractor’s work by Contractor from Owner”by the Owner.”</p> <p>Final payment to be made “within 30 days after the completion of the work included in this sub-contract, written acceptance by the Architect and full payment therefor by the Owner.”</p>	<p>Although the subcontract clearly made payment from the owner a condition precedent, the general contract required the general contractor to submit an affidavit certifying that its subcontractors had been paid before final payment became due. The court found that the conflict between the subcontract and the general contract created an ambiguity. In these circumstances, “the intent to shift the risk of nonpayment is not clearly expressed, the payment provision must be interpreted as establishing a reasonable time to pay by the contractor rather than creating a condition precedent to the Contractor’s obligation to pay the subcontractor.”</p> <p>“[The] intent in most cases is that payment by the owner is not a condition precedent to the general contractor’s duty to pay the subcontractors There is nothing in this opinion, however, to prevent parties to these contracts from shifting the risk of payment failure by the owner to the subcontractor. But in order to make such a shift the contract must unambiguously express that intention. And the burden of clear expression is on the general contractor.”</p>	<p>SURETY: FLA STAT. § 713.245 (1996): “[i]f the contractor’s written contractual obligation to pay lienors is expressly conditioned upon and limited to the payments made by the owner to the contractor, the duty of the surety to pay lienors will be coextensive with the duty of the contractor to pay, if the bond contains on the front page, in at least 10-point type, the statement:</p> <p>THIS BOND ONLY COVERS CLAIMS OF SUBCONTRACTORS, SUB-SUBCONTRACTORS, SUPPLIERS, AND LABORERS TO THE EXTENT THE CONTRACTOR HAS BEEN PAID FOR THE LABOR, SERVICES OR MATERIALS PROVIDED BY SUCH PERSONS. THIS BOND DOES NOT PRECLUDE YOU FROM SERVING A NOTICE TO OWNER OR FILING A CLAIM OF LIEN ON THIS PROJECT.”</p>
rgia	Minority	<p><u>St. Paul Fire & Marine Ins. Co. v. Georgia Interstate Electric Co.</u>, 187 Ga. App. 579, 370 S.E.2d 829 (1988).</p> <p><u>Sasser & Co. v. Griffin</u>, 133 Ga. App. 83, 210 S.E.2d 34 (1974).</p>	<p>“ . . . no payment shall be due Subcontractor for such changed or extra work until Contractor has received payment from the Owner for said changes or extra work performed by Sub-contractor.”</p> <p>Subcontractors to be paid “as the work progresses, based on estimates and certificates of the Architects or Contractor and payments will be made from money received from the owner only and divided Pro Rata amount [sic] all approved accounts of subcontractors labor and material.”</p>	<p>Clause enforced as creating a condition precedent to payment. Court noted that the condition precedent to payment was clearly expressed in this subcontract.</p> <p>“A provision in a contract may make payment by the owner a condition precedent to a subcontractor’s right to payment if ‘the contract between the general and the subcontractor should contain an express condition clearly showing that to be the intention of the parties’ The condition is clearly expressed in this subcontract.”</p>	
rgia (Cont.)		<p><u>Peacock Constr. Co. v. West</u>, 111 Ga. App. 604, 142 S.E.2d 332 (1965).</p>	<p>“Final payment shall be made within 30 days after the completion of the work included in this subcontract, written acceptance by the Architect, and full payment therefor by the Owner.”</p>	<p>“[A]s we construe the plain and unambiguous language of the agreement, there are clearly expressed conditions precedent to defendants’ liability for the final payment of the contract price.”</p>	

Conditional Payment Clauses

aii	No cases				
o	Minority	<u>Hoff Cos. v. Danner</u> , 121 Idaho 39, 822 P.2d 558 (1991).	Language not given: Court concluded that parties, through their language and conduct, had impliedly agreed that the contractor's payment obligation was conditioned on its first receiving payment.	Pay-When-Paid terms of the parties' agreement created a valid condition precedent to payment. However, this is only the case when the payment by the Owner is <u>not</u> under the control of the Contractor.	
is	Minority	<u>Premier Elec. Constr. Co. v. American Nat'l Bank of Chicago</u> , 276 Ill. App. 3d 816, 656 N.E.2d 157 (1st Dist. 1995), <u>modified</u> , 213 Ill. Dec. 128, 658 N.E.2d 877 (1st Dist. 1995). <u>A.A. Conte, Inc. v. Campbell-Lowrie-Lautermilch Corp.</u> , 132 Ill.App.3d 325, 477 N.E.2d 30 (1985).	<p>"The amount retained by the General Contractor shall be disbursed to the Subcontractor upon the last to occur of . . . the Owner has paid the General Contractor the entire balance related to the work due to the General Contractor"</p> <p>"Final payment shall be held no more than the stated three months in the event that other subcontractor's [sic] or the General Contractor [sic] not completed their work"</p> <p>"Material invoices submitted before the 25th of the current month will be paid by the 28th of the following month . . . if payment for invoiced material has been received [I]f the work has been satisfactorily performed and invoice as rendered is approved and if payment for such labor and material so invoiced has been received . . . the subcontractor will be paid"</p>	<p>Pay-when-paid clause in contract was superseded by unambiguous language of final payment clause in same contract. The court concluded that the second clause overruled the pay-when-paid clause.</p> <p>"We do not believe that the record supports [the subcontractor's] claim that its right to payment . . . was absolute and not in any way contingent upon [the general contractor] receiving payment from the owners under the general contract. Our analysis of [the subcontract provisions] convinces us that the language is clear and unambiguous and, thus, there is no need to resort to rules of construction nor extrinsic evidence . . . plain, unambiguous language contained in the contract binds the parties to a condition precedent."</p>	"Any provision in a contract, agreement, or understanding, when payment from a contractor to a subcontractor or supplier is conditioned upon receipt of the payment from any other party including a private or public owner, shall not be a defense by the party responsible for the payment to a claim brought under Section 21, 22, 23 or 28 of the Act against the party." 770 I LCS 60/21.
is (Cont.)	surety case - void under statute	<u>Brown & Kerr Inc. v. St. Paul Fire & Marine Ins. Co.</u> , 940 F. Supp. 1245 (N.D. Ill., 1996).	"Final Payment . . . [shall be made] when . . . the Contractor has received final payment from the Customer under the Prime Contract."	By statute, the clause cannot create a condition precedent to payment. The clause merely establishes a reasonable time for payment. A surety cannot defeat a subcontractor's claim on a payment bond by asserting the contractor's pay-when-paid clause defense.	
ana	Majority	<u>Midland Eng. Co. v. John A. Hall Constr. Co.</u> , 398 F. Supp. 981 (N.D. Ind. 1975).	" . . . the last payment, which the said contractor shall pay to said subcontractor immediately after . . . final payment received by the contractor."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
a	Majority	<u>Grady v. S.E. Gustafson Constr. Co.</u> , 251 Iowa 1242, 103 N.W.2d 737 (1960).	"Contractor shall pay [] Sub-contractor in full within three (3) days after final acceptance of the project and payment of the final estimate by the Owner."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	

Conditional Payment Clauses

sas	Majority	<u>Shelley Elec., Inc. v. United States Fidelity & Guaranty Co.</u> , 1992 W.L. 319654 (D.Kansas 1992).	“Payment shall be made to Subcontractor within ten days after payment has been received by Contractor respecting such work or material, less any applicable percentage thereof retained in accordance with the aforesaid General Contract.”	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor. The parties may shift the risk of payment but that intention must be clearly and unambiguously expressed. (It noted that there was no express condition precedent language or use of terms like “if” or “unless.”)	
tucky	Majority	<u>A.L. Pickens Co. v. Youngstown Sheet & Tube Co.</u> , 650 F.2d 118 (6th Cir. 1981).	“We will pay you a sales commission of 5% on our F.O.B. net realized mill value of our products covered by this agreement. This commission will be paid once each month on sales of our products on the invoices which have been fully paid.”	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
siana	Majority	<u>Southern States Masonry, Inc. v. J.A. Jones Constr. Co.</u> , 507 So.2d 198 (La. 1987).	“. . . Contractor shall pay to Subcontractor, upon receipt of payment from the Owner, an amount equal to the value of Subcontractor’s complete work, to the extent allowed and paid by Owner on account of Subcontractor’s Work. . . . final payment. . . shall be made within forty-five (45) days after the last of the following to occur. . . (c) final payment by Owner to Contractor. . . .”	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor. (Note: LA courts appear willing to consider extrinsic evidence.)	
siana (Cont.)		<u>C.Bel for Awnings, Inc. v. Blaine-Hays Constr. Co.</u> , 532 So.2d 830 (La. Ct. App. 4th Cir. 1988).	“The contractor agrees to pay the subcontractor . . . as the work progresses on estimates made and approved by the Contractor and/or Architect and payment received from the owner.” Additionally, by subsequent agreement: [the] “parties acknowledge that . . . Subcontractor is not entitled to receive payment from [the general contractor] until [the general contractor] receives payment from [the owner].”	The subsequent agreements remove this case from the factual context of <u>Southern States</u> . The provision creates a condition precedent.	

land	Majority	<u>Gilbane Bldg. Co. v. Brisk Waterproofing Co.</u> , 86 Md. App. 21, 585 A.2d 248 (1991).	“Monthly and final payments will be made to the trade contractor within five (5) days after receipt of payment by the construction manager from the owner. . . . It is specifically understood and agreed that the payment to the trade contractor is dependent, as a condition precedent, upon the construction manager receiving contract payments, including retainer from the owner.”	Clause was enforced as creating a condition to payment because the parties utilized express condition precedent language to shift the risk of owner non-payment or owner insolvency. (Case preceded statute).	“(b) A provision in an executory contract between a contractor and a subcontractor that is related to construction, alteration, or repair of a building, structure, or improvement and that conditions payment to the subcontractor on receipt by the contractor of payment from the owner or any other third party may not abrogate or waive the right of the subcontractor to: (1) Claim a mechanics’ lien; or (2) Sue on a contractor’s bond (c) Any provision of a contract made in violation of this section is void as against the public policy of this State. Maryland <u>Real Property Code</u> , § 9-113. (Applies only to contracts executed after 10/1/94.)
sachusetts	Majority	<u>A.J. Wolfe Co. v. Baltimore Contractors, Inc.</u> , 355 Mass. 361, 244 N.E.2d 717 (1969).	“Payments were to be made, “. . . within 10 days after . . . [the owner’s] payment of such monthly progress payments . . . [has] been received by . . . [general contractor]. The balance of the contract price shall be paid . . . within thirty . . . days after full and final payment for the work by . . . [the owners]. . . . “	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	Pending: 1997 MA H.B. 1813 (introduced Jan. 1, 1997; now in Joint Comm. on State Admin.): “Performance by a subcontractor in accordance with the provisions of its contract shall entitle it to payment from the party with whom it contracts. Payment by the owner to a contractor is not a condition precedent for payment to a subcontractor and payment by a
sachusetts it.)					contractor to a subcontractor is not a condition precedent for payment to any other subcontractor, and as [sic] agreement to the contrary is unenforceable.”
igan	Minority	<u>Berkel & Co. Contractors v. Christman Co.</u> , 210 Mich. App. 416, 533 N.W.2d 838 (1995), appeal denied sub. nom., 450 Mich. 1019, 549 N.W. 2d 562 (1996).	“All payments received by Christman for the work done, ‘the receipt of such payments received by the Christman Company being a condition precedent to payments of the subcontractor.’”	Clause enforced as creating a valid condition precedent to payment. Therefore, the contractor was not required to pay the subcontractor unless and until the owner paid the contractor. Court held that, because the pay-when-paid clause did not contain any language limiting the condition precedent and requiring payment in a reasonable amount of time, the court refused to read the limitation into the clause.	

Conditional Payment Clauses

Minnesota	Majority	<u>Mrozik Constr., Inc. v. Lovering Assoc., Inc.</u> , 461 N.W.2d 49 (Minn. Ct. App. 1990).	"At all times the Subcontractor shall be paid to the extent that the Contractor has been paid on the Subcontractor's account."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	Pending: 1997 MN H.B. 335 (introduced Jan. 30, 1997; House Comm. on Commerce, Tourism and Consumer Affairs recommended passage) (same as 1997 MN S.B. 256): "A provision contained in, or executed in connection with, a building and construction contract whereby payment from a contractor to a subcontractor or supplier is conditioned upon receipt of payment from any other party, including the state, a political subdivision of the state, or a private owner, is void and unenforceable."
Mississippi	No cases				
Missouri	Majority	<u>Havens Steel Co. v. Randolph Eng. Co.</u> , 613 F. Supp. 514 (W.D. Mo. 1985), <u>aff'd</u> , 813 F.2d 186, (8th Cir. 1987).	Payment due ". . . after Supplier/ Subcontractor has satisfied Havens . . . and Owner of its compliance with all the terms and conditions hereof and, if also satisfied, twenty (20) days after Havens has received final payment from the . . . Owner."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor. The parties may shift the risk of payment but that intention must be clearly and unambiguously expressed.	Mo. Rev. State § 431.183 (1996): "Any provision in a contract, agreement or understanding that provides that a payment from a contractor to a subcontractor, trade contractor, specialty contractor or
Missouri (Cont.)		<u>American Drilling Service Co. v. Springfield</u> , 614 S.W.2d 266 (Mo. Ct. App. 1981).	"Upon complete performance of this subcontract by [the subcontractor] . . . [the general contractor] will make final payment to [the subcontractor] of the balance due to [the subcontractor] under this Subcontract within 30 days after full payment for such work and materials has been received by [the general contractor] from [the owner]."	"A clause which provides that the contractor shall pay a subcontractor within a stated number of days after the contractor has received payment from the owner merely fixes the time when payment is due and does not establish a condition precedent to payment."	supplier is contingent or conditioned upon receipt of a payment from any other private party, including a private owner, is no defense to a claim to enforce a mechanic's lien pursuant to the provisions of Chapter 429, RS Mo."
Tennessee	No cases				

Conditional Payment Clauses

aska	Majority	<u>D.K. Meyer Corp. v. Bevco, Inc.</u> , 206 Neb. 318, 292 N.W.2d 773 (1980).	"[T]he Contractor shall not be liable for, nor bound in any respect to the Sub-contractor for the payment to him of his monthly or final estimates of any monies in excess of the amount which the Contractor receives from the Owner for the Subcontractor's work."	Clause not enforced as creating a condition precedent to payment, the clause merely established a reasonable time for payment by the contractor to the subcontractor.	
ada	No cases				
Hampshire	No cases				
Jersey	Majority	<u>Seal Tite Corp. v. Ehret, Inc.</u> , 589 F. Supp. 701 (D. N.J. 1984).	"The contract price [] shall be payable in the following manner: Ninety (90) percent monthly of work completed, within seven (7) days of receipt of payment by the Owner, or his Agent . . . [t]he balance to be paid within thirty (30) days after acceptance and receipt of final payment by the owner. . . ."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
Mexico	No cases				
York	Quasi-Majority	<u>West-Fair Elec. Contractors v. Aetna Cas. & Sur. Co.</u> , 87 N.Y.2d 148, 638 N.Y.S.2d 394, 661 N.E.2d 967 (1995).	"It is specifically understood and agreed that the payment to the Trade Contractor is dependent, as a condition precedent, upon the construction manager receiving contract payments including retainer from the owner. . . ."	Clause not enforced as creating a condition precedent to payment, because shifting the risk of payment to the subcontractor violates New York public policy as stated in its Lien Law. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
	Void as against public policy	<u>Com-Tec, Inc. v. Bilt-Rite Steel Buck Corp.</u> , 1996 U.S. Dist. LEXIS 8310, (S.D.N.Y. 1996) <u>supp. op.</u> , 1996 U.S. Dist. LEXIS 11996 (S.D.N.Y. 1996).	"Contractor agrees to pay Subcontractor the amount stated in this subcontract expressly conditioned upon and subject to Contractor's prior receipt of funds from Owner for the work properly applied for, invoiced and performed by Subcontractor . . . The retained percentage and final payment shall not be paid to Subcontractor unless: . . . (3) Contractor has been fully and finally paid by Owner for the work"	Clause not enforced as creating a condition precedent to payment, because shifting the risk of payment to the subcontractor violates New York public policy as stated in its Lien Law.	

Conditional Payment Clauses

h Carolina	Clauses void by Statute (Previous to Statute, Courts followed Majority Rule)				"Performance by a subcontractor in accordance with the provisions of its contract shall entitle it to payment from the party with whom it contracts. Payment by the owner to a contractor is not a condition precedent for payment to a subcontractor and payment by a contractor to a subcontractor is not a condition precedent for payment to any other subcontractor, and an agreement to the contrary is unenforceable." N.C. Gen. Stat. § 22C-2 (1995).
h Dakota	No cases				
)	Majority	<u>Thos. J. Dyer Co. v. Bishop Int'l Eng. Co.</u> , 303 F.2d 655 (6th Cir. 1962).	"The total price to be paid to Subcontractor shall be . . . (\$115,000.00) . . . no part of which shall be due until five (5) days after Owner shall have paid Contractor therefor, provided however, that not more than . . . (90%) thereof shall be due until thirty-five (35) days after the	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
) (Cont.)	Majority	<u>Power & Pollution Services, Inc. v. Suburban Power Piping Corp.</u> , 74 Ohio App.3d 89, 598 N.E.2d 69 (1991), <u>not overruled</u> , 62 Ohio St. 3d 1441, 579 N.E.2d 214 (1991).	entire work to be performed and completed under said contract shall have been completed to the satisfaction of Owners, and provided further that Contractor may retain sufficient money to fully pay and discharge any and all liens, stop-notices, attachments, garnishments and executions " "[General contractor] shall not be required to pay any such monthly billing of the subcontractor prior to the date [the general contractor] receives payment of its corresponding monthly billing from the Owner Within ten (10) days after said final payment by the Owner, [the general contractor] shall pay the subcontractor the balance of the subcontract sum."	"[Although] a promise to pay 'if and when funds are available' was conditional and did not impose any obligation to pay until funds were available . . . the provision in dispute here does not set a condition precedent to the general contractor's duty to pay the subcontractor, but rather constitutes an absolute promise to pay, fixing payment by the owner as a reasonable time for when payment to the subcontractor is to be made. If the parties intended to shift the risk of solvency of the owner to the subcontractor, such intention should have been unambiguously expressed."	

Conditional Payment Clauses

Katz & Stone, Vienna, Virgin

Idaho	Majority	<u>Byler v. Great American Ins. Co.</u> , 395 F.2d 273 (10th Cir. 1968).	“Contractor . . . will pay to the said Subcontractor, in monthly payments . . . as follows: . . . (100%) of all labor and material which has been placed in position and for which payment has been made by said ‘Owner’ to said Contractor, . . . except the last payment, which the said Contractor shall pay to said Subcontractor immediately after said materials and labor installed by said Subcontractor have been completed, approved by the said Architect, and final payment received by the Contractor”	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment, by the contractor to the subcontractor. (See also, <u>Moore v. Continental Cas. Co.</u> , 366 F. Supp. 954 (W.D.Okla. 1973) (following <u>Byler</u>)).	
Illinois	Majority	<u>Mignot v. Park Hill</u> , 237 Ore. 450, 391 P.2d 755 (1964).	“It is fully understood by and between the parties hereto that Contractor shall not be obligated to pay Subcontractor for any of the work until such time as Contractor has himself received the money from Bate Lumber Co. . . . In consideration of the prompt and faithful performance by Subcontractor . . . Contractor agrees to pay without interest thereon the . . . total value and price of the road construction work. . . .”	The parties may shift the risk of payment, but that intention must be clearly and unambiguously expressed. Where, as here, the contract contains a definite and unambiguous promise to pay for labor and materials performed and furnished, or for other services, the pay-when-paid clause will not be enforced.	
Pennsylvania	Majority	<u>United Plate Glass Co. Div. of Chromalloy American Corp. v. Metal Trims Indust., Inc.</u> , 106 Pa. Commw. 22, 525 A.2d 468 (1987).	“Subject to the terms and conditions of this contract, final payment will be made to the subcontractor upon final acceptance of the work by the owner”	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	8 P.S. § 194 (1996) 73 P.S. §§ 501-516 (1996) 73 P.S. § 507 (1996). “A contractor or subcontractor shall disclose to a subcontractor, before a subcontract is executed, the due date for receipt of payments from the owner. Notwithstanding any other provision of this act, if a contractor or subcontractor fails to accurately disclose the due date to a subcontractor, the contractor or subcontractor shall be obligated to pay the subcontractor as though the due dates established [elsewhere in the act] were met by the owner.”
Rhode Island	No cases				

Conditional Payment Clauses

North Carolina	Majority	<u>Elk & Jacobs Drywall v. Town Contractors, Inc.</u> , 267 S.C. 412, 229 S.E.2d 260 (1976).	“Subject to the receipt of corresponding payments by the Contractor covering the work requisitioned by the Subcontractor, and subject to the approval of quantities in place by the Contractor, ninety (90%) percent of the value of the work actually completed by the Subcontractor during said period shall be paid to the Subcontractor The retainage will be paid sixty (60) days after the later of the following events. . . . iv) Full and final payment to the Contractor of all the funds due him for this project; and. . . . Subcontractors have been paid in full.”	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
North Dakota	No cases				
Tennessee	Majority	<u>Koch v. Constr. Technology, Inc.</u> , 924 S.W.2d 68 (Tenn. 1996).	“Partial payments subject to all applicable provisions of the Contract shall be made when and as payments are received by the Contractor. The Subcontractor may be required as a condition precedent to any payment to furnish evidence satisfactory to the Contractor that all payrolls, material bills, and other indebtedness applicable to the work have been paid.”	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor. The parties may shift the risk of payment, but that intention must be clearly and unambiguously expressed.	
Texas	Majority	<u>Wisznia v. Wilcox</u> , 438 S.W.2d 874 (Tex. 1969), (superseded by statute in part on other grounds). <u>Gulf Constr. Co. v. Self</u> , 676 S.W.2d 624 (Tex. App., 1984).	“The engineer shall be paid in the same proportionate manner as the architect is being paid by the Overlook Development Corporation.” “Under no circumstances shall the general contractor be obligated or required to advance or make payments to the subcontractor until the funds have been advanced or paid by the owner or his representative to the general contractor.”	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment. The clause was simply a modification of the time for payment provision preceding it and did not create a condition precedent to payment.	
Tennessee	Majority	<u>Zions First Nat’l Bank v. Christiansen Bros., Inc.</u> , 66 F.3d 1560 (10th Cir. 1995).	[Statutory language:] a contractor must pay his suppliers “within 30 consecutive days after receiving construction funds from . . . another contractor . . . or after the last day payment is due under the terms of the billing, whichever is later”	“[T]he general rule is that such pay-when-paid provisions do not operate as conditions precedent under which the duty to pay is contingent upon receipt of funds from a third party. To the contrary, these provisions are viewed only as postponing payment for a reasonable time and merely establishing a convenient time for payment.”	
Montana	No cases				

Conditional Payment Clauses

ington	Majority	<u>Amelco Elec. v. Donald M. Drake Co.</u> , 20 Wash. App. 899, 583 P.2d 648 (1978), <u>rev. denied</u> , 91 Wash. 2d 1020 (1979).	“Contract Cancellation: If the Contract between Owner and Contractor is cancelled in whole or in part through no fault of Contractor this Subcontract may be cancelled by Contractor in whole or in part without liability for damages and 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.”	Clause did not create a condition precedent to payment, the clause merely established a reasonable time for payment by the contractor to the subcontractor.	
Virginia	No cases				
consin	Void by statute.				“The following provisions in contracts for the improvement of land in this state are void: . . . (3) Provisions making a payment to a general contractor from any person who does not have a contractual agreement with the subcontractor or supplier a condition precedent to a general contractor’s payment to a subcontractor or a supplier. This subsection does not prohibit contract provisions that may delay a payment to a subcontractor until the contractor receives payment from any person who does not have a contractual agreement with the subcontractor or supplier.” Wis. Stat. §779.135 (1994).
oming	No cases				

ore\MGMT\PRSNTATN\0041MAH.WPD\vg

INDIVIDUAL STATE'S POSITIONS ON CONDITIONAL PAYMENT CLAUSES IN CONSTRUCTION SUBCONTRACTS

(a supplement to
“Getting Paid: Pay-When-Paid,
Pay-If-Paid or Something Else?”)

by

Gerald I. Katz

KATZ & STONE, L.L.P.

8230 Leesburg Pike, Suite 600

Vienna, Virginia 22182

(703) 761-3000

This table contains a summary of recent cases and statutes which interpret and affect the enforceability of conditional payment clauses in construction contracts.

If you have any questions regarding the contents, please contact:

Gerald I. Katz
Daniel K. Felsen
Katz & Stone, L.L.P.
8230 Leesburg Pike, Suite 600
Vienna, Virginia 22182
Telephone: (703) 761-3000
Facsimile: (703) 761-6179