

"Pay When Paid" not enforceable in North Carolina construction contracts

By [Melissa Dewey Brumback](#)

[Adopted from [Construction Law in North Carolina](#) 4/29/2010]

"Pay when paid" clauses are clauses found in many construction contracts that state that the contractor will pay his subcontractor only if and/or when the contractor receives payment from the owner. Are these clauses enforceable? The answer depends on (1) what state you are in and (2) what choice of law provision is contained in your construction contract.

A limited number of states do honor "pay when paid" clauses under the theory that the parties are usually sophisticated parties who negotiated the contract terms and as such they are duty bound to honor those terms. When such a clause is enforced, it can prove fatal in a case where the owner files bankruptcy or otherwise defaults on its payments to the general contractor.

In North Carolina, such clauses are unenforceable as against public policy:

Performance by a subcontractor in accordance with the provisions of its contract shall entitle it to payment from the party with whom it contracts. Payment by the owner to a contractor is **not a condition precedent** for payment to a subcontractor and payment by a contractor to a subcontractor is not a condition precedent for payment to any other subcontractor, **and an agreement to the contrary is unenforceable.** [N. C. Gen. Stat. Section 22C-2.](#) [Emphasis added].

Does that mean that, if you are a subcontractor, you don't need to worry about such "pay when paid" clauses in North Carolina? Not necessarily. It depends on what law is the law that will be applied by the court. If your contract states that the law of another state will apply, you need to know if that state is one in which "pay when paid" clauses are enforceable.

In some states, [such as Virginia, the contract is king](#) and whatever the contract says will be enforced. Such clauses are also generally enforceable in a few other states such as [Connecticut](#) and [Michigan](#). Other states take a more cautious view, and hold that such clauses are only enforceable if unambiguously written, including [Arizona](#), [Ohio](#), and [Massachusetts](#). States which concur with North Carolina's view that such clauses are unenforceable include [Nevada](#), [New York](#), [California](#), and [South Carolina](#). Therefore, it is important to know not only what your contract says, but what state's law will apply to your contract.

For a complete listing of all states, check out [Contingent Payment Clauses in the 50 States](#). Case law and statutes change regularly, so consult a licensed attorney in the jurisdiction you are concerned about to learn the latest status of contingent payment clauses in that jurisdiction.

Melissa Dewey Brumback is a Raleigh, NC attorney who focuses on construction law. She blogs on construction law at [www.constructionlawNC.com](#). Her twitter handle is @MelissaBrumback.