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MIND OF A LAWYER. HEART OF A CONTRACTOR.

*This article is written by Scott G. Wolfe Jr., founding member of Wolfe Law Group and publisher of the Construction Law Monitor. Scott practices law in Washington, Oregon and Louisiana. The article can be found online at this link: <http://www.constructionlawmonitor.com/?p=2346>*

## **3 Legal Concepts That Are Counter-Intuitive...and Dangerous**

Sometimes the best blog posts and legal articles are the simplest. Take, for example, a post from early October by [Joshua Glazov on his Construction Law Today blog](#), where he simply cites a 1941 quote from [US Supreme Court Justice Robert Jackson](#):

The legal profession, like many another, tends to become over-professionalized. We forget that the law is the rule for simple and untaught people to live by. We complicate and over-refine it as a weapon in legal combat until we take it off the ground where people live and into the thin atmosphere of sheer fiction.

-- The Struggle for Judicial Supremacy (1941)

Nail on the Head!

This made me think about all the crazy requirements and legal interpretations out there that may go against conventional logic, and I compiled this Top 3 list.

### **Number One: Prevailing Wage Determinations**

You're on a state or federal construction project that requires payment of the [prevailing wage](#), and so you go to the books to determine how much you need to pay your employees. You separate the employees into categories: electrician, plumber, helper/laborer.... Sounds easy enough, right? Wrong.

How do you distinguish between someone who is a plumber and someone who is a plumber helper, for example? While you may make a distinction in your everyday business, that distinction may not be the same as the US Department of Labor or the state agency controlling your project. Frequently, in fact, it's not.

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Unfortunately, the laws aren't very helpful to the folks who need to follow them. That's because the laws are a bit ambiguous, and requires interpretation. And from first hand experience, I can tell you that agencies like the US Department of Labor are currently interpreting these requirements very pro-laborer.

Take a plumber, for example, as defined by the U.S. Department of Labor. [Standard Occupational Classification \(SOC\) §47-2152](#) defines a plumber as one who does the following: "Assemble, install, alter, and repair pipelines or pipe systems that carry water, steam, air, or other liquids or gases..."

Compare this to the plumber's helper ([SOC §47-3015](#)) who: "Help plumbers...by performing duties of lesser skill. Duties include using, supplying or holding materials or tools, and cleaning work area and equipment..."

What exactly is a "lesser skill?" What if a licensed plumber points to a pipe and asks the other employee "cut right there," does this make that other employee a helper or a plumber? I've seen the US Department of Labor interpret this as rendering the other employee a "plumber," and requiring the higher wage.

## **Number Two: Lien and Notice Requirements**

The lien laws are there to protect folks, but it seems that every state in the Union is a bit conflicted about who the laws are designed to help. In some states, the law is construed in favor of the lien claimant and against all other parties. In other states, it's the opposite.

Perhaps more confusing that this interpretation preference, however, is the notice requirements for the various states. In some places, notice must be provided by the subcontractors to the property owner, the theory being that the owner might not know the subcontractors are there. In other places, however, the notice system is completely reversed, requiring the prime contractors to deliver the notice. Clearly, the owner should know who the prime contractor is!

What makes this very difficult for contractors is that unlike state legislatures and lawyers, the construction industry does business across state lines very frequently. In fact, some suppliers and contractors do business in *every state*. It's impossible for these contractors to know the highly-technical and complex laws that apply in each state. The result? The law is rendered worthless, and not protecting the parties it is designed to protect.

For great discussions about lien and notice laws across the country, check out the [Construction Lien Blog](#).

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## Number Three: Pay When Paid Clauses

Contractors and subcontractors all around the country have heard of "pay when paid" clauses, and they frequently find them in their contracts. Why are they in the contracts? Because the parties in a construction project understand the payment chain, and they are agreeing to put the risk of non-payment on each project participant.

However, the law in many states has created an interpretation for "pay when paid" clauses that seems counter-intuitive. In these states (and there are many), a "pay when paid" clause does not allow a contractor to refuse payment to its subs or suppliers after a "reasonable time" has passed since the subs or suppliers work was completed. In these states, if such an outcome is desired, the parties must enter into a contract with a "pay if paid" clause.

We've written about this phenomenon here: [Payment Provisions in Construction Contracts](#).