Contingent Payment Clauses

Pay-If-Paid and Pay-When-Paid are contingent payment clauses.

> "A contingent payment clause is a contractual provision that makes payment contingent upon the happening of some event. In construction subcontracts, the typical contingent payment clause makes the subcontractor's payment contingent upon the payment of the contractor by the owner." -- American Subcontractors Association

Pay-if-paid is generally interpreted to mean that the subcontractor will receive payment from the general contractor IF the general contractor is paid by the owner.

IF the owner fails to pay the general contractor, the general contractor is not obligated to pay the subcontractor.

Pay IF Paid

Pay WHEN Paid

Pay-when-paid is generally interpreted to mean that the subcontractor will receive payment from the general contractor WHEN (or after/once) the general contractor receives payment from the owner.

WHEN the owner pays the general contractor, the general contractor will remit payment to the subcontractor.

The Public Contracting Institute states that pay-if-paid makes the "owner's payment to the prime a "condition precedent" for the prime's payment to its subs."

Whereas pay-when-paid is viewed more as a "timing provision" – i.e. the GC has to pay the sub within a reasonable amount of time from when the sub invoices.

Are Contingent Payment Clauses within a Contract Enforceable?

Typically, when enforceable, the language of the Pay-If-Paid clause must be very specific, clearly outlining a condition precedent to payment of the contractor, and acknowledging that the subcontractor is assuming the risk of non-payment by the owner. In some cases, when a Pay-if-Paid clause is ambiguous, it may be interpreted as a Pay-when-Paid clause, setting a time for payment.

Generally, if the statute does not allow an executory contract to waive lien rights, a contingent payment clause will not waive lien rights.

Pay-If-Paid (Private Commercial Projects)

Enforceable	Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Washington, West Virginia
Enforceable (except as to liens per statute)	District of Columbia, Illinois, Indiana, Kansas, Maryland, Missouri, Ohio, Utah
Likely Enforceable	Alaska, Hawaii, Idaho, New Mexico
Unclear/ Undecided	Maine, Montana, Nebraska, North Dakota, Rhode Island, South Dakota, Vermont, Wyoming*
Unenforceable/ Unenforceable (statute)	California, Delaware, Massachusetts+, Nevada, New York**, North Carolina, South Carolina, Virginia, Wisconsin

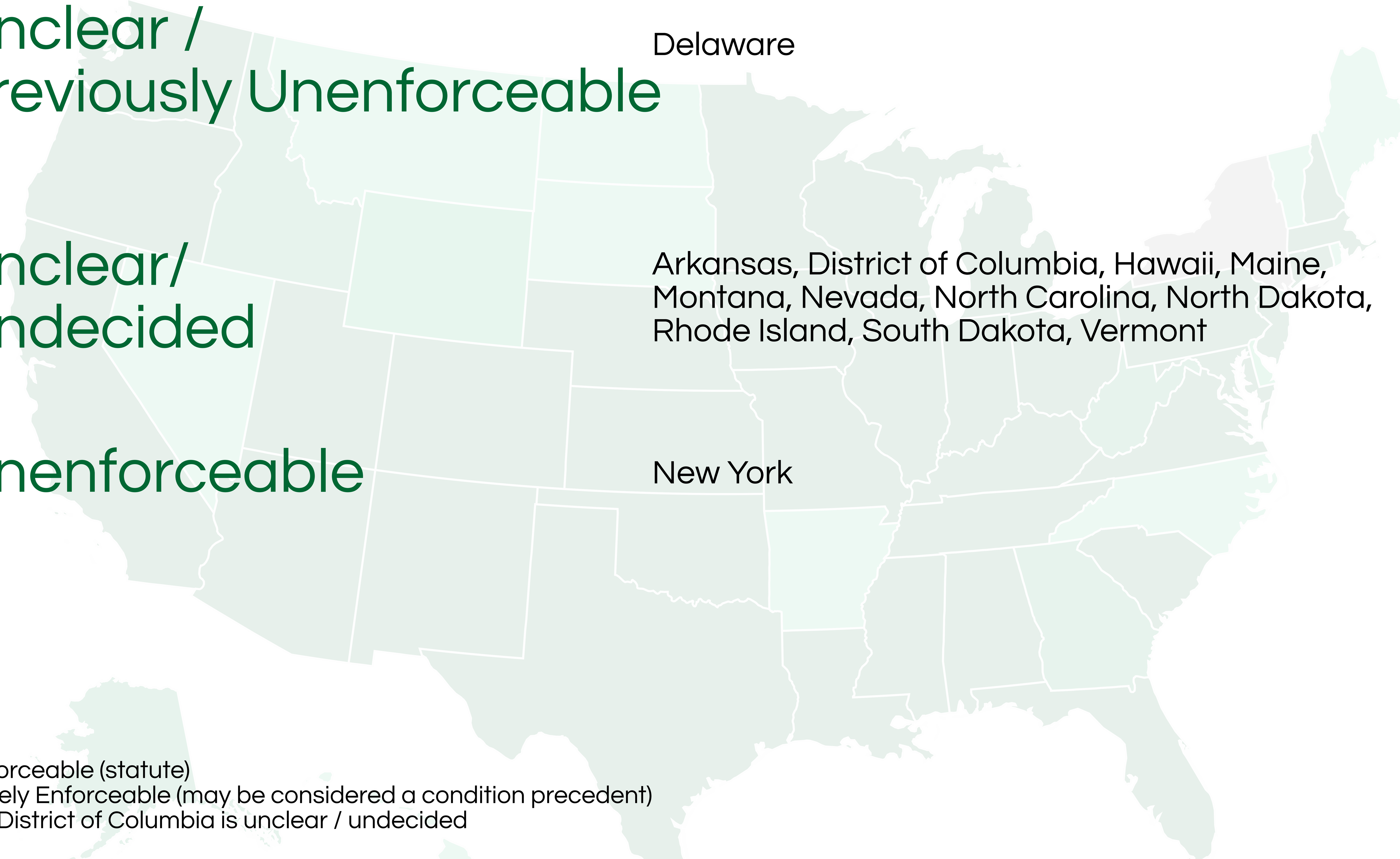
*Unclear / Likely Enforceable
**Unenforceable Except as to Liens (statute)
+Unenforceable (see Mass. Gen. Law 149 §29E for exceptions)
The District of Columbia is enforceable (except as to lien per statute)

Are Contingent Payment Clauses within a Contract Enforceable?

Typically, Pay-When-Paid clauses govern the timing of payment by the contractor, but the contractor must make payment within a reasonable time, even if the general contractor does not receive payment from the owner.

Pay-When-Paid (Private Commercial Projects)

Enforceable	Alabama, Arizona, California, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin*
Likely Enforceable	Alaska, Georgia, Idaho**, West Virginia
Unclear/ Likely Enforceable	Wyoming
Unclear / Previously Unenforceable	Delaware
Unclear/ Undecided	Arkansas, District of Columbia, Hawaii, Maine, Montana, Nevada, North Carolina, North Dakota, Rhode Island, South Dakota, Vermont
Unenforceable	New York



*Enforceable (statute)
**Likely Enforceable (may be considered a condition precedent)
The District of Columbia is unclear / undecided

Are Contingent Payment Clauses within a Contract Enforceable?

Which clause is better?

A pay-when-paid clause is much better than a pay-if-paid clause, as the general contractor is not relieved of the responsibility to pay his subcontractors if he is not paid. However, payment clauses can be tricky and you should seek a legal opinion if your contract has a clause you are uncomfortable with.

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