

# LEGAL PERSPECTIVE

## LIEN LAW AND CASPA AMENDMENTS: THE PRACTICAL SIGNIFICANCE OF THE EBB AND FLOW OF STATUTORY LEVERAGE

BY TIMOTHY D. BERKEBILE, ESQ.

Over the past twelve years, there have been many updates from Pennsylvania law firm construction practices educating clients and prospective clients regarding changes to the Mechanic's Lien Law of 1963 (the "Lien Law") and the Contractor and Subcontractor Payment Act ("CASPA"). A typical response has been a mix of gratitude that legal counsel was aware of changes in the laws and overall disinterest in the details. To this day, these laws are generally viewed by industry participants as lacking any practical relevance during performance of the construction project. While this may have proven true in the past, it is arguably no longer the case. The evolution of the Lien Law and CASPA has made it more crucial than ever to understand the big picture of how these laws function together during all phases of the project.

The cumulative effect of recent amendments to the Lien Law and CASPA has been to swing leverage in payment disputes back and forth in an attempt to balance the competing interests of the parties issuing and seeking payment. Attempts to address systemic issues have created new requirements and strengthened existing ones. The addition of new rules has complicated the landscape and made it easier to miss the significance of actions taken by others. A missed deadline or failure to provide required notice may result in a lost right or remedy for one party or the other. Coupling a missed opportunity with the other party taking advantage of the statutory tools at their disposal will have a profound effect on the bottom line if a dispute ultimately arises.

This article does not rehash every technical aspect of the 2007 and 2017 amendments to the Lien Law and the 2018 amendments to CASPA or provide legal advice on how these laws should be utilized. Instead, the following is intended to demonstrate how the recent amendments have morphed these laws from afterthoughts to relevant considerations during the course of the entire project.

### Payment and Performance Issues in Construction

The construction process presents timing and enforcement issues relating to payment and performance. When payment precedes performance, the party issuing payment (the "payer" in most cases being the owner or an upstream contractor) has little ability to influence the ongoing performance of the work by downstream contractors. This exposes the payer to the risks of deficient work, neglect, or abandonment of the project. For this reason, performance generally precedes payment. Contractors, subcontractors, and material suppliers incur significant expense furnishing labor and materials prior to receiving payment. While

nonpayment in the case of deficient or incomplete work may be justified, the consequences of encountering an owner that is unable or unwilling to pay in accordance with the terms of the applicable contract can be catastrophic. The risk of non-payment is generally even higher for lower tiered subcontractors and material suppliers. The costs and risks of enforcing contractual terms through dispute resolution procedures often embolden the parties issuing payment to pay less than originally agreed.

### The Lien Law & Upfront Waivers

The Lien Law was enacted to address the risk of nonpayment by those unable or unwilling to pay in accordance with their contract. This was accomplished by providing contractors and first-tier subcontractors the ability to a claim of secured interest in the improved property while the merits of any dispute were resolved. If successful, the prevailing lien claimant had the right to foreclose on the property and have it sold to cover the amount due. In theory, the Lien Law decreased the risk of the payer being insolvent or otherwise judgment-proof and increased pressures to pay from external sources with interests in the property, such as lenders. Further, it provided a potential source of funds to pay those that had been denied payment otherwise due and owing. As a practical matter, however, mechanic's liens were easily avoided through upfront lien waivers that eliminated the right to file a mechanic's lien claim against the project. Many potential lien claimants felt compelled to waive their lien rights or risk not being hired to perform the work. These potential lien claimants were forced to forego rights that were meant to level the playing field. For projects on which upfront lien waivers were executed, mechanic's liens had no effect as between the parties issuing and seeking payment. For projects on which upfront lien waivers were not executed, mechanic's liens could be treated as an afterthought, as the deadline for filing was months after the potential lien claimant's last work on the project.

### CASPA's Limited Effect

Made effective in 1994, CASPA's stated purpose was to address downstream payment abuses in the building industries. CASPA provided, among other things, gap-filler payment terms and the ability for parties that had not been paid in accordance with the terms of their contract to recover penalty interest and reasonable attorney's fees. CASPA also provided parties issuing payment the right to withhold payment in good faith for deficiencies in performance and invoicing. The withholding payer was required to provide timely written explanation for not

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issuing payment, but CASPA was unclear regarding the amounts that could be withheld and the consequences for failing to timely provide the written explanation. Because most construction contracts contain payment terms of the type the gap-fillers provided, CASPA was primarily raised in attorney demand letters after a payment dispute arose. The possibility of recovering penalty interest and attorney's fees lowered the barriers to pursuing enforcement of contract provisions, emboldening some to pursue claims they otherwise may have negotiated away due to the costs and risks of dispute resolution.

#### **2007 Lien Law Amendments: Expansion of Lien Rights**

In 2007, the Lien Law was strengthened by a prohibition against upfront lien waivers on commercial projects, except under specific circumstances. Lien rights were extended to second-tier subcontractors and the time to file a lien was extended to six months. These changes constituted a monumental shift in leverage toward subcontractors and represented a mixed result for contractors. Owners could no longer rely on the general inapplicability of the Lien Law provided by upfront lien waivers and they faced claims by another layer of subcontractors. Contractors were also disadvantaged by these changes to some degree, as claims by subcontractors could be tendered to contractors to remove and defend. If owners wished to oversee payment of potential lien claimants in order to protect themselves from lien waivers, the onus was on owners from the outset to attempt to secure and monitor the site to identify who provided labor or materials and require progress lien waivers. This method was onerous and largely ineffective. Owners were susceptible to mechanic's lien claims from a larger pool of lien claimants with no means to insulate themselves from downstream payment disputes unless they were willing to incur the cost of a payment bond. If an owner chose to withhold payment to a contractor due

to a deficiency, the owner risked claims being brought by numerous unknown subcontractors.

#### **2017 Lien Law Amendments: State Construction Notices Directory & New Subcontractor Notice Requirements.**

In 2017, the issues created for owners by the 2007 Lien Law Amendments were addressed by the creation of the State Construction Notices Directory ("SCND"). Upon fulfilling certain requirements, an owner may now opt to register a project over \$1.5 million with the SCND before the project commences. Upon owners registering the project and meeting certain notice requirements, all first and second tier subcontractors are required to timely file a Notice of Furnishing to preserve their mechanic's lien rights.


This additional step for subcontractors represents another prerequisite to filing a mechanic's lien claim that may easily be missed if proper attention is not paid early in the project.

Likewise, an owner must be aware of the SCND registration option at the outset of the project to take advantage of this fix to the unwieldy scenario created by the 2007 Lien Law Amendments. An owner must also be aware of the effect of a subcontractor filing a Notice of Furnishing. The preservation of first and second tier subcontractor mechanic's lien rights has a complicating and direct effect on an owner's ability to negotiate payment disputes with its contractor(s).

#### **2018 CASPA Amendments: Right to Suspend Work for Nonpayment and Explanation of Basis for Withheld Payments Enforced.**

The 2018 amendments to CASPA are the most recent attempt to even the playing field between parties issuing and seeking payment on construction projects. Contractors and subcontractors are now afforded the statutory right to suspend work if payment is withheld as little as 70 days beyond the date payment is due, even if such right is not afforded by the applicable contract. Owners withholding payment to enforce contract requirements now face a greater possibility that the project will grind to a halt with owners potentially having little to no recourse. The amendments also address the prior lack of clarity regarding amounts that could be withheld and the consequences for failing to provide timely written explanation for the withholding. Parties withholding payments that fail both to provide written explanation within 14 days of the date of invoice and withhold only the amount in dispute waive the basis for withholding and must pay the entire amount. These changes constitute a massive shift in leverage that require the parties issuing payment to be both (1) hyper-diligent in documenting reasons for withholding payment, and (2) extremely vigilant of how they seek to enforce contract requirements and the potential consequences.

## Conclusion

The amendments to the Lien Law and CASPA have shifted leverage between parties issuing and seeking payment back and forth over the past twelve years but have also increased the relevance of these statutes throughout the entire course of the construction project. While litigation strategy should not hinder cooperation and compromise as the first option in resolving a potential dispute, the Lien Law and CASPA can no longer be treated as afterthoughts to be handled exclusively by attorneys subsequent to a dispute arising. The rights and remedies of both parties to a dispute are dependent on choices made early on. Many of those choices have a direct effect on the parties' ultimate negotiating leverage, and the parties to the dispute are not even aware. 

*Tim Berkebile is a member in the construction practice at Metz Lewis Brodman Must O'Keefe LLC. He can be reached at [tberkebile@metzlewis.com](mailto:tberkebile@metzlewis.com).*