

## Massachusetts Rules Defenses to Prompt Pay Act Violations Retained Only If Payment Made Before Assertion in Legal Proceeding

On June 17, 2024, the Massachusetts Supreme Judicial Court issued an opinion of first impression regarding the Prompt Pay Act, M.G.L. c. 149, §29E, holding that a contractor found to have violated the Prompt Pay Act for non-payment must pay the unpaid amounts prior to, or contemporaneous with, asserting its common law defenses in a subsequent lawsuit filed by its unpaid contractor for breach of contract.

The Prompt Pay Act applies to private construction projects with an original contract value of \$3,000,000 or more “for which a lien may be established under sections 2 or 4 of chapter 254” (mechanics liens). The Act requires, among other things, that an entity receiving a payment application on a qualifying construction project must approve or reject it within a set period of time (15 days for payment applications from general contractors and an additional seven days for each tier of contract below). If not, the payment application is deemed to be approved and must be paid 45 days thereafter, although the entity receiving the payment application may reject the payment application at any point before the date payment is due. Further, any rejections, in whole or in part, “shall be made in writing and shall include an explanation of the factual and contractual basis for the rejection and shall be certified as made in good faith.”

### The Ruling

In *Business Interior Floor Covering Business Trust v. Graycor Construction Co. Inc.*, the Court determined that:

1. The party asserting a Prompt Payment Act violation need not establish or perfect a lien in order to invoke the Prompt Payment Act. Specifically, the Court held that the reference to the lien law in the Prompt Payment Act -- “for which a lien may be established under sections 2 or 4 of chapter 254” -- shall be interpreted broadly and does not impose the strict compliance requirements necessary for enforcement of mechanics liens as a prerequisite to a claim for violation of the Prompt Pay Act. Rather, the trigger for the applicability of the Prompt Payment Act is the fact that the property on which work was performed or improved was capable of being lienied at the time the contract was entered into, not that it has in fact been lienied.
2. An upstream party that fails to pay an approved or deemed to be approved payment application within 45 days of such approval or deemed approval in accordance with the Prompt Pay Act and does not reject the payment application prior to the payment due date (i.e., within that 45-day safe harbor period), may only assert its common-law defenses<sup>1</sup> to a breach of contract claim for failure to pay if (and only if) it pays the overdue approved or deemed to be approved payment application “prior to, or contemporaneous with, the invocation of any common-law defenses in any subsequent proceeding regarding enforcement of the invoices.” The Court noted that the Contractor still retains any viable contract or common law defenses to payment but “must first pay the funds purportedly owed and then seek to disgorge such funds in a succeeding adjudication.”
3. The Court rejected the approach taken by the Appellate Court in *Tocci v. IRIV Partners, LLC*<sup>2</sup> which treated a partial summary judgment finding of Prompt Pay Act violations as automatically qualifying as an appealable separate and final judgment without regard to the presence of other pending and unresolved claims. Instead, the Court ruled that all pending claims, crossclaims, and counterclaims must be considered before the Court



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may issue a final judgment as to the Prompt Pay Act violations. The Court did note, however, that a preliminary injunction ordering immediate payment of outstanding invoices may be justified when the failure to pay causes irreparable harm to a contractor's business.

## Practical Guidance

Best practices for those receiving payment applications remain largely unchanged with regard to timing of responses. If rejecting a payment application, in whole or in part, the upstream party must provide a written rejection complying with the Prompt Pay Act within the statutory time period (15 days for a payment application from a general contractor). If it fails to do so, the safe harbor of 45 additional days to provide such rejections before the date payment is due remains. In total, payment application rejections are ultimately (and strictly) due no more than 60 days from the date of receipt of payment applications from general contractors (and an additional seven days for pay application received from contractors each tier of contract below).

The Supreme Judicial Court decision clarifies that entities that fail to provide such a rejection before the due date effectively waive their right to withhold any approved or deemed to be approved payment. Instead, they must issue such payments, even where the sums are disputed. Further, unless payment is made **prior to or contemporaneous with** asserting common-law defenses to the disputed (but not properly and timely rejected) payment application, they waive the right to assert all common-law defenses in any subsequent legal proceeding brought by the unpaid party for non-payment. Therefore, parties failing to timely and properly reject payment applications but nonetheless disputing a downstream contractor's entitlement to payment must issue payment before responding to a Complaint, Arbitration Demand, or similar document to preserve their right to assert common-law defenses. However, such interim payment will be without prejudice to the payor's right to seek disgorgement of the amounts paid on the basis of its common law defenses.

As for contractors and subcontractors with past due approved or deemed approved payment applications, this decision may motivate them to consider expeditious legal action to force the payor to choose whether to release the disputed funds during the pendency of the proceeding or to waive its common-law defenses. It also appears to be an open issue as to whether an unpaid subcontractor will always need to seek a preliminary injunction in order to obtain payment for Prompt Pay Act violations while other claims are still pending in the legal proceeding, such as was the case in the *Boston Interior* case.

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<sup>1</sup> Contract defenses were not at issue in this appeal, but it appears from the Court's decision that they would be treated largely in the same way.

<sup>2</sup> *Tocci v. IRIV Partners, LLC*, 101 Mass. App. Ct. 133 (2022)

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