

Dave Fine quoted in MA Lawyers Weekly, “Prompt Pay Act violation claim for recoupment”

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After a party is required to make a payment for failing to comply with the Prompt Pay Act, an arbitrator is not allowed to let the party seek recoupment of a portion of that payment, a Superior Court judge has decided.

Judge Keren E. Goldenberg's decision in *J.C. Cannistraro, LLC v. Columbia Construction Co.* addresses questions left open in the Supreme Judicial Court's ruling earlier this year in [*Business Interiors Floor Covering Business Trust v. Graycor Construction Company Inc., et al.*](#)

In *Cannistraro*, the arbitrator ordered a general contractor to pay nearly \$1 million worth of applications for payment but allowed the company to file a counterclaim challenging the subcontractor's change order requests.

After the arbitrator found the contractor should get several hundred thousand dollars back, the subcontractor filed a motion to vacate the award, arguing that the arbitrator had made an error of law. Goldenberg agreed.

In keeping with the statute's purpose of ensuring that a subcontractor is not deprived of critical revenue while it litigates a construction dispute, the SJC in *Graycor* held that a party must first make the payment triggered by a Prompt Pay Act violation before pursuing any defenses in a subsequent proceeding, Goldenberg noted.

Under the *Graycor* rule, the contractor in *Cannistraro* was prohibited from seeking recoupment of its payment to the subcontractor, Goldenberg concluded. Instead of paying the amount due “prior to, or contemporaneous with, the invocation of any common-law defenses,” the contractor had raised the defenses underlying its claims for recoupment two years before paying the subcontractor.



The cases arising under the Prompt Pay Act are demonstrating the “real-life implications” of enforcing the PPA’s procedures, leading to several “gotcha” scenarios, said Westborough construction attorney David L. Fine.

Savvy subcontractors in their dealings with general contractors and savvy general contractors in their dealings with owners have, to some degree, learned to “play the game,” according to Fine.

“Where this is going at some point is that the courts eventually are going to create a requirement for real prejudice before enforcing the act or at least carving out exceptions to enforceability based on a reasonable review of the project records and communications,” Fine said.

The decision illustrates the need for some “leveling out” of Prompt Pay Act relief, Fine said.

“The realities of how construction projects operate will make it difficult, if not impossible, for reasonable parties to strictly comply with these procedures, and not every failure to comply should warrant a forfeiture of these rights,” he said.

To read the article in its entirety, visit [Prompt Pay Act violation voids claim for recoupment | Massachusetts Lawyers Weekly \(subscription required\)](#)