



AN AVENUE FOR SUBCONTRACTORS TO SETTLE CLAIMS

'Pass-through' process makes contractors point men in litigation

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A recent Superior Court decision, *Worth Construction Co. v. State of Connecticut, Department of Public Works*, HHD-CV-075011827, is an important addition to the state's "pass-through" claims jurisprudence. It confirms what was thought to be the law concerning these claims against the state, but its implication for claims against municipal and private owners is dramatic.

Some background: Pass-through claims arose because subcontractors are often delayed or disrupted in their work due to a property owner's acts or omissions. Because the contractor did not cause the delay and is not vicariously liable for the owner's derelictions, the subcontractor cannot sue the contractor for its losses.

Because the subcontractor is not in privity with the owner and is not a third-party beneficiary of the owner-contractor agreement, it cannot sue the owner either. There are occasions, however, when a contractor will sue the owner for its subcontractor to "pass through" the subcontractor's claim to the owner.

The principle of standing – the rule that a person can only access the courts for an injury he suffered – is a patent impediment to pass-through claims, but it can be overcome. If the contractor assumes liability to the subcontractor for the owner's delay, most jurisdictions will deem the standing requirement met. Contractors rarely assume this liability in the subcontract prior to harm. The assumption ordinarily occurs after the damage

has been done, when the contractor has its own delay or other claims against the owner, the subcontractor is asserting claims against the contractor as well, and the contractor and subcontractor sign a liquidating agreement to settle the subcontractor's claim against the contractor.

In the typical liquidating agreement, the contractor acknowledges liability to the subcontractor for the owner-caused delay and promises to pursue the subcontractor's claim against the owner for the subcontractor's benefit. In exchange, the subcontractor agrees to accept what the contractor recovers from the owner on the subcontractor's claim in satisfaction of its claim against the contractor and releases the contractor. See *Wexler Construction Co. v. Housing Authority*, 149 Conn. 602, 183 A.2d 262 (1962).

Where the owner is the state, another impediment to the assertion of pass-through claims exists: sovereign immunity. The state, via Connecticut General Statute § 4-61(a), has waived its sovereign immunity so those who contract directly with it for construction can sue it on "disputed claims under [those] contract[s]." However, in *Federal Deposit Insurance Corp. v. Peabody, N.E. Inc.*, 239 Conn. 93, 680 A.2d 1321 (1996), the Supreme Court held that a contractor sued by its subcontractor on a state project could not implead the state unless the contractor unequivocally admitted its liability to the subcontractor and folded the subcontractor's claim into its own. The conditional admission the contractor made in that case was insufficient. Only where the admission was unequivocal would the contractor have "a disputed claim under its own direct contract with

the state" and thus fall within the purview of the statutory waiver. While *Peabody* did not involve a pass-through claim, most construction lawyers recognize that its reasoning extends to these claims, and the Connecticut Bar Association Construction Law Section, which favors pass-through claims against the state, has been seeking a legislative remedy for years, without success.

The recent Superior Court case, *Worth Construction*, unlike the *Peabody* case, was a pass-through claim case arising out of a state project. Two counts in the plaintiff-contractor's complaint against the state sought recovery for its subcontractors on their claims. The contractor alleged in these counts that it had liquidated the subcontractors' claims and was liable to the subcontractors for those claims. The state sought dismissal on immunity grounds.



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After discussing the pass-through claims concept, the federal common law allowing pass-through claims on federal projects, the scope of § 4-61's immunity waiver, and the *Wexler Construction* and *Peabody* cases, the Court concluded that pass-through claims against the state "are permissible under § 4-61(a) . . . as long as the general contractor admits *unconditional* liability to the subcontractor, liquidates the liability to a sum certain, and incorporates the subcontractor's claim into its own." It then proceeded to consider whether the contractor's admissions of liability were unconditional, finding that one was, but another was not.

This result confirmed the bar's extrapolation from the *Peabody* case and thus is not groundbreaking. What is groundbreaking is that the *Worth* decision can be read to extend the "unconditional admission of liability" requirement beyond "claims against the state" to pass-through claims against municipal and private owners. The language in *Worth* that permits this reading is its reference to *Wexler*

Construction and the Court's supposed imposition there of a "requirement" that the contractor's admission of liability be unconditional for the contractor to assert pass-through claims against the defendant, a municipal owner. (Memo. of Decision, p. 20.) Presumably, this "requirement" is tied to standing, not sovereign immunity.

Construction lawyers on both the subcontractor and contractor side have never considered an unconditional admission of liability an element of standing and, hence, a requirement for pass-through claims against a municipal or private owner. Every day, construction lawyers confront situations where subcontractors have claims against a contractor, and the contractor has its own claims against the owner. Every day, these practitioners resolve the subcontractor's claim against the contractor – eliminating the need for the contractor to defend against both the subcontractor and the owner – through a liquidating agreement where the contractor admits liability conditionally, and the subcontractor agrees to accept what the

contractor recovers on a pass-through claim in satisfaction of its claim.

Although these agreements may result in increased liability for owners, they also eliminate multiple litigations (or arbitrations) and provide fairness to contractors and subcontractors. That federal common law and the common law of virtually all states considering the issue recognize pass-through claims and require only conditional admissions of liability confirms that the result is fair. See *Interstate Contracting Corp. v. City of Dallas*, 135 S.W.3d 605 (Tex. 2004).

And contrary to the statement in *Worth*, there is nothing in *Wexler Construction* that addresses the issue of conditional versus unconditional admissions. The words "conditional" and "unconditional" do not even appear in the opinion. It would be unfortunate if *Worth* were read to require unconditional liability admissions. It would effectively sound the death knell for municipal and private sector pass-through claims and destroy the utility of the liquidating agreement settlement device, all to the detriment of sound public policy. ■