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Anti-Drug Program, Cleanup Requirements, Significant Cases Fill October Issue

This month, we focus on cleaning up the construction site in at least two ways:

(1) Our lead article tells you what you need to know about Governor Taft's new program to get drugs and drug-related problems off state construction sites. It was co-authored by Tom Sant, a Bricker & Eckler attorney whose practice deals with Workers' Compensation, so he really knows that Bureau's Drug-Free Workplace Program. Read "Keeping Drugs off the Construction Site—The Governor's Latest Efforts," and you will know about it, too.

(2) We deal with another kind of site cleanup in our Construction Documents column. This month, Sam Wampler discusses contractual requirements for cleaning up the construction site in Holman, Gillis & Wampler on Construction Documents. Who is responsible for cleanup, how clean must the site be, and what problems can arise? If you've ever had difficulties with a littered construction site, you'll want to read Sam's column.

Our legislative column this month repeats our listing of pending legislation to watch. With the General Assembly out until next month, there is no highlight this time. But we compensate by giving you summaries of six new cases in "What the Courts Are Saying." The courts have been busy, and our selection runs the gamut from a federal district court (1 case) to Ohio appellate courts (4 cases) to a Franklin County Common Pleas court (1 case). The topics are varied, too: disappointed bidders and their right to challenge a contract award, the Freedom of Information Act, responsibility for after-hours stunts that injure workers, insurance coverage for counterclaims related to mechanic's liens, the Consumer

Sales Practices Act (again), and one court's view of "alternate security" for mechanic's liens. Read this column, and you'll be up to date, as the case on public bidding was just decided October 28.

Rounding off this month's offerings are a jam-packed OSHA column (including three more case summaries!) and quite a list of seminars.

If you have anything to do with school construction, you will want to read about—and attend—a roundtable on the subject of successful school construction. It's coming to a city near you, it's free, and you can read about it on page 9.

This should give you enough reading until Thanksgiving, when we will return.

Keeping Drugs off the Construction Site— The Governor's Latest Efforts

By

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If someone anonymously surveyed your employees about their drug and alcohol use, how many would admit to having a problem? In the construction industry, that number is high—just above 28%, according to a survey reported by the Ohio Bureau of Workers' Compensation. More than one in four employees. That percent is nearly double the response in manufacturing (14.8 %) and well above the average for all industries of 17%.



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In fact, the construction industry has a larger percentage of workers with admitted substance use problems than any other industry. Hoping to make dramatic inroads on that problem, Governor Bob Taft signed an Executive Order last month.

The Executive Order

Executive Order 2002-13T, signed September 20, 2002, limits state-

administered construction contracts to contractors and subcontractors who are in good standing in the Ohio Bureau of Workers' Compensation's Drug-Free Workplace Program.

The phase-in period is short. By July 1, 2003, the bid of any bidder who is not enrolled in the program—or in a similar program approved by the Bureau—will be deemed non-responsive. For the first six months of 2003, a contractor may bid without enrolling in a program. But if the company turns out to be the apparent low bidder, it will have to join the program within 10 days of that determination. And so will its subcontractors, if they are not already participating in an approved program.

The Bureau of Workers' Compensation initiated the Drug-Free Workplace Program in 1997 and has vigorously pushed its statewide implementation for the past five years. Until now, the main incentive has been a carrot: An employer in good standing in the program can receive up to

a 20% discount of its pure Workers' Comp premium, depending on which level of the Drug-Free Workplace Program it has implemented, for up to five years. Now, with state construction projects at least, the Governor is trying a stick. But the carrot will still be available, and many contractors should benefit from it.

Overview of the Program

Flexibility is built into the Program, which has two variations—one for small employers, called "Drug-Free EZ," and the standard Drug-Free Workplace Program—and three levels of participation. But five components are common to all levels:

1. A written policy on substance abuse;
2. Education of employees;
3. Training for supervisors;
4. Testing for drug and alcohol use; and
5. Assistance for employees who need it.

Participants in Level 2 or 3 must also implement various steps in the Bureau's "Ten-Step Business Plan," which focuses on the employer's overall safety efforts.

For a company just signing up, placement depends on (1) the size of the company, and (2) whether it already has a drug-free program and if so, how long the program has been in existence. A reduction in the paperwork required and streamlining of other requirements makes the Drug-Free EZ Program less demanding for small employers, defined as Ohio companies with, on average, 25 or fewer employees.

Companies that qualify would normally choose to participate in Drug-Free EZ. For all other companies, the option is the standard Drug-Free Workplace Program.

Large or small, a company with no existing program or with a program less than a year old automatically starts out at Level 1 and stays there for at least a year. Such a company could receive a discount on Workers' Comp premiums (the "pure" premiums) for up to five years. An employer who has had its own program comparable to a Level 1 program for one to four years has a maximum four-year period to receive premium discounts.

REQUIREMENTS OF THE DRUG-FREE WORKPLACE PROGRAM (DFWP) AND DRUG-FREE EZ PROGRAM (DF-EZ)

	Level 1	Level 2	Level 3
Written policy?	Required for both DFWP & DF-EZ , to present an “executive summary” of the program	Required for both DFWP & DF-EZ , to present an “executive summary” of the program	Required for both DFWP & DF-EZ , to present an “executive summary” of the program
Employee education?	DFWP: 2 hrs/year for every employee, presented or supervised by teacher with credentials in drug education DF-EZ: 1 hr/year for every employee; credentialed teacher not required	For both DFWP & DF-EZ , same requirements as Level 1 but with content designed for Level 2	For both DFWP & DF-EZ , same requirements as Levels 1 & 2 but with content designed for Level 3
Supervisor training?	DFWP: 4 hrs in first year, with 2-hr “refresher” annually; trainer or trainer’s supervisor must have credentials DF-EZ: 2 hrs in first year, with 1-hr “refresher” annually; trainer or trainer’s supervisor must have credentials	For both DFWP & DF-EZ , same requirements as Level 1 but with content designed for Level 2	For both DFWP & DF-EZ , same requirements as Levels 1 & 2 but with content designed for Level 3
Testing?	DFWP: Pre-employment or new-hire drug testing for all (5-drug screen); plus drug & alcohol testing (a) for reasonable suspicion, (b) post-accident, or (c) after assessment or treatment DF-EZ: Same as DFWP, but some leeway on (b) & (c), based on situation	For both DFWP & DF-EZ , same testing as Level 1+ random testing of 10% of total workforce each year (limited, for public employers, to safety-sensitive positions)	For both DFWP & DF-EZ , same testing as Level 1+ random testing of 25% of total workforce each year (limited, for public employers, to safety-sensitive positions)
Employee assistance?	DFWP: Explain substance use assessment, provide list of resources, & urge employee with + test to get assessment DF-EZ: Keep a list of local resources for employees & families	DFWP: Direct referral of employee with + test to specific resource for assessment (usually paid for by employer); can only terminate on first + test if stated in policy DF-EZ: Same as for Level 1	DFWP: Same as for Level 2, + must offer insurance that includes coverage for chemical dependency & treatment; intent is for employer to pay for most services DF-EZ: Same as for Level 1
10-Step Plan?	Not required for either DFWP or DF-EZ at Level 1	DFWP: Implement first 5 steps in first year at Level 2 DF-EZ: Implement 3 steps—Senior Leadership, Employee Involvement, & Written & Communicated Safe Work Practices	DFWP: Implement all 10 steps in first year at Level 3 DF-EZ: Same as Level 2
Potential reduction in premium?	10%	15%	20%

An employer with a comparable drug-free program for four or more years will not be eligible for discounts. Such an employer, according to the Bureau of Workers' Compensation, "will already be enjoying the long-term benefits of improved claims experience and reduced costs associated with having fewer accidents, and fewer and less severe claims."

The prerequisites for each level of participation—along with a few technical exceptions to eligibility—can all be found in a 230-page DFWP Technical Assistance Manual, available online at www.Ohiobwc.com. Check "Ohio Employers," then "Programs," and "Drug-Free Workplace Program."

Progression from one level to the next requires greater commitment from the employer but promises greater rewards, both in a safer workplace and in a bigger discount on Workers' Comp premiums. Discounts start at 10% and move to 15% and finally 20%. The easiest way to illustrate the progression of the Program's levels is through the chart on the previous page, which sums up the various program components.

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The Program Components

A Written Policy. Every program starts with a Written Policy. This should be specific to the company. The Bureau stresses the importance of developing it carefully, perhaps by a broad-based task force, so that employees will "buy in" to the program. The policy should explain all the components of the program, especially the drug and alcohol testing. Descriptions should be user-friendly and should emphasize the employer's concern for confidentiality.

The Technical Assistance Manual provides samples of written policies but states that these are only models. Each company needs to develop its own policy, preferably with legal assistance. (The Manual says this repeatedly.) For smaller employees, the Bureau offers sample policies tailored to the size of the company and recommends adding company specifics and taking the draft policy to an attorney for review.

Developing a well-thought-out written policy that introduces the Drug-Free Workplace Program to employees in a positive light obviously takes time. One thrown together in haste will guarantee later regret. Even if you can postpone participation until July 1—or until you are the apparent low bidder on a state project after January 1, if that comes sooner—you cannot afford to wait to begin developing this policy.

Employee Education. Employee education is the second component of the Program. The hours are minimal, just one hour a year for small companies enrolled in the DF-EZ Program and two hours for others. But **every** employee must participate, right up to the top levels. And, except for the DF-EZ Program,

training must be given or at least supervised by a qualified educator, which means someone with one of four credentials:

- SAP (Substance Abuse Professional);
- CEAP (Certified Employee Assistance Professional);
- CCDC III (Certified Chemical Dependency Counselor); or
- OCPS (Ohio Certified Prevention Specialist).

The content of the training is Level-specific and includes information about the testing of employees.

Training of Supervisors. Supervisors must receive their own particular training, in addition to the education just discussed. The program requires an additional four hours in their first year, followed by an annual two-hour "refresher." For the EZ Program, these numbers are halved. Supervisors need to learn how to observe behavior, recognize and document substance abuse problems, and raise the issue of suspected substance abuse with employees. They also need to learn what resources are available and how to refer an employee for assistance.

Drug and Alcohol Testing. Accurate, confidential, consistent drug and alcohol testing is essential to any program. Both the Drug-Free Workplace Program and its EZ version require pre-employment or new-hire testing for 100% of the employees, screening for five drugs:

- (1) Cocaine;
- (2) Cannabinoids, such as marijuana;
- (3) Opiates, such as heroin and codeine;
- (4) Amphetamines; and
- (5) PCP (Phencyclidine).

Later testing, for both drugs and alcohol, should take place when there is a reasonable suspicion, based on specific, objective facts and reasonable inferences, that an employee is violating the company drug policy. Whenever there is an on-the-job accident causing injury or damage, any employee who may have caused or contributed to it should be tested for both drugs and alcohol.

At Level 1, the only other required tests are the unannounced tests given to employees who are returning from assessment or treatment to which they have been referred after an earlier positive test. But higher levels of the Program require random tests (for drugs only) given to a certain percentage of the workforce. At Level 2, that is 10% a year, and it increases to 25% at Level 3. The Manual emphasizes that there should be an equal probability of any one employee being selected each time the testing occurs.

Employee Assistance. The last component of a Level 1 plan is Employee Assistance, which should be offered to any employee who tests positive for prohibited substances. Even an employer who terminates an employee based on one positive result should still offer a list of resources for

substance abuse assessments, explain what an assessment is, and encourage the employee to get one.

At higher levels of the Program, the employer is expected to do more. Level 2 and Level 3 employers should have a pre-established relationship with a qualified provider who can assess the employee's drug habits and make recommendations. When a test is positive, the company should make a direct referral to this provider. Employers at these levels can still choose to terminate a first-time-positive employee, but only if the company's Written Policy announces this practice.

For employees enrolled in the EZ program, providing a list of local resources fulfills this requirement at any level.

Must the employer pay for the assessment and treatment services its employee receives? While that is not an absolute requirement for Level 2 and 3 employers, the intent of the Program is to have the employer cover most of the costs. (The discount on Workers' Comp premiums is supposed to cover the expense, according to the Manual.) An employee co-pay is permissible if the amount is reasonable, but such a practice should be announced in the Written Policy.

Additional Requirements for Levels 2 and 3. An employer who reaches the upper levels of the Program must begin to implement the Bureau's Ten-Step Plan for overall safety efforts (not specific to the dangers of drug and alcohol abuse). In the first year of Level 2, the first five steps must be carried out, while the remaining five can wait until the first year of Level 3.

But small companies in either level of the EZ Program get a break: They must implement only a specific three steps. The first of these is Senior Leadership, which requires just what it says. Senior management staff, from the top on-site executive on down, must be visibly involved in promoting safety. Second is Employee Involvement, including recognition of employees who contribute to accident prevention. Finally, small companies must have Written and Communicated Safe Work Practices. These are job-specific and relate to such things as wearing respiratory protection and communicating accurately about hazards. These "safe work practices" go well beyond practices related to preventing drug and alcohol abuse.

Support for the Program

According to the Bureau of Workers' Compensation, organized labor approves the specific kind of drug and alcohol testing ("systems presence testing") the Program requires. It is "considered the fairest and most reliable testing system in the world." But no test is 100% accurate, so an employee who contests a positive result may request a second test. If that, too, is positive, the employee foots the bill for the second test. But a negative result means the employer pays.

A recent grant from the Ohio Bureau of Workers' Compensation will assure that labor and management tackle the problem together. Earlier this month, the Bureau announced a \$200,000 grant to UCIP, the Union Construction Industry Partnership, with the announced goal of supporting drug-free construction sites and improving workplace safety in 27 counties throughout Ohio.

Contractors generally support the Drug-Free Workplace Program and its mandated application to state construction projects. *BuildingOhio*, the official publication of the Associated General Contractors of Ohio, pointed out in its Fall 2002 issue why such a program needs to be mandatory:

Currently, many large private owners require contractors to have, or to institute, these types of programs as a condition of contract. Additionally, increasing numbers of contractors and contractor associations are establishing these types of programs on their own initiative. This serves to drive individuals with substance abuse problems to the projects of owners or contractors where there is no drug and alcohol abuse policy and program.

The ironic result may be that, on state construction projects at least, even more than the estimated one in four workers has a problem with alcohol or drugs. If Executive Order 2002-13T works as planned, this should change soon.

Getting Started

If getting such a Drug-Free Workplace Program started in the next eight months seems like a challenging task, it is. But help is available. The Bureau of Workers' Compensation is well stocked with expertise, materials, and advice, and it's all as nearby as your computer. Almost everything the Bureau has is available on its website, www.Ohiobwc.com, and what isn't available can be ordered online.

Information is available, too, from the State Architect's Office, which has teamed up with the Bureau of Workers' Compensation to present a series of free seminars on the new program. The seminars in Cincinnati and Cleveland took place earlier this month, but the Columbus seminar is set for Thursday, November 7, from 8 to 9 a.m. The location is the Builders Exchange, and you can get more information from its website, www.bx.org.

You can also follow the news in ohioconstructionlaw.com as the policy is being implemented. We will watch with interest any further developments and report them to you promptly. And, after a year or two, we hope to see some measurable results tied to the benefits promised by the Bureau of Workers' Compensation in its *Drug-Free Workplace Program (DFWP) Information*:

- **Increased productivity** (because substance users are 33% to 50% less productive than other workers);
- **Decreased accidents** (because substance users are 3 to 5 times more likely to have an accident on the job);
- **Decreased severity of accidents;**
- **Reduced use of Workers' Compensation medical benefits by substance users;**
- **Decreased theft on the job** (because substance-using employees cause an estimated 50% to 80% of pilferage from jobsites); and
- **A stronger bottom line as a result.**

What the Legislators Are Considering . . .

This monthly column focuses on legislation pending in Ohio that is of interest to the construction industry. Our goal is to provide a concise summary, including just enough information that anyone who wants to learn more will know where to direct questions about the bills. For the text of any particular bill, go to <http://www.bricker.com/legislation/>.

Occasionally, we will highlight a recently enacted law of particular significance or a pending bill that deserves more than two or three sentences. If you are

interested in a bill we have previously highlighted, check out the specific back issue by going to our website, <http://www.ohioconstructionlaw.com/>.

The General Assembly will return from recess on November 12th and plans eight sessions to conclude its tasks. With the legislators out of town, there is little to report, but we still repeat our listing of pending legislation, in case you are watching a favorite (or least favorite) bill and want to follow it for the last two months of the 124th General Assembly.

*** SUMMARIES OF PENDING LEGISLATION ***

I. Arbitration

Enacting the Uniform Arbitration Act, H.B. 343, Rep. Womer-Benjamin (R, Aurora)

This bill would make the Uniform Arbitration Act the law of Ohio.

For additional information on this bill, see the “Highlighted Bill” in the September 2001 issue of ohioconstructionlaw.com.

Assigned to the House Civil & Commercial Law Committee.

II. Bidding

Changing Set-Asides to “Challenged” Business Enterprises, Sub. H.B. 58, Rep. Williams (R, Akron)

The substitute bill would eliminate the minority business enterprise program entirely for both construction and goods and services.

For additional information on this bill, see the lead article in the March 2001 issue of ohioconstructionlaw.com.

Assigned to the House Commerce & Labor Committee.

Modification of Controlling Board Procedures, S.B. 167, Sen. McLin (D, Dayton)

Under this bill, the liability of state officials who fail to let bids competitively when they are required to do so would be limited to \$10,000, with three exceptions: bad faith, the official’s

personal gain, or loss to the state (so full value was not received). Also, state agencies would be required to advertise on the Internet when they plan public improvement contracts or purchases of supplies or services.

For additional information on this bill, see the “Highlighted Bill” in the April 2002 issue of ohioconstructionlaw.com

Assigned to the Senate State & Local Government Committee.

Debarment of Vendors Convicted of Bribery, S.B. 282, Sen. Ryan (D, Niles)

Vendors with a conviction for contract-related bribery could be debarred by individual public authorities if this bill becomes law. Following notice and, if requested, a hearing, a vendor could be ineligible to bid on public contracts for that authority for 5 years.

For additional information on this bill, see the “Highlighted Bill” in the September 2002 issue of ohioconstructionlaw.com.

Assigned to the Senate Insurance, Commerce & Labor Committee.

III. Building Codes

Modification of County Building Codes, H.B. 292, Rep. Grendell (R, Chesterland)

Under this bill, counties could include regulations in their building codes to protect surface and subsurface drainage

when farmland is subdivided for housing. Currently, the county has no such authority, which causes problems once a development is built.

Passed the House on 10/30/01; assigned to the Senate State & Local Government Committee.

Establishing a Uniform Building Code, H.B. 403, Rep. Kilbane (R, Rocky River)

This bill would establish the Ohio Basic Building Code as the standard throughout Ohio. It would also set up two new committees within the Department of Commerce to review and interpret Code issues.

For additional information on this bill, see the “Highlighted Bill” in the October 2001 issue of ohioconstructionlaw.com.

Assigned to the House Commerce & Labor Committee.

IV. Compensation & Wages

Prohibition Against Contractor Retainage, S.B. 73, Sen. Hottinger (R, Newark)

This bill would prohibit the practice of withholding retainage from contractors, subcontractors, and suppliers.

For additional information on this bill, see the “Highlighted Bill” in the April 2001 issue of ohioconstructionlaw.com.

Assigned to the Senate Insurance, Commerce & Labor Committee.

Compensatory Time in Lieu of Overtime, H.B. 138, Rep. Husted (R, Kettering)

Under this bill, private employers could permit—but not require—employees to take compensatory time off in lieu of receiving overtime pay. Also, both public and private employers could establish biweekly work periods and allow their employees to elect to work 80 hours within a work period. Opponents note that this would violate Ohio's Prevailing Wage Law in construction.

Assigned to the House Commerce & Labor Committee.

Limiting Prevailing Wage to State-Owned Construction Projects, S.B. 114, Sen. Wachtmann (R, Napoleon)

This bill would limit the requirement for paying prevailing wage to non-university, state-owned construction projects and would set deadlines for claims based on violations of Prevailing Wage Laws.

For additional information on this bill, see the lead article in the June 2001 issue of ohioconstructionlaw.com.

Assigned to the Senate Insurance, Commerce & Labor Committee.

Prevailing Wage on School Facilities Construction, H.B. 239, Rep. Cirelli (D, Canton)

This bill would remove the exemption for school facilities construction from R.C. § 4115.04, Ohio's Prevailing Wage Law.

Assigned to the House Commerce & Labor Committee.

Prevailing Wage on School Construction + Ohio Contractors on Public Improvements, H.B. 252, Rep. Bocchieri (D, New Middletown)

This bill would go beyond removing the exemption for school facilities construction from R.C. § 4115.04, Ohio's Prevailing Wage Law. In addition, it would prohibit a board of education or the governing board of a school service center from awarding to any contractor from outside Ohio a contract for work on any public improvement supported

at least partially by state money.

Assigned to the House Commerce & Labor Committee.

V. Construction Site & Debris

Moratorium on New Facilities for Construction Debris, Sub. S.B. 41, Sen. Carnes (R, St. Clairsville)

Construction and demolition debris facilities that have not yet started operation and that plan to accept debris from outside Ohio would have to wait at least two years to begin, according to this bill. If a license has already been issued to such a facility, this bill would mandate suspension of the license for the two-year period.

The Senate Energy, Natural Resources & Environment Committee reported out a substitute bill 3/15/01.

Solid Waste & Construction Debris Commission, H.B. 459, Rep. Schuring (R, Canton)

This bill would establish a Commission on Solid Waste & Construction Debris and would require the Governor to appoint an expert to report on related issues within one year of the bill's effective date.

Assigned to the House Energy & Environment Committee.

VI. Funding

Capital Reappropriations, Am. Sub. H.B. 524, Rep. Carey (R, Wellston)

This bill made it through both houses of the General Assembly and was signed by Governor Taft in exactly 30 days. As a capital reappropriations bill, it makes multiple changes in the law, but those of most interest concern the Ohio School Facilities Commission. The new law allows school districts generally to increase the terms of bonds issued for certain state-assisted school facilities projects from the current 23-year maximum. Additionally, bonds can be approved by the voters on an incremental basis. A ballot question to approve certain bonds can be combined

with certain other ballot questions, such as an operating levy or income tax.

For additional information on this bill, see the "Highlighted Bill" in the May 2002 issue of ohioconstructionlaw.com.

Introduced in the House 2/26/02 and signed by Governor Taft on 3/28/02; effective on 6/28/02.

VII. Licenses

Licensing of Home Inspectors, H.B. 29, Rep. DePiero (D, Parma)

This bill would require licensing of all home inspectors by a newly created State Board of Home Inspectors within the Department of Commerce. The Board would set up standards of practice and a code of ethics. Licensing would be required 480 days after the effective date of this bill, and performing an unlicensed inspection would be a third-degree misdemeanor, subject to as much as 60 days' imprisonment and up to a \$500 fine.

Assigned to the House Commerce & Labor Committee.

Revising the Licensing of Landscape Architects, H.B. 214, Rep. Willamowski (R, Lima) & 3 others

This bill expands the definition of "landscape architecture" and strengthens the requirements for registration to reflect national uniformity. Under the amended bill, applicants for licenses need to complete an internship program or three years of practical experience (not both).

For additional information on this bill, see the "Highlighted Bill" in the June 2002 issue of ohioconstructionlaw.com.

Signed into law by Governor Taft on 4/23/02; effective on 7/23/02.

Engineer & Surveyor Licensing Law, Am. Sub. H.B. 337, Rep. Lendrum (R, Huron)

A technical corrections bill from the State Board of Registration for Professional Engineers and Surveyors, this bill clarifies the definitions of the terms "engineer" and "surveyor." Amend-

ment eliminated one questionable part of the original bill: the power of the Board of Registration to issue Cease and Desist Orders prohibiting unregistered persons from practicing either profession in Ohio.

For additional information on this bill, see the “Highlighted Bill” in the June 2002 issue of ohioconstructionlaw.com.

Signed into law by Governor Taft on 5/07/02; effective on 8/06/02.

VIII. Lien Rights

Amendment to Mechanic’s Lien Laws, H.B. 514, Rep. Seitz (R, Cincinnati)

When an owner fails to file a timely Notice of Commencement, this bill would expand the time during which the lien rights of subcontractors or material suppliers would be preserved. It would also change the criteria for determining whether a notice, affidavit, or other document has been served under the Mechanic’s Lien law.

For additional information on this bill, see the “Highlighted Bill” in the March 2002 issue of ohioconstructionlaw.com.

Passed the House as amended on 5/15/02; assigned to the Senate Insurance, Commerce & Labor Committee.

IX. Public Projects

BuyOhio, H.B. 27, Rep. D. Miller (D, Cleveland) & 19 others

This bill would designate steel slag as a product included in the Buy Ohio program and require that steel slag used on capital improvements be purchased in the United States.

Assigned to the House Commerce & Labor Committee.

Including Services in BuyOhio, H.B. 277, Rep. R. Miller (D, Columbus)

Under this bill, the current “BuyOhio” law, which applies to “goods” purchased by the state, would be expanded to apply to the purchase of services.

Assigned to the House State Government Committee.

Eliminating Apprentice-to-Journeyman Ratios, S.B. 62, Sen. Jordan (R, Lima)

For public prevailing wage projects, this bill would eliminate required ratios of apprentices to journeymen.

Assigned to the Senate Insurance, Commerce & Labor Committee.

State Contractors: Fair Employment in Northern Ireland, H.B. 186, Rep. Flannery (D, Lakewood) & 10 others

Under this bill, any firm contracting to supply goods or services to the state or to construct a public improvement would be required to implement the MacBride Principles of Fair Employment for any business activities in Northern Ireland.

Assigned to the House State Government Committee.

Prohibition Against Requiring Particular Surety, S.B. 109, Sen. Nein (R, Middletown)

This bill prohibits a state or local public authority from including in its invitation for bids or request for proposals a requirement that any related bond be furnished from a particular surety, company, agent, or broker.

For additional information on this bill, see the “Highlighted Bill” in the May 2001 issue of ohioconstructionlaw.com.

Signed into law by Governor Taft on 2/13/02; effective 5/16/02.

Immunity for Construction & Operation of School Athletic Facilities, S.B. 106, Sen. Hottinger (R, Newark)

If this bill passes, the construction, renovation, repair, maintenance or operation of a school athletic facility, auditorium, or gymnasium would be defined as a “governmental activity” for which a political subdivision would generally not be liable in damages.

For additional information on this bill, see the “Highlighted Bill” in the August 2002 issue of ohioconstructionlaw.com.

Passed the Senate 11/14/01; assigned to the

House Local Government & Townships Committee.

Contractor Drug Testing for School Facilities, S.B. 210, Sen. Shoemaker (D, Bourneville) & Sen. Herington (D, Ravenna)

School districts that work with the Ohio School Facilities Commission to build projects would be required under this bill to adopt a drug policy mandating drug tests for any contractor bidding on the project. This would include both owners and employees.

For additional information on this bill, see the “Highlighted Bill” in the February 2002 issue of ohioconstructionlaw.com.

Assigned to the Senate Insurance, Commerce & Labor Committee.

Standards for Determining Fiscal Responsibility of Contractors, H.B. 458, Rep. Williams (R, Akron)

This bill would modify the standards for determining financial responsibility in the awarding of construction contracts to the lowest and most responsible bidder and would make certain financial information confidential.

For additional information on this bill, see the “Highlighted Bill” in the January 2002 issue of ohioconstructionlaw.com.

Signed into law by Governor Taft on 6/24/02; effective 9/20/02.

Design-Build for Public Projects, SB. 236, Sen. Coughlin (R, Cuyahoga Falls)

This bill would permit public authorities to use design-build firms to construct public improvements and would establish a procedure for selecting those firms.

Assigned to the Senate Insurance, Commerce & Labor Committee.

State To Pay for Errors of School Facilities Commission, SB. 276, Sen. Shoemaker (D, Bourneville)

If an assessment error made by the Ohio School Facilities Commission

should cause a school district to require additional assistance, this bill would make the state pay for the resulting increase in cost.

Introduced in the Senate 6/06/02; assigned to the Senate Finance & Financial Institutions Committee.

**Prohibition Against the Use of Prison Labor, H.B. 610,
Rep. Carano (D, Austintown)**

No competitively bid construction project, including road repair work, could use prison labor if this bill passes.

Introduced in the House 7/02/02; not yet assigned to a committee.

X. Public Records

**Excluding Private Dwelling Plans from Public Records Law, H.B. 468,
Rep. Trakas (R, Independence)**

This bill would re-define "public records" to exclude the plans for private, single-family residences, except for the related site plans.

Assigned to the House State Government Committee.

XI. Purchasing

**BuyOhio, H.B. 27,
Rep. D. Miller (D, Cleveland)
& 19 others**

This bill would designate steel slag as a product included in the Buy Ohio program and require that steel slag used on capital improvements be purchased in the United States.

Assigned to the House Commerce & Labor Committee.

XII. Unions and Collective Bargaining

**Project Labor Agreements, S.B. 19,
Sen. Shoemaker (D, Bourneville)**

This bill would allow school districts to enter into project labor agreements (PLAs) on their school building projects. It would prohibit the Ohio School Facilities Commission from considering whether a PLA is contained

in a bid specification before approving a project under the Classroom Facilities Assistance Program. Also, the Commission would not be allowed to prohibit PLAs in such a project.

Assigned to the Senate Insurance, Commerce & Labor Committee.

XIII. Workers' Compensation

**Self-Insuring Employers for Higher Education & School Construction, S.B. 260,
Sen. R.L. Gardner (R, Bowling Green)**

For construction projects of more than \$25 million, state institutions of higher education, school districts, county school financing districts, educational service centers, and community schools would be able to self-insure under the Workers' Compensation Law, if this bill passes.

Assigned to the Senate Finance & Financial Institutions Committee.

ROUNDTABLES IN FOUR CITIES PROMOTE SUCCESSFUL SCHOOL CONSTRUCTION

What differentiates a successful school construction project from a problem project?

Find out at roundtables in four cities over the next few weeks, where attorneys from Bricker & Eckler LLP's Construction Law Department, joined by panelists experienced in the industry, will share their best ideas on an important topic: "Achieving Success in School Construction from the Start." Bricker & Eckler LLP is providing these roundtables without charge, as an educational service.

School construction is challenging. If you have any role in it, you won't want to miss participating in one of these three-hour brainstorming sessions when the free roundtable comes to a city near you.

Each roundtable will take place on a Friday morning, from 8:30 to 11:30. Here are the dates and places:

November 15, 2002—Columbus, Bricker & Eckler LLP, 100 S. Third Street, Columbus, Ohio.

November 22, 2002—Cleveland, Comfort Inn Suites, 17550 Rosbaugh Drive, Middleburg Heights, Ohio.

December 6, 2002—Cincinnati, Comfort Inn Suites, 11349 Reed Hartman Road, Blue Ash, Ohio.

December 6, 2002—Toledo, Holiday Inn French Quarter Hotel, 10630 Fremont Pike, Perrysburg, Ohio.

Each city will have a great panel for the free roundtable.

In Columbus, Sylvia Gillis, from Bricker & Eckler, will join Richard Lombardi, of Turner Construction, Clyde Henry, of Triad Architects, and Richard Schneider, of Limbach Sabo Mechanical Contractors, to discuss the methods that lead to a successful school construction project. They expect lots of audience participation, as do the panelists in the other cities.

In Cleveland, Sam Wampler will represent Bricker & Eckler, while the panelists there will be Denny Humbel, of Turner Construction, Tari Rivera, of Regency Construction Services, Dana Mitchell, of URS Corporation, and Lonnie Coleman, of Coleman-Spohn Corporation.

In Cincinnati, the Bricker & Eckler attorney will be Jack Rosati. Joining Jack will be Denny Humbel, of Turner Construction, and Tom Lindsey, of Cole + Russell Architects.

On the same day (December 6) in Toledo, Mike Holman will join Joe Kunkle, of SSOE Studios, and Tim Meyer, of the Lathrop Company, to share their best tips with attendees.

There's no charge, but you do need to register in advance. Seating will be limited, so get your name in early. You have three choices: (1) Call Kathy Parker at 614-227-2300, Ext. 2447; (2) Send her a fax at 614-227-2390; or (3) Send her an E-mail at kparker@bricker.com.

Did we tell you the roundtables are free?

What the Courts Are Saying . . .

Each month, ohioconstructionlaw.com summarizes recent decisions of Ohio and federal courts that may affect construction projects and those involved with them in Ohio. From time to time, we may even include a case from another state, if it seems particularly relevant. If we overlook a case that you think is significant, E-mail us with your suggestions. We can always use feedback, and we would enjoy hearing from you!

In an unusually busy month for the courts, we had trouble narrowing our choices but finally settled on a record six cases to summarize. We begin with a case from the Butler County Court of Appeals just this week that helps to define a bidder's eligibility to challenge the award of a public contract. Our second case is federal (from the Southern District of Ohio) because it deals with a federal statute, the Freedom of Information Act, and explains whether *The Dodge Reports* become public records in the hands of the Department of Labor and must be produced on request. Back in the Ohio Courts of Appeals for our third case, we investigate the potential liability for injuries to an employee using a rented crane for after-hours recreation. (Recreation with a rented crane? Read the summary to find out.) Next, we look at what a Franklin County Court of Appeals had to say about insurance coverage for a "slander of title" claim based on filing a mechanic's lien. Our fifth case, from the Darke County Court of Appeals, applies Ohio's Consumer Sales Practices Act to the installation of a water softener that didn't match the one described in the contract. Finally—whew!—we comment on a recent decision of a Franklin County trial court that permitted unusual security to "bond off" mechanic's liens.

"Joint Bidder" Can't Challenge Bid's Rejection, Butler County Court Says.

Before asking a court to declare that your bid on a public project was lowest and best, you must first submit a bid. That proclamation of the Court of Appeals for Butler County on October 28 resolved the dispute in *Treadon v. City of Oxford* (Oct. 28, 2002), Butler App. No. CA2002-01-025, 2002 Ohio App. LEXIS 57533.

The plaintiff, an architectural firm, had joined with Warm Bros. Construction to bid on a public parking garage that was apparently a design build project (under the city's home rule provisions). Treadon subcontracted with Warm Bros. to design the garage, and Warm Bros. submitted the bid.

The Notice to Bidders required the architectural design to conform to the guidelines of the Historic and Architectural Preservation Commission. Warm Bros.' bid was the lower bid—there were only two bidders—but it failed to conform to these guidelines. (The court didn't say how.) So the city selected the other bidder, and both Warm Bros. and Treadon filed suit. They sought to prevent the award to the other

bidder, to have their own bid declared "lowest and best," and to have the court award them damages.

When the trial court upheld the city's decision, only Treadon appealed. Warm Bros. apparently decided not to challenge the trial court's ruling that it was entitled to bring suit (it "had standing to sue," in legalese) but that its bid was properly rejected as not responsive. But Treadon did challenge the court's reason for dismissing its claim: that it had no standing to bring suit because it had never submitted a bid.

Treadon argued to the appellate court that it had, indeed, submitted a bid as a "joint bidder" with Warm Bros. The court looked at the bid itself and found several reasons to reject Treadon's argument, starting with the letterhead, which was Warm Bros.' The bid discussed Warm Bros.' history and experience with parking garages, listing eight similar projects, all built by Warm Bros. The bid was signed by the president of Warm Bros., but not signed by anyone from Treadon. In fact, there was nothing in the bid about the history or experience of Treadon. So the court concluded that the two companies were not joint bidders.

Could Treadon have standing anyway, as a subcontractor? The court rejected this idea, too. One case had suggested that subcontractors might challenge a bid rejection, but it had peculiar facts. All bidders had been required to obtain "letters of intent to perform" from their subcontractors before submitting a bid. The court said this gave them "a stake in the controversy" that was missing in the case of the Oxford parking garage.

What could Treadon have done to secure a different outcome? Most obviously, it could have followed the required guidelines. But to be sure it had a right to challenge the contract award in court, it needed to make its presence visible in the bid itself. If the bid had contained the history and experience of both companies and been signed by officials from both, the court might have looked differently at Treadon's right to challenge the results of the bidding.

FOIA Requires Government Agency To Disclose Proprietary Dodge Reports.

In selecting the next work site for an OSHA inspection, the United States Department of Labor has an inside track to construction site information: *The Dodge Reports*. These reports, provided by McGraw-Hill to fee-paying subscribers, also provide clues to tell the Occupational Safety and Health Administration what sites might merit inspections. But when an oft-inspected contractor sought free access to those reports to try to decipher those clues for itself, the result was a battle in federal court that produced a decision last month.

Cody Zeigler, Inc. v. OSHA, No. C2-00-134, 2002 U.S. Dist. LEXIS 19059 (S.D. Ohio Sept. 3, 2002), focused on the application of FOIA, the Freedom of Information Act, 5 U.S.C.

§ 552. Zeigler, a construction contractor, made a request under that Act for copies of specific *Dodge Reports*: the ones the Department of Labor used to determine what OSHA inspections to conduct during a four-month period in 1999.

The request went right to the Department of Labor, which turned it down. The Reports were “protected contractually and considered trade secrets,” according to the Department. It saw the *Dodge Reports* as necessary to the administration of its OSHA duties, and it wanted to keep this source of insider information confidential. The McGraw-Hill Company also opposed releasing these reports, as it did not want the public to have free access to its product. Free disclosure would put McGraw-Hill at a competitive disadvantage in the market place.

So, because FOIA is a federal statute, the dispute wound up in federal court, the United States District Court for the Southern District of Ohio. The court started its analysis with the fundamental basis of the Act: to ensure an informed public by disclosing public records as a means to review government conduct. For this reason, government agencies are required to disclose public records upon request.

At the same time, the court recognized certain exemptions from disclosure, including trade secrets and confidential commercial or financial information obtained from a private party. Necessarily, the court was forced to weigh McGraw-Hill’s commercial interests and the Department of Labor’s information source interest with Zeigler’s right to review the Department’s work site choices for OSHA inspections.

Should the *Dodge Reports* be exempt from disclosure? The court applied a two-part test for exempting “confidential commercial information” from the Act. Such information is exempt if disclosure is likely to (1) impair the Government’s ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person (here, the Department of Labor) from whom the information was obtained.

The Department of Labor tried to meet this standard but produced only “generalizations and speculative possibilities.” The requested *Dodge Reports* were outdated, but they maintained commercial value over time and could provide a competitor with information about McGraw-Hill’s sources of project data. Still, the specific evidence was missing. According to the court, “The issue was—and is—whether the current disclosure of the requested *Dodge Reports* ‘might cause some competitive disadvantage to F.W. Dodge, which in turn would make it more difficult for the government to obtain *Dodge Reports*.’”

The court concluded that McGraw-Hill’s project source data was readily available to any subscriber to the *Dodge Reports*. The Reports in the possession of the government were public documents, and therefore not exempt from the Act. The Department of Labor must disclose the Reports and the construction site information they contained that led to OSHA inspections of Cody Zeigler work sites.

Any purveyor of proprietary information should heed this decision. Under the Freedom of Information Act, government agencies that purchase such information in the course of their duties must disclose the information to the public for free. F.W. Dodge—and any other company that compiles data and sells reports to the government—may create a competitively damaging portal to the market place. In turn, the government may find it more difficult (or more expensive) to obtain such information.

Appeals Court Bounces Bungee Case.

How secure is your construction equipment during the off hours? What is your policy regarding personal use of your construction equipment? Although the employer in this next case was exonerated, an employee was nearly killed and the employer had to incur legal fees before the matter of the employer’s liability was finally decided in its favor. If the rental crane involved had been better secured, or if there had been a strict policy against personal use of the crane, the near-tragedy could have been avoided altogether.

In *Blankenship v. CRT Tree* (Oct. 3, 2002), Cuyahoga App. No. 80907, 2002-Ohio-5354, decided earlier this month, the Cuyahoga County Court of Appeals dismissed all claims of a man who was injured while “bungee bouncing,” using a telescoping boom crane operated by a fellow employee after hours.

The court explained bungee bouncing very well: “Bungee bouncing is a variation of the activity of bungee jumping. Rather than jumping off of a high structure, the ‘bouncer’ wears a harness that is attached with a bungee

cord to the wire cable of a crane and is hoisted off the ground. An operator then takes up and lets out the cable to create a bouncing motion for the participant.”

In this particular incident, the ‘bouncer’ was suspended from a telescoping hydraulic crane that was extended to over 100 feet above the ground. Unfortunately, two significant safety devices had been disabled: the ‘anti-two block limit switch’ and the wire rope retaining pins. As a result of these omissions, during the bouncing process the wire rope derailed from the pulley at the top of the crane, putting 25 feet of slack in the cable and allowing the bouncer to fall to the ground, where he was seriously injured.

Initially the injured man sued his employer (a tree cutting and trimming business), the manufacturer of the crane, the landscaping business where the crane was parked, the insurer of the flatbed truck on which the crane was mounted, and the employer’s commercial general liability insurance carrier. He sought damages from all defendants.

In a separate action, the injured man was denied workers’ compensation benefits for his injuries because the bungee bouncing activity did not arise out of the course and scope of his employment.

In the suit for damages, the court granted judgment in favor of all defendants without a trial (summary judgment). There was no need for a trial because the law was so clear. Unwilling to give up, the plaintiff appealed.

The court started its analysis with the fundamental basis of the Act: to ensure an informed public by disclosing public records as a means to review governmental conduct.

The Court ruled that the plaintiff had knowingly assumed the risks associated with bungee bouncing. He knew the crane operator was not a professional bungee bouncer and indeed had expressed concerns about whether the operator knew what he was doing. Perhaps more importantly, the Court cited various case law rulings that established the obvious inherent risks of bungee jumping, “a close cousin to bungee bouncing.”

The Court also dismissed the plaintiff’s argument that he was an invitee, to whom a landowner owes a duty to warn about hazards that the landowner should have known about. This argument would clearly not work against the majority of the defendants, none of whom owned the land where the accident occurred. It also failed against the landowner because the plaintiff was not an invitee, but was on the premises for his own benefit as an employee of the tree trimming business.

Next, the plaintiff’s product liability claims against the crane manufacturer collapsed under the weight of the manufacturer’s ample warnings. These included a substantial owner’s manual supplied with the crane, a specific warning against bungee bouncing, and warnings posted directly on the crane declaring that operators should have proper training and that the missing safety devices should be in place.

The claim against the injured man’s employer’s commercial general liability insurer failed because the policy specifically excluded bodily injury arising from “stunting activity.” Webster’s Dictionary satisfied the court that bungee bouncing was a stunting activity. In addition, the court relied upon its prior finding that the injured man was not acting within the scope of his employment, thus enforcing another policy exclusion.

Finally, the claim against the employer’s auto insurance policy failed because the policy excluded mobile equipment, specifically including cranes within that definition.

With no defendants left, the court dismissed the case, ending nearly six years of court proceedings. Surely it would have been cost-effective to lock up the construction equipment, protecting foolhardy employees from themselves and clearing the courts for more important issues.

Business Liability Insurance Won’t Always Defend Contractor in Suit by Homeowner.

Business owners purchase business liability insurance as protection from liabilities such as claims made against the company. Such insurance may protect an owner from a variety of claims: bodily or personal injuries, damage to the property of others, fire, and more exotic claims like “products completed operations,” “advertising,” “premises operations,” legal liability, and related legal defense costs. For instance, liability insurance not only pays the cost of covered damages but also the attorney fees and other costs associated with the defense.

But does a business liability insurance policy protect the business in a slander of title counterclaim arising in the

context of a suit to foreclose a mechanic’s lien? The Court of Appeals for Franklin County recently addressed this question in *Hahn’s Electric Co. v. Cochran* (Sept. 24, 2002), Franklin App. Nos. 01AP-1391 and 01AP-1394, 2002-Ohio-5009.

Cochran hired Hahn’s Electric Company to perform electrical work in her home. When she didn’t pay the \$9,500 bill, Hahn’s filed a complaint against Cochran and a mechanic’s lien against the residence.

In a counterclaim, Cochran said Hahn’s had verbally agreed to complete the electrical work for \$2,000, failed to perform in a workmanlike manner, performed the work negligently, and slandered her title to the property by filing the mechanic’s lien against it.

Hahn’s turned to Hartford, its business liability insurance and completed operations insurance carrier, for coverage. When Hartford said its policies didn’t cover these claims, Hahn’s brought Hartford into the lawsuit as a defendant. Hahn’s asked the court to declare (in a “declaratory judgment”) that the policies did indeed provide coverage.

The trial court looked at the policy definition of “personal injury” and concluded that Cochran’s claim for slander of title fit within that definition. The somewhat technical claim charges that a defendant “falsely and maliciously defame[d] title to

property,” causing some special financial damages. Cochran’s complaint accused Hahn’s of improperly recording a mechanic’s lien and filing suit on it, thus defaming the title to her property and causing her financial damages in an amount to be proven at trial. Was it close enough to slander to a person (covered under the policy) that it, too, should be covered?

Under Ohio law, the duty of an insurance company to defend an action against an insured is determined by the scope of the allegations in the complaint. There must be some set of facts that could bring the allegations in the underlying complaint within the provisions of the liability insurance. The Hartford policy at issue expressly stated that it applied to personal injury caused by an “offense” arising out of the insured’s business, including the “offense” of “oral or

written publication of material that slanders or libels a *person* or *organization* or disparages a person’s or organization’s *goods, products or services.*”

Although the trial court thought this claim could conceivably fall within the policy definition of “personal injury,” the Court of Appeals disagreed. It reversed the trial court because an allegation of slander of title to real estate is not against “a person, organization, good, product or service” and thus did not fall within the policy coverage.

Hahn’s also tried to argue that Hartford was required to defend or indemnify under the terms of the “products completed operations” policy, which generally picks up where the general liability insurance ends (after the insured has finished performing its work on another’s premises) and provides cover-

Cochran’s complaint accused Hahn’s of improperly recording a mechanic’s lien and filing suit on it, thus defaming the title to her property and causing her financial damages in an amount to be proven at trial.

age against risks of property damage that occurs later. Again, the court held in favor of Hartford and found this policy inapplicable because Cochran's counterclaim expressly stated that the electrical work was "incomplete and needs to be completed."

The *Hahn's* case provides yet another lesson that the specific language in insurance policies will determine whether the insurance company has a duty to defend or indemnify, based on the allegations in the complaint. If the allegations don't fall within the policy, then the insurance company will most likely not have a duty to defend (pay for the insured's lawyer) or indemnify (pay any damages the court says the insured must pay).

Installing Wrong Softener Made Contractor Liable for Triple Damages, Attorney Fees.

"Bait and switch" tactics violate Ohio's Consumer Sales Practices Act, according to the Court of Appeals for Darke County. So contracting to install one brand of water softener and installing a different brand made the contractor liable for triple damages and attorney fees in *Wiseman v. Kirkman* (Oct. 4, 2002), Darke App. No. 1575, 2002-Ohio-5384.

The facts of this case are relatively simple. The plaintiff, a homeowner, received a written estimate from the contractor to replace his water softener. The estimate specifically stated that the contractor would "install a new McClean twin tank 45,000-grain water softener in place of the old water softener with any parts and labor needed to do the installation."

After the installation was completed, the homeowner discovered that the contractor installed an Oh So Soft water softener and not a McClean. After unsuccessfully trying to resolve this issue with the contractor, the homeowner sued for breach of contract and violation of the Consumer Sales Practices Act. The trial court held in favor of the homeowner and awarded actual and punitive damages (three times the actual damages) and attorney fees, as permitted under the Act.

The contractor appealed, arguing that the Act was not violated by the installation of the wrong product. In support, the contractor took the position that the brand of water softener must be a **material factor** in the homeowner's decision to purchase the product before substitution would violate the Act. Therefore, because the homeowner did not know the McClean brand when he sought the water softener, the McClean brand was not material to the decision to purchase and there was no violation.

The appellate court rejected the contractor's argument and upheld the decision of the trial court, finding that the substitution of brands was a violation of the Consumer Sales Practices Act. Although the homeowner was not aware of McClean water softeners before hiring the contractor, the court said, he relied on the contractor's plumbing expertise when determining which water softener to buy. Moreover, the court stated that it is common

sense that the contractor's recommendations regarding an expensive home product may be material to the homeowner's choice of product.

The court called it "unconscionable" for the contractor "to contract to provide one brand of water softener, substitute a cheaper brand, and retain the profits from his wrongful act."

Accordingly, the court found that the Act was violated and the contractor was liable for damages—the \$240 difference in price trebled to \$720—plus attorney fees of \$3,559.27. (There were additional damages for charging for the water softener twice and for performing unnecessary repair work.)

As this decision teaches, contractors should pay close attention to substantive deviations between the equipment described in estimates and the actual equipment installed on a particular project. This is especially important when dealing with unsophisticated purchasers who do not have technical expertise and who rely on the contractor for equipment recommendations.

Common Pleas Court Okays Payment Bond To "Bond Off" Mechanic's Liens.

In a decision that could impact both mechanic's lien and surety law throughout Ohio, a trial court in Franklin County last month permitted a general project "payment bond" to provide security to "bond off" nearly \$900,000 in mechanic's liens.

The facts of *Brice Road Development, L.L.C. v. Alleged Mechanics' Lien of Porter Drywall* (Sept. 23, 2002), Franklin County Common Pleas Court No. 02 CVH 08-8964, were unusual. Although the housing project was private, HUD financing required the contractor to obtain a surety "payment bond" for some \$12 million. When the project was about 73% complete, according to the court, numerous unpaid subcontractors filed mechanic's liens on the property.

The result was a Catch 22 the court saw as a "unique problem." The general contractor needed release of the funding from HUD in order to pay the subs. But HUD wouldn't release any money so long as the property was encumbered with the liens. The parties were at a standstill, and the court looked to find a solution in Ohio Revised Code § 1311.11(C), the statute on bonding off liens.

That statute permits the removal of liens if they are replaced by "a bond, cash deposit, general obligation of any state government or of the United States government, obligation insured by an agency of the United States government, or . . . other reasonable security." The security must generally be 1.5 times the amount of the lien (except for liens up to \$5,000, which require double the amount), and if it is "other reasonable security," it can only substitute for the lien if the lienholder consents.

The lienholders did not consent. Instead, they argued that normal business practice called for both a general payment bond and individual bonds in favor of each lienholder. Without

The court called it "unconscionable" for the contractor "to contract to provide one brand of water softener, substitute a cheaper brand, and retain the profits from his wrongful act."

both, the subcontractors had no real guarantee of security. But the general contractor and developer argued that the general payment bond should suffice. After all, the project was 73% complete (never clarified in the opinion), the existing liens totaled less than \$900,000, and the bond was for more than \$12 million.

In a quandary, the court looked at the bond itself to determine if it was “drawn in favor of the lienholder”—another requirement of 1311.11(C). If not, it would have been “other security” and would have required the lienholders’ consent before it could substitute for the liens. The payment bond stated that it was “for the use and benefit of claimants,” a term defined by the bond to include anyone who contracted to supply labor, material, or both to either the Principal or a sub of the Principal. So the court found that “by definition, the bond is drawn in favor of the lienholder.”

“There is nothing in the statute,” the court said, “that requires anything separate and distinct with respect to the lienholder, or any requirement that the lienholder be specifically designated as the only beneficiary to the bond.” Nor was there a problem with the amount of the bond, according to the court, although the lienholders feared that more liens might be filed. Therefore, the court determined that the amount of the bond was sufficient and the bond could substitute for the liens.

Although the court was clearly attempting to break the parties’ stalemate, so far that hasn’t happened. HUD has not released the funds, the subcontractors have not been paid, and they are appealing the court’s decision. The surety, who was surprisingly not a party to the case, has yet to be heard from. The saga of this case is far from over, and we plan to cover it as it develops.

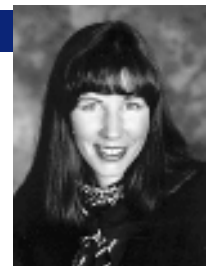
HOLMAN, GILLIS AND WAMPLER ON CONSTRUCTION DOCUMENTS

Cleaning Up During Construction and Upon Completion

Twenty-ninth in a Series—Each issue of ohioconstructionlaw.com discusses important terms found in typical construction documents. Each article explains the language found in construction documents and provides practical guidance. This month, Sam Wampler discusses cleanup of the construction site as required in AIA Document A201-1997, the General Conditions.



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Overview. Maintaining a work site free of unnecessary debris is important to the safety of the workers and will generally lead to a more efficient construction project. This month we look at how the General Conditions set forth in AIA Document A201-1997 allocate the responsibility for keeping a work site clean and delivering a completed Project. We will examine the contract provisions relating to cleaning up; what an owner can do if a Contractor does not clean up; what an Owner must do if it self-performs the cleanup work; and what the parties can do to avoid issues concerning a clean workplace.

The express contract requirements. The Contractor’s obligations to maintain and deliver a clean work site are set forth in Subparagraph 3.15.1 as follows:

The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor’s tools, construction equipment, machinery and surplus materials.

As we can see, the Contractor’s duty to keep the premises clean is not limited just to the job site. It also applies to the surrounding area. If a property owner complains about debris flowing from the job site to its property, an Owner is within its rights to insist that the Contractor clean it up. This type of problem usually arises from dirt, mud, and other problems on the streets and highways leading to and from the job site. The Contractor is obligated to keep these areas cleaned up during construction and upon completion. As an example, Subpara-

graph 3.13.1 provides:

The Contractor shall confine operations at the site to areas permitted by law, ordinances, permits and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

The Contractor has the right and duty to enforce its maintenance of a clean work site in the Contract Documents as well. Subparagraph 3.4.3 includes this mandate:

The Contractor shall enforce strict discipline and good order among the Contractor’s employees and other persons carrying out the Contract.

Article 12 of the General Conditions also addresses the obligation of the Contractor to clean up after correcting Work, as ordered by the Architect or upon notice from the Owner to correct defective or non-conforming Work. Subparagraph 12.2.3 provides as follows:

The Contractor shall remove from the site portions of the Work which are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

This provision makes it clear that if portions of the Work need to be corrected because they are non-conforming,



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whatever is replaced must be removed from the job site unless the Owner agrees that it may stay. For instance, if a block wall was unacceptable or damaged during construction and was therefore non-conforming, it would have to be removed and replaced. The Contractor would be required to remove the rubble from the wall that was replaced.

What to do when a contractor does not clean up as required? Some job sites become pretty messy during construction—this is expected. At some point, however, the mess can become a safety issue or just be so bad that it has to be cleaned up. What happens when the Contractor and the Owner disagree on the threshold that requires cleaning up? At that point, both parties would be well advised to take photographs and preserve the scene before cleaning up, because Subparagraph 3.15.2 provides as follows:

If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and the cost thereof shall be charged to the Contractor.

A Contractor is entitled to reasonable notice from the Owner that it should clean up its work area. If it fails to do so, the Owner then has the right to perform the cleanup itself and charge the Contractor for the cost. Seems simple enough, but who decides whether the Contractor or the Owner is right? And if the Owner is right, who decides how much is reasonable to charge for the cleanup? The answer is in Subparagraph 6.3.1 which says this:

If a dispute arises among the Contractor, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and the Architect will allocate the cost among those responsible.

This provision is most likely to arise when the Owner is self-performing or when there is a dispute between the Contractor and other contractors on the job, but it is clear that the Architect is the one to determine how the cost of cleaning up should be allocated should it become necessary for one of the parties to clean up for the other. The Architect's decision would likely be made on a case-by-case basis. One way to allocate the final cleanup of a Project involving multiple contractors, should it become necessary, would be to prorate

the cost of cleanup on the basis of the size of the contractor's contract as it relates to the Project as a whole.

If cleaning up is required after the Contractor has corrected its Work under Article 12, and the Contractor fails to perform the cleanup, the Owner can clean up as required and charge the Contractor, who will then bear "*the cost of . . . removal of the Work which is not in accordance with the requirements of the Contract Documents.*" See Subparagraph 12.2.4.

What can the parties do to avoid these problems? Like many issues on a construction project, problems with cleanup probably find their roots in the parties' undisclosed or poorly communicated expectations. It is not fair for an Owner to have fastidious tendencies and not communicate them to the Contractor before the Contract is signed.

Cleanliness, like beauty, is in the eye of the beholder. But sometimes the degree of cleanliness required depends on the purpose of the construction and what is going on around it. For example, a clean job site would be important in the case of an addition to a hospital where the need for a clean environment is particularly important. Such a Project should not require special communication of such a need. However, construction of a sewage treatment plant may have less demanding standards.

If cleanliness is important to an Owner, such expectation should be expressed in the invitation to bidders and emphasized in the bid documents. If it is important to the Owner, it should also be brought up at the pre-bid meeting, the pre-construction meeting and made a regular agenda item during all construction meetings—perhaps as part of the safety review each week.

Conclusion. The Contractor is generally responsible for keeping the job site and surrounding areas clean. If other contractors are on the Project, it is a good idea to find a way to work together to keep the job site clean. Otherwise the Owner will perform the cleanup and send the Contractors a bill. If the Contractor and the Owner cannot agree on a reasonable charge for cleaning up, the Architect will decide. If the Owner discloses its expectations early, and if ongoing communications emphasizing the importance of a clean job site are maintained, the Contractor and Owner should not have problems keeping the Project clean—and delivering a Project everyone will be proud of.

Construction Claims 101

This seminar will teach both management and field-level personnel important concepts and give practical advice on identifying, avoiding, and winning claims on construction projects, with special emphasis on helpful job documentation techniques.

The two-hour seminar covers these topics:

- Types of claims • Notice requirements for claims
- Commonly made claims • Claims Documentation
- Claims process Do's and Don'ts

Presented by Mark Evans, P.E., Esq. and Doug Shevelov, P.E. of Bricker & Eckler LLP. Together, Mark and Doug have over 15 years of engineering experience and over 10 years of construction management experience. Both hold degrees in civil engineering.

Your Place... Or Ours? For your convenience, the seminar can be presented at your office or requested location.

What's New in the World of Job Safety?

The Occupational Safety and Health Administration (OSHA) can seriously affect any contractor or construction project. Compliance with OSHA regulations can be time-consuming and tedious, but it is essential to maintain a viable position in the construction industry. This month, as always, we report on recent developments in the world of OSHA.

Ohio Courts Rule on Electrocuting Accidents

Two recent Ohio Court of Appeals cases determined the liability of two employers stemming from separate electrical accidents. Tragically, in one of the cases a worker was killed.

The employee who died was a foreman of a tree trimming company. He was killed when a branch he was trimming came into contact with a 7,200-volt power line. His widow sought compensation in addition to regular workers' compensation death benefits. She attempted to obtain additional benefits under an Ohio regulation (Ohio Adm. Code 4121:1-5-23(E)) that allows additional awards when a work injury results from an employer's violation of a specific safety requirement. (The shorthand reference for such a violation is "VSSR.")

At first a hearing officer from the Industrial Commission of Ohio denied the claim on the basis that the cited regulation only applied to workshops and factories. But the Franklin County Court of Appeals ordered the Commission to rehear the claim based on a then-recent Supreme Court of Ohio case establishing that the regulation did apply to tree-trimming operations.

A hearing officer then denied the claim upon its merits, and the Commission declined to review the hearing officer's decision. So the widow took her case to the Franklin County Court of Appeals once more, but in the end that Court affirmed the hearing officer. The result can be found at *Thieman v. Industrial Comm. of Ohio* (Sept. 26, 2002), Franklin App. No. 01AP-1274, 2002-Ohio-5071.

In the several hearings the tree trimming company showed that it was very safety conscious. It conducted weekly safety meetings, regularly reminded employees about the specific hazards of electricity, and created manuals covering safe tree trimming. Additionally, it was company policy to allow any worker to refuse to trim any tree thought to be unsafe.

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Before the accident, the deceased foreman and other workers decided that the power needed to be shut off before starting the work. Nevertheless, the deceased foreman proceeded to trim the tree before the line was de-energized.

By weighing the employer's actions and safety policies as well as the foreman's actions on that fateful morning, the Appeals Court determined that the employer did comply with all applicable safety requirements; the widow was not entitled to additional benefits.

Fortunately, the second Ohio case involving an electrical accident did not result in a fatality. In this case, *Hillabrand v. Drypers Corp.* (Oct. 10, 2002), Marion App. No. 9-02-37, 2002-Ohio-5485, the Court of Appeals for Marion County ruled that the hirer of an independent contractor was not liable for the injuries suffered by the independent contractor's employee.

The accident occurred when the employee of a roofing contractor was shocked when the metal debris he threw off the roof contacted a live power line and he was injured by the "flash." The injured worker tried to prove that the building owner owed him the duty of due care and breached that duty by directing the placement of a dumpster beneath the power line.

The court first recited the rule that the hirer (here, the building owner) of an independent contractor is not liable for injuries suffered by the contractor's employees unless the hirer participates in the performance of the work.

The injured worker claimed that by directing the placement of the dumpster, the building owner "participated in the work."

But the court ruled that the injured employee failed to prove that the building owner knew the placement of the dumpster was dangerous. Besides, the roofing contractor had the ability to move the dumpster to a safer location if it so wished. The building owner's lack of knowledge meant that it was not required to protect the injured worker.

Finally, the court did not buy the injured worker's "business invitee" argument, whereby a property owner is required to provide a safe workplace for people invited onto its property. The court ruled that the doctrine did not apply to workers engaged in inherently dangerous work such as roof repair.

New York State Prosecutes Contractors In Separate Accidents

Two New York District Attorneys recently announced indictments of contracting companies and company officials resulting from investigations into separate accidents involving the collapse of first a scaffolding and then a building.

The scaffolding collapse occurred in October 2001, killing five workers and injuring four. OSHA had previously cited the company in connection with the collapse. The company and its owner were each charged with five counts of second-degree manslaughter and four counts of second-degree assault.

The 130 foot-high scaffolding was to be used for masonry repair by the low-bid contractor at a Manhattan office building. Prosecutors claim the scaffolding was designed by the company owner, who is not an engineer, in violation of the city building code. Prosecutors further charge that the load on the scaffolding's legs, without men or equipment, exceeded recommended maximums by between 150 and 700 percent.

When the building collapsed in May 2002, one worker was killed and three were injured. Prosecutors charged the construction company, its owner, and the site foreman with manslaughter, assault, and reckless endangerment.

The contractor was adding an additional floor and penthouse to the apartment building when the accident occurred. Prosecutors claim that the newly installed metal joist system failed under the weight of the cinderblock walls of the additional stories, because the joists were installed incorrectly.

The indicted individuals face sentences of up to 15 years in prison if found guilty.

Massachusetts Contractor Faces Large Fine For Multiple Trenching Violations

On October 8 OSHA announced a proposed fine of \$248,020 levied against a contractor installing sewer lines in downtown Boston. There was no accident, however. The company was cited for various violations in and around excavations ranging from 5 to 9.5 feet deep.

The violations ranged from failure to provide cave-in protection to having ladders on unstable surfaces. Four trenching violations were deemed to be willful, hence the large fine.

The company was also cited for trenching violations on a similar project in February. It is contesting the current citations.

Prosecutors charged the construction company, its owner, and the site foreman with manslaughter, assault, and reckless endangerment.

Federal Court Determines Willful Violations

Although this next case is set within a factory, it helps define what the courts consider a "willful" violation of an OSHA standard when an employer is aware of a problem and takes no concrete steps to mitigate it. See *Selkirk v. OSHA* (6th Cir. Oct. 10, 2002), 2002 U.S. App. LEXIS 21504. Alleged willful OSHA violations are common in construction.

The case started in 1991 when the Ohio Bureau of Worker's Compensation inspected a manufacturing facility in Logan, Ohio. The inspector noted that a particular pipe rolling machine lacked a hand guard when it was run in reverse, as workers did to accommodate certain sizes of work.

In 1994 and 1995, two employees were injured by the machine. In 2000, OSHA inspected the facility, observed the unguarded machine, and suggested to the company how it might improve the safety

of the machine. Several days after the inspection, OSHA issued a citation to the company for willful failure to provide a hand guard, with a proposed penalty of \$63,000.

The penalty was reduced to \$30,000 at a later hearing in front of an administrative law judge, but the citation for willfulness was affirmed because the company knew that workers continued to operate the machine without the guard. Retraining, new signs, and attempts to develop a safer method all had no effect.

When the company appealed, the Sixth Circuit Court of Appeals (the federal appellate court for Michigan, Ohio, Kentucky and Tennessee) agreed with the administrative law judge. The Court cited case law saying it does not matter if the employer lacks malicious intent. The long record of the company's knowledge of the machine's problems, punctuated by the several injuries and the failure to take action, combined to elevate the violation to "willful" status.

QUICK REFERENCE

WHERE IS YOUR REGIONAL OSHA OFFICE?

Region V (Includes Ohio)
Michael G. Connors, Regional Administrator
230 South Dearborn Street
Room 3244
Chicago, IL 60604
Telephone: (312) 353-2220

OSHA WEBSITE

<http://www.osha.gov>

SAFETY AND HEALTH STANDARDS FOR THE CONSTRUCTION INDUSTRY

<http://www.osha-slc.gov/Publications/CRM/TOC.html>

Upcoming Seminars Involving Bricker & Eckler LLP Construction Attorneys

For Registration Information, call Karen McCloskey (614) 227-8828 or (800) 844-5292

Date & Time	Seminar	Location	Attorneys	Sponsors
November 5, 2002 7:30 to 9:00 A.M.	Best Practices: Ethics Codes for Construction	Digerati Conference Center (Easton) Columbus, OH	S. Wampler	Bricker & Eckler Breakfast Forums
November 13, 2002 9:00 to 4:30 P.M.	Public Contract Code & Competitive Public Bidding	Doubletree Hotel Miamisburg (Dayton, OH)	M. Taylor	Lorman Education Services
November 14, 2002 1:00 to 4:30 P.M.	Unbid State Contracts	Quest Business Centers - Columbus, OH	L. Liggett	Bricker Construction
November 15, 2002 8:30 to 11:30 A.M.	Achieving Success in School Construction	Bricker & Eckler 100 South Third Street Columbus	S. Gillis	Bricker & Eckler Roundtable
November 22, 2002 8:30 to 11:30 A.M.	Achieving Success in School Construction	Comfort Inn Suites Middleburg Heights (Cleveland)	S. Wampler	Bricker & Eckler Roundtable
December 3, 2002 7:30 to 9:00 A.M.	Best Practices: Building an Ethics Model	Digerati Conference Center (Easton) Columbus, OH	S. Wampler	Bricker & Eckler Breakfast Forums
December 3, 2002 8:30 to 4:30 P.M.	Construction Issues in Ohio	Holiday Inn - West Columbus, OH	M. Taylor, S. Wampler	Lorman Education Services
December 6, 2002 8:30 to 11:30 A.M.	Achieving Success in School Construction	Comfort Inn Suites Blue Ash (Cincinnati)	J. Rosati	Bricker & Eckler Roundtable
December 6, 2002 8:30 to 11:30 A.M.	Achieving Success in School Construction	Holiday Inn French Quarter (Toledo)	M. Holman	Bricker & Eckler Roundtable
December 19, 2002 9:00 to Noon	Construction Law Update	Columbus Bar Association 175 South Third Street	J. Rosati	Columbus Bar Association
January 7, 2003 7:30 to 9:00 A.M.	Best Practices	Digerati Conference Center (Easton) Columbus, OH	S. Wampler	Bricker & Eckler Breakfast Forums
February 4, 2003 7:30 to 9:00 A.M.	Best Practices	Digerati Conference Center (Easton) Columbus, OH	S. Wampler	Bricker & Eckler Breakfast Forums
March 4, 2003 7:30 to 9:00 A.M.	Best Practices	Digerati Conference Center (Easton) Columbus, OH	S. Wampler	Bricker & Eckler Breakfast Forums

When Experience CountsSM

When experience counts in construction matters, the attorneys of Bricker & Eckler LLP's Construction Law Department are ready to help you meet your construction law challenges.

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