

# LEGAL AND INSURANCE UPDATE FOR MASFA

JASON A. COPLEY  
GEORGE E. PALLAS  
OCTOBER 30, 2018

# Indemnification and Waivers of Worker's Compensation Immunity

Presented with Christopher M. Santoleri of The Safeguard Group, Inc.

# INDEMNIFICATION PROVISIONS

- A contract under which one party (the “indemnitor”) agrees to assume the tort liability of another (the “indemnatee”)
  - Claims of third parties arising work under a contract.
  - Risk is being pushed down the chain
    - Owner to the GC, and the GC to the SCs
    - GCs strive to have SCs assume risk

# WORKERS' COMPENSATION IMMUNITY

- Injured employee cannot, generally, sue employer in tort (remedy through WC system only)
- An injured plaintiff's employer cannot be joined as an additional defendant to its employee's personal injury action by another party **unless** there is a written indemnification agreement entered into by the employer prior to the date of the injury.
- “Statutory Employer” issue: If the SC lacks WC coverage, the GC becomes the “employer” of SC’s employees for WC purposes.

# WORKERS' COMPENSATION IMMUNITY & INDEMNIFICATION

- If a GC seeks indemnification from a SC for personal injury claims brought by the SC's employees, the SC employer must waive its workers' compensation immunity for the indemnification provision to be enforceable.
- Otherwise, the SC can claim that it is immune from the GC's suit to enforce the indemnification provision.

# WAIVER OF WORKERS' COMPENSATION IMMUNITY

- Many states (including PA, NY, NJ, MD and DE) allow an employer to waive its workers' compensation immunity.
- For an employer to waive its workers' compensation immunity, the contract language must indicate that the employer intends to indemnify the third-party against claims on the part of its employees by:
  - Expressly waiving the employer's immunity through reference to workers' compensation statute, or
  - By specifically referring to claims involving injuries to its employees.

# SAMPLE INDEMNIFICATION PROVISION WITH WORKERS' COMPENSATION IMMUNITY WAIVER

“In the event and to the extent that a claim is made by an employee of the Subcontractor against an Indemnified Party, the intent of this Section is that the Subcontractor shall and it hereby agrees to, defend, indemnify, and hold harmless the Indemnified Party to the same extent as if the claim was made by a non-employee of the Subcontractor. Accordingly, in addition to the above provisions, and in order to render the parties’ intent and this indemnity agreement fully enforceable, the Subcontractor, in an indemnification claim hereunder, **hereby expressly and without reservation waives any defense or immunity it may have under any applicable Worker’s Compensation Laws or any other statute or judicial decision disallowing or limiting such indemnification and consents to a cause of action for indemnity.** This waiver and consent to indemnification is made irrespective of and specifically waiving any defense or immunity under any statute or judicial decision disallowing or limiting such indemnification.”

# Waiver Of Subrogation

Presented with Christopher M. Santoleri of The Safeguard Group, Inc.



# WHAT IS SUBROGATION?

- Subrogation is “the right of one, who has paid an obligation which another should have paid, to be indemnified by the other.”
- Insurance company that has paid a loss under a policy uses concept of subrogation to recover damages paid from responsible party
  - **Example:** Paid to rebuild house that burned down due to electrical short, brings action against electrician that caused short
  - **Example:** Paid workers compensation claim and asserts subrogation lien against injured employees personal injury lawsuit

# WHEN IS SUBROGATION WAIVER USED?

- Builders' Risk Policy - Requires carrier to waive subrogation so that cannot pursue Owner, GC or SCs to recover claims paid under the policy
  - Since “one and done” policy, no concerns about future rate increases due to claim history
- Liability Policies- Owner and GC want to avoid subrogation claims being asserted against them related to project, so require waiver down the chain of contracting (Owner requires waiver from GC, and GC from all SC)
  - **Example:** SC's Auto carrier pays for damage to SC's vehicle that occurred when GC's vehicle backed into it. GC wants to avoid having SC's auto carrier filing subrogation claim against it to recover payment carrier made to SC to fix truck

# WHEN IS SUBROGATION WAIVER USED?

- Workers' Compensation Policy – GC requires waiver of subrogation so that WC carrier cannot seek to recover costs of WC claim from negligent parties in employee's personal injury suit
  - WC subrogation claims drive up cost of settling personal injury cases because WC carrier wants its cut of settlement
  - Permitted in PA, NY, DE and MD. Prohibited in NJ
  - “To the extent permitted by law, the policy shall contain a Waiver of Our Right to Recover from Others Endorsement (WC 00 0313) (or the equivalent).”

# SAMPLE WAIVER OF SUBROGATION

“The Subcontractor and its respective insurance carriers waive all rights of recovery against each of the Indemnified Parties for loss or damage covered by any of the insurance required to be maintained by the Subcontractor pursuant to the Subcontract, and **hereby waive all rights of subrogation** against the Indemnified Parties **for loss or damage covered by any of the policies of insurance required to be maintained by the Subcontractor pursuant to the Subcontract.** If any of the policies of insurance required under this Subcontract require an endorsement to provide the waiver of subrogation, then the Subcontractor shall cause them to be so endorsed and shall attach a copy to the Certificate of Insurance.”

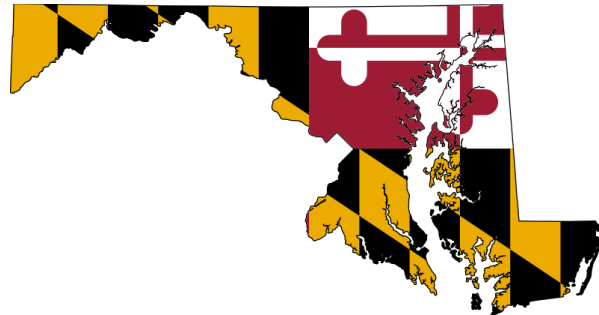
# ADVANTAGES FOR GC OF INDEMNIFICATION AND WAIVER OF IMMUNITY AND SUBROGATION

- GC's want:
  - An enforceable indemnity provision for SC to indemnify the GC from all 3rd party claims
  - A waiver of SC's workers' compensation immunity
  
- Reduces GCs insurance costs by:
  - Avoiding WC subrogation for SCs injured employees
  - Avoiding subrogation and liability claims with valid indemnity and waiver of subrogation provisions on all liability policies (CGL, Umbrella, Auto, etc.)

# CONSEQUENCES FOR SC OF INDEMNIFICATION AND WAIVER OF IMMUNITY AND SUBROGATION

- SC exposes itself to a lawsuit from GC to enforce indemnity obligation
  - Means SC is exposed to WC claim and CGL claim
- WC subrogation waiver means lost opportunity to reduce WC loss ratios by recovery
- Liability carriers indemnity for other's losses and waiver of subrogation may lead to increased premium due to claims

# Maryland General Contractor Liability for Unpaid Wages Act



# MARYLAND GENERAL CONTRACTOR LIABILITY FOR UNPAID WAGES ACT

- New Law – Effective October 1, 2018;
- Holds general contractors jointly liable for failure of a subcontractor (of any tier) to pay wages to an employee in violation of Maryland Wage and Hour and Wage Payment Collection Law;
- Includes treble (3x) damages and attorney's fees and costs



# COVERED PROJECTS

- Applies to all work, public or private:
  - **Note:** Maryland has separate law where a GC is liable for a subcontractor's failure to pay prevailing wages on a public project;
  
- “Construction Services” projects:
  - Building
  - Reconstruction
  - Improvements
  - Enlargements/  
Additions
  - Alterations
  - Painting
  - Repairs

# GOOD NEWS?

- Mandatory indemnification provision in the Act requires a sub to indemnify GC for liability incurred because of that SC's violation of the law

# WHAT WILL CHANGE?

- Tighter payment controls and monitoring procedures to be added to contracts with SCs for compliance with wage and hour laws
- Stricter vetting procedures required
- Broad and undefined liability risk
- Require SCs to obtain bond or insurance to protect against wage claims

# HOW OTHER JURISDICTIONS COMPARE

## Private Work

- Pennsylvania, Delaware, and New Jersey do not have statutes that impose liability on a general contractor for a subcontractor's failure to pay wages under state wage and hour or wage payment collection law for work on **non-publicly funded projects**
- No federal law that governs

# HOW OTHER JURISDICTIONS COMPARE

## Public Work

- Federal Davis Bacon Act
  - Under the DBA, general Contractors are jointly liable for a subcontractor's failure to pay prevailing wages
  
- State Counterparts:
  - Maryland, New Jersey, and Delaware follow the federal approach and where a prevailing wage violation occurs, the public body will withhold monies owed to the general contractor;
  - Pennsylvania law does not follow this same approach and will not withhold monies owed to a general contractor on account of a subcontractor's failure to pay prevailing rate.

# CASPA

## Amendments

### Impacts Private Work Only

# NEW AMENDMENTS

- Signed into law on June 12, 2018
- Effective October 10, 2018
  - Possibly unclear meaning
- **Purpose:** Strengthen contractors' and subcontractors' rights to prompt payment



# OVERVIEW OF AMENDMENTS TO CASPA

- Right to suspend work without penalty
- Requirements for withholding payment for defective work  
– remedy is waiver of right to withhold
- Mistakes on invoices
- Posting of maintenance bond in lieu of retainage
- CASPA protections may not be waived by contract



## Be On the Look Out:

- Waiver of right to withhold payment if written deficiency notice is not provided within 14 days of receipt of invoice
  - Common law: courts generally interpret statutory notice provisions strictly – constructive or actual notice not good enough
- Unclear whether the amendments will apply to contracts executed on or after October 10, 2018, or projects ongoing as of effective date (“in medias res”)

# SUSPENSION OF WORK

**Provides subcontractors who have not been paid the right to suspend work without penalty.**

- If 30 days have passed since the end of the billing cycle, and the subcontractor has not been paid in accordance with the agreement, the sub may suspend work after complying with notice requirements:
  - Provide initial written notice of nonpayment to **contractor** at least 30 days after end of billing cycle
  - After another 30 days, provide written notice to **owner**
  - After another 10 days, provide additional notice & suspend work without penalty

# SUSPENSION OF WORK

**Contractors also have the right to suspend work without penalty if not paid by the owner.**

- Slightly different rules

# WITHHOLDING PAYMENT

**Contractor may still withhold payment for a deficiency item.**

- But must:
  - Notify the subcontractor within 14 days of the time period specified in contract or 14 days after receipt of notice of the good faith reason for the withholding
  - Remit payment for completed work that is satisfactory
  - Failure to comply will result in waiver of basis to withhold payment & payment of invoice **in full**

# WITHHOLDING PAYMENT

## Owner Withholding Payment:

- Written notice to contractor within 14 days of receiving invoice containing deficiency item

# INVOICE ERROR

An error in an invoice is not an excuse for nonpayment.

- Recipient of incorrect invoice must notify sender of error(s) within 10 days of receipt
- Must still pay the correct amount on the due date

ERROR



# RELEASE OF RETAINAGE

**Release of retainage will be available prior to final completion of a project.**

- Instead, contractors and subcontractors may post a maintenance bond with approved surety for 120% of the retainage amount
- Right is available upon reaching substantial completion of subcontractor's own scope of work
- Posting the bond obligates the owner or contractor to release the retainage if no written notice of deficiency

# RELEASE OF RETAINAGE

## New limits on how long retainage may be withheld.

- Retainage cannot be withheld for more than 30 days after final acceptance of work, unless written notice of deficiency is properly and timely provided
- Violation results in liability for CASPA damages



# NON-WAIVER

## **\*New\* Non-Waiver Provision:**

- Prohibits protections in the statute from being waived
- Even if the parties agree to the waiver in writing – not enforceable
- Bottom Line: Parties cannot “contract around” CASPA protections

# QUESTIONS?



# CONTACT INFORMATION

## Philadelphia

30 South 17 Street  
19<sup>th</sup> Floor  
Philadelphia, PA 19103  
215.564.1700

**Jason A. Copley | Partner**  
[jcopley@cohenseglias.com](mailto:jcopley@cohenseglias.com)

## New Jersey

17 Academy Street  
Suite 903  
Newark, NJ 07102  
973.474.5003

**George E. Pallas | Managing Partner**  
[gpallas@cohenseglias.com](mailto:gpallas@cohenseglias.com)

## New York

55 Broadway  
Suite 901  
New York, NY 10006

[www.cohenseglias.com](http://www.cohenseglias.com)