Construction Law (PA)

A Practical Guidance® Practice Note by Edward Gentilcore, Blank Rome, LLP

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Licensing of Construction Professionals

Current as of: ***07/29/2022***

Does the State Require Construction and Design Professionals to Be Licensed?

Architects

Yes. The "Architects Licensure Law," 63 P.S. § 34.1 et seq., states in Section 34.2, that "In order to protect the health, safety and property of the people of the Commonwealth of Pennsylvania and to promote their welfare, no person shall engage in the practice of architecture in this Commonwealth except in compliance with the requirements of this act."

Land Surveyors

Yes. The "Engineer, Land Surveyor and Geologist Registration Law," 63 P.S. § 148 et seq., states in Section 150(a) that "*In order to safeguard life, health or property and to promote the general welfare, it is unlawful* for any person to practice or to offer to practice engineering in this Commonwealth, unless he is licensed and registered under the laws of this Commonwealth as a professional engineer, *for any person to practice or to offer to practice land surveying, unless he is licensed and registered under the laws of this Commonwealth as a professional land surveyor* or for any person to practice or to offer to practice geology unless he is licensed and registered under the laws of this Commonwealth as a professional geologist. Individuals licensed as professional engineers, professional land surveyors or registered landscape architects may perform geological work which is incidental to their engineering, surveying or landscape architecture without being licensed as a professional geologist."

63 P.S. § 150(a) (emphasis supplied).

Engineers

Yes. The "Engineer, Land Surveyor and Geologist Registration Law," 63 P.S. § 148 et seq., states in Section 150(a) that "*In order to safeguard life, health or property and to promote the general welfare, it is unlawful for any person to practice or to offer to practice engineering in this Commonwealth, unless he is licensed and registered under the laws of this Commonwealth as a professional engineer*, for any person to practice or to offer to practice land surveying, unless he is licensed and registered under the laws of this Commonwealth as a professional land surveyor or for any person to practice or to offer to practice geology unless he is licensed and registered under the laws of this Commonwealth as a professional geologist. Individuals licensed as professional engineers, professional land surveyors or registered landscape architects may perform geological work which is incidental to their engineering, surveying or landscape architecture without being licensed as a professional geologist." (emphasis supplied).

63 P.S. § 150(a) (emphasis supplied).

General Contractors

Yes and no. The Commonwealth generally requires no licensing for general contractors. However, the Home Improvement Consumer Protection Act, 73 P.S. § 517.1 et seq. (HICPA), requires that "Contractors" covered by HICPA must register with the Bureau of Consumer Protection in the Office of Attorney General (the "Bureau") to perform home improvement work covered under HICPA. See 73 P.S. § 517.3. Under the HICPA, a "Contractor" is "Any person who owns and operates a home improvement business or who undertakes, offers to undertake or agrees to perform any home improvement. The term includes a subcontractor or independent contractor who has contracted with a home improvement retailer, regardless of the retailer's net worth, to provide home improvement services to the retailer's customers. The term does not include any of the following: (1) A person for whom the total cash value of all of that person's home improvements is less than $5,000 during the previous taxable year. (2) A home improvement retailer having a net worth of more than $50,000,000 or an employee of that retailer that does not perform home improvements." 73 P.S. § 517.2.

Subcontractors

As discussed above, there is no general requirement for subcontractors to be licensed in the Commonwealth of Pennsylvania to perform work not covered by HICPA. However, the definition of "Contractor" under HICPA "includes a subcontractor or independent contractor who has contracted with a home improvement retailer, regardless of the retailer's net worth, to provide home improvement services to the retailer's customers." See 73 P.S. § 517.3.

Residential vs. Commercial Work

The Commonwealth generally requires no licensing for general contractors. However, the Home Improvement Consumer Protection Act, 73 P.S. § 517.1 et seq. (HICPA), requires that "Contractors" covered by HICPA must register with the Bureau of Consumer Protection in the Office of Attorney General to perform home improvement work covered under HICPA. See 73 P.S. § 517.3.

Treatment of Unlicensed Construction Work

Current as of: ***07/29/2022***

What are the Consequences of Performing Unlicensed Construction Work?

Penalties

Generally, no penalties are imposed on general contractors for unlicensed construction work, except for home improvement work covered under HICPA, defined above. Section 517.10 of HICPA entitled Unfair Trade Practices and Consumer Protection Law states as follows: " A violation of any of the provisions of this act shall be deemed a violation of the act of December 17, 1968 (P.L. 1224, No. 387) [73 P.S. § 201-1 et seq.], known as the Unfair Trade Practices and Consumer Protection Law. Nothing in this act shall preclude an owner from exercising any right provided under the Unfair Trade Practices and Consumer Protection Law." 73 P.S. § 517.10. Further, Section 517.8 of HICPA addresses consequences of home improvement fraud covered by HICPA. 73 P.S. § 517.8.

Enforcement Rights for Unlicensed Contractors

Again, contractors are not generally required to be licensed or registered in the Commonwealth of Pennsylvania to perform construction work in Pennsylvania. However, as discussed above, HICPA requires registration with the Bureau for home improvement contracts. Failure to register is a prohibited act under Section 517.9 of HICPA. Further, Section 517.7 (a) of HICPA states: "No home improvement contract shall be valid or enforceable against an owner unless it: (1) Is in writing and legible and contains the home improvement contractor registration number of the performing contractor." 73 P.S. § 517.7(a). However, Section 517.7 (g) of HICPA entitled Contractor's Recovery Right provides: "Nothing in this section shall preclude a contractor who has complied with subsection (a) from the recovery of payment for work performed based on the reasonable value of services which were requested by the owner if a court determines that it would be inequitable to deny such recovery." 73 P.S. § 517.7(g). This has been construed to permit a claim in quantum meruit. See *Shafer Elec. & Const. v. Mantia, 96 A.3d 989, 996 (Pa. 2014)*

Little Miller Act Claims

Current as of: ***07/29/2022***

How Does the State's Little Miller Act Operate?

Performance vs. Payment Bonds

The Commonwealth of Pennsylvania has two statutes that require bonds on public projects in Pennsylvania. These both protect the intended beneficiaries specified in the respective acts. The first is the "Public Works Contractors' Bond Law of 1967," 8 P.S. §§ 191–202 (the Bond Law) and the other is the Commonwealth's Procurement Code, 62 Pa.C.S. §§ 101–4604 (the Procurement Code).

For contracts entered into and performed for public agencies, with the exception of those addressed in and governed by the Procurement Code, where the contract exceeds $5,000, the terms of the Bond Law are applicable. Section 193 of the Bond Law requires the "prime contractor" on these projects to provide a performance bond for the total amount of the contract sum "conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract." See 8 P.S. § 193(a)(1). The performance bond is specified to be executed "solely" for the protection of the public contracting entity awarding the contract. Id. The Bond Law also requires a payment bond to be provided by that prime contractor. These payment bonds are " . . . shall be solely for the protection of claimants supplying labor or materials to the prime contractor to whom the contract was awarded, or to any of his subcontractors, in the prosecution of the work provided for in such contract, and shall be conditioned for the prompt payment of all such material furnished or labor supplied or performed in the prosecution of the work. 'Labor or materials' shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site." The Bond Law, as amended in 2020, then continues as follows:

> [Section 193] (a)--Before any contract exceeding ten thousand dollars ($10,000) for the construction, reconstruction, alteration or repair of any public building or other public work or public improvement, including highway work, of any contracting body is awarded to any prime contractor, such contractor shall furnish to the contracting body the following financial security, which shall become binding upon the awarding of said contract to such contractor:
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> (1) A performance bond, Federal or Commonwealth chartered lending institution irrevocable letter of credit or restrictive or escrow account in such lending institution, equal to one hundred percent of the contract amount, conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract. Such financial security shall be solely for the protection of the contracting body which awarded the contract.
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> (2) A payment bond, Federal or Commonwealth chartered lending institution irrevocable letter of credit or restrictive or escrow account in such lending institution, equal to one hundred percent of the contract amount. Such financial security shall be solely for the protection of claimants supplying labor or materials to the prime contractor to whom the contract was awarded, or to any of his subcontractors, in the prosecution of the work provided for in such contract, and shall be conditioned for the prompt payment of all such material furnished or labor supplied or performed in the prosecution of the work. 'Labor or materials' shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.

8 P.S. § 193(a).

The Procurement Code applies to all contracts with a "Commonwealth agency" (also defined in the Procurement Code). For those contracts, the Procurement Code provides as follows:

> **§ 903. Contract performance security and payment bonds.**
>
> **(a) When required and amounts.--**For construction contracts awarded for amounts between $25,000 and $100,000, the purchasing agency shall require contract performance security, in an amount equal to at least 50% of the contract price, as the purchasing agency in its discretion determines necessary to protect the interests of the Commonwealth. When a construction contract is awarded in excess of $100,000, the following bonds shall be delivered to the purchasing agency and shall be binding on the parties upon the execution of the contract:
>
> (1) A performance bond, executed by a surety company authorized to do business in this Commonwealth and made payable to the Commonwealth, in an amount equal to 100% of the price specified in the contract and conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract.
>
> (2) A payment bond, executed by a surety company authorized to do business in this Commonwealth and made payable to the Commonwealth, in an amount equal to 100% of the price specified in the contract and conditioned upon the prompt payment for all materials furnished or labor supplied or performed in the prosecution of the work. Labor or materials include public utility services and reasonable rentals of equipment for the periods when the equipment is actually used at the site.

62 Pa.C.S. § 903.

Minimum Contract Amount Required for a Contractor to Be Protected under the State's Little Miller Act

As discussed above, "prime contractors" (Bond Law) and "Contractors" (Procurement Code) are not the beneficiaries of the performance and payment bond requirements under either the Bond Law or the Procurement Code. The beneficiaries are the contracting entity under performance bonds and "claimants" (first tier and second tier subcontractors) are the beneficiaries under the Bond Law (8 P.S. § 192(1)) and, similarly, under the Procurement Code at 62 Pa.C.S. § 903(b) provides a "payment bond shall be solely for the protection of claimants supplying labor or materials to the prime contractor to whom the contract was awarded or to any of its subcontractors in the prosecution of the work provided for in the contract, whether or not the labor or materials constitute a component part of the construction."

Minimum Contract Amount for a Project to Be Subject to a Payment Bond Requirement under the State's Little Miller Act

For contracts entered into and performed for public agencies, with the exception of those addressed in and governed by the Procurement Code, where the contract exceeds $5,000, the terms of the Bond Law are applicable. Section 193 of the Bond Law requires the "prime contractor" on these projects to provide a performance bond for the total amount of the contract sum "conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract." See 8 P.S. § 193(a)(1). The performance bond is specified to be executed "solely" for the protection of the public contracting entity awarding the contract. Id. The Bond Law also requires a payment bond to be provided by that prime contractor. These payment bonds are " . . . shall be solely for the protection of claimants supplying labor or materials to the prime contractor to whom the contract was awarded, or to any of his subcontractors, in the prosecution of the work provided for in such contract, and shall be conditioned for the prompt payment of all such material furnished or labor supplied or performed in the prosecution of the work. 'Labor or materials' shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site." The Bond Law, as amended in 2020, then continues as follows:

> [Section 193] (a)--Before any contract exceeding ten thousand dollars ($10,000) for the construction, reconstruction, alteration or repair of any public building or other public work or public improvement, including highway work, of any contracting body is awarded to any prime contractor, such contractor shall furnish to the contracting body the following financial security, which shall become binding upon the awarding of said contract to such contractor:
>
> (1) A performance bond, Federal or Commonwealth chartered lending institution irrevocable letter of credit or restrictive or escrow account in such lending institution, equal to one hundred percent of the contract amount, conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract. Such financial security shall be solely for the protection of the contracting body which awarded the contract.
>
> (2) A payment bond, Federal or Commonwealth chartered lending institution irrevocable letter of credit or restrictive or escrow account in such lending institution, equal to one hundred percent of the contract amount. Such financial security shall be solely for the protection of claimants supplying labor or materials to the prime contractor to whom the contract was awarded, or to any of his subcontractors, in the prosecution of the work provided for in such contract, and shall be conditioned for the prompt payment of all such material furnished or labor supplied or performed in the prosecution of the work. 'Labor or materials' shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.

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> **§ 903. Contract performance security and payment bonds.**
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> **(a) When required and amounts.--**For construction contracts awarded for amounts between $25,000 and $100,000, the purchasing agency shall require contract performance security, in an amount equal to at least 50% of the contract price, as the purchasing agency in its discretion determines necessary to protect the interests of the Commonwealth. When a construction contract is awarded in excess of $100,000, the following bonds shall be delivered to the purchasing agency and shall be binding on the parties upon the execution of the contract:

(1) A performance bond, executed by a surety company authorized to do business in this Commonwealth and made payable to the Commonwealth, in an amount equal to 100% of the price specified in the contract and conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract.

(2) A payment bond, executed by a surety company authorized to do business in this Commonwealth and made payable to the Commonwealth, in an amount equal to 100% of the price specified in the contract and conditioned upon the prompt payment for all materials furnished or labor supplied or performed in the prosecution of the work. Labor or materials include public utility services and reasonable rentals of equipment for the periods when the equipment is actually used at the site.

62 Pa.C.S. § 903.

Minimum Contract Amount for a Project to Be Subject to a Performance Bond Requirement under the State's Little Miller Act

For contracts entered into and performed for public agencies, with the exception of those addressed in and governed by the Procurement Code, where the contract exceeds $5,000, the terms of the Bond Law are applicable. Section 193 of the Bond Law requires the "prime contractor" on these projects to provide a performance bond for the total amount of the contract sum "conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract." See 8 P.S. § 193(a)(1). The performance bond is specified to be executed "solely" for the protection of the public contracting entity awarding the contract. Id. The Bond Law also requires a payment bond to be provided by that prime contractor. These payment bonds are " . . . shall be solely for the protection of claimants supplying labor or materials to the prime contractor to whom the contract was awarded, or to any of his subcontractors, in the prosecution of the work provided for in such contract, and shall be conditioned for the prompt payment of all such material furnished or labor supplied or performed in the prosecution of the work. 'Labor or materials' shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site." The Bond Law, as amended in 2020, then continues as follows:

[Section 193] (a)--Before any contract exceeding ten thousand dollars ($10,000) for the construction, reconstruction, alteration or repair of any public building or other public work or public improvement, including highway work, of any contracting body is awarded to any prime contractor, such contractor shall furnish to the contracting body the following financial security, which shall become binding upon the awarding of said contract to such contractor:

(1) A performance bond, Federal or Commonwealth chartered lending institution irrevocable letter of credit or restrictive or escrow account in such lending institution, equal to one hundred percent of the contract amount, conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract. Such financial security shall be solely for the protection of the contracting body which awarded the contract.

(2) A payment bond, Federal or Commonwealth chartered lending institution irrevocable letter of credit or restrictive or escrow account in such lending institution, equal to one hundred percent of the contract amount. Such financial security shall be solely for the protection of claimants supplying labor or materials to the prime contractor to whom the contract was awarded, or to any of his subcontractors, in the prosecution of the work provided for in such contract, and shall be conditioned for the prompt payment of all such material furnished or labor supplied or performed in the prosecution of the work. 'Labor or materials' shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.

8 P.S. § 193(a).

The Procurement Code applies to all contracts with a "Commonwealth agency" (also defined in the Procurement Code). For those contracts, the Procurement Code provides as follows:

§ 903. Contract performance security and payment bonds.

(a) When required and amounts.--For construction contracts awarded for amounts between $25,000 and $100,000, the purchasing agency shall require contract performance security, in an amount equal to at least 50% of the contract price, as the purchasing agency in its discretion determines necessary to protect the interests of the Commonwealth. When a construction contract is awarded in excess of $100,000, the following bonds shall be delivered to the purchasing agency and shall be binding on the parties upon the execution of the contract:

(1) A performance bond, executed by a surety company authorized to do business in this Commonwealth and made payable to the Commonwealth, in an amount equal to 100% of the price specified in the contract and conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract.

(2) A payment bond, executed by a surety company authorized to do business in this Commonwealth and made payable to the Commonwealth, in an amount equal to 100% of the price specified in the contract and conditioned upon the prompt payment for all materials furnished or labor supplied or performed in the prosecution of the work. Labor or materials include public utility services and reasonable rentals of equipment for the periods when the equipment is actually used at the site.

62 Pa.C.S. § § 903.

Preliminary Notice Requirements to Be Protected by the State's Little Miller Act

For payment bonds addressed by the Bond Law, Section 194 provides:

(a)--Subject to the provisions of subsection (b) hereof, any claimant who has performed labor or furnished material in the prosecution of the work provided for in any contract for which a payment bond has been given pursuant to the provisions of subsection (a) of section [19]3 of this act or for which other financial security has been given pursuant to subsection (a) of section [19]3.1 of this act, and who has not been paid in full therefor before the expiration of ninety days after the day on which such claimant performed the last of such labor or furnished the last of such materials for which he claims payments, may bring an action on such payment bond or other financial security in his own name, in assumpsit, to recover any amount due him for such labor or material, and may prosecute such action to final judgment and have execution on the judgment.

(b) Any claimant who has a direct contractual relationship with any subcontractor of the prime contractor who gave such payment bond or other financial security but has no contractual relationship, express or implied, with such prime contractor may bring an action on the payment bond or other financial security *only if he has given written notice to such contractor within ninety days from the date on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment*, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished. Notice shall be served by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business or served in any manner in which legal process may be served in the manner now or hereafter provided by law for the service of a summons, except that such service need not be made by a public officer.

8 P.S. § 194 (emphasis added).

Similarly, under Section 903 of the Procurement Code:

(d) Actions on payment bonds.--

(1) Subject to paragraph (2), any claimant who has performed labor or furnished material in the prosecution of the work provided for in any contract for which a payment bond has been given under subsection (a) and who has not been paid in full before the expiration of 90 days after the day on which the claimant performed the last of the labor or furnished the last of the materials for which it claims payments may bring an action on the payment bond in its own name, in assumpsit, to recover any amount due it for the labor or material and may prosecute the action to final judgment and have execution on the judgment.

(2) Any claimant who has a direct contractual relationship with any subcontractor of the prime contractor who gave the payment bond but has no contractual relationship, express or implied, with the prime contractor may bring an action on the payment bond *only if it has given written notice to the contractor within 90 days from the date on which the claimant performed the last of the labor or furnished the last of the materials for which it claims payment*, *stating with substantial accuracy the amount and the name of the person for whom the work was performed or to whom the material was furnished*.

(3) Notice shall be served by registered mail in an envelope addressed to the contractor at any place where its office is regularly maintained for the transaction of business or served in any manner in which legal process may be served in the manner provided by law for the service of a summons except that the service need not be made by a public officer.

Pa.C.S. § 903 (emphasis added).

Deadline to File Suit for Payment under the State's Little Miller Act

Under 42 Pa.C.S. § 5523, any action on a performance or payment bond must be commenced within one year from the time the claim accrues. However as noted above, the Bond Law provides that an action may not be brought on a payment bond before the expiration of 90 days after the day on which the claimant performed the last of the labor or furnished the last of the materials for which its claims payment. 8 P.S. § 194(a). This is a requirement that is rigidly followed. In Centre Concrete Co. v. AGI, Inc., 559 A.2d 516 (Pa. 1989), the supreme court of Pennsylvania held a payment bond cause of action under the Bond Law would not accrue until the 90-day period specified by the Bond Law had expired. In that case, the surety company providing the payment bond in question argued the one year statute of limitation for claims on payment bonds had already expired on a suit brought by a claimant one year and six weeks after the claimant had furnished its last materials on the project. The court observed "a statutorily imposed time ban against filing suit acts as a toll on the applicable statute of limitations which does not begin to run until the expiration of the banned period." Centre Concrete, 559 A.2d at 519. A similar logic should follow for payment bond claims under the Procurement Code.

Prompt Payment Act Claims

Current as of: ***07/29/2022***

How Does the State's Prompt Payment Act Operate?

Public vs. Private Contracts

The Commonwealth of Pennsylvania has the Procurement Code, §§ 101–4604, discussed above, covering many public projects, as described more specifically in Section 3902 of the Procurement Code. Sections 3901 and 3902 provide, in relevant part, as follows:

> **§ 3901. Application and purpose of chapter.**
>
> **(a) Application.--**Except as otherwise specifically provided in this chapter, this chapter applies to contracts entered into by a government agency through competitive sealed bidding or competitive sealed proposals.
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> ****
>
> **§ 3902. Definitions.**
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> The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:
>
> **"Contract."** A contract exceeding $50,000 for construction as defined in section 103 (relating to definitions), including heating or plumbing contracts but excluding Department of Transportation contracts under section 301(c)(1) (relating to procurement responsibility).
>
> **"Contractor."** A person who enters into a contract with a government agency.
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> ****
>
> **"Government agency."** Includes any State-aided institutions.

62 Pa.C.S. §§ 3901–3902.

In light of the above, there are public projects that would not be within the reach of the Procurement Code prompt payment provisions. For a while, that left the issue open of whether the Commonwealth's Contractor and Subcontractor Payment Act (CASPA) found at 73 P.S. §§ 501–516 would provide relief to those other public projects like the private projects where CASPA provides prompt payment protections to both contractors and covered subcontractors. However, in the case of Clipper Pipe & Serv., Inc. v. Ohio Cas. Ins. Co., 115 A.3d 1278, 1284 (Pa. 2015), the supreme court of Pennsylvania, on a certified question from the U.S. Court of Appeals for the Third Circuit, held and stated definitively that "CASPA does not apply to a construction project where the owner is a governmental entity," which in *Clipper* was the U.S. Department of the Navy.

The payment provisions are found in Chapter 39, covering Contracts for Public Works. See 62 Pa.C.S. §§ 3931–3939. For those construction projects not covered under the Procurement Code, CASPA found at 73 Pa. Stat. Ann. §§ 501–516 provides prompt payment protections to both contractors and covered subcontractors.

Retainage for Public Projects

The Procurement Code has specific sections dealing with retainage at Sections 3921 (for contractors) and 3922 (for subcontractors). These sections provide as follows:

> **§ 3921. Retainage.**
>
> **(a) Contract provision.--**A contract may include a provision for the retainage of a portion of the amount due the contractor to insure the proper performance

of the contract except that the sum withheld by the government agency from the contractor shall not exceed 10% of the amount due the contractor until 50% of the contract is completed. When the contract is 50% completed, one-half of the amount retained by the government agency shall be returned to the contractor. However, the architect or engineer must approve the application for payment. The contractor must be making satisfactory progress, and there must be no specific cause for greater withholding. The sum withheld by the government agency from the contractor after the contract is 50% completed shall not exceed 5% of the value of completed work based on monthly progress payment requests. In the event a dispute arises between the government agency and any prime contractor, which dispute is based upon increased costs claimed by one prime contractor occasioned by delays or other actions of another prime contractor, additional retainage in the sum of one and one-half times the amount of any possible liability may be withheld until such time as a final resolution is agreed to by all parties directly or indirectly involved unless the contractor causing the additional claim furnishes a bond satisfactory to the government agency to indemnify the agency against the claim. All money retained by the government agency may be withheld from the contractor until substantial completion of the contract.

(b) Department of General Services.--Notwithstanding subsection (a), when the Department of General Services is the government agency, the contract may include a provision for the retainage of a portion of the amount due the contractor to insure the proper performance of the contract except that the sum withheld by the department for the contractor shall not exceed 6% of the then total estimates until 50% of the contract is satisfactorily completed. The sum withheld by the department from the contractor after the contract is 50% satisfactorily completed shall not exceed 3% of the original contract amount.

§ 3922. Payment of retainage to subcontractors.

In the absence of sufficient reason, within 20 days of the receipt of payment by the contractor, the contractor shall pay all subcontractors with which it has contracted their earned share of the payment the contractor received.

62 Pa.C.S. §§ 3921–3922. Section 3902 defines "Subcontractor" as a "person who has contracted to furnish labor or materials to or has performed labor for a contractor or another subcontractor in connection with a contract." 62 Pa.C.S. § 3902.

Retainage for Private Projects

CASPA sets forth the following regarding retainage:

Retainage. (a) Time for payment.--If payments under a construction contract are subject to retainage, any amounts which have been retained during the performance of the contract and which are due to be released to the contractor upon final completion shall be paid within 30 days after final acceptance of the work.

(a.1) Posting of security in lieu of retainage.--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% of the amount of retainage being held.

(b) Agreement between contractor and subcontractor.--If an owner is not withholding retainage, a contractor may withhold retainage from a subcontractor in accordance with their agreement. The retainage shall be paid within 30 days after final acceptance of the work.

(c) Payment of retainage to subcontractors.--A contractor shall pay to the contractor's subcontractors, and each subcontractor shall in turn pay to the subcontractor's subcontractors, within 14 days after receipt of the retainage, the full amount due each subcontractor.

(d) Withholding acceptance or failure to pay retainage.--Withholding of retainage for longer than 30 days after final acceptance of the work shall be subject to the obligations imposed upon the owner, contractor or subcontractor in section [50]6(b) or [5]11(b). If an owner, contractor or subcontractor unreasonably withholds acceptance of work or fails to pay retainage as required by this section, the owner, contractor or subcontractor shall be subject to the payment of interest at the rate established in section [50]5(d) on the balance due and owing on the date acceptance was unreasonably withheld or the date the retainage was due and owing, whichever is applicable. The owner, contractor or subcontractor shall also be subject to the provisions of section [5]12.

73 Pa. Stat. Ann. § 509.

Required Timing for Payments from the Owner to the Prime Contractor (Public Projects)

Under Section 3931 of the Procurement Code:

Performance by contractor or subcontractor.

(a) Entitlement of contractor to payment.--Performance by a contractor in accordance with the provisions of a contract shall entitle the contractor to payment by the government agency.

(b) Entitlement of subcontractor to payment.--Performance by a subcontractor in accordance with the provisions of a contract shall entitle the subcontractor to payment from the contractor with whom the subcontractor has contracted.

62 Pa.C.S. § 3931.

Further, under Section 3932 of the Procurement Code:

§ 3932. Government agency›s progress payment obligations.

(a) Payments in accordance with contract.--The government agency shall pay the contractor or design professional strictly in accordance with the contract.

(b) Application for progress payments.--If the contract does not contain a term governing the time for payment, the contractor or design professional shall be entitled to make application for payment from the government agency for progress payments, and the government agency shall make payment less the applicable retainage amount as authorized in section 3921 (relating to retainage) to the contractor or design professional within 45 calendar days of the date the application for payment is received.

(c) Interest on progress payments not timely made.--Except as otherwise agreed by the parties, if any progress payment less the applicable retainage amount as authorized in section 3921 is not made to a contractor or design professional by the due date established in the contract or in subsection (b), the government agency shall pay to the contractor or design professional, in addition to the amount due, interest on the amount due, and the interest shall be computed at the rate determined by the Secretary of Revenue for interest payments on overdue taxes or the refund of taxes as provided in sections 806 and 806.1 of the act of April 9, 1929 (P.L.343, No. 176), known as The Fiscal Code.

(d) When interest payment not required.--In the event that the contract does not contain a grace period and if a contractor or design professional is not paid by the payment date required by subsection (b), no interest penalty payment required under this section shall be paid if payment is made on or before the 15th calendar day after the payment date required under this subchapter.

62 Pa.C.S. § 3932.

Required Timing for Payments from the Owner to the Prime Contractor (Private Projects)

Under Section 505 of CASPA, the owner's payment obligations are generally as follows:

(a) Construction contract.--The owner shall pay the contractor strictly in accordance with terms of the construction contract.

(b) Absence of payment term.--In the absence of a construction contract or in the event that the construction contract does not contain a term governing the terms of payment, the contractor shall be entitled to invoice the owner for progress payments at the end of the billing period. The contractor shall be entitled to submit a final invoice for payment in full upon completion of the agreed-upon work.

(c) Time for payment.--Except as otherwise agreed by the parties, payment of interim and final invoices shall be due from the owner 20 days after the end of a billing period or 20 days after delivery of the invoice, whichever is later.

(d) Interest.--Except as otherwise agreed by the parties, if any progress or final payment to a contractor is not paid within seven days of the due date established in subsection (c), the owner shall pay the contractor, beginning on the eighth day, interest at the rate of 1% per month or fraction of a month on the balance that is at the time due and owing.

73 Pa. Stat. Ann. § 505.

Required Timing for Payments from the Prime Contractor to a Subcontractor (Public Projects)

The Procurement Code addresses both Prime Contractor and Subcontractor payment obligations on public projects in Section 3933:

(a) Performance by subcontractor entitles subcontractor to payment.--Performance by a subcontractor in accordance with the provisions of the contract shall entitle the subcontractor to payment from the party with whom the subcontractor has contracted. For purposes of this section, the contract between the contractor and subcontractor is presumed to incorporate the terms of the contract between the contractor and the government agency.

(b) Disclosure of progress payment due dates.--A contractor or subcontractor shall disclose to a subcontractor, before a subcontract is executed, the due date for receipt of progress payments from the government agency. Notwithstanding any other provisions of this subchapter, if a contractor or a 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 in subsection (c) were met by the government agency. This subsection shall not apply to a change in due dates because of conditions outside of the contractor's control, including, but not limited to, design changes, change orders or delays in construction due to weather conditions.

(c) Payment.--When a subcontractor has performed in accordance with the provisions of the contract, a contractor shall pay to the subcontractor, and each subcontractor shall in turn pay to its subcontractors, the full or proportional amount received for each such subcontractor's work and material, based on work completed or services provided under the subcontract, 14 days after receipt of a progress payment. Payment shall be made under this section unless it is being withheld under section 3934 (relating to withholding of payment for good faith claims).

(d) Interest due when progress payment not timely.--If any progress payment is not made to a subcontractor by the due date established in the contract or in subsection (c), the contractor shall pay to the subcontractor, in addition to the amount due, interest as computed in section 3932(c) (relating to government agency's progress payment obligations).

(e) When interest payment not required.--In the event that the contract does not contain a grace period and if a subcontractor is not paid by the payment date required by subsection (c), no interest penalty payment required under this section shall be paid if payment is made on or before the 15th calendar day after the payment date required under this subchapter.

62 Pa.C.S. § 3933

Required Timing for Payments from the Prime Contractor to a Subcontractor (Private Projects)

Section 507 of CASPA states:

Contractor's and subcontractor's payment obligations.

(a) Entitlement to payment.--Performance by a subcontractor in accordance with the provisions of the construction contract shall entitle the subcontractor to payment from the party with whom the subcontractor has contracted.

(b) Disclosure of payment dates.--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 in section [50]5(c) were met by the owner. This subsection shall not apply to a change in due dates because of conditions outside of the contractor's control, including, but not limited to, design changes, change orders or delays in construction due to weather conditions.

(c) Time for payment.--When a subcontractor has performed in accordance with the provisions of the construction contract, a contractor shall pay to the subcontractor, and each subcontractor shall in turn pay to the subcontractor's subcontractors, the full or proportional amount received for each such subcontractor's work and materials, based on work completed or service provided under the subcontract, 14 days after receipt of each progress or final payment or 14 days after receipt of the subcontractor's invoice, whichever is later. Payment shall be made under this section unless it is being withheld under section [5]11.

73 Pa. Stat. Ann. § 507

Interest on Late Payments (Public Projects)

As stated above, Section 3932(c) refers to interest being "computed at the rate determined by the Secretary of Revenue for interest payments on overdue taxes or the refund of taxes as provided in [72 P.S. §§] 806 and 806.1."

Interest on Late Payments (Private Projects)

As noted above, Section 505(d) of CASPA specifies "1% per month or fraction of a month on the balance that is at the time due and owing."

Exceptions Where a Prompt Payment Act Deadline Will Not Apply to a Public Project

Government agencies may withhold payment consistent with Section 3934 of the Procurement Code:

§ 3934. Withholding of payment for good faith claims.

(a) When government agency may withhold payment.--The government agency may withhold payment for

deficiency items according to terms of the contract. The government agency shall pay the contractor according to the provisions of this subchapter for all other items which appear on the application for payment and have been satisfactorily completed. The contractor may withhold payment from any subcontractor responsible for a deficiency item. The contractor shall pay any subcontractor according to the provisions of this subchapter for any item which appears on the application for payment and has been satisfactorily completed.

(b) Notification when payment withheld for deficiency item.--If a government agency withholds payment from a contractor for a deficiency item, it shall notify the contractor of the deficiency item within the time period specified in the contract or 15 calendar days of the date that the application for payment is received. If a contractor withholds payment from a subcontractor for a deficiency item, it must notify the subcontractor or supplier and the government agency of the reason within 15 calendar days of the date after receipt of the notice of the deficiency item from the government agency.

62 Pa.C.S. § 3934

Exceptions Where a Prompt Payment Act Deadline Will Not Apply to a Private Project

These exceptions exist in Pennsylvania. Section 506 of CASPA states:

Owner's withholding of payment for good faith claims.

(a) Authority to withhold.--The owner may withhold payment for deficiency items according to the terms of the construction contract. The owner shall pay the contractor according to the provisions of this act for any item which appears on the invoice and has been satisfactorily completed.

(b) Notice.—

(1) Except as provided under section [50]9, if an owner withholds payment from a contractor for a deficiency item, the amount withheld shall be reasonable and the owner shall notify the contractor of the deficiency item by a written explanation of its good faith reason within 14 calendar days of the date that the invoice is received.

(2) Failure to comply with paragraph (1) shall constitute a waiver of the basis to withhold payment and necessitate payment of the contractor in full for the invoice.

(3) If an owner withholds payment from a contractor for a deficiency item, the owner shall remit payment to the contractor for each other item that has been satisfactorily completed under the construction contract.

73 Pa. Stat. Ann. § 506.

Further, Section 511 of CASPA provides the following:

Contractor's and subcontractor's withholding of payment for good faith claims.

(a) Authority to withhold.--The contractor or subcontractor may withhold payment from any subcontractor responsible for a deficiency item. The contractor or subcontractor shall pay any subcontractor according to the provisions of this act for any item which appears on the invoice and has been satisfactorily completed.

(b) Notice.--

(1) Except as provided under section 9, if a contractor or subcontractor withholds payment from a subcontractor for a deficiency item, the contractor or subcontractor withholding payment must notify the subcontractor and the owner in writing of the good faith reason for the withholding within the time period specified in the construction contract or 14 calendar days of the date after receipt of the notice of the deficiency item.

(2) Failure to comply with paragraph (1) shall constitute a waiver of the basis to withhold payment and necessitate payment of the subcontractor in full for the invoice. (c) Amount of withholding.--If a contractor or subcontractor withholds payment from a subcontractor for a deficiency item, the contractor or subcontractor withholding payment shall remit payment to the subcontractor for each other item that has been satisfactorily completed under the construction contract.

73 Pa. Stat. Ann. § 511.

Contractor's Right to Suspend Work for Nonpayment (Public Projects)

Nothing is set forth in the Procurement Code to allow the Contractor to suspend in the case of nonpayment for its work.

However, the Procurement Code does provide in Section 3935 as follows:

§ 3935. Penalty and attorney fees.

(a) Penalty.--If arbitration or a claim with the Board of Claims or a court of competent jurisdiction is commenced to recover payment due under this subchapter and it is determined that the government agency, contractor or subcontractor has failed to comply with the payment terms of this subchapter, the arbitrator, the Board of Claims or the court may award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was withheld in bad faith. An amount shall be deemed to have been withheld in bad faith to the extent that the withholding was arbitrary or vexatious. An amount shall not be deemed to have been withheld in bad faith to the extent it was withheld pursuant to section 3934 (relating to withholding of payment for good faith claims).

(b) Attorney fees.--Notwithstanding any agreement to the contrary, the prevailing party in any proceeding to recover any payment under this subchapter may be awarded a reasonable attorney fee in an amount to be determined by the Board of Claims, court or arbitrator, together with expenses, if it is determined that the government agency, contractor or subcontractor acted in bad faith. An amount shall be deemed to have been withheld in bad faith to the extent that the withholding was arbitrary or vexatious.

62 Pa.C.S. § 3935.

Contractor's Right to Suspend Work for Nonpayment (Private Projects)

This right is set forth in Section 1505(e) of CASPA, which states as follows:

(e) Suspension of performance.—

(1) If payment is not received by a contractor in accordance with this section, the contractor shall have the right to suspend performance of any work, without penalty, until payment is received according to the terms of the construction contract. Any procedure in a construction contract that exceeds the procedure in paragraph (2) shall be unenforceable.

(2) Suspension of performance in a construction contract may occur in accordance with paragraph (1) or if:

(i) payment has not been made to the contractor in accordance with the schedule established under subsection (c);

(ii) at least 30 calendar days have passed since the end of the billing period for which payment has not been received according to the terms of the construction contract. The contractor shall provide written notice to the owner or the owner's authorized agent, via electronic mail or postal service, stating that payment has not been made; and

(iii) at least 30 calendar days have passed since the written notice in subparagraph (ii) has been sent. The contractor shall provide at least 10 calendar days' written notice, via certified mail, of the contractor's intent to suspend performance to the owner or the owner's authorized agent.

73 Pa. Stat. Ann. § 505(e).

Contingent Payment Provisions

Current as of: ***07/29/2022***

Does the State Permit Pay-If-Paid and/or Pay-When-Paid Clauses?

Pay-If-Paid Clauses

As discussed and summarized by the U.S. Court of Appeal for the Third Circuit, applying Pennsylvania law:

Liberty Mutual argues that these conditions constitute a "pay-if-paid" clause. In construction contract parlance, this means that a subcontractor gets paid by the general contractor only if the owner pays the general contractor for that subcontractor's work. Pennsylvania courts follow suit, and construe clauses that condition payment to the subcontractor on the general contractor's receipt of payment from the owner as pay-if-paid clauses. *See, e.g.*, C.M. Eichenlaub Co., Inc. v. Fidelity & Deposit Co., 293 Pa. Super. 11, 437 A.2d 965, 967 (Pa. Super. Ct.1981); Cumberland Bridge Co. v. Lastooka, 8 Pa. D. & C.3d 475, 482 (C.P. Washington 1977).

Sloan, on the other hand, argues that the first subparagraph of 6 .f does not establish a condition precedent to Sloan's payment, but rather is a "pay-when-paid" clause. On the surface, these terms seem much the same (save, perhaps, that paying if paid does not tell us when that payment is due). But in industry jargon, they are different. In contrast to a pay-if-paid clause, a pay-when-paid clause does not establish a condition precedent, but merely creates a timing mechanism for the general contractor's payment to the

subcontractor. *See, e.g.*, United Plate Glass Co. Div. of Chromalloy Am. Corp. v. Metal Trims Indus., Inc., 106 Pa.Cmwlth. 22, 525 A.2d 468, 471 (Pa. Super. 1987).

Sloan & Co. v. Liberty Mut. Ins. Co., 653 F.3d 175, 179–80 (3d Cir. 2011) (footnote omitted). However, make sure to consult and consider the potential impact of Procurement Code, § 3933 (public projects) and CASPA, § 507 (private projects), both discussed above.

Pay-When-Paid Clauses

Pay-when-paid clauses are permitted. See Sloan & Co. v. Liberty Mut. Ins. Co., 653 F.3d 175, 179–80 (3d Cir. 2011). Additionally, make sure to consult and consider the potential impact of Procurement Code, § 3933 (public projects) and CASPA, § 507 (private projects).

Forum Selection and Choice of Law Clauses

Current as of: ***07/29/2022***

Does the State Prohibit Out-of-State Forum Selection and/or Choice of Law Clauses If the Construction Took Place in That State?

Out-of-State Forum Selection Clauses

Out-of-state forum selection clauses are prohibited in Pennsylvania. CASPA provides that "making a contract subject to the laws of another state or requiring that any litigation, arbitration or other dispute resolution process on the contract occur in another state shall be unenforceable." 73 Pa. Stat. Ann. § 514.

Out-of-State Choice of Law Clauses

Out-of-state choice of law clauses are prohibited in Pennsylvania. Section 514 of CASPA prohibits such clauses on projects within its coverage. 73 Pa. Stat. Ann. § 514.

Indemnification Provisions

Current as of: ***07/29/2022***

Does the State Limit the Scope of Indemnification Clauses in Construction Contracts and, if so, how?

Permitted Scope of Indemnification Clauses

From a case law perspective, the Superior Court of Pennsylvania observed and held in the case of Burlington Coat Factory of Pennsylvania, LLC v. Grace, 126 A.3d 1010 (Pa. Super. 2015), as follows:

> A party cannot obtain indemnification for its own negligence unless the contract clearly and unequivocally provides for such indemnification. Ruzzi v. Butler Petroleum Co., 588 A.2d 1, 7 (Pa. 1991); Perry v. Payne, 66 A. 553, 557 (Pa. 1907). "Unless the language of the contract is clear and unambiguous, however, such that the 'contract puts it beyond doubt' [. . .] we must opt for the interpretation that does not shoulder [the indemnitor] with the fiscal responsibility for [the indemnitee's] negligence." Greer v. City of Philadelphia, et al., 795 A.2d 376, 380 (Pa. 2002) (citing Perry, 66 A. at 557; Ruzzi, 588 A.2d at 4). Where an agreement includes multiple contradictory indemnity provisions drafted by the same person, we construe the agreement against the drafter and enforce the narrower provision. Chester Upland School Dist. v. Edward Melony, Inc., 901 A.2d 1055, 1061-62 (Pa. Super. 2006).

Burlington Coat Factory, 126 A.3d at 1023.

However, from a statutory perspective, 68 P.S. § 491 ("Preparation of plans; giving or failure to give directions; indemnification agreement") adds:

> Every covenant, agreement or understanding in, or in connection with any contract or agreement made and entered into by owners, contractors, subcontractors or suppliers whereby an architect, engineer, surveyor or his agents, servants or employees shall be indemnified or held harmless for damages, claims, losses or expenses including attorneys' fees arising out of: (1) the preparation or approval by an architect, engineer, surveyor or his agents, servants, employees or invitees of maps, drawings, opinions, reports, surveys, change orders, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the architect, engineer, surveyor or his agents, servants or employees provided such giving or failure to give is the primary cause of the damage, claim, loss or expense, shall be void as against public policy and wholly unenforceable.

Id. (Emphasis added).

Specific Limitations on the Scope of Indemnification Clauses (Indemnified Party's Sole Negligence, Own Negligence, Wrongful Acts, or Unlawful Acts)

See the discussion of Burlington Coat Factory and 68 P.S. § 491, above.

Mechanic's Liens Claims

Current as of: ***07/29/2022***

How Does the State's Mechanic's Lien Statute Operate?

Mechanic's Lien Statute

Pennsylvania's Mechanics' Lien Law of 1963, as amended, can be found at 49 P.S. §§ 1101–1902 (the Lien Law).

Lien Rights and Claims on Public Projects

Generally, as set forth in Section 1303(b) of the Lien Law, "No lien shall be allowed for labor and materials furnished for a purely public purpose." This has been interpreted by cases, including Cornerstone Land Development Co. of Pittsburgh, LLC v. Wadwell Group, 959 A.2d 1264 (Pa. Super. 2008). There the Superior Court of Pennsylvania discussed factors to be consider in evaluating whether a project is for a purely public purpose. "These factors include: 1) whether the government or a private entity managed and controlled the attached property when the lien was filed; 2) whether the property was constructed and paid for by a private entity; 3) whether the property was being used to further proprietary motives when the lien was filed; and, most importantly, 4) whether execution on the lien would disrupt an essential public service." Cornerstone, 959 A.2d at 1268–69, citing American Seating Co. v. Philadelphia, 256 A.2d 599, 601 (Pa. 1969).

Separate Mechanic's Lien Requirements for Residential Construction

For filing, there are no separate requirements. The Lien Law does permit broader up front waivers of lien rights on "Residential Property," however. See 49 P.S. § 1401. It also offers other protections for Residential Property owners. See 49 P.S. § 1510(f), discussed further below.

Required Preliminary or Pre-lien Notices for Filing a Mechanic's Lien Claim

Section 1501 of the Lien Law sets forth the requirements for the notice of intention to file lien claim and states as follows:

> **(b.1) Time Period of Formal Notice.** No claim by a subcontractor, whether for erection or construction or for alterations or repairs, shall be valid unless, at least thirty (30) days before the same is filed, he shall have given to the owner a formal written notice of his intention to file a claim, except that such notice shall not be required where the claim is filed pursuant to a rule to do so as provided by section [1506].
>
> **(c) Contents of Formal Notice.** The formal notice shall state:
>
> (1) the name of the party claimant;
>
> (2) the name of the person with whom he contracted;
>
> (3) the amount claimed to be due;
>
> (4) the general nature and character of the labor or materials furnished;
>
> (5) the date of completion of the work for which his claim is made;
>
> (6) a brief description sufficient to identify the property claimed to be subject to the lien.
>
> **(d) Service of notice.** The notice provided by this section may be served by first class, registered or certified mail on the owner or his agent or by an adult in the same manner as a writ of summons in assumpsit, or if service cannot be so made then by posting upon a conspicuous public part of the improvement.

49 P.S. § 1501. Further, if the project has been registered under the "State Construction Notices Directory," the subcontractor must file a "Notice of Furnishing" in order to not forfeit lien rights. See generally, 49 P.S. §§ 1501.1–1501.6.

Time Limit for Filing a Mechanic's Lien Claim

Section 1502(a)(1–2) of the Lien Law states:

> **(a) Perfection of Lien.** To perfect a lien, every claimant must:
>
> (1) file a claim with the prothonotary as provided by this act within six (6) months after the completion of his work; and
>
> (2) serve written notice of such filing upon the owner within one (1) month after filing, giving the court, term and number and date of filing of the claim. An affidavit of service of notice, or the acceptance of service, shall be filed within twenty (20) days after service setting forth the date and manner of service. Failure to serve such notice or to file the affidavit or acceptance of service within the times specified shall be sufficient ground for striking off the claim.

49 P.S. §§ 1502(a)(1), (2).

Time Limit or Statute of Limitations for Foreclosing on a Mechanic's Lien

Section 1701 of the Lien Law provides:

> (b) Time for Commencing Action. An action to obtain judgment upon a claim filed shall be commenced within two (2) years from the date of filing unless the time be extended in writing by the owner.
>
> ****
>
> (d) Limitation on Time of Obtaining Judgment. A verdict must be recovered or judgment entered within five (5) years from the date of filing of the claim. Final judgment must be entered on a verdict within five (5) years. If a claim is not prosecuted to verdict or judgment, as provided above, the claim shall be wholly lost: Provided, however, That in either case, if a complaint has been or shall be filed in the cause and if the cause has been or shall be at issue, all time theretofore or thereafter consumed in the presentation and disposition of all motions and petitions of defendants, substituted defendants and intervenors in the cause, and in any appeal or appeals from any order in the cause, from the date of perfection of such appeal to the date of return of the certiorari from the appellate court to the court of common pleas, shall be excluded in the computation of the five (5) year period herein provided.

49 P.S. §§ 1701(b), (d).

Statutory Authority Allowing the Owner to Require a Performance Bond in lieu of or to Replace a Mechanic's Lien

There is no statutory authority directly on point. Nevertheless, the Lien Law does recognize the posting of security in place of a perfected lien as follows in Section 1510 as follows:

> (d) Security in Lieu of Cash. In lieu of the deposit of any such sum or sums, approved security may be entered in such proceedings in double the amount of the required deposit, or in such lesser amount as the court shall approve, which, however, shall in no event be less than the full amount of such required deposit; and the entry of such security shall entitle the owner to have such liens discharged to the same effect as though the required sums had been deposited in court as aforesaid.
>
> (e) Authority of Court. The court, upon petition filed by any party, and after notice and hearing, may upon cause shown:
>
>> (1) require the increase or decrease of any deposit or security;
>>
>> (2) strike off security improperly filed;
>>
>> (3) permit the substitution of security and enter an exoneration of security already given.

49 P.S. § 1510.

Additionally, for Residential Property, Section 1510(f) adds:

> (1) A claim filed under this act with respect to an improvement to a residential property subject to section [1]301(b) shall, upon a court order issued in response to a petition or motion to the court by the owner or a party in interest, be discharged as a lien against the property when the owner or tenant has paid the full contract price to the contractor.
>
> (2) Where the owner or tenant has paid a sum to the contractor which is less than the sum of the full contract price, a claim filed under this act with respect to an improvement to a residential property subject to section [1]301(b) shall, upon a court order issued in response to a petition or motion to the court by the owner or a party in interest, cause the lien to be reduced to the amount of the unpaid contract price owed by the owner or tenant to the contractor.

49 P.S. § 1510(f).

Statutory Form for Lien Waivers

There is no statutorily required form. Although the Lien Law does discuss the validity and enforceability of waivers in Sections 1401 through 1407 of the Lien Law under Article IV Waiver of Lien; Effect of Filing. See below.

Circumstances Where a Lien Waiver May Be Void or Unenforceable under State Statute

Sections 1401 through 1407 of the Lien Law address lien waivers and their enforceability.

In particular, Section 1401 of the Lien Law states:

> **(a) Residential Property.** A contractor or subcontractor may waive his right to file a claim against residential property by a written instrument signed by him or by any conduct which operates equitably to estop such contractor from filing a claim.
>
> **(b) Nonresidential Buildings.**
>
>> (1) Except as provided in subsection (a), a waiver by a contractor of lien rights is against public

policy, unlawful and void unless given in consideration for payment for the work, services, materials or equipment provided and only to the extent that such payment is actually received.

(2) Except as provided in subsection (a), a waiver by a subcontractor of lien rights is against public policy, unlawful and void, unless given in consideration for payment for the work, services, materials or equipment provided and only to the extent that such payment is actually received, or unless the contractor has posted a bond guaranteeing payment for labor and materials provided by subcontractors.

49 P.S. § 1401. Other sections in this Article IV Waiver of Lien; Effect of Filing address: Waiver by Contractor; Effect on Subcontractor (49 P.S. § 1402), Release as Waiver (49 P.S. § 1403), Effect of Credit or Collateral (49 P.S. § 1404), Right of Owner to Limit Claims to Unpaid Balance of Contract Price (49 P.S. § 1405), Rights of Subcontractor to Rescind after Notice of Contract Provisions (49 P.S. § 1406), and Contracts Not Made in Good Faith; Effect (49 P.S. § 1407).

Mechanic's Liens and Priorities of Claims

Current as of: ***07/29/2022***

How Does the State Address Mechanic's Lien Priority?

Among Mechanic's Liens

Generally, priorities are addressed in Section 1508 of the Lien Law, as follows:

Priority of Lien.--The lien of a claim filed under this act shall take effect and have priority as follows:

(a) Except as set forth in subsection (c), in the case of the erection or construction of an improvement, as of the date of the visible commencement upon the ground of the work of erecting or constructing the improvement.

(b) Except as set forth in subsection (c), in the case of the alteration or repair of an improvement, as of the date of the filing of the claim.

(c) Any lien obtained under this act by a contractor or subcontractor shall be subordinate to the following:

(1) A purchase money mortgage as defined in 42 Pa.C.S. § 8141(1) (relating to time from which liens have priority).

(2) An open-end mortgage as defined in 42 Pa.C.S. § 8143(f) (relating to open-end mortgages), where at least sixty percent (60%) of the proceeds are intended to pay or are used to pay all or part of the costs of construction.

49 P.S. § 1508. The distinction between what constitutes erection and construction versus alteration and repair becomes critical in creating priorities between Mechanics' Lien Claims under the Lien Law and other mortgage and security filings. Section 1201 of the Lien Law states:

(10) "Erection and construction" means the erection and construction of a new improvement or of a substantial addition to an existing improvement or any adaptation of an existing improvement rendering the same fit for a new or distinct use and effecting a material change in the interior or exterior thereof.

(11) "Alteration and repair" means any alteration or repair of an existing improvement which does not constitute erection or construction as defined herein.

(12) "Erection, construction, alteration or repair" includes:

(a) Demolition, removal of improvements, excavation, grading, filling, paving and landscaping, when such work is incidental to the erection, construction, alteration or repair;

(b) Initial fitting up and equipping of the improvement with fixtures, machinery and equipment suitable to the purposes for which the erection, construction, alteration or repair was intended; and

(c) Furnishing, excavating for, laying, relaying, stringing and restringing rails, ties, pipes, poles and wires, whether on the property improved or upon other property, in order to supply services to the improvement.

49 P.S. § 1201. In addition to these definitions, there are a myriad of cases discussing what specifically qualifies as erection and construction versus alteration and repair. A close examination of these cases in relation to the facts of the particular situation at hand becomes essential.

Between Mechanic's Lien Claimants and Mortgagees

As noted above, Section 1508 expressly subordinates all Mechanics' Lien Claims under the Lien Law to the extent

of the existence of "(1) A purchase money mortgage as defined in 42 Pa.C.S. § 8141(1) (relating to time from which liens have priority). (2) An open-end mortgage as defined in 42 Pa.C.S. § 8143(f) (relating to open-end mortgages), where at least sixty percent (60%) of the proceeds are intended to pay or are used to pay all or part of the costs of construction." 49 P.S. § 1508. Having said that, there have already been cases interpreting essentially the super priority provisions (better perhaps stated as the super subordination) of the Lien Law. See, e.g., Commerce Bank/ Harrisburg, N.A. v. Kessler, 46 A.3d 724 (Pa. Super. 2012) and Shaner Capital L.P. v. Zambrano Condo. Assocs., L.P., 2011 Pa. Dist. & Cnty. Dec. LEXIS 220 (August 10, 2011), aff'd in part, rev'd. in part, in a non-precedential decision at 55 A.3d 150 (Pa. Super. 2012).

Between Mechanic's Lien Claimants and Judgment Creditors

As stated above, this determination would depend on the priority of lien under Section 1508 of the Lien Law and the perfection date of the judgment. 49 P.S. § 1508.

Between Mechanic's Lien Claimants and Bona Fide Purchasers for Value

Section 1303(c) of the Lien Law states "Conveyance Prior to Lien. If the property be conveyed in good faith and for a valuable consideration prior to the filing of a claim for alterations or repairs, the lien shall be wholly lost." While there are some cases that have applied this Section of the Lien Law in non-alteration and repair situations, consider the relation back principle of Section 1508 of the Lien Law as it relates to erection and construction liens. If an erection and construction lien relates back to "visible commencement upon the ground of the work of erecting or constructing the improvement," then it would appear that the conveyance of the improvement-based property would always be subsequent to the visible commencement of work upon the ground that constitutes erection and construction.

Further, Section 1307 specifically mentions the purchaser of a liened property as follows:

> Removal or Detachment of Improvement Subject to Claim.—
>
> (a) Removal Prohibited; Effect. No improvement subject to the lien of a claim filed in accordance with this act shall be removed or detached from the land except pursuant to title obtained at a judicial sale or by one owning the land and not named as a defendant. Any improvement otherwise removed shall remain liable to the claim filed, except in the hands of a purchaser for value.
>
> (b) Restraint of Removal by Court. The court may on petition restrain the removal of the improvement in accordance with the Pennsylvania Rules of Civil Procedure governing actions to prevent waste.

49 P.S. § 1307.

Construction Defect Claims

Current as of: **07/29/2022**

How Does the State Limit the Ability to Bring a Construction Defect Claim?

Statute of Limitations

Simply stated, there is a two-year statute of limitation for actions in tort (e.g., negligence), 42 Pa. C.S. § 5524, and a four-year statute of limitation of actions in contract, 42 Pa. C.S. § 5525. This issue was addressed extensively in two cases involving the same project: Gustine Uniontown Associates, Ltd. v. Anthony Crane Rental, Inc., 842 A.2d 334 (Pa. 2004), "holding that a four-year statute applied to all actions sounding in breach of contract, even those involving latent defects in the construction of real property," as stated in Gustine Uniontown Associates, Ltd. v. Anthony Crane Rental, Inc., 892 A.2d 830, 834 (Pa. Super. 2006).

Interplay of Statute of Limitations and Discovery of the Defect

While there is no statutory tolling of statutes of limitation for latent construction defect claims, the discovery rule exists as a matter of case law in the Commonwealth of Pennsylvania. In Fine v. Checcio, 870 A.2d 850 (Pa. 2005), the supreme court of Pennsylvania recognized:

> . . . when a court is presented with the assertion of the discovery rules application, it must address the ability of the damaged party, exercising reasonable diligence, to ascertain that he has been injured and by what cause. *Id*. Since this question involves a factual determination as to whether a party was able, in the exercise of reasonable diligence, to know of his injury and its cause, ordinarily, a jury is to decide it. Hayward, 608 A.2d at 1043. *See* Smith v. Bell Telephone Co. of Pennsylvania, 397 Pa. 134, 153 A.2d 477, 481 (1959). Where, however, reasonable minds would not differ in finding that a party knew or should have known on the exercise of reasonable diligence of his injury and its cause, the court determines that the discovery rule does not apply

as a matter of law. Pocono International, 468 A.2d at 471.

When the discovery rule applies, the statute of limitations does not commence to run at the instant that the right to institute suit arises, i.e., when the injury occurs. Id. at 611; Ayers, 154 A.2d at 791. Rather, the statute is tolled, and does not begin to run until the injured party discovers or reasonably should discover that he has been injured and that his injury has been caused by another party's conduct. *Id*. Whether the statute of limitations has run on a claim is a question of law for the trial court to determine; but the question as to when a party's injury and its cause were discovered or discoverable is for the jury. Hayward, 608 A.2d at 1043.

Fine, 870 A.2d at 858-59. These principles have been addressed and applied in construction law cases in Pennsylvania. See, e.g., Amodeo v. Ryan Homes, Inc., 595 A.2d 1232, 1235 (Pa. Super. 1991)

However, the statute of repose is not subject to the same case law protections in favor of the claimant. See Noll v. Harrisburg Area YMCA, 643 A.2d 81 (Pa. 1994) (citing Schmoyer by Schmoyer v. Mexico Forge, Inc., 621 A.2d 692, 693 (Pa. Super. 1993) and Graver v. Foster Wheeler Corporation, 96 A.3d 383 (Pa. Super. 2014)).

Notice of a Right to Cure as a Prerequisite to Bringing Suit

There is no expressly recognized notice of a right to cure defects prior to filing suit in Pennsylvania.

Statute of Repose

The Commonwealth's statute of repose is found in 42 Pa. C.S. § 5536 and provides as follows:

§ 5536. Construction projects.

(a) General rule.--Except as provided in subsection (b), a civil action or proceeding brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction of any improvement to real property must be commenced within 12 years after completion of construction of such improvement to recover damages for:

(1) Any deficiency in the design, planning, supervision or observation of construction or construction of the improvement.

(2) Injury to property, real or personal, arising out of any such deficiency.

(3) Injury to the person or for wrongful death arising out of any such deficiency.

(4) Contribution or indemnity for damages sustained on account of any injury mentioned in paragraph (2) or (3).

(b) Exceptions.--

(1) If an injury or wrongful death shall occur more than ten and within 12 years after completion of the improvement a civil action or proceeding within the scope of subsection (a) may be commenced within the time otherwise limited by this subchapter, but not later than 14 years after completion of construction of such improvement.

(2) The limitation prescribed by subsection (a) shall not be asserted by way of defense by any person in actual possession or control, as owner, tenant or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or wrongful death for which it is proposed to commence an action or proceeding.

(c) No extension of limitations.--This section shall not extend the period within which any civil action or proceeding may be commenced under any provision of law.

42 Pa. C.S. § 5536.

Construction Warranties

Current as of: ***07/29/2022***

What Types of Construction Warranties Exist in the State?

Warranties for Nonresidential Construction Contracts

As noted further below, and above, the Commonwealth of Pennsylvania has a number of avenues to afford protection to consumers in a residential construction context. These protections sometimes turn on whether the contract is for home improvement versus new construction for the initial purchaser/consumer who will be living in the residence.

In the home improvement context, consider and review HICPA. Initially, HICPA requires certain provisions to appear in the written agreement with between the home improvement contractor covered under HICPA and the residential consumer:

> **§ 517.7. Home improvement contracts** (a) Requirements.--No home improvement contract shall be valid or enforceable against an owner unless it:
>
> (1) Is in writing and legible and contains the home improvement contractor registration number of the performing contractor.
>
> (2) Is signed by all of the following:
>
> (i) The owner, his agent or other contracted party.
>
> (ii) The contractor or a salesperson on behalf of a contractor.
>
> (3) Contains the entire agreement between the owner and the contractor, including attached copies of all required notices.
>
> (4) Contains the date of the transaction.
>
> (5) Contains the name, address and telephone number of the contractor. For the purposes of this paragraph, a post office box number alone shall not be considered an address.
>
> (6) Contains the approximate starting date and completion date.
>
> (7) Includes a description of the work to be performed, the materials to be used and a set of specifications that cannot be changed without a written change order signed by the owner and the contractor.
>
> (8) Includes the total sales price due under the contract or includes a time and materials provision wherein contractor and owner agree in writing to the performance of the home improvement by the contractor and payment for the home improvement by the owner, based on time and materials. If the contract includes a time and materials provision:
>
> (i) The contractor shall provide an initial cost estimate in writing to the owner before any performance of the home improvement commences.
>
> (ii) The contract shall state:
>
> (A) The dollar value of the initial cost estimate for the services to be performed under the time and materials provision.
>
> (B) That the cost of the services to be performed under the time and materials provision may not exceed 10% above the dollar value indicated in the initial cost estimate.
>
> (C) The total potential cost of the services to be performed under the time and materials provision, including the initial cost estimate and the 10% referenced in clause (B), expressed in actual dollars.
>
> (D) A statement that the cost of the services to be performed under the time and materials provision shall not be increased over the initial cost estimate plus a 10% increase without a written change order signed by the owner and contractor.
>
> (9) Includes the amount of any down payment plus any amount advanced for the purchase of special order materials. The amount of the down payment and the cost of the special order materials must be listed separately.
>
> (10) Includes the names, addresses and telephone numbers of all subcontractors on the project known at the date of signing the contract. For the purposes of this paragraph, a post office box number alone shall not be considered an address.
>
> (11) Except as provided in section [73 P.S. § 517.12] , agrees to maintain liability insurance covering personal injury in an amount not less than $50,000 and insurance covering property damage caused by the work of a home improvement contractor in an amount not less than $50,000 and identifies the current amount of insurance coverage maintained at the time of signing the contract.
>
> (12) Includes the toll-free telephone number under section [73 P.S. § 517.3].
>
> (13) Includes a notice of the right of rescission under subsection [73 P.S. § 517.7] (b).

73 P.S. § 517.7.

Thereafter, HICPA identifies specific actions by the home improvement contractor to be fraudulent:

> **§ 517.8. Home improvement fraud** (a) Offense defined.--A person commits the offense of home improvement fraud if, with intent to defraud or injure anyone or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, the actor:
>
> (1) makes a false or misleading statement to induce, encourage or solicit a person to enter into any written or oral agreement for home improvement services or provision of home improvement materials or to justify an increase in the previously agreed-upon price;
>
> (2) receives any advance payment for performing home improvement services or providing home improvement materials and fails to perform or provide such services or materials when specified in the contract taking into account any force majeure or unforeseen labor strike that would extend the time frame or unless extended by agreement with the owner and fails to return the payment received for such services or materials which were not provided by that date;
>
> (3) while soliciting a person to enter into an agreement for home improvement services or materials, misrepresents or conceals the contractor's or salesperson's real name, the name of the contractor's business, the contractor's business address or any other identifying information;
>
> (4) damages a person's property with the intent to induce, encourage or solicit that person to enter into a written or oral agreement for performing home improvement services or providing home improvement materials;
>
> (5) misrepresents himself or another as an employee or agent of the Federal, Commonwealth or municipal government, any other governmental unit or any public utility with the intent to cause a person to enter into any agreement for performing home improvement services or providing home improvement materials;
>
> (6) misrepresents an item as a special order material or to misrepresent the cost of the special order material;
>
> (7) alters a home improvement agreement, mortgage, promissory note or other document incident to performing or selling a home improvement without the consent of the consumer; or
>
> (8) directly or indirectly publishes a false or deceptive advertisement in violation of State law governing advertising about home improvement.

73 P.S. § 517.8. Finally, HICPA identifies other "Prohibited Acts" in Section 517.9. Importantly, a violation of HICPA is considered to be the basis for a statutory claim under the Commonwealth's Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1–201-9.2 (UTPCPL). 73 P.S. § 517.10.

Relevant to both claims under HICPA and residential construction generally, are at least the following "Unfair methods of competition" provisions of the UTPCPL, which was held to be applicable to residential construction projects in Gabriel v. O'Hara, 534 A.2d 488 (Pa. Super. 1987):

> (vii) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;
>
> ****
>
> (xiv) Failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made;
>
> (xv) Knowingly misrepresenting that services, replacements or repairs are needed if they are not needed;
>
> (xvi) Making repairs, improvements or replacements on tangible, real or personal property, of a nature or quality inferior to or below the standard of that agreed to in writing . . . .

73 P.S. § 201-2.

The UTPCPL has significant private action relief provisions, among other avenues of enforcement, including those in Section 201-9.2 ("Private actions"):

> (a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or person, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action to recover actual damages or one hundred dollars ($100), whichever is greater. The court

> may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars ($100), and may provide such additional relief as it deems necessary or proper. The court may award to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorney fees

73 P.S. § 201-9.2.

Implied Warranty of Good Workmanship in New Residential Construction

Pennsylvania recognizes an implied warranty of warranty of good workmanship in new residential construction. In one of the seminal cases in this area of residential consumer protection law, Elderkin v. Gaster, 288 A.2d 771 (Pa. 1972), the supreme court of Pennsylvania observed and held as follows:

> There are but few Pennsylvania decisions concerned with attaching implied warranties to the sale of a new home. In Stewart v. Trimble, 15 Pa. Super. 513 (1901) and Raab v. Beatty, 96 Pa. Super. 574 (1929) our Superior Court held that a builder-vendor impliedly warrants good workmanship in the completion of what was at the time of sale a partially constructed building. Neither of these decisions involved an implied warranty of habitability, but an English case substantially similar to Raab v. Beatty, supra, has been cited as the basis for a series of American decisions holding that the sale by its builder-vendor of a new home in the process of construction is accompanied by implied warranties of workmanlike construction and habitability . . . . The thesis of all these decisions is succinctly summarized in a quotation from *Miller v. Cannon Hill Estates*, supra, at 121: "[T]he whole object, as both parties know, is that there shall be erected a house in which the intended purchaser shall come to live. It is the very nature and essence of the transaction between the parties that he will have a house put up there which is fit for him to come into as a dwelling house. It is plain that in those circumstances there is an implication of law that the house shall be reasonably fit for the purpose for which it is required, that is for human dwelling."
>
> ****
>
> In Kellogg Bridge Co. v. Hamilton, 110 U.S. 108, 28 L. Ed. 86 (1884), the Supreme Court, speaking through the first Mr. Justice HARLAN, stated that the law will imply a warranty of fitness for the purpose intended when a buyer has reason to rely upon and does rely upon the judgment of a seller who manufactures the product. We have concluded that one who purchases a development house conforms to this standard; he justifiably relies on the skill of the developer that the house will be a suitable living unit. Not only does a housing developer hold himself out as having the necessary expertise with which to produce an adequate dwelling, but he has by far the better opportunity to examine the suitability of the home site and to determine what measures should be taken to provide a home fit for habitation. As between the builder-vendor and the vendee, the position of the former, even though he exercises reasonable care, dictates that he bear the risk that a home which he has built will be functional and habitable in accordance with contemporary community standards. We thus hold that the builder-vendor impliedly warrants that the home he has built and is selling is constructed in a reasonably workmanlike manner and that it is fit for the purpose intended-habitation.
>
> Having reached this conclusion, it remains to consider whether the deficiency of which appellants complain is within the purview of this warranty. Most of the cited cases supporting the theory of implied warranty of reasonable workmanship and habitability were factually concerned with structural defects rendering the home unfit for habitation. In several cases, however, the implied warranty of habitability was found to have been breached not because of structural defects, but because of the unsuitable nature of the site selected for the home . . . . This seems to be a natural application of the implied warranty of habitability of the home since selection and subdivision of the home sites are within the exclusive domain of the builder-vendors. The developer holds himself out, not only as a construction expert, but as one qualified to know what sorts of lots are suitable for the types of home to be constructed. Of the two parties to the transaction, the builder-vendor is manifestly in a better position than the normal vendee to guard against defects in the home site and if necessary to protect himself against potential but unknown defects in the projected home site.
>
> While we can adopt no set standard for determining habitability, it goes without saying that a potable water supply is essential to any functional living unit; without drinkable water, the house cannot be used for the purpose intended. Accordingly, we find the implied warranty of habitability to have been breached by the appellee in the instant case.

Elderkin, 288 A.2d at 775–77 (footnotes and select citations omitted).

Implied Warranty of Habitability in New Residential Construction

As discussed immediately above, the supreme court of Pennsylvania recognizes *both* an Implied Warranty of Habitability and an Implied Warranty of Good Workmanship in the context of new residential construction. However, the extension of the Implied Warranty of Habitability to subsequent purchasers/users of the new home was curtailed (and with it presumably the Implied Warranty of Good Workmanship) by the supreme court of Pennsylvania in *Conway v. Cutler Group, Inc.*, 99 A.3d 76 (Pa. 2014). As well-summarized in the non-precedential decision of *Mitchell v. Megill Homes, Inc.*, 262 A.3d 558, 2021 Pa. Super. Unpub. LEXIS 2294 (Pa. Super. 2021):

> A chronological review of the development of the doctrine of the implied warranty of workmanlike construction reveals that the resolution of this appeal is straightforward. We start by noting that the Supreme Court of Pennsylvania adopted the implied warranty of workmanlike construction in Elderkin v. Gaster, 288 A.2d 771, 777 (Pa. 1972). Under this doctrine, the builder of a newly constructed home implicitly warrants that the building is fit for habitation. *See id.* "It is the very nature and essence of the transaction between the parties that [the purchaser] will have a house . . . which is fit for him to come into as a dwelling house." Id., at 775.
>
> This Court consistently applied the implied warranty to sales of newly constructed homes. *See, e.g.*, Ecksel v. Orleans Const. Co., 519 A.2d 1021, 1026 (Pa. Super. 1987); *see also* Tyus v. Resta, 476 A.2d 427, 433 (Pa. Super. 1984). We have made clear that the warranty does not arise from the express terms of the sales contract. *See* Ecksel, at 1025. Moreover, any attempt by the builder to disclaim the implied warranty must be specific and unambiguous. *See id.*
>
> Thirty years ago, this Court expanded the application of the warranty in *Spivack*. There, the *Spivacks* purchased a not-yet constructed condominium from Breyer Woods. See Spivack, 586 A.2d at 404 n.2. After the home was built, the Spivacks filed suit against, among others, the general contractor responsible for building the home, Berks Ridge Corp., Inc. The trial court sustained Berks Ridge's preliminary objection, holding that the implied warranty did not apply where there was no contractual privity between Berks Ridge and the Spivacks. This Court reversed. *See* id., at 405. "Privity of contract is not required to assert a breach of warranty claim against the builder of a new residential unit." Id. The court reasoned that where a home builder knew or should have known that they were selling the home to a party that would not use the home, the warranty necessarily extended to the first actual user. *See id.*
>
> Twenty years later, the Supreme Court of Pennsylvania defined a limit to the applicability of the implied warranty of workmanlike construction. *See Conway*. There, the Cutler Group built and sold a home to the Fieldses, who lived in the home for three years. *See id.*, 99 A.3d at 68. The Fieldses sold the home to the Conways. *See id.* Five years later, the Conways filed suit against the Cutler group. See id.
>
> The Supreme Court began by distinguishing the Conways' position from the Spivacks'; while both were technically second purchasers, only the Spivacks were the first users of the home. *See* id., at 667. After reviewing precedent from other jurisdictions, the court opined that the extension of the implied warranty of workmanlike construction to second and later users of a home was a matter for the legislature. *See* id., at 669-670. It reasoned that even though the implied warranty was not created by explicit promises in the agreement of sale, the implied warranty "was rooted in the existence of a contract - an agreement of sale - between the builder-vendor of a residence and the purchaser-resident." Id., at 665. As such, the court declined to extend the implied warranty to second and later users of a new home. *See* id., at 671.
>
> Importantly, however, the court explicitly disclaimed any alteration of the holding in *Spivack*:
>
> > As we have discussed . . . supra, the facts of this case are readily distinguishable from those of [*Spivack*], where the first purchaser of the new home was a developer who did not reside in or use the home. As the facts of *Spivack* are not before us, we decline to rule on the Superior Court's holding in that case. Conway, 99 A.3d at 671 n.4.
>
> Accordingly, *Spivack* is still controlling precedent in this Court when it cannot be distinguished. *See* Commonwealth v. Pepe, 897 A.2d 463, 465 (Pa. Super. 2006).

Mitchell, 2021 Pa. Super. Unpub. LEXIS 2294, at *8–11.

Statutory Warranties for New Residential Construction

At present, there is no expressly statutory warranty for New Residential Construction. However, as discuss above, the UTPCPL does contain a number of provisions relevant to the subject of warranties, and those terms have been extended to home improvement construction. See 73 P.S. § 517.7, discussed above.

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