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CLIENT ALERT**SHOULD OWNERS PAY ALL SUBCONTRACTORS DIRECTLY?****PRACTICE AREAS**

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A general contractor's sworn statement imposes a duty on the owner to retain funds sufficient to pay any subcontractors identified on the sworn statement, according to a May 2009 decision by the Illinois Supreme Court.

In the case, Weather-Tite, Inc. v. University of St. Francis, the owner wired funds to the general contractor's account sufficient to pay amounts owed as shown on the general contractor's sworn statement submitted to the owner. The general contractor's bank promptly seized the funds and applied them to other obligations of the general contractor. Two of the subcontractors listed on the sworn statement later attempted to enforce their mechanic's liens, and the Illinois Supreme Court upheld their right to do so. The owner was essentially required to pay twice for the subcontractors' work.

Briefly, the Court said that receipt of a sworn statement from the general contractor puts the owner on notice of the claims of the subcontractors identified on the sworn statement and imposes upon the owner a duty to retain funds sufficient to pay subcontractor claims. Where, as here, the owner pays the general contractor with the expectation that the general will in turn pay the subs, the owner bears the risk that the subcontractors may not get paid.

Further, the Court went on (in what may be non-binding *dicta*) to state that, if the owner receives lien waivers from the subcontractors, the owner must still hold funds subject to a lien waiver in trust for the benefit of the subcontractor. Thus, it would appear that the owner has to make sure all subcontractors listed on the contractor's sworn statement are paid, whether the subcontractor submits a lien waiver or not.

This decision upends the common practice of payment to the general contractor by the owner, with subsequent payment to a subcontractors by the general contractor. If the general contractor for any reason fails to pay the contractors, the subcontractor would have a lien claim against the owner, who would in most cases have to pay the sub again. What's an owner to do? Possible alternatives include the following:

- Ensure that the general contract at a minimum permits direct payment of subcontractors by the owner.
- Ensure that the general contract requires any subcontractor to submit a lien waiver with receipt for payment (many general contracts allow for 30-day trailing lien waivers from subcontractors, which would not have helped the owner in this case).
- Pay subcontractors directly, or issue joint checks written to both the general contractor and the subcontractors.
- Make all payments through a construction escrow with a title insurance company, and require that the owner's title insurance policy be updated to cover the date of the last payment (this shifts the risk to the title company).

Please contact any member of the Construction or Real Estate practice at Kubasiak, Fylstra, Thorpe & Rotunno, P.C. if you have any questions regarding this decision or how to protect yourself from its consequences.

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