

## Construction & Infrastructure Law Blog

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### The Year 2010 In Review: Prompt Payment

*This article is the fourth in a series summarizing construction law developments for 2010.*

By [Candace Matson](#), [Harold Hamersmith](#) & [Helen Lauderdale](#)

1. [Yassin v. Solis](#), 184 Cal. App. 4th 524 (2d Dist. May 2010)

Homeowners entered into an agreement with a contractor for home improvement work. The agreement called for the contractor to be paid fixed amounts upon reaching specific milestones on the project, with the final payment of \$7,500 due once the work was complete and a certificate of occupancy issued. The homeowners became dissatisfied with the contractor's work, terminated him from the project, and hired another to complete the work.

The contractor filed suit to recover amounts he claimed were owed, including the \$7,500 due upon completion. The homeowners cross-complained to recover amounts they spent to correct the contractor's deficient work. The trial court awarded the contractor nothing and awarded the homeowners \$50,000, plus \$36,000 in attorneys' fees under Civil Code Section 3260(g), which governs payment of retention proceeds. The trial court reasoned that the homeowners were entitled to recover attorneys' fees because they were the prevailing party on the contractor's claim for the last payment of \$7,500, which the court determined to be retention.

The Court of Appeal overturned the award of attorneys' fees. The Court distinguished the type of installment payments agreed upon by the homeowners and contractor in this case with retention. Unlike installment payments, retention consists of amounts withheld from progress payments until after the project is complete and the lien period has expired as security for the contractor's performance and full payment of subcontractors and suppliers. Because the \$7,500 payment the contractor sued to recover was not withheld from any prior progress payment, it was not retention. Instead it was simply an installment payment and, therefore, could not trigger the recovery of attorneys' fees under Civil Code Section 3260(g), which only covers the timely payment of retention. Without much discussion or analysis, the Court of Appeal endorsed the trial court's conclusion that attorney's fees are not recoverable under Civil Code Section 3260.1, which addresses the timely payment of progress payments.

2. [Hinerfeld-Ward Inc. v. Lipian](#), 188 Cal. App. 4th 86 (2d Dist. Sept. 2010)

A contractor on a substantial, multi-year home remodeling project sued the homeowners for

unpaid amounts claiming breach of an oral contract. The homeowners cross-complained for, among other things, negligence and fraud, and defended against the contractor's affirmative claims by citing Business and Professions Code Section 7159, which requires home improvement contracts to be in writing. At trial, the contractor obtained a judgment for \$200,000 for earned but unpaid progress payments and was awarded 2% per month on the unpaid amount, plus another \$200,000 in attorney's fees, under the prompt pay provisions of Civil Code Section 3260.1. Meanwhile, the homeowners were awarded \$1,000 on their negligence claim against the contractor.

The appellate court affirmed the trial court. Citing Asdourian v. Araj, 38 Cal. 3d 276 (1985), the appellate court held that while oral home improvement contracts violate Business and Professions Code Section 7159 and are illegal, they are not automatically void. In deciding whether an oral home improvement contract should be enforced, courts must examine whether enforcing the contract will undermine the consumer protection purposes of the statute or whether declaring the contract unenforceable will result in an unjust windfall to the homeowners. Because the homeowners in Hinerfeld-Ward were well-educated and were assisted by an experienced architect throughout the project, the Court of Appeal found they were not in danger of being manipulated or abused by a contractor. Moreover, declaring the contract unenforceable would have resulted in a substantial windfall to the homeowners. Thus the Court ruled the oral contract was enforceable.

The appellate court – a different division of the Second District than the one that decided Yassin v. Solis – reached a decision at odds with the outcome of Yassin v. Solis regarding the recoverability of attorneys' fees in actions brought under Civil Code Section 3260.1. The homeowners challenged the imposition of both a 2% percent per month charge on unpaid amounts and attorney's fees. Section 3260.1 states that if progress payments are wrongfully withheld, the contractor is entitled to recover "the penalty" specified in Section 3260(g). Section 3260(g) provides for both the charge of 2% per month on the wrongly withheld amount plus an award of attorney's fees and costs to the prevailing party. Relying on legislative history that reflected an intention to allow the recovery of both the 2% charge and attorney's fees, the Court of Appeal rejected the homeowners' argument that an attorney's fees award was not part of "the penalty" that could be recovered under Section 3260.1.

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