

Ask Wallace Jordan: Construction Contracts—Payment and Non- Payment

By [Clark R. Hammond](#)

A clear, comprehensive, and unambiguous contract is vitally important for contractors and subcontractors engaged in the business of construction to negotiate and execute.

There is a lot on the line in large, expensive (and lucrative) projects. Schedules for completion of work, payment, [licensing requirements](#), conditions related to potential delays, remedies for damages—it's all in play, and critical to defining success.

How you negotiate your contracts now will determine how you resolve any legal issues that arise later.

Here, we answer some important questions related to setting final payment terms under your contracts, and how you can seek remedies for non-payment by the other party.

(This list is not exhaustive. For more information, reach out to one of [our construction attorneys](#).)

PAYMENT

QUESTION

How should “completion” be defined under the contract to trigger final payment?

ANSWER

This is a key one, as this language is often the subject of disputes litigated between the contracting parties.

Be sure the contract states precisely when payment comes due. Include all conditions precedent that will permit any non-payment or withholdings. Otherwise, Alabama law generally does not construe reasons for non-payment subject to provisions in the absence of explicit procedure under the contract, such as pay-if paid provisions. Compare [*Federal Insurance Company, et al. v. I. Kruger, Inc.*](#), 829 So.2d 732 (Ala. 2002) (no condition precedent) with [*Lemoine Co. of Alabama L.L.C. v. HLH Constructors, Inc.*](#), 62 So. 3d 1020 (Ala. 2010) (explicit contractual provision).

QUESTION

As a subcontractor, I need to know: What condition, if any, dictates how and when I will be paid?

Answer

Contracts between contractors and subcontractors often include either a “paid when paid” clause or a “paid if paid” clause to govern the timing of payments made to the subcontractor. As the language suggests, these provisions allow for two possibilities— the timing of the payments from the owner , or no payment at all if the contractor never gets paid. Thus, in any negotiation, it is critical for the subcontractor to understand if the contractor has transferred the risk of non-payment by the owner to the subcontractor or merely agreed that the timing of the payment may be temporarily impacted.

QUESTION

What is "prompt payment" under Alabama law?

While parties can set specific payment terms and deadlines, in the absence of specifics under the contract that transfers the risk of nonpayment by the owner to the subcontractor, Alabama mandates the following: for both private and public payors See, Ala Code 8-29-1 et al (1975) (private projects) and Ala. Code 41-16-3 (1975) (public projects):

- Payment to contractors *must* be paid to a contractor within 30 days from a payment request
- Payment to a subcontractor from a contractor *must* be paid within 7 days from when payment from an owner is received by the contractor

For private parties, retainage cannot exceed 10 percent, and after 50 percent of the work is completed, there can be no further retainage. If the payor is a governmental entity, then retainage cannot exceed the amount due to be paid, assuming no provision in the contract stating otherwise.

Contractors seeking to dispute prompt payment requests must provide written notice to the other party within 5 days of receiving the request. Owners have 15 days to dispute a request for payment from a contractor; that owner dispute must also be in writing.

Additionally, contractors seeking the recovery of delayed payments from private parties can recover 12 percent interest and attorney's fees, but can only recover the legal amount of interest charged by the state under public prompt payment law, but not attorney's fees under the statute.

NON-PAYMENT

QUESTION

How much time do I have to file a lawsuit for breach of

contract if I don't get paid?

ANSWER

The statute of limitations to bring suit for breach of contract generally under Alabama law is 6 years from the time the breach is identified. This would govern suits for non-payment.

QUESTION

What type of mechanic's lien should I file in case I want to pursue that avenue?

ANSWER

This depends on the situation or nature of the relationship.

All contractors and subcontractors may pursue an "unpaid balance" lien to enforce collection from an owner on monies owed after successful completion of work. Alabama Code § 35-11-210. Although an unpaid balance lien is a possible remedy, payment is by no means guaranteed because the owner may have already paid the contractor in full or be claiming a problem excuses further payment to the contractor.

The same statute contemplates another type often, known as a "full price" lien. Under this option, if the person, firm or corporation, before furnishing any material, shall notify the owner or his agent in writing that certain specified material will be furnished by him to the contractor or subcontractor for use in the building or improvements on the land of the owner or proprietor at certain specified prices, unless the owner or proprietor or his agent objects thereto, the furnisher of such material shall have the lien for the full price thereof. . . .Two critical issues: (1) notice to the owner or its agent in writing BEFORE the materials are furnished and (2) no objection by the owner to the notice.

The "full price" lien is based on the existence of either an

express or implied contract of the owner to pay for materials, *Richard v. Little*, 96 So. 114 (Ala. 1923). The contract need not be in writing. [Sherrod v. Crane Co.](#), 182 So. 48 (Ala. 1938). The contract may be implied from the owner's silence following receipt of notice from the materialman, [Buettnerbros. v. Good Hope Missionary Church](#), 18 So.2d 75 (Ala. 1944). The statute appears to make the "full price" lien by advance notice available only to materialmen and not to those applying labor and services, [Crane Co. v. Sheraton Apartments, Inc.](#), 58 So.2d at 616 (Ala. 1952).

QUESTION

What is a surety bond, and how does it work?

A contractor may in some private projects and *must* in public works projects acquire a performance and/or payment bond prior to the performance work under a contract. In a surety arrangement, a contractor or subcontractor secures a bond from an issuer, known as a surety. If that contractor or subcontractor breaches the contract by failing to pay subcontractors or suppliers or fails to perform to specification, the surety may then be called on to compensate the other party for the loss by payment, or in the case of a performance bond, agree to complete the unfinished work.

The aggrieved party must file a claim with the surety to begin the process of collecting on the applicable bond. These can become complicated disputes that take years to resolve, especially if the project owner is the State of Alabama or the federal government (see the federal [Miller Act](#) and Alabama's "[Little Miller Act](#)").

Be sure to research the law and procedures concerning performance and payment bonds should you be required to acquire such bonds or work on a project where bonds have been required.

QUESTION

What venue should I specify to resolve disputes under the contract in a court proceeding? Should I choose an alternative route such as arbitration or mediation?

ANSWER

This is a critical question to decide upon before you execute any contract. It is not an easy one to answer.

For instance, would it be cheaper, quicker or easier to seek a ruling from an arbitrator over a judge or jury, or is it advisable to seek to resolve issues through mediation before filing suit or demanding arbitration? Would it be wiser to seek arbitration with individuals who are familiar with construction? What if the other party to the contract place of business is in the county where a dispute would be tried in court before local jurors or a local judge? Is there a concern about local bias? Can you expect legal fees to be less under one scenario versus another?

As with most matters, the amount of legal fees and the outcome of a dispute with by arbitration, or court proceeding will boil down to the facts of your case and the presentation to the persons deciding the issue; however, some contractors are not in favor of arbitration while others would not have any other method for deciding a dispute. This is an important topic to be discussed with your legal counsel when drafting the contract

Some court dockets have jammed up during the pandemic, meaning this could become an even more critical and complicated analysis.

No representation is made that the quality of the legal services to be performed is greater than the quality of legal services to be performed by other lawyers.

CTA: Have other questions related to your contracts? Contact [Wallace Jordan](#) today?

You Can't Own an Idea: An Intellectual Property Primer

By [William B. Stewart](#), [Sally S. Reilly](#) and [Laura M. Jackman](#)

Imagine this: You are walking down the street one day when a fit of genius comes to you. What if I create a 7-inch-long stick with a row of bristles attached to it that people can use to clean their teeth and freshen their breath? I will be rich.

Then you do a little digging, and it dawns on you, That's a toothbrush.

This innovation train left that station a long time ago. Actually, it happened a [very long time ago](#). In the U.S., the [first patent](#) on a toothbrush, filed by inventor H.N. Wadsworth, dates back to 1857.

Another question comes to you soon after you make this discovery: How does a patent work, and how can I get one on a toothbrush anyway?

Wadsworth himself had to work hard to put his own stamp on

this simple, widespread idea for a product, which was already bristling its way through Europe. He had to convince the US Patent Office that his innovations made the commonplace item original. So must you if you want to claim an idea for a product your own.

Patenting is not the only way to protect the [intellectual property](#) rights attainable for your own latest, greatest toothbrush, though. You can also earn rights to trade secret, trademark and copyright protection with enough hard work on designing, manufacturing, branding and distributing your creation.

Here is a checklist to help you as an aspiring innovator to evaluate and determine your options for protecting your toothbrush, and to guide its creation:

Can your invention be patented?

Basic patent (and copyright) rights are granted explicitly in the [U.S. Constitution](#). Patents approved and published as a public record by the U.S. Patent and Trademark Office (USPTO) are protected for up to 20 years from the date of first filing the patent. To meet the threshold for the issuance of a patent, you must demonstrate that your invention is:

- Articulate how and why your toothbrush is different from all of the “prior art,” a term of art to describe all of the related patents that precede yours.
- Is your spin on the toothbrush a solution to a distinct

problem? What does it do and how does it work? You must lay this out in exacting detail in your patent filing.

- Non-obvious. Is your particular combination of a toothbrush's elements so unique that it would not occur to another, competing inventor? Then it would be "non-obvious." Here is an example: You've probably toasted a marshmallow or two over a campfire a time or two in your life. Did you ever consider that the marshmallow could one day contain or a creamy or fruity filling? One inquiring mind did, and his [method](#) for getting that filling in there earned patent protection in 2004. The patent has since been abandoned, but that was quite a non-obvious twist on snack food.

Does a camelhair bristled brush head with 1.1 millimeters of space in between them with a handle with a very slight angle and newly created synthetic plastic an innovation that would meet the requirements for a patent? You must do your homework, as Wadsworth did in his explanation to the USPTO.

What are trade secrets? Can you invoke both patent and trade secret protection?

Unlike other forms of intellectual property, you do not need to file to protect your rights to them with the federal government. [Trade secrets](#) represent confidential, sensitive, vital processes, formulas, methods, and other work product that, if they became public knowledge or were misappropriated, would cause its possessor great harm financially

A trade secret can be protected indefinitely as long as the

secret is commercially valuable, its value derives from the fact that it is secret, and the owner take reasonable precautions to maintain its secrecy. To protect a trade secret, businesses often use non-disclosure and other restrictive confidentiality agreements to bind their partners. Similar agreements with employees, contractors, vendors and consultants are also necessary to protect trade secrets as intellectual property.

It is possible to possess a publicly issued patent and maintain related trade secrets simultaneously. You may include a claim in the patent application that states the toothbrush's handle is made of a sturdy, proprietary polymer, while not revealing the formula you use to manufacture the polymer, which is to be maintained as a trade secret.

You can also choose not to patent your invention at all, maintain it under tight security and keep it hidden from competitors. A patent, after all, is your exclusive right to employ the invention and to prevent others from appropriating it for themselves for 20 years. Yet your analysis may also show the trade secret affords you more leverage in the marketplace or another business advantage than a patent would particularly since trade secrets may enjoy perpetual protection. Coca-Cola, for instance, has never patented its formula and treats it as a heavily guarded trade secret. It is a secret that has become [purposefully mythological](#), which add to the soft drink's allure—and to its commercial viability since its secret formula has never been successfully replicated. Human nature is to want what we cannot have. By keeping its famous secret, Coca-Cola assures that we do not have it.

What can you trademark?

You are ready to start producing your angled camel-hair creation. You will now need to brand it, package it and make it attractive to your prospective customers. This means naming it, creating a logo or selecting a fancy font, choosing color schemes and perhaps securing it in a specially designed or unique container.

The law allows any or all of these receive trademark protection through registration issued by the USPTO. A trademark can be any word, phrase, symbol, design, a combination of these things, or any other distinguishing feature that identifies your goods or services.

Business Insurance Claims due to Covid-19 Interruption

Overview of State and Local Government Powers During the Covid-19 Pandemic

Phillip Corley, April Danielson, and Gabe Tucker authored this article that appeared in *The Alabama Lawyer* regarding the complicated issues surrounding orders and restrictions from local Alabama municipalities and the State of Alabama during the COVID-19 pandemic.

[July 2020 Overview of State and Local Gov't during Pandemic](#)

Overview of Drainage Law in Alabama and How the Law Impacts Municipalities

Wallace Jordan attorneys, Phillip Corley and April Danielson, authored a recent article entitled “Overview of Drainage Law in Alabama and How the Law Impacts Municipalities” published in the Fall 2020 edition of *The Alabama Municipal Journal*, which provides information to Alabama municipalities related to drainage issues on private property. To read the full article, please click [here](#).

Employment Law Update Regarding Supreme Court Title VII Ruling

[Click here](#) for an update on a Supreme Court ruling regarding discrimination on the basis of sexual orientation.

Employment Law Updates concerning COVID-19

[Click here](#) to read important updates regarding the employment provisions of the Families First Coronavirus Response Act, DOL guidance, OSHA guidance, CDC guidance, and IRS guidance (updated April 15, 2020).

Paycheck Protection Program Loans and Loan Forgiveness under the CARES Act

[Click here](#) for important information regarding loans and forgiveness of loans for businesses, charities, churches, and faith-based organizations under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

Governor Bentley signed Ala. Act No. 2012-491

On May 18, 2012, Governor Bentley signed Ala. Act No. 2012-491, which is an amendment to the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, also known as Alabama's immigration law. There were no changes to the primary employment-related provision – Section 15 – so all employers are still required to be enrolled in E-Verify and to run through E-Verify all new hires. [Click here](#) to read important information for Alabama employers.

Governor Bentley signed the “Beason-Hammon Alabama Taxpayer and Citizen Protection Act

On June 9, 2011, Governor Bentley signed the “Beason-Hammon Alabama Taxpayer and Citizen Protection Act”. [Click here](#) to read important information for Alabama employers.